

## Perspective

### **DEATH IS TOO FINAL**

by MARK M. BAKER

In a "Perspective" article appearing in the Law Journal, Ulster County District Attorney Michael Kavanagh explained his view of the "deterrent value" of capital punishment. I agree; capital punishment is indeed a deterrent -- at least with regard to the person being put to death. But even if, assuming arguendo, it were a deterrent as to the otherwise potential acts of others as well, there is an inevitable, and all too foreboding aspect to this ultimate sanction that is simply too bothersome to eschew.

As a long-time criminal defense attorney, concentrating, as counsel of last resort, in appellate and post-judgment litigation (following ten years as a prosecutor, during which tenure I continually opposed the death penalty), I have won the release over the years of at least three persons serving lengthy sentences in state correctional facilities, upon demonstrating their innocence of the crimes of which they were convicted. From the perspective, therefore, of one who has witnessed first-hand the horrific ramifications of those deficiencies endemic in our otherwise enviable criminal justice system, I can honestly state that no human emotion -- aside, perhaps, from that enjoyed by a surgeon who saves a patient's life -- quite approximates the exhilaration one experiences upon effecting the freedom of someone wrongfully incarcerated for a crime which that person did not commit. Clearly, with all its attendant horrors, confinement in a penal institution at least does not eviscerate all hope of ultimate vindication. The death penalty, on the other hand, allows no such comfort -- for utter finality is its linchpin.

On these premises, I was absolutely numbed by the reactions of various capital punishment proponents to the utterly obscene execution in Texas, recently, of Jesse Dewayne Jacobs. It will be recalled that even the local District Attorney conceded that Mr. Jacobs was not guilty of the homicide for which he had been condemned.

Mr. Kavanaugh tells us that although "[o]ur judicial system is not infallible...the chances of a mistake being made are infinitesimal." Similarly, New York State Senator Dale M. Volker, who is one of the leading backers of the restoration of the death penalty in this state, has decried "the last refuge" of his opponents who note the possibility of mistake. As the Senator has opined: "You would hope that would never happen, but the mere fact that you might fail does not argue that you should not do it."

Further, in a chilling article appearing recently in the New York Times about the Jacobs execution, the profound sensitivity of Laurin A. Wollan, Jr., an associate professor in the School of Criminology and Criminal Justice of Florida State University was reported. Professor Wollans reminded us that "[i]nnocent people have been executed." But, added the professor, "[t]he value of the death penalty is its rightness vis-a-vis the wrongness of the crime, and that is so valuable that the possibility of the conviction of the innocent, though rare, has to be accepted."

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As one who has repeatedly traveled as a passenger on the emotional roller coaster upon which wrongfully convicted persons and their loved-ones are forced to ride, to the District Attorney Kavanaughs, Senator Volkens and Professor Wollans of the world, I

pose a single query: Would you be equally as willing to sacrifice your own wrongfully convicted son or daughter on the alter of the politically expedient re-introduction of the death penalty for the greater common good? If, as common sense would dictate, your intellectually honest answer is "no", then you have no right to expect someone else's loving parent to be any more inclined.

Indisputably, the only certain aspect of our otherwise imperfect criminal justice system is its all too recurring lack of certainty. Death, under such circumstances, is simply too final a sanction.