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# Examining Death Penalty Ballot Measures: A Review of Austin Sarat’s *The Death Penalty on the Ballot*

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Michael Conklin\*

## INTRODUCTION

Austin Sarat’s 2019 book *The Death Penalty on the Ballot*<sup>1</sup> chronicles U.S. death penalty ballot measures over the last one hundred years. Since the early twentieth century, there have been twenty-nine capital punishment ballot measures, and abolitionists lost twenty-five times.<sup>2</sup> Since 1968, all fifteen of the death penalty ballot initiatives proposed by pro-death penalty advocates have been approved.<sup>3</sup> Sarat provides far more insight into the issue than simply tallying the results of ballot measures. He provides illuminating, behind-the-scenes analysis of the tactics used by both abolitionists and retentionists.

This review is primarily limited to six topics: (1) inflated survey results; (2) race; (3) retentionist arguments; (4) abolitionist arguments; (5) deterrence versus incapacity; and (6) the death penalty as undemocratic. However, Sarat’s book is not limited to these topics. It covers many additional areas related to death penalty ballot measures, such as the distorting influence of money and special interest groups<sup>4</sup> and whether or not initiatives and referendum rules that require a two-thirds majority violate the spirit of the “one-person, one-vote” principle.<sup>5</sup> The book provides an inside glimpse into abolitionist and retentionist strategies, which start before a ballot initiative is

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<sup>1</sup> AUSTIN SARAT, *THE DEATH PENALTY ON THE BALLOT* (2019).

<sup>2</sup> *Id.* at 6.

<sup>3</sup> *Id.* at 16.

<sup>4</sup> *Id.* at 11.

<sup>5</sup> After all, this results in a negative vote being equal to two positive votes. *Id.* at 10-11.

even created.<sup>6</sup> Selecting which election a ballot referendum will be on can be a strategic move. “Jack initiatives” can be used to increase voter turnout in a targeted demographic of the electorate which can benefit a specific candidate.<sup>7</sup> In one instance, a proposition to abolish the death penalty and a proposition to remove legal protections from capital case appeals were both on the same ballot.<sup>8</sup> It was determined that, in the peculiar result of both propositions passing, the one with the most “Yes” votes would override the other.<sup>9</sup>

Covering death-penalty ballot measures over a one-hundred-year period also uncovers many intriguing stories. Examples include an abolitionist who accused retentionists of being “more attached to the death penalty than to their mothers”<sup>10</sup> and a botched electric chair execution due to the seemingly trivial last-minute replacement of the required, authentic sea sponge with a supermarket synthetic sponge.<sup>11</sup>

## INFLATED SURVEY RESULTS

Results of death penalty surveys vary vastly based on the phrasing of questions. The standard survey question is from the Gallup Poll and asks, “Are you in favor of the death penalty for a person convicted of murder?”<sup>12</sup> The results of the Gallup Poll question consistently show that more people support than oppose the death penalty.<sup>13</sup> But even this finding underreports

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<sup>6</sup> *Id.* at 14.

<sup>7</sup> An example is the placement of same-sex marriage ban initiatives in the 2004 election. This likely caused higher voter turnout among Christians and therefore helped George W. Bush win reelection. *Id.*

<sup>8</sup> *Id.* at 166.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 117.

<sup>11</sup> *Id.* at 108–109.

<sup>12</sup> *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/death-penalty.aspx> [<https://perma.cc/3M76-UWXG>] (last visited July 12, 2019).

<sup>13</sup> For more than fifty years, the Gallup Poll has returned more positive responses than negative. The most disparate result was in the mid-nineties when 80% replied “Yes” and only 16% replied “No.” *Id.*

support for the death penalty due to the biased phrasing of the question. In the U.S., only around one in 700 murderers are executed.<sup>14</sup> But the Gallop Poll question appears to be asking about support for executing most—or even all—people convicted of murder (which would include second-degree murder and manslaughter). It is likely that some people who support the death penalty as currently implemented would nevertheless state opposition to executing the majority of people convicted of manslaughter.<sup>15</sup>

Another survey question asks, “If convicted murderers in this state could be sentenced to life in prison with absolutely no chance of ever being released on parole or returning to society, would you prefer this as an alternative to the death penalty?”<sup>16</sup> This phrasing suffers from the same problem as the Gallup Poll question in that answers are in response to all convicted murderers. Furthermore, this phrasing suffers from the additional problem that a life sentence with “absolutely no chance of ever being . . . return[ed] to society” is a complete fiction. As evidenced by the high-profile Willie Horton incident discussed at footnote 32 below, there is always a chance that a convicted murderer serving life without parole (LWOP) could be returned to society. Therefore, using the results of this purely hypothetical question to

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<sup>14</sup> Based on an average of 18,000 annual murders and 25 annual executions. *2017 Crime in the United States*, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION (last visited Apr. 16, 2020), <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/murder> [<https://perma.cc/J8PB-9DGX>]; *DPIC Analysis: Execution Trends Continue to Decline in 2017*, DEATH PENALTY INFORMATION CENTER (Oct. 23, 2017), <https://deathpenaltyinfo.org/news/dpic-analysis-execution-trends-continue-to-decline-in-2017> [<https://perma.cc/36KT-GT2J>].

<sup>15</sup> For an analogy, most people would likely answer in the negative if asked, “Are you in favor of twenty-year prison sentences for grand-theft auto?” But, many of those same people would likely support the ability to sentence someone to twenty years for a particularly heinous incident of grand theft auto by a repeat offender. It would be misleading to provide the results of this hypothetical grand theft auto survey to make claims regarding public support for the complete abolition of 20-year prison sentences for grand theft auto.

<sup>16</sup> HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 99 (1997).

demonstrate support in the real world for LWOP over the death penalty is misleading.

Sarat makes this same mistake of presenting misleading survey findings that result in diminishing the actual level of public support for the death penalty. One such example is in reference to a poll that allegedly shows only 29.9 percent support for the death penalty.<sup>17</sup> However, the question used to reach this conclusion was, “In your opinion, which punishment is appropriate for people convicted of murder?”<sup>18</sup> The options were as follows:

1. Life in prison with possibility of parole
2. Life in prison with no parole
3. Life in prison with parole in 40 years
4. Death penalty
5. Unsure

Again, this underreports support for the death penalty by asking about all “people convicted of murder” instead of asking whether people want the death penalty as an option for some murderers.

In a book that extensively covers tactics in death penalty ballot measures, it is unfortunate that the issue of utilizing deceptive statistics was not addressed. Retentionists use this tactic as well, such as when they refer to a person-specific death penalty survey question, such as asking if the respondent supports the death penalty for the Oklahoma City bomber, Timothy McVeigh,<sup>19</sup> to inflate public support for the death penalty.<sup>20</sup>

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<sup>17</sup> SARAT, *supra* note 1, at 79.

<sup>18</sup> *Survey on the Death Penalty*, PRISM SURVEYS, [https://urldefense.proofpoint.com/v2?url?u=https-3A\\_www.aclunnebraska.org\\_sites\\_default\\_files\\_field-5Fdocuments\\_Necappu01-5FReport-5FMemo-5F1.pdf&d=DwMF3g&c=KWdgdGIPkIHv0aAlAqn4Ng&r=uei0xwRTa53vqWtKqX6yZuOOPBE-magGWRZU6-XTjrM&m=doQwZA94pDxRVcRzcdcU04Cnb7RpYJEYJafGOT7sbT0&s=ULg3ubQ4afzzx36LeY\\_YXBTPH2iCko4yERZedNFHm0&e=\[https://perma.cc/83G9-JNEH\]](https://urldefense.proofpoint.com/v2?url?u=https-3A_www.aclunnebraska.org_sites_default_files_field-5Fdocuments_Necappu01-5FReport-5FMemo-5F1.pdf&d=DwMF3g&c=KWdgdGIPkIHv0aAlAqn4Ng&r=uei0xwRTa53vqWtKqX6yZuOOPBE-magGWRZU6-XTjrM&m=doQwZA94pDxRVcRzcdcU04Cnb7RpYJEYJafGOT7sbT0&s=ULg3ubQ4afzzx36LeY_YXBTPH2iCko4yERZedNFHm0&e=[https://perma.cc/83G9-JNEH]).

<sup>19</sup> Jeffrey M. Jones, *Vast Majority of Americans Think McVeigh Should Be Executed*, GALLUP (May 2, 2001), <https://news.gallup.com/poll/1567/vast-majority-americans-think-mcveigh-should-executed.aspx> [https://perma.cc/AWM9-KRDU].

<sup>20</sup> These person-specific surveys overstate support for retaining the death penalty by asking only about a single implementation—over eighty percent supported executing

## RACE

When discussing the death penalty, it is inevitable that the issue of race will be covered. However, Sarat goes beyond simply documenting racial issues in death penalty ballot measures and inserts the issue where it is not necessarily relevant. For example, to support his claim that “race and racial symbols marked many death penalty ballot campaigns,”<sup>21</sup> Sarat quotes a retentionist who said, “Judges who think our society has advanced to such a high level of decency that capital punishment no longer fits should be sentenced to walk the streets of Boston, or any large city, alone at night.”<sup>22</sup> Sarat tenuously links this quote to race by claiming that it “invoked not only the racially charged notion of urban ‘streets,’ but also the racial symbols of darkness and night.”<sup>23</sup> Additionally, this quote was not even made by anyone working for a retentionist campaign; it was simply a letter to the editor of a newspaper from “A Massachusetts voter.”<sup>24</sup> Therefore, it is misleading to use it to support the claim that race “mark[s] many death penalty ballot campaigns.”<sup>25</sup>

Sarat’s desire to read in racial issues where they likely do not exist is evidenced through another example. An abolitionist advertisement featured an exonerated, former death-row inmate who was also a white, male ex-marine with no criminal history.<sup>26</sup> He warns the audience that if it can happen to him, “it can happen to anybody in America.”<sup>27</sup> Sarat concludes that viewers will find it “difficult not to hear the word ‘white’ lurking behind [this advertisement].”<sup>28</sup> Perhaps this commercial is the product of an abolitionist

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Timothy McVeigh in the above survey, when in reality, the death penalty is applied to more than just the one person inquired about. *Id.*

<sup>21</sup> SARAT, *supra* note 1, at 179.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 170.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

plan to exploit racial biases. However, it seems more likely that an ex-marine with no criminal history who was exonerated while on death row is an excellent spokesman for the abolitionist cause regardless of his race.

Sarat also goes beyond simply documenting the use of race in death penalty ballot measures when he makes judgments on the issue. One such example is his assertion that “race discrimination in sentencing” is a “flaw[] that haunt[s] the death penalty system.”<sup>29</sup> The issue of race and the death penalty is highly nuanced. Consequently, it deserves careful debate and analysis of the evidence for both sides, not an unsupported assertion.<sup>30</sup>

### RETENTIONIST ARGUMENTS

Overall, Sarat chronicles well the various arguments used by abolitionists and retentionists. Relevant background details and the effectiveness of the arguments are provided to give context. Many of the retentionist arguments involve claims about alternatives to the death penalty. In a 1914 Oregon ballot measure, retentionists inaccurately claimed that abolishing the death penalty would leave the state with no alternative to capital punishment, and therefore the murderers on death row would have to be freed.<sup>31</sup> A less dishonest argument by retentionists regarding the insufficiency of alternative punishments points out that LWOP is a “legal fiction.”<sup>32</sup> Certainly most people sentenced to LWOP do not get out to kill again. However, the few

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<sup>29</sup> *Id.* at 180.

<sup>30</sup> For an example of evidence against the notion that the death penalty is a racist system, see Michael Conklin, *Painting a Deceptive Portrait: A Critical Review of Deadly Justice*, 22 NEW CRIM. L. REV. 223, 230 (2019) (“It would be a very peculiar racist system against blacks that resulted in whites being more likely to receive the death penalty, more likely to be executed after receiving the death penalty, executed at a faster rate, and to have these results more prominent in the South.”).

<sup>31</sup> SARAT, *supra* note 1, at 32.

<sup>32</sup> *Id.* at 36.

that do can make for sensational, emotional appeals. The most famous example is likely that of Willie Horton.<sup>33</sup>

It is unfortunate that this topic is not covered by Sarat because it adds an interesting dimension to the death penalty debate. Sarat leaves many other important questions unanswered as well. How have retentionists attempted to employ a “slippery slope” argument claiming that abolishing the death penalty will lead to abolishing LWOP? Have advocates who are anti-death penalty and anti-LWOP tried to downplay the latter to gain support for the former?<sup>34</sup> If the public had the binary choice of retaining the death penalty or abolishing it and abolishing LWOP, how would that affect support for the death penalty?

Another interesting retentionist argument Sarat discusses is one regarding a perverse incentive for rapists to kill their victims. Since particularly heinous rapes can result in life sentences, abolishing the death penalty would mean “there would be little or nothing to deter the rapist from killing his victim.”<sup>35</sup> Without the death penalty, people who engage in the particularly heinous

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<sup>33</sup> Although Willie Horton did not kill anyone during his time out from prison, he was the subject of great controversy in the 1988 presidential election. Horton was convicted of the brutal murder of a teenager in Massachusetts. Since Massachusetts did not have the death penalty he was sentenced to LWOP. However, then governor Dukakis thought it a good idea to release murderers serving LWOP into the community, unsupervised on weekends. During one of these furloughs, Horton kidnapped a young couple, torturing and raping the female. Roger Simon, *How a Murderer and Rapist Became the Bush Campaign's Most Valuable Player*, BALTIMORE SUN (Nov. 11, 1990), <https://www.baltimoresun.com/news/bs-xpm-1990-11-11-1990315149-story.html> [<https://perma.cc/YY72-8MB4>]. Kenneth Allen McDuff is another example that illustrates how only the death penalty can guaranty a murderer is not released back into society to kill again. In the 1960s McDuff was sentenced to death for killing two teenage boys and raping and killing a teenage girl. When the Supreme Court banned executions in 1972 in *Furman v. Georgia*, McDuff's sentence was commuted. This resulted in him being released in 1989 and his subsequent rape, torture, and murder of at least nine women in the 1990s. Gary Cartwright, *Free to Kill*, TEXAS MONTHLY (Aug. 1992) <https://www.texasmonthly.com/articles/free-to-kill-2/> [<https://perma.cc/7QGV-DJKC>].

<sup>34</sup> For a detailed analysis of the internal struggle between those who are just anti-death penalty and those who are also anti-LWOP, see Malkani, *infra* note 41.

<sup>35</sup> SARAT, *supra* note 1, at 92.



rapes that result in life sentences would be incentivized to kill their victims because doing so would remove a key witness from the potential rape trial without increasing the penalty if convicted.<sup>36</sup> A similar argument was presented in *Kennedy v. Louisiana*<sup>37</sup> to support a bar on capital punishment for the rape of a child not accompanied with a murder. The Supreme Court reasoned, “by in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim.”<sup>38</sup>

Other retentionist arguments focus on the harm capital murder imposes on those associated with the victims.<sup>39</sup> The fact that many people who lose a loved one to capital murder advocate against the application of the death penalty is, obviously, not addressed. Another argument used by retentionists, often implicitly, is that the existence of the death penalty deters future murders. This is highly controversial and further discussed in this essay under the “Deterrence v. Incapacity” section.

It is unfortunate that, in addition to the issue of LWOP as a suitable alternative, many death penalty abolitionists also want to abolish LWOP. The Pope, who is referenced as a source in Sarat’s book, wants to ban LWOP.<sup>40</sup> In 1990, the director of the ACLU National Capital Punishment Project was only willing to state that they “acquiesce” to LWOP as an alternative to the death penalty.<sup>41</sup> Advocacy groups such as The Sentencing Project call for the

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<sup>36</sup> *Id.*

<sup>37</sup> *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

<sup>38</sup> *Id.* at 445.

<sup>39</sup> SARAT, *supra* note 1, at 178.

<sup>40</sup> Francis X. Rocca, *Pope Francis Calls for Abolishing Death Sentences and Life Imprisonment*, CATHOLIC NEWS SERVICE (Oct. 23, 2014), <https://www.catholicnews.com/services/englishnews/2014/pope-francis-calls-for-abolishing-death-penalty-and-life-imprisonment-cns-1404377.cfm> [<https://perma.cc/55KV-RYYV>].

<sup>41</sup> BHARAT MALKANI, *SLAVERY AND THE DEATH PENALTY: A STUDY IN ABOLITION* 166 (2018). The author of the book, Malkani, opposes LWOP as an alternative to the death penalty because, he states, they are both rooted in dehumanization and subjugation.

elimination of LWOP.<sup>42</sup> Alaska has no LWOP sentencing option and some politicians in other states are trying to follow suit.<sup>43</sup>

## ABOLITIONIST ARGUMENTS

Contrary to the retentionist argument that the death penalty deters crime, many abolitionists point to studies that show the death penalty has no such effect.<sup>44</sup> Some abolitionist campaigns go even further and imply that the existence of the death penalty increases murder,<sup>45</sup> although they are on much weaker ground with this claim. One abolitionist advertisement pointed out that “[t]he states which have the highest rate of execution have, generally, the highest rate of murder . . .”<sup>46</sup> While true, this is a textbook example of confusing correlation with causation. There is little evidence to suggest that if Oklahoma and Texas abolished the death penalty, this alone would cause their murder rate to decline.

Another abolitionist argument is based on the claim that Christian morality is incompatible with the death penalty.<sup>47</sup> This is somewhat peculiar given that the death penalty is explicitly condoned in the Christian Bible.<sup>48</sup> Additionally, the protections and manners of execution imposed on those

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<sup>42</sup> *Webinar: The Case for Abolishing Life Sentences in the United States*, THE SENTENCING PROJECT (Feb. 28, 2019), <https://www.sentencingproject.org/news/case-abolishing-life-sentences/> [https://perma.cc/CT7T-ER8L].

<sup>43</sup> *No More Life Sentences, Some Massachusetts Legislators Say*, STATE HOUSE NEWS SERVICE (Mar. 1, 2019), <https://newbostonpost.com/2019/03/01/no-more-life-sentences-some-massachusetts-legislators-say/> [https://perma.cc/LS9L-UZ86].

<sup>44</sup> *The Case Against the Death Penalty*, ACLU (last visited Apr. 6, 2020), <https://www.aclu.org/other/case-against-death-penalty> [https://perma.cc/EPM6-DRQH]; *Experts Explain Why the Death Penalty Does Not Deter Murder*, DEATH PENALTY INFORMATION CENTER (Oct. 23, 2007), <https://deathpenaltyinfo.org/news/experts-explain-why-the-death-penalty-does-not-deter-murder> [https://perma.cc/9ZMQ-9BC4].

<sup>45</sup> See, *infra* note 46.

<sup>46</sup> SARAT, *supra* note 1, at 62.

<sup>47</sup> *Id.* at 38.

<sup>48</sup> Genesis 9:6 (“Whoever sheds the blood of man, by man shall his blood be shed . . .”). Furthermore, the law of Moses enumerated multiple capital offenses. See Exodus 21, 22, 35; Leviticus 20, 24; Deuteronomy 21-24.

accused of a capital offense today are certainly more favorable to the defendant than those in biblical times.

When formulating campaign strategy, abolitionists are in the precarious position that there are significant risks with either emphasizing the high cost or brutality of the death penalty. Too much emphasis on the brutality seems to cause people to weigh the brutality of the execution with the brutality of the murder that resulted in the punishment.<sup>49</sup> Likewise, too much emphasis on the high cost can backfire by inadvertently pointing out how many protections are in place.<sup>50</sup>

Sarat presents a fascinating instance of this with his coverage of California Proposition 34. There, abolitionists emphasized how the money spent on lengthy appeals processes (which rarely resulted in an execution) would be better spent investigating unsolved rapes and murders.<sup>51</sup> This Yes on 34 campaign also presented the support of family members of murder victims who explained how the long legal process in capital cases serves to cause more pain and delays reconciliation with their loss.<sup>52</sup> This strategy of presenting testimony from family members may have avoided the problem that previous abolitionist movements faced—namely, that of appearing soft on crime and downplaying the harm caused by perpetrators of capital murders—by focusing more on the inhumanity of the death penalty. But it caused another problem, equally fatal to the proposition: it emphasized the lengthy appeals process, which likely “palliated the concerns of voters who worried about the death penalty’s cruelty.”<sup>53</sup> Whether due to this double-edged-sword nature of their strategy or some other reason, the measure to abolish the death penalty failed fifty-two percent opposed to forty-eight percent for.<sup>54</sup>

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<sup>49</sup> See *infra* notes 49–52 and accompanying text.

<sup>50</sup> *Id.*

<sup>51</sup> SARAT, *supra* note 1, at 152.

<sup>52</sup> *Id.* at 153.

<sup>53</sup> *Id.* at 160.

<sup>54</sup> *Id.* at 159.

Although not an argument presented to support abolition, Sarat chronicles a latent theme present in many abolitionist campaigns—the belief that if the electorate were just more educated on the issue, they would surely support abolition.<sup>55</sup> Sarat includes a Thurgood Marshall quote from *Furman v. Georgia* illustrating this position. In it, Justice Marshall explains that the knowledge he has regarding the death penalty, if known by the average American, “would surely convince [them] that the death penalty was unwise.”<sup>56</sup>

#### DETERRENCE V. INCAPACITY

While Sarat covers the highly contested deterrence issue, the often misunderstood distinction between deterrence and incapacity is ignored. Deterrence refers to how the threat of punishment can deter people from committing crime; incapacity refers to incapacitating an individual from committing additional crimes.<sup>57</sup> The lack of coverage of this distinction by Sarat is highly relevant to the death penalty debate. Retentionists and abolitionists often engage in senseless conversations regarding deterrence simply because they do not realize they are discussing two different things (the retentionist is referring to incapacity while the abolitionist is referring to deterrence).

After the deterrence versus incapacity distinction is understood, a more productive conversation on the death penalty can be had. Of course, this does not mean that the retentionist and abolitionist will ultimately agree on the issue.<sup>58</sup> There is vastly contradictory evidence as to the ability of the death

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<sup>55</sup> *Id.* at 151.

<sup>56</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>57</sup> This is the same distinction as between specific deterrence and general deterrence.

<sup>58</sup> Additionally, once the distinction is understood, there is debate as to the ultimate relevance of the deterrence versus incapacity distinction. Retentionists point out that if your loved one was murdered, the distinction that the murderer was not deterred rather than not incapacitated would be of little relevance. Michael Conklin, *A Stretch Too Far: Flaws in Comparing Slavery and the Death Penalty*, 97 DENV. L. REV. FORUM 110 (July 4, 2019).

penalty to deter others from committing murders. One study cited by retentionists concluded that, on average, every execution results in eighteen fewer murders.<sup>59</sup> Other studies show no deterrence effect.<sup>60</sup>

### CONFLATING WRONGFUL CONVICTIONS WITH INNOCENCE

As with the topic of race, Sarat goes beyond just documenting the discourse on executing the innocent and interjects his own opinion on the matter. This is particularly troublesome because Sarat seems to make the popular-level mistake of conflating innocence with wrongful conviction.<sup>61</sup>

One such example is Sarat's claim that the executed inmate Cameron Todd Willingham was "innocent."<sup>62</sup> Sarat reasons that Willingham was innocent because it is "clear" he "had not set the fire" that killed his three children.<sup>63</sup> This demonstrates a misunderstanding of the Willingham case. At trial, an expert testified that the fire was the result of arson.<sup>64</sup> After conviction, more experienced experts refuted the rationale provided by the trial court expert for why the fire was arson.<sup>65</sup> Notice that this is not the same as these new

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<sup>59</sup> Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003).

<sup>60</sup> *Deterrence Studies Show no Link Between the Presence or Absence of the Death Penalty and Murder Rates*, DEATH PENALTY INFO. CTR. (last visited July 12, 2019), <https://deathpenaltyinfo.org/policy-issues/deterrence> [<https://perma.cc/B2KB-KDWE>].

<sup>61</sup> SARAT, *supra* note 1, at 185-199. This error is generally limited to popular-level media accounts by non-experts. However, even Supreme Court justices fall prey to the error. In the *Kansas v. Marsh* dissent, Justice David Souter claimed that over 110 death row inmates had been released since 1973, "upon findings that they were innocent of the crimes charged." *Kansas v. Marsh*, 584 U.S. 163, 209-210 (2006). In a concurring opinion, Justice Antonin Scalia pointed out that most of these allegedly "innocent" people were released due to technical issues such as inadmissible evidence, double jeopardy, or the death of a key witness, not because of a finding of innocence. *Id.* at 196-97 (Scalia, J., concurring).

<sup>62</sup> SARAT, *supra* note 1, at 168.

<sup>63</sup> *Id.*

<sup>64</sup> Michael Conklin, *Innocent or Inconclusive? Analyzing Abolitionists' Claims About the Death Penalty* 4 (Neb. L. Rev. Bull. ed., White Paper, 2018), available at <https://lawreview.unl.edu/downloads/Conklin%20-%20Innocent%20or%20Inconclusive%20PDF.pdf> [<https://perma.cc/U2VU-LHJV>].

<sup>65</sup> *Id.* at 4-5.

experts stating that the fire was not the result of arson. Rather, the rationale provided in court for why it was arson was inaccurate. Because of this, along with the testimony of a jailhouse informant who later wavered regarding his testimony, Willingham was likely wrongfully convicted. However, this does not equate to innocence.<sup>66</sup> The Death Penalty Information Center, an adamantly abolitionist organization, demonstrates the intellectually honest response to the Cameron Todd Willingham case by stating that “it is possible the fire was accidental”<sup>67</sup> and that, therefore, Willingham is “possibly innocent.”<sup>68</sup>

### DEATH PENALTY AS UNDEMOCRATIC

After discussing the near-unanimous success retentionists have had in democratic ballot measures, Sarat makes the peculiar claim that the death penalty is inconsistent with democracy.<sup>69</sup> Sarat’s justification for this seemingly contradictory claim is, essentially, that democracy is founded on the principles of equality and human dignity.<sup>70</sup> Since the death penalty is inhumane and denies the equal worth of every citizen, it is therefore undemocratic.<sup>71</sup>

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<sup>66</sup> The fire expert and jailhouse informant were not the only evidence of guilt. Willingham repeatedly beat his wife. He never tried to go back inside to save his children despite a neighbor pleading with him to do so. He admitted to lying to police about trying to save one of his daughters. Conveniently, the fire happened when his wife was out of the house (and therefore could not have saved the children). Willingham was partying the next night and bragging about how he was going to get money from the community. His wife and brother both say that he confessed to them. An Innocence Project investigation found no prosecutorial misconduct. *Id.* at 5.

<sup>67</sup> *Executed but Possibly Innocent*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executed-possibly-innocent#cam> [<https://perma.cc/ZW5S-9JYZ>] (last visited July 12, 2018).

<sup>68</sup> *Id.*

<sup>69</sup> SARAT, *supra* note 1, at 181–87.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* The claim that the death penalty is inhumane and harms equality is simply asserted and counterarguments are never addressed.

Looking at the death penalty on an international scale seems to contradict the notion that it is inconsistent with democracy. As Sarat acknowledges, “[i]n every Western democracy that has scrapped the death penalty, politicians have acted against the wishes of a majority of voters . . .”<sup>72</sup> The reason Europe does not have the death penalty is because “its political systems are less democratic, or at least more insulated from populists’ impulses, than the U.S. government.”<sup>73</sup> The abolishment of the death penalty in France, over the will of the vast majority of citizens, has been described as a “*coup d’etat*,” a very undemocratic process.<sup>74</sup> Germany banned Turkish consulates and embassies from acting as polling stations for purposes of reinstating the death penalty in Turkey.<sup>75</sup> A German government spokesperson said it was “politically inconceivable” to allow Turkish citizens in Germany to vote on the death penalty in Turkey.<sup>76</sup> Austria also said they would ban Turks from voting on the issue.<sup>77</sup> When a poll showed forty-nine percent support for reinstating the death penalty in Sweden, their justice minister asserted, “They don’t really want the death penalty.”<sup>78</sup>

Sarat also presents another, more convoluted argument for why the death penalty is undemocratic despite support for it in democratic elections. He posits that a democracy must respect the dignity of its citizens, and, in order

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<sup>72</sup> *Id.* at xi, quoting from *An Evolving Debate: Do Voters Want to be Asked What they Think About the Death Penalty?*, THE ECONOMIST (Feb. 8, 2013), <https://www.economist.com/lexingtons-notebook/2013/02/08/an-evolving-debate> [https://perma.cc/B7CA-D6TN].

<sup>73</sup> EVAN J. MANDERY, CAPITAL PUNISHMENT IN AMERICA: A BALANCED EXAMINATION 640 (2nd ed., 2011).

<sup>74</sup> Robert Nye, *Two Capital Punishment Debates in France*, 29(2) HISTORICAL REFLECTIONS 211 (2003).

<sup>75</sup> Lizzie Dearden, *Germany Set to Ban Turkish Citizens from Voting in Death Penalty Referendum*, INDEPENDENT (May 6, 2017), <https://www.independent.co.uk/news/world/europe/germany-turkey-death-penalty-referendum-voting-ban-merkel-erdogan-gulen-coup-eu-refugees-asylum-a7721301.html> [https://perma.cc/F3RS-6FL8].

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Mandery, *supra* note 69, at 641.

to do so, it must view punishment as a necessary evil.<sup>79</sup> Therefore, democracies must punish as “reluctantly and as leniently as possible.”<sup>80</sup> When voters choose to uphold the death penalty, they are subverting the will of political and legal officials who are exercising reluctance to punish.<sup>81</sup> This means these voters are not reluctant to use the death penalty and, therefore, not acting democratically.<sup>82</sup>

There are two main problems with the logic employed in this second argument. First, it is misleading to claim that voting in favor of retaining the death penalty subverts the will of political and legal officials, because not all those officials are against the death penalty. Second, just because one group supports a punishment and another group is against it does not lead to the conclusion that the former group is not reluctant to use the punishment. There is nothing inconsistent with being reluctant to use the death penalty and voting in favor of having it as an option for rare murder cases.

Applying the same logic Sarat uses in this second argument to a parallel, hypothetical ballot initiative regarding LWOP demonstrates the questionable logic involved. To be consistent, Sarat would have to maintain that voting to retain LWOP is undemocratic for the exact same reasons he believes voting to retain the death penalty is undemocratic. LWOP retentionists would, by Sarat’s logic, be subverting the will of the political and legal officials who do not want LWOP, therefore demonstrating a lack of reluctance and not acting democratically.

## CONCLUSION

This review focuses primarily on the aspects of the book that deserve critique rather than those that deserve praise, but overall the book documents the topic in an unbiased manner, which is difficult to do for such a polarizing

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<sup>79</sup> SARAT, *supra* note 1, at 79.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*



topic. As illustrated in this review, Sarat does occasionally go beyond the role of a historian and into the role of an abolitionist activist. Despite this, retentionists and abolitionists alike will both benefit greatly from reading this book and learning the many lessons it provides. It is the aspiration of this author that critiquing Sarat's book will provide a much needed counterpoint and therefore give readers on both sides of the issue a more well-balanced perspective.