Introductory Remarks: Symposium on Capital Punishment and the Administration of Justice

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If we hold the sanctity of life to be an absolute value, then the death penalty exacts of the administration of justice a certainty that we ask and expect of no other institution in our self-governing society. As we shall now hear, the administration of justice is beset with imperfection. That is so even though, along with those other democratic institutions, we know of none that is better.

On post-conviction appeal, more than 40 percent of the petitions heard have brought orders for retrial or other reexamination of the record. For a few years, until the election of the 104th Congress, the federal government funded the representation of defendants by more adequate counsel on appeal than they had had at trial. This experiment in the administration of justice produced many of the court orders counted in that 40 percent. Without such public funding and with no access to other resources, most of 3,700 men and women on death row will have no review of their convictions.

In Illinois, thirteen condemned have been released from death row upon rehearing and reversal of their convictions. The governor of that state has called a moratorium on the death penalty. DNA, the genetic molecule that distinguishes each of us from every other, has now established error in conviction with certainty in more than sixty cases.

Uncertainty inherent in the truth-finding function of the adversary process of litigation must attend many more cases for which DNA cannot establish such certainty. To that quotient, as we shall hear, human frailty of a less tolerable kind, tripped by the death penalty itself, adds more miscarriages of justice.

1 Read 26 April 2002.
The high percentage of verdicts found defective and returned to the trial court for review and for retrial speaks for the inadequate representation of defendants at trial. That, in turn, speaks for the socio-economic disability and racial discrimination that blight the past and the future of the overwhelming majority of defendants. Their trials and convictions escape the weak public attention paid to the conduct of the police and prosecutors, even in capital cases.

Justices Powell, Blackmun, and Marshall each, upon retirement from the U. S. Supreme Court, deplored the poisoning of the criminal justice system by the death penalty.

We shall hear, first, a history of how and by what authority in faith and morals the practice of the death penalty came into our law and custom. Three lawyers will then appraise, from their individual experience in the representation of capital cases at trial and on appeal, the corrosive stress that capital punishment lays upon the administration of justice in our country.