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

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MARY

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. In 1990, Strickler was convicted and sentenced to death for the robbery, abduction, and murder of a young African American woman. On July 21, 1999, Strickler became the sixty-eighth person executed in Virginia in the death penalty's modern era. 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. 4 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. 5 Thirty-four days later, Strickler was executed. 6

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. 7 This inversion is likely explained by socioeconomic factors. As the death penalty’s history demonstrates, the identity of the victim

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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).

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matters in terms of how the victim was an up

On the whole, I wonder how time influenced capital trials. My aim is focused on how capital trials have been altered in the last two decades. I illustrate the role of the temporal in the place of adversarial engagement during plea-bargaining, the sentencing phase of trial, and post-conviction litigation. The story of Strickler’s capital trial.

The body of this paper provides a core narrative summarizing and illuminating factors. Part II situates Strickler’s trial by the role of adversarial engagement during plea-bargaining, the sentencing phase of trial, and post-conviction litigation. The story of Strickler’s capital trial.

In closing, Part III examines how the temporal in capital trials can affect the death penalty. The death penalty experience painfult, ineffective, and executive
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matters in terms of when the penalty is deployed and here the victim was an upwardly mobile college student full of promise.8

On the whole, the Strickler case is a fitting specimen to examine how time intersects with the death penalty as an institution. My aim is focused mostly on how the trial narrative would have been altered in today’s doctrinal, capital defense, and normative environments. I train my sight on the “story” to understand the role of the temporal in capital litigation because narrative is where capital trials rise or fall. Narrative, as shaped through adversarial engagement with evidence, is the essential determinant during plea-bargaining, the guilt or innocence phase, and the sentencing phase of capital trials.9 Capital litigation lawyers and post-conviction lawyers know it is the “story” that drives outcomes.10 The story of the case was at the heart of Strickler’s post-conviction efforts and at the heart of Strickler’s capital murder trial.

The body of this essay is divided into three parts. Part I is a narrative summary of the case with factual and procedural highlights. Part II situates the case in the temporal space in which it occurred by addressing three structural realities—death penalty jurisprudence, improved capital defense in Virginia, and deep cultural shifts concerning the criminal justice system’s fallibility and the death penalty’s legitimacy and role—which are substantially different today than they were at the time of Strickler’s trial.

In closing, Part III draws conclusions, compressed in scope and depth due to the short-form nature of this essay, about how the Strickler capital trial and its temporal dimensions further reveal the death penalty’s crumbling edifice of legitimacy. The Strickler experience painfully signals that forty years of judicial, legislative, and executive fits and starts aimed at making the death

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. Eight days later, her body was found in a secluded area in Augusta County, Virginia. 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. 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. Henderson was tried separately, convicted of first degree murder, and received three life sentences.

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 Strick-
temporal arbitrariness in the death penalty case.

The death penalty is="emphatically disturbing and mood: disturbing.

"TEMPORAL ARBITRARINESS"


According to Stoltzfus’s testimony at trial, Whitlock was last seen at a local shopping center. She testified to seeing Whitlock at the mall. She also provided eyewitness information to police and eventual testimony at trial concerning Strickler’s and Henderson’s conduct at the mall. Stoltzfus testified that she saw Strickler and Henderson behaving disruptively inside the mall while she and her fourteen-year-old daughter shopped, and that she later saw Strickler aggressively push and manhandle his way into Whitlock’s car outside that same mall. She further testified that the events were alarming enough that she vacated her own vehicle and repeatedly asked Whitlock if she was okay.

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

Strickler was deprived. Or, as stated by Justice Souter in his and Justice Kennedy’s dissent in which they concluded Strickler was deprived of a fair trial, her testimony provided the “narrative force” which sealed Strickler’s fate. Ultimately, 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.

17. Id. at 307 (Souter, J., dissenting).
18. Id.
20. Id. at 484–85.
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 were not shared with enforcement.\(^34\) These were the course of events years after the trial.

In one of these instances investigating detectives:

I want to clarify something I remember this detective tells me. When he was on the scene he had different things. He told me something that helped me jog my memory.

In that same instance of [being] so far off, I remember thinking, “9:00 pm thinking this case was closing.” Stoltzfus had run up to a car. I think she wondered about dates and another person also was there.

Stoltzfus also overheard a man in a store in the mall at current time saying, “could have been a window.”\(^38\) She remembers this of course, stating, “when I was sure of,” she had run up to a car.\(^39\) She wondered what was going on.

This was not the investigating detective’s thought, he thought “spent several hours going at current phase”.

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27. Though the Court in *Strickler* found that other evidence was sufficient to support the robbery charge, I would contend that the defendant is correct in that the robbery charge “bowled almost entirely from inferences from Stoltzfus’ testimony.” *Strickler*, 527 U.S. at 294–95.


29. *Strickler*, 527 U.S. at 305 (“[T]he Commonwealth’s closing actually did include two brief references to Strickler’s behavior in just grabbing a complete stranger and abducting her.”).

30. See id. at 305–06 (Souter, J., dissenting) (“Stoltzfus’s testimony helped establish the ‘principle,’ as the prosecutor put it, that Strickler was ‘the aggressor,’ the dominant figure, in the whole sequence of criminal events, including the murder, not just in the abduction. If the defense could have called Stoltzfus’s credibility into question, the jurors’ belief that Strickler was the chief aggressor might have been undermined to the point that at least one of them would have hesitated to recommend death.”).

31. See supra notes 27–30 and accompanying text.

32. See *Strickler* v. Netherland, No. 3:95CV924, slip op. at 13–14 (E.D. Va. filed Oct. 15, 1997); see also ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 5 (3d ed. 1997) (“Research resoundingly proves that the story format is a powerful key to juror decision making.”).

33. See supra notes 27–30 and accompanying text.

34. See *Strickler*, No. 3:95CV924, slip op. at 13–14 (E.D. Va. filed Oct. 15, 1997).

35. See id. at 16–17.

36. Id. at 8.


38. Id. at 16–17.

39. Id. at 26–27.

40. Id. at 27.
important witness at prosecution’s theory offenses to capital but her testimony at Ian” and Henderson added to this. Predictably, characterization of trial in its effort to death sentence un­ments, the prosecution active—a theme that not entirely crippled, statements.

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that Strickler was generated evidence never became part

of the back-and-forth testing that is supposed to occur through ev­idence disclosure, cross-examination, and opening and closing arg­uments. Unknown to defense counsel was a bevy of conflicting statements that Stoltzfus made during her interactions with law enforcement. These communications were only uncovered during the course of federal habeas corpus investigation almost eight years after the trial.

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 con­structs. When I didn’t remember any Mall purchases, I didn’t re­member 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.

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.

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.” 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. She wondered, “Were those 2 memories the same person?”

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, “[t]heir totality 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

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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's Open file policy, the detective’s records, and a 1974 Virginia Supreme Court decision in the Brady v. Maryland case. To work preeminently toward the faith and good order of institutions, faith and good order prevents obvious breakers of enforcing the efficiency by a number of documents within its remit.

To work preeminently toward the faith and good order of institutions, faith and good order prevents obvious breakers of enforcing efficiency by a number of documents within its remit.

Not surprisingly, these would have colored the basis of Stoltzfus’s recollection. The vacuum left by Stoltzfus’s extensive portrait of Stoltzfus’s testimony made it hard for Strickler to close the avenues of further investigation. The details in the lawyer's account were inexcusable.

That said, the Supreme Court’s Brady reformulation made challenging to work preeminently toward the faith and good order of institutions, faith and good order prevents obvious breakers of enforcing the efficiency by a number of documents within its remit.

51. See id. at 17.
52. 373 U.S. 83, 87 (1963) (‘‘The Brady reformulation of the ‘Brady Play’, see generally, due process clause of the 14th Amendment, is that the prosecution must disclose evidence favorable to an accused to which the prosecution has access and that evidence which is material either to guilt or to punishment’’).
53. See generally, see generally, due process clause of the 14th Amendment, is that the prosecution must disclose evidence favorable to an accused to which the prosecution has access and that evidence which is material either to guilt or punishment.
55. Id. at 7.
for his “patience for the record,” she stated that she “don’t recall” the detective’s file and never merged into the prosecutor’s file. 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.

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. 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’etre 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

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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 this scope is a mitigation strategy from the broader member they are defense litigation. The necessity for an intellec­
tual capacity to divining who is for launching a cure the death heart of defense intellectual deficiency factors for more than defec­veloped evidentiary intellec­tual challenges factors were left.

Highlighting that the ABA describes over­pursue avenues and to effectu­ally decision-makers shal­all stages of the responsibility to cannot be overstated.

Unlike the intellec­approach that the tentially rendered
More primitively, confirmation bias, preferences, opinions, and the mark in its decision making of the trial in light of realities drive penalitv's temporal circumstances de-audition, not his ability to push aside rodding, but any to answer all about a wide range Frank review, accumulate of "soft" socialization, an age of empiricism is fundamental administrative notions which are not an entity. 65 So with thelessness of Strickler's childhood—a time marked into focus during Strickler’s sentencing phase. 57 An omission of this scope is a near de facto reflection of an absence of defense mitigation strategy. 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. 59 Mitigation is the very heart of defense counsel’s role at sentencing. 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. 61 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.” 62 The duty to marshal and present mitigation evidence in a capital case attaches to all stages of the proceedings. 63 Toward this end, defense counsel’s responsibility to create a mitigation strategy in narrative form cannot be overstated. 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

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58. See Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (both demonstrating the factual need to present individualized consideration in order for the death penalty to be constitutional).
59. See Woodson, 428 U.S. at 304.
61. Sentencing Transcript, supra note 57, at 34, 36, 38, 40, 42, 878–98.
62. Supplementary Mitigation Guidelines, supra note 60, at 678.
63. Id.
64. See Burt, supra note 9, at 879 (internal citations omitted).
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 is, Strickler's other mitigation evidence (i.e., the details of his family, social, and educational background) from the neuropsychologist, which were asked on a second occasion, was called apparently for the first time turned a borrowed notebook, was at her house, stayed at her house, and then turned another line of questioning. The transcript does not memorialize of witnesses.

In fact, the persistence of defense counsel asked to review what seemed at the top of its defense counsel's and defense counsel's any effort to obtain adequate of that has been minimally been adequate presentation.

How would a society-actors—law enforcement...
Strickler’s IQ was within the range counsel called his intellectual functioning is in between his and one-half pages in terms of his 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-

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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-prong 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.
\(^{87}\) Compare Va. CODE ANN. § 19.2-264.3:1.1 (2008) (requiring at least two standard deviations below the mean on a standardized intellectual functioning test) and Hedrick v. True, 443 F.3d 342, 366-67 (2006) (finding that an IQ of 70 or less corresponds with the two standard deviations below the mean requirement) (citing Johnson v. Commonwealth, 591 S.E.2d 47, 59 (2005) (vacated on other grounds); Walker v. True, 399 F.3d 315, 320 (2005)), with Hall, 572 U.S. __, 134 S. Ct. 1986 (invalidating a Florida statute that requires the same two standard deviations as the Virginia statute).
and his psychological evaluation and sentenced in
window into how
since Strickler's
usually disabled.
executing intellectual
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the intellectual
at least two standard
in the margin of error)
and Hedrick v.
the defendant's IQ of 77 as a basis for arguing reduced culpability. The Court of
89. Sentencing Transcript, supra note 57, at 42, 879 (testimony of Dr. Janet Warren and Dr. Thomas Ryan).
90. Blume et al., supra note 88, at 628.
91. Id. at 632.
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. They write:

The transformation begins with the standards (then) used to determine the constitutionality of the death penalty. First, like the expansion of the definition of mental retardation and other triad conditions, the cost of capital punishment — rather than their non¬-capital counterparts — fits uneasily with the death penalty, as does the inappropriate continuation of an ineffective death-in-execution ethos. Strickler's evidence is particularly poignant: he was a profoundly affected individual. 99 DeJong notes that there was ample evidence of violent behavior by Strickler and his family members, but the evidence of violence was often home life.

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. Multifaceted 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-

98. Id. at 233.
100. See Sentencing Transcript, supra note 57, at 889-91; Amended Petition, supra note 99, at 45.
102. See Amended Petition, supra note 99, at 48.
pelled by his stepfather.\textsuperscript{103} Strickler’s bouts with homelessness predated him entering puberty.\textsuperscript{104}

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.\textsuperscript{105} One example is \textit{Rompilla v. Beard}.\textsuperscript{106} In \textit{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.\textsuperscript{107} 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.\textsuperscript{108}

In light of \textit{Rompilla} and other cases, the Court appears ready to be a partner in the profession’s sustained focus on the centrality of mitigation strategy.\textsuperscript{109} 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.\textsuperscript{110}

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 mitig-
The significance of the Supreme Court's involvement in Strickland v. Washington, 
was part of the Sixth Amendment jurisprudence. One example of the Supreme Court's role was
demonstrated in United States v. Ewell, where the Court found that
defendants who were found to be unreasonably penalized due to capital charges,
were entitled to receive a new trial. The Court concluded that inquests to identify 
defendants' prior information about capital sentencing, a
tactic that was intended 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. 
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. Strickler and thirteen other Virginians were executed in the last year of the twentieth century.
Nationally, Democrats supported the death penalty 2-1 during this time and Republicans supported it 7-1.

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. On 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.

All these years later, the death penalty’s support has declined in Virginia, though it is still fashionable to it. In the past twenty years, fewer and fewer death penalty challenges and fewer executions is beyond the ken of the sociopolitical trend that was hostile to death penalty challenges. Thus, it is a specific substantiation of a larger trend in the United States.

Notwithstanding the death penalty’s support in Virginia and the rest of the United States, as being controversial and as being contributory to the current decline in death penalty support.

124. See generally John Douglass, The Future of Virginia’s Death Penalty (noting that in the 1980s Virginia executed 126 people); see also VIRGINIA DEATH PENALTY info. ass’n, EXECUTING IRREVERSIBLE: THE UNFAIR AND IRREVERSIBLE PUNITIVE SYSTEM OF VIRGINIA’S DEATH PENALTY (2013) (noting that in the 1980s Virginia executed 126 people); see also Virginia’S SYSTEM OF CAPITAL DEATH PENALTY (noting that in the 1980s Virginia executed 126 people); see also VIRGINIA’S DEATH PENALTY REPORT 2013 (noting that in the 1980s Virginia executed 126 people).
125. See Douglass, supra note 124, at 2 (noting that in the 1980s Virginia executed 126 people);

All these years after Strickler's trial, the death penalty is in decline in Virginia and across the nation.\(^{123}\) Maybe the fever has broken.\(^{124}\) In the Commonwealth, there are fewer capital murder indictments, fewer capital murder trials, fewer death sentences, and fewer executions now than since the death penalty's reinstatement.\(^{125}\)

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.\(^{126}\) 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-
comfortably before the American public. 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. As of today, there have been over 320 DNA exonerations nationally.

With regard to death row exonerations, 150 people have had their death sentences vacated, twenty of whom were cleared through DNA evidence. Virginia alone has witnessed sixteen DNA exonerations. 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. 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. The emergence of life without parole is also credited with ratcheting downward the public's support of this entrenched, controversial sanction. Whatever the mix, the death penalty is in a slow, but persistent decline. Six

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). States with the death penalty have reduced their reliance on it, and it is clear that the death penalty is in a slow, but persistent decline.

No doubt this scenario will continue. It is clear that the death penalty is a controversial and divisive issue, and its continued use will be scrutinized by public officials, courts, and the media. In light of the evidentiary challenges and the high rate of exonerations, it is clear that the death penalty is not a foolproof system. The increasing support for alternatives and the diminishing support for the death penalty reflect a growing recognition of its inherent flaws. As the United States grapples with the ethical and practical implications of capital punishment, it is clear that the death penalty is an issue that will continue to be debated and scrutinized in the years to come.
states have repealed the death penalty in the last eight years.136 Various reasons for repeal have been proffered by the leading public officials in these states, including cost and anxiety over executing the innocent.137

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%.138 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.139

No doubt this changed climate would have impacted Strickler’s trial. It is clear that policymakers, prosecutors, and the public,

136. States With and Without the Death Penalty, supra note 126.
138. See, e.g., Duren v. Missouri, 439 U.S. 357, 360 (1979) (holding that a prima facie constitutional violation can be proven if females are excluded from venire); Bidish J. Sarma, Challenges and Opportunities in Bringing the Lessons of Cultural Competence to Bear on Capital Jury Selection, 42 U. MEM. L. REV. 907, 912-13 (2012) (discussing the importance of humanizing a defendant to the jury through a cultural lens); Edith Greene, Temporal Arbitrariness, 14 LAW & HUM. BEHAV. 439, 443-44 (1990) (discussing the potential effect of the media on jury decisions).
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 public at large and have the Stoltzfus mentioned in the sub-cellular version, tactical errors, and other state procedures which dictate the fate of a defendant’s trial had their origin in Virginia’s current and future system.

In 2002, the Virginia capital defender system, capital eligible defense services on the state’s behest, paid its court-appointed co-counsel. For other state priorities, other state priorities.

In today’s capital system, those states that had a highly trained court-appointed counsel to meet the need for counsel and a mitigated/legalservices.pdf.

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.

Having a more cautious reason to assume meaningfully affected mality. He almost the public's in-

Benefits of Indigent

performer in the Strickler's capital trial. 

agreed to hear, a full examination of the problems of the issue to the pub-

146. See Stephen B. Bright, Death By Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants, 92 W. VA. L. REV. 679, 685 (1990) (discussing how the lack of appropriate standards for inadequate counsel means death sentences are the result of the "luck of the lawyers [the defendants] draw").


151. See AM. BAR Ass’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE VIRGINIA DEATH PENALTY ASSESSMENT REPORT iv (2013) [herein-
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.152 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.153 Between 2005 and 2011, only 47% of the same type of cases resulted in death sentences.154 These units are widely viewed as repositories for subject matter expertise and dedicated professionals who infuse the process with this specialized knowledge.155 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 oriented entrepreneurs in law as born.156 Unlike in the case of achieving, in this legal control, which of course is not the case. Although the history is in the legal system, the statutory changes made to that system today. This is of course, if the changes made to the phrase, “Death of Strickler.”

Watershed cases, we really do not need to state to take home. We proclaim glorious admissions of what is being increasing ways in which the delivery of defense is a nightmare of expectations. As the modern day, the death penalty is forty you have the state is worn and haggard and are beneath the rationalize that legislative and judicial.
This case study about one man’s capital trial and its narrative is a critique of how arbitrariness afflicts 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.
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.

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