

# A HEALTHY DOSE OF AGNOSTICISM ABOUT THE DEATH PENALTY

Michael Vitiello\*

I. INTRODUCTION ..... 57  
II. DETERRENCE ..... 59  
III. EVEN IF ..... 61  
    A. Exonerations ..... 61  
    B. Defense Counsel..... 66  
IV. RACIAL BIAS..... 67  
V. CONCLUDING THOUGHTS: WHAT IS LEFT OF THE DEATH PENALTY? . 70

## I. INTRODUCTION

Since 2007, Arnold Loewy is almost certainly responsible for putting the Texas Tech School of Law on the national map because of his widely admired, annual symposium on criminal law and procedure issues.<sup>1</sup> As a result, I jumped at the opportunity when he invited me to participate in this year’s Symposium. As the cliché goes, be careful what you wish for. In my enthusiasm, I paid little attention to his assumption that I was opposed to the death penalty.

I do oppose the death penalty, but I do not have an ironclad view on the issue. As a general matter, I support laws that protect human life, but I am not an absolutist. While I oppose most wars, I am not a pacifist. As I will develop below, truly compelling arguments could convince me to reverse my opposition to the death penalty. Indeed, over a decade ago, I received a notice to report for jury duty in a death penalty case. As I filled out a twenty-plus page questionnaire, I realized that if I wanted to avoid jury service, I could answer the *Witherspoon v. Illinois* questions in a way to get an automatic disqualification from service.<sup>2</sup> But as I indicated there, I am not sure what I

---

\* Distinguished Professor of Law, the University of Pacific McGeorge School of Law; University of Pennsylvania, J.D., 1974; Swarthmore College, B.A., 1969. I would like to extend my thanks to Professor Arnold Loewy for the invitation to participate in this Symposium and to my friend and former colleague Professor Joshua Dressler for his helpful comments on this draft. I would also like to thank colleagues who commented on this Article when I delivered it as a work in progress at McGeorge, including Julie Davies and Stephen Smith Cody. Finally, I want to thank my research assistant Kendall Fisher for her excellent work on the footnotes for this Article.

1. See generally *Arnold H. Loewy*, TEX. TECH U. SCH. LAW, [http://www.depts.ttu.edu/law/faculty/a\\_loewy.php](http://www.depts.ttu.edu/law/faculty/a_loewy.php) (last visited Dec. 30, 2018).

2. *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (holding that a general personal opposition to the death penalty is not enough to strike a prospective juror for cause; however, prospective jurors who state that they *will not* impose the death penalty *under any circumstance* may be dismissed for cause).

would do if I were on a jury deciding whether to impose the death penalty on a particularly heinous defendant. Adolf Eichmann comes to mind.<sup>3</sup>

In fact, my agnosticism about the death penalty does not seem all that far from at least two of the proponents of the death penalty presenting in this Symposium. Joshua Marquis and Ronald Allen are on record as supporting the death penalty, in large part because of what they find to be compelling empirical evidence supporting a substantial deterrent effect of the death penalty.<sup>4</sup> If those data convinced me, my continued opposition to the death penalty would seriously erode. As I develop below, those data are suspect.<sup>5</sup>

Also as developed below, even if I were convinced that the death penalty has a significant deterrent effect, I might not become a proponent of the death penalty because of competing values.<sup>6</sup> Presumably, the deterrent effect for the death penalty works best when the penalty is imposed and carried out frequently and expeditiously in a wide range of cases.<sup>7</sup> Such a death penalty system poses too many risks.<sup>8</sup>

While some proponents of the death penalty rely on econometric studies supporting the deterrence theory, they also accept some of the Supreme Court decisions narrowing the death penalty. For example, some death penalty supporters acknowledge decisions like *Atkins v. Virginia*<sup>9</sup> and *Roper v. Simmons*<sup>10</sup> that have held the death penalty unconstitutional if the defendant was sufficiently developmentally disabled or was an adolescent when he committed his crime.<sup>11</sup>

Further, many—if not most—proponents of the death penalty readily agree that executing innocent defendants is unacceptable and that our criminal justice system needs in place significant due process guarantees to assure that does not happen.<sup>12</sup> At the same time, many—if not most—

---

3. See generally Gabriel Bach, *The Eichmann Trial*, 39 LOY. L.A. INT'L & COMP. L. REV. 315 (2012) (discussing the trial of Adolf Eichmann, the individual widely thought of as the main promulgator of the Holocaust).

4. See, e.g., Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008).

5. See *infra* Part II (exploring whether the death penalty has a deterrent effect on crime).

6. See *infra* Part III (examining the number of innocent people on death row and whether exonerations are possible with current resources); *infra* Part IV (analyzing racial disparities and the connection to the death penalty).

7. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 715 (2005).

8. See *infra* Part III (examining the number of innocent people on death row and whether exonerations are possible with current resources).

9. See generally *Atkins v. Virginia*, 536 U.S. 304 (2002).

10. See generally *Roper v. Simmons*, 543 U.S. 551 (2005).

11. See, e.g., Bill Mears, *High Court: Juvenile Death Penalty Unconstitutional*, CNN (Mar. 1, 2005, 7:42 PM), <http://www.cnn.com/2005/LAW/03/01/scotus.death.penalty/> (quoting Eugene, Oregon District Attorney Joshua Marquis on *Roper v. Simmons*, “This is simply a further refinement in what I believe is a trend of the court and prosecutors and jurors becoming more discriminating about when the death penalty should be imposed”).

12. See, e.g., Paul G. Cassell, *We're Not Executing the Innocent*, WALL STREET J., <https://www.wsj.com/articles/SB961116188606389139> (last updated June 16, 2000, 12:21 AM).

proponents believe that we must speed up the execution process.<sup>13</sup> Indeed, some econometric scholars argue that the deterrent effect of the death penalty is stronger if the execution occurs closer to the date that the death penalty is imposed.<sup>14</sup>

Also, few—if any—death penalty advocates support the racial imbalance in the death penalty or the execution of an offender who had ineffective assistance of counsel.<sup>15</sup>

Proponents of the death penalty have different responses to opponents' concerns.<sup>16</sup> I explore some of those responses below.<sup>17</sup> At the end of the day, their responses are not sufficiently compelling to remove the grave doubts about the death penalty, certainly not as it is administered in the United States.

## II. DETERRENCE

Prominent liberal scholar Cass Sunstein and his co-author Adrian Vermeule grabbed the attention of legal academics and members of the media in their 2010 *Stanford Law Review* article, where they argued that, if empirical data show that the death penalty has a strong deterrent effect, a state has a moral obligation to maintain the death penalty.<sup>18</sup>

Some death penalty proponents have read the Sunstein–Vermeule article as finding that the death penalty, in fact, saves lives.<sup>19</sup> That is not the case.<sup>20</sup> After reviewing the empirical studies concerning the deterrent effect of the death penalty, the authors stated specifically, “[O]ur goal here is not to

13. See, e.g., Maggie Clark, *Some States Speed Up Death Penalty*, PEW CHARITABLE TR. (June 18, 2013), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/06/18/some-states-speed-up-death-penalty>.

14. See Adam Liptak, *Does Death Penalty Save Lives? A New Debate*, N.Y. TIMES (Nov. 18, 2007), <http://www.nytimes.com/2007/11/18/us/18deter.html>.

15. See TEX. DEF. SERV., LETHAL INDIFFERENCE 3–4 (2002), [texasdefender.org/wp-content/uploads/Lethal-Indiff\\_web.pdf](http://texasdefender.org/wp-content/uploads/Lethal-Indiff_web.pdf) (explaining that many death penalty supporters have concerns about racism with regard to the death penalty). See generally *Race and the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/race-and-death-penalty> (last visited Dec. 30, 2018) (illustrating the racial imbalance of those receiving the death penalty).

16. See, e.g., CHARLES LANE, *STAY OF EXECUTION: SAVING THE DEATH PENALTY FROM ITSELF* 65–95 (2010).

17. See *infra* Part II (discussing death penalty proponents' and opponents' views on deterrence); *infra* Part III (discussing responses of both sides of the death penalty debate to the issues of exoneration and representation even if the death penalty does deter crime); *infra* Part IV (discussing various responses to the issue of racial bias by proponents and opponents of the death penalty).

18. See Sunstein & Vermeule, *supra* note 7 *passim*.

19. See Joshua Marquis, *Death Penalty Opponents Ignore Facts and Voters' Wishes: Guest Opinion*, OREGONIAN (June 27, 2014), [http://www.oregonlive.com/opinion/index.ssf/2014/06/death\\_penalty\\_opponents\\_ignore.html](http://www.oregonlive.com/opinion/index.ssf/2014/06/death_penalty_opponents_ignore.html); Vanderbilt Univ., *Vanderbilt Law School Death Penalty Debate*, YOUTUBE (Nov. 11, 2009), <https://www.youtube.com/watch?v=hqrTHllqp68>.

20. See Sunstein & Vermeule, *supra* note 7, at 716.

reach a final judgment about the evidence. It is to assess capital punishment given the assumption of a substantial deterrent effect.”<sup>21</sup>

I am not an empiricist and hesitate to wade into the debate about econometric analyses.<sup>22</sup> But at least if one does a head count, “approximately 80% of the experts in criminology believe, on the basis of the literature and research in criminology, that the death penalty does not have significant deterrent effects.”<sup>23</sup> While not conclusive, “states without the death penalty do not have homicide rates that are above the average homicide rates in death-penalty states.”<sup>24</sup>

Over the past twenty-plus years, the United States has experienced an unprecedented decline in crime.<sup>25</sup> During that period, the Supreme Court has repeatedly narrowed the cases in which the death penalty may be imposed consistent with the Constitution, and the Court has increased the State’s burden when it seeks to impose the penalty in a number of areas.<sup>26</sup> In fact, over much of the recent past, executions have plummeted and the imposition of new death sentences have declined at an even greater rate than the murder rate.<sup>27</sup> Those data seem flatly inconsistent with the econometric studies’ central thesis. We are experiencing a sharp decline in crime despite abandoning the death penalty.<sup>28</sup>

One’s confidence in the deterrent effect should be further eroded not only by conflicting studies but also by the conclusions reached by the

---

21. *Id.* Interestingly, many commentators who cite Sunstein and Vermeule as supportive of the death penalty ignore their larger theme. *See, e.g.*, Marquis, *supra* note 19. That theme is that the state has a moral commitment to act when it can prevent harm. *See* Sunstein & Vermeule, *supra* note 7 *passim*. They reject the thesis that a government can justify inaction in many areas, including, for example, when inaction produces environmental harm. *Id.* at 708, 749. Such a view is not surprising to those of us who believe in a positive role for an activist government.

22. In one instance, I did wade into claims made by Joanna Shepard. *See* Michael Vitiello, *California’s Three Strikes and We’re Out: Was Judicial Activism California’s Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1088–95 (2004) (explaining several criticisms of econometric analyses, including the assumption that a criminal actor making a “choice” between criminal and lawful activity has full and perfect information about the cost and utility of the different choices).

23. Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 9 (1996).

24. LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW 8–9 (2012).

25. *See* Matt Ford, *What Caused the Great Crime Decline in the U.S.?*, ATLANTIC (Apr. 15, 2016), <https://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/477408/>.

26. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the execution of those under eighteen years old is prohibited by the Eighth and Fourteenth Amendments); *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the execution of mentally incapacitated criminals); *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that a trial judge sitting alone may not determine the presence or absence of aggravating factors triggering the availability of the death penalty).

27. Jacey Fortin, *U.S. Had 23 Executions in 2017, Second-Lowest Number in a Quarter-Century*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/us/death-penalty-execution-rate.html>.

28. Ford, *supra* note 25. There is an air of unreality about the econometric scholars’ claims about the death penalty. In 2015, according to FBI data, there were 15,696 murders in the United States. *Murder*, FBI UNIFORM CRIME REPORTING PROGRAM, <http://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/murder> (last visited Dec. 30, 2018). Does anyone think that the murder rate would go to zero if we executed 872 offenders?

National Research Council (NRC). In 2012, the NRC published a substantial report on the death penalty and deterrence.<sup>29</sup> Its conclusions are sobering for death penalty proponents whose support hinges on the deterrent effect of the death penalty.<sup>30</sup> It identified three major flaws in studies supporting the deterrent effect of the death penalty.<sup>31</sup> First, those studies failed to factor in alternative punishments, like life-without-benefit-parole.<sup>32</sup> Second, they used unrealistic models of potential murderers' response to the use of capital punishment.<sup>33</sup> Finally, the statistical models are not based on credible assumptions.<sup>34</sup>

Thus, despite on-going efforts to resolve the deterrence debate, proponents of the death penalty have yet to deliver a knockout punch.

### III. EVEN IF

For purposes of argument, what if the death penalty has a deterrent effect? To be clear, some econometric studies suggest that the death penalty deters more effectively if the execution comes closer in time to the imposition of the death penalty.<sup>35</sup> For example, Joanna Shepherd found in one study that “more frequent executions, carried out in closer proximity to convictions, are predicted to amplify the deterrent signal for both rational and boundedly rational criminals.”<sup>36</sup> If we are serious about saving lives, if those data are even close to correct, states would have to make a serious commitment to executing more offenders and to do it quickly. Is that a good thing?

Increasing the speed of executions poses a number of risks.<sup>37</sup> Several are worth exploring.

#### A. Exonerations

One cannot deny the importance of DNA evidence that has led to exoneration of death-row inmates.<sup>38</sup> Although measuring the precise impact

---

29. See NAT'L RESEARCH COUNCIL, COMMITTEE ON DETERRENCE AND THE DEATH PENALTY, DETERRENCE AND THE DEATH PENALTY (2012).

30. *Id.* at 101–20.

31. *Id.* at 4.

32. *Id.* at 4–5.

33. *Id.* at 5–6.

34. *Id.* at 6–7.

35. Sunstein & Vermeule, *supra* note 7 (quoting Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005)).

36. *Id.*

37. See *infra* Part III (exploring problems with the death penalty even under proponents' likely false assumptions).

38. BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 38–41 (2017). Although Professor Garrett concludes that exonerations of death-row inmates are not the major explanation for the downturn in new death sentences around the country, he acknowledges that it is part of the explanation. *Id.* at 44.

is difficult, revelations about actually innocent defendants on death row has gained national attention.<sup>39</sup> But those exonerations only dramatize what death penalty opponents have known for years: there are innocent people on death row.<sup>40</sup>

Death penalty proponents face a dilemma: How can they maintain their commitment to the death penalty (imposed often enough to deter) and their commitment to protecting against the execution of innocent defendants? Some death penalty advocates argue that the risk of executing innocent offenders is the cost that society must bear in order to maintain the deterrent effect of the death penalty.<sup>41</sup> Other death penalty supporters are uncomfortable with that position. Many of them take comfort in those procedural steps in place that reduce the risk of executing innocent offenders.<sup>42</sup>

Some death penalty proponents cite Justice Scalia's widely quoted statement to the effect that no innocent person has been executed.<sup>43</sup> In his acerbic concurring opinion in *Kansas v. Marsh*, Justice Scalia took on the dissent's claim that the death penalty created an unacceptable risk of executing innocent defendants.<sup>44</sup> Here is an excerpt:

There exists in some parts of the world sanctimonious criticism of America's death penalty, as somehow unworthy of a civilized society. (I say sanctimonious, because most of the countries to which these finger-waggers belong had the death penalty themselves until recently—and indeed, many of them would still have it if the democratic will prevailed.) It is a certainty that the opinion of a near-majority of the United States Supreme Court to the effect that our system condemns many innocent defendants to death will be trumpeted abroad as vindication of these criticisms. For that reason, I take the trouble to point out that the dissenting opinion has nothing substantial to support it.<sup>45</sup>

That was just the beginning of his critique.<sup>46</sup> He challenged those who claim that states execute innocent defendants in our system as currently administered.<sup>47</sup> At the core of his argument was the assertion that death

---

39. *Id.* at 35–38.

40. *Id.* at 38.

41. *See, e.g.*, Ernest Van Den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 141, 141 (1969).

42. *See, e.g.*, Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 517–18 (2005).

43. *See, e.g.*, Jeffrey L. Kirchmeier, *Dead Innocent: The Death Penalty Abolitionist Search for a Wrongful Execution*, 42 TULSA L. REV. 403, 405 (2006).

44. *Kansas v. Marsh*, 548 U.S. 163, 185–99 (2006) (Scalia, J., concurring); *id.* at 204–07 (Souter, J., dissenting).

45. *Id.* at 187–88 (Scalia, J., concurring) (footnote omitted).

46. *Id.*

47. *Id.*

penalty opponents cannot prove that we have, with current protections in place, executed an innocent defendant:

It should be noted at the outset that the dissent does not discuss a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent’s name would be shouted from the rooftops by the abolition lobby. The dissent makes much of the new-found capacity of DNA testing to establish innocence. But in every case of an executed defendant of which I am aware, that technology has *confirmed* guilt.<sup>48</sup>

Scalia cited Mr. Marquis on the larger proposition that even proven exonerations show that a miniscule percentage of convicted defendants are innocent.<sup>49</sup> As quoted in the *New York Times*, Marquis stated, “During [the 15 years between 1989 and 2003], there were more than 15 million felony convictions across the country. That would make the error rate .027 percent[—]or, to put it another way, a success rate of 99.973 percent.”<sup>50</sup>

Beyond the scope of this paper are two thoughts about Justice Scalia. I wonder whether he ever expressed regret for his sharp criticism of any death-row inmates whom he would have condemned to death but who were later exonerated.<sup>51</sup> The other point worth noting in passing is that Justice Scalia often opposed expanding the kinds of procedural protections that have allowed exonerations.<sup>52</sup> Indeed, he doubted that a claim of factual innocence without more was sufficient to prevent an execution.<sup>53</sup>

To his credit, Mr. Marquis has expressed grave concern about executing innocent prisoners.<sup>54</sup> But like Justice Scalia, Mr. Marquis and other death

---

48. *Id.* at 188 (footnote omitted).

49. *Id.* at 197–98.

50. Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES (Jan. 26, 2006), <http://www.nytimes.com/2006/01/26/opinion/the-innocent-and-the-shammed.html>.

51. See generally Brian Beutler, *Antonin Scalia Used This Wrongful Conviction to Defend the Death Penalty*, NEW REPUBLIC (Sept. 4, 2014), <https://newrepublic.com/article/119319/scalia-deathpenalty-defense-cited-murder-case-it-was-just-overturned> (quoting Justice Scalia’s opinion in *Callins v. Collins*, 510 U.S. 1141, 1142–43 (1994): “[Death by lethal injection] looks even better next to some of the other cases currently before us which Justice Blackmun did not select as the vehicle for his announcement that the death penalty is always unconstitutional . . . . For example, the case of the 11-year old girl raped by four men and then killed by stuffing her panties down her throat. How enviable a quiet death by lethal injection compared with that!”) (alteration in original).

52. See Rory Little, *The Court After Scalia: A Mixed Bag on Criminal Law and Procedure Issues*, SCOTUSBLOG (Sept. 9, 2016, 10:20 AM), <http://www.scotusblog.com/2016/09/the-court-after-scalia-a-mixed-bag-on-criminal-law-and-procedure-issues/>.

53. See *Herrera v. Collins*, 506 U.S. 390, 427–28 (1993) (Scalia, J., concurring) (“There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.”).

54. See generally Marquis, *supra* note 42.

penalty proponents adhere to the belief that we have not executed innocent prisoners.<sup>55</sup>

That view seems highly unrealistic. In recent years, evidence has emerged that two named prisoners who were innocent were executed.<sup>56</sup> One might argue that even assuming that they were innocent, the statistical risk is so miniscule that it is outweighed by other benefits.<sup>57</sup>

I draw a very different conclusion from the relatively few proven instances where evidence proves that states have executed innocent prisoners.<sup>58</sup> Justice Scalia failed to recognize efforts by some prosecutors to allow DNA or other post-execution testing to prove that the state killed an innocent person.<sup>59</sup> Some courts have agreed.<sup>60</sup> More importantly, post-execution, few individuals or institutions have resources or incentive to continue exoneration efforts.<sup>61</sup> For example, death penalty foes can use resources to provide adequate defenses for those charged with capital murder or who are on death row, rather than on trying to prove that executed offenders were innocent.<sup>62</sup>

The other part of the argument, relying on exonerations as proof that the system works, is candidly wishful thinking.<sup>63</sup> As I have described elsewhere, anyone close to a case where an offender has been exonerated knows the sheer luck involved in earning an exoneration.<sup>64</sup> Apart from procedural complexities, made worse by AEDPA,<sup>65</sup> defense attorneys face many hurdles in securing exonerations.<sup>66</sup> That includes some recalcitrant prosecutors and

---

55. *Id.* at 518.

56. See Ed Pilkington, *The Wrong Carlos: How Texas Sent an Innocent Man to His Death*, GUARDIAN (May 14, 2012, 11:00 PM), <https://www.theguardian.com/world/2012/may/15/carlos-texas-innocent-man-death>; Cameron Todd Willingham: *Wrongfully Convicted and Executed in Texas*, INNOCENCE PROJECT (Sept. 13, 2010), <https://www.innocenceproject.org/cameron-todd-willingham-wrongfully-convicted-and-executed-in-texas/>.

57. See Ed Pilkington, *US Death Row Study: 4% of Defendants Sentenced to Die Are Innocent*, GUARDIAN (Apr. 28, 2014, 3:50 PM), <https://www.theguardian.com/world/2014/apr/28/deathpenalty-study-4-percent-defendants-innocent>.

58. See Michael Vitiello, *Personal Reflections on Connick v. Thompson*, 11 OHIO ST. J. CRIM. L. 217 *passim* (2013) (explaining that the odds are strong that our society has executed innocent people).

59. See Lara Bazon, *Scalia's Embarrassing Question*, SLATE (Mar. 11, 2015, 9:37 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/03/innocence\\_is\\_not\\_cause\\_for\\_exoneration\\_scalia\\_s\\_embarrassing\\_question\\_is.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/innocence_is_not_cause_for_exoneration_scalia_s_embarrassing_question_is.html).

60. See Adam Liptak, *Consensus on Counting the Innocent: We Can't*, N.Y. TIMES (Mar. 25, 2008), <http://www.nytimes.com/2008/03/25/us/25bar.html>.

61. See Pema Levy, *One in 25 Sentenced to Death in the U.S. Is Innocent, Study Claims*, NEWSWEEK (Apr. 28, 2014, 3:40 PM), <http://www.newsweek.com/one-25-executed-us-innocent-study-claims-248889>.

62. *See id.*

63. *See id.*

64. Vitiello, *supra* note 58, at 230.

65. 28 U.S.C. § 2254 (1996).

66. *See Vitiello, supra* note 58 (discussing how racial animus, corruption, and a lack of resources can make exonerations hard to achieve).



courts.<sup>67</sup> At times, it involves finding evidence that may have been misplaced or worse.<sup>68</sup> No one can deny instances of corrupt practices by some prosecutors who have withheld exculpatory evidence.<sup>69</sup> Given the almost complete absence of sanctions against prosecutors who violate their duties, including their duty to hand over such evidence, one should not be surprised that such cases exist.<sup>70</sup>

Exoneration after an execution is not likely absent extraordinary resources.<sup>71</sup> Often, those resources are provided pro bono.<sup>72</sup> High-powered law firms secure exonerations, often after the expenditure of millions of dollars of pro-bono attorney work.<sup>73</sup> Even with such resources, exoneration may come about through sheer luck, not simply through good legal work.<sup>74</sup> In John Thompson's case, for example, one of the nation's premier law firms spent years and millions of dollars of pro-bono work, but was still unable to prevent Thompson from facing execution.<sup>75</sup> Only at the last moment—even after counsel visited Thompson to tell him that they were out of options—did a private eye, hired at Thompson's insistence, find suppressed blood evidence that led to his exoneration.<sup>76</sup>

Does that prove Justice Scalia's point that the system works? Or does it prove the opposite? Had Thompson been executed, no one would have continued the search for exonerating evidence, and no one would have believed his attorneys' claims of innocence.<sup>77</sup> We can only guess at how many John Thompsons exist who benefitted from such a Hail Mary exoneration.

---

67. See *id.* at 223 (discussing prosecutors who strive only to get convictions, as opposed to seeking justice).

68. See Liptak, *supra* note 60.

69. See Vitiello, *supra* note 58, at 224–25.

70. See *id.* at 226–28.

71. See, e.g., Jim Figorski & Melissa Boyers Bluestine, *An Inside View of Getting the Wrongfully Convicted Exonerated*, AM. LAW. (June 28, 2017, 9:38 AM), <https://www.law.com/americanlawyer/almID/1202791170402/?mcode=1202615731542&curindex=406&curpage=2/>.

72. *Id.*

73. See, e.g., Press Release, James J. Brosnahan, Northern California Innocence Project, Morrison & Foerster LLP and Orrick, Herrington & Sutcliffe LLP Win Release for Innocent Man, Morrison Foerster (July 2, 2013), <https://www.mofo.com/resources/press-releases/northern-california-innocence-project-morrison-foerster-llp-and-orrick-herrington-sutcliffe-llp-win-release-for-innocent-man.html>.

74. See generally JOHN HOLLWAY & RONALD M. GAUTHIER, *KILLING TIME: AN 18-YEAR ODYSSEY FROM DEATH ROW TO FREEDOM* (2010).

75. See David Corn, *Cruz the Politician Champions the Death Penalty. Cruz the Private Lawyer Did Something Else.*, MOTHER JONES (Mar. 12, 2015, 10:45 AM), <http://www.motherjones.com/politics/2015/03/ted-cruz-death-penalty-thompson-connick-supreme-court/>.

76. See HOLLWAY & GAUTHIER, *supra* note 74, at 247–48.

77. See *id.* at 488.

*B. Defense Counsel*

Death penalty proponents agree that the state must provide capital defendants with due process; of course, they may disagree on the parameters of due process.<sup>78</sup> At a minimum, they agree that the state must provide indigent defendants—a category that includes most of those who face capital charges—with competent counsel.<sup>79</sup> Mr. Marquis, for example, is on record agreeing with those propositions.<sup>80</sup>

At some point, the goal of providing due process is at odds with securing death penalties. In the past nineteen years, the nation has experienced a sharp decline in the imposition of new death penalties.<sup>81</sup> Thus, from a high of ninety-eight in 1999, imposed death sentences dropped to twenty-three in 2017.<sup>82</sup> In *End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice*, Professor Brandon Garrett identified a number of causes for this decline, including greater awareness of exonerations resulting from DNA evidence.<sup>83</sup> But Garrett credits cases where capital defendants have adequate counsel at trial.<sup>84</sup>

Case law is full of instances in which the performance of inexperienced or incompetent attorneys has been almost beyond belief.<sup>85</sup> Not surprisingly, many of their clients have ended up on death row.<sup>86</sup> Garrett documents what happens in jurisdictions where various organizations, including public defender associations or other anti-death penalty organizations, put in place proven strategies for their clients.<sup>87</sup> One minimal need is to have at least two attorneys handling a capital defense.<sup>88</sup> The first attorney focuses on the guilt phase of the trial; the second attorney prepares for the sentencing phase.<sup>89</sup> Beyond competent counsel, successful defense teams include paralegals,

---

78. See, e.g., *Scalia: Fifth Amendment 'Clearly Permits the Death Penalty'*, N.Y. TIMES (Feb. 23, 1994), <http://www.nytimes.com/1994/02/23/us/scalia-fifth-amendment-clearly-permits-the-death-penalty.html>.

79. *Id.*

80. See, e.g., *Is Poor Representation by Public Defense Attorneys a Widespread Problem in Capital Cases?*, PROCON.ORG, <https://deathpenalty.procon.org/view.answers.php?questionID=000992> (last updated Sept. 18, 2018, 10:18 AM). Although at a formal level members of the Supreme Court agree with those minimal requirements, at times, their votes in death penalty questions belie those beliefs. Thus, Justices O'Connor, Brennan, and Stevens, for example, have not overturned death sentences in cases where the offender's counsel was drunk or fell asleep through part of the case or where counsel effectively presented no defense during the sentencing hearing. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984).

81. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Dec. 14, 2018).

82. *Id.*

83. GARRETT, *supra* note 38, at 187–200.

84. *Id.*

85. *Id.* at 109–13.

86. *Id.*

87. See *id.* at 111–13.

88. See *id.*

89. See *id.*

social workers, and investigators who can assemble evidence in mitigation for the sentencing hearing.<sup>90</sup> Beyond that, a competent team requires resources to hire mental health and other forensic experts.<sup>91</sup>

Garrett cites James Holmes's trial as a case study in the team defense.<sup>92</sup> Holmes was the admitted Aurora, Colorado mass murderer who carefully planned his murders.<sup>93</sup> Despite the grisly details of the murders, including the extent to which he planned them and evidence that he booby-trapped his apartment in an effort to harm investigators, the jury refused to impose the death penalty and, instead, chose life without parole as the appropriate sentence.<sup>94</sup>

#### IV. RACIAL BIAS

Again, for the sake of argument, assume that the death penalty saves innocent lives more effectively than any alternative punishment. Assume also that governments can put in place effective protections against executing innocent defendants. Can they also assure that the death penalty will be administered in a non-racially discriminatory manner?

Few, if any, death penalty proponents would openly avow a system of executions that is racially discriminatory. Some commentators attempt to downplay the role of race in how the death penalty is administered.<sup>95</sup> But racial discrimination persists in how the system is administered.<sup>96</sup>

Some death penalty supporters point to changes that have occurred since the Baldus study, published in 1983, which demonstrated racial bias in the administration of the death penalty.<sup>97</sup> They ignore numerous studies since then.<sup>98</sup> In response to a Senate inquiry, the General Accounting Office found that 80% of death penalty studies found some racial disparity.<sup>99</sup> An American Bar Association report, published in 2013, found racial disparity in every major death penalty state.<sup>100</sup>

One would be naïve to deny that some prosecutors and jurors are consciously and unconsciously racially biased.<sup>101</sup> One could say that with confidence even before the recent resurgence of racial bigotry reflected in

---

90. *Id.* at 128–31.

91. *Id.*

92. *Id.* at 49.

93. *Id.*

94. *Id.* at 55–59.

95. *See, e.g.,* Kent Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 OHIO ST. J. CRIM. L. 147, 164–65 (2012).

96. GARRETT, *supra* note 38, at 83–84.

97. *Id.*

98. *See id.* at 84.

99. *Id.*

100. *Id.*

101. *Id.* at 85.

Donald Trump's appeal to that segment of his base.<sup>102</sup> Apart from that kind of bigotry, some Supreme Court cases tolerate or encourage racial bias in the system.<sup>103</sup>

Nominally, *Batson v. Kentucky* limited prosecutors' racially motivated use of peremptory challenges.<sup>104</sup> In that case, the Court found in favor of Batson, an African-American criminal defendant who objected to the prosecutor's use of peremptory challenges to exclude African-Americans from his jury.<sup>105</sup> Even in *Batson* and post-*Batson* cases, prosecutors who are capable of explaining non-racially motivated reasons for excluding particular jurors achieve all-white juries.<sup>106</sup> Even though he concurred in *Batson*, Justice Marshall predicted that reality.<sup>107</sup>

At times, prosecutors' comments become public.<sup>108</sup> An assistant district attorney in Philadelphia explained to new attorneys the need to question black jurors at length to increase chances of finding reasons to exclude them.<sup>109</sup> At one point, the North Carolina Prosecutors' Association handed out a one-page document that listed reasons to disqualify a prospective juror based on non-racial factors.<sup>110</sup> The document was entitled "BATSON Justifications: Articulating Juror Negatives."<sup>111</sup> A judge must be willing to tell a prosecutor that she is lying about her explanation for a judge to reject the prosecutor's explanation for the use of her peremptory challenge.<sup>112</sup> As a result, judges seldom reject the prosecutor's challenges.<sup>113</sup>

Caddo Parish, Louisiana, is one of the counties where juries historically imposed the death penalty.<sup>114</sup> Data showed that prosecutors were able to

102. See *Even Prosecutors Are Not Immune from Implicit Bias, Says ABA Panel*, A.B.A. (June 27, 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2016/september-2016/even-prosecutors-are-not-immune-from-implicit-bias--says-aba-pan/>.

103. See, e.g., *Supreme Court Declines to Address Death Penalty Racial Bias*, EQUAL JUST. INITIATIVE (Dec. 6, 2017), <https://eji.org/news/supreme-court-denies-review-christopher-floyd-death-penalty-case>.

104. *Batson v. Kentucky*, 476 U.S. 79, 100 (1986).

105. *Id.* at 83.

106. See Garrett Epps, *When Is It Constitutional to Purge Black Jurors?*, ATLANTIC (Oct. 28, 2015), <https://www.theatlantic.com/politics/archive/2015/10/race-based-strikes/412825/>.

107. Linda Greenhouse, *The Supreme Court's Gap on Race and Juries*, N.Y. TIMES (Aug. 6, 2015), [https://www.nytimes.com/2015/08/06/opinion/the-supreme-courts-gap-on-race-and-juries.html?\\_r=0&mtref](https://www.nytimes.com/2015/08/06/opinion/the-supreme-courts-gap-on-race-and-juries.html?_r=0&mtref).

108. See *id.*

109. Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), <https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors>.

110. *BATSON Justifications: Articulating Juror Negatives*, N.C. CT. SYS. OFF. INDIGENT DEF. SERVICES, <http://www.ncids.org/racebank/Peremptory/Top%20Gun%20II%20Batson%20Justifications-%20Articulating%20Juror%20Negatives.pdf> (last visited Dec. 30, 2018).

111. *Id.*

112. Greenhouse, *supra* note 107.

113. Edelman, *supra* note 109.

114. *1 County, 2 Prosecutors Responsible for 3/4 of Recent Louisiana Death Sentences, Amid Charges of Prosecutorial Misconduct*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6097> (last visited Dec. 30, 2018).

strike 48% of qualified black jurors, but only 14% of qualified white jurors.<sup>115</sup> Other southern states demonstrate similar disparity.<sup>116</sup> In some counties, like Houston County, Alabama, many of the juries that imposed the death penalty were all white.<sup>117</sup> Former prosecutors in Dallas, Texas, admitted that their office systematically excluded black jurors, which was reflected by a manual available in their office.<sup>118</sup>

The reasons for prosecutors' efforts to exclude African-American jurors do not surprise anyone familiar with the criminal justice system.<sup>119</sup> African-Americans are more likely to be sympathetic toward African-American defendants and less sympathetic to a white victim than their white counterparts.<sup>120</sup>

Policing the use of peremptory challenges may be next to impossible, short of outlawing the use of peremptory challenges.<sup>121</sup> While that idea has some support, its implementation, especially as a matter of constitutional law, seems doubtful.<sup>122</sup>

*Witherspoon v. Illinois*, a case allowing a state to disqualify prospective jurors if they have "conscientious or religious scruples" about the death penalty, also influences the racial composition of juries.<sup>123</sup> Indeed, it also tends to make the jury more guilt-prone because opponents of the death penalty may be more open-minded on the question of guilt or innocence.<sup>124</sup> *Witherspoon* indirectly results in putting more African-Americans on death row: it tends to exclude more African-American jurors because they tend to be more likely to oppose the death penalty than their white peers.<sup>125</sup>

A death penalty proponent might argue that the solution is to rethink *Witherspoon*. I would agree. But the Court has shown no willingness to

---

115. *Illegal Racial Discrimination in Jury Selection Documented in Caddo Parish, Louisiana*, EQUAL JUST. INITIATIVE (Aug. 24, 2015), <https://eji.org/news/study-documents-racially-biased-jury-selection-caddo-parish-louisiana> [hereinafter *Illegal Racial Discrimination*].

116. See Lincoln Caplan, *Racial Discrimination and Capital Punishment: The Indefensible Death Sentence of Duane Buck*, NEW YORKER (Apr. 20, 2016), <https://www.newyorker.com/news/news-desk/racial-discrimination-and-capital-punishment-the-indefensible-death-sentence-of-duane-buck>.

117. *Illegal Racial Discrimination*, *supra* note 115.

118. Sara Rimer, *In Dallas, Dismissal of Black Jurors Leads to Appeal by Death Row Inmate*, N.Y. TIMES (Feb. 13, 2002), <http://www.nytimes.com/2002/02/13/us/in-dallas-dismissal-of-black-jurors-leads-to-appeal-by-death-row-inmate.html>.

119. See Elissa Krauss & Martha Schulman, *The Myth of Black Juror Nullification: Racism Dressed Up in Jurisprudential Clothing*, 7 CORNELL J.L. & PUB. POL'Y 57, 60 (1997).

120. *Id.*

121. Morris B. Hoffman, *Unnatural Selection*, N.Y. TIMES (Mar. 7, 2006), <http://www.nytimes.com/2006/03/07/opinion/unnatural-selection.html>.

122. See, e.g., Patricia Henley, *Improving the Jury System: Peremptory Challenges*, PUB. L. RES. INST., <https://gov.uchastings.edu/public-law/docs/plri/juryper.pdf> (last visited Dec. 30, 2018).

123. *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968).

124. See, e.g., *Death Qualification*, CAP. PUNISHMENT CONTEXT, <https://capitalpunishmentincontext.org/resources/deathqualification> (last visited Dec. 30, 2018).

125. *Id.*

rethink that decision; the rightward movement of the Court does not increase the chances for the end of *Witherspoon*.<sup>126</sup>

One final point about racial disparity is worth making. The death penalty is in sharp decline around the country.<sup>127</sup> A few counties account for most of the new death penalties each year.<sup>128</sup> Many of those counties are in the South, where the history of racial discrimination is beyond dispute.<sup>129</sup> That suggests that racial bias in the imposition of the death penalty is ingrained, resistant to any reform efforts.<sup>130</sup>

#### V. CONCLUDING THOUGHTS: WHAT IS LEFT OF THE DEATH PENALTY?

I go back to my original point: Even if one assumes that the death penalty deters and does so better than alternative sentences, how can we fashion a system that avoids the other problems identified above?<sup>131</sup>

In *Furman v. Georgia*, the Court came close to outlawing the death penalty once and for all.<sup>132</sup> But the five Justices who struck down the death sentences could not agree on a rationale.<sup>133</sup> Only Justices Brennan and Marshall held that the death penalty was cruel and unusual in all instances.<sup>134</sup> Justices Douglas, Stewart, and White held that the specific death sentences were cruel and unusual because they were arbitrarily administered.<sup>135</sup> That nuance has created years of litigation about how states can administer the death penalty in order to avoid arbitrariness.<sup>136</sup>

No one thinks that the death penalty system that has evolved since *Furman* works well.<sup>137</sup> Long delays raise a host of problems, from concerns

126. See Rafi Schwartz, *The Supreme Court's Right-Wing Majority Is Back, Folks!*, SPLINTER (Apr. 10, 2017, 9:20 AM), <https://splinternews.com/the-supreme-courts-right-wing-majority-is-back-folks-1794168561>.

127. Radley Balko, *The Slow Decline of the Death Penalty*, WASH. POST (Aug. 16, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/08/16/the-slow-decline-of-the-death-penalty>.

128. *Id.*

129. *Id.*

130. *Id.*

131. See *supra* Part II (exploring whether the death penalty has a deterrent effect on crime); *supra* Part III (examining the number of innocent people on death row and whether exonerations are possible with current resources); *supra* Part IV (analyzing racial disparities and the connection to the death penalty).

132. See *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam) (holding for the death penalty by a 5–4 vote).

133. *Id.* at 240.

134. *Id.* at 375 (Burger, J., dissenting).

135. *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

136. See Franklin E. Zimring & Gordon Hawkins, *A Punishment in Search of a Crime: Standards for Capital Punishment in the Law of Criminal Homicide*, 46 MD. L. REV. 115 (1986) (discussing various death penalty cases and legislation that has developed post-*Furman*).

137. See *Furman v. Georgia: The Constitutionality of the Death Penalty*, CONST. L. REP., <https://constitutionallawreporter.com/2015/09/23/historical-furman-v-georgia-the-constitutionality-of->

about victims' families to the effect on death row inmates.<sup>138</sup> Some even argue that such delays themselves amount to cruel and unusual punishment.<sup>139</sup> That poses a challenge for proponents of the death penalty: what would a system look like that would effectively deter and protect against the many problems posed above?

Any effort at finding a single criterion to separate the worst-of-the-worst from other murderers inevitably fails.<sup>140</sup> Reliance on the premeditation formula, for example, notoriously failed to achieve that result.<sup>141</sup> Alternative systems, like the original Model Penal Code provision, which weighed aggravating and mitigating factors, produced arbitrary and discriminatory results.<sup>142</sup> Indeed, the failure of that approach led the American Law Institute to withdraw its support for the provision that many states adopted after *Furman*.<sup>143</sup> One might come up with an alternative criterion to single out the worst-of-the-worst offenders, but I have yet to see a serious proposal for what the criterion would be.

Perhaps the answer is that we have to live with some arbitrariness.<sup>144</sup> Surely, that is the case in other areas of criminal sentences.<sup>145</sup> No one pretends that states sentence similarly-situated offenders the same, within a state or across state lines.<sup>146</sup> But do we really want to admit that our society tolerates arbitrariness when the punishment is death, and especially when the arbitrariness involves racial discrimination?<sup>147</sup>

Beyond avoiding arbitrariness, how can supporters of the death penalty deter other murders while honoring other values?<sup>148</sup> They cannot.

In 2016, California voters had the chance to abolish the death penalty or to adopt a law that would speed up executions.<sup>149</sup> Despite decreased support

the-death-penalty/ (last visited Dec. 30, 2018).

138. See, e.g., Michael C. Dorf, *Are Long Death Penalty Delays Unconstitutional?*, NEWSWEEK (May 6, 2016, 9:42 AM), <http://www.newsweek.com/are-long-death-penalty-delays-unconstitutional-455693>.

139. *Id.*

140. See *Aggravating Factors for Capital Punishment by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/aggravating-factors-capital-punishment-state> (last visited Dec. 30, 2018).

141. See Zimring & Hawkins, *supra* note 136, at 117.

142. See *id.*

143. *Model Penal Code: Sentencing*, A.L.I., <https://www.ali.org/projects/show/sentencing/> (last visited Nov. 21, 2018).

144. See Corey Adwar, *Justice Scalia Says Executing the Innocent Doesn't Violate the Constitution*, BUS. INSIDER (Sept. 4, 2014, 5:00 PM), <http://www.businessinsider.com/antonin-scalia-says-executing-the-innocent-is-constitutional-2014-9>.

145. See, e.g., *Jurisdiction: Criminal*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/jurisdiction-criminal> (last visited Dec. 30, 2018).

146. See generally Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People*, 30 CARDOZO L. REV. 1 (2008).

147. Caplan, *supra* note 116.

148. See *supra* Part II (exploring whether the death penalty has a deterrent effect on crime); *supra* Section III.A (examining the number of innocent people on death row and whether exonerations are possible with current resources); *supra* Part IV (analyzing racial disparities and the connection to the death penalty).

149. *California Proposition 66, Death Penalty Procedures (2016)*, BALLOTPEdia, <https://ballotpedia>.

for the death penalty statewide, California adopted the latter choice.<sup>150</sup> To avoid obvious concerns about the fairness of the process, proponents of Proposition 66 promised that death row inmates would be provided with competent counsel.<sup>151</sup> Strategically, the proponents did not explain how California would pay for counsel.<sup>152</sup> The price tag for competent counsel—truly competent counsel—for death row inmates is staggering.<sup>153</sup> As mentioned above, some high-powered firms donate millions of dollars of pro bono time seeking post-conviction relief for those sentenced to death.<sup>154</sup> In many states, public defender associations are begging for adequate resources; at times, public defenders have admitted that they cannot adequately handle their ordinary caseload.<sup>155</sup> *Gideon v. Wainwright*'s promise of competent counsel for indigent defendants is at risk of becoming hollow.<sup>156</sup> Where do proponents of the death penalty propose to find resources to provide adequate representation for death row inmates?<sup>157</sup>

Providing adequate counsel is essential if proponents of the death penalty are committed to avoiding the execution of innocent offenders.<sup>158</sup> That is beyond debate.<sup>159</sup> But providing competent counsel undercuts the deterrent effect of the death penalty.<sup>160</sup> According to some empirical studies, delay in carrying out the death penalty reduces its deterrent effect.<sup>161</sup> Assuming that a state has sufficient, competent attorneys to represent death row inmates, they will surely insist on substantial delays between sentencing

---

org/California\_Proposition\_66\_Death\_Penalty\_Procedures\_(2016) (last visited Dec. 30, 2018).

150. *Id.*

151. *See Props 62 and 66: California Voters Should End the Death Penalty, Not Speed It Up*, L.A. TIMES (Sept. 3, 2016, 5:00 AM), <http://latimes.com/opinion/editorials/la-ed-prop-62-prop-66-20160826-snap-story.html>.

152. *Id.*

153. *See PD Editorial: Death Penalty: Yes on Prop 62, No on Prop 66*, PRESS DEMOCRAT (Sept. 15, 2016), <http://www.pressdemocrat.com/opinion/6088780-181/pd-editorial-death-penalty-yes>.

154. *See, e.g.*, Brosnahan, *supra* note 73.

155. *See* Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, GUARDIAN (June 17, 2015, 7:30 AM), <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked>.

156. Stephen B. Bright & Sia M. Sanneh, 'Gideon v. Wainwright', *Fifty Years Later*, NATION (Mar. 20, 2013), <https://www.thenation.com/article/gideon-v-wainwright-fifty-years-later/>.

157. *See New Resources: Representation and Costs in Federal Death Penalty Cases*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/new-resources-representation-and-costs-federal-death-penalty-cases> (last visited Dec. 30, 2018) (discussing the cost of death penalty cases).

158. *See id.* (explaining that defendants with high representation costs were less likely to receive the death penalty).

159. *See id.*

160. *See* Robert S. Henry, *The Death Penalty Is About Deterrence, Not Revenge*, L.A. TIMES (Nov. 7, 2016, 11:10 AM), <http://www.latimes.com/opinion/readersreact/la-ol-le-death-penalty-20161107-story.html> (stating that the death penalty is about deterrence); *see also* Dorf, *supra* note 138 (explaining that defense attorneys increase the delay between sentencing and execution); Liptak, *supra* note 14 (explaining that delay between sentencing and execution decreases the death penalty's deterrent effect).

161. *See* Liptak, *supra* note 14.



and execution.<sup>162</sup> They also reduce the chances that the death penalty will be imposed.<sup>163</sup> As data demonstrate, competent counsel often get death penalties reversed.<sup>164</sup> And of course, speeding up the death penalty process increases chances that states will execute the innocent.<sup>165</sup>

This Article does not address retributivist arguments that support the death penalty. It has proceeded on one assumption: The death penalty deters. At the end of the day, even if I assume that the death penalty deters—a questionable assumption—I fail to see how death penalty proponents can design a system that eliminates discrimination and assures against executing innocent defendants. From where I sit, designing such a system is an impossible task.

---

162. See Dorf, *supra* note 138 (explaining that defense attorneys increase the delay between sentencing and execution).

163. See *New Resources: Representation and Costs in Federal Death Penalty Cases*, *supra* note 157 (describing the correlation between high attorney costs and low death penalty sentences); see also Maurice Chammah, *The Price of Death*, SLATE (Dec. 17, 2014, 8:00 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/12/death\\_penalty\\_cost\\_prosecutors\\_in\\_rural\\_counties\\_cant\\_afford\\_to\\_bring\\_capital.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/death_penalty_cost_prosecutors_in_rural_counties_cant_afford_to_bring_capital.html) (detailing the effect cost of litigation and death penalty proceedings have had on pursuing capital charges).

164. See Fox Butterfield, *Death Sentences Being Overturned in 2 of 3 Appeals*, N.Y. TIMES (June 12, 2000), <https://archive.nytimes.com/www.nytimes.com/library/national/061200death-penalty.html> (discussing the number of errors attributed to incompetent defense lawyers).

165. See *supra* Part III (discussing the negative consequences of speeding up the death penalty process).