

READING DEATH SENTENCES: THE NARRATIVE CONSTRUCTION OF CAPITAL PUNISHMENT

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INTRODUCTION

Three-quarters of the United States currently supports capital punishment,¹ and the pro-death penalty forces seem to be gaining momentum.² The death penalty was a central issue in the 1994 congressional and gubernatorial elections, and according to one anti-death penalty activist, it appears that “[d]eath won.”³ In New York State’s 1994 gubernatorial race, one in five voters cited the death penalty as the most important issue of the election.⁴ As a result of the election, New York has joined the thirty-seven other states that impose capital punishment.⁵

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¹ Linda Greenhouse, *A Capacity to Change As Well As to Challenge*, N.Y. Times, Feb. 27, 1994, § 4, at 4; Bruce Tomaso, *Texas’ Deadly Ritual*, Dallas Morning News, Oct. 1, 1995, at A1, A32.

² See *56 Executions This Year Are Most Since 1957*, N.Y. Times, Dec. 30, 1995, § 1, at 28; Alison Mitchell, *Clinton Signs Measure on Terrorism and Death Penalty Appeals*, N.Y. Times, Apr. 25, 1996, at A18 (reporting that statute restricting habeas corpus will “drastically accelerate executions by shaving years off appeals in most capital cases”); see also Tom Kuntz, *The Rage to Kill Those Who Kill*, N.Y. Times, Dec. 4, 1994, § 4, at 1 (“Sentiment in favor of capital punishment is sweeping the land.”).

³ Mary McGrory, *Radiance in the Shadow of Death*, Wash. Post, Nov. 17, 1994, at A2 (quoting Leigh Dingerson, director of the Coalition Against the Death Penalty).

⁴ Todd S. Purdum, *Voters Cry: Enough, Mr. Cuomo!*, N.Y. Times, Nov. 9, 1994, at B11. Four out of five Pataki voters said they supported the death penalty. Jacques Steinberg, *G.O.P. Strength Denies Cuomo a Close Finish; Suburbs Give Pataki Bounce*, N.Y. Times, Nov. 13, 1994, § 13, at 1, 6; see also James Dao, *In a Fury of Campaigning, Candidates Pursue Last-Minute Votes*, N.Y. Times, Nov. 6, 1994, § 1, at 49, 52 (quoting Pataki supporter as saying, “Of course I’ll support [Pataki] . . . For the death penalty.”); James Dao, *Voters Wary of Promises, Especially from Cuomo*, N.Y. Times, Oct. 7, 1994, at B4 (quoting Pataki supporter as stating, “My vote is on the death penalty. If Pataki weren’t for it, I’d be up in the air.”); David Firestone, *Voters Give Cuomo a Struggle on His Home Turf*, N.Y. Times, Oct. 8, 1994, § 1, at 1, 28 (quoting Pataki supporter as saying, “I don’t know anything about Pataki except two things: he’s for the death penalty and lower taxes . . . That’s all I need to know.”); Ian Fisher, *Clamor Over Death Penalty Dominates Debate on Crime*, N.Y. Times, Oct. 9, 1994, § 1, at 45 (quoting Pataki supporter as saying that “[t]he death penalty for me is No. 1”).

⁵ See James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. Times, Mar. 8, 1995, at A1.

Support for the death penalty has not always been so high. In 1966, for example, only forty-two percent of the population supported capital punishment.⁶ According to polling experts, this large shift in public opinion over a relatively short period of time is “puzzling” and suggests that there are factors “more emotional than rational” driving the increased support for the death penalty.⁷

This support for the death penalty persists despite seemingly overwhelming counterarguments. Utilitarian arguments, based on the evidence that the death penalty does not deter murder,⁸ fail to stimulate death penalty opposition.⁹ Indeed, research suggests that when death penalty proponents are presented with mixed evidence about the deterrent effect of the death penalty, they disproportionately credit the data that supports their position, so that the mixed evidence

In addition to shaping the votes of legislators, public opinion is increasingly important as death penalty opponents bring their appeals in specific cases to the general public. See Kenneth B. Noble, *As Executions Increase, Appeals Go to the Public*, N.Y. Times, Dec. 2, 1995, at A1; see also John C. Freed, *Convict Appealing Death Sentence Turns to the Internet for Aid*, N.Y. Times, May 7, 1995, § 1, at 25. Public opinion is also important in the death penalty context because Supreme Court jurisprudence looks to public opinion as a relevant factor in determining what constitutes “cruel and unusual” punishment. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989) (examining whether states have prohibited execution of mentally retarded persons as indication of whether it violates Eighth Amendment’s “evolving standards of decency” (internal quotations omitted)); *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976) (looking to 35 states that enacted post-*Furman* death penalty statutes as indication that death penalty does not violate Eighth Amendment); *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (stating that what constitutes cruel and unusual punishment “is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened” (internal quotations omitted)).

⁶ Hans Zeisel & Alex M. Gallup, *Death Penalty Sentiment in the United States*, 5 J. Quantitative Criminology 285, 287 (1989).

⁷ *Id.* at 294-95.

⁸ See Thorsten Sellin, *The Death Penalty* 63 (1959) (“[T]he death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crime. It has failed as a deterrent.”); Anne Cronin, *Murder and the Death Penalty: A State-by-State Review*, N.Y. Times, Dec. 4, 1994, § 4, at 3 (presenting state statistics on murder rates and death penalty that show no change in murder rates after imposition of death penalty); Tom Kuntz, *Killings, Legal and Otherwise, Around the U.S.*, N.Y. Times, Dec. 4, 1994, § 4, at 3 (interpreting Cronin data, *supra*, and stating that these statistics “lend little support” to notion that death penalty deters murder). But see Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, *Am. Econ. Rev.*, June 1975, at 397 (finding significant correlation between capital punishment and deterrence of homicide).

⁹ Zeisel & Gallup, *supra* note 6, at 290, 295 (finding that majority of people would still support death penalty even if it did not deter murder); see also William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 *Am. J. Crim. L.* 77, 83 (1994) (noting that abstract death penalty support appears to be “impervious to logical inconsistencies or empirical evidence”). Professor Anthony Amsterdam suggests that the deterrence argument is better understood as a “rationale” for the death penalty rather than as a “reason.” Interview with Anthony G. Amsterdam, Judge Edward Weinfeld Professor of Law, New York University, in New York, N.Y. (Mar. 17, 1995).

actually results in more hardened support.¹⁰ Moral arguments similarly fail to change people's minds.¹¹

Despite the ineffectiveness of these arguments, there are indications that death penalty support is not as monolithic as it might appear. Poll data indicates that a majority of people prefer alternatives to the death penalty, such as life imprisonment without the possibility of parole plus restitution to the victim's family.¹² Significantly, even a majority of those who "strongly" favor the death penalty abandon their support for capital punishment when presented with such an alternative.¹³ Research also indicates that there is an underlying ambivalence among death penalty supporters. In one poll, for example, roughly 80% of those surveyed stated that the death penalty is "too arbitrary," and between 44% to 56% said they have "moral doubts" about capital punishment.¹⁴ Thus, support for the death penalty is far shallower than standard polls reveal.¹⁵

What is it about the death penalty that causes so many Americans to express support, despite the contradictions underlying this support? And since utilitarian and moral arguments have proven to be ineffec-

¹⁰ Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 *J. Personality & Soc. Psychol.* 2098, 2101-07 (1979). This principle also applies to death penalty opponents: evidence on deterrence is selectively incorporated, and mixed evidence can actually result in a cementing of the opposition. *Id.*

¹¹ Zeisel & Gallup, *supra* note 6, at 295 ("Arguments over . . . basic value positions have little power to change minds [in the death penalty context]. Whoever has attempted it knows how frustrating it is. Moral positions are seldom changed by persuasion; they are changed, as a rule, only by the more complex and mysterious process of conversion.").

¹² See Bowers et al., *supra* note 9, at 104 (presenting results of author's study that shows that majorities in New York (73%) and Nebraska (64%) favor life without parole plus restitution to death penalty); *id.* at 91 (reporting that majorities in Arkansas (62%), Georgia (51%), Indiana (62%), Kansas (66%), and Massachusetts (67%) favor life without parole plus restitution to death penalty); Craig Haney et al., *Enlightened by a Humane Justice: Public Opinion and the Death Penalty in California 117* (1993) (unpublished manuscript, on file with the *New York University Law Review*) (reporting that 67% of Californians surveyed favor life without parole plus restitution).

¹³ In polls in New York State, New York City, and Nebraska, majorities (ranging from 56% to 70%) of those who had said they "strongly" favored the death penalty later said they preferred life without parole plus restitution as an alternative. Bowers et al., *supra* note 9, at 107-08. Similarly, a poll of Californians showed that half of those who had originally been "strongly in favor" of the death penalty switched their position when presented with such an alternative. Haney et al., *supra* note 12, at 120. Two-thirds of those self-described as "strongly Republican" and "conservative" also reversed their support for the death penalty when presented with this alternative. *Id.*

¹⁴ See Bowers et al., *supra* note 9, at 120-21.

¹⁵ See *id.* at 81 (noting that some evidence indicates that death penalty support is "shallow and shaky"); see also Haney et al., *supra* note 12, at 157 ("[A]ny portrayal of the public's attitude about the death penalty as monolithic and unidimensional is highly misleading. The picture that emerges from our California data reveals an attitude structure that is highly unstable and volatile . . .").

tive, how can those who oppose capital punishment most effectively fight against it?¹⁶

This Note addresses these questions by analyzing narratives about the death penalty, focusing on films that are based on true-life stories.¹⁷ Since these true-life narratives recount actual occurrences, they provide examples of how reality is shaped into narratives. Narrative is one of the primary ways in which people make sense of the world, and as Robert Cover notes, “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”¹⁸ As such, these popular culture narratives help illuminate the role that the death penalty plays in America. In addition, they offer insights into how death penalty opponents can use narrative to erode capital punishment’s high but unstable support. Analyzing how a particular narrative tells the story of an actual defendant may therefore provide insight for those who tell real-life stories to juries, to commutation boards, and to the media.

Part I outlines the theoretical basis of the Note by explaining the role of narrative. By providing a way for people to make sense out of the chaotic world around them, narrative helps societies explain inexplicable events and helps jurors process the complexities of trial. Narrative is also a powerful persuasive tool, with applications in the public-opinion arena as well as the courtroom.

Part II analyzes pro-death penalty narratives. In these narratives, a brutal murder causes a breach in the social order. A crisis ensues while the killers are at large, characterized by a profound sense of irrationality, chaos, and fear in the community. In each of these sto-

¹⁶ These questions also arise in individual capital cases before individual jurors. Since, in most states, all capital jurors must express a willingness to vote for the death penalty in at least some instances, see Haney et al., *supra* note 12, at 151 (stating that, as far as authors are aware, all states use death-qualified sentencers in capital cases), the lawyer in a death penalty case is confronted with two critical questions: What is it about the death penalty that makes this juror willing to vote for a death sentence? And what tools will be effective in persuading her that the death penalty is inappropriate in this instance?

¹⁷ True-life stories about the death penalty are prevalent in our culture. See *Bird Man of Alcatraz* (Norma Prods. 1962); *Breaker Morant* (South Australian Film Corp. 1979) (Australian); *Dead Man Walking* (PolyGram Film Prods. 1995); *The Executioner's Song* (Lawrence Schiller 1983); *In Cold Blood* (Pax Enters. 1967); *In the Name of the Father* (Universal City Studios 1993); *I Want to Live!* (United Artists 1958); *Let Him Have It* (Film Trustees Ltd. 1991) (English); *Murder in the First* (Warner Bros. 1994); *Paths of Glory* (Harris-Kubrick Pictures 1957); *The Thin Blue Line* (Miramax Films 1988); see also Wendy Lesser, *Pictures at an Execution 2* (1993) (“[T]here is something new . . . in our increasing tendency . . . to convert real-world murder into made-up stories . . .”); cf. Stephanie B. Goldberg, *Walking the Last Mile, on Film*, N.Y. Times, Dec. 24, 1995, § 2, at 9 (discussing films about death penalty, informed in part by conversations with author of this Note).

¹⁸ Robert M. Cover, *Nomos and Narrative*, 97 Harv. L. Rev. 4, 4 (1983).

ries, healing can only begin when the murderer is executed. This Part argues that these narratives help illuminate the role that the death penalty plays in America: the death penalty represents a symbolic attempt to create order in a world filled with chaos.

Part III analyzes anti-death penalty narratives that tell stories about innocent defendants. Like the pro-death penalty narratives, these narratives place fear of chaos as their ultimate concern. Yet here the execution of the condemned does not cure a breach in the social order, but instead represents the ultimate symbol of chaos.

Part IV explores ways of telling persuasive anti-death penalty narratives about guilty defendants. Like the innocence narratives, these narratives need to undermine the sense that the death penalty is a symbol of order. This Part suggests three possibilities: telling a story about the arbitrariness of the death penalty, increasing an audience's identification with the accused, and portraying a central character who shifts her position about capital punishment. The Note concludes by arguing that anti-death penalty advocates must focus their attention on telling stories about guilty defendants—for only by telling effective stories about guilty defendants can the fight against the death penalty be won.

I

THE POWER OF NARRATIVE

Narrative is one of the primary ways in which people structure and make sense of the world. According to Louis Mink, "narrative is a primary cognitive instrument—an instrument rivaled . . . only by theory and by metaphor as irreducible ways of making the flux of experience comprehensible."¹⁹ The forms of narrative are infinite.²⁰

According to some theorists, all narratives have a similar structure: they begin with a breach of a norm,²¹ which is followed by a

¹⁹ Louis O. Mink, *Narrative Form as a Cognitive Instrument*, in *The Writing of History: Literary Form and Historical Understanding* 129, 131 (Robert H. Canary & Henry Kozlcki eds., 1978); see also id. at 132 ("[Narrative is] a primary and irreducible form of human comprehension . . .").

²⁰ See Roland Barthes, *Image—Music—Text* 79 (Stephen Heath trans., 1977):

The narratives of the world are numberless. Narrative is first and foremost a prodigious variety of genres . . . [U]nder this almost infinite diversity of forms, narrative is present in every age, in every place, in every society; it begins with the very history of mankind and there nowhere is nor has been a people without narrative.

²¹ See Victor Turner, *Social Dramas and Stories About Them*, in *On Narrative* 137, 146 (W.J.T. Mitchell ed., 1981) ("[A] social drama first manifests itself as the breach of a norm, the infraction of a rule of morality, law, custom, or etiquette . . ."); see also Jerome Bruner, *The Narrative Construction of Reality*, 18 *Critical Inquiry* 1, 11 (1991) ("[N]ot every sequence of events recounted constitutes a narrative . . . [T]o be worth telling, a tale

crisis.²² The goal of the narrative is to heal the breach of the social norm and to bring resolution and closure.²³

Narratives can act as “shield[s] against terror,”²⁴ providing ways for societies to make sense of a chaotic world.²⁵ The creation of cultural narratives is an attempt by the community “to establish cognitive control” and to “make[] sense of inexplicable events.”²⁶ According to Lévi-Strauss, cultural narratives which seek to order the world need not correspond to any objective reality to perform this role for the community.²⁷

In addition to helping societies explain the inexplicable, narratives also help individuals understand the complex world around them. Narrative can play this vital role in the courtroom. As jurors, nonlawyers are asked to make sense out of voluminous evidence, conflicting testimony, and technical legal rules. According to some theorists, jurors process this information and arrive at a decision through

must be about how an implicit canonical script has been breached, violated, or deviated from . . .”).

²² See Turner, *supra* note 21, at 146-47 (noting that after breach “a mounting crisis follows, a momentous juncture or turning point in the relations between components of a social field”).

²³ See *id.* at 147 (“The final phase consists either in the reintegration of the disturbed social group . . . or the social recognition of irreparable breach between the contesting parties . . .”). As Annette Kuhn states:

In the classic narrative, events in the story are organized around a basic structure At the beginning of the story, an event may take place which disrupts a pre-existing equilibrium in the fictional world. It is then the task of the narrative to resolve that disruption and set up a new equilibrium. The classic narrative may thus be regarded as a process whereby problems are solved so that order may be restored to the world of the fiction.

Annette Kuhn, *History of Narrative Codes*, in *The Cinema Book* 208, 212 (Pam Cook ed., 1985) (citation omitted).

²⁴ David I. Kertzer, *Ritual, Politics, and Power* 4 (1988) (quoting Peter L. Berger, *Secret Canopy* 22 (1969)).

²⁵ Lévi-Strauss, in a study of childbirth in several Latin American cultures, noted the way in which a shaman’s mythology provides a cure to the pain of childbirth:

The shaman provides the sick woman with a *language*, by means of which unexpressed, and otherwise inexpressible, psychic states can be immediately expressed. . . . [T]he transition to this verbal expression [makes] it possible to undergo in an ordered and intelligible form a real experience that would otherwise be chaotic and inexpressible

Claude Lévi-Strauss, *Structural Anthropology* 198 (Claire Jacobson & Brooke G. Schoepf trans., 1963); see also Kertzer, *supra* note 24, at 4 (“Through symbols we confront the experiential chaos that envelops us and create order.”); *id.* at 8 (“[R]itual is an analytical category that helps us deal with the chaos of human experience and put it into a coherent framework.”).

²⁶ Paul S. Berman, *Note, Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 *N.Y.U. L. Rev.* 288, 318 (1994).

²⁷ Lévi-Strauss, *supra* note 25, at 197.

narrative.²⁸ Simply put, “the criminal trial is organized around storytelling.”²⁹

An understanding of narrative is critical for the death penalty lawyer in attempting to persuade the public or particular jurors to vote against the death penalty. Although utilitarian and moral arguments are ineffective in changing public opinion about capital punishment,³⁰ narrative may provide an effective tool. This possibility is especially encouraging given the public support for alternatives to the death penalty, as well as the ambivalence about capital punishment among its supporters.³¹ Similarly, because jurors structure their understanding of cases through narrative, a lawyer’s effective use of narrative may help shape jurors’ understanding of the facts and the law³² and ultimately determine the jurors’ verdict.³³

This Note analyzes pro-death penalty and anti-death penalty narratives, focusing on films that are based on true-life stories. These narratives help illuminate the role that the death penalty plays in America and also suggest techniques that death penalty lawyers can use—both in the media and before particular jurors—in their fight against capital punishment.

II

A SYMBOLIC ATTEMPT TO CREATE ORDER: PRO-DEATH PENALTY NARRATIVES

This Part analyzes pro-death penalty narratives. Section A analyzes two pro-death penalty narratives, both of which tell a very particular story: a brutal crime (the “breach”) by amoral killers; an ensuing crisis, characterized by a profound sense of irrationality, chaos, and fear in the community; and a final execution that allows healing to begin. The execution is the required final act to bring clo-

²⁸ W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* 4 (1981).

²⁹ *Id.* at 3; see also Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in *Inside the Juror* 192, 192 (Reid Hastie ed., 1993) (asserting that “a central cognitive process in juror decision making is *story construction*” and providing empirical support for the theory); Daniel Goleman, *Study Finds Jurors Often Hear Evidence with a Closed Mind*, *N.Y. Times*, Nov. 29, 1994, at C1, C12 (“[Research] findings underscore the fact that a trial boils down to two versions of a story—the prosecution’s and the defense’s . . .”).

³⁰ See *supra* notes 9-11 and accompanying text.

³¹ See *supra* notes 12-15 and accompanying text.

³² See generally Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 *N.Y.L. Sch. L. Rev.* 55 (1992) (using narrative theory to analyze defense lawyer’s closing arguments to jury).

³³ See Pennington & Hastie, *supra* note 29, at 193, 210-13, 217 (concluding that narrative determines, rather than justifies, jurors’ decisions).

sure and a perceived return to rationality and order. Section B argues that these narratives help explain the role that the death penalty plays in America: it is a symbolic attempt to create a sense of order in a world filled with chaos.

A. *Pro-Death Penalty Narratives*

*In Cold Blood*³⁴ and *The Executioner's Song*³⁵ are both pro-death penalty narratives.³⁶ *In Cold Blood* is Truman Capote's account of Richard Hickock and Perry Smith's murder of the Clutter family in Holcomb, Kansas in 1959.³⁷ *The Executioner's Song* is Norman Mailer's account of the story of Gary Gilmore, the first man executed in the United States after the hiatus in executions³⁸ resulting from *Furman v. Georgia*³⁹ and ending with *Gregg v. Georgia*.⁴⁰ Both narratives tell of brutal murders that cause a breach in the social order. A crisis ensues, due to a feeling of chaos in the community as a result of the motiveless crimes. According to these narratives, the only way to heal the breach is to execute the killers.

In *In Cold Blood*, the breach that drives the narrative occurs early in the film: two ex-convicts brutally murder an entire family in a crime that nets a mere forty-three dollars.⁴¹ The ensuing crisis comes from the feeling of chaos and lawlessness that overwhelms the community in the aftermath of the murders.

This sense of chaos pervades *In Cold Blood*. Soon after the murder, a reporter tells the police inspector investigating the crime that his interest in the murder is "fairly basic." The inspector demands: "What's basic about a stupid, senseless crime?" The reporter responds: "A violent, unknown force destroys a decent, ordinary family. No clues. No logic. [It] [m]akes us all feel frightened, vulnerable."⁴²

³⁴ *In Cold Blood*, supra note 17.

³⁵ *The Executioner's Song*, supra note 17.

³⁶ Because these narratives tell a story that supports the death penalty, they will be referred to as "pro-death penalty narratives." This is not to imply, however, that they were made to support the death penalty or that they represent pro-death penalty propaganda.

³⁷ *In Cold Blood*, supra note 17.

³⁸ *The Executioner's Song*, supra note 17.

³⁹ 408 U.S. 238, 239-40 (1972) (holding that death penalty, as then administered in United States, violated Eighth Amendment's prohibition against cruel and unusual punishment).

⁴⁰ 428 U.S. 153, 169 (1976) (holding that death penalty "does not invariably violate the Constitution"); id. at 188-207 (approving Georgia's post-*Furman* death penalty statute and providing blueprint for other states seeking to impose death penalty).

⁴¹ *In Cold Blood*, supra note 17.

⁴² Id. The disruption of order is further demonstrated later in the same conversation. The reporter asks the police investigator, "How'd [the murderers] enter the house? A

When the police inspector enters a local restaurant after having caught a suspect who was not the murderer, a local patron demands: "Well if he's the wrong one, why in the hell don't you find the right one. I've got a house full of women that are afraid to go to the toilet alone."⁴³ Another patron in the restaurant suggests that someone who hated the murdered family was responsible for the crime. The waitress sharply cuts him off: "Nobody asked ya. Nobody hated [them] neither."⁴⁴ The irrationality of the crime fuels a feeling of chaos—this was not a crime of hate, but one without a motive. "If this can happen to a decent, God-fearing family," the waitress adds, "who's safe anymore?"⁴⁵

In another scene, the police inspector is perplexed by the illogic of the crime: "I can believe one man might work up enough rage to do it—but two? Who would kill four people in cold blood for a radio, a pair of binoculars, and forty dollars in cash?" Another police officer responds: "These days—take your pick on any crowded street."⁴⁶ Implicit in the inspector's question is an acknowledgment that it is at least understandable for a person to kill in rage or for large amounts of money; what causes the fear and chaos is the utter lack of motive for the crime. The other police officer's response heightens the feeling of terror: not only did these particular murderers have no motive, but such killers can be found at random "on any crowded street."

Even the murderer focuses on the irrationality of the crime: "[It] doesn't make sense. I mean what happened. Or why. It had nothing to do with the Clutters. They never hurt me. They just happened to be there. I thought Mr. Clutter was a very nice gentleman. I thought so right up to the time I cut his throat."⁴⁷ This statement reinforces the viewer's sense of terror. The murderer himself sees no logic in his act, yet he still slits the "nice gentleman's" throat.

After the murderers are eventually caught, their trial is signalled by a very brief court scene. The viewer sees only the prosecution's closing arguments, in which the prosecutor stresses the irrationality of the murders in his appeal for a sentence of death:

Gentleman—four of your neighbors were slaughtered like hogs in a pen—by them. They did not strike suddenly in the heat of passion—but for money. They did not kill in vengeance—they planned

key? Force a window?" "Probably just walked in," says the inspector. The reporter is surprised: "Don't people around here lock doors?" "They will tonight," answers the inspector. *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

it for money. And how cheaply those lives were bought. Forty dollars. Ten dollars a life.⁴⁸

Like the police inspector,⁴⁹ the prosecutor seems to assume that murders of passion, vengeance, or for large sums of money are somewhat understandable; it is the illogic of this particular crime that makes it warrant the death penalty. In a world without order, the prosecutor appeals to the Bible, the ultimate symbol of order. He concludes his closing argument by reading from Genesis: "Whoso sheddeth man's blood, by man shall his blood be shed."⁵⁰ The accused are found guilty and sentenced to death.

The narrative marches on to its conclusion: the execution of those who have caused the social breach. In the final scene of the movie, the viewer sees the gallows from a distance. The trapdoor opens, and the viewer watches one of the murderers bounce up and down on the rope in slow motion, as an echoing heartbeat softens.⁵¹

The Executioner's Song tells a story very similar to *In Cold Blood*. As in *In Cold Blood*, brutal murders constitute the breach that drives the narrative. This breach occurs in the very first scene of the movie, with police cars speeding to a crime scene, shots of a bloody body, and the pained screams of the victim's family.⁵²

Like *In Cold Blood*, *The Executioner's Song* portrays a sense of chaos in the community following illogical, motiveless crimes. Gary Gilmore kills his first victim for apparently no reason. His only pecuniary gain is a small amount of change found on the victim's body. Nor is there any apparent motive for the killing of his second victim: although he steals \$125 from him, this robbery seems incidental to the murder.⁵³ It is this utter absence of motive that makes the killings so disturbing and causes such a divisive breach in the social order. After the first murder, a local car dealer is visibly upset as he reads about the crime: "Shooting a guy for nothing! I can understand if he has to fight for the money. . . . He's got to be a psychomaniac. . . . To shoot a kid for nothing you've got to be crazy" ⁵⁴ This theme resurfaces as Gary Gilmore is questioned by a police lieutenant after he is captured: "Gary, why'd you shoot those guys? *Why?* Why did you do it?"

⁴⁸ Id.

⁴⁹ See supra text accompanying note 46.

⁵⁰ In *Cold Blood*, supra note 17; see also Genesis 9:6 (King James).

⁵¹ See *In Cold Blood*, supra note 17.

⁵² See *The Executioner's Song*, supra note 17.

⁵³ Id.

⁵⁴ Id.

. . . I'd just like to understand *why* you did it. I can't understand taking a life for the amount of money you got."⁵⁵

Gary Gilmore is captured soon after the second murder. As in *In Cold Blood, The Executioner's Song* does not present a full-blown court scene, but only shows the closing arguments of the prosecution. In a very brief scene, the prosecutor does not make an argument for why Gary Gilmore should be executed, but instead flips the presumption: "What is the point or the reason to let him live?" Gary Gilmore is found guilty and sentenced to death.⁵⁶

As in *In Cold Blood*, the narrative cannot conclude until the murderer—the cause of the social breach—is executed.⁵⁷ Even Gilmore believes that an execution is necessary to heal the social breach. When the car dealer expresses shock over the motiveless murder to Gilmore (before Gilmore is identified as the murderer),⁵⁸ Gilmore responds, "Maybe [the murderer] deserves to die." After he is captured, he says, "I want my debts paid—whatever it may take," and "I deserve to die." Gilmore dismisses his lawyer and fights the American Civil Liberties Union's attempt to appeal his case. "[P]eople . . . want to have the death penalty," he states, "but they don't want any executions." When brought before his pardon board, he adds: "In my opinion, you're all acting like a bunch of moral cowards."⁵⁹

Thus, in the penultimate scene of the movie, Gary Gilmore is strapped into a chair, and he says his final words: "Let's do it." The shots of the firing squad ring out, and he is pronounced dead.⁶⁰

B. Executions as an Attempt to Create Order

These pro-death penalty narratives provide insight into the role that capital punishment plays in America: it is an attempt to create a feeling of social order in an increasingly violent world. Murders spawn a feeling of chaos which instills fear in a community. The execution of the condemned, according to this cultural narrative, acts as a symbolic return to order.

This need to create order is especially strong when the feeling of chaos results from acts of random violence.⁶¹ Americans are increas-

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See *supra* text accompanying note 51.

⁵⁸ See *supra* text accompanying note 54.

⁵⁹ *The Executioner's Song*, *supra* note 17.

⁶⁰ *Id.*

⁶¹ Wendy Lesser has noted that real-life murder is often turned into art-about-murder, which "tends to be art about the search for structure and meaning in an apparently random existence." Lesser, *supra* note 17, at 18. According to Lesser, we try to view real-life

ingly horrified by random violence,⁶² which has taken many forms: mass murders,⁶³ car jackings,⁶⁴ and gang⁶⁵ and drug⁶⁶ violence. Random violence is terrifying because of its very randomness—it can strike anyone at any time. It not only spurs a general feeling of chaos but also an intensely personal fear.⁶⁷ It creates the feeling that *no one* is safe.⁶⁸

Thus, the death penalty is one of the symbolic ways that communities attempt to order this chaos, creating a narrative in which the breach of the norm can be healed by the execution of the condemned.⁶⁹ In this light, the public's impatience when death penalty

murder as narrative in an attempt to "remove some of the terrifying randomness from it." Id. at 190.

⁶² See, e.g., Adam Walinsky, *The Crisis of Public Order*, *Atlantic Monthly*, July 1995, at 39, 44 (stating that "our greatest fear is of violence from a nameless, faceless stranger"); id. at 46 (noting that "chances of getting . . . away with the murder of a stranger are greater than 80 percent"); see also *Cable News Network News: Crime Changes Lives of Victims—Perhaps to the Worse* (CNN television broadcast, Dec. 27, 1993) (stating that "[t]he fear of random violence in the United States has become a fact of life," and quoting Professor Robert Trojanowicz of Michigan State University as saying that "[r]andom violence is on the rise"). There were 3.5 million reported incidents of "stranger-on-stranger" violence in 1993. Stephen Braun & Judy Pasternak, *A Nation with Terror on Its Mind*, *L.A. Times*, Feb. 13, 1994, at A1, A16.

⁶³ See, e.g., Senator Bill Bradley, *Address at the National Press Club Luncheon* (May 11, 1994), available in LEXIS, News Library, CURNWS File ("The Charles Starkweather or Charles Manson used to come on once a decade, [but] now it seems like a Jeffrey Dalmer pops up some place every year.").

⁶⁴ See, e.g., *If You Can, Stay Step Ahead of Car-Jackers*, *Chicago Sun-Times*, Feb. 24, 1993, Auto Section, at 6A ("In a stretch of 21 days in Detroit 205 cars were car-jacked. One thief alone took 35 cars . . . Car-jacking quickly spread to every city. And alarm grew as, inevitably, some people were killed.").

⁶⁵ See, e.g., *American Gangs*, *Economist*, Dec. 17, 1994, at 21 ("In the cities [gangs are] a source of unremitting fear. Gangs, of course, have always caused trouble. But in the past decade trouble has given way to chaos, as gang violence has become ever more common, vicious and random."); see also id. at 22 ("In Chicago . . . the police blame [gang-related] slayings for virtually the entire increase in murders over the past five years.").

⁶⁶ See, e.g., Rich Connell, *The Hidden Devastation of Crack*, *L.A. Times*, Dec. 18, 1994, at A1, A19 (quoting Los Angeles County Sheriff Sherman Block's observation that emergence of crack cocaine has led to "much more bizarre behavior and random violence . . . [a] change in the nature of crime").

⁶⁷ Tamar Lewin, *Who Decides Who Will Die? Even Within States, It Varies*, *N.Y. Times*, Feb. 23, 1995, at A1, B6 (quoting law professor and death penalty expert David Baldus as saying "[p]eople identify more with the victim when it's a total stranger, because . . . random killing is what people have the most horror of").

⁶⁸ See *This Week with David Brinkley* (ABC television broadcast, Dec. 12, 1993) (reporting that after gunman killed seven people in Palatine, Illinois, town mayor stated that "[i]f a terrible tragedy like that can happen in Palatine, it can happen anywhere in the world"); id. ("Is anyone safe?"). These are the same sentiments expressed by the waitress in *In Cold Blood*. See *supra* text accompanying note 45.

⁶⁹ See, e.g., Tina Rosenberg, *The Deadliest D.A.*, *N.Y. Times*, July 16, 1995, § 6 (Magazine), at 20, 23 (stating that for District Attorney of Philadelphia County, death penalty

appeals take years⁷⁰ is more understandable: if executions are seen as necessary to heal society's wounds, then the wounds cannot heal until the execution takes place, thus creating a profound uneasiness while the condemned is on death row.

To perform this role of symbolically creating order, these death penalty narratives need not conform to any objective reality.⁷¹ Thus, the fact that the death penalty does not deter crime⁷² does not undercut its symbolic power. According to Robert Weisburg, professor at Stanford Law School:

If the public gets psychological pleasure and satisfaction out of seeing an execution . . . so be it. . . . I would simply like to make the . . . modest point that it is entirely symbolic, and there's no particular *reason* to feel any more in control or any more secure about the public safety because . . . it has essentially no connection to it.⁷³

Thus, in an increasingly violent culture, the death penalty—which has no connection to the actual imposition of order—is a cultural means through which society tries to exert some cognitive control. In this sense, all those executed are playing parts not tailored to their particular crimes, but rather to society's need to feel a sense of order in an increasingly violent and chaotic world.

III

THE DEATH PENALTY AS A SYMBOL OF CHAOS: NARRATIVES ABOUT INNOCENCE

Part III analyzes anti-death penalty narratives about innocence. Interestingly, these narratives use the same devices as the pro-death

"doesn't offer society control over crime—she doesn't believe it's a deterrent—but instead gives the *feeling* of control demanded by a city in decay").

⁷⁰ See 56 Executions This Year Are Most Since 1957, *supra* note 2, at 28 (quoting Richard Dieter of Death Penalty Information Center as saying "[t]here seems to be an impatience, a call for finality"); see also Mitchell, *supra* note 2, at A18 (reporting that statute restricting habeas corpus will "drastically accelerate executions by shaving years off appeals in most capital cases").

This impatience and anger also comes from Supreme Court Justices. During oral arguments in *McFarland v. Scott*, 114 S. Ct. 2568 (1994), Justice Scalia castigated the defendant's lawyer for seeking a stay of execution five days before the scheduled execution date: "I just want you to know that I am not happy with [your office's] performance . . . in the cases that come before me." Linda Greenhouse, *Court Confronting Results of Limiting Death Row Appeals*, *N.Y. Times*, Mar. 30, 1994, at A1, B7. And when the lawyer for the state of Texas in *McFarland* acknowledged that it can sometimes take years for Texas courts to process death penalty appeals, Justice Scalia again struck out from the bench: "If you want us to get serious, you should get serious yourselves" *Id.*

⁷¹ See *supra* text accompanying note 27.

⁷² See *supra* note 8.

⁷³ Lesser, *supra* note 17, at 45 (quoting Robert Weisburg's interview for documentary *Appealing Death*).

penalty narratives—focusing on a fear of irrationality and chaos. In these narratives, however, the chaos results not from a motiveless crime but from the injustice of an innocent person condemned to death. *I Want to Live!*⁷⁴ and *The Thin Blue Line*⁷⁵ both tell this story.

I Want to Live! is a 1958 movie about the life of Barbara Graham. In her youth, Graham associates with small-time criminals. She distances herself from these criminals because, in a classic 1950s way, she “env[ies] the housewives carrying out the groceries”⁷⁶ and decides to get married. Her domestic life, however, is not the 1950s fairy tale: she has an abusive and substance-abusing husband, a crying baby, and a landlord demanding rent. Out of concern for her child, she rejoins her old criminal associates in search of money. These men, however, have recently murdered a handicapped widow. They implicate Graham, although the viewer knows she is innocent. She is convicted and sentenced to death.⁷⁷

The clock ticks toward the date of execution. An appellate lawyer and a psychiatrist come to Graham’s aid, yet her appeals are denied and the date of her execution gets closer. The viewer waits and waits with Barbara Graham while she is on death row⁷⁸—a “waiting” that one author describes as “relentless[.]”⁷⁹ The viewer hopes for the Hollywood plot turn that will save this innocent woman. This hope continues even as she is led to the gas chamber and strapped into the chair. The cyanide eggs drop, and the chamber fills with gas. And then, the viewer watches as Barbara Graham suffocates to death.⁸⁰

In this narrative, it is not the crime that constitutes the breach of the norm—indeed, the crime is off camera and of little importance. The initial breach is the arrest, conviction, and condemnation of an innocent person. The sense of chaos reaches its apex when the un-

⁷⁴ *I Want to Live!*, supra note 17.

⁷⁵ *The Thin Blue Line*, supra note 17.

⁷⁶ *I Want to Live!*, supra note 17.

⁷⁷ See id.

⁷⁸ See id.

⁷⁹ Lesser, supra note 17, at 16. It is no surprise that an anti-death penalty narrative would focus on the “waiting” to be executed. According to one death penalty expert: “The thirty seconds or sixty seconds or two minutes [of the execution] is almost no part of the death penalty The death penalty is the process of waiting for years and then measured by the calendar and then finally by the clock.” Id. at 141 (quoting death penalty lawyer David Bruck). The relentless waiting is also central to *Dead Man Walking*, the story of a Catholic nun who befriends and counsels a death-row inmate, in which time drags until the moment of execution. See *Dead Man Walking*, supra note 17; see also Helen Prejean, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* 84-95 (1993). The relentlessness of this waiting starkly contrasts with *In Cold Blood*, where a narrator speeds up the wait by informing the viewer that “Perry and Dick waited [on death row for] five years.” In *Cold Blood*, supra note 17.

⁸⁰ See *I Want to Live!*, supra note 17.

thinkable occurs in a Hollywood movie: the innocent Barbara Graham is not saved at the last minute by a heroic lawyer or compassionate governor, but is executed. Thus, unlike in *In Cold Blood* and *The Executioner's Song*, the execution here does not cure the breach of order, but instead intensifies the sense of chaos.⁸¹

Errol Morris's documentary *The Thin Blue Line*⁸² similarly portrays the death penalty as a symbol of chaos. It tells the story of Randall Adams, an innocent man who was condemned to death for the murder of a police officer in 1976. Like *I Want to Live!*, *The Thin Blue Line* tells the story of an innocent person on death row. Yet the documentary also features characters who see an execution as necessary to heal the social breach resulting from the brutal crime. The contrast between these two stories gives the anti-death penalty narrative added power.

The judge who tried Randall Adams perceives a breach similar to those in *In Cold Blood* and *The Executioner's Song*:⁸³

You can understand why a man might steal if he needs money to put food on the table. . . . I can understand why a seventeen-year-old boy who doesn't have a car would steal one to ride around in. I can understand why the heroin addict needs heroin. But . . . [i]t's . . . very hard to understand why anyone has to kill a police officer. It just doesn't have to be.⁸⁴

Like the characters in *In Cold Blood*,⁸⁵ this judge expresses understanding for many crimes, but he is disturbed by the irrationality of this murder. Within his narrative framework, there has been a breach of order that needs to be healed.

While our criminal justice system presumes that the breach will be healed by the punishment of the guilty party, in *The Thin Blue Line* it seems that the system was intent on finding *anyone* to fill this role. The police detective in the case recalls the feeling of uneasiness in the community when no one had yet been charged with the crime:

It was getting awfully close to Christmas. We'd never really gone that long in Dallas without clearing the murder of a police officer. We'd had several killed, but we'd always cleared them pretty quick. And this case had gone a month . . . or nearly a month, and we still hadn't cleared it.⁸⁶

⁸¹ See also *Let Him Have It*, supra note 17 (English film in which innocent man who functions at fourth-grade level is executed in final scene).

⁸² *The Thin Blue Line*, supra note 17.

⁸³ See supra notes 42-50, 53-55 and accompanying text.

⁸⁴ *The Thin Blue Line*, supra note 17.

⁸⁵ See supra text accompanying notes 46, 48-49.

⁸⁶ *The Thin Blue Line*, supra note 17.

Although the evidence against Adams was thin, the police arrested him and charged him with murder.⁸⁷

At the time Randall Adams was charged, there were numerous indications that David Harris, a sixteen-year-old boy, had committed the murder. Nevertheless, the authorities prosecuted Adams, arguably because the community felt that an execution was necessary to heal the social breach.⁸⁸ As Adams's lawyer states:

They had a twenty-eight-year-old man [Randall Adams]. The only alternative would be prosecuting a sixteen-year-old that could not be given the death penalty under Texas law, where our twenty-eight-year-old man could. That's always been the predominant motive, in my opinion, for having a death penalty case against Randall Adams. . . . [J]ust that he was a convenient age.⁸⁹

Randall Adams also believes that the central intent of the prosecutor was not to find out who killed the police officer, but to execute him: "[The District Attorney is] talking about how he's going to kill you. He don't give a damn if you're innocent, he don't give a damn if you're guilty. He's talking about killing you."⁹⁰

In the final scene of the documentary, David Harris strongly implies that he—and not Randall Adams—committed the murder.⁹¹ The narrative then ends. Flashed on a black screen are the following words: "Randall Adams is serving a life sentence, in Eastham Unit, Lovelady, Texas. . . . It has been over eleven years since the murder of Dallas Police Officer Robert Wood."⁹²

Like *I Want To Live!*, *The Thin Blue Line* undermines the pro-death penalty narrative. The police officers and the judge see the breach as the pointless murder of a police officer—a breach that can only be healed through an execution. The narrative of *The Thin Blue Line*, however, identifies the breach as having an innocent man convicted and sentenced to death.⁹³ The presence of the death penalty does not offer the possibility of healing, but instead represents the ultimate symbol of chaos.

⁸⁷ See *id.*

⁸⁸ See *supra* text accompanying notes 51, 57-60.

⁸⁹ *The Thin Blue Line*, *supra* note 17.

⁹⁰ *Id.*

⁹¹ See *id.*

⁹² *Id.*

⁹³ During the documentary, the viewer is told that the Supreme Court reversed Randall Adams's death sentence. The prosecution decided not to retry him, and as a result, Adams was to serve a life sentence. Adams's appellate lawyer speculates that the reason the prosecutor did not retry Adams was because the evidence was so weak. *Id.* Adams was later released. Lisa Belkin, *Dallas Will Not Retry Man in Killing of Officer*, *N.Y. Times*, Mar. 24, 1989, at A11.

IV

BEYOND INNOCENCE:
THE CHALLENGE TO CREATE NEW NARRATIVES

Even though narratives about innocence effectively tell a story in which the death penalty is a symbol of chaos, these narratives seem to have limited effect in persuading people that capital punishment should be abolished. While there is evidence that innocent people are sentenced to death,⁹⁴ innocence is not the primary issue in the majority of death penalty cases. As a result, the strength of the innocence stories is diluted by the perception that the innocence narratives are rare exceptions singled out for prominent treatment.⁹⁵

In addition, the innocence narrative is simply not available in some instances. For example, because a death penalty trial is bifurcated,⁹⁶ the fact finder has already determined the defendant's guilt before the sentencing phase begins. As a result, the defense lawyer must inevitably tell a story about a guilty defendant at the sentencing phase—that even though the defendant is guilty of the crime, his life should nonetheless be spared.⁹⁷

Thus, while the innocence stories are powerful, advocates fighting against the death penalty must create new narratives. In so doing, they must tell stories which counter the notion that the death penalty is a symbol of order and instead portray it as a symbol of chaos. As this Part will demonstrate, there are a number of themes and techniques to employ in this effort.

⁹⁴ Hugo Bedau and Michael Radelet have documented 350 cases in the twentieth century where innocent defendants were "convicted of capital or potentially capital crimes." Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *Stan. L. Rev.* 21, 23 (1987). Bedau and Radelet found that "in virtually every year in this century, in some jurisdiction or other, at least one person has been under death sentence who was later proved to be innocent." *Id.* at 38. Twenty-three of these innocent defendants were executed. *Id.* at 36. In January 1995, Texas executed Jesse Dewayne Jacobs, who very well may have been innocent. According to a *New York Times* editorial, "Texas has just executed a man with full knowledge that he was not guilty of the crime for which he was put to death." *Murder by Texas*, *N.Y. Times*, Jan. 5, 1995, at A26.

⁹⁵ See Alex Kozinski & Sean Gallagher, *For an Honest Death Penalty*, *N.Y. Times*, Mar. 8, 1995, at A21 ("Wrongfully convicted defendants are rare; wrongfully convicted capital defendants are even rarer."); Haney et al., *supra* note 12, at 112 ("[C]oncerns about the execution of innocent persons is unlikely to have had much impact on attitudes toward the death penalty." (citations omitted)); see also Sam H. Verhovek, *When Justice Shows Its Darker Side*, *N.Y. Times*, Jan. 8, 1995, § 4, at 6 (quoting death penalty supporters who state that even if innocent people are sometimes executed, benefits of death penalty still outweigh costs).

⁹⁶ See *Gregg v. Georgia*, 428 U.S. 153, 158 (1976).

⁹⁷ Interview with Anthony G. Amsterdam, Judge Edward Weinfeld Professor of Law, New York University, in New York, N.Y. (Aug. 30, 1994).

A. *The Arbitrariness of the Death Penalty*

Narratives that demonstrate the arbitrariness of capital punishment—due to ineffective assistance of counsel or racism—can effectively portray the death penalty as a symbol of chaos. Death penalty narratives, however, neglect these themes.

The quality of counsel is arguably one of the key factors in determining who is sentenced to death,⁹⁸ yet death penalty narratives fail to explore this angle. None of the “true-life” stories about the death penalty analyzed in Parts II and III focus on the quality of legal representation. *I Want to Live!* touches on this theme—Graham’s lawyer pressures her to fabricate an alibi that ultimately helps convict her—but it is primarily a story about innocence.⁹⁹ *Dead Man Walking*, which is discussed in Part IV.C, also raises the quality of representation as an issue, but only in passing.¹⁰⁰

⁹⁸ According to Stephen Bright: “[A] large part of the death row population is made up of people who are distinguished by neither their records nor the circumstances of their crimes, but by their abject poverty, debilitating mental impairments, minimal intelligence, and the poor legal representation they received.” 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, 1840 (1994). Bright has documented numerous cases in which there is strong evidence that the competency of the defendant’s lawyer was determinative as to whether the defendant received a sentence of life or death. See *id.* at 1837-41. Based on this evidence, Bright concluded that the death penalty is not assigned to defendants who have committed the worst crimes but to those who have the worst lawyers. See *id.* at 1836; see also Ronald Smothers, *Court-Appointed Defense Offers the Poor a Lawyer, But the Cost May Be High*, *N.Y. Times*, Feb. 14, 1994, at A12 (quoting Stephen Bright as saying he had found that “getting the death penalty was not so much the result of how bad the crime was or how bad the defendant was, but how bad the lawyer was”).

A *National Law Journal* study of the death penalty in the South supports Bright’s conclusions. Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation’s Death Belt*, *Nat’l L.J.*, June 11, 1990, at 30. In conducting its six-month, six-state study, the journal examined thousands of pages of trial transcripts, conducted in-depth interviews with attorneys who tried and lost capital cases, and talked with judges, prosecutors, and experts in capital law. *Id.* The study found that lawyers trying capital crimes often had no experience, expended little effort, and were further limited by unrealistic statutory fee caps:

The decision as to who should live and who should die frequently is based less on what defendants did than on the skill employed in presenting to jurors the question of *whether* they should live or die.

And simply put, that boils down to lawyers—defense lawyers—and the system that selects them, pays them and gives them what they need to mount a meaningful defense.

Indigent defendants on trial for their lives are frequently represented by ill-trained, unprepared court-appointed lawyers so grossly underpaid they literally cannot afford to do the job they know needs to be done.

Id. The study concluded that “in the southern tier of states known as the nation’s Death Belt . . . fairness is more like the random flip of a coin than a delicate balancing of the scales of justice.” *Id.*

⁹⁹ See *I Want to Live!*, *supra* note 17.

¹⁰⁰ See *Dead Man Walking*, *supra* note 17 (lawyer at pardon hearing states that death-row inmate had been represented at trial by tax lawyer who had no trial experience).

Other anti-death penalty narratives that are based on true stories actually undermine the notion that the lawyer's skill is critical. In *Paths of Glory*, a war movie about the death penalty in which soldiers are tried for cowardice, the unsuccessful lawyer is the narrative's hero: the Colonel (played by Kirk Douglas) valiantly and effectively defends his men in a court-martial proceeding.¹⁰¹ *Breaker Morant*, another war movie about the death penalty, also undermines the notion that death sentences are the result of poor legal representation. In *Breaker Morant*, three men are being tried by a military court for war crimes. Their attorney has no court experience and has less than two days to assemble the case. The lawyer is shown as bumbling and incompetent—dropping papers on the way to court and re-asking questions of the defendants that they had already answered. Nevertheless, he is transformed in the courtroom almost immediately, and top officials note that he “is putting up an unexpectedly good defense.”¹⁰² The implicit message is that an incompetent lawyer can be transformed when justice is on his side.

Although none of these “true-life” narratives about the death penalty show the case turning on the quality of legal representation, a *Perry Mason* episode about the death penalty does.¹⁰³ In the episode, a very wealthy white woman is condemned to die despite Perry Mason's representation. His investigator, Paul Drake, assures Mason that he has investigated every lead: “For over three months, my men and I have checked and rechecked every possible lead, every possible angle—every possible possibility.”¹⁰⁴ Mason represents her on appeal, and in response to a seemingly insignificant lead, he sends Drake to Brazil to talk to a relative of the defendant. When Mason eventually discovers the real murderer, he tells Drake that it was Drake's trip to Brazil that led to the discovery of the murderer.¹⁰⁵

On the one hand, this story could create the misleading impression that all death-row defendants receive representation of Perry Mason's caliber. Nevertheless, it is one of the few narratives about the death penalty that makes the quality of representation the determinative factor—for if Perry Mason had not been on the case, and if he had not dispatched Paul Drake to Brazil, an innocent woman would have been executed.

¹⁰¹ See *Paths of Glory*, supra note 17.

¹⁰² *Breaker Morant*, supra note 17.

¹⁰³ See *Perry Mason: The Case of the Deadly Verdict* (CBS television broadcast, Oct. 3, 1963).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

The power of the quality-of-counsel story is that it highlights the arbitrariness of capital punishment: although there are approximately 20,000 homicides each year in the United States, the death penalty is imposed in only approximately 250 cases per year.¹⁰⁶ A narrative that shows a defendant being singled out for this rare punishment because of his lawyer's incompetence could effectively paint the death penalty as a symbol of chaos.

There is also strong evidence that the race of the defendant and the race of the victim play a large factor in determining who is sentenced to die.¹⁰⁷ In each of the narratives analyzed in Parts II and III, however, the defendant is white,¹⁰⁸ and the story of racism in the imposition of the death penalty is ignored. A story about the racist application of the death penalty could demonstrate that capital punishment does not create order out of chaos, but that it instead discriminatorily singles out a few for society's harshest punishment.

In order to convey arbitrariness, however, one must broaden the scope of the narrative. One cannot tell a single story about a single defendant and show a pattern of arbitrariness; instead, one must tell stories of multiple defendants. An article in the *Dallas Times Herald* demonstrates this technique. In a story about the racist application of the death penalty, the authors tell three pairs of stories. Each pair describes similar brutal murders. Yet in each pair, the defendant who

¹⁰⁶ See Bright, *supra* note 98, at 1841.

¹⁰⁷ The Baldus study, the study of Georgia's capital sentencing scheme which the Supreme Court considered in *McCleskey v. Kemp*, 481 U.S. 279 (1987), concluded that the race of both the victim and the defendant are statistically significant factors in determining who receives a death sentence:

[Baldus] found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims.

Id. at 286; see also Gregory D. Russell, *The Death Penalty and Racial Bias* 40-44 (1994) (noting that empirical data calls into question assumption that "death qualification" of death penalty juries does not introduce racial bias into process); Erik Eckholm, *Studies Find Death Penalty Tied to Race of the Victims*, *N.Y. Times*, Feb. 24, 1995, at B1, B4 (surveying studies which show correlation between race and imposition of death penalty).

¹⁰⁸ See *The Executioner's Song*, *supra* note 17 (white defendant); *In Cold Blood*, *supra* note 17 (white defendants); *I Want to Live!*, *supra* note 17 (white defendant); *The Thin Blue Line*, *supra* note 17 (same); see also *Bird Man of Alcatraz*, *supra* note 17 (same); *Dead Man Walking*, *supra* note 17 (same); *Murder in the First*, *supra* note 17 (same); *Perry Mason: The Case of the Deadly Verdict*, *supra* note 103 (same). But see *Native Son* (Int'l Film Forum 1988) (black defendant); see also Pete Earley, *Circumstantial Evidence: Death, Life, and Justice in a Southern Town* (1995) (telling true story about innocent black man sentenced to death).

killed a white person received a death sentence while the defendant who killed a black person did not.¹⁰⁹

Although it is harder to tell a story about arbitrariness than to tell one about innocence, arbitrariness arguments have been effective in the fight against the death penalty. In *Furman v. Georgia*,¹¹⁰ evidence of the death penalty's arbitrariness led the Supreme Court to strike down all of the then-existing death penalty statutes. Evidence of racial disparities in the administration of the death penalty also led four Justices to dissent in *McCleskey v. Kemp*,¹¹¹ arguing that racial disparities in Georgia's application of the death penalty rendered it unconstitutional. Justice Powell, the author of the majority opinion in *McCleskey*, has since stated that he wishes he had voted the other way.¹¹² In addition, concerns about arbitrariness led Justice Blackmun to fundamentally shift his view on the death penalty: although he had consistently voted to uphold the constitutionality of the death penalty throughout his career as a Justice,¹¹³ he eventually concluded that its imposition was too arbitrary to pass constitutional muster.¹¹⁴

¹⁰⁹ Jim Henderson & Jack Taylor, Killers of Dallas Blacks Escape the Death Penalty, *Dallas Times Herald*, Nov. 17, 1985, § 1, at 1, 16.

¹¹⁰ 408 U.S. 238, 239-40 (1972).

¹¹¹ 481 U.S. 279, 320 (1987) (Brennan, J., dissenting, joined by Marshall, J., and joined in part by Blackmun and Stevens, JJ.); *id.* at 345 (Blackmun, J., dissenting, joined by Marshall and Stevens, JJ., and joined in part by Brennan, J.); *id.* at 366 (Stevens, J., dissenting, joined by Blackmun, J.).

¹¹² John C. Jeffries, Jr., A Change of Mind That Came Too Late, *N.Y. Times*, June 23, 1994, at A23 (quoting Justice Powell as stating that he has changed his mind about capital punishment, in part because of its arbitrariness).

¹¹³ See, e.g., *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (Blackmun, J., concurring); *Proffitt v. Florida*, 428 U.S. 242, 261 (1976) (Blackmun, J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Blackmun, J., concurring).

¹¹⁴ See *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.").

The two opinions in *Callins v. Collins* demonstrate an interesting "battle of stories." Justice Blackmun opens his dissent to the denial of certiorari with a story of an execution:

On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction.

Id. at 1128. Justice Scalia mocks Justice Blackmun's reliance on "'intellectual, moral, and personal' perceptions" and states that it is the text and tradition of the Constitution that must control. *Id.* at 1127 (Scalia, J., concurring). Nevertheless, Justice Scalia also tells a story:

Justice BLACKMUN begins his statement by describing with poignancy the death of a convicted murderer by lethal injection. He chooses . . . one of the less brutal of the murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare

B. Sympathetic Stories About Guilty Defendants

One of the difficulties in telling an arbitrariness story is that one must tell such a story about a guilty defendant. Death penalty proponents counter the arbitrariness story by arguing that if the death penalty was imposed in one case but not the other, it should have been imposed in *both* cases. As Ernest van den Haag, a vocal supporter of the death penalty, has stated: "The fact that a murderer who gets the death penalty could point to a murderer who didn't . . . does not make him any less guilty."¹¹⁵

Thus, to supplement an arbitrariness story, it is important to tell a sympathetic story about a guilty defendant. The defendant must be seen not only as the victim of chance but as someone different than the typical murderer. Even though this is more difficult than telling a story about innocence, there are a number of narrative techniques which make this task less daunting.

I. When to Start the Story

Pro-death penalty narratives have a very narrow time frame. They begin with the crime and end with the defendant's execution.¹¹⁶ This choice of starting point can cause the audience to see the defendant primarily as a murderer,¹¹⁷ depriving the defendant of identities or attributes that might engender sympathy. To combat this deprivation of identity, the anti-death penalty narratives must expand the time frame. Thus, the choice of starting point is critical.

Let Him Have It,¹¹⁸ an English film about the death penalty, provides a good example of the strategic choice of starting point. The narrative begins with brief scenes of Derek Bentley as a child and then moves to Derek Bentley as an adult—a gentle, shy, mildly retarded man who has trouble coping with the world. The crime that leads to Derek's execution does not occur until the very end of the

himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which Justice BLACKMUN describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which Justice BLACKMUN did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. How enviable a quiet death by lethal injection compared with that!

Id. at 1128 (citation omitted).

¹¹⁵ Eckholm, *supra* note 107, at B1.

¹¹⁶ See *supra* text accompanying notes 41, 51-52, 60.

¹¹⁷ See *The Executioner's Song*, *supra* note 17 (portrayal of Gary Gilmore); *In Cold Blood*, *supra* note 17 (portrayal of Richard Hickock).

¹¹⁸ *Let Him Have It*, *supra* note 17.

movie.¹¹⁹ Thus, by the time the crime occurs, the viewer “knows” Derek as a person—not as a murderer.¹²⁰

A similar strategic choice of starting point occurs in *Murder in the First*.¹²¹ The movie begins with Henry Young being caught in an unsuccessful prison escape from Alcatraz. He is placed in solitary confinement in complete darkness for over three years in Alcatraz’s “dungeons,” where he becomes crazy. When he is finally returned to the prison population, he is told that a fellow prisoner—who squealed about the prison escape—was responsible for Young’s years in the dungeons. Young kills him in a deluded rage as warped voices echo in his head.¹²²

Although both of these stories could have begun with the murder, by starting before the murder and giving context to the crime the filmmaker portrays a defendant who is less culpable. The viewer sees the world from the perspective of the protagonist and therefore better understands the act.

One way to extend this technique is to start the story even earlier, by telling the story of a child. When, later in the narrative, the person commits a murder, the motivations and pressures will be better understood. The importance of starting the story at childhood is recognized in an anti-death penalty poster produced by Amnesty International and the Death Penalty Focus. The poster shows eight pictures of children—all of whom later committed a murder and were sentenced to death. The caption reads: “Shouldn’t we be asking what went wrong?”¹²³

2. *When to End the Story*

Like the choice of beginning, the ending point also constitutes an important narrative choice.

a. Rehabilitation. While pro-death penalty narratives show the execution of the condemned as the natural ending point, one way to create a different ending is to follow a prisoner into a period of rehabilitation.

¹¹⁹ See *id.*

¹²⁰ In *Let Him Have It*, Derek’s culpability depends on what he meant when he shouted “Let him have it”: Was he inciting his friend to shoot the police officer, or imploring him to hand over his gun to the police? *Id.* Because the viewer “knows” Derek, she sees him as intending the latter, and therefore believes that Derek is innocent of the crime.

¹²¹ *Murder in the First*, *supra* note 17.

¹²² *Id.*

¹²³ Amnesty Int’l & Death Penalty Focus, *Shouldn’t We Be Asking What Went Wrong?* (on file with the *New York University Law Review*).

*Bird Man of Alcatraz*¹²⁴ effectively tells a rehabilitation story. The movie begins with Robert Stroud imprisoned for committing a murder. In prison, Stroud murders a guard with a makeshift knife. He is sentenced to death, but his death sentence is commuted after his mother makes a plea to President Wilson.¹²⁵

While in prison, he takes in a baby bird which he finds in the exercise yard. He nurtures the bird to health and begins raising other birds. He becomes a gentle man, as well as an expert on birds. He publishes in scientific journals, and the prison doctor calls him a "genius." Nonetheless, he remains in prison. Although he is a paragon of rehabilitation, the warden tells him, "Not once have you ever shown a sign of rehabilitation."¹²⁶ The narrative ends with a voice-over telling the viewer that Robert Stroud has spent fifty-three years in prison—and that his parole petition is denied each year.¹²⁷

A rehabilitation story can also include an inmate who is waiting to be executed. In Texas, for example, 115 death-row inmates work in a garment factory, producing uniforms, sheets, diapers, and tote bags for the state of Texas:

Here human beings judged incorrigibly beyond the normal entitlement to freedom and life busy themselves at making some final goods for society. As the bobbins whirl and the assembly line works through life case by case, convicts seize the work as a final chance to confound society's judgment of their lives' utter worthlessness.¹²⁸

According to one inmate, "We do it to say, 'By God, I showed them I'm not really the threat they think I am.'"¹²⁹ Another inmate agrees: "It's kind of a paradox If a condemned man shows he can exist quite well without posing a danger to his peers, what's the real reason for executing him?"¹³⁰

These rehabilitation stories undermine the notion that punishment is always part of an ordered system of justice. Keeping Robert Stroud incarcerated or executing rehabilitated garment workers por-

¹²⁴ *Bird Man of Alcatraz*, supra note 17.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Francis X. Clines, *Self-Esteem and Friendship in a Factory on Death Row*, N.Y. Times, Jan. 12, 1994, at A1.

¹²⁹ *Id.*

¹³⁰ *Id.* at A14; see also Rick Bragg, *Where Alabama Inmates Fade into Old Age*, N.Y. Times, Nov. 1, 1995, at A1 ("Grant Cooper knows he lives in prison, but there are days when he cannot remember why. . . . Back [in 1954], before he needed help to go to the bathroom, Mr. Cooper was a dangerous man. Now he is 77, and since his stroke in 1993 he mostly just lies in his narrow bunk at the Hamilton Prison for the Aged and Infirm . . .").

trays the criminal justice system not as a symbol of order, but as a system which confounds logic.

b. Ending Without Closure. One of the ways in which anti-death penalty narratives reinforce the feeling of chaos is by ending without closure. *The Thin Blue Line*, for example, powerfully uses this technique, ending as the viewer learns that Randall Adams is still serving jail time for a murder that he most likely did not commit.¹³¹ *Let Him Have It* also employs this device. When the innocent Derek is executed in the final scene, the following words appear on the screen: "William and Lillian Bentley continued their struggle to clear Derek's name until their deaths in the 1970's. Today [Derek's sister] continues that fight."¹³² *I Want to Live!*,¹³³ *Bird Man of Alcatraz*,¹³⁴ *Breaker Morant*,¹³⁵ and *In the Name of the Father*¹³⁶ also use this technique.

These unresolved endings reinforce the unsettling feeling of disorder and lawlessness associated with these narratives. Because the story lacks closure, the viewer cannot feel settled. Leaving the narratives unfinished may also be an attempt to spur viewers to action. The viewer is left with two options: she can either feel the terror of a world without logic in which innocent people are executed or imprisoned for life, or she can attempt to change it. It is a half-finished tale, and only the audience can bring the narrative to a resolution.¹³⁷

Given the prevalence of the half-finished tale in anti-death penalty narratives, a narrative which tells the story of a guilty defendant may also want to use this technique. For example, a narrative could tell the story of a death-row garment-factory worker. Although the individual committed a brutal crime, he could now be seen as a productive member of society. The viewer could get to know and like the man. When he is executed in the final scene, a message could flash on the screen, informing the viewer that other death-row garment work-

¹³¹ See *supra* text accompanying note 92.

¹³² *Let Him Have It*, *supra* note 17.

¹³³ See *I Want to Live!*, *supra* note 17 (ending with reporter needing to write about the injustice).

¹³⁴ See *Bird Man of Alcatraz*, *supra* note 17 (ending with voice-over telling that Robert Stroud has served 53 years in prison and that his request for parole is denied each year).

¹³⁵ See *Breaker Morant*, *supra* note 17 (ending with execution of two scapegoats and with third defendant, sentenced to life in prison, needing to write about the injustice).

¹³⁶ See *In the Name of the Father*, *supra* note 17 (ending with protagonist pledging to clear name of his father).

¹³⁷ See Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 *Clinical L. Rev.* 9, 17-20 (1994) (noting that Thurgood Marshall's argument in *Brown v. Board of Education*, 347 U.S. 483 (1954), "constitutes a half-finished tale that requires judicial action to conclude it").

ers are awaiting execution. The result would be an unsettled feeling in the viewer, undermining the sense that the death penalty represents order.

3. *Humanizing the Defendant and "Typicality Effects"*

It is crucial in anti-death penalty narratives to induce viewer identity with the accused.¹³⁸ This is not a difficult task when the narrative tells a story of innocence. While an average viewer may not easily see herself as a murderer, the viewer of an innocence narrative is only asked to see herself as an innocent person wrongly accused, convicted, and condemned.¹³⁹ Yet narratives also have the power to create viewer identification with a guilty defendant.¹⁴⁰

One way to increase identification with the defendant is to give him an identity apart from that of "murderer." Indeed, sociological studies have demonstrated that this is a key factor in determining whether jurors feel a particular defendant should be executed. One such study examines "typicality effects"—the extent to which opinions about the death penalty are shaped by a general notion of who a "murderer" is.¹⁴¹ This study concludes that proponents of capital punishment are likely to think that the death penalty is appropriate for a "typical" murderer, as opposed to an "atypical" one.¹⁴² This research suggests that one way to steer a sentencer away from imposing

¹³⁸ This, of course, is intimately connected to choices about when the story begins and ends. See *supra* Part IV.B.1-2.

¹³⁹ As Wendy Lesser has noted, stories in which an innocent person is condemned to death are "painful—not only because the injustice is extreme, but because the victim is close[] to ourselves in nature. He is relatively innocent and so are we; ergo this could happen to us." Lesser, *supra* note 17, at 87. This feeling is expressed for the viewer by Barbara Graham's friend in *I Want to Live!*, in which the innocent Graham is executed: "It could have been [me]," the friend declares. *I Want to Live!*, *supra* note 17.

¹⁴⁰ An important characteristic of narrative is that it induces empathy. Seymour Chatman describes the "interest point of view" which exists in narrative: "We become identified with the fate of a character, and even if we don't see things or even think about them from his or her literal perspective, it still makes sense to say that we share the character's point of view." Seymour Chatman, *What Novels Can Do That Films Can't (and Vice Versa)*, in *On Narrative* 117, 130 (W.J.T. Mitchell ed., 1980). Chatman notes that "[a] reader [or viewer] must obviously be able to participate imaginatively in a character's set of mind, even if that character is a nineteenth-century lecher." *Id.* at 135 n.4. While "interest point of view" exists in all narratives, Chatman adds that it is "particularly strong in film narratives." *Id.* at 136 n.4. Similarly, Jerome Bruner notes that narratives act as "magnets for empathy." Jerome Bruner, *Actual Minds, Possible Worlds* 20-21 (1986).

¹⁴¹ Charles G. Lord et al., *Typicality Effects in Attitudes Toward Social Policies: A Concept-Mapping Approach*, 66 *J. Personality & Soc. Psychol.* 658, 664-65 (1994).

¹⁴² *Id.* at 655; see also Craig Haney, *Lessening the Impulse to Condemn to Death: Five Mitigation Heuristics* (Feb. 1992) (unpublished manuscript, on file with the *New York University Law Review*) (arguing that sentencer is more likely to impose death penalty if defendant is viewed as deviant or foreign, not a person, and someone to be feared).

death is to provide the sentencer with *any* information that sets the defendant apart from the typical murderer.¹⁴³

Perhaps the best narrative example of this occurs in *Bird Man of Alcatraz*, where the murderer cares for birds and becomes a scientist—a development which breaks the association of Robert Stroud as a “typical” murderer.¹⁴⁴ The O.J. Simpson case provides another example: the prosecutor probably did not seek the death penalty for this brutal crime because it would be unlikely that a jury would see Simpson as the “type” of person who gets executed. As Bryan Stevenson, the director of the Alabama Capital Representation Resource Center, stated: “We feel most comfortable sentencing someone to death when we can reduce their whole life to a single act of brutal violence O.J. Simpson has the advantage of being known for something other than allegedly killing his wife and another person.”¹⁴⁵

This is not to suggest that a defendant needs to be a bird trainer or a football star to counter typicality effects. Research suggests that people “typically envision an idealized or hypothetical defendant who is more deviant, powerful, and dangerous than the . . . defendant who actually appears in court.”¹⁴⁶ Thus, the challenge for the death penalty opponent—in each and every case—is to show that *this* defendant does not resemble the hypothetical, arguably nonexistent, “typical” murderer.¹⁴⁷

If the defendant is portrayed as a full human being, with a personality that does not fit within the “murderer” stereotype, a viewer can identify with the guilty defendant on death row. Thus, even if the viewer believes that murderers in general should be executed, she may very well feel that this particular defendant should be spared.

¹⁴³ Interview with Anthony G. Amsterdam, *supra* note 97.

¹⁴⁴ See *Bird Man of Alcatraz*, *supra* note 17; see also *supra* text accompanying notes 125-26.

¹⁴⁵ Henry Weinstein & Alan Abrahamson, *Death Penalty Unlikely for Simpson*, *Experts Say*, *L.A. Times*, July 10, 1994, at A1, A29.

¹⁴⁶ Haney et al., *supra* note 12, at 92.

¹⁴⁷ See, e.g., *In the Name of the Father*, *supra* note 17 (portraying protagonist Gerry Conlon as son); cf. *I Want to Live!*, *supra* note 17 (portraying Barbara Graham as mother whose primary concern is welfare of her child).

Not surprisingly, pro-death penalty narratives often do not encourage viewer identification with the murderer. For example, in *The Executioner's Song*, Gary Gilmore is portrayed as a killer from the very beginning. Before the viewer even meets Gilmore, she sees a bloody victim and hears the pained screams of the victim's family. The viewer quickly learns who is responsible for the pain—at the scene of the crime, one observer says, “Gary did it,” and another man approaches a policeman and says, “It's possible my nephew Gary Gilmore had something to do with this.” *The Executioner's Song*, *supra* note 17.

C. *The Story of the Observer's Journey*

Another way of telling an anti-death penalty narrative is to shift the main character of the story. Instead of focusing on the guilty defendant himself, one can center the story on a third party who changes her position toward capital punishment. These are narratives of personal journeys, where the viewer is asked to come along.¹⁴⁸

An episode of the television show *In the Heat of the Night*¹⁴⁹ is a powerful example of this type of story. The episode focuses on Gillespie, a police chief in Mississippi. He is puzzled when a death-row prisoner, whom he had arrested years ago, requests that Gillespie visit him. Gillespie is reluctant, but goes nonetheless. The prisoner wants Gillespie to be the executor of his will: "I trust you, Chief. You see things done right." The inmate also asks whether Gillespie will come to the execution. Gillespie is again very reluctant, but agrees.¹⁵⁰

After a sleepless night, Gillespie returns the next morning to be an execution witness. The prisoner is to be executed by lethal injection, and the environment is sterile. The doctor injects the needle into the prisoner's arm. Other witnesses avert their eyes, but Gillespie cannot turn away. The dying prisoner attempts to make eye contact with Gillespie, but his vision is blocked by a doctor. Gillespie jumps up to be by the prisoner's side. Their eyes meet, and the prisoner dies.¹⁵¹

The next day at the police station, Gillespie tries to downplay the significance of what he experienced. Nevertheless, he feels compelled to open the subject. He asks a coworker if he thinks executions are "cruel and unusual." The coworker responds that the Framers of the Constitution made a distinction between executions and torture, and that executions therefore do not constitute cruel and unusual punishment. Gillespie disagrees:

About the only way you can execute a man without torturing him is to tell him you forgive him. That's right, you tell him you forgive him. And you go and turn him loose. And then as soon as you see a happy smile come over his face, you shoot him in the back of the head.¹⁵²

With this, the episode ends.¹⁵³

¹⁴⁸ Cf. Amsterdam & Hertz, *supra* note 32, at 64-65 (analyzing defense lawyer's closing arguments to jury using narrative theory, and noting that lawyer makes jurors central characters of story).

¹⁴⁹ *In the Heat of the Night: A Trip Upstate* (NBC television broadcast, Feb. 7, 1989).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

This theme of the observer's journey is prevalent in other stories as well. *Dead Man Walking*¹⁵⁴ tells the story of Sister Helen Prejean's personal journey.¹⁵⁵ At first she is mistrustful of the defendant who has committed the brutal crime,¹⁵⁶ and she repeatedly reminds him that he has caused horrible pain to the victim's family.¹⁵⁷ Yet she nonetheless sees his humanity¹⁵⁸ and accompanies him until the very end.¹⁵⁹ *Cry, the Beloved Country*¹⁶⁰ tells the story of a white, racist man in South Africa whose son—a racial reformer—is killed by a black man. At first the father is understandably filled with rage. Slowly, however, he begins to see the injustice of apartheid. In the end, he becomes a reformer himself.¹⁶¹

One way to increase the effectiveness of the personal-journey story is to open with the protagonist articulating the pro-death penalty narrative—that the death penalty is necessary to create order in a chaotic world. Over the course of the narrative, the protagonist can slowly begin to see the death penalty itself as a symbol of chaos—because innocent people are sometimes executed, because it is applied arbitrarily and discriminatorily, or because even guilty people possess a core humanity that should not be extinguished. Hopefully, as the protagonist changes, the viewer will be brought along as well.

CONCLUSION

This Note argues that America's support for the death penalty can be explained in part by the narrative role that it plays: it represents a symbolic attempt to create order in a world filled with chaos. Random violence spawns a feeling of disorder and lawlessness that creates fear within a community. The execution of the condemned, according to this cultural narrative, acts as a symbolic return to order.

Anti-death penalty narratives about innocent defendants also focus on fear of chaos. In these narratives, however, the death penalty does not cure a breach in the social order but instead represents the

¹⁵⁴ *Dead Man Walking*, supra note 17.

¹⁵⁵ In the autobiography on which the movie is based, Prejean calls her story an "eyewitness account of the death penalty." Prejean, supra note 79, at iii. She describes herself as an "ordinary person [who became] involved in extraordinary events." *Id.* at xiii.

¹⁵⁶ *Dead Man Walking*, supra note 17; see also Prejean, supra note 79, at 3-22.

¹⁵⁷ See *Dead Man Walking*, supra note 17; see also Prejean, supra note 79, at 38, 84.

¹⁵⁸ See *Dead Man Walking*, supra note 17; see also Prejean, supra note 79, at 62 ("I'll acknowledge the evil Pat has done and make very clear that I in no way condone his terrible crime, but I'll try to show that he is not a monster but a human being like the rest of us . . .").

¹⁵⁹ See *Dead Man Walking*, supra note 17; see also Prejean, supra note 79, at 68-95.

¹⁶⁰ *Cry, the Beloved Country* (British Lion Film Corp. Ltd. 1951).

¹⁶¹ *Id.*

ultimate symbol of chaos and irrationality. Although the innocence stories are powerful, they seem to have limited effect in persuading people that the death penalty should be abolished.

Those fighting the death penalty therefore need to create new narratives. They must go beyond innocence stories and embrace the ultimate challenge of persuading people that even guilty defendants should not be executed. To tell an effective story about a guilty defendant, one must still paint the death penalty as a symbol of chaos—by showing the arbitrariness of the death penalty, by having the death penalty threaten a person that the viewer believes should be spared, or by having the viewer identify with a character who shifts from a pro-death penalty to an anti-death penalty stance. When advocates succeed in crafting stories in which the execution of a guilty defendant symbolizes a world without order, the fight against the death penalty will have been won.