Many, many thanks to the Section of Individual Rights and Responsibilities and its leadership, former leadership and staff. And many, many thanks to Skadden Arps -- without whose support and understanding I could not have done this work in the manner in which I've done it. I thank all of you who have come here this evening, some of whom have never met me before, some of whom have known me since childhood, and many of whom I have encountered over the years in many ways, often helping me – most notably, Mike Greco, who helped me when I had an awful moment during an otherwise great time in Japan.

I'm humbled by the past recipients who have received this award, starting with Father Drinan, John Pickering, Jack Curtin, Marna Tucker, Cruz Reynoso, Jerry Shestack, Sandy D'Alemberte, Martha Barnett, Mike Greco, Llew Pritchard, Roy Hammer, Brookesley Born, and Steve Hanlon – most of whom I have gotten to know only because of my involvement in this wonderful section.

What I've decided to do this evening is to give a top ten list like none you have heard, even if you've heard me give one before. Like most of my top ten lists, this one is full of compound items, explanations, interpolations, etc. But this one is probably the longest top 10 list ever given. I'll try to get through it as efficiently and humorously as possible.

The Top Ten Lessons I Have Learned From Working With The ABA Section Of Individual Rights And Responsibilities On The Death Penalty:

Number 10: If you want to get something done in the ABA on an important public interest issue, start with IR&R. I learned that lesson in 1983 for the first time, when, after I was thrust into representing a death row inmate, I learned to my amazement that there was no right to counsel after the first appeal. Steve Bright and George Kendall (whom I met when they helped me prepare for the Eleventh Circuit argument) and I asked: "Where should we go in the ABA to try to get the ABA to do something about this?" We were told, "Go to IR&R." As a note in my files reflects, later in 1983 we went to an IR&R council meeting in Miami, Florida hosted by Martha Barnett. IR&R decided to advocate the creation of what became the ABA Death Penalty Representation Project, whose first Chair was a former Chair of this Section. The Project was never housed in this Section, as far as I know the Section has never funded the Project, but we led the advocacy that caused its creation. I have been involved with the Death Penalty Representation Project ever since its creation, either informally or formally.

Number 9: If you go to an ABA meeting for one reason, don't be surprised if you get drafted to do something completely different. One example was when I went to the ABA annual meeting in August 1988 in Toronto, working on a resolution about racial discrimination and the death penalty. Then, Justice Powell gave a speech attacking the fact that many death row inmates were getting relief using habeas corpus. He felt it was outrageous that people whose rights under the United States Constitution were violated so seriously as not to be harmless error were actually getting relief. The ABA President (the last one prior to Jim Silkenat to come from New York State), Robert MacCrate, who knew me, said to me right after that speech ended: "Please talk to the press to refute what Justice Powell just said." You can look it up in the August 8th, 1988
New York Times: there I am refuting Justice Powell, having been given no advance notice of what he would say or that I'd be refuting him on behalf of the ABA.

Another example was an annual meeting in Honolulu, to which I had gone to speak about pro bono at a session of the Torts section. While I was there, I got a frantic call from the NAACP Legal Defense Fund's death penalty lawyers. They said that Julius Chambers (who later received the Thurgood Marshall Award) was in Honolulu to debate Justice Scalia on the death penalty. They urged me to help Julius prepare, which I did, with no advance notice.

Number 8: If you're not at an IR&R meeting, they may draft you. I discovered, with no notice, that I had been named to be the Vice Chair of the Death Penalty Committee. Then, I discovered with no notice that I'd been named to be the Chair of the Death Penalty Committee. A few years later, I discovered I'd been elected to the Council of IR&R with nobody having asked me if I was in position to do so. They had decided to keep me as the Chair of the Death Penalty Committee because they knew I wouldn't agree to be a member of the council if I wasn't chair of the committee.

Then, a few months ago, IR&R's leadership outdid themselves. During a council meeting in which I and a few others were participating by phone, they said they were having a problem with the phone connection and asked us all to get off the call back in a few minutes. When I got back on the call, Myles Link said, "by the way, while you were off the call, we decided to give you this year's Drinan Award.

Number 7: If you're not in a position to respond right away to something, do so as soon as you can. I have two examples, both arising from my testimony before the United States Senate Judiciary Committee in support of the Racial Justice Act. After I was done testifying, Strom Thurmond said that it was unfortunate to hear about problems with counsel in death penalty cases, but that in his day, he represented many people in capital cases pro bono and none of them got the death penalty. If I had been on the panel that was then testifying, I would have said what I have said on a number of later occasions: "Senator Thurmond, unfortunately we don't have lawyers as talented as you today. We need you to resign from the Senate and go back to representing people facing the death penalty."

During my Senate Judiciary Committee testimony, I addressed the major argument being made against the Racial Justice Act, namely, that you shouldn't pass the Racial Justice Act because that would inevitably mean that you couldn't have the death penalty. In effect, they were saying that in order to have the death penalty, you have to have a racist death penalty. In my testimony, I pointed out numerous things that could be done to deal with racial discrimination and still have the death penalty – such as significantly narrowing the scope of the death penalty. Thereafter, I was amazed to read in the Congressional Record that during the floor debate on the Racial Justice Act, Senator Dixon, a Democrat from Illinois, had said that thanks to my testimony, it was clear that Congress didn't need to pass the Racial Justice Act because the racism could be dealt with in the various ways I had discussed. I responded to this in a law review piece that included my testimony – pointing out that Senator Dixon's logic was like saying in 1964, "Congress doesn't have to pass the Civil Rights Act because the southern states could get rid of segregation by enacting state legislation." The fact that they would never have done so without
the Civil Rights Act – or in this situation, that the steps to which I referred would never be taken without Congress' enacting the Racial Justice Act -- was somehow lost on Senator Dixon.

Number 6: Organize programs and make every effort to transcribe them and publish them. We even did that with a Tokyo program, including speakers who spoke in Korean and had what they said translated first into Japanese and then into English. While what we published probably bears little relationship to what some of them said, at least we got it published.

An example of why this is important is in Justice Sotomayor's dissent from the denial of certiorari last year in *Woodward v. Alabama*, where a death row inmate was seeking to get the Court to consider a constitutional challenge to Alabama's system that permits judges to override even unanimous jury recommendations of life sentences and to impose the death penalty instead. Justice Sotomayor cited in the text of her opinion, as the leading citation for one of her points, a statement that Bryan Stevenson made at a program we organized in 1993, whose edited transcription was published in 1994 in the Fordham Urban Law Journal. Due to that publication, Justice Sotomayor was able to find what Bryan had said 20 years earlier. If we had merely presented the program and never had published what people had said at the program, the citation to Bryan's remarks would not be in Justice Sotomayor's dissent.

Number 5: Amicus curiae briefs can be important even years later, although they can cause you headaches at the time.

An ABA amicus curiae brief that Robert MacCrate, as ABA President, particularly liked was the one I wrote in *Murray v. Giarratano*. That case involved whether a death row inmate has a constitutional right to counsel in subsequent proceedings after his direct appeal ends. The Court decided it 4-4-1, with the 1 being Justice Kennedy. He said, in his concurrence, that maybe there could be some circumstances where there might be a constitutional right to postconviction counsel.

A number of years later, in 1998, I was the third of the three listed authors, the least important, on an ABA amicus curiae brief asking the Supreme Court to grant certiorari in *Mackall v. Angelone*. The brief urged the Court to consider whether it is constitutional for a state to preclude you from raising in federal habeas corpus a claim that your trial counsel had been ineffective, where inadequate state postconviction counsel had failed to raise that claim. The Alabama Attorney General's office decided to include in its opposition to the granting of certiorari an *ad hominem* lengthy footnote attacking me – saying that Tabak doesn't like the procedural default doctrine, so don't believe any brief relating to procedural default that Tabak has anything to do with writing. Certiorari was denied in that case in 1998. But 15 years later, in 2013, the Supreme Court finally granted certiorari on the issue we had addressed in that brief. In *Trevino v. Taylor*, the Court's holding was exactly what the ABA had asked the Court to hold 15 years earlier.

I hope that in *Hall v. Florida*, in which the ABA submitted an excellent amicus curiae brief (on which I provided input) the Court will prevent the most outlying of outlier states from using a ridiculously rigid definition of mental retardation under which clearly mentally retarded people can be executed.

Number 4: Speak even when it seems crazy – especially because you never know who will be there or what the impact will be on those who are there.
In August 2003, the ABA annual meeting was in San Francisco. I was scheduled to speak at a program about *Gideon* and how the right to counsel had been implemented in criminal cases. The program was scheduled for Monday afternoon. I protested that this was the stupidest scheduling I had ever heard of – because the only people who would still be at the annual meeting would be there for the House of Delegates meeting, which would still be in session at the time of our program. I asked, "Why are you making me come to speak at this program that will be completely useless?" Part of my annoyance was that by that time, the ABA had begun charging *a la carte* admission for attendance to this type of program – so I could no longer invite people not otherwise attending to the annual meeting to come (since they would be unwilling to pay the relatively steep admission fee.)

Soon after I arrived at the room where the program was going to be held, I saw that somebody I recognized – although we had never met – was not being permitted to come in because he hadn't pre-registered and had not paid. It was none other than Justice Kennedy! I said to those asking for his payment, "Please let Justice Kennedy into this program!" I proceeded to direct all of my remarks at the program to Justice Kennedy – in particular saying how prescient his concurring opinion in the *Giarratano* case had been, and giving reasons why I was sure that when the proper case came before him, he would undoubtedly see that he should apply that concurrence to recognize a constitutional right to postconviction counsel.

Another example of not always recognizing, when asked to comment on something, the long-lasting impact you may have involves one of the most bizarre things that has ever happened to me. The Albany Times Union in an April 15, 2008 editorial said this about the New York Legislature's having passed a death penalty law in 1995 -- which had been held unconstitutional in 2004:

"It's one thing for a law to be struck down by the courts despite the best efforts, and legal advice, of the lawmakers who crafted it. But it's quite another when the warning signs are everywhere. That was the case as far back as 1995, when Ronald Tabak, a New York City attorney, warned that the new law 'raised the danger of pressuring juries to unanimously vote for death to avoid the possibility of parole.' As it happens, that was just what the Court of Appeals said in 2004."

That was the first – and so far, the last -- time that something that I had long forgotten saying to a newspaper was said to have been a warning sign so important that it should have caused the Legislature not to pass a law. While I was somewhat surprised by the editorial, it did lead to one of my clergy saying that this showed I was a prophet.

Number 3 is the wisdom of the 1997 ABA Moratorium Resolution, which has been called the Moratorium Resolution although the word "moratorium" never appears in it. An ABA section said it would not sponsor the resolution if it included the word "moratorium". It feared that the word would remind people of Vietnam War era moratorium efforts – which had nothing to do with the death penalty. So, we took the word out of the resolution. But as soon as the resolution passed, we were told by the Media Affairs Office that we had to called it a Moratorium Resolution. We protested that we had promised not to call it a moratorium resolution, but they said we had to do it.
It had been the view of many, including Father Drinan, that we should have presented a resolution calling for abolition of the death penalty. But with the leadership of people like Estelle Rogers, Mike Greco, and many others (many of them here) too many to mention, we took the view that it was more important to focus attention on the extraordinary (but rarely reported) unfairness with which the death penalty was being implemented. In particular, we were outraged that when Congress passed and President Clinton signed the infamous Anti-Terrorism and Effective Death Penalty Law of 1996 – which certainly has done nothing to achieve an "effective death penalty" (an oxymoronic phrase), it was described, to the extent it was reported on at all, as being a law that would prevent death row inmates from relying on legal technicalities. But, as everyone who knew about the law realized, what it actually did was to create legal technicalities that would prevent people with meritorious constitutional claims from getting relief. The press had also generally ignored several other serious problems with capital punishment's implementation about which the ABA had adopted substantive policies over a period of years. We felt it was vital to call attention to these issues -- which we did.

Number 2: If you suggest something, expect to have to do it. One example proves this point. Right after the Supreme Court held that it was unconstitutional to execute people with mental retardation, Jim Ellis (who had developed the entire legal strategy and had argued the Supreme Court case about mental retardation) and I attended a speech at an ABA event by Rosalynn Carter. Afterwards, I introduced Jim to Ms. .Carter, who said, in substance, "Big deal! You helped the mentally retarded but what have you done for the mentally ill? Bupkus!" She didn't actually say "Bupkus", but she would have if she had spoken Yiddish.

I soon thereafter proposed that IR&R form a task force on mental illness and the death penalty. IR&R agreed but said I should chair it -- even though I didn't know very much about mental illness at that time. Expectations for our task force were low even before it began meeting. I attended an ABA program around that time at which the only thing on which every speaker agreed was that there was no way to reach agreement among psychologists and psychiatrists on any proposal regarding mental illness and the death penalty. But we did -- and our proposal was adopted not only by the ABA, but also by the American Psychological Association and the American Psychiatric Association.

How did this happen? I used a method I learned in my paying client practice: I asked people to explain what they were saying and then to tell me why they were taking the positions they were taking, and I eventually said, "You don't seem to be really disagreeing that much" – and explained why it seemed that way to me. When all was said and done, we reached unanimous agreement.

To this day, I think that pretty much everybody on that task force is convinced that I was playing dumb and that I knew the subject backwards and forwards and was aware from the outset exactly what I wanted our proposal to be. Believe me, I was not playing dumb. I was dumb. But I did what I do with expert witnesses. I made the task force members explain the subject to me so that even a fool like me could understand what they were saying. Once they did that, I was able to get them to see that what they were arguing about didn't make that much difference (no matter how much they seemed to enjoy arguing with each other).
I'm happy to say that a joint Ohio Supreme Court and State Bar of Ohio task force has proposed adopting the most important part of the task force's proposal — as have all of the ABA state assessment teams on the death penalty whose assessments were done after our proposal was adopted as ABA policy.

And now I come to Number 1 -- which is a two-parter.

Number 1: Sending out publications can have wonderful effects. My main proof of that consists of eleven letters that Father Drinan wrote to me between 1990 and 2005, I will not read you the full text of every one of these letters, but I will read you enough to provide you with a flavor of them.

June 11, 1990: "I take this occasion to commend you again and tell you how proud everybody" -- I doubt it was everybody -- "in the American Bar Association is of your continued efforts to bring greater justice in post-conviction remedies for those who are on death row. I must say I was almost taken a back at the recent exposé of the deficiencies of counsel of those who are charged with a capital offense. Your splendid efforts go far to counteract that unfortunate situation." He added that as the incoming chair of IR&R, he wanted me to feel free to call upon him for anything he could do to help.

In January 1997, the month before the moratorium resolution was going to be voted upon, he wrote me again. He wasn't going to be able to be there, to his regret. His term as section delegate to the House of Delegates had expired and Estelle Rogers had become our new delegate. Even though he had not agreed with our strategy, he wished us "every possible success" with the resolution.

In June 1998, he wrote, "I must say I was very encouraged and convinced once again that all of your good work in the ABA will pay off in wonderful ways."

In February 1999, he thanked me for sending him an article, which he said he was "forwarding … to the people of Massachusetts who are vigorously opposing the Governor's determination to restore the death penalty." He added that "the Massachusetts Council of Churches and all the Catholic groups have collaborated with many other faith-based units to counter the Governor."

In May 2000, he thanked me for sending another law review piece, and then mentioned a program he had attended. He said, "The discussion was quite lively, especially the concession by Pat Robinson that there should be a moratorium on the death penalty."

In February 2001, he thanked me for yet another article and added: "You undoubtedly saw the reference to your fine work with the ABA in the Supreme Court of Canada's decision with regard to extradition." And then he said, "Thank you for coming to the lovely event in San Diego." He was referring to the first Father Drinan Award event, at which he had received the award. He added, "I am honored to participate in that group which, with your great help, has accomplished so much."

In August 2001, he thanked me for another article, and stated: "I am more and more persuaded, as your article suggests, the moratorium will become a de facto abolition." So, by
this time, he agreed with our policy and strategy. He added, "The arguments you mount are, I think, making more and more an impression on all of the observers. Perhaps in the not too distant future, the Section on Individual Rights and you and others can take great credit for the abolition of the death penalty." And then he threw in this wonderful Drinanism: "I must say that I was annoyed that the new Ambassador of the Bush administration to the Holy See, a Catholic, said he favors the death penalty. Perhaps somebody in the Holy See can convert him to the Pope's evermore adamant opposition to the death penalty."

In October 2001, he thanked me for the latest document I had sent him, and also thanked me for the decision, with which I had had nothing to do, in which the Georgia Supreme Court had banned execution by electrocution.

In January 2004, he thanked me for sending him an article in the Hofstra Law Review, and said, "I hadn't thought through the questions you raised. I will be utilizing your materials in many ways. He closed the letter exuberantly: "I thank you again for your abiding devotion to elimination of the death penalty. You are winning! Indeed all of us are winning."

On June 15, 2004, he congratulated me on my article about Johnny Lee Gates, whom colleagues and I had gotten off of Georgia's death row after 26 years to serve life without parole for a crime he did not commit. Father Drinan then gave me some career advice, that perhaps I will follow some day: "The thought occurred to me in reading your fine article that you might supervise the collection of essays about the death penalty. This could very easily be a reader for college classes in the death penalty and for law schools." He also thanked me because he otherwise wouldn't have seen the University of Toledo Law Review (in which my article had appeared), "which contains so many thoughtful articles about the death penalty."

Finally, in November 2005, a little bit more than a year before his death, he thanked me for my kindness in sending him the Catholic University Law Review's symposium about mental illness and the death penalty, which he said "would be very valuable to me. I commend you upon your wonderful work on behalf of the elimination of the death penalty. All of us are grateful." He went on to say he had had a nice time at Skadden Arps at a legal ethics program.

Now, for the second part of Number 1: This is in honor of Steve Hanlon, last year's recipient of this award. As you many know, I've had the privilege every year for quite a number of years to write a chapter about the death penalty for the book, The State of Criminal Justice, published by the ABA's Criminal Justice Section. Steve has repeatedly told me that he likes the way that I finish the chapter, which I have not changed in several years. So, I decided that this was sufficient reason to change it this year – which I have done.

I'm going to read you the last paragraphs of it. I hope Steve will be smiling when I'm done. It's not yet been edited and it's not yet been published. Here is how I finish it in the draft (as further edited a week after the Drinan Award presentation):

"It has been shown repeatedly that providing competent counsel reduces drastically the number of death outcomes. This should – but is not likely to – lead to a systematic re-examination of the quality of representation received by those already on death row. The
Supreme Court's decisions concerning defense representation in capital sentencing proceedings have been fact-specific and, when handed down in a federal habeas context, constrained by the AEDPA. Most lower courts are likely to continue to ignore the deadly impact of many capital defense counsel – at least unless they learn the hard way, as Judge Mark W. Bennett did – that what may seem like a ‘dream team’ of defense counsel may actually be an unmitigated disaster for the defendant.

"It is crucial that the public recognize, and that scholars document, that the majority of those now being executed would not be sentenced to death (and often would not even have the death penalty sought for them) if the exact same cases were to arise today. This is due to such things as the greater availability of life without parole, greater discretion for prosecutors not to seek the death penalty, improved performance by defense counsel, and greater skepticism by many jurors. Legal arguments need to be developed about its being unconstitutional – as well as unconscionable – to carry out executions in such cases.

"But in the meantime, all too many courts will continue to use procedural technicalities to bar consideration of fundamental, highly prejudicial constitutional violations. And all too many clemency authorities will continue to hide behind the fiction that judges or juries have fully considered all facts relevant to a fair determination of whether an execution should be carried out. Usually, they will continue to fail completely to act as the 'fail-safe' against unfairness that those with clemency authority are supposed to be. Often, they are the first, and last, people who could consider, weigh, and act on crucial mitigating facts about the defendant.

"In this and so many other respects, it is vital that the legal profession and the public be better informed about what is really going on in the capital punishment system. It continues to be true (as reflected by the changed opinions of so many people discussed near the outset of this chapter) that the more that people know about the death penalty system as actually implemented, the more they oppose it.

"Ultimately, our society must decide whether to continue with a system that cannot survive any serious cost/benefit analysis. As more and more people recognize that our capital punishment system is inconsistent with both conservative and liberal principles, and with plain common sense, the opportunity for its abolition throughout the United States will arrive. It is the responsibility of those who realize that our death penalty system is like "the emperor's new clothes" to do everything possible to accelerate the date of its demise."

Thanks again so much to IR&R for this award and to all of you for coming this evening.