

# Outmatched

*The Death Penalty Meets  
the Wisdom of Montaigne*



*Philip D. Hansten*

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## Cover Photo:

The Château de Montaigne about half way between  
Bordeaux and Bergerac in southwest France. Photo taken  
from the tower where Michel de Montaigne wrote his essays.

# Table of Contents

Topic	Page
Key Points	5
Introduction	24
1. Reason	38
2. Justice	62
3. Deterrence	94
4. Innocence	116
5. The System	172
6. Cruelty	239
7. Evil	267
Epilogue	316
Bibliography	323
Acknowledgements	334
Endnotes	336
About the Author	391

**Endnotes:** When you see an yellow box with the name of a person in it followed by a superscript number, that means there is more information in the Endnote section at the back of the book. Reading the Endnotes may be useful if you are not familiar with the person in question.





Lady Justice rejecting executions in favor of imprisonment and hard labor. (*Drawing by Matthew S. Shirley, 2019*) This drawing is based on an engraving by Giovanni Lapi for Cesare Beccaria's book, *On Crimes and Punishments*, 1765 edition.)

# KEY POINTS

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*Let us work on thinking well.  
That is the principle of morality.*  
—Blaise Pascal

The morning of September 14, 2019 was cool but sunny as I entered the visitors parking lot outside San Quentin State Prison just north of San Francisco. I was to meet with an inmate on death row and had no idea what to expect. I got out of my car and joined the line with other visitors—mostly women of color with young children in tow—and was surprised by how friendly the guards were. They joked with the children and treated the adults with courtesy. So far so good.

I was there to visit Kevin Cooper, who was convicted of the 1983 murders of four people in San Bernardino County, California. Despite compelling evidence of innocence, Kevin Cooper has been on death row for more than three decades.

After the first checkpoint another guard behind a glass partition collected our identification and let us into the death row visiting area. Inside there were a number of wire cages with two doors--one on the visitor's side, and another that led to the bowels of death row.

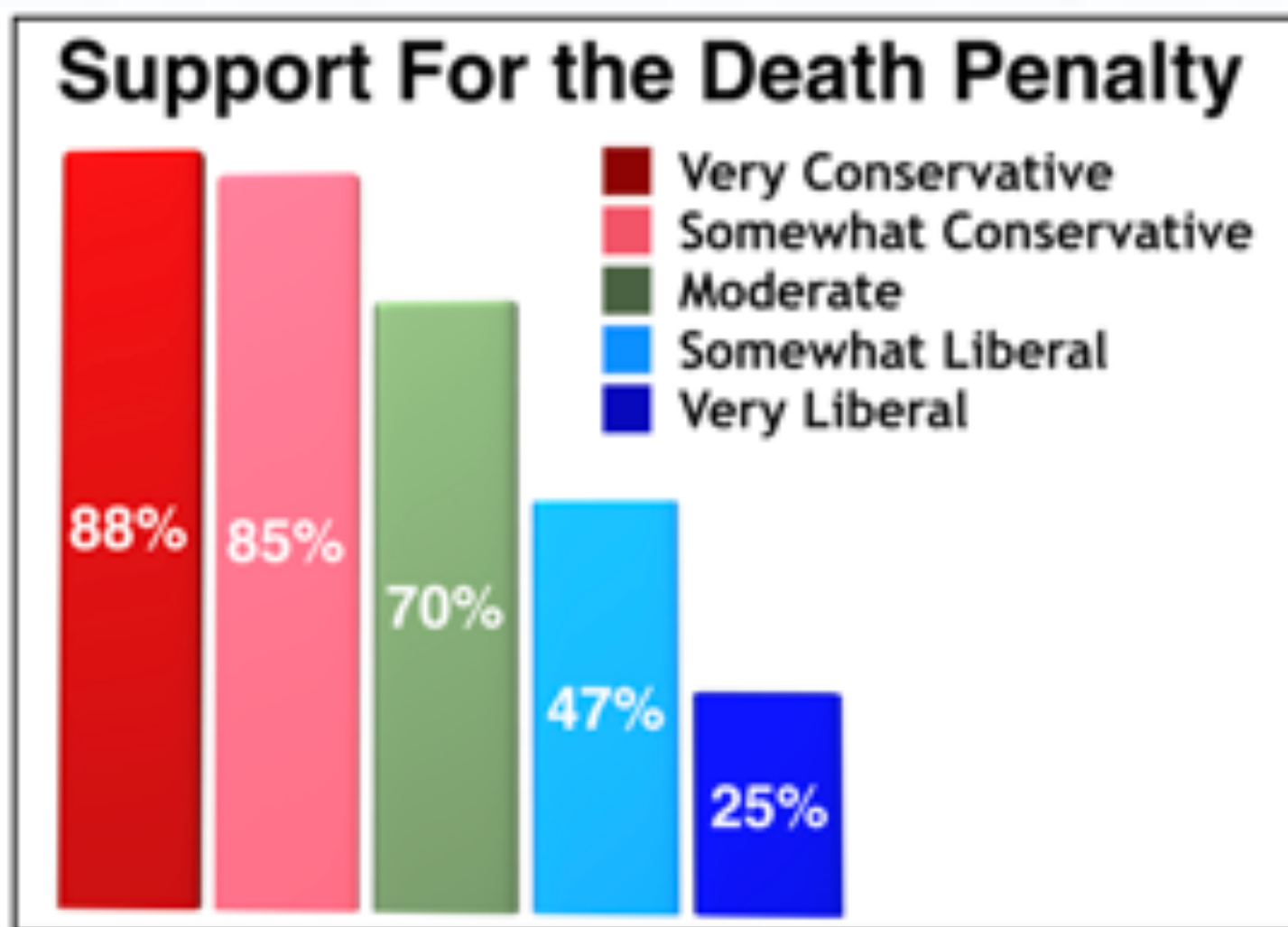
Along with the two people who facilitated my visit, Carole and Mary Kate, I entered the cage and the door was locked behind us. Then Mr. Cooper, hands cuffed behind him, was admitted to the cage, the door was locked, and he backed up to a small opening in the cage to have

his cuffs removed. Mr. Cooper gave warm hugs to my two companions and shook my hand. I learned much from Mr. Cooper over the next two hours, as I will discuss in the following chapters

I WOULD LIKE TO begin by addressing two common misconceptions about the efforts to abolish the death penalty. The first error is to think—since conservatives tend to support capital punishment and liberals tend to oppose it—the best way to eliminate capital punishment is to convince more conservatives to join the opposition. Why is this an error? Because it is likely to fail.

Support or opposition for capital punishment does *not* submit strictly to a conservative/liberal divide. Previous data suggested this, but it was strikingly confirmed in a poll of California voters published in June, 2019 by the University of California, Berkeley, *Institute of Governmental Studies* (IGS). See **Figure 1**

When respondents were asked where they fit on the conservative-liberal continuum and also asked about their views about keeping the death penalty, the



**Figure 1.** Support for Death Penalty Declines as Liberal Political Views Increase



trend was not surprising—the more conservative the person, the higher the support for the death penalty. The surprise came on the liberal side, where 47% of people who described their views as “somewhat liberal” and 25% of those who were “very liberal” supported the death penalty.

It would appear we progressives are in the predicament described by Walt Kelley’s cartoon character Pogo who famously said, “We have met the enemy and he is us.” It appears that we are our own worst enemy, because *there is a sense in which the “somewhat liberal” and “very liberal” people in **Figure 1** are the very reason we have capital punishment in the United States today.*

Conservatives—as their name implies—hold more consistently to their positions, while people on the liberal side tend to be more likely to adjust their views based on new evidence or additional options. Since this book is an appeal to reason and empirical evidence, it is likely to have the most impact on liberals (perhaps also with some in the “moderate” category). This is excellent news because we have a real chance of changing the minds of enough liberals through education to turn the tide against the death penalty. That is the goal of this book.

The second error is to suppose that—because execution is almost always a punishment for those accused of murder—the rest of us need not worry because we will never murder anyone. That was my assumption as I started writing this book several years ago, but now I am not so sure. Given the expanding authoritarian inclinations of governments at home and abroad, I began thinking perhaps abolishing the death penalty is more important now than in any time in our nation’s history. I should have guessed that the importance of abolition in times of gov-



ernment instability was not an original idea, and I later found that Jeremy Bentham mentioned this issue 200 years ago. Bentham said:

*If we reflect on those very unfrequent [sic] occurrences, but which may at any time recur—those periods at which the government degenerates into anarchy and tyranny, we shall find that the punishment of death, established by law, is a weapon ready prepared, which is more susceptible of abuse than any other mode of punishment. A tyrannical government, it is true, may always re-establish this mode of punishment after it has been abolished by the legislature. But the introducing of what would then become an innovation, would not be unattended with difficulty. ... Tyranny is much more at its ease when exercised under the sanction of law, when there is no appearance of any departure from the ordinary course of justice, and when it finds the minds of people already reconciled and accustomed to this mode of punishment.*

**Jeremy  
Bentham<sup>1</sup>**

Accordingly, the death penalty may have a greater potential impact on the general population than one might think. We tend to associate executions with people accused of murder based on the laws of their individual states, but a central government out of control—as has occurred countless times around the world throughout history—may use the death penalty as an instrument of terror to keep the population in check. (Note that in July 2019 United States Attorney General William Barr announced the resumption of federal executions... a disturbing sign.) Moreover, the global political disruptions from the climate crisis may increase calls for “law and order” policies, even after this administration is out of power. Complete abolition of capital punishment in the United States as a whole is required to reduce this risk, not just state-by-state abolition.

Lest those whose politics align with any current administration take comfort in the idea that they are immune from the risk of execution because it would only be used on “the opposition,” rest assured that the vicissitudes of internecine conflicts almost guarantee major reversals. Even a casual look at world history shows repeated examples of civil wars and revolutions in which those in charge ended up at the end of a rope or with their heads in baskets. It seems to me that anything we can do to reduce the likelihood of such carnage—even by a little—is worth doing.

## **ARGUMENTS FOR THE DEATH PENALTY**

I would like to lay my cards on the table at the beginning, so the reader will know what is to follow. Accordingly, here are a dozen of the arguments made by those who favor the death penalty with my rating of the validity of each argument using a grade. (Yes, I have been grading students for over five decades, so I can’t help myself!) Also, I realize that an “F-minus” is not a thing, but some of the arguments are so absurd, that it seemed to be the only appropriate grade.

**Claim #1:** We can decide whether or not capital punishment is good public policy by addressing moral issues alone, without considering empirical evidence or using reason. Grade: D

Moral considerations are obviously important when considering the death penalty, but they are only part of the story. As we will discuss in Chapter 1, it is impossible to make good moral decisions without considering the large body of empirical evidence on the death penalty, because this evidence itself has deep implications for the morality of capital punishment.

Even that is not enough, however. In addition to the empirical evidence, we must also assess whether the arguments for or against the death penalty are reasonable and rational. Absurd and irrational arguments must be called out for what they are. Moral considerations by themselves, therefore, are only one leg of a three-legged stool along with empirical evidence and rational thinking. We need all three if we are to come to a reasonable solution.

**Claim #2:** The moral opinions of death penalty supporters should take precedence over the moral opinions of those who oppose the death penalty. Grade: F

Since the overwhelming majority of people who are for or against the death penalty base their opinion on gut feelings rather than evidence, there is no basis to justify placing the subjective opinions of a death penalty proponent—who feels capital punishment is morally desirable—over the equally subjective opinions of those who find capital punishment morally reprehensible. The public is divided about equally regarding whether the death penalty or life in prison is preferable, so neither side can claim a moral mandate on that basis.

I would further argue that the burden of proof should be on the death penalty proponent, since they are proposing the extraordinary measure of the state taking the life of one of its citizens. Extraordinary measures—such as the state killing one of its citizens—should require extraordinary moral justification.

Death penalty proponents generally claim that their motive is achieving justice, but as we discuss in Chapter 2, vengeance is probably closer to the real motive. It is difficult for a person on either side of the issue to assess their true motives. As the Spanish (Basque) phi-

osopher, poet, and novelist Miguel de Unamuno observed, “What we believe to be the motives of our conduct are usually but the pretexts for it.”

**Miguel de Unamuno<sup>2</sup>**

**Claim #3:** We almost never send innocent people to death row, and most of the people exonerated and released from death row were actually guilty. Grade: F

Death penalty proponents know their Achilles heel is the innocence issue, so they make outlandish arguments to deny that executing innocent people is a problem. As of this writing (early 2020) there have been 166 people exonerated and released from death row for reasons of innocence. (I will sometimes use 166+ when talking about the number of people exonerated from death row, because the number will almost certainly be higher than 166 by the time you read this.) Some claim the people exonerated from death row were actually guilty, but just not guilty in the legal sense. This is a preposterous claim on several levels.

First, someone who is found to be not guilty in a legal sense must be assumed to be not guilty in reality. One cannot claim just because you *think* someone is guilty, they are guilty. That is not how our system works, nor should it. We have to have enough valid evidence to convict, and in some cases such evidence is simply lacking.

More importantly, as we discuss in Chapter 4, for most of the 166+ who were exonerated, there was compelling evidence of *actual* innocence, not just legal innocence. Some were exonerated through DNA evidence, and others due to false confessions, mistaken witness identifications, and official misconduct. The most common reason for exonerations was perjury/false accusations (present in two-thirds of exon-



erations). This suggests that most defendants who were exonerated were actually innocent as well as legally innocent. Moreover, charges were completely dismissed for about two-thirds of all exonerated defendants—far more than those who were acquitted—further suggesting that they were factually as well as legally innocent.

We must also note that the 166+ exonerated defendants are only the people for whom evidence of innocence came to light, usually by pure chance. We do not know how many other innocent people have been sent to death row, but for whom no exculpatory evidence has been discovered. Given how often the exculpatory evidence for those who are exonerated has been uncovered through serendipity, it would be reasonable to assume that there are many more innocent defendants who are never discovered to be innocent.

Expecting a human-designed criminal justice system—operated by fallible and foible-ridden human beings—to only send guilty people to death row is not reasonable or rational. Moreover, to think that the criminal justice system can be rendered infallible through “fixes”—as necessary as the fixes are—is equally irrational. Humanity cannot be perfected. The criminal justice system cannot be perfected (as we discuss in Chapter 5). The only way to avoid the virtual certainty that we will execute innocent people is to replace the death penalty with life in prison without the possibility of parole (aka “death in prison”).

**Claim #4:** Obtaining justice for a victim’s loved ones can best be achieved by the death penalty. Grade: C-minus

It would not be fair to claim the death penalty has no value whatsoever—some family and friends of victims say they were relieved of some suffering when the person who killed their loved one was exe-

cuted. In their view “justice” was served. We must take these statements at face value. Most of us have not experienced the loss of a loved one through murder, so we are in a poor position to judge the agony they experience. Moreover, some members of society who do not know the victims personally may gain some degree of retributive satisfaction when they hear about executions. Again, they may feel justice requires the death penalty in some cases.

Nonetheless, against this potentially positive “justice” effect of the death penalty for the family, we must juxtapose the negative outcomes. First, as we will discuss in Chapter 2, the loved ones of the victim may think execution of the murderer will assuage their suffering, but will it? ... especially when they get over the initial satisfaction of the execution? Moreover, the multiple appeals on the way to execution can be an emotional roller coaster for the victim’s loved ones, especially so if any of the appeals succeed. The road to execution, therefore, may cause more pain for the victim’s loved ones than the relief of pain provided by the execution. One must also consider that some victim’s loved ones are strongly opposed to the death penalty, and the execution would only increase their pain, not relieve it.

Nonetheless, one cannot deny that for *some* loved ones of a murder victim, execution of the murderer may be an overall positive, even in the long term. That said, they are not the only ones who must be considered, as we discuss in Claim #5, below.

**Claim #5:** With regard to justice, we need only to consider the victim and their family. Grade: F

The “justice” achieved by executing the murderer must be juxtaposed to the manifold *injustices* inherent in the death penalty, such as execut-

ing the innocent, the highly arbitrary nature of who ends up actually getting executed, and the negative impacts of the death penalty on innocent people other than the victim's loved ones. When one adds the brutalization and vulgarization of society, along with the unproved but real possibility the death penalty increases the murder rate rather than decreasing it (discussed in Chapter 3), one could argue that the injustices of capital punishment outweigh any justice achieved.

While it is vital that we consider the needs of the loved ones of the murder victim in all of our considerations, we must also take into account all the other innocent people potentially harmed by capital punishment. As we discuss in Chapter 4, the cumulative suffering that the 166+ innocent people endured before being released from death row is mind-boggling. Collectively, they spent almost two thousand years under the threat of death—that is a total of over 500,000 mornings in which they arose only to realize that their nightmare was real, and they are on death row for a crime they did not commit. Some of them had repeated execution dates set before they were exonerated. As with the suffering of the victim's loved ones, those of us who have not experienced this kind of torture can only dimly imagine what it would actually be like.

Add to the suffering of the innocent on death row the millions of mornings that the loved ones of the falsely condemned got up to realize that their nightmare is also real. Even the loved ones of the guilty on death row must suffer horribly. They would also suffer if their loved one had been sentenced to death in prison, but at least they would not have to imagine the execution over and over. The loved ones of people on death row are innocent, yet their plight is rarely considered in discussions of the death penalty.

Then, as we discuss in Chapter 6, we must consider all of the people involved—directly or indirectly—in the execution: prison guards, executioners, spiritual advisers, witnesses to the execution, and those who put the person on death row such as judges, juries, eyewitnesses, expert witnesses, and the like. Some of them suffer in a way they would not if the defendant had been sentenced to death in prison. Occasionally—but not nearly often enough—even prosecutors have misgivings, especially if it turns out that the condemned person was actually innocent. More often, however, prosecutors maintain the guilt of the defendant despite even overwhelming and incontrovertible evidence of innocence.

**Claim #6:** Having the death penalty on the books reduces the homicide rate. Grade: F

Historically, claiming we need the death penalty to discourage people from committing murder is a common argument, and it continues to this day. The problem is that there is no credible empirical evidence to support the claim. As we discuss in Chapter 3, not only is there a lack of evidence that the death penalty reduces the homicide rate, but the available evidence actually suggests a trend in the opposite direction—an *increase* in the homicide rate in the presence of the death penalty (called “counterdeterrence”). I say “suggests” because the evidence is only a trend and is not conclusive. Nonetheless, if one were asked to state whether deterrence or counterdeterrence is more likely, one would have to respond “counterdeterrence.”

Even if we ignore this counterdeterrence trend and assume that the death penalty has no overall effect on the homicide rate—which may indeed be the case—when we add in the fact that we regularly send in-



nocent people to death row, we are forced to a very disturbing conclusion: ***More likely than not, the death penalty results in a net increase in the deaths of innocent human beings.*** That is precisely where the empirical evidence leads, and—in order to dispute this claim—the empirical evidence must be ignored or distorted.

**Claim #7:** No innocent people have been executed in the United States. Grade: F

There are people who insist that innocent people are never executed. This claim is irrational and indefensible given the 166+ people on death row who have been exonerated and released, and given that after a person is executed efforts to prove their innocence basically stop. Believing the 166+ exonerated people represent all of the innocent people on death row is to engage in magical thinking. How likely is it that the error-prone system that wrongly sentenced all of these innocent people to death will somehow miraculously become infallible during the appeal process?

In response to California Governor Gavin Newsom's March 2019 moratorium on executions, one death penalty proponent argued that executing the innocent is no longer a problem due to modern science such as DNA testing. This argument is specious, because many death penalty convictions do not involve DNA. Indeed, a majority of the 166+ exonerations from death row did not involve DNA exonerations. Moreover, "false and misleading forensic evidence" was a contributing factor in almost one-third of exonerations from death row, even in many recent cases. Science will not save us from sending innocent people to death row.

**Claim #8:** Even if an innocent person is executed now and then, it is the same principle as having laws for speed limits or building codes. People die in auto accidents and sometimes buildings collapse on people. Shit happens. Grade: F-minus

This is possibly the most absurd argument proposed by death penalty proponents. The claim is that executing an innocent person now and then is no big deal because, well... shit happens. They cite other public policy decisions resulting in deaths, but this is an egregious example of false equivalence as we will discuss in some detail in Chapter 4. When we decide on speed limits or building codes, we are trying to pick the best benefit to risk ratio along a continuum. We cannot reduce the deaths in traffic or in buildings to zero without making car travel so slow or construction of buildings so expensive that nobody would drive a car or build a building. On the other hand we can reduce the number of innocent people executed to zero by using death in prison, a punishment that essentially serves all of the penological and societal goals that the death penalty does at less than half the cost.

Moreover, we cannot forget the unspeakable suffering experienced by the innocent person who spends a decade or two on death row, getting their hopes raised and dashed repeatedly during appeals (given their innocence, they would obviously have hope that their innocence might be established). To make matters worse, many people on death row have multiple execution dates set over the years, further tormenting the innocent inmate. Finally, consider the horrific days before the innocent person is executed, and the day of execution when they are led down to the execution chamber, and the needle is placed in their arm. Anyone who can consider this whole decades-long torture of an innocent person, and then admit that it probably happens occasionally,

and then shrug it off with the response “shit happens” is, in my view, suffering from some sort of psychological pathology.

For former Supreme Court Justice John Paul Stevens—and for many of the rest of us as well—there can be no acceptable number of innocent people being executed, particularly when we have an effective and cheaper alternative—death in prison.

**Claim #9:** Lethal injection is a humane way of executing people.  
Grade: D

Actually, execution by firing squad or guillotine would be much quicker and more humane. Lethal injection is used to make *the rest of us* feel better. Moreover, as we discuss in Chapter 6, the second drug in the three-drug regimen is usually a skeletal muscle relaxant, whose purpose is to make sure the inmate does not thrash around during the execution, lest it disturb those witnessing the process. If the inmate is not rendered unconscious by the initial sedative—which seems to have occurred in a number of cases—giving the muscle relaxant would create the horrific situation of the inmate struggling to breathe, but being unable to do so... producing a slow suffocation.

Even if we used an injection that was quick, universally effective, and painless, however, the vast majority of the suffering experienced by the inmate would have occurred in the many years before he was taken to the execution chamber.

**Claim #10:** Only “the worst of the worst” are sent to death row. Grade: F-minus.

Death penalty advocates are fond of claiming the people who are sentenced to death are only “the worst of the worst,” and they follow with

a litany of the horrific crimes they committed. This is one of the arguments sometimes used by liberals who support the death penalty; one of the reasons I wrote this book was to bring evidence to light that would allow them to rationally reverse their opinion. This claim is not absurd on its face, but it represents one of the most counterfactual of all the claims in this list, which is why it gets an F-minus.

The argument may seem reasonable at first glance, but, as we discuss in Chapter 6, when one looks at the factors that dictate who ends up on death row it becomes clear that it is not true. Many other murderers committed crimes as bad or sometimes even worse than “the worst of the worst” who end up on death row. Consider just one example: Gary Ridgeway killed dozens of women in Washington state, but escaped the death penalty because he had hidden some of the bodies and police wanted to find them.

The egregiously arbitrary nature of death sentences effectively invalidates the “worst of the worst” argument. We will discuss the arbitrary nature of death sentences in detail in Chapter 5, but here is a quick summary of some factors that affect the likelihood of a defendant ending up on death row: race of the victim, race of the accused, appearance of the accused, state and jurisdiction in which the murder occurred, resources of the accused to hire attorneys and experts, the wishes of the victim’s loved ones, the impulses of the prosecutor, composition of the jury, competence of expert witnesses, attitude of the judge... indeed the integrity, competence, and whims of all of the individuals in the criminal justice system and many other factors over which the accused has little control. Chance plays an outsized role for most of these factors, so a person who is sentenced to death may well not have been had the circumstances been slightly different.



The demeanor and actions of the accused in court also play a role, which can actually work against innocent defendants in capital cases. A display of remorse and an abject apology can make the difference at sentencing, and tip the scales from a death sentence to death in prison. It is a cruel irony that innocent defendants naturally would be reluctant to make such a display, and it would actually be counterproductive if the innocent defendant had steadfastly maintained innocence throughout the trial. Ironically, this increases the chances that an innocent defendant will be sent to death row.

**Claim #11:** Inmates sentenced to death in prison live pleasant and comfortable lives. Grade: D

Death penalty proponents (such as those in the Intelligence Squared Debate we will discuss later) sometimes describe inmates sentenced to death in prison as having wonderful living conditions, lounging around with their pals, with free food, free medical care, playing sports, and watching TV. (Although it would be hard to claim that watching Wheel of Fortune for a lifetime is not cruel and unusual punishment!) I'm not sure what prisons they visited, but the reality is that the inmates sentenced to death in prison generally live in Spartan conditions in a small concrete cell, dealing with issues such as overcrowding, violence, sexual abuse, frequent "lock-downs" where they are confined to their small cell, mistreatment and abuse by guards, and lousy medical care.

Moreover, even if there *were* prisons where the conditions are too much like Club Med, this could easily be changed. Reasonable people can discuss it and come up with humane but not luxurious living conditions for those sentenced to death in prison. By what distorted logic

are the conditions under which inmates are housed, and over which we have complete control, an argument in favor of the death penalty? This argument is tantamount to saying, “Well, the prison conditions *we have chosen for you* are too cushy, so we are going to have to kill you to avoid the problem.”

**Claim #12:** We humans can determine precisely who deserves to die for committing homicide, and who does not. Grade: F-minus.

This claim asserts that *certain* murderers are evil people and deserve execution, but we are good people and deserve to execute them. In Chapter 7 we discuss the poverty of this ludicrous claim. The question is whether we fallible humans can negotiate the knife-edge difference between a murderer who deserves execution versus one who *only* deserves death in prison. Those who think they can reliably make this distinction apparently feel they have a God-like ability to discern what is in another person’s heart and mind. I think we are justified to be skeptical of this claim.

A lucid and nuanced analysis of how we decide who is blameworthy, and then choose punishments for them to make them suffer for their crimes can be found in the book *The Limits of Blame. Rethinking Punishment and Responsibility* by Erin I. Kelly. Kelly observes:

*The blame industry reaches well beyond a pragmatic need for protection from truly dangerous persons and a moral need to repudiate their harmful acts. It massively overreaches: the stigma of criminality attaches to the convicted as a group and condemns them.*

\* \* \*

OVERALL, THEN, THE CLAIMS made by death penalty proponents are at best questionable, and at worst patently absurd. I do not say this to demonize those who favor capital punishment, most of whom sincerely believe the death penalty is good public policy. My hope, however, is that those people whose opinions are amenable to revision—as more facts and evidence are brought to their attention—will rethink their position on the death penalty.

Finally, I should explain why I have Michel de Montaigne in the title. Montaigne's *Essays* are a delightful and eclectic melange, with many asides and side roads, but there is one recurring theme: the inherent fallibility of human beings. He leads us away from dogmatism and ignorant certainty—two prominent features of the death penalty debate. Please go to the Endnotes for more information on Montaigne.

**Michel de  
Montaigne<sup>3</sup>**

I began these Key Points with my visit to San Quentin State Prison where I had a conversation with death row inmate Kevin Cooper. As I walked back to the car after visiting Mr. Cooper, the soul-numbing nature of this place started to sink in. I began to wonder whether this is the best we can do to gain closure for the victim's loved ones, and to protect society from people who may cause harm.

Given what we know about the serious flaws in our criminal justice system and the egregiously arbitrary nature of who is actually executed—as we have discussed briefly in this section—does the death penalty bend toward or away from justice? And what does the death penalty mean for those awaiting execution who are most likely innocent, such as Kevin Cooper? We will discuss all of these issues and many others in the pages that follow.

I AM CONFIDENT there will come a day when we will have abolished the death penalty, and we will wonder how we could possibly have let such an ineffective, irrational, immoral, and costly institution to endure for so long. You will be hearing much from Arthur Koestler in the pages that follow. Koestler was a tireless opponent of capital punishment in the United Kingdom for many years, and he lived to see it abolished in all of the UK in 1973.

**Arthur  
Koestler<sup>4</sup>**

It is fitting, therefore to end the Key Points with a quote from Koestler's marvelous book on the death penalty, *Reflections on Hanging*:

*The gallows is not merely a machine of death, but the oldest and most obscene symbol of that tendency in mankind which drives it towards moral self-destruction.*



# INTRODUCTION

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*After all, it is putting a very high price on one's conjectures to have a man roasted alive because of them.*

—Michel de Montaigne

In turbulent and bloody sixteenth century France, some men were facing imminent execution for murder. But before the death sentence could be carried out, a nearby court found the men who had actually committed the murders and had confessed to doing so. The judges holding the innocent men, however, found themselves in a quandary. What precedent would it set if they reversed the death sentence of the innocent men? After all, the men were legally convicted in a court of law, and to reverse their death sentence might shed doubt on other decisions of the court. They decided, therefore, to ignore the exculpatory evidence, and the innocent men were hanged.

This story was told by the 16th century French writer Michel de Montaigne, and he punctuates the absurdity of the outcome by citing another case in which a man was required by a judge to pay a heavy fine to another man. When it turned out the judgment was wrong, the judge reversed the decision and had the money returned. Montaigne then observes, “But he was dealing with a reparable accident; my men were irreparably hanged. How many condemnations I have seen more criminal than the crime!” Montaigne’s story is only an anecdote and it would be hard to corroborate its accuracy at this remove from the events in

question. But it does sound eerily familiar to some cases in the United States over the past half century where compelling evidence of innocence has been brushed aside. More on that later.

Montaigne would be happy to know that France has now abolished the death penalty, as has virtually every other developed country in the world except the United States. Many other less developed countries have also abolished capital punishment over the past century. France abolished capital punishment in 1981, one of the last holdouts in Europe along with the United Kingdom. By 2019, a majority of countries around the world had abolished capital punishment by statute or in practice, including almost every country in Central and South America, and a majority of African countries.

Does this have any bearing on the death penalty in the United States? Do we know something these other countries do not regarding the value of the death penalty? Is the United States unique in requiring the death penalty while most other countries in the world apparently do not? What are the benefits and risks of having capital punishment on the books? Does justice require the death penalty in certain cases? Are there rational arguments for or against capital punishment? We will address these and other questions in the pages that follow.

As with many public policy issues—whether it is tax policy, education, health care, or abortion—those of us on one side or the other tend to put up the barricades and vigorously defend our position against all assaults. This is inevitable—and rational I suppose—for the many complex issues where personal interests do in fact diverge and there are winners and losers. Tax policy, for example, usually results in concrete benefit or loss depending on your financial situation. A person could

therefore be considered rational, if not always ethical, by favoring one tax policy over another. For capital punishment, however, most of us have the same objectives: We want to be kept safe from murderers. We want justice for victims and for society. We want a criminal justice system where everyone is treated equally and fairly, and where only guilty people are convicted.

With so many common goals, it is a shame that the capital punishment debate has become so polarized. Perhaps the problem is whether we are for or against capital punishment, we tend to arrive at our position through “gut feelings” alone, without adding a careful analysis of the empirical evidence. Perhaps if more people understood this evidence, we would have more agreement on whether capital punishment is good public policy. This is precisely what Sister Helen Prejean has been promoting for decades.

**Sister Helen  
Prejean<sup>5</sup>**

*The death penalty is one of the great moral issues facing our country, yet most people rarely think about it and very few of us take the time to delve deeply enough into this issue to be able to make an informed decision about it.*

—Sister Helen Prejean

Fortunately, most of the empirical evidence on capital punishment is easy to understand, unlike, for example, the byzantine maze of economic policies. Capital punishment is in that “sweet spot” of issues where the empirical evidence 1) needs to be considered (unlike an issue like same sex marriage that is essentially a values-only issue), and 2) is manageable in size and understandable to the non-expert (unlike topics such as economics).

Understanding the available empirical evidence on the death penalty is critical, but this understanding is—as the philosophers like to say—necessary but not sufficient. We also need to assess, as rationally and objectively as we possibly can, all of the other (non-evidentiary) arguments for and against the death penalty. In other words, we need to identify reasoning errors and logical fallacies made by the disputants. This will necessarily require a philosophical approach, which is why you often will hear from philosophically oriented thinkers, especially Montaigne, as you read this book. (But no Heidegger, of course, I’m not a complete idiot!) I must assure you, however, that it will be practical philosophy—not theoretical philosophy—that we will use to hack our way through the competing arguments.

MUTUAL STEREOTYPING PROBABLY contributes to the polarization on capital punishment. Many death penalty opponents tend to think of death penalty supporters as ghoulish, narrow-minded people standing outside the prison with misspelled signs and cheering wildly at the announcement of a successful execution. This is not a fair representation, because not only the ignorant and uneducated favor capital punishment. Many death penalty advocates are highly educated, including law professors and Supreme Court Justices. Moreover, I would argue that most death penalty supporters genuinely believe that capital punishment is good public policy. They talk of justice and retribution, and evil people getting what they deserve. Some supporters of capital punishment even come to their position somewhat reluctantly, viewing it as a necessary evil.

Death penalty opponents are also unfairly stereotyped. They are effete intellectuals—grey-haired elders and young men with beards carrying candles in silent protest of the death penalty. They are labeled naïve



criminal-coddlers with little understanding of the harsh realities of the world. With their bleeding hearts, they care more for the criminal than for the terrible suffering of the victim and the victim's loved ones. They do not recognize that there is good and evil, and that evil must be punished. This is also unfair. Most death penalty opponents care deeply for the victim and their families, but feel that all human life is sacred, and it is wrong for the state to kill. They often point out that life in prison without parole is sufficient punishment and protects society. They also often feel that the unequal and arbitrary application of capital punishment renders it egregiously unjust.

Partially as a result of this mutual stereotyping, it is difficult to avoid becoming sanctimonious and judgmental toward people on the opposite side of the issue. I suppose we would do well to emulate 20th century thinker and theologian, Reinhold Niebuhr. Niebuhr recognized that as much as one would like to assign virtue to our own position and evil to our opponent, it is rarely that simple. "We must fight their falsehood with our truth," Niebuhr observed, "but we must also fight the falsehood in our truth."

In an introduction to an anthology of Niebuhr's writings, Robert McAfee Brown observed, "Niebuhr's most important contribution to our own time may be his reminder that one clear sign of the presence of virtue is an unwillingness to claim it too absolutely as one's own possession." Those of us on either side of the death penalty debate, therefore, would do well to heed Niebuhr's advice. Neither side can self-righteously claim to be the sole voice of virtue. This does not mean, however, that one is given license to stake out a position without considering the available evidence on capital punishment or without using rational thought.

LET US RETURN TO MONTAIGNE—the patron saint of intellectual humility and civil discourse—who would be quite annoyed with me if I did not acknowledge the strongest arguments in favor of the death penalty at the outset. We often seek our opponent’s weakest arguments and hold them up to ridicule, but to be fair one must focus on their “stronghold” as Montaigne put it. Montaigne—although he had serious misgivings about the death penalty—would also have us show respect for those who favor it.

This does not preclude being direct or even blunt in rebutting the arguments from one’s opponent if they are irrational or absurd. (Maybe not as absurd as the fact that the Yellow Truck Company paints their trucks orange, or that SpongeBob SquarePants has rectangular pants, not square... but some of the pro-death penalty arguments are pretty absurd.) But, when one’s opponent’s arguments are most preposterous and the temptation to impugn is the most acute, one’s arguments must be as fair and as accurate as one can make them.

*I want reasonings that  
drive their first attack into  
the stronghold of the doubt.*

—Michel de Montaigne

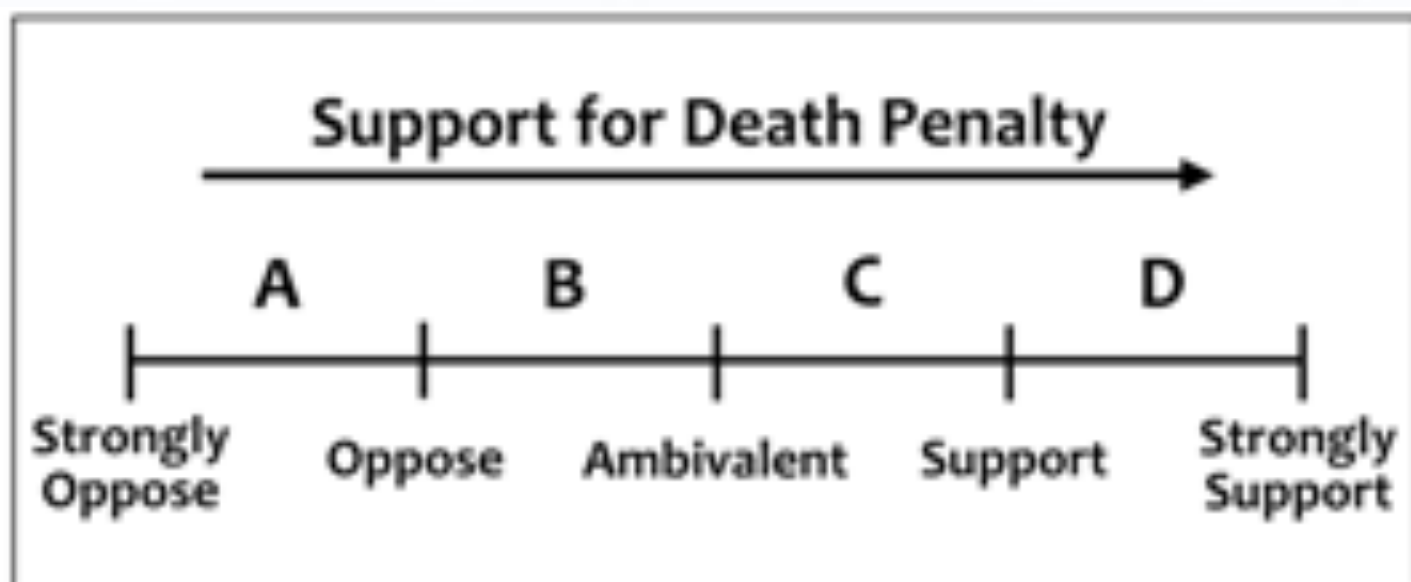
Accordingly, the “stronghold” argument in favor of the death penalty must be, it seems to me, the voice of people whose loved ones were murdered, often in a most appalling way. I have lost loved ones, but not to murder, and I can only dimly imagine what it must be like to lose a child, spouse, sibling or parent to a senseless and heinous murder. Those of us who have not lost a loved one to murder must acknowledge that we do not truly understand what they are going through. We must give them an opportunity to speak, we must hear what they are

trying to tell us, and we must try to accommodate their positions if we can.

Nevertheless, while we must never forget the agony that the loved ones of the victims have endured, it would be irrational and unjust not to consider the impact of the death penalty on everyone involved and on society as a whole (as we mentioned earlier in Key Points). There are also potential negative impacts on those in the criminal justice system who are called upon to carry out the death penalty. These people may have lingering nightmares and visions that last for years or decades. There is also the potential for the death penalty to vulgarize society at large, leading to the soul-numbing idea that we can solve problems by simply killing the people we deem evil.

ONE MIGHT THINK that I have written this book to try to convince those who strongly support the death penalty to rethink their position, but actually I have other audiences more in mind. Support for the death penalty, as with most public policy issues, is not binary but rather lives on a continuum (see **Figure 2**). On the far right, Group D, we have the people who British author Arthur Koestler called the “hang-hards.”

Many of these people love the death penalty, and would like to see it used more frequently than it already is.



**Figure 2.** Support for Death Penalty is on a Continuum

Some of them feel that lethal injection is too easy on the condemned, and promote more painful and terrifying methods of execution. Former Maine Governor Paul LePage is at the extreme end of Group D, and he thought it would be nice if we had public executions by guillotine, and then we could—apparently like a carnival game—see which hole the severed head fell into. My guess is that few people in group D will read this book, and even if they did, it would be unlikely to influence their views.

I have written the book, therefore, primarily for people in Groups A, B, and C. For those in Group A—who most strongly oppose the death penalty—I hope to provide arguments and evidence that might be useful in their efforts to abolish the death penalty. Nonetheless, I suspect that Groups B and C might be the most amenable to the arguments in this book. They may be nominally on opposite sides of the issue, but perhaps they are not so dug in to their respective positions that they will ignore evidence and reason. Perhaps even a few people in group “B” will end up in group “A”—a transition that happened to me as I researched this book.

WHEN WE ASK PEOPLE a simple up or down question on whether we should have the death penalty or not the results are useful insofar as they give the percentage of people who are okay with capital punishment. This question does not tell us however, whether the respondents would prefer the death penalty over life in prison without the possibility of parole. (Given the unwieldy nature of “life in prison without the possibility of parole” I will generally use the shorter and more descriptive phrase “death in prison” meaning the prisoner is locked up in prison until he or she dies.) As Professor Erin Kelly has observed in her insightful book *Limits of Blame. Rethinking Punishment and Re-*



*sponsibility*, life in prison without parole has been called “the other death penalty” because the person dies in prison either way—it is only a matter of timing.

Using “death in prison” instead of “life in prison” also avoids an ambiguity with the later term. If one says simply “life in prison” (as some death penalty proponents are wont to do) it might be construed to mean a life sentence *with* parole as a possibility. Using “death in prison” makes the meaning clear.

I recognize that some of my fellow death penalty opponents and many of those involved in prison reform will not like my support for death in prison as a substitute for the death penalty. After all, life in prison is itself an extreme punishment. They also rightly wonder if we can declare some people absolutely beyond redemption.

I have agonized about this, because I agree that some people who are sentence to death in prison may eventually represent a minimal threat to society. For example, a man who committed a murder during a robbery when he was 18-years-old, who then spent 40 years as an exemplary inmate and accepted full responsibility for his actions may be less of a danger to society than another man who is convicted of second-degree murder and released after 12 years for killing someone in a road-rage incident. These are difficult issues, and I ask you to please bear with me until you see my arguments later in the book before passing judgement.

WE SHOULD NOT UNDERESTIMATE the positive impact of conservatives who oppose the death penalty. Ben Jones, who worked on a project called “Conservatives Concerned about the Death Penalty” has made compelling arguments for conservatives to oppose capital punishment.

He points out that the death penalty is not consistent with key conservative principles, and Republicans should not automatically support it. In fairness, the same could be said of the pro-death penalty liberals and Democrats—the death penalty is not consistent with liberal values either, especially given the empirical evidence discussed in this book.

Ben Jones is not alone among conservatives and libertarians who question the value of the death penalty. In an op-ed titled “Abolish the Death Penalty” conservative columnist George F. Will correctly points out that capital punishment is a government program, and presuming the government to be infallible is not consistent with conservative values. George Will observes that government “is altogether too full of itself, and investing it with the power to inflict death on anyone exacerbates its sense of majesty and delusions of adequacy.” It seems strange that more “government sucks” conservatives do not recognize the power the death penalty confers on the state.

Former Republican congressman Ron Paul also questioned how conservative skepticism about government is consistent with giving it the power to make life and death decisions. Edward Crane of the Cato Institute—while not against capital punishment in principle—opposed it in practice due to possible mistakes by an incompetent and corrupt government. The high cost of the death penalty versus death in prison has also convinced some conservatives to oppose capital punishment.

*There is a cogent and compelling conservative argument against the death penalty: it is incompatible with limited government, fiscal responsibility, and promoting a culture of life.*

—Ben Jones

Support for capital punishment is not even a believer/non-believer issue, since different religious traditions have widely different views on the death penalty. For example, many Christians hold fast to the tenets that every life is sacred and nobody is beyond redemption, both of which are belied by support of capital punishment. Having the death penalty brings with it the very real possibility that we have executed innocent people in the past and will execute more in the future. This is not a pro-life position. Even when there is no question of innocence, however, we humans are deciding who is capable of redemption, and who is not. This also seems inconsistent with most professed Christian views that give this job to God.

It would appear, therefore, that perhaps more than most public policy issues, support for or opposition to capital punishment cuts across lines of education, political party and religion. I have often been surprised by anti-death penalty or pro-death penalty positions from people who did not conform to my preconceived notions about how they would come down on the issue.

I have made every effort to follow Arthur Koestler's good example to be objective in presenting my arguments, but—as sages have advised us for millennia—complete impartiality is not achievable by human beings. As Bertrand Russell observed in *My Philosophical Development*, “To achieve such [pure] impartiality is impossible for us, but we can travel a certain distance towards it.” I have tried to travel that certain distance but readers of this book will judge whether or not I have succeeded.

When physician-philosopher William James (1842-1910) was asked to define philosophy, he is said to have replied, “A peculiarly stubborn ef-

fort to think clearly.” If James is correct—and I think he is—it would seem that a philosophical approach could improve the discussion on almost any topic. Philosophy can help us achieve more rational solutions to difficult problems, particularly those laden with uncertainty and competing moral outlooks. I have recently argued for a philosophical approach to address the seemingly intractable debate on the drug-drug interactions of tamoxifen, a drug used to treat breast cancer. In this case the scientific evidence per se leaves us in limbo, so a philosophical treatment of the evidence, I believe, is the only way to reconcile the competing viewpoints in order to protect patients from harm.

**Tamoxifen  
Article<sup>7</sup>**

In the pages to follow I will occasionally refer to an Intelligence Squared debate of April 15, 2015 on the motion, "Abolish the Death Penalty." John Donovan was the moderator and the four debaters were Diann Rust-Tierney and Barry Scheck in favor of the motion to abolish, with Robert Blecker and Kent Scheidegger against the motion to abolish capital punishment. It seems clear to me that all four of the disputants sincerely believed in and passionately espoused their respective points of view. Nonetheless, I would argue that there were numerous factual errors, specious arguments, and lapses in rational thought on the part of Messrs. Blecker and Scheidegger, and—given the high profile of debates such as this—it seems reasonable to point out these faulty arguments. More on that later.

There is a sense in which this book is a paean to Michele de Montaigne, a man whose writings are the veritable anti-matter to dogmatic thinking. I know of no thinker who more eloquently and convincingly called us to reexamine our habitual unthinking beliefs. He promoted what might be called enlightened intellectual humility, which—when



considering the death penalty—should lead us to question our arrogant claim that we know with certainty who should die for their crimes.

Montaigne's mantra was "What do I know?" and I must acknowledge that this sentiment must apply to my arguments against capital punishment. I feel strongly that the death penalty is ineffectual, inhumane, and unjust, but I must entertain the possibility that my positions are misguided, at least in some respects. Thus, I welcome counterarguments that may give me guidance for a course correction.

It seems likely that Montaigne's legendary ability to see both sides of an argument came partly from his experience as a "counselor" at the parliament in Bordeaux (the "parliament" was actually a regional court). In this position, he prepared documents for the judge by addressing both sides of the various disputes. These insights—combined with his extensive reading of virtually every ancient thinker including Heraclitus, Socrates, Plato, Sextus Empiricus, Seneca, Plutarch, Lucretius, Cicero, Virgil, Horace, and Ovid—allowed Montaigne to create a synthesis of his practical experience in the world with the wisdom of the ancients. It proved to be a potent combination.

In the "pop-over" at the end of the Key Points I discuss Montaigne's impact on intellectual history in the West, including the thinkers for whom Montaigne's writings became a central animating influence on their thought. I also describe Montaigne's unusual upbringing and other aspects of his life that may be of interest. If you have not already read the pop-over, I encourage you to do so now.

When reading Montaigne's Essays (which I highly recommend, if you have not already done so) one sees quotes from one of his intellectual heroes on almost every page, helping him drive home a point he is

making. I have adopted Montaigne's method for this book. Essentially all of the quotes have come from my reading of the books themselves rather than collections of quotes, because it is important to see quotes in context to make sure they are being used as the author intended.

One may wonder why—given all that is going wrong in the world—I spent so much time writing a book on the death penalty. To explain, I refer you to a story told by psychiatrist Robert Jay Lifton in his book *Witness to an Extreme Century: A Memoir*. Lifton tells the story of Ichiro Moritaki, an elderly philosophy professor in Hiroshima who protested silently in front of the atom bomb monument whenever any country was testing a nuclear weapon. At first Lifton thought the professor was wasting his time, but upon reflection he concluded that Moritaki's actions were worthwhile. Indeed, Moritaki helped Lifton arrive at a principle that became somewhat of a mantra for him: "Everything counts." I offer this book in the same spirit: it is unlikely to be anything more than just one more small voice on the issue of capital punishment... but "Everything counts."

*Work and struggle and never accept  
an evil that you can change.*

—André Gide

# 1

# REASON

## **Reason.** *Why Do We Need Reason for a Moral Question Like Capital Punishment?*

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*For the impression of the passions does not remain superficial in him, but penetrates right to the seat of reason, infecting and corrupting it.*

—Michel de Montaigne

AN 1865 PROTEST MARCH by black peasants in Jamaica led Governor Edward John Eyre to declare martial law, resulting in the brutal slaughter more than 400 Jamaican peasants and the burning of about 1000 houses. The British philosopher John Stuart Mill became almost unhinged in his desire to see Governor Eyre executed for the murder of the peasants. Mill was joined by Charles Darwin, Thomas Huxley and Herbert Spencer, and opposed by the likes of Thomas Carlyle, Charles Dickens, and Alfred Lord Tennyson. Mill finally gave up after it became clear that Eyre would not face justice.

Mill was a formidable amalgam of intellect and passion, and one could hardly accuse Mill of lacking rationality. Moreover, Mill was known for his enlightened positions: he strongly supported women's rights, and bitterly condemned slavery in the American South. His outrage at the

hideous actions of Edward John Eyre, however, overwhelmed any qualms he might have had about the death penalty.

This story shows, I think, how difficult it can be for many of us—even if we consider ourselves supremely rational—to deal with what we consider an unspeakably evil crime. John Stuart Mill felt that Eyre had committed a crime against humanity, and he wanted Eyre to die for the atrocities he orchestrated. Upon hearing about a horrible murder virtually all of us are appalled, and we often frame our outrage in moral terms. So the question becomes, why not follow our natural and passionate reactions to heinous murders, and support capital punishment as the most appropriate punishment for certain egregious crimes? This question leads us to consider the osmotic borders that divide emotion and reason.

**John Stuart  
Mill<sup>7</sup>**

Some death penalty proponents and opponents are moral absolutists on capital punishment because they claim it is a moral fact that we either are (or are not) justified in executing people convicted of certain crimes. How, then, do we decide which side is right when their respective positions are totally contradictory? We do have general agreement on at least some absolute moral facts; if I chop off your leg—just for the hell of it, not because your leg needs to be amputated because it has gangrene—that would be considered immoral by virtually everyone. No justification is needed because the immorality of such an action is self-evident.

Some people who endorse or condemn the death penalty want us to believe their respective positions are similarly self-evident; the proponents claim executions are morally justified (even necessary), and opponents claim it is immoral for the state to take a life. I would argue



that these positions are reasonable starting points for discussion, but I believe it is fair to ask both sides for the fundamental basis for their positions. Is there any justification other than individual opinion? This is what ethicists call the “grounding problem”—namely, what is the solid foundation upon which our moral beliefs are based? Nietzsche held that we often have no idea where our moral judgments come from. “Our moral judgments and evaluations” he said, “are only images and fantasies based on a physiological process unknown to us.”

To solve the grounding problem, we will not appeal to “revealed truth” from religious traditions, because various religions have differing views on issues relating to capital punishment. There is nothing wrong with having a strong opinion on capital punishment based on one’s religious beliefs, but we are searching for rational and philosophical answers rather than religious ones.

If we allow that there is no firm grounding upon which to decide whether the death penalty is moral or not, we are forced into a type of moral subjectivism that says it is only our attitudes and sentiments about the death penalty that count. In this world, supporters and opponents of capital punishment have an equal claim to their respective positions. This is why it is not possible to have an adequate debate about the death penalty without introducing the empirical evidence and then assessing that evidence using reason.

We must also address whether morality can be substantially different in different cultures. During the many years that England had capital punishment while most of Europe did not, some British people claimed that England was unique in needing the death penalty. It is a slippery slope, however, to say that a punishment is morally correct in one

country, but not in another. On this account, it is morally correct to stone to death women who commit adultery because some societies use that punishment.

## EMOTION VERSUS REASON

*A habit of basing convictions upon evidence, and of giving to them only that degree of certainty which the evidence warrants, would, if it became general, cure most of the ills from which the world suffers.*

—Bertrand Russell

On High Street in Edinburgh there is an almost three meter high statue that has weathered over the years to the usual patina of greenish-blue, but with a right big toe that is smooth and shiny thanks to constant rubbing by visitors. (See photo) It is said that students who rub the toe will do better on their examinations, especially if the test happens to be in philosophy. The magic toe is attached to the statue of 18th century Scottish philosopher, David Hume, rightfully recognized as one of the greatest philosophers of all time. The irony of David Hume's statue becoming a good luck charm was not lost on the sculptor of the statue, Sandy Stoddart, who noted that Hume was a champion of rationality and he derided superstition.



There is another irony, however, and it is one that stands directly across High Street from the statue of Hume. On the building facing Hume is a shiny bronze plaque that reads, “Site of the Last Public Execution in Edinburgh. George Bryce, the Ratho Murderer, was executed here on 21st June 1864, the last public execution in Edinburgh.”

Hume said much about the possibility of certainty in human affairs, and he held that absolute certainty or absolute proof is unattainable by human beings (outside of mathematics). We deal only in probabilities rather than certainties. Hume also knew that our psychological makeup played a large role in our beliefs, and those beliefs were often unreliable. How ironic, then, that Hume, a man with such an acute sense of the fallibility of human judgment, should be forced to look in perpetuity at a monument commemorating our belief in absolute certainty—actually two certainties: certainty that the accused is guilty and certainty that the accused deserves to be executed.

**David  
Hume<sup>8</sup>**

One of Hume’s central tenets was that our passions and emotions—rather than reason and rational thought—rule our behavior. The discussion of emotions versus reason in making decisions did not start with Hume. From the very first philosophers of the sixth century BC, the Ancient Greeks felt they needed to justify their statements with reasons instead of just relying on myths and speculation. The Greeks knew that emotions have an oversized role in forming opinions, and Plato talked of the “philodoxers”—people who formed opinions or beliefs without much regard for rational thought or evidence.

Plato, Aristotle and the Stoics all celebrated human reason as the primary path to truth. Hume, however, recognized the primacy of feelings



and passions, and the second-rate status of our celebrated reasoning capacity. He knew that we normally reason *from* our convictions rather than allowing our convictions to arise from our rational thinking. Hume recognized—long before our “discovery” of the concept of confirmation bias—that once we form a conclusion on an issue, any subsequent information is merely shaped to fit our preconceived notions. James Carse, Professor Emeritus at New York University, summarized this phenomenon well:

*As soon as a person becomes committed to a belief—not just an opinion, but a deeply held belief—thinking basically stops.*

—James Carse

I believe it would be useful to dilate a bit on Hume’s ideas about passions trumping reason. After all, there are few events that generate stronger emotions than hearing about a brutal murder, so the task of marshaling our reasoning faculties to secure a foothold when considering capital punishment is especially fraught. When we are in the grip of strong passions and emotions we have difficulty bringing empirical evidence and reason into our thinking, and have trouble appreciating the nuances and complexities of an issue.

Hume said our morality comes from our moral “sentiments” (passions) rather than reason. Despite Hume’s view that reason was the slave of the passions, however, he clearly recognized that reason cannot be discarded in making important decisions. Reason can provide insight and information that can actually change our moral sentiments. For example, providing someone with the information that 166+ people have been exonerated and released after being sent to death row could sof-



ten their support for the death penalty. While Hume recognized the dominant role of passions, he would agree completely that for issues such as capital punishment, we need both passion and reason... both heart and head.

Before Hume, the necessity of both reason and passion was articulated by the 17th century mathematician, scientist and philosopher, Blaise Pascal. Pascal, like Hume, was one of the most profound thinkers in human history. Although Hume would have disagreed strongly with some of Pascal's positions, especially regarding religion, he would likely have concurred with Pascal's pithy observation [Pascal's emphasis]: "Two excesses. Excluding reason, allowing only reason." Pascal recognized the typical dominance of passions over reason:

**Blaise  
Pascal<sup>9</sup>**

*For we must not misunderstand ourselves: we are as much automaton as mind. And therefore the way we are persuaded is not simply by demonstration. How few things can be demonstrated! Proofs only convince the mind; custom provides the strongest and most firmly held proofs: it inclines the automaton, which drags the mind unconsciously with it.*

—Blaise Pascal

What Pascal and Hume are saying is that while reason and logic alone are insufficient to solve most thorny human problems, they cannot be disregarded without the risk of coming to wrongheaded conclusions. We need the force of our passions—which is the wind that propels the sailboat onward—but without the ballast of reason, the boat will be unstable and end up dashed against the rocks. We need to think clearly and objectively, but we must never lose sight of the fact that we have a heart as well. As Andre Gide observed, "The want of logic annoys. Too

much logic bores. Life eludes logic, and everything that logic alone constructs remains artificial and forced.”

We started the book with the simple yet profound statement by Blaise Pascal from his *Pensées*: “Let us work on thinking well. That is the principle of morality.” This is on my short list of the best things anyone ever said. Pascal is saying that in order to make the best moral decisions, we need to think clearly and rationally. Moral decisions that ignore, distort, or deny empirical evidence and reason have a substantial chance of becoming themselves immoral, despite the best of intentions on the part of the decision maker. (Would that all politicians heeded this deep truth, rather than frothing on about morals while making patently immoral political decisions that ignore facts and reason.)

The issue of capital punishment has both moral aspects and rational/empirical aspects, and to consider the former without the latter is precisely what Pascal was warning us against. It is difficult, however, to look at the empirical evidence on capital punishment without allowing one’s passions some room to operate. As Arthur Koestler said in his introduction to his book on capital punishment, *Reflections on Hanging*, “Fair pleading requires that one’s facts and figures should be right, that one should not distort or quote out of context; it does not exclude having one’s heart and spleen in it.”

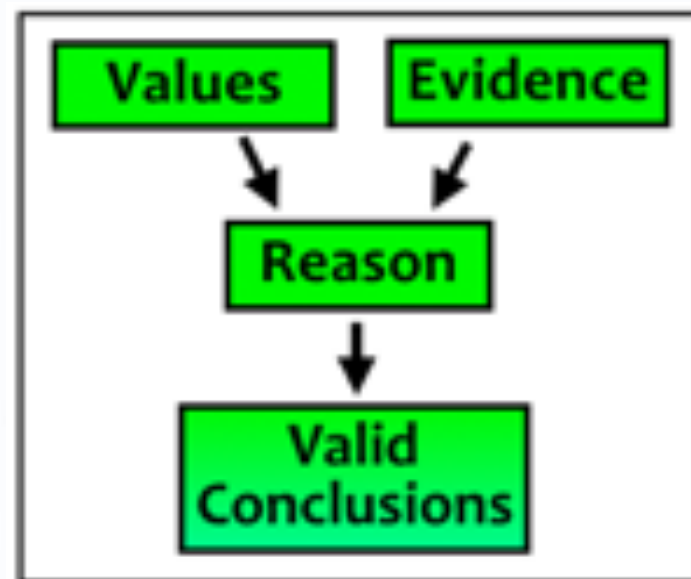
Accordingly, I think most people would agree that in order to make optimal public policy decisions on complex issues, one should start with 1) the values (which often include passions and emotions) that one brings to the issue, and 2) the empirical evidence available on the issue, with the aid of experts as necessary. Then, ideally, one applies reason and rational thought to the values and evidence, and achieves

a valid conclusion. (**Figure 3**) Perhaps it goes without saying, that this “Ideal Method” is not commonly used.

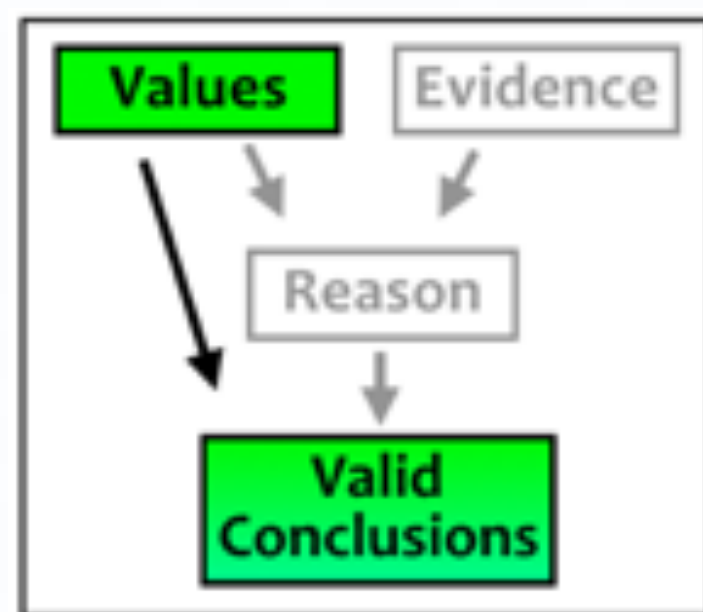
This “Ideal Method” isn’t always needed, however. For some “values only” issues evidence and reason are largely unnecessary. To form a conclusion on whether to allow same sex marriage, for example, most people base their conclusion almost exclusively on what they profess to be their

values. (See **Figure 4**) There is not much empirical evidence to analyze. For such issues, few people would change their opinion based on rational arguments, because rationality doesn’t play much of a role. Debates between opponents on issues like same sex marriage, therefore, are generally exercises in futility. For such values-only issues, therefore, it would seem reasonable to take a short cut from values to conclusions. Whether the professed “values” are consistent with other values the person holds is a different question, but there is no need to address that here.

For some issues, experts are required to assess the evidence, such as the climate crisis or complex scientific questions. Fortunately, understanding the empirical evidence about the death penalty does not require a PhD in physics. Indeed, most of it is entirely understandable if one makes the effort to study it. Capital punishment is in that “sweet spot” of public policy issues—it is not a purely



**Figure 3.** Ideal method for reaching conclusions.



**Figure 4.** “Values Only” Issues bypass Reason.

values issue for which empirical evidence is mostly irrelevant such as same sex marriage, and it is not an issue that requires specialized training to understand the science, such as the climate crisis. Capital punishment is an issue for which we should be able to look at the evidence, apply our values, and come up with a rational decision.

The debate on capital punishment also largely sidesteps another distorting influence that infects so many other public policy debates: greed. The climate crisis, for example, would not be nearly so misrepresented were it not for the powerful individuals and corporations who think they would suffer financially if our policies reflected the actual danger of a warming planet. Greed also infects many other policy debates such as regulations on banks and pharmaceutical companies, tax policy, gun control, and military spending. There are interest groups providing money to both sides of the death penalty debate, and some of them do try to obfuscate the issues, but fortunately, few people will gain or lose much money if capital punishment is abolished.

*Out of passions grow opinions;  
mental sloth lets these  
rigidify into convictions.*

—Friedrich Nietzsche

**Friedrich  
Nietzsche<sup>10</sup>**

Rather than greed and self-interest, the problem with the death penalty debate is that people too often use passions and emotions alone to come to their conclusions. Uncomfortable evidence is merely ignored or shoehorned to fit predetermined conclusions. Sadly, the passions and emotions may or may not comport with the person's professed values. Our passions tend to overwhelm our values, and when this happens it is not unusual for people to arrive at conclusions that



are patently inconsistent with what they claim to value. This is the definition of hypocrisy, and it is on full display in the death penalty debate.

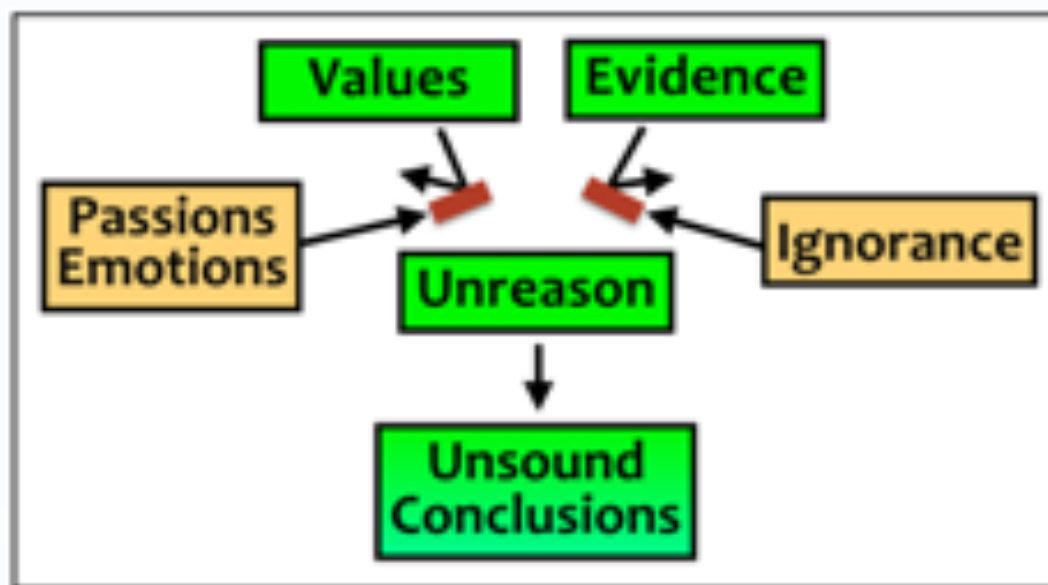
As I hope to show in this book, however, the overriding deficit that prevents sound conclusions on capital punishment is simple ignorance of the empirical data. For example, as we will discuss in Chapter 3, there is a compelling evidence going back more than a century showing that the death penalty is not likely to deter future homicides. This evidence is often ignored in death penalty debates, even by those who are opposed to capital punishment. There is also sometimes *distortion* of the empirical evidence by partisans, but this is generally less of a problem than ignorance.

Sometimes the ignorance is willful. Arthur Koestler was obviously frustrated by the fact that capital punishment proponents simply ignored the two gigantic reports prepared by the British government in the first half of the 20th century, even though both commissions failed to find any evidence of a deterrent effect:

*“It seems hardly believable that in a nation-wide controversy which has now been going on for some twenty-five years, one side should produce, with ant-like diligence, facts, figures and historic precedent, mobilise the whole array of psychiatry and social science, borne out by impartial Royal Commissions—and the other side should content themselves with evasion and stonewalling.”* —Arthur Koestler

The death penalty debate, therefore, is plagued by two major impediments to a reasoned resolution, often occurring simultaneously. See **Figure 5**. First, emotions and passions often overwhelm and nullify our values. This is not surprising, because it requires singular resolve to remain faithful to values when those values are facing the onslaught

of deep emotions. The second impediment is the widespread ignorance of the empirical evidence on capital punishment. This is understandable for the lay public, who cannot possibly keep up on every public policy issue.



**Figure 5.** Death Penalty Debate is Contaminated by Passions and Ignorance.

even by people who are paid to know about it, especially legislators but also judges, prosecutors, and even public intellectuals. The person suffering simultaneously from both strong emotions and abject ignorance is in a very poor position to arrive at sound conclusions regarding capital punishment.

The effort to prevent our passions from overtaking and nullifying our reason is not easy, and no one can claim pure objectivity in this regard. After hearing about a particularly heinous murder my initial reaction is often that the killer should be severely punished and suffer, especially if the murderer acted out of base emotion such as racism or homophobia. Even Albert Camus—a lifelong opponent of the death penalty—had a lapse, and he actively promoted the death penalty for the French who collaborated with the Germans and thereby caused the death of fellow French citizens. He later admitted publicly that he was wrong, but even a man as wise and insightful as Camus can be overwhelmed by emotion. Camus’ experience suggests that clarity of thought can only exist in the temperate zone of the passions. (Even if you know Camus, you might go to the Endnotes to see why I quote him so often in this book.)

**Albert  
Camus<sup>11</sup>**

*Men decide many more problems  
by hate, love, lust, rage, sorrow,  
joy, hope, fear, illusion or some  
similar emotion, than by reason.*  
—Montaigne (quoting Cicero)

It is likely that subconscious factors play an outsized role in our feelings about the death penalty, and these feelings serve to sabotage our more rational impulses. Given the stakes involved—the state-sanctioned killing of a human being—to base our public policy on reactive impulses seems particularly ill-advised. Subconscious influences, by definition, are not perceived, so we may be pushed to irrational positions on capital punishment without fully engaging rational thought.

In his insightful piece entitled *Scared to Death: Capital Punishment as Authoritarian Terror Management*, Donald P. Judges presents a detailed and compelling argument that support for capital punishment may spring from an effort to achieve symbolic protection from the terror of our own mortality. This startling thesis is based on arguments first made in detail by Ernest Becker (1924–1974) and subsequently supported by hundreds of research papers in the field of “Terror Management Theory” (TMT). If you don’t know about Ernest Becker (or need a refresher) please go to the Endnotes for details.

**Ernest  
Becker<sup>12</sup>**

Donald Judges proposes, based on TMT, that the terror of our mortality leads to support for capital punishment by promoting punitive urges, authoritarianism, and aggression. Over several decades of TMT experiments it has repeatedly been shown that increasing the death awareness of subjects results in subconscious activation of negative

feelings toward “outgroup” people, and increased desire for punishment of transgressors.

*American capital punishment is largely  
a nonconscious, symbolic defense  
against the terror that accompanies  
awareness of human mortality.*

—Donald P. Judges

Donald Judges suggests, therefore, that support for capital punishment comes primarily from an effort to assuage our subconscious fears rather than from a desire for a beneficial and rational procedure in the criminal justice system. As such, those who support it based on these deep-seated fears are unlikely to be influenced by rational arguments. On the other hand, some proponents of capital punishment base their support on misconceptions, such as a mythical deterrent effect, the myth that it costs less than death in prison, and the myth that innocent people are not sent to death row. These people may be willing to change their minds based on evidence.

## **WHY EMPIRICAL EVIDENCE MATTERS**

First, I would like to argue for a particular way of looking at evidence that may be useful. We like to talk about “facts” but what do we actually mean when we call something a “fact?” The term “fact” suggests something that is certainly true, but virtually nothing—other than mathematical truths or trivial descriptive statements—can be unequivocally and universally relied upon to be the case.

This is what Friedrich Nietzsche meant when he said, “There are no facts, only interpretations.” In almost all human endeavors, we are



dealing with probabilities rather than facts. We will not get into philosophical skepticism here, but proving anything with absolute certainty is problematic. Even Descartes' *cogito ergo sum* (I think, therefore I am) is suspect if one is rigorous in demanding evidence of certainty. I could accept "something exists" as absolutely certain, but it gets dicey after that.

Even the validity of scientific theories should be considered more or less probable, and every scientific theory is in principle replaceable by a refined theory that is closer to the truth. Some scientific theories, of course, are so well established by thousands of strands of evidence interwoven into a tapestry that they are virtually certain. But the operative word here is "virtually."

This is even more true of social science research, where controlled experiments are rarely possible and legions of confounding factors lurk, ready to spoil the soup. The empirical evidence on capital punishment is mostly of this type, so it would be disingenuous for me to call the evidence "fact." Nonetheless, the probabilities we derive are still useful in deciding whether the death penalty should be endorsed.

To exemplify the potential importance of empirical evidence, consider two scenarios:

A) Suppose the evidence suggests that every execution prevents 30 future murders... Or Alternatively,

B) Suppose the evidence suggests that capital punishment does not deter future murders (and there is even a trend toward *increased* murders in the presence of capital punishment).

If scenario A were true, death penalty opponents would have a very inconvenient bit of evidence to confront. If killing this murderer would save 30 innocent future victims, how could death penalty opponents justify their position? If, on the other hand, if B is true, then it becomes more difficult to *support* the death penalty. Deterrence, after all, has historically been one of the cornerstones of the argument in favor of the death penalty.

As it turns out, as we will discuss in Chapter 3, the evidence clearly supports “B” rather than “A.” There is no credible evidence to suggest that the death penalty acts as a deterrent to future homicides. By itself this doesn’t destroy the pro-death penalty argument, but when “B” is combined with other evidence, it does indeed make support for the death penalty difficult to reconcile with morality. That evidence, discussed in Chapter 4, starts with an actual fact (rather than a probability): 166+ people have been exonerated and released from death row for reasons of innocence. When I first started studying capital punishment a several years ago, the figure was almost two dozen less. Starting with this number, a team of attorneys, scientists, and statisticians calculated that at least one out of 25 people condemned to death in the US would be exonerated if the real evidence became known. (We will discuss this study in more detail in Chapter 4.)

These calculations of innocent people being sentenced to death are a matter of probability rather than fact, of course, but the results are entirely consistent with what we know about the fallibility of our criminal justice system, as we discuss in Chapter 5. Indeed, given the ample evidence of subconscious bias, duplicity, incompetence and even overt racism in our criminal justice system, expecting all of those sent to death row to be guilty is wildly optimistic. So, a rational death pen-

alty proponent is faced with a very uncomfortable probability: if the death penalty does not deter future homicides, and if we are sending innocent people to death row... ***capital punishment in the US more likely than not results in a net increase in the deaths of innocent human beings.***

As we will discuss later, assessing the empirical evidence uncovers many other problems of rationality regarding the death penalty. For example, the death penalty is a luxury, costing taxpayer millions of dollars more than a system of life in prison without parole. There is also compelling evidence that race plays a role in who gets the death penalty, especially the race of the victim, but also the race of the accused. Empirical evidence also shows that the possibility a person accused of murder will be sent to death row is flagrantly arbitrary, based on a host of factors such as the behavior of police and prosecutors, competency of expert witnesses, composition of the jury, the judge, and the county and state in which the murder took place. The competency of defense counsel and their ability to devote sufficient time to the case is also crucial, which is why wealthy people are virtually never sentenced to death.

Sometimes, of course, the emotions-only conclusions just happen to be the same as one would reach if one were to go through the hard work of evaluating the evidence and applying reason. I would argue this is exactly what happens when a death penalty opponent comes down on the side of abolition using values and emotion alone without knowing any of the evidence. But such a person is just lucky that the evidence happens to comport with his or her values, because for all they know the empirical evidence does not support their position. Let us now address this issue.

## WHY DO WE IGNORE EVIDENCE AND REASON?

If Americans fully understood the empirical evidence accumulated on the death penalty over the past two centuries, one might expect that support for it would be minimal. Nonetheless, while virtually every modern democracy has abolished capital punishment, the United States persists despite growing evidence that the process is deeply flawed. Our current peer group includes countries like China, Iran, Libya, Saudi Arabia, and Yemen. How did this happen? The short answer is that we are tethered to the ambient presumptions of a public that is not overly given to study or deep reflection.

In an article titled “How Dumb is America” Beth Dalbey presented us with the sorry statistics: 1) 40% of Americans do not know about Auschwitz (it was 66% in one age group), 2) 33% of Americans cannot name a single branch of government, 3) 25% of Americans think the sun orbits the Earth, 4) 34% of Americans entirely reject evolution. When more Americans can name the Three Stooges than the three branches of government, we are in trouble.

These are sobering statistics, and they reveal an appalling ignorance on the part of the American public. On the other hand, it is not realistic to expect the public to be well-informed on all public policy issues. Many people have little time for reading and reflection outside of work and the activities of daily living. Moreover, there are so many issues about which to form opinions that it is impossible for the individual citizen to understand them all. Even those of us who try to be informed have huge gaps in our understanding of many public policy debates. It would not take long for a clever interlocutor to uncover my gross ignorance on a host of topics.



On a trip to speak at Oxford University in the UK, Sister Helen Prejean was asked why Americans are so vengeful that we keep the death penalty. Sister Prejean said that after talking to the American people about the death penalty for 20 years, she found that it is not only a desire for vengeance—it is also that people just don't think about it much. She eventually concluded that it was more a lack of reflection than mean-spiritedness that caused about half of Americans to support capital punishment. She observed, "The more we reflect, the quicker we move to ending it."

Montaigne offered a famous image of how we let our hectic lives take over so that there is no time for the deep reflection Sister Prejean talked about. Most of us are like shopkeepers, Montaigne says, who are preoccupied with the front of our shop; we have our occupations, our family and friends, our public activities. We watch the street; take care of customers; chat with passers-by. These activities expand to fill our whole existence and we seldom retreat into that 'back shop' (arrière-boutique) of our inner lives for solitude and introspection. Ignoring one's arrière-boutique may have been a problem for the French of the 16th century, but Montaigne would be abhorred by the age of the internet, text messaging, and television.

*[we do not have] "... as much malice as stupidity. We are not so full of evil as inanity..."*

—Michel de Montaigne

Although one must concede most people do not have the time to study public policy issues such as the death penalty, policy-makers and legislators have a responsibility to do so. That is what we pay them to do. It is unconscionable when they adopt public policy positions that defy evi-

dence and reason. I realize that I am asking a lot of people with political ambitions, but I would hope that more policy-makers would heed Blaise Pascal's profoundly simple advice with which we started this book: "Let us work on thinking well. That is the principle of morality."

It is deeply troubling to see some lawmakers (and even some judges) hiding from the responsibility to become informed about capital punishment by using sound bites or citing the opinions of an uninformed public. This is intellectual indolence of a particularly pernicious kind. We elect these people to carefully and thoroughly look into the available empirical evidence on public policy issues and make enlightened votes on our behalf... with the help of their staff, of course. Public opinion should be considered, but if a majority of the American public thought children do not need to be in car seats, should the legislators eliminate those laws?

In *Reflections on Hanging*, Arthur Koestler, with obvious frustration, described the intransigence of British legislators who fought for so long to keep the death penalty:

*Victims of their professional deformity, ignorant of the forces of heredity and social environment, hostile to any social and psychological explanation, the criminal was for them nothing but a bundle of depravity, who cannot be redeemed and must be destroyed. Like all who believe in terror as the only protection of society, and have not faith in humanity, they were frightened men. Their grotesque outcries against any relaxation of the terror statutes were caused by irrational but genuine fear."*

Koestler verges on ad hominem here with "professional deformity" but the rest of his description seems apropos to the "hang-hard" legisla-

tors in the United States today. And do not mistake Koestler for a bleeding-heart snowflake. As Michael Scammell describes in his biography, *Koestler: The Literary and Political Odyssey of a Twentieth Century Skeptic*, Koestler's life was filled with danger and brushes with death. He experienced military occupation in Budapest in his youth, was on death row in Franco's Spain, imprisoned again in France before the Nazi invasion, barely escaped to North Africa, and eventually made it to England. Koestler knew first-hand the extent and reach of human evil.

Unfortunately, the "law and order" obsession in the United States prevented even many of those running for office who personally oppose the death penalty from expressing their views. In the past many liberal politicians have considered it professional suicide to speak against the death penalty because they would be savaged by their opponent for being "soft on crime." For example, the Willie Horton advertisements by the George H.W. Bush campaign depicting Michael Dukakis as a criminal-coddler probably helped Bush get elected.

*The abolition of the death penalty ought to be asked for by all thinking members of our society, for reasons both of logic and of realism.*

—Albert Camus

Legislators often profess compassionate values toward their fellow humans, but those same people may vote for legislation that is diametrically opposed their professed views. Moreover, it is not unusual for legislators to adopt positions that are precisely the opposite of what the empirical evidence shows, such as promoting "trickle-down" economics or downplaying the severity of crimes committed by a member of

their political party. Such behavior shows a lack of “epistemic responsibility”—a concept to which we now turn.

## EPISTEMIC RESPONSIBILITY

Ultimately—since we are talking about state-sponsored killing of human beings—we have an epistemic responsibility to justify the existence of this policy. We need to get it right. The word “epistemic” roughly translates into “knowledge” and epistemic responsibility is a fancy way of saying we need to carefully consider the death penalty in light of empirical evidence and reason. Any time we are establishing public policy—especially on life and death matters—we have a responsibility to incorporate into our decisions what is known and what is not known about the topic. Unfortunately, there seems to be an epidemic of shirking epistemic responsibility, not only for capital punishment but also for the climate crisis, vaccinations, and many other issues.

Nineteenth century mathematician-philosopher William K. Clifford presented a thought experiment that nicely demonstrates the concept of epistemic responsibility (although he did not use that term). In his 1877 essay “The Ethics of Belief” Clifford asks us to consider a man who owns a ship about to cross the ocean filled with people emigrating to a new land. The shipowner had doubts about whether the ship is seaworthy and thinks perhaps it should be overhauled before sailing. But he knows this would be time-consuming and expensive, so he gradually convinces himself that the ship will make the voyage safely. The ship then sailed without inspection, and the shipowner got his insurance money when it sank mid-ocean with no survivors.

Few people would fail to condemn the shipowner for this behavior, but Clifford addresses the specific *reason* why the shipowner is blamewor-



thy. One must admit the shipowner had convinced himself that the ship was seaworthy; he had, in Clifford's words "acquired a sincere and comfortable conviction that his vessel was thoroughly safe." The problem, therefore, was not that he had a sincere belief about the soundness of the ship; it was because he had arrived at this belief through suppressing his doubts rather than by an objective assessment of the empirical evidence. Clifford observed that the owner of the ship was culpable because *"he had no right to believe on such evidence as was before him."* [Clifford's emphasis]

**William K. Clifford<sup>13</sup>**

Accordingly, our beliefs about the suitability of the death penalty need to be founded on an objective assessment of the evidence—in other words we need to exercise our epistemic responsibility. Clifford recognized that people are busy and may not have time to investigate various issues, but he has a solution for that: suspend judgement:

*"But," says one, "I am a busy man; I have no time for the long course of study which would be necessary to make me in any degree a competent judge of certain questions, or even able to understand the nature of the arguments." Then he should have no time to believe.*

Clifford would not look kindly on people who promote the death penalty without considering factors such as the lack of deterrence, the innocent people sent to death row, the arbitrary application, and other problematic features that attend the practice of capital punishment. Nor would he give a pass to those who *oppose* capital punishment without looking at the empirical evidence, because they came to a "correct" conclusion by accident. The only proper way to decide if the

death penalty is appropriate public policy is to carefully consider all of the valid evidence—pro and con—in light of reason and moral values.

Clifford was not the first to make this argument. As is often the case, the Ancient Greeks came up with ideas that were rediscovered by later thinkers. Aristotle would tell us in a debate such as this we need more “phronesis.” This is a more or less untranslatable word from Ancient Greek, sometimes called “practical wisdom” because it combines both rational thought and integrity when deciding what action to take. That is precisely the process recommended by William K. Clifford.

*To be truly rational is to become ethical.*

—Albert Schweitzer

In assessing the morality of the death penalty, we should certainly listen to the proponents who say, “It is morally necessary” and to the opponents who say “It is morally wrong.” Nonetheless, when either side goes beyond their moral opinions to support their positions based on rational arguments or supporting empirical evidence, we are justified in holding them to high standards of reason and clear thinking. We are talking about killing a human being, after all.

# 2

# JUSTICE

## **Justice.** *Does Justice Sometimes Require the Use of Capital Punishment?*

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*But he who, outraged and stung to the quick by an injury, should arm himself with the arms of reason against this furious appetite for vengeance.*  
—Michel de Montaigne

On July 9, 2014 in a suburb near Huston, Ronald Lee Haskell, dressed as a FedEx delivery man, came to the front door of Stephen and Katie Stay's home. Haskell was looking for his ex-wife, Katie Stay's sister Melanie. He tied up the whole Stay family—Katie, Stephen, and 5 children aged 4 to 15—demanding that they tell him where his ex-wife was. When they said they didn't know, he shot each of them in the head. Only the oldest daughter, Cassidy, survived by playing dead after she was shot, and she was able to tell police what had happened. Haskell was captured before he could find his ex-wife.

How could anyone hear about a crime like this without wishing for vengeance? Even those of us who are opposed to the death penalty may start to wonder if perhaps justice does require that such a perpetrator should pay the ultimate price for his crimes. The desire for re-

venge and retribution runs deep in the human soul, even when we are not personally acquainted with the victims. One can only imagine how much more intense is the desire for retribution for the victim's loved ones

## VENGEANCE VERSUS JUSTICE

*Now when you hates you shrinks up  
inside and get littler and you squeezes  
your heart tight and you stays so mad.*

—Margaret Walker

**Margaret  
Walker<sup>14</sup>**

Almost all of the people who are sentenced to death in the United States are those who have been convicted murdering one or more innocent people. We will not consider federal crimes, which represent only a small fraction of death sentences in the United States. (Unfortunately, we cannot count on this ratio continuing, given the current lurch toward authoritarian governmental policies. See quote from Jeremy Bentham at end of Introduction.)

Many people, including this author, believe that murder is the worst crime that anyone can possibly commit. We must acknowledge this. It takes away the future of a human being; all of their dreams, aspirations, and possibilities are gone forever. And this is not to mention the manner in which the victim died, which is often so appalling that one cannot stand to hear about it. It is hard to imagine anything worse for a victim than suffering a horrible death and being robbed of a future in one stroke.

In his *The Theory of Moral Sentiments* Adam Smith described murder as “...this most dreadful of all crimes” and when we hear about a mur-



der we have in Smith's words "an immediate and instinctive approbation of the sacred and necessary law of retaliation." Smith went on to observe that the instinct for revenge has "been given us by nature."

Filmmakers get it. Perhaps one shouldn't be surprised at the ease with which they can make "revenge" movies attended by the public in droves. I have convinced myself that I could write the formulaic plot myself: bad guy kills good guy's (pick one or more) wife/children/lover/friend; then good guy goes on an improbable vendetta against the all-powerful bad guy; good guy almost dies several times; there are many of near misses in catching bad guy; and then, hallelujah! bad guy is cornered and good guy makes some pithy bon mots to bad guy's face, and then fills him full of lead... or blows him up... or throws him into a vat of acid... or....

Of course, some of these movies are superbly done. The reason I am so fond of *The Shawshank Redemption* is not only the delicious revenge that Andy Dufresne (Tim Robbins) exacts on the despicable prison warden. The marvelous acting of Tim Robbins, Morgan Freeman, and the others no doubt contributes much to the enduring popularity of the movie around the world.

Why are these movies so successful? As Adam Smith knew, the desire for revenge is one of the strongest human emotions. A reputation for vengeance probably conferred survival value to our human ancestors. A tribe known for extracting a terrible revenge if they were violated in any way is more likely to be left alone. If a group were perceived as soft or a push-over, rivals would be more likely to kill all the men and abscond with the women and children. When Jason Epstein talked of the "vestigial adaptations to pri-

**Adam  
Smith<sup>15</sup>**

mordial rigors that have shaped human nature” our modern need to exact violent retribution is probably just such an adaptation.

*We have all known that impulse [revenge],  
often to our shame, and we know its power, for  
it comes down to us from the primitive forests.*

—Albert Camus

Hollywood, however, has nothing on the Ancient Greek tragedians. In Euripides’ tragedy, *Medea*, the eponymous protagonist decides to gain vengeance on her husband, Jason—who has abandoned her for Glauce, the daughter of King Creon—by murdering her two sons, who were fathered by Jason. She loves her sons, but her desire for vengeance against Jason is so strong that her hate triumphs over her love of her children. It is only a play, but it highlights the grip that vengeance holds on the human soul. Indeed, self-destructive vengeance is a commonplace in the actual world. Ronald Lee Haskell’s life certainly took a turn for the worse when he decided to kill the Stay family in his search for vengeance against his ex-wife.

While vengeful feelings are normal, the ever-insightful Montaigne urges us to use reason to soften our desire for revenge. This advice may sound impractical, but Montaigne knew (from his readings of Seneca and others) that it is possible to resist the urge to act out our revenge, even if we cannot completely overcome the *desire* for retribution. It actually can be done, although it takes constant practice. By all accounts, the committed Roman Stoic and Emperor Marcus Aurelius was almost always able to control his temper despite the fact that he could have had anyone in the Empire executed on the spot.

Given that the desire for retribution is so ubiquitous, why can't we just incorporate that emotion into our ideas of justice and execute murderers? The idea of "justice" is a human construct, after all, so it would seem reasonable to accommodate our human need for retribution. The most obvious response is that although the urge to seek revenge may be a common human emotion, some people think we are justified in translating that urge into a public policy of capital punishment while others do not agree. At this point, we have simply competing opinions about the morality of executions based primarily on passions and emotions. It is difficult to make a convincing argument that either side deserves to win this argument based on feelings alone. That is precisely why empirical evidence needs to be considered.

*Before you embark on a journey  
of revenge, dig two graves.*  
—Unknown

One must also consider the mutability of moral values. Friedrich Nietzsche claimed that moral feelings evolve over time in response to fears, superstitions, and perceived necessities. From this perspective, our moral sense emerges from our animal nature rather than from some deep intellectual reasoning, as Kant proposed. Regarding moral evolution, Nietzsche said, "Everything has become: there are no eternal facts, just as there are no absolute truths." One does not need to buy into this completely to recognize Nietzsche's important insight.

While there are some universal moral principles accepted in almost all times and places, many moral precepts evolve and change. The pederasty and slavery that occurred in Ancient Greece, for example, would earn significant prison time in most countries today. As another exam-

ple, consider a Rip Van Winkle who went to sleep in the 1950s and awoke today; he would be amazed that television shows depict openly gay characters. Shifts in moral views do occur, and it would be perverse to deny that at least some moral sentiments change over time.

It would be pertinent to ask, for example, what the prevailing opinion on capital punishment will be in the United States 50 years from now, or even 10 years from now. Given that dozens of countries around the world have abolished capital punishment in the past 150 years, and given that the only developed countries in the world with capital punishment are Japan and the U.S., it would not be a stretch to guess that the U.S. and Japan may—perhaps sooner than later—join the majority of countries in the world that do not sentence murderers to death.

A person who holds that capital punishment is morally necessary in 21st century America, therefore, is expressing an opinion that comes from a particular person at a particular point in time. Nietzsche would call this “instinctive morality” rather than a morality based on defensible reasons. I have a different instinctive morality, because I do not believe capital punishment is morally necessary. The obvious question, therefore, is what privileges the instinctive morality of the capital punishment advocate over mine?

*It is hard to fight against anger. Whatever it wants, it buys at the cost of soul.*

—Heraclitus

The Roman stoic and statesman, Seneca (4 BCE?–65 CE), wrote a marvelous treatise on the “horrors of anger.” He observes that almost all types of anger have revenge as their source—we want to harm those who have harmed us or others. In typical stoic fashion, Seneca



points out that we have control over our own thoughts, and should not let others dictate what we think: “It would be scandalous—could anything be more so?—for the wise man’s state of mind to depend on the wickedness of others?”

*Tell me then, is not chastisement  
sometimes necessary? Of course!  
but chastisement without anger,  
chastisement aided by reason.*

—Seneca

Another problem with the “hang-‘em-high” attitude is the irony of claiming the mantle of “justice” to support the death penalty, without admitting the massive injustices that are perpetrated in the service of capital punishment. For example, we execute only those who cannot afford an expensive attorney. We execute in an arbitrary manner depending on the race of the victim, because we are more likely to seek execution when we deem the victim a “person of worth” and sometimes not when they are a person of color or homeless. We execute only in certain states, and even within states, almost exclusively in certain jurisdictions. We execute only when the prosecutor has decided (for reasons that may or may not be rational, reasonable or even consciously determined) to seek the death penalty. Perhaps most troubling of all, there is a non-trivial risk that we will execute people who actually did not commit the crime in question... the *ultimate* injustice.

Indeed, regarding the last point, as much as we would like to assert that people sent to death row for horrific murders are all guilty, it has become abundantly clear that this is not the case. One must, there-

fore, juxtapose the satisfaction we gain from executing those convicted of capital murder with the virtual certainty that we will continue to send some percentage of innocent people to death row.

Sometimes, the very people we use as examples to show execution is deserved actually turn out to be innocent, such as Henry Lee McCollum who was accused of murdering an 11-year-old girl. Ironically, the late Supreme Court Justice Antonin Scalia used McCollum as an example of why the death penalty is absolutely necessary. Then it turned out McCollum was found to be innocent and was released from prison. As you might guess, Scalia chose to ignore this embarrassing turn of events. We discuss the innocence issue in more detail in Chapter 4.

*To take revenge is often  
to sacrifice oneself.*  
—Bakongo Saying, Zaire

There is a sense in which those of us who clamor for the execution of murderers are classic Epicurean hedonists. The hedonist believes that an act is generally justified by the feelings of pleasure produced by the act, rather than any fixed moral laws or even the dictates of reason. A hedonist, therefore, could easily justify executions based simply on the pleasure it gives them to hear about the death of someone who, in their opinion, does not deserve to live. So even if reason tells us that the death penalty sometimes condemns the innocent and is applied arbitrarily and unjustly, such considerations are trumped by the pleasure provided by the execution. Of course, the pro-death penalty person gains only an incremental increase in pleasure resulting from execution as compared to death in prison.

**Epicurus<sup>16</sup>**

Albert Camus recognized that the essence of the death penalty was revenge rather than justice: Even though people like to call retribution in the form of capital punishment a “principle” of justice, he saw the baser motive of revenge disguised as justice. He asked whether it is the function of the law to participate in such ventures, and he concluded that the law is designed to reign in the base human instincts such as greed, rage, dishonesty, and cruelty—not to act in the service of such instincts. Here is Camus’ searing indictment of our motives in seeking the death penalty:

*Let us call it by the name which, for lack of any other nobility, will at least give the nobility of truth, and let us recognize it for what it essentially is: a revenge. ... This is an emotion, and a particularly violent one, not a principle.”*

—Albert Camus

**Not Everyone  
Seeks Revenge<sup>17</sup>**

In 18th century England Sir William Blackstone felt that everything should be done to ease the pain of the victim’s family. Arthur Koestler observed that Blackstone “...approved of drawing and quartering [for men], the burning of women, and held that hanging the corpses in chains on the gibbet was ‘a comfortable sight to the relations and friends of the deceased.’” It might have been a comfort to them, but at what cost to society?

Montaigne could have been talking about Blackstone when he said, “Anger and hatred are beyond the duty of justice, and are passions serving only those who do not hold to their duty enough by reason alone. All legitimate and equitable intentions are of themselves equa-

ble and temperate; otherwise they degenerate into the seditious and illegitimate.” And lest one think that Blackstone’s ghoulish ideas about how to treat murderers are outdated, a casual perusal of online debates of capital punishment will quickly disabuse us of this notion. There is much talk of dispatching murderers by using alligators, baseball bats and assorted tortures involving genital mutilations. Basic human nature does not improve over time.

*Deep inside every civilized being there  
lurks a tiny Stone Age man, dangling a club  
to rob and rape, and screaming an eye for an  
eye. But we would rather not have that little  
fur clad figure dictate the law of the land.*

—Arthur Koestler

I respect the sincerity of a person who feels that there are just some people for whom the death penalty is the only way to achieve justice. I respect their sincerity, if not their lack of attention to the empirical evidence or rational thought. But I do not understand the “hang-hards” who become giddy at the thought of executing murderers. During the Republican debates for the 2012 election, then Texas governor Rick Perry was asked about the 234 death row inmates Texas has executed, but before Brian Williams could finish the question, the crowd started clapping, cheering and whistling its approval of the executions.

I do not think it unfair to wonder if these people who cheered and whistled at the thought of an execution could, in a previous life, have been in the huge crowds who attended the public hangings at the Tyburn Tree in London. Arthur Koestler described the macabre scenes as recounted by observers. From one description:



*All the Way, from Newgate to Tyburn is one continued Fair, for Whores and Rogues of the meaner sort. ... Here Trollops, all in Rags, may pick up Sweethearts of the same Politeness.*

Then There was a description from a hanging in 1841:

*The town was converted for the day into a fair. The country people flocked in their holiday dresses, and the whole town was a scene of drunkenness and debauchery of every kind.*

And it was not just the lower classes who found hangings a time to be merry. Grandstands were constructed for the well to do, and at the Newgate Prison the Governor often had high-ranking observers for breakfast after the hangings. One participant described it this way:

*And if there were no more than six or seven of them hanged, his guests would return grumbling and disappointed to breakfast, complaining that ‘there were hardly any fellows hanged this morning’.*

There is a very real sense in which those who cheer and whistle to show their delight over the death penalty do a disservice to those more sober souls who favor the death penalty, but who realize that the state taking a life is a serious and grave decision that must be made with utmost care and deliberation. The group who make serious and sincere arguments in support of the death penalty should be taken seriously. When this is done, the death penalty fails on the basis of the evidence... not because some of its supporters are ghouls.

So far we have been describing vengeance as a relatively simple emotion—a desire to punish someone who has willfully and without justification killed another human being. Is it really that simple? Is venge-

ance against murderers a simple emotion, or does it come from a deeper place as described by Ernest Becker.

*The paradox is that evil comes from  
man's urge for heroic victory over evil.*

—Ernest Becker

On Ernest Becker's account, when we hear about an evil act like murder it subconsciously engenders in us an increase in the recognition of our own mortality. To assuage this terror of our own finitude—always there, but it waxes and wanes—we want to see the murderer killed. Becker's most prominent disciples, Sheldon Solomon, Jeff Greenberg and Tom Pryszczynski call this process "mortality salience." As they observed, "The death of "evildoers" reduces their own mortal terror." If this idea strikes us as strange—as it often does at first hearing—it is important to understand the substantial body of empirical evidence supporting the concepts proposed by Becker.

*"Ironically, then, a good deal of  
evil in the world results from  
efforts to rid the world of evil."*

—Solomon, Greenberg, Pryszczynski  
*Worm at the Core*

Even a casual review of human history provides countless examples of evil perpetrated in the service of eliminating evil. If we humans can convince ourselves that our motives are "pure"—because we are eliminating evil—we think we can do pretty much anything to our fellow humans. If we have a good conscience and feel self-righteous, therefore,

we can send our fellow humans to execution... even if the ultimate cause of our hunger to execute derives from our desire for vengeance.

In his autobiography, John Stuart Mill goes into some detail about how his father viewed “good intentions” to be useless in assigning praise or blame. Those conducting the Spanish Inquisition, after all, felt they were doing good by burning heretics. But the elder Mill would have none of it. Even when our conscience tells us that a certain action is “right” we are often misled, especially if strong emotions such as outrage and revenge are involved. That which we consider our moral “duty” may instead be what will be most likely to cause injustice.

*‘Retribution’—an inhuman word and, what is more, accepted as right—is not very different from wrongdoing, except in the order of events. He who pays back pain with pain is doing wrong; it is only that he is more readily excused for it.*

—Seneca, *On Anger*

Mike Farrell (aka B. J. Hunnicutt on the television series *M\*A\*S\*H*), is president of Death Penalty Focus. He has been an eloquent voice in the abolitionist movement. He commented on the natural feelings of vengeance experienced by the loved ones of the victim, but wonders if in some cases this rage may be counterproductive:

*Experience has shown me that when it comes to seeking the death of the presumed perpetrator of a terrible crime, those closest to the victim can become overwhelmed by grief and anger, sometimes rage. One certainly can’t blame them, such feelings are only natural in the moment. But some become so bereft they lose themselves and their*

*sense of humanity, their basic decency. Consumed by a need for revenge, they become rage-driven, death-seeking lesser versions of who they once were, compounding the terrible loss.*

Mr. Farrell is making an important point. Spiraling into the vortex of vengeance—whether one is a loved one of the victim, a detective, a district attorney, or a prosecutor—can lead to corrosion of the soul rather than closure.

Friedrich Nietzsche also discussed the down side of revenge in his book, *The Wanderer and His Shadow*. Nietzsche considers an immediate reaction to someone who harms you as self-preservation, not revenge. The desire for revenge, on the other hand, takes place later after one has had time to think about how to produce maximum pain for the offender. In this sense, one assesses the offender's vulnerabilities, and capacity for suffering in order to maximize that suffering. Our goal is not self-preservation, because in our zeal to cause the person to suffer, we often damage ourselves. As Nietzsche observed, "Protecting oneself against further harm... is so little a consideration for the seeker of such vengeance that he almost regularly brings on further harm to himself."

Finally, one might think the feelings of pleasure in seeing a murderer executed are caused by schadenfreude, the German word for taking pleasure in another's misfortune. As I describe in the Endnote, however, the etiology of schadenfreude is more complex than we might think, and the type related to executions could be called "Revenge Pseudoschadenfreude" rather than the "Classic Schadenfreude" that is related to envy.

**Schadenfreude<sup>18</sup>**



## EXECUTION VERSUS DEATH IN PRISON

I have already raised the question of seeking death in prison rather than the death penalty, but I would like to dilate on this issue in order to consider the pros and cons of each approach. It is to the advantage of those who favor capital punishment to obfuscate the distinction between the death penalty and death in prison, because polls have shown that people are more likely to approve of the death penalty when the alternative of death in prison is not mentioned (as we discussed earlier).

We discussed many of the arguments used by death penalty proponents earlier in the Key Points, but the “big four” are: 1) protecting society from the murderer, 2) achieving retributive justice, 3) relief of suffering for the family and friends of the victim, and 4) deterrence of future homicides by other people. Let us see how the first three of these benefits stack up when we compare the death penalty to death in prison. (The lack of evidence for a deterrent effect of capital punishment will be considered in Chapter 3.)

### ***Protecting society from the murderer.***

Starting with the easiest issue to address, it is clear that putting a prisoner in a maximum-security prison for the rest of his life protects society from him committing additional crimes. While it is true that the prisoner may commit crimes within the prison against other inmates or guards, this can also be minimized through proper policies. Moreover, even with the death penalty those on death row (often for a decade or more) can also commit crimes in prison, so having the death penalty is hardly a cure for such behavior. From the standpoint of protecting society, therefore, we have a virtual tie. Both execution and death in prison

effectively remove the prisoner from society, and protect society at large. Saying “We must kill the killer so he cannot kill again” is specious.

### ***Achieving Retributive Justice.***

As we discussed, many people genuinely feel that capital punishment provides some measure of justice not only for the family and friends of the victim, but also for society at large. In their view the murderer is getting his or her just desserts for committing an appalling crime. One often hears, “A person who committed such heinous acts does not deserve to live.” People with this view generally feel death in prison is insufficient to provide justice for particularly brutal murders and that execution is a more severe punishment than death in prison. They need redemptive violence to assuage their anger.

This position, however, does not always hold up to scrutiny. First, not everyone agrees that execution is worse than death in prison. It is not unusual for those convicted of capital murder to express their preference to be executed rather than to spend their life in prison. If we want such people to endure maximal suffering to achieve maximal retribution, therefore, death in prison could be considered preferable to execution. It is likely that some percentage of defendants seek “suicide by execution.” For such individuals, you are actually letting them off *more easily* by executing them. Indeed, one of the reasons John Stuart Mill was not against capital punishment was because he thought death in prison was a worse punishment than execution. It is not at all self-evident, therefore, that we inflict more suffering on the murderer by executing him than by forcing him to rot away in prison for the rest of his life. Sometimes yes, sometimes no.

Moreover, most of us probably suffer from a lack of imagination regarding what death in prison would be like. Most obvious is that you have lost your freedom to do what you want, but the living conditions—despite what some death penalty proponents claim—are usually very unpleasant. You live in a small concrete cell, sometimes for 23 hours at a time; your food is not prepared by Wolfgang Puck; your family and friends may visit at first, but that usually trails off; there is always the risk of being brutalized by fellow inmates or guards; your sex life changes, not likely for the better; if you get sick, the health care is abysmal. Also, the other inmates know why you are in prison, and if they consider your crime cowardly or evil, they can make your life a living hell... or end it prematurely.

For all of these reasons the retribution achieved by the putting people on death row is not all that different from condemning them to death in prison, and in some cases it is less retributive.

### ***Reduced Suffering of Victim's Loved Ones.***

Proponents of capital punishment rightly stress that we must pay close attention to the needs and wants of the victim's family, people whose suffering is unimaginable for most of us. The death of their loved one was undeserved, usually sudden, unexpected, and may have involved horrendous terror and suffering of the victim. In *The Theory of Moral Sentiments* Adam Smith recognized the devastating effect on the family of the victim: "Death is the greatest evil which one man can inflict upon another, and excites the highest degree of resentment in those who are immediately connected with the slain."

The friends and family of the victim, who have suffered so much, may think the execution of the murderer will be a form of closure. The mur-

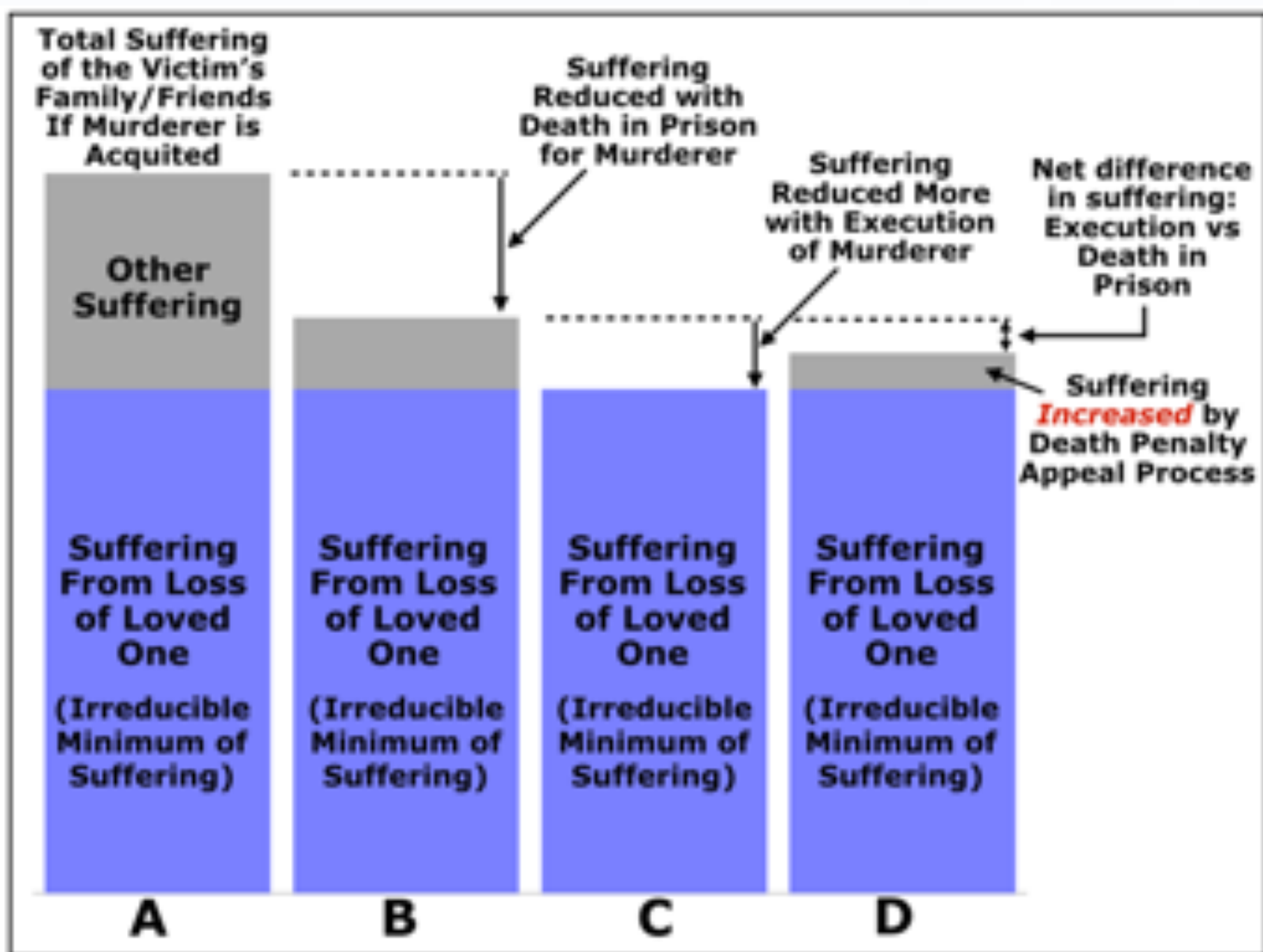
der, arrest, incarceration, trials, appeals, and finally execution must certainly be an emotional rollercoaster ride for them that finally comes to an end. Even with the execution, of course, the victim's family and friends will continue to suffer for the rest of their lives because they have lost the person they loved. That loss is not erased by an execution, and it is not clear that the execution will result in a lasting satisfaction for the victims' family. As Lao Tsu said, "Anyone who delights in slaughter will never find satisfaction in this world."

One cannot deny, however, that those who loved the victim often express some degree of satisfaction, relief, or even equanimity when the person who killed their loved one is himself killed. This may reduce somewhat the suffering the victim's family is experiencing. This, it seems to me, represents the most compelling argument in favor of capital punishment. I suspect that even the most committed death penalty opponent would have to admit that at least some family members of some victims may have their suffering reduced more by the execution of the killer than with a sentence of death in prison.

Nonetheless, one wonders about the durability of the pleasure that accrues to the loved ones upon the execution of the murderer. It seems likely that the pleasure would fade over time. As Simone Weil said about the revenge killings in the Iliad, "the death of Hector would be but a brief joy to Achilles, and the death of Achilles but a brief joy to the Trojans, and the destruction of Troy but a brief joy to the Achaians." If executions provide only temporary pleasure for the victim's loved ones, is it worth the many drawbacks and injustices of having capital punishment on the books?



Moreover, while one must admit that the death penalty may console loved ones of the victim, how much greater is that consolation compared to death in prison? In **Figure 6, Column A** represents the total suffering of the family of the victim. Most of this suffering (shown in blue) is irreparable because it results from the loss of their loved one; it would be about the same even if they had died in an auto accident. But there is additional suffering due to the fact that their loved one was murdered, and someone was responsible for that murder. This is represented in gray and labeled “other suffering.”



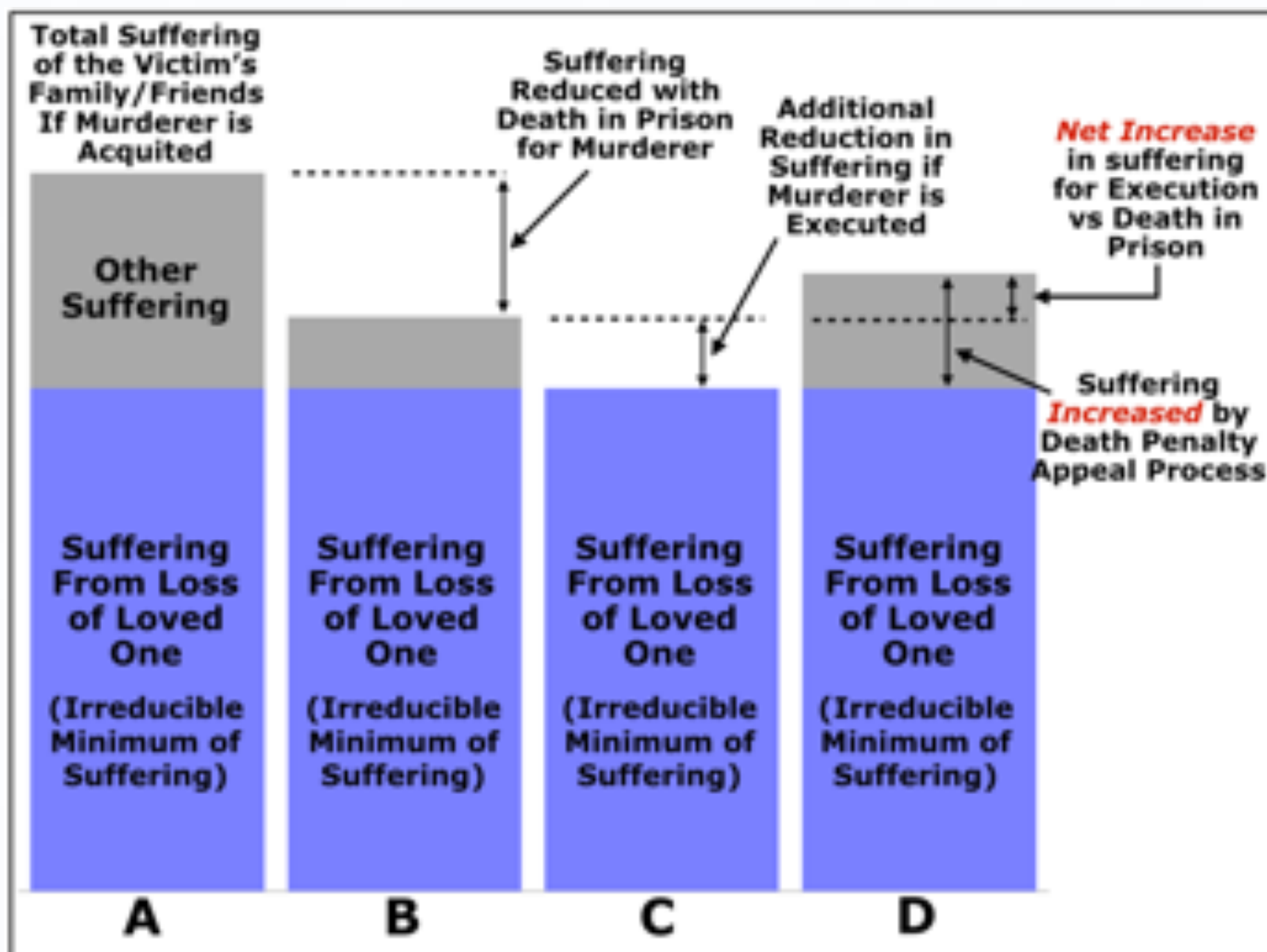
**Figure 6.** Incremental reduction in suffering by victim's loved ones with execution versus death in prison.

In **Figure 6, Column B** we see that this “other suffering” can often be reduced by sentencing the murderer to death in prison, which will both protect society and provide a substantial retributive component. In many cases (but certainly not all) suffering of family members may be reduced even more by executing the murderer as depicted in **Figure 6, Column C**. The problem, of course, is that the road to execution is not easy for the family. Because execution is an extreme and irreversible punishment, the courts rightfully allow the accused to appeal on various grounds, including issues of innocence and mitigating factors that might make death in prison more appropriate than execution for a particular defendant.

The “benefit” of execution over death in prison to the victim’s loved ones, therefore, is likely to be reduced (and in some cases eliminated) by the agony experienced by the family as they watch all of the appeals as we see in **Figure 6, Column D**. Each appeal re-opens the painful wounds for the victim’s family, and the process may last for many years. Moreover, if any of the appeals succeed in removing the defendant from death row, the victim’s family may feel that they have failed and the murderer has won. Thus, the appeal process for death sentences almost always adds suffering to the victim’s family. **Figure 6** represents the “best case scenario” because I have been charitable in the amount of added suffering due to appeals depicted in the figure. In some cases the long road to execution no doubt increases the suffering to a level greater than that would occur if the murderer had just been given a sentence of death in prison in the first place, as shown in the next figure (**Figure 7, Column D**).

Unlike the best case scenario shown in the Figure 6, above, in some cases seeking the death penalty instead of death in prison may actu-

ally *increase* the total suffering of the victim's family as shown in **Figure 7**. In this figure **Columns A, B, and C** are the same as in the previous figure, but in **Figure 7, Column D**, we see that the increase in suffering of the victim's family (from the long appeal process) may actually be greater than the *reduction* in suffering gained by having the person sent to death row and then executed.



**Figure 7.** The death penalty may actually increase the suffering of the victim's loved ones compared to death in prison.

Moreover, although death penalty proponents frequently invoke the argument that executions help the victim's family cope with their loss, it

is worth asking whether those in the criminal justice system always consider the wishes of the victim's family and friends as paramount. It is not always clear. Even when the victim's family expressly request that the prosecutor not seek the death penalty, prosecutors have been known to simply ignore the wishes of the victim's family and press ahead with a capital prosecution. We will now address what happens when the victim's loved ones do not want the prosecutor to seek the death penalty.

### **WHEN VICTIM'S FAMILY DOES NOT WANT DEATH PENALTY**

Chris Watts was married with two daughters aged four and three, and his wife Shannon was pregnant. He started an affair with a co-worker, and decided he needed to get rid of his family. So he strangled his pregnant wife with his bare hands, smothered his 2 daughters, and tried to hide the 3 bodies at a work site. When law enforcement tied the murders to him, he initially said he killed Shannon in a fit of rage, but it became clear that the murders were premeditated and calculated to free him from his family so he could pursue the affair with his co-worker.

Elliott McLaughlin and Kelly Murray of CNN described how devastated and outraged Shannon's mother and father were, but the parents did not want the death penalty for Watts. Shannon's mother, Sandy Rzucek said, "I didn't want death for you because that's not my right. Your life is between you and God and I pray he has mercy for you." Sandy Rzucek chose mercy over revenge, despite being shattered by the horrific murder of her pregnant daughter and two granddaughters.

In another tragic case, Juan David Ortiz was convicted of killing four women in Laredo, Texas. Ortiz lured the women into his truck, drove



them to a remote location, and shot them in the head. Journalist Rick Jervis recounts the comments of an aunt of one of the slain women who felt life in prison was the best option for Ortiz. “I can’t say I want to see him die,” she said. She went on to say that she trusted God to handle the situation

A mother of one of the other victims also spoke out against the death penalty for Ortiz, saying “Let God apply justice.” The sister of a third victim appeared agnostic regarding the death penalty for Ortiz, saying “We’re no one to wish death on anybody. But we know God has the last word. Whatever the outcome, justice will prevail.” One of the victim’s nieces was one in favor of the death penalty for Ortiz, but another niece pointed out that he was suicidal so life in prison would be a worse punishment for him than execution. Despite the fact that the general sentiment among the victims’ families was against the death penalty, prosecutors decided to seek the death penalty for Ortiz. This would not be the first time that prosecutors overrule family members of the victim who do not want the death penalty. Prosecutors, who often claim to be the champions of the victim’s loved ones, sometimes put their own agenda first.

In August 2017 at a white supremacist rally in Charlottesville, Virginia, James Alex Fields, Jr. intentionally drove his car into a group of counter-protestors, killing 32-year-old Heather Heyer. When Fields was sentenced to life in prison for first-degree murder, Heather’s father Mark Heyer said he was glad that Fields would not face the death penalty. In an astonishing burst of magnanimity, the father said, “He was too stupid and too young to realize what he was about to do would change his whole life.”

At this point probably few people remember hearing about the 2011 murder of James Craig Anderson, the 47-year-old African American man who was attacked and murdered in Jackson, Mississippi by a group of 10 white teenagers. Despite the murder being caught on surveillance video, and despite the fact that Anderson was murdered randomly, simply for being black, the story received surprisingly little attention. Some of the teens yelled “White Power!” and racial slurs during the killing of Anderson.

The 10 young people had been partying, and decided to find some African Americans to attack, one of them saying, “Let’s go fuck with some niggers.” They found Mr. Anderson, beat him up, and then one of them, Deryl Dedmon, ran him over with his truck while being urged on by two female passengers. Anderson died a few days later from his injuries. Dedmon later boasted, “I ran that nigger over.”

All ten of the perpetrators were convicted, and Dedmon was sentenced to 50 years in prison in federal court, and two concurrent life sentences in state court. Why, one might wonder, did such a heinous crime not result in a death sentence? Some wondered aloud what might have happened if a group of African American teens randomly killed a white man yelling “Black Power!” At least part of the answer is that Mr. Anderson’s family did not want the death penalty for any of those responsible for his murder. Anderson’s sister, Barbara Anderson Young, wrote a beautiful letter to the District Attorney and said she was speaking also for her mother and two brothers:

*Those responsible for James' death not only ended the life of a talented and wonderful man. They also have caused our family unspeakable pain and grief. But our loss will not be lessened by the state tak-*

*ing the life of another. We also oppose the death penalty because it historically has been used in Mississippi and the South primarily against people of color for killing whites. Executing James' killers will not help balance the scales. But sparing them may help to spark a dialogue that one day will lead to the elimination of capital punishment.*

The family of James Craig Anderson chose mercy over vengeance, despite the fact that their brother had been viciously beaten and run down like a dog by a group of racists. This raises a question: If Mr. Anderson's family can be magnanimous and forgiving under these extreme circumstances, why cannot the rest of us choose this path?

What is it about some of us that we scream for savage revenge, while the Anderson family recognized that killing the killers would not lessen their loss. Fortunately, and unlike some cases where the District Attorney ignores the wishes of the victim's family to eschew the death penalty, Hinds County District Attorney Robert Shuler Smith sought life in prison for Deryl Dedmon.

WHY WOULD THE victim's family be opposed to seeking the death penalty? In some cases the family recognizes that the agony of multiple appeals of the capital punishment process (as described above) would outweigh any satisfaction they would gain from the eventual execution. Also, family members may be opposed to capital punishment in principle and for these people executing the murderer would increase their suffering. Some families even consider that redemption is possible for everyone, and that the murderer may, over time, learn to repent for his heinous crimes.

Sometimes the victim's loved ones feel that death in prison is a greater punishment than execution, and they want the murderer to "rot in prison." As already mentioned, some condemned prisoners also feel death in prison is worse than execution, and they resist any appeals that would prolong the time until execution. Other inmates given a sentence of death in prison have found it so terrible that they killed someone while in prison so that they would get the death penalty. In any case, it is a vast oversimplification to say that the death penalty must be maintained for the benefit the loved ones of the victim, because that may or may not be the case.

Sister Helen Prejean has observed that societal pressure sometimes influences whether or not the victim's family seeks the death penalty for the murderer. The victim's family may feel impelled to seek the death penalty because if they do not, society may think that they did not love their murdered loved one enough.

Finally, there is the question of whether the victim's family is in a position to really know what will make them feel better. Revenge against someone who has harmed you may afford temporary relief of pain, but is it a long-term palliative? As Philadelphia District Attorney Larry Krasner has observed, we seldom truly consider what would be best for victims. We basically tell them that punishing the perpetrator will make up for their loss, and we do little to truly help them through their ordeal. If we had death in prison instead of the death penalty, we could use the millions of dollars we saved to materially help the victim's family. We could offer them therapy, financial help (the victim may have been a breadwinner) and other forms of assistance that could make their lives easier. Offering only to kill the person who murdered their loved one, and then ignoring them is probably not the best course of action.



## LOVED ONES OF THE DEATH ROW INMATE

While it is true that the family of the victim may express a need for retributive justice to assuage their suffering, fairness and reason require that we consider the suffering of everyone affected by capital punishment. The suffering of the family and friends of the condemned prisoner, for example, is seldom considered in the debate. It is impossible to accurately measure and compare the positive and negative effects on all the innocent people involved, of course, but it is self-evident that there are offsetting effects that must be considered. Any incremental reduction in suffering for the victim's family and friends achieved by use of the death penalty versus death in prison must be juxtaposed to the accompanying increase in suffering by other innocent people swept up in the process,

First let us consider the family and friends of the death row inmate in the typical case, in which the condemned person is actually guilty of the murder that put him on death row. His family and friends did not commit the murder, and most of them had little or nothing to do with the murderer turning out the way he did. Their suffering, like that of the victim's family, is the suffering of the innocent bystander. The question before us, therefore, is how much more do the innocent loved ones of the convicted murderer suffer if he receives a death penalty versus being sentenced to death in prison? Albert Camus understood the agony these loved ones must feel:

*...but the relatives of the condemned man then discover an excess of suffering that punishes them beyond all justice. A mother's or a father's long months of waiting, the visiting room, the artificial conversations filling up the brief moments spent with the condemned*

*man, the visions of the execution are all tortures that were not imposed on the relatives of the victim.*

As with the family of the victim, much of the suffering of the murderer's loved ones prior to execution would be the same whether he has been condemned to death or life in prison. The loss of contact with the loved one, the shame, and the concern for the prison living conditions wouldn't be much different either way. But as Camus observed, the "visions of their execution" would certainly torture a parent who remembered cradling their smiling baby in their arms so many years ago. Here the parents of the victim, and the parents of the about-to-be-executed would both suffer horribly. There is no question that death in prison for a loved one would be awful, but imagining their execution would be a horror, despite the fact that they had committed murder.

But ah! you say, not all of the relatives are innocent; what if a father brutally beat and abused the son, and thereby contributed to his murderous behavior. Well, in that case how can we justify putting to death someone who suffered such egregious abuse and neglect as a child? We certainly need to protect society from the murderer, but would not death in prison be a more appropriate punishment than execution for such a person? You cannot have both ways.

*An innocent man, brought to the scaffold  
by the false imputation of an infamous or  
odious crime, suffers the most cruel misfortune  
which it is possible for innocence to suffer.*

—Adam Smith *The Theory of Moral Sentiments*

For the people who have been wrongly sent to death row their suffering and that of their loved ones rises to the level of obscenity. Hun-

dreds of people have spent an aggregate of literally thousands of years on death row prior to being exonerated for reasons of innocence. (Again, we must keep in mind that these are only the known cases who were exonerated and released from death row. There are no doubt many others who were executed or died in prison before they could be executed.)

The loved ones of innocent people on death row must know the drill. Every morning their loved one wakes up on death row and realize that they are not awaking from a nightmare, and that they have been falsely condemned to death... it is a reality from which they will not awake. They wonder... is this the day that my execution date will be set? Is there a chance they will find the real murderer before I am led to the execution chamber?

Will I be able to withstand the terror on the day I am dragged to the execution chamber, knowing that, despite my innocence, I am going to die in the most shameful way possible. Will I suffer a “botched” execution as a result of an experimental drug cocktail? How will my family and friends cope with me being executed for a crime I did not commit? And, ultimately, imagine what goes through the innocent man’s mind as he lies on the table in the execution chamber and the needle is inserted into his arm.

The aggregate relief of suffering by the family and friends of the victim, therefore, must in fairness be juxtaposed to the all of the suffering incurred by the loved ones of the people on death row. On the one hand we have the suffering of the loved ones of the guilty on death row, plus the even greater suffering of the loved ones of the innocent prisoner, plus the unimaginable suffering of the innocent prisoner himself.

On the other side of the ledger we have the incremental relief of suffering enjoyed by the victim's loved ones through execution instead of death in prison. There is no way to precisely make this comparison, of course, but a strong case could be made—if one had a utilitarian philosophical bent—that the total suffering of just the condemned innocent and their families is vastly greater than that suffered by victim's families who only get the satisfaction of death in prison for the killer of their loved one instead of the death penalty. Although utilitarian philosophy sometimes leads to moral absurdities, in this case it seems apropos: I do not see how a utilitarian would be able to add all of this up and conclude that the death penalty relieves overall suffering in the world.

## **THE WORST OF THE WORST**

Almost everyone who speaks in favor of the death penalty—whether enthusiastically or reluctantly—expresses their support by claiming only “the worst-of-the-worst” are executed. For example, on March 13, 2019 after California Governor Gavin Newsom's executive order to halt executions in the state, KQED Radio had a debate of sorts in which death penalty proponents recited the usual litany of the heinous crimes committed by “the worst of the worst” on death row. No one could deny the appalling nature of the crimes, including the rape and murder of children.

The claim that the people on death row are the worst-of-the-worst, however, is the claim that of all the horrific murders committed in the United States, those on death row represent the worst, say, 1% of murderers. When one considers such a claim rationally, however, it becomes clear that it could not possibly be true. First, as we will discuss in Chapter 4, probably about 4% of those deemed the “worst-of-the-



worst” of murderers are actually innocent of the crime. Some people condemned to death have been used as examples of why we need capital punishment, but later they turned out to be innocent. Rather than being the worst-of-the-worst, such people would be better termed “the unluckiest of the unlucky.”

*Love or hatred stands  
justice on its head.*

—Blaise Pascal

Moreover, in addition to the innocent, even the guilty on death row are not necessarily the worst of the worst because they have to live in a state that has capital punishment, live in a jurisdiction of that state where prosecutors tend to seek the death penalty, and they cannot be wealthy enough to hire a “dream team” to defend them in court.

As we will discuss in Chapter 5, many other factors also contribute to the egregiously arbitrary nature of who ends up on death row, such as the race of the victim, the race of the murderer, the composition of the jury, the motives of eye witnesses, and the proclivities of the judge. For all of these reasons, saying that death row is inhabited only by the worst of the worst is absurd.

To give just one example, the state of Texas executed Joseph Garcia in 2018 for the death of a police officer, Aubrey Hawkins. Garcia was committing a robbery of a sporting goods store with six other men, but he was not one of the shooters. Garcia made a terrible decision to commit the robbery, but it was not Garcia who made the terrible decision to shoot the officer. By what distorted logic can Garcia be considered “the worst of the worst?”

## Summary.

We say we want justice and truth in criminal justice, but these fine sentiments, in their pure form, are unattainable for us. fallible humans. Blaise Pascal recognized how difficult it is for us to achieve anything approaching precision in such matters.

*Justice and truth are two points  
so subtle that our instruments are  
too imprecise to locate them exactly.*

—Blaise Pascal

Ultimately, the claim that “justice” requires that certain murderers be executed rather than die in prison is not a self-evident truth; it is a personal opinion. There is no moral principle upon which the opinions of capital punishment proponents need to be given precedence over the opinions those who oppose it. I would argue that since capital punishment involves the state killing a human being, the burden of “proof” of the necessity of executions lies with those who favor it. Any claims that we can only achieve justice by executing certain murderers must be juxtaposed to the injustices that necessarily attend the death penalty. When that is done, the argument for capital punishment topples under the weight of evidence and reason.

# 3

# DETERRENCE

## **Deterrence.** *Does the Death Penalty Reduce the Homicide Rate?*

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*Our truth nowadays is not what is,  
but what others can be convinced of.*  
—Michel de Montaigne

In Foochow, China on December 8, 1900, American teacher Martha Wiley wrote a letter to her brother Wallace, describing a remarkable attempt to prevent people from cheating during an examination for people seeking office.

*Dear Wallace,*

*Yesterday a party visited the Examination Hall, what an immense affair it is! Ten thousand separate cells arranged in rows of 50 each. Candidates for literary honors present themselves and are looked over to see that they are not smuggling in anything, then they are shut in one of those cells two days and nights to write upon some given theme. A guard is placed at each row to see there is no communication, yet they cheat, and in spite of the fact that their head is cut off if caught cheating. There are two high walls around the cells, and cobras imported and put between to prevent anyone coming over.*

*Last exam five men were bitten by them and three died in the cells.*  
—Kathy Langhorn, Pat Langhorn, Editors. *Letters From the Dragon's Head. Martha Wiley's China 1900-1947.*

The key phrase in Martha Wiley's letter is, "...yet they cheat, and in spite of the fact that their head is cut off if caught cheating." If immediate decapitation or death by cobra does not discourage people from cheating on a test, one wonders how the remote possibility of execution could deter a person who has decided to commit murder.

**Cobras Not the Best Method<sup>19</sup>**

IN A PERFECT WORLD, this chapter should be one sentence long: "Evidence from dozens of countries going back over a century as well as current data from the American states in no way supports the claim that the death penalty reduces the murder rate; in fact, if anything the trend is in the opposite direction." Unfortunately, I must write this chapter because the odor of the deterrence argument still lingers around the capital punishment debate.

Even some death penalty opponents do not understand how empty the deterrence claim is, and those who should know better—judges writing opinions, for example—sometimes imply that deterrence is real. It is not real, and no one should be able to invoke deterrence in their argument for the death penalty without being strongly challenged with the empirical evidence. In fairness, some death penalty proponents understand the lack of evidential support for a deterrence effect of capital punishment, and have indeed stopped using the deterrence argument.

At first glance the idea that the death penalty deters future homicides seems to make sense. How could it not act as a deterrent? If people



know that they may be executed for murder, it should certainly dissuade people from murdering. After all, if we did not have laws to punish embezzlers, there would be more bank employees driving Rolls Royces. For murder, however, the deterrent argument totters. Murder is different from most other crimes because the guy swinging the axe or pulling the trigger is probably not pondering the incremental difference between the death penalty and death in prison.

In his book, *The Passions and the Interests*, twentieth century thinker Albert O. Hirschman described how easy it is for passions, especially violent passions, to defeat reason and even self-interest. He cites Baruch Spinoza, David Hume, and other philosophers as agreeing that a strong passion cannot be controlled by reason, but only by another even stronger passion. It seems self-evident that a person about to commit a murder is not likely to be using their faculties of reason to weigh various options.

**Albert O.  
Hirschman<sup>20</sup>**

Nobody said it better than Arthur Koestler in *Reflections on Hanging*.

*The gallows obviously failed as a deterrent in all cases where a murder has actually been committed. It is certainly not a deterrent to murderers who commit suicide—and one-third of all murderers do. It is not a deterrent to the insane and mentally deranged; nor to those who have killed in a quarrel, in drunkenness, in a sudden surge of passion—and this type of murder amounts to 80 to 90 per cent of all murders that are committed. It is not a deterrent to the type of person who commits murder because he desires to be hanged; and these cases are not infrequent. It is not a deterrent to the person who firmly believes in his own perfect method... which, he thinks, will*

*never be found out. Thus the range of hypothetical deterrees who can only be kept under control by the threat of death and nothing short of death, is narrowed down to the professional criminal class. But both the abolitionists and their opponents agree that ‘murder is not a crime of the criminal classes;’ it is a crime of amateurs, not of professionals.*

Of course, the irony of using execution as an example to show deterrence is that the only people being executed are those for whom the deterrence effect self-evidently did not work. As Arthur Koestler observed, this reasoning is like “...physicians who would justify their favorite cure by the example of patients who had not been cured by it.”

The fact that many people *think* that executions deter murders is irrelevant. Any person’s opinion—in the absence of a careful and rational look at the available data—is not a valid basis upon which public policy decisions should be made. The uninformed opinions of the public are notoriously fallible. A sizable proportion of the public *think* the climate crisis is not real and we do not need to reduce carbon dioxide emissions; many people *think* that cutting taxes on the wealthy “trickles down” to the poor; many *think* that foreign aid is a substantial portion of the federal budget. I could go on, but the fact that many people erroneously think capital punishment deters future murders should not enter the discussion.

*I see ordinarily that men, when facts are put before them, are more ready to amuse themselves by inquiring into their reasons than by inquiring into their truth.*

—Michel de Montaigne

Montaigne recognized that we often ignore evidence and argue about chimeras: “They ordinarily begin thus: ‘How does this happen?’ What they should say is: ‘But does it happen?’” Regarding the claim that the death penalty deters future murders, as with any claim based on common sense, Montaigne would advise skepticism and a focus on the evidence. Let us turn to that evidence.

Those arguing for the necessity of the death penalty need to be held to normal standards of rational debate. For example, in a 2015 Intelligence Squared debate, Kent Scheidegger initially listed deterrence of homicides as one of his three reasons for supporting capital punishment. He later admitted “The one thing that all experts agree on is that the case has not been proved either way, for or against deterrence.” Finally, he claimed that “empirical studies” show that each execution prevents five to eighteen subsequent homicides. It would not be unfair to state Mr. Scheidegger’s position thus: ‘Deterrence is one of my top reasons for supporting capital punishment, except all experts agree we don’t know if deterrence is real, but the evidence shows the death penalty deters lots of homicides.’ Incoherent arguments such as this “triple flip-flop” by Mr. Scheidegger have no place in a serious debate about whether or not the state is justified in killing one of its citizens.

## LONGITUDINAL OR COMPARATIVE STUDIES OF DETERRENCE

Modern combatants in the capital punishment debate may not realize how long the controversy over deterrence has been raging. In the eighteenth century, Cesare Beccaria questioned the practical value of capital punishment in his book *On Crimes and Punishments*. He noted a paradox—in order for the death penalty to be a deterrent the murder rate had to stay relatively high so that execution would be in the minds of those consider-

**Cesare  
Beccaria<sup>21</sup>**

ing murder. He also proposed that the death penalty—through the population becoming inured to violence—might provoke some people to murder. This is the “counterdeterrent effect” that we will discuss shortly.

In the 1950s Arthur Koestler meticulously chronicled the effect of abolition of capital punishment on crime rates. Scores of countries in Europe, Latin America, Africa, and elsewhere eliminated capital punishment over the years, some going back to the mid 19th century. In every country, one can be sure that the arguments against abolition of the death penalty included the loss of the deterrent effect of executing murderers. If deterrence were real, one would expect with almost 200 years of data from different countries eliminating the death penalty at various times—and with differing cultures, social stresses, and economic conditions—a pattern of increased murder rates after abolition would emerge. It did not... indeed, the murder rate often went down instead of up after the death penalty was abolished.

*The facts are beyond dispute: throughout the twentieth century, abolition was in no European country followed by an increase in the murder-rate, and was in nearly all countries followed by a decrease.*

—Arthur Koestler

Koestler also provided details from the British Parliamentary Select Committee of 1929-1930, which studied all of the evidence they could find from around the world regarding the efficacy of capital punishment as a deterrent, and wrote an 800-page report. In their conclusion they said, “Our prolonged examination of the situation in foreign countries



has increasingly confirmed us in the assurance that capital punishment may be abolished in this country without endangering life or property, or impairing the security of Society.” A later report from a Royal Commission on Capital Punishment of 1948-1953 filled 1400 pages and basically confirmed that the evidence does not support the claim that capital punishment acts as a deterrent.

The Royal Commission looked at three issues: 1) Homicide rates in a given country before and after the abolition of capital punishment, 2) Comparing, over the same period of time, the homicide rate in countries which abolished capital punishment with others who did not. (They compared neighboring countries with similar social situations.), and 3) In a given country, looking at the number of executions in a particular year, and determining if executions affected the murder rate in the time immediately following. None of these three types of investigations provided any evidence of a deterrent effect. So long before the deterrence debates over the past 50 years in the U.S., a substantial body of evidence of various types suggested that the deterrence value of the death penalty was a myth. **André Gide<sup>22</sup>** This is an example of “Gide’s Law.”

It is clear that Koestler was against capital punishment before he started writing *Reflections on Hanging*, but it is equally clear that he was astonished at how much empirical evidence supported his position. His inability to get his opponents to even consider the evidence debunking deterrence was obviously frustrating:

*This belief in the irreplaceable deterrent value of the death-penalty has been proved to be a superstition by the long and patient inquiries of the Parliamentary Select Committee of 1930 and the Royal Com-*

*mission on Capital Punishment of 1948; yet it pops up again and again. Like all superstitions, it has the nature of a Jack-in-the-box; however often you hit it over the head with facts and statistics, it will solemnly pop up again, because the hidden spring inside it is the unconscious and irrational power of traditional beliefs.*

Longitudinal studies from the past also looked at changes in non-homicide crime rates after discontinuation of capital punishment for such crimes. Koestler describes what happened when in the 1830s England markedly reduced the number of offenses punishable by death. Despite the fact that the reform coincided with difficult social conditions (called the “hungry forties”) there was no evidence of an increase in the crimes that had formerly earned the death penalty; in fact, quite to the surprise of those predicting rampant crime and chaos, the crime rate went down.

*In the 33 nations that have abolished the death penalty or no longer use it, the number of murders has not increased. Who could deduce from this that capital punishment is really intimidating?*

—Albert Camus

Anecdotes do not represent valid empirical evidence and are hard to verify, but some are interesting. Anecdotes from the past mentioned by Arthur Koestler include pickpockets picking the pockets of the people watching pickpockets being hanged. Apparently, the perfect time for pickpocketing was just as the “strangled man was swinging above them” because at that moment everyone was looking up. Other interesting anecdotes from Koestler: A man named Fontleroy got the idea to commit forgery while watching the hanging of a forger. Another man

who was on a jury that convicted Dr. Dodd of forgery later committed forgery and died on the same gallows as Dr. Dodd. Perhaps most striking, the prison chaplain at Bristol, Reverend W. Roberts, stated that of 167 persons awaiting execution, 164 had previously witnessed one or more executions. This caused Koestler to wonder: “What would the British Medical Association say of the value of a patent medicine for the prevention of polio, if it were found that in 167 polio cases that 164 had been treated with that medicine?”

To the person who is against the death penalty, the above anecdotes may look like excellent evidence against a deterrent effect, but they are not. First, they come from long ago, and they represent mostly hearsay. Moreover, it would be difficult to corroborate most of the stories at this point. Anecdotal evidence on the other side of the debate is also of little value. There are stories of people who were considering murder, but said they changed their minds because they feared the death penalty. Again, there is no way to determine whether such accounts are true. It is probably best, therefore, to listen to the anecdotal evidence on both sides of the debate to see if it makes any sense and fits with other more reliable evidence, but to consider it only ancillary evidence when coming to conclusions.

## **EXPERT ASSESSMENT OF THE EVIDENCE ON DETERRENCE**

Over the years most criminologists in the United States have been skeptical of the deterrent value of capital punishment. Indeed, in 1989, the American Society of Criminology approved a resolution that condemned the death penalty because social science research “found no consistent evidence of crime deterrence through execution.” Subsequently, a 1996 survey of leading American criminologists by Radelet and Akers found that the vast majority believed that the empirical re-

search had failed to show that capital punishment was superior to lengthy imprisonment as a deterrent.

Albert Camus knew instinctively that claiming a deterrent value of capital punishment was problematic. He cited a magistrate who observed that the vast majority of murderers he had known did not know while shaving in the morning that they would commit murder later in the day. In response Camus wryly observed that it might be a good idea to hold up a severed head in front of all who are shaving in the morning.

*The most sweeping uncertainty [deterrence] in this case authorizes the most implacable certainty [death by execution].*

—Albert Camus

Then in the 2000s, studies began to appear—authored mainly by economists rather than criminologists—suggesting that each execution prevented many future homicides. Some claimed that each execution prevented several subsequent murders, some up to 18, and one claimed that each execution prevented 74 murders the following year. Some of these studies received extensive exposure in the Wall Street Journal and the Washington Post. This exposure is unfortunate, because these studies have been found to have fatal methodological flaws and they have been largely discredited.

Some criminologists have suggested precisely the opposite of a deterrent effect. William J. Bowers and Glenn L. Pierce analyzed the relationship between 692 executions and the homicide rate in New York state during the period between 1906 and 1963. They concluded that in the nine months after each execution, three additional homicides oc-



curring over the expected number of homicides. We will discuss this issue of the death penalty possibly increasing the homicide rate shortly.

Perhaps the economists and other non-criminologists who have ventured into the deterrence debate would do well to listen to Montaigne, who noted the unfortunate tendency of people to stray outside their area of expertise. Montaigne mentions this issue several times in his *Essays*, but my favorite is: “If it is a subject I do not understand at all ... sounding the ford from a good distance; and then, finding it too deep for my height, I stick to the bank.” Would that these economists had heeded this advice and stuck to the bank.

Unfortunately for those who still cling to the argument that the death penalty deters homicides, a prestigious panel of experts from the Committee on Law and Justice of the National Research Council released a report in 2012 concluding that the empirical evidence does not support a conclusion that capital punishment acts as a deterrent to future homicides. They looked carefully at the empirical evidence and concluded that “research to date is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates.” Experts such as those on the National Research Council are not always right, of course, but they are considerably more likely to be right than the non-experts who claim a deterrent effect.

*We have no right to inflict suffering and  
death on another living creature unless  
there is some unavoidable necessity for it.*  
—Albert Schweitzer

In the Intelligence Squared Debate of April 15, 2015 Kent Scheidegger tried to discredit the National Research Council paper, but what he says about the report is an egregious distortion of the truth. First, Mr. Scheidegger says this report is “simply the personal opinions” of the authors. This is patently false. The author experts reviewed an extensive amount of evidence from studies published since 1967. They were extremely fair, and explicit in not offering opinions on whether or not the death penalty was good public policy. Obviously, any commission such as this, after a careful review of the data, will come to conclusions. But this can hardly be characterized as “simply the personal opinions” of the authors. To state it in this way is an unconscionable distortion of reality.

In 2009 Radelet and Lacroix published another survey sent to 94 leading criminologists (all were Fellows in the American Society of Criminology (ACS), ACS award winners, or ACS presidents, past and present). The survey had an 84% return rate, and the results were telling: only 2.6% of leading criminologists believed that executing people acts as a deterrent to future murders. Possibly even more surprising, 18.8% of these criminologists said “strongly agree” or “agree” to the statement, “Overall, the presence of the death penalty tends to increase a state’s murder rate rather than to decrease it.”

This means if one polls true experts in the field (criminologists) the percentage believing that capital punishment increases the murder rate is seven times greater than the percentage believing that it decreases the murder rate. Again, this certainly doesn’t prove that capital punishment increases murders, but it remains a possibility. The proposal that the presence of the death penalty increases the murder rate is called

the “Brutalizing Effect” or “Counterdeterrent Effect.” We now turn to this possibility.

### **DOES CAPITAL PUNISHMENT INCREASE MURDERS? (THE COUNTERDETERRENT EFFECT)**

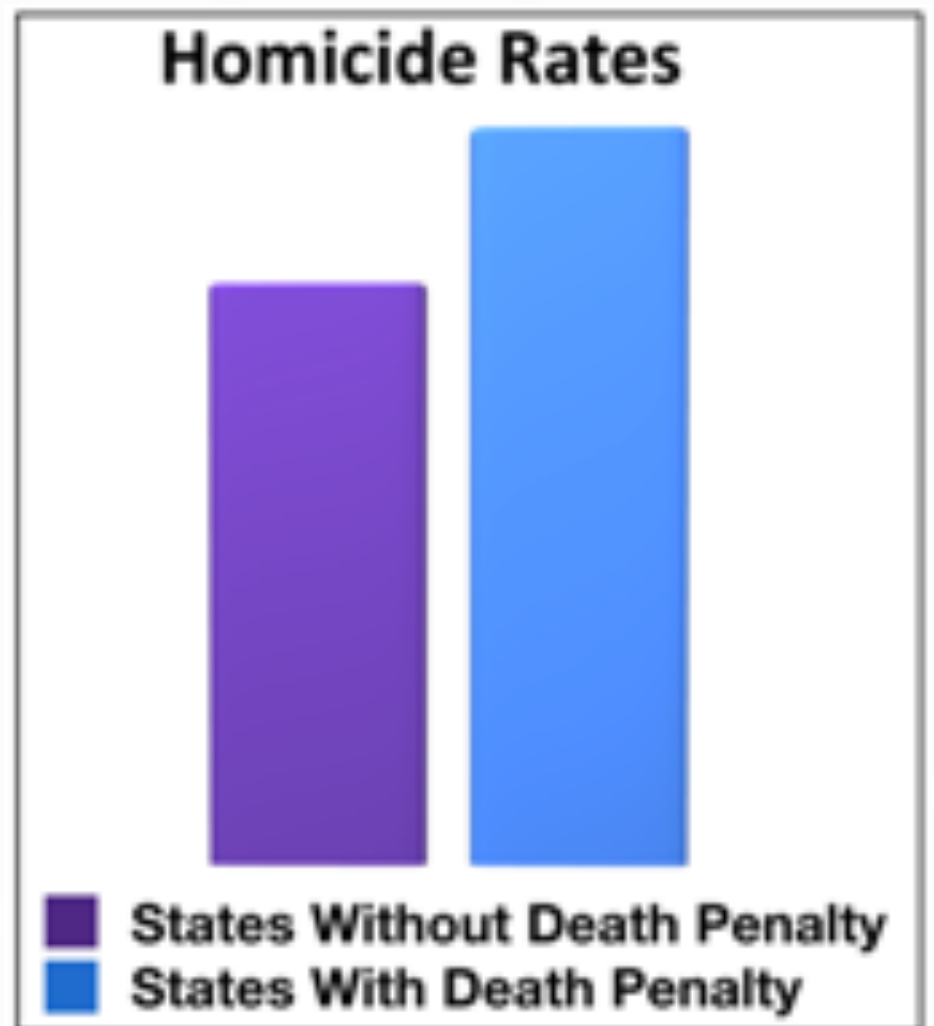
There are three possibilities regarding the effect of the death penalty on homicide rates: 1) The death penalty reduces the murder rate, and therefore has a “deterrent” effect, or 2) The death penalty has no net effect on the murder rate. This could be because it has essentially no effect at all on the murder rate, or because it deters some people from murdering, and encourages others to murder, so the two influences cancel each other out, or 3) The death penalty increases the overall murder rate.

The third of these possibilities is sometimes called the “brutalizing effect” because it proposes that the death penalty brutalizes society and promotes an attitude that killing people is an appropriate way to solve problems. We will use the broader term “counterdeterrent effect” since it does not imply that we know the cause of the proposed increase in the murder rate.

Which of these three possibilities is supported by the evidence? First, as described above, we have the longitudinal studies of murder rates after abolition of the death penalty in various countries with no increase in the murder rate. Instead, it often went down. Then we have the English reforms of the 1830s where the number of crimes punishable by death was substantially reduced. Again, the crime rate went down instead of up. We also have data from the United States where murder rates are compared in different locations with similar characteristics over the same period of time, where one location has the death

penalty and another does not. Perhaps the most common example of this type of study is to compare the murder rates in US states that have capital punishment with states that do not have capital punishment.

Unfortunately for death penalty advocates, this turns out to be the opposite of what would be expected if capital punishment acted as a deterrent. The murder rates in states with the death penalty are higher than those without the death penalty. Indeed, if one looks at the average murder rate in the 5 years from 2008 to 2012, in death penalty states it is 4.82 per 100,000 people, and in non-death penalty states it is 3.16. In other words, over this period you were 53% more likely to be murdered in a state that has capital punishment. (See **Figure 8**)



**Figure 8.** Homicide rate is higher in states with death penalty.

These data comparing the murder rates in various states do not prove that the death penalty increases the murder rate, of course, although if the results were reversed, I suspect that they would be regularly used by death penalty proponents to show a deterrent effect of executions. Proving a counterdeterrent effect is fraught with the same serious limitations as proving a deterrent effect, so it would not be fair to claim the death penalty increases the homicide rate based on this evidence.



There is certainly a trend toward counterdeterrence, but trends are not proof, so we death penalty opponents cannot use this as an argument. States differ in all sorts of ways, access to guns, crime rates, socioeconomic conditions, just to name a few. In any case, the fact that there is no overall evidence of a deterrent effect is by itself enough to remove deterrence from the discussion... or at least it should be. It is not possible to discern with any degree of certainty what is in someone's heart or mind when they decide to kill, we are often left with anecdotes and conjectures rather than empirical evidence.

It has been suggested that the presence of capital punishment vulgarizes and brutalizes society. In Seneca's *Letters From a Stoic*, he describes the blood and brutality of a Roman gladiator match and observes that he goes home from such a spectacle "more selfish, more self-seeking" and "a person crueller and less humane." Could the death penalty thus normalize the view that killing people is an appropriate way to eliminate people we view as evil. This is sometimes called the "executioner syndrome." In this case, the murderer apparently believes he is performing a public service by eliminating someone he or she deems unworthy to live. As criminologist William J Bowers said,

*The lesson of the execution... may be to devalue life by the example of human sacrifice. Executions demonstrate that it is correct and appropriate to kill those who have gravely offended us. If the typical murderer is someone who feels that he has been betrayed, dishonored, or disgraced by another person—and we suggest that such feelings are far more characteristic of those who commit murder than is a rational evaluation of costs and benefits—then it is not hard to imagine that the example executions provide may inspire a potential*

*murderer to kill the person who has greatly offended him. In effect, the message of the execution may be lethal vengeance, not deterrence.*

Another possible cause of the counterdeterrent effect is “suicide by execution.” How many people commit murder with the expectation, perhaps subconsciously, that they will thereby be put to death? This is similar to “suicide by cop” in which the person does not want to live, but is unable to commit suicide. Criminologist Robert M. Bohm described several anecdotal cases that may represent this phenomenon. For example, a woman in San Jose, California who, after several unsuccessful suicide attempts, strangled two children she was babysitting purportedly so she would be executed instead of having to try another suicide. A suicidal man in Georgia shot two strangers in a parking lot, and received the death penalty so the state would do the dirty work for him. John Blackwelder was executed in 2004 after he killed a fellow inmate, apparently because he could not bear the thought of his current sentence of life in prison without parole. These and many other anecdotal cases of suicide by execution do not prove much by themselves, but they do seem plausible, and may account for some increase in the murder rate in the presence of capital punishment.

Still other murderers might kill to gain the notoriety of being executed for spectacular crimes. This may have motivated serial killer Danny Rolling who committed five murders, three rapes, and three burglaries in Florida. Rolling claimed he wanted to be a “criminal superstar” and the “world’s greatest rapist.” When such people are executed it provides them a stage that allows them to live on through their criminal exploits. This is entirely consistent with the theories of Ernest Becker that we discussed previously. (see Pop-Over in Chapter 1)

Counterdeterrence, therefore, remains a viable possibility but not an argument anti-death penalty people can use in rational debate. Although more evidence supports a counterdeterrent effect than a deterrent effect of capital punishment, we must ask exactly how one could ever get a definitive answer to the question of deterrence. It would not be unfair to challenge anyone claiming a deterrent value of capital punishment to describe how they would set up a study that would yield valid data on whether or not capital punishment is a deterrent to future murders. Murder rates go up and down for all sorts of reasons, and to tease out one factor (capital punishment) from all of this is next to impossible. Moreover, so many interlocking factors go into a decision to murder, to think that the murderer is carefully assessing the marginal difference between the death penalty versus death in prison as he is deciding whether or not to pull the trigger is simply not credible.

The impossibility of designing a definitive study of the deterrent effect of the death penalty reminds me of my high school track coach. I was on the track team in high school, and rose to the level of mediocrity in the pole vault. A few days before each track meet, the coach gave us “the lecture” advising us not to do anything in the 24 hours before the meet—alone or with someone else—that could result in a seminal emission. He said it would impair our performance in the track meet. (I found out later this advice goes back to the Ancient Greeks.)

After Coach left we discussed his warning and rejected it out of hand. (We were teenage boys, after all!) But looking back, we were right to be skeptical. Athletic performance in a track meet (as with a person deciding whether or not to commit murder) is governed by a myriad of factors that would be impossible to control for in a scientific study. How

could one possibly tease out and control for all of these factors to set up a study that would yield valid results?

It is difficult enough to obtain definitive scientific results, on drug therapy, for example, using randomized, double-blind, placebo-controlled crossover studies in which one attempts to control for every imaginable variable. When studying the effect of public policy (death penalty) on human behavior (murders) it becomes virtually impossible. The various states within the United States differ with regard to laws, customs, media, economies, demographics, and a host of other factors, so comparing the murder rates in one state versus another is always going to be contaminated. Moreover, one cannot randomize people within a given state such that some people would be told that the death penalty exists and others told that it does not exist. There is just no way to do a study with adequate controls to yield definitive results.

We are left with data comparing the murder rate in one state versus another or comparing the murder rate before and after capital punishment is abolished or initiated. These data cannot do more than suggest that the murder rate is impacted by the death penalty. In any case, if one considered these studies definitive, one would be forced to conclude that the death penalty has no effect or even increases murder rates rather than decreasing them.

Perhaps the claim of deterrence resides in some “opposite-world” where the actual outcome of some law or concept is exactly the opposite from the intended outcome. When you have a firearm in the house, your family members are *more* likely to die from a gunshot (accidental shootings, suicide, and family homicide) than be protected



from an intruder. Likewise it is possible that instead of deterring homicides, the death penalty might actually *increase* the murder rate.

As “Gide’s Law” would predict, the counterdeterrent effect is not a new idea. One of the first arguments that the death penalty actually increased crimes compared to imprisonment came from Jeremy Bentham (1748-1832). He observed that the abolition and re-institution of the death penalty in Tuscany resulted in a decrease and increase in crimes respectively. He also noted the dramatically lower assassination rates in Tuscany during abolition of capital punishment compared to the Roman States. These were crude statistics and would not pass muster today, but Bentham’s argument shows that counterdeterrence was considered a possibility even then.

## **DETERRENCE OF EXECUTION VERSUS OTHER PUNISHMENTS**

Perhaps the most egregious error made by those claiming a deterrent effect of capital punishment is the failure to compare execution to the alternative of death in prison. As pointed out earlier: Any poll of public opinion... any study of deterrence... any argument claiming that capital punishment reduces the murder rate... must have death in prison as the alternative to the death penalty.

If death in prison is not presented as the only viable alternative to the death penalty, the person pondering capital punishment may think that the alternative is perhaps a decade or two in prison, as can happen with non-capital murder convictions. Accordingly, some people who wish to promote capital punishment are aware that presenting death in prison as the alternative can weaken their argument, and they make every effort to avoid mentioning it.

As Albert Camus observed, if we really believed in deterrence we would “exhibit the heads.” Could we make the execution so terrifying that it would act as a deterrent? Modern death penalty opponents who say we should have the executions televised and made available to the public perhaps don’t expect to be taken seriously but their point is actually valid. If we believe in deterrence, we should not be so secretive about executions and should not try to make them painless. Albert Camus mused about why we take such pains to keep executions as far as possible away from the eye of the public.

*How could a future criminal keep in mind at the moment of his crime, a sanction that everyone strives to make more and more abstract? And if it is really desired that he constantly keep that sanction in mind so that it will first balance and later reverse a frenzied decision, should there not be an effort to engrave that sanction and its dreadful reality in the sensitivity of all by every visual and verbal means?*

Arthur Koestler addressed this issue as well. He held that even if we assumed capital punishment *did* act as a deterrent—provided the execution were suitably painful and horrific—it would not necessarily mean it would be a good idea to use it. What if it turned out that execution by lethal injection was not a deterrent, but that killing murderers by throwing them into a pit of hungry crocodiles in the town square reduced the homicide rate? Would we adopt the “execution by crocodiles” method?

Even if we found a method of execution that was so gruesome and obscene that it worked as a deterrent, we would still have to weigh the pros and cons of using it. Deterrence would simply be one of the pros.

Moreover, given the apparent lack of deterrence in centuries past when they used torture, public hanging with disemboweling, drawing and quartering and the like, it seems unlikely that even crocodile executions would work as a deterrent. (Consider also the cobra story at the start of this chapter.)

*In reality, ‘effectiveness’ can never be the only consideration; even if it were proved that death preceded by torture or on the wheel, were more effective, we would refuse to act accordingly.*

—Arthur Koestler

(Koestler is being too charitable here, of course, because some people would have no problem with torturing before execution.)

## **Summary.**

Dozens of countries in Europe, Latin America and elsewhere have stopped capital punishment over the past two centuries, but murder rates did not increase and usually went down. Moreover, the murder rates in states with the death penalty are consistently higher than those without the death penalty. After looking at the available empirical data, a 2012 National Academy of Sciences report concluded that there is no credible evidence to support the claim that capital punishment prevents future murders. The deterrent argument for capital punishment is bankrupt, and should not be allowed to corrupt serious debate on the death penalty.

Finally, as Albert Camus observed, if the death penalty actually did stop a potential killer we would never know it.

*...in the blind hope that one man at least, one day at least, will be stopped from his murderous gesture by thought of the punishment and, without anyone's ever knowing it, will justify a law that has neither reason nor experience in its favor. In order to continue claiming that the guillotine is exemplary [i.e., a deterrent], the State is consequently led to multiply very real murders [executions] in the hope of avoiding a possible murder which, as far as it knows or ever will know, may never be perpetrated. An odd law, to be sure, which knows the murder it commits and will never know the one it prevents."*

An odd law indeed.



# 4

# INNOCENCE

*Innocence. Are Innocent  
People Sent to Death Row?*

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*How many innocent people we have  
found to have been punished... and  
how many there have been that we  
have not found out about!*  
—Michel de Montaigne

In May of 1975 money order salesman Harold Franks was shot and killed outside a Cleveland convenience store. Police soon arrested three men, 18-year old Ricky Jackson and his friends, Wiley and Ronnie Bridgeman. Detectives found a 12-year-old paperboy named Eddie Vernon who said Ricky Jackson and the Bridgeman brothers were the killers. No physical evidence linked the three men to the crime, and the paperboy could not identify the suspects in a police lineup. Moreover, several of the paperboy's classmates testified that he was not near the crime scene at the time of the murders. Nevertheless, the three men were sentenced to death by electric chair.

On death row Ricky Jackson was shaken by the realization that there were people who actually wanted him to die for a crime he did not commit. In 1977 Jackson's sentence was reduced to life in prison due to a

technicality, but his 39 years in prison were brutal. He had to defend himself from other inmates, and ended up in solitary confinement for months at a time. He maintained a sliver of hope, however, and became an avid reader of books from the prison library, which allowed him to forget his sad predicament, at least momentarily.

Jackson also tried to get help by writing letters about his wrongful conviction to journalists and others, and finally a magazine article appeared describing the flimsy evidence against the three men. By an amazing stroke of luck, one of the people who read that article was the pastor of Eddie Vernon, the former paperboy who—those many years ago—said he saw the murder. When confronted by his pastor, Vernon admitted he was on a school bus when the murder occurred, and the police had coerced him to say Jackson and the Bridgemans were the killers. The pastor put Vernon in touch with lawyers from the Ohio Innocence Project who arranged a hearing in which Vernon rescinded his testimony. The Judge dropped all charges against the three men, but it was now 2014, and Jackson had spent just short of four decades in prison for a crime he did not commit.

On January 5, 2019 National Public Radio's Morning Edition presented the remarkable story of the meeting of Ricky Jackson, now a free man, and the "witness" who was responsible for his wrongful conviction, Eddie Vernon. Ricky admitted that while in prison he had been full of hatred for Eddie, whose lie had caused Ricky so much pain. When Ricky saw Eddie testifying in court to rescind his testimony, however, Ricky "saw Eddie as the little, 12-year-old kid," and his hatred started to fall away. When the two met in person and hugged, Ricky said "And it might have been my imagination, but when we embraced, it felt like you just got lighter in my arms." Eddie agreed, observing that

a huge weight had been taken off his shoulders. Eddie said that knowing the terrible lie he had told “ate him up inside” and he was depressed and suicidal as he grew up.

Amazingly, Ricky Jackson forgave Eddie for his false testimony, telling Eddie “People still find it hard to understand that I forgive you... But if forgiveness is my way out, I’ll gladly take it.” Eddie responded, “And I thank God for that, man. I really do.” In the end Ricky simply said to Eddie, “I’m saying, one man to another, I wish you nothing but the best. Always.” I wish I could say that I would be so gracious to someone who had deprived me of my freedom for 39 years.

As Matthew Shaer of the Smithsonian magazine reported, Ricky Jackson recognized the multiple failures that contributed to his false conviction. “it wasn’t only [Eddie] that put us there. It was the lawyers, the police, the whole broken system. And there are a lot of innocent men out there who are never going to get justice. In that sense, I feel lucky.” Ricky’s attorney, astonished at Ricky’s magnanimity, said “He’s probably the wisest person I’ve ever met.”

To the people in the criminal justice system who put Rickey away with such callous disregard for his rights, he was probably just a throwaway person... a young African American male who would never amount to much. Is it possible that the detectives and prosecutors truly did not care if Ricky committed the murder or not? In any case, Ricky Jackson showed through his grace and through his forgiveness that he had ten times more humanity than any one of them could ever hope to have.

As is often the case when police, detectives, prosecutors, attorneys and judges convict innocent people, the actual killer is free to to kill again. Reuters reports that three years after Harold Franks was mur-

dered, Cleveland police linked a gun and car seen at the Franks murder crime scene with another man who was arrested for aggravated murder during a string of robberies. Amazingly, he was not charged with the murder of Harold Franks. If this man was the one who murdered Franks—which seems likely given the evidence—the rush to convict Jackson and the Bridgemans allowed the actual murderer to murder again. This only multiplies the tragedy of the false murder convictions of these three men.

Before further discussing the issue of innocence, however, I must again concede there are criminals whose heinous brutality and lack of remorse by the perpetrator may seem to justify capital punishment. They commit tortures, rapes, and murders without apparent contrition, and they give every indication that given the chance, they would do it again. Upon reading of such savagery, some of us might have fantasies of taking a baseball bat to the murderer ourselves. The problem, unfortunately, is that more often than most people would like to admit, these crimes were committed by someone other than the person we send to death row, and eventually haul off to the execution chamber.

### **EXONERATIONS FROM DEATH ROW**

As stated earlier, as of this writing 166 people who were sentenced to die in the United States have been released from death row for reasons of innocence. If this were a rational rather than emotional discussion, capital punishment probably would have been abolished after the first 5 or 10 exonerations. Some might be tempted to claim that exonerations from death row demonstrate that the system is working. After all, it is usually during the lengthy appeal process that the exoneration takes place, so the system catches the errors before the execution. This claim is a logical error on several levels.



First, since efforts to determine innocence rarely continue after a person is executed, we have little chance of detecting innocence after the person has been put to death. This means that innocent people could easily have been executed without the travesty coming to light.

Second, exonerations from death row occur when there is enough evidence to support exoneration. For other innocent people on death row there simply is not enough exculpatory evidence that can be unearthed, and they have little chance of exoneration. In other words, exculpatory evidence has to exist, and you have to be lucky enough to have someone uncover it. This can be problematic if the evidence is being hidden or manufactured by police or prosecutors.

Third, we have the number of exonerations (the numerator) but we have no idea of the total number of innocent people on death row (the denominator). Without the denominator, we have no idea of what percentage of innocent people are discovered before execution. To think that this number is 100% is preposterous, given the convoluted nature of the appeals and the reluctance of some people involved in the appeal process to grant the convicted a fair and thorough hearing. *Even if the system works exceptionally well and we identified the innocent before executing them 90% of the time—a wildly optimistic estimate—we would have executed almost twenty innocent people given 166 exonerations.* The actual number is almost certainly higher.

Finally, finding innocent people on death row is precisely *not* evidence of a functioning system, but exactly the opposite. Consider “near misses” in commercial aviation where two aircraft end up too close for safety. Near misses are dangerous, and in the United States, the Federal Aviation Administration (FAA) analyzes every incident to find the

root cause. The FAA even has an Aviation Safety Reporting System that allows pilots and crew to confidentially report near misses. A near miss in aviation represents a failure of the system rather than evidence the system is working; near misses are bugs, not features. Likewise, the 166+ exonerations from death row are “near misses” and they show us that our criminal justice system in capital cases is deeply flawed.

**A Near Miss<sup>23</sup>**

Arthur Koestler tells of an interesting case of an exoneration:

*To illustrate how exceptional the circumstances must be for proof of innocence to be possible, take the following example. In 1835 a man was found guilty of murder, sentenced to death and then transported for life to Australia. Nearly forty years later, he met the real murderer on that continent; even so, it took two Parliamentary debates and the eloquence of John Bright to obtain the Queen's pardon. The reader will say, 'Ah, but such cases are rare and exceptional'. He is making a common logical mistake. The exceptionality of the case does not mean that judicial errors are rare; it proves, on the contrary, that it needs exceptional luck to detect a judicial error.*

An article by Samuel R. Gross and colleagues entitled "Rate of false conviction of criminal defendants who are sentenced to death," appeared in the prestigious Proceedings of the National Academy of Sciences in 2014. Their results were disturbing. They concluded that from 1973 to 2004, more than one out of 25 (4.1%) of defendants sentenced to death were falsely convicted. These results contradict late Supreme Court Justice Antonin Scalia's written claim that the error rate in the American criminal justice system is a paltry 0.027 percent. As Gross and colleagues

**Samuel R. Gross<sup>24</sup>**

pointed out, however, Scalia committed the flagrant error of taking the exonerations known at the time for murder and rape (which are only a subset of criminal false convictions) and divided that number by all felonies for any crime, including things like income tax evasion. Gross and colleagues called this absurd calculation “silly.” It is a sad day when a Justice of the highest court in the land makes a claim that would earn an “F” on a paper if he submitted it as freshman in a criminal justice class.

Justice Scalia refused to acknowledge that our criminal justice system is fatally flawed in its application of capital punishment. His mind-numbing obstinacy appeared to arise primarily from his rejection of incontrovertible evidence, but also through his distortion of data. Scalia denied that we have a serious problem of putting innocent people on death row. A rational person would look at the 166+ people exonerated and released from death row, and admit that our criminal justice system in capital cases is badly broken.

Plato knew about people like Justice Scalia, and would have called him a “philodoxer”—defined as a person who is especially fond of his or her own opinions, without having objectively investigated the facts of the situation. We all encounter people like this in our daily lives, and we are all guilty of this failing to one degree or another. We did not deserve, however, to have a flagrant and unrepentant philodoxer on the United States Supreme Court for so many years.

Many death row inmates have spent decades on death row before exoneration, which demonstrates the peril of shortening the time from sentencing to execution (as recommended by some death-penalty pro-

ponents). Speeding up the process would substantially increase the risk of sending innocent people off to be executed.

*We should always give ourselves time:  
its passing reveals the truth. ... Punishment  
delayed can still be exacted; once exacted  
it cannot be cancelled.*

—Seneca, On Anger

In the Intelligence Squared debate, Mr. Kent Scheidegger launched into a diatribe about how the risk of executing the innocent “is much less than the other side says” but he offered no evidence. Then he made the highly disingenuous statement, “The claim you may have heard of 152 [now 166] innocent people, that list has been debunked.” Really? Every person on that list is actually guilty? He gives no data, but he implies that we can disregard almost all of these 152 people and pronounce them guilty. He then admits to a “handful of cases” of innocent people being sentenced to death. This is interesting, since there have been more than a “handful” of innocent death row inmates released every year since they started keeping records of these exonerations. And many of these exoneration cases were strong, with innocence established through DNA testing, blood testing, or other definitive measures.

Let us unpack the validity of the arguments made by Mr. Scheidegger and others that most of the people who are exonerated from death row are guilty of the crimes that put them on death row, but are just not guilty in a legal sense.



First, as already mentioned, for many of the exonerated death row inmates, the evidence of innocence is virtually certain, such as DNA results or other compelling evidence. Scheidegger's argument obviously does not apply to these people because they clearly did not commit the murder.

Second, the argument is a *non sequitur*, because people for whom there is not enough evidence for a legal determination of guilt (i.e., the 166+ exonerated people) are by definition "not guilty." We cannot put people on death row because we *think* they may be guilty; we must have sufficient evidence. I think everyone would agree that this is how the criminal justice system is supposed to work.

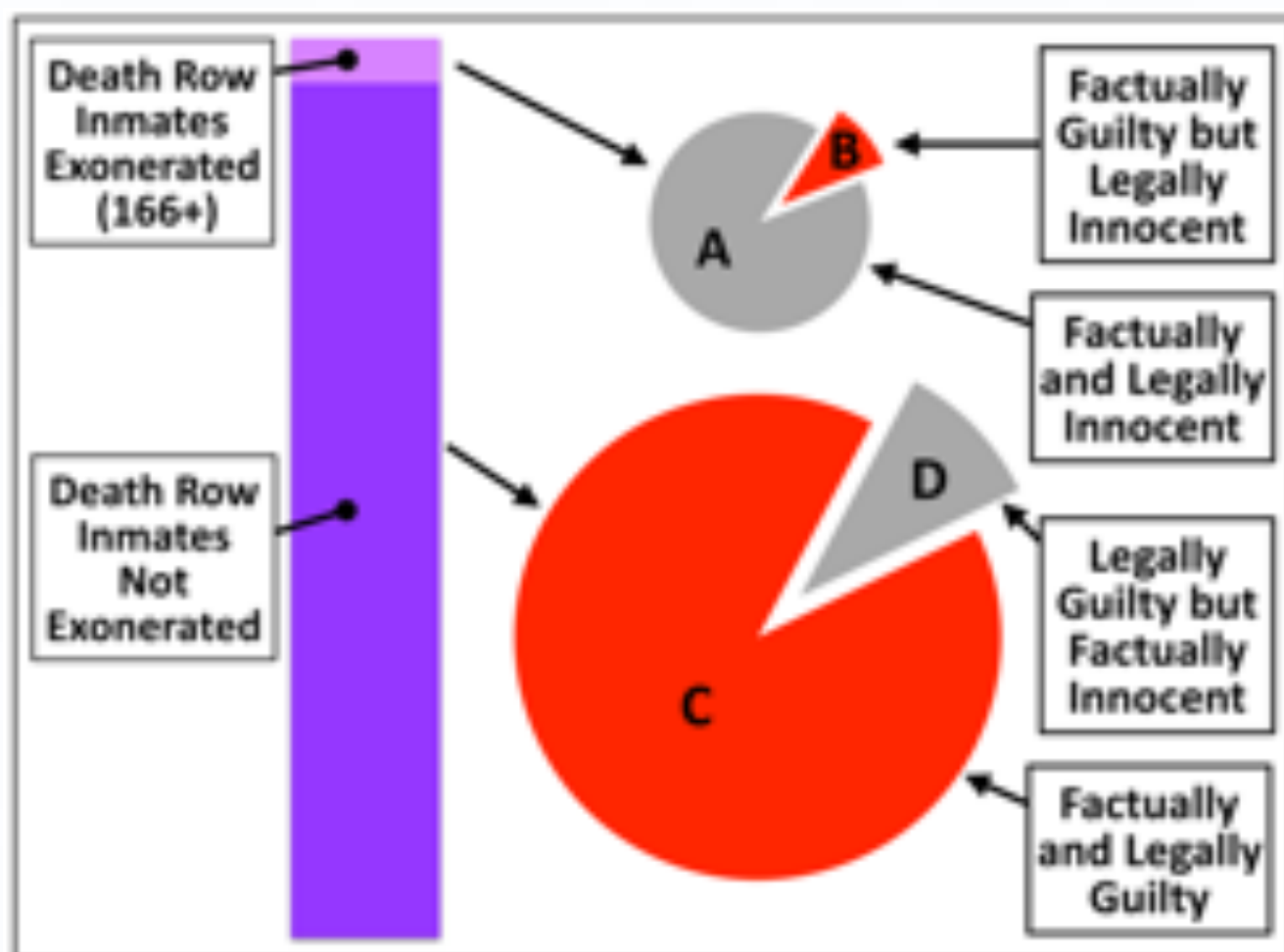
Third, even in the unlikely event that several dozen of the 166+ people exonerated as of this writing were actually guilty and the true number of innocent people is only 120, does that really affect the argument that we have a serious problem of putting innocent people on death row?

Finally, even if a few of the exonerated people are actually guilty, there are almost certainly at least as many truly innocent people on death row for whom we do not have exculpatory evidence and their innocence is never discovered. They never appear on any one's radar screen. Such people would probably more than offset any guilty people who were exonerated.

This last point is shown in **Figure 9**, where those who are exonerated from death row are the lavender at top of bar on the left. If you break these down in a pie chart the bulk are almost certainly factually innocent as represented by the gray part labeled "A" in the pie chart. Here the system worked as it should, with factually innocent people being

correctly exonerated for reasons of innocence. Given the reasons that led to exonerations such as DNA evidence, false confessions, mistaken witness identifications, prosecutorial misconduct and especially perjury or false accusations (which was present in two-thirds of exonerations), this strongly suggests that most defendants who were exonerated were factually innocent as well as legally innocent.

Slice “B” in red represents the people who actually committed the crime but were found legally innocent. Mr. Scheidegger would have us believe that this slice represents the majority of the people who are exonerated, but there is



**Figure 9.** People exonerated from death row.

absolutely no evidence to support this claim. Moreover, this argument conveniently ignores the lower pie graph which breaks down those on death row who are *not* exonerated. Most of these people are no doubt guilty (represented by “C” in red on the lower pie chart), but there are almost certainly many factually innocent people who are never discovered to be innocent, represented by “D” in the lower pie chart. Mr. Scheidegger wildly exaggerates slice B (people who are exonerated, but actually guilty) and completely ignores slice D (the factually innocent people who are never exonerated). Based on reason and evi-

dence, it is likely that the number of people in slice D is substantially greater than the number of people in slice B. Kevin Cooper, who we discussed earlier, is almost certainly in the D category—as of this writing he has not yet been exonerated, but I am hopeful by the time you read this he will have been.

*It is better 100 guilty Persons should escape  
than that one innocent Person should suffer.*

—Benjamin Franklin

Then Mr. Scheidegger made a most astonishing argument in favor of capital punishment. Here it is: the death penalty is better than death in prison for the innocent inmate because he is more likely to have his innocence revealed if he is under the threat of death than if he is sentenced to life in prison. Let us explore this reasoning.

Let us be wildly optimistic and say that 90% of the innocent people on death row are released for reasons of innocence. The 10% of innocent people not released, of course, are subject to execution, and some will be executed. On the one hand he argues—despite compelling evidence to the contrary—that virtually nobody on death row is actually innocent, and then he argues that the death penalty is a good thing because the innocent are more likely to be exonerated.

So apparently, Mr. Scheidegger is recommending the death penalty as an instrument for correcting the flaws in a system that sends innocent people to death row on a regular basis, even though some of these innocent people will be executed. To be blunt but fair, patently absurd arguments such as this have no place in reasoned debate about capital punishment.

Taken together, the empirical evidence suggests that innocent people are regularly sent to death row. This is hardly surprising given that we are dealing with a flawed criminal justice system inhabited by fallible human beings, as we will discuss in Chapter 5. It would be amazing if we did *not* condemn innocent people to death. This raises our next question: Have we already executed innocent people?

### **HAS AN INNOCENT PERSON ACTUALLY BEEN EXECUTED?**

A couple decades ago, I was sitting on a plane at the Seattle-Tacoma Airport waiting to leave for Denver, when a trim, middle-aged man with a beard sat down next to me. After he got settled I leaned over and said to him, “You are a physics professor at the University of Alaska in Fairbanks, and you are an expert on aurora borealis.” He looked at me, astonished, and asked, “How did you know that?” I’m terrible with names, but pretty good with faces, so I explained to him that we sat next to one another about a year earlier on a different airline going to a different city. On that previous flight we had chatted about our respective disciplines, and I found aurora borealis fascinating.

I then made the mistake of commenting, “What are the chances that we would sit by one another twice?” I meant it rhetorically, but he whipped out a calculator and began to grill me on the number of flights I took each year, and on which airlines. He even stopped a flight attendant to ask her questions about the number of seats on the plane and how many flights this airline had between various cities. He paused after about ten minutes of furious calculating, and I asked him what the chances were. The best he could do was, “Very slim.” He told me there were too many variables and pieces of data he did not have.



Death penalty proponents sometimes portray the risk of executing an innocent person as similar to the likelihood of the same professor sitting next to me on an airplane twice. Would that this were true. Unfortunately, unlike the pure chance event of the airplane coincidence, the person accused of murder often has powerful tailwinds pushing him or her toward execution in the form of people who may be eager to see the crime solved and the accused executed: police, prosecutors, district attorneys, and sometimes judges, juries, and expert witnesses.

THE DATA ON EXONERATIONS from death row detailed in the previous section lead to the virtual certainty that we have already executed a number of innocent people, and that when we prepare an inmate for execution, there is a nontrivial chance that we are about to take the life of an innocent person. This creates (or perhaps I should say “ought to create”) an uncomfortable dilemma for anyone who, for example, feels that all life is sacred, yet supports capital punishment.

When he was on the US Supreme Court Justice Antonin Scalia challenged death penalty opponents to show him a single case of an innocent person who has been executed, and others have taken up his cause. Scalia’s demand was irrational and disingenuous, however, because—as we have stated—once a person is executed, efforts to prove his innocence basically stop. As Arthur Koestler observed over sixty years ago, “Once a man is dead, the chances of proving that he was innocent are virtually nil.” It is no different today. Montaigne called this a “Mustard After Dinner” situation: “Mustard after dinner. I have no use for a good thing of which I can make no use.”

This is a critical point. It would be very surprising if we *did* have many examples of innocent people who have actually been executed. The

system is geared to ignore and even suppress evidence of innocence after the person is dead. The impediments to exonerating the already executed are manifold.

First, the people who are the most involved in exonerating innocent people on death row—the various non-profit groups like the Innocence Project—have so many other (living) people on death row that need representation, that they simply do not have the resources to deal with possible exonerations of those who have already been executed.

Second, detectives, prosecutors, and judges are obviously reluctant to reopen and investigate a case where—due to their own incompetence or misconduct—an innocent defendant has been convicted and executed. Moreover, they may see no good that can come out of a thorough investigation, since the person is already dead. The horse has already left the barn. Even when the defendant is still alive on death row, they are often not happy to revisit a case that has already been adjudicated. It is a no-win situation for them. If it turns out that the person actually committed the murder, they have just wasted their time dealing with a guilty defendant who was already sent to death row. And if the person turns out to be innocent, it may expose embarrassing incompetence or misconduct on the part of the prosecution team.

Third, for some innocent people sent to death row, there are no warning signs of a miscarriage of justice that would be picked up by the various non-profit groups that are involved. The police, detectives, and prosecutors may have not committed any misconduct, and may have genuinely believed that the person was guilty. The defendant may have had adequate (if uninspired) legal representation. The judge and juries may have similarly performed their respective functions appropri-

ately. For all that, an innocent person could still be sent to death row. It is baked in to our deeply flawed criminal justice system.

*Innocent men have been hanged in  
the past and will be hanged in the future  
unless either the death penalty is abolished  
or the fallibility of human judgment is  
abolished and judges become supermen.*

—Arthur Koestler

FROM A PHILOSOPHICAL PERSPECTIVE, the possibility of proving unequivocally and with 100% certainty that a person did *not* do something is vanishingly small. Proving a person's innocence is rarely an all or none proposition—as with virtually everything else in life, we are dealing with probabilities. With people on death row, we have theoretically eliminated the obviously innocent from consideration. For example, a person who was making a presentation in front of 200 people at the time the murder occurred in a different city can be assumed to be innocent of committing the murder with virtual certainty. One must posit fantastical scenarios to deny their innocence, such as an unknown identical twin or a look-alike conspiring with the murderer. For almost all people on death row, however, no easily provable and incontrovertible exculpatory evidence has been found, or—if it has been found—it has been hidden by detectives or prosecutors. Accordingly, proving innocence usually depends upon a chance finding.

In the course of human affairs, we can and should make valid inferences based on known data; it is what we do. Let us consider an analogy from the field of drug interactions. The ability of allopurinol (used mainly for gout) to increase the risk of life-threatening bone-marrow

suppression in patients receiving azathioprine (used to suppress immune responses) has been known for half a century. Giving the two drugs concurrently without adjusting doses and monitoring of bone-marrow function is potentially fatal, yet over the decades a steady stream of tragic case reports have been published. One recent case made it to a major newspaper complete with a photo of the woman who was killed by the interaction, and naming the physician and pharmacist who failed to recognize the problem until it was too late.

If we count up all the fatalities from this interaction appearing in the medical literature, in the press, and reported to regulatory agencies, can we conclude that this number represents the total of all people who have been killed by this interaction? That would be an absurd conclusion. First, we know that many adverse drug interactions are never diagnosed as such. Second, even when cases were correctly diagnosed, the health professionals who made the mistake are unlikely to advertise their incompetence by publishing it in a medical journal. There are also medico-legal issues, if the relatives of the patient figure out what happened. The answer is, therefore, that the cases that have come to light could not possibly represent the total number of people killed by this drug interaction—the actual number of fatalities is almost certainly several fold higher.

Another example of valid inference from empirical evidence are the gray whale moms who make the trek from Mexico to Alaska with their calves in tow. Unfortunately for them, predators await, and some of the calves have been observed falling prey to orcas despite the valiant efforts of their moms to protect them. Given that we know many grey whale calves do not make it all the way from Mexico to Alaska, would it be logical to assume that the only ones who were killed by orcas are



the ones we personally observed? After all, we have no proof that other whale calves were eaten by orcas. Or would it make more sense to assume that the instances we observed represent only a subset of the total? The answer is obvious. Similarly, the chances that the 166+ people exonerated from death row represent all of the innocent people who have been condemned is virtually nil. (See Figure 9 above)

It is a logical fallacy to claim that because we do not have incontrovertible proof of the execution of a number of innocent people, we are therefore certain that no innocent people have been executed. This fallacy of informal logic is called “argument of ignorance” where one claims that whatever has not been proved to be true beyond any doubt must be false. But absence of proof is not proof of absence. We can thank philosophers John Locke and David Hume for this concept.

Moreover, there are many cases where the evidence does in fact strongly suggest that the executed person was innocent. Consider Cameron Todd Willingham who was almost certainly innocent of setting the fire that killed his 3 children. Rick Perry, governor of Texas, ensured that Willingham would be executed by replacing key members of the Texas Forensic Science Commission just days before they were to hear from a forensic expert who would testify that the evidence in the Willingham case was invalid. Rick Perry... tough on crime... soft on the truth.

As we noted earlier, during the Republican debates for the 2012 presidential election Brian Williams asked Perry about the high rate of executions in Texas. Before Williams could finish the question, however, the crowd started clapping, cheering and whistling its approval of the executions. After the audience settled down, Williams then asked

Perry if he struggled to sleep at night with the idea that any one of those people might have been innocent. With no hesitation Perry assured Williams that he had no problem sleeping.

This exchange reminds me very much of an essay by Albert Camus, *The Artist and His Time* in which Camus talks about why he had been so outspoken about the injustice he saw in the world. He begins by citing the miner who is shot down, the slaves in the camps, the persecuted masses throughout the world, and argues that “they need all those who can speak to communicate their silence.” He concluded with this insightful observation:

*But from my first articles to my latest book I have written so much, and perhaps too much, only because I cannot keep from being drawn toward everyday life, toward those, whoever they may be, who are humiliated and debased. They need to hope, and if all keep silent or if they are given a choice between two kinds of humiliation, they will be forever deprived of hope and we with them. It seems to me impossible to endure that idea, nor can he who cannot endure it lie down to sleep in his tower. Not through virtue, as you see, but through a sort of almost organic intolerance, which you feel or do not feel. Indeed I see many who fail to feel it, but I cannot envy their sleep.*

Here we have testament to Camus’ remarkable magnanimity, his penetrating insights into human nature, and his refusal to play the role of the self-righteous scold. Despite Camus’ vehement opposition to capital punishment, I think he would have felt that Rick Perry, like himself, was in some sense a victim of unknown forces that either do or do not imbue this “organic intolerance” to injustice. Camus had it; Perry does not. On Camus’ view, individuals either have the ability to empathize

with the oppressed or they do not, and don't have much control over the whole thing. Montaigne expressed a similar sentiment, describing any virtue he [Montaigne] might have as "accidental and fortuitous."

Historically, many politicians—both conservative and liberal—apparently feel their chances of winning elections are enhanced by being "tough on crime." On the conservative side, most candidates for election no doubt truly do believe that capital punishment is good public policy. They may up the ante a bit with graphic details of crimes to make to make sure the electorate gets the picture, but their basic feeling on the death penalty is probably genuine.

Most (but clearly not all) liberal candidates on the other hand tend to either avoid the topic or, alternatively, come out in favor of capital punishment for one very simple reason: if they admit being opposed to capital punishment, their conservative opponent will almost certainly demagogue the issue calling them "soft on crime." Thus, at least some liberal candidates apparently conclude that capital punishment is an issue over which it not worth losing an election.

Finally, Rick Perry is hardly alone among death penalty proponents who claim that the innocent are never executed. Arthur Koestler describes the same argument being made repeatedly during the death penalty debates in Britain in the mid-20th century. Mercy was never refused when there was a "scintilla of doubt," was the typical refrain. But, of course, whether or not they have doubts in executing people is more or less irrelevant; the question is whether the accused is actually guilty... not whether they *think* he is guilty. I'm sure there are many issues about which I do not have a "scintilla of doubt" but am completely wrong about.

## EXAMPLES OF EXONERATIONS

There is no better way to gain an appreciation for how innocent people are sent to death row than to look at the details of some actual cases. Given the 166+ exonerations, there are exactly that many stories, but here are just two. (Several others, are described in other chapters in this book.)

### ***Henry Lee McCollum and Leon Brown.***

Henry Lee McCollum and Leon Brown, two mentally disabled half-brothers from North Carolina, were convicted of brutally murdering an 11-year old girl. They spent 30 years in prison for a crime they did not commit. McCollum spent it on death row, and both men have now been exonerated and released. Although McCollum and Brown are just two more people exonerated and released from death row, the case is of particular interest because it had earlier attracted the attention of Supreme Court Justice Antonin Scalia. Although Justice Scalia is no longer with us, his arguments linger on with the “hang-hards,” so it is reasonable to address the validity of Scalia’s arguments.

Justice Scalia’s rhinocerine obstinacy regarding capital punishment was well known, but in 1994 Justice Scalia made the unfortunate choice of using Henry Lee McCollum as an example of why the death penalty is absolutely necessary. Scalia dismissively rejected fellow justice Harry Blackmun’s assertion that the death penalty is unconstitutional, citing the McCollum case. But instead of proving Scalia’s point, of course, it turns out that the McCollum case shows precisely why the death penalty should be abolished. If Scalia had been a reflective thinker rather than a reactive ideologue, one would expect he would have acknowledged that he was dead wrong on this case, and per-



haps considered the possibility that he was wrong about capital punishment in general. It never happened.

### ***Manuel Velez.***

On the afternoon October 31, 2005 in Brownsville, Texas an 11-month old boy, Angel Moreno, began having trouble breathing and was rushed to the hospital. He died two days later from head trauma. Angel's mother, Acela Moreno was charged with capital murder, as was her live-in boyfriend, Manuel Velez. Before her trial, however, Acela accepted a plea deal admitting to child abuse, but claiming that Velez was the one who had administered the fatal blows. Acela went to prison, but she was then released and deported back to Mexico. Manuel Velez was tried and sentenced to death for killing the infant.

As is often the case for those wrongly sent to death row, however, Velez's innocence was discovered by pure chance. It was only because a Texas law professor was concerned that Velez was mentally disabled that the ACLU and two respected law firms joined to assess Velez's case. What they uncovered was an obscene travesty of justice.

First, at the time of her arrest, Acela Moreno had said in a recorded interview that Velez had never struck Angel or mistreated him in any way. After she got the plea deal, however, she changed her story and told the jury at Velez's trial that he was the culprit.

Even more disturbing, however, was that the expert neuropathologist had presented unequivocal evidence that the head trauma that killed Angel had occurred before Velez had any contact with the infant. When Angel was injured Velez was on a job 1000 miles away in Memphis, Tennessee. Velez's initial defense attorneys did not even bring

up this obviously exculpatory evidence despite the fact that it was a prominent part of the autopsy report.

Also ignored by Velez's original defense attorneys were several witnesses, including Acela's family members, who testified that she had repeatedly abused Angel. Acela had also admitted to detectives that she bit Angel on the face and burned him with a cigarette. One witness said Acela flew into a rage at Angel's crying and threw him five feet onto a couch.

Police misconduct also played a role. Despite the fact that Velez was functionally illiterate in both Spanish and English, during his interrogation police typed up two statements in English and had Velez sign them. It was clear that Velez had no idea what he was signing, but it turned out he was falsely admitting to shaking, biting and otherwise abusing Angel. To make matters worse, police did not videotape their interview of Velez, even though video equipment was readily available to them.

Then some ugly prosecutorial misconduct came to light. One of the two statements interrogators concocted was more damning than the other because it had more false confessions, so prosecutors chose that one and lied that the other one was made up by the defense attorneys. This is a perfect example of how much control prosecutors have in criminal trials, where they often overwhelm the poorly funded and overworked defense counsel. But the cherry on the top of this dismal fiasco was the judge, who also made errors that came to light only when the case was appealed.

Manuel Velez had one more outrage to endure, however. Despite the fact that the state of Texas did not dispute any of the facts in Velez's

appeal, and despite the fact that they knew they had put an innocent man in prison for 9 years, they obstinately demanded that he plead guilty to a lesser crime of reckless injury to a child or go to a retrial. The state of Texas, instead of expressing remorse or contrition for how they treated Velez, wanted to double down and force one more indignity on him.

Velez wanted to clear his name and hear the words “not guilty” declared in court, but even more he wanted to see his two sons, his aging parents, and his siblings. Therefore, Velez pleaded no contest to the new charges and left for Brownsville with this conviction on his record. Ironically, the very misconduct committed by the state of Texas was a major reason Velez could not take a chance on a retrial to clear his name. He and his lawyers knew that they would be dealing with the very people who had committed the wrongdoing that lead to his initial conviction, and who had a score to settle, given that their unconscionable behavior had been exposed.

This is the sad story of how Manuel Velez was repeatedly denied due process through egregious misconduct by police, detectives, defense attorneys, prosecutors and a judge. It is impossible to sort out how much of this injustice was due to incompetence, sloth, racism, anger, machismo, a desire for personal advancement or reelection, or just bad habits. In the end, I suspect at least some of them looked at this illiterate Mexican immigrant, a manual laborer with no future they could discern, and they didn't really care much what happened to him one way or the other. As Simone Weil put it, “That marvelous indifference that the strong feel toward the weak.” How much evil in the world has been perpetrated by those who just don't give a damn? (I realize

that I have gone a bit ad hominem here, but it is difficult not to become indignant at an injustice of this magnitude.)

To the extent that indifference to the truth—rather than outright lying—leads prosecutors and others to send innocent people to death row, they are classic “bullshitters” as described by philosopher Harry Frankfurt. In his intergalactic bestseller *On Bullshit* Frankfurt described the difference between lying and bullshitting. Liars tell you something they know to be untrue, while bullshitters don’t care much about the truth one way or the other. There is a certain mindlessness in mind of the bullshitter—as Frankfurt put it, “It is just this lack of connection to a concern with truth—this indifference to how things really are—that I regard as the essence of bullshit.” While some law enforcement officials and prosecutors may be guilty of lying and duplicity, some of them may just not care that much whether or not the defendant is guilty.

Photographer Joanna Kulesza catalogued Velez’s release from prison, and then followed Velez and his team of attorneys 500 miles to Brownsville for Velez’s joyous reunion with his family and friends. I doubt the people responsible for his incarceration ever saw those photos, but I will never forget them. Particularly poignant was the photo of Velez being reunited with his two sons, Jose Manuel 15, and Ismael 11, with Ismael wrapping his arms completely around his father.

IT IS NOT UNUSUAL TO SEE astonishing callousness and intransigence on the part of prosecutors, district attorneys and law enforcement after it becomes clear that a defendant is innocent. But occasionally there are exceptions, such as exonerated death row inmate Glenn Ford.

Glenn Ford was released from death row in 2014 after 30 years in prison for a crime he did not commit. The State of Louisiana admitted



Ford's innocence, but denied compensation for his time on death row (in a dingy small cell with poor lighting, heat and cooling). Ford had lung cancer that was not adequately treated in prison and he died not long after being released. But in this case, unlike the typical situation in which prosecutors and district attorneys cling to the fiction that the accused is actually guilty, the prosecutor who put Ford in prison, Marty Stroud, has apologized to Mr. Ford and to the victim's family. Stroud called the death penalty an "abomination that continues to scar the fibers of this society." Would that more prosecutors had the integrity of Marty Stroud, and were willing to admit their mistakes.

## **DIFFICULTY OF GAINING EXONERATIONS**

In a sense, it is amazing that we have as many exonerations from death row as we do, given the tenacity with which many prosecutors and district attorneys desperately hold onto their death penalty convictions, sometimes in the face of overwhelming evidence of innocence. We have presented some examples of this earlier, but it is difficult to find a case as egregious as that of death row inmate Kevin Cooper.

As of this writing in early 2020 Kevin Cooper has been on death row in California's San Quentin Prison for more than three decades after being convicted of the brutal murder of four people in 1983: Doug and Peggy Ryen, their 10-year-old daughter, Jessica, and a visiting friend, 11-year-old Chris Hughes.

Huge holes in the prosecution's case started to emerge early on, and over the years the case has gone completely rancid with new evidence of duplicity and deception by the police. Yet Kevin Cooper remains on death row as of this writing. (Efforts to gain his exoneration are ongoing, so I hope he will be free by the time you read this.)

Let us review how the police, detectives, and prosecutors immediately decided Kevin Cooper was the murderer (based on virtually no evidence) and then proceed—according to many who have looked carefully at the evidence—to falsify, destroy, withhold, or ignore the evidence to achieve a conviction.

Before the murders, Cooper had escaped from a minimum security prison, and had been hiding out in a vacant house near the Ryen's house. These two facts apparently conferred a kind of certainty to police detectives that Cooper committed the murders. There is little evidence that they considered any other viable suspects after they found out that Cooper was in the vicinity, despite almost all of the evidence pointing away from Cooper.

The following information comes from a variety of sources, but much of it from Judge William A. Fletcher of the Ninth Circuit Court of Appeals. (I also discussed many of these points with Kevin Cooper himself.) After thoroughly reviewing the case against Kevin Cooper, Judge Fletcher wrote a scathing—but meticulously documented—dissent from the Ninth Circuit Court denial of Kevin Cooper's appeal for a rehearing of his case. In his almost 100-page dissent, Judge Fletcher described the discrepancies, irregularities, and the compelling evidence suggesting the police had framed Cooper. Four other Ninth Circuit Court Judges joined Judge Fletcher's dissent.

**Judge William  
A. Fletcher<sup>25</sup>**

New York Times columnist Nicholas Kristof has also written and talked about Kevin Cooper's case several times. After reviewing numerous documents, trial transcripts and talking to many people involved in the case, Kristof said, "In 34 years at The New York Times, I've never come across a case as outrageous as Kevin Cooper's."

Former FBI agent Tom Parker looked at the evidence against Cooper, and concluded that the police reversed the normal procedure of collecting evidence and determining where the evidence leads. Instead the police decided Cooper was the murderer and then collected evidence to support their preconceived notion. They developed “tunnel vision”—as Parker called it—which is precisely what police should *not* do in an unfolding case like this. Parker was particularly troubled by how incriminating physical evidence miraculously “appeared” *after* the police had already thoroughly searched an area. The “discovered” evidence, of course, all implicated Kevin Cooper.

As I mentioned in the Key Points, I spent two hours with Kevin Cooper in September 2019 sitting with him in a “visiting cage” on death row at San Quentin Prison in California. We discussed the current status of his defense including some discrepancies which are discussed below, but it was difficult for me to maintain my composure as he described what was going through his mind the night in February 2004 when he was hauled off for execution and was only a few hours from dying when he received a stay. I will discuss this in Chapter 6 on Cruelty.

We now turn to the astonishing contortions and counterfactuals promulgated by the San Bernardino Sheriff’s Department.

### ***Witnesses.***

THE LONE SURVIVOR SAW “THREE WHITE MEN.” Doug and Peggy Ryen’s 8-year-old son, Josh, was savagely attacked and left for dead, but survived. Josh initially told investigators that the attackers were three or four white men, and the police issued a bulletin to be on the lookout for them. Over time, detectives visited with Josh numerous times, and he eventually revised his story to say it was a single attacker. Even

more disturbing, when Josh Ryen saw Kevin Cooper on the television, he volunteered that Cooper was *not* the murderer.

DIANA ROPER. Another potential witness was Diana Roper, who told deputies that her boyfriend, a convicted murderer, showed up late on the night of the murders with coveralls drenched in blood, and driving a station wagon that looked like the one stolen from the Ryen's house that night. Her boyfriend was with some other people who stayed in the station wagon. Roper gave the bloody coveralls to the police. Also, her boyfriend's hatchet was missing from the tool rack, a hatchet that looked like one of the murder weapons.

TAN T-SHIRT. Diana Roper also said that on the day of the murders, she laid out a tan medium-sized Fruit of the Loom T-shirt with a pocket on the chest for her boyfriend. It was the exact brand and type of shirt later discovered by the sheriff's department with blood on it near the murder scene.

STATION WAGON WITH WHITE PEOPLE INSIDE. Several witnesses said they saw what looked like the Ryen's station wagon the night of the murders with several white people inside. Another witness said she saw the Ryen's car the next day driving erratically with three white people in it. Her grandmother wrote down the license number. It was the Ryen's station wagon.

WITNESSES AT BAR. The night of the murders, Christine Slonaker was eating at the Canyon Coral, a bar not far from where the murders took place. She reported that three men came into the bar, and one man in particular was "covered in blood." She said there was so much blood the men's feet were sticking to the floor. Not knowing about the murders at the time, she said she assumed that perhaps they were slaugh-



tering animals. Moreover, she reported that there was a uniformed police officer in the bar, and she assumed he would follow up. She only came forward many years later when she heard Kevin Cooper was about to be executed.

### ***Physical Evidence.***

Initially there was no physical evidence of Cooper having been at the murder scene such as hair or fingerprints, but then evidence began to appear. It seems strange that the evidence was not found with the first investigation by police.

BLOND OR BROWN HAIR. In the hands of the murder victims investigators found straight blond or brown hair, but Kevin Cooper is African American.

GREEN BUTTON. Even though the empty house Cooper had been staying in had been well searched, new items started to appear, such as a green button from a prison coat. The problem? Cooper had been wearing a brown coat with different types of buttons. How did the green button get there unless someone brought it there after the murders to implicate Kevin Cooper?

CIGARETTE BUTTS. When they found the Ryen's station wagon, an initial search found no evidence that Cooper had been in the car, but later detectives found cigarette butts that matched the butts they had retrieved from the house in which Cooper had stayed. How could they have missed seeing the cigarette butts with a thorough initial search, but then find them later? It is certainly possible that the detectives simply missed the cigarette butts the first time, but the *most probable* explanation is that they were planted by detectives.

LOCATION OF STATION WAGON. Even though we know Cooper checked into a Tijuana hotel at 4:30 PM the day after the murders, the Ryen's station wagon was found six days later in a church parking lot in Long Beach, California. Why would Cooper have dropped the car off more than a hundred miles away from Tijuana? The car was also just a few miles from the home of the stepmother of Diana Roper's boyfriend, the one with the bloody coveralls. And most damning of all to the Sheriff's case, the priest at the church said the car was not there the day before. So how exactly did the car arrive there five days after the murders, when Cooper was already in Tijuana the day after the murders?

BLOOD ON CAR SEATS. The station wagon had blood not just on the driver's seat, but also on the front passenger seat and one of the back seats—precisely what one would expect if there were three killers in the car. When I visited Kevin Cooper at San Quentin State Prison, I asked him if the police thought he had murdered four people, and then sat in three different seats in the station wagon just for the fun of it. Cooper just smiled and shook his head.

BLOODY COVERALLS DISCARDED. What happened to the bloody coveralls? After Diana Roper gave them to the the San Bernardino County Sheriff's Department, they threw them away with no testing whatever. Keep in mind that the bloody coveralls *were worn by a convicted murderer who showed up at Roper's house on the night of the murders driving a station wagon similar to the one stolen from the Ryens*. If this were a TV crime drama, one would think the writers had gone too far to be believable.

BLUE AND TAN BLOODY SHIRTS. Another problem for the prosecution was that they found two bloody shirts—one tan and one blue—dis-

carded by the perpetrators after the murders. This was inconvenient, since they claimed Cooper was the murderer, so the blue shirt simply disappeared, just like the bloody coveralls.

TENNIS SHOES. One of the most egregious violations of Kevin Cooper's rights related to shoeprint evidence. During Cooper's trial, a key prosecution claim was that the shoeprints found at the murder scene were "Pro-Ked Dudes" tennis shoes, and they were not sold anywhere in retail outlets. The shoe, they said, was available only at prisons like the one from which Kevin Cooper escaped. The problem was that this was patently false; the shoes were available to the public through retail outlets such as Sears.

It was later determined that the Sheriff's investigators were given this information *before* trial, and kept it away from Cooper's defense. This was a blatant Brady violation (failure to divulge exculpatory evidence to the defense). This violation by prosecutors was devastating to Cooper's claim of innocence, because the jury was told the tennis shoes were not sold to the public, and the only place they could have come from was an institution like the one from which Cooper escaped.

But the tennis shoe saga gets worse in several more ways. First, as Judge William Fletcher observed in his dissent, there was a "suspicious delay" in the discovery of the shoeprint on a sheet at the murder scene. It was not initially seen at the murder scene, but was supposedly "discovered" later in the Sheriff's crime lab. It is not clear why the shoeprint was not seen initially.

Second, the manager of the Sheriff's crime lab where the shoeprint was belatedly found was William Baird. Not long after Kevin Cooper's

trial, Baird was found stealing heroin from the Crime Laboratory, which he apparently was using himself as well as selling to drug dealers.

Third, James Taylor, an inmate in prison with Cooper, testified at Cooper's trial that he had issued Pro-Ked Dudes tennis shoes to Cooper right before his escape from prison. Taylor was given a reduction in his sentence as a result of his testimony. The problem is that Taylor later gave a sworn declaration recanting his trial testimony. He was lying, apparently in order to get a shorter prison sentence.

Fourth, virtually everyone on the prosecution and the defense agreed that the tennis shoe evidence was critical to convicting Cooper. District Attorney Dennis Kottmeier in helping James Taylor get a reduced prison sentence said Taylor's tennis shoe testimony "was of critical importance both at the preliminary hearing and at the jury trial." When Cooper's case was appealed to the California Supreme Court, they affirmed Cooper's conviction, and specifically referred to Taylor's tennis shoe testimony as a reason for denying his appeal.

**DNA TESTING OF TAN SHIRT.** By 2002 Kevin Cooper had been on death row for almost twenty years, but by this time DNA testing was available. So Cooper's defense team requested DNA testing on the bloody tan shirt. If Kevin Cooper were actually guilty, despite his repeated claims of innocence, why would he want the tan T-shirt tested?

Clearly, Cooper and his team thought at last they would prove his innocence. But the test found Cooper's blood on the T-shirt. Cooper and his team were incredulous and dismayed, and Cooper was then scheduled to be executed at 12:01 AM on February 10, 2004. At the last minute, Cooper was given a stay of execution and his team was allowed to do additional testing on the shirt. When the testing was done, it



strongly suggested evidence tampering by the San Bernardino Sheriff's Department.

The new testing provided a startling discovery; in addition to Cooper's blood, the T-shirt also tested positive for EDTA, a chemical used to preserve blood samples. This would be consistent with the T-shirt having Cooper's blood coming from a test tube rather than directly from him. And guess what—the sheriff's office indeed had a test tube of Cooper's blood.

To make it even more damning for the Sheriff's department, when they tested the blood from the test tube of Cooper's blood, it now contained blood from at least one other person. The most likely explanation? After using some of Cooper's blood from the test tube to put on the tan T-shirt to incriminate him, the sheriff's department added some other blood to the test tube to conceal the missing blood. (Anyone who drank booze from their parents liquor cabinet and then added water to the bottles to conceal the theft knows this principle!)

Of course, none of this *proves* that the sheriff's department tampered with evidence to implicate Kevin Cooper. Rather, like everything else, it is a matter of probabilities. What is more likely... that a guilty inmate who had repeatedly professed innocence would request DNA testing that would almost certainly seal his fate and lead to his execution? Or is it more likely that a sheriff's department that had repeatedly falsified, destroyed, and planted evidence would continue to do everything they could to make sure the person they framed would be executed?

### ***Law Enforcement Personnel.***

SHERIFF FLOYD TIDWELL. San Bernardino County sheriff Floyd Tidwell *at the same time he was investigating Kevin Cooper for murder, was*

stealing guns from the Sheriff's evidence room. Tidwell later pleaded guilty to four felony counts after being accused of stealing at least 523 firearms. Despite the egregious nature of his crimes—stealing hundreds of guns worth tens of thousands of dollars—Tidwell was given a plea agreement with no jail time.

But that's not all. Tidwell was also subsequently the subject of an expose for reportedly using the San Bernardino Sheriff's helicopters and planes on a regular basis for vacations in Colorado and to visit a second home he was building at Big Bear Lake.

Is it a stretch to think that a person in law enforcement who obviously has no respect for the rule of law would hesitate to frame an African American felon like Cooper? Moreover, Tidwell, as with any person in his position, would have enormous pressure to solve this horrendous crime, and the pressure was probably made worse by the fact that Tidwell was also facing reelection.

**WILLIAM BAIRD.** As we already mentioned during the tennis shoe discussion above, an important prosecution witness was the head of the Sheriff's crime lab, William Baird. A year after Cooper was convicted he was fired for stealing heroin from an evidence locker.

**DANIEL GREGONIS.** As if two criminals in the Sheriff's department working to get Cooper convicted were not enough, the incriminating prosecution report from forensic expert Daniel Gregonis about a blood spatter had numerous inconsistencies that can best be explained by the planting of evidence by Gregonis. When pressed by Cooper's attorney, Gregonis admitted that he had repeatedly lied under oath about the blood sample. Daniel Gregonis was later accused of misconduct in other cases in which innocent people have been convicted.

It would be fair to ask whether it is Kevin Cooper who should be in prison for murder, or whether Tidwell, Baird, and Gregonis should be in prison for the attempted murder of Kevin Cooper.

### ***Implausible Claims by Prosecution.***

KEVIN COOPER VS. DOUG RYEN. Could Kevin Cooper have committed these murders alone as police claimed? How could a lone 155-pound Kevin Cooper overpower and murder Doug Ryen, a 6-foot 2-inch former Marine who had experience as a military police officer? Peggy Ryen was also in excellent shape, and both Doug and Peggy had loaded firearms close at hand. It is possible that Cooper could have overpowered them both, but it would not have been easy.

MULTIPLE WEAPONS. Another question is why a single attacker would use three or four different weapons—a hatchet, two knives and an ice pick. The hatchet was undoubtedly the most effective weapon, so to claim that Kevin Cooper put down the hatchet to grab the the ice pick makes no sense. Indeed, the coroner stated that there were probably several assailants wielding the several weapons.

MONEY ON COUNTERS. While staying in the vacant house nearby, Kevin Cooper had phoned friends asking them for money. They apparently refused. Yet, at the Ryen's house money and credit cards were left lying around on counters, but the murderer did not take any of it.

CAR THEFT MOTIVE. The car theft motive also did not make sense. Prosecutors said Kevin Cooper killed the family so he could steal their car, but the keys were in the ignition. It seems very unlikely that a person such as Kevin Cooper, who had stolen many things in the past, would have failed to simply check to see if the keys were in the car.

That would have made it much easier for Cooper to get away than if he had killed four people. Committing murders would ensure that the stolen car would be the focus of an intense search by the police.

MUCH OF THE PROSECUTION'S case against Kevin Cooper falls afoul of *Ockham's Razor*. William of Ockham (1285?–1347?) was a Franciscan philosopher who is known primarily for “Ockham's Razor” (sometimes spelled Occam's Razor). This principle asserts that—other things being equal—the simpler answer to a problem is more likely to be correct than a complicated and convoluted one.

Consider the many witnesses who suggested that three white men were the murderers. The lone survivor, Josh Ryen, said the murderers were three or four white men. Other witnesses saw a car like the Ryen's station wagon the night of the murders with white people inside. Women at a local bar saw three white men come in, covered in blood. And the next day other witnesses saw three white people driving the Ryen's station wagon (confirmed by license plate number).

Prosecutors were forced into a melange of absurdities to explain away the mountain of exculpatory evidence, so they could keep insisting that Kevin Cooper was the killer. Ockham's Razor would cut through all the rhetorical spaghetti by pointing out that a simple and reasonable conclusion explains everything: Kevin Cooper did not commit the murders.

In the Kevin Cooper case—as with many other death penalty cases—even after compelling evidence of actual innocence of the defendant appears many police and prosecutors remain “100% convinced” that the defendant is guilty. Even with compelling evidence of prosecutorial misconduct or error, they often cling to their certainty of guilt. No



doubt some of them are simply lying to cover up their misconduct, but I suspect that in many cases they have actually convinced themselves that the accused is guilty, and they did nothing wrong.

Faulty memory, therefore, is not only a problem for witnesses testifying at criminal trials—it is also a problem for police and prosecutors when it becomes clear to them (at least subconsciously) that accurately remembering their own blunders or misconduct would be unbearable for them. One of my favorite quotes from Friedrich Nietzsche (from *Beyond Good and Evil*) captures this phenomenon beautifully:

*‘I have done that,’ says my memory.*

*‘I cannot have done that,’ says my  
pride and remains adamant.*

*Eventually—memory yields.*

—Friedrich Nietzsche

We are all guilty of this human foible, so I am not claiming that police and prosecutors are unique. It is just that when *their* memory is perverted in a capital case, the life of a potentially innocent defendant is in the balance. When police, prosecutors and district attorneys have been able to secure a death sentence against an accused murderer, admitting that they may have made a mistake or have been guilty of misconduct would be so awkward that they may not even be able to admit it to themselves. That is Nietzsche’s point.

Consider Dennis Kottmeier, the district attorney in the Kevin Cooper case who—even after it became obvious that the case against Cooper had huge holes—continued to insist that Cooper was guilty. Kottmeier said, “There is no question... there is no doubt... about the guilt of

Kevin Cooper. The only justice in this case is for Kevin Cooper to face his maker, and spend the rest of his days in hell.”

Mr. Kottmeier’s absolute certainty of Mr. Cooper’s guilt is astonishing given all of the huge leaps of logic required to reconcile the many inexplicable discrepancies in his case. Unfortunately, once we humans have decided something is true (such as someone’s guilt) we tend to rationalize any data that conflicts with our preconceived notion.

Dennis Kottmeier’s attitude is precisely what Friedrich Nietzsche meant when he talked about “convictions” (in the sense of something we are convinced is true, not legal convictions). Nietzsche said, “Convictions are more dangerous enemies of truth than lies.” Accordingly, Mr. Kottmeier may not be consciously lying about the problematic evidence against Kevin Cooper, and this makes his absolute certainty about Mr. Cooper’s guilt sound even more convincing.

I do not mean to demonize Mr. Kottmeier, because—as with faulty memory—he is demonstrating a common human foible. Once we have arrived at a firm conviction that something is true, we tend to cling to it tenaciously. A striking and humbling example of this happened to me several years ago. I had a complicated watch that had all sorts of buttons that I couldn’t figure out. One day I accidentally pushed a button that advanced the time by one hour, but I was unaware that this had happened. This story is *in no way comparable* to an innocent person in death row, of course—I am simply demonstrating the concept of how we cling tenaciously to our preconceived notions.

I was at my office at the University of Washington, and when it got to what I thought was 5:30 PM (it was actually only 4:30 PM) I walked out of the office to catch my bus. But the administrative assistant was still

at his desk, so I assumed one of my fellow professors had a grant deadline and had talked him into staying late to help out.

Then as I walked to the bus, the sun was much higher in the sky than I expected, so I assumed I had just not noticed how far into spring we were. Then the bus didn't come at the right time (according to my watch) and when I got to the ferry to Bainbridge Island, it left early. This was weird... the ferry never left early, so I assumed it was actually the previous ferry that was late.

The story goes on and on with additional anomalies that I rationalized instead of recognizing that my watch an hour off. It wasn't until I made it all the way home that I saw a clock that disabused me of my error. I had been given ten or twelve bits of information suggesting that my watch was wrong, but each time I came up with an explanation. I like to think of myself a reasonable and rational person, but if such I am, I was not spared from this embarrassing sequence of events.

I would submit that this is precisely what is going on with Mr. Kottmeier and the many other police, prosecutors, and district attorneys who refuse to acknowledge compelling evidence of innocence in cases where they were—at some earlier point—*certain* of the person's guilt. Their rock-solid certainty early on allows them to rationalize and dismiss all of the subsequent exculpatory evidence, and they sleep well at night knowing that justice has been done.

Finally, the eagerness of police and prosecutors to see people such as Kevin Cooper actually executed may lie in their knowing—perhaps subconsciously—that after the person is executed they will be largely off the hook for any misconduct they committed. As we have mentioned

elsewhere, once a person is executed the efforts to prove their innocence essentially stop. Hence, they can literally bury their mistakes.

## HOW MANY EXECUTIONS OF INNOCENT ARE ACCEPTABLE?

Most people arguing in favor of capital punishment realize that their primary vulnerability is the very real possibility of executing the innocent, so they go to great lengths to argue that innocent people are never—or almost never—executed. Even if some innocent people were executed, some argue that it is no big deal. We might call this the “Shit Happens” view of executing an innocent person now and then.

For example, one death penalty proponent, John McAdams, has argued that even if a few innocent people have been executed, it is okay because society makes numerous public policy decisions that result in deaths of innocent people. As examples he cites policy decisions that set speed limits on highways, set building codes, and require testing for prescription medications.

This is an argument that might seem reasonable on the surface, but once one starts unpacking the reasoning, the fundamental absurdity becomes apparent. When we consider the *type* of decision we are making when we decide on speed limits or building codes, we find it follows “Pascal’s Curve.” In his *Pensées* Pascal showed his sense of humor under the heading of

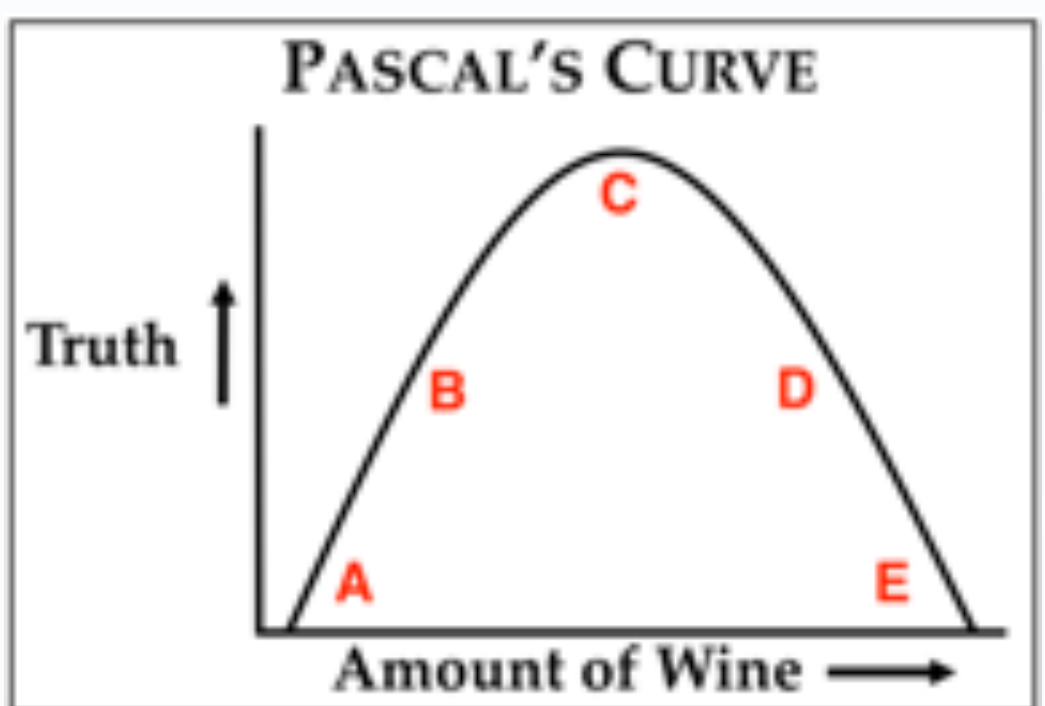


Figure 10. Pascal's curve for optimal amount of wine to achieve truth.



*Too Much and Too Little Wine:* “If you give someone none, he cannot discover the truth. It is the same if you give him too much.” I converted this concept to a figure (See **Figure 10**) where we see that at the extremes (points “A” and “E”) we can achieve very little truth, while implicitly there must be an optimum at point “C” where truth is maximized. (Unfortunately, Pascal gives no guidance regarding the amount of wine one has to drink to achieve optimal truth!)

Since “Pascal’s Curve” is something I made up, perhaps we should use a more common example in the form of the “Salt Curve.” See **Figure 11**. If one puts no salt on the popcorn (point A) it is not very tasty, nor will it be tasty if one puts the whole box of salt on (point E). As with wine and truth, there is an optimal

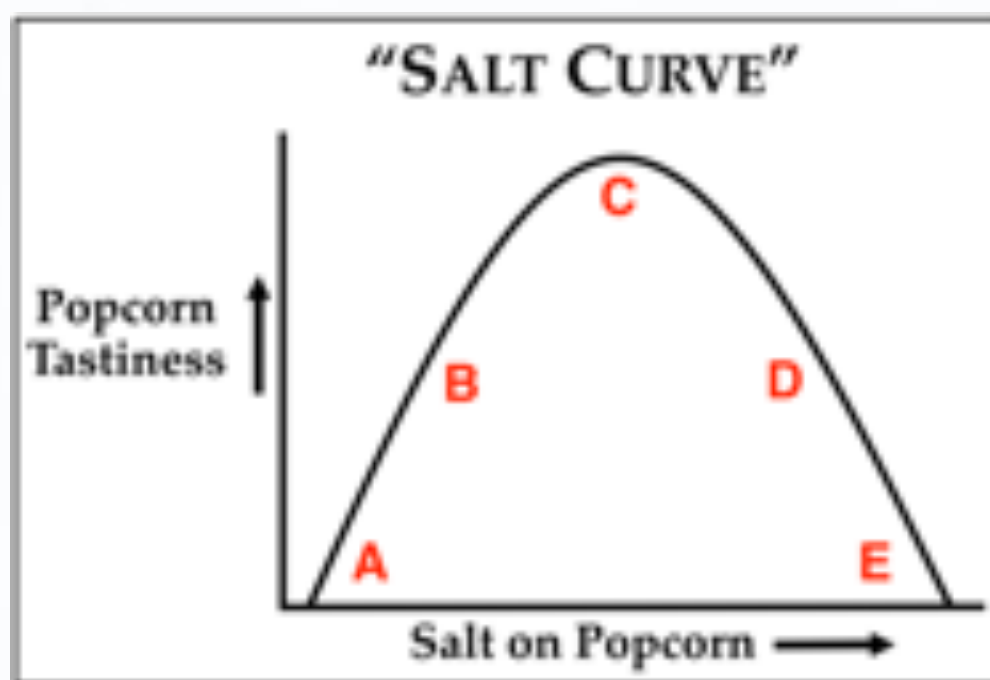


Figure 11. The “Salt Curve” for salt on popcorn.

amount of salt (point C) that should be used to maximize the tastiness of the popcorn. (Note that the “Salt Curve” has sometimes been called the “Laffer Curve” after economist Arthur Laffer who proposed a similar curve to describe the relationship between tax rates and tax revenue. Few economists agree with Laffer that his simplistic curve works the way he predicts, and I prefer to use the term “Salt Curve.”)

In all of the examples Mr. McAdams uses, we are making public policy decisions in which we try to pick an optimal point along a spectrum, just as in Pascal’s Curve or the Salt Curve. Consider setting speed limits. If we made the speed limit 10 miles per hour on all roads, we

would have almost no traffic fatalities, but people would spend half their work day driving to and from work. (See “A” on **Figure 12**) On the other hand, if we allowed drivers to go as fast as they wanted on any road most people would arrive at their destinations more quickly, but traffic fatalities would be unacceptably high. (See “C” on **Figure 12**) (Policy makers, therefore, consider the benefits and risks of the various speed limits on various types of roads, and do their best to achieve the best benefit-risk ratio.

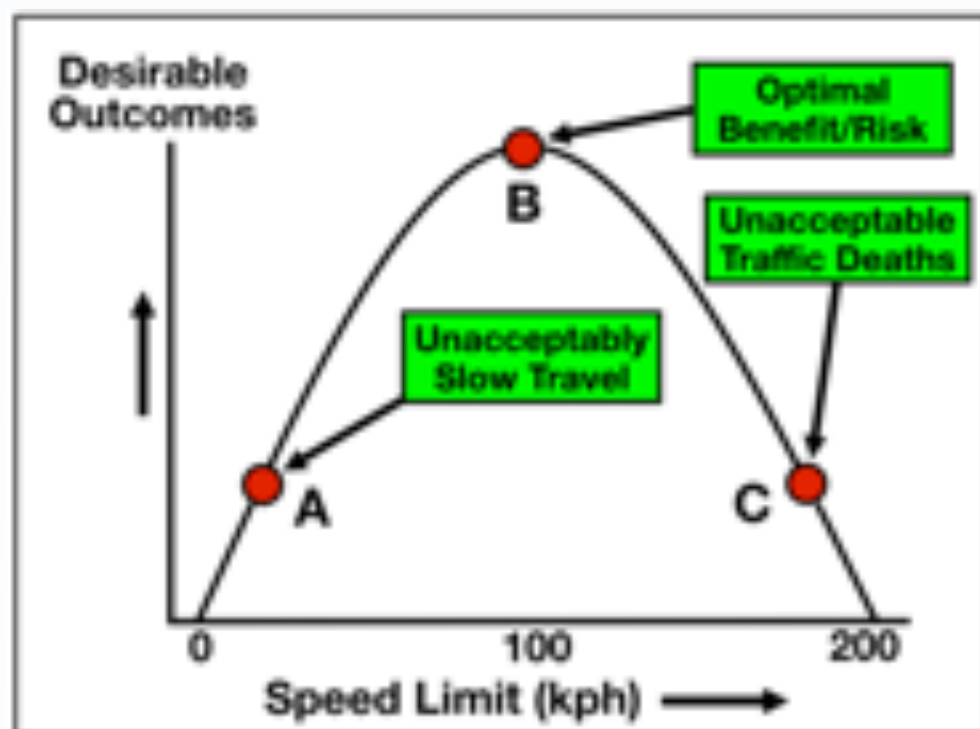


Figure 12. Setting optimal speed limits

The same principle applies to building codes, where the extremes at either end are patently absurd, and some optimal middle ground must be sought to aim for the best safety consistent with practical constraints such as cost of construction. Again, this is benefit versus risk.

The decision regarding the death penalty versus death in prison is an altogether different type of question. Here we are deciding between two distinct options, not merely an adjustment up or down along a continuum. Execution and death in prison are two different methods of handling the question of what to do with murderers, and death in prison achieves virtually all of the penological and societal goals that the death penalty does. We could choose not to even consider the death penalty, as virtually all other developed countries have done.

There is no “optimal” number of executions of innocent people. Everyone on both sides of the death penalty debate would agree that the

number of executions of innocent people should be zero. As such, executing the innocent should be assessed using the “Crocodile Curve” rather than “Pascal’s Curve” or the “Salt Curve.”

The “Crocodile Curve” comes from considering the optimal number of live, adult crocodiles to have in your swimming pool. Like executing the innocent, the optimal number is zero. (See **Figure 13**) The analogy used by Mr. McAdams, therefore, is specious, no matter how reasonable it may sound initially.

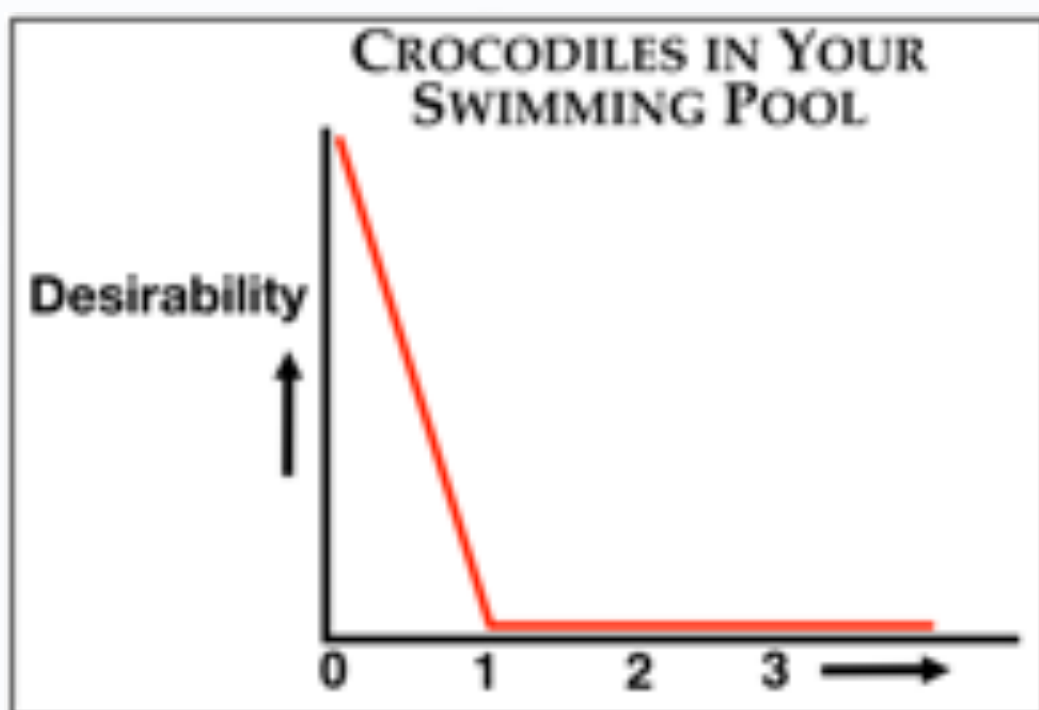


Figure 13. Optimal number of crocodiles in your swimming pool.

Moreover, the public policy examples Mr. McAdams gives are all situations where we are comparing concrete risks and concrete benefits, such as the dead and injured on our highways versus the benefit of traveling in cars at speeds that will actually get us to our destination in a reasonable time. With the death penalty debate, on the other hand, we have the concrete risk of killing innocent people versus a mere opinion that the death penalty is needed to secure justice. Many of us have the opposite opinion, and executions engender in us feelings of moral horror rather than feelings of satisfaction. The logical question would be why the opinions and emotions of pro-death penalty people should take precedence over the opinions and emotions of anti-death penalty people.

Making this “public policy sometimes kills people” argument, therefore, is basically saying that executing a few innocent people is less impor-

tant than the fact that some people will have lost the satisfaction of revenge and the feelings of “justice” that accrue to them if we execute people instead of sentencing them to death in prison. If an overwhelming majority of the population agreed with the “justice” argument it might carry more weight, but that is not the case.

The most illogical argument Mr. McAdams makes, however, is that the innocent deaths occurring as a result of public policy decisions made during the approval process for prescription medications are analogous to the executions of innocent people. Mr. McAdams is apparently oblivious to the process of drug approval, or he would not have used this example. Having studied FDA-approved medications for over fifty years and having advised the FDA and other federal agencies regarding drug safety issues, I can assure him that it is nothing like capital punishment. Indeed, I cannot think of a better analogy of why capital punishment is *not* good public policy, and I thank Mr. McAdams for giving me the idea.

Suppose that the FDA had applications for two new drugs used to treat a serious disease. Assume Drug A was only a tiny bit more effective than Drug B for some types of patients, but evidence from many large clinical studies found that Drug A killed about 4 percent of patients from liver failure in the course of treatment. Drug B, on the other hand, did *not* cause the fatal liver failure seen with Drug A, and it also was substantially less expensive than Drug A. Which drug do you think the FDA should approve?

As you will have guessed by now, Drug A is the death penalty, which is perhaps slightly more effective in producing satisfaction for *some* victim’s loved ones and for certain segments of society, but it carries the



risk of killing innocent people. Drug B is death in prison, which is almost as effective as the death penalty in achieving satisfaction (for those who wish to punish), but does not kill the innocent. The FDA would not have to deliberate long to determine that Drug B should be approved, and Drug A should be rejected.

IN THE 2015 INTELLIGENCE SQUARED DEBATE mentioned earlier, death penalty proponent Robert Blecker offered a variant of the “Shit Happens” argument. Blecker admitted executing the innocent would be bad, but then listed a series of non-sequiturs about the possibility that the ceiling could fall, or a truck might jump the curb and kill his grandchildren. All of that is true. Bad things happen all the time, and Mr. Blecker could have added deadly cancers, tsunamis, car accidents, and cerebral hemorrhages. He could even be killed by a meteor.

One would be right to wonder, however, how this could possibly inform the public policy debate on whether we should have death in prison or the death penalty, with the latter meeting out an irreversible punishment dependent on a deeply flawed criminal justice system. This kind of argument might work in a courtroom for a naïve jury, but it should have no purchase for people who value reasoned discussions.

Mr. Blecker commits the fallacy of comparing a bad thing that cannot be completely eliminated with something that is totally avoidable. If someone orders a new refrigerator for their house, a truck will be used to deliver it. We have no alternative unless we do away with refrigerators or have a different way of delivering them. (I suspect that drone delivery of refrigerators might be a bit more dangerous than trucks.) So we are stuck with trucks for the foreseeable future, and every now and then one will jump a curb and people will be injured or killed.

Mr. Blecker asserts—because bad things happen to good people all the time—we shouldn’t be so concerned about innocent people being executed. This astonishing argument ignores the fact that we do take public policy measures to avoid ceilings from collapsing (e.g., building codes) and truck drivers from jumping curbs (e.g., limiting consecutive hours truck drivers can work). Likewise, for the death penalty we have a viable public policy alternative for preventing the execution of innocent people: it is called death in prison. One wonders if Mr. McAdams and Mr. Blecker would be so blasé about executing the innocent if there were even a remote chance that it could happen to them. People in their demographic are not executed, so their risk is essentially zero.

## THE IGNORANCE OF CERTAINTY

As we have discussed elsewhere in the book, unwarranted certainty causes a lot of mischief in the world, and is central to the death penalty debacle. We have been amply warned about this—Montaigne was not the only one who urged us to examine our cherished certainties. Bertrand Russell talked about the ignorance of certainty, and how difficult it is for most people to avoid the easy way out:

*The demand for certainty is one which is natural to man, but is nevertheless an intellectual vice. So long as men are not trained to withhold judgment in the absence of evidence, they will be led astray by cocksure prophets, and it is likely that their leaders will be either ignorant fanatics or dishonest charlatans. To endure uncertainty is difficult, but so are most of the other virtues. [Prophetic, Bertrand!]*

Much of our ignorant certainty surrounding the death penalty comes from our claim to know what was in the murderer's mind, and our assignment of precise degrees of culpability to each murderer. This is demonstrated by the fact that we sentence some defendants to death, and others to death in prison. Our ignorant certainty also allows us to pronounce the person evil and that he represents "the other." These arrogant claims require us to deem as certain, a number of factors that are not certain at all—that human free will is an established fact; that we know the defendant had no compromise of his free will by factors such as brain damage or mental illness; that any abuse he received as a child did not contribute to his adult behavior; and, of course, that he actually committed the crime. We will discuss these issues in more detail in Chapter 7.

Montaigne's views on human fallibility might be considered the specific antidote for those who are absolutely certain that capital punishment is warranted, and that it does not result in the deaths of innocent people. Montaigne knew that wisdom is impossible without intellectual humility, and he provided countless examples of how human thinking can go awry through hubris. Despite his sincere protestations that he knew very little, his wisdom is evident on almost every page. The pompous pontificators who have hijacked our public dialogue—on capital punishment and many other issues—would do well to listen to Montaigne, who calls us back from our arrogant certainty and leads us to reason and intellectual modesty.

*Believe those who are seeking the  
truth. Doubt those who find it.*

—André Gide

So, what about the claim that we only execute people when we are certain they are guilty? When we say we are “certain someone is guilty of murder” and we are “certain they deserve to die for their crime” what do we exactly mean by the word “certain” in this context? What is the fundamental nature of “certainty” in general? Well, it turns out that certainty is a more slippery concept than most of us imagine.

If you want to track the issue of certainty back to its lair from a philosophical perspective (which is the only way to do it justice) you are left with the inescapable conclusion that absolute certainty—a certainty that allows not even the remotest possibility of error—does not exist. There is always some alternative explanation that is actually possible, albeit sometimes highly improbable. This is not philosophical naval gazing or arguing about angels dancing on the head of a pin. It means that in human life we are basically dealing, at best, with “practical certainties” rather than “absolute certainties.” Another way of describing “practical certainty” is to say there is an extremely high probability of something being true.

I go into considerable detail on the issue of ignorant certainty in my book, *Premature Factulation: The Ignorance of Certainty and the Ghost of Montaigne*, but I will try to succinctly present some of the major points here. The Ancient Greek Skeptics fully understood the problematic nature of absolute certainty. In the 6th century BCE Xenophanes observed: [translation by Karl Popper]

*... as for certain truth, no man has known it, nor shall he know it, neither of the gods nor yet of all the things of which I speak, for even if by chance he were to utter the final truth, he would himself not know it: for all is but a woven web of guesses.*



Over the millennia, many thinkers have tried to find something that is absolutely certain. René Descartes thought he had achieved such certainty with his famous *Cogito Ergo Sum* (“I think, therefore I am”). If one is philosophically rigorous about it, however, he did not succeed. As a later philosopher observed, Descartes perhaps should have said, “I think that I think, therefore I think that I am.”

Even scientific theories cannot be held to be absolutely certain. Some well-established scientific theories have been corroborated by thousands of scientists in different fields over more than a century, and the chance that such theories will be overturned wholesale is vanishingly small. Nonetheless, every scientific theory is, in principle, replaceable by a revised theory that is just slightly closer to the truth.

Now, I am sure some of you clever souls are saying to yourself, “Wait a minute! Isn’t it a contradiction to say we can be certain there is no certainty?” As the Epicurean Poet, Lucretius, said in the 1st century BCE, “Whoever thinks that we know nothing does not know. Whether we know enough to say that this is so.” You are right to bring this up, but it doesn’t change the fact that—despite all the brilliant people who have tried—no one has ever come up with a compelling argument that can be accepted as absolutely certain. Ultimately, of course, any argument for certainty can be defeated by the simple thought experiment—so loved by philosophers—that you are not really a person acting in the world but merely a brain in a vat... or the newer version... that you really just exist on a computer.

With regard to the death penalty debate, it seems that our reasoning is often sabotaged by our desire to avoid ambiguity and achieve certitude. As Richard Rohr put it in his July 19, 2017 blog:

*There are commonly two kinds of human beings: there are people who want certitude and there are people who want understanding; and these two often cannot understand one another. Those who demand certitude out of life will insist on it even if it doesn't fit the facts. Logic has nothing to do with it. Truth has nothing to do with it. ...it seems to me it's only this ongoing search for understanding that will create compassionate and wise people.*

I think Rohr is saying when one is dealing with complex issues involving human behavior, attempting to reach simplicity and certitude is both unrealistic and counterproductive. Achieving full understanding is also unrealistic, of course, but at least we can attempt to go down that path as far as possible.

The reason I dilated on certainty here is to point out that the kind of certainty we are dealing with when we assert that a person is guilty of murder is not certainty at all, but merely varying degrees of probability. Let us now look at the issue of probability as it relates to capital punishment, with the help of Blaise Pascal.

### ***Certainty versus Probability***

We like to think that we are dealing with “facts” but almost every statement we make is based on probabilities. We are obviously speaking in terms of probabilities when we say “It is going to rain today” or “France is going to win the World Cup.” We are also speaking in terms of probabilities with any non-trivial statement we make. When we claim a statement is “false” what we think we are saying is that the statement is the opposite of what is in fact the case. What we are really saying, however, is there is only a low probability of this “false” statement being true. In extreme cases we may even be able to say there is only a

spectacularly remote chance the “false” statement is true, but we still cannot say the chance is zero.

*When one admits that nothing  
is certain one must, I think, also  
admit that some things are much  
more nearly certain than others.*

—Bertrand Russell

When climatologists assert that the climate crisis represents an existential threat to humanity, they are basically saying, “There is a very high probability that if we do not act rapidly and vigorously to reduce greenhouse gasses, we will have increasingly catastrophic droughts, flooding, and extinctions.” Every other non-trivial statement we make about the world is similarly a probability rather than a fact. Yet we tend, especially in politics, to talk about facts rather than probabilities; we want things to be binary... either true or false. I believe our public discourse would be substantially improved if we focused on probabilities rather than “facts.” (Even discredited theories, such as supply-side economics, are not technically “false.” There is just a low probability that they are valid.)

When we say we are certain a person is guilty of murder, therefore, we are saying there is a high probability that the person committed the crime. Juries are given instructions to convict if the guilt of the accused is deemed to be “beyond reasonable doubt,” but we do not know how the individual jurors interpret that phrase. Available evidence suggests that for some people a probability of 75 to 80 percent would satisfy the “beyond reasonable doubt” benchmark. Unfortunately percentages are meaningless in this context; what could a probability of 80 percent pos-

sibly mean? Applying a percentage in a situation like this reminds me of Niels Bohr's comment advising us not to express ourselves more clearly than we are able to think.

Notwithstanding that statements of percentages are impossible to define, for the sake of argument, let us consider a best-case scenario, and assume that all twelve jurors take “beyond reasonable doubt” to mean a 95 percent probability of guilt. And let us further assume that all twelve jurors are highly competent, diligent, conscientious, unbiased, and work perfectly together to hammer out the very best decision that is humanly possible. Even under these flawless (and virtually unattainable) conditions, a 95% probability of guilt would mean one out of twenty people sent to death row would be innocent. This is surprisingly close to the study by Samuel Gross and colleagues discussed earlier, in which they estimated that at least 1 out of 25 people sent to death row should be exonerated for reasons of innocence.

Moreover, even if we could somehow precisely define “beyond reasonable doubt” or describe what a 95 percent chance actually means, the juror's judgement of guilt or innocence is constrained by the behavior of all the players in the criminal justice system: police, detectives, prosecutors, district attorney, defense counsel, eye witnesses, expert witnesses, judges, and the defendant himself.

### ***Pascal's Wager***

Blaise Pascal is most famous for “Pascal's Wager”—a probabilistic view of whether one should believe in God. Pascal proposes a thought experiment. Suppose we wager that God exists and behave accordingly. Looking at **Figure 14**, if we turn out to be correct we gain eternal bliss (Yellow Box), but if we turn out to be incorrect we have lost little



(Orange Box). On the other hand if we wager that God does not exist and he does, we endure eternal damnation, at least according to the ambient presumption in Pascal's day. (Red Box). If we correctly wager that God does not exist, it is pretty much a wash. (Blue Box).

		<b><i>God Actually Exists</i></b>	
		<b>Yes</b>	<b>No</b>
<b><i>You Believe God Exists and You Act Accordingly</i></b>	<b>Yes</b>	<b><i>Eternal Bliss</i></b>	<b><i>Minor Inconvenience</i></b>
	<b>No</b>	<b><i>Eternal Damnation</i></b>	<b><i>Issue is Moot</i></b>

**Figure 14.** “Pascal’s Wager” on whether or not one should believe in God.

In scientific investigations, Pascal’s Wager could be termed a discussion of what we call Type I and Type II errors. A Type I error occurs when we think something is true but it is not. A Type II error is the opposite—we think something is not true, but it is. Using Pascal’s Wager, therefore, the person who believes that God exists but is incorrect is committing a Type I error, while the person who believes that God does not exist (but She does) commits a Type II error. Pascal warns that of the four scenarios, it is the Type II error that should be avoided.

[Please see Chapter 1 for a “pop-over” of Blaise Pascal, in which we discuss the reasons why Pascal’s contributions to the history of ideas, psychology, mathematics, probability, and science is so much more than his “Wager.”]

So let us apply Pascal's Wager to a death penalty case (**Figure 15**). If the accused is innocent and found not guilty (Yellow Box) it is all good... the system worked. If the accused is guilty, but is found not guilty (Orange Box) a guilty person goes free (a Type I error). This

		<i>Accused is Innocent</i>	
		Yes	No
<i>Accused is Found Not Guilty</i>	Yes	<i>Innocent Person Found Not Guilty</i>	<i>Guilty Person Found Not Guilty</i>
	No	<i>Innocent Person Sent to Death Row</i>	<i>Guilty Person Convicted</i>

**Figure 15.** "Pascal's Wager" as applied to the death penalty.

can happen because the evidence to convict is not sufficient, or because the defendant has the resources to hire a superb defense team; would O.J. Simpson have been acquitted if he had been poor? The Type II error in this scenario is when an innocent person is sentenced to death (Red Box), and this potentially results in catastrophe—namely the execution of an innocent person. Even if there is only a 4 percent chance of committing a Type II error, the outcome is unacceptable to most people. If a guilty person is convicted (Blue Box) we have achieved the intended outcome.

Given the lack of a deterrent effect of the death penalty, and given that innocent people are sent to death row, it appears likely that more innocent people die with the death penalty than without it. Accordingly, it is possible for a rational person to retain support for capital punishment, but only if he or she admits, "I understand that capital punishment

probably increases the deaths of innocent people, but it is more important for me to see murderers suffer and die.”

The question, however, is whether a transient pleasure from achieving vengeance is worth innocent deaths. Moreover, one must keep in mind that this is only an incremental increase in vengeful satisfaction at that—we are not comparing execution with letting the inmate go free. We are comparing execution with death in prison where the inmate will spend the rest of his days rotting away in a small prison cell.

The principle behind “Pascal’s Wager” is particularly useful for assessing the best course of action when dealing with “High Impact–Low Probability” (HILP) events. When Pascal argues that we should believe in God even if there is a “Low Probability” of God existing, it is because the consequences represent “High Impact”—namely roasting in hell for an eternity.

I have used the concepts of Pascal’s Wager and how they relate to HILP events to argue for taking precautions to avoid certain adverse drug interactions if the potential consequences are dire, even if we need more scientific study to establish how dangerous the drug interactions actually are. This is especially important if the measures needed to avoid the risk are relatively easy and inexpensive, such as merely choosing another non-interacting drug.

“Pascal’s Wager” also applies to the climate crisis. Even if there were only a 1 in 20 chance of virtual extinction of the human race due to climate change (a HILP event), does it make any sense to take that chance? Climatologist Veerabhadran Ramanathan asks us if we would get on a plane that had a 1 in 20 chance of crashing. We would not, of

course, but many people seem willing to put their children and grandchildren on that plane.

**Justice John  
Paul Stevens<sup>26</sup>**

To conclude this chapter, let us consider United States Supreme Court Justice John Paul Stevens, and the evolution of his thought on the death penalty. During his decades on the Supreme Court Stevens consistently supported capital punishment, and he regularly voted against death row inmates who claimed that state officials committed constitutional violations. In retirement Stevens had a change of heart, and the possibility of executing the innocent was a big part of the reason:

*For me, the question that cannot be avoided is whether the execution of only an ‘insignificant minimum’ of innocent citizens is tolerable in a civilized society. Given the availability of life imprisonment without the ability of parole as an alternative method of preventing the defendant from committing other crimes and deterring others from doing so, and the rules that prevent imposing an ‘eye for an eye’ form of retributive punishment, I find the answer to that question pellucidly clear. When it comes to state-mandated killings of innocent civilians, there can be no ‘insignificant minimum.’*

It is hard to even imagine a reasonable counter-argument to Stevens’ last sentence.



# 5

# THE SYSTEM

## The System. *Does Our Criminal Justice System Work?*

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*My position, like that of Alcibiades, is this:  
I shall never turn myself over, if I can help it,  
to a man who can dispose of my head, where my  
honor and my life depend on the skill and diligence  
of my attorney more than on my innocence.*

—Michel de Montaigne

On United States Supreme Court building are the words, “Equal Justice Under Law.” This is a fine sentiment, and no doubt many of those involved in our criminal justice system try to live up to it. The reality, however, that we often fall far short, and with capital murder cases the failures in the system have disastrous implications.

### **CRIMINAL JUSTICE: COMPLEX SYSTEM WITH MANY PLAYERS**

I want to state clearly at the outset that most police officers, detectives, prosecutors, judges, and others in the criminal justice system are dedicated and competent professionals with who truly want to protect society from crime, and seek justice for victims of crime. Every profession has some bad actors, however, and criminal justice professionals are no exception. The problem is not just dishonesty—the system

also suffers from mistakes, misjudgments, communication errors, lack of coordination, and simple laziness, all of which are inevitable in any complex system involving many people, even when they try to work together for a common goal. It would not be reasonable to expect criminal justice to be the only complex human enterprise that had eliminated errors.

*There are no just people—merely  
hearts more or less lacking in justice.*

—Albert Camus

To show that the fallibility of the criminal justice system is not unique, consider the health care system. I have worked extensively with physicians and other health care professionals over the past 50 years. As a group I think physicians are some of the smartest, hardest-working, and empathetic people on the planet. Yet it is estimated that medical errors kill hundreds of thousands of people every year in the United States. (The errors are, of course, not all due to physician mistakes; virtually everyone in the system contributes to the problem.) Health care, like criminal justice, is complex and convoluted, requiring large numbers of people to work together... people with disparate functions, competencies, motives, biases, and personal problems.

With both healthcare and criminal justice it is not just the individual practitioners who are the problem. There are numerous systemic problems within the health care system that could be improved, and we have made some progress. But, for both health care and criminal justice, even if—by some miracle—we fixed all the systemic problems and eliminated all of the dishonest and incompetent practitioners, mistakes would still occur. It is simply the nature of such complex sys-

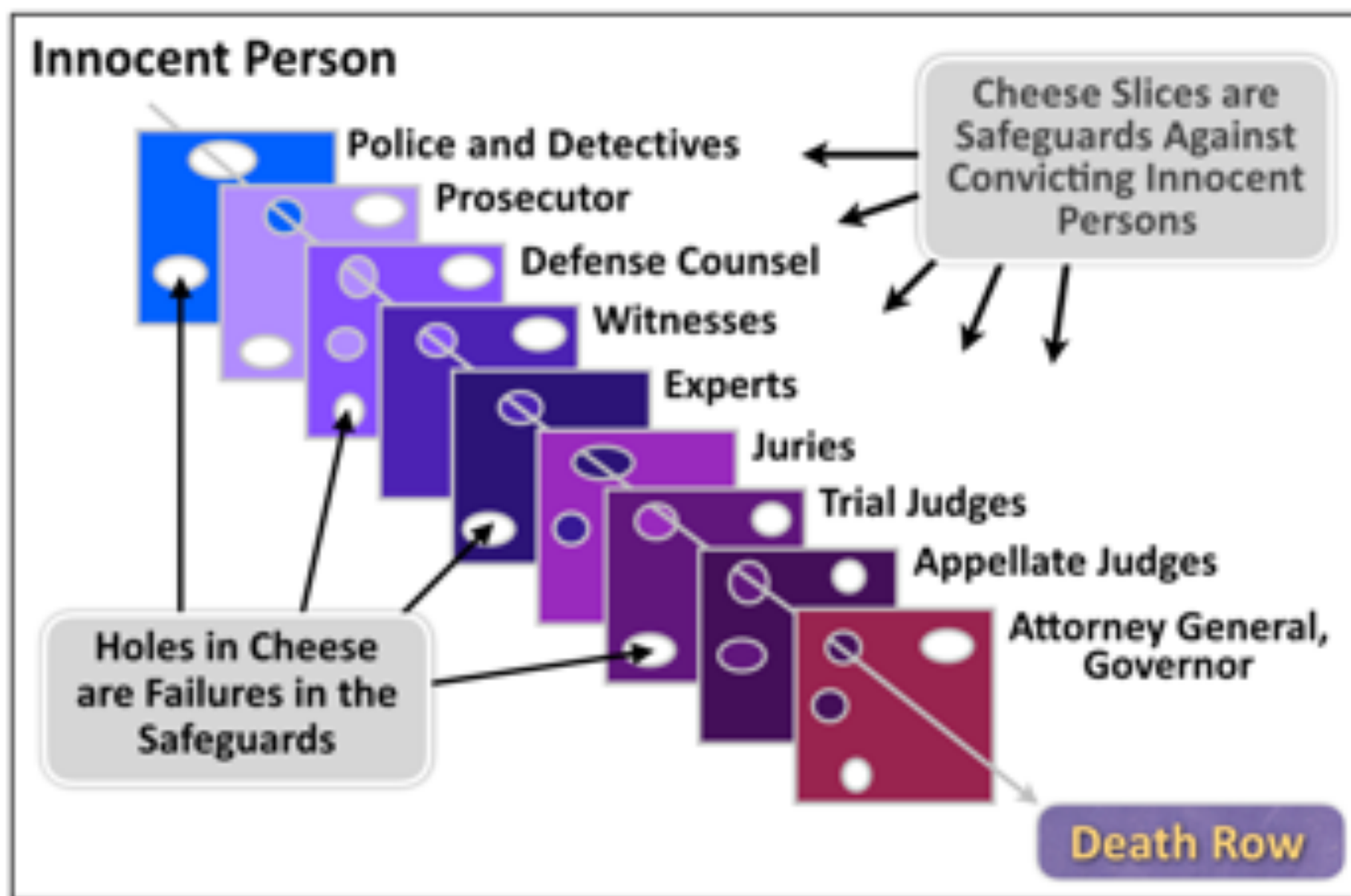
tems; there is an irreducible minimum of catastrophes that will occur despite our best efforts. But we are not even close to that irreducible minimum, and have a huge task ahead in trying to eliminate all of the preventable errors in both healthcare and criminal justice.

The sheer complexity of both criminal justice and health care work against anything even close to perfection. As just one very small example, take the drug interaction between epinephrine (adrenalin) and beta-adrenergic blockers (used mainly for cardiovascular disorders). Under certain very special circumstances, this combination can cause an acute hypertensive crisis and in susceptible people can result in a stroke, extreme slowing of the heart rate, and cardiac arrhythmias. This interaction was discovered more than 50 years ago, and has been repeatedly documented over the ensuing years.

Recently I spent two months carefully reviewing the fifty or sixty published papers describing this interaction and prepared a decision table with the dozens of factors that must be considered in order to determine which patients are likely to be at risk. Yet, while this interaction is included on most computerized drug interaction detection systems, currently not a single one of them adequately accounts for these modifying factors. It is not easy to take scientific data and apply it to the practical aspects of health care, some of the same impediments apply to criminal justice.

In discussing the criminal justice system, I will use the “Swiss Cheese” model developed by British psychologist, James Reason. (See **Figure 12**) In the upper left we have the “hazard” which is the problem potentially resulting in an adverse outcome. In our case the hazard is a person accused of a murder that he or she did not commit, and the ad-

verse outcome in the lower right is sending this innocent person to death row, and possible execution.



**Figure 16.** When “the holes line up” an innocent person is sent to death row.

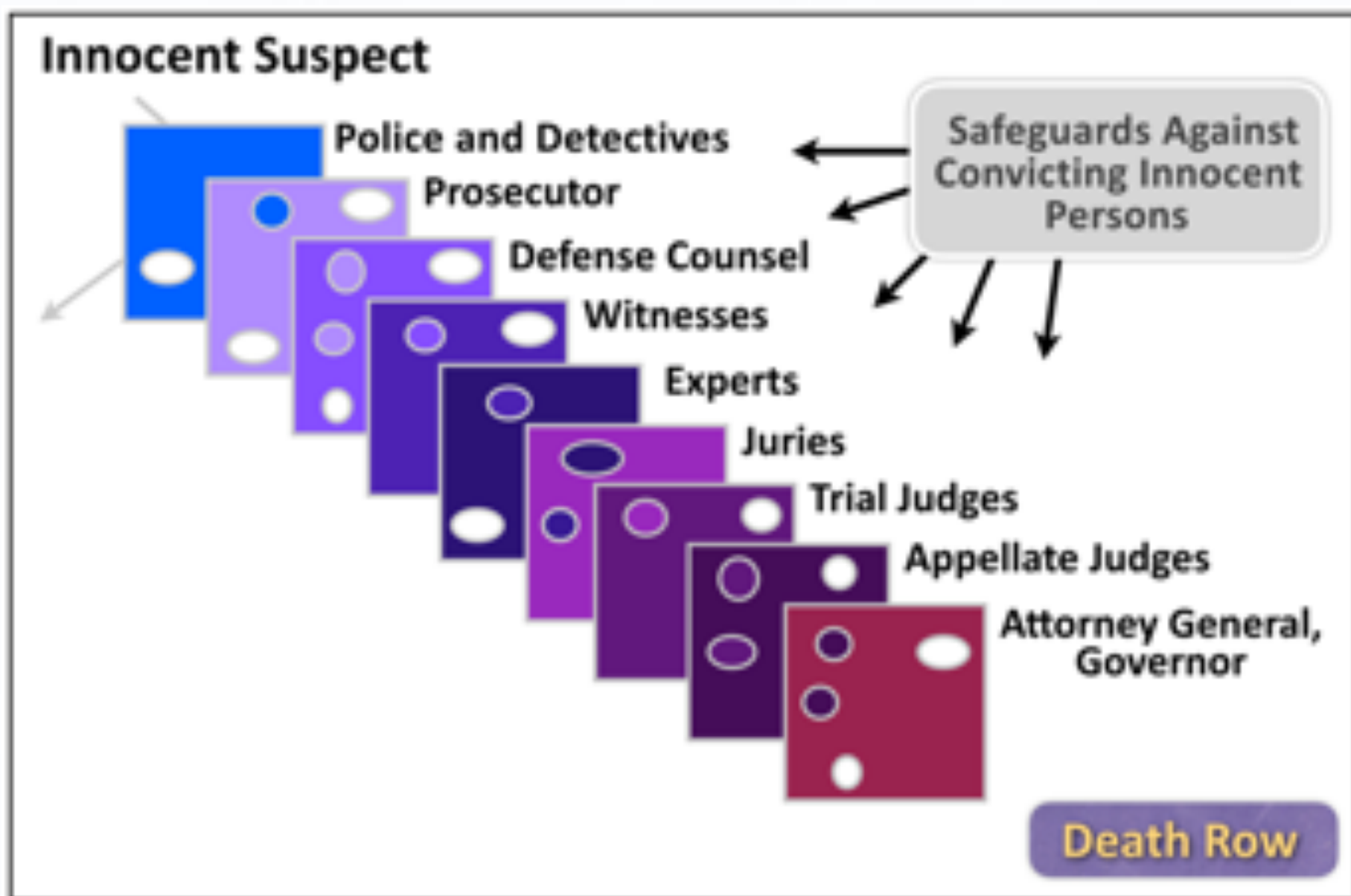
The slices of Swiss Cheese represent the safeguards against convicting innocent people of murder, and the holes in the cheese represent failures in the safeguards. Sometimes there is a failure in just the right place in every safeguard, and the “holes line up” resulting in an innocent person going to death row, as shown in **Figure 16**. Other times a failure early in the process demolishes the remaining safeguards, such as when detectives obtain a false confession from the accused. When the system works as planned, however, one of these safeguards stops the process somewhere along the line, and the innocent person is ei-



ther not prosecuted or is acquitted at trial or on appeal. Now I would like to discuss the various players in the criminal justice system using the Swiss cheese concept.

## POLICE AND DETECTIVES

Police officers and detectives have a challenging and often dangerous job. Those of us who have not walked in their shoes can only guess, for example, what it would be like to respond to a domestic violence call with an armed and enraged man threatening to kill his wife as well as anyone who interferes with him. Moreover, I have no doubt that most police and detectives are both competent and honest, and try to do the best job they can. Through the appropriate use of interviews



**Figure 17.** Police/detectives are the first safeguard to protect the innocent.

and investigation, police and detectives are able to rule out innocent suspects who might otherwise be accused of murder. This is depicted in **Figure 17**, where police and detectives represent the first line of defense in making sure innocent people do not end up on death row. (For simplicity, I will generally use the term “police” in this section, but consider that I mean to include police detectives as well.)

While I have little doubt that the police usually rule out the truly innocent from being charged with murder, sometimes things go wrong. For example, sometimes police have good motives, but feel that justice cannot be achieved unless they bend (or even break) the rules. Other times their motives are more sinister. Let us consider some of the ways police can fail to protect the innocent from prosecution.

### ***Bias, Prejudice, Racism***

Police officers cannot be expected to be the only people in the world whose behavior is completely objective while on the job. Like the rest of us, they have biases, prejudices, and blind spots that affect their actions. I am sure that my subconscious biases have occasionally affected how I graded my students’ essays over the years. I make a sincere effort to be objective, but it is impossible to eliminate bias completely, precisely because our biases are largely subconscious. An overtly racist or unconsciously biased police officer may assume criminality on the part of certain people as opposed to others. There is no way to completely eliminate these pernicious influences.

### ***Misconduct.***

Again, most police are no doubt honest and try to act with integrity, but there are clearly exceptions. Misconduct includes lying, withholding or

altering evidence, and mistreatment of accused. One egregious example was uncovered by Larry Krasner, who was elected Philadelphia District Attorney in 2017. Krasner, a former public defender and defense attorney, exposed police misconduct in his defense of Askia Sabur who went to trial in 2013 for assaulting a police officer. The problem with the police version was that a cell-phone video showed the exact opposite—the police beating Sabur. Krasner demonstrated at trial that the officers were lying about the assault, and Sabur eventually won a civil settlement of \$850,000. The police were not charged with lying under oath, which is not terribly surprising given how seldom police or prosecutors are held responsible for misconduct.

One of Krasner's friends observed that in the process of defending Sabur, Krasner was trying to demonstrate how prosecutors and judges tend to believe police officers, even when their testimony is not credible. This is perhaps a natural mistake for prosecutors and judges to make. After all, most police are trying to tell the truth, and they are likely to seem more trustworthy than many defendants. But even if only 10% of police commit misconduct in criminal cases, that is a huge number of potentially innocent people who are denied real justice.

Sometimes the motives of police misconduct are understandable (if not legal). On the one hand some cases of police misconduct no doubt spring from ignoble motives such as racism or a personal desire to advance their career by getting a conviction at any cost, whether the accused is guilty or innocent. But in other cases the police may honestly believe that the accused is guilty of the murder, and they are afraid that if they don't cut some corners, the murderer may go free. One can certainly understand their dilemma; they may feel that they are the only ones standing between the murderer and the safety of society.

Put yourself in their shoes. They are convinced that although the defendant has committed a heinous murder (or murders), he may well go free due to lack of evidence. The police may also rightly worry that the person will kill again if released. This is not how the criminal justice system is supposed to work, however. If the police were allowed to decide who is guilty and who is innocent, we could save a lot of time and money and just eliminate the rest of the criminal justice system. The sad fact is that some murderers are clever enough or lucky enough to avoid being convicted of their crimes. This does not mean that a police officer or detective should subvert the rule of law by putting a thumb on the scale, no matter how tempting it is.

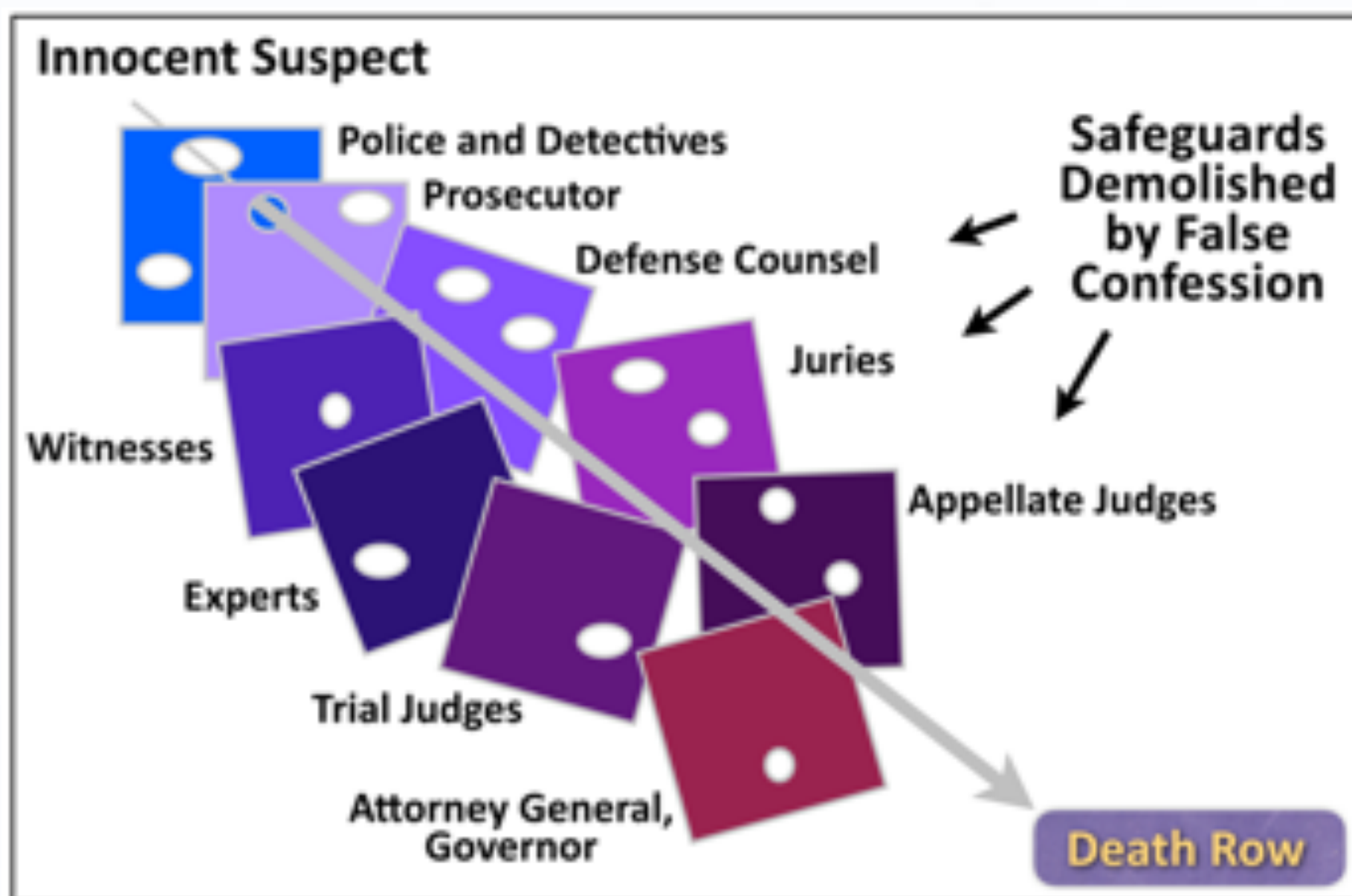
### ***False Confessions.***

I suspect that most people think that—short of being subjected to brutal torture—nobody would admit to something they did not do, particularly if the potential punishment was execution or life in prison. This common-sense assumption is wrong. It turns out that false confessions are actually relatively common.

In criminal trials in general, false confessions are a relatively common cause of convicting the innocent. (Other common causes are inaccurate eyewitness testimony and misleading expert witness testimony.) Of more than 360 wrongful convictions documented by DNA evidence by the Innocence Project, false confessions were identified in about 30 percent of the cases. The threat of the death penalty by police detectives and prosecutors is sometimes used to obtain false confessions in exchange for a lesser sentence, but even in capital cases false confessions do occur. Of the current 166 people exonerated from death row, false confessions were a factor in more than two dozen cases.



Occasionally the suspect—usually someone who is mentally ill—offers a false confession without any coercion on the part of police or detectives. Other times, the innocent suspect confesses under the duress of a harsh interrogation. Regardless of how it occurs, a false confession on the part of an innocent suspect is a devastating blow to the process of justice, because it almost always results in a conviction. As shown in **Figure 18**, a false confession generally destroys all of the downstream safeguards against convicting the innocent (i.e., the swiss cheese slices), and renders them moot.



**Figure 18.** False confessions demolish the safeguards for the innocent.

False confessions following physical torture are certainly understandable, and have been repeatedly documented in historical accounts. The Soviet purge trials under Josef Stalin produced large numbers of

false confessions, and those making the false confessions were often summarily shot soon thereafter. This behavior has baffled many people—if you knew you were going to be shot anyway, why make a false confession?

In his memoir, *Witness to an Extreme Century*, Robert Jay Lifton describes his experiences in 1954 Hong Kong, interviewing people who had been subjected to “thought reform” by the Chinese Communists. The oppressors used prolonged indoctrination, threats of violence, and sometimes actual violence to achieve their goal. Lifton interviewed an Italian missionary, Father Luca, who began his incarceration by telling himself that he would never admit to something that wasn’t true. But as time went on he decided to “say almost anything they wanted me to say.” He eventually made a false confession that was not good enough for his interrogators, so he “improved” it so it would be consistent. In this new form it was accepted.

Father Luca’s case showed Lifton how the Communists could not just get a confession, but could also manipulate the victim into creating a credible confession that the prisoner in some sense actually believed. (This process has occurred during police interrogations as well.) Lifton described this as “the mind’s capacity under duress to spin out falsehood and then come to believe that falsehood.”

You may say that these false confessions were obtained under extreme circumstances, and that this would not occur under police interrogation. Unfortunately, police and detectives have regularly been able to obtain false confessions from suspects during prolonged interrogations. Consider the tragic case of Juan Rivera, who—after a psychologically brutal 12-hour interrogation—confessed to the rape and mur-

der of an eleven-year-old girl, Holly Staker, in Waukegan, Illinois. He was found guilty and sentenced to life in prison without the possibility of parole. His sentence was overturned by an Appellate Court, but he was found guilty again at a second trial. Finally DNA evidence was found that exonerated Juan, but a third trial, astonishingly, found him guilty again. Juan was finally released after he had spent nineteen years in prison when the Illinois Court of Appeals overturned his conviction.

The police had put a thumb on the scale by altering evidence in order to convict Juan Rivera. Before Rivera went to trial, police and prosecutors claimed that they had found Holly Staker's blood on Rivera's Voit sneakers. There was a slight problem with this claim: the type of Voit sneakers in question were not available for sale anywhere in the U.S. until after the girl was murdered.

Unfortunately, the nineteen years that Juan Rivera spent in prison were not the only tragedy in this case. The real murderer's DNA was matched with another murder committed ten years after Holly Staker was killed. This is yet another case where putting innocent people in jail through false confessions allows real perpetrators to remain free and commit more murders. The motivation of police and detectives to protect society by obtaining a confession at all costs, therefore, can end up producing the exact opposite result from what they intended.

POLICE DETECTIVES HAVE A huge advantage over the accused in securing a false confession. Interrogators can lie to suspects, telling them about damning evidence that doesn't actually exist in order to secure a confession. They can even tell them (falsely) that they failed a lie detector test, or that DNA evidence shows they committed the crime, and

imply that the evidence will surely result in a conviction unless they confess to a crime they did not commit. It is hard to imagine something more preposterous than allowing detectives to lie to suspects, particularly when the detective can then threaten the suspect with the death penalty if they do not confess.

In another tragic case, the lie detector ploy used by interrogators appeared to be instrumental in getting Kevin Fox to falsely confess that he had raped and murdered his daughter. Even though standard lie detector tests are not admitted as evidence, new neuroscience technologies involving brain imaging and other techniques are being admitted in trials. Unfortunately, it is doubtful that many judges or jury members have the scientific understanding to evaluate such evidence.

Some of the more famous examples of false confessions occurred in the “Central Park Jogger” case. After five teenagers were arrested for raping a jogger in Central Park, the person who would later become the 45th President of the United States took out full page advertisements in all four New York City newspapers calling for a return of the death penalty for “criminals of every age.” The five teens were convicted after confessing under police interrogation, despite the fact that the DNA collected at the crime scene did not match any of the accused. The DNA came from a single person, as yet unknown. Moreover, there were many substantive discrepancies in the confessions that were glossed over by prosecutors and police.

When the DNA was matched to Matias Reyes, and he confessed, the convictions were vacated and the five men received a large settlement from New York City. Still, despite the fact that the only DNA found at the scene belonged to Matias Reyes (who said he acted alone), and



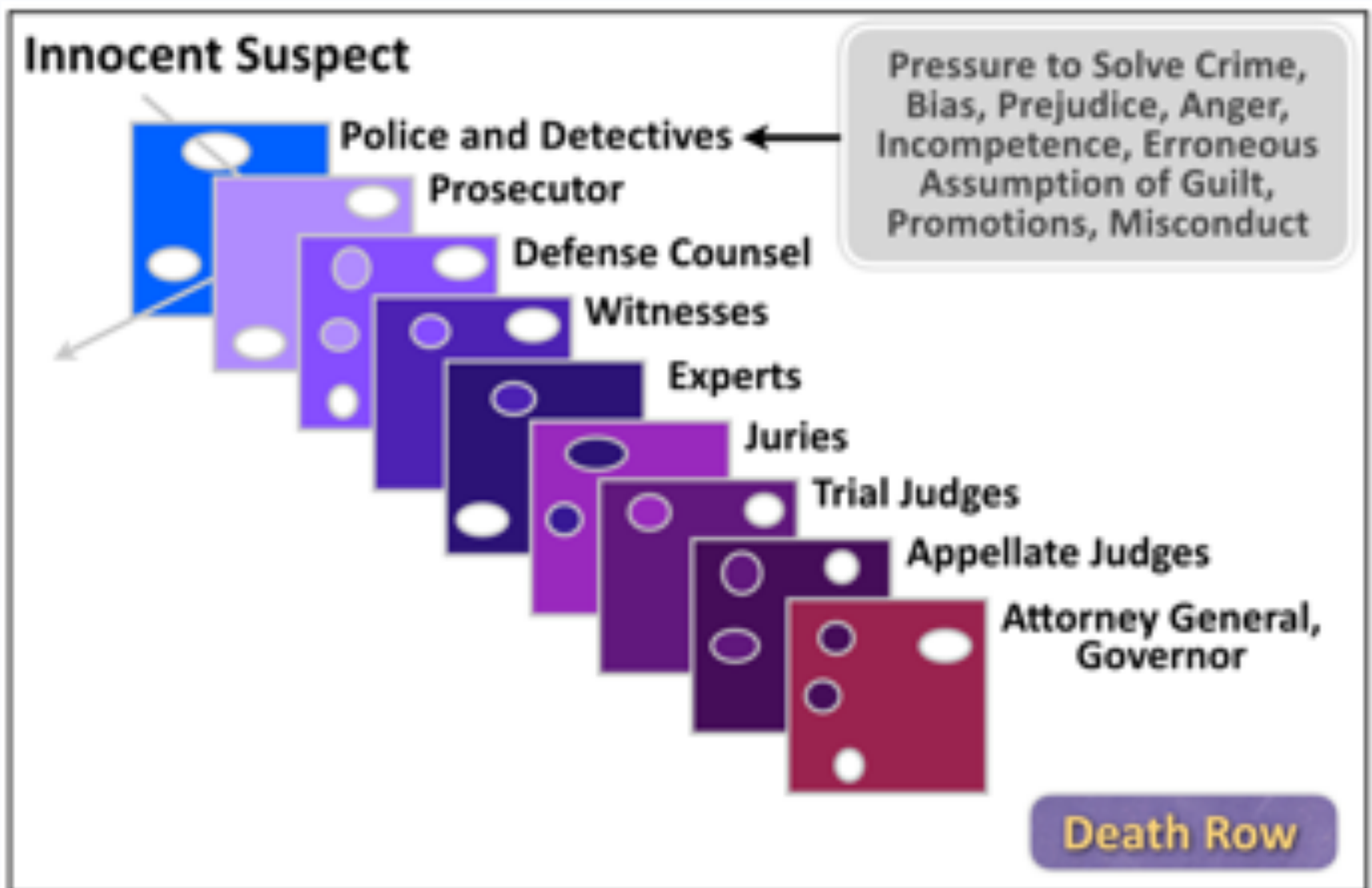
despite the fact that the five were convicted based almost completely on their inconsistent confessions, Donald Trump and others continued to claim that the five men were guilty.

Trump called the settlement “a disgrace,” and added, “These young men do not exactly have the pasts of angels.” This is an appalling non sequitur. Whether they were “angels” or not is irrelevant—the question is whether they committed the rape. On that count, given the evidence, it is very unlikely that they did. When the only DNA evidence at the scene is a perfect match to a person who confessed and said he acted alone, one cannot claim that vacating the convictions of the five men is a miscarriage of justice. The absurdity of an argument, however, does not seem to deter those who have become untethered from rational thought. It is best to be upwind when these people begin their pontification.

In summary, as shown in **Figure 15**, police sometimes abrogate their responsibility to act as a safeguard by sending people to the prosecutor who, based on the available evidence, should not be charged with a crime. This creates a hole in the cheese slice, and the case goes on to the next step, the prosecutor. Sometimes the prosecutor recognizes the problems with the case and declines to prosecute. Other times the prosecutor fails to stop the already faulty process, and may even add to the injustice. We will now address these problems.

## PROSECUTORS

As with police and detectives, most prosecutors most likely do the best they can with the time and resources they have. **Figure 19** shows the prosecutor correctly ruling out a person of interest, or refusing to prosecute a case where the evidence is insufficient to take a case to trial.



**Figure 19.** When police and detectives do not identify innocent suspect.

The prosecutor may also decide not to seek the death penalty when there are mitigating factors, such as a defendant who is floridly psychotic or who has severely diminished mental capacity. When the system works as it should, the prosecutor seeks justice rather than merely trying to win as many cases as possible by any means available. Unfortunately, prosecutors have historically been rewarded with reelection by being perceived as “tough on crime” by winning cases... not by seeking justice.

Many prosecutors appear to view trials as a contest to be won, much in the same way that those in business would want victory over a competing company. The difficulty of this approach is that the truth may be

vanquished along with the defendant. As Montaigne put it: “What greater victory do you expect than to teach your enemy that he is no match for you? When you win the advantage for your proposition, it is the truth that wins; when you win the advantage for order and method, it is you who win.” In other words, when your proposition wins, you succeed based on the actual evidence; when “order and method” win, you succeed based on how cleverly you presented your case rather than on the truth.

In addition to prosecutors being pushed to hardline positions by reelection pressures, all of the distorting influences we discussed about police and detectives apply to prosecutors as well. Prosecutors are not immune from the same biases, prejudices, and racist views as the rest of us. Also, like every other profession, some prosecutors are incompetent, dishonest, or both.

As discussed above for police and detectives, prosecutors may strongly feel that the person is guilty of the murder, but they may not have enough evidence to gain a conviction. This may lead the prosecutor to believe that that he or she is doing the right thing by cutting corners, but, again, this is not how our criminal justice system is supposed to work.

Prosecutors have such an outsized effect in the American criminal justice system, because they have so much power. Prosecutors decide who should be prosecuted for which crimes, decide what evidence should be divulged to the accused during plea bargains, and decide whether or not to seek the death penalty. It appears, however, that Lord Acton’s dictum, “power corrupts, and absolute power corrupts absolutely” applies here, at least for some prosecutors.

*The proliferation and breadth of criminal statutes have given prosecutors and the police so much enforcement discretion that they effectively define the law on the street.*

—John Paul Stevens

Sister Helen Prejean also observed that prosecutors can play a sinister role in pressuring the families of victims to push for the death penalty by suggesting that the execution of the person who killed their loved one will give them closure and satisfaction. They are told that watching the killer die will resolve their suffering. Of course, it does not. Instead of allowing the victim's family to heal, waiting through all the appeals and twists and turns in the case *prevents* rather than promotes healing for many people. The victim's loved ones are also sometimes pressured to ask for the death penalty as proof that they really loved the murdered victim. Somehow, if they do not cry loudly for execution, it means they do not really care deeply about their murdered loved one.

### ***Prosecutorial Misconduct.***

On January 25, 2019 The New Yorker Radio Hour devoted an entire episode to the case of John Thompson, who was convicted of a murder he did not commit. It was a riveting account of how things can go wrong when the prosecutors and district attorney badly want to solve a case quickly. Thompson's case also demonstrates how easily flagrant prosecutorial misconduct can be concealed, and how a stroke of luck is often required for the misconduct to come to light.

When John Thompson was 22-years-old he was arrested for the murder of Raymond Liuzza, Jr. and sentenced to death. The victim was



from a prominent local family, and the New Orleans District Attorney, Harry Connick Sr. (father of singer-actor Harry Connick Jr) knew them. The prosecutors apparently wanted a quick conviction and the ultimate punishment for Thompson, who was a petty criminal and had received stolen goods in the past.

Mr. Thompson had no previous convictions for violent crime, however, so to justify seeking the death penalty the prosecutors first tried him for carjacking. The prosecutors had a problem, however, because Thompson was just as innocent of the carjacking as for the murder, so prosecutors withheld from the defense the fact that Thompson's blood type did not match the carjacker. Based on flimsy eyewitness testimony, Thompson was convicted of carjacking, and then—because the prosecutors could cite a previous violent crime—Thompson was convicted of murder and sentenced to death.

John Thompson had executions scheduled six times, but after the seventh and final execution date was set, his lawyers had an investigator take one last look at the evidence. She talked her way into the Police Crime Lab, and found evidence showing the blood type that did not match Mr. Thompson. Thompson was finally exonerated of both the carjacking and the murder after 18 years in prison (14 of them on death row) and seven agonizing dates with the executioner.

One of the prosecutors in the case was Gerry Deegan, and when he was dying of colon cancer, Deegan confided to a friend that he had withheld the exculpatory blood evidence on Mr. Thompson. Deegan was apparently ashamed to reveal his secret, and his friend initially remained silent as well. The friend finally came forward to report what

Deegan had told him, and this evidence contributed to Mr. Thompson's exoneration.

Prosecutors not only withheld the blood type evidence, but did not disclose other exculpatory evidence as well. For example, the witness to the murder clearly described the murderer as an African American who was six feet tall, and had close cropped hair. John Thompson was 5 feet 8 inches tall, with a large Afro. Despite this and much other exculpatory evidence originally hidden from the defense coming to light, the prosecutors inexplicably decided to try John Thompson again for murder. It took the jury 35 minutes to declare Thompson not guilty.

Since prosecutorial misconduct was critical to his death sentence, after his release Mr. Thompson brought a civil suit against the District Attorney's office and was awarded \$14 million in damages. The U.S. Supreme Court, however, negated the award in a 5 to 4 decision, with Justice Clarence Thomas writing the majority opinion and Antonin Scalia writing a concurring opinion. Thomas and Scalia tried to make the case that it was just a isolated instance, ignoring several other cases thrown out because the same prosecutors hid evidence from the defense.

One wonders how egregiously Mr. Thompson's right to a fair trial would have to be violated in order for Justices Thomas and Scalia to recognize his right to compensation for almost two decades in prison, much of it spent in a small isolation cell for 23 hours a day. Justice Ruth Bader Ginsburg took the unusual step of reading her dissenting opinion from the bench. In essence, she expressed her dismay that Mr. Thompson had to suffer yet one more injustice, this time at the hands of the U.S. Supreme Court.

John Thompson died in 2017, having spent one-third of his life in prison before being exonerated. He commented on the life and death power prosecutors have when the death penalty is an option: “A person could have that much power over your life without being accountable for it. I can throw the evidence away and still try to kill you. Whether you did it or not, without no consequences. That’s scary. That should be scary to everybody in the whole world.”

ANOTHER EXAMPLE OF PROSECUTORIAL excess that might make George Orwell blush was described by Ken Armstrong in the November 13, 2017 edition of *The New Yorker*. In an Ohio murder case, prosecutors accused two different people in two separate trials of pulling the trigger that killed the same individual. When David Stumpf and Clyde Daniel Wesley entered the Ohio home of Norman and Mary Jane Stout and shot them, Mary Jane died but Norman survived. Norman did not know which one of the robbers had killed his wife, however, so the prosecutor first accused Stumpf of pulling the trigger in one trial, and in a later trial accused Wesley of the murder. Absurdity is apparently not a deal-breaker when one wants a conviction at all costs.

Unfortunately, prosecutorial misconduct may easily go undetected. The prosecutors may be the only ones who know about exculpatory evidence, so if a prosecutor simply decides to withhold evidence from the defense, it is very possible it will never be discovered. To make matters worse, even when it is discovered that a prosecutor illegally withheld evidence, it seldom results in significant consequences for the prosecutor. They are immune from civil suits, and typically suffer no repercussions from their reprehensible behavior, either from their superiors or from the public.

When it becomes clear that the prosecutors were responsible for sending an innocent person to death row—no matter whether the cause was prosecutorial incompetence or misconduct—the prosecutors often take extraordinary measures to obfuscate and stonewall. Apologies from prosecutors in such situations are rare, and more often they insist that the person is guilty in reality, if not legally. As Montaigne observed, the truth is sometime uncomfortable: “Truth has its inconveniences, disadvantages, and incompatibilities with us.”

PROSECUTORS FIND THEMSELVES in a position of “moral hazard.” This term is used in financial situations when someone does not take precautions against risk when they will not suffer the consequences if something goes wrong. For example, a person insured against car theft may not be quite as careful to avoid situations that increase the risk their car will be stolen. Since prosecutors are almost never called to account—even if they commit outrageous prosecutorial misconduct—there is little incentive for them to pay serious attention to the rights of the defendant other than their own moral compass. For minor crimes such misconduct may increase the suffering for the defendant, but in capital cases it can be the difference between life and death. (Again, I am not implying that all prosecutors behave in this way, and there is reason for optimism. Some newly minted prosecutors and district attorneys—such as Philadelphia district attorney Larry Krasner—seem to be intent on rooting out prosecutorial misconduct.)

### ***Plea Bargains.***

When someone has been charged with a crime, the prosecutor usually tries to get the accused to agree to a plea deal in order to avoid a trial. As Judge Jed S. Rakoff has observed, “The real decisions in criminal



cases are made by the prosecutors, not the courts. ... It is much too risky for any defendant, even an innocent one, to go to trial.” During the plea bargain process, the accused has no right to see what evidence the prosecutor has. Even more appalling, as we mentioned earlier for police and detectives, prosecutors can lie to the accused, such as falsely telling him that his DNA was found at the crime scene, or surveillance video shows him committing the crime. In this way, the prosecutor can gain a conviction without even worrying about whether the accused is guilty or innocent.

In a sense, prosecutors who force a plea bargain in this way are behaving in a manner much like the “bullshitters” described by philosopher Harry Frankfurt in his intergalactic best seller, *On Bullshit*. Frankfurt pointed out that people who bullshit are different from liars in that liars are telling you something they know to be untrue, while bullshitters just say things without caring whether it is true or not. In like manner, an indolent prosecutor can gain a plea deal without really spending much time worrying about whether the person is guilty or not. The fact that the accused *might* be guilty is enough for them.

*To call the process “plea bargaining” is a cruel misnomer. There is nothing here remotely like fair bargaining between equal parties with equal resources or equal information.*

—Judge Nancy Gertner

In jurisdictions where capital punishment is an option, plea bargains assume life and death significance. The very existence of the death penalty means the prosecutor has enormous leverage over a person ac-

cused of murder. Even if the prosecutor isn't convinced the accused is guilty, they can avoid all the work of a trial by asking the accused if they want the assurance of life in prison, or go to the crapshoot of a trial and risk execution. As former Supreme Court Justice John Paul Stevens observed, having the death penalty allows prosecutors to obtain guilty pleas to unprovable crimes by making charges...

*that make the defendant eligible for the death penalty in order to bargain the defendant into accepting a life sentence. Because of the uniqueness of the fear of death, I find that prosecutorial bargaining chip particularly offensive since it seriously risks persuading an actually innocent defendant to plead guilty and to accept incarceration for his entire life. In my view, it should not be permissible.*

This is just one more way the death penalty promotes injustice, by giving the prosecutors a way to bludgeon innocent defendants into a false guilty plea through the threat of death. The bitter irony is that innocent defendants are naturally more likely to want a trial—even with the risk of the death penalty—rather than plead guilty to a crime they did not commit. This probably contributes to the number of innocent people who have ended up on death row..

The John Thompson case described above under “Misconduct” demonstrates yet another problem with plea bargains—namely, false testimony from those with something to gain. Kevin Freeman, the man who sold the ring of the victim and the gun used in the murder to the unsuspecting Thompson claimed—in exchange for a one-year prison sentence—that it was Thompson who committed the murder. There is always a danger of other people involved in the crime testifying that an

innocent person committed the murder so they can avoid prosecution for the murder themselves.

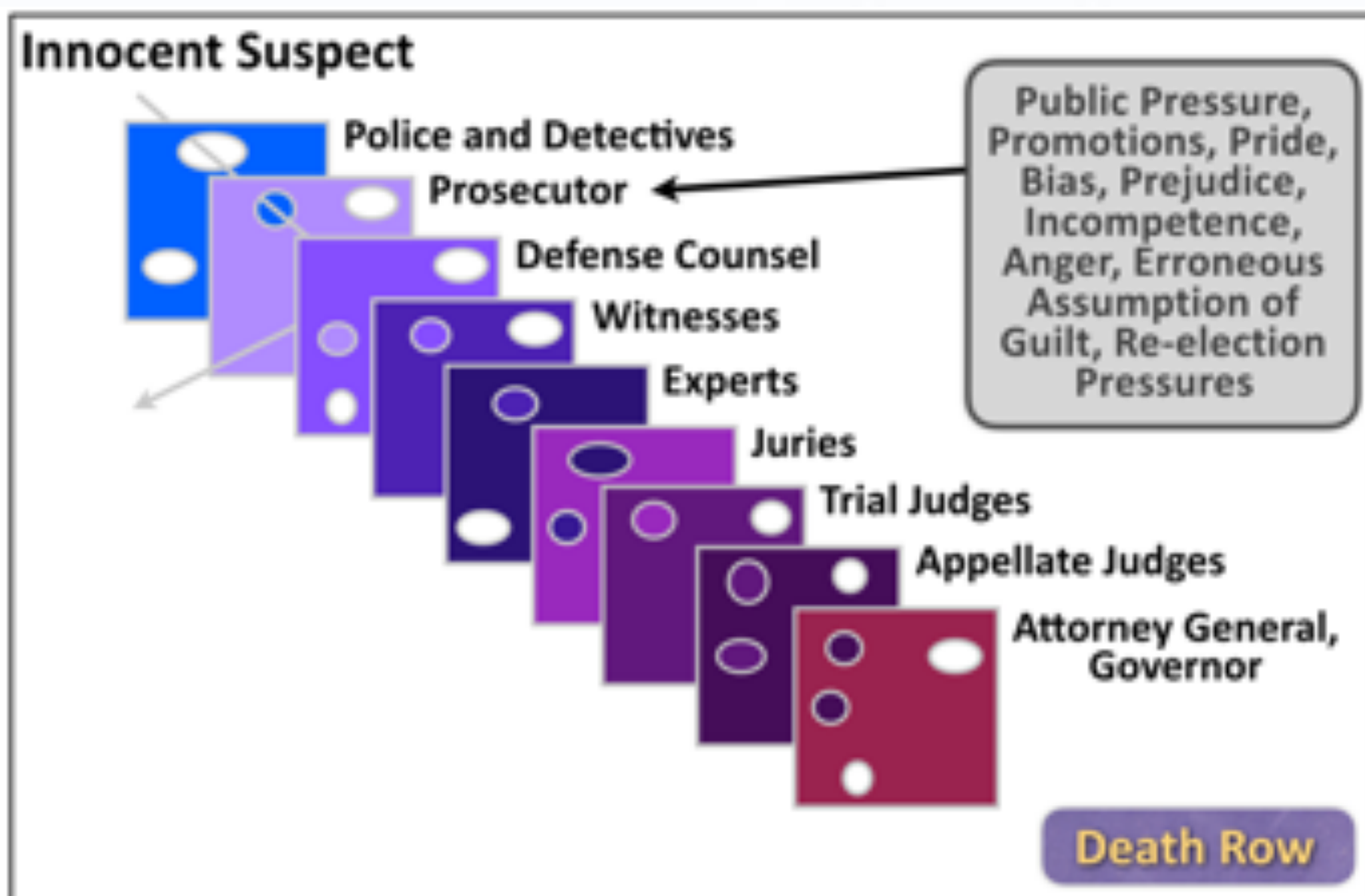
Finally, there is sometimes behavior by prosecutors and district attorneys that borders on ghoulish. They sometimes seem almost obsessed with executing prisoners, even if the condemned is almost ready to die from disease, or is so demented that they cannot remember the crime for which they will die. Consider death row inmate, Vernon Madison, as described by conservative columnist George F. Will. Madison was guilty of murdering a police officer, but misconduct by prosecutors invalidated the first two trials. At the third trial the jury recommended life in prison, but the judge overruled them and sentenced Madison to death.

**Vernon  
Madison<sup>27</sup>**

By the time they were ready to execute Madison, he had multiple strokes, dementia, was legally blind, had slurred speech, could not walk without assistance, had urinary incontinence, and could not remember committing the murder. To spend so much time, effort, and money trying to execute such a pathetic and debilitated human being speaks volumes about those seeking the execution. There are many other similar cases where the state has attempted to execute inmates who are horribly disabled and have relatively short life expectancy. Sometimes they have succeeded.

Amazingly, the Supreme Court later ruled 5-3 that Vernon Madison should not be executed because he did not understand why he would be killed. Clarence Thomas dissented because he felt executing such a person was just fine. I do not think it is hyperbole to suspect that Thomas would favor executing a person who was dying of cancer, and had only a day or two to live. This “hang-em high” proclivity of Thomas

is not rational, because it serves no penological or societal purpose. It must, therefore, come from some dark place in Thomas's soul—a place to which even he probably has no conscious access. It is not condescending to feel compassion for someone like Clarence Thomas who is so morally broken that he feels he must behave in this way.



**Figure 20.** Prosecutor Fails, but Defense Counsel Succeeds Succeeds.

In summary, as shown in **Figure 20**, prosecutors sometimes proceed with prosecution of an innocent person. This creates a hole in the cheese slice, and the case goes on to the next safeguard, defense counsel. Sometimes the defense counsel is able to gain an acquittal of an innocent defendant as shown **Figure 20**. Other times the defense counsel fails to (or is not given the ability to) provide adequate defense, and we will address these problems now.



## DEFENSE COUNSEL

In a 2018 speech at Harvard University, Sister Helen Prejean gave a stirring paean to the lawyers she has known who defend those on death row. “Our hero lawyers” she called them, people who try so hard to save the lives of the inmates, and yet often have to sit and watch their clients be killed by the state. “I have never met one that is not of superior soul stature” she said.

Many of the lawyers Sister Prejean refers to are high-profile attorneys working pro bono on death penalty cases. Defendants in capital cases often do not have the resources to pay attorneys, and must rely on public defenders or court-appointed attorneys. Most public defenders are dedicated professionals who are overworked, underpaid and have few resources to defend their clients. Sometimes, however, the court assigns attorneys to defend clients in capital cases, and they may or may not be dedicated and competent.

Sadly, some attorneys defending clients in capital cases are incompetent, dishonest, lazy or racist, and seem indifferent to the fate of the accused. Evidence from states such as Texas, Washington, Illinois, and North Carolina suggests that attorneys representing people sentenced to death were more likely to be disciplined for misconduct resulting in suspension, disbarment, or arrest. According to the Death Penalty Information Center, attorneys appointed in death penalty cases have been known to sleep during the trial, show up at court drunk, and not even know the name of the person they are representing.

Defense counsel may also be burdened with conflicts of interest, as when the lawyer appointed to a defendant in a state appeal is the same one as for a federal appeal. If the lawyer made errors in the

state appeal (such as failing to bring up incompetent representation at trial) he or she is not likely to point those out in the federal appeal.

Former United States Supreme Court Justice Sandra Day O'Connor had consistently supported the death penalty, but she came to realize that lack of adequate representation was a serious problem. In a 2001 speech in Minnesota, she stated that defendants represented by court-appointed attorneys were more likely to be convicted, and 44 percent more likely to be sent to death row. O'Connor observed:

*After 20 years on [the] high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country. Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.*

Regrettably, defense counsel is often at a decided disadvantage in the proceedings. A capital case is like any contest where the side with the most power and resources has an advantage, and often it is winning, not truth, that becomes the objective. Overwhelmingly it is the prosecutor who has the power and resources, but occasionally it is the defendant. Wealthy defendants can hire teams of high-priced defense attorneys, expert witnesses, jury consultants and more. They almost never go to death row.

Look at the team that O.J. Simpson put together when he was on trial for murdering Nicole Brown and Ronald Goldman. And look at the outcome. It is difficult to imagine that O.J. Simpson would have been acquitted if he were a destitute and unknown African American represented by an overworked and inexperienced public defender. As former Supreme Court Justice Hugo Black observed, "there can be no

equal justice where the kind of trial a man gets depends upon the amount of money he has.”

Another egregious example of the ability of wealth to immunize defendants against effective prosecution is Jeffery Epstein, who was accused of sexually abusing dozens of underage girls. In 2008, with the help of an army of aggressive lawyers, Mr. Epstein got a laughably lenient sentence from federal prosecutors in the Southern District of Florida. The prosecutors were led by Alexander Acosta, who later became President Trump’s secretary of labor. Instead of facing life in prison, Epstein was given 13 months in a cushy prison and was able to spend six days a week, twelve hours a day, in his office. As with O.J. Simpson, Epstein’s wealth provided him the ability to obtain a group of defense lawyers that a defendant with modest means could never afford.

*Men in the inferior and middling stations of life, besides, can never be great enough to be above the law.*

—Adam Smith

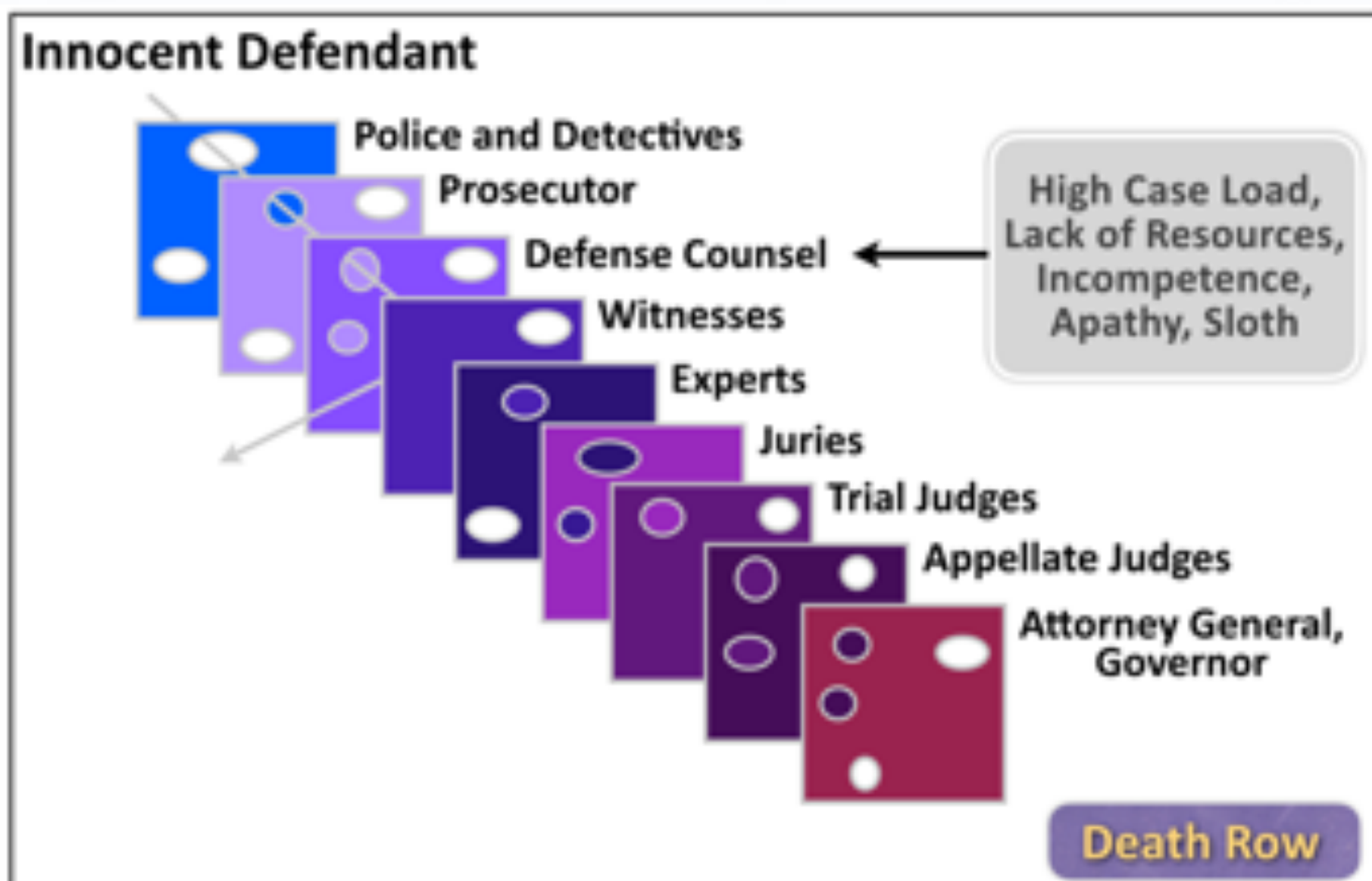
Regarding the ability of the wealthy to avoid the death penalty, Arthur Koestler characteristically cut to the heart of the matter:

*If there is even a slight risk that a man’s financial means could influence his chances of suffering capital punishment, then a fair trial is only possible if we abolish either financial inequality, or abolish capital punishment.*

In practice, it is not a “slight risk” but rather a virtual certainty that the defendant’s financial status influences his chances of being sent to death row. Wealthy defendants accused of murder almost never end

up sentenced to death, and sometimes escape any consequences whatever. It appears particularly perverse for anyone to claim—against the overwhelming evidence to the contrary—that wealthy people who murder are just as likely as poor people to be sent to death row.

In summary, as shown in **Figure 21** the defense counsel—sometimes through no fault of their own—does not provide an adequate defense of an innocent defendant. This creates a hole in the cheese slice, and the case goes on to the next safeguard, eye witnesses. Sometimes, as shown in **Figure 21**, the cheese slice holds and witnesses for the defense provide compelling evidence of innocence, such as providing proof that the defendant was not in the area where the murder was committed. Other times, eye witnesses wrongly implicate the innocent defendant, which we will discuss now.



**Figure 21.** Defense counsel does not adequately defend innocent client.



## WITNESSES

The evidence showing the unreliability of eyewitness testimony is extensive, yet it remains a problem. Of more than 360 wrongful convictions in criminal trials documented with DNA evidence by the Innocence Project, faulty eyewitness identification evidence was introduced in over 70 percent of the cases. These cases were not confined to capital cases, but inaccurate eyewitness testimony has resulted in innocent people going to death row.

The unreliability of witnesses is not a new problem. Arthur Koestler gives an example from the past:

*In 1896, a certain Adolf Beck was sentenced to seven years for robberies from women. In 1904 he was again convicted of similar offences. He was identified on the first occasion by ten, on the second by five women. Nine years after his first conviction the real culprit, Smith, was found; all of the fifteen identification witnesses were proven wrong. Beck was discharged and paid five thousand pounds as compensation. If he had been convicted of a capital offence and executed, who would have bothered after nine years?*

### ***Fallibility of the Senses.***

Eyewitnesses recount the input from their senses, such as what they saw, heard, smelled, and felt, but the accuracy of such recounting is often less than perfect. For example, a witness may describe the color of something they saw, but color may change depending on the angle of light striking the object. This mutability of color depending on the angle of light has been known for thousands of years. As the Epicurean philosopher Lucretius (99 BCE? – 55 BCE?) observed, “Color itself

changed by a change of light, according as the beams strike it vertically or aslant. ... In the same way a peacock's tail profusely illuminated changes color as it is turned this way or that."

Upon returning from a trip several years ago, I noticed that the lamp shades in the kitchen were different colors. (See unretouched photo.)

The lamp shades were identical, so it seemed impossible. I asked my wife to look, and she agreed that one was a light cream color and one a darker tan. We speculated that perhaps the cat-sitter had broken



one, and replaced it with a new one of a different color. At this point, if I were testifying in court on the color of the lamp shades, I would have told the court with 100 percent certainty the shades were different colors. My wife would have corroborated the observation, so we would have had two witnesses with the same story. If my testimony had somehow resulted in a homicide conviction, I would have gone to my grave thinking my testimony was honest and accurate.

Upon reflection, we quickly decided the cat-sitter theory was highly unlikely—how could she possibly find a replacement exactly the same shape as a decades-old lampshade? To investigate I walked over to the kitchen window to get a different perspective. Now, both shades

were getting the same angle of light with respect to me, and I realized they were indeed the exact same color. From the initial perspective, the colors were different. I took a photo of the shades to use in my philosophy of science classes to demonstrate the fallibility of the senses.

In the first chapter of his book *Problems of Philosophy* entitled “Appearance and Reality” Bertrand Russell talked—in his usual lucid fashion—about the color of the table at which he was writing. To him the table looked generally brown, but the color varied depending on how much light was striking any particular part of the table. If several people visited his study, they would all have a different perspective on the table’s color. If one were to ask what is the “true” color of the table, Russell says probably the best we can do is consider “the sort of colour which it will seem to have to a normal spectator from an ordinary point of view under usual conditions of light.” A witness in a murder investigation often does not have these optimal conditions when sensory input is being recorded in their brains.

### ***Fallibility of Memory.***

Memory, like the senses, is notoriously unreliable. Despite having a good memory, Montaigne—with characteristic modesty—was exasperated about his memory failures: “The slips that my memory has made so often, even when it reassures me most about itself, are not vainly lost on me; there is no use in her swearing to me now and assuring me, I shake my ears.” It was not that Montaigne’s memory was worse than ours; he was just more introspective and self-aware than we are.

In a newspaper report I read several years ago the witnesses said the perpetrators escaped in a tan or blue car that was either a Ford Pinto or a Ferrari. I do not know much about cars, but I am pretty sure that

Pintos and Ferraris have a rather different look. Tan and blue aren't that similar either. It is not just cars that people have trouble identifying. In police lineups, eyewitnesses select innocent people a disturbingly high percentage of the time.

Psychologist Hugo Munsterberg in his 1908 book, *On the Witness Stand*, described an experiment conducted in Germany at a convention of judges, physicians, and psychologists. Without telling the audience, the president of the association had a clown run into the hall, being chased by a man with a revolver. A shot rang out, and the two actors ran out of the hall. The president then had the participants write down what they had seen for the police. As you might expect, the highly educated eyewitnesses had vastly different versions of what had happened.

Another problem with memory is each time we retell the story to someone it is stored again in our brains, slightly altered. Greybeards like me know this well. We have told some of our favorite stories so many times that we have almost completely lost the original memory of the event. We start to wonder how much of our description is true, and how much is embellishment. As Robert Jay Lifton observed, "... memory is a rendering of the past from the perspective of the present."

Some states have set eyewitness standards in order to reduce the risk of mistaken identifications and wrongful convictions. California Senate Bill No. 923 approved in 2018 requires safeguards to reduce error in police lineups such as: 1) blinded identification procedures, 2) eyewitness shall be instructed that the perpetrator may or may not be present, 3) eyewitness should not be compelled to make an identification, 4) eyewitness should know that failure to make an identification will



not end the investigation, 5) when the eyewitness identifies a person as the perpetrator, the investigator shall immediately ask the eyewitness how much confidence he or she has, and record this statement verbatim, 6) the identification procedure shall be electronically recorded with both audio and visual representations.

*Improving witness procedures does not pit the interests of defendants against law enforcement; it serves our common goal of achieving fairness and efficiency in criminal law.*

—Adam Benforado

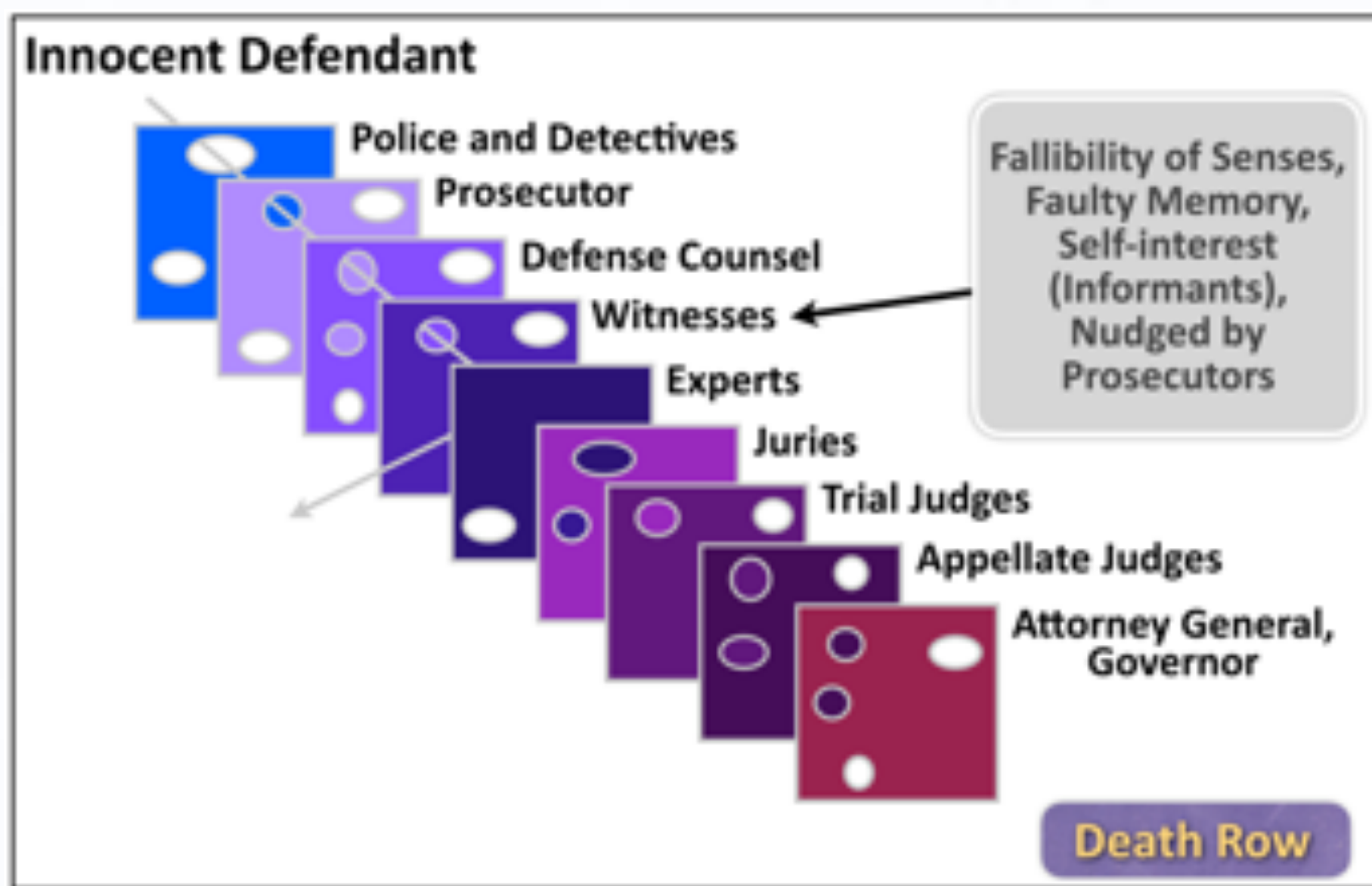
**Adam  
Benforado<sup>28</sup>**

These efforts are needed, but even if we were magically able to correct all of the flaws in witness procedures as conducted by police and detectives, we will be left with humans with fallible sense perceptions and unreliable memory. Innocent people will continue to be convicted of homicide—and some will be sent to death row—based on false eyewitness testimony because there is no way to completely eliminate errors. The evidence showing eyewitness testimony to be fallible is incontrovertible, and leads once again to the question: Given what we know, does it make sense to have an irreversible penalty on the books (execution) or should we have death in prison where there is at least the possibility of correcting eyewitness errors?

Finally, in addition to the honest mistakes made by witnesses that lead innocent people to be convicted, there are also cases in which eyewitnesses make false accusations because they have a motive for misremembering. This is especially a problem when “jailhouse snitches” have an incentive to falsely incriminate a defendant in order to gain an advantage for themselves, such as reduced prison time. Sometimes,

the actual perpetrator of the murder is able to incriminate an innocent person, thus directing attention on someone else. Strikingly, of the 166 people exonerated from death row, “perjury/false accusation” was involved in the exoneration in two-thirds of the cases, making it the most common contributing factor to exonerations.

In summary, it is clear that witnesses contribute to miscarriages of justice as shown in **Figure 22**. Witnesses who are sincerely mistaken or intentionally committing perjury can almost single-handedly gain a conviction of an innocent defendant. If the witness appears credible, and points out the defendant in the courtroom, it can be almost impossible for the defense to counter. This creates a huge hole in the cheese slice, and may weaken all of the downstream safeguards. Now the



**Figure 22.** Witnesses give an inaccurate account of the events.

case goes on to the next safeguard, expert witnesses. Sometimes expert witnesses for the defense of an innocent defendant are able to effectively demonstrate that the defendant is not guilty as shown in **Figure 18**. Other times misleading, erroneous, or even duplicitous expert testimony against an innocent defendant leads to a presumption of guilt, and we will turn to that issue now.

## EXPERT WITNESSES

Expert witnesses sometimes aren't. Misleading expert witness testimony appears to be the second most common cause of convicting the innocent in criminal trials. Of more than 360 wrongful convictions documented by DNA evidence by the Innocence Project, faulty expert witness evidence was introduced in 45 percent of the cases. These wrongful convictions included some death penalty cases.

I am not at all surprised by these statistics. I have served as an expert witness many times over the years in civil drug interaction cases. I have been an expert witness for the plaintiff a few times, but in most cases I have been testifying for the defense, usually on behalf of a physician. I have turned down many plaintiff cases because it did not appear to me that the drug interaction was actually the cause of the adverse outcome. I only took on cases when it was clear that the person I would be testifying for has the scientific evidence on his or her side.

My conversations with the attorneys—generally attorneys defending a physician—tended to go like this. Me: “Well, the scientific evidence suggests that, although the physician did indeed make an error, the error was very unlikely to be the cause of the adverse outcome experienced by the patient.” Attorney: “Good, that is what we were hoping to hear.” Me: “But virtually any drug interaction expert would come to the

same conclusion that I came to... how is the plaintiff going to find someone to say that the error was the cause of the adverse outcome?" Attorney: "Oh, rest assured, they will find an 'expert' to say exactly that." Me: "But that would mean that by definition they are actually not an 'expert' at all." Attorney: "True, but if you dangle money in front of some expert witnesses you can get them to say pretty much anything you want."

**Expert Witness  
Anecdote<sup>29</sup>**

The attorneys were right, of course, and I was astonished to find out what these 'experts' said. It was clear that the arguments these experts made were not scientifically valid; most of my students at the university would have been able to immediately see the flaws. These were civil cases but it would be very surprising if incompetent 'experts' only testified at civil trials and not in criminal trials as well. The juries, of course, hear one expert saying one thing, and another expert saying the opposite, and they are rarely in a position to assess the scientific validity of either position.

In my work as an expert witness in drug interactions, therefore, it became clear to me that some "experts" are not experts at all in the field in which they are testifying. Unfortunately, when the prosecution brings in an expert, the defendant in a capital case—often indigent and without the resources to hire a competing expert—has no way of countering the damning testimony from a pseudo-expert. Montaigne talked about people who profess expertise beyond their reach: "...for a man ignorant of music to want to judge singers, or for a man who was never in a camp to want to argue about arms and warfare, presuming to understand by some flimsy conjecture the products of an art that is outside his knowledge."



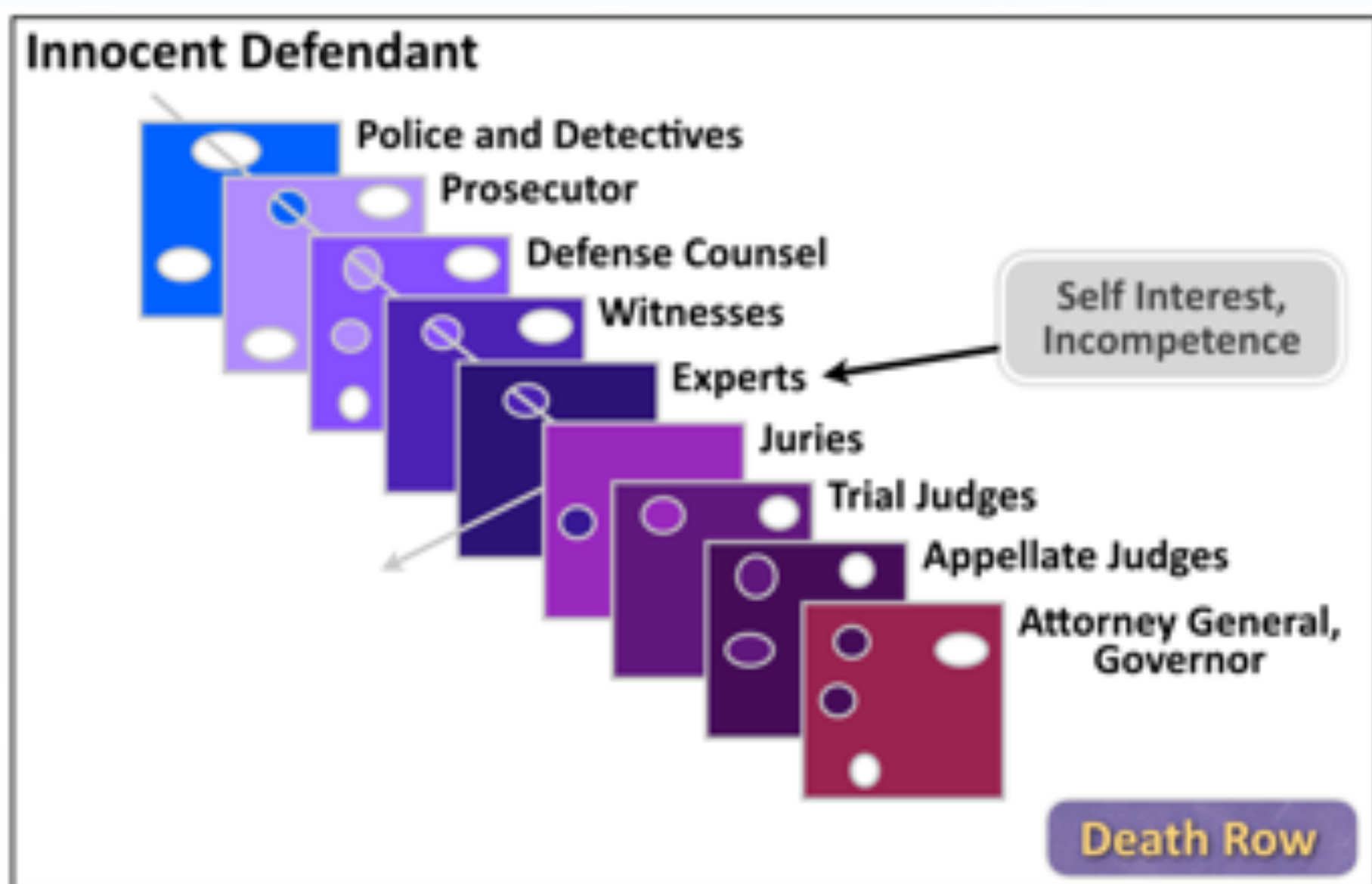
My experiences as an expert witness led me early on to wonder why we allow the circus of dueling expert witnesses to continue in our courts. It seems to me that justice would be much better served by an impartial panel of 2 or 3 experts hired by the court who could look at the case and assess the empirical evidence. They could still be wrong, of course, but at least the jury (or judge) would not be faced with the task of assessing two diametrically opposed expert opinions on a topic about which the jury or judge may be woefully ill-informed. In my drug interaction examples, all of the true experts would come to the same conclusion, and the jury would not be faced with trying to decide which expert was correct. This would be expensive, of course, so it may not happen any time soon.

Expert witnesses can be decisive in the outcome of criminal trials. Consider the brutal beating of Rodney King by Los Angeles police officers in 1991, a self-evident example of police brutality caught on videotape. Most people felt that no sane person could view the video and claim that it did not represent a particularly egregious example of excessive force on the part of the police, but all four officers were acquitted. The reason? The main reason for the acquittals was the effective testimony of the expert witness for the defense named Charles Duke. The jury bought into the testimony of Duke, described by Adam Benforado as “barrel-chested with a brown mustache and the squinty eyes of a veteran officer, he exuded authority and coolheaded objectivity.”

CAMUS RECOGNIZED THE limitations of expert witnesses as well. “When the learned expert holds forth in court, it seems as if a priest has spoken, and the jury, raised in the religion of science, expresses its opinion. However, recent cases, chief among them the Besnard case, have shown us what a comedy of experts is like. Culpability is no bet-

ter established for having been established in a test tube, even a graduated one. A second test tube will tell a different story...” Marie Besnard (1896-1980) was accused of poisoning several people with arsenic, but the expert witnesses for the prosecution made numerous errors. Moreover, the defense was able to show that the arsenic may have leached into the bodies from the surrounding soil. After three trials, she was eventually acquitted.

As shown in **Figure 23**, expert witnesses who are incompetent or are intentionally distorting the data can be instrumental in condemning an innocent defendant. If the expert appears credible, it may be difficult for the defense to counter the testimony. This creates a hole in the cheese slice, and the case goes on to the next safeguard, the jury. Ide-



**Figure 23.** Expert witnesses fail to provide valid testimony.

ally, juries consider all the evidence carefully and acquit the innocent defendant as shown in **Figure 23**. Other times juries do not act as an effective safeguard, and an innocent person is convicted. We will now discuss what can go wrong with juries in capital cases.

## JURIES

In his wonderful piece, “An Historical Monograph Written in 4930” Ambrose Bierce (1842-1914) pretends to be writing about the demise of “Ancient America” from the perspective of three millennia in the future. He weighs in on the jury system: “It is difficult to conceive a more clumsy and ineffective machinery for ascertaining truth and doing justice than a jury of twelve men of the average intelligence, even among ourselves. [“ourselves” meaning the enlightened people of the year 4930] ... “So unintelligent were these juries that a great part of the time in every trial was consumed in keeping from them certain kinds of evidence with which they could not be trusted; yet the lawyers were permitted to submit to them any kind of misleading arguments that they pleased and fortify it with innuendoes without relevancy and logic without sense. Appeals to their passions, their sympathies, their prejudices, were regarded as legitimate influences and tolerated by the judges...” We may have made some progress since Bierce wrote this over a century ago, but many of the problems he cited remain with us.

**Ambrose  
Bierce<sup>30</sup>**

### ***Lack of Impartiality.***

Members of juries are intended to be a cross-section of the public, the “impartial jury” guaranteed by the Sixth Amendment. But getting a truly “impartial” jury in any given case is easier said than done. We all have

our subconscious biases and prejudices, and no one can put all of those aside when he or she becomes a juror.

The system is designed to weed out jurors who may not be “impartial” and jurors with obvious conflicts of interest would be removed from the jury pool—for example, people who work with the defendant. Also, both prosecutors and defense attorneys are able to remove some jurors if they feel they may not be sympathetic to their side.

Juries can be influenced by many factors irrelevant to the guilt or innocence of the accused. The appearance and demeanor of the defendant, for example, is an important cause of potential bias for juries. The race of the defendant is an obvious factor, but there are many other factors. There is research evidence, for example, suggesting that overweight defendants are more likely to get a guilty verdict, especially with slim male jurors voting on the guilt of an overweight woman.

The jury introduces an arbitrary element beyond their pronouncements of guilt and innocence. Even when the defendant is truly guilty, the sentence he or she receives depends on many irrelevant factors. Very little has changed since Albert Camus observed,

*a large element of chance enters into any sentence. The look of the accused, his antecedents (adultery is often looked upon as an aggravating circumstance by jurors who may or may not have been always faithful), his manner (which is in his favor only if it is conventional—in other words, play-acting most of the time), his very elocution (the old hands know that one must neither stammer nor be too eloquent), the mishaps of the trial enjoyed in a sentimental key (and the truth, alas, is not always emotionally effective): so many flukes*



*that influence the final decision of the jury. At the moment of the death verdict, one may be sure that to arrive at the most definite of penalties, an extraordinary combination of uncertainties was necessary. ... Inasmuch as there are never two comparable juries, the man who is executed might well not have been.*

As Camus observes, the demeanor of the defendant can be critical. One of the tragic aspects of innocent people being convicted of murder occurs during sentencing. How likely is it that a person falsely accused of murder will offer a profuse apology to the victim's family? Would you? Innocent defendants are naturally much less likely to act remorseful; they didn't commit the crime! Ironically the person falsely accused of murder may increase their chances of being given a death sentence by simply refusing to express remorse for a crime they did not commit. As Adam Benforado observed:

*"...when a person does not apologize or act remorseful, experimental participants tend to view him as having a worse character and being more likely to reoffend. In turn, this can lead participants to advocate less harsh punishment for a contrite or apologetic offender."*

We are all susceptible to the ubiquitous thinking errors and foibles such as preconceived notions, confirmation bias, self-deception, wishful thinking, rationalization, reactive judgments, hubris, and just plain ignorance. Montaigne described the typical human: "...the common run of men today, stupid, base, servile, unstable, and continually tossed about the by tempest of the diverse passions that drive them to and fro;..." We give Montaigne a pass for his cynical view of humanity, because he freely admitted he was guilty as well. Nonetheless, this is the pool of humans from which we select jury members.

Lest we think these foibles are restricted to those with more pedestrian intellectual gifts, consider Nobel Laureates William Shockley and James Watson both of whom promoted egregiously unscientific racist ideas. Also, the eminent physicist Freeman Dyson—with unconscionable hubris—says all the climatologists are wrong, and climate change is not a serious risk to humans. Dyson is not a climatologist, and his behavior is like a neurosurgeon telling the nephrology community that they are all wrong about how the kidney works. This is not okay.

Montaigne described such people: “Those who have some rare excellence beyond the others, and some extraordinary quickness, are nearly all, we see, incontinent in the license of their opinions and conduct.” Smarter people are not immune from ignorant certainty because they often think mental horsepower alone allows them to perceive the true nature of the world.

Another problem is the scientific illiteracy of the average American citizen. (I will not bore you again with the statistics regarding what percent of Americans think the sun goes around the earth.) It is not lack of knowledge about scientific facts that is the problem, however. The problem is that the average American does not know how science *works*. When we teach science in high school and even in most university courses, we are conveying scientific “facts” rather than giving the student an understanding of the scientific process.

Criminal trials increasingly involve scientific concepts, and most jurors will not be able to adequately incorporate these issues into their verdicts. For example, if an unqualified expert witness for the prosecution says that a house fire that killed the defendant’s three children was the result of arson, jurors are unlikely to be able to detect the flaws in the expert’s testimony. There is no easy solution for this, but it does add

yet another confounding factor in deciding whether the death penalty should be one of the sentencing options.

Then there is the universal inability of one person to know with any degree of certainty what is in the mind of another person. The human brain is the most complex entity in the known universe, yet we think a jury will discern what is going on in the defendant's brain with such precision that we feel comfortable taking the life of one person, but not another. We humans can't even figure out our cable TV bill; what unmitigated hubris to think we can decide who "deserves" to die for their crimes, some of whom did not even commit the crime.

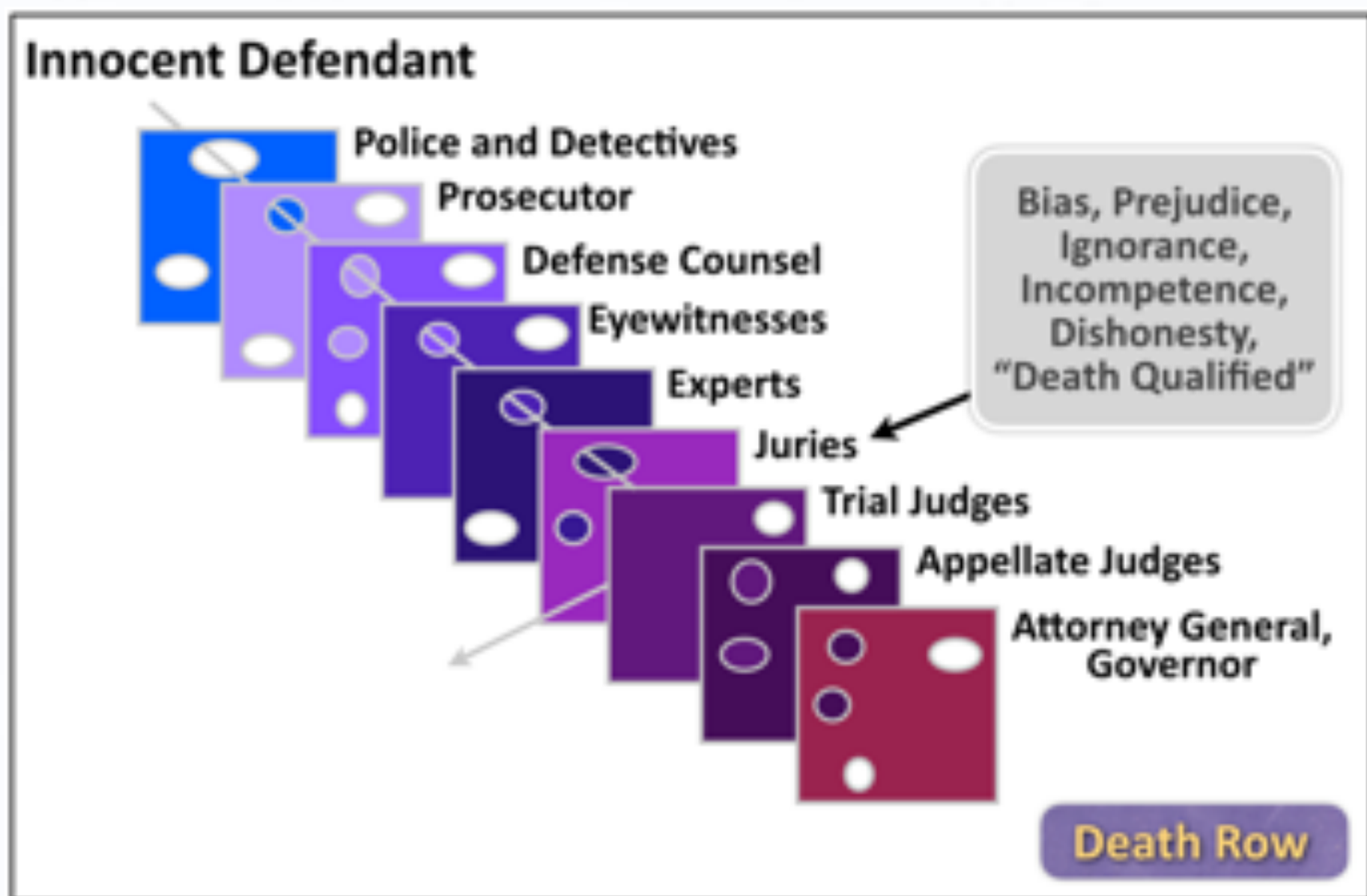
Finally, as if we needed any more evidence of human incompetence and ignorance, consider the book—now in its third edition—entitled, "Outwitting Squirrels: 101 Cunning Stratagems to Reduce Dramatically the Egregious Misappropriation of Seed from Your Birdfeeder by Squirrels." So we have twelve people on a jury—most of whom cannot out-think an acrobatic rodent—deciding with certainty who deserves to be executed for their crimes.

### ***Death penalty qualified juries.***

One of the more appalling defects of capital cases is the requirement that each juror be "death penalty qualified"—in other words, the juror must be willing to apply the death penalty as a punishment. This assures, for example, that I will never be allowed to sit on a jury in a capital case. And since a desire for retribution is one of the strongest impulses leading people to support the death penalty, a death penalty qualified jury is one that is fundamentally inclined to meeting out severe payback for murderers. This is not an impartial jury of one's peers... it is a group who is much more likely than average to be inclined to vengeance and to want the murderer to suffer.

Given that people who favor the death penalty are much more likely to have a conservative political ideology, requiring death penalty qualified juries means that even in “blue” states a majority of the jurors in capital cases will have conservative political views. This isn’t necessarily bad in and of itself, but does skew the composition of the jury to render it less representative of the population as a whole.

In summary, as shown in **Figure 24**, juries can fail in their duty to protect an innocent defendant. This creates a hole in the cheese slice, and the case goes on to the next safeguard, the trial judges. Judges have considerable power in a courtroom, and ideally they conduct themselves in such a way that the rights of innocent defendants are protected, as shown in **Figure 24** by the arrow trajectory being



**Figure 24.** The jury fails in its duty to acquit the innocent.



stopped. Other times judges do not act as an effective safeguard, and an innocent person is convicted. We will now discuss what can go wrong with the behavior of judges in capital cases.

## JUDGES

Trial judges are vital in ensuring the fairness of the judicial process, and preventing the conviction of innocent people. The judge can reign in overzealous police or prosecutors who have abrogated the defendant's rights, through ignorance or duplicity, and can seek new representation for the defendant if the defense counsel is not doing his or her job. The judge can also ensure that the testimony of witnesses and experts is in accord with court procedures, and can allow or disallow evidence on this basis. The judge also instructs the jury to ensure that they understand their function.

Unfortunately, judges are not infallible and sometimes they contribute to miscarriages of justice. How can this happen? Let us begin with the obvious: judges are like the rest of us, with our own biases, moods, mental states, perceptions, life experiences, and worldview. Despite this obvious fact, some judges are not willing to admit that they are anything but purely objective. As John Roberts said during his confirmation hearings for the US Supreme Court, "Judges are like umpires. Umpires don't make the rules; they apply them." That sounds fine in theory, but in fact judges do *not* act like an umpire calling balls and strikes. It could not possibly work that way given the susceptibility of human beings to making subjective rather than objective decisions.

*No judge or justice ever approaches a case with a genuinely open mind. They read briefs and hear arguments with minds shaped by Sunday school, military service, summers on Cape Cod, and years as*

*a prosecutor or a parent. Researchers recently found that judges who had a daughter rather than a son were 16 percent more likely to decide gender-related civil rights cases in favor of women's rights.*

In the above quote, Adam Benforado is essentially saying that judges, like the rest of us, harbor all sorts of subconscious ideas, urges, and biases based on our life experiences. Adding to the variability, these life experiences are interpreted by a particular brain, with its unique physical characteristics and neurochemistry.

Chief Justice Roberts would have us believe that Supreme Court justices, like umpires, simply apply the already established rules to specific cases in a more or less mechanical and straightforward way. That is exactly what we do *not* need from Supreme Court justices or judges in general; instead we need wisdom, not mere knowledge of the rules. The distinction between knowledge and wisdom was noted by the ancients. Heraclitus held that “abundance of knowledge does not teach men to be wise.” Eighteenth century poet William Cowper said the same thing perhaps more eloquently:

*Knowledge and wisdom, far from being one,  
Have ofttimes no connection. Knowledge dwells  
In heads replete with thoughts of other men;  
Wisdom in minds attentive to their own.  
Knowledge, a rude unprofitable mass,  
The mere materials with which wisdom builds,  
Till smoothed and squared and fitted to its place,  
Does but encumber whom it seems to enrich.*

—William Cowper, *The Task*

The problem of knowledge versus wisdom affects not only judges—many of us in the twenty-first century feel encumbered by the “rude unprofitable mass” of knowledge in our respective fields. I have used this Cowper quote so often in hundreds of drug interaction lectures to physicians and pharmacists over several decades that I inadvertently committed it to memory.

### ***Subconscious Influences Affecting Judges.***

There is no reason to believe that judges are ruled by their subconscious any less than the rest of us. The dominance of the subconscious in our mental activities is fairly benign for most of our day-to-day decisions, but can have devastating consequences if a judge is hearing a capital case. The problem is not only the fact that judges have subconscious biases. It is also that most judges—like humans in general—do not recognize the many factors that dictate their state of mind at any given moment.

An astonishing example comes from a 1987 study of judges, performed by social psychologists Sheldon Solomon, Jeff Greenberg, and Tom Pyszczynski, who decided to test Ernest Becker’s theory that our terror of death tends to engender negative and intolerant behavior. This was one of the first studies of “Terror Management Theory” designed to test Becker’s ideas. In the study, twenty-two judges were randomized into two groups: Group 1 completed a survey in which they were asked very specific and detailed questions about their own death. This forced them to seriously contemplate their mortality. Group 2 was not given the death survey. The judges were then given a hypothetical case of a twenty-five-year-old woman who was arrested for prostitution, and they were asked to set her bail.

The results were astounding. The average bail amount imposed by judges in Group 1, who had been forced to think about their own death, was \$455. In the “control” group of judges, the average bail was \$50, an amount that would have been typical in this jurisdiction. The researchers concluded, “The scales of justice were tipped, if not toppled, by the judges who had pondered their demise.”

I am sure some of you are thinking, “That is impossible! There is no way that thinking about death could have made that much difference!” I understand that sentiment because that is exactly how I reacted upon first hearing of this study. [To help sort out how this could possibly be real, please see the “pop-over” on Ernest Becker in Chapter 1. Perhaps that discussion will temper your incredulity somewhat.]

Like every other human on the planet, judges cannot avoid the central influence of the subconscious on their thoughts and actions. The fact that judges are awash with subconscious bias should be enough to give one pause regarding the death penalty. Moreover, thinking about death is only one subconscious influence on a judge. A judge who has strong feelings for or against the death penalty, for example, can certainly nudge the decision in one way or another through rulings and decisions. And because many of these influences on the judges are subconscious, there is simply no corrective. The judge can honestly claim that he or she is not biased, because that is how it feels.

In another example involving a study of eight judges on two Israeli parole boards, they found that the judges granted parole about 65 percent of the time at the start of the day and after food breaks, but at the end of the day they almost never ruled in favor of the prisoner. The researchers suggested that by the end of the day the judges were men-



tally fatigued, and it was easier to deny parole than to carefully consider whether the prisoner deserved parole.

It is not surprising that Montaigne instinctively knew that the decisions of judges would be affected by their own life situation at the time:

*As for a judge who brings with him from his home the pain of the gout, jealousy, or the pilfering of his valet, a judge whose whole soul is dyed and steeped in anger, there is no doubt that his judgment is biased in that direction.*

The modern studies of judges' behavior just confirm what Michel de Montaigne already knew. With his extraordinary insights into the human condition, Montaigne described many other human behaviors long before modern social psychologists demonstrated the same behavior through experimentation. Indeed, it is unusual to find a “new” discovery in psychology—whether it is the subconscious, confirmation bias, refusal to consider empirical evidence, perspectivism, binary thinking, presentism, limitations of language, or self deception—that has not already been described by Michel de Montaigne or by one or more other psychologically sophisticated thinkers such as Seneca, Blaise Pascal, or Friedrich Nietzsche.

### ***Failure to Recuse.***

In *The Spirit of Laws* Baron de Montesquieu (1689–1755) emphasized that judges should be unbiased, and have a certain coolness and indifference to the case at hand. One would indeed expect that when a judge has an obvious source of bias in a case she would recuse herself. If the judge's daughter is the CEO of a company that is being sued, the judge obvi-

**Baron de  
Montesquieu<sup>31</sup>**

ously should not hear the case. But the situation is often not that straightforward, and judges are too often reluctant to recuse themselves in cases where there is at least an appearance of bias.

In one particularly famous case Justice Antonin Scalia angrily refused to recuse himself in a 2004 Supreme Court case involving his longtime friend, Dick Cheney. Scalia made the astonishing argument that he would recuse himself if Cheney were at risk of losing money or of being imprisoned, but not in any other type of case. In other words, Scalia wanted us to believe that he could ignore his longtime friendship with Cheney in some situations, but not in others—kind of like a light switch being on or off.

The fact that Cheney was his duck-hunting buddy was irrelevant, in Scalia's view. Using similarly convoluted reasoning, Scalia justified flying to Louisiana on Cheney's private jet by claiming that he had purchased a round-trip ticket and thus had not saved any money. Any of us "stern-dwellers" who sandwich ourselves into crowded coach seats when we fly would probably not be convinced that flying on Cheney's private jet would be the equivalent of sitting in seat 14B on Sardine Discount Airlines between an NFL lineman and a sumo wrestler.

Scalia seems to have also missed the point that most sensible people hearing of his friendship with Cheney would assume that he could not possibly be unbiased in judging a case in which Cheney had an obvious interest. The appearance of bias in such a situation is unavoidable, and even if by some miracle a judge is not actually biased, the appearance of bias can result in loss of faith in the outcome of the case in question, and even in the judicial process generally. It is astonishing that such a self-evident concept is vehemently denied by people who pride themselves in their judgement.

*There are few things on which we  
can give a sincere judgment, because  
there are few things in which we have  
not in some way a private interest.*

—Michele de Montaigne

In June, 2016 the Supreme Court ruled that a judge may not hear an appeal in a case where he previously was involved in the case as a prosecutor. Ronald D. Castille was a prosecutor when Terrance Williams was given the death penalty. Later lawyers for Williams filed an appeal citing prosecutorial misconduct and a lower court concurred. But when the case reached Judge Castille's court and Williams' lawyers (naturally) asked Castille to recuse himself, he refused. Williams' death sentence was reinstated.

This case is disturbing, because as with Scalia in the Cheney case, it doesn't really matter how much Judge Castille is personally convinced that he is not biased in the case. His group of prosecutors succeeded in obtaining a death sentence for Williams, and these were the very same prosecutors who were being accused of misconduct. So allowing Judge Castille to decide if his own group of prosecutors was guilty of misconduct would be a bit like asking an NFL football coach to decide if his own player—who was accused of an illegal hit on an opponent—was guilty of the penalty or not. That is why we have a third party (the official) decide such things.

I must admit that I am mystified by the all-too-often failure of judges to recuse themselves when there is reason to believe that they may be biased. When it would be obvious to any random fifth grader that the judge may well be biased (as in the Calstille case) why not just bow

out and let other judges handle it. It is not as though the criminal will be set free if you recuse yourself. The public needs to have faith the courts will at least try to be objective, and failure to recuse when there is a reasonable argument that the judge may be biased certainly undermines that faith. In other words, in my view the standard should be, “When in doubt, recuse yourself.”

In thinking about the recusal issue, it is important to recognize that all humans, including judges, are very poor at recognizing their own biases and prejudices. Biases often come from our deep selves... from our subconscious. I am sure that most judges who fail to recuse feel that they can be completely objective in hearing the case in question. As François, duc de La Rochefoucauld (1613-1680) said, “Everybody complains of his memory, but nobody of his judgement.” This is precisely why judges should recuse themselves if the standard “reasonable person” who knows all of the circumstances would have doubts about the impartiality of the judge in question.

Montaigne, ever on the lookout for human foibles, recognized—just as we all think we are better than average drivers—we almost never question our own judgment: “We readily acknowledge in others an advantage in courage, on bodily strength, in experience, in beauty; but an advantage in judgment we yield to no one.” Perhaps it is inevitable that judges should have the same blind spots as the rest of us, but their lack of judgment on recusal can have serious consequences in a capital case.

### ***Election of judges.***

The election of judges sounds like a reasonable practice at first glance, but in practice it can be problematic. It takes money to run for



an office, and the money has to come from somewhere. If an attorney donates to a judge's campaign, and then has a case before that judge, will the judge recuse? If a businessperson donates to a judge's campaign, and then has an interest in how a case before that judge turns out, will the judge recuse? As we have just discussed, at least some judges are reluctant to recuse, even when it is obvious to others that they should.

Ambrose Bierce recognized this problem with the election of judges: "The judges, as a rule, were no better [than juries]... Most of them depended for their office upon the favor of the people, which, also, was fatal to the independence, the dignity and the impartiality to which they laid so solemn claim. In their decisions they favored, so far as they dared, every interest, class or person powerful enough to help or hurt them in an election."

Another problem with electing judges is that they may be particularly averse to being considered "soft on crime" especially before an election. There is no better way to show one's "law and order" bona fides than to eagerly seek the death penalty for those convicted of murder. In the past, judges in some states were able to impose the death penalty even if a jury recommended life in prison. On March 15, 2015, The New York Times Editorial Board pointed out that in Alabama elected judges imposed the death penalty 101 times after the jury voted for life in prison. Death penalty judgements appeared to be higher in election years, and Justice Sonia Sotomayor noted that the judges "appear to have succumbed to electoral pressures."

The practice of a judge overriding the will of a jury would not sit well with 18th century penal reformer, Cesare Beccaria. His view was the

legislature should make the laws and the judge should not be given wide discretion to impose his own will on judicial proceedings against the will of the legislatures, juries, and the like.

I am not weighing in on whether or not we should elect judges. I am only pointing out that it represents yet another variable in whether or not a given person gets the death penalty. There may be other reasons why election of judges is good or bad, but as a source of hyper-punitive behavior by judges, it is likely to contribute to the arbitrary nature of death sentences.

### ***Scientific Literacy of Judges.***

Lack of scientific literacy is a huge societal problem. For example, very few state or national legislators truly understand the scientific process, and yet a rational assessment of many issues on which they vote depends on just such an understanding. The fact that so many scientifically illiterate legislators are voting on the climate crisis and other issues vital to the future of humanity is truly frightening.

Like legislators, judges need more education in scientific principles. One survey found that only 5% of state trial court judges understood the basic scientific concept of “falsifiability.” It seems clear that many judges need training in scientific principles so that they will be able to assess expert testimony. This is especially a problem now that more and more evidence involving neuroscience is being introduced into trial proceedings.

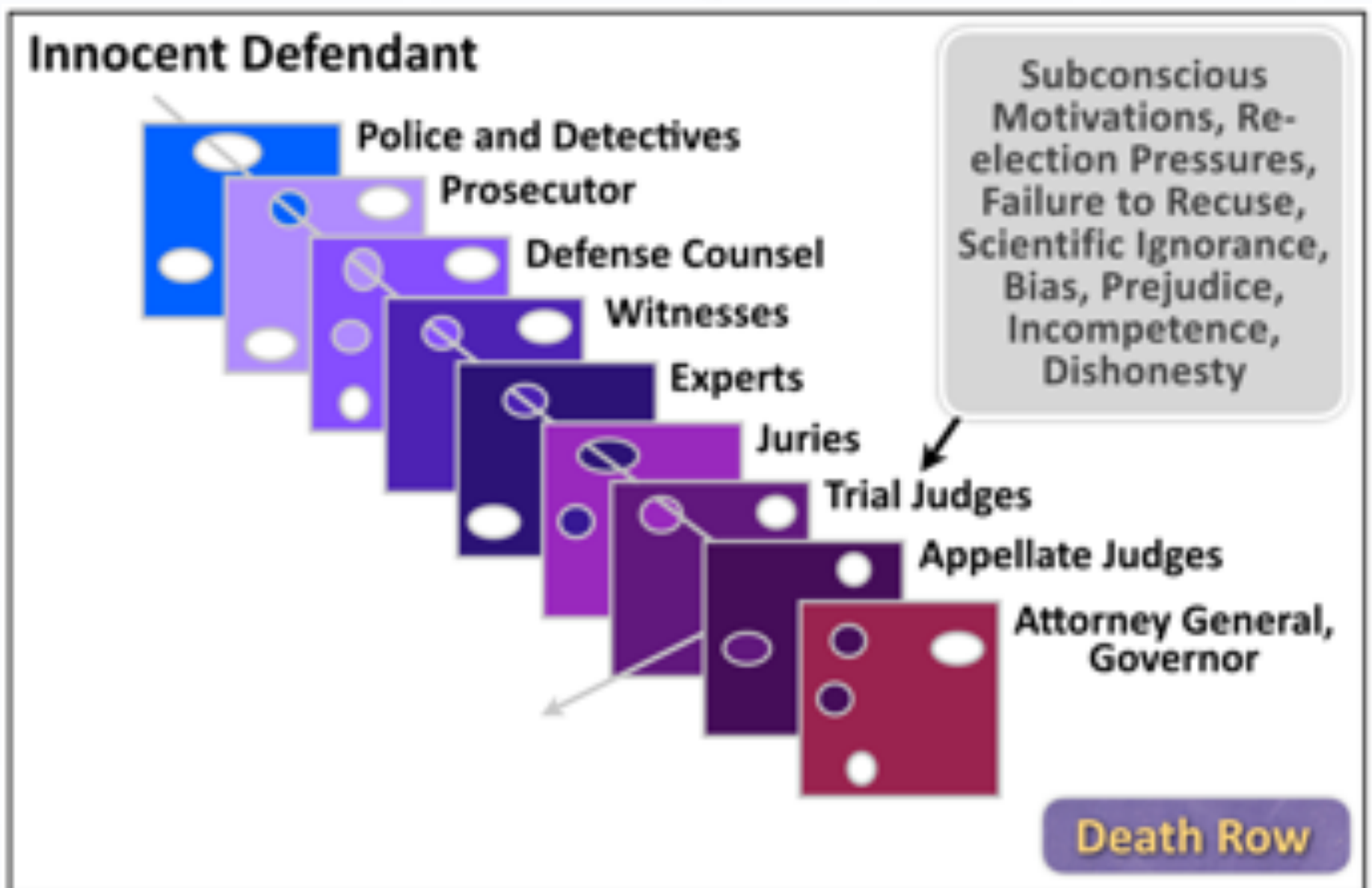
The task of educating judges in scientific principles may not be as onerous as one might think. Judges do not need to memorize thousands of scientific “facts” but rather understand scientific principles... how sci-

ence actually works. Many people think that if they have taken courses such as chemistry and physics they understand the scientific process, but unfortunately that is rarely the case. Textbooks of chemistry, physics, and other scientific disciplines essentially provide the *end results* of the scientific enterprise in a nice, tidy framework. Such texts do not generally spend much time on the actual process of science... a messy, two steps forward, one step back business that results in conclusions that are always, in principle, capable of being improved upon.

Another misconception is that people who work in fields involving science—health professionals, meteorologists, engineers, and the like—necessarily understand the scientific process. Some do, some don't. Some philosophers—for example, David Hume, Friedrich Nietzsche, Alexander Herzen, Steven Toulmin, Daniel Dennett—have exhibited a deeper understanding of how science works than many people who actually work in scientific fields. Getting judges up to speed on the process of science, therefore, is at least theoretically doable.

Indeed, some judges and attorneys have demonstrated a remarkable ability to understand scientific principles. In his 139-page decision issued on December 20, 2005, Judge John E. Jones III (a George W. Bush appointee) ruled for the plaintiffs in *Kitzmiller v. Dover Area School District*. The school district had recently required that intelligent design be taught as an alternative to evolution. In his decision (worth reading) Judge Jones demonstrated a thorough and nuanced understanding of the scientific issues involved. It is interesting that two of the expert witnesses in this case were philosophers rather than pure scientists. This is yet another example of the importance of a philosophical approach to thorny issues such as teaching intelligent design or debating the death penalty.

It seems self-evident that judges can influence trial outcomes, and in some cases make it more likely that an innocent defendant will be sent to death row. As shown in **Figure 25** trial judges can fail in their duty to protect an innocent defendant. This creates a hole in the cheese slice, and the case goes on to the next safeguard, appellate judges. We will now discuss what can go wrong with the actions (or lack of action) of appellate judges in capital cases.



**Figure 25.** Trial judges may fail to protect rights of the innocent.

## APPELLATE JUDGES

People sentenced to death are given an automatic direct appeal to the state's highest court where one of three things happens: 1) the death



sentence is affirmed, 2) the conviction is reversed, or 3) the death sentence is reversed. If either side does not like the ruling, they can petition the United States Supreme Court for a ruling on federal constitutional issues. The Supreme Court can accept or refuse to consider the case. Subsequently there are various other appeal avenues available in state courts to those sentenced to death.

*APPEAL, v.t. In law, to put the dice into the box for another throw.*

—Ambrose Bierce

Appellate judges are at a bit of a disadvantage in determining exactly what happened during the original trial, since they were not there. Accordingly, even in cases where prosecutors and judges cut corners and put their thumbs on the scale to gain a conviction of a seemingly guilty but actually innocent defendant, it may or may not be detected by appellate courts. Arthur Koestler quoted a respected legal scholar from Britain, Sir R. C. K. Ensor: “It is very easy for a bad judge, especially in a jury case, to defeat justice by the crassest stupidity or partisanship, without perpetrating any technical misdirection of the jury or explicit twist of the law, of which an Appeal Court could take cognizance.”

Moreover, some former and current United States Supreme Court Justices—think Antonin Scalia and Clarence Thomas—seem to be an automatic vote against defendants in death penalty cases regardless of the issues involved. Antonin Scalia, for example, even seemed to think executing the innocent was acceptable as long as they were sentenced to death “according to law.” Scalia actually said, “Mere factual innocence is no reason not to carry out a death sentence properly reached.”

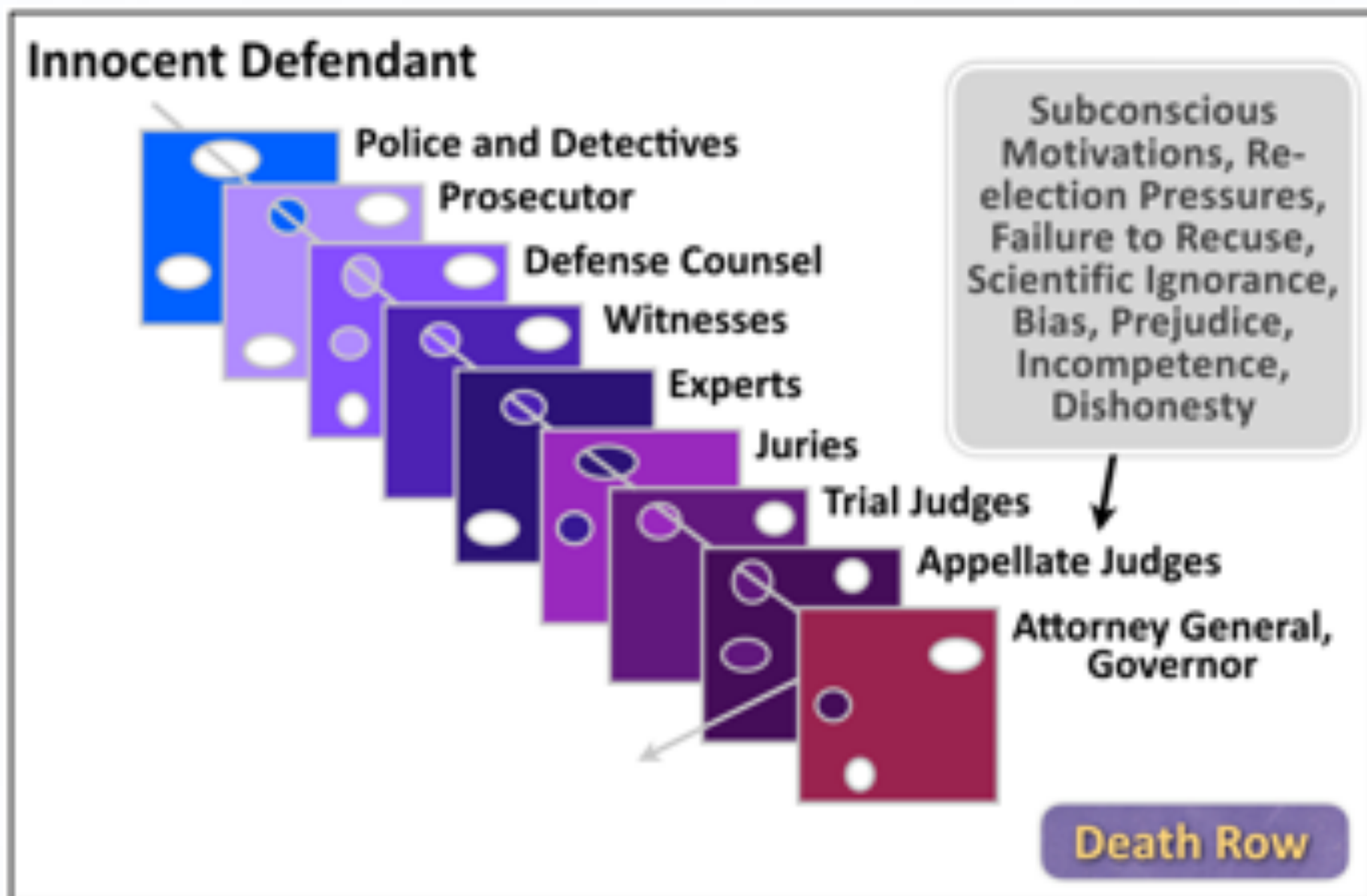
Is Scalia actually saying that we can commit any repugnant and outrageous act as long as it is not against the constitution? We do have the Eighth Amendment to the Constitution that prohibits “cruel and unusual” punishments. If executing the innocent is not cruel, I’m not sure what could be possibly be classified as cruel. Vincent Rossmeier stated in Salon, in an understatement of Olympic proportions, that Scalia’s views on the constitutionality of executing the innocent “...suggested a certain callousness...” Executing innocent human beings is absurd, of course, but it is only one of the many absurdities that permeate the death penalty debate in 21st century America. Sadly, in many ways we in the United States have not progressed much since Montaigne’s innocent men were executed as we described on the first page of the Introduction.

Although Scalia is no longer with us, the votes of Clarence Thomas are sometimes just as bizarre. As Jeffrey Toobin said in the June 21, 2019 New Yorker, “A Mississippi prosecutor went on a racist crusade to have a black man executed. Clarence Thomas thinks that was just fine.” Curtis Flowers was accused of murdering four people in 1996, and was tried six separate times by the same prosecutor, Doug Evans. Of the forty-two prospective African-American jurors, Evans used preemptory challenges to remove forty-one. When the Flowers case came to the Supreme Court it overturned his sixth conviction by a vote of 7-2. Let that sink in... Justices voting to overturn a death penalty conviction included Brett Kavanaugh, Samuel Alito, and John Roberts.

Writing for the majority, Justice Brett Kavanaugh recounted the egregious nature of the prosecutor’s behavior, racism so obvious that Samuel Alito and John Roberts joined Kavanaugh in the majority opinion. Only Neil Gorsuch voted with Thomas to deny justice to Flowers, who

had spent over two decades in solitary confinement. In his dissenting opinion, Thomas even insulted his fellow justices, implying that they only voted to enhance their self-esteem, and that they were under the influence of the media. One wonders how irrational and absurd Justice Thomas would have to be in order to be removed from the bench.

As shown in **Figure 26**, appellate judges can fail in their duty to protect an innocent defendant in all the same ways that trial judges can fail. This creates a hole in the cheese slice, and the case goes on to the final safeguard, attorney general and governor. We will now discuss what can go wrong at this last step in death penalty cases.



**Figure 26.** Appellate judges may fail to protect the innocent.

## ATTORNEY GENERAL, GOVERNOR

The likelihood that the state attorney general and governor will take seriously their responsibility to make sure there are no reasons to grant a stay of execution for a condemned inmate is subject to a substantial degree of chance. Some former governors such as Rick Perry and George W. Bush seemed not to be much concerned about the possibility the accused might be innocent, or that there might be mitigating factors that might make death in prison a more appropriate sentence.

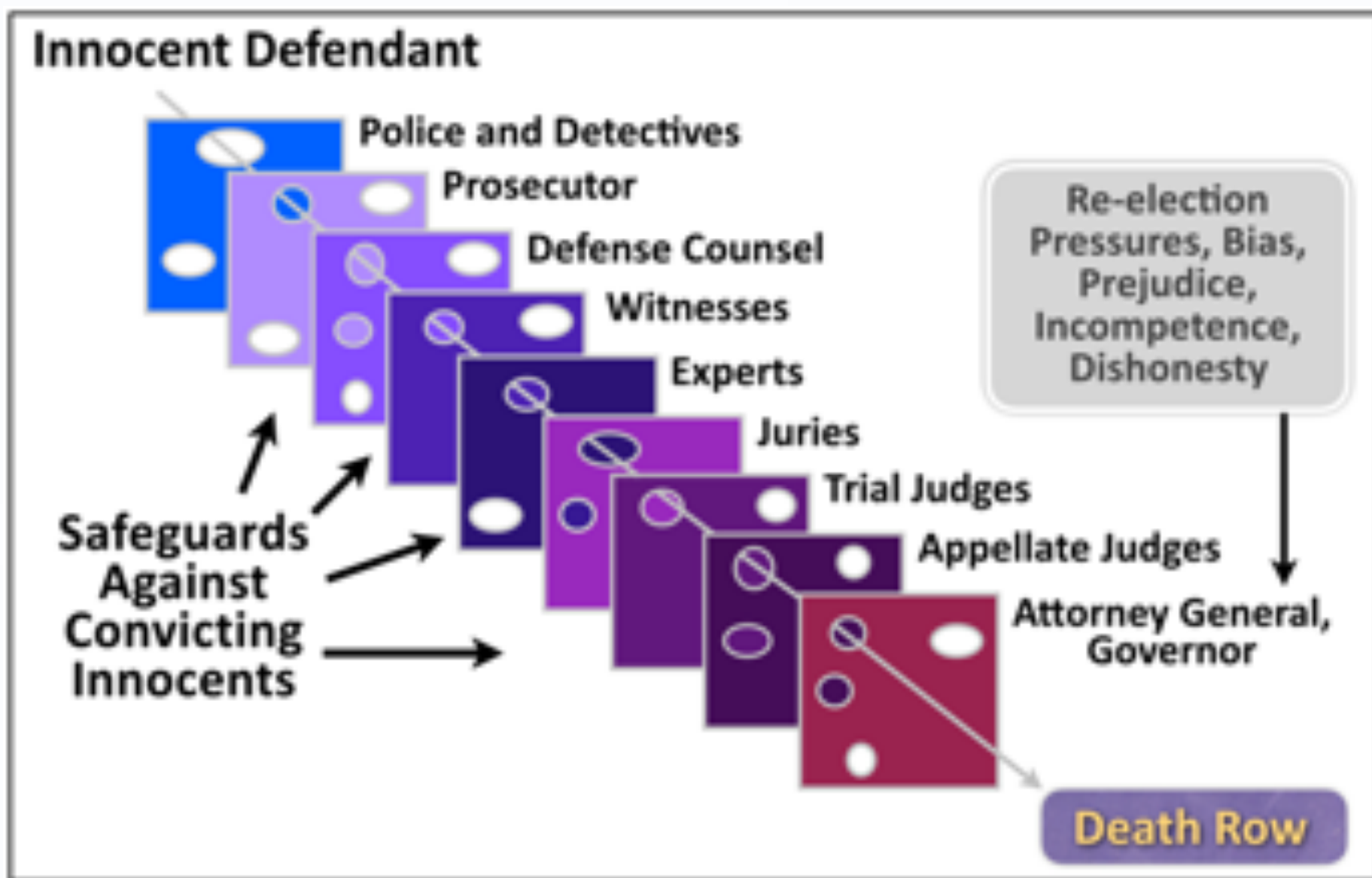
In Chapter 4 we discussed then Governor Rick Perry's handling of the execution of Cameron Todd Willingham, who was accused of setting the fire that killed his 3 children. Perry stacked the deck against Willingham—who was probably innocent—by replacing members of the Texas Forensic Science Commission right before a forensic expert who would testify that the damning evidence against Willingham case was junk science.

In a Montaigne essay entitled *Of the Most Outstanding Men*, he picks three men who are “above all the rest.” He lists Homer and Alexander the Great, but reserves the apotheosis of excellence for the ancient Greek, Epaminodas. Most of us have never heard of Epaminodas, but Montaigne tells us the Greeks named him the “first man” among them. Montaigne assures us that he had exceptional courage, valor, wisdom, reason, intellectual brilliance, virtue, and possessed virtually every other positive human trait in abundance. Epaminodas was also concerned about the the death penalty, and, according to Montaigne, “He did not think it was permissible, even to recover the freedom of his country, to kill a man without full knowledge of the case.” How far we have fallen... from Epaminodas to a situation where some governors



and attorneys general seem not to take seriously the awesome responsibility of the state taking the life of one of its citizens.

We have now passed the last safeguard against convicting the innocent, and we have reached the situation that has occurred probably several hundred times in the last fifty years in the United States—an innocent defendant on his or her way to death row. This is “when the holes line up, as shown in **Figure 27**.



**Figure 27.** Attorney General and Governor fail and the “holes line up to send an innocent person to death row.

We will now turn to another problem in our criminal justice system, the highly arbitrary nature of who actually is executed, regardless of whether they are guilty or innocent. Only a tiny fraction of people who

commit murder in the United States are executed, and chance plays an outsized role in who actually receives the ultimate punishment.

## ARBITRARY NATURE OF EXECUTIONS

Along with the virtual certainty that some of the people we execute are innocent, the arbitrary nature of capital punishment is one of the strongest arguments for abolition. As we mentioned, etched in marble on the west façade the Supreme Court of the United States is the statement “Equal Justice Under Law.” Regrettably, when it comes to capital cases we fall far short of this lofty aspiration. On November 28, 2005 a large chunk of marble above these very words fell to the steps below. Perhaps it would be churlish of me to suggest the venerable building was sending us a message.

Seeking equal justice for all, regardless of the defendant’s station in life was a major element of criminal justice reform for 18th century Italian thinker Cesare Beccaria. In his day, those with power and money had a huge advantage over the poor if accused of a crime. Unfortunately, little has changed since the 18th century, and wealth of the defendant is one of the major reasons that the application of the death penalty in the United States is so arbitrary. In his book *What’s Wrong with the World*, G. K. Chesterton recites an old English rhyme describing the harsh treatment of the poor compared to the rich:

*You prosecute the man or woman  
Who steals the goose from off the common,  
But leave the larger felon loose  
Who steals the common from the goose.*

—G.K. Chesterton

As we have discussed, the single most common argument by those who support the death penalty is to claim it is the only appropriate punishment for certain heinous crimes committed by “The Worst of the Worst”. Unfortunately, it has become obvious—depending on a host of arbitrary factors—it is not only the most monstrous crimes that result in death penalty convictions. If we as a society plan to use executions as the ultimate punishment, few would dispute that there should be a close relationship between the grievousness of the crime and the likelihood of a defendant being condemned to death. No one who has looked at the evidence, however, could possibly conclude this is the case in the United States. Former U.S. Supreme Court Justice Stephen G. Breyer knew this argument was specious.

*[The death penalty is] capricious,  
random, indeed, arbitrary.*  
—Stephen G. Breyer

Let us consider the vicissitudes on the path to execution for someone who commits a murder in the United States in order to assess whether we actually achieve “Equal Justice Under Law.” The murderer is unlikely to face execution if 1) he does not get caught, 2) he is arrested for the murder but was clever enough to cover his tracks so well that prosecution is futile, 3) simply by pure chance the evidence is insufficient for conviction, 4) there are no aggravating factors, 5) he murders in a state that does not have the death penalty, 6) he murders in a death penalty state, but in a jurisdiction of the state where prosecutors rarely seek the death penalty because the jurisdiction cannot afford it or because the prosecutor is not enthusiastic about capital punishment, 7) he murders a person of color, 8) he has the resources to hire one or more excellent attorneys and expert witnesses, 9) there are miti-

gating factors in his past that can be used to argue against the death penalty, 10) he comes across to the jury as sympathetic, 11) the judge is in a good mood. Add it all up and it results in less than 1% of all people who commit murder in the United States are executed, based on these and other arbitrary factors.

The arbitrariness can be egregious. In the Seattle area Gary Ridgeway—the “Green River Killer”—murdered 48 women, yet escaped the death penalty by promising to lead authorities to some bodies that had not yet been discovered. This has led, unsurprisingly, to other murderers in Washington prisons who have killed one or two people to question their death sentences, arguing if they had killed more people and hid the bodies well they might not be on death row.

The theories of Ernest Becker (discussed earlier in this chapter) may at least partly explain the lack of death penalty convictions when the victim is an African American. White members of the jury look at the victim and say “I am not black, so it couldn't be me.” As a result they are not reminded of their own death and they are less likely to invoke the death penalty. When it is a white victim, white jurors are more likely to think about their own death because that person could be them. This in turn can create a punitive mindset in the juror.

Bryan Stevenson, the Executive Director of the Equal Justice Initiative in Montgomery, Alabama recalled a harrowing personal experience from the past in front of his apartment in Atlanta. Stevenson, a young African-American professional with a degree from Harvard Law School, had lingered in his car for 15 minutes to listen to music. As he got out of his car, a police officer pointed a gun at him and threatened to blow his

**Bryan  
Stevenson<sup>32</sup>**



head off. This event—a commonplace for African Americans in America—is something that as a white male I have never experienced or even worried about. It is, however, emblematic of the way our criminal justice system treats people of color, especially young black men, from the arresting police officers to the sentencing of those found guilty.

Stevenson traced the history of the subjugation of blacks over the past 200 years. After the Civil War and the emancipation of black slaves, the criminal justice system was one of the primary tools to keep African-Americans under white control. Blacks were arrested for crimes such as “loitering” and “vagrancy” and black convicts were leased out to work for whites in conditions that were brutally similar to slavery before the Civil War.

Then there were the lynchings, more than four thousand by Stevenson’s count. As lynching began to decline, the use of the death penalty began to pick up. It does not seem surprising that more than 80% of the lynchings from 1889 and 1918 occurred in the South, and more than 80% of legal executions since 1976 also occurred in the South.

No intellectually serious person could deny that the risk of being sentenced to death for murder is dramatically higher if the victim is white as compared to black. The statistics are clear on this. But the race of the accused is also important, with African-Americans making up only about 13% of the American population, yet comprising almost 42% of people on death row.

One of the many factors contributing to these disparities, Stevenson observes, is the illegal racial discrimination that still regularly occurs in American courtrooms. Adam Benforado points out that African-Americans “receive higher bails, face a greater incarceration rate, and

are subject to longer sentences than white defendants.” ... “It’s not just whether you are black; it’s how black you are. The broadness of a defendant’s nose, the thickness of his lips, and the darkness of his skin have all been correlated with capital punishment decisions ...”

*Ultimately, we must face the fact that a substantial element of chance plays a role in the outcome of sentencing in the criminal justice system in general, and capital cases in particular. The look and manner of the accused, the makeup and prejudices of the jury.*

—Albert Camus

On October 11, 2018, the Washington State Supreme Court ruled the death penalty unconstitutional because it was found to be arbitrary and racially biased: “Under article I, section 14, we hold that Washington’s death penalty is unconstitutional, as administered, because it is imposed in an arbitrary and racially biased manner. Given the manner in which it is imposed, the death penalty also fails to serve any legitimate penological goals.” The court further stated that the sentence for aggravated first degree murder would now be life imprisonment, and they converted all current death sentences to life imprisonment. It seems highly unlikely that Washington is more arbitrary and racially biased than other states that still have capital punishment on the books.

## ***Summary***

Let us state again: most people who work within the criminal justice system are committed professionals who want the system to work and want justice to be served. Only a small percentage of them actively and knowingly subvert justice. As with many other professions, how-

ever, those who lack integrity or competence can—in the course of their career—be the source of much human suffering.

More importantly, honesty and competence alone are not enough. Even if one could magically achieve the unachievable, and 100% of the police, prosecutors, judges, attorneys, expert witnesses, and juries were honest and tried to do their very best to ensure that justice was done, mistakes would still occur. Innocent people would still be sent to death row, and some would be executed. ***Because there is no way to make the criminal justice system error free, there is no way to eliminate sending the innocent to death row.*** There would be an irreducible minimum of errors in even the best theoretical system one could imagine, and in the system we actually do have—and probably will have for the foreseeable future—the error rate in capital cases is a travesty. As Arthur Koestler observed, “the probability of error is inherent in the judicial procedure.”

Even in the absence of errors, one must consider the egregiously arbitrary manner in which only a tiny percentage of people who commit murder in the United States are executed. As Former U.S. Supreme Court Justice Stephen G. Breyer observed, being executed is “the equivalent of being struck by lightning.”

Cognitive dissonance abounds in this debate, but one of the most egregious is that many of the same people who are convinced that the government is hopelessly inept, confer on that same wretched and incompetent entity the ability to carry out an irreversible punishment with unerring precision.

# 6

# CRUELTY

## *Cruelty. Is Capital Punishment Cruel?*

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*Among other vices, I cruelly  
hate cruelty, both by nature and by  
judgment, as the extreme of all vices.  
—Michel de Montaigne*

Before we discuss whether the death penalty is cruel and inhumane we must again acknowledge the murders resulting in a death sentence are sometimes committed with horrible cruelty. Even when the murder was not terrifying or painful, at the very least the victim had their most precious possession taken away—a future. Accordingly, some would say that the state has every right to be cruel to murderers. Unfortunately, this opinion runs afoul of the Eighth Amendment to the United States Constitution which specifically states that cruel and unusual punishments shall not be inflicted. The question before us, therefore, is whether or not capital punishment is cruel—if it is cruel, it is prohibited by the Constitution. Legal arguments have been made pro and con on what constitutes “cruelty,” but we will approach it from a common-sense viewpoint. (The use of “common sense” is often the path to oversimplification and error, but in this case it may be just what we need.)



There are three aspects of the death penalty in which the issue of cruelty to the accused is pertinent: 1) the long-term dread from the anticipation of death during the years spent on death row, 2) the short-term terror in the few days before execution, and 3) the execution itself. In this chapter we will also consider potential cruelty to the loved ones of the condemned, and those involved—directly or indirectly—in implementing the execution.

We also must not forget that the death penalty may even be cruel to the victim's loved ones as we discussed in Chapter 2. They may be told by prosecutors and others that the death penalty will give them closure, even pleasure, but these benefits may or may not occur. We may think achieving vengeance will make us happy, but the pleasure is often transitory. Moreover, the repeated appeals of the death sentence constitute an emotional rollercoaster for the victim's loved ones, and in the long run may end up causing more pain than comfort for them. This would be especially true if the appeals uncover mitigating factors that result in a sentence of death in prison instead of a death sentence for the defendant. This may cause the victim's family to believe the defendant “won” by not going to death row.

### **CRUELTY OF WAITING ON DEATH ROW FOR EXECUTION**

Before we address the question of whether or not the execution itself is cruel—as important as that is—we must also ask if it is cruel to put people on death row for many years under the threat of impending death. (It takes an average of roughly fifteen years from the death sentence to actual execution.) In a speech to the Harvard Law Forum, Sister Helen Prejean describes the torture experienced by those on death row waiting for execution. They all have the same nightmare, she

says, of the guards coming to haul them away for execution. “You die a thousand times in your mind before you die,” she said.

Albert Camus also recognized how we focus on the execution itself while failing to realize that the real cruelty is in the waiting:

*When our official jurists talk of putting to death without causing suffering, they don't know what they are talking about and, above all, they lack imagination. The devastating, degrading fear that is imposed on the condemned for months or years is a punishment more terrible than death...*

The lack of imagination cited by Camus in the above quote does not apply to Arthur Koestler, who spent several months on death row in a Spanish prison in the late 1930s. He wrote about his experiences in his book *Dialogue with Death* in which he describes the abject terror that a death sentence imposes on the condemned. Unlike many of the rest of us, those on death row have a vivid imagination, often focused on what will happen to them when they are hauled off to execution. Given Koestler's unique situation—a gifted and philosophically sophisticated writer on death row—it would be useful to recount some of Koestler's insights.

*The things which go on inside a condemned man's head have a certain psychological interest. Professional writers have rarely had an opportunity of studying these processes in first person singular.*

—Arthur Koestler

Koestler's death row story began in late January 1937 when Francisco Franco's Nationalist forces overran the Republican troops in Málaga, Spain. Almost everyone loyal to the Republicans had left, but the British consul, Sir Peter Chalmers-Mitchell had refused to evacuate. At 11 AM on February 9, 1937 Franco's forces burst into Sir Peter's residence and arrested Arthur Koestler, then a British journalist who had elected to stay with Sir Peter instead of escaping.

One of Koestler's books with photos of Franco's tortured and mutilated victims had just been published in Paris, and there was a warrant for Koestler's arrest. Koestler knew that one of Franco's men, Captain Luis Bolín, had sworn "to shoot Koestler like a mad dog" if he ever found him. To Koestler's terror, it was this very same Luis Bolín who arrested him that morning. Koestler assumed he would be shot on the spot by Bolín, but instead was driven off in a truck with five armed men. He was put in solitary confinement and during the long nights he heard men from the prison being hauled off to be executed. He was then transferred to another prison in Seville, where the executions continued.

**Dirty  
Postcards<sup>33</sup>**

On his first day in the Seville prison Koestler was allowed on the exercise yard in Seville where he met a young peasant named Nicolás. Koestler tried to assuage Nicolás' fears of execution but the next day Nicolás was gone. Koestler found out that he—along with sixteen other prisoners—had been shot the night before. Koestler never forgot "little Nicolás" and this had a profound effect on his views of capital punishment.

Many years later in England, every time an execution was carried out it caused Koestler's memory of Nicolás "to fester like a badly healed

wound.” He became a life-long opponent of capital punishment, saying “I shall never achieve peace of mind until hanging is abolished.” Koestler concluded his forward to *Dialogue With Death* with “I dedicate it to my friend Nicolás, an obscure little soldier of the Spanish Republic, who on April 14th, 1937, on the sixth birthday of that Republic, was shot dead in the prison of Seville.”

Koestler describes in gruesome detail his three-month experience on death row in Malaga and Seville. It is clear that those of us who have not been on death row can only dimly imagine what it must actually be like. Koestler’s book provides but a small window into the mind of the condemned, but even these few morsels of insight are illuminating. Koestler describes hearing men being dragged away to their execution, sobbing and whimpering like children, and crying out for their mothers. In Koestler’s words, “Through the window I could hear isolated shots, then a salvo, then shots again, and in between, cries. They were piercing yells which ensconced themselves in the labyrinth of the ear and remained long after the yelling man was silenced forever.”

This experience had a devastating effect on Koestler, as it must for any person on death row today who sees other inmates taken off for execution. And Koestler’s time on death row was but an instant compared to current inmates on death row, who often spend decades under these dreadful conditions. Koestler recounts lying on his bunk wondering if the condemned were shot one by one or in batches, and whether by rifle or machine gun: “My imagination, no longer under my control, depicted for me the scene outside, in all possible variations, fifty or a hundred times.” This overactive imagination no doubt haunts most of the inmates on death row today.



Simone Weil described the soul-wrenching effect of looking death in the eye over and over again:

*The mind is then strung up to a pitch it can stand for only a short time; but each new dawn reintroduces the same necessity; and days piled on days make years. On each one of these days the soul suffers violence. Regularly, every morning, the soul castrates itself of aspiration, for thought cannot journey through time without meeting death on the way.*

One can indeed imagine that for those on death row “the soul castrates itself of aspiration” with each new dawn. This crushing reality must be infinitely worse than the execution itself. For each of those thousands of mornings between the death sentence and execution the condemned prisoner must confront his dismal fate.

**Simone  
Weil<sup>34</sup>**

Fyodor Dostoyevsky was sentenced to death in 1849, and about a month later was marched out to face a firing squad on a cold December day in St. Petersburg. But he was reprieved right before the execution took place, and had only hours of the terror of impending execution compared to months for Koestler. Nonetheless, even that short period of believing he was going to be executed had a profound effect on him, and Dostoyevsky was never the same after this close call with death by execution. It seems likely that anyone who is subjected to such an experience would develop PTSD.

With Koestler, despite his connection to Sir Peter Chalmers-Mitchell, Koestler had every reason to think he would be executed. He was told by the prison guards that he was “condemned” and he later found out that a court martial in Málaga had indeed given him a death sentence.

As with current death row inmates who are appealing their death sentence on various grounds, Koestler was dealing with massive uncertainty. He knew that several of Franco's military leaders wanted him dead, but he also thought (correctly it turned out) that friends and officials in Britain and elsewhere must be appealing for his release. There could be no more horrific emotional roller coaster—for Koestler as for current death row inmates—than to have ones hopes of survival buoyed and dashed over and over again. Koestler observed that this uncertainty was a special sort of hell.

We subject people on death row in the United States to this same horrific cruelty. Our system is set up so that after an execution date is set, the condemned are sometimes given a temporary reprieve just days or even hours before they are scheduled to be killed. One can be sure that in many such cases the prisoner undergoes the same unspeakable terror described by Koestler. Many people who have been exonerated and released from death row have described in chilling detail what went through their minds during their close calls with execution.

On one particularly terrifying night, Koestler heard the prison guard and the priest opening the doors of the cells near him one by one, coming in his direction... first three doors down, then two doors down, then next door. The condemned men knew they were to be executed that night, and they sobbed and called out for help... "Socorro, Socorro..." Then Koestler heard the priest fumbling with the bolt at his cell, but the guard said, "No, not this one." Not surprisingly, Koestler was a basket case. "I frequently awoke during this night feeling my bed shaking, as though in an earthquake. Then I realized that it was my own body that was trembling from head to foot."

**Koestler  
Close Calls<sup>35</sup>**

Toward the end of Koestler's time on death row, they brought in a new prisoner, a boy of fifteen or sixteen. That night outside the boy's cell one of the guards commented that the boy would probably be executed that night. The boy heard the comment, and started pounding on the door with his fists, "I don't want to die. Mother, mother help. I don't want to die. Help, help..." That night, they took the boy to the prison yard and shot him in the head.

One of the other condemned men, Carlos, had also heard men being dragged away for execution night after night. Carlos was found lying on the ground by his cell door, foaming at the mouth and unable to move his legs. The guards fetched Koestler to speak to Carlos in German, but Carlos was totally unresponsive. His legs were as stiff as boards and they could not bend his knees. He had become catatonic, unable to bear the pressure of his impending execution. For those of us who have not been on death row, there is no way to know whether or not we would turn out like Carlos.

Albert Camus described what it must be like to know so far in advance that that you are to be executed:

*Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had at his mercy for months. Such a monster is not encountered in private life.*

The fear of death is, for most of us, the primal fear that we do everything possible to suppress from our consciousness. For a person on death row, trying to push death to the subconscious would be pointless. You have heard about Ernest Becker in previous chapters; Becker and his later disciples have made a strong case that the terror of our own demise is so overpowering that it has a substantial effect on our behavior. If Becker was right—and I think he was—forcing a person to confront this terror consciously on a daily basis is the ultimate cruelty.

Finally, on the question of cruelty, consider the suffering incurred by the people who have been wrongly sent to death row. As we discussed in Chapter 4, as of this writing 166 people in the United States have been released from death row for reasons of innocence. Cumulatively, innocent people have already spent over one half million mornings, waking up on death row, and realizing that their nightmare is real. Our criminal justice system can be improved but not rendered infallible. Accordingly, we will continue to send innocent people to death row, and they will continue to suffer.

CONSIDER THE CASE OF death row inmate John Thompson discussed in Chapter 5. Mr. Thompson had seven execution dates set before an investigator for his lawyers—in one last-ditch review of his case weeks before his execution—found compelling evidence that he was innocent. They presented the evidence, and Thompson was subsequently released. As is typical of exonerations from death row, it was by sheer chance that Thompson's innocence was discovered. The prosecutor had withheld the exculpatory evidence, and it was only discovered at the last minute.



If John Thompson had been executed—and he came very close—we almost certainly would never have learned of his innocence. His lawyers would have moved on to other cases, and Thompson would have been just a statistic... another evil murderer executed. We will never know how many innocent people have been executed, or of the cruel agony they endured as the poisons flowed into their bodies and their life slipped away. Try to imagine what thoughts went through Mr. Thompson's head on each of those seven different occasions that he was scheduled to be executed for a crime he did not commit. If this does not constitute cruelty, it would be difficult to know what would.

As Arthur Koestler recounted so poignantly, those on death row not only suffer when *they* have an execution date. John Thompson described what it was like when one of his fellow inmates was being prepared for execution. “To see an execution... and this is what really got me... to be there when someone was being executed... the level of... Oh, (sigh) I don't really know how to really explain that... the transitioning death row goes through them final 24 hours before execution... man, it's remarkable. I'm sorry to see these guys praying... I mean this fucked me up... this affected me so much because the reality hadn't really, really, really hit me that they gonna kill you. And that just scared the fuck outta me.” For those on death row this must be a special kind of torture. (If possible, I recommend listening to John Thompson say these words on the New Yorker Radio Hour podcast, which aired on January 25, 2019. It sends shivers down your spine.)

*He hears it as it comes, counts days,  
measures the breath of life upon their  
length, tortured by coming death.*  
—Michel de Montaigne (quoting Claudian)

It has only been a few months since I visited death row inmate Kevin Cooper, a man who is almost certainly innocent of the murders as we discussed in detail in Chapter 4. During our conversation, Mr. Cooper described what it was like the night of February 9, 2004 when he was hauled off for execution; he was to be killed at 12:01AM on February 10. They stripped him and examined him like he was slave being auctioned for sale. The clock showed he had about three hours to live.

As he talked, Mr. Cooper stared into the distance, and said he has never recovered from the experience. Like everyone who has gone through this ordeal—Arthur Koestler, Fyodor Dostoyevsky, and countless others through the centuries—the trauma left a permanent wound on the soul... I guess our prosaic way of describing it would be PTSD.

Death penalty proponents might logically say, “Well, if it is so cruel to make people on death row wait so long to be executed, we should speed up the process and execute them quickly. That way we can save money and the inmate suffers less. Win-win.” This argument might sound reasonable, but it is not. First, if we cut the average time on death row before execution to something like three or four years, that would still be a long time to suffer the cruelty of impending death. And the level of suffering would likely be greater, since the execution would be more imminent.

Much more important, however, is that by speeding up executions we would almost certainly increase the risk of executing the innocent. Most exonerations from death row have occurred after more than three years. What at first may have sounded logical, therefore, is supremely illogical, because it would be like saying, “Since our current system of multiple appeals for death row inmates has been an effec-

tive tool in identifying many innocent people, let's enfeeble this safeguard to save money." Ultimately, speeding up executions is a terrible idea, but this has not stopped pro-death penalty people from supporting it.

As we discussed in Chapter 4, former United States Supreme Court Justice John Paul Stevens supported capital punishment through decades of voting on cases before the court. Then his position began to change, and he ended up calling for abolition based on the possibility of executing the innocent, but also on the basis of cruelty. In a 2008 concurring opinion, Stevens wrote that the death penalty represents:

*the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.*

Several years later in his 2014 book, *Six Amendments: How and Why We Should Change the Constitution*, Stevens proposed the addition of five words to the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments *such as the death penalty* be inflicted." [Added words in italics.]

Occasionally, a death row inmate achieves great things before he or she is executed. One of the most famous death row inmates in history was the Roman statesman, philosopher and gifted Greek scholar Anicius Manlius Severinus Boethius (c. 477 - c. 525 AD). Boethius was imprisoned and sentenced to death after being accused (perhaps falsely) of treason. Prior to his brutal execution, he spent his time in prison writing *The Consolation of Philosophy*. This remarkable book turned out to be one of the most widely read books for centuries in medieval

Europe, and influenced the writing of many famous writers such as Dante and Chaucer.

While awaiting his fate, Boethius recorded his thoughts and his numerous “conversations” with a figure he called “Lady Philosophy” who, in his mind’s eye, appeared before him in his cell. Boethius’s wisdom shines through in his discussions of topics such as fate, chance, free will, the problem of evil, and happiness. Boethius showed us the value of a philosophical perspective under even the most horrific conditions, and his short book is well worth reading today. (I include it in the “recommended reading” list for my students.) After being cruelly tortured, Boethius was bludgeoned to death in Pavia where he was imprisoned.

The fact that some people imprisoned on death row make important contributions to their fellow inmates or to society, however, is no justification for keeping capital punishment on the books. For the overwhelming majority of those on death row there is no redemption through good works.

### **CRUELTY OF EXECUTION ITSELF**

What about cruelty during the execution itself? Considerable attention has rightfully been focused on whether the method of execution itself is cruel. In the United States older methods of execution such as hanging, gas chamber, electric chair, and firing squad have largely given way to lethal injection... promoted as the “humane” way of executing people.

The many botched lethal injections show that this method may not be so humane after all. In Oklahoma, Clayton Lockett writhed and gasped for 45 minutes; in Arizona Joseph R. Wood III took almost two hours to



die; in Alabama, Doyle Lee Hamm, who had terminal cancer, had needles stuck all over his body for two and a half hours in a futile attempt to gain intravenous access—legs, ankles, and finally his groin.

Many more botched executions have occurred, but there is no need to go into the details here. The point is that using drugs and combinations of drugs that were never meant to be used to kill people are being used by prison personnel with minimal knowledge of the drugs, and who often have great difficulty actually getting the drugs into the inmate. We are basically experimenting on condemned criminals.

Virtually all health professional organizations have wording in their code of ethics stating that their members should not participate in executions. It is not a medical procedure, and is antithetical to the goals of the healing professions. Anesthesiologists, the professionals who have the most expertise in these matters, have particularly strong wording that condemns participation of their profession in the death penalty.

Lethal injection requires that prison officials gain access to an appropriate vein to administer the lethal drugs. This has proven to be problematic in several executions, partly because the inmates may have bad veins due to drug use, and partly because people actually qualified to gain intravenous access in difficult cases usually do not want to have anything to do with an execution.

Then there is the problem of states acquiring the drugs used for executions. I must say that I do not understand the almost ghoulish zeal with which state officials do everything they can to execute inmates, even to the extent cutting legal corners. Apparently, they don't see the irony of breaking laws to execute people who have broken the law.

The international human rights organization, Reprieve, has done amazing work to stop the flow of drugs used for lethal injection into the United States. Maya Foa, Blaire Andres and their colleagues at Reprieve have collected dozens of statements from pharmaceutical companies stating opposition to the use of their drugs in executions. Many of the companies pointed out that their drugs are used to improve health and well-being rather than to kill, and they often used strong words such as “strongly object” or “are deeply opposed” or “object in the strongest possible terms” or “adamantly opposes the distressing misuse of our product in capital punishment.”

Sometimes the companies went beyond simply demanding their products not be used in executions. Roche Holding AG, after stating they did not want their midazolam to be used for executions, added: “We support a worldwide ban on the death penalty.” Another company “Shrenik Pharma Limited said, “We are aware of the use of Thiopental Sodium in killing of prisoners in USA and have often wondered why the US-Govt. does not simply out-law the practice altogether.”

The pharmaceutical companies frequently pointed out that the use of their drugs for executions is “non-approved” or “off label” and does not represent a legitimate medical purpose for their medicines. They often consider the use of their drugs for executions a diversion of their products and as such illegitimate.

One company from India even pointed out that they do not allow their drugs to be used in lethal injections, because they cherish the Ethos of Hinduism (which promotes non-violence and opposes killing and revenge). When products from the pharmaceutical company Naari AG were obtained by Nebraska to be used in executions, the Naari CEO

sent a letter to Justice Heavican of the Nebraska Supreme Court saying, “I am shocked and appalled by this news. Naari did not supply these medicines directly to the Nebraska Department of Correctional Services and is deeply opposed to the use of the medicines for executions.”

A number of states have passed “secrecy laws” that basically allow the department of corrections to obtain the drugs for executions without any oversight whatsoever. This means the states can try to get the drugs through any source, and the pharmaceutical companies are powerless to completely stop their drugs from being misused. It is difficult to know how we would find out if the states even stooped to buying the drugs on the black market.

Given the difficulty of obtaining the drugs, several states have stockpiled drugs for future executions. If these were solid dosage forms they would last many years at full potency, but since most of them are injectable products, outdated products may not have the intended effect due to drug degradation, increasing the risk of more botched executions.

Given all this resistance from pharmaceutical companies, the state departments of corrections, in their desperation to execute people as fast as possible, have been acquiring drugs from questionable sources. In one famous case the drugs came from a supplier in the back of a driving school in London. States have also resorted to questionable overseas generic suppliers from poorly regulated companies in India and China.

Although occasionally drugs obtained from overseas are contaminated, a more likely problem is substandard potency. This could be se-

rious if the drug is used by a patient with a life-threatening illness. When used for a chronic condition by a patient under medical care, it may be detected with ongoing monitoring of the patient and adjustments made. When used for executions, however, the results could be disastrous. When multiple drugs are used to execute, the first drug is usually the one intended to cause unconsciousness. If that drug is of substandard potency leading to inadequate central nervous system depression, the inmate would suffer hideously when the drugs are given to paralyze the diaphragm and then the potassium chloride to stop the heart.

### ***Midazolam.***

The states have been experimenting with various combinations of drugs, with unqualified “consultants” helping them decide drugs and doses. Midazolam, a sedative-hypnotic used in a number of executions, can have vastly different effects in different people based partly on the activity of a drug metabolizing enzyme called CYP3A4. This enzyme is susceptible to genetic influences and also to a process called “enzyme induction” in which other drugs or substances increase the activity of CYP3A4, thus increasing the elimination of midazolam. Drugs increasing the activity of CYP3A4 include drugs used for tuberculosis and other infections, anti-HIV drugs, anti-epileptic drugs, herbal preparations, and many more.

Anyone with high CYP3A4 activity will be more resistant to midazolam, but will the huge doses of midazolam overcome this problem? We really do not know the effect of these mega-doses of midazolam used in executions. It would be unethical to study these doses in patients or healthy subjects, so it is not clear what actually happens when midazo-



lam is used in this way. Some drugs have paradoxical effects in overdose, and as mentioned above many factors affect drug response. Overdoses of midazolam tend not to be lethal, so it obviously cannot be used alone for executions, but is midazolam actually producing unconsciousness? Perhaps it does for some, and not for others--we simply don't know. Virtually all of the inmates die during the execution at some point, so we cannot ask them.

If midazolam (or opioids used in executions such as hydromorphone) sedate the patient without rendering them unconscious, the subsequent use of a paralytic drug would prevent breathing in a most horrifying scenario... the inmate would be trying to breathe or move, but unable to respond in any way. The muscle paralysis from the second drug makes the witnesses more comfortable, because the inmate will not thrash around during the execution, but appearances would be hideously deceiving if the inmate were not actually unconscious. They would simply suffocate before our eyes, unable to move a finger.

### ***Opioids.***

The use of opioids in executions represents another source of potential disaster. Opioids have numerous problems due to genetic differences in drug metabolizing enzymes and due to concomitant drug therapy. Some opioids—including fentanyl, hydrocodone, methadone, morphine, and oxycodone—are metabolized by the CYP3A4 enzyme. People taking one of the many drugs that increase the activity of this enzyme can have drastic reductions in opioid plasma concentrations (as we discussed for midazolam above).

Another drug metabolizing enzyme that may be important in ensuring that opioids exert the expected effect is CYP2D6. Several opioids—in-

cluding codeine, dihydrocodeine, hydrocodone, and oxycodone—require conversion to an active metabolite in order to have full effect. It is the enzyme CYP2D6 that effects this conversion, and this is why in people genetically deficient in CYP2D6 (roughly 4% to 14% of the population, depending on race) taking codeine is like taking a placebo. The other opioids listed would also have reduced effect in patients with minimal CYP2D6 activity.

It is not just people with genetic deficiency of CYP2D6 who have reduced effect from these opioids, however, because many commonly used drugs also inhibit this enzyme. Patients on the antidepressant paroxetine (Paxil) or fluoxetine (Prozac), for example usually have extremely low CYP2D6 activity. Dozens of other drugs are also CYP2D6 inhibitors, and it seems highly unlikely that prison officials have even a remote inkling of the drug interactions and genetic effects on the response to drugs they use for executions.

To make matters worse, in addition to drug interactions, many other factors affect how each person responds to drugs. Drug response (for all drugs) is notoriously variable from one person to another, based on genetics, age, diseases, kidney function, liver function, diet, herbal drugs, drugs of abuse, and many others. Even in studies with healthy subjects receiving a single drug, we often see a ten-fold variability in drug response. It is also not unusual in drug studies to have “outliers”—people who do not respond as expected, and may even go in the opposite direction from the expected outcome.

Even some people who strongly support the death penalty feel that lethal injection is a failed experiment. Judge Alex Kozinski, for example, has promoted the use of the guillotine or firing squad, and said the pub-

lic should watch. Citing Justice Antonin Scalia's appallingly tone-deaf statement "How enviable a quiet death by lethal injection..." Kozinski pointed out that "executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf." While many of us would disagree vehemently with Kozinski's support of the death penalty, one cannot help but admire his lack of hypocrisy.

*Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments.*

—Judge Alex Kozinski

As disgraceful as lethal injection has turned out to be, there is an even more important issue—even if we came up with some quick and painless method of execution it would not change the fact that the person on death row spends years in anticipation of his or her execution. As we discussed earlier in this chapter, the dread and terror experienced by the prisoner for the previous ten to twenty years is by definition cruel and inhumane and, I would argue, is vastly crueler than the actual execution.

## **CRUELTY TO THOSE ASSOCIATED WITH THE EXECUTION**

We must also consider the potential trauma inflicted on those who are responsible for implementing the death penalty such as prison guards

as well as those more peripherally involved such as witnesses, chaplains, spiritual counselors, and many others. In *Dialog With Death* Arthur Koestler described the heavy toll exacted on the prison guards and executioners. The executions recounted by Koestler took place after midnight, and the next morning the guards “crept along the corridors, pale, scared, and troubled. A man named Angelito who was the one who opened the cell doors of those on their way to execution was visibly shaken, and showed up one morning, eyes red, and said, “If this goes on, they’ll finish us all off.”

Even more chilling was the 1923 execution of a 28-year-old woman described in Koestler’s *Reflections on Hanging*. In what Koestler called a revolting butchery, the woman to be hanged, Edith Thomson, was ill and had totally decompensated physically and mentally on her way to the gallows. Her “insides fell out” as she was being hanged. Miss Margery Fry testified by the Royal Commission that “Everybody who took part in the scene suffered some damage to their nervous system.”

The executioner, a man named Ellis, attempted suicide, and a person describing another participant in the hanging said he had “never seen a person look so changed by mental suffering.” The prison chaplain, Rev. Glanville Murray said “My God, the impulse to rush in and save her by force was almost too strong for me.” The botched execution of Edith Thompson is rendered even more obscene by the fact that Lord Birkenhead later confessed that he had doubts about Mrs. Thompson’s guilt.

Certainly there must be some who act as executioners or otherwise participate in executions who do so with relish, and with no qualms



whatever. Perhaps some of them actually enjoy the process. Perhaps they are, like many of the condemned, sociopaths. Indeed, Camus gave several examples of people who were quite excited about acting as an executioner. Nonetheless, at least some of the many people involved in the execution must be emotionally harmed by the process.

Albert Camus discussed the effect of executions on those who were involved in carrying it out. He described a warden of an English prison who admitted to “a keen sense of personal shame” and a chaplain who talked of “horror, shame, and humiliation” due to participation in executions. Camus then wonders aloud: If a warden and a chaplain describe these feelings, what effect would executions have on the actual executioner. Camus concludes with: “The fine and solemn example [capital punishment], thought up by our legislators, at least produces one sure effect—to depreciate or to destroy all humanity and reason in those who take part in it directly.”

*The first of the soul's needs, the one which touches most nearly its eternal destiny, is order; that is to say, a texture of social relationships such that no one is compelled to violate imperative obligations in order to carry out other ones.*

—Simone Weil

Executions have potentially negative psychological effects on people other than prison workers who are directly involved with the condemned prisoner. Everyone involved from the arrest to the execution could be impacted including police, prosecutors, witnesses, judges, and juries. What if a participant in condemning the accused has a change of heart about the death penalty itself? This would be particu-

larly problematic when doubts arise later regarding the guilt of the executed person. After a person has been executed, prosecutors often vehemently deny the validity of any exculpatory evidence no matter how compelling, but one wonders if—in their private moments or at least in their subconscious—they wonder if their actions have resulted in an innocent person being killed by the state.

Witnesses to executions may also suffer. Albert Camus' father, Lucien, died when Albert was an infant, but Albert's mother recounted an astonishing story about Lucien that haunted Albert for the rest of his life. Shortly before the First World War, a farm worker robbed an Algerian farm family, and slaughtered them all, including the children. Camus' father was incensed by this barbaric crime, and, for the first time in his life, wanted to see a criminal receive the fatal punishment he so deserved. Lucien arose at 3:00 AM and joined the throng of like-minded people to see the guillotine in action at Barberousse prison.

Camus' father never spoke to anyone about what he saw, but he returned home from the execution with a distorted face, threw himself on the bed, and began to vomit. As Albert Camus put it, "He had just discovered the reality hidden under the noble phrases with which it was masked. Instead of thinking of the slaughtered children, he could think of nothing but that quivering body that had just been dropped onto a board to have its head cut off."

Camus also tells of a similar fate suffered by one Judge Falco, who at the end of his career made the following statement:

*The only time in my life when I decided against a commutation of penalty and in favor of execution, I thought that despite my position, I could attend the execution and remain utterly impassive.*

*Moreover, the criminal was not very interesting: he had tormented his daughter and finally thrown her into a well. But, after his execution, for weeks and even months, my nights were haunted by that recollection. ...Like everyone else, I served in the war and saw an innocent generation die, but I can state that nothing gave me the sort of bad conscience I felt in the face of the kind of administrative murder that is called capital punishment.*

So here we have a man hardened by first-hand observation of the horrific carnage of World War I who was haunted by attending an execution. How many others have been similarly tormented by participating in or observing an execution, but who never made their distress known?

Sister Helen Prejean had a similar experience in 1984 when she witnessed the execution of Elmo Patrick Sonnier by electric chair: “I came out into the darkness, it was one o’clock in the morning, I threw up, and that’s when I realized that people are never going to get close to this—it’s a secret ritual.”

For all of these reasons we must consider the potentially detrimental effects of capital punishment on everyone involved in the process, and people involved directly or indirectly in the execution are not exempt from suffering trauma. As Friedrich Nietzsche observed, “Whoever fights monsters should see to it that in the process he does not become a monster. And if you gaze long enough into an abyss, the abyss will gaze back into you.”

## CRUELTY TO SOCIETY - DEHUMANIZATION

Regarding capital punishment, the United States of today in some ways resembles Great Britain of the 1950s. As Arthur Koestler wryly noted, “Great Britain is that peculiar country in Europe where people drive on the left side of the road, measure in inches and yards, and hang people by the neck until dead.” Koestler goes on to describe how the British didn’t see what all the fuss was about, and that hanging had a long proud tradition in the U.K. It was just those hypersensitive foreigners who were always whining about the inhumanity of it all. They should mind their own business. Basically, many British people felt that even if other countries didn’t need capital punishment, Britain did.

This all sounds eerily familiar to the arguments made by death penalty proponents in the United States today. Britain and France were the death penalty pariahs of Europe in the 1950s (both would later ban the death penalty, partly due to the efforts of Arthur Koestler and Albert Camus), but the United States has now become the pariah of the civilized world. Virtually every modern democracy has banned capital punishment, and many more countries of all sorts have banned it in practice, for a total of well over one hundred countries. Even China has made noises about stopping the death penalty.

*Punishment. A strange thing, our punishment!  
It does not cleanse the criminal, it is no atonement;  
on the contrary, it pollutes worse than the crime does.*

—Friedrich Nietzsche, *Daybreak* #236

As we have discussed, the United States does have some company in maintaining an active death penalty program. Here are some of our peers: Afghanistan, Bahrain, Belarus, Chad, China, Congo, Gambia,



Indonesia, Iran, Iraq, Libya, Oman, Pakistan, Qatar, Saudi Arabia, Uganda, Yemen, and Zimbabwe. Here we have a rogues' gallery of the most oppressive and corrupt governments in the world, and we are part of it. When we add the United States to the list, alphabetically we fall between Uganda and Yemen.

Even many of the "Stans" have eliminated the death penalty completely (i.e., Kyrgyzstan, Turkmenistan, Uzbekistan) or in practice (Tajikistan) or for "ordinary crimes" like murder (Kazakhstan). Russia has essentially abolished the death penalty in practice, although exceptions are apparently made if you piss off Putin. In Africa, many countries have abolished the death penalty completely, and almost two dozen have eliminated it "in practice." It is similar in South America where almost all countries have either abolished the death penalty totally or in practice.

After California Governor Gavin Newsom issued a moratorium on executions in March, 2019, there was a backlash from death penalty supporters. NPR station KQED in San Francisco had a call-in show to interview people on both sides of the issue. The responses were largely predictable, but one argument was truly astounding.

Death penalty supporter and California representative Shawn Steele was asked by the interviewer about the fact that the death penalty had been abolished in virtually all developed countries, including all of Europe. Steele's astonishing response was that we did not have to worry about what Europe does, because that's where the Holocaust took place. Yes, he actually said that... because the Holocaust occurred in Europe seventy five years ago, we can ignore all European policies, good or bad, that have occurred since.

As we have discussed previously, the Italian thinker Cesare Beccaria had an enormous impact on how criminal justice developed in the Western world. In his book *On Crimes and Punishments* Cesare Beccaria discussed the impact of severe punishments—especially the death penalty—on society: “The death penalty is not useful because of the example of savagery it gives to men.” He goes on to say, “It seems absurd to me that the laws, which are the expression of the public will, and which hate and punish murder, should themselves commit one, and that to deter citizens from murder, they should decree a public murder.” This is what Arthur Koestler meant when he said, “Legal barbarity begets common barbarity.” Beccaria, Koestler and others are saying that the death penalty creates vulgarization of society with the counterproductive idea that exterminating evil people will solve our problems. But it doesn’t. It just adds new ones.

*We kill the killers to prove to the throng... that killing is wrong.*

—Holly Near

**Holly Near<sup>36</sup>**

One argument for the death penalty still heard today is that it has been used by the vast majority of societies throughout history. This is true, and it is difficult to find cultures from the past where the death penalty was outlawed. Beccaria’s eloquent response to this argument is worth quoting: “If it is objected that almost all times and almost all places have used the death penalty for some crimes, I reply that the objection collapses before the truth, against which there is no appeal, that the history of mankind gives the impression of a vast sea of errors, among which a few confused truths float at great distances from each other.” Even a casual student of human history would have to concur with this eloquent assessment.

## ***Summary.***

The cruelty of the death penalty resides primarily in the years of waiting by the condemned individuals on death row, combined with the terror he endures in the days leading up to his execution. The execution itself is sometimes also cruel, but even if an absolutely painless and quick method of execution were devised it would not change the fact that the overwhelming bulk of the suffering by the condemned takes place before the execution occurs.

Others also suffer, including the loved ones of the condemned and at least some of the people involved in the execution. Moreover, one cannot discount the real possibility that the suffering of the victim's loved ones will end up being greater when the murderer is sentenced to death than it would have been if the murderer were "just" sentenced to death in prison. Finally, society in general suffers from vulgarization and dehumanization, and helps foster an "us versus them" and dichotomous view of human nature as good and evil.

## **Evil.** *Are Murderers Fundamentally Different From the Rest of Us?*

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*A sound intellect will refuse to judge men simply by their outward actions; we must probe the inside and discover what springs set man in motion.*

—Michel de Montaigne

Russian writer Aleksandr Solzhenitsyn knew evil first hand. During the Second World War he was an eye-witness to vile atrocities committed by the Red Army against civilians, and he also spent eight years in Soviet prisons and labor camps. Yet his wisdom transcended the prosaic binary thinking that classifies people as either good or evil. Solzhenitsyn went on to describe how chance and fate dictate where that fateful line between good and evil in a person's heart is pulled one way or the other. He observed—with almost superhuman objectivity given what he had seen and endured—that given other circumstances he might have been one of the oppressors. “Confronted by the pit into which we are about to toss those who have done us harm, we halt, stricken dumb: it is after all only because of the way things worked out that they were the executioners and we weren’t.”



*If only there were evil people somewhere  
insidiously committing evil deeds, and it  
were necessary only to separate them  
from the rest of us and destroy them.  
But the line dividing good and evil cuts  
through the heart of every human being.*

—Aleksandr I. Solzhenitsyn

Does anyone doubt that the very same firefighter who on September 11, 2001 gave his life to save people in the twin towers could, in a different life in a different time, have run the crematorium in Auschwitz? This, it seems to me, is undeniable—depending on circumstances, most of us are capable of life-saving or life-destroying behavior. Accepting this, however, goes against our natural human tendency to label some people inherently heroic, and some people inherently evil. Solzhenitsyn continues:

*During the life of any heart this line keeps changing place; sometimes it is squeezed one way by exuberant evil and sometimes it shifts to allow enough space for good to flourish. One and the same human being is, at various ages, under various circumstances, a totally different human being. At times he is close to being a devil, at times to sainthood. But his name doesn't change, and to that name we ascribe the whole lot, good and evil.*

Solzhenitsyn is not denying the existence of evil or claiming that no one should be held responsible for committing evil. Rather, he is saying that evil is present in all of us, and we are, down deep, not that different from one another. There are people who deny that their moral compass would allow them to commit evil. Could there be such peo-

ple? Perhaps... but if one considers the historical evidence—the long, wretched stumble of the human race through the centuries—such a claim to virtue rings rather hollow for most of humankind.

*If we wish our judgement to be fair in all things  
we must start from the conviction that no one  
of us is faultless. For here is where indignation  
most arises—'I haven't done anything wrong!'*

*—Seneca, On Anger*

At the risk of losing readers who have just finished the penultimate chapter of the book, honesty compels me to admit that there is a sense in which this last chapter is superfluous. After all, it should be enough for any rational person to denounce capital punishment based on what we have already discussed: 1) the lack of a deterrent effect, 2) the sending of hundreds of innocent people to death row, 3) the egregiously arbitrary manner in which the death penalty is applied, 4) the overweening certitude that we can determine who should live and who should die, 5) the prolonged cruelty to the condemned as they wait for years to be executed, 6) the incontrovertible evidence of the fallibility of our criminal justice system, and 7) the fact that those who are executed are sometimes “the worst of the worst” but too often they are not. Taken together these arguments are more than enough to make a compelling case for death in prison instead of execution.

But there is another sense in which this is the most important chapter of all, because it deals with how easily all of us (including those of us who oppose the death penalty) fall into the trap of placing people whose views or actions we despise in a box we call “the other” and then demonizing them. As Solzhenitsyn expressed so poignantly, however, the truth is we are actually not so different from one another.

Albert Schweitzer (1875–1965)—philosopher, writer, humanitarian, musician, theologian, and physician—was a most remarkable human being. His key personal philosophy was to cultivate a reverence for life... for all life. As such, Schweitzer would categorically condemn the murderer who showed no reverence for life at all, but he would also condemn the killing of murderers by the state. Schweitzer described reverence for life as:

*...seeking so far as possible to refrain from destroying any life, regardless of its particular type. It says of no instance of life, “This life has no value.” It cannot make any such exceptions, for it is built upon reverence for life as such. It knows that the mystery of life is always too profound for us, and that its value is beyond our capacity to estimate.*

Yet estimate we do, and we consider our estimations sufficient reasons to snuff out the lives of those we deem unworthy to live. Schweitzer would find this astonishing arrogance reprehensible.

**Albert  
Schweitzer<sup>37</sup>**

IMPORTANT CAVEAT! I cannot emphasize enough that this chapter is not intended to deny that people commit evil acts, or to in any way excuse the behavior of those who commit them. ***Every single argument in this chapter is presented with this implied question in the background: Given this evidence, does it make sense to execute the worst murderers, or sentence them to death in prison?*** In no way am I excusing the behavior of those who commit murder. To explain is not to excuse. Nonetheless, I am sure some will be tempted to excoriate me as a bleeding heart criminal-coddler who wants murderers to run free. This is inaccurate. I do not.

## ORDINARY MEN

At about 2:00 AM on July 13, 1942 in the Polish town of Biłgoraj, almost 500 men assigned to Reserve Police Battalion 101 were driven in trucks to the village of Józefów. The policemen were mostly early middle-aged family men from Hamburg who were too old or were otherwise unsuitable for use in the regular German army, and they had recently been drafted for a most sinister assignment.

The men climbed out of the trucks and formed a semi-circle around their leader, a fifty three-year-old German career policeman named Wilhelm Trapp. Major Trapp was not a typical hardened Nazi, and his troops fondly referred to him as “Papa Trapp.” His superiors did not consider Trapp as being suitable for an SS appointment, and his demeanor as he addressed his troops that morning in Józefów would have affirmed to his superior officers that he did not have the stomach to perform as an SS officer.

Trapp was pale, choked with emotion and had tears in his eyes as he described to his men how the male Jews of working age in Józefów were to be rounded up and sent to work camps, and the women, children of any age, and elderly were to be shot immediately. But then Trapp made an offer: if any of the older men in the battalion felt they could not participate in this action, they could opt out. After a few moments of silence one man stepped forward, followed by ten or twelve more. Major Trapp immediately took these men under his protection so they would not have to participate in the massacres.

One of Trapp’s officers also refused to participate. Lieutenant Heinz Buchmann (not his real name) was 38 and ran a family lumber business in Hamburg. When told the night before about planned killings,



he said that he “would in no case participate in such an action where defenseless women and children are shot.” Buchmann was adamant and eventually obtained a transfer back to Hamburg.

After the killings began, more policemen asked to be given other duties, and some others avoided killing through subterfuge. These men (who either refused outright to participate, or those who just avoided the killing by slipping away or pretending to be busy with other duties) were not harmed. They only had to put up with derision from their fellow policemen, who called them names like “shithead” or “weakling.” Overall, however, it was probably not more than ten or twenty percent of all the men who refused or evaded the killing of Jews. That means that eighty to ninety percent were willing to do so, despite the fact that it was obvious to all that there were minimal repercussions for those who refused. Simone Weil did not live long enough to hear about this operation, but she would not have been surprised:

*As soon as men know that they can kill without fear of punishment or blame, they kill. ... If anyone happens to feel a slight distaste to begin with, he keeps quiet and he soon begins to suppress it for fear of seeming unmanly.*

—Simone Weil

Major Trapp decompensated emotionally during the whole operation, and this became common knowledge. He apparently spent a lot of time pacing back and forth, weeping like a child and muttering about how awful it was. Trapp successfully protected those who refused to kill, but this was not unheard of. Even Heinrich Himmler seemed to tolerate this “weakness.” Himmler lavishly praised the hardened Nazis

who could kill with no qualms, but acknowledged that some people are weak, and to those he said, “Good, go take your pension.”

Christopher Browning, a noted Holocaust historian, described the actions of Police Battalion 101 in his book, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*. Delving into the records of these horrific murders could not have been easy for Browning. In his preface, however, he makes what I think is one of the most important points of his whole book:

*The policemen in the battalion who carried out the massacres and deportations, like the much smaller number who refused or evaded, were human beings. I must recognize that in the same situation, I could have been either a killer or an evader—both were human—if I want to understand and explain the behavior of both as best I can. This recognition does indeed mean an attempt to empathize. What I do not accept, however, are the old clichés that to explain is to excuse, to understand is to forgive. Explaining is not excusing; understanding is not forgiving. Not trying to understand the perpetrators in human terms would make impossible not only this study but any history of the Holocaust perpetrators that sought to go beyond one-dimensional caricature.*

Browning, like Solzhenitsyn, recognized that while it is perfectly appropriate and justified to condemn vile and evil behavior when we see it, we must at the same time disenthral ourselves from the fantasy that under similar circumstances we would have most certainly acted differently. We actually do not know. As Albert Camus observed, we tend to rationalize our reprehensible behavior:

*However surprising this may seem to anyone who has never observed or directly experienced human complexity, the murderer, most of the time, feels innocent when he kills. Every criminal acquits himself before he is judged. He considers himself, if not within his right, at least excused by circumstances.*

We humans are tempted to judge what is in the heart of our fellow humans, and the very presence of the death penalty shows that we think we can. But as Adam Smith said in *The Theory of Moral Sentiments*, “As we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected, but by conceiving what we ourselves should feel in the like situation. ... it is by the imagination only that we can form any conception of what are his sensations.” And as we have already discussed, most of us suffer from a distinct lack of imagination when we are trying to figure out what other people are thinking or feeling.

## **THE MANICHEAN WORLDVIEW**

I would argue that a type of Manichaeism permeates the death penalty debate. Manichean thinking is dichotomous, binary, and dualistic; people are good or evil, things are all or none. Death penalty proponents often openly state that we are dealing with a simple issue of good and evil. The murderer commits the evil and we in society are the “good” who counteract the evil. The question, of course, is whether capital punishment is the good that offsets the evil, or if the death penalty is yet itself another evil.

The poet W.H. Auden was outspoken on the poverty of Manichean thinking. Auden was a remarkably compassionate human being, and one who regularly acted on his humane urges. But his keen self-

awareness foreclosed him from assuming that he occupied any moral high ground. Auden perceived the great truth that virtually all human beings are capable of evil, and that given the right circumstances virtually every person is capable of committing evil acts. Yet there are many of us who judge ourselves to be on the side of virtue and righteousness, and evil resides only in the hearts and actions of other people. Very few of us, however, can match Auden's ability to put other people's needs before our own.

*There are very few monsters who  
warrant the fear we have of them.*

—André Gide

The “good versus evil” calculus of Manichean thinking is in some ways related to “all or none” thinking in general. We humans are naturally inclined to binary thinking, and we often fail to recognize nuance or ambiguity. Friedrich Nietzsche—whose writings were the epitome of nuance—was famous for showing that concepts that appeared opposite may actually depend on one another for their very existence. The early Greek philosopher, Heraclitus, discussed this issue, and Nietzsche—a big fan of Heraclitus—probably got the idea from him.

In my view, one of Nietzsche's most profound insights is about opposites: namely, his recognition of the absolute necessity of suffering for a flourishing and even joyful life. It was with this Nietzschean insight that, thirty years ago in a period of personal travail, I recognized the immense value of a philosophical habit of mind. In the intervening years I read the rest of Nietzsche's oeuvre and studied virtually every other Western philosopher. It became clear to me that he was not the only philosopher with useful wisdom, but he is certainly one of the best.



Nietzsche clearly had an anti-Manichean spirit:

*It is easy enough to divide our neighbors quickly, with the usual myopia, from a mere five paces away, into useful and harmful, good and evil men; but in any large-scale accounting, when we reflect on the whole a little longer, we become suspicious of this neat division and finally abandon it.*

In some sense opposites are part of the same substance, but at different points along a continuum. Hot and cold are considered opposite, but in reality they are just more or less of the same thing—namely, the motion of molecules. The good versus evil dichotomy could be looked at in the same way rather than as two absolutes. Most of us lie along a spectrum with total evil at one end and total virtue at the other. We move right or left along the spectrum depending on the circumstances, but it is unlikely that anyone dwells every moment of their lives at either end of the continuum.

*That nostalgia for unity, that appetite  
for the absolute illustrates the essential  
impulse of the human drama.*

—Albert Camus, *The Myth of Sisyphus*

In his biography of Arthur Koestler, Michael Scammell noted that the writers and intellectuals who experienced first-hand the Spanish Civil War of the late 1930s—including Koestler, George Orwell, and André Malraux—often had a decisive turning point in their thinking. Specifically, it was much harder for them to justify Manichean thinking in, for example, politics. Malraux recognized that the true intellectual was “anti-Manichean”—a person who recognized that the world is full of

subtleties and complexities, not dogmatic truths. Such people can see the shadings in the moral landscape.

This way of looking at the world, of course, is precisely what Michel de Montaigne promoted so effectively, and is one of the many reasons reading Montaigne's *Essays* is still worthwhile today. Self-awareness should automatically generate intellectual humility for most of us. Montaigne was the perfect example of this truth, with his penetrating self-awareness and genuine humility.

Binary thinking may be more likely to occur when we have a particularly strong aversion to ambiguity, and I would argue that this is likely one of the primary determinants of whether or not one supports capital punishment. Most of us are uncomfortable with ambiguity, and are tempted to take intellectual shortcuts—sometimes to the point of accepting absurdities—in order to make our world more orderly and understandable.

Those who see the world more in black and white terms may be more prone to suppress any doubts about the factual guilt of the murderer, and avoid considering extenuating circumstances—mental disease, diminished intellectual capacity, severe abuse and neglect as a child—that may have contributed to the actions of the murderer. This is one of the reasons that the “death penalty qualified juries” we described in Chapter 5 are so problematic. If we only allow people who approve of the death penalty to serve on capital murder juries, we are much more likely to have ambiguity-averse jurors with Manichean views.

Manichean thinking is reminiscent of intellectual historian Isaiah Berlin's distinction between hedgehogs and foxes. The ancient Greek poet, Archilochus, said that the fox knows many things, but the hedge-

hog knows one big thing (i.e., curling up in a ball to protect itself). Being a hedgehog can be a good thing if your big idea happens to be mostly right. Those who are single-minded on the right path can accomplish much. Hedgehogs, however, can also be prone to dogmatic and binary thinking, and may be more likely to see people in good and evil terms. They may see the murderer in a one-dimensional manner as an evil entity that must be destroyed. One could argue, therefore, that hedgehogs are more prone to supporting the death penalty.

Foxes, on the other hand, tend to see nuance, complexity, and ambiguity rather than certainty. The up side of this approach is that most of the issues with which we humans deal are in fact nuanced, complex and ambiguous. The fox may be more likely, therefore, to see the murderer in human terms, and recognize that many factors are likely to have contributed to his despicable behavior. The danger for the fox is to go so far along this path so as to actually justify the behavior of the murderer based, for example, on his childhood abuse or other traumas. It seems to me, therefore, that the most enlightened foxes would strongly condemn the murder while at the same time seek death in prison rather than execution as the punishment.

One of Isaiah Berlin's key intellectual influences was the Russian thinker, Alexander Herzen, who Berlin called "the forerunner of much twentieth century thought." Herzen was primarily a philosopher but he had detailed knowledge of science and history as well. At the center of Herzen's thought was an essential anti-Manicheanism—a general rejection of absolutes, at a time when absolutes were in vogue. Karl Marx, for example, called communism the "solution to the riddle of history" but Herzen knew there were no such utopian solutions.

Part of Herzen's ability to understand the poverty of absolutism when considering governments or people came from his sophisticated scientific outlook. Once one realizes that even science does not lead to incontrovertible absolutes, it is easier to recognize the poverty of dichotomous thinking in "squishier" fields as well. This point is apropos to the death penalty debate, because the fact that absolute certainty is unattainable for science—the most rigorous and self-correcting process in the history of humankind—means that the certainties claimed by death penalty proponents are not certainties at all. In fact, sometimes the claims are not even probable, such as the deterrent value of capital punishment, and the idea that we have never executed an innocent person. To be fair, death penalty opponents cannot claim certainty either, but we can make compelling arguments based on probabilities.

Herzen knew that imagining some people as being evil and others as virtuous was a vast oversimplification. We humans deal with a whirlpool of chance, and even under the best circumstances we achieve probabilities rather than certainties. Nonetheless, we cling to these beloved certainties as if our lives depended on them. The illusion that we are capable of accurately judging other people consoles us. Perhaps we feel worthier when deem ourselves—in a deep and fundamental sense—different from people who commit murder.

There is a sense in which Fyodor Dostoyevsky's *Crime and Punishment* is an anti-Manichean novel. Rodion Romanovitch Raskolnikov, thinking he is ruthless in the mold of Napoleon, murders a woman and her pregnant half-sister in cold blood. But he is then tormented by guilt and remorse, and he turns himself in to the police to face his punishment. Maybe he wasn't so ruthless after all.



Dostoyevsky seems to be telling us that people are not one-dimensional, and no one is all good or all evil. By making Raskolnikov appealing in appearance and demeanor (other than the murders, of course) Dostoyevsky is demonstrating that our “Charles Manson” stereotype of murderers doesn’t always fit. Dostoyevsky is asking if there is a fundamental (Manichean) difference between us and those who commit violent crimes. He is also implicitly suggesting that no one is beyond redemption and no one is utterly undeserving of our compassion.

Alain de Botton suggests that these views of redemption and compassion for all humans emanate from Dostoyevsky’s Christian sensibilities, and that Dostoyevsky is arguing that “No one is outside the circle of God’s love and understanding.” Unfortunately, this perspective appears to be at odds with many twenty-first century Christians who find the death penalty suitable punishment for those *they* deem evil and unredeemable. One might ask if God gets a say in this decision.

## **LUCK AND CHANCE**

The concept of chance in human lives had long fascinated me, going back to my teenage years. In speech class in my first year of college, we got to choose our own topics. For my first speech I talked about “The Radical Contingency of Human Existence.” My classmates were beyond bored, and the teacher wasn’t much interested either. Given that I was petrified to stand in front of the class, and my speech fell on deaf ears, I dropped the speech class that afternoon and signed up for a writing class instead. Over the years, I could rarely get anyone to listen to me on this issue, so I decided I must be misguided. Then I read John Rawls.

Some of Rawls ideas on political philosophy are controversial, but we do not need to discuss those here. His ideas on the dominant role of chance in how people turn out, however are central to our discussion of the death penalty. Rawls argued that a person's prospects in life are heavily influenced by the situation into which he or she is born. I have conducted a Rawlsian thought experiment with my students many times over the years.

First, I ask them how much chance, luck, and coincidence, affect whether people's lives turn out well or poorly. On average they usually say about twenty or thirty percent. Then I ask them to tell me all the factors that affect how people turn out, and the list is always pretty much the same: intelligence, industriousness, personality, childhood (socioeconomic status, parenting, schools), gender, race, physical attractiveness, physical health, mental health, and the like.

I then ask them to state the extent to which each of these factors is under the control of the individual. This is when the picture starts to change, because for most of the factors they listed the individual has little or no control. The only factor where one might claim more than fifty percent control is industriousness, and even that claim is problematic. Jon Stewart once asked George Carlin in an interview to explain the longevity of his success, since so many comedians "go off the rails." Carlin replied:

*The luck stroke. Gotta have luck in this world. Part of it's your genetic makeup—that's luck. And then what you do with it is also partly genetic, because hard work is genetic... the desire to do hard work. The willingness to work hard and be determined and not be turn aside—that's all genetic too.*

Unlike many people who get to the top who take personal credit for their success, in this refreshing statement the introspective and genuinely humble George Carlin knew better. The equally humble and earthy Montaigne would have loved Carlin. The actor Paul Newman also had a deep appreciation for how lucky he was, saying “Luck is my mantra.” This kind of genuine humility, however, requires thoughtful introspection, a process that many of us eschew.

**My Lucky  
Break<sup>38</sup>**

Luck and chance, of course, cut both ways. Just as good luck can lead to a life of success and fulfillment, truly bad luck can have the opposite effect. To observe that luck has not been kind to a majority of people on death row is not to excuse their behavior—it is simply to recognize that those with abusive childhoods, poverty, mental illness, substance abuse, and personality disorders (such as psychopathy) are overrepresented. That applies not just on death row, of course, but in the prison-population generally.

One might counter, “Yes, but what about all the other people who suffered abuse, poverty, mental illness, etc. and yet did *not* commit murders?” True, but that is not the point. The question before us is “*Were it not for these events in the person’s life, would they have committed the murders?*”

Since there is no way for us to answer this plausible question “yes” or “no” the only reasonable conclusion is to say, “We can never be certain if—absent these factors over which the murderer had no control—they would have become a murderer. So we will give them death in prison (to protect society) rather than sentencing them to execution (to achieve vengeance).”

## ***Moral Luck.***

The concept of “moral luck” must be addressed in the death penalty debate. Suppose Ralph is bathing his one-year-old child when the phone rings. He was expecting an important call from his boss, so he goes to the den for several minutes to talk. He finishes the phone call and comes back into the bathroom to finish bathing his child, who was happily splashing around in the bathtub while he was gone.

Across town, Zeno, another father bathing his one-year-old child has the same issue—an important call from his boss that meant that his child was left unattended for the same amount of time as Ralph’s child. But this time, the child drowns while Zeno is talking. The two men both committed the same lapse in judgment, but Ralph suffers no repercussions, while Zeno is responsible for the death of his child. Ralph, in other words, had “moral luck.”

Even with intentional wrongdoing, moral luck can play a role. Suppose Henry shoots Oscar during a robbery, and despite Oscar’s life-threatening wounds he happens to go to a trauma center where one of the most talented surgeons in the world is working that night. Oscar survives and he makes a full recovery. But let us assume that only one surgeon in 1000 could have saved Oscar. So Henry is charged with lesser crimes than murder only because he was lucky enough to shoot Oscar when that surgeon was on duty. Henry had good “moral luck.”

There seems to be little doubt that many people on death row are there not only for the terrible decision they made to murder, but also because they had bad moral luck. If the bullet had gone a few millimeters to the left, they would be facing prison time for attempted murder instead of sitting on death row.



## THE SUBCONSCIOUS

We humans like to think that we are in largely in control of our thoughts and subsequent actions, with subconscious urgings only occasionally exerting an influence on our cognitive processes. Actually, it is the other way around. Our subconscious dominates our thinking in ways that most of us can't even imagine, and not just when we think about the death penalty. It is not an exaggeration to say that conscious human thought is like the tip of the iceberg, with the subconscious representing the ninety percent of the iceberg below the surface. I am going to expand on the subconscious a bit, because it looms large over several issues in the death penalty debate.

First, and most obviously, the factors that actually led the murderer to kill have a subconscious component. Although many motorists get angry at other drivers on the road, only a small percentage of motorists pull out a gun and kill the person who angered them. Many people commit armed robbery, but only some kill the person they are robbing. We do not even know what was in the killer's conscious mind, let alone what subconscious urges and fears he had. So to say we are capable of knowing what is in the heart of a killer is nonsense—the killer doesn't even know what is in his own heart.

Second, as we discussed in Chapter 5, subconscious activity affects (and almost certainly distorts) the judgement of every person involved in the criminal justice system: police, detectives, prosecutors, defense attorneys, eye witnesses, expert witnesses, juries, judges, and governors. This impact of the subconscious introduces a pervasive, unknown (by definition), and no doubt capricious influence on the process of deciding who should live and who should die. As a result, a po-

lice officer or prosecutor or juror or judge can honestly say “I am not racist” or “I believe in equal justice under the law” with a completely clear conscience, even when their actions belie their words.

Third, the subconscious affects how members of the general public view the death penalty. That includes yours truly, of course, and that is precisely why we all need to redouble our efforts to think rationally and not let our subterranean demons dictate our positions. The fact that our subconscious prevents us from ever being completely objective should not cause us to give up. There are degrees of objectivity and reason, and more is better for issues such as capital punishment (not so much for “values” issues such as same sex marriage).

*Don't let us forget that the motives  
of human actions are usually infinitely  
more complex and varied than we are  
apt to explain them afterwards, and  
can rarely be defined with certainty.*

—Dostoyevsky, *The Idiot*

Accordingly, Socrates' famous dictum to “know thyself” is a grand idea but the degree to which it can be achieved is drastically limited by the hegemony of the subconscious over our conscious thoughts and actions. Michel de Montaigne probably ventured about as far as humanly possible on the voyage of self-discovery, yet it was clear to him that he was often not in control of his thoughts and feelings: “My will and my reasoning are moved now in one way, now in another, and there are many of these movements that are directed without me. My reason has accidental impulses that change from day to day.” Ironically, the fact that Montaigne knew himself better than virtually anyone else was

what provided him the insight that he, in fact, knew very little about what was truly behind his thoughts and actions.

The prudish Blaise Pascal admired the earthy Montaigne in spite of himself, and Pascal developed a worldview that underscored the critical role of unconscious forces in the formation of desires and beliefs.

*“...this arrogant soul, which prided itself on acting only through reason, follows through a shameful, headstrong choice what a corrupt will desires, whatever resistance the only too enlightened mind can bring to bear on it. It is then that there is an uncertain balance between truth and pleasure, and that the knowledge of the one and the feeling of the other creates a contest whose outcome is very uncertain, since, in order to judge it, we would need to know everything that happens in the deepest interior of a human being...”*

The “deepest interior of a human being” that Pascal describes is the subconscious.

Although Montaigne, Pascal, and others recognized the importance of the subconscious in the 16th and 17th centuries, the philosopher who gave the subconscious center stage was Arthur Schopenhauer (1788-1860). He observed, “One might almost believe that half our thinking takes place unconsciously. Usually we arrive at a conclusion without having clearly thought about the premises which lead to it.” We now know that attributing “half” of our thinking to the subconscious is a vast understatement, and modern cognitive science puts the percentage of subconscious thinking closer to ninety percent.

Schopenhauer said it almost seemed as though conscious thought takes place on the surface of the brain, and unconscious thought in-

side the brain. This is not anatomically correct, of course, but it is a nice way of expressing the supremacy of the unconscious.

Typical of Schopenhauer's practical philosophical writings, he gives concrete examples from everyday life to demonstrate his argument for the subconscious. First he asks us to consider our first emotion when we see a letter from someone in the mailbox. That will tell you what you really think about the person, and it comes from your subconscious. Most of us recognize this concept when we have an emotion (a vague feeling of happiness or disappointment) that lingers despite the fact that we have forgotten the issue that engendered the positive or negative emotion. Then we recall the issue and say, "Ahah, that is what caused this emotion, and now I know how I really feel about it."

Schopenhauer's attention to the subconscious is apropos to many debates taking place today for which evidence and facts are too often disregarded: climate change, supply-side economics, vaccinations, voter fraud, and, of course, the death penalty. Ignoring evidence is nothing new, of course, as Schopenhauer observed, "Nothing is more provoking, when we are arguing with a man with reasonings and explanations, and taking all pains to convince him, than to discover at last that he *will* not understand, that we have to do with his *will*." (Schopenhauer's emphasis) Much of this "will" is animated by the subconscious.

*The automatic unconscious mind  
dwarfs the conscious mind.*

—David G. Myers

Albert Camus also recognized the difficulty of following in any meaningful sense Socrates' advice to know ourselves. He observed, "Forever I shall be a stranger to myself. In psychology as in logic, there are truths



but no truth. Socrates' 'know thyself' has as much value as the 'Be virtuous' of our confessionals. They reveal a nostalgia at the same time as an ignorance." Camus was fond of Montaigne, and like virtually everyone who has genuinely taken Montaigne's ideas onboard, he developed an outlook of intellectual and moral humility.

Given the supremacy of the subconscious, it is preposterous for us to think we can identify with any precision the motives that led a particular person to commit murder. The murderer himself has only his conscious thoughts and passions to go on, and these represent only the "outer bark" of his thinking, as Montaigne put it.

If, for example, a police officer shoots and kills an unarmed person of color running away from him, the motivation to shoot may be some combination of racism, genuine (if unwarranted) fear, cruelty, and anger, with a topping of terrible judgement. The police officer may cite only his fear as the motivation, but it will almost certainly be far more complex than that. So if murderers themselves do not truly know the motivations for their actions, on what rational basis can we possibly decide that the motives of Murderer A warrant the death penalty, and the motives of Murderer B warrants "only" death in prison.

As if the dominating role of the subconscious in human action were not inconvenient enough for the death penalty proponent, we will now turn to free will—the consideration of which may be fatal to the argument that capital punishment is compatible with justice.

## **FREE WILL**

The question of whether humans at least sometimes have control over their own actions—that is, have free will—is one of the most profound

and intractable dilemmas in the history of human thought. For many it will seem silly to question whether we can freely make choices, and a typical response would be: “Of course I have free will; after all, I am the one who decided which pair of socks to put on this morning.” But once you start unpacking the various arguments, the free will dilemma quickly becomes tangled into an intractable Gordian knot.

Free will has traditionally been a philosophical and theological question, but lately has been addressed by cognitive scientists, neuroscientists, psychologists, legal scholars, and many others. Because the free will question is so important to the issue of morality and punishment, it seems appropriate to dilate on the topic in a discussion of capital punishment. Accordingly, I will discuss some of the arguments on both sides, include some historical insights that provide context, and comment on why the free will issue is central to the death penalty debate.

When we talk about free will in this context, we are not talking about situations where some outside force is preventing you from doing something. For example, you obviously cannot drive your car down a road that is closed for repairs where immovable barricades have been placed across the roadway. We are instead talking about situations where you choose to do or not do something that is within your power, such as decide whether to wear your blue shirt or your green shirt.

### ***Synopsis of the Free Will Arguments***

There are people who categorically deny the existence of human free will (aka “hard determinists” or “materialists”) and they generally use the following arguments: 1) Nothing in the universe happens without a cause, and all events that occur are caused by antecedent causes in a chain of causality going back to the beginning, 2) Everything that hap-

pens in the universe is governed by immutable scientific laws, and 3) Human beings are physical beings in the universe, and so every human action results from antecedent causes that are subject to these immutable scientific laws. From this scientific view, it is very difficult to see where freedom of human action can gain even a tentative foothold, let alone a solid footing.

The materialistic viewpoint (that everything is simply a dance of tiny particles and that free will does not exist) is therefore tempting for the scientific mind. As G. K. Chesterton observes, however, this position takes the easy way out: “The materialists analyse the easy part, deny the hard part and go home to their tea.”

The free-will deniers may have science and logic on their side, but they have a disturbingly counterintuitive story to tell. The countervailing argument to hard determinism, therefore, is that virtually everyone has a deep and unshakable belief that they have free will. It just seems obvious that we have it. But, of course, a universally held opinion isn’t always correct. As Ludwig Wittgenstein said regarding universal beliefs in general: “From its seeming to me—or to everyone—to be so, it doesn’t follow that it is so.” [Wittgenstein’s emphasis]

***So as counterintuitive as it is, there is no way to rule out the possibility that free will is a collective illusion of humankind.*** From a purely scientific viewpoint, that is actually the most likely explanation. If free will is an illusion, however, there is no disputing that it is a very useful illusion. The concept of free will might be what Friedrich Nietzsche called one of humanity’s “necessary errors.”

Understandably the argument in favor of free will is more palatable to most people than hard determinism. As I type these words, it seems

clear to me that I am choosing the words that appear on my screen. Of course, I recognize that my choice of words is heavily influenced by all sorts of external factors, not least the books I have read over my lifetime. My word selection is also affected by my moods, my preoccupations, my education, the words used by those with whom I interact, even whether or not I have had my morning coffee (alas, I have not... my Chemex pseudo-Erlenmeyer coffee apparatus is just finishing up its work over on the kitchen counter). But despite all the things that influence the words I use, I have the firm impression that ultimately, I choose them.

We also feel we can decide which clothes to put on in the morning from among the clothes available to us. Or I can decide whether or not to put my finger to my nose, assuming I have both a finger and a nose, the neuromuscular capability to complete the action, and no one is restraining me from doing so. How could something that seems so obvious to us not be true?

It turns out, then, that some people are absolutely certain that we do not have free will while others (most people) are certain that we do. But it seems to me that absolute certainty at either end of the spectrum is not a rationally supportable position. If someone tells you that they have the final and complete answer to the free will problem, run the other way as fast as you can. They have obviously made some unwarranted assumptions or have otherwise skated onto some philosophical thin ice.

The question of free will is what philosophers call an “antinomy” which is an apparent contradiction between two statements or concepts, both of which appear to result from correct reasoning. Concept A is



that everything that happens in the universe has a cause, going all the way back to the beginning, and that all events are subject to universal scientific laws. There is no conceivable mechanism for a nonmaterial “free will” to interact with this system. Concept B is that virtually all humans assume that they have free will, in the sense that they at least sometimes have control over their own actions. In my view, even the best minds in the history of humankind have not been able to adequately reconcile these seemingly contradictory positions.

### ***History of the Free Will Debate.***

In the West, the story starts with the pre-socratic Greeks, Leucippus and Democritus who proposed a remarkably prescient atomic theory in the 5th century BCE. They stated that the entire universe was made up merely of “atoms and the void.” This led to the logical conclusion voiced by Leucippus, “Nothing occurs at random, but everything for a reason and by necessity.” This was a thoroughgoing materialist conception, meaning that the universe is made up of tiny particles that interact with each other to form everything that exists, and that every event has an antecedent physical cause, going back to the beginning of time.

It was only a small step from claiming that there was nothing but atoms and the void to realizing that this materialistic conception of the universe did not allow for human free will. This uncomfortable conclusion led Epicurus and others to add a little “fudge factor” to bring free will back into the picture, a phenomenon called “the swerve.” On this theory, the atoms occasionally vary from their predictable causal trajectories, and “swerve” so that they bang into other atoms. This swerve, they thought, avoided the purely predictable and deterministic movement of atoms, and provided a source for human free will.

Unfortunately, the “swerve” had absolutely no supporting evidence and did not catch on, but the problem of how humans could have agency in a physical universe governed by immutable natural laws remained. René Descartes claimed to have solved the problem with a philosophy of “dualism”—we have a physical body, and a non-physical mind (or soul). Our free will comes from that non-physical part of our being, and it directs the actions of our physical bodies. But it was one thing to declare human dualism and quite another to defend it.

**René  
Descartes<sup>39</sup>**

Descartes’ friend and correspondent, Princess Elizabeth of Bohemia (1618-1680) held his feet to the fire on this point. Princess Elizabeth was obviously a deep thinker who clearly understood the implications of Descartes’ dualism. The Princess asked Descartes in a 1643 letter, “Given that the soul of a human being is only a thinking substance, how can it affect the bodily spirits in order to bring about voluntary actions?” She went on to point out that when a thing moves, the movement depends upon how it is pushed and the physical properties of the thing that pushes. Moreover, since any movement of an object depends upon physical contact between the thing pushed and the thing that pushes, how can an immaterial thing like the soul or spirit interact physically with a material thing like a human body?

Descartes replied to the Princess with a lengthy (and in my estimation futile) discussion of how the material body and the immaterial soul can interact. In response, the Princess, after profusely praising Descartes’ brilliance, asks the question that again goes to the heart of the matter, “But I’ve never been able to conceive of ‘what is immaterial’ in any way except as the bare negative ‘what is not material,’ and that can’t enter into causal relations with matter!” The correspondence goes on, but by

my reading Descartes never adequately answers Princess Elizabeth's valid concerns on how exactly the immaterial and material interact.

IN THE PREVIOUS CENTURY and before Descartes was born, Montaigne had pondered—in much the same way as Princess Elizabeth—how a soul or spirit could possibly produce human action. Montaigne asked, “But how a spiritual impression can cut such a swath in a massive and solid object, and the nature of the connection between these wonderful springs of action, no man has ever known.” We still do not know, and it is possible we never will.

For some people, this is a deal-breaker; the fact that nobody can come up with a credible theory for how spirit and body can interact means that free will is impossible. I am prepared to concede that this “mind-body problem” has not been adequately solved, despite numerous attempts by some very talented thinkers. To make matters worse, as science continues to pry apart the molecular basis for biological processes, more and more is explained, and it becomes increasingly difficult to describe how some non-material agency (soul, spirit, *elan vital*, whatever you wish to call it) interacts with and directs the actions of a material substance such as the human body. The task for the free-will believer, therefore, is becoming more difficult over time.

You are entitled to ask how I can believe that free will is possible given the lack of any convincing evidence for its existence, and given that the theory has almost no scientific support. My answer is not much better than the “Swerve” proposed by the Epicureans 2300 years ago, but here it is: It is possible that our inability to come up with a justification for free will results from the limited intellectual capacity of human beings. Our anthropocentric and hubristic view is that we know quite a

lot, but as philosopher of science Karl Popper pointed out, it is actually a mixed bag:

*First Thesis: We know a great deal. And we know not only many details of doubtful intellectual interest but also things which are of considerable practical significance and, what is even more important, which provide us with deep theoretical insight, and with a surprising understanding of the world.*

*Second Thesis: Our ignorance is sobering and boundless. Indeed, it is precisely the staggering progress of the natural sciences (to which my first thesis alludes) which constantly opens our eyes anew to our ignorance, even in the field of the natural sciences themselves. This gives a new twist to the Socratic idea of ignorance. With each step forward, with each problem which we solve, we not only discover new and unsolved problems, but we also discover that where we believed that we were standing on firm and safe ground, all things are, in truth, insecure and in a state of flux.*

It is possible, therefore, that our inability to justify free will results from our Popperian “sobering and boundless” ignorance, rather than from a fundamental lack of any possible justification for it. As Montaigne observed regarding people who regard some things as impossible, “For to condemn them [ideas you discount] as impossible is to pretend, with rash presumption, to know the limits of possibility.”

I recognize that these arguments about free will can be disorienting for those who have never thought about the free will question before. Nonetheless, to those of you who believe fervently in free will I ask this question: Do you think it is possible our conviction that we have free



will is actually an illusion? I do not see how any intellectually serious person can answer in the negative, and this possibility is all I need for my argument.

*A good legislator is less bent on  
punishment than preventing crimes.*  
—Montesquieu, *The Spirit of Laws*

It is difficult to find a deep thinker who has not tackled the free will problem, from Democritus, Epicurus, Aristotle, Lucretius, Augustine, Boethius, Michele de Montaigne, David Hume, René Descartes, Immanuel Kant, Arthur Schopenhauer, Friedrich Nietzsche, William James, and countless modern philosophers. Despite all of this brainpower, however, not a single one of these thinkers has presented an account of human free will (or lack thereof) that—in my opinion—rises above the level of “plausible.”

### ***Free Will and Capital Punishment.***

The fact that human free will is only a provisional theory means we are executing people based on the unproved claim that they could have acted other than how they did act. If we channel our inner Cesare Beccaria, however, whether or not free will exists becomes moot because we would concentrate on protecting society instead of extracting vengeance—we would use death in prison rather than execution. I propose, therefore, that we: 1) Recognize that human free will is only a theory, and one with almost no empirical or even theoretical scientific support, and 2) Despite the lack of evidence, we should assume that free will exists for purposes of assigning culpability and determining the consequences for criminal behavior.

It is critical, however, that we keep in mind simultaneously both points #1 and #2 in the paragraph above. If we consider only #1 in isolation, we might be too slow to assign culpability for behavior that seriously harms other people. If we consider #2 without understanding #1 (our current situation) we may be inclined to be 100% certain, for example, that some people “do not deserve to live.” In my view, the only intellectually respectable position is that we may or may not have free will, and that this must be in the calculus when we decide whether we should have executions or death in prison.

This is not letting murderers “off the hook”—it is simply recognizing that we can never know with certainty if someone who commits murder had full control over his or her actions, and sentencing them to death in prison relieves us of the need to decide whether or not humans have free will.

Arthur Koestler was philosophically sophisticated and a profound thinker who understood what was at stake in the free will debate when considering the death penalty. Asserting that humans have free will requires a leap of faith. As he put it, “*the concept of criminal responsibility implies the existence of a super-natural order; it is not a legal, but a theological, concept.*” [Koestler’s emphasis] If one does not believe in a transcendental, super-natural order (e.g., a soul or spirit) from which free will emanates, one should have difficulty justifying the death penalty. Koestler again, “From the determinist point of view, vengeance against a human being is as absurd as punishing a machine.”

Koestler observes that criminal culpability must result from the accused having murderous urges accompanied by a defect in restraining mechanisms. Koestler observes, “But whether the offense was caused

by too much steam or by defective brakes, the law assumes ... that there was in him an untapped reserve of effort, a hidden store of brake-lining, which he failed to find or to use.” This legal view of criminal culpability obviously cannot be supported if the person does not have free will.

Nonetheless, Koestler does not deny the reality of our human condition. There is a sense in which it doesn't really matter whether one is intellectually committed to the belief that human free will does or does not exist... in both cases one is “unconsciously and emotionally” convinced that he or she has free will. Koestler further holds that the question of whether or not humans have free will has little practical significance, since we all behave as though we do. In non-capital cases, we would put violent offenders in prison for long periods to protect society whether we believe in free will or not. It is only when a person is on trial in a capital case that the issue of free will assumes existential importance, because it is then that we make the implicit claim, “This person is evil and does not deserve to live.” Such a statement is nonsense in the absence of free will.

IT IS POSSIBLE (though by no means inevitable) that in the distant future we will find out whether or not free will exists. But for now we do not know, and basing a final and irreparable punishment on something as tenuous as free will does not seem justified. I do not think Koestler's statement on free will is hyperbole:

*“The issue of free will versus determinism is hardly mentioned at all in the century-old controversy on capital punishment. Yet it is really the heart of the matter. It is shunned because it is the oldest and most awe-inspiring problem of philosophy and probably an insoluble*

*one. Yet I will try to show that our inability to solve the problem is the strongest argument against capital punishment.”*

If all of this talk about free will makes your brain hurt, there is a merciful remedy: death in prison in place of the death penalty. With death in prison, we don't have to decide the undecidable regarding the extent to which humans have free will. We protect society, achieve justice for victims, and we can sleep at night knowing we have not accidentally executed some innocent people.

### **COMPROMISED FREE WILL**

If we do not have free will, choosing execution over death in prison for murderers becomes morally indefensible. For the sake of argument, however, let us assume—despite the lack of evidence—that we do have control over our own actions, and we do have free will. Is free will an all-or-nothing phenomenon? Are we being Manichean by putting the free will question in “yes or no” terms? Perhaps we are. Canadian philosopher Patricia Churchland would rather talk about the degree to which we are able to exert self-control over our actions. We all have proclivities and propensities based on a myriad of factors, so perhaps there is a sense in which we may only have “partial free will” under some circumstances. What are some of the ways in which limits to our free will might occur?

#### ***Brain Damage.***

In the year 2000 a 40-year-old man in an apparently happy marriage began to visit brothels, collect pornography and visit pedophilic websites. After making sexual advances to his stepdaughter, he was discovered and found guilty of child molestation. Before he was sent to



prison, he complained of severe headache and loss of balance. A brain tumor was discovered, and after it was removed he seemed to become normal again. He was allowed to return to his wife and step-daughter, but later when he started to have headaches and a return of his abnormal sexual urges, physicians found his tumor had returned. When the second tumor was removed, he was again cured of the pedophilic behavior.

Some headlines at the time announced that the brain tumor had “caused” his pedophilia. Nonetheless, I think that the more nuanced view of Canadian psychologist James Cantor is probably closer to the truth. Cantor suggested that the man probably had pedophilic feelings all along, but the damage to his frontal cortex by the brain tumor simply uncovered what was already there. In other words, he was unable (or less able) to suppress the pedophilic behaviors due to the brain damage.

Neurologist Antonio Damasio discussed the issue of brain damage and behavior in his book, “Descartes Error” in which he described the famous Phineas Gage case. In 1848, Phineas Gage was a 25-year-old construction foreman, where his crew was blasting rock for a railway in Vermont. Gage put some blasting powder in a drilled hole, and told a helper to put sand in the hole. Gage got distracted, and then turned back and tamped the powder with an iron bar. The powder exploded and the iron bar went through Gage’s cheek, eye, and then out through the top of his head, ripping a huge hole in his skull.

To the astonishment of onlookers, Gage was soon conscious and speaking to the people gathered around him. They took him by cart to a hotel, and when the physician arrived Gage was sitting on the hotel

porch chatting with people. Despite severe infections and high fevers over the next few months, Gage survived. This good news, however, was offset by the fact that his personality took a substantial turn for the worse. He went from friendly and likable before the accident to nasty and selfish afterward. He also became vacillating and indecisive, and rational decision-making became almost impossible for him.

Damasio compared Gage to patients he had treated with frontal lobe damage, and described one patient, “Elliott.” Pre-brain damage Elliott was well-respected, successful, and a good husband and father. After a tumor was discovered in his frontal lobes (signaled by severe headaches) Elliott started failing at home and at work. He lost job after job, and lost all of his money in a bad business deal. His marriage failed and after the divorce he married again, and then divorced again. His intellect was largely intact and he was healthy, but, as Damasio put it, “The machinery for his decision making was so flawed that he could no longer be an effective social being.”

There are many examples of frontal lobe damage affecting personality and behavior in addition to Phineas Gage and “Elliott.” These people are often nice enough before the frontal lobe damage, but after the damage their assholery knows no bounds. So how much should this be considered “their fault” and how much due to the damaged frontal lobes? They still exhibit normal rational functioning in most areas of their lives, but their personality often changes dramatically, and they have a terrible time making decisions. Do they still have free will? Assuming free will is a thing (which as we have discussed is only a hypothesis) it would appear that they can decide which pair of shoes to put on in the morning. As Damasio observed, however, “It is appropriate to say that his [Elliott’s] free will had been compromised...”

To claim that damage to the frontal lobes or certain other areas of the brain is irrelevant to behavior (as some have asserted) is to willfully ignore or distort a large body of empirical evidence. Again, these findings on brain damage in no way represent an excuse for reprehensible behavior. Assuming that anyone has free will, brain damage of the type we have been discussing probably represents, as Damasio asserted, a “compromise” of free will, not an abolition of it. The only relevance of this discussion for our purposes is whether this type of brain damage should be considered when deciding whether a person should get death in prison or should be executed. In that context, it would seem that only the irremediably perverse would choose execution.

### ***Abuse and Neglect.***

Children who suffer substantial abuse or neglect often have difficulty functioning as adults. Sister Helen Prejean and others have observed that the majority of people on death row were abused as children. She also pointed out that we have to turn them into monsters to justify killing them. But when you meet them, you find out they are not monsters. They did terrible things (the guilty ones) but they are human beings, and many of them suffered horrific abuse as children.

ROBERT ALTON HARRIS. Some crimes are so heinous that any one opposing capital punishment for the killer would seem to have completely lost touch with reality. Consider the story of Robert Alton Harris as described by Miles Corwin in the Los Angeles Times. On July 5, 1978 two sixteen-year-old boys, John Mayeski and Michael Baker, were eating lunch in their car while sitting in parking lot of a Jack in the Box in San Diego, California. They were spotted by Robert Alton Harris and

his brother Daniel, and the Harris brothers decided to steal the teenage boys' car so they could use it in a bank robbery they were planning later that day.

Robert Harris pointed a gun at the boys, and forced them to drive to a nearby canyon. Robert then told the boys he needed the car for a bank robbery, and they would not be hurt. As the boys started to walk away Robert raised his Luger and shot Mayeski in the back. Then he chased Baker down a hill and shot him four times. When Robert got back up the hill, he saw Mayeski was still alive so he went over and shot him point blank in the head.

Robert's brother, Daniel, reported that after killing the two boys in cold blood, Robert stood there laughing as he swung the rifle and pistol in the air. The Harris brothers then drove to a friend's house where Robert ate the slain boys' lunches, and told his brother that it might be funny to pose as police officers and give the bad news to the parents of the dead boys. Later as they were getting ready to rob the bank, Robert pulled out the Luger and noticed flesh and bloodstains on the barrel. He said, "I really blew that guy's brains out" and began to laugh.

Robert Harris was given the death penalty, and his family was not terribly surprised. He had been arrested for car theft as a teenager, was arrested twice for torturing animals, and was convicted of manslaughter for beating a neighbor to death during an argument. Harris seemed like the kind of person who would force Dante to bring in the bulldozers to construct a tenth level of hell.

Even fellow death row inmates at San Quentin planned a celebration when Robert Harris was executed. They had saved up some money to



buy snacks and soda to bid good riddance to a person they called a “total scumbag.” Richard Mroczko, who was on death row in the cell next to Harris for a year, said “We’re not a bunch of Boy Scouts around here, and you might think we’re pretty cold blooded about the whole thing. But then, you just don’t know the dude.”

At this point in the story even staunch death penalty opponents might start to waver on the case of Robert Alton Harris. He murdered two boys in cold blood, and then laughed about it. Even fellow death row inmates thought he was a scumbag. Maybe there are certain cases where the death penalty actually is required to achieve justice. As State Deputy Attorney General Michael D. Wellington said to the court regarding Harris, “If this isn’t the kind of defendant that justifies the death penalty, is there ever going to be one?” Before we take that step, however, let us look at the rest of the story.

Robert Alton Harris was born 2½ months prematurely on January 15, 1953, hours after his mother was kicked in the stomach by her drunk husband, and she began to hemorrhage. Robert almost died, but after months in the hospital he was able to come home. Robert’s nightmare life, however, was just beginning.

Robert’s father was an alcoholic who sexually abused his daughters, and savagely beat his children. Robert was treated especially badly because the father didn’t believe that Robert was his son. The father also abused Robert’s mother, and she became convinced that Robert was the cause of her problems. She ended up hating Robert, and her treatment of him was appalling.

After Robert was sent to Death Row, his sister, Barbara Harris, recalled the horror of their family life. Barbara remembered the time they

were in the car, and her mother was in the back seat with little Robert. The father grew enraged at Robert's crying, and threw a glass bottle at him. But the bottle missed Robert and shattered on the mother's face. A mixture of blood and milk streamed down her face and Robert began to scream.

Barbara then described the effect of these events on her mother: "She ended up blaming Robbie for all the hurt, all the things like that. She felt helpless and he was someone to vent her anger on." Here is Barbara's description of Robert's tragic and futile attempts to get love from his mother:

*He would just break your heart. He wanted love so bad he would beg her for any kind of physical contact. He'd come up to my mother and just try to rub his little hands on her leg or her arm. He just never got touched at all. She'd just push him away or kick him. One time she bloodied his nose when he was trying to get close to her.*

I do not know how to say this without sounding strident, but if this description of Robert vainly seeking love from his mother doesn't tear at your heart, you may need to check where you fit on the sociopathy scale. Of all the nine children in the family, Barbara saw Robert as the most beautiful of all. "He was an angel," she said.

*"The sad thing is he was the most sensitive of all of us. When he was 10 and we all saw 'Bambi,' he cried and cried when Bambi's mother was shot. Everything was pretty to him as a child; he loved animals. But all that changed; it all changed so much."*

One does not need to be a child psychologist to grasp how this may have affected Robert's future emotional development. In their book

*Worm at the Core*, Solomon, Greenberg and Pyszczynski describe what happens when young children do not receive love and nurture from parents or caregivers, as occurred in the infamous Romanian orphanages in the 1990s. Many of the children in the orphanages suffered appalling abuse and neglect, resulting in grossly abnormal emotional development (especially regarding the regulation of feelings).

Solomon and his co-authors give the example of “Cyprian” who was adopted from a Romanian orphanage at the age of two and taken to a loving home where his new parents lavished him with love and gave him every possible advantage. Things seemed to go well at first, but at about age four he developed numerous aberrant social behaviors, including screaming fits and breaking things. Cyprian was diagnosed with “reactive attachment disorder” which can occur when infants and young children have no one with whom to bond and achieve psychological security. Over the past 70 years, compelling evidence has accumulated that infants deprived of love and nurture in the first year or two of life have great difficulty functioning when they get older. If one adds in physical and emotional abuse, the damage is even worse.

*When we judge a particular action  
we must consider many circumstances  
and the whole man who performed  
it, before we give it a name.*

—Michel de Montaigne

Let us return to Robert Harris. The recollections of his sister Barbara regarding their horrific family life appear genuine; he was already on Death Row and he wanted to get the execution over with. Barbara also pointed out that she has a 16-year-old son, and often thought

about the agony of the parents of the boys Robert murdered. “I know how those parents must suffer every day,” she said. Barbara was clearly not an apologist for her brother’s crimes.

Robert Harris had more than just a horrific home environment. When he was sentenced to a federal youth detention center for stealing a car at age 15, he was raped several times and attempted suicide twice by slashing his wrists. His incarceration was extended due to various infractions, and by the time he emerged from federal prison at age 19, Barbara said he had transformed from the sensitive child she knew to a brutal and nasty ex-con.

Robert Harris did not try to delay his date with the executioner. Another sister, Rheadawn Harris said, “In a way, Robbie’s almost looking forward to it. He hates the waiting. He wants to live, but he’d rather die than be locked up at San Quentin for the rest of his life.” Robert Alton Harris was executed in the gas chamber on April 21, 1992. He was 39 years old.

A case like Robert Harris presents—or perhaps it would be better to say should present—a thorny dilemma for a society with capital punishment. On the one hand Harris enjoyed abusing animals, beat a neighbor to death, and then showed no remorse after ruthlessly murdering two 16-year-old boys. On the other hand, he suffered merciless and repeated physical abuse and rejection by both parents, and as a teen he was raped and brutalized in a juvenile detention center.

These facts force us to ask a critical question: Were it not for the relentless neglect, abuse and assaults Robert Harris endured in his earlier life, would he have turned into a brutal killer? Those who say Harris should be sentenced to death instead of death in prison for his crimes



are tacitly claiming to know that the answer to that unanswerable question is yes.

Arguments might be made for or against executing Robert Harris, but in the world of Cesare Beccaria—that is a world with no death penalty—we are mercifully spared from the need to play God. Without the death penalty we do not need to come down on either side of the impossible decision of whether Mr. Harris’ tragic childhood is a mitigating factor to his subsequent behavior. If we focus on protecting society instead of deciding if Robert Harris “deserves” to die, we would sentence him to death in prison.

And if vengeance is important to you, rest assured that Robert Harris preferred execution to spending the rest of his life in San Quentin. As I pointed out in earlier chapters, Harris is not unique among convicted murderers in preferring death over life in prison... a fact that should comfort those who feel the need for revenge and want maximal suffering for murderers.

Replacing execution with death in prison, therefore, protects society, saves us from our arrogant fantasy that we know precisely who deserves to die, and provides the revenge-seeker with almost as much satisfaction as execution. Moreover, by denying the possibility of parole for the crimes that would previously have warranted the death penalty, we are also relieved from the highly problematic duty of deciding—when a person like Robert Harris has spent, say, 40 years in prison and is old—whether it is safe to release him back into society.

Given Robert Harris’ behavior, one wonders if it would ever be safe. If we claim that death penalty proponents cannot possibly know what is in the hearts of murderers and which of them deserve to die, how can

we turn around and claim to know what is in their hearts as a basis for who should be released from prison? Some of my fellow death penalty abolitionists feel I am too harsh here, and I do see their arguments against life in prison without the possibility of parole.

Many of the people sentenced to death in prison have—over the decades—become model citizens and would seem to present no threat to society whatsoever. I get that. So I am forced to agree in theory that even those who have committed the worst murders should be given the chance for eventual release. But as a practical matter I wonder we can successfully abolish the death penalty if life in prison *with* the possibility of parole is the alternative.

I guess I am arguing for incrementalism. Philosopher of science Karl Popper argued—I think persuasively—for incrementalism as the best way to make social change. Popper argued that in science we learn by trial and error, and gradually improve our theories by making small changes in our experiments and learning from our inevitable mistakes. He felt that this is the natural way for human being to learn, and is usually the best way to achieve our social goals as well as our scientific ones. In his 1944 essay, *Piecemeal Social Engineering*, Popper said:

*The piecemeal engineer knows, like Socrates, how little he knows. He knows that we can learn only from our mistakes. Accordingly he will make his way, step by step, carefully comparing the results expected with the results achieved, and always on the look-out for the unavoidable unwanted consequences of any reform; and he will avoid undertaking reforms of a complexity and scope which make it impossible for him to disentangle causes and effects, and to know what he is really doing.*

Popper went on to admit that such a piecemeal approach often does not appeal to the temperament of ‘activists’ who may be more inclined to a holistic approach that fixes several problems at once. I guess my question would be whether we can achieve our goal of abolishing the death penalty without offering death in prison as the alternative. I do not know the answer to that question, but I am inclined to think the answer is no. As I write these words, however, Montaigne is whispering in my ear, “Keep in mind, bozo... you may be wrong.”

By recommending death in prison for some murderers, I am not suggesting that this would be appropriate for all people who murder. It seems self-evident to me that a woman whose husband is beating her and sexually abusing her daughters should not get death in prison if she eventually murders him to get out from under his abuse, even if premeditated. Obviously, there should be some consequences, but such a woman is not likely to be a danger to society.

*With regard to human affairs, not  
to laugh, not to cry, not to become  
indignant, but to understand.*

—Spinoza

JOSEPH JAMES DEANGELO. In 2018 police arrested Joseph James DeAngelo using DNA evidence from an online genealogy database. DeAngelo was accused of being the “Golden State Killer” who murdered at least a dozen people and sexually assaulted more than 50 others. The suffering and despair the Golden State Killer generated in the world is almost beyond comprehension. After DeAngelo was arrested, his nephew reported that when DeAngelo was about 10 years old, he and his 7-year-old sister (the nephew’s mother) were playing in

an abandoned warehouse on an Air Force base in Germany when two airmen arrived and raped his little sister in front of him. The nephew learned this from his mother (the little sister who was raped) before she died of cancer. His mother also said that DeAngelo and his siblings were physically abused by their father and mother.

If DeAngelo pleads guilty or is found guilty at trial, before he is sentenced the courts will have to determine 1) if these stories about DeAngelo's childhood are true, and 2) if they are true, what impact did they have on DeAngelo's subsequent horrible behavior. As with Robert Alton Harris, what we are really asking is, "Were it not for these events in his childhood, would DeAngelo have turned out to be a vicious serial killer?" This question is impossible to answer with any degree of certainty, yet it would have to be addressed. The nephew and others would be called in to testify—as well as experts on both sides—to try to sort it all out.

Instead of pretending we can answer an unanswerable question, how much easier it would be to say, "Perhaps he would not have become a serial killer absent his childhood traumas, and perhaps he would have. We will just put him in prison until he dies, and will not have to address this question." This will also spare the hundreds of loved ones of the victims the agony of listening to stories of DeAngelo's traumatic childhood—stories that would no doubt sound like excuses to them and add to their pain.

### ***Mental Illness and Diminished Mental Capacity***

We will not devote much time to severe mental illness and diminished mental capacity because current laws are supposed to keep such people off death row. It is known that certain psychoses and personality



disorders such as psychopathy are associated with antisocial and sometimes criminal behavior. A schizophrenic who murders his mother because he thinks she is the devil should be treated in an institution for the criminally insane, not sent to death row. But in practice, many defects of mental function in defendants short of florid psychoses are never brought up as a “mitigating factor” at trial or at sentencing.

A good example would be a defendant with frontal lobe brain damage as described earlier for Phineas Gage. There is compelling evidence that people with frontal lobe damage often suffer a dramatic change in their personality, becoming mean and nasty. (Unfortunately “asshole” is not a designation in DSM-5, although I have talked to psychologists who think that designation is long overdue.) But in any case, there are many defects in mental functioning beyond the individual’s control that may negatively affect behavior, yet never come up at trial.

It is well-established that many people currently in prison—on death row or not—suffer from obvious and easily diagnosable mental illnesses. Many of these people should have gone directly to mental health institutions, with violent and dangerous people held in secure facilities. Housing mentally ill people in prison without providing adequate mental health care is a tragedy that goes beyond the capital punishment issue, and is outside the scope of this book. Having adequate mental health services in general would help.

Montaigne once asked for permission to interview and observe about a dozen people accused of witchcraft. He was given access to the accused and to the evidence against them, including their confessions. He claimed to make every effort to consider the evidence without prejudice—and given that it was Montaigne—one can assume that he was

as objective as any human could be. He concluded that he “would have prescribed them rather hellebore than hemlock.” (Hellebore was an herbal drug used for insanity in Montaigne’s day.) There is little doubt that many of the people executed in the United States in the past half century would have fallen into the “hellebore rather than hemlock” category.

People with diminished mental capacity are also not supposed to be given the death penalty. In 2002 the US Supreme Court ruled in *Atkins v. Virginia* that it was unconstitutional to execute those with substantially diminished mental capacity. In the United States we have a dismal record of executing people who clearly have diminished mental capacity, but at least the laws are now there to protect such individuals. At this point our job is to make sure the laws are followed.

## SUMMARY

We addressed a number of thorny questions in this chapter. Is Solzhenitsyn right that “the line dividing good and evil cuts through the heart of every human being” or are there good people and evil people who can be identified as such? How much does chance dictate how we turn out as human beings? How much of our behavior bubbles up from our subconscious? Can we be certain that human beings have free will, and if we cannot be certain how does that affect the decision that the culpability of a murderer rises to the point that they must be exterminated. Are there murderers whose free will is compromised by brain damage, severe abuse and neglect in childhood, mental illness, and diminished mental capacity? Given all of these questions for which precise answers are not possible, does it make sense to send these people to death row, or would it be better to consider the safety of society as our primary goal and give them death in prison?

There is a sense in which the claim that capital punishment is objectively valid is a product of modernity in which certain knowledge exists, and humans are capable of apprehending that knowledge. But over the past fifty years, it has become pellucidly clear that the Enlightenment project that led to modern thought was a mixed bag, and its promise of a knowable objective certainty and inevitable progress through scientific discoveries was unattainable *in principle*. This realization leads us to a rational and reasonable postmodern outlook of multiple viewpoints and perspectives, even for the death penalty. (One need not embrace the radical ideas that every person's "truth" is as valid as any other, and that science is purely subjective.)

Ultimately, as Montaigne would be quick to tell us, we are exercising monumental hubris when we claim to judge the precise culpability of any individual murderer. We can, however, recognize the magnitude of our ignorance as to the causes of murderous behavior in any given case. While society could not possibly function if we did not hold people responsible for their actions, it is also true—given all we know about human behavior—that responsibility could never possibly reach 100%. So, as Camus observed, by clinging to the death penalty, we are punishing "...an always relative culpability by a definitive and irreparable punishment."

*Compassion does not exclude punishment, but it suspends the final condemnation [execution].  
Compassion loathes the definitive, irreparable measure that does an injustice to mankind as a whole because of failing to take into account the wretchedness of the common condition.*

—Albert Camus

In his *Reflections on the Guillotine* Albert Camus urged that those guilty of crimes should suffer the consequences, but deplored the irreversible nature of capital punishment: “The real responsibility of an offender cannot be precisely measured.” It is difficult to even imagine a rational argument against this simple but profound statement. It would seem to be a self-evident truth. Every nontrivial observation of the human condition is based probabilities rather than certainties, all the way down to quantum mechanics. We certainly can judge one murderer to be more culpable than another based on the specific conditions, but a precise measurement in a given individual? That is not available to us.

By the same token, Camus argued strongly that people who commit crimes cannot claim that their atrocious behavior was beyond their control:

*No more than that the reasons based on heredity should cancel all culpability. We must hold people responsible for their actions. It cuts both ways, however... the same reasoning must lead us to conclude that there never exists any total responsibility or, consequently, any absolute punishment or reward. ... no one should be punished absolutely [by execution] if he is thought guilty, and certainly not if there is a chance of his being innocent.*

Ultimately, these views represent a compelling—almost irrefutable—rebuttal to those who assert we fallible humans can make the God-like decision about who should live and who should die. Even if all of the other arguments against capital punishment did not exist, this one would remain, silently impeaching us for our hubris.



# 8

# EPILOGUE

## Epilogue. *The Route Forward*

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*Truth is the first and fundamental part  
of virtue. We must love it for itself.*

—Michel de Montaigne

Albert Camus was against the death penalty before he spent time researching it and writing *Reflections on the Guillotine*, but he admitted that he did not have a compelling case for abolition. After studying the details (especially Arthur Koestler's writings) it became clear to Camus that the arguments supporting capital punishment were completely overpowered by the rational arguments against it. My experience was precisely the same. For decades I felt that capital punishment was bad public policy, but I didn't think much about it. After studying the evidence and arguments on capital punishment for several years, I have concluded it is beyond bad public policy—it is absurd.

### HOPE FOR THE FUTURE

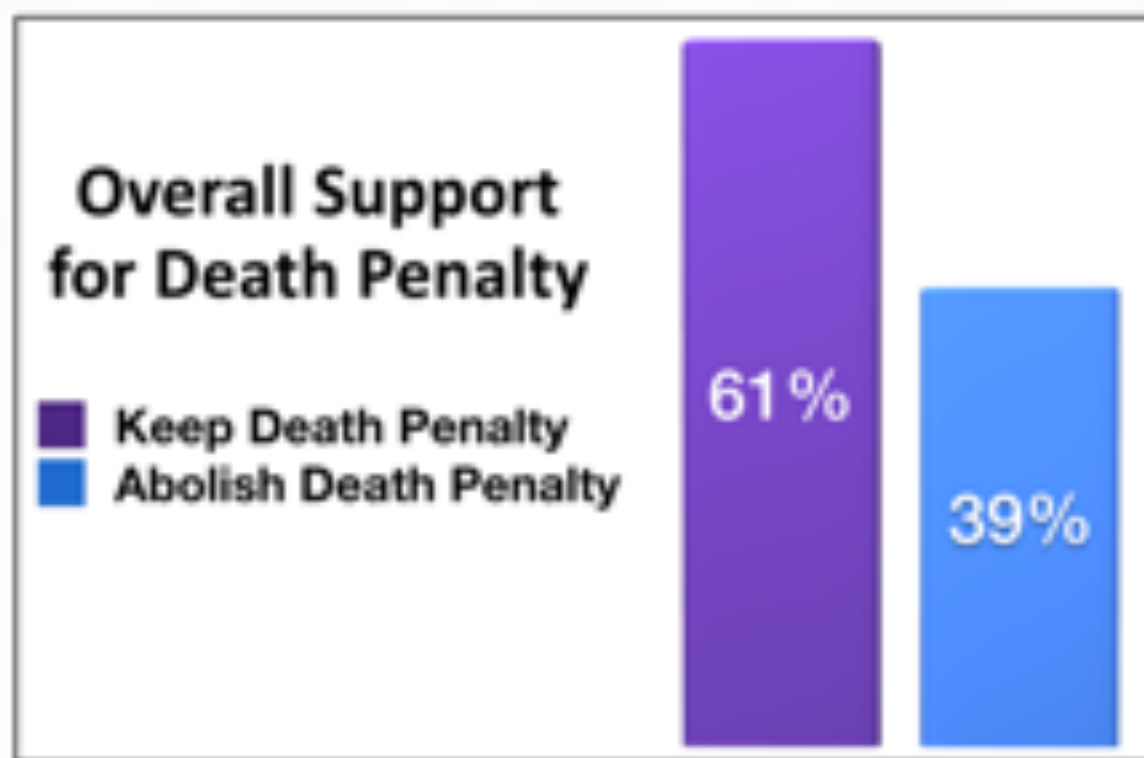
For those of us seeking to abolish the death penalty, it is easy to become discouraged, particularly given the lurch to conservative extremism by some members of the United States Supreme Court. We must

not give in to despair. As writer Paule Marshall said about the plight of African Americans, “I’ll have to, as you say, take a stand—something toward shaking up that system. ...Despair... is too easy an out.” In the fight against capital punishment, combating the climate crisis, or any other self-induced human absurdity, giving in to despair is the road to inaction and certain failure.

**Paule  
Marshall<sup>40</sup>**

As I discussed at the beginning of the book, the most promising path forward appears to be providing the empirical evidence and rational arguments on the death penalty to people on the liberal side of the political spectrum. Conservative supporters of capital punishment (with a few notable exceptions) appear to be much less likely to change their minds based on facts or logical arguments. All of this is hopeful, because support of the death penalty by people who are more liberal has been shown change based on new information.

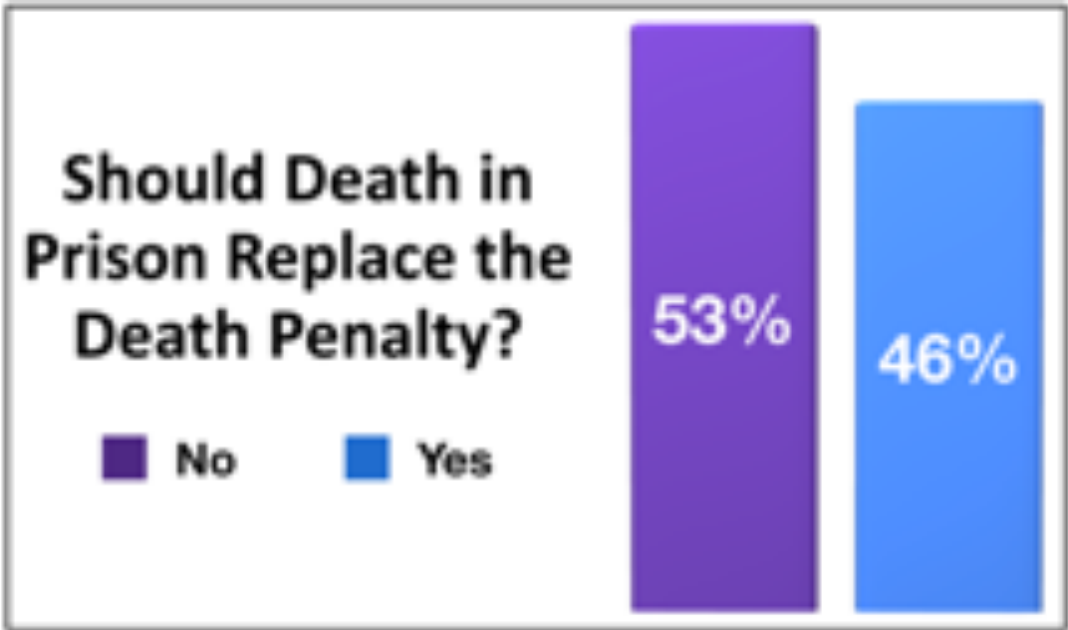
This difference between liberals and conservatives was demonstrated in a poll of voters published on June 17, 2019 by the University of California Berkeley Institute of Governmental Studies (IGS). As we described briefly in the Introduction, when the IGS asked voters the up or down question of whether or not they supported the death penalty, a majority said yes. See **Figure 28**. Death in prison was not given as



**Figure 28.** General Support for Death Penalty

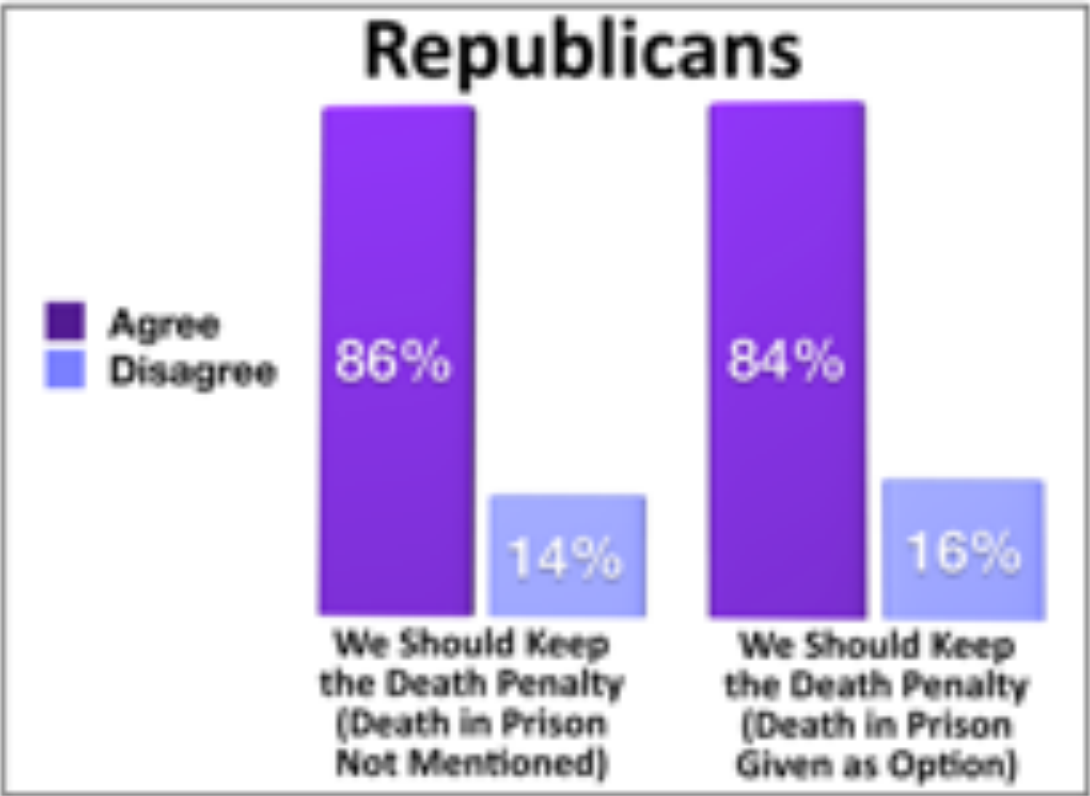
an alternative, so these results are misleading because they do not address the real question at hand.

When they separately asked the much more meaningful question of whether the death penalty should be abolished and replaced with “life in prison without the possibility of parole” the results were quite different. With this question, there was only a slight overall preference for keeping the death penalty: 53% to 46%. See **Figure 29**. This is consistent with what we already knew—asking about the death penalty in isolation, without mentioning death in prison as an alternative, skews the results in favor of the death penalty, as shown in **Figure 28**.



**Figure 29.** Death in Prison vs. Death Penalty

Now comes the interesting part—the striking difference in how Republicans versus Democrats responded when given the option of death in prison. As shown in **Figure 30**, Republicans tend to be hide-bound in supporting the death penalty, even when death in prison is presented as an alternative. When Republicans were

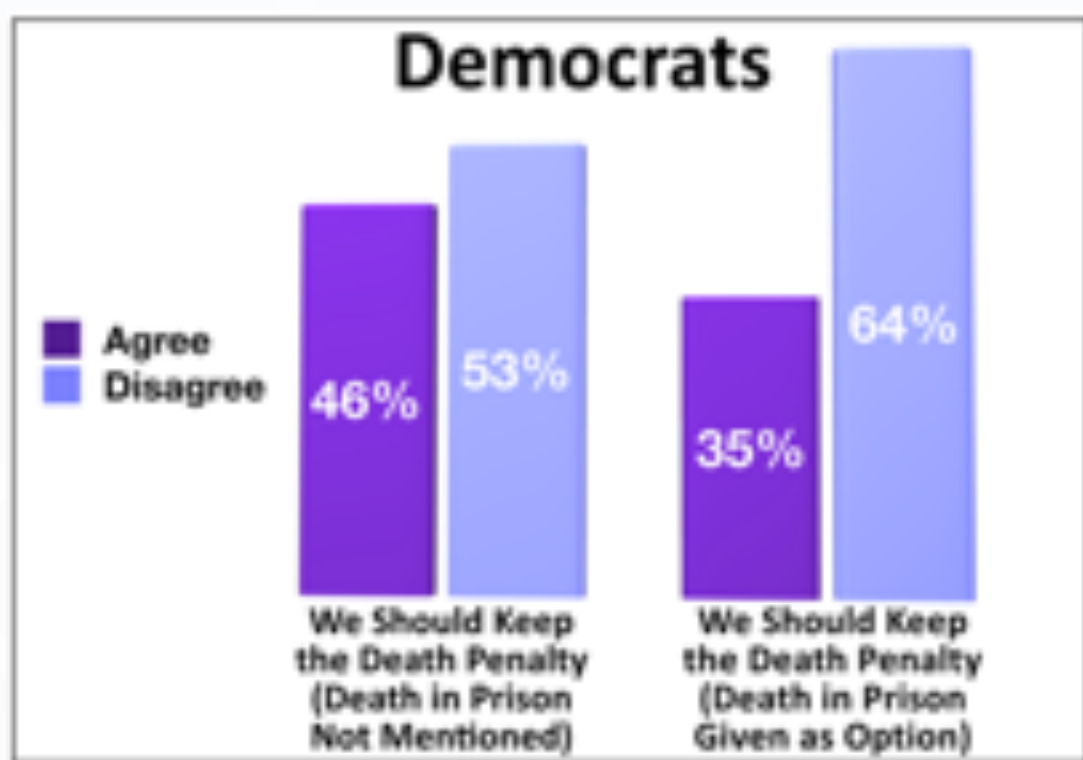


**Figure 30.** Republicans Support Death Penalty With or Without Death in Prison Option

asked if they support the death penalty in a yes or no question with no alternatives, 86% said yes. When given death in prison as an alternative, the results hardly changed at all, with 84% saying yes. It would appear that most Republicans just like the idea of the death penalty and are unlikely to change their minds.

Conversely, Democrats changed their views substantially when they were given the option of death in prison to replace the death penalty.

In **Figure 31** we see Democrats overall were almost evenly divided when asked if they support the death penalty in a yes or no question, 46% for and 53% against. But when asked to choose between the death penalty and death in prison, they preferred death in prison by almost two to one (64% vs. 35%).



**Figure 31.** Democrats Prefer Death in Prison When it is Offered as an Option

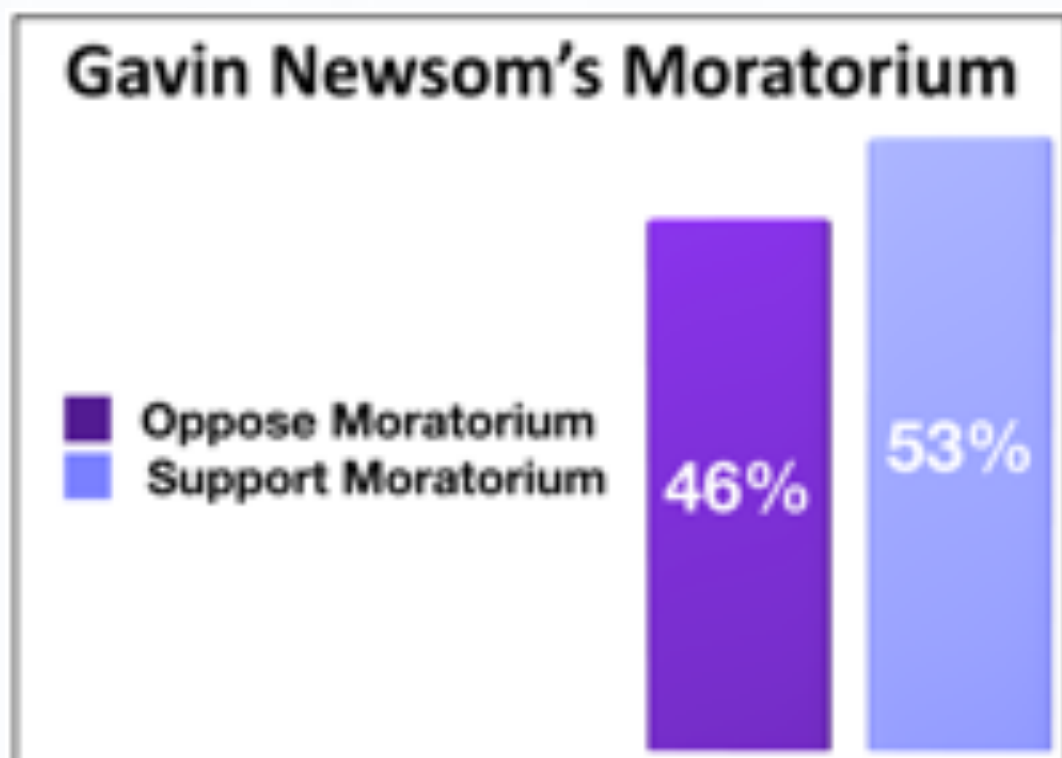
The steadfast support of the death penalty by Republicans even when death in prison is offered as an alternative suggests that Republicans who support the death penalty will be relatively immune to the rational arguments and empirical evidence presented in this book. Perhaps this should not be surprising, given that Republicans are more likely to remain faithful to their beliefs and opinions even after the empirical evidence overwhelmingly supports the opposite view. Consider the climate crisis for example, where as of this writing most Republicans deny that it represents a significant risk of disaster despite overwhelm-



ing scientific evidence. Accordingly, while I would welcome Republican readers, I suspect that there will be very few of them.

Democrats, on the other hand, appear to be amenable to new information and new options as shown by the dramatic decline in support for the death penalty when death in prison is offered as an alternative as shown in **Figure 31**. From these findings one could conclude that Democrats who are currently okay with the death penalty are the people who could do the most to swing public opinion to opposition of capital punishment. Most Democrats at least try to be fact based, and should be amenable to rational arguments and empirical evidence—we just need to get those arguments and evidence to them.

In **Figure 32** we see another reason for hope. Overall, 53% of respondents in the IGS poll supported California Governor Gavin Newsom’s 2019 moratorium on executions. The support for Governor Newsom’s moratorium might have even been higher if the up or down question on the death penalty had not been included. If the up or down question were asked first, it may have contaminated the response to the moratorium. Since 61% of respondents approved of the death penalty per se, they may have been less likely to “reverse” their opinion by subsequently approving the moratorium on the death penalty.



**Figure 32.** Majority Support for Governor Newsom’s Moratorium on the Death Penalty

I sincerely believe that a majority of the liberals who support capital punishment would change their minds if they just recognized four simple facts: 1) the death penalty does not deter murders, 2) innocent people are regularly sent to death row, 3) the death penalty is egregiously arbitrary, and, perhaps most important, 4) it is not “the worst of the worst” who are sentenced to death (this is manifestly false, as we described earlier).

IF WE WISH TO ABOLISH the death penalty in the United States more people need to understand the empirical evidence and also need to recognize the irrationality—and sometimes patent absurdity—of the arguments used to support it. It is my hope that this book will provide one small push in that direction.

Ultimately, perhaps we should channel some of Montaigne’s intellectual humility, and admit that we fallible humans should look inward to our own foibles and inadequacies instead of arrogantly claiming to know when another human being does not deserve to live. As long as we remain tethered to this hubristic fantasy we will continue to commit monstrous injustices in the name of justice.

Our society deserves better. Everyone associated with the process of capital punishment deserves better. Even the victim’s loved ones deserve better. Let us join virtually every other civilized country in the world and abolish this obscene charade.

9

END MATERIAL

End Material. *Bibliography, Acknowledgements, Endnotes, About the Author*

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Topic	Page
Bibliography	323
Acknowledgements	334
Endnotes	336
About the Author	391

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# Endnotes

**1. Jeremy Bentham (1748–1832)** was an interesting character. He named his cat The Reverend Sir John Langbourne (which I’m sure his cat found entirely fitting). Also, Bentham’s pickled remains—at his request—were put in a glass display case at the University College London, a must see if you go to London!

Despite this rather loony final request, Bentham was actually a serious philosopher and social reformer. He was an opponent of capital punishment based on utilitarian grounds where punishment is viewed as an evil, and must be offset by an even greater benefit that outweighs the evil.

Bentham promoted not just abolition of capital punishment, but also advocated abolition of slavery, promoted women’s rights, freedom of expression, prison reform, separation of church and state, right to divorce, humane treatment of animals, and the decriminalization of homosexual acts.

True to his utilitarian worldview, Bentham argued that punishments should control the action of the wrongdoer so they do not offend again, and should also result in “general prevention” of future crimes. Since death in prison removes the murderer from society just as well as execution, and having capital punishment does not prevent future homicides (and may even increase them), the utilitarian calculus points in favor of death in prison over execution.

Like Cesare Beccaria and John Stuart Mill (you will hear about both of them later) Jeremy Bentham felt that death in prison was in reality a more severe punishment than execution, even though many people to-

day think execution is worse. This “exemplary” role leading to deterrence, Bentham thought, was the strongest argument in favor of the death penalty for those who favored it. Even in his day, however, Bentham suspected that the deterrence effect of capital punishment was minimal, and we now know his skepticism was well placed.

Apropos to our current situation, Bentham felt that the “popularity” of the death penalty in his time was due to ignorance and error. Today, many death penalty proponents erroneously hold that capital punishment reduces future homicides and almost always provides lasting comfort for the victim’s family, both of which are false.

As with many death penalty abolitionists today, Bentham felt that the strongest argument against capital punishment was the very real possibility of executing innocent people. Unlike death in prison there is no way to correct the error, and Bentham recognized that there was no way to constitute the criminal justice system in such a way that these errors cannot occur. He cited fallible judges, lying witnesses, and the chance nature of circumstantial evidence as contributing to the conviction of innocent people.

Bertrand Russell agreed with Bentham on many things, but his tongue-in-cheek comment about Bentham is worth repeating: “A hundred years ago there lived a philosopher named Jeremy Bentham, who was universally recognized to be a very wicked man. I remember to this day the first time that I came across his name when I was a boy. It was in a statement by the Rev. Sydney Smith to the effect that Bentham thought people ought to make soup of their dead grandmothers. The practice appeared to me as undesirable from a culinary as from a moral point of view, and I therefore conceived a bad opinion of Bentham.”

**2. Miguel de Unamuno (1864–1936)** was born in the Basque city of Bilbao, and was one of the more important thinkers of the 20th century. His father died when he was six, and he grew up in humble surroundings. But he started his intellectual odyssey early, reading everything he could get his hands on in adolescence, including Kant, Hegel, and Schopenhauer.

Unamuno eventually became Professor of Greek and later Rector at the University of Salamanca in Spain. The University has preserved his living quarters and personal library—worth a look if you are in the area. In an introduction to one of Unamuno’s most famous books, *Tragic Sense of Life*, Salvador de Madariaga describes Unamuno as “A tall, broad-shouldered bony man, with high cheeks, a beak-like nose, pointed grey beard, and a complexion the colour of the red hematites on which Bilbao, his native town, is built...”

Miguel de Unamuno was a larger-than-life intellectual who was brilliant, passionate, vigorous, and eloquent. He eventually read basically everything worth reading in the Western world, and almost all of it in the language of the author. He ended up with command of more than a dozen languages, including, it is said, learning Danish so he could read Kierkegaard in the original. Now THAT is impressive on multiple levels!

Like Friedrich Nietzsche, Unamuno was polemical, and he intellectually engaged and provoked his readers so they would think for themselves. Both men also had a passionate love of life, and had a deep integrity that forced them to tell the truth, even when it did not serve their personal interest. Nietzsche once said he admired only that which was “written with blood” and I cannot think of a better description of Unamuno’s writing. I have more admiration for these two—both as intellectuals and as human beings—than for any other thinkers I know.

One of Unamuno's central themes—like Blaise Pascal before him—was the importance of using both your head and your heart. As Unamuno put it, there are “truths felt” as well as “truths thought.” On the one hand, hyper-rationality can lead us to sterile, impractical positions, while on the other hand, ignoring evidence and rational thought can lead to absurd conclusions. Passion and commitment are the keys to a life of meaning, but we also need reason, the latter shown by his delightful statement, “A lot of good arguments are spoiled by some fool who knows what he is talking about.”

We need these insights of Unamuno for the death penalty debate. Empirical evidence and rational thought are critical to the debate, but it is inevitable that feelings and passions enter the discussion and we must accommodate them as well. Unamuno also encouraged us to appreciate that in a debate each side is often sincere, and “Your neighbor's vision is as true for him as your own vision is true for you.” This is also an important insight for the death penalty controversy, and it sounds a lot like Montaigne.

Unamuno was outspoken and polemical, traits that did not endear him to military dictators such as Miguel Primo de Rivera, who had Unamuno fired from the University in 1924 and sent him to exile on the Canary Islands. When Franco came to power, Unamuno again ended up on the wrong side of a dictator.

One of my favorite Unamuno stories took place on October 12, 1936 when Unamuno delivered his National Day address in the great hall at the University of Salamanca. In the audience were not only academic dignitaries, but many military leaders, including the ruthless General Millan Astray. The astonishing courage displayed by Unamuno on this occasion has been frequently recounted, and the following is based largely on Joe Duggan's October 30, 2016 report in *The Olive Press*.



The proceedings began with the fascist General Astray stirring up the many Franco supporters in the crowd with fascist rhetoric, and they respond fascist salutes and chants of, “Franco, Franco.” Despite this hostile environment the 72-year-old Unamuno, always the eloquent orator, rose slowly with all eyes on him, and proceeded to speak truth to power. He told the audience, “At times, to be silent is to lie. For silence can be interpreted as acquiescence.”

Unamuno then proceeded to excoriate General Astray, calling his words “senseless” and “appalling” and went on to say that in the end Astray will fail to persuade the Spanish people because he lacked “reason and right in the struggle.” The audience was stunned at Unamuno’s courageous speech, and it did not take long for the humiliated General Astray to yell, “Death to Intellectuals!! Down with Intelligence!!”

Of course, Unamuno could have been executed on the spot, but he was whisked away to safety by a fellow professor as well as a very unlikely savior—Carmen Polo do Franco, the wife of Francisco Franco. When Francisco Franco heard about Unamuno’s speech, he initially wanted him shot, but then realized executing an internationally renowned intellectual would be counterproductive. Unamuno was placed on house arrest, and died of natural causes a few months later.

Throughout history governments have attempted to exert control over their populations, and in some places it is now worse then ever. Authoritarian leaders are too often met with silent acquiescence by us timid souls, or by toadying sycophancy by those who wish to profit from their association with the ruler. Most of us stand impeached of cowardice in the face of the heroic gestures of people such as Miguel de Unamuno. We could certainly use him today.

**3. Michel de Montaigne (1533–1592)** comes up so often in this book, that I hope you take the time to read this short introduction to his life, ideas and his influence on the history of ideas.

Montaigne had an unusual upbringing. He was born to a wealthy family, but—because his father wanted him to understand what it was like to live with modest means—Montaigne spent his first few years with a peasant family. Montaigne was also immersed in Latin from infancy. His German tutor spoke only Latin to him, and the father hired servants who could speak Latin as well. They were instructed to speak to little Montaigne only in Latin. As a result, Montaigne became fluent in Latin at an early age, making him rather intimidating when he went to school, since few of his teachers could match his proficiency.

Montaigne's *Essays* of may be the most important book I have ever read. Montaigne pioneered the personal essay, and coined the term. He was earthy, witty, learned, and provided profound insights into the human condition. Montaigne was not a systemic thinker; he wrote on every topic imaginable including anger, cannibals, cowardice, cruelty, customs, drunkenness, education of children, fear, flatulence, food, good and evil, law, liars, moderation, sleep, smells, solitude, thumbs, vanity, and virtue.

Despite a becoming humility, his profound insights show through in almost every essay. One of his central tenets was the fallibility of human reason, and his mantra was “What do I know?” It is hard to overestimate his impact on thinkers over the next 500 years. Montaigne is one of those writers who—after one takes his ideas onboard—fundamentally changes the way you look at the world.

Montaigne had a profound understanding of the human condition. When I read about a new discovery in cognitive science or psychology, I often play the “Montaigne Game”—that is, I search my memory

or more often my dog-eared and Post-it laden copy of Montaigne's *Essays* to find the place where Montaigne has explicitly stated the concept that was just "discovered." I am rarely disappointed, but when I am, my equally dog-eared library of Nietzsche's works and Pascal's *Pensées* usually fill in any gaps left by Montaigne. This is what André Gide meant when he said, "Everything that needs to be said has already been said, but no one was listening, so it all must be said again."

Montaigne's influence on later thinkers is hard to overstate, and included Blaise Pascal, Voltaire, Rene Descartes, Jean-Jacques Rousseau, Montesquieu, Shakespeare, Francis Bacon, William Hazlitt, David Hume, T.S. Eliot, Ralph Waldo Emerson, Aldous Huxley, Friedrich Nietzsche, Albert Camus, T.S. Eliot, Laurence Sterne, Eric Hoffer, Ivo Andrić, Albert O. Hirschman, Virginia Woolf, Isaac Asimov, Gore Vidal (who, at the end of his life said Montaigne was the only person worth reading), and countless others.

For some of these thinkers such as Emerson, Hoffer, Hirschman, and Vidal, Montaigne was the central influence on their thought. Eric Hoffer, Albert O. Hirschman and the older Gore Vidal were never more than a few meters from their beloved copies of Montaigne's *Essays*.

Eric Hoffer (1902-1983) was a migrant worker, gold miner, and eventually a longshoreman in San Francisco, which led him to be known as "The Longshoreman Philosopher." Hoffer's most famous book is *True Believer*, in which he discussed the nature of mass movements and why they generate and the zealots and fanatics who are willing to die for their cause—it gained new currency after the September 11 attacks.

In his autobiography *Truth Imagined* Hoffer describes how he discovered Montaigne. Hoffer was headed up to the mountains of California where he expected to be snowbound, so he decided to buy a “thick book of about a thousand pages.” He went to a secondhand bookstore, and bought a copy of Montaigne’s *Essays* for a dollar. He had never heard of Montaigne. It changed his life. Many years later I read a story about Hoffer in *Harper’s*, and decided to read Hoffer’s books. When I read what Hoffer said about Montaigne—that reading Montaigne had transformed his whole intellectual outlook—I bought Montaigne’s *Essays* and had the same experience. Once you read Montaigne you cannot go back.

Hoffer read Montaigne’s *Essays* three times while snowbound, and said “I recognized myself on every page. He knew my innermost thoughts.” Hoffer’s description of how Montaigne transformed his relationship with his fellow migrant workers is worth quoting:

“When I got back to the San Joaquin Valley I could not open my mouth without quoting Montaigne, and the fellows liked it. It got so that whenever there an argument about anything—women, money, animals, food, death—they would ask, ‘What does Montaigne say?’ Out came the book, and I would find the right passage. I would not be surprised if even now there are migratory workers up and down the San Joaquin Valley still quoting Montaigne.”

Montaigne—who disdained the empty pomposity of those who prided themselves as “intellectuals”—would have loved this!

There is also a wonderful story about Albert O. Hirschman and Montaigne. Hirschman was an important 20th century economist and social scientist, and his ideas were both original and profound. His biographer, Jeremy Adelman called Hirschman “one of the 20th century’s



most remarkable intellectuals.” Montaigne was a pivotal influence on Hirschman’s thinking, and provided him (as it does for almost anyone who studies Montaigne) the intellectual humility to help minimize intellectual arrogance and dogmatism.

Hirschman grew up in Germany in a Jewish family, escaped the Nazis in 1933, fought against the fascists in Franco’s Spain, and—working with American journalist Varian Fry—risked his life to help thousands of people escape from France after Hitler took over, including Hannah Arendt, Marcel Duchamp, Max Ernst, and Marc Chagall. Hirschman’s fondness for Montaigne was never more evident than when the Gestapo in Marseilles was closing in on him, and he escaped on foot over the Pyrenees into Spain. Faced with the need to lighten his rucksack, he jettisoned everything except an extra pair of socks and his beloved copy of Montaigne’s *Essays*. Montaigne was with him for the rest of his life.

Nietzsche, not overly given to praise for other thinkers, said of Montaigne, “That such a man wrote has augmented the joy of living on this earth.” Aldous Huxley adored Montaigne, calling his *Essays* “one damned thing after another—but in a sequence that in some almost miraculous way develops a central theme and relates it to the rest of human experience.” Virginia Woolf was also impressed with Montaigne, saying, “... this talking of oneself, following one’s own vagaries, giving the whole map, weight, colour and circumference of the soul in its confusion, its variety, its imperfection—this art belonged to one man only: to Montaigne.”

Others took on Montaigne’s ideas reluctantly or surreptitiously. David Hume quarried Montaigne’s ideas largely without attribution, but Montaigne’s fingerprints are there. The pious Pascal disapproved of Montaigne’s earthiness and implicit agnosticism, but he could not shake

the huge influence Montaigne had over his thinking. In his discussion of Pascal, T. S. Eliot captures this in a delightful description of the hold Montaigne had over Pascal:

“One cannot destroy Pascal, certainly; but of all authors Montaigne is one of the least destructible. You could as well dissipate a fog by flinging hand-grenades into it. For Montaigne is a fog, a gas, a fluid, insidious element. He does not reason, he insinuates, charms, and influences; or if he reasons, you must be prepared for his having some other design upon you than to convince you by his argument. It is hardly too much to say that Montaigne is the most essential author to know, if we would understand the course of French thought during the last three hundred years. ... Pascal studied with the intention of demolishing him. Yet, in the *Pensées*, at the very end of his life, we find passage after passage ... almost “lifted” out of Montaigne, down to a figure of speech or a word. The parallels are most often with the long essay of Montaigne called *Apologie de Raymond Sebond*—an astonishing piece of writing upon which Shakespeare also probably drew in *Hamlet*. Indeed, by the time a man knew Montaigne well enough to attack him, he would already be thoroughly infected by him.”

I love the last sentence of this quote. When I am king of the world, I will require everyone to study Montaigne, especially politicians, pundits, and public intellectuals. The cocksure pontificators and Manichean thinkers would object, of course, but maybe we could infect them with a virulent case of “Montaigne-itis” before they tried to mount their attack against him!

**4. Arthur Koestler (1905–1983).** One of the reasons I am so grateful that I began researching the death penalty several years ago was because it led to my discovery of Arthur Koestler. Koestler’s magnificent *Reflections on Hanging* (1957) should, in my opinion, be required read-

ing for anyone with an interest in the capital punishment debate. In this penetrating and eloquent history of capital punishment in Britain and Europe, Koestler prefigures many of the capital punishment dilemmas we face in the United States today.

Koestler's philosophical sophistication, along with his wide-ranging—and sometimes harrowing—personal experiences in the most unstable spots in Europe and the Soviet Union during the 20th century, his superb writing style, and his wry wit make his writing a joy to read. Koestler had a very personal reason to be interested in the death penalty; in 1937 he was imprisoned on death row in Spain for three months with every expectation that he would be executed at any moment. He recounts this chilling experience in another book, *Dialogue with Death*, which we will discuss this in Chapter 6.

Koestler's arguments against capital punishment are so compelling that after reading the book one wonders how the practice could possibly be justified by anyone who makes a claim to rational thought. Koestler reviewed the monumental reports commissioned by the British government, the *Parliamentary Select Committee on Capital Punishment* of 1929-30 (800 pages), and the *Royal Commission on Capital Punishment* of 1949-53 (1400 pages) as well as many other documents.

He was able to glean unique insights into the history of capital punishment including the perennial arguments used to support it. Koestler fully admits his bias against capital punishment in the preface to *Reflections on Hanging*, but he clearly made every effort to ensure the book's contents were accurate. He confessed, "My intention was to write it in a cool and detached manner, but it came to naught; indignation and pity kept seeping in." I am afraid that the same applies to this book; I tried to remain detached as well, but it is impossible to look at the issue rationally and not be moved by the towering injustice of it all.

Koestler was on the short list for a Nobel prize (Literature) several times, and his brilliant writing in *Reflections on Hanging* led me to go on to read several of his other books. His 1959 book *The Sleepwalkers: A History of Man's Changing Vision of the Universe* is a masterful and fascinating study of Copernicus, Tycho Brahe, Johannes Kepler, and Galileo Galilei. It is an amazing account of humankind's ideas about the constitution of the universe, especially our solar system. He starts with the ancient Greeks, including Aristarchus, who Koestler calls "The Greek Copernicus" because he proposed a sun-centered solar system almost 2 millennia before Copernicus. The discussion of the Greeks is interesting, but the rest of the book is fascinating.

Koestler describes in wonderful detail the lives and the scientific discoveries of Copernicus, Tycho Brahe, Johannes Kepler, and Galileo. He quotes many letters sent by these four giants of science to each other and to others. He also presents the science and mathematics, but in a way that is largely understandable to the non-specialist. He makes a convincing case for Kepler being the most compelling personality of the four, with Galileo being a bit of a jerk at times. Koestler's focus on science as a younger man served him well in writing this book.

Since I am in a biological science, I enjoyed Koestler's *The Case of the Midwife Toad* even more than *The Sleepwalkers*. In this book Koestler recounts the tragic story of a noted 20th century biologist, Paul Kammerer, who committed suicide in 1926 after being accused of scientific fraud in his "midwife toad" experiments. Koestler, in his usual lucid and objective style, presents an even-handed version of the story. Paul Kammerer claimed that he could alter the characteristics that were inherited by the offspring of these toads by putting them in an artificially heated environment. He was mercilessly attacked by many fellow scientists of the time, partly because no other scientists were as expert as Kammerer in performing the experiments.



Fast forward to the 21st century, and turns out that Kammerer's experiments are completely consistent with the new discoveries in epigenetics. Indeed, a team of biologists from Chile, Germany, and Sweden have recently analyzed Kammerer's midwife toad experiments, and found that they not only fit with epigenetic theory, but one of Kammerer's findings (on "parent of origin effects") is exactly what one would expect given newly discovered findings in epigenetics. Kammerer would have no way of knowing this epigenetic principle that would not be discovered for a century, so he hardly could have faked these results. More research is needed, but it seems likely that Paul Kammerer's reputation will be restored, and he will eventually be considered a pioneer of epigenetic research

After reading some of Arthur Koestler books described above, I was hooked, and felt the need to read the excellent biography of Koestler by Michael Scammell. Koestler was born in 1905 into a Jewish family in Budapest. After studying at the University of Vienna he went to Spain where he was imprisoned by Franco's forces and barely escaped execution. He later narrowly escaped occupied France after being jailed by the Nazis.

Koestler was intellectually gifted, a magnificent writer, and had an extraordinary reservoir of experiences in Hungary, Spain, France, Germany, Palestine, Russia, America, and finally the United Kingdom. He became famous (and wealthy) after his anti-communist novel *Darkness at Noon* became a world-wide best-seller. Koestler was no Mr. Rogers; he could be pugnacious, drank way too much alcohol, and was an inveterate womanizer. But he was also brilliant man of ideas, and—unlike many armchair intellectuals—Koestler was willing to die for those ideas. People like Koestler don't come along very often, and their biographies make fascinating reading.

Koestler had more than his share of human foibles, but his intellectual output in the form of books and essays was exceptional. I am not the only one to be seduced by his writing. As Scammell observes, after his *Scum of the Earth* was published in 1941, *The New York Times Book Review* said Koestler had “written a book so moving that invites the use of the most extravagant adjectives.” *The New Yorker* called it “one of the most extraordinary books of its kind ever written,” and the *Christian Science Monitor* said the book demonstrated “authentic literary mastery.” I get more than a little jealous, when a person like Koestler can write such superb English even though he learned English as a 3rd or 4th language! Koestler had that rare combination of a brilliant mind, intellectual rigor, almost superhuman objectivity, logic, dry wit, and a lucid literary style. Please read him if you have not already.

**5. Sister Helen Prejean (b. 1939)** is the author of *Dead Men Walking* (1993) and *The Death of Innocents: An Eyewitness Account of Wrongful Executions* (2004) has arguably done more to abolish capital punishment in the United States than any other single person.

**6. Tamoxifen Article:** Philip D Hansten. The underrated risks of tamoxifen drug interactions. *European Journal of Drug Metabolism and Pharmacokinetics*. 2018;43:495-508.

**7. John Stuart Mill (1806-1873).** In his autobiography John Stuart Mill describes his unique upbringing and education, coordinated by his father. Mill apparently started learning Ancient Greek at age three, and by about age 7 he had read (in Greek) the first 6 dialogues of Plato. Over the next few years he had studied almost all the important works in philosophy, history, and poetry. He was also schooled in mathematics, chemistry, and many other disciplines, all of it reinforced by discussions with his father on their frequent walks. Importantly, his father insisted on understanding and critical thinking rather than memorization.

Mill's early education is reminiscent of that received by Michele de Montaigne and Simone Weil, both described below. In each case their classical education started when they were toddlers, and they learned Latin and/or Greek at an age when I was still peeing my pants and learning how to tie my shoes. For Mill and Montaigne it was the father who pushed the early education, and for Weil it was her mother. Mill argues that it was this early education and not any particular brilliance on his part that resulted in his intellectual achievements later in life.

Mill also discusses his views on the necessity of clear thinking and logic for morality, and how mental sloth can lead to morally untenable conclusions. This appeal is apropos to our discussion of the death penalty, because rational thought and empirical evidence is clearly on the side of abolition. Mill, however, lived in a time before we knew that capital punishment does not deter homicides, and we now regularly send innocent people to death row. Armed with this evidence, there is no question in my mind that the supremely rational and compassionate John Stuart Mill would oppose the death penalty as it is applied today in the United States.

In his book *On Liberty* John Stuart Mill presents his philosophical ideas on the personal freedom that we call "liberty." Mill summed up his view of liberty thus: "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." In other words, we should not interfere with the freedom of others to act as they wish except for self-protection. This principle is self-evident in laws against assault, rape, and murder, but it is also an argument against the death penalty, since protection of society can be achieved through death in prison as well as by execution. This is the same argument made earlier by Cesare Beccaria (see above).

John Stuart Mill also argued against the possibility of certainty in human affairs, which would, of course, include certainty that a defendant is guilty of murder. The general lack of certainty makes freedom of expression and a free press that much more necessary. One never knows when the minority opinion may turn out to be correct. At the same time (much like Locke before him) he recognized that we still have to make decisions based on the best evidence. Throughout *On Liberty* Mill provides deep insights into rational thought and the corrosive influence of bias, passion, and superficial thinking.

I am sure that Carlyle's opposition to John Stuart Mill regarding the death penalty for Edward John Eyre had nothing to do with the fact that—30 years earlier—Mill accidentally burned Carlyle's only copy of his manuscript on the French Revolution. After years of toil on the manuscript, Carlyle had to write the whole thing all over again. The next time you lose a document on your computer, ponder how puny your loss was compared to poor Thomas Carlyle!

**8. David Hume (1711–1776).** It is hard to overestimate the originality and brilliance of David Hume. Indeed, some of his observations on issues such as induction, causality and morality are still being debated by philosophers. Anthony Gottlieb reported that in 2009, David Hume came in first in a poll of philosophers who were asked name the dead philosopher with whom they most identified. Aristotle came in second.

Albert Einstein said on more than one occasion that had not read Hume, he likely would not have come up with the theory of special relativity. Einstein observed that the “type of critical reasoning” he learned from Hume was decisive in his discovery of his theory.

Hume was a superb writer, who recognized the central role of the passions in human affairs. Hume was descriptive rather than prescriptive,



describing human nature rather than passing judgment on it. In a sense, Hume is arguing that in assessing morality we use induction (observing many instances of human behavior and arriving at general conclusions) rather than deduction (arriving at morality via rational thought).

Hume made a distinction between statements of empirical fact (such as, ‘I have a carton of milk in my refrigerator’) and moral assertions, which cannot be found unequivocally to be either true nor false (such as ‘That person is evil, and justice requires that he be killed’). The concept of “justice” is a human construct that is formed through public agreement, and there is no public agreement on the need for executions in the United States today.

Hume plays an important role in my philosophy of science classes because his views on induction are important to the medical sciences, especially in the clinical arena. Hume’s ideas about causality are also useful, as is his advice on intellectual humility.

Some of his originality may be due to his many hours spent alone in contemplation early in his career. The story is that his family thought he was studying for the law, but in reality was reading philosophy and other intellectual writings. Although we went to university, given how much time he spent alone reading and thinking, he could be considered an autodidact. My take on this is that working alone allowed him to develop his novel ideas without being told by colleagues or professors that they were unsound. Some of his ideas—such as on causality—are so counterintuitive that they may seem absurd until you think about them for a while.

But he was also a practical man, and after a particularly deep and theoretical philosophical discussion with his colleagues Hume would say

something like, “Well, that was a lot of fun, but let’s go have a few pints and forget about all this nonsense.”

Hume placed high value on collegiality, and it appears that he was loved by almost everyone who knew him. The French loved him and called him “le bon David” and the name of the street in Edinburgh where he lived has been changed to “Saint David’s Street.”

**9. Blaise Pascal (1623–1662).** Pascal was born in Clermont-Ferrand, France, and his mother died when he was three. He was a sickly child who received most of his education from his father at home. By any measure, Blaise Pascal was a supreme genius. He was a child prodigy in mathematics, and at age 16 presented a paper on projected geometry at a congress.

He went on to make landmark discoveries in mathematics and science, and was instrumental in founding probability theory. In his *Pensées* Pascal offered profound insights into the human condition, and prefigured many “discoveries” of modern cognitive scientists including confirmation bias, the subconscious, self-deception, fallibilism and the need for both passion and reason in human affairs.

He did pioneering work on the barometer and laws of fluid mechanics, developed a mechanical calculator, and with his friend Roannez started the first bus service in Paris in 1662. As if you needed any more reason to feel inadequate, consider that he cared deeply about his fellow humans and donated half the bus proceeds to the poor.

It is a pity that to most people Pascal is known only for “Pascal’s Wager,” a clever but not terribly profound argument for the practical utility of believing in God. Pascal is so much more than that. Nonetheless, even though the “Wager” is not theologically interesting, it is perfect for

considering what to do with HILP (“High Impact, Low Probability) problems, such as executing an innocent inmate. We will return to Pascal in this context when we discuss innocence in Chapter 4

Like *Meditations* by Marcus Aurelius, Pascal’s *Pensées* was not meant to be read by others. But it is our good fortune that Pascal, like Marcus Aurelius, had friends and colleagues who recognized that these private writings should be preserved for posterity.

Most of *Pensées* is in the form of aphorisms, and some of them are truly profound. In this book I have quoted several of my favorite sayings of Pascal, such as “Let us work on thinking well. That is the principle of morality.” (This should be emblazoned on the walls of every legislature and courthouse.)

**10. Friedrich Nietzsche (1844–1900).** You will be hearing from Friedrich Nietzsche frequently in this book, for many of the same reasons Michel de Montaigne’s name comes up so often—they are both masters of identifying human foibles that lead us to ignorant certainty. Nietzsche recognized the power of our subconscious, and how self-deception plays a central role in our thought. He also recognized the shaky ground that supports many of our most firmly held convictions. All of these ideas are useful in dealing with the death penalty debate.

When Harold Bloom pondered where wisdom could be found, his answer was “In Shakespeare, Goethe, Emerson, Nietzsche and in their few peers.” Philosopher Bryan Magee praised Nietzsche’s literary style as “one of extraordinary brilliance” and a Canadian psychology professor opined that Nietzsche was “brilliant beyond comprehension.” Nietzsche’s professor at Leipzig said in 39 years, he was the most brilliant student he had ever seen, and said he would “stake my whole philological and academic reputation” on Nietzsche. I could go on, includ-

ing a list of thinkers who have called Nietzsche a genius, but I will stop here.

But there is another side of Friedrich Nietzsche (1844–1900) that does not get as much attention as his intellectual brilliance—his courage and integrity in the face of relentless physical and emotional suffering. As Will Durant so insightfully observed, “...we can see him suffering at every line, and we must love him even where we question him. ... Seldom has a man paid so great a price for genius.” Nietzsche’s courage is astounding given his almost constant pain, failing vision, extreme loneliness, failed relationships, financial woes, and perhaps worst of all... until the very end, almost no recognition of his work.

Nietzsche is often maligned by those who have not read him, and several myths have appeared. They accuse him of being an anti-Semite (in truth he was a vehement *anti*-anti Semite), a nasty person (he was polite and respectful), a nihilist (he recommended living life to the fullest), against spirituality (a more spiritual person would be hard to find), and immoral (he had remarkable integrity).

Reading Nietzsche is not for the faint of heart. It took me over ten years to read all of his major works in my spare time. But the rewards are worth it. For some reason one of the last Nietzsche books I read was one of his best—*The Gay Science*. It is so rich with ideas that it sometimes took me an hour to read one page. Nietzsche’s goal is always to get the reader to think for him or herself... not dictate the proper way to think about any given topic. I do not know of another thinker who is a greater stimulant to thought.

**11. Albert Camus (1913-1960).** In my opinion, Albert Camus—French novelist, playwright and philosopher—is one of the truly great writers and great human beings of the 20th century. Camus was a deeply



compassionate person who held a mirror up to humanity, but only after he looked with honesty and humility into the mirror himself.

In the largely philosophical *The Myth of Sisyphus* Camus addresses the major existential issues of absurdity, suffering, death, fate, resignation, and authenticity of human life. Some of the penetrating insights in this book changed forever the way I look at life and human nature.

My copy of *The Myth of Sisyphus* includes an essay by Camus titled “The Artist and His Time” which provides an insightful discussion of why some people are compelled to do everything to help the vulnerable and the oppressed and others can ignore them. Camus said he cared about the suffering of others because of what he called a personal “organic intolerance” to human wretchedness, not from a self-righteous or morally superior position.

Camus derived many insights from Nietzsche and said, “I owe to Nietzsche a part of who I am.” Camus also gained much from reading Montaigne, and shared Montaigne’s opinion that cruelty and violence were the worst vices. After a visit to America, Camus said, “In this country where everything is done to prove that life isn’t tragic, they feel something is missing.” This remarkably insightful statement about the USA is still true today. Camus’ magnificent and lucid Nobel Prize acceptance speech is well worth reading as well. Like the ancient Greek tragedians Camus was a clear-eyed realist who stared into the face of human wretchedness without yielding to despair. This is one of life’s great lessons, and nobody said it better than Camus.

Regarding the death penalty, my debt to Albert Camus is almost as great as my debt to Arthur Koestler. (Unlike Koestler’s several Nobel near misses, Camus, actually did win the Nobel Prize for literature.) Camus was an unshakably decent man who cared deeply for the vul-

nerable and oppressed Camus wrote a long essay entitled *Reflections on the Guillotine* that was a companion piece to Koestler's *Reflections of Hanging* (the differing titles apropos to the preferred method of converting living humans into corpses in their respective countries).

Koestler's essay focused more on the empirical evidence, and Camus more on the moral aspects of capital punishment, but both appealed primarily to reason. It is astonishing how directly the arguments in these two essays are applicable to the current debates on capital punishment; it is as if they were written yesterday.

*Reflections on the Guillotine* is a long essay of about 50 pages in which Camus makes an eloquent, passionate, and compelling case against the death penalty. Camus started out as a death penalty opponent, but after writing this piece he was even more convinced that it was an obscenity, a "revolting butchery" as he called it. He discusses the hypocrisy of claiming that capital punishment deters homicides while the barbarity of executions is hidden from the public. Throughout, Camus urges us to use reason rather than emotion (i.e., vengeance) in considering whether the death penalty is warranted.

**12. Ernest Becker (1924–1974).** Because we will discuss Ernest Becker's ideas several times in this book, if you are not familiar with Becker's work, it would be useful at this point to get a short introduction. Becker was trained as cultural anthropologist and had a scientific perspective, but his writings are a synthesis, incorporating ideas in many other fields including philosophy, psychology and literature. Becker is known primarily for his trilogy: *The Birth and Death of Meaning* (1971), *The Denial of Death* (1974), and *Escape From Evil* (1975). Reading all three is the best way to understand the development of Becker's ideas, but if you only have time for one, I would recommend *Escape From Evil*. It is succinct, yet it covers Becker's main tenets well.

In his 1971 book *The Birth and Death of Meaning*, Becker draws on Carl Jung and Alfred Adler to argue that self-esteem is the core concern and dominant motive of human beings. Becker then describes how our culture provides a vital buffer against threats to our self-esteem, and allows us to feel worthy—a person of value in a world of meaning.

It was with *The Denial of Death*, however that Becker's ideas gained a world-wide audience, and won for Becker the 1974 Pulitzer Prize. Drawing on ideas from Austrian psychoanalyst Otto Rank and other earlier thinkers, Becker fleshed out the startling theory that terror of death is a universal and unique feature of human beings, and that this terror is a fundamental cause of evil in the world. It is considered by some to be one of the most important books of the 20th century, and I think rightly so.

Becker's provocative thesis is that the terror of mortality—something only humans experience—animates much of our behavior. We assuage the terror of our own demise primarily by finding “meaning” in our lives through our culture and society. Because our culture will still exist after we die, we subconsciously deny our finitude through our immersion in an ongoing culture. In a sense, then, we live on with it after we die. The problem arises when we experience threats to our culture, which subconsciously raises the specter of our own demise. This in turn leads to negative feelings toward the “other,” and in the worst case we perpetrate evil against them.

For most of us, this immersion in our culture and defending it against others could be considered our “immortality project.” We use it as a way to achieve symbolic immortality. It is only a small step, says Becker, from our need to defend our culture to the evils of xenophobia, racism, and war against other groups and cultures.

Other negative behaviors may also result from our immortality projects. Consider the fact that greed does not seem to have an end point. Even the richest person in the world wants more, despite the fact that he or she could not possibly spend the additional money. As Becker put it in *Escape from Evil*, “the amassing of a surplus, then, goes to the very heart of human motivation, the urge to stand out as a hero, to transcend the limitation of the human condition and achieve victory over impotence and finitude.”

Theoretically, this urge to immortality through posthumous notoriety might incline some people to commit heinous crimes, to ensure that their reputation lives on long after they are gone. This is consistent with the well-known phrase, “There is no such thing as bad publicity.” Never mind that this statement it is self-evidently false.

Fortunately “immortality projects” are not always negative. Some people gain symbolic immortality with achievements, such as excellence in art, scientific discoveries, or through exemplary service to their fellow humans. Michelangelo, Newton, and Mother Theresa live on in our thoughts, even though their time on earth is done. Ironically, some people may even risk shortening their mortal life by attempting to achieve *symbolic* immortality. Witness Alex Honnold who, in June 2017, climbed El Capitan in Yosemite—almost one kilometer of vertical rock face—but he did it alone and without ropes or other safety equipment.

When I first read Becker, I was blown away by his central thesis, but I was not convinced that it was real. I could not see how our terror of death could be the primary cause of “man’s inhumanity to man.” What about self-interest, territorial conquest, and many other sources of malicious behavior? What about just very nasty people, sociopaths and narcissists? It seemed to me that there were all sorts of reasons for people being vile and repugnant. I found out I was not the only person



who was initially skeptical, but the more I read about it, the more convinced I became.

At the time that Becker published *The Denial of Death* his proposal was just a theory, and there was virtually no empirical evidence to support it. Enter social psychologists Sheldon Solomon, Jeff Greenberg and Tom Pyszczynski who decided to test Becker's theories. They started doing psychological research in a field they dubbed Terror Management Theory (TMT). Since they started doing TMT research, hundreds of studies from around the world have corroborated the thesis that reminding people of their own mortality (using various surreptitious methods) engenders negative behaviors against people considered "other" and can also produce various other negative behaviors.

In their 2015 book, *The Worm at the Core. On the Role of Death in Life*, Solomon, Greenberg, and Pyszczynski present much of the empirical evidence that supports Becker's thesis, holding that that fear of death is a major contributor to nasty behavior by homo sapiens toward one another. Before writing off Becker's ideas as misguided, you owe it to yourself to read this book. It is beautifully written, and is the best summary of Becker's work available.

As with many of the books that have changed my worldview, I came to Ernest Becker's *The Denial of Death* by accident. I was reading a book by Roxanne Coady and Joy Johannessen titled *The Book That Changed My Life: 71 Remarkable Writers Celebrate the Books That Matter Most to Them*. It was a collection of essays by noted writers and other luminaries, where they were asked to describe the one book that most changed their lives. There was almost no overlap, and only two books were recommended by more than one person—*The Denial of Death* was one of them. That endorsement, plus the fact that the book won the Pulitzer Prize, was enough for me. I bought a copy and read it.

A personal note: In my copy of *Denial of Death* Sam Keen wrote the forward in which he mentioned the *Ernest Becker Foundation*. Since the Foundation was in the Seattle area and I was then teaching at the *University of Washington*, I sent a copy of my recently published book, *Premature Factulation. The Ignorance of Certainty and the Ghost of Montaigne* to the Foundation. I attached a note saying how much I had enjoyed reading *The Denial of Death*, and got a very gracious note in return from Dr. Neil Elgee, the founder of the Ernest Becker Foundation and a retired physician.

This led to a number of delightful meetings over coffee with Neil, where we discussed Becker's ideas, philosophy, and many other topics. I also ended up giving some lectures at meetings of the *Ernest Becker Foundation*, and wrote some blogs for on their website:  
<http://thedenialfile.wordpress.com/author/leucocephalus74/>

In the process, I came to know some of the leading Becker scholars, such as Sheldon Solomon and Dan Liechty from whom I learned much. I also sat next to Ernest Becker's widow, artist Marie Becker-Pos, at one luncheon. Marie is a delightful woman who did much to keep her late husband's ideas alive, including editing the unpublished manuscript of *Escape from Evil* and getting it published.

**13. William Kingdon Clifford (1845-1879)** was a gifted and ingenious mathematician who apparently anticipated some aspects of Einstein's relativity, including the bending of space. He has been frequently lauded by mathematicians, but his essay, *The Ethics of Belief* has been gaining traction in philosophical circles over the past few decades.

Clifford's thought experiment about the shipowner's decision is a perfect example of how useful philosophy can be, both in life-and-death

decisions as well as in everyday life. Consider the shipowner who let the ship sail. Everyone agrees that it was unethical for the shipowner to let the ship sail without inspection, but then Clifford asks a more interesting question: What if the ship had made it across the ocean safely, and then sailed many more times without mishap. Does that excuse the shipowner? “Not one jot” warns Clifford. “When an action is once done, it is right or wrong for ever; no accidental failure of its good or evil fruits can possibly alter that.”

Clifford is saying that if one has based a decision on a careful and objective look at the available evidence, it makes absolutely no difference how it all turns out in the end. This is a mercifully liberating worldview, and has transformed how I look at my decisions, whether I’m making a major life decision, or if I am simply deciding which vacuum to buy. I call it “Clifford’s Law” and it is difficult to overestimate the importance of the concept Clifford is expressing.

I invoke Clifford’s Law when I talk to my students about drug interactions such as the combination of colchicine (used for gout) and clarithromycin (an antibiotic). It is not possible to accurately predict who will be harmed by this combination. If one gave these drugs to ten people, there would likely be a few who would get a little diarrhea, and then recover without sequelae, a few who would have more severe problems, a couple might be hospitalized, and probably a couple of people would die.

If one of my students decides not to take action on this drug interaction and nothing bad happens to the patient, they are just as wrong as the person whose patient dies from the drug interaction. The ghost of Clifford hovers over them saying “When an action is once done, it is right or wrong for ever; no accidental failure of its good or evil fruits can possibly alter that.”

Here is another practical example of Clifford's Law. A few year ago, my wife, Ruth, and I were driving back to our house on the Olympic Peninsula in Washington state, but when we pulled up to the Hood Canal Bridge at noon (a floating bridge at the head of a fjord) the bridge was closed due to high winds. We were only 5 minutes away from our house under normal circumstances, but not today! There was an alternative route through Tacoma and Olympia, but it would take about two hours.

We knew that the bridge was seldom closed for more than 20 or 30 minutes, but Ruth had an important conference call at 3 PM. So we rationally considered our options. Historically, there was probably an 80% chance that the bridge would open in time for Ruth to get home for her conference call. But the call was important, so we decided to spend two hours driving instead of taking a chance.

We were an hour into our drive when we got word that the bridge had opened. I immediately said "Clifford's Law!" because we had made the best decision based on the available evidence, and it did not matter "one jot" that, in retrospect, we should have waited for the bridge to open. We had complete equanimity instead of feeling bad for making the wrong choice.

As I mentioned, Clifford's Law applies to minor decisions such as selecting a vacuum cleaner. If you checked everything out carefully before selecting a vacuum to buy, and then it turns out to be a piece of shit... you don't have to beat yourself up at all. Clifford's Law.

**14. Margaret Walker (1915–1998)** was an African American poet and writer, whose parents were instrumental in instilling a love of learning. She received her masters and PhD at the University of Iowa, and



taught for many years at Jackson State University in Mississippi. In 2014 she was inducted into The Chicago Literary Hall of Fame.

**15. Adam Smith (1723–1790).** On High Street in Edinburgh—just down from David Hume’s statue—is a statue of Adam Smith, Hume’s friend and fellow member of the Scottish Enlightenment. Adam Smith was an insightful thinker, and his views on capital punishment may be unexpected to those who have not read him. Smith is a person who tends to be misinterpreted by both conservatives and liberals. Conservatives love him as the champion of the “invisible hand” and liberals are not fond of him because he is perceived as recommending unregulated capitalism.

Adam Smith has been the darling of predatory laissez-faire capitalists who would rip off their Adam Smith ties if they ever actually read his books. Many progressives also have distorted views of Adam Smith, viewing him as a vulgar and selfish materialist. In reality Smith was a remarkably compassionate man, whose writings were filled with concern for the disadvantaged

If one reads Smith’s *The Theory of Moral Sentiments*, for example, one finds dozens of statements lamenting the acquisitive side of human nature, such as “the rapine and injustice, which avarice and ambition have introduced into this world.” The third chapter in this book is entitled, “Of the Corruption of our Moral Sentiments, Which is Occasioned by This Disposition to Admire the Rich and the Great, and to Despise or Neglect Persons of Poor and Mean Condition.” This doesn’t sound like something that would engender the warm approval of a billionaire hedge fund manager.

The reason I refer to Adam Smith in this book, however, is because of his penetrating insights into the nature of justice. Smith speaks directly

to the death penalty as well, particularly to the obscenity of executing the innocent. He recognized that this was an inevitable outcome of having the death penalty, and recognized it as an unmitigated evil.

**16. Epicurus (341-270 BCE).** This is in no way to be construed as a condemnation of Epicurus, who eschewed violence and promoted humanism, friendship, a simple life, and women's rights. His view that death was nothing to fear was an effort to achieve equanimity (ataraxia) in one's life rather than any statement about the death penalty.

**17. Not Everyone Seeks Revenge.** After the Versailles conference following World War I, the irascible French statesman, Georges Clemenceau, was attacked by an anarchist, Émile Cottin. Although Cottin fired seven times, only one bullet hit Clemenceau. Many demanded the death penalty, but Clemenceau disagreed, "We have just won the most terrible war in history, yet here is a Frenchman who misses his target six times out of seven. ... Of course the fellow must be punished for the careless use of a dangerous weapon and for poor marksmanship." Clemenceau then recommended eight years in prison and "intensive training in a shooting gallery."

**18. Schadenfreude.** As I have described previously in my book *Premature Factulation: The Ignorance of Certainty and the Ghost of Montaigne*, the genealogy of schadenfreude is complex. The most common form—where something bad happens to someone we have previously envied—we might call "Classic Schadenfreude." Envy is a ubiquitous human emotion, and can even occur in people with relatively good self-esteem.

Consider the co-worker who incessantly prattles on about his or her perfect, brilliant, athletically and musically gifted children. When you

find out that one of these wunderkinds has been arrested for shoplifting, it is hard to stifle a momentary surge of pleasure. I think this envy-related emotion is usually what we mean when we use the word *schadenfreude*, so that is why I call it “Classic Schadenfreude.” But there are also other causes of *schadenfreude* we might call “pseudoschadenfreude.”

*Wildebeest Pseudoschadenfreude.* If you see a wildebeest in a herd fleeing from a lioness, you may gain pleasure when the lioness snags your Uncle Wilbur instead of you. Nothing against Uncle Wilbur... he might have been your favorite. You are just glad it is not you. We have the same feeling when we see another motorist pulled over by the police, even though we were also speeding.

*Zero Sum Pseudoschadenfreude.* Suppose you are auditioning for a part in the school play, and another student, who was your main competition, gets the flu and can't audition. As with Uncle Wilbur, you may like the other student, but their loss is your gain and you feel pleasure.

*Misery-Loves-Company Pseudoschadenfreude.* If we make a mistake, sometimes we take pleasure when another person makes the same mistake. I have always been very absentminded, and occasionally forget to do things. So it makes me feel a little better when I see other people forgetting things as well. If I'm scheduled to Face-Time with a friend and he forgets, I am never upset, because I know I may well do the same thing in the future.

*Justice Pseudoschadenfreude.* Suppose you read that a tobacco executive who was peddling his deadly product to children in third-world countries has developed lung cancer from his decades of smoking. Many of us would have difficulty avoiding at least momentary pleasure from this. Some would view this as justice served.

*Revenge Pseudoschadenfreude*. Suppose a person in your neighborhood who has been particularly nasty to you is arrested in a road-rage incident. You may feel pleasure that he got his comeuppance without you lifting a finger.

With regard to executions, the pleasure some people get is probably related to some combination of Justice Pseudoschadenfreude and Revenge Pseudoschadenfreude.

**19. Cobras Not the Best Method.** In my 50 years of university teaching, I have not seen much cheating. We always take measures to prevent it, of course, but I never thought of bringing cobras into the exams! I see two reasons not to use cobras to prevent cheating: 1) it obviously does not work, and 2) I suspect the presence of cobras at exams might adversely affect my teacher ratings by the students.

**20. Albert O. Hirschman (1915–2012)** was an important 20th century intellectual who made original contributions to economics, social science, and the history of ideas. Many of his views have proved to be remarkably durable, and are still relevant to our problems today. He was also a thoroughly decent man, and was respected for his humanity and equanimity as well as for his intellectual excellence.

After I read in a book review about how much Hirschman admired Michel de Montaigne, I read Jeremy Adelman's biography, *Worldly Philosopher: The Odyssey of Albert O. Hirschman*. I soon recognized that Adelman's use of the word "odyssey" was not hyperbole; Hirschman led an astonishingly rich and eventful life. I went on to read several of Hirschman's books and learned much from them.

Hirschman was born to a Jewish family in Berlin, but left in 1933 when the Nazis came to power. He then fought against Franco's forces in



the Spanish Civil War, after which he ended up in Nazi-occupied France. In southern France Hirschman worked with American journalist Varian Fry to help over 2,000 Europeans escape to America including Marc Chagall, Marcel Duchamp, Max Ernst, Hannah Arendt, and many other intellectuals and artists. Hirschman, Fry, and their colleagues established escape routes through the Pyrenees to Spain, then on to Portugal and America.

Despite growing up in Germany, Hirschman's French was flawless, and native French speakers could not detect an accent. Hirschman occasionally amused himself by chatting casually with French police, many of whom would have turned him over to the Gestapo if they detected an accent. The police were on the lookout for German Jews, which is exactly what Hirschman was.

Eventually, Hirschman was told the Gestapo in Marseilles was looking for him, so he escaped to the border and prepared to cross the Pyrenees into Spain. His helpers told him his rucksack would make him look suspicious, so he threw away everything except two things: an extra pair of socks and his beloved copy of the *Essays* of Michele de Montaigne. Crossing the mountains with two other refugees, Hirschman refused to jettison Montaigne despite having to carry one of his companions part of the way.

After arriving in America, Hirschman held positions at University of California, Berkeley, Yale, Columbia, Harvard, and for the last three decades of his life, The Institute for Advanced Study at Princeton. He also spent several years in South America working on development. He received many accolades, and Amartya Sen called him "one of the great intellectuals of our time."

His 1970 book *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* was widely read and is still quoted today. The book deals with the ways that members of an organization respond when things are not going well. They can “Exit” by leaving the organization or by emigrating to a new country (which is what Hirschman did in 1933). They can “Voice” their displeasure with the current situation, and perhaps make recommendations for improvements. Or they can demonstrate “Loyalty” by sticking with the organization. Hirschman artfully described the interplay and nuance of these three options.

With regard to the death penalty debate, Hirschman’s most important book is *The Rhetoric of Reaction: Perversity, Futility, Jeopardy*, in which he describes the three primary reactionary arguments used by those who argue against one proposal or another.

The “Perversity” argument claims that a proposed action will have the opposite effect from the stated goals... in other words, instead of solving the problem, the action will make the problem worse. For example, one might claim that a particular social welfare program will make poverty worse instead of better.

The “Futility” argument basically says that any efforts to change some undesirable feature of society is doomed to failure, because it will never change. For example, some people claim that it is futile to try to do anything to help the poor, because we will always have poor people no matter what we do.

The “Jeopardy” argument is that the proposed change might be desirable in itself, but is likely to produce unwanted consequences. For example, some death penalty proponents argue that while abolishing the death penalty would eliminate the possibility of executing innocent peo-

ple (a good thing), more innocent people would die due to the murder rate going up due to the lack of a deterrent effect of the death penalty (a bad thing that outweighs the good thing). This is a specious argument, of course, because there is no evidence of a deterrent effect. We have ample evidence from scores of countries who have abolished the death penalty over the last 150 years showing that the murder rate did not increase.

Another refreshing feature of Hirshman's thinking was as a counterpoise to the many economists in the 20th century who were obsessed with complex mathematical solutions to economic problems. Hirschman brought wisdom and real life experience to the table, which were badly needed commodities in the world of arcane economic mathematics.

**21. Cesare Beccaria (1738–1794)** was the first person in Europe to make a thoroughgoing case against the death penalty. Many people have not heard of Beccaria but his influence on modern thought far exceeds his name recognition. Beccaria's 1764 book *On Crimes and Punishments*—not to be confused with Fyodor Dostoyevsky's *Crime and Punishment* which we discuss in chapter 7—was published anonymously for fear of negative reactions from the government and churches. Beccaria even resorted to a little pandering on the first page of his book, calling his government “benign and enlightened.”

Beccaria need not have worried because the book was well received all over the Western world and made the reticent Beccaria famous. It was translated into twenty-two languages, and we know that both George Washington and Thomas Jefferson purchased a copy. It was later placed on the Catholic Church's list of banned books, but by that time Beccaria had already made his reputation. As Beccaria scholar,

John D. Bressler pointed out, “It really became the equivalent of a New York Times bestseller.”

A mediocre student (although he excelled at mathematics), Beccaria joined a group of young intellectuals called *Accademia dei pugni* (Academy of Fisticuffs) where Pietro Verri encouraged Beccaria to write the book on criminal justice that made him famous. Beccaria was extensively read and quoted by people all over Europe, and influenced Katherine the Great, Voltaire, Denis Diderot, Thomas Jefferson, John Adams, and Jeremy Bentham (see below). His influence on modern Western thought has been immense. Indeed, the title of a recent book on Beccaria by John D. Bessler is *The Celebrated Marquis: An Italian Noble and the Making of the Modern World*. (The 1774 Continental Congress lauded Beccaria by calling him “The Celebrated Marquis.”)

Beccaria promoted a rational basis for criminal justice rather than the more theological approach of punishing people for their sins. He also urged that punishments should be consistent and timely for all accused, and that the punishment should be commensurate with the crime. Unlike the “punishing sin” school of criminal justice Beccaria recognized that criminals as well as victims had rights.

Beccaria felt that capital punishment was not a rational punishment and was almost never justified... certainly not for the crimes for which it is being used in the United States today. For Beccaria, severe punishments were only justified if they acted as a deterrent to future crimes, and even in his day, he asserted the death penalty was not a deterrent to murder. His view was that death in prison would have a greater chance of acting as a deterrent than execution. Beccaria has been called “the father of criminal justice” but he also could be called “the father of death penalty abolitionists.”



Beccaria presented possible reasons for the inability of capital punishment to deter crimes. Beccaria held that cruel punishments such as the death penalty results in the populace becoming inured to it, so that “human minds harden, adjusting themselves, like fluids, to the level of objects round them.” Moreover, Beccaria felt that at least some murderers committed their crime for the glory of becoming a martyr, thus potentially increasing the murder rate.

Koestler summarized Beccaria’s argument against cruel punishments: “Terror has its own law of diminishing returns; in a century of savage punishments, people are no more frightened by the gallows than under a milder regime they are frightened of prison.” Koestler held that Beccaria’s strong influence on European thought contributed substantially to the ultimate elimination of capital punishment in European countries

According to Beccaria, retributive justice was backward-looking with the focus on punishing the wrongdoer. Alternatively, the more utilitarian view proposed by Beccaria was forward-looking because it was an effort to prevent future crimes, thus preventing future pain. The retributive path wants the criminal to suffer, and the more egregious the pain, the greater the satisfaction to the rest of us. Beccaria rejected this approach in favor of a rational system with the primary goals being “to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise.” The death penalty did not accomplish this..

Torture was immoral and useless, according to Beccaria. It seems self-evident, he said, that torturing someone to determine their guilt is wrong, because we are administering a terrible punishment to someone who may well be innocent. Moreover, torture is likely to generate

false confessions and other false information subverting the very aims of the interrogators to find who is guilty.

Beccaria was subject to wide swings in mood, which causes one to wonder if he is yet another example of a bipolar super-achiever such as Friedrich Nietzsche and Vincent van Gogh. A word of caution in case you decide to read Becarria. I first downloaded and read a free on-line version only to find out that some older translations are based on corrupted text. I then obtained the Cambridge University Press version edited by Richard Bellamy, and that is the primary source for the information and quotes I used for this book. When I compared the two translations, however, they are usually quite close, and occasionally the free on-line version had more understandable wording.

**22. André Gide (1869–1951).** Our rediscovery of the failure of capital punishment to reduce the murder rate conforms to what might be called “Gide’s Law.” André Gide, Nobel Laureate in literature, once said, “Everything that needs to be said has already been said, but no one was listening, so it all must be said again.” This is on my short list of the best things anyone ever said. I present it to my students each year as “Gide’s Law” and I would argue that applies to virtually every field of thought. If you are easily shocked, however, don’t read about Gide’s romantic adventures—he was a sexual omnivore with wide-ranging tastes.

**23. A Near Miss.** Many years ago I was on a flight from Los Angeles to San Diego, and about 10 minutes after takeoff the pilot drastically aborted our climb as though he were diving under something. If we had not all had our seatbelts on we would have collectively impaled our heads on the overhead bins. But the pilot said nothing until we were landing in San Diego, when he said a private plane appeared directly in front of us and we had to dive under it. I mumbled something

about the tardy announcement, and the guy next to me opined that it was probably hard to fly a plane and change your pants at the same time.

**24. Samuel R. Gross.** In 2014 Samuel R. Gross, Barbara O'Brien, Chen Hu, and Edward H. Kennedy—two law professors and two medical researchers published a study of the rate of false convictions resulting in a death sentence. They used a survival analysis technique, the Kaplan-Meier method often used to assess the efficacy of cancer treatments.

We use this same statistical method for assessing some types of drug-drug interactions, such as when we are trying to determine whether certain drugs may be inhibiting the efficacy of anti-cancer drugs. In cancer treatment studies, the researchers observe the cumulative occurrence of the endpoint (death), whereas in the study by Gross, et al., exoneration (due to innocence) was the endpoint. They used the imaginative method of calling the "treated" group those who were removed from death row (but still in prison), a group that has a very low rate of exoneration due to the meager resources devoted to assessing innocence in non-death penalty cases. The "untreated" group consisted of those remaining on death row, and thus having a higher likelihood of exoneration.

They looked at 7,482 defendants sentenced to death from 1973 through 2004, and assessed the cumulative probability of exoneration over time. They also used a variety of established techniques to account for potential biases. For purposes of their calculations they conservatively assumed that none of the defendants who were actually executed during this time would have been exonerated had they remained on death row. Overall, they concluded that at least 4.1 percent

of people sentenced to death in the U.S. is innocent of the crime for which they are condemned.

Because this study creates significant discomfort for the death penalty proponent, they make every effort to discredit it. In the Intelligence Squared Debate of April 15, 2015 Barry Scheck, speaking against the death penalty brought up the Gross study. In response, death penalty advocate Robert Blecker claimed the 4.1% number is incorrect, but provided no evidence to support his position. Then he admitted that the study has complex statistics (which it does) and that he is “probably not qualified to...” [assess the statistics]. (Which he isn’t.)

Mr. Blecker then said “There’s no 4 percent error rate, Barry. And you know it.” Again, this kind of fact-free accusation may be appropriate in a courtroom where winning trumps truth, but it doesn’t rise to the level of a rational discourse. Perhaps Mr. Blecker is unfamiliar with the scientific publication process, but a person who is not qualified in statistics [which Mr. Blecker admits to] is not expected to judge the statistical validity of such a paper.

If Mr. Blecker would like to question the validity, he should seek the services of a qualified statistician, and have him or her write a critique of the statistics in the Gross paper, preferably in form of a letter to the editor. Then the Gross group can assess the critique and respond. Both the critique and the response are published in the journal, and readers judge for themselves who has the better argument. That is the way to sort these things out... not by tossing out ad hominem arguments in a debate.

Later in the Intelligence Squared debate both of the death penalty proponents (Kent Scheidegger and Robert Blecker) stated that if the error rate in death penalty cases really were 4.1% they would be against



capital punishment. Mr. Scheidegger says “I don’t believe it’s true [the 4.1% figure], not for a minute.” I’m sure he is being completely honest that he does not believe it is true, but then that is not really the question. The question is not what Mr. Scheidegger believes; the question is whether or not the 4.1% figure is a reasonable estimate of the error rate in capital cases.

Mr. Scheidegger presents no specific reasons for his disbelief of the Gross paper. What precisely is the basis for his disbelief other than that he would find the results highly inconvenient to his pro-death penalty position? Moreover, if one looks at the methods used in the Gross paper, the 4.1% figure is more likely to be an underestimate than an overestimate.

Mr. Scheidegger then launches into an ad hominem argument that Gross is “one of those people I’ve referred to, who just pumps out paper after paper after paper every time supporting abolition of the death penalty.” A more flaccid argument would be hard to imagine. If I “just pump out paper after paper” telling Mr. Scheidegger that he should not take clarithromycin (an antibiotic) with his colchicine (a gout drug) because it could kill him, would he follow my advice? (He should, because it could kill him.)

Or if a climatologist “just pumps out paper after paper” saying climate change is potentially catastrophic for humanity, should we ignore him or her? The real question is whether or not the “paper after paper” gets it right. Mr. Scheidegger’s argument thus gets a bad argument “twofer”: it is both specious and ad hominem. In any case, pending a substantive and in-depth discussion by Mr. Scheidegger on the failings of the Gross paper, we can safely ignore his comments on this issue.

**25. Judge William A. Fletcher.** Judge William Fletcher has a rather impressive background. He received his B.A. from Harvard, went to Oxford as a Rhodes Scholar, and got his law degree from Yale. Then he clerked for United States Supreme Court Justice William J. Brennan, Jr.

**26. Justice John Paul Stevens.** On July 21, 2019 Barry P. McDonald wrote an Op-Ed in the New Times claiming that the evolving views of Justice Stevens on the death penalty were due to his drifting political ideology, but he missed the point. In Stevens's early years on the Supreme Court it was common to believe the death penalty deterred future homicides, and that virtually everyone sent to death row was guilty. By the time Stevens retired, the deterrence argument had crumbled, and exonerations from death row for reasons of innocence became commonplace.

This evidence has continued to build, and now no intellectually serious person can possibly claim capital punishment deters homicides, or claim that only the guilty are sentenced to death. What changed during Steven's tenure on the Supreme Court was the growing empirical evidence showing that the death penalty was ineffective, arbitrary, unjust, error prone, and costly. The Justices who refused to budge despite the evolving empirical evidence were people like Antonin Scalia and Clarence Thomas, both of whom demonstrated an unfortunate amalgam of intellectual indolence and pugnacious certitude in clinging to the death penalty no matter what the evidence showed.

**27. Vernon Madison.** Amazingly, the Supreme Court later ruled 5-3 that Vernon Madison should not be executed because he did not understand why he would be killed. Clarence Thomas dissented because he felt executing such a person was just fine. I do not think it is hyperbole to suspect that Thomas would favor executing a person who was

dying of cancer, and had only a day or two to live. This “hang-em high” proclivity of Thomas is not rational, because it serves no penological or societal purpose. It must, therefore, come from some dark place in Thomas’s soul—a place to which even he probably has no conscious access. It is not condescending to feel compassion for someone like Clarence Thomas who is so morally broken that he feels he must behave in this way.

**28. Adam Benforado.** In his excellent book, *Unfair: The New Science of Criminal Injustice*, Adam Benforado discusses many of the failures of our criminal justice system that regularly result in injustice instead of justice. Benforado describes the obvious sources of injustice (corrupt police and prosecutors, coerced confessions from innocent people, biased jurors, faulty witnesses, corrupt judges, and more, but he also observes that a big part of the problem is the way the human brain functions (or in this case malfunctions).

Benforado discusses one of the most damaging flaws in criminal justice, that of coming to conclusions early on, and then being reluctant to change. Thus, even when exculpatory evidence is overwhelming, defendants are sometimes still convicted. When convincing exculpatory evidence is discovered after conviction, it is often difficult to reverse the false conviction. (We also discussed these issues in Chapter 4)

Benforado describes the problems presented by plea-bargaining, a process with very little oversight that coerces people (innocent or guilty) to plead guilty. He also discusses the problem of convicting people with severe mental illnesses, mental disabilities, or a history of severe abuse as a child. He observes that it is not just the convicted who suffer under this system. We all pay the bill for having more people in prison than any other country; it costs more for a year in a New Jersey prison than a year at Princeton University.

Overall, this is an excellent book to read if you are interested in what is wrong (and right) with our criminal justice system, and if you want to hear Benforado's recommendations for fixing it.

**29. Expert Witness Anecdote.** On one occasion I was testifying for the defense in a medical malpractice case, and there was a paper published in a prestigious medical journal that appeared to support the plaintiff's case. But it was deeply flawed, so I told the defense attorney with whom I was consulting that I would discuss the paper when I testified. He told me not to mention the paper, and I asked why. He said that if I didn't mention the paper, the opposing attorney would bring it up and then I could shoot it down. I asked him how he could be so sure that would happen, but he just told me to trust him.

So I went to the stand, and when the defense attorney for whom I was serving as an expert witness was done asking me questions, the opposing attorney stood up and walked toward me... and in his hand he was waving said article; he had walked right into the defense attorney's trap! We won the case (on the merits, of course) but it didn't hurt that the opposing attorney was hamstrung in using the article for his case. The opposing attorney did have a sense of humor about it, however, and he smiled as he asked his last question of me on the stand, "Dr. Hansten, you really don't like that article, do you?" He realized he had been had by the defense attorney, but obviously didn't hold a grudge.

**30. Ambrose Bierce (1842-1914?)** was a journalist and gifted writer who fought in the Civil War. The question mark after his death date is there because it actually isn't known when he died. In late 1913 Bierce went to Mexico to observe the Mexican Revolution, and disappeared. Kurt Vonnegut called Bierce's *An Occurrence at Owl Creek Bridge* the greatest American short story, and a work of genius. (It is a work of fic-



tion about of the death penalty from the perspective of the man who was hanged.)

The prophetic wisdom of Ambrose Bierce is on full display in the essay we just mentioned in this book, in which he pretends to be writing about “Ancient America” from the year 4930. He stated that the failure of self-government in America occurred in 1995, only a couple decades before it actually happened. He rightly predicted that selfishness of humans would eventually win: “Politics, which may have had something of the character of a contest of principles, becomes a struggle of interests, and its methods are frankly serviceable to personal and class advantage.”

One remarkable passage is worth quoting in full: “It is not to be denied that this unfortunate people [in America] was at one time singularly prosperous, in so far as national wealth is a measure and proof of prosperity. Among nations it was the richest nation. But at how great a sacrifice of better things was its wealth obtained! By the neglect of all education except that crude, elementary sort which fits men for the coarse delights of business and affairs but confers no capacity of rational enjoyment; by exalting the worth of wealth and making it the test and touchstone of merit; by ignoring art, scorning literature and despising science, except as these might contribute to the glutting of the purse; by setting up and maintaining an artificial standard of morals which condoned all offenses against the property and peace of every one but the condoner; by pitilessly crushing out of their natures every sentiment as aspiration unconnected with accumulation of property, these civilized savages and commercial barbarians attained their sordid end.” A better description America during the past 50 years would be hard to find, and he wrote it more than a century ago.

One of his best-known books is *The Devil's Dictionary*, which is an amazing collection of wry wit combined with a deep knowledge of human nature. Just a few examples: **Absurdity**, n. A statement of belief manifestly inconsistent with one's own opinion. **Actually**, adv. Perhaps; possibly. **Back**, n. that part of your friend which it is your privilege to contemplate in your adversity. **Calamity**, n. A more than commonly plain and unmistakable reminder that the affairs of this life are not of our own ordering. Calamities are of two kinds: misfortune to ourselves, and good fortune to others. **Distress**, n. A disease incurred by exposure to the prosperity of a friend. **Politics**, n. A strife of interests masquerading as a contest of principles. **Proof**, n. Evidence having a shade more of plausibility than of unlikelihood. **Reason**, v.i.. To weigh probabilities in the scales of desire. *The Devil's Dictionary* is a great book to read when you only have a few minutes, because every definition stands on its own.

**31. Baron de Montesquieu (1689–1755).** Like Michele de Montaigne, Montesquieu was born near Bordeaux, France, and also like Montaigne he served as “counselor” in the Bordeaux parliament. Very much unlike Montaigne, however, Montesquieu was an organized and methodical thinker, and his writings are not nearly as entertaining as Montaigne's. Montesquieu recommended separation of powers in governments, which heavily influenced the Founding Fathers of the United States when they were drafting the Constitution.

Montesquieu's best-known work is *The Spirit of Laws* in which he offered enlightened views on the evils of slavery, and on the issue of punishments for crimes. Montesquieu recognized that excessive punishments can be counterproductive and that punishments should be proportional the crimes, both being issues taken up later by Cesare Beccaria.

**32. Bryan Stevenson.** By any measure, Bryan Stevenson is a remarkable human being. Coming from a Delaware family of modest means, Stevenson studied philosophy as an undergraduate, and then got a law degree from Harvard. Instead of going to a prestigious law firm and joining the upper middle class, Stevenson moved to Atlanta and worked for the Southern Center for Human Rights. In his excellent 2014 book, *Just Mercy. A Story of Justice and Redemption*, Stevenson describes his efforts to get innocent people released from death row, and to stop death sentences for minors and the mentally ill. Stevenson's book is an eloquent testament to the many failings of our criminal justice system.

One of Stevenson's most remarkable traits is his lack of rancor, given the racist prosecutors and judges with whom he has had to deal, and given the racism he has personally experienced. One of the most poignant stories in the book is about a racist prison guard who learned of the foster care abuse suffered by one of the prisoners, and how it completely changed the guard's outlook toward that prisoner. (The guard had suffered similar abuse as a child.) I learned much from Stevenson's book, but this story resonated deeply with me, because it pierced a huge hole in my self-righteous intolerance of intolerant people. Here is the story.

Stevenson was going to visit Avery Jenkins, an African-American death row inmate who was clearly mentally ill. As Stevenson pulled into the parking lot, he saw a pickup truck covered with Confederate flags and racists bumper stickers. When Stevenson got inside, the man who owned the pickup forced Stevenson to submit to a strip search (something never required for attorneys visiting a client), and harassed and humiliated Stevenson in other ways as well, such as demanding that Stevenson sign a book that was not required to be signed by attorneys. When Stevenson jumped through all the hoops

and finally got to visit with Avery, Avery seemed fixated on getting a chocolate milkshake rather than talk about his case. Avery was clearly not in touch with reality, but he really wanted a chocolate milkshake, something Stevenson was not allowed to provide.

But Stevenson got Avery a new hearing, and it turned out that the racist guard was the person who transported Avery to and from the courthouse every day for the three days of the hearing. Stevenson's efforts to get Avery a new trial succeeded, and eventually Avery ended up in a mental institution (where he belonged all along) instead of death row.

At the hearing for Avery, it came out that his father had been murdered before Avery was born, and his mother died of a drug overdose when he was a year old. His foster care experience was horrific. He was in 19 different foster homes before he was eight; he was beaten, locked in a closet, starved, and tied to a tree for 3 days before hunters found him. He started having seizures and psychotic episodes by the time he was 15.

Getting Avery off death row and into a mental institution was a wonderful outcome, but another great thing happened as well. After Avery's hearings Stevenson went back to visit him at the prison where the racist guard was. (Keep in mind that by now the guard now had heard 3 days of testimony regarding the terrible abuse and neglect Avery had experienced growing up.)

When Stevenson pulled up to the parking lot, he saw the pickup truck with all the racist signs, flags and gun rack. When he encountered the racist guard this time, however, there had been a transformation. The guard treated Stevenson with respect, and put his hand on Stevenson's shoulder while telling him that he respected what Stevenson had



done for Avery. The guard had heard how awful it was for Avery growing up in foster care, and said, "Man, I didn't think anybody had it as bad as me. They moved me around like I wasn't wanted nowhere. I had it pretty rough. But listening to what you was saying about Avery made me realize that there were other people who had it as bad as I did. I guess even worse."

The guard went on to say that his mistreatment growing up made him so angry he sometimes wanted to just hurt somebody. During Avery's hearings Stevenson had repeatedly brought up the term "mitigation," and the guard went home to look up what the word meant. Then the guard understood that Avery did indeed deserve mitigation. Then the guard smiled, shook Stevenson's hand and said, "Well, I think you done good, real good." Stevenson, obviously touched by the guard's opening up to him, responded, "You know, I really appreciate you saying to me what you just said. It means a lot. I really mean that. Sometimes I forget how we all need mitigation at some point."

In his book, Stevenson just tells this beautiful story and leaves it to the reader to come to their own conclusions. As I see it, if Stevenson had never had that last encounter with the guard, he would have gone to his grave with a very negative view of the guard. I think it is a profound example of the fact that we rarely know what may have contributed to repugnant behavior in any individual.

**33. Dirty Postcards.** There was an amusing twist in the story that explains why Captain Bolín did not shoot Koestler immediately. It turned out that Sir Peter had previously sheltered Bolín's cousin and family in his house. A soldier had come to Sir Peter's house and asked to see the cousin's papers. Sir Peter presented the papers, but cleverly added some pornographic postcards from Paris. Then Sir Peter suggested that the young man keep the postcards, and Sir Peter would

keep the papers. The young man agreed, so Bolín's cousin and his family were saved. Thanks to Sir Peter's quick thinking, Captain Bolín, owed an enormous debt to Sir Peter and therefore did not "shoot Koestler like a mad dog." As Koestler later observed, "It is an elevating thought that one should owe one's life to a set of dirty postcards."

**34. Simone Weil (1909–1943).** The short and troubled life of Simone Weil began in Paris with her accomplished parents, Bernard and Selma, and brilliant older brother, André. Her father had a thriving medical practice, and her mother devoted her life to the intellectual development of André and Simone. There were no toys or dolls in their household so they could concentrate on their studies.

The mother's efforts obviously worked (at least intellectually), and in her biography of Simone Weil, Francine du Plessix Gray describes the astonishing accomplishments of the Weil children. André became a mathematical prodigy before he turned ten, and by age twelve had taught himself classical Greek. Simone was similarly gifted and read widely in literature, philosophy, and history. When the children talked to each other it was like attending a university seminar. Unfortunately, Selma also imposed on her children, especially Simone, an obsession with cleanliness and a fear of germs that resulted in life-long phobias about contracting infectious diseases.

Simone started early with what would prove to be her life-long concern for justice and for the suffering of others, which lead to her supererogatory self-sacrifice. During World War I at age six she gathered and sold wood to earn money for her "adopted" soldier at the front. Astonishingly, at age ten Simone—who read several newspapers every day—recognized that the Treaty of Versailles was excessive and humiliating. Perhaps those drawing up the treaty should have consulted with Simone, given subsequent European history.

Simone Weil's views on the death penalty are sometimes misunderstood. Her almost pathological agonizing over the sufferings of others meant that she would be vehemently opposed to any death sentence that resulted from injustice. She once suggested that "To die for an unknown and repulsive convict who is a victim of injustice" was proof of faith in God. Given that the current process of capital punishment in the United States is steeped in injustice, it seems clear that Simone Weil would be opposed to it. Moreover, Simone Weil's Kantian view that we have a categorical obligation to respect every single human being, no matter what their circumstances, would automatically include murderers.

Simone Weil's views on punishment, however, include in some cases the necessity to inflict harm in order to reintegrate "the good" in people who have committed evil. She thought that by feeding the innocent part of the criminal's soul, they would eventually recognize and condemn their past behavior and be reintegrated into society. This quasi-religious approach was intended to awaken in the criminal "the desire for pure good." This view of punishment was more like an atonement for sins, and is quite at odds with the more practical approach of Cesare Beccaria I discussed earlier.

Also, apropos to a discussion of the death penalty was Simone Weil's remarkable objectivity, and insistence that we allow new ideas to arrive in our minds with absolute openness. Our minds should be detached, empty, and ready to be evenhanded in response to new ideas. She said, "Above all, our thought should be empty, waiting, not seeking anything, but ready to receive in its naked truth the object which is to penetrate it." In other words, Simone Weil is encouraging us to eschew the reactive thinking that permeates the arguments about the death penalty.

**35. Koestler Close Calls.** And it was far from the last time Koestler believed he was about to be killed, as Michael Scammell recounts in his biography, *Koestler: The Literary and Political Odyssey of a Twentieth-Century Skeptic* (2009). Koestler was to see the inside of several more prisons and have more close calls with death.

After barely surviving the Spanish Civil War, he was arrested and imprisoned in France in late 1939. He was released, and then escaped from France right before the Germans invaded. by joining the French Foreign Legion and going to North Africa. Being Jewish, he may not have survived had he not thought of this plan. He then managed to illegally bluff his into the UK from Portugal, but he was imprisoned again. Ironically, after all of these brushes with death, he eventually killed himself in 1983 after developing Parkinson's disease.

**36. Holly Near.** Singer-songwriter-actor Holly Near's actual words in her song Foolish Nation were, "Why do we kill people who are killing people. To show that killing people is wrong."

**37. Albert Schweitzer (1875–1965).** Growing up in the 1940s and 1950s, I heard Schweitzer's name mentioned usually in connection with his selfless medical work in Africa. It was only later that I realized Schweitzer was a polymath with a PhD in philosophy, a music scholar and accomplished organist, and a respected theologian. He won the Nobel Peace Prize in 1952. Schweitzer's wisdom writings are well worth reading today.

**38. My Lucky Break.** Part of the reason I find George Carlin's and Paul Newman's position on luck so refreshing is that my own success—albeit infinitely less impressive than Carlin's or Newman's—had a huge element of luck.



As a student at the University of California San Francisco in the 1960s, I decided to collect and assess data on drug-drug interactions. Late one night in the medical library I was staffing the “Drug Information Center” that provided drug information for clinicians in the hospital. A physician walked in with a drug question, and I looked up some information for him.

He thanked me and then saw the drug interaction materials I was working on. He asked, “What’s that?” I told him, and he responded, “There aren’t any books on that topic; you should assemble this into a book, and send it to a publisher.” I was amazed... here I was a lowly student and some medical school professor thinks my stuff is worth publishing!

I spent the next couple months getting the manuscript ready, but after the first publisher turned me down, I decided to drop the idea. But by chance I saw the same doctor in front of the hospital and he told me I shouldn’t give up. I saw him again a month later, and he told me again I had to publish the book. He was relentless.

So I sent it to a publisher in Philadelphia who said yes, and the book transformed my career. It has sold more than a million copies over the decades, was translated into 7 languages, and I ended up lecturing all over the world. All of this was directly related to my luck of being in the Drug Information Center at the very time the doctor came in, and then my luck of seeing him again after I gave up working on the book. But... there is an embarrassing side story.

In the first edition of the book, I thanked the doctor who had made it all possible, saying without him I would have never written the book. A couple years later I was teaching at Washington State University, and happened to be talking on the phone to one of my colleagues back in the Bay Area. It went like this:

Colleague: “Remember that guy who you dedicated your book to?”

Me: “Yes, how is he doing?”

Colleague: “Well, not so good... he was arrested.”

Me: “You are kidding! For what???”

Colleague: “For impersonating a physician.”

It turned out that he had put on a white coat and was going around a Bay Area hospital (not UCSF) examining patients when he got caught. I had been completely fooled by a sleazy guy impersonating a doctor. Not my finest hour.

So I took his name out of the second edition of the book, but many years later when the time came to write the preface to the fifth edition, I put his name back in (without the “Doctor” title!). I pointed out that he wasn’t who I thought he was, but he was still largely responsible for the existence of the book.

So my teenage fascination with the “radial contingency of human existence” was borne out in my own life. If someone else had been assigned to the Drug Information Center that night, or if I had been a few minutes later walking out of the hospital those subsequent times that I saw the “doctor” my entire life would have been completely different.

**39. René Descartes (1596-1650)** is considered one of the leading thinkers in the history of philosophy, and also the first modern philosopher. He was a brilliant mathematician as well, and he became fixated on the question of whether we could ever be completely certain of anything. He applied his mathematical training to an approach that was logical and rigorous.

Descartes recognized that he often felt absolutely certain that he was engaged in doing one thing or another, only to wake up and find that it

was a dream. So how could he be certain that what he was thinking right now was not a particularly vivid dream? This seemed to shed doubt on any type of certainty, but he eventually came to one indubitable conclusion—the fact that he had conscious experiences of some sort or other. This then led to his “certain” conclusion that he must be a being that thinks: “Cogito ergo sum” which is usually translated into “I think, therefore I am.”

Descartes also developed the concept that we humans are made up of two different types of substances: mind and matter. This is often referred to as “Cartesian dualism” and the concept of dualism continues to be debated today. The correspondence on free will and dualism between Descartes and Princess Elizabeth of Bohemia has been preserved, and is still interesting to read:

[https://www.earlymoderntexts.com/assets/pdfs/descartes1643\\_1.pdf](https://www.earlymoderntexts.com/assets/pdfs/descartes1643_1.pdf)

**40. Paule Marshall (1929-2019)** was a talented African American writer who won numerous awards, including a MacArthur “Genius” Fellowship, Dos Passos Prize for Literature, and a Guggenheim Fellowship. As I write these words, it is just months after she died at age 90.

# About the Author



Philip D. Hansten is currently Professor Emeritus at the *University of Washington in Seattle*. His books on drug interactions have sold more than one million copies since 1971, and have been translated into seven languages. Hansten has lectured widely on drug interactions in North America, Europe, Asia, Latin America and the Middle East.

He testified before US Congressional Subcommittee hearings, the US Food and Drug Administration, and the Federal Trade Commission. He was an editor or consultant for the *American Board of Internal Medicine*, the *American Medical Association's Drug Evaluations*, *The Medical Letter*, and others.

After receiving his Doctor of Pharmacy from the *University of California San Francisco* he held positions at the Division of Clinical Pharmacology at *Stanford University School of Medicine* (working with Professor Stanley N. Cohen) and at *Washington State University*.

In 1967 he received the Bowl of Hygeia Award from the *University of California San Francisco School of Pharmacy*, the the school's highest student honor. He received the Distinguished Alumnus Award from the *UCSF School of Pharmacy* in 1989. He received teaching awards from students at the *University of Washington* and *Washington State University*, and gave the 2007 commencement address at the *UCSF School of Pharmacy*. A YouTube of the address is available: [http://www.youtube.com/watch?v=rWEsIF7yk\\_4](http://www.youtube.com/watch?v=rWEsIF7yk_4)

He also has written essays on the history of ideas for the Ernest Becker Foundation: <http://thedenialfile.wordpress.com/author/leucocephalus74/>, and his YouTube presentation on Stoic Philosophy has been viewed over 40,000 times : <http://www.youtube.com/watch?v=3aFNCkoLzDk>

Most importantly, he was a finalist in *The New Yorker* Cartoon Caption Contest for September 10, 2018, and his letters to the editor have appeared in *The New York Times*, *The New York Review of Books*, *The New Yorker*, *The Atlantic*, and others. Hansten's faux booklet *Lascivious Leucocephalus* on mating bald eagles was featured on Stephen Colbert's *The Colbert Report*: <http://www.cc.com/video-clips/njn4f1/the-colbert-report-stephen-jr--in-canada>