



Donald Trump and the Death Penalty Professor Clive Stafford Smith JD OBE

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What I refer to as *Hateful-Populism* involves riling up hatred (and sometimes fear) for a “vilified minority” in order to motivate your political base. The playbook of the *Hate-Populist* is depressing, because it always has three fundamental features: one, focusing on a real (or imagined) problem in society that has the potential to anger or frighten people; two, identifying a “vilified minority” who can credibly be blamed, drumming up hatred against them; and three, promising loudly, but invariably falsely, that the solution is to persecute this small group of people, whereupon the world will somehow become a better place.

It is the task of the human rights advocate (you) to prevent this by providing power to these powerless people. Ultimately, of course, we must also offer a proper solution to any real problem.

A. Hateful-Populism and the Death Penalty: Creating an alluringly simple false solution to the complex issue of American Violence

The American death penalty is the classic example of *Hateful-Populism*: in this instance, the U.S. does have a serious “crime problem”. There are various sensible things that can be done about this, but they involve time and a great deal of effort. For example:

- it would help if the U.S. had a better education system where parents and society offer genuine hope, inspiration and training to young people;
- we must get rid of guns (since it is obviously harder to shoot someone without one) and other weapons;
- we need a grown-up approach to addiction – arguably, if drugs are legalized and taxed, and those who abuse them were helped off their addiction, there will be vastly less for us to call a “crime”;
- if there was a proper health and welfare system, there would be less motive to seek money;

And so forth.

Instead, Donald Trump offers us the notion that executing a small number of people will somehow solve all our troubles.

This is, of course, total nonsense, partly because it cannot be done under the U.S. system, and partly because it would anyway not achieve its goal. However, it is a nonsense that appeals to many who want a rapid solution – after all, if a politician says he will solve the perceived threat of violence in your neighbourhood by initiating sensible, grass-roots policies that may take fifty years, you will probably be dead long before you witness the promised Nirvana.

Like many false promises, the truth behind capital punishment is well-hidden.

B. A similar example of “Hateful Populism” comes in the shape of Guantánamo Bay - as an illustration of how the Government hides the truth to try to maintain its Mythology

Consider, for example, the promise made with respect to Guantánamo Bay - that it would strike a huge blow against the “worst of the worst” terrorists responsible for 9/11. The essential feature of Guantánamo Bay was that it was designed to be secret, miles away from anywhere, difficult or impossible for lawyers and family members to reach, with limited judicial oversight and strictly controlled media access. Thus, in its early days, the American people knew nothing about the people there, and could not know (until we exposed it) that President George W. Bush’s assurance that he was truly making the U.S. safe was a tropical mirage.

The building blocks of secrecy in Guantánamo were quite familiar with those of us who had done death penalty cases: it was a prison far away from prying eyes. The media could only go there in tightly choreographed visits (one of my chastisements from the Admiral in charge came when I asked a French journalist how his propaganda tour had been that day). The only lawyers were military officers, who were expected to obey orders.¹ Civilian lawyers were not allowed until the Supreme Court ordered it, and even then every word our client spoke was deemed classified and had to be passed through the censors. In the bizarre military commission “courts” the sound system could be cut off the moment anyone said something the faceless controller did not like.

Nobody in the detainee’s family could ever visit; the majority of Red Cross video calls to this day are literally a back-and-forth: the prisoner records something, it goes through the censor to the family; there is a delay, then something comes back from the family member.

My colleague Joe Margulies coined what became our mantra: *“If we open it up, they will close it down.”* It would be seen for the embarrassing sham it was. As the work went forward, every time we got someone released home, we had to prove to the satisfaction of all six of the main U.S. intelligence agencies that the client was “no threat to the U.S. or our coalition partners” – in other words, that they were not even bad guys, let alone the worst of the worst. As of today

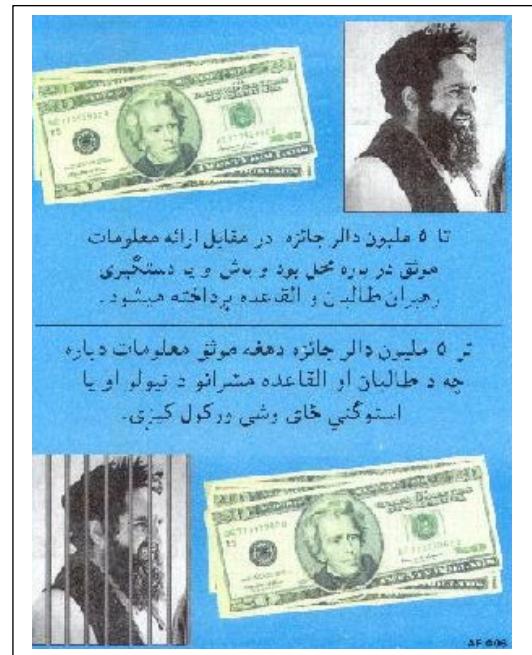
¹ This underestimated many of them: my military co-counsel in Binyam Mohamed’s case, Lt. Col. Yvonne Bradley, was threatened with a capital offense herself for disobeying a direct order from the military judge, her superior officer – before she could face a firing squad, I intervened to have her take the Fifth.

(a relatively short two decades later) we have met this difficult standard in 768 out of 780 cases, which works out at a fraction under 98.5%.

Certainly, we proved that the promise of Guantánamo was a lie. Even George W. Bush ended up calling for the prison to close. What other human activity reaches the wrong result over 98% of the time? I asked a cabin attendant on a British Airways flight to the U.S. what she would do if the plane reached the wrong airport or, worse yet, crashed in flames 98% of the time: understandably she would not work on it. Not only did Guantánamo and its torture cells achieve nothing to end extremism, it provoked more: the hypocrisy of the U.S. - *"We stand for human rights and condemn repressive regimes who violate them; but we jettison all that nonsense when someone attacks us"* - was prompting many alienated young Muslim men to join the ranks of al Qaida, then ISIS, then anyone whose mission was to attack the U.S.

Hypocrisy is, of course, the yeast that ferments its own hatred.

How could something go so horribly wrong? Even though my experience of the intelligence officers over the last 23 years inspires no faith that they could ever keep America safe, intelligence failings could not be the only explanation. It took a while, but ultimately it turned out that the main problem was the “bounty programme”, where the U.S. was paying anything from \$5,000 to \$20 million to those who turned in suspects – the money all going to the notoriously corrupt Pakistani military. Money is invariably a corrupting influence.



General (and self-appointed President) Pervez Musharraf explained how this worked in his autobiography:

We have captured and handed over 369 [terrorists] to the United States. We have earned bounties totaling millions of dollars. Those who habitually accused us of 'not doing enough' in the war on terror should simply ask the CIA how much prize money it has paid to the government of Pakistan.

This was on page 237 of the copy of *In the Line of Fire* that I bought. However, in the next edition the passage was edited significantly, as the U.S. had been shocked to hear that corrupt elements of the military were pocketing the loot. To me, it was quite a revelation: at least one major explanation for the catastrophe of Guantánamo was the age-old issue of money, of taking bribes.

C. The Parallel world of the Death Penalty: Hiding the Fact that the Emperor Wears no Clothes by giving the Death Row prisoner no tools to fight the case

I give Guantánamo as an example, as it is clear to everyone how the system was meant to work (covering up the truth). But it was merely an extrapolation of the death penalty world. Indeed, one element of Guantánamo that initially drew me to the work was that everyone there was facing execution for such retrospectively concocted “war crimes” as Conspiracy to Aid the Enemy. (It made one wonder: is not Aiding the Enemy the job of any enemy?)

The U.S. death penalty system takes a series of steps to protect the people from the truth. When it comes to “Death Row”, or prison in general, the motto is “out of sight, out of mind.” The gas chamber of the Mississippi State Penitentiary at *Parchman* is way out in the middle of the delta, 128 miles from Jackson. *Angola*, the Louisiana State Prison, is a former plantation named for where the slaves were abducted in Africa, hidden in a corner of the state hemmed in by the Mississippi River, so inaccessible that in the 1970s a federal court had to force the government to build a proper road up there. Most descriptive of all is *Starke*, the State Prison and long-time home of Old Sparky, the state electric chair, set in the middle of nowhere in north Florida.

It is not easy for friends or family members to come for visitation days. It is therefore unsurprising then that a tiny number of the population have ever met someone on death row; many more – supposedly 7 percent of the British population - think they have encountered a space alien.² The general population, whether in the U.S. or the U.K., requires the media to let them know who these condemned people are. All Western media is obsessed with “true crime” stories, some of which are more “true” than others. There are plenty of films about horror, and more involve “truly evil” serial killers than people failed by the legal system. So the “vilification” of the “Death Row Inmate” is a simple matter.

Thus, few people actually know the saving graces of people who end up on death row – how they are all better than the worst 15 minutes in their lives. Obviously I have a reasonable idea of this, as I have met hundreds of condemned people. Yet it is convenient to dehumanise them based on the worst fifteen minutes of their lives, if your narrative is that they are the cause of all of society’s problems.

The truth gets covered up some more because of the problem the prisoner has in getting help – generally effective legal representation but also investigation and expert testimony – throughout the case. At trial, his lawyer was probably incompetent, almost certainly paid little more than minimum wage. To quote myself (and the more credible Professor Bill Quigley!) in an article:

² I should note that I cannot say for sure whether our own King Charles piloted an alien ship over Canada in 1975, as ‘revealed’ in The King of UFOs.

Although prosecutors in Louisiana enjoyed generous funding, in those days, there was a rule that state-appointed defense could spend no more than \$1,000 on a given case [for the lawyer, investigation, and experts], all told. “You get what you pay for,” Clive Stafford Smith said. [Professor Bill] Quigley told me a typical capital defense at the time was “like having heart surgery [done] by an EMT.”³

If defense lawyers have been underpaid at trial, the system grants the death row prisoner nothing at all in the years of appeals. The U.S. Supreme Court has long held that once your initial appeal is denied, the death row prisoner has *no right to counsel*, and must either represent himself or rely on a volunteer.⁴ In the case of Willie Russell, I filed a “*Motion for a Pencil*” in the Mississippi Supreme Court. He had written it at my instigation, shortly before his execution was due to be carried out, to illustrate the madness of it all:

Monday

To the Justices of the Mississippi Supreme Court.

I do not want to lose my only chance to ask for state post-conviction release. But I have no lawyer. I am not in the position that I can help myself. I am locked in a cell 23 3/4 hours a day. I do not have a pencil (I borrowed this pen for this note). I do not have paper (I borrowed this paper to). I do not have any legal papers in the cell with me. All that they have allowed me to have in this cell is (2) sheets and a blanket to sleep on. I don't have the materials to write legal briefs even if I had the training to do so. I am set to be executed tomorrow-night. (Please) appoint me a lawyer.

*Sincerely, Willie C. Russell*⁵

Willie was meant to represent himself in challenging his execution; fortunately his death was stopped, albeit with only 40 minutes to go. It was absurd enough on its face, but we later proved that he was further handicapped by being mentally disabled, and also that he was probably not guilty.

The Supreme Court has also held that, even if some do-gooder lawyer volunteers to help him, *merely* proving that Willie was innocent would not be a sufficient to stop the death penalty. In *Herrera v. Collins*, 506 U.S. 390 (1990), the Court held that a fair trial is all one has the right to, and a fair trial can reach the wrong result. Hence there is no constitutional right not to be executed if one is innocent.

³ Piper French, *The Human Cost of Jeff Landry’s Drive to Resume Executions: Chris Duncan’s death sentence—built on the testimony of two discredited doctors—illustrates just how faulty the system can be*, Bolts (March 20, 2025), available at <https://boltsmag.org/the-human-cost-of-jeff-landrys-drive-to-resume-executions/> (accessed 2025.11.22).

⁴ *Murray v. Giarratano*, 491 U.S. 1 (1989) (O’Connor, J., concurring) (“there is nothing in the Constitution or the precedents of this Court that requires that a State provide counsel in postconviction proceedings.”).

⁵ Stafford Smith & Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 Loy. L. Rev. 55, 87 (1999).

All this is designed to make it harder to show that the Emperor is wearing no clothes.

D. Executing the wrong Person is clearly not going to Solve the “Crime Problem”

If we are able to prove people innocent, it is certainly not going to solve the crime problem if we execute the wrong person. At the height of the horrific New Orleans crime wave there were 833 murders in four years in a city of 484,000 – in 1999 there were 158 murders, in 2000 there were 204, in 2001 there were 213 and in 2002 there were 258.⁶ For those who think England a particularly dangerous place, in the same years there were an average of 12 murders in London, a city of 7.273 million - so New Orleans' rate was an incredible *260 times worse*.⁷

In those years my charitable office in New Orleans took on 171 potential capital cases at the moment the crime first happened, and tried to give each person charged a first-rate defense. We called it the “*Preliminary Hearing Project*,” as our goal was to see if we could get some of the flimsiest cases dismissed at the first court hearing, saving a great deal of time and energy. Another aim was to evaluate how bad the system really was. The result surprised even me. Out of 171 cases, we *acquitted* 126, an extraordinary 74%. (In the vast majority of cases, the prosecution agreed to dismissal, as we shared all the evidence with them.) Only one person was convicted of first-degree murder, and he did not get death.

While we did not publicise our success because it would have ended the DA's cooperation, the conservative version of this story is that at least 74% of the real killers were still out on the street. The most important part of our study was to figure out how this was happening. It was all about the same corrupting influence - money.

The reader may be aware of the *Crimestoppers* programme, since it is one of the many attention-grabbing, but ill-conceived, ideas British politicians have adopted after being told what a great success it is in America. In New Orleans, if a citizen witnesses a crime, or learns about a perpetrator, she can call the *Crimestopper* number. It is all anonymous, rather than giving her name she is given a number – let us say, 1-2-3-4. Then if the tip leads to an arrest, she calls back, gives her number (1-2-3-4), and instructs them where in some French Quarter alleyway she would like her tax-free cash delivered to her, in a brown bag.

Looking back on it, I should have recognized the flaw long before I did. I worked it out by 1996, when I was representing a very young (16-year old) lad called Shareef Cousin. By the time we had completed the investigation of his status as the youngest person on Death Row in the country, we had an extremely strong case for his innocence. One element of it all was the *Crimestopper* tip in his case: it said he was five-foot-three and skinny. This was perplexing, as when I met Shareef he was five-eleven and pretty muscular, around 175 lbs (12 stone 7 lbs). But then we got a copy of the file on his one prior criminal conviction, for the heinous crime of CINS (“*Child In Need of Supervision*”, or being out after dark in New Orleans). He had been 12 years old: it reflected that he had been five-three, 113 lbs (just over 8 stone).

⁶ <https://nolacrimenews.com/statistics/historical-statistics/>.

⁷ <https://www.murdermap.co.uk/statistics/homicide-england-wales-statistics-historical/>.

The key to learning the truth about what the police are up to is to find someone so disaffected that she will breach the “thin blue line” of loyalty that binds them. I asked Regina Small, the soon-to-be-ex-wife of lead detective Anthony Small whether he had called in the tip? She looked surprised and asked how we knew. She said that yes, the NOPD had a sideline that involved calling in *Crimestopper* tips on an African-American male they did not like, going out and arresting him, and then anonymously collecting the cash. In Shareef’s case, she said, it had been worth \$11,500 (quite a bonus for an officer starting on \$34,000 a year⁸).

Regina was in divorce proceedings and so angry at him that she told us a number of his other ‘sideline’ operations – the Rolex on his wrist came off one dead body; when executing one search warrant, he stole a number of tropical fish for his collection; and so forth. The *Crimestoppers* was the kicker; it began to explain how the police could get their arrests so wrong in what was then my home town.

What we learned about *Crimestoppers* was one reason we conducted the *Preliminary Hearing Project*. It was clear that this corruption was a significant factor in our extraordinary exoneration rate. Surely every player in the system would want to set this right – nobody could want to keep arresting the wrong person? Not so. The mayor’s office wanted nothing to do with a story involving their utter failure to detain the right person. We went to the federal authorities and they showed a similar disinterest. We publicized my latest rather silly project called *Stop the P.I.G Awards* (“Perjury In Government”) - given to the officer to had lied most blatantly that month. Nothing came of it.

While the proponents of the death penalty are all about someone “taking responsibility” when it comes to the people I represent, but they have created rules that make it very difficult to hold them liable for their own misdeeds. We sued Detective Anthony Small for his own falsification of the case against Shareef, and the federal courts dismissed the case, based on the policeman’ “immunity”.⁹ Other cases against him hit the same buffer.¹⁰ Small “retired as retired as an exceptional Homicide Detective” after his thirty-years service.¹¹

It is an irony that has seemingly escaped many that Donald Trump’s first foray into a very public support for capital punishment was in the case of the Central Park Five. Infamously, following the assault and rape of a jogger in 1989, Trump took out full-page ads in the city’s major newspapers calling for the return of the death penalty for those held responsible —inciting racial tensions in the city. They five men who were convicted ended up suing him for defamation because, at the 2024 Philadelphia presidential debate, he justified his actions, saying:

⁸ <https://bjs.ojp.gov/content/pub/pdf/lpd00.pdf>.

⁹ *Cousin v. Small et al.*, 325 F.3d 627 (5th Cir. 2003). This absurd rule has been created by the courts out of an irrational notion that the prosecutors and police who had framed Shareef have to have “immunity” because this is necessary to free them up to do their job without fear or favour. No such rule applies to the defense, of course.

¹⁰ *Gable & Hill v. City of New Orleans, Anthony Small, et al.*, <https://www.kaplangrady.com/wp-content/uploads/2023/10/Gable-v.-New-Orleans-Complaint.pdf> (Messrs. Gable and Hill would have been twice as unlikely to prevail against Small in this case as he had died the year before).

¹¹ <https://www.legacy.com/us/obituaries/nola/name/anthony-small-obituary?id=35686393>.

that at the time the teenagers “admitted – they said, they pled guilty. And I said, well, if they pled guilty they badly hurt a person, killed a person ultimately.”¹²

Actually, the victim is still alive, the five pled not guilty for the crimes and were belatedly exonerated by DNA. They have not even got compensated for what was clearly slander: the litigation is still pending after the judge recently rejected yet another effort by Trump’s lawyers to have it dismissed.¹³

E. When it comes to the Death Penalty, there is a looming problem facing liberals in the U.S. – the massive backlog of cases

The deck is truly stacked against the death row prisoner. Indeed, before we look at the light at the end of the tunnel, it is important to recognize that there is more darkness ahead.

Some of the foreboding about a resurgence of capital punishment is quite insubstantial. When Trump took office for the second time, one of his first acts was to promulgate Executive Order 14164, which was touted as “restoring the death penalty”. Trump’s problem here is that President Joe Biden, in his final days, granted commutation to 37 of the 40 people on *federal* death row. He left his successor with three people who Trump could execute (and no doubt will, if he is given the chance). There was little he could do about those who had been commuted, and all he could do in his EO but demand that Pam Bondi, his new Attorney General, should be as nasty as possible to them:

The Attorney General shall evaluate the places of imprisonment and conditions of confinement for each of the 37 murderers whose Federal death sentences were commuted by Biden and ensure these prisoners are imprisoned in conditions which are consistent with the monstrosity of their crimes.

Sure enough, she immediately moved as many as she could to the SuperMax prisons like ADX:

Inside the federal supermax tucked away in Colorado’s high desert, prisoners spend 22 to 24 hours a day locked alone inside concrete cells that are smaller than a standard parking space. The prison, formally called United States Penitentiary Florence Administrative Maximum Facility but better known as ADX, has earned the nickname “*The Alcatraz of the Rockies*” because of its harsh conditions. Contact with others is extremely limited; programming, such as anger management or religious services, is broadcast over televisions in the cells, while psychological evaluations happen through the steel doors. Belongings are also strictly limited and prisoners aren’t allowed to hang photographs or drawings on their walls. Exercise time out the cell happens alone inside large cages called

¹² <https://www.npr.org/2024/09/11/nx-s1-5108632/central-park-five-trump-debate>.

¹³ <https://www.cnbc.com/2025/06/28/trump-central-park-five-defamation.html>.

“dog runs”, where prisoners can only walk a few paces each direction. Prisoners are given virtual reality goggles to simulate the outdoors or community. A former warden once called ADX a “clean version of hell,” and said that living there was “far much worse than death.” Olympic Park bomber Eric Robert Rudolph and Rami Yousef, mastermind of the 1993 World Trade Center bombing, are both incarcerated at ADX.¹⁴

This is true even if, like Billie Allen, they might be innocent.¹⁵ Prison conditions are bad everywhere, but they don’t get much ink in the papers, so perhaps it helps the cause that Trump goes out of his way to be a barbarian.

It is all very well his demanding in his EO that:

the death penalty should be sought for the death penalty, regardless of other factors, for every federal capital crime involving: the murder of a law enforcement officer; a capital crime committed by an alien illegally present in this country.

However, his demand runs headlong into the American juror, who has been steadily rejecting the death penalty in recent years. In 1996, 316 people were given death nationwide, but in the first half of 2025 the number of new sentences was just ten, lower even than 2024.¹⁶

When I started my capital work in earnest, in 1984, support for executions ran at almost 85%. Most recently, in October 2025, the

results of a Gallup survey show[ed] just 52% of respondents favored the practice. Those results followed a steady decline in Americans' support for capital punishment since the

early 1990s, according to Gallup's earlier polls, and they also marked a slight drop in support from 2024.¹⁷

In other words, just as the Supreme Court found itself out of step with the nation in 1972 when trying to abolish capital punishment, now Trump (and the Trump Court) are out of step in trying to ramp it up.

This does not mean Trump's *Hateful-Populist* strategy is entirely failing. As Trump promotes his entirely false claim that no country will be safe without the death penalty, his bluster will have dreadful consequences, but this has been inevitably for a long time. This is because

¹⁴ Lauren Gill, *Death Row Prisoners Granted Clemency by Biden Brace for “Living Hell” Under Trump*, Bolts (Nov. 24 2025), available at <https://boltsmag.org/death-row-clemency-adx-supermax/>.

¹⁵ <https://www.freebillieallen.com/case-facts#:~:text=Billie%20Allen%20was%20wrongfully%20convicted,was%20arrested%20the%20next%20day.>

¹⁶ <https://deathpenaltyinfo.org/news/mid-year-review-2025-new-death-sentences-remain-low-amidst-increase-in-executions-2>.

¹⁷ <https://www.cbsnews.com/news/us-death-row-executions-2025-rise/>.

there are still around 2,100 people on death row across the U.S.¹⁸ Translate this into basic statistics, and if someone was executed every day of the working week, 260 a year, it would take over 8 years to kill everyone, even without adding anyone new in the meantime.

I have been predicting for a long time, dejectedly, that there would inevitably be a flood of executions. The dam that held them up was the federal courts, but now there is an extraordinary

six-Catholic conservative majority on the Supreme Court who listen to the teaching of the Pope when he condemns abortion, but ignore him on the death penalty. Thus the dam is very frail. When I was doing this work full time from New Orleans, we used to get last-minute stays quite often. In the case of my client Larry Lonchar, it came just 58 seconds before his official execution time, which was enough to give me PTSD, let alone Larry – and we won unanimously when the Supreme Court ultimately heard the case. I have not seen a last-day stay from the Supreme Court in 2025, and they have routinely overturned lower court judges who have ordered that an execution be delayed.

This has provided space in the *Hateful-Populist* world for the wannabe-Trump successor Florida Governor Ron DeSantis. For a while, he was Trump's worst enemy. When DeSantis was running for president, he derided Trump's age, comparing him unfavorably to Joe "Father Time" Biden:

The Florida governor's campaign took advantage of it too, creating an "[accident tracker](#)" to record "how long the former president can go without a workplace accident on the campaign trail."¹⁹

Trump replied with various habitually erudite comments, including a photo [that] had text on it that read, "*Here is Ron DeSantimonious grooming high school girls with alcohol as a teacher.*" A vomit emoji also accompanied the caption.²⁰

It seemed the two of them would never exchange a civil word.

But all this changed as DeSantis watched the success of his mentor's *Hateful Populism*. On the back of Trump's Death Penalty executive order, DeSantis pushed through more executions than Florida has ever seen before in its history – 15 of the 41 nationwide up to November. This is unlikely to stop come Christmastime as there are still 253 prisoners on Florida's death row, and DeSantis (who I first encountered when he was a military officer in Guantánamo Bay) has only 3 years before his next run for president.

Inevitably, then, there is going to be the bloodbath that I have long foreseen. There is just no other way the backlog of people. A few courageous and principled governors may grant clemency, but the other backstop to the backlog (the Courts) will not do their job.

¹⁸ It is difficult to say precisely how many people are on Death Row USA at any time as, even if your sentence was vacated by a court, that does not mean you leave death row: at any given time there are as many as 175 cases where the State may appeal to have it reinstated, or seek a resentencing trial.

¹⁹ <https://www.politico.com/news/2024/12/04/trump-desantis-hegseth-defense-00192688>.

²⁰ <https://www.newsbreak.com/mediaite-520570/3305925526125-here-are-the-5-worst-things-trump-said-about-desantis-before-florida-governor-endorsed-him>.

* * *

F. Despite all this, the Excesses of the Trump Big Lie about it may well spell the death of the Death Penalty

There is plenty of doom for us and our clients, to be sure. Too many people are going to die. But what will the consequences be for death penalty as an institution?

When I was involved, for a quarter century, with the battle in the trenches against wave upon wave of prosecutors trying to kill my clients, we used to pray for the dead and fight for the living. Now based in the U.K., I have the comparative luxury of fighting for the dead as well. I have also long thought that, if we focus on illustrating the individual stories that show the *Hateful Populist* theory is nonsense, it might spell the end of executions.

Briefly, this is the essence of the theory. In *Kansas v. Marsh*, 548 U.S. 163 (2006), the late Supreme Court Justice Antonin Scalia proclaimed that there is not “a single case -- not one -- in which it is clear that a person was executed for a crime he did not commit.” Meanwhile, the current Chief Justice John Roberts stated during his 2005 Senate confirmation hearings that death row exonerations demonstrate that the legal system’s safeguards are working. The comments by the Chief Justice are, of course, pretty foolish. We have now exonerated 200 people from Death Row, and Glynn Simonns spent 48 years facing execution before he was finally deemed innocent. However, such comments make clear that the only path some will accept if we are going to prove that the system is truly too fallible to assess who should live and who should die is to prove that innocent people have been executed.

To this end, I have been conducting the “*Post Mortem Project*” (PMP) for the past seven years, where I – along with a bevy of students and others - have been looking into the cases of the 1,650 (and rising) people who have been executed since 1977. This has involved collecting and analyzing hundreds of thousands of pages of materials. As of this writing, I have 204 cases that seem to have a strong case of innocence – over 12 percent of those executed. Indeed, it is telling that we may prove more innocent people who were executed than have thus far been exonerated while they were still alive.

Some of the trends are interesting. I originally thought that we would see a majority of the innocence cases from the early days of the “modern era”,²¹ when nobody knew what they were

²¹ The “modern era” of the American death penalty is normally dated from 1976. Through the 1960s the death penalty was dying out, and in 1972 the Supreme Court seemed to apply the *coup de grace* in *Furman v. Georgia*, 408 U.S. 238 (1972), when the court declared all existing capital statutes to be unconstitutional. While the court split in various ways when it came to the reasoning, the general theme was that the laws were too vague, and resulted in the imposition of the death penalty in capricious ways, “These death sentences are cruel and unusual,” wrote Justice Potter Stewart, “in the same way that being struck by lightning is cruel and unusual.” However, in the next four years, 35 of the 50 states enacted new statutes, seeking to overcome the caprice in different ways. It was an instance, perhaps, of the court being out of tune with the pro-death penalty views of a significant majority of the U.S. population. In 1976, the Court retreated from the promise of *Furman*, albeit striking down those that imposed an automatic death sentence on everyone convicted of capital murder, *Woodson v. North Carolina*, 428 U.S. 280 (1976), but upheld schemes that supposedly provided “guided discretion” to the jurors. *Gregg v. Georgia*, 428 U.S. 153 (1976). The first person executed under this newly minted system was Gary Gilmore in 1977. Ironically, today,

doing and the best lawyers were losing cases. Back then, we were all guilty of ignorance: my original inspiration for the PMP was Edward Earl Johnson, who I represented for the last three weeks of his life in 1987. Back then, we thought we could win everything with “legal technicalities” – and our error was spiced, at least in my case, with youthful arrogance (I had never lost a case before then). Edward’s case taught me that facts are much more important than law – after all, it was at his funeral that I met Mary, the woman who gave him an alibi. She said she had been with him at the time of the crime. When I asked, aghast, why she had not told anyone that, she said she had: she had gone to the (white) police with her information and they told her to mind her own business.

It made me think of the movie *Ghost Busters*: “Who you gonna call?” For an African American falsely accused of sexually assaulting an elderly white woman and killing a white police officer, who are you going to call? These are two of most heinous crimes imaginable in the mind of the white majority, and there just is no F.B.I. agent going to ride in on his - white - horse.

I launched into the PMP in part to exact my revenge on the State of Mississippi for killing Edward.

In terms of the curve of cases, my expectation has turned out to be wrong. We are seeing more, rather than fewer, innocence cases in recent years. This may have something to do with having a Supreme Court that is intent on clearing out death row, applying their theory that everyone is guilty, thereby running a judicial steamroller over Justice.

In the end, I hope the PMP will bring the stories of these unfortunate people to a wide audience. Who can even imagine what Todd Willingham, aged 23, was going through when a fire burned down his trailer home, killing his three girls (Amber aged two, and one-year old twins Karmen and Kameron). Who can imagine how much worse this was when he was falsely charged with capital murder by a prosecutor who said he set the fire to cover up abuse of the children (though his wife said he “spoiled the kids rotten”). How did he feel when Dr. James Grigson (aka “Dr. Death”) testified he was a sociopath and would inevitably kill again, corroborating another doctor whose “diagnosis” of future danger was based in part on Todd’s posters of *Iron Maiden* and *Led Zeppelin*. Most of all, what went through his mind as, on February 17, 2004, the Supreme Court denied his final appeal and he was strapped in for execution?

I hope we make films about these unfortunate people. But the students I have working on the cases also plan podcasts, music, and other art work. For myself, I am most keen on making the VR of the day of your execution, and a videogame: “*John Jackson, Ace Prosecutor: Anyone can convict a Guilty Person, but it takes an Ace to execution someone who is Innocent.*”

Whatever we do we cannot rest until we have magnified these terrible stories over and over, and demonstrated the ugly sins of the death penalty. Until the death penalty is dead and buried.

public support for the death penalty has fallen a long way, but the Supreme Court is again out of synchronicity, and the six-justice majority are intent on carrying out executions.

* * *

The Blood that is Being Spilled may at least (and at Last) Help Convince America to do away with the Death Penalty

It is very possible that the “Rush to Justice” by Donald Trump and the Trump Supreme Court will – as ever - end up with an increasing number of obvious Injustices. But all this will only happen if we make it so by continuing to represent the unfortunate people who die.

I invite those interested in helping it to happen to work with us on the project. You can always get me at clivestaffordsmith2020@gmail.com, and there is barely any talent that we cannot exploit...

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