

# Lawyers and Prophetic Justice

by Timothy W. Floyd\*

## I. THE TRADITIONAL IMAGE OF JUSTICE

The statue of Lady Justice, a blindfold over her eyes, holding scales in one hand and a sword in the other, is our traditional visual image of justice. The scales convey the idea of neutrality and the weighing of competing interests; they emphasize rationality and the application of neutral principles in decision making. The blindfold emphasizes equality before the law, that the law is dispassionate and objective, and that decision making is untainted by bias. The statue also implies the stability and permanence of the justice system.<sup>1</sup>

In my experience with lawyers, justice is not a regular topic in our offices, in court, or in the law school classroom. Lawyers do, however, talk about justice on certain occasions. In speeches at Bar Association meetings, annual Law Day events, and law school graduations, the word “justice” frequently appears. Most often justice is used as part of the phrase “our justice system.” The tone is celebratory: lawyers often claim that we have the best justice system on earth or the finest justice system ever created. The attributes of justice in the speeches are the same as those evoked by the statue image.<sup>2</sup>

The traditional, prevailing image of justice, however, does not capture all that justice is and can be. The longer I have been a lawyer and

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1. For a thorough discussion of the imagery of justice, see Dennis Curtis & Judith Resnick, *Images of Justice*, 96 *YALE L.J.* 1727 (1987).

2. In these speeches, lawyers emphasize that we resolve conflict with the cool voice of reason rather than the heated words of passion. And the speeches emphasize lawyers’ role as guardians of the justice system. Frequently our justice system is described as the glue that holds society together; maintaining tradition and ensuring stability are central features of the justice they describe. (I’ve heard enough of these speeches to recognize the themes; in fact, I’ve made some very similar speeches myself!)

worked in our justice system, particularly on behalf of indigent clients, the clearer it has become that something important gets left out of our conventional image. Although our justice system promises equal justice under law for all, we simply do not provide equal justice for the poor. For the poor, *injustice* is more apparent than justice. The vast bulk of the civil legal needs of poor individuals and families go unaddressed.<sup>3</sup> And although indigent criminal defendants have a constitutional right to appointed counsel, the criminal justice system also fails to provide equal justice. Poor persons accused of crimes do not receive equal treatment in our criminal courts. America imprisons a higher percentage of its population than any nation on earth; those prisoners are overwhelmingly poor. In the most serious criminal cases, those involving the death penalty, the process is rife with arbitrariness, bias, and unfairness; we do not have a principled system that singles out those most deserving for the ultimate punishment. One thing that persons on death row do have in common, however, is that they are overwhelmingly poor.

Our justice system is not living up to the ideals of equality and fairness promised by the statue with blindfold and scales. Moreover, justice contains more than can be captured in that image.

In this essay, I offer a different image of justice, that articulated by the biblical prophets. The prophetic image of justice is markedly different than our prevailing idea of justice. In explicating the prophetic vision, I draw upon two theologians and biblical scholars who write about the Hebrew prophets. In his book *The Prophets*,<sup>4</sup> the great twentieth-century rabbi and theologian Abraham Joshua Heschel eloquently described the prophetic passion for justice. The contemporary Protestant theologian and biblical scholar Walter Brueggemann has also written with passion and insight about the prophets and justice,

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3. The Legal Services Corporation has documented the gap between the legal services available and the

necessary access to civil legal assistance—that is, the level of assistance that would be required across the nation to respond appropriately to those needs. The civil legal needs of low-income people involve essential human needs, such as protection from abusive relationships, safe and habitable housing, access to necessary health care, disability payments to help lead independent lives, family law issues including child support and custody actions, and relief from financial exploitation.

LEGAL SERVICES CORP., REPORT: DOCUMENTING THE JUSTICE GAP IN AMERICA 1 (2005) (emphasis omitted).

4. ABRAHAM JOSHUA HESCHEL, *THE PROPHETS* (Harper Perennial Classics 2001).

particularly in his landmark book *The Prophetic Imagination*.<sup>5</sup> In the last portion of this essay, I explore the contrasting images—that of the scales and blindfold on the one hand and the prophetic image on the other—to one particular area of the American legal system, the death penalty system.

I submit that the prophetic image of justice offers new possibilities for transforming our justice system, and it holds great promise for delivering equal justice to all, particularly those marginalized by our current system.

## II. HESCHEL AND THE PROPHETS: GOD'S PASSION FOR JUSTICE

Abraham Joshua Heschel, one of the great theologians of the twentieth century, had a particular interest in the prophets and in social justice. Justice was the central message of the biblical prophets. Heschel emphasizes, however, that the prophetic idea of justice is strikingly different than our traditional Western image of justice. How is it different? Heschel contrasts the prophetic view of justice with the traditional image of scales: “Justice is usually defined as giving every person his due. It connotes a conformity, a congruence, a proportion of some kind . . . . The idea of balancing two sides against one another is expressed in the most common symbol of justice, namely, the scales.”<sup>6</sup> But as Heschel points out: “In sharp contrast to these symbols, expressing calmness, congruence, and precision, stands the prophetic image: ‘Let justice roll down like waters, [a]nd righteousness like a mighty stream.’”<sup>7</sup>

This “bold image,” Heschel notes, “combine[s] several ideas: a surging movement, a life-bringing substance, a dominant power.”<sup>8</sup> The image expresses concepts of form, standards, balance, measure, stillness—and of consistency and integrity. The image of a mighty stream, on the other hand, expresses power, movement, and vitality, as opposed to calmness and stability.<sup>9</sup>

Unlike our modern American lawyers’ rhetoric of celebration, the prophetic voice is more critical of injustice than it is celebratory of justice. The prophets’ preoccupation with justice is rooted in a powerful awareness of injustice. As Heschel notes: “Moralists of all ages have been eloquent in singing the praises of virtue. The distinction of the

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5. WALTER BRUEGGEMANN, *THE PROPHETIC IMAGINATION* (2d ed. 2001) [hereinafter BRUEGGEMANN, *PROPHETIC IMAGINATION*].

6. HESCHEL, *supra* note 4, at 271 (emphasis omitted).

7. *Id.* (quoting *Amos* 5:24).

8. *Id.*

9. *Id.* at 275.

prophets was in their remorseless unveiling of injustice and oppression

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Heschel emphasizes the *pathos*, or passion, of God. The prophets are not concerned with objectivity, rationality, and neutrality. Rather, they emphasize God's passion for justice. The divine passion is manifested as compassion for those who are suffering and anger toward those who perpetuate injustice and oppression.

Neutrality is not necessarily a virtue to the prophets. Justice consists not merely in neutral principles and abstract norms; it is "a fighting challenge, a restless drive."<sup>11</sup> Prophetic justice is partial to the powerless, the weak, and the oppressed. Nor is stability and permanence celebrated in prophetic speech. Rather, prophetic justice is dynamic, emphasizing movement and vitality. According to Heschel, fighting injustice requires a dynamic power:

Balancing is possible when the scales are unimpaired, and the judge's eyes sound. When the eyes are dim and the scales unsure, what is required is a power that will strike and change, heal and restore, like a mighty stream bringing life to the parched land. There is a thirst for righteousness that only a mighty stream can quench.<sup>12</sup>

God's concern for justice grows out of God's compassion for people.<sup>13</sup> Therefore, prophetic justice is personal, not impersonal; it is concrete, not abstract:

The prophets do not speak of a divine relationship to an absolute principle or idea, called justice. They are intoxicated with the awareness of God's relationship to [all people] . . . .

Justice is not important for its own sake; the validity of justice and the motivation for its exercise lie in the blessings it brings to man.<sup>14</sup>

Heschel emphasizes that people are more important to God than are principles:

An act of injustice is condemned, not because the law is broken, but because a person has been hurt. What is the image of a person? A person is a being whose anguish may reach the heart of God. "You shall not afflict any widow or orphan. If you do afflict them, and they cry out to Me, I will surely hear their cry . . . . [I]f he cries to Me, I will hear, for I am compassionate" (Exod. 22:22-23, 27).

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10. *Id.* at 260.

11. *Id.* at 272.

12. *Id.*

13. *Id.* at 276.

14. *Id.*

When Cain killed his brother Abel, the words denouncing his crime did not proclaim: "You have broken the law." Instead we read: "And . . . the Lord said: What have you done? The voice of your brother's blood is crying to Me from the ground" (Gen. 4:10).<sup>15</sup>

Heschel contrasted this caring and compassionate God with the God of the rationalists: "It is a thought staggering and hardly compatible with any rational approach to the understanding of God, that the Creator of heaven and earth should care about how an obscure individual man behaves toward poor widows and orphans."<sup>16</sup> It is just this compassion for those who suffer from social injustice that most characterizes Heschel's view of justice.

### III. BRUEGGEMANN AND THE PROPHETIC IMAGINATION: GIVING VOICE TO HURT AND TO HOPE

In *The Prophetic Imagination* as well as numerous other works, Walter Brueggemann emphasizes the central prophetic tasks of *criticizing* and *energizing*: the radical critique of the suffering caused by social structures and a powerful imagination for new possibilities. He demonstrates that Moses and the Hebrew prophets consistently opposed oppression and exploitation by imagining an alternative theological and social reality of peace and justice.<sup>17</sup> Brueggemann contrasts this "prophetic imagination" with what he calls the royal or imperial consciousness. The social reality created by the royal consciousness is characterized by great affluence for the elite, but scarcity for the masses; oppressive social policy, including forced labor and harsh laws for debtors; and the establishment of a controlled, static religion and ideology. Brueggemann believes that we live in a similar cultural

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15. *Id.*

16. *Id.* at 280.

17. God's passion for justice is not confined to the prophetic literature, but is central to the entire Bible. We have already noted God's response in Exodus to the oppression and suffering of the children of Israel. In Deuteronomy, the people are instructed, "Justice, and only justice, you shall pursue, so that you may live and occupy the land that the Lord your God is giving you." *Deuteronomy* 16:20. Jesus also stands solidly in the justice tradition of the prophets. In his first recorded address in his home synagogue, Jesus proclaimed (reading from Isaiah):

The Spirit of the Lord is upon me, because he has anointed me to bring good news to the poor. He has sent me to proclaim release to the captives and recovery of sight to the blind, to let the oppressed go free, to proclaim the year of the Lord's favour.

*Luke* 4:18-19. And in the parable of the last judgment, Jesus insists that how we treat the "least of these" is of ultimate importance. *Matthew* 25:31-46.

situation to the royal or imperial consciousness he describes.<sup>18</sup> He suggests that we too are enmeshed in “economics of affluence in which we are so well off that pain is not noticed” and “politics of oppression in which the cries of the marginal are not heard or are dismissed as the noises of kooks and traitors.”<sup>19</sup>

However, it is not easy for us to perceive this reality, precisely because it is so dominant. As Brueggemann confesses:

Perhaps you are like me, so enmeshed in this reality that another way is nearly unthinkable. The dominant history of [the biblical] period, like the dominant history of our own time, consists in briefcases and limousines and press conferences and quotas and new weaponry systems. And that is not a place where much *dancing* happens and where no *groaning* is permitted.<sup>20</sup>

How does the prophetic imagination counter this imperial consciousness? Brueggemann follows Heschel in emphasizing the importance of passion: “[T]he possibility of passion is a primary prophetic agenda . . . . Passion as the capacity and readiness to care, to suffer, to die, and to feel is the enemy of imperial reality.”<sup>21</sup> Moses and the prophets are characterized by “criticizing and energizing”; they *criticize* the social order of economic oppression by bringing *hurt* to public expression.<sup>22</sup> That is the crucial first step in the “dismantling criticism that permits a new reality, theological and social, to emerge.”<sup>23</sup> They *energize* by offering *hope*, by bringing to expression the prospect of new realities of peace and justice. The Hebrew scriptures “mediate[] ethical reflection through *disclosures of hurt and articulations of hope*. The human experience of hurt and hope not only provide the materials for Israel’s conversation about ethics but also supply the categories for ethical discussion, ethical criticism, and ethical possibility.”<sup>24</sup>

Brueggemann insists that how a society deals with pain is crucial. How an individual responds to deep psychological pain is crucial to

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18. See BRUEGGEMANN, PROPHETIC IMAGINATION, *supra* note 5, at 35-36.

19. *Id.* at 36.

20. *Id.*

21. *Id.* at 35.

22. *Id.* at 12.

23. *Id.*

24. WALTER BRUEGGEMANN, OLD TESTAMENT THEOLOGY: ESSAYS ON STRUCTURE, THEME, AND TEXT 45 (1992) [hereinafter BRUEGGEMANN, OLD TESTAMENT THEOLOGY]. Brueggemann observes that this discourse can be embraced in Christian ethical discourse but that the rhetoric of hurt and hope protests against a Christian ethical discourse that is “excessively rationalistic, positivistic, or romantic.” *Id.* This last phrase nicely captures my criticism of lawyers’ rhetoric of justice; that rhetoric can be quite rationalistic, positivistic, and romantic.

personal meaning and wholeness. Similarly, our social health also depends on recognizing pain and responding properly. As a society, whether we recognize “the pained and the pain-bearers—the poor, the useless, the sick, and the other marginal ones” is central to our social health.<sup>25</sup> Those of us who enjoy the benefits of the prevailing power structures often ignore those who suffer. When we celebrate the current order, we “must excommunicate all the pained and the pain-bearers as having violated the common theology. Indeed, the presence of pain-bearers is a silent refutation of the legitimated structures. Visible pain-bearers, therefore, must be denied legitimacy as well as visibility because they assert that the legitimated structures are not properly functioning.”<sup>26</sup>

Where the prevailing structures and order are celebrated without acknowledging the voice of pain, “there will be oppression without compassion. There will be competence without mercy. There will be no need for or possibility of good news.”<sup>27</sup> When the dominant order only celebrates and recognizes success and does not recognize those who suffer and are left out of the benefits of that order, it is a system “that allows no slippage, no graciousness, no room for failure.”<sup>28</sup> Persons in authority, in the ancient and in the modern world, present particular policies and actions in cosmic or universal terms and thereby try to immunize those from criticism. But the system of rationality, order, permanence, and stability, in Brueggemann’s words, “lacks a human face when it is articulated consistently.”<sup>29</sup> In this regard, note the blindfold on our statue of justice. A justice system that cannot see the human face cannot deliver justice.

According to Moses and the prophets, God’s response to the suffering of the oppressed is *compassion*. Compassion entails paying careful attention to the cries of those who suffer. Empathy for the oppressed is the beginning of true criticism. The biblical narrative of liberation begins with Israel’s grieving complaint while in slavery: “The Israelites

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25. *Id.* at 19.

26. *Id.* Brueggemann notes:

The issue in our time (and I suspect in every culture) concerns the management and resolution of pain, both personal and public. Where pain is not dealt with effectively, both in terms of policies and symbols (liturgy), it will be driven underground, sure to surface in unexpected and harmful ways. For those who can afford it, unprocessed pain is likely to appear as emotional pathology. For those who cannot afford emotional disorder, it is likely to surface as violence and terror.

*Id.* at 21.

27. *Id.* at 26.

28. *Id.* at 17.

29. *Id.*

groaned under their slavery, and cried out. Out of slavery their cry for help rose up to God. God heard their groaning, and God remembered his covenant . . . .”<sup>30</sup> As Brueggemann suggests: “[T]hink what happens if the Exodus is the primal scream that permits the beginning of history.”<sup>31</sup> The verb “cry out” in this passage is especially significant for lawyers. Brueggemann notes the ambiguity in this verb “cry out” (*za’ak*): on the one hand it is a cry of misery and wretchedness, but it is also the verb used in the official filing of a legal complaint.<sup>32</sup> Take note here: the “mournful one” is the plaintiff. Indeed, something of the same double meaning occurs in our English usage. When a lawyer initiates a lawsuit with the filing of a complaint, the cry of someone who suffers (her “complaint”) is given public voice.

True compassion, however, truly hearing, understanding, and standing with those who suffer, is countercultural within the imperial reality. “Quite clearly, the one thing the dominant culture cannot tolerate or co-opt is compassion, the ability to stand in solidarity with the victims of the present order. It can manage charity and good intentions, but it has no way to resist solidarity with pain or grief.”<sup>33</sup> So long as we keep those who suffer at a distance, their suffering does not really affect those of us who enjoy the benefits of the dominant culture, and the threat to the current order is minimal. In our everyday reality, we are:

pressed and urged and invited to pretend that things are all right—either in the dean’s office or in our marriage or in the hospital room. And as long as the empire can keep the pretense that things are all right, there will be no real grieving and no serious criticism.<sup>34</sup>

Brueggemann, noting that “criticism begins in the capacity to grieve because that is the most visceral announcement that things are not right,”<sup>35</sup> points to Jeremiah as the preeminent voice of prophetic criticism and the embrace of grief. Jeremiah laments in stark terms over the suffering of the people of Judah:

Is there no balm in Gilead? Is there no physician there? Why then has the health of my poor people not been restored? O that my head were a spring of water, and my eyes a fountain of tears, so that I might weep day and night for the slain of my poor people!<sup>36</sup>

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30. *Exodus* 2:23-25.

31. BRUEGGEMANN, *PROPHETIC IMAGINATION*, *supra* note 5, at 11.

32. *Id.*

33. BRUEGGEMANN, *OLD TESTAMENT THEOLOGY*, *supra* note 24, at 91.

34. BRUEGGEMANN, *PROPHETIC IMAGINATION*, *supra* note 5, at 11.

35. *Id.*

36. *Jeremiah* 8:22-9:1.

Jeremiah does not lament, however, either to predict doomsday or to express a personal grudge. Jeremiah knows that tears break barriers in ways that anger and harshness cannot. He cries to force awareness that the dominant culture is not working; his cries “embod[y] the alternative consciousness of Moses in the face of the denying king.”<sup>37</sup>

Criticism, grief, and the embrace of suffering are only one side of the prophetic imagination. Prophetic speech also gives voice to *hope* and new *possibilities* in the midst of suffering. The prophetic tradition knows that social realities can be transformed.<sup>38</sup> However, the authorities do not welcome visions of hope for a different social order; they perceive that hope as a challenge to the tradition and to the king’s authority; “the dominant culture, now and in every time, is grossly uncritical, cannot tolerate serious and fundamental criticism, and will go to great lengths to stop it.”<sup>39</sup> As Brueggemann notes, the dominant culture is also “a wearied culture,” one that is nearly unable to be energized to new beginnings and a different future.<sup>40</sup>

The prophetic imagination, however, awakens and energizes people to the promise of new possibilities. Amos’s energizing image of justice as mighty waters is an example.<sup>41</sup> So also is the vision of Isaiah<sup>42</sup> and Micah<sup>43</sup> of a new human community in which war is studied no more and swords are beaten into plowshares. Jeremiah, whose cries of grief are almost unbearable, also offers the beautiful vision of a new covenant in which the law will be written on the hearts of people.<sup>44</sup> And the prophet of the exile known as Second Isaiah offers a dramatic vision of newness and possibility:

Do not remember the former things, or consider the things of old; I am about to do a new thing; now it springs forth, do you not perceive it? I will make a way in the wilderness and rivers in the desert.<sup>45</sup>

The prophet continues:

Why do you say, O Jacob, and speak, O Israel, “My way is hidden from the LORD, and my right is disregarded by my God?” Have you not known? Have you not heard? The LORD is the everlasting God, the

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37. BRUEGGEMANN, PROPHETIC IMAGINATION, *supra* note 5, at 47.

38. *Id.* at xxi.

39. *Id.* at 4.

40. *Id.*

41. *Amos* 5:24.

42. *Isaiah* 2:4.

43. *Micah* 4:3.

44. *Jeremiah* 31:33.

45. *Isaiah* 43:18-19.

Creator of the ends of the earth. He does not faint or grow weary; his understanding is unsearchable. He gives power to the faint, and strengthens the powerless. Even youths will faint and be weary, and the young will fall exhausted; but those who wait for the LORD shall renew their strength, they shall mount up with wings like eagles, they shall run and not be weary, they shall walk and not faint.<sup>46</sup>

#### IV. TWO IMAGES OF JUSTICE

With the help of Heschel and Brueggemann, I have offered a prophetic image of justice in contrast to our prevailing image of blindfold and scales. To summarize, several emphases of that prophetic image contrast with our prevailing image of justice:

- The importance of a *passionate* commitment to justice, as opposed to a detached and dispassionate reason;
- *Criticism* of injustice in the current social order, as opposed to celebration of the current system of justice;
- Focus on *persons* as opposed to abstract principles;
- *Dynamism* and *change* as opposed to stability and order;
- *Compassion* for and partiality to the oppressed, as opposed to strict impartiality and even-handedness;
- *Results* as opposed to process;
- *Vision* for new possibilities, as opposed to supporting and following tradition and precedent;
- *Energy and enthusiasm* for change, as opposed to dispassionate neutrality.

I do not offer this prophetic vision of justice in order to replace our present image. There is much of value in our justice system: justice necessarily depends upon reason, principles, predictability, stability, and impartiality, and equality for all is a crucial principle. I do insist, however, that our system does not live up to those ideals. The different emphasis of the prophetic image of justice is essential if we are to hear the voice of those who are hurt by the current order and to envision new possibilities of peace and justice.

Both images—blindfold and scales on the one hand, and mighty waters on the other—contain essential aspects of justice. However, we should not ignore those aspects of justice that are in contradiction. Our task should not be to forge a synthesis of the two images but rather to hold them together in dialectical tension. According to Brueggemann, a

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46. *Isaiah* 40:27-31.

central dynamic of the Hebrew Bible is the tension between the celebration of the dominant order and a consistent critique of it; both are essential aspects of the biblical message, and neither should be read out of the canon.<sup>47</sup> Similarly, I would submit that both a commitment to the prevailing system of justice and a corresponding critique must be held together in a dynamic, creative tension.

## V. PROPHETIC JUSTICE AND THE DEATH PENALTY

Finally, I wish to explore these competing images of justice in a concrete legal arena. I have chosen to explore the images of justice in the area with which I am most familiar, that of the death penalty.<sup>48</sup>

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47. See BRUEGGEMANN, OLD TESTAMENT THEOLOGY, *supra* note 24, at 17. Although Brueggemann is quite critical of the “royal consciousness” or “dominant culture,” he also acknowledges the importance of order and stability. BRUEGGEMANN, PROPHETIC IMAGINATION, *supra* note 5, at 36. The dominant structures stand as a guard against chaos and anarchy. Brueggemann notes with approval

the sense that the world is ordered and governed. The world is not chaos; it is not endlessly pliable; it is not yet to be decided. There is an ordered quality to life that will not be mocked . . . . There is a transcendent mystery before which everyone must answer, sooner or later. This is a general assertion of God’s sovereignty, and one may even say it is an affirmation of providence.

BRUEGGEMANN, OLD TESTAMENT THEOLOGY, *supra* note 24, at 16. This sense of order and providence is the “fundamental conviction that lets social life exist, that permits a measure of humanness, that lets us set limits on our common beastliness, that lets us nurture our children in decency, and that lets there be some public planning and continuity of policy.” *Id.*

48. There are other examples of prophetic lawyers giving voice to hurt and to hope. Our greatest president was a lawyer who, at his best, was also a prophet. Lincoln’s second inaugural address offers themes of the prophetic imagination. The speech is suffused with biblical quotes and allusions; as Frederick Douglass reported, “[t]he address sounded more like a sermon than a state paper.” RONALD C. WHITE, JR., LINCOLN’S GREATEST SPEECH 184 (Simon & Schuster 2002).

Lincoln steadfastly resisted the urge to be celebratory. Notwithstanding the fact that the long nightmare of the Civil War was nearly over, with Union victory plainly in sight, the speech has no hint of triumphalism or boasting of Union superiority: “The prayers of both could not be answered; that of neither has been answered fully. The Almighty has his own purposes . . . . He gives to both North and South, this terrible war, as the woe due to those by whom the offence came.” *Id.* at 18. Much of the speech gives voice to the pain and injustice of slavery. “It may seem strange that any men should dare to ask a just God’s assistance in wringing their bread from the sweat of other men’s faces.” *Id.* Further, Lincoln emphasizes “all the wealth piled by the bondsman’s two hundred and fifty years of unrequited toil . . . [and] every drop of blood drawn with the lash.” *Id.* at 19. And, just as the biblical prophets, Lincoln urges care for the widow and orphan. In the last paragraph, the speech also offers a powerful voice of hope. *Id.* The vision of “malice toward none; with charity for all” and the call to “bind up the nation’s wounds” is a remarkable call for reconciliation to a bitterly divided nation. *Id.* The closing line, “to . . . achieve and cherish a just, and a lasting peace, among ourselves, and with all nations,” *id.*,

The image of blindfold and scales is particularly powerful in rhetoric about the death penalty and in United States Supreme Court decisions in this area. The actual practice of our current death penalty system, however, satisfies virtually no one—neither proponents nor opponents of the death penalty. I suggest that the prophetic image of justice as I have described it can be helpful in grappling with the difficult and divisive issues in this arena.

There is nothing to celebrate in the current death penalty system. In many ways, the “machinery of death”<sup>49</sup> (to use Justice Blackmun’s phrase) shows our criminal justice system at its worst. Our current death penalty system falls far short of the vision of rational and even-handed justice embodied in the blindfold and scales image; it is anything but rational and impartial. The death penalty system is driven by fear, anger, and racial animus. Politicians and voters support the death penalty out of fear over violent crime without any real basis to believe that the death penalty is actually a solution to our crime problem. The surviving family members of murder victims urge the death penalty for the killer of their loved one out of an understandable rage and grief. Finally, racial prejudice has historically infected the death penalty system, and evidence unfortunately shows that bias still plays a role in selecting who will receive the death penalty.<sup>50</sup>

For these reasons, death penalty opponents have traditionally emphasized reason over passion and neutrality over partiality. The Supreme Court’s cases consistently assert that the death penalty should be the jury’s *reasoned* moral response to the crime and the offender<sup>51</sup> and that the death penalty should not be decided under the influence of

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has strong echoes of the vision of peace in *Micah* 4:3: “[T]hey shall beat their swords into ploughshares, and their spears into pruning-hooks; nation shall not lift up sword against nation, neither shall they learn war any more.”

An example of prophetic work by American lawyers—of giving voice to hurt and to hope—is the long litigation campaign for school desegregation of the NAACP Legal Defense Fund led by Charles Hamilton Houston and Thurgood Marshall. In showing the real effects of shoddy and inadequate schools, especially on the psyches of children who attended them, their strategy gave voice to the pain and harm of segregation. Houston and Marshall also offered a vision of hope for a truly integrated school system and society. The climax of that effort, the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), exemplifies many aspects of prophetic justice, including taking off the blindfold to see sociological evidence of harm and overruling long-standing precedent.

49. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

50. See DEATH PENALTY INFO. CTR., FACT SHEET 2-3 (2006), <http://www.deathpenaltyinfo.org/FactSheet.pdf> (last visited Mar. 15, 2007).

51. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)).

passion or prejudice.<sup>52</sup> Many death penalty statutes explicitly require jurors to weigh in the balance the aggravating and the mitigating factors; jurors are instructed that they should only render a verdict of death if the aggravating factors outweigh the mitigating factors.<sup>53</sup> In ruling on the constitutionality of death penalty statutes, the Supreme Court insists that the risk of wholly arbitrary or prejudiced application be minimized and that there must be a principled basis to distinguish the relatively few murderers who receive the death penalty from the many other murderers who do not.<sup>54</sup>

The problem comes in the application of these principles.<sup>55</sup> Our criminal justice system simply does not and cannot select the worst, and only the worst, of all murderers for execution. Only about two percent of all persons who commit criminal homicide are sentenced to death.<sup>56</sup> Although it is often claimed that the death penalty is reserved for only the very worst of those murderers, that is simply not the case. The real factors that lead some murderers to receive the death penalty, while the vast majority do not, have little or nothing to do with the severity of the crime or the moral depravity of the defendant. A large part of the death row population is made up of people who are distinguished by neither

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52. See *Saffle v. Parks*, 494 U.S. 484, 486 (1990) (holding that the Eighth Amendment does not require that jurors be allowed to base sentencing decision in capital cases upon feelings for defendant after hearing mitigating evidence); see also *Brown*, 479 U.S. at 542 (upholding jury instruction during penalty phase of capital murder trial that jurors must not be swayed by “mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling”).

53. See, e.g., ALA. CODE § 13A-5-46(e) (2005); ARK. CODE ANN. §§ 5-4-603(a), (b) (2006); OKLA. ST. 21 § 701.11 (2006).

54. See *Gregg v. Georgia*, 428 U.S. 153, 199-201 (1976).

55. The current death penalty system has many negative societal consequences:

[T]he substitution of a politics of revenge and resentment for sustained attention to the social problems responsible for so much violence today; the use of crime to pit various social groups against one another and to generate political capital; what has been called an effort to “govern through crime”; the racializing of danger and, in so doing, the perpetuation of racial fear and antagonism; the erosion of basic legal protections and legal values in favor of short-term political expediency; the turning of state killing into an invisible, bureaucratic act, which can divorce citizens from the responsibility for the killing that the state does in their name.

AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 30 (2001).

56. Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?scid=67&did=915> (last visited Mar. 15, 2007). The website of the Death Penalty Information Center, <http://www.deathpenaltyinfo.org>, contains comprehensive facts and figures about the death penalty in the United States; see also Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1841 n. 44 (1994).

their records nor the circumstances of their crimes but by their abject poverty, debilitating mental impairments, dysfunctional family background, and minimal intelligence—and, virtually uniformly, by the poor legal representation they received.<sup>57</sup>

Although proponents of the death penalty often point to the facts of murder cases to show how deserving of death particular defendants are, virtually all murders involve tragic and gruesome facts. Pointing to particular cases fails to answer whether the selection process is a principled one based on neutral, objective factors that provide a “meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”<sup>58</sup>

The ideals of reason, neutral principles, and even-handedness have failed to ensure a rational and fair death penalty. Although it goes against the grain of traditional thinking on the death penalty, I submit that embracing passion and humanity and giving voice to hurt and hope may be more effective in bringing justice to this troubled area of law.

In recent Supreme Court cases, focus on the individual characteristics of the defendant has been more at center stage than have concerns about overall rationality and predictability of the system. Although the Supreme Court’s decisions in *Furman v. Georgia*<sup>59</sup> and *Gregg v. Georgia*<sup>60</sup> emphasized that a constitutional death penalty system must reflect principles of reliability, consistency, and predictability, challenges to the constitutionality of sentencing schemes of particular jurisdictions

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57. See generally Bright, *supra* note 56. Bright offers numerous examples of egregious ineffectiveness by defense lawyers for poor capital defendants. He also notes the randomness of the process:

A member of the Georgia Board of Pardons and Paroles has said that if the files of 100 cases punished by death and 100 punished by life were shuffled, it would be impossible to sort them out by sentence based upon information in the files about the crime and the offender.

*Id.* at 1840. A Mississippi Supreme Court justice made a similar observation about the imposition of death sentences in his jurisdiction in testimony before the Senate Judiciary Committee:

I dare say I could take every death sentence case that we have had where we have affirmed, give you the facts and not tell you the outcome, and then pull an equal number of murder cases that have been in our system, give you the facts and not tell you the outcome, and challenge you to pick which ones got the death sentence and which ones did not, and you couldn’t do it.

*Id.* (quoting *Habeas Corpus Reform: Hearings Before the Comm. on the Judiciary, United States Senate on S. 88, S. 1757, and S. 1760*, 101st Cong. 349 (1989-90) (statement of Justice James L. Robertson of the Supreme Court of Mississippi)).

58. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)).

59. *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring).

60. *Gregg*, 428 U.S. at 194-95.

based on these principles have generally not been successful in recent United States Supreme Court death penalty cases.<sup>61</sup> However, significant victories for defendants in death penalty cases in the United States Supreme Court have occurred in cases dealing with the individual culpability of the defendant. The Court has recently declared the death penalty cruel and unusual as applied to those with mental retardation<sup>62</sup> and to children.<sup>63</sup> These holdings were based not on the fairness of procedures and systems but on the moral culpability of particular categories of defendants. In addition, in three ineffective assistance of counsel cases since 2000, the Supreme Court reversed based upon failure to investigate and offer mitigating evidence about the defendant's character and background.<sup>64</sup> Again, these holdings were based not on the fairness of the process but on whether crucial facts about this particular defendant were brought to the sentencer.

In individual cases at the trial level, death penalty opponents have been wary of emotion and passion, and for good reason. Inflaming the passions of the jury is precisely how prosecutors convince a jury to vote to kill someone. On the other hand, simply arguing to the jury about the unfairness of the death penalty system or trying to keep emotions out of the courtroom clearly is not effective.

Over the past decade, however, it is striking that significantly fewer death sentences have been handed down in the United States.<sup>65</sup> One reason is that an increasing number of defense attorneys have become more skilled and resourceful in persuading jurors that the lives of their clients are worth saving. Indeed, it is now more accurate to speak of defense teams, rather than simply defense lawyers. Capital defendants are increasingly assisted by mitigation specialists, whose job is to gather a complete social and family history of the defendant and assist the lawyer in telling the story of the defendant's life. The American Bar Association's guidelines for capital defense attorneys now call for the defense team to include a mitigation specialist.<sup>66</sup> Even more significantly, the Supreme Court has emphasized the constitutional duty of

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61. See, e.g., *Kansas v. Marsh*, 126 S. Ct. 2516 (2006).

62. *Atkins v. Virginia*, 536 U.S. 304 (2002).

63. *Roper v. Simmons*, 543 U.S. 551 (2005).

64. *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

65. Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?scid=9&did=873> (last visited Mar. 15, 2007). In the mid-1990s, approximately 300 death sentences were handed down per year. In the middle of the current decade, the annual average is about 125. *Id.*

66. American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 925 (2003).

defense attorneys in capital cases to fully investigate their clients' social histories, and it has noted with approval the ABA Guidelines in this regard.<sup>67</sup>

Investigating and proving the mitigation case is crucial because the prosecution's goal is to dehumanize the defendant. The prosecution seeks to portray the defendant as something less than human, as an "animal" or a "monster."<sup>68</sup> Defense teams give voice to the humanity of persons whom the prosecution wishes to silence. An excellent example of this process is revealed in an article in the *New York Times Magazine*.<sup>69</sup> Alex Kotlowitz described a case in which the jury gave a life sentence to a man who was caught on videotape committing a chilling and brutal murder. He describes how the defense team told the story of the defendant's life in such a compelling way that the jury was able to judge Jeremy Gross on his life as a whole and not solely on the horrible crime. As a result, a jury that believed strongly in the death penalty in principle refused to vote for it in that particular case.<sup>70</sup>

Death penalty cases always involve tremendous suffering and hurt, including most obviously the murder that gives rise to the prosecution. In almost every case, however, there has also been tremendous suffering, pain, and disorder in the life of the defendant, usually from a very early age. Given the awful suffering at the heart of these cases, one might think that the death penalty leaves little room for a focus on hope.

At its best, however, the defense mitigation case seeks to:

- Explore not only what has happened to the defendant and the disorders he has suffered in the past, but also how those events and conditions have shaped his actions in the present;
- Reveal the defendant's sorrow and remorse for the life he has taken and that the defendant accepts responsibility for the crime;<sup>71</sup>

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67. *Wiggins*, 539 U.S. at 524.

68. Richard Burr notes:

The portrait that emerges on the prosecution's canvas is the image of a person that is different from the rest of us—one in whom "greed, hatred, and carelessness" are the driving forces, who does not have the same range of emotions as the rest of us, whose heart does not feel compassion or pain, in short, one who is evil and ordained to kill and therefore, not worthy of life.

Richard Burr, *A New Way of Thinking About Mitigation 1* (Oct. 1-3, 2004) (unpublished paper on file with the author).

69. Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES MAG., July 6, 2003, available at [http://www.alexkotlowitz.com/03\\_01.html](http://www.alexkotlowitz.com/03_01.html) (last visited Feb. 1, 2007).

70. *Id.*

71. That is, only in cases in which the defendant did in fact commit the crime and accepts responsibility for it. Unfortunately, in a disturbing number of cases, the state has sought and obtained the death penalty for persons who were actually innocent of the crime.

- Understand the defendant as a fully complete human being who has much in common with the rest of us and who is capable of transcending those limitations and growing into a better person;
- Show that the defendant may find redemption if permitted to live out his life in prison instead of being put to death;
- Respond to the profound human tragedy that is the murder at the heart of the case and establish a relationship with the innocent, suffering survivors.<sup>72</sup>

On this last point, defense teams have recently begun to address the harm done by defendants that reach out and establish relationships with the victim's survivors.<sup>73</sup> A process of defense-initiated survivor outreach founded on the principles of restorative justice has been developed and implemented in a few cases. This process expands the focus of the criminal prosecution to address the judicial needs of survivors, to allow for cooperation between the defense and the prosecution that may benefit survivors, and to include expressions of offender accountability.<sup>74</sup>

The death penalty itself reflects a profound failure of imagination; it is a product of hopelessness and fear. It is a symptom of our societal belief in what Walter Wink calls the "myth of redemptive violence."<sup>75</sup> But the exercise of the prophetic imagination offers hope for something better, by:

- Reaching out in compassion to the lowest of the low, the capital defendant;
- Uncovering and giving expression to suffering and pain;
- Offering hope for mercy and the possibility of redemption.

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See DEATH PENALTY INFO. CTR., FACT SHEET 2 (2006), <http://www.deathpenaltyinfo.org/FactSheet.pdf> (last visited Mar. 15, 2007).

72. This description is taken from Burr, *supra* note 68, at 2-3.

73. See *Payne v. Tennessee*, 501 U.S. 808, 826-27 (1991) (allowing admission of evidence concerning impact of murder on victim's family as relevant to jury's decision to impose death penalty).

74. For descriptions of defense-based victim outreach and of the program at Eastern Mennonite University, see Richard Burr, *Litigating with Victim Impact Testimony: The Serendipity that has Come from Payne v. Tennessee*, 88 CORNELL L. REV. 517 (2003) and Kristen F. Grunewald & Priya Nath, *Defense-Based Victim Outreach: Restorative Justice in Capital Cases*, 15 CAP. DEF. J. 315 (2003).

75. See WALTER WINK, *ENGAGING THE POWERS: DISCERNMENT AND RESISTANCE IN A WORLD OF DOMINATION* 13-30 (1992) (Volume Three of the Powers Trilogy), in which he explores—and debunks—the "myth of redemptive violence."

This prophetic vision offers hope that mercy and compassion can be victorious over the fear and anger that drives our death penalty system and one day bring an end to our failed experiment with capital punishment.

#### VI. CONCLUSION

If we can envision justice rolling like mighty waters, then we may open ourselves to compassion for the poor, the weak, and the suffering. We may give voice to their sorrow and pain and to the anger at the injustice that keeps people under the thumb of unjust structures and systems. And we may be energized by a hope that there are new possibilities of healing and peace in the midst of the suffering. May this restless, mighty stream restore the promise of equal justice under the law.