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Capital Punishment: The Great American Paradox

A. M. Stroud III

I. INTRODUCTION

On June 6, 1944, American forces landed on Omaha and Utah beaches as part of the Normandy invasion that had as its objective the liberation of occupied Europe from the tyranny of the Nazi Occupation.¹ This was America at its finest hour. This was not a professional army, but an army consisting of young men who had been drafted or had enlisted after Pearl Harbor.² The young men came from all walks of life: farmers, teachers, family members, mechanics, truck drivers and the rest, with the sole objective to make the world safe again from the atrocities of the Axis Powers. They were part of America's Greatest Generation.³ Ten months later the war was over; Germany had been defeated.⁴ Europe owed America a debt of gratitude. American blood had been spilled to drive the Hun into

I would like to acknowledge and thank Brain Gallini, Associate Dean and Professor of Law at the University of Arkansas for extending the invitation for me to be the keynote speaker at the 2016 symposium on the death penalty. I also am appreciative of the Arkansas Law Review offering me the opportunity to publish an article in connection with my address. Additionally, I would not have been able to complete this publication without the valuable assistance of Elise Holman, Arkansas Law Review Symposium Editor, Blake Z. Brizzolara, Articles Editor, Arkansas Law Review and other members of the Arkansas Law Review that contributed to the publication of this article. Also, my paralegal, Lindsey Garcie, and Vicki Warner, my former law partner contributed numerous untold hours in review of, and revising the numerous drafts of this Article, for which I am most grateful. I thank my wife, Joan, for putting up with me during my work on this Article, for I readily admit that I can be very difficult to be around when I am concentrating on a task such as authoring this Article. Moreover, her insight was most valuable and her encouragement always there for me. -A.M. Stroud, III

1. Mildred Berman, *D-Day and Geography*, 84 GEOGRAPHICAL REV. 469, 469 (1994).

2. TOM BROKAW, *THE GREATEST GENERATION* xxvi-xxvii (1998).

3. The "Greatest Generation" was a term made popular by Tom Brokaw's 1998 book. *Id.* at xxx.

4. Berman, *supra* note 1.

submission. This author has been to the American Cemetery on the cliffs of Normandy overlooking the English Channel. There, in neat rows, are hundreds of small crosses and Stars of David marking the graves of those who died in this cause for freedom. It was a very emotional experience. Indeed, if one goes there and does not shed a tear of emotion, that person should check his pulse for signs of life.

On June 16, 1944, ten days after the invasion, as American troops were slowly advancing along the hedge rows of Normandy,⁵ fourteen-year-old George Stinney, Jr. was executed for the killing of two white girls.⁶ He was tried in the Jim Crow South.⁷ After a two-hour trial and a ten-minute deliberation, the young boy was convicted of murder by an all-white jury and sentenced to die by electrocution.⁸ His lawyer elected not to appeal.⁹ The main evidence against Stinney was his alleged confession that was reportedly made without the presence of his lawyer or parents.¹⁰ There was no written record of the confession.¹¹

Many young Americans died on June 16, 1944, in defense of the ideals for which this country supposedly stands. On the same date, as these unsung heroes were battling the Nazi war machine, Stinney, who was barely five feet tall and weighed just more than 90 pounds, was led to the electric chair.¹² “The electric chair’s straps were too big for his frail body. Newspapers at the time reported he had to sit on books to reach the headpiece. And when the switch was flipped, the

5. Arthur Davies, *Geographical Factors in the Invasion and Battle of Normandy*, 36 GEOGRAPHICAL REV. 613, 627 (1946).

6. Lindsey Bever, *It Took 10 Minutes to Convict 14-Year-Old George Stinney Jr. It Took 70 Years After His Execution to Exonerate Him*, WASH. POST (Dec. 18, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/12/18/the-rush-job-conviction-of-14-year-old-george-stinney-exonerated-70-years-after-execution/?utm_term=.610cccef4126 [https://perma.cc/V59V-7ZXZ]. The description of his execution came from the text of this Article.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Bever, *supra* note 6.

12. *Id.*

convulsions knocked down the large mask, exposing his tearful face to the crowd.”¹³

It would take seven decades after this brutal execution to exonerate him.¹⁴ For George Stinney, the American ideal had no meaning. He died solely as a result of the color of his skin and the prejudices of the time. Unspeakable horrors occurred on the battle fields of France and in the court house in Alcolu, South Carolina on that date in June 1944, only ten days after the invasion. This is but one example of the great American Paradox. We kill in the name of justice, while portraying ourselves as a leader of the civilized world in the effort to protect basic human rights. It is time for this masquerade to stop. We should finally accept what most of the civilized world has long ago acknowledged: capital punishment is an anathema to any country that purports to call itself civilized. It is time to separate ourselves from the totalitarian regimes of our world. We should not walk in lockstep with those nations who view executions as justice.

II. 156 INNOCENTS AND COUNTING

Since the reinstatement of capital punishment in 1974, 157 innocents have walked off of death row.¹⁵ This author was the prosecutor of one of those innocents, Glenn Ford.¹⁶ In a harbinger of the final resolution of the case, Justice Calogero dissented from the affirmation of the conviction in the original appeal to the Louisiana Supreme Court stating, “I am not convinced that a rational trier of fact could have found the essential elements of the crime of first degree murder beyond a reasonable doubt, especially considering that the case is based upon circumstantial evidence every reasonable hypothesis of innocence must be excluded.”¹⁷ It would take thirty years for

13. *Id.*

14. Bever, *supra* note 6.

15. *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> [<https://perma.cc/W5PV-6SMG>].

16. *See* State v. Ford, 489 So. 2d 1250, 1252 (La. 1986).

17. *Id.* at 1268 (Calogero, J., dissenting) (citations omitted).

Mr. Ford to leave the horrors of death row at Angola State Prison.¹⁸

The exoneration of innocents who spent years living in the horrid conditions of the death rows of this country appears to have discredited the arguments of capital punishment advocates that capital trials contain built-in safeguards against the execution of an innocent person.¹⁹ Indeed, questions are becoming more persistent about the possible, if not probable, prior executions of innocents.²⁰

What do these exonerations tell us about our country? Obviously, our system of capital punishment is flawed. Yet, we continue the prosecutions that fuel the killing chambers of the states that sanction murder as an appropriate punishment to avenge certain crimes. Nothing changes. The population on death row continues to grow. As of January 1, 2016, there were 2,943 death row inmates in the United States.²¹ It is unknown how many innocents are among these poor souls, but given this country's sordid record of convicting innocents, one would be hard pressed to assert that all of these men and women received fair trials and were guilty of the charges against them. The risk of a mistake is real; the probability of killing an innocent is a continuing danger. Again, where are the voices of protest?

18. Dana Ford, *Louisiana's Longest Serving Death Row Prisoner Walks Free After 30 Years*, CNN (Sept. 8, 2014, 7:33 AM), <http://www.cnn.com/2014/03/11/us/louisiana-glenn-ford-freed/> [<https://perma.cc/P2JU-XHFW>].

19. See, e.g., Dudley Sharp, *Death Penalty and Sentencing Information in the United States* (Oct. 1, 1997) (unpublished manuscript), http://la.utexas.edu/users/jmciver/357L/2481_DP_proarguments.html [<https://perma.cc/9XKT-KDXT>] (“There is, in fact, no proof that an innocent has been executed since 1900.”).

20. See *Executed but Possibly Innocent*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executed-possibly-innocent> [<https://perma.cc/TB2T-AN63>]; Editorial, *Convicting Americans Based on Junk Science?*, DES MOINES REG. (Sept. 29, 2016, 9:02 PM), <http://www.desmoinesregister.com/story/opinion/editorials/2016/09/29/editorial-convicting-americans-based-junk-science/91197444/> [perma.cc/5733-2ECR] (“[A]t least one man, Cameron Todd Willingham of Texas, was executed based on such mumbo jumbo.”).

21. CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. 1 (2016), http://www.naacpldf.org/files/publications/DRUSA_Winter_2016.pdf [<https://perma.cc/5YZX-CVW3>].

They are apparently lost in the beliefs of a solid majority that continue to support the death penalty.²²

According to a Gallup poll taken during the week of October 7-11, 2015, (1) 61% of U.S. adults favor use of the death penalty; (2) 37% oppose use of the death penalty, which is higher than in the recent past; and (3) African Americans are more likely to oppose the death penalty.²³ The most astonishing result for this author, however, is that 53% of Americans believe that, generally speaking, the death penalty is applied fairly in the United States.²⁴

It should be noted that attitudes may be slightly shifting away from support of capital punishment,²⁵ and there is a National Coalition to Abolish the Death Penalty that purports to have 90 million members.²⁶ Yet, the voice of the abolitionists has not created a groundswell of outrage and anger at public rallies and meetings throughout this land. The fickle news media's coverage of the release of another innocent from death row or of a botched execution or of the growing incidents of prosecutorial misconduct, soon dissipate as does the "chaff [in] the wind."²⁷

The outcry of injustice as a result of police-related deaths of citizens in Baltimore, Maryland; Baton Rouge, Louisiana; Cleveland, Ohio; and Dallas, Texas, has not occurred in the capital punishment arena.²⁸ The issue of state-assisted murder does not appear to resonate throughout this country.

22. Andrew Dugan, *Solid Majority Continue to Support Death Penalty*, GALLUP (Oct. 15, 2015), <http://www.gallup.com/poll/186218/solid-majority-continue-support-death-penalty.aspx> [<https://perma.cc/6TNK-MHK5>].

23. *Id.*

24. *Id.* While Mr. Dugan indicates that the 53% rate is below the high of 61% in 2005, and that 41%, meanwhile, say they believe the death penalty is applied unfairly, it nevertheless is disturbing to this writer that 156 mistakes have not created more of a backlash against an obviously flawed system.

25. See, e.g., *Less Support for Death Penalty, Especially Among Democrats*, PEW RES. CTR. (Apr. 16, 2015), <http://www.people-press.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/> [<https://perma.cc/8MZX-CEPZ>].

26. See NAT'L COALITION TO ABOLISH THE DEATH PENALTY, <http://www.ncadp.org> [<https://perma.cc/2K8M-PXMF>].

27. 1 *Psalms* 4; see also Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 591 (2004).

28. See WSJ News Graphics, *From Ferguson to Dallas: A Recent History of Deaths Involving Police*, WALL ST. J. (July 8, 2016, 3:30 PM), <http://graphics.wsj.com/dallas->

Innocence does not stop the killing machine. “I think we need to kill more people,” Dale Cox, a prosecutor in Caddo Parish, Louisiana, has gone on record as stating.²⁹ Cox has admitted “that the execution of an innocent person would be a ‘horrible injustice.’”³⁰ Still, he said of the death penalty, “We need it more now than ever.”³¹ If someone happens to be innocent, too bad for him or her. These innocents will be sacrificed to keep the machine of death in operation.

Yet, as noted above, a majority of Americans believe our system of killing is fair to our condemned.³² Are we blind to the obvious? One of the basic tenets of our law is that it is better that 100 guilty persons should escape than one innocent person should suffer.³³ Square this with the indifference to the killing of an innocent to protect our machinery of death. An unsettling paradox, indeed.

III. THE POLITICS OF THE DEATH PENALTY

*“No white person has ever been executed for killing a black person in the Louisiana Parish of Caddo—or anywhere in Louisiana for that matter.”*³⁴

This is an extraordinary time in this country. We have just finished a presidential election,³⁵ the likes of which may never

police-involved-deaths/ [https://perma.cc/7KPJ-H9UK]. Several police officers lost their lives during these incidents. These killings also warrant our condemnation. Our society should not brook riots and violence in the name of a call for justice.

29. Robert J. Smith, *America’s Deadliest Prosecutors*, SLATE (May 14, 2015, 3:54 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/amerca_s_deadliest_prosecutors_death_penalty_sentences_in_louisiana_florida.html [https://perma.cc/S4JX-WDUB].

30. *Id.*

31. *Id.*

32. Dugan, *supra* note 22.

33. BENJAMIN FRANKLIN, *Letter to Benjamin Vaughan*, in THE WRITINGS OF BENJAMIN FRANKLIN 291, 293 (Albert Henry Smyth ed., 1906).

34. Charles Ogletree, *The Death Penalty’s Last Stand*, SLATE (Jan. 6, 2016, 5:15 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/01/data_and_charts_s_how_few_states_impose_the_death_penalty.html [https://perma.cc/2GMS-885N].

35. See Sam Levine, *Here Are All the Dates You Need to Know for Election 2016*, HUFFINGTON POST (Oct. 10, 2016), http://www.huffingtonpost.com/entry/2016-primary-dates_us_56689f99e4b009377b23acc3 [https://perma.cc/UJA3-VSKJ].

have been previously seen. There was huge voter dissatisfaction. The nation still is bitterly divided. Any sense of civility between the candidates was nonexistent. Each candidate set forth an agenda hoping to appease their respective bases. Yet, nowhere in all of the debate, was there any discussion about capital punishment, and what its existence says about our society. Why is this? Do we, as a purportedly civilized people, really care?

On July 25, 2016, at the Democratic National Convention, Bernie Sanders stated:

Citizens United,^[36] [is] one of the worst Supreme Court decisions in the history of our country. That decision allows the wealthiest people in America . . . to spend hundreds of millions of dollars buying elections and, in the process, undermine American democracy. Hillary Clinton will nominate justices to the Supreme Court who are prepared to overturn *Citizens United* . . . Her Supreme Court appointments will also defend a woman's right to choose, workers' rights, the rights of the LGBT community . . . and the government's ability to protect our environment.³⁷

The sound of silence on the issue of capital punishment was deafening. It illustrated the problem for the abolitionist. The issue was not on the proverbial lips of voters. While the direction of the Supreme Court should have been on the minds of the voters throughout this land, the issue of capital punishment should also have been at the forefront of the debate.

Senator Sanders's failure to address an issue that goes to the core of our view of humanity illustrates that capital

36. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), is not within the scope of this Article. While it may be a bad decision, this author would not put it into the same category as *Dred Scott v. Sandford*, 60 U.S. 393, 451-52 (1857), commonly referred to as the *Dred Scott Decision*, which upheld the institution of slavery; *Plessy v. Ferguson*, 163 U.S. 537, 544-45 (1896), which upheld state racial segregation laws for public education under the guise of separate but equal schools; and *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944), in which the Supreme Court upheld the forced internment of Japanese Americans living on the West Coast in detention centers.

37. *READ: Bernie Sanders' Speech at the Democratic Convention*, NPR POL. (July 25, 2016, 10:42 PM), <http://www.npr.org/2016/07/25/487426056/read-bernie-sanders-prepared-reamerks-at-the-dnc> [https://perma.cc/Q4JG-825M].

punishment is not high on the radar screen of our politicians. The scab of injustice remains because a politician's weak stance on the death penalty is viewed as a gauge of a politician's soft position on law and order issues.

In 1988, Michael S. Dukakis's campaign was damaged because of his opposition to capital punishment.³⁸ Four years later, the Democratic nominee, Bill Clinton, took a hardline stance stating that Democrats "should no longer feel guilty about protecting the innocent."³⁹ Indeed, Mr. Clinton, who was then the governor of Arkansas, returned to the state for the execution of Rickey Ray Rector.⁴⁰ "He is, in the vernacular, a zombie," said Jeff Rosenzweig, a lawyer for Mr. Rector before the execution.⁴¹ "His execution would be remembered as a disgrace to the state."⁴²

The two major candidates favored capital punishment, though Mrs. Clinton's stance was not as ardent as Mr. Trump's.⁴³ Though the respective views of the candidates do not decide the issues, as the death penalty is primarily a matter of concern for the states, it nevertheless is reflective of the manner in which our criminal justice system is viewed on the world stage.

38. Thomas Kaplan, *Death Penalty Takes on New Dimension in 2016 Campaign*, N.Y. TIMES (Nov. 13, 2015), https://www.nytimes.com/2015/11/14/us/politics/death-penalty-takes-on-new-dimension-in-2016-campaign.html?_r=0 [<https://perma.cc/VDM6-QWXG>]. When Mr. Dukakis, a death penalty opponent, was asked if he would favor the death penalty if his wife were raped and murdered, he said he would not. *Id.*

39. *See id.*; *see also* Peter Applebome, *The 1992 Campaign: Death Penalty; Arkansas Execution Raises Questions on Governor's Politics*, N.Y. TIMES (Jan. 25, 1992), <http://www.nytimes.com/1992/01/25/us/1992-campaign-death-penalty-arkansas-execution-raises-questions-governer-s.html> [<https://perma.cc/S8Y3-MLG3>].

40. Kaplan, *supra* note 38.

41. Applebome, *supra* note 39.

42. *Id.*

43. *Compare* Amy Chozick, *Hillary Clinton Comes Out Against Abolishing the Death Penalty*, N.Y. TIMES (Oct. 28, 2015, 4:20 PM), <http://www.nytimes.com/politics/first-draft/2015/10/28/hillary-clinton-comes-out-against-abolishing-the-death-penalty/> [<https://perma.cc/3LHU-49W5>] (stating that "she did not support abolishing the death penalty, but she did encourage the federal government to rethink it"), *with* Interview by Steve Doocy with Donald Trump, Presidential Candidate (May 11, 2015), <http://2016.presidential-candidates.org/Trump/?on=capital-punishment> [<https://perma.cc/MAE6-62DQ>] (stating his support for the death penalty in regards to the shooting of two Mississippi law enforcement officers).

The United States' closest allies in Europe and North America are unanimous in rejecting the death penalty and they do not hesitate to let their views be known. New countries can only be admitted to the growing European Union . . . if they renounce the death penalty. Courts in countries such as Canada and Mexico, and throughout Europe, have begun to consistently refuse extradition as long as the death penalty is a possibility in the U.S.⁴⁴

Louisiana, like many other states, elects its judges.⁴⁵ District Attorneys are also elected officials in this state.⁴⁶ Thus, capital punishment is an issue in elections for these positions. This state is steeped in the killing of its citizens in the name of societal revenge. Indeed, the killing fields of Louisiana have been the site of 391 lynchings between the years of 1882 and 1968, with 335 of those unfortunate souls being African American.⁴⁷ Denial of any semblance of due process was the common characteristic of this mob killing.⁴⁸ This attitude did not stop at the door of the court house. Between 1608 and 2002, Louisiana has used its judicial processes to execute 658 people, of which 69.4% were African American and 22.3% were white.⁴⁹ “Four out of five death sentences in Louisiana since

44. See Richard C. Dieter, *International Influence on the Death Penalty in the United States*, FOREIGN SERV. J. 31, 38 (2003). See also UNITED NATIONS HUMAN RIGHTS, MOVING AWAY FROM THE DEATH PENALTY: LESSONS FROM NATIONAL EXPERIENCES iii (2012) (“The large majority of Member States of the United Nations—about 150 out of 193 States—have already abolished the death penalty or observe a legal or de facto moratorium on its use.”).

45. LA. CONST. art. V, § 22.

46. LA. STAT. ANN. § 16:1(A) (2016).

47. *Lynchings: By State and Race, 1882-1968*, <http://law2.umkc.edu/faculty/projects/ftrials/shipp/lynchingsstate.html> [https://perma.cc/T9BX-5AXZ].

48. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 52-57 (2000).

49. *US Executions from 1608-2002*, PROCON.ORG (Dec. 9, 2016, 2:25 PM), <http://deathpenalty.procon.org/view.resource.php?resourceID=004087#X> [https://perma.cc/WK7H-FKPY].

1976 have been reversed.”⁵⁰ “And for every three executions the state carried out, one death row prisoner was exonerated.”⁵¹

Yet, candidates for judges and district attorney eagerly embrace the death penalty as

part of their platform. Political ads tout a candidate’s strong support of law enforcement.⁵²

Judicial candidates promise longer sentences and less tolerance of criminal conduct.⁵³ As mentioned earlier, any candidate that appears to be sympathetic to the plight of the criminal element risks almost certain defeat. The poor, the underclass, the powerless, the unemployed, are at the mercy of the law and order crowd. This base of voters, this constituency, really has no one to speak for them. They are the vulnerable of our society. Few, if any, in a position of power appear to care about their station in life.⁵⁴

Do politicians intervene to offer some form of compassion for the convicted? Is mercy ever shown? The money these politicians chase is not found on death row, as leniency is counter to the harshness and severity with which politicians wrap around their platforms of law and order. And judicial

50. Maurice Chamamah, *A Death Sentence in Louisiana Rarely Means You’ll Be Executed*, MARSHALL PROJECT (Apr. 28, 2016), <https://www.themarshallproject.org/2016/04/28/a-death-sentence-in-louisiana-rarely-means-you-ll-be-executed#.902f1ulxv> [https://perma.cc/6D8P-J389].

51. *Id.*

52. *See, e.g.*, Perry Bacon Jr., *Trump and Other Conservatives Embrace ‘Blue Lives Matter’ Movement*, NBC NEWS (July 23, 2016, 4:46 PM), <https://www.nbcnews.com/politics/2016-election/trump-other-conservatives-embrace-blue-lives-matter-movement-n615156> [https://perma.cc/TV7S-TPS5].

53. KATE BERRY, BRENNAN CTR. FOR JUSTICE, *HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES* 5-6 (2015), http://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf [https://perma.cc/2BRH-F87U].

54. A stark example of a lack of a spokesperson is found in a report of a Louisiana State Legislator who acknowledged that he was considering a plan to pay poor women to have their tubes tied. *See* Mark Waller, *LaBruzzo Considering Plan to Pay Poor Women \$1,000 to Have Tubes Tied*, TIMES-PICAYUNE (Oct. 23, 2009, 10:25 PM), http://www.nola.com/news/index/.ssf/2008/09/labruzzo_sterilization_plan_fi.html [https://perma.cc/MB3U-NQGL]. He was convinced that people receiving government aide such as food stamps and publicly subsidized housing were reproducing at a faster rate than more affluent, better educated people who reasonably pay more tax revenue to the government. *Id.* He also wanted to include tax incentives for college-educated, higher-income people to have more children. *Id.* Who are the poor? Who are the affluent, better educated people? Racial Cleansing? Who is being marginalized?

racers can be very expensive, which warrant extensive fund raising endeavors.⁵⁵

Charles E. “Buddy” Roemer was the last governor of Louisiana “to commute the death sentence of a convicted murderer to life in prison without parole because of doubts that ha[d] been raised about the case.”⁵⁶ This extraordinary action occurred on August 16, 1989, almost twenty-seven years ago.⁵⁷ Roemer was no “bleeding heart” though, as he did allow an execution to proceed less than a day after his inauguration.⁵⁸

“Louisiana’s incarceration rate is nearly five times Iran’s, 13 times China’s and 20 times Germany’s.”⁵⁹ Louisiana has the highest rate of people imprisoned per capita than any state or country in the world.⁶⁰ “The death-sentencing rate per homicide in Caddo Parish, Louisiana was nearly 8 times greater between 2006 and 2015 than the rest of the state, making a parish with only 5% of Louisiana’s population responsible for 38% of the death sentences imposed statewide.”⁶¹ In Caddo Parish, there have been no instances of a white person being executed for killing a black person.⁶² Given this history, is it any real surprise that the courts turned a deaf ear to Mr. Ford’s claim for compensation despite the statement from the District Attorney,

55. *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999), <http://billmoyers.com/content/justice-for-sale-2/> [<https://perma.cc/WA3F-C7BK>].

56. Peter Applebome, *Governor of Louisiana to Spare Inmate’s Life*, N.Y. TIMES (Aug. 17, 1989), <http://www.nytimes.com/1989/08/17/us/governor-of-louisiana-to-spare-inmate-s-life.html> [<https://perma.cc/A2FE-C92F>].

57. *See id.*

58. *A Vietnam Veteran Who Said He’d Kill Again Is Executed*, N.Y. TIMES (Mar. 15, 1988), <http://www.nytimes.com/1988/03/15/us/a-vietnam-veteran-who-said-he-d-kill-again-is-executed.html> [<https://perma.cc/L2FC-ZJW9>] (reporting that a Vietnam veteran, who was convicted of killing a policeman, was executed on March 15, 1988).

59. Cindy Chang, *Louisiana Is the World’s Prison Capital*, TIMES-PICAYUNE (Apr. 6, 2016, 12:38 PM), http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html [<https://perma.cc/3SNL-22N9>].

60. *How Louisiana Became the World’s ‘Prison Capital’*, NPR (June 5, 2012, 11:38 AM), <http://www.npr.org/2012/06/05/154352977/how-louisiana-became-the-worlds-prison-capital> [<https://perma.cc/C3NR-AT8D>].

61. *Outlier Counties: Legacy of Racism Persists in Caddo Parish, Which Had Nation’s Second-Highest Number of Lynchings*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/6561> [<https://perma.cc/6E3E-QDVY>].

62. *Id.*

in his motion to dismiss the case, that there was no evidence to arrest Mr. Ford, much less convict him?⁶³

The politics of death in the states with a history of killing venues offer no risk to the politicians. They care about popularity polls, not whether an indigent on death row might actually be innocent. It boils down to a simple question of political power, and there is none for those who populate the death rows of this country.

This author has been unable to find any introduction of a bill to ban the death penalty that has gained any traction since the re-establishment of the death penalty in Louisiana in 1976.⁶⁴ But the idea of torture is alive and well in the bayou state. In 2014, Prosecutor Dale Cox wrote a memo stating that a man convicted of murder “deserves as much physical suffering as it is humanly possible to endure before he dies.”⁶⁵

And finally, last year the Louisiana legislature cut funding for capital defense in order to increase funding for local public defender offices.⁶⁶ There is irony here. The chief backer of the bill was the District Attorneys’ Association, whose offices have not fared well in the appellate arena.⁶⁷ “In March, Michael Wearry became the 58th death row inmate in the state since 2000 to have his conviction overturned. His case is one of 129 reversals (versus 28 executions) since 1977.”⁶⁸

How do we stop this trend? Cut funding. Hugo Holland, an outspoken supporter of capital punishment, told legislators

63. See Ruling on Petition for Compensation for Wrongful Conviction and Imprisonment at *1, *State v. Ford*, 2015 WL 12642065 (La. Dist. Ct. Mar. 27, 2015).

64. In the 2017 general session of the LA legislator, bills to prospectively ban the death penalty were introduced in the House and Senate. See S.B. 142, 43d Leg., Reg. Sess. 2017 (La. 2017); H.B. 101, 43d Leg., Reg. Sess. (La. 2017). Though the Senate Bill (S.B. 142) was favorably reported to the floor, the House Bill (HB 101) died in committee by a vote of 9-8. See *id.*

65. Campbell Robertson, *The Prosecutor Who Says Louisiana Should ‘Kill More People’*, N.Y. TIMES (July 7, 2015), <https://www.nytimes.com/2015/07/08/us/louisiana-prosecutor-becomes-blunt-spokesman-for-death-penalty.html> [https://perma.cc/6XFR-TGSH].

66. Della Hasselle, *Louisiana Conservatives Rethinking the Death Penalty*, GAMBIT (May 2, 2016), <http://www.bestofneworleans.com/gambit/louisiana-and-the-death-penalty/Content?oid=2935349> [https://perma.cc/5ZDJ-QHX5].

67. *Id.*

68. *Id.*

that attempts to fund capital defense is the work of “anti-capital punishment zealots” who are “trying to price it out of existence.”⁶⁹

How do we stack the deck against indigent capital defense? Take away the money and let us see what happens. No doubt the district attorneys are smiling. This is Louisiana politics at work, for after all, we are a state of law and order; the killing machine is fueled by revenge, not mercy.

IV. A LACK OF TRANSPARENCY

“Death row is a nightmare for serial killers and ax murderers. For an innocent man, it’s a life of mental torture that the human spirit is not equipped to survive.”⁷⁰

In addition to the politics of death, a lack of transparency is a counter balance to any sustainable outrage sufficient to end capital punishment in this country. Executions are barbaric and gross. In a description of the death of Francis Kemmler, the first to be legally executed using the electric chair, George Westinghouse, the largest supplier of alternating current commented, “They would have done better with an axe.”⁷¹ Over a hundred years later, Joseph Rudolph Wood III suffered what was one of the longest executions in U.S. history, lasting almost two hours.⁷² “[W]itnesses said he gasped and snorted for much of that time before eventually dying.”⁷³ The death penalty has not become more civilized with the passage of time.

69. *Id.*

70. JOHN GRISHAM, *THE CONFESSION* 104 (2010) (emphasis added).

71. Staff, *August 06, 1890: First Execution by Electric Chair*, HISTORY (2010), <http://www.history.com/this-day-in-history/first-execution-by-electric-chair> [https://perma.cc/8E7T-6JLS].

72. See Mack Berman, *Arizona Execution Lasts Nearly Two Hours; Lawyer Says Joseph Wood Was ‘Gasping and Struggling to Breathe’*, WASH. POST (July 23, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/07/23/arizona-supreme-court-stays-planned-execution/?utm_term=.7d973ba4ab45 [https://perma.cc/YBM5-FSFH].

73. *Id.* Several other reporters reported seeing Wood gasp more than 600 times before dying. See Bill McGuire & Danielle Genet, *Arizona Inmate Dies 2 Hours After Execution Began*, ABC NEWS (July 23, 2014, 9:25 PM), <http://abcnews.go.com/US/arizona-execution-takes-hours-prompts-plea-stay/story?id=24687542> [https://perma.cc/VVY5-EHV9]; Bob Ortega et al., *Execution of*

The killings are not broadcast for all to see. The procedures are secret, there are no YouTube clips to illustrate the suffering of the condemned during the process of killing the convicted murderer. The executioner's song is that the killing is painless and humane. There is no blood, no gore, no undue suffering. The perception the state attempts to tell is belied by the reality of eyewitness reports of botched executions such as those just described. No doubt the deadly secrets of untold brutality and painful deaths allow the public to maintain support for capital punishment without being bothered by the gory details of the realities of the state's killing venues.

Robert E. Lee is attributed with the quote, "It is well that war is so terrible, otherwise we would grow too fond of it."⁷⁴ The execution of the condemned is not open to viewing, as is the carnage of an intense battle. The filming of the atrocities of war, the dead, the wounded, the suffering, the destruction, dull our eagerness as a country for the sting of battle. The actual filming of executions no doubt would achieve a similar result. Consider if the following had been broadcast into the households of America on the evening news back in 1997:

[The condemned was strapped into the chair to await his fate.] [F]lames "leaped from the head" of the condemned . . . a solid flame covered his whole head, from one side to the other A foot-long blue and orange flame shot from the mask covering his head for about 10 seconds, filling the execution chamber with smoke and sickening witnesses with the odor of charred human flesh.⁷⁵

Can it now also be said, it is well that capital punishment is so terrible or else we would grow too fond of it? Not likely,

Arizona Murderer Takes Nearly 2 Hours, ARIZ. REPUBLIC (July 24, 2014, 12:24 AM), <http://www.azcentral.com/story/news/local/arizona/2014/07/23/arizona-execution-botched/13070677/> [<https://perma.cc/U2QL-YM5K>].

74. Roy Blount, Jr., *Making Sense of Robert E. Lee*, SMITHSONIAN (2003), <http://www.smithsonianmag.com/history/making-sense-of-robert-e-lee-85017563/> [<https://perma.cc/KGX7-E2KP>].

75. Austin Sarat, "A Solid Flame Covered His Whole Head": *Botched Executions and the Horrific, Inhumane History of the Death Penalty*, SALON (June 8, 2014, 2:00 PM), http://www.salon.com/2014/06/08/a_solid_flame_covered_his_whole_head_botched_executions_and_the_horrific_inhumane_history_of_the_death_penalty/ [<https://perma.cc/S6TW-GHZL>].

because the terrible reality of the process of killing is not recorded for our citizens to witness in the living rooms of their homes. The suggestion that the death penalty is a humane punishment free of undue suffering survives because of ignorance. Our government continuously does not allow the transparency necessary for our citizens to make an informed decision on this issue.

But there is more to this sorrowful state of capital punishment in the country. And that is the solitary confinement of the condemned on death row for years while awaiting resolution of the case. Again, lack of knowledge is at the forefront of the problem.

Concurring in *Davis v. Ayala*,⁷⁶ Justice Kennedy wrote, “Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society’s simple unawareness or indifference.”⁷⁷

Death rows are hidden from public viewing. Most consist of the same identical cells where the condemned are locked down for all but one hour daily.⁷⁸ The rows are dimly lit, the hallways narrow, the air still and heavy, very little, if any, natural light, an environment conducive to depression and hopelessness.⁷⁹ There is nothing but somber surroundings. Food is barely edible. Beds, toilets, and tables constitute the furniture in the cells of a hell on earth.⁸⁰

In a scathing July 2013 report, the ACLU concluded:

While the courts determine whether states are entitled to execute our fellow human beings, some prisoners will

76. 135 S. Ct. 2187 (2015).

77. *Id.* at 2209 (Kennedy, J., concurring) (objecting to the use of permanent solitary confinement for death row and other prisoners). See also Marah Stith McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 OHIO ST. L.J. 525, 575 (2016).

78. McLeod, *supra* note 77, at 530 n.14.

79. *Id.* at 538.

80. See *Death Row Information and Frequently Asked Questions*, ARIZ. DEP’T CORRECTIONS, <https://corrections.az.gov/public-resources/death-row/death-row-information-and-frequently-asked-questions> [<https://perma.cc/ND7W-QGN2>]. The author has been to death row at Angola on several occasions. The stench can be unbearable at times. On several occasions, he was nauseous upon leaving; the horrors of death row having made a lasting impression upon him. There is no mercy to be found there, no joy, no compassion. It is a living hell.

endure conditions of solitary confinement for years and decades on end, followed, for some, by a long-delayed execution. Especially as we move toward becoming a country without capital punishment, this human rights violation requires immediate attention.⁸¹

Again, how would the public react to a video of the following view from death row:

I saw guys who dropped their appeals because of the intolerable conditions. Before his execution, one inmate told me he would rather die than continue existing under these inhumane conditions. I saw guys come to prison sane, and leave this world insane, talking nonsense on the execution gurney. One guy suffered some of his last days smearing feces, lying naked in the recreation yard, and urinating on himself.⁸²

The lack of transparency is hiding these unsettling sights. Unfortunately, there is more.

States are engaged in a campaign of secrecy to protect disclosure of the killing drugs of the executioner, and the courts are following in lockstep, allowing this blanket of secrecy to spread among the killer states. In an attempt to circumvent international and national scrutiny, the Georgia Assembly recently passed a law that “has made the method by which it acquires pentobarbital a ‘state secret,’ which . . . raises questions about needless suffering and separation of powers.”⁸³ Why the cover up? What is wrong with transparency? Are the killer states concerned about the reaction of the public if the true facts become known?

The flawed executions in the recent past provide a clue. The prolonged, painful and suffering deaths of those injected

81. AM. CIVIL LIBERTIES UNION, DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 9 (2013), <https://www.aclu.org/files/assets/deathbeforedying-report.pdf> [<https://perma.cc/GCM5-6YJ5>].

82. *Id.* at 3 (statement by Anthony Graves, who spent years on Texas’ death row in solitary confinement for a crime he did not commit).

83. Andrew Cohen, *The Warren Hill Execution: A Late Challenge over Lethal-Injection Drugs*, ATLANTIC (July 15, 2013), <https://www.theatlantic.com/national/archive/2013/07/the-warren-hill-execution-a-late-challenge-over-lethal-injection-drug/277776/> [<https://perma.cc/76PA-7G54>].

with the secret serums concocted by state executioners have the highest rate of botched executions.⁸⁴ Without any doubt, a human being should be advised of the drug that will be used to kill him. This author believes that such a proposition is at the core of the dignity our society should afford all human beings without exception.

What does this darkness, this lack of transparency, say about our system of justice? Small wonder there is no moral outrage, for the state refuses to open its chambers of horrors to its citizens. Death row and the gurney of death are kept from the view of the public. Out of sight, out of mind. Exposing this cancer to our society will provide a startling view of the horrors of the process employed to kill the condemned. All human life matters, does it not?

Bringing the killing process out into the open for all to see will truly test this theory.

Open government has long been a cornerstone of democracy in the United States. Principles of transparency and an accountable, responsive government are embedded in Federal law and the U.S. Constitution, and the United States was one of the first countries in the world to adopt an access to information law—the 1966 Freedom of Information Act.⁸⁵

Sounds so great, doesn't it? Paradoxically, the killing states want no part of this openness when questions arise about the serum and other processes employed in the killing of the condemned.

84. See AUSTIN SARAT ET AL., GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 80 (2014); see also Austin Sarat et al., *Lethal Injection Leads to the Most Botched Executions*, DAILY BEAST (Apr. 30, 2014, 7:20 AM), <http://www.thedailybeast.com/articles/2014/04/30/lethal-injection-leads-to-the-most-botched-executions.html> [<https://perma.cc/AEJ7-BPZB>].

85. OPEN GOV'T P'SHIP, THIRD OPEN GOVERNMENT NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA 1 (2015), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/final_us_open_government_national_action_plan_3_0.pdf [<https://perma.cc/N7GT-97E7>].

Finally, the United Nations had condemned the United States over torture and injustice.⁸⁶ Specifically, the report has criticized the mistreatment of prisoners held in solitary confinement as well as botched executions.⁸⁷ From this, it can readily be seen that we are an embarrassment among the nations of the civilized world when it comes to our treatment of the condemned. We should be ashamed.

V. THE SAGA OF GLENN FORD

*“A former death row inmate . . . died on Monday, hours before his exoneration was cited by the US [S]upreme [C]ourt as a reason for caution in carrying out death sentences.”*⁸⁸

In the movie *A Time To Kill*, Carl Lee Hailey (Samuel L. Jackson) is on trial for the murder of two white men who savagely raped, beat, and tortured his daughter.⁸⁹ Carl Lee Hailey tells his lawyer, Jake (Matthew McConaughey), “When you look at me, you don’t see a man, you see a black man How [sic] a black man ever gonna [sic] get a fair trial with the enemy on the bench and in the jury box?”⁹⁰

Though the movie is fictitious, it sets the stage for the introduction of Glenn Ford into this article. Marginalization and indifference toward a human being, the politics of death, and race are the underpinnings upon which Glenn Ford was sacrificed on the altar of justice. Like Carl Lee Hailey, Mr. Ford was a black man. He, too, would find himself at the mercy of an uncaring bureaucracy, a bureaucracy that has continued to savage this innocent man, even after his death. There will be no necessity for many footnotes about his trial because the source of the destruction of Mr. Ford, in a system that ran amuck, is the

86. See Ed Pilkington, *United Nations Condemns US over Torture & Injustice*, POPULAR RESISTANCE (Nov. 30, 2014), <https://popularresistance.org/united-nations-condemns-us-over-torture/> [<https://perma.cc/U2B9-J8PY>].

87. *Id.*

88. Erin McCann, *Freed Death Row Inmate Died Hours Before Supreme Court Cited His Case*, GUARDIAN (June 29, 2015, 12:25 PM) (emphasis added), <https://www.theguardian.com/world/2015/jun/29/freed-death-row-inmate-dies-supreme-court-ruling> [<https://perma.cc/5DJN-49SU>].

89. *A TIME TO KILL* (Warner Bros. Pictures 1996).

90. *Id.*

author. His mind set at the time was one of condemnation and destruction of a criminal, who, as far as he was concerned, deserved to die a painful death for what he had allegedly done.

In another conversation during *A Time to Kill*, Jake tells Carl Lee that the jury must identify with the defendant. “They see you, they see a yard worker; they see me, they see an attorney. I live in town; you live on the hill.”⁹¹ Glenn Ford was literally the yard man for the victim, Isadore Rozeman.⁹² Mr. Rozeman was the victim of a murder during an armed robbery. Mr. Ford was arrested shortly after the crime, indicted for First Degree Murder, convicted, and sentenced to death after a jury trial.⁹³ His conviction was affirmed, and post-conviction appeals were unsuccessful.⁹⁴ He spent thirty years in a cage in solitary confinement before he was released based on the discovery of evidence that the District Attorney’s Office stated created a mountain of doubt that, if known at the time, would not have been sufficient to arrest Mr. Ford, much less try him.⁹⁵ On June 29, 2015, Mr. Ford died of lung cancer at the age of sixty-five. Merely a few hours later, his exoneration was cited in a dissenting opinion in the denial of a writ application in *Glossip v. Gross* by Justice Steven Breyer, urging the court to take up a full review of the death penalty.⁹⁶

But there was no sympathy, remorse, or sorrow shown by state officials. Immediately after Mr. Ford’s release, his attorneys filed suit under the Louisiana Compensation Act Statute for the wrongfully convicted.⁹⁷ The state vigorously opposed this request.⁹⁸

91. *Id.*

92. For a recitation of the facts set forth in the decision of the Louisiana Supreme Court, see *State v. Ford*, 489 So. 2d 1250, 1252-55 (La. 1986).

93. *Id.*

94. *Id.* at 1263.

95. *Id.* Motion to Vacate Conviction and Sentence at 1, *Ford v. State*, No. 126,005 (1d Jud. Dist. Parish of Caddo Mar. 11, 2014).

96. McCann, *supra* note 88; *Glossip v. Gross*, 135 S. Ct. 2726, 2757 (2015) (Breyer, J., dissenting).

97. See Ruling on Petition for Compensation for Wrongful Conviction and Imprisonment, *supra* note 63; LA. STAT. ANN. § 15:572.8(A) (2016).

98. Vickie Welborn, *Judge Denies Glenn Ford Compensation*, SHREVEPORT TIMES (Mar. 27, 2015, 8:11 PM), <http://www.shreveporttimes.com/story/news/local/2015/03/27/glenn-ford-exonerated->

The courts not only denied the request for compensation but “also reportedly double-down[ed] on the state’s claim that Mr. Ford participated in the crime as a ‘sinister guardian of the killers’” based upon a series of assertions that Andrew Cohen of the Marshall Project “maintains were ‘never proven at trial, or which were later refuted by state prosecutors.’”⁹⁹ Indeed, Andrew Cohen laments:

The court’s new claims are unfounded. As state prosecutors recognized when they exonerated Glenn, there is no legitimate reason to suspect that Glenn had any part in the crime It’s not until this effort to deny Glenn Ford compensation that the state came up with this new theory to try to connect Glenn to this crime he did not commit.¹⁰⁰

Representative Cedric Glover, the first African American mayor of Shreveport, introduced a bill to amend the statute to cure it of its draconian interpretation that allowed the court to freely inject conjecture and speculation about the culpability of Mr. Ford; unfortunately, the bill died in committee.¹⁰¹ It should come as no surprise that the vote was 6-9, strictly along racial lines.¹⁰²

The courts of Louisiana have completely glossed over a public admission of a participant in the miscarriage of justice perpetrated against Glenn Ford. Let it be stated here with no hesitation that there was no due process, no equal protection, no effective representation of a citizen of the United States in a trial for his life. It was a shameful exhibition of the process and resources of the state that overwhelmed any notion of fairness

compensation-katherine-dorroh-aaron-sandler-kristin-wenstrom-isadore-rozeman/70575350/ [https://perma.cc/8EFT-EVGT]. It was this opposition that caused the author to go public with his support for compensation for Mr. Ford and his family.

99. Innocence Staff, *Louisiana Court Displays ‘Indifference to Justice’ in Fight to Deny Compensation to Wrongfully Convicted Man’s Family*, INNOCENCE PROJECT (May 4, 2016), <https://www.innocenceproject.org/glenn-ford-compensation-fight/> [https://perma.cc/PU4D-248Y].

100. *Id.* (“For his part, Cohen laments that in his 20 years of experience as a legal analyst, he has never seen anything quite like the behavior of Louisiana’s Second Circuit Court of Appeal.”).

101. Kevin Frey, *La. House Committee Blocks Bill to Compensate Glenn Ford*, KSLA NEWS 12 (May 4, 2016, 8:08 PM), <http://www.ksla.com/story/31894336/la-house-committee-blocks-bill-to-compensate-glenn-ford> [https://perma.cc/V6Z7-SR4Q].

102. *Id.*

and effectively stripped Mr. Ford of any ability effectively to defend his life. The tools provided by the state to supposedly help this man were as ineffective as the spears the Ethiopian soldiers threw at the Italian tanks that invaded their country on October 3, 1935.¹⁰³

It is a small wonder that, in their zeal to bring Glenn Ford's life to an end in the name of justice, the Louisiana Courts want to re-write the history of this case and place all of the system's sins upon a dead man who was poor and unimportant in the eyes of the bureaucrats.¹⁰⁴ What the pious individuals who attempt to justify the injustices of this case conveniently overlook are the following red flags of injustice.

1. *The Charging Decision was Arbitrary*

The primary reason we (the prosecutors) brought charges against Mr. Ford was to scare him into making an (anticipated) plea bargain which would require him to testify against others who we believed participated in the crime and were more culpable than Mr. Ford.¹⁰⁵

2. *Mr. Ford Lacked Effective Representation*

In Louisiana, if you have a law degree and a heartbeat, you qualify for appointment.¹⁰⁶ His lawyers had never tried a jury

103. *Second Italo-Ethiopian War*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Second_Italo-Ethiopian_War#cite_note-0 [<https://perma.cc/9QLP-4C6K>].

104. *See* *State v. Ford*, 193 So. 3d 1242, 1254 (La. Ct. App. 2016). The author confesses that he had the same mindset as the bureaucrats when he prosecuted Mr. Ford and completely disregarded the dignity owed to Mr. Ford as a human being.

105. In Louisiana, a capital prosecution must be initiated by grand jury indictment. LA. CONST. art. 1, § 15. But, amazingly, proceedings do not have to be recorded. *See* Mary Ann Coffey & Joe B. Norman, Comment, *Selected Problems of the Louisiana Grand Jury*, 52 TUL. L. REV. 707, 748-49 (1978). The real charging decision is with the District Attorney and it is his office, alone, who can actually decide who is subjected to the trial that ends at the death chamber.

106. The indigent defense system in Louisiana is a bad as ever. No effort will be made by the legislature to provide funding for a system that is mandated under the constitution if it requires an amendment to do so. For an excellent article on the current crisis in Louisiana, see Eli Hager, *Louisiana Public Defenders: A Lawyer with a Pulse Will Do*, GUARDIAN (Sept. 8, 2016, 7:13 AM), <https://www.theguardian.com/us-news/2016/sep/08/louisiana-public-defender-crisis> [<https://perma.cc/YD3M-GMZB>].

case. They had no experience in the court room. They did not know how to obtain experts. They had never filed a motion in a criminal case. Mr. Ford's fate was in the hand of counsel who readily admitted their incompetence.

The *Strickland v. Washington*¹⁰⁷ standard for determining when a criminal defendant's sixth amendment right to effective assistance of counsel has been violated is hard to meet. In October 2000, Judge Rhesa Barksdale and another judge upheld the death penalty for Calvin Burdine, a Texas man whose lawyer had slept through much of the trial.¹⁰⁸ Barksdale held that Burdine had failed to show that his lawyer napped during a critical stage of the trial.¹⁰⁹ After an *en banc* hearing, the Fifth Circuit reversed, finding that "Sixth Amendment jurisprudence compel[led] the presumption that counsel's unconsciousness prejudiced the defendant."¹¹⁰ Mr. Ford's counsel might as well have been asleep; they had about as much business in that courtroom as this author would have had in being in the pilot's seat of an aircraft.

3. Race

Mr. Ford was an African American, and the jury was all white. At the time of the trial, peremptory strikes were governed by *Swain v. Alabama*.¹¹¹ A challenge to the exclusion of African Americans could not be sustained unless it could be shown that African Americans historically had been systematically excluded by a prosecutor's office.¹¹² Over the years, there was no successful challenge to the venire under that test. In *Batson v. Kentucky*,¹¹³ the Supreme Court overruled *Swain* and held that a prosecutor's peremptory challenge in a criminal case could not be used to exclude jurors based solely on their race.

107. 466 U.S. 668 (1984).

108. *Burdine v. Johnson*, 231 F.3d 950, 951 (5th Cir. 2000).

109. *Id.* at 964.

110. *Burdine v. Johnson*, 262 F.3d 336, 338 (5th Cir. 2001) (*en banc*).

111. 380 U.S. 202 (1965).

112. *Id.* at 227.

113. 476 U.S. 79 (1986).

Swain was in effect when Mr. Ford was tried. However, after the decision in *Batson* was rendered, the case was remanded by the United States Supreme Court to the Louisiana Supreme Court for reconsideration in light of the ruling in *Batson*.¹¹⁴ The Louisiana Supreme Court found no violation.¹¹⁵

However, the Supreme Court has since slapped down efforts by the Louisiana Supreme Court to ignore the *Batson* standard. In *Snyder v. Louisiana*,¹¹⁶ Justice Alito, in a seven-two decision, concluded the trial judge improperly employed a double standard excusing African Americans for reasons that also applied to white jurors who were on the jury.¹¹⁷ Unfortunately for Mr. Ford, this decision came too late to save him. Had the *Snyder* rationale been applied by the U.S. Supreme Court in review of the initial remand, Mr. Ford could have possibly secured an earlier release and earlier treatment of his cancer.

4. *Brady* Violations

This prosecutor failed to investigate claims of possible exculpatory evidence, relying instead on his belief that Mr. Ford was guilty and the claims were nothing more than an effort of the defendant to escape justice. There was no showing made by the defense counsel of a claim that merited attention.¹¹⁸ But counsel was wrong, with bad consequences. It is now clear that the state's disclosure obligation turns on the cumulative effort of all suppressed evidence to the defense—not on the evidence considered item by item—and this responsibility remains if the police fail to bring favorable evidence to the prosecutor's attention.¹¹⁹ Moreover, Mr. Ford need not have shown on a *Brady* claim that “more likely than not” he would have been

114. *Louisiana v. Ford*, 479 U.S. 1077, 1077 (1987); *State v. Ford*, 503 So. 2d 1009, 1009 (La. 1987); *see also* *Griffith v. Kentucky*, 479 U.S. 314, 316 (1987).

115. *State v. Ford*, 563 So. 2d 873, 873 (La. 1990).

116. 552 U.S. 472 (2008).

117. *Id.* at 474, 483-84.

118. However, we are talking about counsel who had never tried a case before and was not familiar with the process of how to make a record for denial of a *Brady* request, preserving the issue for appeal.

119. *Kyles v. Whitley*, 514 U.S. 419, 421 (1995).

acquitted if the undisclosed evidence had been admitted.¹²⁰ Rather, all he needed to show was that “the new evidence is sufficient to ‘undermine confidence’ in the verdict.”¹²¹

This prosecutor’s vanity prevented him from properly performing his duty. Even though the cited cases occurred several years later, their foundation was firmly cemented in 1984; the potential of possible exculpatory evidence must be seriously considered by a prosecutor, as an officer of the court. *Brady v. Maryland* demanded such attention.¹²² And that was not done in Glenn Ford’s case.

5. *Prejudicial Argument to the Jury*

The prosecutor did not stick to the facts. His argument bled over into areas of emotion: fear, anger, hatred, and the tearing down of Mr. Ford’s humanity. It was a vengeful argument shamefully used to convince the jury that Mr. Ford’s life was worthless. And no voice of objection was heard from either the defense or the court.

6. *A Prosecutorial Attitude of Win at All Cost*

Capital cases can advance a prosecutor’s career. You do not climb the ladder of success with losses. In the opening scene of the movie *Patton*, George C. Scott, as Patton, states, “Americans love a winner and do not tolerate a loser. Americans play to win all the time. I wouldn’t give a hoot in hell for a man who lost and laughed. That’s why Americans have never lost, and will never lose a war”¹²³ In the movie *And Justice for All*, Al Pacino as the lead character asks in his opening statement:

What is justice? What is the intention of justice? The intention of justice is to see that the guilty people are proven guilty and that the innocent are freed . . . It is the

120. *Id.* at 434.

121. *Weary v. Cain*, 136 S. Ct. 1002, 1006 (2016) (quoting *Smith v. Cain*, 132 S. Ct. 627, 630 (2012)).

122. 373 U.S. 83, 87 (1963).

123. *PATTON* (Twentieth Century Fox Film Corp. 1970).

defense counsel's duty to protect the rights of the individual, as it is the prosecutions duty to uphold and defend the laws of the State. Justice for all. Only we have a problem here. And you know what it is? Both sides want to win. We want to win. We want to win regardless of the truth. And we want to win regardless of justice, regardless of who's guilty or innocent.¹²⁴

This prosecutor had these personality traits at the age of thirty-three when he tried Mr. Ford. He wanted to win, and win he did at great cost to Glenn Ford, our system of justice, and to himself.

Glenn Ford is but one of the 156 innocents. His fate is bad enough, but what about the other 155 souls who were similarly treated in the system? Where is the public outcry? Does the exoneree's station in life, when coupled with the lack of transparency and our history of killing, at least create some empathy for a man, even if he is a black man. Are we in such a state of existence in our society that we have no concern about the value of human life? We send innocents to the hell of death row, our legislators limit funding for capital defense and lawyers sleep during a trial when a human's life is on the line. Yet, we continue to kill, ignoring the realities of a broken system.

Do we as a people fail to remember the racial history of places like Caddo Parish and the continuing efforts of its prosecutors to rid the venire of African Americans? When Mr. Ford was tried, *Swain* effectively insulated peremptory challenges from complaints of racial discrimination. *Batson* changed the law, but its enforcement has been slow to take effect. The following are some examples the courts accepted as sufficient reasons:

They were young or old, single or divorced, religious or not, failed to make eye contact, lived in a poor part of town, had served in the military, had a hyphenated last

124. AND JUSTICE FOR ALL (Columbia Pictures 1979).

name, displayed bad posture, were sullen, disrespectful or talkative, had long hair, wore a beard.¹²⁵

This illustrates the history of a parish that has continued this indifference to race long after Glenn Ford's trial. The vestiges of racism still exist. No better proof of this can be seen than in the final nail driven into Mr. Ford's coffin.

The opinion denying the motion for consideration of compensation contained a concluding summary, which is rather shocking. The entire text is devoid of judicial temperament and is an unwarranted assault against a dead man who had been vindicated by the District Attorney's Office.

No reasonable conclusion can be reached that Ford's involvement in the circumstances surrounding the brutal murder of Mr. Rozeman was incidental, minor, or insignificant. This is clear from the evidence at the compensation hearing which Ford did not explain or refute. Ford was intricately involved in every facet of this case with the exceptions of entering the house and pulling the trigger.

Ford helped orchestrate the robbery which led to the murder. Although motive need not be proved, Ford was angry at Mr. Rozeman for not providing him money he had requested earlier the week of the murder.

Ford created the opportunity for entry into Mr. Rozeman's home. Despite Mr. Rozeman's employer-employee relationship with and trust of Ford, this trust was misplaced. Ford orchestrated the opportunity for an unauthorized entry into Mr. Rozeman's home, which had been meticulously secured.

Before and during the murder/robbery, Ford operated as the sinister guardian of the killers. Ford then financially benefitted from the robbery, cashing in on the sale of Mr. Rozeman's property. Continuing in his criminality, Ford made every effort to dispose of the probable murder weapon and conceal the identity of the trigger man.

125. Adam Liptak, *Exclusion of Blacks from Juries Raises Renewed Scrutiny*, N.Y. TIMES (Aug. 16, 2015), https://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html?_r=0 [https://perma.cc/H64M-W4EP].

Any conclusion that Ford was not integrally involved in the circumstances leading to Mr. Rozeman's brutal death is baseless. Such a conclusion defies facts, evidence and logic. *Ford's demand for compensation clearly and perversely violates the letter, intent and spirit of the will of the Louisiana legislature.*¹²⁶

The summary was later withdrawn, but not before the words of contempt for Mr. Ford had spread throughout the public. In the court's mind, Mr. Ford was still a principal to murder. The viciousness Mr. Ford suffered for thirty years on death row, followed him to his grave.

VI. THE EVOLVING STANDARDS OF DECENCY

*"[T]o take a life where a life has been lost does not serve justice and is often shallow revenge."*¹²⁷

Regardless of the amount of popular support or disapproval for the death penalty, the Supreme Court is the only entity that counts. Whether capital punishment continues or is finally abolished rests with the majority of the justices of the Supreme Court. As we learned in our civics classes, courts interpret the law, and the death penalty does not escape this power of judicial review.

In 1972, the Court struck down existing death penalty statutes in *Furman v. Georgia*.¹²⁸ In a concurring opinion, Justice Stewart stated, "that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."¹²⁹ But the death penalty was far from dead; it was simply asleep until the killing states enacted new statutes. Death was back in business in 1976.

126. Memorandum from Judge Bleich to Clerk's Office (Apr. 18, 2016) (emphasis added) (on file with author).

127. *South African Archbishop Desmond Tutu Calls for Release of Mumia Abu-Jamal*, DEMOCRACY NOW (Dec. 8, 2011), https://www.democracynow.org/2011/12/8/south_african_archbishop_desmond_tutu_calls [<https://perma.cc/48AE-B77G>].

128. 408 U.S. 238, 239-40 (1972).

129. *Id.* at 310 (Stewart, J., concurring).

In *Gregg v. Georgia*,¹³⁰ the Supreme Court held that a constitutional capital sentencing scheme must provide objective criteria to direct and limit the death penalty decision and the scheme must allow the sentence to take into account the character and morals of the defendant.¹³¹ In order to ensure death sentence statutes could pass scrutiny, it would be necessary to avoid any arbitrariness; juries would still have discretion but it would have to be grounded in objective factors.¹³² This has led to an increased examination of any factor that may have been arbitrarily considered, thereby unduly prejudicing the defendant.

Recently, in his dissent from the denial of the writ application in *Tucker v. Louisiana*,¹³³ Justice Breyer wrote, “Tucker may well have received the death penalty not because of the comparative egregiousness of his crime, but because of an arbitrary feature of his case, namely, geography.”¹³⁴

Arbitrariness abounds in the current system of capital punishment. What can be more arbitrary than a verdict premised upon junk science, incompetent counsel, and hidden evidence; improper exclusions of minority jurors and lack of funding; a prosecutor who wants to kill more people;¹³⁵ prosecutors who place winning above justice;¹³⁶ prosecutors, now judges, who continue to maintain a prosecutorial mind set; jail house snitches trying to buy their freedom; and secret trial deals that encourage embellishment, if not, outright lies.

130. 428 U.S. 153 (1976).

131. *Id.* at 206-07; *see also* Proffitt v. Florida, 428 U.S. 242, 251 (1976); Jurek v. Texas, 428 U.S. 262, 271-72 (1976); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976); Roberts v. Louisiana, 431 U.S. 633, 636 (1977).

132. *Roberts*, 431 U.S. at 637 (holding that Louisiana’s mandatory death penalty is unconstitutional).

133. 136 S. Ct. 1801 (2016).

134. *Id.* at 1801-02 (2016) (Breyer, J., dissenting). Justice Ginsburg joined in the dissent. *Id.*

135. *See* Robertson, *supra* note 65.

136. *See* A.M. “Marty” Stroud III, *Lead Prosecutor Apologizes for Role in Sending Man to Death Row*, SHREVEPORT TIMES (Mar. 20, 2015), <http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/> [<https://perma.cc/6FND-L84B>].

How can a system of killing continue when 156 innocents have walked off of death row? Do we accept the risk that an innocent may be executed in order to continue the killing? Does this not, in and of itself, give us pause as citizens of a supposedly civilized country that such a system is wrong? If the death penalty is reserved for the worst of the worst, then it is difficult to explain why a man who admitted to forty-eight murders will serve a life sentence with no parole in exchange for cooperation, or why prosecutors agreed to a life sentence for a nurse who murdered thirteen patients.¹³⁷ A twenty-three-year-old African American Rodricus Crawford received a death penalty for allegedly killing his child when the evidence clearly showed the child died from sepsis pneumonia.¹³⁸ Based on this evidence, Louisiana Supreme Court Justice Jeanette Theriot Knoll asked at least three times during oral arguments, “How did this become a first-degree murder case?”¹³⁹ The state had no answer. This miscarriage of justice also included the acting District Attorney’s assertion that Jesus Christ required a death verdict.¹⁴⁰ On November 16, 2016, the Louisiana Supreme Court reversed the conviction of Mr. Crawford due to a *Batson* violation and remanded for a new trial.¹⁴¹ Chief Justice Johnson and Justice Knoll would have directed entry of a judgment of an acquittal because of insufficient evidence.¹⁴²

Because of our humanity, there are simply no objective means to limit the death penalty to the worst of the worst. Such

137. Charles Cullen, former nurse, pleads guilty to killing thirteen patients at Somerset Medical Center in Somerville, N.J., and one patient at Easton Hospital in Easton, PA; Cullen agreed to thirteen life sentences. David Kocieniewski, *Death on the Night Shift: The Plea; Ex-Nurse Pleads guilty to Killing Patients*, N.Y. Times (Apr. 30, 2004), http://www.nytimes.com/2004/04/30/nyregion/death-on-the-night-shift-the-plea-ex-nurse-pleads-guilty-to-killing-patients.html?_r=0 [https://perma.cc/C5H6-PXPU].

138. Yolanda Young, *‘Is There Any Evidence the Father Abused the Child?’*, SHREVEPORT TIMES (Sept. 19, 2016, 9:50 AM), <http://www.shreveporttimes.com/story/money/2016/09/19/there-any-evidence-father-abused-child/90519578/> [https://perma.cc/364W-Y9AM].

139. *Id.*

140. *Id.* Mr. Crawford’s mother spoke about how moved and uplifted she felt after a hundred white and mostly Catholic clergy signed an amicus brief disavowing this assertion. *Id.*

141. *State v. Crawford*, ___ So. 3d ___ (2016), No. 2014-KA- 2153, 2016 WL 6780518, at *18.

142. *Id.*

features as ego get in the way. How else do you explain the prosecutors who “continue to pursue death sentences with abandon, mitigating circumstances and flaws in the system be damned.”¹⁴³

The Eighth Amendment is grounded in the concept of evolving standards of decency. In *Louisiana ex. rel Francis v. Resweber*,¹⁴⁴ the Court considered whether Louisiana could put a man in the electric chair a second time, after the first attempt failed to kill him.¹⁴⁵ The Supreme Court, by a five-four vote, permitted the execution concluding that the cruelty of the “punishment” at issue should not be measured by what happened in the past or the mental anguish the prisoner might suffer as he awaits his second date with the electric chair.¹⁴⁶ The four dissents held there could be no doubt that a punishment consisting of two jolts of electricity weeks apart would be cruel.¹⁴⁷ Since then, the Supreme Court has held that executing the insane is unconstitutional.¹⁴⁸ Additionally, the highest court has also held that executing those with intellectual disabilities constitutes cruel and unusual punishment violating the Eighth Amendment.¹⁴⁹ Finally, the Court has held that the execution of minors at the time of their crimes now violates “the evolving standards of decency” and, hence, the Eighth Amendment.¹⁵⁰

In 1947, it was obvious that black lives did not matter; electrocuting a black man twice was constitutional. But with the evolving standards of decency, we have grown in our humanity. The Court has recognized that our country has been lagging behind the times in providing necessary care to those with intellectual difficulties and minors. It appears we are focusing on the particulars of the process that are raising mounting concerns. Justice Breyer is open to reconsidering the

143. Smith, *supra* note 29.

144. 329 U.S. 459 (1947).

145. *Id.* at 460-61.

146. *Id.* at 464.

147. *Id.* at 472, 476 (Burton, J., dissenting).

148. *Ford v. Wainwright*, 477 U.S. 399, 417 (2002).

149. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

150. *Roper v. Simmons*, 543 U.S. 551, 561, 578 (2005).

constitutionality of the death penalty.¹⁵¹ We should consider the eloquent words of Bryan Stevenson: “[T]he death penalty is not about whether people deserve to die for the crimes they commit. The real question of capital punishment in this country is, *Do we deserve to kill?*”¹⁵² When the state of Louisiana gave Glenn Ford a twenty dollar debit card after his release from thirty years on death row for a crime he did not commit,¹⁵³ for any inconvenience the state may have caused, its price tag for the life of a human being was less than a dollar a year.

Does anyone really believe that we have the right to kill? Do we really have such a cavalier attitude toward life? That act of the state was not designed to show dignity. It was an insult to a fellow human being. It was a callous and outrageous act of the Department of Corrections designed to further humiliate a human being who had the misfortune of being bullied by a system for thirty miserable years.

VII. CONCLUSION

*“I’m a believer that the death penalty serves society’s interest in revenge I think (revenge) is the only reason for it.”*¹⁵⁴

As discussed earlier, the death penalty, with all of its attendant horrors, continues to be a part of our culture. The stark reality is that despite all the publicity about wrongful convictions, hiding of exculpatory evidence, ineffective assistance of counsel, and lack of funding for indigents, a Pew Research Center poll conducted in March 2015, found that a

151. *Tucker v. Louisiana*, 136 S. Ct. 1801, 1802 (2016) (Breyer, J., dissenting) (“I would grant certiorari in this case to confront the first question presented, i.e., whether imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”).

152. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 313 (2015).

153. Andrew Cohen, *What Are Thirty Years Worth?*, MARSHALL PROJECT (Feb. 19, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/02/19/what-are-30-years-worth#.Y2a1Vdzp8> [<https://perma.cc/RPG3-DWXH>].

154. Vickie Welborn, *UPDATED: ADA on Death Penalty: ‘We Need to Kill More People’*, SHREVEPORT TIMES (Mar. 27, 2015, 8:07 PM) (emphasis added), <http://www.shreveporttimes.com/story/news/local/2015/03/27/glenn-ford-dale-cox-charles-scott-caddo-parish-death-penalty-execution-marty-stroud/70529188/> [<https://perma.cc/2FCF-AK4T>].

solid majority, or fifty-six percent, favor the death penalty for people convicted of murder.¹⁵⁵ While the poll focuses upon the lowest level of support for the death penalty,¹⁵⁶ this does not mask that a fifty-six percent favorability rating is a mandate for the continued use of killing as an appropriate punishment. If one questions this assertion, just ask any politician what he or she would give for such a favorable rating. It is a sufficient number to counterbalance any outrage generated by the conviction of innocents and the other injustices of the death penalty discussed in this article.

The states of the Old Confederacy,¹⁵⁷ plus the Border States¹⁵⁸ and Oklahoma, have performed 80% of all executions since 1977.¹⁵⁹ These southern states constitute 48.38% of the states with capital punishment.¹⁶⁰ In 96% of the states where there have been issues of race and death penalty, there was a pattern of either race-of-victim or race-of-defendant discrimination, or both.¹⁶¹

This country prides itself on the concept that we are a nation of laws, not men.¹⁶² This was perhaps most dramatically demonstrated during the Watergate scandal which led directly to

155. *Less Support for Death Penalty, Especially Among Democrats*, *supra* note 25.

156. *Id.*

157. *Confederate States of America*, HISTORY (2009), <http://www.history.com/topics/american-civil-war/confederate-states-of-america> [<https://perma.cc/W66M-GEXE>] (listing the Confederate States of America as Virginia, North Carolina, South Carolina, Tennessee, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and Texas).

158. *Border States*, U.S. HISTORY, <http://www.u-s-history.com/pages/h401.html> [<https://perma.cc/F94Y-E3HN>] (listing the Border States as Delaware, Maryland, Virginia, Kentucky, and Missouri).

159. *Quick Facts*, TEX. MORATORIUM NETWORK, <http://www.texasmoratorium.org/quick-facts> [<https://perma.cc/K7DW-AZYV>].

160. *See Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (June 2, 2015), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/MCD3-6QK7>].

161. *See id.* (Professor Baldus report to the ABA, 1998).

162. *John Adams*, AM. HISTORY, <http://www.let.rug.nl/usa/presidents/john-adams/novanglus-text-february-6-1775.php> [<https://perma.cc/CJ2E-KEM4>]. The concept found its genesis in John Adams's Seventh Letter of Novanglus. *Id.* He argued that Great Britain's treatment of its American colonists violated their rights under British law. *Id.* He wrote that "the British constitution is much more like a republic than an empire . . . a government of laws, and not of men." *Id.*

the resignation of President Richard Nixon.¹⁶³ Yet in Winn Parish, Louisiana, a district judge's chambers cautions those who enter with a sign that reads, "Be Still And Know That I Am Boss."¹⁶⁴

If no one regardless of his/her station in life is above the law, how is it possible that a prosecutor with apparently complete immunity can state in open court to the defense attorneys, "I want to kill everyone in here. I want to cut their f**king throats. I'm just being honest, and if any of them want to go outside we can do it right now."¹⁶⁵ Also, how can a Louisiana district court judge appoint a city prosecutor to represent an indigent defendant without any regard for the complete absurdity of his actions?¹⁶⁶ Where is the respect for, as well as the adherence to, the rule of law? So, in the end, the great American paradox remains.

As ships enter the New York harbor, the Statue of Liberty greets the travelers on board: "Give me your tired, your poor, your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, the tempest-tossed to me, I lift my lamp beside the golden door!"¹⁶⁷ Lady Justice is our beacon; her blindfold represents objectivity, in that justice should be meted out objectively, without fear or

163. John Herbers, *Nixon Resigns, He Urges a Times of 'Healing'; Ford Will Take Office Today*, N.Y. TIMES, Aug. 9, 1974.

164. Eli Hager, *When Real Estate and Tax Lawyers Are Forced to Do a Public Defender's Job*, MARSHALL PROJECT (Sept. 8, 2016, 7:00 AM), <https://www.themarshallproject.org/2016/09/08/when-real-estate-and-tax-lawyers-are-forced-to-do-a-public-defender-s-job#.Cp1tQP4wF> [<https://perma.cc/42C9-FU7X>].

165. Dahlia Lithwick, *Louisiana Prosecutor Wants to "Cold Cock" Defense Attorneys*, SLATE (Oct. 28, 2015, 4:53 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/10/louisiana_prosecut_or_dale_cox_wants_to_cold_cock_defense_attorneys.html [<https://perma.cc/GC5W-AGFC>].

166. See Vickie Welborn, *UPDATE: New Trial Date for Convicted Killer Delayed*, SHREVEPORT TIMES (Sept. 17, 2014, 7:06 AM), <http://www.shreveporttimes.com/story/news/local/2014/09/17/new-trial-date-will-set-today-convicted-killer/15763423/> [<https://perma.cc/G77T-QU33>].

167. *What is the Quote on the Statue of Liberty?*, <https://www.howtallisthestatueofliberty.org/what-is-the-quote-on-the-statue-of-liberty/> [<https://perma.cc/YY83-7YWM>] ("This quote comes from Emma Lazarus' sonnet, *New Colossus*, which she wrote for a fundraiser auction to raise money for the pedestal upon which the Statue of Liberty now sits.").

favor, regardless of wealth, fame, power, or identity. For our country is the foundation for equal justice under the law.

Yet we are a land that has known darkness and terror. The evils of slavery, the trail of tears, where thousands of Native Americans died in a forced exile of their people who suffered the loss of their lands,¹⁶⁸ the injustices of Jim Crow,¹⁶⁹ lynchings of African Americans,¹⁷⁰ and the internment of Japanese-Americans during World War II¹⁷¹ are stark examples of a few of the atrocities that have occurred with what may be best described as callous indifference. The United States is not God's gift to civilization; we are far from it.

It is important to understand the complexities of this country in order to gauge the future of the death penalty. The abolitionists are confronted by powerful forces within the criminal justice system that view capital punishment as societal vengeance and a strong symbol of intolerance for the dregs of society who kill decent, law-abiding citizens. All too many within our society could care less if an accused killer has mental and developmental issues that affect his ability to reason and make appropriate decisions. These factors are viewed as excuses; mercy and compassion are *not elements* of such reasoning.

It is a stain on the reputation of the United States that we have a system of capital punishment that casts most of its deadly net around the poor and disenfranchised of this country. This system continues to operate despite overwhelming evidence that it all too often causes innocent people to spend years in a cage as castaways from the rest of mankind.

The seeds of the abolitionist movement are out there. However, until we as a people stand and rise as one and expose

168. *Trail of Tears*, HISTORY (2009), <http://www.history.com/topics/native-american-history/trail-of-tears> [https://perma.cc/EZ92-KTHG].

169. *Scholar: Jim Crow is Far from Dead*, NPR (June 2, 2010, 12:00 PM), <http://www.npr.org/templates/story/story.php?storyId=127368484> [https://perma.cc/H683-RZ5D].

170. *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUST. INITIATIVE, <http://eji.org/reports/lynching-in-america> [https://perma.cc/6LAS-KEED].

171. *Japanese-American Relocation*, HISTORY (2009), <http://www.history.com/topics/world-war-ii/japanese-american-relocation> [https://perma.cc/JU4X-DMF7].

the continued flaws of the death penalty prosecutions; the unwillingness of prosecutors to admit mistakes; the insidious discrimination at work in the use of peremptory challenges against minorities; and the conscious hiding of evidence that undercuts the validity of verdicts, then change will be very slow in coming. And the quest for winning, for which there is no substitute, is the driving force of the prosecutorial arm of the government that without hesitation uses its power and prestige in an effort to prevent at every juncture any substantial growth in the abolishment movement that will be necessary to rid this country of the scourge of state-sanctioned murder.

In the movie *Judgment at Nuremburg*, the speech of Chief American Judge Dan Haywood, delivered by Spencer Tracy, states, “[L]et it now be noted in our decision here this is what we stand for: justice, truth, and the value of a single human being.”¹⁷² But arbitrariness and racism undermine the value of a human being and run afoul of the noble principles of Nuremburg. Capital punishment is a violent act of premeditated violence that will result in the death of a human being. Society has decreed there is no value in this life. Victor Hugo stated, “[W]hat is a crime when individuals do it is no less an offense when society commits the deed.”¹⁷³ Why do we afford the government the right to kill?

Until very recently, the confederate flag flew as a memorial to the Confederacy just outside the Caddo Parish courthouse.¹⁷⁴ Every day scores of African Americans walk past this monument on their way to court. A few years ago, an African American had the “audacity” to claim the flag’s presence prevented criminal justice from being fairly administered, particularly in death penalty cases.¹⁷⁵

172. JUDGMENT AT NUREMBERG (Metro-Goldwyn-Mayer Studios, Inc. 1961).

173. Victor Hugo, *Plea Against the Death Penalty*, GOOD READS, <http://www.goodreads.com/quotes/22004-plea-against-the-death-penalty-look-examine-reflect-you-hold> [https://perma.cc/N3Y4-N6R6].

174. Associated Press, *Caddo Parish Officials Vote to Remove Confederate Flag*, TIMES-PICAYUNE (Nov. 3, 2011, 10:45 PM), http://www.nola.com/politics/index.ssf/2011/11/caddo_parity_officials_vote_to.html [https://perma.cc/KM8U-SZRE].

175. *Presence Outside Caddo Parish Courthouse Creates Intolerable Risk That Capital Punishment System Cannot Be Fairly Administered Within Courthouse Walls*,

The ACLU, religious leaders, historians, scholars, and other groups filed an amicus brief with the Louisiana Supreme Court.¹⁷⁶ The issue was succinctly framed by Anna Arceneaux, staff attorney with the ACLU Capital Punishment Project: “Flying the flag outside the courthouse risks diminishing the trust of African-Americans in the criminal justice system and priming white jurors to view African-American defendants and victims as second-class citizens.”¹⁷⁷

The conviction of Mr. Dorsey, whose jury was comprised of eleven whites and one black, was affirmed. The argument fell on deaf ears. After all, Shreveport was the last capital of the Confederacy¹⁷⁸ and many wear this fact as a badge of honor and defiance. The flag has since been removed, but the statue remains, with a confederate soldier on top looking Northward in focused watch for the aggressors from the North.

The vestiges of the civil war are still strong in Caddo Parish. The statistics cited in this article are compelling. As Hillary Clinton, the Democratic Party’s nominee for U.S. President, summarized in the First Presidential debate, race is always an issue.¹⁷⁹

On October 5, 2016, the Supreme Court heard an argument on the admissibility of a psychologist’s testimony that the petitioner was more likely to be dangerous in the future because he was black, where future dangerousness was both a prerequisite for a death sentence and the controlling issue at sentencing.¹⁸⁰

ACLU (May 9, 2011), <https://www.aclu.org/news/aclu-argues-louisiana-supreme-court-confederate-flag-outside-courthouse-taints-capital> [<https://perma.cc/G7VY-4JCJ>].

176. *Id.*

177. *Id.*

178. *Shreveport NAACP Calls for Removal of Confederate Monument from Caddo Courthouse*, KTBS 3 (June 24, 2015, 8:07 PM), <http://www.ktbs.com/story/29402444/shreveport-naacp-calls-for-removal-of-confederate-monument-from-caddo-courthouse> [<https://perma.cc/94JC-N547>].

179. *Full Transcript: First 2016 Presidential Debate*, POLITICO (Sept. 27, 2016, 1:55 AM), <http://www.politico.com/story/2016/09/full-transcript-first-2016-presidential-debate-228761> [<https://perma.cc/8MNP-BXC8>].

180. Nina Totenberg, *Supreme Court to Hear Death Penalty Case Based on Racially Tainted Testimony*, NPR (Oct. 5, 2016, 5:10 AM), <http://www.npr.org/2016/10/05/496630474/supreme-court-to-hear-death-penalty-case-based-on-racially-tainted-testimony> [<https://perma.cc/6VJ9-52Q6>].

And with respect to audacity, consider the case of Kenneth Bratton, who is being prosecuted in Judge Dunn's case in Winnfield.¹⁸¹ He has been in jail for more than a year and is demanding trial.¹⁸² Judge Dunn's strategy: He will have the prosecutor represent Mr. Bratton.¹⁸³ "Kenny's got a lawyer, so now we can convict him."¹⁸⁴

Will this madness continue? Only time will tell. But, as set forth in a song from the early seventies: "Does anybody really know what time it is . . . Does anybody really care?"¹⁸⁵ What say you, America?

POSTSCRIPT: THERE IS AN IRONY HERE

Dale Cox has been vilified in the national press about his comments on the death penalty and his aggressive prosecutions of capital cases. I have known Mr. Cox for almost forty years. He was the initial First Assistant District Attorney for Paul Carmouche, who served as District Attorney of Caddo Parish for thirty years.¹⁸⁶ When I first met Mr. Cox, I was an Assistant United States Attorney in the Western District of Louisiana, and I succeeded Mr. Cox as the First Assistant for Caddo Parish.

When Mr. Cox was prosecuting at that time, he opposed capital punishment. He basically made no argument to the jury in the penalty phase other than to tell the jury that the decision was theirs, alone. There were no death verdicts returned.

When I succeeded Mr. Cox, my attitude mirrored much of what Mr. Cox has recently stated. At the time, I felt that the death penalty should be aggressively pursued in capital cases. As I have previously disclosed, I was immature, narcissistic, and

181. Jarvis DeBerry, *Louisiana: Not Even Pretending to Provide Real Indigent Defense*, TIMES-PICAYUNE (Nov. 10, 2016, 1:46 PM), http://www.nola.com/crime/index.ssf/2016/09/louisiana_public_defender.html [https://perma.cc/YLH7-KAR4].

182. *Id.*

183. *Id.*

184. *Id.*

185. CHICAGO, DOES ANYBODY REALLY KNOW WHAT TIME IT IS? (Columbia 1970).

186. *Paul Joseph Carmouche*, Attorney Profiles, <http://www.weems-law.com/Attorney-Profiles/Paul-J-Carmouche.shtml> [https://perma.cc/FAT8-PBZT].

very full of myself. Glenn Ford's death penalty case was returned under Paul Carmouche's tenure as District Attorney.¹⁸⁷ It was rendered by a Caddo Parish jury just a few years after the death penalty was reinstated in 1976.¹⁸⁸ Back then, Mr. Cox was for life. I was for death.

Thirty years later, our positions had changed; Mr. Cox's, due to the horrors of the crimes he was prosecuting, and mine, due the painful lessons of the injustice inflicted on Glenn Ford as a result of my failure fully to grasp that all life has value.

Humans are complicated beings. There is good and bad in all of us. I certainly am no philosopher of mankind, but I do know that the only constant of life is change. Perhaps my position currently is best described as follows:

[L]earning that truth [about Glenn Ford] cost Stroud his good opinion of himself and 30 years of another man's life. His experience should serve as a warning to those who persist in believing the death penalty is justice. The death penalty, writes Stroud, is "an abomination." The death penalty is "state-assisted revenge." He didn't always feel that way, but he has paid a high price for his education. And he will continue to pay. After all, Glenn Ford eventually walked free. Marty Stroud never will.¹⁸⁹

And what about Dale Cox, who has secured more than a third of Louisiana's death sentences over the last five years and has lately become one of the county's bluntest spokesmen for the death penalty? On March 11, 2014, he signed a Motion to Vacate Conviction and Sentence of Glenn Ford. The last paragraph of his motion read, "In light of the newly-discovered and credible exculpatory evidence, and in light of its obligation under *Brady v. Maryland*, the State therefore moves that the

187. *Id.*

188. *Introduction to the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/part-1-history-death-penalty> [<https://perma.cc/3LMC-GHFW>].

189. Leonard Pitts Jr., *Pitts: Ex-Louisiana Prosecutor Eaten by Remorse over Unfair Murder Trial*, LUBBOCK AVALANCHE-JOURNAL (Mar. 29, 2015), <http://lubbockonline.com/columnists/2015-03-29/pitts-ex-louisiana-prosecutor-eaten-remorse-over-unfair-murder-trial> [<https://perma.cc/5CRD-J3CP>].

Court vacate Mr. Ford's conviction and sentence, without reservation."¹⁹⁰

Glenn Ford was sent to the horrors of death row as the result of a prosecution led by me; it was Mr. Cox's motion that led to his release. There is, indeed, irony here. The real culprit in this case is neither Glenn Ford nor Dale Cox; it is I, and for that, I will, indeed, never "walk free" from my prosecution of Mr. Ford.

190. Motion to Vacate Conviction and Sentence, *supra* note 95.