2015

Temporal Arbitrariness: A Back to the Future Look at a Twenty-Five-Year-Old Death Penalty Trial

Mary Kelly Tate
University of Richmond, mtate@richmond.edu

Follow this and additional works at: http://scholarship.richmond.edu/law-faculty-publications
Part of the Criminal Law Commons

Recommended Citation

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.
TEMPORAL ARBITRARINESS: A BACK TO THE FUTURE LOOK AT A TWENTY-FIVE-YEAR-OLD DEATH PENALTY TRIAL

Mary Kelly Tate *

INTRODUCTION

This symposium essay is a thought experiment—a "back to the future" re-imagining of the capital murder trial of Tommy David Strickler, an indigent man deemed borderline mentally retarded.¹ In 1990, Strickler was convicted and sentenced to death for the robbery, abduction, and murder of a young African American woman.² On July 21, 1999, Strickler became the sixty-eighth person executed in Virginia in the death penalty's modern era.³

In post-conviction habeas corpus proceedings, Strickler came uncommonly close to judicial relief when the Supreme Court of the United States agreed to review the prosecution's failure to...
provide exculpatory statements from its star witness. Within the fractured forty-four-page opinion, the Court concluded that the statements in question, although exculpatory as a matter of law due to their contradiction of trial testimony, would not have altered the outcome of Strickler’s trial if the defense had possessed them during trial preparation, cross-examination, opening and closing statements, and sentencing. Thirty-four days later, Strickler was executed.

I wonder how Strickler’s Augusta County, Virginia trial would have been different had it happened today. How does the circumstance of time affect capital defendants? And what might that say about the stability of our notions of justice when it comes to our most severe, irreversible punishment? I pose these questions because I was one of Strickler’s federal habeas corpus counsel in the 1990s.

To illustrate the role of the temporal in capital trial outcomes, I use Strickler’s trial, specifically its core narrative, as a case study. It affords us a glimpse into many of the structural hallmarks and pitfalls of capital litigation in twentieth-century America. Other than the human suffering for the victim’s family, the community, and Strickler himself, Strickler’s trial is prosaic in many of its cultural characteristics. A tragic and senseless murder, an indigent defendant with cognitive vulnerabilities, an ambitious pro-death penalty prosecutor, and a rural setting are all in play. Its one feature that deviates from the prototypical capital case is its racial contours. The defendant was white and the victim was black; usually those features run the other way. This inversion is likely explained by socioeconomic factors. As the death penalty’s history demonstrates, the identity of the victim matters in terms of how quickly he or she is executed.

On the whole, I examine how time impacts capital trials. My aim is focused on how the trial’s environment has been altered in the past few decades. The role of the temporal in capital settings is to determine how capital trials are shaped by adversarial engagement during plea-bargaining, sentencing phase of conviction, and post-conviction outcomes. The story of Strickler’s trial offers insight into how the temporal influences the role of the adversarial and post-conviction phases.

The body of this Article kicks off with the narrative summary of Strickler’s trial. Part II situates Strickler’s trial within a broader context of the role of time in the context of capital litigation. Part III delves into a comparative analysis of the temporal phases of the trial. Part IV concludes the Article by presenting a set of recommendations for addressing the issue of time in capital litigation.

To provide context, I use searchable execution databases from the Death Penalty Information Center, which tracks executions in the United States. The database allows for queries based on race, state, and gender of both victim and defendant. I also utilize data from the Capital Case, 77 UMKC L. REv. 879 (1998), which emphasizes the critical role of time in capital litigation.

---

5. Id. at 293-96.
7. Strickler, 527 U.S. at 266 (indicating Leanne Whitlock was African American); Thomas Strickler, supra note 6 (indicating Strickler was white); see Searchable Execution Database, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/views-executions?exec_name_1=&race%5B%5D=White&sex=m&state%5B%5D=VA&race_1%5B%5D=Black&sex_1=f&federal=All&foreigner=All&juvenile=All&volunteer=All (last visited Feb. 27, 2015) (demonstrating that only four white men have been executed for the murder of only black victims in Virginia).
within the fitness. Within the concluded that the would not have possession had possessed opening and r-four days later, Virginia trial would how does the circumstance might that say even it comes to our these questions bonus counsel in the final trial outcomes, I narrative, as a case more structural hallmarks twenty-first-century the victim's family, victim's trial is prosaic gic and senseless vulnerabilities, an rural setting are the prototypical case was white and the other way. This c factors. As the identity of the victim

8. See McCleskey v. Kemp, 753 F.2d 877, 887 (11th Cir. 1985) (defendant presented statistical studies demonstrating that whether the victim was black or white may have an impact on applying the death penalty generally); cf. Ian Record, Two Indicted in Whitlock Abduction, BREEZE, Jan. 18, 1990, at 1 (describing Leann Whitlock as a sophomore psychology major and a member of a campus singing group).


10. See id. at 879.
penalty democratically “hygienic” have failed. Temporal arbitrariness courses through each and every death penalty case.

For those subjected to its reach, the story of the death penalty is one marked by the vagaries of time, place, and mood: disturbingly ephemeral bases for the ultimate sanction.

I. NARRATIVE BACKGROUND: A LOOK AT THE FACTS AND THE LAW OF STRICKLER’S CAPITAL TRIAL

On January 5, 1990, Leanne Whitlock, a James Madison University undergraduate student, disappeared after having borrowed her boyfriend’s car.\(^{11}\) Eight days later, her body was found in a secluded area in Augusta County, Virginia.\(^{12}\) Strickler was arrested prior to the discovery of Whitlock’s body and became connected to the disappearance by various witnesses who linked Strickler to the car and various belongings of Whitlock.\(^{13}\) An autopsy and the physical investigation of the area where Whitlock’s body was found led to the prosecution’s theory that Strickler and another man, Ronald L. Henderson, had killed Whitlock with a sixty-nine-pound boulder.\(^{14}\) Henderson was tried separately, convicted of first degree murder, and received three life sentences.\(^{15}\)

To grapple temporally with this case requires an understanding of the prosecutor’s narrative not only as to Strickler’s guilt or innocence or the original charging decision, but also as to why Strickler was the “worst of the worst” and thus deserving of execution as a sentencing matter. This universal “winnowing” burden on prosecutors in death penalty cases is one reason for the emphasis on narrative in this summary.

A major component of this funneling process in the Strickler trial turned on a single witness named Anne Stoltzfus. She was the star witness who cemented the prosecutor’s claim that Strickler was depraved; Justice Kennedy’s prudence deprived of a fair trial which sealed Strickler’s sentence.

According to her story as it was later seen at a local store and eventual testimony of Henderson’s conduct, Strickler and Henderson engaged in Whitlock’s car while she and her friend were later saw Strickler into Whitlock’s car. According to Stoltzfus, the events

Not only did Stoltzfus

\(^{11}\) Strickler, 527 U.S. at 266–67.

\(^{12}\) Id. at 276; Strickler v. Commonwealth, 404 S.E.2d 227, 231 (Va. 1991).

\(^{13}\) Strickler, 404 S.E.2d at 231 (indicating that Strickler was arrested on January 11); Record, supra note 8, at 1 (stating that Whitlock’s body was discovered by police on January 13).

\(^{14}\) Strickler, 527 U.S. at 293 & n.43; Strickler, 404 S.E.2d at 231.

\(^{15}\) See Mistake Shocks Slaying Victim’s Parents, FREE LANCE-STAR, Aug. 6, 1993, at C10.
This case raises questions about the fairness of the death penalty system. The case involvespetient arbitrariness in a capital case.

The death penalty was imposed in a case involving the murder of an individual. The defendant, Strickler, was convicted of murder and sentenced to death. The case is significant because it involves the role of eyewitness testimony in the capital punishment process.

The testimony of a witness, Stoltzfus, was crucial in establishing the defendant's guilt. She witnessed an incident involving the defendant and another individual, Whitlock. Stoltzfus's testimony was critical in linking the defendant to the crime.

Justice Souter, in his dissent, noted the importance of Stoltzfus's testimony. He wrote, "Ul-timately, I cannot accept the Court's discount of Stoltzfus... [and] the undeniable narrative force of what she said... What is important is that her evidence presented a gripping story." 18

According to Stoltzfus's testimony at trial, Whitlock was last seen at a local shopping center. She testified to seeing Whitlock with a car that matched the description of the vehicle used in the crime. She also provided information to police and was interviewed by police officers.

Stoltzfus's testimony was critical in linking the defendant to the crime. She testified that she saw the defendant and another individual behaving disruptively inside a mall. She later saw the defendant aggressively push and manhandle his way into Whitlock's car outside that same mall.

Not only did she not call the police immediately after witnessing a violent abduction, Stoltzfus did not come forward until after the defendant's arrest, heavy news coverage of the crime, discovery of the body, and a publicized interstate highway search for the defendant.

Almost two weeks passed before she told her story to the authorities. Henderson was eventually apprehended in Oregon while Strickler was arrested in possession of Whitlock's car.

17. Id. at 307 (Souter, J., dissenting).
18. Id.
20. Id. at 484-85.
21. Id. at 485-88; Strickler v. Netherland, no. 3:95CV924, slip op. at 5-10 (E.D. Va. filed Oct. 15, 1997).
22. Strickler Trial Transcript, supra note 19, at 476-80, 482, 485-87.
23. Id. at 488-90.
24. Id. at 494-97.
25. Id. at 476; Strickler v. Greene, 527 U.S. 263, 273 (1999) (demonstrating that Stoltzfus testified to seeing the incident on January 5 but did not interview with a police officer until January 19).
As a legal matter, Stoltzfus was the most important witness at trial. Her testimony strongly supported the prosecution's theory that Strickler had committed the predicate offenses to capital murder of abduction and robbery.²⁷ Throughout her testimony at trial, she referred to Strickler as “Mountain Man” and Henderson as “Shy Guy.”²⁸ Defense counsel never objected to this. Predictably, the prosecution deployed this aggressive characterization of Strickler during the sentencing phase of the trial in its effort to persuade the jury that Strickler deserved the death sentence under Virginia law.²⁹ During its closing statements, the prosecution also worked this theme as part of its narrative—a theme that would have been substantially weakened, if not entirely crippled, with defense access to Stoltzfus’s contradictory statements.³⁰

As outlined above, Stoltzfus was the jury’s reportorial link to the awful events that the prosecution claimed led to the death of Whitlock.³¹ In effect, it was Stoltzfus who gave the jury its portrait of what occurred; there were no known witnesses to the brutal killing.³² Her description of Strickler’s behavior at the mall laid not only a legal predicate for Strickler’s culpability, but also the narrative foundation for the jury to classify Strickler as an alpha figure with a wantonly aggressive nature.³³

Despite the clean, linear storyline at trial that Strickler was the ring-leader, there existed other Stoltzfus-generated evidence that never reached the proceedings and thus never became part of the back-and-forth evidence disclosure arguments. Unknown statements that enforcement.³⁴ Through the course of five years after the trial.

In one of these investigations, I want to clarify that I remember this situation and constructs. When I remember being in a different thing, I helped me jog my memory.

In that same interview, [being] so far off, I want to think about times like 9:00 pm thinking that Whitlock was closing. Stoltzfus also said about dates and another person around.

Stoltzfus also- saw a shop in the mall, she heard a man in another store in the mall, hearing a man in the mall, “could have been a window.”³⁸ She really wasn’t sure of, stating, “I had run up to a car.”³⁹ She wondered about dates and another person around.

This was not the initial investigating detective, who had been “spent several hours work ing at current phase.”
Important witness at prosecution’s theory offenses to capital put her testimony at Fan” and Henderson lead to this. Predictability characterization of trial in its effort to death sentence un­ in its effort to

nts, the prosecution aggressive—a theme that not entirely crippled, 

statements. 30

This reportorial link to led to the death of lose the jury its por­ witnesses to the bru­ behavior at the mall culpability, but also classify Strickler as an 

that Strickler was generated evidence never became part

... was sufficient to support correct in that the robbery testimony.” Strickler, 527 7-80.

... actually did include two stranger and abducting 

... testimony helped establish 

... aggressor,” the dominant murder, not just in the ab­ into question, the jurors’ 

determined to the point that 


18. [ Wolfe 1990: Eyewitness Testimony: proves that the story for-

of the back-and-forth testing that is supposed to occur through evi­ dence disclosure, cross-examination, and opening and closing argu­ ments. Unknown to defense counsel was a bevy of conflicting state­ ments that Stoltzfus made during her interactions with law enforce­ ment. 34 These communications were only uncovered during the course of federal habeas corpus investigation almost eight years after the trial. 35

In one of these letters, Stoltzfus wrote to Detective Claytor, the investigating detective who interviewed her previously:

I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical con­ structs. When I didn’t remember any Mall purchases, I didn’t re­ member being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me jo[g] my memory. 36

In that same letter, she also apologized for her “initial times [being] so far off,” and explained that she “placed the time around 9:00 pm thinking [she] must have not gone in because the Mall was closing.” Stoltzfus then explained that her new certainty about dates and times was based upon what her daughter and another person at the mall told her. 37

Stoltzfus also admitted in this letter that she recalled visiting a store in the mall and only later, on the way back from that store, hearing a man in the mall yelling at a woman. She said that he “could have been the same guy who knocked on the [victim’s] car window.” 38 She related “a very vague memory that [she was] not sure of,” stating, “It seems as if the wild guy that I saw” earlier had run up to a bus, missed it, and then approached the blue car. 39 She wondered, “Were those 2 memories the same person? 40

This was not the only exculpatory letter she wrote to the investigating detective. On January 25, 1990, she wrote that she “spent several hours with John Dean [the victim’s boyfriend] looking at current photos from which [she] made the identification [of

---

34. See Strickler, No. 3:95CV924, slip op. at 6, 16-17.
35. See id. at 16-17, 22-23.
36. Id. at 8.
37. Amended Brief for Petitioner at 26-27, Strickler, No. 3:95CV924.
38. Id. at 28.
39. Id. at 26-27.
40. Id. at 27.
the victim]."\(^{41}\) She also thanked the detective for his "patience with [her] sometimes muddled memories."\(^{42}\) She stated that she "didn't believe [a crime was] what [she] saw until [she] saw Leanne's pictures."\(^{43}\) She admitted that, without the detective's help, she "never would have made any of the associations" that she made.\(^{44}\)

According to Judge Merhige, the district court judge presiding over Strickler's federal habeas corpus review in the Eastern District of Virginia, these admissions of the unreliability of her memory were so significant, "[I]t provides a basis for which Stoltzfus's testimony might have been excluded altogether."\(^{45}\) Even if not excludable, these admissions were directly and powerfully contradicted, and therefore, they could have impeached her testimony at trial.

Although it took several hours with the victim's boyfriend and pictures of the victim before Stoltzfus could identify Whitlock to the police, at trial she described Whitlock at the mall as being "a rich college kid," "singing" and "happy."\(^{46}\) At trial, she also described the clothing Whitlock was wearing.\(^{47}\) The inconsistencies with regard to the degree of detail she described to the investigators "were extremely material for cross-examination."\(^{48}\)

There were other significant issues with Stoltzfus's testimony. At trial, she claimed she was "one hundred percent sure" of her identification of Strickler from photographs that the investigators gave to her.\(^{49}\) However, according to the detective's report, "she could not positively identify Strickler but stated only that he 'resembled' one of the men she had seen. Stoltzfus stated that his hair color was not right."\(^{50}\)

The foregoing statements were not part of the documents that Strickler's defense counsel had access to via the Augusta County

---

41. Id.
42. Id. at 28.
43. Id.
44. Id.
46. Id. at 6.
47. Id.
48. Id.
49. Id. at 7.
50. Id.

Commonwealth. To work pre-open file policies, open file policies force Brady v. United States, 373 U.S. 83 (1963), to "ensure that the totality of relevant evidence favorable to an accused either to guilt or to severity by allowing the jury to consider evidence within the scope of the prosecutor's ringleadership," as well as to "provide a basis for which Stoltzfus's testimony might have been excluded altogether."

To work pre-open file policies, open file policies force Brady v. United States, 373 U.S. 83 (1963), to "ensure that the totality of relevant evidence favorable to an accused either to guilt or to severity by allowing the jury to consider evidence within the scope of the prosecutor's ringleadership," as well as to "provide a basis for which Stoltzfus's testimony might have been excluded altogether."

That said, the Supreme Court's Brady reformulation is "challenging to work pre-open file policies, open file policies force Brady v. United States, 373 U.S. 83 (1963), to "ensure that the totality of relevant evidence favorable to an accused either to guilt or to severity by allowing the jury to consider evidence within the scope of the prosecutor's ringleadership," as well as to "provide a basis for which Stoltzfus's testimony might have been excluded altogether."

51. See id. at 17.
52. 373 U.S. 83 (1963), to "ensure that the totality of relevant evidence favorable to an accused either to guilt or to severity by allowing the jury to consider evidence within the scope of the prosecutor's ringleadership," as well as to "provide a basis for which Stoltzfus's testimony might have been excluded altogether."
53. Strickler, No.
54. closed Impartiality in sentencing decisions of
for his “patience and interest” she stated that she would be there until [she] saw the detective’s file, but the detective’s associations” that

part judge presiding 

reliability of her

basis for which

powerfully

impeached her

in her boyfriend and

identify Whitlock to the investigators

called the

inconsistencies

to the investiga

Stoltzfus’s testimony.

certain sure” of her

the investigators

investigative’s report, “she

only that he ‘re-

Stoltzfus stated that his

documents that

Augusta County

Commonwealth Attorney’s “open file” policy. They were part of the detective’s file and never merged into the prosecutor’s file.51

Open file policies are meant to operationalize transparency, enforce Brady v. Maryland’s edict that prosecutors disclose exculpatory evidence to defendants’ counsel prior to trial, and enhance efficiency by allowing defense counsel to review any and all documents within the prosecutor’s domain.52

To work properly, the open file system depends on both good faith and good management. Open file policies depend on cooperation between law enforcement and the prosecution in order to ensure that the files that the defense counsel review reflect the totality of relevant information. In Strickler’s case there was an obvious breakdown in cooperation or shared knowledge on law enforcement’s part. Clearly, this information would have been valuable to Strickler’s defense and its capacity to offset the prosecutor’s ringleader theory of culpability.

Not surprisingly, the nondisclosure of the Stoltzfus materials colored the basic character of the prosecution’s trial narrative.53

The vacuum left little space for the defense to counter the aggressive portrait of Strickler that Stoltzfus painted. To be sure, it made it harder to question the underlying felonies that exposed Strickler to the death penalty. Additionally, it foreclosed potential avenues of further pre-trial investigation. After all, the particular details in the letters would (or should) have caused defense counsel to pursue those leads.

That said, this essay’s raison d’être is not to argue a legalistic Brady reformulation of Strickler’s case. Brady claims are always challenging to win due to post-conviction relief’s existential battle

51. See id. at 17.

52. 373 U.S. 83, 87 (1963) (holding that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”). See generally Bennett L. Gershman, Litigating Brady v. Maryland: Games Prosecutors Play, 57 CASE W. RES. L. REV. 531 (2007) (discussing how prosecutors often don’t fulfill their Brady obligations of turning over law enforcement files).

with the legal system's preference for finality. More primitively, post-conviction litigation must do battle with "confirmation bias," the strong human desire to preserve initial beliefs, opinions, and conclusions. Although I believe the Court missed the mark in its Brady ruling, my purpose here is to re-imagine the trial in light of current doctrinal, capital defense, and normative realities driving capital litigation in today's Virginia.

In short, I strive to lift the veil on the death penalty's temporal arbitrariness by taking stock of important changed circumstances as they relate to Strickler's capital trial and its narrative, not his federal habeas corpus litigation. It may be tempting to push aside my thought experiment as mere counterfactual prodding, but any capital punishment regime should be prepared to answer all manner of inquiry. Death penalty regimes warrant a wide range of review: cost review, fairness review, demographic review, accuracy review, deterrent review, and even the kind of "soft" temporal review underway here. Although we live in an age of empiricism, the democratic currency of our legal system is fundamental fairness and due process, two distinctly qualitative notions which strongly animate the core of America's civic identity.

So with that in mind, what can we say about the fairness of Strickler's trial when viewed from a different point in time—a time marked by different doctrine, mores, and resources?

II. THE TEMPORAL ZONE OF STRICKLER'S CAPITAL MURDER TRIAL: DOCTRINE, NORMS, AND RESOURCES

A. Strickler's Limited Intellectual Capacity and Sentencing: Atkins v. Virginia and Increased Emphasis on the Role of Mitigation

Strickler's status as "borderline" mentally retarded and his background of severe deprivations were not narratively brought into focus during his trial. This scope is a function of the mitigation strategy and the broader factors they affected defense litigation. Highlighting who is "let in," or the necessity for an increasingly heart of defense intellectual deficiency, is crucial for launching an effort to secure the death penalty more than defense-developed evidentiary intellectual challenge factors were left.

Highlighting the ABA describes our global in nature, we pursue avenues and to effectively decision-makers may approach all stages of the responsibility to cannot be overstated.

Unlike the incomplete approach that the partially rendered

54. See Gershman, supra note 52, at 562.
into focus during Strickler's sentencing phase.\textsuperscript{57} An omission of this scope is a near de facto reflection of an absence of defense mitigation strategy.\textsuperscript{58} I discuss intellectual disability separately from the broader psychosocial history, but it is important to remember they are inextricably linked as a matter of capital defense litigation. These evidence categories are directly related to divining who is the "worst of the worst"—a stated constitutional necessity for any death penalty regime.\textsuperscript{59} Mitigation is the very heart of defense counsel's role at sentencing.\textsuperscript{60} Both Strickler's intellectual deficits and his upbringing were essential ingredients for launching a defense against the prosecution's mission to secure the death penalty. The sentencing transcript reveals little more than defense counsel's anemic communication of undeveloped evidentiary scraps hinting at childhood hardships and intellectual challenges.\textsuperscript{61} In other words, Strickler's chief mitigating factors were left untapped.

Highlighting the overarching structural role of mitigation, the ABA describes counsel's duty to fashion a mitigation strategy as global in nature. It states, "The duty to investigate, develop and pursue avenues relevant to mitigation of the offense or penalty, and to effectively communicate the fruits of those efforts to the decision-makers, rests upon defense counsel."\textsuperscript{62} The duty to marshal and present mitigation evidence in a capital case attaches to all stages of the proceedings.\textsuperscript{63} Toward this end, defense counsel's responsibility to create a mitigation strategy in narrative form cannot be overstated.\textsuperscript{64}

Unlike the intentional, targeted, and integrated mitigation approach that the ABA envisions, Strickler's defense counsel essentially rendered his intellectual profile meaningless by neglecting
to develop and contextualize its significance. Strickler's IQ was measured to be 75, a number that soundly placed him within the zone of the intellectually limited. Strickler's counsel called a neuropsychologist who examined Strickler for intellectual functioning to testify at the sentencing phase. The total direct examination of the neuropsychologist was three-and-one-half pages long. One-and-one-half-pages detailed the neuropsychologist's credentials. Defense counsel's only substantive questions directed to the neuropsychologist were the following:

**Question:** What does that [IQ of seventy-five] mean in terms of his range?

**Answer:** A full scale IQ of seventy-five places his intellectual functioning in a borderline range. The borderline range is in between mentally retarded and the low average range.

**Question:** How many people in his age group would be above him in IQ?

**Answer:** The average twenty-four-year-old male in the United States would achieve an IQ of a hundred so that places him at [the] fifty percentile. Meaning that ninety-five percent of individuals his age and educational background would achieve IQs higher than what he achieved.

**Question:** Is that, would that in anyway affect his decision making processes?

**Answer:** Intellectual tests are tests of verbal questions and visual and motor tasks that give an idea of how well someone thinks with regard to cognition, making appropriate choices, being able to work efficiently with their hands and it can be an indicator of how well someone will do, say, on a job or in school.

Unfortunately for both Strickler and for society's interest in zealous representation in capital trials, this line of questioning ended with the above. Defense counsel then immediately turned to five final questions requesting the names of the cognitive tests used and requesting minor details about how blocks are applied in such testing. Beyond the intellectual testing method, Strickler's counsel called a neuropsychologist to educate the jury on his limitations having to do with his intelligence, reasoning, and memory.

Beyond the intellectual testing, Strickler's other mitigating circumstances (i.e., the details of his childhood, family, social, and personal history from the neighborhood) were asked on a total of one-and-one-half-pages. The neurologist, who was called apparently to testify at the sentencing phase, turned a borrowed two-story neighborhood, was caring for her mother, stayed at her home, was provided no other questions were asked of the witnesses.

In fact, the prosecution's attorney had been asked to review the testimony at the top of its class and the defense counsel had made any effort to obtain corroboration. It had been minimally prepared, and no adequate presentation had been made.

How would a jury make sense of the actors—law enforcement?
Strickler’s IQ was cited him within the ’s counsel called a r intellectual func- total direct exam- and-one-half pages neuropsychologist’s in such testing. The questioning faded into a blasé treatment of testing methods. Glaringly absent were any attempts by defense counsel to educate the jurors concerning the effects intellectual limitations have on an individual’s memory, judgment, awareness, reasoning, and social interactions.

Beyond the issue of Strickler’s limited cognitive ability, Strickler’s other mitigation evidence, namely his psychosocial history (i.e., the detailed, exhaustive analysis of educational, medical, family, social, and other personal data) was directionless. Apart from the neuropsychologist, the additional five witnesses called to testify at the sentencing phase were family and friends. They were asked on average ten questions. One witness, a neighbor, was called apparently to recount how as a young boy Strickler returned a borrowed bike. Another witness, also from the neighborhood, was called and asked simply whether Strickler ever stayed at her house. She answered in the affirmative and no further questions were asked. Her testimony totaled seven questions. The transcript is a mere twenty-one pages long in its memorialization of defense counsel’s direct examination of all six witnesses.

In fact, the psychosocial report produced by the social worker asked to review Strickler’s past was labeled “Not a Final Report” at the top of its cover sheet. Nonetheless, neither the transcript nor defense counsel’s files indicated that defense counsel made any effort to obtain a complete report. Such a report would have been minimally necessary for any hope of a substantively adequate presentation of Strickler’s background.

How would a contemporary capital trial and its institutional actors—law enforcement, prosecutor, defense counsel, and ju-

71. Id. at 880–81.
72. Id.
73. Id. at 878–81.
74. Id. at 882–98.
75. Id. at 883–85, 887, 891–92, 894, 898.
76. Id. at 883–98 (excluding questions for identification purposes).
77. Id. at 892–93.
78. Id. at 883.
79. Id.
80. Id.
81. Id. at 878–98.
82. JANET WARREN, PSYCHOSOCIAL SUMMARY OF THOMAS DAVID STRICKLER 1 (1990).
rors—confront Strickler’s intellectual make-up and his psychosocial history if Strickler were charged, tried, and sentenced in 2015?

First, Strickler’s intellectual profile is a major window into how time has altered the capital litigation landscape. From a doctrinal perspective, the ground has shifted enormously since Strickler’s trial in the arena of protections for the intellectually disabled. In 2002, the Court ruled in Atkins v. Virginia that executing intellectually disabled persons violates the Eighth Amendment’s ban on cruel and unusual punishments.83 The Court devised a three-pronged analysis for determining intellectual disability: (1) the individual must show significant subaverage intellectual functioning, (2) the individual must have significant limitations in adaptive functioning for everyday living, and (3) the individual must have experienced these deficits prior to the age of eighteen.84

Consistent with America’s decentralized criminal justice model, the Court left to the states the role of implementing the particulars of this paradigm, yet recently held in Florida v. Hall that the states cannot set a fixed numerical demarcation within the margin of error on any given intelligence test.85 Relevant to the evidence surrounding Strickler’s intellectual status, the Court in Hall invalidated Florida’s scheme, which enforced a strict limit against any exclusions for individuals with IQs over 70.86 The language of Virginia’s death penalty regime has been interpreted by courts to have the same numerical break point of the sort invalidated in Hall.87

When the Court announces new categorically driven constitutional constraints in cases like Atkins, in which residual proce-

---

84. Id. at 318.
85. See Hall v. Florida, 572 U.S. __, 134 S. Ct. 1986, 2000-01 (2014) (holding that although the State can set the parameters for defining disability, it must not foreclose further exploration of a potential intellectual disability if IQ score is within margin of error).
86. Id. at __, 134 S. Ct. at 1994, 2000.

91. Id. at 632.
and his psychosocial and educational history, and sentenced in 1990.

A window into how this played out is instructive. From a doctrinal standpoint since Strickler's sentence, the intellectually disabled have suffered. In 2002, the Court was asked to execute intellectual capability. The Amendment's ban on executing intellectually disabled individuals devised a three-tiered model: (1) the individual must have intellectual functioning of less than 70; (2) the individual must be at least two standard deviations below the mean on an IQ test; (3) the individual must be within the margin of error zone deemed problematic in the Hall case. Overall, despite Justice Scalia's concern in the Atkins dissent about an avalanche of frivolous claims, only 7% of death row inmates had litigated this issue as of 2009.

While Strickler was deemed only "borderline" in his cognitive abilities, this status would still carry more weight in today's legal setting and could be used in plea negotiations or litigated in connection with sentencing. To be sure, Strickler's measurement would fall within the margin-of-error zone deemed problematic in the Hall case. Overall, despite Justice Scalia's concern in the Atkins dissent about an avalanche of frivolous claims, only 7% of death row inmates had litigated this issue as of 2009. In fact, 15% of capital defendants who successfully litigated Atkins claims across the nation have had IQs measured above 70.

The attenuated linkage between intellectual disability and culpability was one of the main rationales for the Atkins ruling. Importantly, these arguments were being made at sentencing long before the Court outlawed the execution of the intellectually disabled. A Sixth Circuit habeas case from 2006 involved a defense lawyer deemed ineffective for his sentencing performance in part because he failed to investigate and present mitigation related to the defendant's IQ of 77 as a basis for arguing reduced culpability. The Court of Appeals expressly noted the arguments under-
girding the Atkins ruling as the foundation for what should have been defense counsel's mitigation narrative. 93

From the data we have thus far concerning successful Atkins claims and in light of Hall, we now know that in the hands of capable capital defense counsel, Strickler's intellectual profile would be eminently contestable in terms of a legal bar prohibiting his execution and be powerfully resonant in relation to plea negotiations and sentencing mitigation strategy. Now it would be vetted by the full array of institutional actors charged with the administration of the death penalty in Virginia. Simply put, after Atkins and Hall, IQ and adaptive functioning would be a centerpiece of Strickler's defense team's approach in Virginia's contemporary capital defense litigation.

Another altered dimension in today's capital defense litigation is a greater, more muscular approach to the role of mitigation, especially as it pertains to the all-important sentencing phase. One year before Strickler's trial in 1989, the ABA set forth comprehensive guidelines for the appointment and performance of counsel in capital cases, describing the expansive range of duties required to deliver effective representation in such cases. 94 Those tasks included investigation into a defendant's medical history, special educational needs, employment history, family background, cultural environment, and other detailed biographical information. 95 In 2003, the ABA returned to the subject of capital defense when it produced more guidance stating that effective capital defense necessitated the coordinated and collaborative work of a team of experts—lawyers, fact investigators, mitigation specialists, and other professionals. 96 These standards have slowly, but imperfectly, taken root in the professional culture surrounding death penalty litigation. They were not widely at play in 1990 when Strickler was tried and sentenced.

Professors Carol and Jordan Steiker have addressed the ascendency of mitigation in death penalty litigation over the last twenty or twenty-five years in their analysis of how death penalty reforms are aligned with the changing standards (tho­ughts aside). First, like the increased legal and other tri­alia cost of capital judgment, the death penalty fits uneasily with inappropriate costs, including the death penalty's inappropriacy of age at the time of charge, a judgment abou­t the death penalty.

In addition to that, there was ample evidence to more fully mine the familial ethos. Strickler's faceted evidence of violence at age of sixteen in the hands of his alcoholic dysfunction. 99 De­cision. 100 His older sibling's violence in Strickler's family member and older siblings route also revealed that was often homeless.

93. Id. at 698.
94. AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989).
95. Id. at 11.4.1 § 2(C).
reforms are aligning at a functional level with abolitionist goals. They write:

The transformation of capital-trial defense, reflected in the ABA standards (though not fully in capital practice) has been destabilizing to the continued use of the death penalty in at least two ways. First, like the additional layers of procedural safeguards wrought by increased legal regulation, the emergence of robust individualization and other trial-preparation standards has dramatically raised the cost of capital punishment. Capital-trial costs are stunningly greater than their noncapital counterparts. Second, robust individualization fits uneasily with many of the traditional and religious defenses of the death penalty, because it presumes that "an eye for an eye" is an inappropriate command; the death penalty decision must be as much a judgment about the offender as the offense.

In addition to evidence of Strickler's intellectual impairment, there was ample traditional mitigation evidence which would be more fully mined in today's mitigation-centered capital defense ethos. Strickler's life was replete with mitigation evidence. Multi-faceted evidence existed to show that Strickler left school at the age of sixteen in the eighth grade, suffered severe violence at the hands of his alcoholic stepfather, and had signs of organic brain dysfunction. Defense counsel also omitted Strickler's drug addiction. His older sister and mother reported a chronic atmosphere of violence in Strickler's home. He was thrown off a truck by a family member at age three and suffered a fractured leg, and his older siblings routinely struck him. Post-conviction investigation also revealed multiple sources establishing that Strickler was often homeless during his childhood as a result of being ex-
pelled by his stepfather. Strickler's bouts with homelessness predated him entering puberty.

Not only has the legal profession elevated the significance of mitigation strategy since Strickler's trial, but the Supreme Court has also been more willing to require it as part of the Sixth Amendment right to effective assistance of counsel. One example is Rompilla v. Beard. In Rompilla, the Court found that defense representation fell below the level of reasonable performance when counsel did not investigate their capitaly charged defendant's previous conviction. The Court concluded that investigating the prosecutor's file relating to the defendant's prior conviction would have unearthed important information about the defendant's limited intellectual functioning.

In light of Rompilla and other cases, the Court appears ready to be a partner in the profession's sustained focus on the centrality of mitigation strategy. Even as ineffective assistance of counsel claims remain difficult to win, the Court is identifying mitigation evidence and strategy as a cornerstone in the delivery of a constitutionally adequate capital trial. Interestingly, Justice Souter highlighted the ABA's standards for capital defense counsel in noting that lawyers should now be very cognizant of mitigation evidence as an essential part of constitutionally reasonable representation.

Despite the essential role of mitigation in capital sentencing, a mitigation strategy never made its way into the jury's narrative understanding of Strickler's life. A detailed, comprehensive mitigation narrative, had a human perspective on Strickler, "Man." A well-crafted mitigation narrative would have countered the demeanor of the prosecutor, Strickler, his childhood dependencies, and the investigation which should have formed the framework for mitigation.

In sum, Strickler was a human being who was second only to Americans were put to death, and in Virginia were executed in 1976, Furman v. Georgia. In 1976, why 1999 was a bad year for death, Democrats supported and Republicans supported.

Why 1999 was the year after the executions in modern America.

103. See Sentencing Transcript, supra note 57, at 897; Amended Petition, supra note 99, at 48.
104. See Sentencing Transcript, supra note 57, at 897 (discussing how Strickler had to "strike out on his own" at a young age after being kicked out of the house by his stepfather).
106. 545 U.S. 374.
107. Id. at 382–83, 389.
108. Id. at 382–83.
109. See generally Sears v. Upton, 561 U.S. 945, 946 (2010) (finding that the state court failed to apply the correct prejudice inquiry when "counsel did present some mitigation evidence during Sears' penalty phase—but not the significant mitigation evidence a constitutionally adequate investigation would have uncovered").
110. Rompilla, 545 U.S. at 387–88 & n.6–7.
112. See supra notes 103–105.
114. Executions by Supreme Court Term, CapitalInfo.org/node/5741#V
115. Executions by Death Sentence, CapitalInfo.org/node/5741#V
116. 7 in 10 Favor Death Penalty, CapitalInfo.org/node/5741#V
The significance of the Supreme Court's decision in Strickland v. Washington,105 a part of the Sixth Amendment,106 One example is when the court found that defense counsel was not reasonably competent to provide the defendant with assistance of counsel.107 One conclusion that in adequately maintaining the defendant's prior work history, the information about the strange childhood of Strickler appears ready to be compromised on the central issue of the presentment of the delivery of a comprehensive mitigation narrative, a testament to humanize him in the minds and the hearts of the jurors.

In sum, Strickler was sentenced without any targeted, strategic vision to humanize him in the minds and the hearts of the jurors. Post-Atkins and with the heightened emphasis on the importance of mitigation evidence in recent decades, Strickler's sentencing phase of his capital trial would be markedly more robust in the present moment in strategy, investigation, framing, and narrative.

B. Declining Public Support for, and Declining Prosecutorial Pursuit of, the Death Penalty

Strickler was sentenced and executed at a time when Virginia was second only to Texas in total executions.113 Indeed, more Americans were put to death in 1999, both at the national level and in Virginia at the state level, than any other year post-Furman v. Georgia.114 Strickler and thirteen other Virginians were executed in the last year of the twentieth century.115 Nationally, Democrats supported the death penalty 2-1 during this time and Republicans supported it 7-1.116

Why 1999 was the numeric high point of state sanctioned death in modern America is a complicated question with a host of as-

112. See supra notes 19–44 and accompanying text.
115. Executions by State and Year, supra note 114.
serted explanations. My colleague, Professor Corinna Barrett Lain, writes that this era was one characterized by a “jurisprudential trend that was exceedingly hostile to death penalty challenges—and that trend was, in turn, part of a larger sociopolitical trend moving the same way.”

In the first nearly twenty years of the death penalty's modern era, prior to any definitive evidence to the contrary, many Americans could assume that the death penalty's asserted retributive purpose was unsullied. In short, the death penalty had many friends at all levels of the democratic pyramid—voters, jurors, prosecutors, judges—and it had yet to be questioned scientifically with the DNA revolution.

In terms of the national electoral climate, the “tough on crime” political ethos that followed the 1960s was deeply entrenched by the time many of the trials that gave rise to the 1999 cohort of executions occurred. Average, those executed in 1999 spent nearly twelve years on death row between their sentencing and execution. Thus, many of these defendants had been tried in the 1980s. That decade saw the beginning of the war on drugs era and the unveiling of the Willie Horton ad, which helped cripple Michael Dukakis's presidential campaign by marginalizing him as soft on crime. The gruesome cable-televised coverage of Ted Bundy’s execution for the serial murders of young Floridian women has even been suggested as a factor in the country’s death penalty support.

And what does today look like in terms of public support for the death penalty across the nation and in Virginia? Are capital trials affected by the ebb and flow of public support?

118. See Scott Shane, A Death Penalty Fight Comes Home, N.Y. Times, Feb. 6, 2013, at A14 (discussing Kirk Bloodsworth who, in 1993, was the first death row inmate to be exonerated by DNA evidence); see also Maryland, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/maryland-1 (last visited Feb. 27, 2015).
119. See infra notes 120-22 and accompanying text.
Corinna Barrett

by a "jurisprudential challenge to death penalty challengers sociopolitical twenty years of affirmative evidence to the death penalty's reinstatement." In short, the democratic nation had yet to be "tough on crime" entrenched by the 1999 cohort of the end of the war on drugs era helped cripple marginalizing him coverage of Ted Floridian woman's country's death penalty. For many reasons, deconstructing why and how the death penalty has lost support and why the nation is producing fewer executions is beyond the scope of this essay. The death penalty is a varied phenomenon across the thirty-two states that maintain it. Thus, it is a creature of idiosyncratic political cultures with specific substantive and procedural laws governing death penalty schema. In other words, there is no unitary "death penalty" in the United States.

Notwithstanding the complex patchwork that makes up capital punishment in America, there are macro trends broadly accepted as being contributors to the declining support of the death penalty. As such, there is a working consensus among scholars and other observers concerning the factors giving rise to this important development.

A widely noted contributing factor to the decline of the death penalty is the DNA revolution and the exonerations it thrust un-

123. Executions by State and Year, supra note 114; Executions by Year, supra note 114.
125. See Douglass, supra note 124, at __. Compare ACLU of VA, Unequal, Unfair and Irreversible: The Death Penalty in Virginia 3 (2000) [hereinafter Unequal, Unfair and Irreversible], available at www.acluva.org/publications/deathpenaltystudy.pdf (noting that in the 18 years between 1982, when Virginia executed its first inmate under post-Furman death penalty law, and 2000, there were 81 executions), with AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE VIRGINIA DEATH PENALTY ASSESSMENT REPORT 1 (2013) (noting that between 1975 and 2013, Virginia executed 110 inmates, meaning that in the 13 years between 2000 and 2013 there were only 29 executions), and JOINT LEGIS. AUDIT & REV. COMM'N, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT 17 (2002) (listing 170 capital murder indictments and 64 capital prosecutions between 1995 and 1999), with VA. INDIGENT DEF. COMM'N, ANNUAL REPORT 13 (2013) (noting that there were only 14 new capital case assignments in 2013).
comfortably before the American public.\textsuperscript{127} In a steady pace since Gary Dotson became the first DNA exoneree in 1989, the American people have been confronted with a regular diet of faulty convictions for cases typically involving rape and murder.\textsuperscript{128} As of today, there have been over 320 DNA exonerations nationally.\textsuperscript{129}

With regard to death row exonerations, 150 people have had their death sentences vacated, twenty of whom were cleared through DNA evidence.\textsuperscript{130} Virginia alone has witnessed sixteen DNA exonerations.\textsuperscript{131} Strikingly, a recent empirical study by a prominent death penalty scholar asserts that there is a 4.1% error rate for those sentenced to death.\textsuperscript{132} The public and its elected officials are slowly becoming hesitant about a practice that no longer has the veneer of infallibility.

Other factors affecting the diminished support of the death penalty include heavy costs, international normative pressures, and changing demographics.\textsuperscript{133} The emergence of life without parole is also credited with ratcheting downward the public’s support of this entrenched, controversial sanction.\textsuperscript{134} Whatever the mix, the death penalty is in a slow, but persistent decline.\textsuperscript{135} Six states have recently abolished the death penalty. Various reasons have been advanced by public officials in favor of not executing the innocent.

Notwithstanding, the sentiment that death is different than life must be swayed. Today, Strickler v. Greene,\textsuperscript{136} and others\textsuperscript{137} credit the role of jury potentially eliminating the special status of the death penalty in institutional and personal settings. The friends and families of the victim may matter even though the court has declared the criminal justice system inoperable—differences—socioeconomic status, geography, and others—are fatal.

No doubt this will continue to matter in the trial. It is clear that whatever the mix, the death penalty is in a slow, but persistent decline.


\textsuperscript{129} \textit{DNA Exonerations Nationwide}, \textsc{Innocence Project}, http://www.innocenceproject.org/content/dna_exonerations_nationwide.php (last visited Feb. 27, 2015).

\textsuperscript{130} Id.; \textit{Pennsylvania Governor Announces Moratorium on Executions}, \textsc{Death Penalty Info. Ctr.}, http://www.deathpenaltyinfo.org/node/6054 (last visited Feb. 27, 2015).


\textsuperscript{132} Samuel R. Gross et al., \textit{Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death}, 111 \textsc{Proceedings Nat’l Acad. Sci.} 7230, 7234 (2014).

\textsuperscript{133} See Art Swift, \textit{Americans: “Eye for an Eye” Top Reason for Death Penalty}, \textsc{Gallup} (Oct. 23, 2014), http://www.gallup.com/poll/178789/americans-eye-eye-top-reason-death-penalty.aspx (identifying cost as a basis for opposition to the death penalty); see also James Gibson & Corinna Barrett Lain, \textit{Death Penalty Drugs and the International Moral Marketplace}, 103 \textsc{Geo. L.J.} ___ (forthcoming 2015) (discussing various factors which have had an impact on perception of the death penalty).

\textsuperscript{134} Gibson \\& Lain, supra note 133 (stating the low rate of support for the death penalty where an alternative for life without parole is available).


\textsuperscript{136} \textit{States With a Death Penalty}, \textsc{Death Penalty Info. Ctr.}, http://www.deathpenaltyinfo.org/node/6054 (last visited Feb. 27, 2015) (listing states with death penalty).


\textsuperscript{139} See, e.g., \textit{Dunham v. Texas}, 417 U.S. 655 (1974), and \textit{Hernandez v. Texas}, 391 U.S. 590 (1968) (listing noncapital and capital cases); \textit{Watts v. Illinois}, 338 U.S. 64 (1949) (discussing various constitutional violations that affect the death penalty); \textit{Lakin v. Illinois}, 341 U.S. 193 (1951) (listing noncapital and capital cases); \textit{Challenges and Controversies in the Criminal Justice System}, \textsc{Death Penalty Drugs and the International Moral Marketplace}, supra note 133 (discussing various factors which have had an impact on perception of the death penalty).

\textsuperscript{131} See also J. \textit{Death Penalty in State and Federal Court}, \textsc{Death Penalty Info. Ctr.}, http://www.deathpenaltyinfo.org/node/6054 (last visited Feb. 27, 2015) (listing states with death penalty).


\textsuperscript{139} See, e.g., \textit{Dunham v. Texas}, 417 U.S. 655 (1974), and \textit{Hernandez v. Texas}, 391 U.S. 590 (1968) (listing noncapital and capital cases); \textit{Challenges and Controversies in the Criminal Justice System}, \textsc{Death Penalty Drugs and the International Moral Marketplace}, supra note 133 (discussing various factors which have had an impact on perception of the death penalty).
steady pace since 1989, the American public’s support for the death penalty has steadily declined. As of today, support for the death penalty is significantly lower than it was when Strickler was tried and sentenced to death, a time when support for the death penalty was over 70%. Whatever the reasons, the public’s support for the death penalty has steadily declined.

Six factors, which have been confirmed by numerous empirical studies, help explain why support for the death penalty has waned. First, the public’s support for the death penalty is shaped by its own experiences. For example, public support for the death penalty is lower in states with a history of executions or where people have had relatives or friends executed. Second, the public’s support for the death penalty is influenced by the normative pressures, which have been shaped by the moral and political climate of the time. Third, the public’s support for the death penalty is influenced by the public’s confidence in the criminal justice system. Fourth, the public’s support for the death penalty is influenced by the media’s coverage of executions, which has been shown to shape public opinion. Fifth, the public’s support for the death penalty is influenced by the public’s sense of justice and fairness. And, finally, the public’s support for the death penalty is influenced by the public’s sense of security and the belief that the death penalty is necessary to deter crime.

Notwithstanding why, the normative milieu here and now is different than it was when Strickler was tried and sentenced to death, a time when support for the death penalty was over 70%. Today, Strickler would have faced a community, prosecutor, and jury potentially more sensitive to wrongful convictions and the special status of the intellectually disabled. Also, these important institutional actors likely would have been more exposed to friends and family opposed to the death penalty. These factors matter even though they cannot be quantitatively measured. As criminal justice actors know deep in their bones, qualitative differences—sociopolitical, psychological, narrative, demographic, and others—affect trial outcomes.

As support for the death penalty has waned, numerous states have repealed the death penalty in the last eight years. Various reasons for repeal have been proffered by the leading public officials in these states, including cost and anxiety over executing the innocent.
even those who support the death penalty, bring a more cautious approach to the enterprise today. There is no reason to assume that Strickler’s case would not have been meaningfully affected by the waning public support for the death penalty. He almost certainly would have been the beneficiary of the public’s increased hesitancy on the death penalty.

C. Creation of the Capital Defender Units: The Benefits of Intentional Investment for Capitally Charged Indigent Defendants

Virginia was well-known nationally as a low performer in the delivery of indigent defense at the time of Strickler’s capital trial. At the time, there were inadequate qualifications for court-appointed counsel. A patchwork of public defenders and lawyers from court-appointed lists provided indigent defense in capital cases. As of the year 2000, 97% of death row inmates since 1977 in Virginia had court-appointed counsel.

Strickler had two court-appointed counsel to represent him during his capital trial. One was a public defender and the other was drawn from the private bar. Undoubtedly, they were both under-resourced and had not received adequate training in this complex area of the law. In fact, the public defender had been deemed ineffective in a previous capital case.

Even apart from the Brady issue the Court agreed to hear, Strickler’s trial was pocked with infirmities. Any full examination of the trial would expose many of the operational problems of the death penalty. So often these problems are invisible to the pub-

140. See ACLU OF VA., BROKEN JUSTICE: THE DEATH PENALTY IN VIRGINIA 31 (2003) (hereinafter BROKEN JUSTICE), http://www.aclu.org/files/FilesPDFs/broken_ justice. pdf (indicating the recent improvement that the Virginia legislature has made in ensuring better quality lawyers for capital cases).


142. BROKEN JUSTICE, supra note 140, at 28.


144. UNEQUAL, UNFAIR AND IRREVERSIBLE, supra note 125, at 18.

g a more cautious reason to assume meaningfully affected by the public's interest. He almost certainly was broken, justice. pelf has made in ensuring... of errors establishing grounds for unlawful detention).

Unsurprisingly, Strickler's trial had these problems as well.

How might Strickler's capital trial have been different under Virginia's current capital defender units? What quality and resource differences would be at play?

In 2002, the Commonwealth of Virginia created four regional capital defender units. These units were designed so that capital-eligible defendants would receive more uniform, expert defense services while facing the threat of losing their lives at the state's behest. This was a major development in the history of the delivery of indigent defense services for the state. Virginia paid its court-appointed capital defense counsel less than any other state prior to switching to the capital defender unit system.

In today's capital litigation environment, Strickler would have had a highly trained capital defender, along with a well-trained appointed co-counsel, whose sole responsibility would have been to meet the needs of their capitally charged defendants. They almost certainly would have had direct access to a fact investigator and a mitigation specialist, both of whom would have been additionally trained and singularly assigned for this work.
this essay’s time machine, the fact investigator may well have been able to unearth Stoltzfus’s inconsistent statements, a development that would have changed the complexion of plea bargaining, the trial, and sentencing. Undoubtedly, the mitigation specialist would have systematically delved into Strickler’s educational, family, medical, and social background. This, in turn, would have unquestionably led to a cohesive, compelling narrative at the sentencing portion of Strickler’s trial.

With regard to long-vocalized aspirational goals around parity and a level playing field between defense and prosecution in the indigent defendant arena, the prosecutor would have known from the outset that he would be dealing with a formidable trained and experienced defense team. This alone could have led to plea negotiation benefits for Strickler. In toto, these enhancements in defense resources would today have an enormous effect on the quality, direction, and strength of Strickler’s defense.

Beginning with the reinstatement of the death penalty in Virginia in 1976, and including up until the creation of the capital defender units in 2004, 84% of capital cases that went to trial resulted in a death sentence. Between 2005 and 2011, only 47% of the same type of cases resulted in death sentences. These units are widely viewed as repositories for subject matter expertise and dedicated professionals who infuse the process with this specialized knowledge. No doubt Strickler would have been better off in the expert hands of these legal advocates who now have the structural and improved, if not sufficient, fiscal infrastructure to support their democratically critical mission. The passage of time tells us that the existence of the capital defender units have substantially changed for the better how indigent capital defense is delivered.

This case study is a critique of strictly temporally contingent that social entrepreneurs in born. Unlike in the case of achievers, in the case of controls which are worn and haggard, are beneath the rationalization to rationalize the relative and judicial.

---

152. See Douglass, supra note 124, at ___.
153. EVALUATING FAIRNESS, supra note 151, at 142.
154. Id.
156. See MALCOLM X, supra note 157.
158. See Steiker & STIEBER, supra note 2, at ___.
may well have de-
ments, a devel-
mitigation spe-
 into Strickler's
round. This, in
 compelling
rial.

S around parity
have known from
edly trained and
ed to plea nego-
d the qual-
penalty in
went to trial re-
only 47% of
These units
expertise and
with this special-
been better off
now have the
rastructure to
passage of time
units have sub-
ital defense is

III. IMPRESSIONS AND IMAGININGS

This case study about one man's capital trial and its narrative is a critique of how arbitrariness affects the death penalty in a strictly temporal sense. The cultural observer Malcolm Gladwell contends that so much of extraordinary success for athletes or entrepreneurs in life can depend on the year and month they were born. Unlike in the happy Gladwellian sense concerning super-achievers, in the death penalty arena, the kismet of time often controls which defendants live or die at the state's direction. Although the historicity of any case is quite obviously significant in a legal system that evolves over time through case law and statutory changes, Strickler's trial would be markedly different today. This is of greater moral consequence to a democracy than changes made to other areas of the law. To borrow a famous phrase, "Death is different."

Watershed constitutional rulings such as Atkins remind us that we really do not have a moral hold on this mighty power of the state to take human life. Rulings of this sort seem not to announce glorious new terrain, but rather they seem to be shameful admissions of what we already knew or deeply suspected. The increasing ways in which the public is either rejecting the death penalty outright, wanting to limit its scope, or hoping that the delivery of defense services is strengthened to avert the retributive nightmare of executing the innocent make our "moment in time" death penalty system especially difficult to support in a modern society dedicated to notions of human dignity and transparency.

As the modern era of the death penalty nears its fortieth birthday, the death penalty brings to mind the prickly adage that by forty you have the face you deserve. The face of the death penalty is worn and haggard. Its return trips for cosmetic nips and tucks are beneath the dignity of the world's major democracy. Our wish to rationalize the death penalty's operation through myriad legislative and judicial interventions is a failed undertaking.

158. See Steiker & Steiker, supra note 97, at 211–15.
Most importantly, the backward glance of this essay illustrates how the temporal space of doctrinal developments, public policy, and societal mood is a major arbitrary factor in death penalty outcomes. These sociopolitical elements are by their very nature immutably time-bound and thus they burden the death penalty, and us—as the citizens in whose names the penalty is imposed—with another reminder of its problematic, unsteady administration. Contrary to the hopes of reformers and retentionists, time has not healed what ails the death penalty. Instead, time exposes its decaying moral and operational foundation. If the past is indeed prologue, the future’s interventions, short of abolition, are likely to be no different. Temporal arbitrariness has been the modern death penalty’s one and only constant.

159. Cf. JOINT LEGIS. AUDIT AND REV. COMM’N, supra note 125, at 29 (demonstrating the importance of locality in capital crime outcomes).