

**REIMAGINING DEATH PENALTY PROSECUTION:
ANALYZING AMERICA’S FAILURE TO ALIGN THE
PERCEPTION OF THE DEATH PENALTY WITH
REALITY**

BY: SCHYLER B. BURNEY*

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* J.D., The University of Mississippi School of Law; B.S. Auburn University. The author wishes to thank Professor William W. Berry III for his guidance and feedback.

I. INTRODUCTION

“Myths aren’t fairy tales or legends—they’re an honest attempt to explain mysteries.”¹

The death penalty in itself is a complicated issue that is not only deeply rooted in American jurisprudence, but also within American society. The complex nature of capital punishment derives from both the requirements that courts and legislatures establish, as well as the moral considerations for punishment.² In attempts to justify the state-sanctioned killing, many rely on the rationale that the death penalty is only for those who commit the worst of the worst crimes—this belief, however, may be quickly debunked.

Consider the following two instances of crime. First, an individual uses an emergency entrance to enter a sold-out movie theater minutes after the movie begins. This individual has no intent in watching the movie; rather, this person came into the theater donned in body armor and opened fire on a crowd of innocent people—resulting in twelve deaths, and leaving fifty-eight people wounded. Contrast the previous situation with an individual, who police stopped following a report of an intoxicated person. During the stop, the individual shot and killed a police officer. After the fact, law enforcement discovered that the individual had been under the influence of the hallucinogenic drug PCP, at the time of the incident.

Both of the instances are real facts involving the crimes committed by James Holmes in Aurora, Colorado³ and Michael Jackson⁴ in West Covina,⁵ California, respectively. Despite the stark difference in

¹ John J. Geddes, *A Familiar Rain* (2011).

² Brent E. Newton, *Justice Kennedy, the Purposes of Punishment, and the Future of Lackey Claims*, 62 BUFF. L. REV. 979, 993 (2014) (recognizing the purposes of punishment—retribution, deterrence, incapacitation, and rehabilitation—and acknowledging Justice Kennedy’s focus on whether a “legislatively authorized sentence meaningfully serves a legitimate purpose of punishment.”).

³ Erica Goode, et. al, *Before Gunfire, Hints of ‘Bad News’*, N.Y. TIMES (Aug. 26, 2012), <https://www.nytimes.com/2012/08/27/us/before-gunfire-in-colorado-theater-hints-of-bad-news-about-james-holmes.html>.

⁴ Michael Anthony Jackson, not to be confused with Michael Joseph Jackson who sang about “smooth criminal[s].”

⁵ Kenneth Ofgang, *S.C. Upholds Second Death Sentence in Killing of West Covina Officer*, METROPOLITAN NEWS-ENTERPRISE (Feb. 6, 2009), <http://www.metnews.com/articles/2009/jack020609.htm>.

severity of their crimes, Holmes evaded the death penalty,⁶ while Jackson received the death sentence.⁷ The striking disconnect demands an answer as to whether our country's use of the death penalty is actually accomplishing its intent.⁸

In an "honest attempt to explain,"⁹ or justify the mysteries and uses of the death penalty, many point to the exaggerated myths of the death penalty. One must accept that the purported myths are far from the realities of capital punishment. Aligning these myths with reality may prove possible; however, this task will require drastic change. In order to accomplish this lofty goal, this article argues for states establishing state-wide departments focused solely on the prosecution of capital cases.¹⁰

Part I sheds light on the inaccuracies between the myths of America's modern-day perception and the realistic application of the death penalty. Part II proposes the creation of a department within each state's Attorney General's office focused specifically on prosecuting capital cases across the state. Part III analyzes how such a system aligns the perception of the death penalty with reality, ultimately reserving capital punishment for the actual worst of the worst.

II. THE MYTHS OF THE DEATH PENALTY

While it is no surprise that capital punishment and the use of the death penalty has evolved drastically since its first uses in the Eighteenth Century BC,¹¹ the United States Supreme Court began establishing its modern-day death penalty jurisprudence in *Furman v. Georgia* in 1972.¹² Since *Furman*, Justices have grappled with the

⁶ Dan Frosch & Ana Campoy, *James Holmes Spared Death Penalty In Colorado Theater Shooting*, WALL ST. J. (Aug. 7, 2015), <https://www.wsj.com/articles/james-holmes-spared-death-penalty-in-colorado-theater-shooting-case-1438989277>.

⁷ Ofgang, *supra* note 5.

⁸ This article does not deny the tragedy of any crime involving death; however, it attempts to call into question as to whether we are actually punishing the worst of the worst.

⁹ Geddes, *supra* note 1 (explaining that people utilize myths in an honest attempt to explain the mysteries that surround us in the everyday world, much like the mystery of the death penalty).

¹⁰ See *infra* Part II.

¹¹ *Early History of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty> (noting that the Code of King Hammurabi of Babylon codified the death penalty for 25 different crimes).

¹² *Furman v. Georgia*, 408 U.S. 238 (1972) (calling into question the use of the death penalty, the Court's decided to put a hold on the use of the death penalty); *Gregg v. Georgia*, 428 U.S. 153 (1976) (reinstating the use of the death penalty).

purposes and applications of the death penalty.¹³ Likewise, American society itself widely struggles on determining its views on the death penalty, with some encouraging its use and others disavowing it.¹⁴

The sustained divisiveness of the death penalty reasonably pushes many to argue for abolition of the practice.¹⁵ That being said, some Americans argue against the death penalty, except in cases involving crimes showcasing the worst of the worst individuals.¹⁶ The arguments in favor of only using the death penalty for the worst of the worst lack one crucial point—the actual application of such.¹⁷

Wide disparities between the death penalty in theory and the death penalty in practice exist, yet many grapple to hold on to the time-held myths surrounding its practice. This section will consider the myths regarding the application, cost, and time in sentencing someone to the death penalty.

¹³ *Glossip v. Gross*, 576 U.S. 863, 909 (2015) (Breyer, J., dissenting) (“For it is those changes [that occurred over the past four decades], taken together with my own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited ‘cruel and unusual punishment[t].’”) (quoting U.S. Const., Amdt. 8); *Callins v. Collins*, 510 U.S. 1141, 1147 (1994) (Blackmun, J., dissenting) (following his dissent in *Furman* against the hold on the use of the death penalty, Justice Blackmun in *Callins* found that “[a]lthough most of the public seems to desire, and the Constitution appears to permit, the penalty of death, it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all.”); Stephen Wermiel, *SCOTUS for law students: The Supreme Court and the death penalty*, SCOTUSBLOG (Feb. 14, 2020), <https://www.scotusblog.com/2020/02/scotus-for-law-students-the-supreme-court-and-the-death-penalty/>, (“The death penalty has long divided the justices. As they left the court or soon after they retired, Justices Harry Blackmun, Sandra Day O’Connor and John Paul Stevens all expressed doubts about whether the death penalty system can operate fairly in the United States.”).

¹⁴ *See Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, PEW RES. CTR. (June 2, 2021), <https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/>; *see also Public Opinion*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls> (noting that polling the public on its stance of the death penalty is challenging because “poll results can vary widely depending on the polling firm and the specific wording of the questions asked.”).

¹⁵ Hugo Adam Bedau, Ph.D., *The Case Against the Death Penalty*, ACLU, (last updated 2012), <https://www.aclu.org/other/case-against-death-penalty> (“Today, over 140 nations have abolished the death penalty either by law or in practice and, of the 58 countries that have retained the death penalty, only 21 carried out known executions in 2011.”).

¹⁶ Charles Lane, *The death penalty and the worst of the worst*, DENVER POST (June 3, 2016), <https://www.denverpost.com/2016/06/03/the-death-penalty-and-the-worst-of-the-worst/> (“Some crimes are so ghastly that even death-penalty skeptics find it hard, or at least inopportune, to challenge the moral intuition that calls for capital punishment; thus, there will probably always be a death penalty in the United States, as long as that moral intuition remains widely felt. . .”).

¹⁷ *Glossip*, 576 U.S. at 923 (Breyer, J., dissenting) (emphasizing the unpredictability and inconsistency in death sentences relative to the crimes committed).

A. Victims of the Death Penalty

It is not surprising that as we have evolved as a society, opposition to the death penalty has reached an all-time high since the 1960s. In 2019, when Gallup polled Americans regarding the death penalty, sixty-percent said that “life without parole ‘is the better penalty for murder.’”¹⁸ This increase from 1996 signals the highest percentage of Americans in opposition to the death penalty “in the modern history of the U.S. death penalty.”¹⁹ Despite this progress, both the United States Supreme Court and many in the American public remain adamant that the “worst of the worst” receive the death penalty.²⁰

In theory, it makes sense. If death is as different as both the Court and society says it is,²¹ and we actually recognize the gravity of its difference, the death penalty’s narrow application remains solely for the worst of the worst. The use of capital punishment, however, faces many practical realities that both influence and hinder the actual use of seeking the death penalty.

1. The Actual Numbers

Determining what types of crimes warrant the death penalty is no easy task.²² Although deciding who deserves death and for what crimes may subjectively vary between individuals, finding some common

¹⁸Gallup Poll—For First Time, Majority of Americans Prefer Life Sentence to Capital Punishment, DEATH PENALTY INFO. CTR. (Nov. 25, 2019) [hereinafter *Gallup Poll*] <https://deathpenaltyinfo.org/news/gallup-poll-for-first-time-majority-of-americans-prefer-life-sentence-to-capital-punishment>.

¹⁹ *Id.*

²⁰ See *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (“[T]here is the point to which the particulars of crime and criminal are relevant: within the category of capital crimes, the death penalty must be reserved for ‘the worst of the worst.’”); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia* 536 U.S. 304, 319 (2002)) (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”).

²¹ *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) (“[T]here is no doubt that ‘[d]eath is different.’”); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.”).

²² Educated individuals who specialize in this area of the law struggle to fully answer this question. For a discussion on the differing solutions, see Martin J. Leahy, et. al., *Rethinking the Death Penalty: Can We Define Who Deserves Death? A Symposium Held at the Association of the Bar of the City of New York, May 22, 2002*, 24 PACE L. REV. 107 (2003) (considering the following questions: “Is there a category of defendants who are the ‘worst of the worst?’ Can a crime be so heinous that a defendant can be said to ‘deserve’ to be executed? Would such a limited death penalty be supported morally, philosophically, and constitutionally?”).

ground is necessary. The Supreme Court itself has faced challenges in determining which individuals and what crimes are barred from, or are eligible to receive, the death penalty as punishment.²³

For the purposes of this article, the “worst of the worst” may be a proper classification for those who commit mass casualty crimes.²⁴ Although mass casualty crimes may be “complicated by the absence of a commonly recognized definition,” federal agencies have defined “mass casualty shooting as the murder of three or more individuals.”²⁵ In limiting this pool of individuals, this article does not attempt to suggest that those who commit mass casualty crimes are the only ones who may be the “worst of the worst;” instead, this limitation allows a bright-line distinction for purposes of this article.

Although an exhaustive list of those who have received a death penalty sentence is unavailable, many individuals and organizations have attempted to compile data identifying the type of crimes committed and the sentences received. One of these compilations highlights the very antithesis of our country’s systemic beliefs. In documenting “more than eighty [multiple victim cases] cases over a thirty-five-year period from 1982 to 2018 from federal and state courts in twenty-three different states, plus the Commonwealth of Puerto Rico and the District of Columbia” the data indicated the jury explicitly declined to issue the death penalty.²⁶

In 2020, eighteen defendants were sentenced to death.²⁷ Of those eighteen, twelve committed crimes involving one victim with the remaining six defendants committing crimes against multiple victims.²⁸

²³ *Coker v. Georgia*, 433 U.S. 584 (1977) (finding the death penalty to be an excessive punishment for rape crimes); *Ford v. Wainwright*, 477 U.S. 399 (1986) (determining that the execution of insane persons is unconstitutional).

²⁴ While this article does not purport that mass casualty crimes, or those who commit mass casualty homicides, are the only cases that may be classified as “worst of the worst,” this limitation attempts to identify a subset of crime which is easily identifiable and reasonable within the bounds of this article’s analysis.

²⁵ National Center for Victims of Crime, *2017 National Crime Victims’ Rights Week Resource Guide: Crime and Victimization Fact Sheets: Mass Casualty Shootings*, HOMELAND SECURITY DIGITAL LIBRARY (2017), <https://www.hsdl.org/?abstract&did=819184> (additionally noting that the definition does not include “gang or drug-related incidents, the accidental discharge of a firearm, or family- and intimate partner-related shootings).

²⁶ Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 HOFSTRA L. REV. 1161, 1247 (2018) (Appendix 4).

²⁷ *2020 Death Sentences by Name, Race, and County*, DEATH PENALTY INFO. CTR., [hereinafter *2020 Death Sentences*], <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-by-year/2020-death-sentences-by-name-race-and-county>.

²⁸ *Id.*

And of those six defendants who committed crimes involving more than one victim, most of the crimes only involved two victims.²⁹ Ultimately, in 2020, only two defendants were sentenced to the death penalty for the crimes committed against more than two individuals.³⁰

If we consider the number of victims to be an indication for which defendants are the “worst of the worst,” our justice system is off track in aligning these interests.

2. Arbitrary Outcomes

Instead of relegating the death penalty to defendants who may be considered the “worst of the worst,” the prescription of death penalty sentences is arbitrary and inconsistent.³¹ As Justice Potter Stewart emphasized in *Furman*, the imposition of the death penalty is “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”³² The metaphorical echoes of concern from Justice Stewart did not, however, identify a way to solve the core problem.

Concerns regarding the arbitrariness of outcomes when it comes to the death penalty is nothing new to the Court or society.³³ Yet, some argue that because the decision is ultimately a fact question for the jury, some arbitrariness is not necessarily a bad consideration.³⁴ Even if “the Court and [] scholars who push this objection [against arbitrariness] have done so little to articulate a coherent notion of ‘arbitrariness,’” the mere inconsistency in the numbers gives rise for concern.³⁵

While arbitrariness may arise based on a series of factors, there are two key considerations for arbitrariness within the context of this

²⁹ *Id.*

³⁰ *Id.*

³¹ See Bradley A. MacLean & H.E. Miller, Jr., *Tennessee’s Death Penalty Lottery*, 13 TNJLPOL 85 (2018) (finding “Tennessee’s capital punishment system operates as a capricious lottery” where the facts of the crime generally do not indicate whether a defendant would receive the death penalty at sentencing).

³² *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

³³ Arbitrariness across the country is evident, but so is arbitrariness across the individual states themselves. For a more in-depth discussion on the discrepancies between issuance of the death penalty throughout a state, see Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. REV. 227 (2012) (highlighting that “[a] few counties in the United States continue to sentence people to death with any regularity. The vast majority of counties do not use the death penalty at all.”); see also Jennifer Adger, *Why Place Matters: Exploring County-Level Variations in Death Sentencing in Alabama*, 2011 MICH. ST. L. REV. 659 (2011).

³⁴ Chad Flanders, *What Makes the Death Penalty Arbitrary? (And Does it Matter if it is?)*, 2019 WIS. L. REV. 55, 55 (2019) (arguing the differences in intrinsic and extrinsic arbitrariness and the role of each within capital cases).

³⁵ Flanders, *supra* note 34, at 58.

article. First, the difference between the number of victims of the defendant's crime.³⁶ Our current system may present reasons for questioning when an individual commits a single-victim murder and receives the death penalty, while an individual who commits a mass casualty crime does not receive the death penalty.³⁷ Second, since 1973, "186 former death-row prisoners have been exonerated of all charges related to the wrongful convictions that put them on death row."³⁸ Such a stark number rationally raises cause for both concern and questions surrounding the current system.

Despite attempts to limit arbitrariness in decisions,³⁹ this article takes the approach that arbitrariness stemming from prosecutorial discretion is a core issue that is ultimately problematic.⁴⁰

B. The Death Penalty Premium

A second myth surrounding the imposition of the death penalty is the cost surrounding the use of it. While many may "assume that the state saves money by employing the death penalty since an executed person no longer requires confinement, health care, and related expenses[,]" such an assumption is wholly inaccurate.⁴¹ In reality, the "complexity, length, and finality [of these cases] drive costs through the roof, making [death penalty litigation] much more expensive."⁴²

Where the unduly burdensome cost of litigating capital cases drives counties into debt and deters potential action from occurring at

³⁶ Stetler, *supra* note 26; *Glossip v. Gross*, 576 U.S. 863, 923 (2015) (Breyer, J., dissenting).

³⁷ *Glossip*, 576 U.S. at 923 (Breyer, J., dissenting) (calling into question the aggravating factors at play in determining how a defendant who single-victim murder receives the death penalty).

³⁸ *Innocence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence>.

³⁹ Colleen Long, *Death penalty questionable as deterrent to mass killing*, AP NEWS (Aug. 6, 2019), <https://apnews.com/article/legislation-shootings-suicides-donald-trump-crime-07f9f83f09754fa8b5a2725a8b60eec1> ("Trump said he was ordering the Justice Department to propose legislation ensuring that 'those who commit hate crimes and mass murders face the death penalty, and that this capital punishment be delivered quickly, decisively, and without years of needless delay.'"); David McCord, *Lightning Still Strikes Evidence from the Popular Press That Death Sentencing Continues to Be Unconstitutionally Arbitrary More Than Three Decades After Furman*, 71 BROOK. L. REV. 797, 801 (2005) (arguing in favor of a "four-part litmus test for non-arbitrariness," focusing the use of the death penalty on those who are the "worst of the worst.").

⁴⁰ Recognizing that some arbitrariness from use of the jury may arise, such arbitrariness arising as a result of strong county stances and prosecutorial discretion are still problematic.

⁴¹ *Costs*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/costs>.

⁴² *Wasteful & Inefficient: The alarming cost of the death penalty*, EQUAL JUSTICE USA, [hereinafter *Wasteful & Inefficient*], <https://ejusa.org/resource/wasteful-inefficient/>.

a timely rate, alarm among Americans should arise. These increased costs are not minor, rather in most cases the costs of these cases can be “up to [ten] times more expensive” than non-capital cases.⁴³ The collective cost of litigating a capital case from pre-trial, through trial, to appeals and execution is exorbitant in comparison to non-death penalty cases.⁴⁴ Despite these steep premiums on capital cases, someone must pay the price, and that someone is the individual tax payer. The current cost structures and financial incentives in place not only play a role in the imposition of the death penalty, they also ultimately incentivize who is getting the death penalty.

Often times, when counties seek to utilize the death penalty, the costs are “borne primarily by cutting services like police and highway funding.”⁴⁵ Moreover, the budget cuts “divert[] resources that could be used to help homicide survivors heal, including grief and trauma counseling, scholarships for orphaned children, professional leave to attend court proceedings, and financial support.”⁴⁶

Rather than save the county money, the use of the death penalty puts economic strains on individual counties detracting from resources that have long-lasting effects on the community as a whole.⁴⁷ At the end of the day, money is a driving issue in the use of the death penalty, and the controlling nature of cost is detrimental to communities.

⁴³ *Wasteful & Inefficient*, *supra* note 42; Torin McFarland, *The Death Penalty vs. Life Incarceration: A Financial Analysis*, 7 SUSQUEHANNA UNIV. POL. REV. 46, 56–68 (2016) (analyzing both the explicit and implicit costs associated with the death penalty).

⁴⁴ *Death Penalty Cost*, AMNESTY INT’L (May 18, 2017),

<https://www.amnestyusa.org/issues/death-penalty/death-penalty-facts/death-penalty-cost/> (Based on a 2003 audit, the median cost of death penalty cases in Kansas is \$1.26 million, an estimated 70% more than the cost of a non-death penalty case. Likewise, based on a 2008 study, in California, “the current system costs \$137 million per year; it would cost \$11.5 million for a system without the death penalty.”); Maurice Chammah, *Six Reasons the Death Penalty is Becoming More Expensive*, THE MARSHALL PROJECT (Dec. 17, 2014, 7:45 AM) (explaining the expenses may be attributed to “more lawyers, more experts, more time” and noting that while inevitable appeals are taking place, “it costs more to house prisoners on death row than in the general population.”).

⁴⁵ *Wasteful & Inefficient*, *supra* note 42.

⁴⁶ *Id.*

⁴⁷ *State Studies on Monetary Costs*, DEATH PENALTY INFO. CTR.,

<https://deathpenaltyinfo.org/policy-issues/costs/summary-of-states-death-penalty/>; Katherine Baicker, *The Budgetary Repercussions Of Capital Convictions*, NAT’L BUREAU ECON. RSCH. (July 2001), <https://www.nber.org/papers/w8382>.

C. A Month of Sundays

Retribution is no doubt a driving consideration when a county seeks the death penalty for a crime.⁴⁸ In fact, the death penalty itself is the county and state taking action to punish the defendant's actions. Because of this, such justice and punishment may seem very personal to the families of the victims. The victims, or the state itself, may view the death penalty as a way to seek swift justice when it comes to the alleged. The third myth of the death penalty is the time in which it takes to achieve the desired result.

Although speedy trial standards are in place, "speedy" may feel to be a relative term.⁴⁹ After charging an individual with capital murder, the long road begins towards finalizing an outcome. Where the model standard suggests 98% of felony cases should be disposed within 365 days, some standard felony cases may require additional time.⁵⁰ This timeline does not even attempt to prescribe a window in which capital cases must be disposed of, because in many cases the road to trial may take years.⁵¹

Even once a defendant reaches trial, there are many possible post-trial appeals requiring the defendant to enter into what may feel like a continuous circle of appeals.⁵² Each appeal only adds to the number of days the defendant sits on death row after trial, getting their hopes up each time.⁵³ After exhausting all appellate reviews, execution is not an immediate result. Many defendants "spend more than a decade

⁴⁸ Andrew Oldenquist, *Retribution and the Death Penalty*, 29 UDTNLR 335, 337 (2004) ("Most people's reasons for capital punishment are retributivist. . ."); Retributive ideas as the notion that the "eye-for-an-eye" approach in justifying death penalty for a murder.

⁴⁹ Richard Van Duizend, et. al, *Model Time Standards for State Trial Courts*, at 1, NAT'L CTR. FOR STATE CRTS (2011), https://www.ncsc.org/__data/assets/pdf_file/0032/18977/model-time-standards-for-state-trial-courts.pdf.

⁵⁰ Duizend, et al, *supra* note 49, at 4.

⁵¹ Duizend, et al, *supra* note 49, at 4 ("In the preparation of these time standards, consideration was given to whether capital murder cases should be designated as a separate case category with different time standards. Because some capital cases are disposed by plea, however, it was concluded that those requiring a trial can be better accommodated simply as a "top tier" of one-two percent of all felony cases that require more time to reach disposition.").

⁵² *Death Penalty Appeals Process*, CAP. PUNISHMENT IN CONTEXT, <https://capitalpunishmentincontext.org/resources/dpappealsprocess> (explaining that the death penalty appeals process involves appeals to the state appellate court and U.S. Supreme Court, then appeals through the state's post-conviction relief system, and finally appeals through federal habeas corpus).

⁵³ Barry Latzer, & James N.G. Cauthen, *Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study*, at 35 (Mar. 2007), <https://www.ojp.gov/pdffiles1/nij/grants/217555.pdf> (stating that a study found "it took a median 966 days to complete direct appeal," this is over 2.5 years to get through just the first step of appellate review).

awaiting execution or court rulings overturning their death sentences.”⁵⁴

Because the overall length of time it takes for a capital murder case to go from pre-trial through potential appeals to execution, the rationales for such punishment may seem watered down. While a community may feel a brief moment of temporary relief upon a defendant’s sentence to the death penalty, the likelihood that the victim’s family and community will have strong feelings by the time of execution, if execution ever actually occurs, is slim to none.

At the end of the day, the death penalty as it stands is riddled with crippling problems. The myths that drive the continued, but slimming, support of the death penalty are due to be unraveled. As theory and application of the death penalty diverge, our society must address the changes and evolve our practices.

III. A STATE DEATH PENALTY PROSECUTOR

Comparing the myths of the death penalty relative to reality, there are irreconcilable discrepancies that require addressing. Although the ideal answer is abolition of the death penalty, this section argues for a solution that presents the next best possibility for *actually* limiting the use of the death penalty. If America’s consensus is that the use of the death penalty should remain in effect, but that only the worst of the worst should receive it, practical changes are necessary.

Based on current budgetary and time restraints, the most realistic way to accomplish this goal is through reimagining prosecution of the death penalty from the authority of the state as a whole. This shift not only aligns the realities of the death penalty with the myths society purports to believe, but also simultaneously improves the capital punishment system as a whole.

A. *Shifting Prosecutorial Authority*

As it stands at the moment, all states prosecute capital cases in the same manner as for prosecution of other cases.⁵⁵ This requires the

⁵⁴ *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row>.

⁵⁵ See Office of Victims’ Services California Attorney General’s Office, *A Victim’s Guide to the Capital Case Process*, at 1 [hereinafter *A Victim’s Guide*], <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/deathpen.pdf> (explaining that “capital

district attorney, or the prosecutor for the specific jurisdiction, bring charges against the individual.⁵⁶ Meaning, the prosecutor for each state's judicial circuit has prosecutorial discretion to decide in which cases the death penalty is sought. In doing so, however, the prosecutor must take into account the realities and challenges of capital punishment litigation, often times resulting in the prosecutor being at least partially hamstrung based on the county's particular budget and judicial calendar.⁵⁷

Recognizing the shortcomings in our system, the remedy for aligning the perception of the death penalty with reality is to shift the authority from the county level to the state level. This shift requires removing the prosecutorial authority to seek capital punishment from the county level prosecutors, and establishing state-wide departments focused solely on the prosecution of capital cases. In doing so, this would create a death penalty prosecutor who would authorize and oversee the prosecution of any and all cases throughout the state in which the death penalty is sought.

Creating this shift allows for the prosecutor to analyze all of the crimes committed within the state and assess which ones truly rise to the level of warranting the death penalty. Additionally, such a system may appropriately align more closely with the federal system which requires "prior written authorization of the [United States] Attorney General," in order to seek the death penalty.⁵⁸ In broadening the scope of review, the anticipated outcome provides for increased consistency and less arbitrariness in seeking the death penalty.

Small nuances may be apparent considering these offices may range in size, operations, and core function based on the state, but

murder prosecution begins when the grand jury hands down an indictment or the District Attorney files and information following a preliminary hearing charging the defendant with murder and special circumstances.").

⁵⁶ *Id.*

⁵⁷ See Julián Aguilar, *Who should prosecute the El Paso shooting suspect? A year after the massacre, local and federal prosecutors still fact hard decisions*, TEXAS TRIBUNE, July 21, 2020), <https://www.texastribune.org/2020/07/31/el-paso-walmart-shooting-prosecute/> ("Before the coronavirus pandemic put a stranglehold on local economies, including El Paso's, [the District Attorney] said he was "offended" at the suggestion that the county should sit back and let federal officials take the lead in [the defendant's] prosecution in order to save the county millions in prosecution costs.).

⁵⁸ U.S. Dep't of Just., *The Federal Death Penalty System: Supplementary Data, Analysis, and Revised Protocols for Capital Case Review* (June 6, 2001), <https://www.justice.gov/archive/dag/pubdoc/deathpenaltystudy.htm> ("The protocol requires United States Attorneys to submit cases involving a pending charge of an offense for which the death penalty is a legally authorized sanction, regardless of whether or not the U.S. Attorney recommends seeking the death penalty. The death penalty cannot be sought without the prior written authorization of the Attorney General.").

ultimately, the purpose across these departments would remain consistent. The creation of such a department would minimize inconsistencies throughout the counties in applying the death penalty, alleviating concerns regarding the cost and efficiency of these cases.

At the heart of establishing a department focused on death penalty prosecution is the goal of creating a system which demolishes the personal nature of localized decisions. A state-wide system would allow for death penalty prosecution consistently across the state at the same caliber and from a collective state fund. In conducting capital cases in this manner, the goal is that error in both selecting who to prosecute and how to prosecute, would decrease.

B. Necessary Considerations

This article recognizes both the benefits and the challenges in handling death penalty cases through a state-wide system. On the front end, there are several procedural concerns that require addressing. Each state would decide on the best practices for carrying out a centralized death penalty prosecutor, and although this article considers some of the necessary considerations, this article does not attempt to provide an answer or solution for setting up these offices.⁵⁹

First, although the Attorney General's office in each state may properly house this department, it is by no means the *only* office that could house the department. Additionally, each state may decide the selection criteria and processes for determining who may serve as the state death penalty prosecutor (i.e., appointment by the governor or state-wide election). Whatever method the states commit to, the decision sets the role on a distinctive path with both positive and negative considerations.⁶⁰

A third consideration is selecting the court in which to try the death penalty cases. Perhaps either in the county's trial court with original jurisdiction or in a whole new "death penalty court" organized by the state itself. In determining where the trial must occur, one must also consider who serves on the jury. If the state itself is prosecuting the individual, maybe jury selection is conducted from a panel

⁵⁹ For a more in-depth analysis of considerations for the creation of a statewide system, see Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307 (2010).

⁶⁰ If elected, this role may become a politically motivated seat driven by what will get the prosecutor in office. If this role is appointed by the governor, it may result in the prosecutor bending to the political whims of whoever is in power at the time.

comprised of people from across the state as opposed to just people from the county of original jurisdiction.

While the realities of these challenges may at first seem daunting, these considerations surely have better answers than the fumbled answers that American society receives when it comes to prosecuting the death penalty.

IV. THE BENEFITS OF REFORMATION

Although a state-wide death penalty prosecutor may at first seem outlandish, establishing a centralized death penalty prosecution department tackles many of the faults our present system is facing. The current problems surrounding the death penalty do not merely suggest reform is needed, but demand that it occurs. In weighing the different possible methods to alter the use of the death penalty, no other practical solution has been proposed or attempted. Creating such a system ultimately makes logical sense economically and for the sake of judicial efficiency.

Both the criminal and political policy rationales follow that the creation of a centralized death penalty prosecutor inevitably aligns with the overarching purpose of the death penalty. In demonstrating so, this section will consider how a state office would minimize arbitrariness in sentencing, reduce costs, and reasonably accelerate the process.

A. Punishing the Worst of the Worst

As it stands now, our current system still allows room for flexibility, leaving prosecutors with the discretion to decide when the death penalty is sought. Apprehension arises when this broad discretion is coupled with the personal nature of crime within small communities. When crime, specifically murder, occurs in a small town, vindictive underlying motives may encourage a county to seek tough prosecution. Based on this, and knowing what we know about the statistics of the death penalty regarding race and socioeconomic status,⁶¹ this suggests there may be wide discrepancy as to when particular counties seek the death penalty.

⁶¹ *Race*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/race> (“Racial bias against defendants of color and in favor of white victims has a strong effect on who is capitally prosecuted, sentenced to death, and executed.”).

Establishing a state death penalty prosecutor allows the state to conduct a wholistic assessment in determining when to seek the death penalty. Ideally, this would allow the prosecutor to look at crimes committed across the entire state and determine which crimes are the worst of the worst, and who should stand trial for capital punishment. Shifting the authority from the county level to the state level removes the retributive, and often times vengeful, sentiment behind seeking the death penalty. A broad-scope approach from the perspective of the state as a whole, wards off prosecutors from acting on a whim, and serves as a preventative measure in ensuring the power to pick is not localized.

By focusing in on defendants who are “the worst of the worst,” or specifically those who have committed mass casualty crimes, the state may decrease the amount of times it seeks the death penalty while simultaneously placing emphasis on the importance of prosecuting the worst of the worst. In minimizing the amount of death penalty cases the state seeks to prosecute, the state may see unintended economic benefits. Instead of using state funds to prosecute ten capital cases per year where only half result in death penalty sentences, the state may more efficiently prosecute and receive a death penalty sentence by limiting the caseload to a fewer number per year.

Moreover, because state-sanctioned killing is the state punishing one of its citizens for a crime committed against a fellow citizen, it follows that the state take reasonable action when doling out death penalty charges and sentences. If the state itself, via a state-entity, prosecutes death penalty cases, there is an additional presumption of greater accountability to thoroughly and appropriately do one’s job. Under a centralized system, accountability is more easily accomplished because the state department would be handling only death penalty cases and could place greater focus on the few cases they have per year.

B. Aggregating Resources

Whether or not society accepts this premise, it is unfortunately true that money dictates all areas of society, including the justice system.⁶² Just as individuals reasonably budget the ins and outs of

⁶² *Survey Reveals the Impact of Federal Budget Cuts on Law Enforcement and Criminal Justice Practitioners*, VERA INST. OF JUST. (Nov. 18, 2013), <https://www.vera.org/newsroom/survey-reveals-the-impact-of-federal-budget-cuts-on-law-enforcement-and-criminal-justice-practitioners> (featuring “comments from criminal justice practitioners across the country that reveal the impact funding cuts are having on their agencies and the communities they serve.”).

living expenses, counties must make similar budgetary decisions in determining how to operate throughout the year.⁶³ Although the county's budget may account for large litigation expenses, nothing can fully prepare a county's budget to effectively litigate a drawn-out capital case.

Establishing a state system not only creates a solution for effective prosecution, it also provides an answer for dealing with the exorbitant litigation expenses of death penalty cases. Rather than relying on the counties to finance the unduly burdensome costs of litigation when the prosecution is seeking the death penalty,⁶⁴ a centralized state department allows for state-funding to be the predominant backing support for financial burdens in litigating the death penalty.

Whereas counties are currently crippled by having to choose between seeking capital punishment against a defendant and ensuring the county has sufficient resources to care for its citizens,⁶⁵ a centralized state system alleviates some of that fear. In placing the responsibility of prosecuting capital cases on the state, the state bears the burden of financing the litigation. Although a state system would not entirely eliminate the money from the counties, it would disperse the stress to all of the counties as opposed to requiring one county to solely foot the bill for a capital case.

In deciding on the origin of these funds, states may have a wide variety of options. Ideally, a large amount would preferably come from state taxes paid for by individuals. Perhaps a portion of the state's property tax revenues could be channeled to support the fund. Alternatively the state could decide to use a portion of the state's income tax or sales tax revenue. Regardless of the method decided upon, a state would have ample room for determining the best method of funding.

Using a percentage of the state tax revenue and aggregating the resources from all of the counties together allows the state to collectively come together to fund capital cases. Determining the proper necessary amount to support the prosecution of death penalty cases shifts the burden from the individual counties which vary in budgetary constraints and places it on the even playing field of the state itself.

⁶³ For an example of a district attorney's budget, see *2019 Adopted Budget District Attorney, SEDGWICK COUNTY, KANSAS* (2019), <https://www.sedgwickcounty.org/media/40652/2019-adopted-budget-district-attorney.pdf>.

⁶⁴ Baicker, *supra* note 47, at 7-8.

⁶⁵ *Wasteful & Inefficient*, *supra* note 42.

Ideally, funding should not be an issue, but as it stands currently, costs of death penalty litigation may influence prosecutors, resulting in counties being bound by the resources available to them. A state system provides substantially more resources to the prosecutors, allowing them to adequately try the case without cutting corners.

C. Increasing Efficiency

Establishing a state death penalty prosecutor overwhelming benefits efficiency. As explored in Part I.C., death penalty litigation can take years; however, the creation of a state-based prosecutor alleviates concerns regarding judicial efficiency in death penalty litigation. A state-wide death penalty prosecutor mitigates judicial distress by minimizing controversial on-the-line cases, creating specialized death penalty attorneys, and conversely strengthening representation for capital defendants.

1. Intentional Prosecution

If the state death penalty prosecutors intentionally identified cases in which the crimes committed were truly the worst of the worst, public concern for actual guilt of defendants may decrease. According to Pew Research Center, approximately eight-in-ten Americans recognize the risk that an innocent person could receive the death penalty.⁶⁶ Such stark numbers suggest some public concern surrounding the chance of issuing the death penalty to an individual who is actually innocent. Numbers suggest that the possibility of sentencing an innocent defendant to the death penalty is a legitimate concern.⁶⁷

Coupling this reality with the idea from Part III.A., that a state death penalty prosecutor would have the ability to review all of the crimes committed within a state to rationally and objectively decide

⁶⁶ *Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, PEW RSCH. CTR. (June 2, 2021) <https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/>.

⁶⁷ *National Academy of Sciences Reports Four Percent of Death Row Inmates are Innocent*, INNOCENCE PROJECT (Mar. 28, 2014), <https://innocenceproject.org/national-academy-of-sciences-reports-four-percent-of-death-row-inmates-are-innocent/> (citing Samuel R. Gross., et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, (May 2014)) (finding that “at least 4.1 percent of defendants sentence to death in the United States are innocent,” but noting, “that the number of innocent people is likely more than double the number of those actually exonerated and freed from death row.”).

which crimes constitute the worst of the worst, the concern regarding an innocent individual on death row effectively disappears.

Consider the facts of James Holmes⁶⁸ and Michael Jackson.⁶⁹ The state death penalty prosecutor would likely be able to assess both of these crimes.⁷⁰ Based on the facts surrounding each crime, the likelihood that the state would seek death would be greater for Holmes as opposed to Jackson.⁷¹ While the jury would still have to consider the aggravating and mitigating factors, there would be no question regarding Holmes' innocence.

Following this logic, consider the implications of intentionally prosecuting the worst of the worst individuals who commit mass casualty crime.⁷² In an overwhelming number of occasions, there is no question as to whether or not mass casualty defendants *actually* committed the crime. Focusing in on individuals who are the worst of the worst inevitably leads to less concern regarding whether or not the individual may actually be innocent. Centralized prosecution fundamentally equates to intentional and well-orchestrated prosecution.

2. *Specialization in Capital Prosecution*

Relative to ordinary criminal law, litigation surrounding the death penalty is overwhelmingly more complicated.⁷³ Unlike most traditional criminal trials,⁷⁴ death penalty trials are bifurcated; meaning one jury will determine whether the defendant is guilty or not and another jury

⁶⁸ Goode, *supra* note 3.

⁶⁹ Ofgang, *supra* note 5.

⁷⁰ Assuming in the hypothetical world that both of these crimes occurred within the same state and within the same time frame.

⁷¹ This assumption is based on the approach that number of victims may be used as an indicator as to who is the "worst of the worst." Additionally, the apparent intent behind the acts also suggests which crime may be considered worse.

⁷² Consider the Boston Marathon bombing or the D.C. sniper attacks. See Adam Liptak, *Supreme Court Seems Ready to Restore Death Sentence for Boston Marathon Bomber*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/10/13/us/politics/supreme-court-death-sentence-boston-marathon-bomber.html> ("The bombings, near the finish line of the marathon, killed three people and injured 260, many of them grievously. Seventeen people lost limbs."); FBI, *Beltway Snipers*, <https://www.fbi.gov/history/famous-cases/beltway-snipers> ("10 people had been randomly gunned down and three critically injured while going about their everyday lives—mowing the lawn, pumping gas, shopping, reading a book.").

⁷³ *Episode Fourteen: Legal Process*, DEATH PENALTY INFO. CTR., [hereinafter *Legal Process*], <https://files.deathpenaltyinfo.org/legacy/podcast/resources/Episode14LegalProcess.pdf>.

⁷⁴ Traditional trials involve a jury determining guilt and then the judge deciding the proper sentencing.

at a later date will determine the proper sentencing.⁷⁵ The added procedural complexities generally result in a longer period of time being necessary before the case reaches sentencing. Despite the delays in even getting to a final judgment at the trial court level, the challenges in reaching the final outcome have just begun. Complexity not only affects the efficiency of pre-trial, trial, and sentencing matters, but it also opens the flood gates for an inordinate number of errors raised on an inevitable appeal.⁷⁶

Recognizing the special level of skill and expertise an attorney needs to competently serve as counsel in a death penalty case, the creation of a state death penalty prosecutor alleviates the concern for error. In creating a department made up of a small handful of attorneys whose sole purpose is to prosecute capital cases, the state would essentially equip the attorneys to specialize in death penalty litigation. These attorneys would learn the nuances of the complex litigation and potentially carry out business in a way to prevent errors resulting in cases being overturned.

Specialization would not only increase judicial efficiency, but it would also likely result in more economic litigation, saving the state money from litigating remedial issues on appeal that were the result of inexperienced prosecutors carrying out one of the few death penalty cases they may have come across their desk throughout the entirety of their tenure.⁷⁷ Ideally, this specialization would have wide-reaching benefits, including the eventual eradication of the death penalty all together, just as specialization played that role in Virginia and other states.⁷⁸

Because death penalty litigation consists of intricate processes and drawn-out appeals, the creation of a state death penalty prosecutor allows a handful of attorneys within the state to hone the skills necessary to competently and efficiently prosecute capital cases.

⁷⁵ *Legal Process*, *supra* note 73.

⁷⁶ *Id.*

⁷⁷ In no way is this meant to undermine the skilled local prosecutors throughout each of the states; rather, this focuses on how death penalty cases are atypical in relation to a prosecutor's other traditional criminal cases.

⁷⁸ Corinna Barrett Lain & Douglas A. Ramsey, *Disrupting Death: How Specialized Capital Defenders Ground Virginia's Machinery of Death to a Halt*, 56 U. Rich. L. Rev. 183 (2021) ("The death penalty was dying on the vine, and that was in large part due to Virginia's specialized capital defenders, who literally worked themselves out of a job by litigating the death penalty to death.").

3. *Collective Improvement*

An unforeseen benefit from the creation of a state death penalty prosecutor is rooted in the idea that “a rising tide lifts all boats.”⁷⁹ The establishment of a state death penalty prosecutor may in turn invigorate those who represent capital defendants and allow for capital defense specialization.

Under the current regime, each state and potentially each county within a state have different requirements regarding experience that a lawyer must satisfy to represent a capital defendant. Although these requirements intend to raise the bar for the quality of representation an individual receives, “in many cases the attorneys appointed to defendants are overworked, underpaid, or lacking the trial experience required for death penalty cases.”⁸⁰ Moreover, the Supreme Court does not require that defendants get the *best* advocacy, but just that “legal counsel provided to defendants [] be ‘effective.’”⁸¹

In considering the creation of centralized state death penalty prosecutor who seeks the conviction of defendants throughout the state, the next necessary piece of the analysis is assessing the impact on defense. Recognizing the need for quality defense representation in capital cases, the state must consider the implications of a scheme where the state itself is strengthening the prosecution of capital punishment.

Yet instead of simply creating a state machine against defense attorneys, the creation of a state death penalty prosecutor may actually open the door to allow a criminal defense attorney who practices anywhere within the state be appointed to serve the defendant. While state guidelines regarding appointment of the defendant’s attorney may ultimately stay enforced, the ability to appoint any attorney across the state implicitly introduces attorneys from outside the county where the crime allegedly occurred who may be more skilled in trying capital cases. In broadening the pool of appointable attorneys, the core goal allows the defendant the opportunity to have the most experienced, trained, and skilled lawyer from the state represent him in advocating for his life.

⁷⁹ Although John F. Kennedy and the New England Council have both taken stock in this saying, in this instance the phrase is not being used to reference the economy so much, but rather the quality of legal profession and the quality of death penalty litigation, as a whole.

⁸⁰ *Legal Process*, *supra* note 73.

⁸¹ *Legal Process*, *supra* note 73; *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (“As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance.”).

The facilitation of such a broad reservoir of capital defense attorneys may incentivize specialization in such litigation as well. And furthermore, with the state and its compiled resources funding the state's actions, perhaps there may be an opportunity to expand the resources available to capital defense attorneys as well.

Collectively, the establishment of a centralized state death penalty prosecutor would not only benefit the state seeking the death penalty, it would also likely strengthen capital defendants' representation.

V. CONCLUSION

Until the American public recognizes that the purported myths of the death penalty are anything but reality, change may remain stagnant. It is only when people recognize the truth behind the curtain that meaningful change may occur. As the Supreme Court of the United States established its jurisprudence surrounding capital punishment, confusion and concern evidently remains on both the bench and in society. This disjunctive apprehension ultimately calls for change.

Taking into consideration the realities surrounding who receives the death penalty, and the cost and time of litigating capital cases one possible solution calls for the creation of a department within each state's Attorney General's office focused specifically on prosecuting capital cases across the state. Not only would this system effectively align America's perception of the death penalty with reality, but this system would also reinforce the efficiency of our judicial system.

A collective system may prove to have operational challenges that require developing, but those nuances will work themselves out. American society has been long too complacent with problems in the application of the death penalty, and the lack of meaningful change emphasizes this notion. Because abolition of the death penalty may not be possible as it currently stands, the creation of a state death penalty prosecutor is most certainly the next best alternative. In narrowing the state's focus on a handful of death penalty cases, the eventual hope is that states will find that these offices are no longer needed, leading to the eventual abolition of the death penalty all together.

Although as it stands, death penalty myths may be used as an "honest attempt to explain mysteries,"⁸² of the death penalty, the

⁸² Geddes, *supra* note 1.

creation of a state death penalty prosecutor sheds light on these mysteries ultimately realigning myths with reality.