

## THE FUTURE OF THE DEATH PENALTY IN THE UNITED STATES

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Making predictions about the future is always a risky venture. There are, however, concrete reasons to believe that the story of the death penalty in the United States may be approaching its final chapter. In this essay I will identify strong trends that support this prognosis. I will also underscore the inherent problems with the death penalty that have placed it on a collision course with some of our country's most cherished ideals. These conflicts will likely hasten the demise of the death penalty.

### I. DECLINING USE OF THE DEATH PENALTY

The use of the death penalty in the United States has been rapidly declining since the end of the 1990s.<sup>1</sup> This is reflected not only in fewer executions occurring and fewer death sentence verdicts, but also in fewer states having death penalty statutes.<sup>2</sup> For many states, and much of the public, the death penalty has ceased to be a relevant part of the criminal justice system. Six states have recently abolished the death penalty,<sup>3</sup> and in three others, governors have declared a moratorium on executions.<sup>4</sup> Many states have not had an execution in over ten years.<sup>5</sup>

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1. TRACY L. SNELL, U.S. DEP'T OF JUST., CAPITAL PUNISHMENT, 2013—STATISTICAL TABLES, 3 (2014), available at [www.bjs.gov/content/pub/pdf/cp13st.pdf](http://www.bjs.gov/content/pub/pdf/cp13st.pdf).

2. *Id.* at 1, 3.

3. John Wagner, *Petition Drive to Halt Maryland's Death Penalty Repeal Falls Short*, WASH. POST (May 31, 2013), [http://www.washingtonpost.com/local/md-politics/petition-drive-to-halt-marylands-death-penalty-bill-falls-short/2013/05/31/1bd64bf6-ca1d-11e2-9f1a-1a7cdee20287\\_story.html](http://www.washingtonpost.com/local/md-politics/petition-drive-to-halt-marylands-death-penalty-bill-falls-short/2013/05/31/1bd64bf6-ca1d-11e2-9f1a-1a7cdee20287_story.html).

4. See Emily Greenhouse, *Boston Bombing Trial May Show Whether the Death Penalty Is Alive or Just Undead*, BLOOMBERG POLITICS (Jan. 6, 2015, 3:47 PM), <http://www.bloomberg.com/politics/articles/2015-01-06/boston-bombing-trial-may-show-whether-the-death-penalty-is-alive-or-just-undead>.

5. *Jurisdictions With No Recent Executions*, DEATH PENALTY INFO. CTR., <http://www>.

The sharp decline in death penalty use seemed very unlikely in the 1980s and 1990s when capital punishment was increased by every measure.<sup>6</sup> Executions resumed after the Supreme Court of the United States allowed the death penalty to return in 1976.<sup>7</sup> The next year, Gary Gilmore was executed by firing squad in Utah, just three months after his trial.<sup>8</sup> The number of executions then steadily rose, reaching a high of ninety-eight executions in 1999.<sup>9</sup> However, since then, executions have dropped by more than two-thirds.<sup>10</sup> There were thirty-five executions in 2014, and 80% of those were in just three states (Texas, Missouri, and Florida).<sup>11</sup>

Similarly, the number of death sentences in the United States reached a peak of 315 in 1996.<sup>12</sup> Since then, there has been a dramatic decline. By the year 2000, the number of death sentences dropped to 223;<sup>13</sup> in 2010, the number dropped further to 114;<sup>14</sup> and in 2014, there were 72—a 77% decline from the high point in 1996.<sup>15</sup> Key death penalty states such as Virginia, Tennessee, and Missouri had no death sentences in 2014.<sup>16</sup>

Even in states that regularly give the death penalty through sentencing, its use has waned. Texas sentenced 48 people to death in 1999, but for the past 7 years, it has handed down less than 12 death sentences each year.<sup>17</sup> Texas had almost 75% fewer executions in 2014 than in 2000, when it executed 40 people.<sup>18</sup>

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deathpenaltyinfo.org/jurisdictions-no-recent-executions (stating that twenty-six states have not had an execution in at least ten years).

6. See SNELL, *supra* note 1, at 2, 3.

7. See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

8. Kirk Johnson, *In Utah, Execution Evokes Eras Past*, N.Y. TIMES, June 17, 2010, at A15.

9. SNELL, *supra* note 1, at 14.

10. See *id.* (reporting thirty-nine executions in 2013).

11. *Id.* at 3.

12. *Id.* at 19.

13. *Id.*

14. *Id.*

15. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2014: YEAR END REPORT 2 (2014) [hereinafter YEAR END REPORT 2014], available at <http://www.deathpenaltyinfo.org/documents/2014YrEnd.pdf>.

16. *Death Sentences in the United States from 1977 By State and By Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited Feb. 27, 2015) [hereinafter *Death Sentences in the U.S.*].

17. *Id.*

18. *Executions in the U.S. in 2000*, DEATH PENALTY INFO. CTR., <http://www.deathpen>

North Carolina sentenced 34 people to death in 1995.<sup>19</sup> In 2014 it had 3 death sentences and no executions.<sup>20</sup> Virginia, which for many years was second to Texas in executions, rarely uses the death penalty anymore.<sup>21</sup>

The size of death row within the United States prison system has also dropped, though not as precipitously because fewer people are being removed from death row through executions. In 2000, there were 3703 people on death row.<sup>22</sup> By 2014, that number dropped to 3035, a decline of 18%.<sup>23</sup>

Public opinion has generally supported the death penalty, but that support has weakened considerably since the 1990s. According to the Gallup poll's regular tracking of this issue, death penalty support peaked at 80% in 1994.<sup>24</sup> It is now at 63%, close to its lowest level in forty years.<sup>25</sup> Moreover, when Gallup recently asked respondents to compare the sentence of life without parole ("LWOP") with the death penalty, only 50% chose the death penalty.<sup>26</sup> An *ABC/Washington Post* poll offering the same alternatives found that 52% supported LWOP and only 42% chose the death penalty.<sup>27</sup>

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altyinfo.org/executions-us-2000 (last visited Feb. 27, 2015).

19. *Death Sentences in the U.S.*, *supra* note 16.

20. Michael Hewlett, *N.C. Had Three New Death Sentences in '14, No Executions for 8th Year*, WINSTON-SALEM J. (Dec. 30, 2014, 8:19 PM), [http://www.journalnow.com/news/state\\_region/n-c-had-three-new-death-sentences-in-no-executions/article\\_059b1e8a-908b-11e4-bdfc-37e7f874edd5.html](http://www.journalnow.com/news/state_region/n-c-had-three-new-death-sentences-in-no-executions/article_059b1e8a-908b-11e4-bdfc-37e7f874edd5.html).

21. See Emily Bazelon, *Two Americas: In Much of the Country, The Death Penalty Is Disappearing. In the South, It Lives On*, SLATE (May 6, 2014, 11:49 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/05/the\\_death\\_penalty\\_is\\_disappearing\\_in\\_america\\_except\\_in\\_the\\_south.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/the_death_penalty_is_disappearing_in_america_except_in_the_south.html); SNELL, *supra* note 1, at 1; YEAR END REPORT 2014, *supra* note 15, at 2.

22. DEATH PENALTY INFO. CTR., DEATH PENALTY AT A GLANCE, *available at* <http://www.deathpenaltyinfo.org/documents/CT-DPAtAGlance.pdf> (last visited at Feb. 27).

23. CRIM. JUST. PROJECT OF THE NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A., FALL 2014, at 1 (2014), *available at* <http://www.deathpenaltyinfo.org/documents/DRUSAFall2014.pdf>.

24. *Death Penalty, Gallup Historical Trends*, GALLUP, *available at* <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Feb. 27, 2015).

25. *Id.* at 1–2.

26. *Id.* at 5.

27. Damla Ergun, *New Low in Preference for the Death Penalty*, ABC NEWS (June 5, 2014, 7:00 AM), <http://abcnews.go.com/blogs/politics/2014/06/new-low-in-preference-for-the-death-penalty/>.

### A. *Supreme Court Intervention*

The Supreme Court of the United States has also contributed to the decline in the use of the death penalty. In 2002, the Court stopped the execution of mentally retarded defendants (now referred to as defendants with “intellectual disabilities”).<sup>28</sup> In 2005, the Court barred the execution of juvenile offenders—those under the age of eighteen at the time of their crime.<sup>29</sup> And in 2008, the Court struck down the death penalty for all crimes against an individual except murder.<sup>30</sup> Justice Kennedy, writing for the majority, stated why the death penalty should be more closely scrutinized: “When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”<sup>31</sup> In the recent case of *Hall v. Florida*, striking down Florida’s rigid standards for finding intellectual disabilities, Justice Kennedy spoke even more forcefully: “The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. . . . The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.”<sup>32</sup>

Perhaps as important as these recent individual death penalty restrictions is the Court’s analysis of the Cruel and Unusual Punishments Clause in the Eighth Amendment. A majority of the Court has repeatedly said it will look at the actions of state legislatures and the degree to which a punishment is actually applied in deciding whether it fits within our standards of decency.<sup>33</sup> In the future, if the number of abolition states continues to rise and the number of executions and sentences continues to fall, the death penalty itself may be ripe for such an evaluation.

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

29. *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

30. *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008) (“As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim’s life was not taken.”).

31. *Id.* at 420.

32. 134 S. Ct. 1986, 2001 (2014).

33. *See, e.g., Kennedy*, 554 U.S. at 421.

### B. *Reasons for the Declining Use of the Death Penalty*

Various reasons have been put forward for the decline in the use of the death penalty. Probably the most significant cause for this turnaround has been the emergence of the innocence issue, strengthened by the availability of DNA testing.<sup>34</sup> Images of death row inmates walking out of prison, greeted by their attorneys and the students who helped free them, have had a profound impact on the public's perception of the death penalty. The American people now know that the problem of wrongful convictions is much more serious than previously thought. Since 1973, 150 people sentenced to death in twenty-six states have been exonerated and freed after they were acquitted, granted a full pardon, or all charges were dismissed, including seven in 2014 alone.<sup>35</sup>

Other probable reasons for the decline in the use of the death penalty are the emergence of the alternative punishment of LWOP and the drop in the number of murders nationwide.<sup>36</sup> LWOP, which is relatively new to our criminal justice system, provides assurance to juries and victims' family members that perpetrators will not be set free, but avoids the risk of executing the innocent.<sup>37</sup> The number of death sentences in Texas has markedly declined since 2005 when it became the last of the major death penalty states to adopt LWOP.<sup>38</sup> Additionally, as the death penalty has become more expensive, states have noticed

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34. See generally FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* 3–4, 16–22 (2008) (discussing the wrongful conviction of defendants sentenced to death row).

35. See *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110> (last visited Feb. 27, 2015) [hereinafter *Freed from Death Row*].

36. See *Murder Rates Nationally and by State*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/murder-rates-nationally-and-state#nat1970> (last visited Feb. 27, 2015) (showing statistics indicating a declining murder rate in the United States). See generally *Life Without Parole*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/life-without-parole> (last visited Feb. 27, 2015) (providing resources that explain the concept of LWOP and how it is a viable alternative to the death penalty).

37. See Marc Mauer et al., *The Meaning of "Life": Long Prison Sentences in Context*, THE SENTENCING PROJECT 5 (2004), available at [http://www.sentencingproject.org/doc/publications/inc\\_meaningoflife.pdf](http://www.sentencingproject.org/doc/publications/inc_meaningoflife.pdf) (explaining that LWOP has always been available, but it has been used increasingly frequently in recent decades).

38. See *Death Sentences in the U.S.*, supra note 16; *Year That States Adopted Life Without Parole (LWOP) Sentencing*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing> (last visited Feb. 27, 2015).

that an LWOP sentence is actually cheaper than the death penalty when all the costs of each system are taken into account.<sup>39</sup>

## II. CONFLICT WITH FUNDAMENTAL PRINCIPLES

In addition to the declining use, another reason why the death penalty is unlikely to continue for long in the United States is that it never fit well within the ideals and principles fundamental to our system of democracy and liberty. This is not due to the failings within the system that could theoretically be corrected, such as the racial disparities on death row<sup>40</sup> or the state's withholding of exculpatory information.<sup>41</sup> Instead, the deeper problem for the death penalty is that it directly clashes with some of our longstanding principles that embody who we are as a nation. The fact that the death penalty has been practiced for so long in the United States does not mean it conforms to our ideals. The country's experience with issues such as slavery, segregation, and women's rights indicates that recognition of fundamental flaws and contradictions in society often takes a long time. This section discusses how the death penalty conflicts with these core principles.

### A. *Unalienable Right to Life*

In the United States, every life has unique worth. If an explosion traps miners, we wait until every last one is accounted for, we learn the names of those whose lives hang in the balance, and we use whatever resources necessary to try to save them.<sup>42</sup>

In past wars, some soldiers died but their bodies were never recovered. The Tomb of the Unknown Soldier became a way of rec-

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39. See generally RICHARD C. DIETER, SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS, DEATH PENALTY INFO. CTR. (2009), available at <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf> (detailing the costs incurred when a prisoner is sentenced to execution).

40. Cynthia Jones, *Confronting Race in the Criminal Justice System: The ABA's Racial Justice Improvement Project*, 27 CRIM. JUST., Summer 2012, at 12.

41. See, e.g., *State v. Johnston*, 529 N.E.2d 898, 913 (Ohio 1988) (dropping charges against Johnston because the state withheld exculpatory evidence); *State v. Munson*, 886 P.2d 999, 1004 (Okla. 1994) (affirming the trial court's order for a new trial due to "the wealth of exculpatory evidence suppressed by the State").

42. See, e.g., *Mine Accidents in the United States*, CNN (Apr. 6, 2010, 2:29 PM), <http://www.cnn.com/2010/US/04/06/mine.accidents.timeline/>.

ognizing the inability to fully honor each person who served.<sup>43</sup> The Vietnam Memorial broke new ground in the way it recognized those who died in service to the country. The name of each person who died was inscribed on two polished granite walls for everyone to see; over 50,000 names were carved into the slabs of stone.<sup>44</sup> Each name can be found and remembered. Occasionally, when a deceased soldier is identified, a new name is added to the wall, since such recognition has become very important to all concerned.<sup>45</sup>

Of course, it is not just the deceased whose lives hold value. We have gradually concluded that each person is entitled to food, shelter, and health care.<sup>46</sup> We do not subscribe to the contrary philosophy that lives have worth only to the extent that they serve the state. The country is important, but so is the individual, and we recognize that worth with individual rights of liberty, freedom of speech and religion, and due process under law.<sup>47</sup>

This respect for each individual life has no single root in our system. Its importance is clear from the seminal words of the Declaration of Independence: “[We] are endowed by [our] Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>48</sup> Justice Brennan echoed this principle in *Furman v. Georgia*, noting that the death penalty is unlike any other punishment because of the value we place on life: “Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction. This natural human feeling appears all about us.”<sup>49</sup>

The right to life does not mean that the taking of life is forbidden under all circumstances. We have always recognized the

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43. See Elizabeth M. Collins, *The Tomb of the Unknowns*, U.S. ARMY (Apr. 26, 2010), <http://www.army.mil/article/38013/> (explaining the history of the Tomb of the Unknown Soldier and its significance).

44. See Pamela Roberts, *Vietnam Veterans Memorial*, in 2 MACMILLAN ENCYCLOPEDIA OF DEATH AND DYING 909, 909–11 (Robert Kastenbaum ed., 2003).

45. Mike Ahlers, *Six New Names Added to Vietnam Veterans Memorial*, CNN (May 2, 2001), <http://edition.cnn.com/2001/US/05/02/vietnam.wall.names/index.html>.

46. Cf. Universal Declaration of Human Rights Res. 217 (111) A, U.N. Doc. A/RES/217(111) art. 25 (Dec. 10, 1948).

47. U.S. CONST. amends. I, V, XIV, § 1.

48. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

49. 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

right to self-defense, and have empowered law enforcement and soldiers to exercise that right on our behalf whenever individual lives or our collective lives as a country are in imminent danger.<sup>50</sup> What it does mean is that the taking of life requires a compelling necessity for which no alternative exists.

The death penalty—which involves the calculated taking of life long after a particular offense, of a person in secure custody who is no longer an imminent danger to society—has long come under criticism in this country. Many of this country’s founders either opposed the death penalty entirely or expressed strong reservations of allowing the government to exercise such power.<sup>51</sup> James Madison, the father of the Constitution, was one of several founders who sought to limit the death penalty, saying, “I should not regret a fair and full trial of the entire abolition of capital punishments by any State willing to make it.”<sup>52</sup> Dr. Benjamin Rush, one of the signers of the Declaration of Independence, went further: “[T]he punishment of death has been proved to be contrary to the order and happiness of society.”<sup>53</sup>

Today, it would be nearly impossible to make the case that the death penalty is absolutely necessary. The main justifications for capital punishment—deterrence and retribution<sup>54</sup>—are empty words with a punishment applied so rarely, and is so dependent on arbitrary factors such as geography, race, and economic status.

In 2014, there were thirty-five executions in the entire country.<sup>55</sup> The United States averages approximately 14,000 murders per year.<sup>56</sup> If the death penalty were really necessary to deter

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50. See, e.g., JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* 390–93 (2014) (discussing the Founders’ beliefs in an inherent right to self-defense as encapsulated by the Second Amendment).

51. See generally *id.* at 16–19 (examining early Founders’ opinions on the death penalty).

52. *Id.* at 208.

53. *Id.* at 43; Benjamin Rush, *Signers of the Declaration of Independence*, USHISTORY.ORG, <http://www.ushistory.org/declaration/signers/rush.htm> (last visited Feb. 27, 2015).

54. See Christopher Adams Thorn, *Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment*, 57 S. CAL. L. REV. 199, 200 (1983).

55. *Execution List 2014*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2014> (last visited Feb. 27, 2015).

56. FBI, UNIFORM CRIME REPORTS: CRIME TRENDS IN THE UNITED STATES 2013 tbl.12 (2013), available at [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s/2013-crime-trends-in-the-u.s/2013-crime-trends-in-the-u.s](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s/2013/crime-trends-in-the-u.s/2013-crime-trends-in-the-u.s)



others from committing murder, we would be executing hundreds, if not thousands, of offenders, and all states would employ this tool to protect lives.

If the death penalty was necessary to satisfy the emotional and sacred debt created by those who commit murder, the thousands of victims' families whose cases did *not* result in a death sentence would be demanding equal retribution for their loved ones. The death penalty creates a jarring dichotomy that elevates some lost lives over others because death is imposed as a punishment. The vast remainder are relegated to second class status.

The death penalty in America is not necessary; in fact, it is not even relevant as a tool of the criminal justice system. The death penalty is largely driven by a relatively small number of district attorneys who commonly seek it and campaign on that record, and by a few other officials who try to distinguish themselves from their opponents by aligning with the death penalty.<sup>57</sup> The death penalty may occasionally serve political ends, but it is not essential to the protection of lives.

A second way in which the death penalty is in conflict with the value of life is that it requires the sacrifice of some innocent lives as an inevitable part of the process. Every human endeavor, including capital punishment, is fallible—mistakes will surely happen. As indicated above, exonerations from death row have occurred with disturbing regularity since the death penalty was reinstated.<sup>58</sup> It would be foolish to believe that we find all such mistakes.

Almost all exonerations from death row begin with ordinary errors that happen regularly in our criminal justice system: mistaken eyewitness identification, evidence withheld by the prosecution, ineffective representation, coerced confessions, and racial

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the-u.s.-2013/tables/table-12/table\_12\_crime\_trends\_by\_population\_group\_2012-2013.xls (last visited Feb. 27, 2015).

57. See generally RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL iii–iv (2013), available at <http://deathpenaltyinfo.org/twopercent>.

58. *Supra* notes 34–35 and accompanying text.

bias.<sup>59</sup> The way these mistakes are found and the reversals achieved, however, are often extraordinary.

In the vast majority of these cases, the defendants were acquitted of all charges at a retrial, their death sentences were reduced or the prosecution dropped all charges.<sup>60</sup> For every ten people who have been executed since 1976, there has been one person slated for execution who was found innocent and freed from death row.<sup>61</sup> In 2014, the comparable numbers are one exoneration from death row for every five executions.<sup>62</sup> That represents a substantial risk when human lives are at stake. Moreover, this problem of innocence has not been restricted to the early years of the death penalty; most of the 150 people freed have been exonerated since 1995.<sup>63</sup>

Rather than proving that the system works, these reversals shake the public's confidence in the death penalty. The cases where people were freed as the result of post-conviction DNA testing present a particularly stark reminder of the system's fallibility. In many of the cases where DNA evidence led to an exoneration, the justice system failed in all stages. Initially, a unanimous jury convicted each defendant and sentenced him to death, followed by years of affirmations of this ruling at numerous levels of appeals. If DNA testing technology had not emerged until years later, many of those freed may have been executed. Indeed, many people were executed before DNA testing evidence became available, and some were likely innocent.

Many of the non-DNA exonerations occurred because of fortuitous circumstances outside of the regular justice system. In some

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59. See Amy Sherman, *Florida ACLU Says State Has 'the Most Errors and Exonerations from Death Row'*, POLITIFACT.COM (June 2, 2014, 11:24 AM), <http://www.politifact.com/florida/statements/2014/jun/02/aclu-florida/florida-aclu-says-state-has-most-errors-and-exoner/>; *DNA Exonerations Nationwide*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/DNA\\_Exonerations\\_Nationwide.php](http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php) (last visited Feb. 27, 2015).

60. JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-95* ii (2000), available at <http://www2.law.columbia.edu/instructionalservices/liebman/>.

61. See *Executions by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> (last updated Jan. 14, 2015) (listing 1395 executions since 1976); *Freed from Death Row*, *supra* note 35 (listing 143 exonerations since 1976).

62. See *Executions by Year*, *supra* note 61 (noting thirty-five executions in 2014); *Freed from Death Row*, *supra* note 35 (noting seven exonerations in 2014).

63. See *Freed from Death Row*, *supra* note 35 (illustrating 63% of exonerations occurred since 1995).

instances, journalism students discovered new evidence leading to inmates being freed.<sup>64</sup> The media played an important role in some of the cases; in others, volunteer lawyers from major law firms re-investigated the evidence and reviewed trial records.<sup>65</sup> These individuals donated thousands of free hours resulting in the exoneration of death row inmates.<sup>66</sup> Unfortunately, that kind of attention, and the millions of dollars for appeals that accompany it, are only given to a few cases. Many people were executed when there was considerable evidence they were innocent, but there was neither the time nor the resources to thoroughly re-examine their cases.<sup>67</sup>

Sometimes a witness who lied at trial has a twinge of conscience and the case against a defendant falls apart. The problem, however, is that some wrongful convictions will never be assigned to a prestigious law firm or journalism class, will not have testable DNA evidence, or will not have a witness with a guilty conscience. The mistakes will remain hidden until after the execution or may never be discovered.

Providing the death penalty as a sentencing option increases the likelihood that some innocent lives will be taken. While that is true of many human endeavors, there is no necessity for the death penalty—it serves only a symbolic or political purpose. Alternatives are not only available, they are used in over 99% of the murder cases in the United States.<sup>68</sup> This is an inherent problem, and it stands in contradiction to our recognition of the unalienable right to life.

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64. See, e.g., DAVID PROTESS & ROB WARDEN, A PROMISE OF JUSTICE 122, 139–41 (1998) (showing that an assignment in an investigative journalism class allowed students to stumble upon additional evidence about four suspects).

65. Douglas S. Malan, *Southern Justice: Volunteer Lawyer Works on Georgia Death Row Case*, 34 CONN. L. TRIB., no. 34, at 1 (2008); *Innocence: The Role of Journalists in Freeing an Innocent Man*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-role-journalists-freeing-innocent-man> (last visited Feb. 27, 2015).

66. Malan, *supra* note 65.

67. See *generally Executed but Possibly Innocent*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executed-possibly-innocent> (last visited Feb. 27, 2015) (describing cases of individuals who were executed despite strong evidence that they may have been innocent).

68. ALEX MIKULICH & SOPHIE CULL, JESUIT SOC. RES. INST., DIMINISHING ALL OF US: THE DEATH PENALTY IN LOUISIANA 2 (2012).

B. *Better That Ten Guilty Persons Escape Than That One Innocent Suffer*

The principle that “it is better that ten guilty persons escape, than that one innocent suffer” did not originate in United States law, but rather from the English jurist, William Blackstone.<sup>69</sup> This principle has biblical roots and was adopted by such United States founders as Benjamin Franklin as a fundamental precept of American law.<sup>70</sup> Although the words refer to innocence, the underlying issue is really due process. The arduous task of providing adequate representation, trial by jury, and subsequent appeals mean that some guilty people will escape punishment—a price we are willing to pay. Due process is considered so important in American law that it is mentioned in two amendments to the Constitution: the Fifth and the Fourteenth.<sup>71</sup> Due process “includes the rights to fundamental fairness, . . . [gives defendants the right] to be meaningfully heard in court, to have a fair hearing or trial and . . . [protection] against the arbitrary exercise of state power.”<sup>72</sup>

The death penalty is the epitome of a prolonged and unpredictable process. It currently takes an average of more than fifteen years between sentencing someone to death and his execution.<sup>73</sup> According to one study of capital appeals, two-thirds of the cases are reversed due to serious error.<sup>74</sup> Frequently, when these cases are retried, they result in an outcome other than death.<sup>75</sup>

The Supreme Court has held that a death sentence cannot be a mandatory punishment for any crime.<sup>76</sup> There has to be individual consideration of the defendant and all the factors that might mitigate against a death sentence. The state cannot limit the kinds of evidence that can be presented ahead of time. The Supreme Court has further held that defense attorneys must con-

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69. 4 WILLIAM BLACKSTONE, COMMENTARIES \*352.

70. See *Bessler*, *supra* note 29, at 45.

71. U.S. CONST. amends. V, XIV, § 1.

72. Ramanujan Nadadur, Note, *Beyond “Crimigration” and the Civil-Criminal Dichotomy—Applying Mathews v. Eldridge in the Immigration Context*, 16 YALE HUM. RTS. & DEV. L.J. 141, 149 (2013).

73. SNELL, *supra* note 1, at 14.

74. See LIEBMAN ET AL., *supra* note 60, at i–ii.

75. See *id.* at ii.

76. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

duct an investigation into all aspects of their client's life, even if they later choose not to present such facts to the jury.<sup>77</sup> Because of this immense task, one lawyer is insufficient to handle all aspects of a capital case simultaneously—it takes a defense *team* to represent a defendant in a capital case. The prosecution must employ similar, if not greater, resources to meet its burden of proof and to ensure an innocent man is not wrongfully convicted.

The death penalty could become more efficient by doing away with the guarantee of due process, but that would be an abrogation of our fundamental principles. The irresolvable tension between the need for finality and protection against fatal error means that the death penalty does not fit well within our constitutional framework. Even supporters of the death penalty are not satisfied with the costly process that is used so rarely and unpredictably—the farthest thing from a swift and sure punishment.<sup>78</sup>

The other conflict between the death penalty and due process is that once a person is executed, the courts are no longer available to him. There are no “endless appeals”<sup>79</sup> (though many die on death row of natural causes before they are ever executed).<sup>80</sup> Once an execution date has been set, the courts and state resist new evidence or new lines of appeal.<sup>81</sup> Inevitably, such a cutoff is arbitrary. Science, with its new insights into earlier evidence, does not stop evolving. Forensic techniques soon to be discovered may reveal new facts about a crime, just as the advent of DNA testing did in the 1990s.<sup>82</sup>

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77. *Wiggins v. Smith*, 539 U.S. 510, 524, 533–36 (2003).

78. See, e.g., *Pennsylvania Death Penalty Costs Estimated at \$350 Million*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/5988> (last visited Feb. 27, 2015).

79. Richard Dieter, Remarks at the International Leadership Conference on Human Rights and the Death Penalty (Dec. 6–7, 2005), available at <http://www.deathpenaltyinfo.org/international-leadership-conference-human-rights-and-death-penalty>.

80. See Editorial, *Death Row Futility*, L.A. TIMES, Feb. 23, 2009, at A16 (“Today, a death row inmate is more likely to die of old age than to be put to death by the state.”).

81. See Steve Mills, *Questions of Innocence: Legal Roadblocks Thwart New Evidence on Appeal*, CHI. TRIB., Dec. 18, 2000, at 1 (describing the various ways in which new evidence may not come to light to exonerate condemned convicts); see e.g. AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE VIRGINIA DEATH PENALTY ASSESSMENT REPORT viii (2013) (detailing how those under a death sentence are afforded less due process rights after a conviction).

82. See Lisa Calandro et al., *Evolution of DNA Evidence for Crime Solving—A Judicial and Legislative History*, FORENSIC MAG. (Jan. 6, 2005, 3:00 AM), <http://www.forensicmag.com/articles/2005/01/evolution-dna-evidence-crime-solving-judicial-and-legislative-his>

Similarly, witnesses who testified falsely at trial may decide to come forward ten, twenty, or even thirty years later.<sup>83</sup> Conscience does not follow a calendar. Even the real perpetrator might confess at some unpredictable time and claim responsibility for a crime that put someone else on death row. There is no absolute way to set the time for closing a case or to decide there is no longer a possibility the defendant is innocent.

The Supreme Court has struggled with this issue but has never clearly declared that evidence of potential innocence in the appeals process raises a federal question requiring review. In the case of Leonel Herrera in Texas, the Court simply concluded that they did not have to resolve this issue because his evidence of innocence was too weak.<sup>84</sup> In the more recent case of Troy Davis in Georgia, the Court ordered a federal district judge to conduct an evidentiary hearing regarding testimony that could not have been obtained by the time of Davis's trial, but it still did not resolve the underlying issue of how federal courts should adjust to the reality that new evidence is often more probative than the evidence presented at trial.<sup>85</sup> Both Herrera and Davis were ultimately executed while steadfastly maintaining their innocence.<sup>86</sup>

The problem is not necessarily that the Court has turned a deaf ear to entreaties of innocence. Rather, the problem is that there is no ready solution other than to accept that some innocent people will be executed as the price of having the death penalty. States have a right to carry out their judgments, but once they do, the doors of due process are closed forever. Though most death row inmates are probably guilty, it is better that ten are commuted to life than one innocent person be executed.

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tory; Walther Parson et al., *The Future of Forensics Has Arrived: The Application of Next Generation Sequencing*, FORENSIC MAG. (Apr. 12, 2013, 6:48 AM), <http://www.forensicmag.com/articles/2013/04/future-forensics-has-arrived-application-next-generation-sequencing>.

83. See, e.g., Kim Palmer, *Ohio Man Exonerated After 39 Years in Prison, to Be Released Friday*, REUTERS (Nov. 19, 2014, 5:40 PM), <http://www.reuters.com/article/2014/11/19/us-usa-ohio-exoneration-idUSKCN0J32IL20141119>.

84. *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

85. Order, *In re Davis*, 557 U.S. 952 (2009).

86. See Colleen Curry & Michael S. James, *Troy Davis Executed After Stay Denied by Supreme Court*, ABC NEWS (Sept 21, 2011), <http://abcnews.go.com/US/troy-davis-executed-stay-denied-supreme-court/story?id=14571862>; Leonel Herrera, *Bluhm Legal Clinic Center on Wrongful Convictions*, NW. L., <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/issues/deathpenalty/wrongfulexecutions/leonel-herrera.html> (last visited Feb. 27, 2015).

### C. *Equal Justice Under the Law*

A final way in which the death penalty clashes with our fundamental principles is its failure to provide equal justice under the law. Generally, achieving this goal has been a constant struggle.

The death penalty, in particular, has never been a model of equal justice. Differences of geography, finances, race, and politics have played a major role in who is executed and who is spared.<sup>87</sup> An impressive collection of studies have concluded that a defendant is far more likely to receive the death penalty if the victim of his crime was caucasian rather than a minority.<sup>88</sup> This, of course, is not a matter of law, but of practice. It is a fault in the system, which theoretically could be remedied, though the Supreme Court declined to do so in the major case raising this issue.<sup>89</sup>

It is unlikely that racial prejudice will be eliminated from the key decisions involved in seeking the death penalty, jury selection in capital cases, or the ultimate decision about who should be executed. Inequality is a problem in many areas of society, and at best, we can try to guard against it. However, there are some aspects of the death penalty in which bias is inevitable and completely within the law.

Although serving on a jury is one of the most conspicuous privileges and responsibilities we have as citizens, in death penalty cases this right is largely dependent on the answer to one political question that correlates strongly with race.<sup>90</sup> We would never tolerate making a person's right to vote depend on having "correct" political views, but all persons considered for jury service in

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87. See *Death Penalty 101*, ACLU (Oct. 3, 2011), <https://www.aclu.org/capital-punishment/death-penalty-101>.

88. See generally *Research on the Death Penalty; Race*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/research-death-penalty#Race> (last visited Feb. 27, 2015) (providing links to numerous studies indicating a defendant is more likely to receive the death penalty if he killed a white person).

89. See *McCleskey v. Kemp*, 481 U.S. 279, 286, 313 (1987).

90. Joseph Carroll, *Who Supports the Death Penalty?*, GALLUP (Nov. 16, 2004), <http://www.gallup.com/poll/14050/who-supports-death-penalty.aspx> (discussing results of a 2004 Gallup poll on the death penalty and finding that "[t]here are substantial differences between whites and blacks in their support for capital punishment. The data show that 71% of whites support the death penalty, compared with only 44% of blacks").

a capital case will be asked about their views on capital punishment.<sup>91</sup> If they oppose the death penalty—a view commonly held by tens of millions of Americans—they will be struck from capital jury.<sup>92</sup> These strikes do not stem from the opportunity the government and defense attorneys have to eliminate a limited number of prospective jurors about whom they have qualms.<sup>93</sup> Every potential juror who opposes the death penalty will be struck for cause by the judge.<sup>94</sup> If enough jurors are not left in the pool for the trial, a new pool will be called, subject to the same question.<sup>95</sup>

It may make legal sense that those who cannot impose a death sentence should not be allowed to decide the sentence in a capital case. No bias is intended. In practice, however, the people who will be struck will more likely be people of color, women, Democrats, and Catholics or members of other religious faiths that oppose the death penalty.<sup>96</sup> Not every black person is against the death penalty, nor is every woman or Democrat. But statistically, those groups will more likely answer the death penalty question in a way that eliminates them from service, compared to their counterparts.<sup>97</sup> The resultant jury will have proportionately higher numbers of whites, males, Republicans, and others who repre-

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91. See Justice John Paul Stevens, Assoc. Just. of the Supreme Court of the U.S., Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), [http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp\\_08-06-05](http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-06-05).

92. See *Uttecht v. Brown*, 551 U.S. 1, 35 (2007) (Stevens, J., dissenting) (“Millions of Americans oppose the death penalty. . . . Moreover, an individual who maintains such a position . . . may not be challenged for cause based on his views about capital punishment. Today the Court ignores these well-established principles, choosing instead to defer blindly to a state court’s erroneous characterization of a juror’s *voir dire* testimony.”) (citations and internal quotation marks omitted).

93. See *id.*; *Supreme Court Decision Allows Broader Exclusion of Jurors, but May Further Isolate Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/2122> (last visited Feb. 27, 2015) (“In a 5-4 decision . . . the Supreme Court held that the ruling of the trial judge excluding a juror who had expressed only doubts, but not uniform opposition, to imposing the death penalty, should be given deference and upheld.”) (emphasis added).

94. See *Uttecht*, 551 U.S. at 43–44 (Stevens, J., dissenting); see also *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (“[The] standard is whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”) (citing *Adams v. Texas*, 448 U.S. 38 (1980)).

95. *Id.*

96. See Carroll *supra* note 90; Frank Newport, *In U.S., Support for Death Penalty Falls to 39-Year Low: Fifty-Two Percent Say the Death Penalty Is Applied Fairly*, GALLUP (Oct. 13, 2011), <http://www.gallup.com/poll/150089/Support-Death-Penalty-Falls-Year-Low.aspx>.

97. See Carroll, *supra* note 90; Newport, *supra* note 96.



sent a more conservative segment of society, and will not only be more likely to find the defendant guilty than a randomly selected jury, it will also will be far more likely to sentence the defendant to death.<sup>98</sup>

This dilemma also has no easy solution. Again the Supreme Court looked at this question, recognized the problem it presented, but elected not to take remedial action.<sup>99</sup> As it is inevitable that some innocent people will be executed in a fallible death penalty system, and that the appellate process must be cut off so that an execution can be carried out, juries in capital cases will not be juries of one's peers.

In addition to affecting the defendant's right to a fair trial and sentencing, the process of "death qualification" in jury selection also excludes certain people from exercising their citizenship right to be on a jury.<sup>100</sup> Prospective and willing jurors who are not allowed to serve because of their deeply held moral beliefs are justified in feeling excluded or singled out. They cannot help but see that others like them are left out, while those who conform to the government's position and support the death penalty are welcomed.<sup>101</sup>

## CONCLUSION

The use of the death penalty is declining around the world.<sup>102</sup> Fewer countries are allowing executions than in years past, and votes in the United Nations increasingly call for a worldwide moratorium on executions.<sup>103</sup> The stream of human rights has

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98. See, e.g., Craig Haney & Deana Dorman Logan, *Broken Promise: The Supreme Court's Response to Social Science Research on Capital Punishment*, 50 J. SOC. ISSUES 75, 91 (1994).

99. See *Lockhart v. McCree*, 476 U.S. 162, 183–84 (1986).

100. *Citizenship Rights and Responsibilities*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/citizenship/learners/citizenship-rights-and-responsibilities> (last visited Feb. 27, 2015).

101. See Dax-Devlon Ross, *Bias in the Box*, 90.4 VA. Q. REV., Fall 2014, at 179, 187, available at <http://www.vqronline.org/reporting-articles/2014/10/bias-box>; Clay S. Conrad, *Are You "Death Qualified"?*, *Commentary*, CATO INST. (Aug. 10, 2000), <http://www.cato.org/publications/commentary/are-you-death-qualified>.

102. Saeed Kamali Dehghan, *Amnesty International Report Claims Death Penalty Is Declining Worldwide*, GUARDIAN (Apr. 10, 2013, 3:42 AM), <http://www.theguardian.com/world/2013/apr/10/death-penalty-declining-worldwide-amnesty>.

103. Samuel Oakford, *UN Vote Against Death Penalty Highlights Global Abolitionist*

many tributaries and ending the death penalty is becoming more of a consensus in many parts of the world.<sup>104</sup> The United States has positioned itself outside of this stream despite external entreaties from our allies and internal calls from some of our most respected leaders.<sup>105</sup> This is not just a question of different political philosophies. Even from a pragmatic viewpoint, the experiment of the death penalty appears to have run its course and is failing even for those who support it.

Beyond the mistakes and the significant costs, the death penalty contradicts fundamental American values. The death penalty does not fit well within the ideals most important to our country's vision. Unlawful actions by the state that interfere with a defendant's rights should not be tolerated. But in the areas outlined above, the problems are sanctioned within the law and are bound to continue.

Reverence for individual life, strict adherence to due process, and equality under the law are too important to sacrifice just so thirty-five people can be executed in a handful of states in the course of a year. Other contradictions with our ideals took decades and even centuries to recognize and correct. The death penalty is now facing the same scrutiny.

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*Trend—and Leaves the US Stranded*, VICE NEWS (Dec. 19, 2014, 7:15 AM), <https://news.vice.com/article/un-vote-against-death-penalty-highlights-global-abolitionist-trend-and-leaves-the-us-stranded>.

104. *See id.*

105. *See id.*