

Memories of an Execution*

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On Thursday, February 24, 2000, at 6:00 p.m., the State of Texas executed my client of eleven years, Betty Lou Beets. Betty was sixty-two. For years my co-counsel, John Blume, and I tried to tell people about Betty's life. Now it is time to tell people about her death.

We all have read accounts of executions; too many, even if we have read only one. The accounts have become routine. At some point, after the obligatory paragraph about the crime, but perhaps before the accounting—"this marks the seventh execution this month in the state of Texas," or "the forty-second in Virginia since the Supreme Court . . ."—the reporter will describe the last breath: "The condemned inmate coughed twice and lapsed into unconsciousness." Words like this suggest a relatively painless repose, a man clearing his throat and dying peacefully in his sleep.

That's not what happens.

Betty was already strapped to the gurney when her pastor and I walked into the viewing room. Betty was a little woman, only 5'2", and even flat on her back, I remember how small she looked. They designed the gurney for a man, and if Betty had been laying with her head at the top of the gurney, the retractable platform for her arm would have been at her waist. They made her slide down the gurney, so they could position her arm onto the platform. She looked like a little old lady who had slid off her pillow down to the middle of a hospital bed.

Betty was bound with thick leather straps. Two across each leg. Two more across her stomach and between her breasts. As I recall, two more secured her right arm and another across her right hand. The IV had already been inserted into her right arm. She was completely helpless.

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Executions in Texas take place in a small room, with windows on opposite sides. People stand at each window to watch men and women die. In one room, on Betty's left, the prison ushers in the family of the victims. The other room, to Betty's right, is for family and friends. They must have told Betty which room we would be in, because she was looking for us when her pastor and I walked in. We were let in first, followed by the reporters, who stood behind us. I remember the scratching on their notepads while they recorded what happened. She saw us right away and smiled. We couldn't hear each other through the thick glass, but Betty—who was nearly deaf most of her life—could read lips pretty well, and had no trouble making out, "I love you, Betty." I can't read lips at all, but I was able to make out what she said to me. Even at the end, she was trying to make it clear so I would understand.

Some accounts of her death reported she smiled during the execution, as though she enjoyed it. Why do they need to be gratuitously cruel? She smiled when she saw us and struggled to keep her smile, as did I, so as not to give in to the terror. She smiled because she saw two friendly faces. It was a smile of relief; a familiar smile, well-known to all of us. But somehow this was denied to her, as though she did not deserve that one, small comfort.

She watched us through the execution. The warden asked if she had a statement. He walked away when she said no. I realize now that the poison started flowing as soon as he turned away, but I didn't realize it at the time. I don't know if I expected something more—some signal perhaps—but there was nothing. We just watched each other. I said, "It's alright, Betty." And she nodded her head and said, "I know." Her eyes grew heavy, but we watched each other still.

Then, and quite unexpectedly, she suffered a deep, retching spasm. What reporters casually describe as a cough is something far worse. In that instant, I realized what all those straps are for. They have nothing to do with security for a sixty-two-year-old great-grandmother. Had Betty not been strapped down, she would have lurched off the gurney. Her head and shoulders raised up and strained against the straps across her breasts. Her last breath exploded from somewhere deep within her. A line of spittle flew out of her mouth and landed on her chin. Her eyes opened wide, like discs, and she looked terrified, as though someone had struck her violently from behind, and she knew in that instant that she would die. She appeared to still be conscious—at least her

eyes were open and, in the seconds before the spasm, she and I were looking at each other. Then she gasped, grimacing, trying to draw in the air that had just shot from her body. But of course, she couldn't, and she collapsed back on the gurney. Then her eyes closed, and never opened again.

That's what happened. And it wasn't just a cough.

Postscript

I. Political and Legal Context

Betty was executed amidst a growing debate over the death penalty.¹ Roused by a number of exhaustive studies² and angered

1. On January 31, 2000, Illinois Governor James Ryan declared a moratorium on executions in Illinois. See Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty; Illinois First State To Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, at 1. More than any other single event, Governor Ryan's declaration—prompted by the wrongful convictions and subsequent exoneration of thirteen death row inmates in Illinois—launched the death penalty onto the broader national stage. See also Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois* (pts. 1-5), CHI. TRIB., Nov. 14-18, 1999, at 1 (presenting a meticulously researched five-part series, widely credited as the catalyst to Governor Ryan's decision). To date, over 1800 local, state, national, and international organizations have joined the call for a moratorium to study the persistent problems in the administration of the death penalty. EQUAL JUSTICE USA, NATIONAL TALLY, at http://www.quixote.org/ej/ej_tally_of_moratorium_signers_by_st.html (last updated Oct. 2001) [*hereinafter* NATIONAL TALLY]; see also THE MORATORIUM CAMPAIGN, NEWS (compiling a database of newspaper articles on the moratorium effort), at <http://www.moratorium2000.org/news/> (last visited Dec. 4, 2001). Over four dozen municipalities have called for a halt on executions, including Atlanta, Baltimore, Buffalo, Charlotte, N.C., Detroit, Oakland, Philadelphia, Pittsburgh, Rochester, N.Y., the City and County of San Francisco, Santa Fe (which endorsed outright abolition), and Tucson. NATIONAL TALLY, *supra*. Many of the most prominent newspapers in the country have added their voice to this chorus, including the *New York Times*, *Washington Post*, *Chicago Tribune*, *Los Angeles Times*, *San Francisco Examiner*, *St. Louis Post-Dispatch*, *Dallas Morning News*, *Houston Chronicle*, *Austin American-Statesman*, *Fort Worth Star-Telegram*, *Philadelphia Inquirer*, *Pittsburgh Post-Gazette*, *Baltimore Sun*, *Virginian-Pilot*, and *Richmond Free Press*. *Id.* Even the conservative *Washington Times* has endorsed a moratorium. *Id.*; see *Thoughts on Executions*, WASH. TIMES, June 6, 2000, at A20.

Nationally recognized religious leaders have called for a moratorium, including Cardinal Roger Mahoney in California, Bishop Joseph A. Fiorenza of Houston, Pat Robertson, and Cardinal William Keeler in Baltimore. See THE MORATORIUM CAMPAIGN, THE MORATORIUM CAMPAIGN DOMESTIC NEWS (providing articles on-line describing the pro-moratorium positions of Cardinal Mahoney, Bishop Fiorenza, and Pat Robertson), at <http://www.moratorium2000.org/news/> (last visited Dec. 8, 2001); THE MORATORIUM CAMPAIGN, THE MORATORIUM CAMPAIGN DOMESTIC NEWS ARCHIVE (describing Cardinal Keeler's views on the death penalty), at http://www.moratorium2000.org/news/domestic_archive.lasso (last visited Dec. 8, 2001).

In 2001, moratorium bills were pending in eighteen state legislatures. SARAH KLEMM, EQUAL JUSTICE USA, LEGISLATIVE UPDATE FOR 2001, at

<http://www.quixote.org/ej/> (last visited Dec. 4, 2001). In 2000, a moratorium bill was passed in Nebraska's unicameral legislature, but was vetoed by then Governor Mike Johanns. TRISHA KENDALL, EQUAL JUSTICE USA, LEGISLATION PROGRESS, at <http://www.quixote.org/ej/archives/updates/legis2000.html> (last updated May 1, 2000) [hereinafter LEGISLATION PROGRESS]; see also THE MORATORIUM CAMPAIGN, DEATH PENALTY LEGISLATION BY STATE: NEBRASKA, at <http://www.moratorium2000.org/legislation/index.lasso> (last visited Dec. 4, 2001). The Illinois House of Representatives passed a six month moratorium in 1999, and on January 31, 2000, Governor Ryan implemented the moratorium on executions. LEGISLATION PROGRESS, *supra*. The New Hampshire House of Representatives passed legislation repealing the death penalty, the first state in the modern era to do so, but the matter was postponed indefinitely on May 5, 2001. *Id.* (reporting the actions of the New Hampshire House of Representatives); THE MORATORIUM CAMPAIGN, DEATH PENALTY LEGISLATION BY STATE: NEW HAMPSHIRE (reporting that the matter was postponed indefinitely), at <http://www.moratorium2000.org/legislation/index.lasso> (last visited Dec. 4, 2001).

Prominent national and international organizations have joined the campaign, including the American Bar Association, the American Psychiatric Association, the American Psychological Association, the National Council of Black Mayors, the United Nations Commission on Human Rights, the Council of Europe, and the Parliament of the European Union. NATIONAL TALLY, *supra*.

The debate has now reached the highest levels of the political and judicial branches. In a July 2, 2001, speech to the Minnesota Women Lawyers Association, Supreme Court Justice Sandra Day O'Connor entered the fray with the observation that there were "serious questions" about whether the death penalty is administered fairly in the United States. See Maria Elena Baca, *Justice O'Connor Critical of Death Penalty*, STAR TRIB. (Minneapolis, Minn.), July 3, 2001, at A1. Referring to the number of death row inmates who have been exonerated in recent years, Justice O'Connor said, "If statistics are any indication, the system may well be allowing some innocent defendants to be executed." *Id.* Noting that Minnesota does not have the death penalty, Justice O'Connor said, in studied understatement, "You must breathe a big sigh of relief every day." *Id.*

Consider also the recent comments of Senior District Judge Jack Weinstein, who published the text of a sermon for the congregation of Temple Emanuel of Great Neck, New York: "Now there is a general detestation of capital punishment among political leaders and jurists in Western nations—except in the United States . . . Here it is both prevalent and imposed with sometimes inadequate protections against irreversible mistakes." Jack B. Weinstein, *The Death Penalty: The Torah and Today*, 224 N.Y. L.J. 2 (2000).

2. The most significant recent study was authored principally by Professor James Liebman from Columbia University Law School; it appeared on June 12, 2000, and represents the most comprehensive statistical study ever of the capital appellate process in the United States, examining data on all such appeals between 1973 and 1995. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES 1973-1995 (2000), available at http://www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (last visited Dec. 3, 2001). Among other findings, the authors demonstrated that courts found reversible error in 68% of all capital sentences nationwide during this period, and that 82% of the cases retried after reversal did not lead to a sentence of death. See *id.* at 5. Indeed, in 7% of these retrials, the defendant was acquitted of the capital crime. *Id.*

Three months later, the United States Department of Justice released its long-awaited study on the death penalty. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY 1988-2000 (2000), available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html> (last visited Dec. 8, 2001). This report documented serious racial and geographic disparities in the administration

of the federal death penalty, causing then-Attorney General Janet Reno to announce that she was "sorely troubled" by the results. Marc Lacey & Raymond Bonner, *Reno Troubled by Death Penalty Statistics*, N.Y. TIMES, Sept. 12, 2000, at A17.

Shortly thereafter, the Texas Defender Service, a non-profit organization based in Austin and Houston, released its report on the death penalty in that state. See TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY (2000), available at <http://www.texasdefender.org/study/Reportpdf.htm> (last visited Dec. 4, 2001). This report is the most comprehensive study ever conducted of the death penalty in Texas and documents the pervasive flaws in virtually all stages of the Texas death penalty machine. See *id.* at 134-35. This Author was also one of the principal investigators in the Texas report. *Id.* at vi.

Other recent studies chronicle the relationship between race and the death penalty. On April 16, 2001, researchers from the University of North Carolina released the most comprehensive study ever conducted on the death penalty in North Carolina, reviewing data from 502 murder cases from 1993 to 1997. ISAAC UNAH & JOHN CHARLES BOGER, RACE AND THE DEATH PENALTY IN NORTH CAROLINA: AN EMPIRICAL ANALYSIS: 1993-1997, AT 19 (2001), at <http://www.unc.edu/~jcboger/NCDeathPenaltyReport2001.pdf> (last visited Dec. 6, 2001). Among other findings, Dr. Isaac Unah and Professor John Charles Boger found that defendants whose victims are White are 3.5 times more likely to be sentenced to death than those with non-White victims. See *id.* at tbl. 7. These results confirm the earlier results discussed in *McCleskey v. Kemp*, where an extensive study of the death penalty in Georgia concluded that "defendants charged with killing White victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks." *McCleskey v. Kemp*, 481 U.S. 279, 321-22 (1987) (Brennan, J., dissenting).

Professor David Baldus, the principle author of the study cited in *McCleskey*, has more recently turned his attention to racial disparity in capital sentencing outside the Deep South. In 1998, he reported the results of a detailed examination of race and the death penalty in Philadelphia. See David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998). Based on a comprehensive review of murders eligible for the death penalty between 1983 and 1993, Professor Baldus and his colleagues found that Blacks in Philadelphia were nearly four times more likely to be sentenced to death than similarly situated White defendants. See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN BLACK & WHITE: WHO LIVES, WHO DIES, WHO DECIDES (1998) (discussing the conclusions reached by Professor Baldus, statistician George Woodworth, and others in analyzing race and the death penalty in Philadelphia), <http://www.deathpenaltyinfo.org/racerpt.html> (last visited Dec. 8, 2001).

In 1997, the American Bar Association (ABA) published a comprehensive report on the death penalty, and concluded that the "decisions about who will live and who will die turn not on the nature of the offense the defendant is charged with committing, but rather on the nature of the legal representation the defendant receives." Leslie A. Harris, *Report of the American Bar Association on the Administration of the Death Penalty*, 1997 A.B.A. SEC. INDIVIDUAL RTS. & RESP. 6 (emphasis added), available at <http://www.abanet.org/irr/rpt107.html> (last visited Dec. 4, 2001). The ABA called for an end to executions until the states implemented important reforms, notably in minimum standards for defense counsel and the elimination of racial disparity. See *id.* On July 10, 2000, the incoming president of the ABA renewed this call and urged lawyers in their states to work for a moratorium until persistent questions about racial profiling and incompetent counsel are resolved. Gail Appleson, *U.S. Lawyers' Leader Seeks Death Penalty Moratorium*, REUTERS (New York, N.Y.), July 10, 2000.

by appalling anecdotes,³ the public increasingly doubts whether the ultimate penalty can be administered fairly.⁴ Legislators and courts nonetheless continue to grapple with the execution of juveniles⁵ and the mentally retarded,⁶ while the overwhelming

3. See, e.g., Gene R. Nichol, *Justice Undone by Liquor*, NEWS AND OBSERVER (Raleigh, N.C.), Aug. 22, 2001, at A15 (commenting on trial counsel for death row inmate Ronald Frye). In this op-ed piece, Nichol, who is the Dean of the University of North Carolina School of Law, related that:

Every night after the trial recessed, instead of preparing for the next day, the lawyer went home and drank a bottle of rum. According to his own testimony, Frye's counsel consumed at least 12 shots of 80-proof rum every evening, beginning around 5 and continuing until he fell asleep or passed out. He drank a good deal more on the weekends. And these admissions likely understate the case. When the lawyer was involved in a car wreck during the same time period, his blood-alcohol level was a near-lethal 0.436 percent – even though it was 11 in the morning and he hadn't had anything to drink in hours.

Id. Frye was executed on August 31, 2001. DEATH PENALTY INFO. CTR., NEW VOICES (providing the date of Frye's execution and reporting on the incident in condensed format), at <http://www.deathpenaltyinfo.org/newvoices.html> (last visited Dec. 6, 2001).

4. See, e.g., DEATH PENALTY INFO. CTR., SUMMARIES OF RECENT POLL FINDINGS (citing Harris Poll, which found that ninety-four percent of Americans believe innocent people are sometimes convicted of murder), at www.deathpenaltyinfo.org/Polls.html#Harris7/01 (last visited Dec. 4, 2001). The same survey found that Americans believe that roughly one in eight defendants convicted of murder is innocent, and only forty-two percent believe the death penalty deters crime—the smallest percentage in twenty-five years. *Id.* In February 2001, a Gallup Poll found that sixty-five percent of respondents agreed that a poor person is more likely than a person of average or above average income to receive the death penalty for the same crime, while half the respondents believe that a Black person is more likely than a White person to receive the death penalty for the same crime. See THE GALLUP ORG., DEATH PENALTY, available at www.gallup.com/poll/indicators/inddeath_pen.asp (last visited Dec. 4, 2001).

5. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 822-23 (1988) (holding that the Eighth Amendment bars the execution of offenders younger than sixteen at the time of their crime). *But cf.* *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding that the Eighth Amendment does not prohibit the execution of an inmate who committed the crime at age sixteen). Currently, thirty-eight jurisdictions retain the death penalty (thirty-seven states and the federal government). VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973-DECEMBER 31, 2000, at 5-6 (2001), at <http://www.law.onu.edu/faculty/streib/juvdeath.pdf> (last visited Dec. 8, 2001). Of those, sixteen have chosen age eighteen at the time of the crime as the minimum age for eligibility for the death penalty. *Id.* Another five have chosen age seventeen as the minimum, and the remaining eighteen employ sixteen as the minimum age. *Id.* No state has lowered the minimum age in the modern death penalty era. *Id.* at 7. By contrast, however, "considerable legislative activity to raise the statutory minimum age from sixteen to eighteen can be seen in Arizona, Arkansas, Indiana, Kentucky and Pennsylvania." *Id.*

Thus far, the United States has largely resisted the growing international pressure to eliminate the death penalty for juvenile offenders. On October 12, 1999, Mary Robinson, United Nations High Commissioner for Human Rights, delivered a message to a press conference organized by the Death Penalty Information Center, which included the following remarks:

majority of the Western World watches in disgust at our nation's fascination with vengeance.⁷ Simply put, support for the death

I have on several occasions expressed my particular opposition to the use of the death penalty against juvenile offenders. The Convention on the Rights of the Child clearly stipulates that capital punishment shall not be imposed for offences committed by persons below eighteen years of age. The Convention has been ratified by almost every State [nation], but not by the United States. The overwhelming and growing international consensus that the death penalty should not apply to juvenile offenders, stems from the recognition that young persons lack maturity and judgment and, therefore, cannot be expected to be fully responsible for their actions. More importantly, it reflects the firm belief that young persons are more susceptible to change, and thus have a greater potential for rehabilitation than adults.

Mary Robinson, United Nations High Commissioner for Human Rights, Message to the Press Conference Organized by the Death Penalty Information Center (Oct. 12, 1999), available at <http://www.deathpenaltyinfo.org/UN-Statements.html#robinson> (last visited Dec. 8, 2001).

Still, there is some cause for hope. On October 16, 2001, Kentucky Governor Paul Patton announced that he would support legislation that raised the minimum age for the death penalty in that state to eighteen. Michael Hayman & Joseph Gerth, *Patton Buys Death-Penalty Foes; He Wants to Outlaw Execution in Crimes by Those Under 18*, COURIER-J. (Louisville, KY), Oct. 16, 2001, <http://www.courier-journal.com/localnews/2001/10/17/>.

6. See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (holding that the execution of a mentally retarded inmate did not violate the Eighth Amendment). Writing for the majority, Justice O'Connor said that a "national consensus" had not yet developed against executing the retarded. *Id.* at 353. At that time, only two states, Maryland and Georgia, prohibited such executions. See *id.* at 335. Today, eighteen states and the federal government, although they employ the death penalty, forbid the execution of the mentally retarded. See ARIZ. REV. STAT. § 13-703(B) (Supp. 2001); ARK. CODE ANN. § 5-4-618 (Michie 1997); COLO. REV. STAT. §§ 16-9-401 to -403 (2000); 2001 Conn. Pub. Acts 151 (Reg. Sess.); FLA. STAT. ANN. § 921.137 (West Supp. 2002); GA. CODE ANN. § 17-7-131(j) (1997); IND. CODE ANN. §§ 35-36-9-1 to -7 (Michie 1998); KAN. STAT. ANN. § 21-4623 (1995); KY. REV. STAT. ANN. §§ 532.130-140 (Michie 1999); MD. ANN. CODE art. 27, § 412 (1996 & Supp. 2000); MO. REV. STAT. § 565.030 4.(1) (Lexis through 2001 legislation; effective August 28, 2001); NEB. REV. STAT. § 28-105.01(2) to (5) (Supp. 2000); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000); N.Y. CRIM. PROC. LAW § 400.27(12) (McKinney Supp. 2001) (excepting murder by a prisoner); 2001 N.C. Sess. Laws 346 (Lexis through 2001 legislation); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie Supp. 2001); TENN. CODE ANN. § 39-13-203 (1997); WASH. REV. CODE ANN. § 10.95.030 (West Supp. 2002); 18 U.S.C. § 3596(c) (1994).

In addition, the Supreme Court granted certiorari on October 1, 2001, in *Atkins v. Virginia*, to decide "[w]hether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment." 122 S. Ct. 29 (2001).

7. More than half the world's nations, including all of Europe, Canada, Australia, New Zealand, and most of Central and South America have abolished the death penalty in law or practice. AMNESTY INT'L, WEBSITE AGAINST THE DEATH PENALTY, ABOLITIONIST AND RETENTIONIST COUNTRIES, at <http://www.web.amnesty.org/rmp/dplibrary.nsf/> (last updated June 1, 2001). A number of other countries—including Israel, Mexico, Brazil, and Argentina—retain the death penalty only for exceptional crimes, including crimes under military law or those committed in exceptional circumstances. *Id.* Eighty-six countries retain the death penalty. *Id.* In 2000, Amnesty International documented executions in twenty-seven countries, eighty-eight percent of which took place in China, Iran,

penalty is falling.⁸

Betty is part of this debate. She was executed for the murder of her husband, Jimmy Don Beets.⁹ At one level, her death can be

Saudi Arabia, and the United States. AMNESTY INT'L, WEBSITE AGAINST THE DEATH PENALTY, DEATH SENTENCES AND EXECUTIONS IN 2000, at <http://www.web.amnesty.org/rmp/dplibrary.nsf/> (last updated May 17, 2001). In that year, the United States executed eighty-five people, ten more than Iran. *Id.*

Advocating global abolition, Mary Robinson, U.N. High Commissioner for Human Rights, stated:

While the death penalty is yet to be banned under international law, the trend towards this goal is obvious. The adoption in 1989 of the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty was a clear recognition by the international community of the need to eliminate the use of capital punishment, totally and globally. The Protocol has already been ratified by ninety-five countries. On the regional level both the European and the American conventions on human rights have special protocols for the abolition of the death penalty. The desirability of the total abolition of the capital punishment has also been reaffirmed on repeated occasions by various United Nation bodies and organs. Already in 1971 the General Assembly called on States [nations] to progressively restrict the use of the death penalty with a view to its abolition. Last spring during its fifty-fifth session, the Commission on Human Rights passed for the third consecutive year a resolution calling for restrictions on the use of the death penalty. The Commission urged all States [nations] that still maintain the death penalty to establish a moratorium on executions, with a view to completely abolishing the death penalty.

Robinson, *supra* note 5.

In this country, the continued isolation of the United States on the world stage has not escaped notice. For example, James Moeser, new Chancellor of the University of North Carolina, used the occasion of his first "State of the University" address to urge the university to tackle pressing social issues, including the death penalty. See Eric Ferreri, *Chancellor to UNC: Face Moral Issues; Moeser Addresses Capital Punishment, Character & Values, Sexual-Orientation, Nondiscrimination*, CHAPEL HILL HERALD, Sept. 6, 2001, at 1 (reporting on Chancellor Moeser's address). Moeser asked his audience, perhaps not rhetorically, "How long will America be the last great nation of the developed world to practice capital punishment?" *Id.*

8. See, e.g., Greg Lucas, *Death Penalty Doubts in California*, S.F. CHRON., June 22, 2000, at A1.

By nearly 4 to 1, Californians favor stopping state executions to study how the death penalty is applied, according to a Field Poll released today . . . The surprising results show that not only do 83 percent of Democrats favor a temporary ban on executions, but so do 62 percent of Republicans, usually the staunchest death penalty backers.

Id.; see also Press Release, The Justice Project, New Survey Shows Americans Lack Confidence in Death Penalty System (June 11, 2000) (reporting the results of a survey of 1003 registered voters between November 29, 2000 and December 6, 2000, finding: by 80% to 8%, Americans favor requiring courts to have funds available to make sure that defendants in death penalty cases have qualified court-appointed attorneys; and only 11% of the public express a great deal of confidence in the ability of the death penalty to administer penalties fairly, while 55% say they have little or no confidence in the system's ability to be fair), at <http://justice.policy.net/cjreform/newsroom/2000archive.vtml> (last visited Dec. 2, 2001).

9. See *Beets v. State*, 767 S.W.2d 711, 730-32 (Tex. Crim. App. 1988) (on

reduced to grim statistics: she was the eighteenth person executed in 2000¹⁰ and the 616th executed¹¹ since the Supreme Court upheld the constitutionality of the death penalty in 1976.¹² A man in Florida was executed earlier the same day;¹³ another man, who may well have been innocent, was executed in Texas a week later.¹⁴

Betty was the fourth woman executed in the modern era, and four women have been executed since.¹⁵ She was sixty-two, one of

state's motion for rehearing).

10. DEATH PENALTY INFO. CTR., EXECUTIONS IN THE U.S. 2000, at <http://www.deathpenaltyinfo.org/dpicexec00.html> (last visited Dec. 2, 2001) [*hereinafter* EXECUTIONS IN THE U.S. 2000].

11. *Id.*

12. In a series of decisions in 1976, the Supreme Court upheld the constitutionality of the death penalty for certain categories of murder. See *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that the death penalty did not violate Constitutional protections and that the concerns that the death penalty not be imposed in an arbitrary or capricious manner were met by a carefully drafted statute that ensured that the sentencing authority was given adequate information and guidance); *Proffitt v. Florida*, 428 U.S. 242 (1976) (holding that the Florida statute was constitutional because it directed the sentencing judge to weigh aggravating and mitigating circumstances and provided for automatic review by the state supreme court); *Jurek v. Texas*, 428 U.S. 262 (1976) (holding that the state death penalty statute did not violate petitioner's constitutional rights because the statutory scheme mandated a preliminary finding of aggravating circumstances, and the statutory questions allowed the jury to consider particularized mitigating factors).

A number of organizations collect information regarding the administration of the death penalty in the United States. Two of the most comprehensive and reliable collections have been compiled by the Death Penalty Information Center (DPIC) and the National Coalition to Abolish the Death Penalty (NCADP); each organization has a website that provides information about executions in the modern era. See DEATH PENALTY INFO. CTR., at <http://www.deathpenaltyinfo.org/index.html> (last visited Dec. 4, 2001); NAT'L COALITION TO ABOLISH THE DEATH PENALTY, at <http://www.ncadp.org> (last visited Dec. 4, 2001). Among other things, these websites list all executions in the modern era, organized by state, region, year, and name of the inmate. See DEATH PENALTY INFO. CTR., EXECUTIONS (providing information about executions in the modern era, including statistics provided in the text), at <http://www.deathpenaltyinfo.org/facts.html#Executions> (last visited Dec. 4, 2001); NAT'L COALITION TO ABOLISH THE DEATH PENALTY, FACTS AND STATS (providing information similar to DPIC source), at <http://www.ncadp.org/html/factsandstats.html> (last visited Dec. 4, 2001).

13. The state of Florida executed Anthony Bryan hours before Texas executed Betty. EXECUTIONS IN THE U.S. 2000, *supra* note 10.

14. Odell Barnes was executed in Texas on March 1, 2000, despite considerable doubt surrounding his guilt. See Bob Burtman, *Killing Time*, HOUSTON PRESS, Jan. 27, 2000 (discussing Barnes's case), <http://www.houstonpress.com/issues/2000-01-27/feature.html/1/index.html> (last visited Dec. 4, 2001); EXECUTIONS IN THE U.S. 2000, *supra* note 10.

15. North Carolina executed Velma Barfield (Nov. 2, 1984), Texas executed Karla Faye Tucker (Feb. 3, 1998), and Florida executed Judy Buenoano (Mar. 30, 1998). DEATH PENALTY INFO. CTR., WOMEN EXECUTED IN THE U.S. 1900-2001, at

the oldest people executed in this country, and a great-grandmother several times over. As of July 1, 2001, fifty-four women remain on death row nationwide, along with 3663 men.¹⁶ The number will likely rise by the time this Article appears in print.

But it would be an unfortunate mistake to view Betty as just another number in a more or less continual string of state-sanctioned killings. Her case is important because it casts an uneasy light on perhaps the most persistent problem with the modern death penalty: the abysmal representation provided for poor people charged with capital crimes.

II. The Life of Betty Lou Beets¹⁷

Betty was born March 12, 1937, to a violent, alcoholic father and a mentally ill mother. Raised in poverty and reared in violence, the record of her life is a chronicle of virtually uninterrupted physical, sexual, and emotional abuse. Beginning with the time she was raped at age five and continuing throughout her life, she was beaten, raped, and tortured by the men on whom she depended. She had a lengthy history of well-documented head injuries, including repeated blows at the hands of abusive men. Betty also barely survived a near-fatal car accident in 1980. She suffered from Post-Traumatic Stress Disorder, battered women's syndrome, and organic brain damage. She was both learning-disabled and hearing-impaired.¹⁸

<http://www.deathpenaltyinfo.org/WomenExecuted.html> (last visited Dec. 8, 2001). Since Betty's death, Arkansas executed Christina Riggs (May 2, 2000), and Oklahoma executed Wanda Jean Allen (Jan. 11, 2001), Marilyn Plantz (May 1, 2001), and Lois Nadean Smith (Dec. 4, 2001). *Id.*

16. The definitive and on-going study of women on death row is conducted by Professor Victor Streib. See VICTOR L. STREIB, DEATH PENALTY FOR FEMALE OFFENDERS JANUARY 1, 1973, TO DECEMBER 31, 2000 (2001), at <http://www.law.onu.edu/faculty/streib/femdeath.pdf> (last updated Feb. 2001). The total for all male death row inmates appears in "Death Row USA," a publication of the NAACP Legal Defense and Education Fund. NAACP LEGAL DEF. AND EDUC. FUND, DEATH ROW USA (2001), available at <http://www.deathpenaltyinfo.org/DEATHROWUSARecent.pdf> (updated July 1, 2001).

17. See Application for Reprieve from Execution of Death Sentence and Commutation of Sentence to Imprisonment for Life, *Ex parte* Betty Lou Beets, No. 20,582 (Tex. Crim. App. 1990) [*hereinafter* Application for Reprieve]. Unless otherwise indicated, the information about Betty's life and case is drawn principally from the pleadings and supporting materials filed in the course of her post-conviction appeals, including contemporaneous medical records, court documents, and photographs, as well as affidavits from family and friends. Copies of the exhibits discussed in this Article are on file with *Law and Inequality*.

18. *Id.* at app. 2 (Report of Dr. Lenore Walker at 3), app. 7 (Report of Dr. Linda

When Betty was twelve, her mother suffered a mental collapse and was institutionalized.¹⁹ After she was released from the hospital, Betty's mother was placed on medication, but frequently she became uncontrollable.²⁰ When Betty was fifteen, her mother returned to the Eastern State Hospital, where she was held for three months and treated with electroshock and deep coma insulin therapy. While her mother was institutionalized, her father turned to alcohol. He grew sullen and violent, with outbursts of irrational jealousy, and often beat Betty with his belt buckle and fists. Home offered no shelter for Betty. She suffered from chronic migraine headaches and terrifying nightmares. At age fourteen, she weighed only eighty-two pounds, placing her in the lowest one percentile on standardized growth charts.²¹

In 1952, at age fifteen, she married for the first time. By the time she was arrested for the murder of her husband, she had been married a total of seven times to five men. Like her father, her first husband was pathologically jealous and over-possessive.²² On one occasion, he flew into a violent rage when he found her at the laundromat talking with a male friend. By force, he put her on a bus to her parents and would not allow her to take her two young children with her. On the bus, Betty took an entire bottle of sleeping pills, hoping she would die on the trip home. Eventually, he demanded a divorce, leaving her alone with no education, no skills, and saddled with six children between the ages of one and fifteen. Within months of the divorce, he remarried a younger woman and promptly stopped paying child support.²³

In 1970, Betty married her second husband, Bill Lane. Within days of the marriage, Lane brutally beat her. Unknown to Betty, Lane had a long history of drunkenness and extreme jealousy, accompanied by violent attacks on his former wife, as confirmed by their divorce records.²⁴ Friends and neighbors of Betty, along with her children, recalled the life-threatening abuse he visited upon her:

He used to beat her terribly. One time he beat her while they

Narun), app. 21 (Report of Dr. Robert Geffner), app. 22 (Report of Dr. James Merikangas), app. 23 (Supplemental Report of Dr. Robert Geffner).

19. *Id.* at app. 2 (Report of Dr. Lenore Walker at 3), app. 9 (Medical Records of Eastern State Hospital), app. 8 (aff. of Louise Dunevant).

20. *Id.* at app. 2 (Report of Dr. Lenore Walker at 3), app. 9 (Medical Records of Eastern State Hospital).

21. *Id.* at app. 2 (Report of Dr. Lenore Walker at 4).

22. *Id.* at app. 2 (Report of Dr. Lenore Walker at 4-5).

23. *Id.* at app. 2 (Report of Dr. Lenore Walker at 5).

24. *Id.* at app. 12 (Divorce records of Judith and Billy York Lane).

were driving. He drove with one hand and was just beating her senseless with the other hand. . . . She had to stay in bed, laid up for over a week. Her face was all bruised, and she couldn't get out of bed. It was awful.²⁵

He beat her real bad. I saw her on many occasions when she was bruised up pretty bad. One time she came to work and her eyes were black. . . . Black bruises all up and down her arm, down around her forearms and her upper arm. Her face was all beat up.²⁶

Prior to leaving town for any period, Lane would administer a type of sexual branding by biting Betty on the breasts, thighs, stomach, and buttocks, which left large, black bruises to insure she would not show her body to anyone in his absence. Although she divorced Lane for the first time in 1970, he continued to stalk, rape, beat, and threaten her. His sexual torment included forcing her to listen to his sexual fantasies about Betty's daughter, Connie. She went to a doctor in May 1971, "because of her nerves" and because she was "worried about bills and lack of security."²⁷ Finally in July 1971, she received stitches in the emergency room after Lane struck her in the left eye.²⁸

In 1979, Betty married Wayne Barker.²⁹ Like Lane, Barker had battered and terrorized his former wives. Divorce pleadings from his previous marriage called him "a violent and irrational person" who had "threatened to do serious bodily harm and injury" and had "in fact beaten and injured" his former wife.³⁰ Betty's son, Bobby Branson, recalled how Barker tortured Betty:

Every few days he'd hit mama. Mostly when he was drunk, far as I could see. He drank whiskey and beer. He'd push her around and slap her a lot. He liked to hit her in the face a lot. That really hurt mama, to have her face all bruised up. She'd always try to cover it up with make-up, but you could see where he'd hit her. Everybody knew, and she knew they knew, but she'd do it anyway. It was really bad.

He'd hit her every few days, but every three or four weeks he'd really beat the holy shit out of her. I'd say it was at least about ten times that he really beat her up. Her eyes were all blacked, busted lip, bruises all over her arms, chest,

25. *Id.* at app. 13, para. 10 (aff. of Connie Faith).

26. *Id.* at app. 14, para. 6 (aff. of Jim Kinson).

27. *Id.* at app. 16 (Medical Records of Dr. Leonard Nystrom).

28. *Id.* at app. 17 (Medical Records of Lancaster Hospital), app. 2 (Report of Dr. Lenore Walker at 5-7).

29. *Id.* at app. 10 (aff. of Bobby Branson), app. 2 (Report of Dr. Lenore Walker at 7-8).

30. *Id.* at app. 18 (Divorce records of Juanita and Doyle Wayne Barker).

forehead.³¹

On April 11, 1980, Betty almost died of head injuries from a serious car accident. She was so disfigured and her face and head were so swollen that her family could not recognize her. She suffered a basilar skull fracture, lacerations, and a cerebral concussion.³² Betty, already physically and mentally weak, sustained permanent brain damage.³³ Her migraines intensified, she was constantly dizzy, she lost movement on her right side, and she had greater difficulty concentrating.³⁴ Her injuries meant nothing to Barker. His physical battering continued despite the condition of her health for the next year until his disappearance. A relative recalled:

I saw Betty the day after Wayne disappeared. She looked really bad. She had a bruised chin, bruises all up on her chest, both eyes were black, there were dark black and blue choke marks on her neck, and her arms were covered with big black bruises. It was incredible. We took pictures of her and you should have seen it. Those pictures were unbelievable. . . . I've never seen anybody so beat up.³⁵

By the time Betty met and married Jimmy Don Beets in 1982, she was an emotional and physical wreck.³⁶ To escape the torment of her life, she turned to alcohol, for a period drinking five cases of beer every week. To rebound from the alcohol's depressive effects, she took five or six diet pills a day, five times the daily therapeutic dose.³⁷ The primary ingredient in these pills is pharmacologically related to amphetamines.³⁸ When combined with alcohol, this drug produces paranoia, hallucinations, mania,

31. *Id.* at app. 10, paras. 6-7 (aff. of Bobby Branson).

32. *Id.* at app. 20 (Medical records of Baylor Medical Center), app. 21 (Report of Dr. Robert Geffner).

33. *Id.* at app. 21 (Report of Dr. Robert Geffner), app. 22 (Report of Dr. James Merikangas), app. 23 (Supplemental Report of Dr. Robert Geffner).

34. *Id.* at app. 21 (Report of Dr. Robert Geffner), app. 22 (Report of Dr. James Merikangas at 3, paras. 5-6).

35. *Id.* at app. 19, para. 12 (aff. of Leon Lane).

36. *Id.* at 21. Given the severity of the violence she endured, it is tempting to ask why Betty did not leave. There are two unspoken assumptions in this question. The first is that Betty did not try to leave. The second is that leaving would have ended the violence. But in Betty's case, as for so many victims of horrible domestic abuse, the truth is that she tried repeatedly to leave, just as she tried repeatedly to get help. Often this led only to more severe attacks by her husbands. She also tried, despite fear of retaliation, to seek help and intervention from the police. When the official channels of authority failed her, Betty quickly learned what many battered women learn: that there was no escape from the violence. *See id.* at app. 2 (Report of Dr. Lenore Walker).

37. *Id.* at app. 2 (Report of Dr. Lenore Walker at 5-12), app. 24 (Report of Dr. Arcelia Johnson Fannin, para. 9).

38. *Id.* at app. 24 (Report of Dr. Arcelia Johnson Fannin, para. 9).

and other psychotic reactions similar to those experienced by persons who ingest LSD.³⁹ She was plagued by nightmares, and was unable to prevent intrusive and recurring thoughts of the physical violence and emotional abuse that she had endured.⁴⁰

Though Betty was profoundly impaired, in at least one respect, her abilities were exceptionally accurate and her senses particularly reliable. Like many battered women who live with years of escalating violence, Betty developed a keen sense of physical threat. More than anyone who had not lived with domestic violence, Betty knew well the signs of imminent danger: the quiet gestures, the sullen glance, the seemingly innocent behavior that portended with terrifying certainty the pain to come. And Betty knew from wretched experience that there would be no safety from outsiders, no shelter from the certain storm.

Yet the jury heard none of this evidence. Her lawyer, E. Ray Andrews, about whom we will learn more in the pages that follow, candidly admitted he made no attempt to investigate Betty's life history. Perhaps he thought it would only detract from the story. . .

III. The Case for Murder⁴¹

On August 6, 1983, Jimmy Don Beets disappeared. His overturned boat was found in Lake Athens, Texas, leading to speculation that he had drowned in a fishing accident. In the ensuing months, Betty made no attempt to recover any benefits potentially owed to her as a result of her husband's disappearance.

Later seeking assistance with a fire insurance claim, Betty contacted a lawyer, E. Ray Andrews. Andrews learned that Betty's husband had worked for the City of Dallas prior to his disappearance. Andrews questioned her about both the fire insurance claim and any claim she may have had to death benefits, such as insurance or pension proceeds.⁴² It is undisputed

39. *Id.* at app. 24 (Report of Dr. Arcelia Johnson Fannin, para. 11).

40. *Id.* at app. 2 (Report of Dr. Lenore Walker at 5-12), app. 22 (Report of Dr. James Merikangas).

41. See Application for Reprieve, *supra* note 17.

42. *Id.* at app. 3 (aff. of E. Ray Andrews, para. 6). In relevant part, Andrews' affidavit states:

I knew from my experience that municipalities sometimes provide . . . benefits to their employees as a matter of course. Consequently, I suspected that he may have had a pension from the City of Dallas, as well as a life insurance plan. Since they were married at the time of his disappearance, I also suspected that she may have been the beneficiary of these policies.

that it was Andrews who first suggested to Betty that she might have been entitled to benefits arising out of her husband's disappearance. It is also undisputed that Betty had no idea what benefits, if any, she might have been entitled to as a result of her husband's disappearance.⁴³

Shortly thereafter, Betty was charged with murder "for remuneration and the promise of remuneration, namely: money from the proceeds of retirement benefits from the employment of Jimmy Don Beets with the City of Dallas."⁴⁴ At trial, the State presented only one theory: that Betty killed her husband in order to get these benefits. For Betty to receive the death penalty, the State had to prove beyond a reasonable doubt not only that Betty killed her husband but that she acted with the intent to recover these benefits.

Betty had a witness whose testimony could have established that she had no such intent. That witness was E. Ray Andrews. Andrews knew from his own involvement in the case that Betty knew nothing about these benefits, and that he was the person who learned of their existence, nearly two years after Jimmy Don had disappeared.

On October 8, 1985, Andrews presented Betty with a contract. This agreement transferred all literary and media rights in the case from Betty to Andrews' minor son, E. Ray Andrews, Jr., in exchange for Andrews' agreement to represent Betty at her capital murder trial.⁴⁵ The contract represented their entire fee agreement.⁴⁶ A friend would later recall Andrews' singular focus on the wealth he confidently expected from Betty's story:

I remember when E. Ray started talking about getting the book and movie rights in the Beets case. He talked about it several, several times, both at the [VFW] Post and at my house. When he finally got the contract signed [on the second day of Betty's four day trial] he come over to the Post and was excited as he could be. He said how he was going to get rich

Id.

43. *Id.* at app. 3 (aff. of E. Ray Andrews, para. 6) ("In questioning Ms. Beets, I quickly discovered she had no idea whether she was entitled to benefits. She did not even know whether benefits existed.").

44. Grand Jury Indictment at 1, *State v. Beets* (Dist. Ct. Henderson County, Tex. filed July 11, 1985) (No. A-3144).

45. Application for Reprieve, *supra* note 17, at app. 4 (Media Rights Contract).

46. *Id.* In relevant part, the contract provides as follows: "For and in consideration of the law firm of E. Ray Andrews, Sr. representing me . . . on two felony murder charges, I give, and release all movie, book, and magazine rights concerning my cases in Henderson and Dallas County to the E. Ray Andrews, Jr. [sic]." *Id.*

on all this and the case was going to be the biggest thing that ever happened to him, and whatnot. He said the case was going to turn into a big movie and he had all the rights to it. It was something he talked about pretty often and you could tell he was counting on those rights for a lot of money.⁴⁷

But of course, Andrews could not represent Betty and also testify on her behalf: Andrews could either serve as Betty's lawyer, or her witness, but not both. If he testified, therefore, he would have been forced to withdraw.⁴⁸ If he withdrew, he lost the entire value of the media rights contract, which conditioned his fee on his continued representation in the case. Andrews chose to remain in the case, and the jury never heard his account. Two days after Betty signed the contract, her trial ended with a guilty verdict. Betty was sentenced to die, and Andrews' contract skyrocketed in value.

Not long after Betty's trial, E. Ray Andrews ran for public office. Riding a wave of publicity from Betty's case, he became the elected district attorney in Athens, Texas, the city where she was tried. Shortly after his election, he was indicted on federal charges for soliciting a \$300,000 bribe to fix a murder case.⁴⁹ Andrews pleaded guilty and was sentenced to prison by the same federal judge who had earlier presided over Betty's federal post-conviction appeal.⁵⁰

47. *Id.* at app. 6 (aff. of Bobby Miller, para. 7).

48. See SUPREME COURT OF TEX., CODE OF PROF'L RESPONSIBILITY, DR 5-102(A) ("If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial . . ."); see also Petition for Habeas Corpus, *Ex parte Betty Lou Beets*, No. 20,582 (Tex. Crim. App. 1990), at Exhibit G (aff. of Prof. Stephen Gillers), Exhibit H (aff. of Prof. Steven Lubet), Exhibit I (aff. of Prof. Robert Schuwerk).

49. Mark Smith, *Ex-DA is Sentenced to Prison; Andrews is Guilty of Bank Violation*, HOUSTON CHRON., Mar. 3, 1995, at A29.

50. *Id.*