WHY THE DEATH PENALTY IS SLOWLY DYING

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INTRODUCTION

Public support for the death penalty has drastically declined during the last 20 years.

According to a Gallup survey, in 1994, 80 percent of Americans supported the death penalty.[1] In 2014,[2] support for the death penalty was at 60 percent.[3] There are other strong indicia of the public's declining support for the ultimate punishment. First, the number of individuals sentenced to death by juries and judges has also declined significantly during the past 20 years. In 1994, 311 death sentences were meted out by juries and judges.[4] In 2014, only 73 death sentences were imposed.[5] In 2015, 49 individuals received death sentences, the fewest since 1991 when 14 death sentences were meted out.[6] Even in Texas, the leader among the states in carrying out the death penalty since 1976, far fewer death sentences are being imposed. Juries in Texas sentenced 33 individuals to death in 1996, but only 11

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1. *See* Jeffrey Jones, *American Support for Death Penalty Stable*, GALLUP (Oct. 23, 2014), http://www.gallup.com/poll/178790/americans-support-death-penalty-stable.aspx?utm_source=death%_20penalty&utm_medium=search&utm_campaign=tiles.

2. *Id.*

3. *Id.*

4. *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 Sept. 11, 2016).

5. *Id.*

6. *See* Timothy Williams, *Executions by States Fell in 2015, Report Says*, N.Y. TIMES (Dec. 16, 2015), http://www.nytimes.com/2015/12/16/us/executions-by-states-fell-in-2015-report-says.html.

individuals were sentenced to death in 2014.[7] In 2015, Texas juries sentenced only 2 defendants to death.[8]

Second, there has been a decline in executions. During the last twenty years, there has been a steady decline from a high of 98 executions in 1999 to 35 in 2014 and 28 in 2015, the lowest number of executions since 1973.[9] Third, during the last twenty years, Connecticut, Illinois, Maryland, New Jersey, New Mexico and New York have all abolished the death penalty and the Governors of four other states have imposed moratoriums.[10] Finally, fewer Americans believe the death penalty to be morally acceptable. Gallup began to measure public sentiment regarding the morality of the death penalty in 2001. In the Gallup poll, the number of Americans who believe the death penalty to be morally acceptable during this time period has gone from a high of 71 percent in 2006 to 60 percent in 2014.[11] Most surprisingly, this decline in public support for the death penalty has occurred despite the public's rising anxiety over terrorism.[12] This paper will discuss some of the possible reasons for the decline both in public support and in the number of death sentences imposed and carried out. This paper will also evaluate the two possible alternatives going forward: reform or complete abolition.

II. REASONS FOR THE DECLINE

There are many reasons for the decline in the public's confidence in the death penalty:

A. Innocence

No issue has had a bigger impact on the public's attitude towards the death penalty than the possibility of an innocent person being executed. Since 1973, there have been approximately 156 exonerations of death row inmates.[13] There are currently approximately 3000 individuals on death rows

7. *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 4.

8. *See* Williams, *supra* note 6.

9. *See* Williams, *supra* note 6.

10. *States With and Without the Death* Penalty, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Sept. 11, 2016).

11. Art Swift, *Most Americans Continue to Say Death Penalty Morally Ok*, GALLUP (June 4, 2015), http://www.gallup.com/poll/183503/americans-continue-say-death-penalty-morally.aspx.

12. *See Terrorism in the United States*, GALLUP (2016), http://www.gallup.com/poll/4909/terrorism-united-states.aspx.

13. *Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Sept. 9, 2016).

throughout the United States.[14] Researchers estimate that about 4 percent of those sentenced to death are actually innocent,[15] which would mean that there are currently about 120 individuals on death row who may be executed for crimes that they did not commit. Unfortunately, not every death row inmate with strong innocence claims has been exonerated. There have been credible reports indicating that there is a strong possibility that innocent individuals have been executed.[16] One such individual is Cameron Todd Willingham. Willingham was convicted and sentenced to death as a result of a fire which killed his three young daughters.[17] The state's case against Willingham consisted primarily of an expert's conclusion that the fire was deliberately set and that because he was the only adult in the home at the time of the fire, Williingham deliberately started the fire.[18] Shortly before Willingham's scheduled execution, a report by an acclaimed scientist and fire investigator indicated that the fire which killed Willingham's three daughters was not deliberately set but that the fire was accidental.[19] This information failed to convince either the Texas governor or the Board of Pardons and Parole to grant clemency or even delay Willingham's execution and he was put to death.[20] Since Willingham's execution, additional fire investigators have reviewed the case and have determined that the methods used by the state's trial expert were flawed and that the fire was not the result of arson.[21] Obviously, nothing can be done to rectify what strongly appears to have been the wrongful execution of Willingham and others. It is cases such as Willingham's and the irrevocability of the death penalty that have shaken public confidence in the system.

14. CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. AND EDUC. FUND, INC., DEATH ROW U.S.A. 1 (2015), http://www.naacpldf.org/files/publications/DRUSA_Spring_2015.pdf.

15. *See* Glossip v. Gross, 135 S. Ct. 2726, 2758 (2015) (Breyer, J., dissenting).

16. *See, e.g.*, James S. Liebman, *You Can't Fix The Death Penalty: Carlos Luna's Execution Shows That a Faster, Cheaper Death Penalty is a Dangerous Idea*, L.A. TIMES, June 1, 2012, at A19 (revealing that after a thorough investigation, the authors concluded that Carlos DeLuna was sentenced to death and executed for a crime that he did not commit);

Press Release, Bill Ritter, Jr., Colo. Gov., Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s (Jan. 7, 2011), http://www.deathpenaltyinfo.org/documents/ArridyPardon.pdf ("[A]n overwhelming body of evidence indicates the 23-year-old Arridy was innocent, including false and coerced confessions, the likelihood that Arridy was not in Pueblo at the time of the killing, and an admission of guilt by someone else.").

17. David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER (Sept. 7, 2009), http://www.newyorker.com/magazine/2009/09/07/trial-by-fire.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

B. Race

Another reason for the declining public support is the concern over the continued racial disparities in the administration of the death penalty. Racism in the implementation of the death penalty is not a relic of the past.[22] African-Americans continue to be sentenced to death and executed disproportionately. African-Americans constitute roughly 13 percent of the U.S. population,[23] yet they account for about 42 percent of the death row population[24] and approximately 35 percent of all executions in the U.S. since 1976.[25] Also troubling is the fact that the vast majority of those who have been executed killed white victims,[26] despite the fact that approximately 44 percent of murder victims in the United States are African-American.[27] Since 1976, 76 percent of those who have been executed killed White victims.[28] Thus, because African-Americans are almost one-half of all homicide victims, this means that their killers are, for the most part, not being sentenced to death and executed. Numerous studies have concluded that these disparities are the result of racial discrimination in the administration of the death penalty.[29] The most prominent study to reach such a conclusion was the Baldus study, which purports to show a disparity in the imposition of the death penalty in Georgia based on the race of the murder victim and, to a

22. For a review of the history of the racially disproportionate use of the death penalty in the United States, see Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)visibility of Race*, 82 U. CHI. L. REV. 243, 245-53 (2015).

23. United States Quick Facts, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045215/00 (last visited Sept. 9, 2016).

24. Information on the current death row population available at *National Statistics on the Death Penalty and Race*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976 (last visited Sept. 16, 2016).

25. *See id*.

26. *Id.*

27. According to the 2013 FBI Uniform Crime Report, there were a total of 5723 murder victims and 2491 or 44 percent were African American. *See Crime in the United States 2013: Expanded Homicide Data Table 6*, FBI, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_6_murder_race_and_sex_of_vicitm_by_race_and_sex_of_offender_2013.xls (last visited Sept. 6, 2016).

28. *National Statistics on the Death Penalty and Race*, *supra* note 24.

29. David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1738 (1998) (based on its study of Philadelphia's administration of its death penalty, the authors found "that the problem of arbitrariness and discrimination in the administration of the death penalty is a matter of continuing concern and is not confined to southern jurisdictions."); Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 838-39 (2008) (finding that the Harris County District Attorney was considerably more likely to pursue death against black defendants even when their crimes are less serious).

lesser extent, the race of the defendant.[30] The Baldus study took into account 230 variables that could have explained the racial disparities in capital sentencing on non-racial grounds.[31] Even after taking account of these variables, the Baldus study found that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks.[32] The study also found that Black defendants were 1.1 times as likely to receive a death sentence as other defendants.[33] The study concluded that Black defendants who kill White victims have the greatest likelihood of receiving the death penalty than any other defendant-victim combination.[34]

The Supreme Court has largely ignored the issue of racial disparities in capital sentencing, but the strength of the Baldus findings forced it to confront the issue. In *McCleskey*, although the Court accepted the legitimacy of the Baldus study,[35] it did not allow the inmate to use the statistics as proof of racial discrimination.[36] Rather, the Court held that in order to prevail on a claim of racial discrimination in capital sentencing, a death row inmate would have to prove that the decision makers in his specific case acted with a discriminatory purpose or that a capital sentencing statute was enacted by the legislature with a discriminatory purpose.[37] Not surprisingly, given this onerous standard, neither McCleskey nor any other death row inmate has been able to prove that the decision makers in their specific cases acted with a discriminatory purpose.[38]

The case of Texas death row inmate Duane Buck perfectly illustrates the difficulties of proving racial discrimination in capital cases after *McCleskey*.[39] Buck's responsibility for the murder for which he was convicted is not in dispute.[40] Rather, the issue in his case is whether the death sentence that he received was tainted by the use of race.[41] In Texas, in order to sentence a defendant to death, the jury must determine that the defendant

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

31. *Id.* at 287.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 291 n.7.

36. *Id.* at 292-93.

37. *Id.* at 297-98.

38. *See* KENNETH WILLIAMS, MOST DESERVING OF DEATH? AN ANALYSIS OF THE SUPREME COURT'S DEATH PENALTY JURISPRUDENCE 45 (2012) (finding that no death row inmate alleging racial discrimination has prevailed on a *McCleskey* claim).

39. Buck v. Stephens, 623 F. App'x 668 (5th Cir. 2015).

40. *Id.*

41. *Id.*

could constitute a future danger to society even if he is incarcerated for the remainder of his life.[42] During Buck's sentencing hearing, an expert witness testified regarding Buck's future dangerousness.[43] This expert told the jury that "[i]t's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System."[44] The same statement was included in his report, which was submitted to the jury.[45] After the jury sentenced Buck to death, he has continuously raised the fact that the jury was told that he would be more dangerous in the future because of he was African American on appeal, including three trips to the U.S. Court of Appeals for the Fifth Circuit, but all of his appeals have been denied.[46]

A major reason why the problem of racial disparities in capital sentencing persists is because those who decide whether the defendant lives or dies are typically overwhelmingly white:

> [T]he criminal justice system is the part of American society that has been least affected by the Civil Rights Movement. Many courthouses throughout the country look about the same today as they did in the 1940s and 1950s. The judges are white, the prosecutors are white, and the court-appointed lawyers are white. Even in communities with fairly substantial African American populations, all of the jurors at a trial may be white.[47]

According to a recent study, 95 percent of elected state and local prosecutors are white.[48] These overwhelmingly white prosecutors make the decision whether to seek death in a particular case. They also have a big influence over who sits on the jury in a capital case. Prosecutors are obviously aware of the fact that many African Americans perceive the criminal justice system to be biased.[49] In fact, while the general public continues to express support for the death penalty in public opinion polls, that sentiment is not shared by African American poll respondents. According to the most recent Gallup poll, 55 percent of African Americans indicated that

42. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b)(1) (West 2006).

43. *See Buck*, 623 F. App'x. at 669.

44. *Id.*

45. *Id.*

46. *Id.* In *Buck v. Davis*, 137 S. Ct. 759, 775 (2017), the U.S. Supreme Court held that because Mr. Buck's trial attorneys presented expert testimony tainted by race, he should be resentenced because "[n]o competent defense attorney would introduce such evidence about his own client."

47. Stephen B. Bright, *The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies*, 11 U. PA. J. CONST. L. 23, 27 (2008).

48. *See* Nicholas Fandos, *A Study Documents the Paucity of Black Elected Prosecutors: Zero in Most States*, N.Y. TIMES (July 7, 2015), http://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-black-elected-prosecutors-zero-in-most-states.html.

49. *Id*.

they were opposed to the death penalty while only 39 percent were in favor.[50] As a result, a jury composed of African Americans is significantly less likely to return a death verdict.[51] Therefore, prosecutors have an incentive to remove as many African Americans from a capital jury as they possibly can and they often do so through the use of peremptory challenges. Several studies have documented the continuing use of peremptory challenges by prosecutors in order to strike African Americans from the jury in capital cases despite efforts by the Supreme Court to prohibit this practice.[52]

In *Batson v. Kentucky,*[53] the Supreme Court outlawed the use of race in the exercise of peremptory challenges. Despite *Batson,* courts have tended to uphold the prosecutors' use of peremptory challenges against African American members of the jury pool.[54] As long as the prosecutor can articulate a race neutral reason for the strike, the courts will usually reject the defense's *Batson* challenge.[55] This is so even when the prosecutor offers an absurd reason for striking black jurors, such as the fact that a juror agrees with the verdict in the O.J. Simpson case[56] or that the potential juror has facial hair.[57] Despite the continued use of peremptory challenges to remove black jurors from capital cases, the Supreme Court has refused to strengthen *Batson.*

C. Arbitrariness

Many people are also bothered by the fact that there is no consistency in the manner in which death sentences are imposed.[58] The Court has tried to remedy this problem beginning in 1972 when it struck down the death penalty primarily because of the arbitrary manner in which it was being imposed at the time.[59] The Justices were troubled by the fact that, in their view, the death

50. 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.

51. *See* William J. Bowers et. al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 193 (2001).

52. *See* Bright, *supra* note 47, at 26-27 (discussing the racist practices of the Philadelphia and Houston District Attorneys).

53. 476 U.S. 79 (1986).

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

55. *Id.*

56. *See* Shelling v. State, 52 S.W.3d 213 (Tex. App. 2001).

57. *See* Purkett v. Elem, 514 U.S. 765, 766 (1995).

58. *Arbitrariness*, DEATH PENALTY INFO. CTR., http://www.deathpenaltinfo.org/arbitrariness (last visited Sept. 16, 2016).

59. *See* Furman v. Georgia, 408 U.S. 238 (1972).

penalty "smacks of little more than a lottery system."[60] However, in *Gregg v. Georgia*,[61] a substantial majority of the Court believed that the death penalty could be imposed less arbitrarily through aggressive regulation. In particular, the Court approved of three safeguards which it believed would minimize the arbitrariness which led it to invalidate the death penalty in *Furman*:[62] (1) requiring the jury to consider the circumstances of the crime and the defendant's background at a separate sentencing hearing;[63] (2) limiting the sentencer's discretion by providing guidance as to which aggravating circumstances could warrant the death penalty;[64] (3) an automatic appeals process as a check on arbitrary decision-making.[65]

The decision in *Gregg* began the modern era of capital punishment in the United States. During this modern era, the Court would closely regulate the death penalty by restricting its use to certain categories of defendants[66] and certain crimes and by mandating that the defendant be allowed to present mitigating evidence.[67] The effort, however, to restrict the death penalty to those most deserving of death has failed. The death penalty today is as arbitrary as it was when the Court decided *Furman*. Several Justices who have had to administer the death penalty over the years have acknowledged that the Court's attempt to regulate the death penalty has been a failure.[68]

60. *Id.* at 293 (Brennan, J., concurring).

61. 428 U.S. 153 (1976).

62. *Id.* at 95.

63. *See id.* at 190-91.

64. *Id.* at 192-94.

65. *Id.* at 195.

66. *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty could not be imposed on juvenile offenders); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the death penalty could not be imposed on those defendants who are intellectually disabled); Ford v. Wainwright, 477 U.S. 399 (1986) (holding that the death penalty could not be imposed on those inmates who became insane while incarcerated); Coker v. Georgia, 433 U.S. 584 (1977) (holding that death could not be the punishment for the crime of rape); Kennedy v. Louisiana, 554 U.S. 407 (2008) (prohibiting the death penalty for child rapists who do not kill).

67. *See* Lockett v. Ohio, 438 U.S. 586 (1978).

68. In *Callins v. Collins*, Justice Blackmun announced that "[f]rom this day forward, I no longer shall tinker with the machinery of death . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. . . . The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative." 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). In *Baze v. Rees*, Justice Stevens wrote that "[f]ull recognition of the diminishing force of the principal rationales for retaining the death penalty should lead this Court and legislatures to reexamine the question recently posed by Professor Salinas, a former Texas prosecutor and judge: 'Is it time to Kill the Death Penalty?'" 553 U.S. 35, 81 (2008) (Stevens, J., concurring). Justice Lewis Powell told his biographer, "I have come to think that capital punishment should be abolished." JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994).

Why does the death penalty continue to be imposed arbitrarily despite almost forty years of regulation by the Supreme Court? There are several reasons why this is the case. First, as pointed out earlier, the racial disparities in every jurisdiction that administers the death penalty strongly suggests that it is being imposed in a racially discriminatory manner. Second, only a small fraction of murderers are actually sentenced to death.[69] The murders they commit are often less egregious than many defendants who didn't receive death sentences.[70] Third, gender plays a role in that women are rarely sentenced to death.[71] Fourth, geography plays a huge role. Where a defendant killed his victim is extremely important.[72] A killer in Indiana is much less likely to be sentenced to death than a similar killer in Texas.[73] Even within an active death penalty state, there are huge disparities in death sentences. The imposition of the death penalty is heavily dependent on where the killing occurred within a state.[74] For instance, a killer in Houston is much more likely to be sentenced to death than a similar killer in Austin.[75] Finally, the availability of resources is a crucial factor in whether the death penalty is imposed.[76] For instance, some jurisdictions provide more resources for indigent defense than others.[77] This is crucial because those defendants who

69. According to the FBI, in 2013, there were 5723 murder victims. *See Crime in the United States 2013: Expanded Homicide Data Table 6*, *supra* note 26. In 2013, only 83 individuals were sentenced to death. *Death Sentences in the United States From 1977 By State and By Year*, *supra* note 5.

70. *See* Glossip v. Gross, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting).

71. Women constitute less than 2% of the death row population. *See National Statistics on the Death Penalty and Race*, *supra* note 23.

72. *See Glossip*, 135 S. Ct. at 2761 (Breyer, J., dissenting).

73. *See* Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 673 (2015) (pointing out that 20 percent of U.S. counties are responsible for the death row population).

74. *See* Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. REV. 227, 231-32 (2012); John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637, 673 (2014) ("[T]he single most important influence from 1973−2007 explaining whether a death-eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [County]."); Campbell Robertson, *The Prosecutor Who Says Louisiana Should "Kill More People"*, N.Y. TIMES (July 7, 2015), http://nyti.ms/1NLiJWV ("Within Louisiana, where capital punishment has declined steeply, Caddo [Parish] has become an outlier, accounting for fewer than 5 percent of the state's death sentences in the early 1980s but nearly half over the past five years.").

75. *See* Bright, *supra* note 73, at 680-81 (pointing out that Harris County[, Houston] is responsible for more executions than most U.S. states).

76. *See Glossip*, 135 S. Ct. at 2761 (Breyer, J., dissenting).

77. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worse Lawyer*, 103 YALE L. J. 1835, 1871 (1994).

are represented by competent trial counsel are significantly less likely to receive a death sentence.[78]

Thus, the egregiousness of the crime is a much less important factor than the race of the victim and defendant, the gender of the defendant, where the crime occurs, and the quality of defense counsel in determining who is sentenced to death.[79] It is not surprising therefore that these factors have caused much of the public to doubt the efficacy of the death penalty.

D. Incompetent Lawyers

The public has learned that it is usually not the heinousness of the crime that causes a defendant to end up on death row.[80] Rather, it is often the quality of the legal representation that he received that is dispositive.[81] Defendants have ended up on death row because their lawyers slept during the trial,[82] were drunk and disoriented at trial,[83] failed to present important evidence,[84] didn't understand the law,[85] and because their lawyers simply failed to vigorously defend their clients.[86] It is difficult for the public to have any confidence in a system that determines who should live or die when one of the key players in that system, the defense counsel, is incompetent.

There are several terrible consequences for capital defendants who receive substandard legal representation. The most serious consequence is that they may be wrongly convicted. Another consequence of bad lawyering in capital cases is the possibility that the defendant will be sentenced to death even though he shouldn't be. There have been numerous defendants who have been sentenced to death because their lawyers failed to present important mitigating evidence to the jury.[87] Incompetent trial lawyers also make it difficult for defendants to receive appellate relief because they may

78. *See id.* at 1837-41.

79. *See Glossip*, 135 S. Ct. at 2762 (2015).

80. *See id.* at 1840.

81. *Id.* at 1836 ("Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters.").

82. *See, e.g.*, *Burdine v. Johnson*, 262 F.3d 336, 338 (5th Cir. 2001).

83. *See* Bright, *supra* note 77, at 1835.

84. *Id.* at 1837.

85. *See Hinton v. Alabama*, 134 S. Ct. 1081, 1085 (2014) (trial attorney failed to seek funding for expert because he was not aware that the law authorized such funding).

86. *See* Bright, *supra* note 77, at 1835.

87. *See, e.g.*, Neal v. Puckett, 286 F.3d 230, 233 (5th Cir. 2002) (trial counsel failed to present evidence during punishment phase of petitioner's background "including his horrid childhood of rejection, abandonment, and mental institutions, plus his tortuous prison experience").

fail to make timely objections at and therefore fail to preserve error for appeal.[88]

The Supreme Court attempted to address the problem of incompetent counsel in its decision in *Strickland v. Washington.*[89] In *Strickland,* the Court held that in order to prevail on a claim that his counsel provided ineffective representation, the defendant must prove (1) the counsel's performance was deficient, and (2) that he was prejudiced as a result of counsel's deficient performance.[90] It is very difficult for a defendant to prevail on a claim of ineffective assistance of counsel. Even if the defendant can prove that counsel's performance was deficient, which is no easy task, courts often reject claims of ineffective assistance of counsel on grounds that the defendant did not suffer prejudice.[91] As a result, numerous defendants have been executed after receiving questionable legal representation.[92]

E. Delay in Implementation

Both proponents and opponents are frustrated by the delays in carrying out executions.[93] Proponents are frustrated because they feel as though justice is not served by these delays.[94] Opponents are concerned that these delays contribute to the unfairness of the death penalty.[95] The case of California death row inmate Richard Boyer illustrates why these delays occur and how they impact the system.[96] Boyer was initially sentenced to death over thirty years ago.[97] His first trial ended in a mistrial, his second trial, in 1984, yielded a conviction and death sentence which was later reversed on

88. *See, e.g.*, Henson v. State, 407 S.W.3d 764, 767 (Tex. Crim. App. 2013) ("In order to preserve error for appellate review, a defendant must make a timely request, objection, or motion in the trial court (regardless of whether or not the error complained of is constitutional).").

89. 466 U.S. 668 (1984).

90. *Id.* at 687.

91. *See, e.g.*, Kenneth Williams, *Does Strickland Prejudice Defendants on Death Row?*, 43 U. RICH. L. REV. 1459, 1481-85 (2009) (discussing the case of Johnny Ray Conner); *Westley v. Johnson*, 83 F.3d 714, 721 (5th Cir. 1996) (holding that although trial counsel was deficient for failing to review transcript of co-defendant's trial, this failure did not prejudice petitioner).

92. *See, e.g.*, TEX. DEF. SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY APPEALS (2002), http://texasdefender.org/wp-content/uploads/Lethal-Indiff_web.pdf (a report by the Texas Defender Service which found that "[d]eath row inmates today face a one-in-three chance of being executed without having the case properly investigated by a competent attorney and without having an claims of innocence or unfairness presented or heard.").

93. *See* Glossip v. Gross, 135 S. Ct. 2726, 2764-72 (2015) (Breyer, J., dissenting)

94. *Id.* at 2769.

95. *Id.* at 2764.

96. *See* Boyer v. Davis, 136 S. Ct. 1446 (2016) (Breyer, J., dissenting).

97. *Id.*

the ground that police officers had obtained evidence by violating his constitutional rights.[98] Boyer's third trial occurred in 1992 and took 14 years to move through the California appellate process.[99] As this article goes to print, Boyer still has not been executed and given the small number of executions that have occurred in California,[100] he is not likely to be.

The delays in Boyer's case are not unusual. California has the largest death row in the United States[101] but rarely carries out executions.[102] The California Commission on the Fair Administration of Justice has labeled the system in California "dysfunctional" as a result of these delays.[103] The Commission noted that death row inmates are more likely to have their sentences overturned or die from natural causes than they are to be executed.[104] California is not an aberration. Nationwide, it takes an average of approximately 18 years to carry out a death sentence.[105] These delays have left both proponents and opponents frustrated with the system and has undoubtedly contributed to the loss of public confidence and support for the death penalty both in California and nationwide.

F. Life Without Parole (LWOP)

In the past, jurors often voted for death in order to ensure that dangerous defendants remained in jail and were never released on parole.[106] Now that most states provide jurors with the option of sentencing the defendant to life without parole, jurors are more confident that the defendant will not be released and as a result, they are meting out fewer death sentences and the public seems to agree with those decisions. In a recent poll, 52 percent of the public preferred life without parole whereas 42 percent preferred the death penalty.[107] Even among those who support the death penalty, 29 percent preferred life without parole. The public is increasingly less willing to accept

98. *Id.*

99. *Id.*

100. *Number of Executions by State and Region since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited Jan. 21, 2017)

101. *Id.*

102. *Id.*

103. *See* Boyer v. Davis, 136 S. Ct. 1446 (2016) (Breyer, J., dissenting).

104. *Id.*

105. Glossip v. Gross, 135 S. Ct. 2726, 2764 (2015).

106. *See* Amanda Dowlen, *An Analysis of Texas Capital Sentencing Procedure: Is Texas Denying Its Capital Defendants Due Process By Keeping Judges Uninformed of Parole Eligibility?*, 29 TEX. TECH. L. REV. 1111, 1134-38 (1998).

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

the risk of executing an innocent person now that life without parole provides them with an assurance that he will never be released from prison.

G. Costs

The death penalty is more expensive than sentencing an inmate to life without parole.[108] That's because death penalty cases require more attorneys and more experts who spend more time on the case than attorneys in non-death penalty cases.[109] Furthermore, an ordinary criminal case is usually appealed once whereas there are multiple appeals after an inmate is sentenced to death.[110] Since inmates sentenced to death are almost excessively indigent,[111] the costs of these appeals are borne by the state.[112] There are other costs the state must absorb in death penalty cases, including the higher costs of housing a death row inmate and the increased amount of time that judges, prosecutors and their staffs spend on capital cases.[113] Since life without parole ensures the public safety as much as a death sentence and is more cost efficient, many jurisdictions are opting not to pursue the death penalty as frequently as they have in the past.

III. THE FUTURE: REFORM OR ABOLITION?

Nearly everyone, proponent and opponent, agrees that the death penalty as currently administered does not work.[114] The options for the states that have retained the death penalty and ultimately for the Supreme Court is whether their efforts to reform the death penalty should continue or whether any attempt to reform the death penalty is doomed to failure and that the only solution is total abolition.

108. *See* Maurice Chammah, *Six Reasons the Death Penalty is Becoming More Expensive*, MARSHALL PROJECT (Dec. 17, 2014, 7:45 AM), https://www.themarshallproject.org/2014/12/17/six-reasons-the-death-penalty-is-becoming-more-expensive.

109. *Id.*

110. *Id.*

111. *Some Facts about the Death Penalty*, OKLA. COALITION TO ABOLISH THE DEATH PENALTY, http://okcadp.org/public-education/educational-resources/facts-about-the-death-penalty (last visited Sept. 7, 2016).

112. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

113. *See* Chammah, *supra* note 108.

114. *See id.*

A. Reform

There have been numerous proposals to "fix" the death penalty. Reform proposals have been made by academics,[115] state commissions[116] and others to address many of the issues that have troubled the public about the system. In order to minimize the risk of an innocent person being executed, a number of reforms have been enacted and proposed. For instance, several proposals have been made to minimize the possibility of a misidentification.[117] One such proposal is that lineups be administered by officers who are not involved in the investigation and who are not familiar with the suspect in order to ensure that they do not send signals, deliberate or unconscious, to the witness as to whom the suspect might be.[118] To address the problem of suggestive lineups, some have proposed that individuals in a lineup be presented sequentially so that witnesses wouldn't be able to compare and contrast the individuals in the lineup and choose the individual who most resembles the suspect.[119] Witnesses often believe that the suspect is part of the lineup and therefore feel pressure to pick someone in the lineup as the perpetrator.[120] Some have proposed informing witnesses that the suspect may not be in the lineup to reduce this pressure.[121]

Another cause of wrongful convictions is misconduct by prosecutors and police. In *Brady v. Maryland*,[122] the Supreme Court held that prosecutors were constitutionally required to disclose exculpatory evidence to the defense but they often fail to fulfill this duty. According to federal appeals court Judge Alex Kozinski, there is an "epidemic of *Brady* violations abroad in the land."[123] Furthermore, police sometimes extract false confessions from suspects. To deal with the problem of prosecutorial misconduct, Judge Kozinski believes that open file discovery should be required.[124] Thus, if open file discovery is required, prosecutors would be required to disclose any evidence bearing on the crime with which a defendant is being charged, not

115. *See, e.g.*, Kenneth Williams, *The Death Penalty: Can It be Fixed?*, 51 CATH. U.L. REV. 1177, 1179 (2002).

116. *See, e.g.*, ILL. GOV. COMM. ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002).

117. *Id.*

118. *Id.* at 32.

119. *Id.* at 34.

120. *Id.*

121. *Id.*

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

123. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, viii (2015) (quoting United States v. Olson, 737 F.3d 625, 626 (9th Cir. 2013)) (Kozinski, J., dissenting from denial of rehearing en banc).

124. *Id.* at xxvi-ii.

just exculpatory evidence.[125] Others have proposed that prosecutors should be disciplined more frequently and harshly when they engage in misconduct.[126] To address the problem of false confessions, it has been proposed that police interrogations should be videotaped.[127]

In *McCleskey v. Kemp*,[128] the attempt to eliminate racial disparity in capital sentencing failed at the Supreme Court. Since then two major legislative proposals have been advanced in an attempt to eliminate racial disparities in capital sentencing. First, in federal cases, a federal statute has been enacted in an attempt to eliminate racism in the jury deliberation process.[129] This statute requires that the judge instruct the jury at the end of the sentencing phase of a capital case that they may not in any way consider race, national origin, sex or the religious beliefs of the defendant or the victim in reaching its verdict.[130] The same statute also requires that after a verdict has been rendered, all jurors must certify that they did not, in fact, consider the race, national origin, sex, or religious beliefs of the defendant or the victim in reaching their determinations and that their determinations would have been the same regardless of these factors.[131]

The other legislative effort to eliminate racial disparities in the administration of the death penalty that has been proposed is the Racial Justice Act.[132] The Act would have allowed defendants who had been sentenced to death to use statistical evidence to demonstrate a prima facie case of racial bias,[133] something that the Supreme Court did not permit in *McCleskey*.[134] The burden then would have shifted to the prosecution to explain the reasons for the statistical disparity.[135] The reviewing court would then decide whether race was a factor and if it found that it was, the defendant's death sentence would be overturned.[136] The Racial Justice Act passed the U.S. House of Representatives but failed to be acted upon by the U.S. Senate.[137] Two states, North Carolina and Kentucky, enacted versions

125. *Id.*
126. *See* Williams, *supra* note 115, at 1200-01.
127. *Id.* at 1202.
128. 481 U.S. 279 (1987).
129. *See* 18 U.S.C § 3593(f) (2012).
130. *Id.*
131. *Id.*
132. Racial Justice Act, H.R. 4017, 103d Cong., 2d Sess. § 2921 (1994).
133. Williams, *supra* note 115, at 1182-83.
134. *See* McCleskey v. Kemp, 481 U.S. 279, 286 (1987).
135. Williams, *supra* note 38, at 49.
136. *Id.*
137. Williams, *supra* note 115, at 1182.

of the Act.[138] However, after a state judge overturned an inmate's death sentence based on the Racial Justice Act, the North Carolina legislature repealed its Racial Justice Act.[139]

After reinstating the death penalty in 1976,[140] the Court has regulated it in an attempt to minimize arbitrariness and limit the penalty to the "worst of the worst."[141] In attempting to limit the arbitrary application of the death penalty, death sentences are automatically appealed.[142] In addition, trials are bifurcated into two separate phases: 1) guilt-innocence and 2) punishment.[143] In the second phase, the Court has mandated a broad right to individualized sentencing to permit capital defendants to invoke any relevant grounds supporting a non-death sentence.[144] The Court has also limited the offenses punishable by death by exempting non-homicidal crimes.[145] The Court has also categorically excluded from the penalty's reach certain vulnerable groups such as juveniles[146] and intellectually disabled offenders.[147]

The Court has spent the last 40 years trying to make the death penalty work. Despite its efforts, there are still serious racial disparities in the administration of the death penalty. Defendants continue to be wrongly convicted of capital murder and sentenced to death. Receiving a death sentence remains as arbitrary as being struck by lightning as Justice Stewart declared in *Furman v. Georgia*,[148] and many defendants continue to be represented by incompetent defense counsel. Any further reforms are unlikely to be successful. The death penalty will continue to be "fraught with arbitrariness, discrimination, caprice and mistake."[149] Individuals will continue to be sentenced to death and executed who do not deserve to die.

138. Williams, *supra* note 38, at 49.

139. *See* Lane Florsheim, *Four Inmates Might Return to Death Row Because North Carolina Republicans Repealed a Racial Justice Law*, NEW REPUBLIC (May 9, 2014), http://www.newrepublic.com/article/117699/repeal-racial-justice-act-north-carolina-gop-takeover.

140. *See* Gregg v. Georgia, 428 U.S. 153, 169, 186-87 (1976).

141. *See, e.g.*, Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting); Godfrey v. Georgia, 446 U.S. 420, 432-33 (1980).

142. *See* Dan S. Levey, *Balancing the Scales of Justice*, 89 JUDICATURE 289, 291 (2006).

143. *Part I: History of Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/part-I-history-death-penalty (last visited Sept10, 2016)

144. *See* Tennard v. Dretke, 542 U.S. 274, 284-85 (2004).

145. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (prohibiting the death penalty for the rape of a child) *as modified* (Oct. 1, 2008), *opinion modified on denial of reh'g*, 554 U.S. 945 (2008); Coker v. Georgia, 433 U.S. 584, 599 (1977) (prohibiting the death penalty for the rape of an adult woman).

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

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

148. *See* Furman v. Georgia, 408 U.S. 238, 309 (1972) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

149. Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting).

The innocent will continue to be at risk of being executed. It is therefore imperative that the Supreme Court recognize that Justice Blackmun was right in 1994 when he said "that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies"[150] and abolish the death penalty.

B. Abolition

The states that have retained the death penalty can of course abolish it through their legislative or judicial process. That is not likely to happen in some of the more active death penalty states like Texas.[151] Therefore, if the death penalty is to be abolished throughout the United States, that will have to be done by the U.S. Supreme Court. In his dissenting opinion in *Glossip v. Gross*,[152] Justice Breyer laid out the road map for declaring the death penalty unconstitutional. In *Glossip*, Justice Breyer identified three fundamental defects, which he believes makes the death penalty cruel and unusual punishment and therefore a violation of the Eighth Amendment. The first serious defect that Justice Breyer discussed is the serious unreliability of the death penalty.[153] He discussed at length the significant numbers of exonerations in capital cases and also the likelihood that some innocent individuals were wrongly executed.[154] He concludes that "[i]n sum, there is significantly more researched-based evidence today indicating that courts sentence to death individuals who may well be actually innocent or whose convictions (in the law's view) do not warrant the death penalty's application."[155]

The second serious defect that Justice Breyer identified which undermines the legality of the death penalty is its arbitrariness in application.[156] He first points out that the Court in reinstating the death penalty in 1976 acknowledged that it would be unconstitutional if "inflicted in an arbitrary and capricious manner."[157] He then points to studies indicating that the death penalty is imposed in only a small number of cases even though there are many cases that are death eligible.[158] Justice Breyer points out that

150. *Id.* at 1145.

151. *See* Ross Ramsey, *UT/UTT Poll: Texans Stand Behind Death Penalty*, TEX. TRIBUNE (May 24, 2012), https://www.texastribune.org/2012/05/24/uttt-poll-life-and-death.

152. 135 S. Ct. 2726, 2755-56 (2015).

153. *Id.* at 2755-56.

154. *Id.* at 2756-58.

155. *Id.* at 2759.

156. *Id.*

157. *Id.* at 2760 (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976)).

158. *Id.* at 2760.

in the few cases in which the death penalty is imposed, it is usually not the egregiousness of the crime that is the determining factor but rather that there are other factors which case defendants to be sentenced to death.[159] These factors that Justice Breyer identified include the race of both the defendant and the victim,[160] the gender of the defendant,[161] the place where the crime was committed,[162] the lack of resources available to defense counsel,[163] the quality of the defendant's legal representation,[164] and the political pressures on judges who must stand for reelection.[165] As a result, he concludes that "the imposition and implementation of the death penalty seems capricious, random, indeed, arbitrary."[166]

The third defect which Justice Breyer believes makes the death penalty unconstitutional is the unconscionably long delays that undermine the death penalty's penological purposes.[167] Justice Breyer writes that the Court has recognized in the past that "the death penalty's penological rationale in fact rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community's interest in retribution."[168] According to Justice Breyer, the lengthy delays undermine both the deterrence and retributive rationales for the death penalty.[169] A penalty that serves no useful purpose is therefore cruel. As Justice Breyer points out, the delays in capital cases cannot be eliminated without increasing the arbitrariness and unreliability in its application: "we can have a death penalty that at least arguably serves legitimate penological purpose *or* we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both."[170]

Three major objections are likely to be made to the Supreme Court invalidating the death penalty. The first and probably strongest objection will be that the text of the Constitution allows the death penalty to be imposed.[171] As Justice Scalia argues, "[i]t is impossible to hold unconstitutional that

159. *Id.*
160. *Id.* at 2760-61.
161. *Id.* at 2761.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 2762.
166. *Id.* at 2764.
167. *Id.*
168. *Id.* at 2767.
169. *Id.* at 2768-69.
170. *Id.* at 2772.
171. *See* Gregg v. Georgia, 428 U.S. 153, 177 (1976) ("It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers.").

which the Constitution explicitly *contemplates."*[172] In support of his position, Justice Scalia specifically refers to the Fifth Amendment which provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury," and which also provides that no person shall be "deprived of life . . . without due process of law."[173] These two provisions in the Constitution, it will be argued, make it clear that the framers did not intend to prohibit capital punishment when they enacted the Eighth Amendment.[174] In Scalia's view of the Eighth Amendment, it was enacted only to prohibit those punishments that added "terror, pain, or disgrace to an otherwise permissible capital sentence."[175]

There are a couple of major flaws in the argument that the death penalty is constitutional because of the Fifth Amendment. First, the Fifth Amendment does not confer power onto the state.[176] Rather it limits the power of the state by requiring certain procedural safeguards.[177] As Justice Brennan explained, the "amendment does not, after all, declare the right of the Congress to punish capitally shall be inviolable; it merely requires that when and if death is a possible punishment, the defendant shall enjoy certain procedural safeguards, such as indictment by grand jury and, of course, due process."[178] Second, those who use the Fifth Amendment to argue that the death penalty is constitutional fail to explain why it should trump the Eighth. For instance, the double jeopardy provision of the Fifth Amendment seems to contemplate the taking of limbs as punishment: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[179] Wouldn't the Eighth Amendment prohibit the taking of limbs even though it is contemplated in the Fifth Amendment?

The second objection to the Supreme Court abolishing capital punishment would be that it is an issue that should be left to the American people to decide, as articulated by Justice Scalia:

> The American people have determined that the good to be derived from capital punishment—in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes—outweighs the risk of error. It is

172. Glossip v. Gross, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., dissenting) (emphasis in original).

173. *Id.*

174. *Id.*

175. *Id.*

176. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 324 (1986).

177. *Id.*

178. *Id.*

179. Justin W. Curtis, *The Meaning of Life (or Limb): An Original Proposal for Double Jeopardy Reform*, 41 U. RICH. L. REV. 991, 1009, 1013 (2007)

> not proper part of the business of this Court, or of its Justices, to second guess that judgment, much less to impugn it before the world, and less still to frustrate it but imposing judicially invented obstacles to its execution.[180]

Thus, according to Justice Scalia, individual states should be free to decide whether to retain or abolish capital punishment and they should even have autonomy in carrying it out with almost no interference from the Court. Justice Scalia's argument is flawed in that it is difficult to imagine any issue that needs to be regulated by the Supreme Court more than the death penalty. First, there is the long history of racial discrimination in capital sentencing that continues to this day.[181] Second, capital cases are often extremely emotional and the desire for vengeance is usually strong.[182] It is often only the Court that is able to prevent mob rule and ensure a fair process in these emotionally charged and often racially tinged cases. Third, the defendants are an extremely unpopular minority who aren't able to vindicate their rights through the political process.[183] Finally, according to Chief Justice Marshall the Court has a "virtually unflagging obligation" to exercise the jurisdiction bestowed upon them by Congress and the Constitution.[184] The Eighth Amendment clearly mandates that the Court limit the types of punishment that the state can inflict upon individuals.[185]

The final objection to the Court striking down the death penalty would be to avoid a similar reaction when it found the death penalty as then applied to be unconstitutional in *Furman.*[186] The *Furman* decision, striking down the death penalty, generated an enormous public backlash and ultimately reinvigorated the death penalty which had been on the decline prior to *Furman.*[187] The decision mobilized the pro-death penalty movement into a

180. Kansas v. Marsh, 548 U.S. 163, 199 (2006) (Scalia, J., concurring); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (in discussing whether the Court should intervene in the debate over same sex marriage, Chief Justice Roberts stated in language that many would apply to a decision of the Court invalidating the death penalty: "It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question.").

181. *See* Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In) Visibility of Race*, 82 U. CHI. L. REV. 243, 294 (2015).

182. *See* Susan A. Bandes, *Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty*, 33 VT. L. REV. 489, 491, 498-501 (2009); *see also* Base v. Rees, 553 U.S. 35, 80 (2008) (Stevens, J., concurring).

183. *See* Aliza Cover, *Cruel and Invisible Punishment Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1164 (2014).

184. Stephen I. Vladeck, *Why an Aggressive Supreme Court is Good for the Separation of Powers*, WASHINGTON TIMES (July 6, 2015), http://www.washingtontimes.com/news/2015/jul/8/why-aggressive-supreme-court-good-separation-power.

185. *See* Trop v. Dulles, 356 U.S. 86, 100-102 (1958).

186. *See* Furman v. Georgia, 408 U.S. 238, 239-241 (1972).

187. DAVID GARLAND, PECULIAR INSTITUTION 231-34 (2010).

political force for the first time.[188] Within a few months of the decision, pro-death penalty activists campaigned in every state for reinstatement of the death penalty and they were joined by police chiefs, state attorney generals, local district attorneys, and assorted politicians.[189] Within two years of the decision, thirty-five states had enacted new capital statutes[190] and the Supreme Court responded to the backlash by reinstating the death penalty four years later.[191]

Several factors suggest that the current Court would not face a similar backlash should it find the death penalty unconstitutional. First, prior to *Furman*, the Court had not issued any decisions regulating the death penalty.[192] States had almost unfettered latitude in carrying out the death penalty.[193] Since 1976, the Court has placed important limitations on capital punishment.[194] Therefore, the doctrinal framework is in place for the Court to strike down the death penalty. Furthermore, several members of the Court, both past and present, have been critical of the death penalty.[195] Because of their criticisms, the public has been alerted to the fact that there are problems in the administration of the death penalty. Thus, a decision invalidating capital punishment would not be totally unexpected as it had been when the Court issued its holding in *Furman.* Second, the politics of the death penalty has substantially changed.[196] Candidates no longer need to run for office making their support for the death penalty a major campaign issue.[197] Third,

188. *Id.* at 232-33.

189. *Id.* at 232.

190. *Id.* at 233.

191. *See* Gregg v. Georgia, 428 U.S. 153, 179 (1976).

192. *See* Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1798.

193. *See id.* at 1774-76.

194. Juveniles and the mental retarded cannot be executed. *See* Roper v. Simmons, 543 U.S. 551, 578-579 (2005); *see also* Atkins v. Virginia, 536 U.S. 304, 321 (2002). The death penalty cannot be meted out for crimes do not involve the taking of human life. *See* Coker v. Georgia, 433 U.S. 584, 600 (1977); *see also* Kennedy v. Louisiana, 554 U.S. 407, 447 (2008). Capital defendants have a right to be sentenced by juries. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002). The defendant has wide latitude in offering mitigating evidence to save his life. *See* Tennard v. Dretke, 542 U.S. 274, 285 (2004).

195. *See, e.g.*, *Ring*, 536 U.S. at 614-19 (Breyer, J., concurring) (discussing defects in prevailing capital practice); Kansas v. Marsh, 548 U.S. 163, 207-10 (2006) (Souter, J., dissenting) (arguing for a new capital jurisprudence in light of evidence of wrongful convictions); Baze v. Rees, 553 U.S. 35, 78-80 (2008) (Stevens, J., concurring) (questioning whether death penalty serves any useful social purpose); Callins v. Collins, 510 U.S. 1141, 1158, 1159 (1994) (Blackmun, J., dissenting) (announcing that he would no longer vote to allow an execution as a result of the Court's failed attempts to rectify problems in the administration of the death penalty).

196. *See* Thomas Kaplan, *Death Penalty Assumes New Political Overtones Years After it Bedeviled Democrats*, N.Y. TIMES, Nov. 14, 2015 at A16.

197. *Id.*

a decision striking down the death penalty is likely to be well received in the international community given the international movement against capital punishment.[198]

IV. CONCLUSION

As this paper has demonstrated, the death penalty has too many problems that simply cannot be fixed. Several states have realized this and have decided to abolish the death penalty.[199] Even in the states that retain the death penalty, it is becoming increasingly marginalized.[200] It is only a matter of time before the U.S. Supreme Court comes to the same realization and imposes the final death sentence—on the death penalty itself!

198. *The World Moves Towards Abolition*, AMNESTY INT'L USA, http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty (last visited Sept. 12, 2016), ("International death penalty trends are unmistakably towards abolition.").

199. *See* Lyn Suzanne Entzeroth, *The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century*, 90 OR. L. REV. 797, 820 (2012).

200. *Id.* at 817-21.