

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

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I. INTRODUCTION

“Myths aren’t fai

severity of their crimes, Holmes evaded the death penalty,⁶ while Jackson received the death sentence.⁷ The striking disconnect demands

actually accomplishing its intent.⁸

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

A. Victims of the Death Penalty

It is not surprising that as we have evolved as a society, opposition to the death penalty has reached an all-time high since the 1960s. In 2019, when Gallup polled Americans regarding the death penalty, sixty-

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

If we consider the number of victims to be an indication for which in aligning these interests.

2. Arbitrary Outcomes

Instead of relegating the death penalty to defendants who may be sentences is arbitrary and inconsistent.³¹ As Justice Potter Stewart

a

C. A Month of Sundays

Retribution is no doubt a driving consideration when a county seeks the death penalty for a crime.⁴⁸ In fact, the death penalty itself is

Because of this, such justice and punishment may seem very personal to the families of the victims. The victims, or the state itself, may view the death penalty as a way to seek swift justice when it comes to the alleged. The third myth of the death penalty is the time in which it takes to achieve the desired result.

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

Even once a defendant reaches trial, there are many possible post-trial

living expenses, counties must make similar budgetary decisions in determining how to operate throughout the year.⁶³ Although the

-out
capital case.

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

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

In deciding on the origin of these funds, states may have a wide variety of options. Ideally, a large amount would preferably come from

property tax revenues could be channeled to support the fund.

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income tax or sales tax revenue. Regardless of the method decided upon, a state would have ample room for determining the best method of funding.

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

C. Increasing Efficiency

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

1. Intentional Prosecution

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

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

⁶⁶

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

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

Following this logic, consider the implications of intentionally prosecuting the worst of the worst individuals who commit mass casualty crime.⁷² In an overwhelming number of occasions, there is no question as to whether or not mass casualty defendants *actually*

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

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

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

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

3. *Collective Improvement*

An unforeseen benefit from the creation of a state death penalty establishment of a state death penalty prosecutor may in turn invigorate those who represent capital defendants and allow for capital defense specialization.⁷⁹ The

Under the current regime, each state and potentially each county within a state have different requirements regarding experience that a lawyer must satisfy to represent a capital defendant. Although these requirements intend to raise the bar for the quality of representation an defendants are overworked, underpaid, or lacking the trial experience⁸⁰ Moreover, the Supreme Court does not require that defendants get the *best*

The facilitation of such a broad reservoir of capital defense attorneys may incentivize specialization in such litigation as well. And defense

