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***Wayne Morse Center for Law and Politics Symposium:
The Law and Politics of the Death Penalty: Abolition, Moratorium, or Reform?***

***1 Forward:
The Future of Capital Punishment in the United States**

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The Conference

The Wayne Morse Center for Law and Politics at the University of Oregon is rapidly gaining a national reputation for *2 organizing highly successful events at which leading experts address important and controversial public issues. The timing of this year's major conference could hardly have been better. Just as the atrocities of September 11, 2001, were creating demands for the execution of terrorists and their supporters, advances in forensic science were revealing that a surprising number of men and women had been wrongfully convicted and sentenced to death for crimes they did not commit. Given these developments, many opponents of capital punishment were choosing to redirect their efforts toward winning a moratorium on the use of the death penalty instead of seeking its outright abolition, while many supporters of that penalty were coming to recognize the need for new safeguards against its erroneous imposition. If any consensus survived, it was that the issues surrounding capital punishment deserved close and careful reexamination. Such a reexamination took place on March 1 and 2, 2002, when the Morse Center sponsored a national symposium entitled "The Law and Politics of the Death Penalty: Abolition, Moratorium, or Reform?"

It may not be intuitively obvious that Oregon is the ideal site for a gathering designed to stimulate a rethinking of everything about the death penalty. After all, Oregon is quite remote, both geographically and politically, from the Death Belt, where most American executions occur; [\[FN1\]](#) and more than six years have elapsed since the State last took the life of a convicted murderer. [\[FN2\]](#) Yet the people of Oregon have long vacillated on the question of when, if ever, capital punishment is justified. To date, they have voted no fewer than seven times on the retention, the abolition, or the reinstatement of the death penalty. [\[FN3\]](#) Only days before the Morse Center convened the symposium that began on March 1, 2002, the proponents of yet another abolitionist initiative abandoned their effort to secure enough signatures to *3 place their measure on the statewide ballot this fall. [\[FN4\]](#) The polls had shown that, for now at least, Oregonians strongly support capital punishment. [\[FN5\]](#)

The two-day symposium proved to be a great success. It attracted participants from near and far, and featured a host of prominent figures-- scholars, researchers, writers, practicing lawyers, and present and former elected officials--who have played major roles in the national debate over the death penalty. In addition to those whose papers appear as articles in this issue of the Oregon Law Review, the headliners included former U.S. Senator Mark Hatfield, who has been a lifelong opponent of capital punishment, but who signed a death warrant during his tenure as Oregon's governor; Robert Blecker, a writer and law professor who favors the reservation of the death penalty for "the worst of the worst"; Governor George H. Ryan, who declared a moratorium on executions in Illinois in January 2000, after a total of thirteen people in that state had been exonerated of the crimes for which they had been sentenced to die; Sister Helen Prejean, a Roman Catholic nun and charismatic storyteller who counsels condemned inmates and wrote the critically acclaimed best-seller *Dead Man Walking*; and Stephen B. Bright, the indefatigable director of the Southern Center for Human Rights, who teaches at several law schools, represents defendants in capital cases, and writes and speaks eloquently about the unfairness and racism of our system of criminal justice, through which we inflict death on a selected few.

The Articles

Just as the majority of the speakers at the symposium argued in favor of reforming or abolishing the death penalty, so did virtually all of the authors who responded to the Morse Center's call for papers on topics related to the symposium's theme. Although Margaret Hallock, the director of the Center, was criticized for having organized a conference that was "stacked with opponents" of capital punishment, [\[FN6\]](#) she had, in fact, striven mightily to assure a balanced presentation of views, both at the *4 event itself and within the group of papers that were solicited from interested scholars. Nevertheless, among those who responded to the call for papers, reformers and abolitionists vastly outnumbered supporters of the present system. The disparity, in my view, simply reflected the reality that people in general, and academics in particular, are much more likely to launch attacks against what they perceive to be continuing injustices than to devote time and energy to fashioning defenses of the status quo.

Thus, all of the authors of the seven papers published here in the form of articles are highly critical of our society's stubborn adherence to what they see as a seriously or fatally flawed system of determining when the penalty of death is an appropriate sanction to impose on a particular criminal for the commission of a particular crime. One suspects, in fact, that all seven of the authors may be thoroughgoing abolitionists. Yet, while there are important commonalities among their articles, the authors bring a rich diversity of perspectives and methodologies to their analyses of the historical circumstances and contemporary influences that help to explain why the great majority of our nation's citizens continue to support capital punishment.

The first article, entitled *Black Man's Burden: Race and the Death Penalty in America*, was contributed by Charles J. Ogletree, Jr., the Jesse Climenko Professor at Harvard Law School. Professor Ogletree, who served as the Wayne Morse Chairholder at the University of Oregon during the 2001-02 academic year, and as the official host of the March conference, focuses his comments on the impact of the death penalty on black people--as defendants, victims, and members of the community. After reviewing the history of lynching, Professor Ogletree links it to the modern practice of capital punishment. To this day, racial discrimination pervades our entire system of

criminal justice, from the selection of jurors through the imposition of the death penalty. “[A]pplication of the death penalty may be fairer than the vigilante justice that characterized the Jim Crow era,” concludes Professor Ogletree, “but not by much.” [\[FN7\]](#)

If Professor Ogletree can be said to have painted with bold strokes, the authors of the second article can be described as masters of pointillism. Dr. Glenn L. Pierce and Professor Michael L. Radelet painstakingly analyzed a decade’s worth of *5 data to produce the statistical tables that accompany their article, Race, Region, and Death Sentencing in Illinois, 1988-1997. This article, a revised version of the final report that Pierce and Radelet prepared for and submitted to Governor George H. Ryan and his Commission on Capital Punishment, ends with two principal conclusions: The Illinois defendants who were convicted of first-degree murder in rural counties were more likely to receive the death penalty than were the defendants who were convicted of the same offense in urban counties, [\[FN8\]](#) and the defendants who were convicted of killing blacks or Hispanics were less likely to receive the death penalty than were the defendants who were convicted of killing whites. [\[FN9\]](#) In short, the data demonstrated that two legally irrelevant factors--the place where a homicide occurred and the race of the victim--played a significant role in determining who would and who would not be sentenced to death.

Another Harvard professor, Carol S. Steiker, contributed the article entitled Capital Punishment and American Exceptionalism. In this extraordinarily sophisticated and thoughtful piece, Professor Steiker critically examines each of ten theories that have been offered to explain why the death penalty has been retained in the United States while all other Western democracies have abolished it, either de jure or de facto, for ordinary crimes or for all crimes. She finds that some of the ten theories, which range from the purely sociological to the highly legalistic, have greater merit than others, but concludes that no single one of them can fully account for America’s continuing and exceptional enthusiasm for capital punishment. Whatever the complex of factors that might have caused the abolition of the death penalty in other nations and its retention in our own country, the sad reality is that “we have executed more people in each of the last five years than in any other year since 1955.” [\[FN10\]](#)

The adverse impact of “American exceptionalism” on our nation’s reputation abroad is discussed in Professor Nora Demleitner’s article, entitled The Death Penalty in the United States: Following the European Lead? Professor Demleitner, a native of Germany, provides us with an historical overview of the *6 events leading to the abolition of the death penalty throughout Europe, and describes the ways in which the European Union, the individual European nations, and European human rights institutions have expressed their extreme displeasure with the United States’ continued reliance on capital punishment. In particular, she notes that a number of European states have announced that they will refuse to extradite to the United States alleged terrorists, or to provide intelligence to the United States concerning the activities of alleged terrorists, who would face the death penalty if brought to trial here. While Europe is working for a worldwide ban on capital punishment, the United States persists in aligning itself with a handful of other nations--including such “rogues” as Iraq--that continue to impose sentences of death. Professor Demleitner surely is right when she concludes that “the importance of the death penalty extends far beyond its domestic meaning, and Europe’s fight against it symbolizes a larger schism in the relationship between the Europeans and the United States.” [\[FN11\]](#)

In the next article, entitled *Innocence Abroad: The Extradition Cases and the Future of Capital Litigation*, Professor Daniel Givelber argues that American defense attorneys should renew their challenges to the death penalty on two rationales that foreign courts have used to deny extradition to the United States of individuals who face the possibility of capital punishment here. The first of these rationales was developed in *Soering v. United Kingdom*, [FN12] in which the European Court of Human Rights refused to extradite a German citizen to the State of Virginia on the ground that the long period of time that condemned prisoners typically spend on death row inflicts upon them a form of “inhuman or degrading treatment” in violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. [FN13] The second rationale was articulated in *United States v. Burns*, [FN14] in which the Supreme Court of Canada concluded that, in light of the inevitability that some innocent persons will be convicted and sentenced to death, the extradition of an individual to a nation threatening him with capital punishment would deny that individual the fundamental justice guaranteed *7 by Section 7 of the Canadian Charter of Rights and Freedoms. [FN15] Drawing upon the implications of the *Burns* decision, Professor Givelber argues both that “the criterion for taking life must be absolute certainty” of the defendant’s guilt, and that such absolute certainty can never be achieved. [FN16] The conclusion follows ineluctably: “Capital punishment should end.” [FN17]

Executing White Masculinities: Learning from Karla Faye Tucker may well be both the most challenging and the most provocative of all the articles included in this symposium. In this article, Professor Joan Howarth carefully and thoughtfully develops the thesis that “gender,” in the sense of our socially constructed understanding of what is masculine and what is feminine, is intimately related to our collective decision to retain the death penalty, and significantly influences the choices we make regarding who deserves to be executed. First, Professor Howarth convincingly demonstrates that “the masculinity of the death penalty” helps to account for our attraction to capital punishment, which functions as a symbolic representation of our power over crime and our control of violence. [FN18] Then, by analyzing and comparing the cases of Wanda Jean Allen, Karla Faye Tucker, and Andrea Yates, she casts light on the conflicts and complexities that attend the threatened or actual execution of a woman. While eschewing any formal exemption from the death penalty on the basis of sex, the public did not favor the execution of Karla Faye Tucker, who seemed to be both “feminine” and “redeemed” by the time she was executed. [FN19] Essentially, what distinguished her from the thousands of other men and women who languish on death row is that she had “the capacity to be valued by disinterested strangers.” [FN20] In a final plea, Professor Howarth asks that we “us[e] the lesson of our caring about [Ms. Tucker] to learn to care about the others . . . , whose executions would be just as senseless as was hers.” [FN21]

A college professor and a New York lawyer teamed up to produce *8 the last of the seven symposium articles, *Defending the Politics of Clemency*. In fact, Professor Beau Breslin has been teamed up with John J.P. Howley, Esq. since 1999, when the professor and ten of his students at Skidmore College collaborated with the practicing lawyer to win clemency for Calvin Swann, a severe schizophrenic whose sentence was commuted to life imprisonment just four hours before his scheduled execution by the State of Virginia. [FN22] The clemency petition that the authors filed on Swann’s behalf apparently struck a responsive chord with Governor James Gilmore III, who had lobbied the state legislature some years earlier for a life-without-parole alternative to the death penalty, and who had pledged during his gubernatorial campaign to improve the state’s mental health system. [FN23] Without exaggerating the significance of their success story, Breslin and

Howley cite Swann's case in support of their thesis: "Politics is a necessary component of the clemency decision, and should remain so." [\[FN24\]](#) Although a number of reformers have argued that procedural and structural safeguards against subjectivity, unfairness, and inequality of treatment should be introduced into the clemency process, the authors believe that the reformers' proposals are inconsistent with "the basic tenets of our system of separate powers," and could "prove dangerous to the many death row inmates who will inevitably rely on clemency as their last and final hope." [\[FN25\]](#) If Breslin and Howley are right--if the political character of the typical clemency process is its chief virtue, and if that process gives those who are awaiting execution a better chance to stay alive than a more legalistic system would--then vesting an executive official with the discretionary power to say "No" whenever he or she is in a merciful mood has much to recommend it.

The Future

Barely five months have passed, as this is written, since the Morse Center hosted the conference that spawned the articles that are published here. During this short period, we Americans *9 have witnessed an astonishing number of significant developments in the movement toward the reform or repudiation of the death penalty as it currently is administered within the United States. A brief review of these developments may help to illuminate the likely future of capital punishment in this country.

The Morse Center's conference concluded on March 2, 2002. A little more than one month later, on April 8, 2002, Ray Krone walked out of the Arizona State Prison. Originally condemned to die for a murder committed in 1991, Krone eventually won a second trial, at which he was sentenced to life imprisonment. Then, some ten years after his first conviction, Krone was completely exonerated by DNA evidence. [\[FN26\]](#) He became the 100th person to be released from death row since 1973. [\[FN27\]](#)

On April 15, 2002, just one week after Krone was freed, the bipartisan Illinois Commission on Capital Punishment issued a comprehensive report on how that state's death penalty system had operated in practice. The Commission, which was formed shortly after Governor George H. Ryan declared a moratorium on executions in March 2000, unanimously agreed on more than eighty-five recommendations for reform. [\[FN28\]](#) Scott Turow, the famous lawyer-novelist who served on the Commission, subsequently offered his explanation of the issue that continues to confront us:

As a nation we need to decide if the costs of capital punishment--the staggering financial toll of litigation, the consumption of limited court resources, the disparities in the system's results, and the enduring risk of executing the innocent--are worth the powerful denunciation of ultimate evil that capital punishment is meant to trumpet. [\[FN29\]](#)

On May 9, 2002, Governor Parris N. Glendening of Maryland followed Governor Ryan's example and imposed a moratorium *10 on the death penalty in his own state. [\[FN30\]](#) Ordering a halt to the scheduled execution of Wesley Eugene Baker until the University of Maryland could complete a study of capital punishment, Glendening stressed that he was especially concerned about the question whether the death penalty is administered impartially. [\[FN31\]](#) The Lieutenant Governor, Kathleen Kennedy Townsend, who is a supporter of capital punishment, commented that the

“moratorium is about taking the time to ensure we’ve done everything we can to make sure the penalty is fair and just.” [\[FN32\]](#)

Then, during June, the United States Supreme Court issued two opinions which were immediately hailed as major victories by opponents of the death penalty. On June 20, in *Atkins v. Virginia*, [\[FN33\]](#) the Court held that, “in the light of our ‘evolving standards of decency,’” the Eighth Amendment ban on cruel and unusual punishment prohibits the execution of the mentally retarded. [\[FN34\]](#) Four days later, in *Ring v. Arizona*, [\[FN35\]](#) the Court held that a defendant’s Sixth Amendment right to a jury trial was violated by a state procedural scheme which allowed a judge, sitting without a jury, to find that there was an aggravating circumstance that justified sentencing the defendant to death. [\[FN36\]](#) First in *Atkins* and then in *Ring*, the Court repudiated a relatively recent precedent in order to arrive at its judgment. [\[FN37\]](#)

***11** On July 1, just one week after *Ring* was decided, abolitionists claimed another major success when U.S. District Judge Jed S. Rakoff held that the carrying out of a death sentence under the Federal Death Penalty Act, by causing the execution of the defendant and thereby terminating his ability to establish his actual innocence, would violate the Due Process Clause of the Fifth Amendment. In an earlier opinion in the same case, *United States v. Quinones*, Judge Rakoff had reached the preliminary conclusion that the Death Penalty Act is unconstitutional on the ground that “numerous innocent people have been executed whose innocence might otherwise have been . . . established, whether by newly-developed scientific techniques, newly-discovered evidence, or simply renewed attention to their cases.” [\[FN38\]](#) After allowing the Government to file an additional brief, the judge reaffirmed his original conclusion:

[T]he unacceptably high rate at which innocent persons are convicted of capital crimes, when coupled with the frequently prolonged delays before such errors are detected (and then often only fortuitously or by application of newly-developed techniques), compels the conclusion that execution under the Federal Death Penalty Act, by cutting off the opportunity for exoneration, denies due process and, indeed, is tantamount to foreseeable, state-sponsored murder of innocent human beings. [\[FN39\]](#)

Needless to say, the developments discussed above have heartened all who have been working for the abolition of capital punishment, for a moratorium on its imposition, or for the reform of the systems used in the United States to determine on whom it will be inflicted. Meanwhile, however, the machinery of death has continued to grind away, especially in the states that are responsible for most of the executions in this country. In Texas, for example, there presently are 458 men and women on death row. [\[FN40\]](#) During the five-month period immediately following March 2, 2002, when the Morse Center closed its conference on the death penalty, the State of Texas executed thirteen men. [\[FN41\]](#) ***12** Six more were scheduled for execution in August. [\[FN42\]](#)

What all of this seems to mean is that the future of capital punishment in the United States remains uncertain. It is almost a sure bet that the moratorium movement will spread, and it is probable that the United States Supreme Court will continue to chip away at the edges of the procedures that are currently used to decide who will be executed; but it is unlikely that the decision in *Quinones* will be affirmed on appeal, let alone lead to a broad invalidation of the death penalty throughout the United States. Thus, the thorniest problem, in my view, is how the handful of states that do most of the

executing--Texas, Virginia, Missouri, Florida, and Oklahoma--can be induced or required to change their ways. Two-thirds of the men and women who have been executed in the last quarter of a century have been put to death in these five states. [FN43] It is difficult to be optimistic that any or all of these states will, on their own initiative, reform or abolish their systems of capital punishment. The probable consequence is that any meaningful change in the present regime of capital punishment within the United States will have to be effected at the national level, through the mechanism of a decision of the United States Supreme Court, the United States' ratification of an international treaty concerning capital punishment, or the adoption of an amendment to the United States Constitution. [FN44]

In short, I think that Professor Carol Steiker is entirely right in identifying the United States' system of federalism as one of the major impediments to the end of "American exceptionalism." [FN45] The State of Texas, in particular, accounts for some 38% of the executions that have taken place in the United States since 1976. [FN46] It is worth noting, in addition, that 157 of the 458 offenders currently housed on Texas' death row were convicted in a single political subdivision, Harris County. [FN47] The District Attorney of Harris County, John B. "Johnny" Holmes, Jr., appears to *13 be quite proud of his unparalleled record for winning death sentences. As he recently told a reporter for Texas Monthly, "When one of the national television news programs was pushing me about why we sent so many people to death row, I told the anchor that it's nobody's business but Texans' I said, I don't give a flip how you all feel about it" [FN48]

Is it truly "nobody's business but Texans"? Is it none of the business of those of us who are residents of states other than Texas, but who conscientiously oppose capital punishment or, at the least, believe that the ultimate penalty should be imposed in a fair and nondiscriminatory manner throughout our nation, that just one of the counties of one of the United States is responsible for the fate of 157 men and women who are currently awaiting execution? Or does capital punishment implicate the values and interests of all of us who see ourselves as members of the entire human race-- that is, in some sense, as citizens of the world?

I myself have been opposed to capital punishment for longer than I can remember. My opposition to the death penalty was only intensified when, in 1994, I was appointed to represent a Texas prison inmate who was facing imminent execution. My volunteer co-counsel and I did our best for our client, who nevertheless ultimately was executed, although not until 2001. During the intervening years, as we made regular visits to death row, our client repeatedly told us that, regardless of the final outcome of his case, he would always be grateful that we had given him some additional time on earth. "After all," he would add, "life is precious."

He was right. Life is precious. When at last we fully understand that, capital punishment will end.

[FN41]. Loran L. Stewart Professor, University of Oregon School of Law.

[FN1]. As of July 30, 2002, 520 of the 787 executions that had taken place in the United States since 1976 had been carried out by just five states: Texas, Virginia, Missouri, Florida, and Oklahoma. Death Penalty Information Center, Number of Executions by State Since 1976, at <http://www.deathpenaltyinfo.org/dpicreg.html> (last visited Aug. 6, 2002).

[FN2]. Charles Moore was executed by the State of Oregon in May 1997. William R. Long, *A Tortured History: The Story of Capital Punishment in Oregon* 5 (2002).

[FN3]. See *id.* at 12 n.2.

[FN4]. See Greg Bolt, *Experts Debate Death Penalty: Victims Rights Organization Wants Probe into Conference*, *Register-Guard* (Eugene), Feb. 28, 2002, at 1B.

[FN5]. *Id.*

[FN6]. See Greg Bolt, *Experts Debate Death Penalty: Discussion: Supporters of Capital Punishment Say the Deck Is Stacked at the UO Conference*, *Register-Guard* (Eugene), Feb. 28, 2002, at 1B.

[FN7]. Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 *Or. L. Rev.* 15, 23 (2002).

[FN8]. Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, 81 *Or. L. Rev.* 39, 62 (2002).

[FN9]. *Id.* at 62-63.

[FN10]. Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 *Or. L. Rev.* 97, 98 (2002).

[FN11]. Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 *Or. L. Rev.* 131, 159 (2002).

[FN12]. 11 *Eur. H.R. Rep.* 439 (*Eur. Ct. H.R.* 1989).

[FN13]. *Id.*

[FN14]. [2001] 1 *S.C.R.* 283.

[FN15]. *Id.* at 296.

[FN16]. Daniel Givelber, *Innocence Abroad: The Extradition Cases and the Future of Capital Litigation*, 81 *Or. L. Rev.* 161, 179-80 (2002).

[FN17]. *Id.* at 182.

[FN18]. Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 *Or. L. Rev.* 183, 194 (2002).

[FN19]. *Id.* at 229.

[FN20]. Id.

[FN21]. Id.

[FN22]. See Barbara A. Melville, Crime and Clemency: Skidmore Students Make a Life-and-Death Difference, Skidmore Scope, at <http://www.skidmore.edu/scope/fall1999/oncampus/crime.html>.

[FN23]. Beau Breslin & John J.P. Howley, Defending the Politics of Clemency, 81 Or. L. Rev. 231, 251 (2002).

[FN24]. Id. at 233.

[FN25]. Id. at 233-34.

[FN26]. Dennis Wagner & Beth De Falco, 100th Innocent Death Row Inmate Exonerated!, The Arizona Republic, April 9, 2002, available at <http://www.moratoriumcampaign.org>.

[FN27]. See Death Penalty Information Center, Innocence: Freed From Death Row, at <http://www.deathpenaltyinfo.org/Innocentlist.html> (last visited Aug. 6, 2002).

[FN28]. See Death Penalty Information Center, Illinois Commission Announces Nation's Most Comprehensive Death Penalty Review; Recommends Sweeping Changes to Protect Innocent, Ensure Fairness, <http://www.deathpenaltyinfo.org/PR-DPICILreport.html> (last visited Aug. 30, 2002).

[FN29]. Scott Turow, Repeal or Repair, Wall Street Journal, Apr. 23, 2002, available at <http://www.deathpenaltyinfo.org/WSJ-Turow.html>.

[FN30]. Dennis O'Brien & David Nitkin, Glendening Halts Executions, Baltimore Sun, May 10, 2002, available at <http://www.sunspot.net/news/custom/guns/balte.md.death10may10.story?coll=bal-crime-headlines>.

[FN31]. Id.

[FN32]. Id.

[FN33]. 122 S. Ct. 2242 (2002).

[FN34]. Id. at 2252.

[FN35]. 122 S. Ct. 2428 (2002).

[FN36]. Id. at 2432 (concluding that criminal defendants “are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment”).

[FN37]. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court had held that the execution of the mentally retarded was not “categorically prohibited by the Eighth Amendment.” Id. at 335.

However, in *Atkins*, which was decided thirteen years later, the majority found that “the consistency of the direction of change,” as an ever-increasing number of states exempted the retarded from the death penalty, was “powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.” *Atkins*, 122 S. Ct. at 2249.

Walton v. Arizona, 497 U.S. 639 (1990), had upheld the Arizona death- sentencing scheme that was invalidated in *Ring*. Although the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), appeared to undermine the reasoning of *Walton*, the Court explicitly stated in *Apprendi* that *Walton* remained good law. *Apprendi*, 530 U.S. at 523. In *Ring*, however, the Court found that *Walton* and *Apprendi* were, in fact, “irreconcilable,” and expressly overruled *Walton*. *Ring*, 122 S. Ct. at 2443.

[FN38]. *United States v. Quinones*, 196 F. Supp. 2d 416, 418 (S.D.N.Y. 2002), adhered to, 205 F. Supp. 2d 256 (S.D.N.Y. 2002).

[FN39]. *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002).

[FN40]. Texas Department of Criminal Justice, Gender and Racial Statistics of Death Row Offenders, at <http://www.tdcj.state.tx.us/stat/racial.htm> (last visited Aug. 6, 2002).

[FN41]. See Texas Department of Criminal Justice, Executed Offenders, at <http://www.tdcj.state.tx.us/stat/executedoffenders.htm> (last visited Aug. 6, 2002).

[FN42]. Texas Department of Criminal Justice, Scheduled Executions, at <http://www.tdcj.state.tx.us/stat/scheduledexecutions.htm> (visited Aug. 6, 2002).

[FN43]. See *supra* note 1.

[FN44]. See Michael P. Seng, Reflections on When “We, the People” Kill, 34 *J. Marshall L. Rev.* 713, 723-24 (2001).

[FN45]. See Steiker, *supra* note 8, at 121-22.

[FN46]. See Death Penalty Information Center, Number of Executions by State Since 1976, at <http://deathpenaltyinfo.org/dpicreg.html> (last visited Aug. 6, 2002).

[FN47]. Texas Department of Criminal Justice, County of Conviction for Offenders on Death Row, at <http://www.tdcj.state.tx.us/stat/countyconviction.htm> (last visited Aug. 6, 2002).

[FN48]. John B. Holmes, Jr. (as told to S.C. Gwynne), Dealing Out Death, *Texas Monthly*, July 2002, at 68, 71.