

AMONG THE
LOWEST OF
THE DEAD

Law, Meaning, and Violence

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Among the Lowest of the Dead: The Culture of Capital Punishment,
by David Von Drehle

AMONG THE LOWEST OF THE DEAD

The Culture of Capital Punishment

DAVID VON DREHLE

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To my mother

And I Tiresias have foresuffered all
Enacted on this same divan or bed;
I who have sat by Thebes below the wall
And walked among the lowest of the dead . . .

T. S. Eliot, *The Waste Land*

PREFACE

Ten Years Later

A book about a subject as controversial and fluid as the death penalty is inevitably a bucket pulled from a moving stream. No sooner is it published than readers—and the author—begin to wonder whether the water in the bucket still represents the whole river.

Has this book about a “slow, costly and inefficient” system—an “arbitrary,” “chaotic . . . merry-go-round,” in the words of one of the central figures—become outdated by the frequency with which Texas has carried out executions in the past ten years and by the burst of executions in states like Virginia, Oklahoma, and Missouri? (Indeed, a twenty-first-century “death belt” now runs north from Texas through Oklahoma and into Missouri. These three states regularly account for more than half of all executions each year. The former “death belt,” which ran from Florida to Texas across old Dixie, has been outdone, at least for now.)

Because of these few states, more men (and a handful of women) have been executed in the past decade than I expected when I wrote, in the closing pages of this book, that “a random few dozen” executions per year “is still the limit of possibility.” I remember wondering to myself how many executions the modern death penalty system could produce in a year and guessing that the limit would probably be around fifty. Five years later, in 1999, the states put ninety-eight people to death. Nor was that an aberration. In 2002, Texas alone executed as many people (thirty-three) as were put to death in Florida during the entire span of this book. I imagine a year with a hundred or more executions nationwide—a rate unmatched in more than half a century in America—remains possible.

A whole book, or maybe a shelf of them, could be written exploring the reasons for these higher rates in Texas and the new death belt. A fact

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alluded to in these pages is that Texas wrote a death penalty law in the 1970s that was unique, closer to a mandatory penalty than the elaborate weighing system upheld by the U.S. Supreme Court for other states. The Texas law is simpler and apparently less open to interpretation than laws like Florida's that are premised on "guided discretion." A special Texas "death court"—the state Court of Criminal Appeals—expedites capital cases, showing scant appetite for parsing the law. And the key federal court for Texas inmates—the Fifth Circuit Court of Appeals—has turned a cold eye on death row issues. At the same time, Texas has done little to provide strong advocates for its death row inmates; it is likely that Justice Ruth Bader Ginsburg had Texas at least partly in mind when she recently observed that she had never seen a death penalty case, in nearly ten years on the Supreme Court, in which the inmate had received a good defense at trial. Her colleague former justice Sandra Day O'Connor echoed this assessment in a 2001 speech, having weighed capital cases on the Supreme Court for twenty years. Citing statistics showing that capital defendants in Texas with court-appointed attorneys were 28 percent more likely to be convicted than those who hired their own counsel—and 44 percent more likely to be sentenced to death if convicted—O'Connor ventured: "Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." O'Connor gave this speech not in Texas but in Minnesota, which does not have the death penalty. "You must breathe a big sigh of relief every day," O'Connor told her audience.

Texas is the perfect storm of the American capital punishment enterprise, a state in which inmates receive minimal representation, judges mostly refrain from tinkering with the system, and appellate courts take a dim view of complaints from the row. Even in Texas, however, there are more prisoners living under unresolved death sentences today than there were a decade ago—about 450—despite a plunging crime rate that has helped to drive down the number of capital trials. In other words, even in Texas, the executioner cannot keep up.

Nationwide, the clanking, spluttering, unreliable machine described in these pages is running just as badly a decade later. As I was writing this book, experts were predicting a wave of executions in California. That has not materialized: the death row population there is now well over six hundred, while California executes just one or two prisoners each year. In the face of

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these numbers, it is hard to imagine an emptier or more craven government promise than a California death sentence. Several states, amid growing doubts that the system is working reliably, have imposed a moratorium on executions lasting months or even years—a development that I would never have imagined, given the political power of capital punishment a decade ago.

Take Illinois, for example.

According to a special commission appointed to study that state's death penalty, "serious questions about the operation of the capital punishment system in Illinois . . . were highlighted most significantly by the release of former death row inmate Anthony Porter after coming within 48 hours of his scheduled execution. . . . Porter was released from death row following an investigation by journalism students who obtained a confession from the real killer in the case."

Northwestern University journalism professor David Protes and his students documented to the satisfaction of virtually everyone that there were innocent men on the Illinois death row—a total of fifteen men, in the recent past and present. The reaction to their investigation was a moratorium on executions that was still in effect more than five years later. A specially appointed Illinois Commission on Capital Punishment conducted an exhaustive examination of the death penalty system. The commission's report in 2002 ran to more than two hundred pages, diagnosing nearly one hundred distinct problems with the system, from inadequate defenses to insufficiently skeptical cops. My cast of characters in Florida would recognize just about all of them. The Illinois legislature followed up with sweeping reforms of the state's death penalty laws. Ultimately, then-governor George Ryan, a lame-duck Republican, commuted more than 170 death sentences to life in prison.

The commissioners split on the question of whether the system was worth overhauling again. The renowned author and former prosecutor Scott Turow was a member of the commission. He began his work with mixed feelings about the death penalty but was startled by what he found. "Capital punishment has been one of the most notorious train wrecks of American politics," he concluded.

This same realization—that the system is a train wreck and may not ever work well—has continued to dawn on public officials closest to the

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issue. The frustration and resignation expressed by judges and prosecutors in the closing pages of this book have spread across the country, as capital punishment continues to snarl the justice system nearly three decades after the Supreme Court declared that a constitutionally acceptable death penalty had been devised. Capital punishment is “by far the most difficult, time-consuming, frustrating and critical joint problem [courts] have to grapple with on a daily basis,” according to Judge Gilbert Merritt of the federal Sixth Circuit Court of Appeals, which covers the Upper Midwest. In Arizona, Stanley Feldman, the senior state supreme court justice, called on the state to consider doing away with the system entirely: “There is no way really to do it right,” he said. Moses Harrison, a chief justice of the Illinois Supreme Court, put it this way: “Despite the courts’ efforts to fashion a death penalty scheme that is just, fair and reliable, the system is not working.”

The U.S. Supreme Court, after a relatively hands-off period, is once again showing itself willing to reopen various legal controversies related to the death penalty, taking cases to decide whether electrocution and certain lethal injection procedures are cruel and unusual punishment; whether trial judges or juries should weigh the evidence for and against death sentences; whether execution is acceptable for the mentally ill, the mentally retarded, and juvenile offenders; what constitutes adequate defense counsel, and so on.

On balance, the picture of delay, caprice, and confusion painted in *Among the Lowest of the Dead* continues to represent the death penalty in America. When the book was published, there were about three thousand prisoners on death row across the country. Today, despite the higher execution rates, the emptying of the Illinois death row, the sharply reduced murder rates across the country, and a decline in the frequency of death sentences, that number is even higher—about thirty-five hundred. Capital cases continue to clog courts from coast to coast, and if the problem is not metastasizing as quickly as before, the main reasons have little to do with the death penalty machine itself. There are fewer violent crimes today, more alternatives to death sentences in the form of “life without parole,” and, perhaps, a growing sense among prosecutors that the expense and complication of a death penalty trial are often not worth it, given the slim chance of an eventual execution. Nationwide, the frequency of death

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sentences has dropped by half from a decade ago—a trend matched by the once gung-ho people of the state of Florida.

If this book continues to have value—and I hope readers agree that it does—it is because it tries to show the death penalty system from all sides and through many eyes. The project began fifteen years ago without my even knowing it. An editor at the *Miami Herald* showed me some powerfully intimate photographs from the early years of Florida's modern death row. The pictures were taken by a young man named Bill Wax. Bill was a college student at the University of Florida when John Spenkelink was approaching his weird destiny as the first man to be executed against his will in a dozen tumultuous years. The row was a relatively open place in those days; reporters and photographers came and went rather easily. Bill met Spenkelink, visited death row, and recorded it all with his camera—access I could only envy when I began to delve into the death penalty ten years later. His pictures were like passports for me across a stern, search-lit frontier to a place where men sit sullenly, wash socks in sinks, stare, doze, and wait decades to die.

The editor chose me to write an essay to accompany Bill's pictures—I suppose because I had written several pieces about how and why the death penalty had failed to deliver on its promises. Death row in Florida then housed more than 250 inmates, yet executions were comparatively rare. Everyone complained about the endless and expensive appeals process, but nothing seemed to change. I set out to understand why. Along the way, I caught the assignment, along with scores of other journalists, to cover the execution of Ted Bundy—the most notorious murderer of a generation—from a cow pasture near the Florida State Prison.

As I tried to interpret Bill Wax's pictures, it dawned on me that Bundy's execution had come almost exactly ten years after Florida had begun its modern death penalty experiment with the electrocution of John Spenkelink. And that span, from the pointless execution of a faceless drifter, to the circus execution of a truly diabolical killer—with years of anguish and fiasco in between—seemed to gather up the whole mixed bag of frustrations and stratagems and sorrows that the death penalty had to offer to American life.

Five years, thousands of documents, scores of interviews later, I told the story of those ten years in *Among the Lowest of the Dead*. The book was my best effort to show, from every perspective—prosecution and defense,

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politicians and judges, victims and killers, survivors of every type—what the death penalty in contemporary America *is actually like*. In the course of my research, I read many books by highly skilled thinkers and writers designed to persuade readers. This book has a different purpose: to examine, describe, report.

Now it is more than twenty-five years since Spenkelnik's death. Everything and nothing has changed. The same David Kendall who sped up and down the pine-bordered highways of North Florida in his desperate effort to save John Spenkelnik went on to defend President Bill Clinton against articles of impeachment in the U.S. Senate. He now has two historic events on his resume: the first involuntary execution in the modern era and the only impeachment trial of the twentieth century. The second time, Kendall won—thanks in part to the votes of juror Bob Graham of Florida. Kendall's silent nemesis in the fight for Spenkelnik's life had become a U.S. senator voting on impeachment. Ray Marky, the relentless prosecutor, lost his larynx to his endless chain of nervously puffed cigarettes and now visits Tallahassee schools to warn against the dangers of smoking. Warden David Brierton moved into management of the Florida prison system and ultimately found himself back on the row, investigating botched executions. Robin Gibson, the governor's right-hand man, returned to a prosperous small-town law practice in Central Florida. Millard Farmer is still in Atlanta, throwing monkey wrenches into the courthouse machine. Reverend Joe Ingle, in Nashville, no longer has to leave Tennessee to carry on his ministry to the condemned; the death row in his state has become one of the busiest in the country.

The decision to focus on one state's experience, rather than skimming across the entire death belt, was partly driven by an author's imperatives. Simply to sketch the tale in a single state required me to introduce dozens of figures and to trace a tangle of legal and political strategies. Additional states would have compounded the complications. But the choice of Florida was not accidental: during the period covered in this book, the formative decade of the modern death penalty, Florida led the way in reinstating capital punishment. It was the first state to pass a new death penalty law after the U.S. Supreme Court struck down the old punishments in 1972. It was the first state to execute a man against his will, the first to make a routine of executions, the first to confront the crisis of hundreds of inmates

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in need of adequate appellate counsel. True, there are now larger death rows, in California and Texas, and more inmates die in the execution chambers of several states. But Florida remains a microcosm of the system nationwide. If you sketched a range of state experiences with capital punishment, with a state like Minnesota on one end—no death penalty at all—and Texas on the other, Florida would lie in between: a place where sentences are imposed with stern regularity, where condemned prisoners are housed by the hundreds, where millions are spent to litigate appeals year after year after year. But in the quarter-century since Spenklink's execution, this apparatus has produced, on average, barely more than two executions annually.

The tinkering never stopped.

There was a long fight over Old Sparky, the aged oak electric chair. You can see the first salvo of the battle near the end of this book, where I tell the story of Jesse Tafero, whose head caught fire when the chair malfunctioned in 1990. Over the next ten years, other inmates were burned or bloodied in other malfunctions—enough that in 2000 the U.S. Supreme Court agreed to look at the question of whether electrocution was cruel and unusual punishment, an issue that had supposedly been settled more than a century earlier. Faced with this prospect, the Florida legislature mothballed the chair and adopted lethal injection as the state's execution method.

But this method, too, has had its imperfections. Bennie Demps was one of the first Florida inmates to die by the poisonous cocktail, in which an anesthetic is followed by a paralytic drug to halt breathing, after which comes a drug to stop the heart. The protocol at the Florida State Prison called for two intravenous lines, one in each arm, so that a second round of drugs could be quickly administered if the first round failed to work. The IV went easily into the prisoner's left arm, but when technicians moved to install the second line, they jabbed twice without hitting a vein. They tried again in the prisoner's groin—no luck. Exasperated, a technician pulled out a scalpel to attempt a procedure known as a "cut-down." After making a small incision in the prisoner's thigh, a crew member tried to pull a vein to the surface. Another failure. They tried again near his ankle. No luck.

Bennie Demps was wheeled into the execution chamber more than half an hour late, well after his 6 P.M. date with death. (For the first time in modern memory, the execution was not scheduled at dawn; prison officials

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had decided there was no point in everyone getting up so early.) Demps used his final statement to demand an investigation of his execution. “They butchered me back there. I was in a lot of pain. They cut me in the groin, they cut me in the leg,” Demps said in an angry tirade some seven minutes long. “This is not an execution, it is murder.”

“Eyes bulging and voice quavering,” the *Miami Herald* reporter wrote, Demps “said the medical examiner would find ‘a wound on my leg that they sutured back up. I was bleeding profusely.’” After the speech, the executioner depressed a plunger, and the drugs began to flow. At 6:53 P.M., on June 7, 2000, Bennie Demps was pronounced dead.

Lawyers for the next inmate slated to die, Thomas Provenzano, raised Demps’s botched execution in hopes of winning a stay, with no success. In the long history of legal executions, an almost unimaginable range of methods have been employed: stoning, burning, flaying, dismembering, beheading, starving, shooting, hanging, electrocuting, gassing, and so on. In that context, lethal injection looked almost peaceful. Provenzano won no votes on the issue of the execution method, though two Florida Supreme Court justices voted to stay his death warrant out of concern that Provenzano had lost his mind. “He suffers from a delusional belief that he is Jesus Christ and that this is the real reason he is being executed,” wrote Justice Leander Shaw. Provenzano was killed by lethal injection two weeks after Demps, on June 21, 2000.

One of the running sagas in this book concerns the ragtag band of lawyers recruited by a chain-smoking, wisecracking, hard-drinking dynamo named Scharlette Holdman to defend the men of death row. Over time, even the pro-execution government of Florida concluded that taxpayers should replace Holdman’s makeshift operation with a centralized agency for capital appeals, called—a triumph of stupefying bureaucratise—the Office of Capital Collateral Representative.

As it played out, no one was entirely happy with the result.

Initially, CCR lawyers worked themselves half to death—it must have been the only state agency that kept roll-away beds in the office for employees who couldn’t, or wouldn’t, go home. Over time, the responsibility of defending literally hundreds of lives began to grind down the CCR

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staff. One of the office pioneers, Michael Mello, has since written his own accounts of the confusion, chaos, and insanity of Florida's death penalty project in such memoirs as *Dead Wrong*, *The Wrong Man* (which tells the story of Mello's successful effort to free Joseph "Crazy Joe" Spaziano from death row), and *Deathwork*.

Gradually, many of the founders of CCR drifted away. Mello migrated north to teach law and write books in Vermont. Holdman ultimately headed west, winding up in California, where she remained one of the finest death row investigators in the country. One of the best of the CCR lawyers, Mark Olive, remained in Florida and kept fighting. If someone were to write this book today, Mark Olive would be the mainstay.

A decade or so was enough to see that CCR, by itself, fixed nothing, and Florida authorities began taking the agency apart. Democratic governor Lawton Chiles, elected in 1990, embraced a plan to divide CCR into three regional offices. But the changes made little or no difference. Despite the latest overhaul, the machinery of capital punishment stubbornly refused to hum. Late in his second term, Chiles died in office, and the Florida death penalty was still failing. A short time later Jeb Bush was elected governor, and the system was overhauled again. Now it came full circle: the Florida legislature created a statewide "registry" for capital defense lawyers. And so, after some fifteen years and scores of millions spent, Florida returned to a bureaucratized version of Scharlette Holdman's pencil-scratched ledger, in which she tracked death penalty cases and tried to match the condemned with lawyers. Several years into the registry program, Florida's execution rate remains about the same—between two and three prisoners per year on average.

Other schemes have been hatched and debated. In 2001, one of the leading authorities on the Florida death penalty, editorialist Martin Dyckman of the *St. Petersburg Times*, summarized the state of affairs in a column that suggested little has changed since this book was first published. "The Florida Supreme Court spends about half its time on the tiny fraction of its cases that involve the death penalty," Dyckman began. "Knowing this, some legislators offered competing proposals last year to 'help' the court, either by expanding the bench from seven seats to nine or by creating a separate supreme court just for criminal appeals. What they really wanted

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was to change the outcomes of those death cases that pile up in Tallahassee, so that more inmates would die, and die faster.

“Cooler heads deflected the court-wrecking schemes by creating a Supreme Court Workload Commission, which was expected to report, as in fact it recently did, that there is no good use for either ‘reform.’

“A larger Supreme Court would slow things down, not speed them up,” Dyckman continued. “Nine people need more time to argue and exchange draft opinions than seven do. As for the other, two courts of last resort would bring utter confusion to the rules of evidence.”

The writer wound up with some data: “There were 856 first-degree murders [in Florida] in 1999, 741 arrests, more than 1,000 convictions for all degrees of murder and manslaughter combined, yet only 21 death sentences. That suggests the death penalty is nothing but a costly, capricious symbolism which serves no purpose—other than to enable politicians to posture about it—that couldn’t be served just as well at much less expense by simply throwing away the keys” through life-without-parole sentences.

It is almost stunning to find courts and lawmakers still sifting and resifting these issues three decades after the law was written.

There was a time when I could shock people by telling them that some Florida prisoners would soon be marking their twentieth anniversaries on death row. Twenty-year legal battles seemed like something from Dickens’s *Bleak House*—not the routine business of a major American state. I used to wonder what might happen when inmates started hitting twenty-five years, which was then the minimum a first-degree murderer sentenced to life in prison had to serve before being eligible for parole. (Since then, Florida and a number of other states have adopted true life-without-parole sentences.) Would it be fair to execute a man after he had already served the minimum alternative sentence? Wasn’t that weirdly close to paying double: a life sentence *and* a death sentence? Some version of that idle speculation is now an element in dozens of death row appeals, and someday the courts might find merit in it.

Meanwhile, Florida’s senior death row inmate, Gary Alvord, passed the thirty-year mark in April 2004.

Thirty years. And there is nothing especially complicated about his case—no disputes over guilt, or accusations of racial prejudice, or evidence

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withheld. Alvord was a violent twenty-five-year-old living in a mental hospital when he escaped and went on a murderous rampage, assaulting and strangling three women. He arrived on death row about four months after John Spenkeliink got there, when the population of the row was barely enough to fill out a football team. He watched it grow into a small town.

According to a personal advertisement written by Alvord and posted by his supporters on the Internet, he is now “55 yrs, 6’0, 200 lbs . . . fairly intelligent, able to empathise. I miss normal people/life and . . . enjoy reading [and] caring about others.” The prisoner hasn’t always sounded so reasonable. In the early 1980s, Alvord was so clearly insane that he wasn’t fit even for death row, where raving pedophiles and mumbling psychotics managed to fit in. He was moved for several years to the state hospital for intensive treatment. In time, Alvord was rendered sufficiently sane to resume his place on the row—which has moved, since this book was written, to a new facility across a creek from the older prison at Starke.

Gary Alvord is not the only man growing old in the tiny cells of Florida’s death town. In an average year, old age takes as many lives as the gurney. Alvord has only a few months of seniority on Thomas Knight, who continues, as of this writing, to survive *two* death sentences—one he received in 1975 for the murders of Stanley and Lillian Gans and another handed down six years later for the death row slaying of prison guard Richard Burke. There are now five members of Florida’s thirty-year club, soon to be six, soon to be more.

In 1994, as I was putting the last touches on *Among the Lowest of the Dead*, Jeb Bush was coming down to the wire in a hot, hard campaign against Lawton Chiles. In a final grab at victory, Bush aired a controversial television ad in which Wendy Nelson, the grieving mother of a murdered little girl, looked into the camera and said: “Fourteen years ago, my daughter rode off to school on her bicycle. She never came back. Her killer is still on death row, and we’re still waiting for justice.” Wendy Nelson blamed the incumbent for the delay. Some said a backlash against the ad helped to reelect Chiles.

Almost a dozen years later, Larry Mann, the kidnapper-killer of gregarious little Elisa Nelson, is still on death row. His lawyers say he is no longer the self-loathing, drug-addled, violent pedophile dispatched there so long ago. Supposedly he has found God in his prison cell and studies

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ancient Greek to better understand the New Testament. Mann survived four more years of Chiles and now nearly eight years of Governor Bush. He has been sentenced and resentenced and resentenced again. At one hearing, Wendy Nelson filled the courtroom with supporters from the victim rights group she founded out of her frustration with the dysfunctional death penalty system. The presence that day of so many grim-faced members of the League of Victims and Empathizers was recycled into yet another ground for Mann's appeals.

I often think of the morning I spent in the company of Wendy Nelson, hearing her story. We talked in the presence of a photograph of her adorable ten-year-old daughter. She spoke movingly of the pain that sharpened with each birthday. She had imagined Elisa as she might have been at age sixteen or twenty-one. That was a lot of birthdays ago, and I'm sure Wendy Nelson has pictured a wedding day that Larry Mann prevented and a baby's birth. "I try to imagine what she would be like . . . but I only ever knew the child," Wendy said.

The inability of the death penalty system to resolve a case like Larry Mann's, given fourteen years of trying, led me to declare that capital punishment was "a cruel hoax" for families like the Nelsons. That was one of the most salient, powerful truths I was able to learn about this troubling subject. And it is even more true today, when those fourteen years have turned to twenty-five.

I mentioned Dickens a moment ago. Recently a leader of the fight to end capital punishment in America described today's situation as the best and worst of times. After a generation in which public opinion hardened steadily in favor of executions, Gallup polls suggest that the trend has reversed, albeit slightly. From a high of 80 percent in favor of capital punishment at the time this book was first published, the number has fallen to about 65 percent—still very strong. But if people are given the option of life without parole, the public is evenly split.

The steady stream of inmates released from death row has led Congress to the brink of passing major legislation to improve the defense of capital prisoners. In 2003, ten inmates nationwide were freed due to doubts about their guilt—tying the 1987 record. That number included two Ohio prisoners exonerated more than twenty-five years after their arrest.

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Rudolph Holton was released, having served sixteen years on Florida's death row, thanks to DNA and other evidence that pointed to another man as the killer.

Yet capital punishment continues to serve one function quite well: it inoculates politicians from charges of weakness or coddling of criminals. Most leaders in both parties continue to support the death penalty. President George W. Bush presided over more executions than any modern governor yet was able to run for election on a platform of moderation. There is little reason, beyond the hopes of abolitionists, to imagine that the death penalty won't be with us another ten years down the road, and ten years after that.

So once again I offer this picture of the system from the inside, as seen through many eyes and many perspectives. It is the story of a particular time and place, yes—but it remains true for Florida and for America. The death penalty machinery pictured here is the same perplexing, frustrating, and costly rattletrap we live with today.

David Von Drehle
Washington, D.C.
March 2006

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