

TINKERING WITH DEATH

A death-penalty judge reflects: How does it feel to send another man to die?

BY ALEX KOZINSKI

1.

I WOKE with a start and sat upright in the darkness.

He must be dead by now.

The thought filled my head and gave me a weird sense of relief. But no, it couldn't be. The execution was set for Sunday morning at seven—long after daybreak. The display on the digital clock showed 1:23. I fell back on my pillow and tried to chase Thomas Baal from my mind.

I had first heard his name just three days earlier. My friend and mentor Supreme Court Justice Anthony M. Kennedy had mentioned during a telephone conversation that an execution was scheduled that night somewhere in my jurisdiction. As a judge on the United States Court of Appeals for the Ninth Circuit, I hear cases from nine states and two territories spread over the Western United States and Oceania.

"Must not be mine," I told him, "or I'd have heard about it by now." And left for lunch. When I returned, the fax was chattering away.

"The clerk's office called," my secretary said. "Guess who's been drawn for that execution?"

"How can it be? A man is scheduled to die tonight and this is the first I hear of it?"

"He doesn't want a stay," my law clerk interjected. "I've been reading the documents and it looks like he's ready to swallow the bitter pill. It's his mom and dad who are trying to stop the execution. They say he's not competent to waive his right to appeal. The district court is holding a hearing even as we speak."

"Oh, good," I muttered. "Maybe the district judge will enter a stay."

"Fat chance," my secretary and my law clerk said in unison. "Better read those papers."

2.

AS I drifted back to sleep, I thought that Thomas Baal was not such a bad fellow compared with some of his neighbors on death row. On February 26, 1988,

Baal had robbed thirty-four-year-old Frances Maves at knifepoint. Maves gave him twenty dollars, but Baal demanded more. She struggled. "You shouldn't have done that," Baal told her. "Now you pay. I sentence you to death." He stabbed Maves eight times.

I had seen my first death cases shortly after law school, when I clerked at the United States Supreme Court for former Chief Justice Warren E. Burger. That was almost two decades ago now, but I've never quite gotten over the experience. Whatever qualms I had about the efficacy or the morality of the death penalty were drowned out by the pitiful cries of the victims screaming from between the lines of dry legal prose:

On the afternoon of May 14, 1973, defendant and three others . . . drove to the residence of Jerry Alday. . . . The defendant and one of his companions entered the mobile home for the purpose of burglary. Shortly thereafter two members of the Alday family, Jerry and his father, Ned Alday, arrived in a jeep, were escorted at gunpoint into the trailer, and were shot to death at close range with handguns. . . .

Shortly thereafter a tractor driven by Jerry's brother, Jimmy Alday, arrived at the trailer. After being forced to empty his pockets, he was placed on the living room sofa and killed with a handgun fired at close range.

While one of the four was moving the tractor out of the driveway, Jerry's wife, Mary, arrived at her home by car. . . . Two other members of the Alday family, Aubrey and Chester, Jerry's uncle and brother, arrived in a pickup truck. Mary was forced into the bathroom while Aubrey and Chester were taken at gunpoint into the bedrooms and shot in a manner similar to the first two victims. . . .

Mary Alday was then raped by two or more of the men. . . . She was then taken, bound and blindfolded, in her car about six miles to a wooded area where she was raped by two of the men, was beaten when she refused to commit oral sodomy, and her breasts mutilated. She was then killed with two shots. Her watch was then removed from her nude body.

Sometimes the victims had tiny voices, barely audible as they endured

fates so horrible that they defy human comprehension:

Over the . . . latter portion of Kelly Ann's short, torturous life the defendant [her father] did these things to her on one or many occasions:

1. Beat her in the head until it was swollen.

2. Burned her hands.

3. Poked his fingers in her eyes.

4. Beat her in the abdomen until "it was swollen like she was pregnant."

6. Held her under water in both the bath tub and toilet.

7. Kicked her against a table which cut her head then . . . sewed up her wound with needle and thread.

9. On one occasion beat her continuously for 45 minutes.

13. Choked her on the night she died and when she stopped breathing . . . placed her body in a plastic garbage bag and buried her in an unmarked and unknown grave.

Brutal facts have immense power; they etched deep marks in my psyche. Those who commit such atrocities, I concluded, forfeit their own right to live. We tarnish the memory of the dead and heap needless misery on their surviving families by letting the perpetrators live.

Still, it's one thing to feel and another to do. It's one thing to give advice to a judge and quite another to *be* the judge signing the order that will lead to the death of another human being—even a very bad one. Baal was my first.

3.

ANOTHER start. The clock showed 3 A.M. Would this night never end? I knew I had done the right thing; I had no doubts. Still, I wished it were over.

The district court had made its decision around 6 P.M. Thursday. Yes, Baal was competent; he could—and did—waive his right to all appeals, state and federal. This finding was based on the affidavits of the psychiatrists who had

examined Baal, and on Baal's courtroom responses:

THE COURT: Do you want us to stop [the execution], sir, to give you an opportunity to appeal. . . ?

THE DEFENDANT: No, I feel that I've gone through a lot of problems in there and I'm just—I feel that the death penalty is needed. And I don't feel that I have to stick around ten years and try to fight this thing out because it's just not in me.

THE COURT: You know that your act here in the Courtroom of saying, "Don't stop the execution," will result in your death. You're aware of that, are you not?

THE DEFENDANT: Yes. . .

THE COURT: Now, you know that the choice that you're making here is either life or death. Do you understand that?

THE DEFENDANT: I understand. I choose death. . .

THE COURT: Is there anything else?

THE DEFENDANT: Just bring me a hooker.

THE COURT: Obviously the court can't grant requests such as that. Any other requests?

THE DEFENDANT: Just my last meal and let's get the ball rolling.

In desperation, Baal's parents had submitted an affidavit from a psychiatrist who, without examining Baal, could say only that he *might* not be competent. The district judge didn't buy it. Stay denied.

The case officially landed in my lap just as I was leaving the office for dinner at a friend's house. I arranged with the two other judges who had been selected to hear the case for a telephone conference with the lawyers later that evening. Nothing stops the conversation at a dinner party quite like the half-whispered explanation "I have to take this call. It's a stay in a death case. Don't hold dessert."

Last-minute stay petitions in death cases are not unusual; they're a reflex. Except in rare cases where the prisoner decides to give up his appeal rights, death cases are meticulously litigated, first in state court and then in federal court—often bouncing between the two systems several times—literally until the prisoner's dying breath. Once the execu-

tion date is set, the process takes on a frantic pace. The death warrant is usually valid only for a limited time—in some states only for a single day—and the two sides battle furiously over that piece of legal territory.

If the condemned man (only one woman has been executed in the last

tion's death rows in 1972 by declaring all existing death-penalty statutes unconstitutional. A number of states had quickly retooled their death statutes, but opponents hoped to use procedural delays to stave off all executions for many years. Gilmore upset this calculation by waiving his appeals after he was found guilty.

Gilmore was scheduled to face the firing squad on the morning of January 17, 1977. Efforts to obtain a stay from the lower federal courts during the night had proved unsuccessful, and the lawyers brought a stack of papers to the Supreme Court Clerk's office. The Court was due to hear cases at ten, which was also when the execution was scheduled. In the hour before the Justices took the bench, Michael Rodak, the Clerk of the Supreme Court, carried the petition to them in their chambers—first to one, then to another. The Justices entered the courtroom at the stroke of ten, and Rodak hurried back to his office. A few minutes after ten, he placed a call to the state prison in Draper, Utah, where Gilmore was being held. He first identified himself with a password: "This is Mickey from Wheeling, West Virginia."

He continued, "I've presented the stay petition to the Justices, and it was denied. You may proceed with the execution."

Rodak then fell silent for a few seconds as he listened to the response from the other end of the line.

"Oh. . . You mean he's already dead?"

4.

SO as not to wake my wife with my tossing, I went to the kitchen and made myself a cup of tea. As I sipped the hot liquid, I thumbed through the small mountain of papers that had accumulated over the past seventy-two hours.

With the stakes in death cases so high, it's hard to escape the feeling of being manipulated, the suspicion that



thirty-five years) can delay the execution long enough for the death warrant to expire, he will have bought himself a substantial reprieve—at least a few weeks, sometimes months or years. But, if the state can carry out the execution, the game ends in sudden death and the prisoner's arguments die with him.

The first time I had seen this battle was in 1977, when a platoon of American Civil Liberties Union lawyers descended on the United States Supreme Court in a vain effort to save Gary Gilmore's life. Gilmore's case was pivotal to death-penalty opponents, because he would be the first to be executed since the Supreme Court had emptied the na-

everything the lawyers say or do is designed to entice or intimidate you into giving them what they want. Professional distance—the detachment that is the lawyers' stock-in-trade in ordinary cases—is absent in death cases. It's the battle of the zealots.

And it's not just the lawyers. Death cases—particularly as the execution draws near—distort the deliberative process and turn judges into advocates. There are those of my colleagues who have never voted to uphold a death sentence and doubtless never will. The view that judges are morally justified in undermining the death penalty, even though it has been approved by the Supreme Court, was legitimized by the former Supreme Court Justices William J. Brennan, Jr., and Thurgood Marshall, who voted to vacate as cruel and unusual every single death sentence that came before the Court. Just before retiring, in 1994, Justice Harry A. Blackmun adopted a similar view, by pronouncing, "From this day forward, I shall no longer tinker with the machinery of death."

Refusing to enforce a valid law is a violation of the judges' oath—something

that most judges consider a shameful breach of duty. But death is different, or so the thinking goes, and to slow down the pace of executions by finding fault with every death sentence is considered by some to be highly honorable. In the words of Justice Brennan, this practice "embod[ies] a community striving for human dignity for all, although perhaps not yet arrived."

Judges like me, who support the death penalty, are swept right along. Observing manipulation by the lawyers and complicity from liberal colleagues, conservative judges often see it as their duty to prevent death-row inmates from diminishing the severity of their sentence by endlessly postponing the day of reckoning.

Armageddon on this question was fought in my court in 1992 when Robert Alton Harris became the first person to be executed in California since the days of Caryl Chessman. Harris killed two teen-age boys because he wanted to steal their car; he then finished off the hamburgers they had been eating. There was no doubt that Harris was guilty—he confessed the same day—yet he and his able lawyers managed to hold the executioner at bay for

thirteen years, at a staggering cost to the taxpayers.

With his fifth scheduled execution days away, Harris brought two actions in federal court. In one, he claimed that, regardless of his guilt or innocence, the *method* that California had selected for executing him (lethal gas) was unconstitutional because it inflicted needless suffering. This claim was far from frivolous; another death-row inmate making the same argument later succeeded in closing California's gas chamber. (California now uses lethal injection.) But in Harris's case many judges of my court (I among them) thought there was no reason—other than the hope of manipulating us into granting a last-minute stay—that the claim had not been raised during the many years Harris had spent on death row.

Not all judges saw it that way. To give Harris time to litigate this claim—a process that would have taken years—various judges issued three successive stays in the hours preceding Harris's scheduled midnight execution, but the United States Supreme Court just as quickly lifted them. Finally, at about 3:30 A.M., Harris was taken into the gas chamber and strapped down to await the dropping of the sodium-cyanide pellets into the sulfuric acid—when his lawyers persuaded a judge of my court to issue yet a fourth stay.

Harris was unstrapped and escorted out of the gas chamber, but the reprieve was brief: less than two hours later, as a new day started in Washington, the Supreme Court lifted the stay in a brusque order that forbade any other federal court to interfere with the execution.

Much has been said about the Supreme Court's final order in the Harris case—one of my colleagues went so far as to accuse the Supreme Court of committing "treason to the Constitution"—but the drama had no other possible outcome. Harris and his supporters (both outside and within the judiciary) were bound and determined to keep California from jump-starting its death penalty. Eventually, the Supreme Court Justices, who had



"Sometimes a lick on the ear is just a lick on the ear—it doesn't always mean that all I'm interested in is sex."

held in numerous opinions that the death penalty is constitutional, said, "Enough is enough."

Harris was again subjected to the grisly gas-chamber ritual, and this time there was no reprieve. At 6:10 A.M., he inhaled the deadly gas as relatives of his victims watched from an observation room only six feet away.

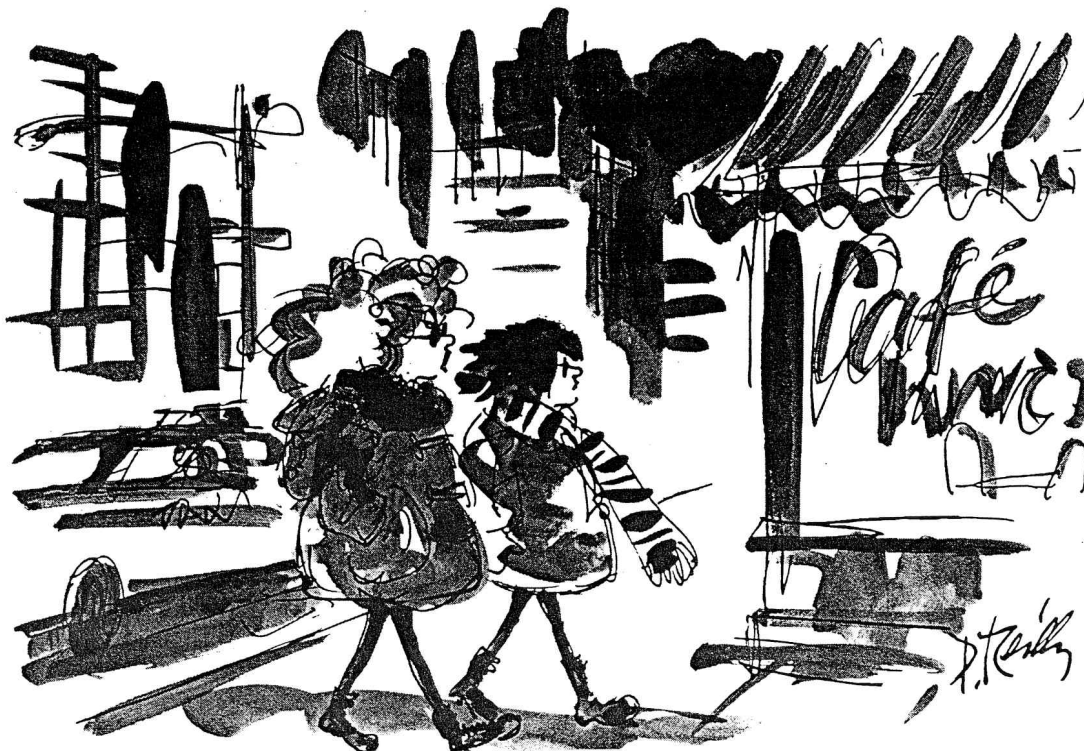
Families of murder victims are among the most fervent supporters of the death penalty. They often use the press and political channels to agitate for the hasty demise of the monster who shattered their lives. Yet no one seems to have given serious thought to whether families are helped or harmed by the process, especially when it is long delayed. Does watching the perpetrator die help the families reach closure, or does the frustrated hope of execution in the face of endless appeals keep the psychological wounds open, sometimes for decades?

5.

ANOTHER hour passed, but sleep eluded me. Events of the last three days kept knocking around in my head.

Over my friend's kitchen telephone, the lawyers spoke with great urgency and took predictable positions. Afterward, my colleagues and I conferred. One of them—who has never seen a death sentence he liked—quickly voted to issue a stay. Almost instinctively, I took the opposite view. After some discussion, the third judge voted for a stay, and the execution was halted.

We spent all day Friday and most of that night preparing the stay order and my dissent. My colleagues argued that Baal's parents made a strong showing that he was not competent to surrender his life: he had a long history of "behavioral and mental problems," had attempted suicide on several occasions, and had been found to suffer from a variety of psychiatric disorders.



"He's not even in my type universe."

Twice in the past, he had waived his legal remedies but had later changed his mind.

My dissent emphasized the diagnosis of the psychiatrists who had examined him; the state court's finding—just a week earlier—that he was competent; and Baal's lucid and appropriate answers to questions posed from the bench. I ended by arguing that Baal's decision to forgo the protracted trauma of numerous death-row appeals was rational, and that my colleagues were denying his humanity by refusing to accept his decision:

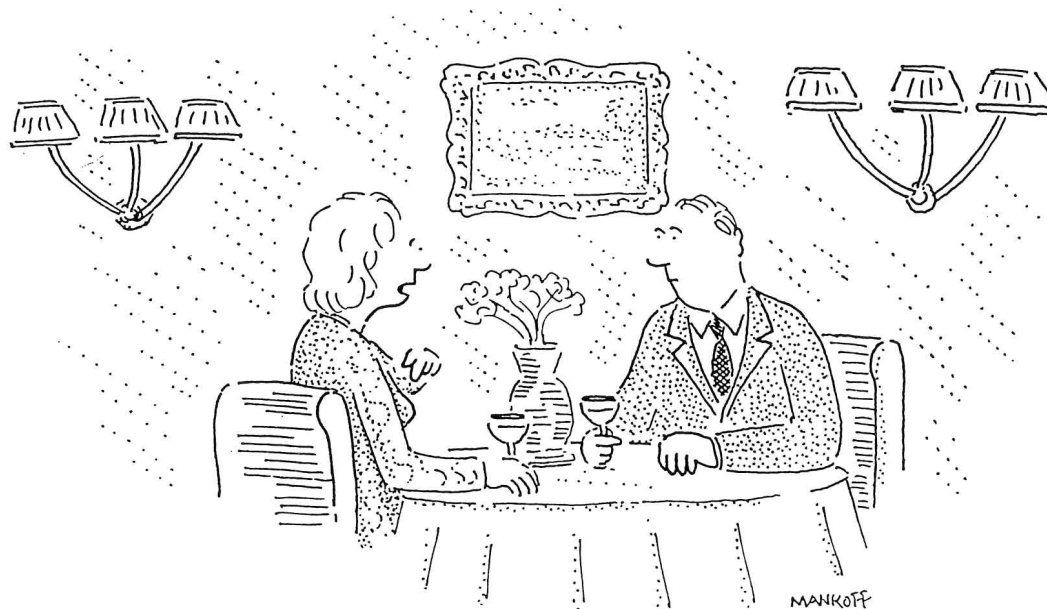
It has been said that capital punishment is cruel and unusual because it is degrading to human dignity. . . . But the dignity of human life comes not from mere existence, but from that ability which separates us from the beasts—the ability to choose; freedom of will. See Immanuel Kant, "Critique of Pure Reason." When we say that a man—even a man who has committed a horrible crime—is not free to choose, we take away his dignity just as surely as we do when we kill him. Thomas Baal has made a decision to accept society's punishment and be done with it. By refusing to respect his decision we denigrate his status as a human being.

The idea that a long sojourn on death row is itself an excruciating punishment—and violates basic human rights—has gained some notable adherents. In

1989, the European Court of Human Rights refused to order the extradition of a man wanted for murder in the United States on the ground that the delay in carrying out death sentences in this country amounts to inhuman and degrading punishment. Four years later, the British Privy Council vacated a Jamaican death sentence because its imposition had been delayed for fourteen years. The Supreme Court of Zimbabwe reached a similar conclusion with respect to much shorter delays—delays that were, however, coupled with unusually harsh conditions of confinement.

This view has some important followers in the United States as well, notably Supreme Court Justice John Paul Stevens. Justice Stevens argues that such delayed executions violate the Constitution, because they serve no purpose. Living for twenty years under the terror of a death sentence is punishment enough, he argues; moreover, a death sentence so long delayed can have no deterrent value and is therefore capricious. No other Justice has yet embraced this view, but Justice Stephen G. Breyer has shown some sympathy.

There is a lot to be said, of course,



"It's not you, Frank, it's me—I don't like you."

for the proposition that the death penalty ought to be carried out swiftly. But swift justice is hard to come by, because the Supreme Court has constructed a highly complex—and mutually contradictory—series of conditions that must be satisfied before a death sentence may be carried out. On the one hand, there must be individual justice: there can be no mandatory death sentence, no matter how heinous the crime. On the other hand, there must be consistent justice: discretion to impose the death penalty must be tightly circumscribed. But individual justice is inherently inconsistent—different juries reach different results in similar cases. And there are scores of other issues that arise in every criminal case but take on special significance when death is involved. Death, as liberal judges keep telling us, is different.

Not surprisingly, a good lawyer (with cover from sympathetic judges) can postpone an execution for many years. When Duncan Peder McKenzie reached the end of the road on May 10, 1995, he had been a fixture of Montana's death row for two decades. A total of forty-one state and federal judges had examined the case (many of them several times) and had issued two dozen published opinions analyzing various claims. In the end, McKenzie argued that he had suffered

enough because of this delay and he should be forgiven his death sentence. We rejected this argument, and the Supreme Court refused to stay the execution, with Justice Stevens dissenting.

6.

DAWN broke as I drifted off into fitful sleep, but a part of me kept reaching out to the man I knew was living the last hour of his life. Awareness of death is intrinsic to the human condition, but what is it like to know precisely—to the minute—when your life is going to end? Does time stand still? Does it race? How can you swallow, much less digest, that last meal? Or even think of hookers?

Though I've now had a hand in a dozen or more executions, I have never witnessed one. The closest I came was a conversation with Bill Allen, a lawyer from my former law firm. I ran into him at a reception and his face was gray, his eyes—usually sharp and clear—seemed out of focus.

"Not well," Bill answered when I asked how he was doing. "I lost a client. His name was Linwood Briley. I saw him die in the electric chair a couple of days ago."

"Was it rough?"

"What do you think? It was awful."

"What was it like when they turned on the juice?"

"Oh, by the time they got done strapping him down, putting the goop on his head and the mask on his face, the thing sitting in that chair hardly looked human. But the really strange part was before: looking at him, talking to him, even joking with him, fully aware he'd be dead in half an hour."

"Why did you go?"

"I thought he should have a friend there with him in his final minutes."

The look on Bill's face stayed with me a long time. It was enough to persuade me that I'd never want to witness an execution. Yet I sometimes wonder whether those of us who make

life-and-death decisions on a regular basis should not be required to watch as the machinery of death grinds up a human being. I ponder what it says about me that I can, with cool precision, cast votes and write opinions that seal another human being's fate but lack the courage to witness the consequences of my actions.

After filing my dissent, at 2:59 A.M. Saturday, I put Baal out of my mind, figuring that it would be quite some time before I'd have to think about him again. Much to my surprise, however, the Supreme Court issued an order that evening, lifting our stay. The execution was on. The Court had more or less adopted my reasoning—even cited me by name. I felt triumphant.

But, as Saturday turned to night, it began to sink in that Baal really *was* going to die, and that I would have played a part in ending his life. The thought took hold of my mind and would not let go. It filled me with a nagging sense of unease, something like motion sickness.

7.

I FINALLY plunged into a deep sleep from which I awoke long after the execution was over. I was grateful not to have been awake to imagine in real time how Baal was strapped onto a gurney, how his vein was opened,

how the deadly fluids were pumped into his body.

Lethal injection, which has overtaken the electric chair as the execution method of choice, is favored because it is sure, painless, and nonviolent. But I find it creepy that we pervert the instruments of healing—the needle, the pump, the catheter, F.D.A.-approved drugs—by putting them to such an antithetical use. It also bothers me that we mask the most violent act that society can inflict on one of its members with such an antiseptic veneer. Isn't death by firing squad, with mutilation and bloodshed, more honest?

8.

SOME three hundred and sixty people have been executed since Gary Gilmore. The most we have dispatched in any one year was fifty-six, in 1995. There are thirty-one hundred or so awaiting their date with the executioner, and the number is growing. Impatient with the delays, Congress last year passed the Effective Death Penalty Act, which will probably hasten the pace of executions. Even then, it's doubtful we have the resources or the will even to keep up with the three hundred or so convicted murderers we add to our death rows every year.

With the pace of executions quickening and the total number of executions rising, I fear it's only a matter of time before we learn that we've executed the wrong man. There have already been cases where prisoners on death row were freed after evidence turned up proving them innocent. I dread the day we are confronted with a case in which the conclusive proof of innocence turns up too late.

And I sometimes wonder whether the death penalty is not an expensive and distracting sideshow to our battle against violent crime. Has our national fascination with capital punishment diverted talent and resources from mundane methods of preventing violent crime? Take William Bonin, the notorious Freeway Killer, who raped, tortured, and murdered fourteen teen-age boys, then dumped their bodies along Southern California's freeways. If anyone deserved execution, surely it was Bonin. And on February 23, 1996, after fourteen years on death row, he

went to his death, even then mocking the families of his victims. Asked if he had any regrets, the confessed killer admitted that, indeed, he did: "Well, probably I went in the [military] service too soon, because I was peaking in my bowling career. I was carrying, like, a 186 to a 190 average. . . . I've always loved bowling."

Yet, looking at the record in his case, one can't help noting that Bonin had given us ample warning of his proclivities. While serving in Vietnam, he had sexually assaulted at gunpoint two soldiers under his command. After returning to civilian life, he had been convicted of molesting four boys between the ages of twelve and eighteen. He had served three years for those crimes and, upon his release, molested another boy. Again, he had served only three years and had then been set free to commence his killing spree.

Bonin is not unique. My concurring

opinion in his case lists a number of other killers who gave us fair warning that they were dangerous but were nevertheless set free to prey on an unsuspecting and vulnerable population. Surely putting to death ten convicted killers isn't nearly as useful as stopping a single Bonin before he tastes blood.

9.

IT'S late Saturday night. Another execution is scheduled for next week, and the machinery of death is humming through my fax. And, despite the qualms, despite the queasiness I still feel every time an execution is carried out in my jurisdiction, I tinker away. I do it because I have taken an oath. But there's more. I do it because I believe that society is entitled to take the life of those who have shown utter contempt for the lives of others. And because I hear the tortured voices of the victims crying out to me for vindication. ♦



"Here's a late bulletin. Wendy and I have been fired, so we'll just say goodbye and God bless."