

WHY CAPITAL PUNISHMENT SHOULD BE ABOLISHED

*Arnold H. Loewy**

Ten years ago at my second annual symposium, which dealt with convicting the innocent, I spoke on the topic of *The Death Penalty in a World Where the Innocent Are Sometimes Convicted*.¹ At that time, I asked whether, if we assumed that capital punishment was a bad idea on the assumption that we never convicted an innocent person, it would *a fortiori* be a bad idea in a world where we do.² I then weighed the value of having capital punishment versus not having capital punishment and concluded that even if no innocent person were ever convicted, we are better off without capital punishment than with it.³

Undoubtedly, some of what I have to say will be repetitious, but some is not. I would like to begin with two examples of innocent, or possibly innocent, people being sentenced to death. These are cases that I have not previously discussed. The first is of Cameron Todd Willingham, a man from Texarkana, Texas, who was convicted of intentionally setting fire to his house, killing his three sleeping children.⁴ The problem was that the evidence used to convict Willingham turned out to be junk science.⁵

The state, and particularly then-Governor Rick Perry, was aware of the flawed evidence, but nobody stopped the execution; thus, Mr. Willingham was executed.⁶ Now, I do not know him to be innocent. It is possible that he was guilty, but I do know that there was no credible evidence to prove his

* George R. Killam Professor of Law, Texas Tech University School of Law.

1. Arnold H. Loewy, *The Death Penalty in a World Where the Innocent Are Sometimes Convicted*, 41 TEX. TECH L. REV. 187 (2008).

2. *Id.* at 189.

3. *Id.* at 197–98.

4. Willingham v. State, 897 S.W.2d 351, 356 (Tex. Crim. App. 1995).

5. See DOUGLAS J. CARPENTER ET AL., INNOCENCE PROJECT, REPORT ON THE PEER REVIEW OF THE EXPERT TESTIMONY IN THE CASES OF STATE OF TEXAS V. CAMERON TODD WILLINGHAM AND STATE OF TEXAS V. ERNEST RAY WILLIS (2006), <https://www.innocenceproject.org/wp-content/uploads/2016/04/file.pdf>. The fire investigators in this case relied heavily on their personal experiences of fire investigation, which were flawed. *Id.* For example, one of the investigators believed the fire was caused by arson because the floor was hotter than the ceiling, a sign that an accelerant was used on the floor; the fire investigator did not realize the floor was made of a more combustible material than the ceiling, which was made of a more fire-retardant material. *Id.*

6. Paul Thornton, *Cameron Todd Willingham's Ghost Won't Stop Haunting Rick Perry*, L.A. TIMES (Aug. 6, 2014, 3:42 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-cameron-todd-willingham-rick-perry-execution-20140806-story.html>.

guilt.⁷ Yet, that did not stop the State of Texas from executing him.⁸

The second case I would like to discuss is Richard Glossip of Oklahoma. Glossip, of course, was the named plaintiff in *Glossip v. Gross*,⁹ which addressed whether Oklahoma's method of execution created an unacceptably high risk of unnecessary pain during execution.¹⁰ When one reads the *Glossip* opinion, it looks like there is no question that Glossip was a vicious, cold-blooded killer.¹¹ Unfortunately that was far from the truth.

The primary evidence the jury relied on was Justin Sneed's claim. He claimed that Glossip hired him to kill Barry Van Treese, but the legitimacy of his claim is questionable.¹² Justin Sneed was somewhat mentally unbalanced to begin with and was told that he could avoid the death penalty if he blamed Glossip for hiring him to kill the victim.¹³ And guess what, the actual killer took the deal and put the blame on Glossip.¹⁴ The only other evidence against Glossip, who had no prior criminal record,¹⁵ was the money he had on him.¹⁶ Sneed claimed that he found \$4,000 in Van Treese's car and split the money with Glossip.¹⁷ Glossip and Sneed were found with \$1,700 and \$1,200, respectively.¹⁸ Glossip's entirely credible explanation was that he saved his money from his paychecks and sold some of his belongings.¹⁹

7. See Radley Balko, *A Texas Prosecutor Is on Trial for Alleged Misconduct*, WASH. POST (May 3, 2017), <https://www.washingtonpost.com/news/the-watch/wp/2017/05/03/a-texas-prosecutor-is-on-trial-for-alleged-misconduct/>. It is difficult to determine if Willingham was found guilty because an informant gave false testimony, the fire investigators used junk science, or the prosecutor possibly withheld exculpatory evidence. *Id.* Nevertheless, Todd Willingham's defense attorney apparently believed Willingham was guilty. Martha Neil, *Defense Lawyer Says Executed Client Was Guilty in Texas Arson*, A.B.A. J. (Oct. 28, 2009, 8:39 PM), http://www.abajournal.com/news/article/defense_lawyer_joins_those_who_say_executed_client_was_guilty/.

8. Thornton, *supra* note 6.

9. *Glossip v. Gross*, 135 S. Ct. 2726, 2735 (2015).

10. *Id.* at 2729.

11. See *id.* at 2735 ("Glossip hired Justin Sneed to kill his employer . . . Sneed entered a room where [Glossip's employer] was sleeping and beat him to death with a baseball bat.").

12. See Phil Cross, *Murderer's Confession Changes Again as New Witness Casts Doubt*, FOX25 NEWS (Apr. 13, 2017), <http://okcfox.com/news/fox-25-investigates/murders-confession-changes-again-as-new-witness>.

13. *Killing Richard Glossip: The Machinery of Death* (Investigation Discovery television broadcast Apr. 18, 2017).

14. *Id.* (available at timestamp 6:00–7:00).

15. *Killing Richard Glossip: An Obvious Homicide* (Investigation Discovery television broadcast Apr. 17, 2017); *Killing Richard Glossip: This Is Pointing to Me* (Investigation Discovery television broadcast Apr. 17, 2017).

16. *Killing Richard Glossip: This Is Pointing to Me*, *supra* note 15.

17. *Id.*; Lilitiana Segura & Jordan Smith, *What Happened in Room 102*, INTERCEPT (July 9, 2015, 2:20 PM), <https://theintercept.com/2015/07/09/oklahoma-prepares-resume-executions-richard-glossip-first-line-die/>.

18. *The Facts on Richard Glossip*, FREE RICHARD GLOSSIP, <http://www.richardeglossip.com/the-facts-on-richard-glossip.html> (last visited Nov. 16, 2018); *Killing Richard Glossip: An Obvious Homicide*, *supra* note 15.

19. *Killing Richard Glossip: This Is Pointing to Me*, *supra* note 15; Segura & Smith, *supra* note 17.

Unlike Willingham, Glossip, as of the last time I checked, is still alive.²⁰ He has, however, had multiple last meals but each time has remarkably received a last-minute reprieve.²¹ It is my fondest hope that he will not be the next innocent person to be executed.

One might wonder how someone like Glossip ends up on death row. Even if he is guilty, a first-time offender who did not take part in the actual killing would seem like a poor candidate for capital punishment. In Glossip's case, the imbalance between a local prosecutor,²² who prided himself in the number of capital convictions he could get, pitted against an inexperienced, and at best, marginally competent defense attorney, had a lot to do with ending up on death row.²³ More generally, where a killing takes place often has more to do with capital punishment than the heinousness of the killing or the alleged killer.²⁴

The reasons that we convict as many innocent people as we do are well known. They include tricked or coerced confessions from innocent people;²⁵ yes, they do happen.²⁶ Witness misidentification is another reason.²⁷ Junk

20. See Ian Woods, *Sky Views: Reattempting Failed Executions Is Cruel*, SKY NEWS, <https://news.sky.com/story/sky-views-reattempting-failed-executions-is-cruel-11190394> (last visited Dec. 30, 2018).

21. *Killing Richard Glossip: Death Watch* (Investigation Discovery television broadcast Apr. 18, 2017). Richard Glossip was scheduled to be executed on January 29, 2014, but he received a stay when the Supreme Court chose to consider if the use of Midazolam was cruel and unusual punishment. *Id.* His second execution date was on September 16, 2015; he came within hours of execution but received a stay because the state lacked the appropriate drugs to administer the execution. *Id.* His third execution was scheduled on September 30, 2015; he again received a stay when the correctional facility he was at had a drug mix-up. *Id.* His current stay is indefinite until the state can find the proper drugs for the execution. *Id.*

22. Ziva Branstetter, *Was 'Cowboy' Bob Macy Product of His Time or 'Deadliest' DA?*, FRONTIER (July 3, 2016), <https://www.readfrontier.org/stories/cowboy-bob-macy-called-2-deadliest-prosecutor/>. Bob Macy was the first prosecutor to prosecute Richard Glossip and was seeking the death penalty. *Id.* Macy sent more people to death row "than any other individual district attorney in the United States . . ." *Id.* In sum, he sent fifty-four people to death row, including Richard Glossip. *Id.* When he retired due to a scandal, the amount of people sent to death row in Oklahoma drastically decreased. See Erica Hellerstein, *Cowboy Bob, Black Magic, and the Courtroom of Death*, THINKPROGRESS (Oct. 29, 2015, 4:10 PM), <https://thinkprogress.org/cowboy-bob-black-magic-and-the-courtroom-of-death-78abd17d2fe1/>; *History of Misconduct Chronicled in Oklahoma County With 41 Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6292> (last visited Dec. 30, 2018).

23. Hellerstein, *supra* note 22.

24. See RICHARD C. DIETER, *THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL* (2013), <https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf>; Hellerstein, *supra* note 22.

25. See Maurice Possley, *Martin Tankleff*, NAT'L REGISTRY EXONERATIONS (Apr. 19, 2018), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?Caseid=3675>.

26. See *id.* For example, investigators interrogated Martin Tankleff for the beating and murder of his father. See *id.* Martin was tricked into falsely confessing to the crime when the investigators told Martin his father regained consciousness and claimed that Martin beat him. See *id.* ("At one point, [D]etective K. James McCready told [Martin] Tankleff that his father had awakened at the hospital and identified him as his mother's attacker. At that point, Tankleff said his father never lied and that perhaps he had blacked out and killed his mother."); see also *The Story*, MARTY TANKLEFF, <http://www.martytankleff.org/the-story> (last visited Dec. 30, 2018) ("Marty's father died weeks later, without having regained consciousness.").

27. See *Eyewitness Misidentification*, INNOCENCE PROJECT, <https://www.innocenceproject.org/>

science—as in the *Willingham* case—is yet another.²⁸ Another big reason is the false testimony of jailhouse snitches who are rewarded therefor, and the closely related false testimony of co-defendants who have their lives spared as in the *Glossip* case.²⁹

Yet another reason, which I discussed in my earlier article, is the unwillingness on the part of some jurors to acquit a man who is probably guilty even if there is a reasonable possibility of innocence.³⁰ I certainly do not dispute the conclusions of Ron Allen, among others, that we probably have more factually wrongful acquittals than we do convictions.³¹ But the reason for that, as outlined in the *Winship* case, is that it is far better to acquit a guilty man than it is to convict one who is innocent.³²

That said, no matter what standard of reasonable doubt one uses, given human fallibility, there is no way to ensure that we will not convict an innocent person.³³ Of course, that is small comfort to the innocent person and their family when that person has been sentenced to death. Nevertheless, as I wrote a decade ago:

[E]xecuting murderers (or some subgroup thereof) clearly benefited society in a way that life imprisonment without parole does not and could not, I would be willing to at least consider the plausibility of allowing an occasional mistaken execution as necessary “collateral damage” to protect a valuable and necessary punishment resource for the State.³⁴

causes/eyewitness-misidentification/ (last visited Dec. 30, 2018) (“Eyewitness misidentification is the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 70% of convictions overturned through DNA testing nationwide.”).

28. DOUGLAS J. CARPENTER ET AL., *supra* note 5 (describing the fire investigators’ faulty analysis); Jordan Smith, *The Junk Science Conundrum: Legislators Ponder How to Keep Questionable Forensics Out of the Courtroom*, AUSTIN CHRON. (Jan. 22, 2010), <https://www.austinchronicle.com/news/2010-01-22/940903/> (describing the faulty analysis used in the *Willingham* case as junk science).

29. See *Safeguarding Against Unreliable Jailhouse Informant Testimony*, INNOCENCE PROJECT, <https://www.innocenceproject.org/causes/incentivized-informants/> (last visited Dec. 30, 2018); see also *Cook v. State*, 940 S.W.2d 623, 624, 626 (Tex. Crim. App. 1996) (en banc) (describing how an inmate gave false testimony to the Smith County District Attorney’s office in exchange for credit for time served and admitted the testimony was false after his release, which the defendant did not know about until twelve years after his first trial).

30. Loewy, *supra* note 1, at 188.

31. Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625, 631–32 n.18 (2005).

32. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“[When considering a margin of error in litigation meant to persuade a fact-finder of someone’s guilt that could cost someone their liberty], I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).

33. Arnold H. Loewy, *Taking Reasonable Doubt Seriously*, 85 CHI.-KENT L. REV. 63, 65–66 (2010).

34. Loewy, *supra* note 1, at 189.

Like Michael Vitiello, I make no such finding.³⁵ And like him, I believe that it is necessary to weigh the benefits of a capital punishment regime versus a non-capital punishment regime rather than just rely on the inherent immorality of capital punishment. Doing that balance, I find little to commend capital punishment and much to reject it.

Of course, capital punishment is a superior restraint to life imprisonment. Although prisoners have been known to escape, this country is blessed with super max prisons that are nearly escape-proof.³⁶ If only we knew who to incarcerate therein, we would be so close to matching the capital punishment restraint that the case for capital punishment for that reason would be marginal at best.

Retribution fares little better. Although I am not a huge fan of retribution, I agree that it can, and probably should, have some role in the calculus of appropriate punishment. Indeed, given the relatively low rate of recidivism among murderers,³⁷ the severity of the penalty for murder is probably largely retributive.³⁸

Furthermore, although there are some murderers whose crimes are so revolting that much of society feels the need to cleanse itself of their presence, these murderers do not tend to be the ones who, in fact, get capital punishment.³⁹ Rather, as in the case of Richard Glossip, the disparity in skill between the prosecutor and defense attorney probably has more to do with who gets executed and who does not.⁴⁰ I would add that this is more than a

35. See Mike Vitiello, *A Healthy Dose of Antagonism About the Death Penalty*, 51 TEX. TECH L. REV. 57 (2019) (discussing that empirical data, rather than strict morality, should guide whether the death penalty is necessary); Mike Vitiello, Panelist at the Texas Tech School of Law's Criminal Law Symposium (Apr. 13, 2018) (available at timestamp 20:00–36:30).

36. See, e.g., *Alcatraz of the Rockies: The Most Secure Prison in America*, SYSTEMS & SPACE, <http://systemsnspace.com/alcatraz-of-the-rockies/> (last visited Dec. 30, 2018). One of the most well-known, super max prisons is called ADX Florence, which is located in southern Colorado. *Id.* It is known for housing some of the most infamous criminals in the nation and has zero escapes so far. *Id.*

37. Joshua Marquis, Panelist at the Texas Tech School of Law's Criminal Law Symposium (Apr. 13, 2018) (available at timestamp 38:00–38:20). The Bureau of Justice Statistics performed a study of former inmates released from prison in 1994 to determine their recidivism rates following a three-year period. BUREAU OF JUSTICE STATISTICS, BJS-202/307-0784, TWO-THIRDS OF FORMER STATE PRISONERS REARRESTED FOR SERIOUS NEW CRIMES (2002), <https://bjs.gov/content/pub/press/rpr94pr.cfm> [hereinafter FORMER STATE PRISONERS]. The Bureau found the rearrest rates for any crime were lowest among those convicted of a homicide (41%), but only about 1% of those convicted of a homicide were rearrested for another homicide within three years. *Id.*

38. See FORMER STATE PRISONERS, *supra* note 37; Marquis, *supra* note 37.

39. See, e.g., Eric Levenson, *Why the Santa Fe Shooting Suspect Cannot Get the Death Penalty or Life Without Parole*, CNN, <https://www.cnn.com/2018/05/21/us/death-penalty-santa-fe-school-shooting/index.html> (last updated May 21, 2018, 11:19 AM) (explaining the Santa Fe school shooter, Dimitrios Pagourtzis, is ineligible for capital punishment because he was seventeen at the time of the Santa Fe school shooting, despite being charged with capital murder); see also *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding juveniles cannot receive the death penalty).

40. *6 Things to Know About Richard Glossip's Controversial Delayed Execution*, CRIMEFEED (Apr. 10, 2017), <http://crimefeed.com/2017/04/five-things-to-know-about-richard-glossip/> (explaining that Glossip's lawyers failed to use Sneed and Glossip's interrogation videos). Lawyers and trial experts believe the videos could have been helpful during the trial. *Id.*

little related to the wealth of the defendant.⁴¹ I ask the audience, when was the last time that you saw a millionaire being executed?

This is not to say that there are not some murderers whose very heinousness seems to warrant their removal from the face of the earth. But even then, or perhaps especially then, there may well be some mitigating circumstances in the mental makeup of such a person making them unfit for execution.⁴² So, on balance, seeking to predicate the wisdom of capital punishment on retribution ultimately fails.⁴³

This brings us to deterrence—far and away the leading rationale of those who favor capital punishment.⁴⁴ Studies on the effectiveness of capital punishment vary.⁴⁵ We have heard of studies that say for every execution about eighteen innocent lives are saved.⁴⁶ Unsurprisingly, other studies challenge that number.⁴⁷ Being a non-expert on statistical analysis, I prefer to rely on logic.

To assume that capital punishment deters requires the following set of postulates. Assume that friends Joe, of El Paso, Texas, and Sam, of Las Cruces, New Mexico, each want to kill their wives. Joe says: “If I kill my wife, there is a 70% chance that I will be convicted. And, if I am convicted, there is a 10% chance that I will receive the death penalty. That is too great of a risk. Therefore, I won’t kill her.” Sam, on the other hand, says: “New Mexico does not have the death penalty; therefore, all I am risking is life without the possibility of parole. Therefore, I will kill my wife.”

41. See generally Jeffery L. Johnson & Colleen F. Johnson, *Poverty and the Death Penalty*, 35 J. ECON. ISSUES 517, 517 (2001) (stating that economic disparity increases the likelihood for impoverished defendants to receive the death penalty).

42. See Carol S. Steiker, *Justice vs. Mercy in the Law of Homicide: The Contest Between Rule-of-Law Values and Discretionary Leniency from Common Law to Codification to Constitution*, 47 TEX. TECH L. REV. 1, 4–8 (2014) (listing various mitigating factors under the Model Penal Code).

43. See Richard B. Roper, *The Death Penalty at the Intersection of Reality and Justice*, 41 TEX. TECH L. REV. 15, 23–25 (2008).

44. See Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 709, 735 (2005); see also 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, 1659 (1998) (discussing the impact of the race of victims in capital cases); Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N.U. L. REV. 689, 701 (2000) (discussing the impact of the race of defendants and victims in capital cases); Roper, *supra* note 43, at 23–24 (arguing that life without parole is an ineffective deterrent); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283, 308, 315 (2004) (stating capital punishment deters murders).

45. See Sunstein & Vermeule, *supra* note 44; see also Ted Goertzel, *Capital Punishment and Homicide: Sociological Realities and Econometric Illusions*, 28.4 SKEPTICAL INQUIRER (2004), https://www.csicop.org/si/show/capital_punishment_and_homicide_sociological_realities_and_econometric_illu (describing different studies providing mixed results that capital punishment acts as a deterrent).

46. Vitiello, *supra* note 35 (available at timestamp 22:45–22:52) (“One study demonstrates apparently that . . . you can save eighteen innocent lives for every execution.”).

47. Goertzel, *supra* note 45 (explaining different studies provide mixed results that capital punishment acts as a deterrent).

Does anybody truly believe that the above-scenario would actually play out? Of course not. First of all, potential murderers rarely calculate at all; but if they do, it is extremely doubtful that life without parole—not a pleasant thought given what prison life is like—would fail to deter in a situation that capital punishment would deter.⁴⁸ I suppose that a professional hitman might have a slight preference for working in a non-capital punishment state, but I have not seen any evidence that is in fact the case.

Beyond that, as I noted a decade ago, the United States has a significantly higher murder rate than other civilized countries that have abandoned the death penalty.⁴⁹ Furthermore, states in the United States that do not impose capital punishment have a lower murder rate than those that do impose the death penalty.⁵⁰ For those who contend that capital punishment deters,⁵¹ these inconvenient truths must be confronted.

Furthermore, we should not forget that murderers or potential murderers tend to be more macho than the run-of-the-mill person.⁵² It is not unheard of for potential murderers to want to be in a state that has capital punishment, either as part of a macho, “I can outwit you,” game or to use the state as an agent for suicide.⁵³ Ten years ago, I gave examples of both, but because each is so poignant, I will repeat them today.⁵⁴

First, when the notorious Ted Bundy escaped from Utah, he is said to have asked in which state would he most likely receive the death penalty for murder.⁵⁵ As the story goes, he was told that it was Florida.⁵⁶ Of course, the correct answer would have been Texas, but happily for Texans, Bundy was

48. Loewy, *supra* note 1, at 189–90.

49. *Id.* at 192–93 n.33 (citing UNITED NATIONS OFFICE ON DRUGS AND CRIME, QUESTIONNAIRE FOR THE NINTH UNITED NATIONS SURVEY OF CRIME TRENDS AND OPERATIONS OF CRIMINAL JUSTICE SYSTEMS, COVERING THE PERIOD 2003–2004 2 (2007), http://www.unodc.org/documents/data-and-analysis/CTS9_by_indicator_public.pdf (indicating that the murder rates in 2004 for Australia, Canada, England, and Germany per 100,000 people were 1.31, 1.99, 1.63, and 0.98, respectively), and FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2005 tbl.4 (2006), http://www2.fbi.gov/ucr/05cius/data/table_04.html (noting that the United States homicide rate in 2004 was 5.5 murders per 100,000 people)).

50. *Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates> (last visited Dec. 30, 2018).

51. See Paul G. Cassell, *In Defense of the Death Penalty*, 2 J. INST. FOR ADVANCEMENT CRIM. JUST. 17–22 (2008); Sunstein & Vermeule, *supra* note 44.

52. See WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 59 (1991); see also Loewy, *supra* note 1, at 193 (noting that some murderers or potential murderers tend to be more macho).

53. See Loewy, *supra* note 1, at 193 (explaining that the class of people most likely to be murderers tend to be macho). Daniel Colwell is an example of someone who wanted to use the state as an agent for suicide, whom I will discuss later. See *infra* notes 60–73 and accompanying text (discussing Colwell’s case in detail).

54. See Loewy, *supra* note 1, at 193–94.

55. See *id.* at 193; Michael Mello, *Certain Blood for Uncertain Reasons: A Love Letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 VT. L. REV. 765, 795–96 (2008).

56. See Loewy, *supra* note 1, at 193; Mello, *supra* note 55.

misdirected.⁵⁷ After entering Florida, a state that he entered only because of the death penalty challenge, he killed several young women.⁵⁸ He was caught, tried, convicted, and executed.⁵⁹ But surely one has to grieve for those young women and their families and realize that if only Florida did not have the death penalty, Ted Bundy never would have been there to perpetrate his foul deeds.

Perhaps even more poignant is the tragic case of Daniel Colwell. Colwell was a star football player in high school and by all accounts an all-around good guy.⁶⁰ He received a football scholarship to college, but eventually gave it up when the religious leaders to whom he paid much attention told him that football was defiling his body, which was a temple of God.⁶¹ Subsequently, one of his favorite religious icons, Jimmy Swaggert, fell from grace, causing Colwell to sink into a deep depression and decide that suicide was his only way out.⁶² To accomplish that end, he took a gun to a rented motel room and prepared to kill himself but discovered that he could not do it.⁶³

Fortunately for Colwell, and unfortunately for his ultimate victims, he lived in Georgia, a state that had capital punishment.⁶⁴ Colwell, an African-American, realized that if he killed another African-American or a Hispanic he probably would not be executed, so he needed to find a Caucasian to kill.⁶⁵ He also figured that he should kill more than one because one might not be enough to get the death penalty.⁶⁶ So, he armed himself with his gun and went to the local Walmart looking for victims.⁶⁷

One of the people he saw was a young mother with her children, at which point Colwell's basic decency returned, and he decided that he could not kill them because they had their whole lives to live.⁶⁸ Then, he saw a

57. See Loewy, *supra* note 1, at 193; Mello, *supra* note 55.

58. Charles Montaldo, *The Capture, Escape and Recapture of Serial Killer Ted Bundy*, THOUGHTCO., <https://www.thoughtco.com/ted-bundy-gets-caught-973179> (last updated Sept. 19, 2018). Ted Bundy is known to have killed three women in Florida, two in a sorority house and one in a separate incident. *Id.* Bundy almost killed two more women at the sorority house, but one of the sorority housemates returned, prompting him to run. *Id.* Bundy confessed to killing thirty people; some experts believed he could have killed over 100 people. *Id.*; Ed Smith, *The Secret Life of Ted Bundy*, INFOMANIA (June 8, 2017), <https://www.truthfinder.com/infomania/crime/ted-bundy/>.

59. Montaldo, *supra* note 58.

60. See *Double Murderer Gets His Wish*, WALB NEWS (Jan. 14, 2003, 8:57 PM), <http://www.walb.com/story/1083665/double-murderer-gets-his-wish>.

61. Serial Killers Around the World, *The Murder of Mitchell and Judith Bell: Crime Documentary*, YOUTUBE (Mar. 27, 2017), <https://www.youtube.com/watch?v=Hac3Mq2HJyU> (available at timestamps 11:50–12:40 and 13:55–14:05).

62. *Id.* (available at timestamps 17:15–17:30, 17:35–17:55, and 18:10–18:32).

63. *Id.* (available at timestamp 5:13–5:30).

64. *Georgia*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/georgia-1> (last visited Dec. 30, 2018).

65. Serial Killers Around the World, *supra* note 61 (available at timestamp 6:08–6:21).

66. *Id.* (available at timestamp 5:59–6:07).

67. *Id.* (available at timestamp 5:13–5:44).

68. *Id.* (available at timestamp 6:25–6:38).

fifty-something-year-old white couple whom he decided would be appropriate victims.⁶⁹ Consequently, he summarily executed them and immediately turned himself in to the sheriff.⁷⁰

At his trial, despite his attorney's pleas for leniency, Colwell himself told the jury that if they did not execute him he might escape from prison and come after them or one of their loved ones.⁷¹ Those threats, coupled with his strong athletic frame, were enough to persuade the jury to sentence him to death.⁷²

This tragic story ended when Colwell hanged himself in prison while awaiting execution, ending his life and, in my view, severely damaging the argument that capital punishment is an effective deterrent.⁷³

Thus far, I have only discussed the absence of good from capital punishment. If it did no harm, then perhaps it would be worth keeping, conviction of the innocent aside.⁷⁴ But it does a great deal of harm.⁷⁵ Ten years ago, I mentioned five types of harm that it does, and I will repeat those momentarily.⁷⁶ But first, I want to discuss a reason for abolition of which I was unaware ten years ago. The reason is that in recent years we have learned that we are not very good at it.

Although there have been many cases of botched executions in recent years, I will focus on one—Clayton Lockett of Oklahoma.⁷⁷ The doctor who was originally scheduled to administer Midazolam⁷⁸ was replaced with a far

69. *Id.* (available at timestamp 6:40–7:20).

70. *Inmate Hangs Himself on Georgia's Death Row: Murderer Recently Removed from Suicide Watch*, NEWS4JAX (Jan. 14, 2003, 9:10 AM), <https://www.news4jax.com/news/inmate-hangs-himself-on-georgias-death-row> [hereinafter *Inmate Hangs Himself*] (describing the events that led to Mr. Colwell arriving on death row).

71. *Serial Killers Around the World*, *supra* note 61 (available at timestamp 2:44–2:58).

72. *See id.* (available at timestamp 33:42–33:53).

73. *See generally Inmate Hangs Himself*, *supra* note 70.

74. *See Johnson & Johnson*, *supra* note 41 (referencing a study indicating 18 innocent lives can be saved for every execution performed).

75. *See infra* text accompanying notes 95–99, 104, 106–107 (explaining the harm caused by capital punishment).

76. *See infra* text accompanying notes 94, 97, 99, 102, 106 (explaining five reasons to abolish capital punishment).

77. *See Botched Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (last visited Dec. 30, 2018). Although Clayton Lockett is the most infamous example of a botched execution in recent memory, another infamous example of a botched execution is Joseph R. Woods's execution in Arizona. *Id.* He was sentenced to death for the murder of his girlfriend and her father in 1989. *Id.* At his execution, he was injected with a 750 mg mixture of Midazolam and Hydromorphone, which is fifteen times the amount in Arizona's execution protocol. *Id.* He gasped for air for one hour and forty minutes. *Id.* A spokesperson for the Arizona Attorney General's Office claimed Joseph Woods was merely snoring, but a reporter, Michael Kiefer, was at the execution and claimed Joseph Wood gasped 640 times before he died. *See* Tom Dart, *Arizona Inmate Joseph Wood Was Injected 15 Times with Execution Drugs*, GUARDIAN (Aug. 2, 2014, 10:40 AM), <https://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood>.

78. Rachael Rettner, *How Does Execution Drug Midazolam Work?*, LIVE SCI. (June 29, 2015, 5:17 PM), <https://www.livescience.com/51384-execution-drug-midazolam-effect.html>. Midazolam is a drug that should induce unconsciousness if properly administered. *Id.*

less competent doctor who could neither tell that the drug was improperly administered nor that Lockett was, in fact, still conscious.⁷⁹

I should add that getting conscientious, competent doctors to perform such procedures is extremely difficult because of the Hippocratic Oath that doctors take, which requires a swearing to do no harm.⁸⁰ It is hard to imagine an activity more inconsistent with the Oath than intentionally administering a cocktail of drugs designed to cause the death of a human being who would like to go on living.⁸¹ Consequently, many times the procedures are performed by people who have insufficient medical training to really know what they are doing.⁸²

Compounding this issue is the fact that Midazolam is difficult to obtain.⁸³ It is produced in Europe, but European countries have refused to provide it to the United States because of their opposition to the death penalty.⁸⁴ Consequently, undisclosed drug manufacturers are often the source of Midazolam, and of course, the drug is usually obtained without a doctor's prescription because of that darned Hippocratic Oath again.⁸⁵

Getting back to Clayton Lockett, the incompetent doctor who attempted to inject him missed his vein and failed to recognize his consciousness until he moaned out in pain.⁸⁶ Finally the execution was halted, but thankfully for the state, Lockett subsequently died of a massive heart attack.⁸⁷

I mention this case specifically because I think it raises the question of whether inflicting extra pain during an execution is unconstitutional. Lockett's case is a good test for this proposition because if anybody deserved

79. Katie Fretland, *Scene at Botched Oklahoma Execution of Clayton Lockett was 'a Bloody Mess'*, GUARDIAN (Dec. 13, 2014, 11:04 AM), <https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess> (describing the botched execution of Clayton Lockett).

80. *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), <https://www.pbs.org/wgbh/nova/article/hippocratic-oath-today/>. The classical version of the Hippocratic Oath emphasizes the protection of life, while the modern version emphasizes the importance of empathy to patients. *Id.*

81. *See id.*

82. *See* Liliana Segura & Jordan Smith, *All Executions on Hold in Oklahoma Following Last-Minute Stay for Richard Glossip*, INTERCEPT (Oct. 3, 2015, 11:52 AM), <https://theintercept.com/2015/10/03/all-executions-on-hold-in-oklahoma-following-last-minute-stay-for-richard-glossip/>. One egregious example is the attempted execution of Glossip. The doctor did not bother to read the full name of the drugs that were administered. *Id.* When asked why he did not bother, he stated he only looked at the first name of the drug. *Id.*

83. Matt Ford, *Can Europe End the Death Penalty in America?*, ATLANTIC (Feb. 18, 2014), <https://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/>.

84. *Id.*

85. *See* Lincoln Caplan, *The End of the Open Market for Lethal-Injection Drugs*, NEW YORKER (May 21, 2016), <https://www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs>.

86. Fretland, *supra* note 79.

87. *Oklahoma Botches Execution of Clayton Lockett*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/5760> (last visited Dec. 30, 2018).

to die painfully, he did.⁸⁸ His crime consisted of shooting a nineteen-year-old woman then burying her alive.⁸⁹ So, was it not poetic justice that, to some extent, he died in the same horrific manner as his victim?

Well, it was indeed poetic justice, but it was not the sort of justice that a state is, or ought to be, free to impose on its citizens. Human cruelty to one another is unlimited, but state cruelty to its citizens is limited.⁹⁰ There are many things that evil humans can do to one another. Many acts, such as Lockett's, are unspeakable, but the state is limited by the Cruel and Unusual Punishment Clause, and it cannot engage in torture without reducing the state to the character of the worst among us.⁹¹

So, because we can neither get the death-causing drugs nor the proper people to administer them, death by lethal injection needs to be terminated. Indeed, were the death penalty to continue contrary to my most persuasive arguments, I would probably prefer the firing squad.⁹² The downside of this is that it looks barbaric; which of course, it is. But at least it is unlikely that the execution would be botched.⁹³

Let me briefly mention the five reasons that I presented ten years ago against capital punishment. First is arbitrariness.⁹⁴ There is little doubt that we do not always execute the worst of the worst as we are supposed to.⁹⁵ Rather, we execute those whose lawyers may be the worst and whose prosecutors may be both the best and the most blood-thirsty.⁹⁶

Second, there is a distinct element of literal cruelty in leading a person to his death, strapping him into a gurney, and injecting him with lethal drugs, even if the administration is done right.⁹⁷ To be sure, we are all going to die

88. See Ziva Branstetter, *Death Row Inmate Killed Teen Because She Wouldn't Back Down*, TULSA WORLD (Apr. 20, 2014), http://www.tulsaworld.com/news/courts/death-row-inmate-killed-teen-because-she-wouldn-t-back/article_e459564b-5c60-5145-a1ce-bbd17a14417b.html.

89. See *id.*

90. See Linda R. Monk, *Crime & Punishment*, PBS, <http://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/crime-and-punishment/> (last visited Dec. 30, 2018).

91. U.S. CONST. amend. VIII; *Summaries of Key Supreme Court Cases Related to the Death Penalty*, CAP. PUNISHMENT CONTEXT, <https://capitalpunishmentincontext.org/resources/casesummaries> (last visited Dec. 30, 2018) (listing case precedent that limits the use of capital punishment).

92. E.g., Amar Toor, *Utah Reinstates Death by Firing Squad*, VERGE (Mar. 24, 2015, 6:57 AM), <https://www.theverge.com/2015/3/24/8282275/utah-firing-squad-lethal-injection-death-penalty>. Of all the death penalty methods used, the firing squad has no recorded botched executions in the United States. *Botched Executions*, *supra* note 77.

93. *Botched Executions*, *supra* note 77.

94. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976); *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (per curiam) (stating capital punishment, if imposed, was administered arbitrarily).

95. Loewy, *supra* note 1, at 194–95.

96. See *supra* note 22 (discussing the fallout left by a prosecutor with a penchant for pursuing the death penalty); see also Johnson & Johnson, *supra* note 41 (stating economic disparity increases the likelihood for impoverished defendants to receive the death penalty).

97. Loewy, *supra* note 1, at 195.

sometime, but not that way.⁹⁸

Third, the presence of capital punishment, frequently available but rarely implemented, makes closure difficult for some victims.⁹⁹ If life is the maximum available penalty, the family of a victim whose killer got life is likely to be satisfied.¹⁰⁰ But if death is theoretically on the table, the likelihood of satisfaction with life, even without parole, is diminished.¹⁰¹

Fourth, as compared to European countries, Australia, and Canada, we are the only country with the death penalty; we create all sorts of problems for ourselves.¹⁰² I have already spoken of European countries' unwillingness to provide us with Midazolam.¹⁰³ Additionally, it is frequently difficult to get a foreign country to extradite an accused murderer to the United States unless the state that is going to try them agrees not to attempt to impose capital punishment.¹⁰⁴ Of course, this can create a huge inequality problem if the escapee's co-defendant has already been convicted and sentenced to death.¹⁰⁵

Finally, there is the cost of capital punishment.¹⁰⁶ Capital punishment costs so much to administer that during the economic crisis of 2008, some states abolished capital punishment to fiscally protect the public.¹⁰⁷

So, given the marginal utility of capital punishment weighed against its great disutility, it is clear to me that capital punishment should be abolished, and the sooner the better.

Let me conclude my remarks with a rather remarkable death penalty story. Charles Warner, who raped and murdered a beautiful eleven-month-old baby named Adriana Waller, is probably more deserving of the death

98. Ironically, we perform cold-blooded executions to show how wrong cold-blooded killings are. *Id.*

99. *Id.*

100. *Id.* at 195–96.

101. *Id.*

102. *Id.* at 196; see also Hon. John von Doussa, *The Death Penalty—A Matter of Principle*, AUSTRALIAN HUM. RTS. COMMISSION (Oct. 22, 2006), <https://www.humanrights.gov.au/news/speeches/death-penalty-matter-principle> (reasserting Australia's commitment to an abolished death penalty).

103. See *supra* notes 83–84 and accompanying text (stating European countries will not provide Midazolam to the United States).

104. *Extradition*, CORNELL CTR. ON DEATH PENALTY WORLDWIDE, <http://www.deathpenaltyworldwide.org/extradition.cfm> (last updated Oct. 31, 2011).

105. Loewy, *supra* note 1, at 196.

106. *Id.* at 196–97.

107. David Ariosto, *Connecticut Becomes 17th State to Abolish Death Penalty*, CNN, <https://www.cnn.com/2012/04/25/justice/connecticut-death-penalty-law-repealed/index.html> (last updated, Apr. 25, 2012, 5:41 PM) (“In the last 52 years, only two people have been put to death in Connecticut—and both of them volunteered for it,” Malloy said. “Instead, the people of this state pay for appeal after appeal, and then watch time and again as defendants are marched in front of the cameras, giving them a platform of public attention they don’t deserve.”); *Illinois Governor Signs Bill Ending Death Penalty, Marking the Fewest States with Capital Punishment Since 1978*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/illinois-governor-signs-bill-ending-death-penalty-marking-fewest-states-capital-punishment-1978> (last visited Dec. 30, 2018) (“In light of the current economic difficulties, the [Illinois] public has increasingly recognized that resources used for the death penalty could be diverted to higher budgetary priorities, such as law enforcement and victims’ services.”).

penalty than anybody I can think of.¹⁰⁸ Indeed, if I ever change my mind about my opposition to the death penalty, I would want Charles Warner to be the first to get it.

But listen to what Shonda Waller, Adriana's mother, had to say about the appropriate punishment for Warner:

I can only see him spending the rest of his life in prison . . . [without] him ever walking out of the cell walls. I don't want to see him be sentenced to death

. . . .

. . . I don't see any justice in just sentencing someone to die. To me, the justice is in someone living with what they have done to you[,] to[] your family, and having to live with that for the rest of their life knowing that they will never walk out those bars.

. . . .

. . . [I]f they truly want to honor me, then they will do away with the death penalty for him and they will give him life in prison without the possibility of parole¹⁰⁹

Ms. Waller concluded, "This person killed. Now we're just doing the same thing in my baby's name. That's wrong. That's fundamentally wrong."¹¹⁰

If one of my loved ones had met the fate of Shonda Waller's precious baby, I honestly do not know if I could have the graciousness to react as she did. But I do know that I would be a better person if I could.

108. See generally Cary Aspinwall, *Charles Warner Is Executed; Here's the Story of His 11-Month-Old Victim*, TULSA WORLD (Jan. 14, 2015), http://www.tulsaworld.com/news/courts/charles-warner-is-executed-here-s-the-story-of-his/article_af39c542-08d0-5bd6-80ac-01a6f1c668ee.html.

109. *Transcript of Shonda Waller Video*, SCRIBD 1, 2–4 (Jan. 26, 2014), <https://www.scribd.com/document/220305378/Transcript-of-Shonda-Waller-Video>.

110. Ali Meyer, *Mother of Infant Who Was Raped and Murdered Speaks Out on Man Convicted of the Crime*, OKLAHOMA'S NEWS 4 (Oct. 31, 2014, 12:28 PM), <https://kfor.com/2014/10/31/mother-of-infant-who-was-raped-and-murdered-speaks-out-on-man-convicted-of-the-crime/>.