University of Richmond Law Review

Volume 49
Issue 3 *Allen Chair Issue: Lethal Injection, Politics, and the Future of the Death Penalty*

Article 3

3-1-2015

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THE ROLE OF RACE, POVERTY, INTELLECTUAL DISABILITY, AND MENTAL ILLNESS IN THE DECLINE OF THE DEATH PENALTY

Stephen B. Bright *

INTRODUCTION

Capital punishment is a difficult and sensitive topic because it involves terrible tragedies, the murder of innocent people, loss and suffering, and the passions of the moment. It is used in only a very small percentage of cases in which it could be imposed and is currently in decline. Six states have recently abandoned it, and the number of death sentences imposed in the country decreased from over 300 per year in the mid-1990s to less than eighty in the last several years.[1] And so it is appropriate for us to ask whether death remains an appropriate punishment in a modern society, whether it is fairly carried out without race and poverty influencing who dies, and whether it is imposed only upon the most incorrigible offenders who commit the most heinous crimes.

The current state of the death penalty raises many concerns. For one, it is a fairly primitive punishment. Before prisons, society punished people by executing them, putting them in stocks, branding them, lashing them, and cutting off fingers and ears or even severing a limb.[2] The double jeopardy clause of the Fifth

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This essay was adapted from the keynote address given at Allen Chair Symposium, on October 24, 2014, at the University of Richmond School of Law. Parts of this essay and speech have been previously presented by Professor Bright, including at the United Nations Headquarters on April 24, 2014.

1. *Death Penalty Trends*, AMNESTY INT'L, http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-trends (last visited Feb. 27, 2015).

2. *See* James A. Cox, *Bilboes, Brands, and Branks: Colonial Crimes and Punishments*, COLONIAL WILLIAMSBURG, http://www.history.org/foundation/journal/spring03/branks.cfm (last visited Feb. 27, 2015); *see also Punishment—Theories of Punishment, Further Readings: The Imposition of Hardship in Response to Misconduct*, http://law.jrank.org/pages/9578/Punishment.html (last visited Feb. 27, 2015).

Amendment provides that no person shall be "twice put in jeopardy of life or limb."[3] Because of this provision, originalists may argue that the severing of limbs is constitutionally permissible today as punishment for a crime, but most Americans would not countenance it any more than they would branding, lashing, and other punishments used at the time the Constitution was adopted. Society has abandoned all of these primitive punishments except death. But Americans have never been completely comfortable with putting people to death, and for good reason.[4]

After the botched execution of Clayton Locket in Oklahoma,[5] President Barack Obama addressed significant problems with the death penalty:

> In the application of the death penalty in this country, we have seen significant problems—racial bias, uneven application of the death penalty . . . situations in which there were individuals on death row who later on were discovered to have been innocent because of exculpatory evidence. . . . And all these . . . do raise significant questions about how the death penalty is being applied.[6]

President Obama asked Attorney General Eric Holder to prepare a report regarding these questions.[7] The Attorney General indicated he was going to look not just at the mechanics of carrying out an execution, but also examine some of the larger issues the President mentioned.[8]

Most critical is the racial bias in the discretionary decisions of law enforcement officers, prosecutors, judges, and juries. Over half of those on death rows are members of racial minorities,[9] and the Supreme Court has accepted racial disparities in the infliction

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3. U.S. CONST., amend. V.

4. *See Shrinking Majority of Americans Support Death Penalty*, PEW RES. CTR.: RELIGION & PUB. LIFE (Mar. 28, 2014), http://www.pewforum.org/2014/03/28/shrinking-majority-of-americans-support-death-penalty/.

5. *See* Erik Eckholm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. TIMES, Apr. 29, 2014, at A1.

6. Peter Baker, *Obama Orders Policy Review on Executions*, N.Y. TIMES, May 2, 2014, at A1.

7. *Id.*

8. Benjamin Goad, *Obama's Death Penalty Review Risks Backlash from the States*, THE HILL (June 8, 2014, 10:31 AM), http://thehill.com/regulation/administration/208567-obamas-death-penalty-review-risks-backlash-from-the-states.

9. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Jan. 22, 2015), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (showing 42% of those on death rows are black and 13% Hispanic).

of the death penalty as "inevitable."[10] Prosecutors continue to use jury strikes to keep racial minorities from fully participating as jurors in capital trials.[11]

If he looks, Attorney General Holder will find the uneven application about which the President expressed concern. Eighty percent of the executions that have taken place since 1976 have been in the South; there were only four executions in the Northeast during that time period.[12] He will find that just two percent of the counties in the United States are responsible for a majority of those on death row and a majority of the executions that have taken place since 1976.[13] That is, 66 of the 3143 counties in the United States account for *over half* the executions that have taken place.[14] Fifteen percent of counties account for *all executions since 1976*, and—as of January 1, 2013—20% account for *all* of the 3125 people on death row.[15] So while thirty-two states have laws providing for the death penalty, only 20% of the counties are responsible for the people that are under death sentences.[16] This is contrary to Supreme Court holdings that the Eighth Amendment requires that the death penalty must be imposed "fairly, and with reasonable consistency, or not at all."[17]

The attorney general will also find, as the President observed, that many people who were sentenced to death were later found to be innocent.[18] Among them is Glenn Ford, a black man, who was released in March 2014 from Louisiana's notorious Angola Prison after serving thirty years on death row for a crime he did

10. McCleskey v. Kemp, 481 U.S. 279, 312 (1987).

11. *See, e.g.*, Shaila Dewan, *Study Finds Blacks Blocked From Southern Juries*, N.Y. TIMES, June 2, 2010, at A14.

12. *See Facts About the Death Penalty*, *supra* note 9, at 1, 3 (stating that 1138 of 1399 executions, or 81.34%, took place in the South).

13. James S. Liebman & Peter Clarke, *Minority Practice, Majority Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. LAW 255, 264–65 (2011); RICHARD C. DIETER, THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL, DEATH PENALTY INFO. CTR. 1 (2013), *available at* http://www.deathpenaltyinfo.org/ documents/TwoPercentReport.pdf.

14. DIETER, *supra* note 13, at 10.

15. *Id.* at 7.

16. *Id.* at 6–7.

17. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

18. *See Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Feb. 27, 2015) [hereinafter *Innocence List*] (identifying 150 individuals who have been exonerated from death sentences).

not commit.[19] As a result of his poverty, Ford was assigned two lawyers to represent him at his capital trial.[20] The lead attorney was an oil and gas lawyer who had never tried a case, criminal or civil, before a jury.[21] The second attorney had been out of law school for only two years and worked at an insurance defense firm on slip-and-fall cases.[22] As often happens in capital cases, the prosecutors used their peremptory strikes to keep blacks off the jury.[23] Despite a very weak case against him, Ford—virtually defenseless before an all-white jury—was sentenced to death.[24]

Ford is just one of at least 150 people sentenced to death who were later exonerated and released.[25] However, other innocent people have been executed. Texas executed Carlos DeLuna and Cameron Todd Willingham, but it has become clear since their executions that they were not guilty of the crimes.[26] Exonerations demonstrate the shoddy quality of what passes for "justice" in the criminal courts. If the courts cannot get the most basic thing right—who is guilty and who is innocent—then how can they address more difficult questions regarding whether a human being should live or die?

And, if he looks further, the attorney general will find that the intellectually disabled continue to be sentenced to death and executed, even though the Supreme Court held in *Atkins v. Virginia* that the Eighth Amendment prohibits the execution of the intel-

19. Andrew Cohen, *Glenn Ford's First Days of Freedom after 30 Years on Death Row*, ATLANTIC (Mar. 14, 2014), http://www.theatlantic.com/national/archive/2014/03/glenn-fords-first-days-of-freedom-after-30-years-on-death-row/284396; Andrew Cohen, *The Meaning of the Exoneration of Glenn Ford*, BRENNAN CTR. FOR JUST. (Mar. 13, 2014), http://www.brennancenter.org/analysis/meaning-exoneration-glenn-ford; Andrew Cohen, *Freedom After 30 Years on Death Row*, ATLANTIC (Mar. 11, 2014), http://www.theatlantic.com/national/archive/2014/03/freedom-after-30-years-on-death-row/284179/.

20. *See* Cohen, *Freedom After 30 Years on Death Row*, *supra* note 19 ("Both attorneys were selected from an alphabetical listing of lawyers at the local bar association.").

21. *Id.*

22. *Id.*

23. *See id.*

24. *See* Cohen, *The Meaning of the Exoneration of Glenn Ford*, *supra* note 19.

25. *Innocence List*, *supra* note 18.

26. *See* JAMES S. LIEBMAN, THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION 315–16 (Colum. U. Press 2014); Maurice Possley, *Fresh Doubts Over a Texas Execution*, WASH. POST, Aug. 4, 2014, at A1; David Grann, *Trial By Fire: Did Texas Execute An Innocent Man?*, NEW YORKER, Sept. 7, 2009, *available at* http://www.newyorker.com/magazine/2009/09/07/trial-by-fire.

lectually disabled, then referred to as mentally retarded.[27] And he will find that people, who through no fault of their own are schizophrenic, bipolar, brain damaged, or suffer some major mental impairment, are being sentenced to death and executed for crimes that are bizarre and senseless.

I. THE HISTORY LEADING TO *FURMAN*

The state death penalty before *Furman v. Georgia* in 1972 is arguably one of the darkest and more disgraceful chapters in American history. William Henry Furman was a twenty-six-year-old, African American, intellectually limited, and mentally ill man.[28] He was sentenced to death for an unintentional murder—committed by the accidental discharge of a .22 caliber pistol through the kitchen door of a home as he fled after attempting burglary.[29] His trial in Savannah, Georgia started at 10 AM and ended at 5:10 PM with the imposition of the death penalty.[30] His lawyer was paid only $150 and not given any funds for investigation.[31] His trial was not that different from ones occurring in Alabama, Arkansas, Texas, Mississippi, and other states at that time. Capital punishment then, as it is now, was very much tied to race—the oppression of African Americans, carried out by this country's criminal courts.[32]

In 1846, Michigan was the first state to abolish the death penalty for murder, followed by Rhode Island in 1852 and Wisconsin in 1853.[33] As prisons developed, many other northern states repealed the death penalty for virtually every crime except murder.[34] That could not be done in the southern states because of

27. *See* 536 U.S. 304, 321 (2002).

28. *See* Brief for Petitioner at 9, Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (No. 69-5003), 1971 WL 134167; Jody Seaborn, *In 'Capital Punishment on Trial,' UT's David Oshinsky Takes Clear Look at Death Penalty's Divisive History*, STATESMAN (Aug. 23. 2010, 12:30 PM), http://www.statesman.com/news/entertainment/books-literature/in-capital-pun ishment-on-trial-uts-david-oshinsky-/nRxCn/.

29. *See* Brief for Petitioner, *supra* note 28, at 2, 6.

30. *See id.* at 2, 3.

31. *See id.* at 8 n.6.

32. JUSTIN D. LEVINSON ET AL., DEVALUING DEATH: AN EMPIRICAL STUDY OF IMPLICIT RACIAL BIAS ON JURY-ELIGIBLE CITIZENS IN SIX DEATH PENALTY STATES 3 (2013), *available at* http://www.deathpenaltyinfo.org/documents/LevinsonSmithYoung.pdf.

33. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 134 (2002).

34. *Id.* at 134–35.

slavery.[35] The slaves were already a captive population. In some states, there were more African slaves than there were whites. The death penalty was seen as essential to maintaining control over the slaves.[36]

After the Civil War, southern criminal codes provided that crimes were punishable based on both the race of the defendant and the race of the victim with the far more severe penalties being imposed on African Americans who committed crimes against whites.[37] For example, Georgia law provided that the rape of a white female by a black man "shall be" punishable by death, while the rape of a white female by anyone else "was punishable by a prison term not less than two nor more than twenty years."[38] However, "[t]he rape of a *black* was punishable 'by fine and imprisonment, at the discretion of the court.'"[39]

The southern states also perpetuated slavery through "convict leasing."[40] African Americans were arrested for crimes—often minor charges such as loitering or not having papers—and then leased to coal companies, plantations, railroads and turpentine camps.[41] In "Slavery by Another Name," Douglas Blackmon describes how Alabama perpetuated slavery through convict leasing all the way until World War II.[42] In "Worse than Slavery," David Oshinsky points out that convict leasing was worse than slavery because the slave owners at least had an interest in protecting their property, but leased convicts were disposable.[43] Unlike the slave owner, the person or company that leased convicts had no interest in their nutrition, their health, the quality of their hous-

35. *See id.* at 142 ("The South's retention of capital punishment for blacks was surely a direct result of slavery.").

36. *Id.*

37. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 256 (1978).

38. McCleskey v. Kemp, 481 U.S. 279, 329–30 (1987) (Brennan, J., dissenting).

39. *Id.* at 330.

40. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 1–10 (2008) (discussing a process by which African American prisoners were funneled into unpaid hard labor).

41. *Id.* at 6–7.

42. *Id.* at 9.

43. *See* DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 37–47 (1996).

ing or any other aspect of their survival.[44] They could literally be worked to death and then replaced by other leased convicts.[45]

Lynching was also used to maintain racial control after the Civil War. At least 4743 people were killed by lynch mobs.[46] More than 90% of lynchings took place in the South, and three-fourths of the victims were African Americans.[47] The death penalty is closely related to lynching. As one historian observed:

> Southerners . . . discovered that lynchings were untidy and created a bad press. . . . [L]ynchings were increasingly replaced by situations in which the Southern legal system prostituted itself to the mob's demand. Responsible officials begged would-be lynchers to 'let the law take its course,' thus tacitly promising that there would be a quick trial and the death penalty. . . . [S]uch proceedings 'retained the essence of mob murder, shedding only its outward forms'.[48]

In the Scottsboro Case, nine black youths charged with the rape of two white women were sentenced to death after brief trials before all-white, all-male juries.[49] Over the course of three trials, the youths were prosecuted in groups, while mobs outside the courtroom demanded the death penalty.[50] The youths were represented by two lawyers who agreed to take the cases on the morning of the first trial; one was a drunk and the other was senile.[51] When there was a national outcry about the injustice of the death penalty being imposed at such summary trials with only perfunctory legal representation, the people of Scottsboro did not understand the reaction.[52] The trials were seen as an improvement over lynchings even though the outcomes were a foregone conclusion.[53]

However, there was often little difference between lynchings carried out by the mob and "legal lynchings" that took place in courtrooms. A man was hung immediately after a trial in Ken-

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44. *Id.* at 44.

45. *Id.*

46. ROBERT M. BOHM, DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES 11 (Pamela Chester ed., 4th ed. 2012).

47. *Id.*

48. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 115 (La. State Univ. Press rev. ed., 2007).

49. Powell v. Alabama, 287 U.S. 45, 50 (1932); CARTER, *supra* note 48, at 5–6.

50. *Powell*, 287 U.S. at 50; *see* CARTER, *supra* note 48, at 111.

51. CARTER, *supra* note 48, at 18–19, 22–23.

52. *Id.* at 49–50, 105.

53. *Id.* at 113–14.

tucky that lasted less than an hour.[54] One state newspaper, the Louisville *Courier-Journal*, noted the progress in an editorial, saying, "The fact . . . that Kentucky was saved the mortification of a lynching by an indignant multitude, bent upon avenging the innocent victim of the crime, is a matter for special congratulation."[55] The paper also observed that since a Negro had raped a white woman, "no other result could have been reached, however prolonged the trial."[56] Between 1930, when the Department of Justice started keeping statistics, and 1972 when *Furman* was decided, 455 people were put to death for the crime of rape; 405 were African American—one of the more damning statistics in the nation's history.[57]

The Supreme Court struck down the death penalty in *Furman v. Georgia* because of the arbitrariness, randomness, and discrimination in its application.[58] Justice Stewart said that of all those eligible for the death penalty, it was imposed only on a "capriciously selected random handful," and concluded that the Eighth Amendment prevented "this unique penalty to be so wantonly and so freakishly imposed."[59] As he put it, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[60] Actually, being sentenced to death was not like being struck by lightning; lightning is much more random. The death penalty was most often imposed in certain jurisdictions in the South and upon certain people—racial

54. GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY 1865–1940: LYNCHINGS, MOB RULE, AND "LEGAL LYNCHINGS" 252 (Louisiana Paperback ed., 1996).

55. *Id.* at 253 (internal quotations omitted).

56. *Id.* (internal quotations omitted).

57. Furman v. Georgia, 408 U.S. 238, 364 (1972) (Marshall, J., concurring) ("A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape.") (footnotes omitted).

58. The justices in the majority in *Furman* concluded that the death penalty was being imposed so discriminatorily, arbitrarily, and infrequently that any given death sentence was cruel and unusual. *Id.* at 249–52 (Douglas, J., concurring); *id.* at 364–66 (Marshall, J., concurring); *id.* at 291–95 (Brennan, J., concurring); *id.* at 311–13 (White, J., concurring). Justice Brennan also concluded that because "the deliberate extinguishment of human life by the State is uniquely degrading to human dignity," it was inconsistent with "the evolving standards of decency that mark the progress of a maturing society." *Id.* at 269–70, 291 (Brennan, J., concurring).

59. *Id.* at 309–10 (Stewart, J., concurring).

60. *Id.* at 309.

minorities, poor people with inadequate legal representation, and the marginalized.[61]

II. THE MODERN DEATH PENALTY

Remarkably, just four years after *Furman*, the Supreme Court held that the death penalty statutes of three states were constitutional.[62] The Court disregarded history, reality, and the limitations of the court system, and held that by slightly tweaking their death penalty statutes, the states had miraculously overcome centuries of race discrimination and arbitrary infliction of the death penalty upon the poorest and most marginalized people in the society.[63] The changes made were slight. Death penalty trials are now bi-furcated trials, with one phase on guilt or innocence and the other on sentencing.[64] Prosecutors must prove at least one aggravating circumstance to "narrow the class of persons eligible for death penalty."[65] Defendants are allowed to introduce mitigating factors that might be a basis for a sentence less than death.[66] These small changes failed to eliminate arbitrariness and discrimination, an impossible task.[67]

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61. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836, 1840–42, 1844 (1994).

62. Gregg v. Georgia, 428 U.S. 153, 207 (1976) (plurality opinion) (upholding a death penalty statute enacted by Georgia in 1973); Proffitt v. Florida, 428 U.S. 242, 259–60 (1976) (plurality opinion) (upholding a Florida statute); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality opinion) (upholding a Texas statute). The Court found unconstitutional Louisiana and North Carolina statutes providing for mandatory imposition of the death penalty. Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion).

63. *Gregg*, 428 U.S. at 162–64 (describing Georgia's new statutory death penalty scheme that was designed to comply with the requirements of *Furman v. Georgia*); *Proffitt*, 428 U.S. at 247 (describing the Florida's legislature's attempt to bring its death penalty statute into line with constitutional requirements); *Jurek*, 428 U.S. at 268–69 (explaining how, in response to *Furman v. Georgia*, Texas narrowed the scope of its capital punishment laws to only five categories of intentional and knowing homicide, and modified its jury procedures).

64. *See, e.g.*, *Gregg*, 428 U.S. at 163, 190–95.

65. 18 U.S.C. § 3592(c) (2012); Lowenfield v. Phelps, 484 U.S. 231, 244 (1988).

66. *See* 18 U.S.C. § 3592(a); *Gregg*, 428 U.S. at 206.

67. Callins v. Collins, 510 U.S. 1141, 1144–45 (1994) (Blackmun, J., dissenting) ("Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.") (citations omitted).

Different practices by prosecutors contribute to the arbitrariness. The two most important decisions made in every death penalty case—whether to seek the death penalty, and whether to offer a plea bargain—are completely in the hands of prosecutors.[68] They are unregulated and subject to no judicial review.[69] There are many prosecutors who never seek the death penalty, others who seldom seek it, and others who seek it in every case in which it could be imposed. Most death penalty cases are resolved with plea bargains (depending on whether the prosecution is willing to offer it and whether the defendant is willing to accept it).[70] Some prosecutors will offer a plea bargain allowing the defendant to plead guilty in exchange for a sentence less than death, usually life imprisonment without the possibility of parole.[71] Mentally impaired and intellectually limited defendants may not understand their options.[72] They may reject the plea offer and end up on death row.[73]

A small number of aggressive prosecutors in the counties that account for so many death sentences refuse to offer plea bargains and try to obtain the death penalty at every opportunity.[74] They are usually successful in jurisdictions in which defendants facing the death penalty receive very poor legal representation.[75] Between 1976 and the end of 2014, 122 people sentenced to death in Harris County, which includes Houston, have been executed,

68. JOHN G. MORGAN, COMPTROLLER OF THE TREASURY, OFFICE OF RESEARCH, TENNESSEE'S DEATH PENALTY: COSTS AND CONSEQUENCES 13 (2004).

69. *See* Nicci Lovre-Laughlin, *Lethal Decisions: Examining the Role of Prosecutorial Discretion in Capital Cases in South Dakota and the Federal Justice System*, 50 S.D. L. REV. 550, 569 (2005).

70. *See* John H. Blume, *Plea Bargaining and the Right to Effective Assistance of Counsel: Where the Rubber Hits the Road in Capital Cases*, 25 FED. SENT'G REP. 122, 122 (2012).

71. *See* WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 145–46 (2006); WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 54–55 (1991); *see also* Nick Quaife, *Colbert Co. Man Faces Trial After Turning Down Plea Deal*, WAFF NEWS (Jan 17, 2015, 12:03 AM), http://www.waff.com/story/27874128/colbert-co-man-faces-trial-after-turning-down-plea-deal.

72. *See* Blume, *supra* note 70, at 123.

73. *See id.* at 122.

74. *See* Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 316–18 (2010); *see also* Mitch Mitchell, *Arlington Woman's Execution Set for Wednesday*, STAR-TELEGRAM (Sept. 15, 2014, 5:44 PM), http://www.star-telegram.com/news/local/crime/article 3873321.html.

75. *See* Bright, *supra* note 61, at 1840.

more people than executed by any state except Texas itself.[76] Harris County judges have made the job easier by appointing incompetent lawyers to represent people facing the death penalty.[77] And, after they are sentenced to death, the condemned are assigned equally bad lawyers to represent them in post-conviction proceedings.[78]

The race of the defendant and the race of the victim continue to influence the imposition of the death penalty. The courts remain the part of American society least affected by the civil rights movement of the mid-twentieth century. Many courtrooms in the South today look no different than they did in the 1950s. The judge is white, the prosecutors are white, the court-appointed lawyers are white, and, even in communities with substantial African American populations, the jury is often all white.[79] It is well-known and well documented that a person of color is more likely than a white person to be stopped by police, to be abused during that stop, to be arrested after the stop, to be denied bail when brought to court, and to receive a severe sentence, whether it is jail instead of probation or the death penalty instead of life imprisonment without the possibility of parole.[80]

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76. *County of Conviction for Executed Offenders*, TEX. DEP'T OF CRIM. JUST., www.tdcj.state.tx.us/death_row/dr_county_conviction_executed.html (last visited Feb. 27, 2015) (listing number of executed offenders by county of execution); *Executed Offenders*, TEX. DEP'T OF CRIM. JUST., www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last visited Feb. 27, 2015) (listing individual offenders executed in Texas).

77. For example, one lawyer repeatedly appointed by judges in Houston had twenty clients sentenced to death due largely to his failure to "conduct even rudimentary investigations." Adam Liptak, *A Lawyer Known Best For Losing Capital Cases*, N.Y. TIMES, May 18, 2010, at A13. Houston judges repeatedly appointed Ron Mock, despite his poor performance in capital cases. Sara Rimer & Raymond Bonner, *Texas Lawyer's Death Row Record a Concern*, N.Y. TIMES, June 11, 2000, at 1. Sixteen people represented by Mock were sentenced to death. Andrew Tilghman, *State Bar Suspends Troubled Local Lawyer*, HOUS. CHRON., Feb. 12, 2005, at B1. Judges also appointed Joe Frank Cannon, who was known for trying cases like "greased lightning" and not always being able to stay awake during trials; ten people represented by Cannon were sentenced to death. Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About the System*, WALL ST. J., Sept. 7, 1994, at A1.

78. Stephen B. Bright, *Elected Judges and The Death Penalty In Texas: Why Full Habeas Corpus Review By Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1808–09 (2000); Stephen B. Bright, *Death in Texas: Not Even The Pretense of Fairness*, CHAMPION, July 1999, at 1, 2.

79. *See* Shaila Dewan, *Blacks Still Being Blocked from Juries in the South, Study Finds*, N.Y. TIMES, June 2, 2010, at A14.

80. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 16 (2010); AMY E. LERMAN & VESLA M. WEAVER, ARRESTING

Prosecutors are usually successful in preventing or minimizing the participation of racial minorities in capital trials. They continue to use their peremptory jury strikes against minorities, as has long been the history in the criminal courts.[81] Exclusion of people of color was explicitly allowed by the Supreme Court of the United States in 1965.[82] The Court did not purport to prohibit it until a quarter of a century ago when it held in *Batson v. Kentucky* that strikes based on race violate the equal protection clause of the Fourteenth Amendment.[83]

But, as predicted by Justice Thurgood Marshall at the time it was decided,[84] *Batson* has failed completely to prevent discrimination in jury selection. Under the procedures adopted in *Batson*, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race that may be inferred from a pattern of striking blacks or other evidence.[85] Upon such a showing, the prosecution must give a race-neutral explanation for striking the juror in question.[86] However, the ultimate burden of proving racial motivation rests with, and never shifts from, the party challenging the strike.[87] Finally, the trial judge must determine, in light of all of the evidence, whether the defendant has shown intentional racial discrimination by a preponderance of the evidence.[88] For a *Batson* challenge to succeed, a ra-

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CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 40–43 (2014); Cynthia E. Jones, *Give Us Free: Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 940–41 (2013).

81. *See* Dewan, *supra* note 79.

82. The Court said in *Swain v. Alabama*, "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." 380 U.S. 202, 221 (1965). The Court said only proof that a prosecutor "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes . . . with the result that no Negroes ever serve on petit juries . . . might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.* at 223–24.

83. Batson v. Kentucky, 476 U.S. 79, 97–98 (1986).

84. *Id.* at 106 (Marshall, J., concurring).

85. *Id.* at 96–97.

86. *Id.* at 97–98.

87. Purkett v. Elem, 514 U.S. 765, 768 (1995).

88. *Batson*, 476 U.S. at 98; *see also Purkett*, 514 U.S. at 767 (describing the strike process).

cially discriminatory result is not sufficient; instead, the strike must be traced to a racially discriminatory purpose.[89]

In making a *Batson* challenge, "the defendant's practical burden [is] to make a liar out of the prosecutor" by showing that s/he struck jurors based on their race and then lied by giving pretextual reasons for them.[90] As United States District Court Judge Mark Bennett has observed, "Most trial court judges will only find such deceit in extreme situations."[91] One might suspect this is particularly true when judges have been prosecutors before being elevated to the bench and the prosecutors before them are their former colleagues. Some judges may have routinely struck minority jurors when they were prosecutors. Others may simply have a good working relationship with prosecutors who come before them frequently and are unwilling to accuse those prosecutors of discrimination. Lastly, some judges and prosecutors may have conscious or unconscious racial biases.[92]

Many prosecutors have resisted *Batson* since it was decided. Just a year after the decision, a senior Philadelphia prosecutor told other prosecutors in his office at a training session to use peremptory strikes to remove black people because, among other reasons, "blacks from the low-income areas are less likely to convict."[93] He went on to explain how to give a "race neutral" reason for the racially based strike:

> When you do have a black juror, you question them at length. And on this little sheet that you have, mark something down that you can articulate later if something happens . . . and question them and say, "Well the woman had a kid about the same age as the defendant and I thought she'd be sympathetic to him," or "She's unemployed and I just don't like unemployed people" . . . So, sometimes under that line you may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race.[94]

89. *Batson*, 476 U.S. at 93.

90. Munson v. Texas, 774 S.W.2d 778, 780 (Tex. App. 1989).

91. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 162–63 (2010) (citing examples of dubious reasons upheld by judges as "race neutral").

92. *See Batson*, 476 U.S. at 106 (Marshall, J., concurring).

93. Wilson v. Beard, 426 F.3d 653, 657 (3d Cir. 2005).

94. Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson's *Net to Ensnare More Than*

After calling the *Batson* process a "charade," one court described it as follows: "The State may provide the trial court with a series of pat race-neutral reasons. . . . [W]e wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'"[95] And indeed, it later came to light that North Carolina prosecutors are provided with just such a "cheat sheet" of race-neutral reasons to justify their strikes.[96] The North Carolina Conference of District Attorneys distributed a one-page handout titled "*Batson* Justifications: Articulating Juror Negatives" at a state-wide trial advocacy course called "Top Gun II."[97] It contained a list of reasons prosecutors could proffer in response to a *Batson* objection. Among the reasons:

> Age . . .
>
> Attitude—air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney
>
> Body Language—arms folded, leaning away from questioner, obvious boredom . . .[98]

Most of these reasons are based on subjective assessments of demeanor that apply to almost all jurors. Most important, it is usually impossible for a judge to know whether they are true.[99] A North Carolina court found that a prosecutor had used reasons from the list to justify striking African Americans in four capital cases.[100] The court also found that in capital cases in North Carolina, prosecutors struck African Americans at approximately dou-

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the Unapologetically Bigoted or Painfully Unimaginative Attorney, 96 CORNELL L. REV. 1075, 1079 (2011) (quoting from videotape of Assistant District Attorney Jack McMahon conducting a training program for Philadelphia prosecutors).

95. People v. Randall, 671 N.E.2d 60, 65 (Ill. App. Ct. 1996).

96. *See* Order Granting Motions for Appropriate Relief at 73, ¶¶ 68, 70, North Carolina v. Golphin, 97 CRS 47314–15 (Dec. 13, 2012) (Cumberland County) [hereinafter Order Granting Appropriate Relief] *available at* http://www.aclu.org/files/assets/rja_order_12-13-12.pdf (consolidating three cases with defendants Tilmon Golphin, Christina Walters, and Quintel Augustine).

97. *Id.* at 73–74, ¶¶ 68–71.

98. *Id.* at 74, ¶ 71

99. *See, e.g.*, *People v. Mai*, 305 P.3d 1175, 1219, 1221 (Cal. 2013) (holding that a prosecutor's assertions about a juror's casual dress and "bored" and disinterested manner were race-neutral).

100. Order Granting Appropriate Relief, *supra* note 96, at 74–77, ¶¶ 72–79.

ble the rate they struck other potential jurors.[101] The probability of such a disparity occurring in a race-neutral process is less than one in ten trillion.[102] The court found a history of "resistance" by prosecutors "to permit greater participation on juries by African Americans."[103]

Prosecutors in states with a history of discrimination have found other ways to prevent or minimize minority participation on capital juries. Capital cases may be prosecuted in federal court if there is any "federal interest" that can be invoked for trying the case in federal court.[104] In state jurisdictions with substantial minority populations, such as New Orleans Parish, Louisiana, which is about 60% African American, capital cases may be tried in federal court where jury pools come from a larger geographical area that is only 24% African American.[105] This practice can also be seen in Richmond, Virginia; Prince George's County, Maryland; and St. Louis, Missouri.[106] In these jurisdictions, when a capital crime occurs in a locale with a higher minority population, it is more likely to be prosecuted in federal court in order to obtain a jury pool with fewer minorities.[107]

The Supreme Court has held that states must minimize the risk of race coming into play in the decisions that lead to imposition of the death penalty.[108] This raises the question of how much racial bias is acceptable in the process through which courts condemn people to die. With the long history of slavery, lynchings, convict leasing, segregation, racial oppression, and now mass incarceration, surely states should eliminate *any* chance that racial prejudice might play a role. But there is only one way to do that: eliminate the death penalty.

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101. *Id.* at 143, 153, ¶¶ 223, 254. The Court found that prosecutors statewide struck 52.8% of eligible black venire members and 25.7% of all other eligible venire members. *Id.* at 153, ¶ 254.

102. *Id.* at 153, ¶ 254.

103. *Id.* at 4.

104. *See* G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 480 (2010).

105. *Id.* at 446–47.

106. *Id.* at 450–51, 454, 458.

107. *See id.* at 445, 490.

108. Turner v. Murray, 476 U.S. 28, 36–37 (1986); *see also* McCleskey v. Kemp, 481 U.S. 279, 305, 308, 313 (1987).

The death penalty is also imposed almost exclusively on the poor.[109] The remarkably poor quality of legal representation in some capital cases and the even more remarkable indifference of courts is illustrated by the case of Robert Wayne Holsey, an African American executed by Georgia on December 9, 2014.[110] Holsey was represented at his trial by a lawyer who drank a quart of vodka every night of the trial and was preparing to be sued, criminally prosecuted, and disbarred for stealing client funds.[111] Holsey's other court-appointed lawyer had no experience in defending capital cases and was given no direction by the alcoholic lawyer in charge of the case except during trial, when she was told to cross-examine an expert on DNA and give the closing argument at the sentencing phase.[112] The lawyers failed to present mitigating evidence that might well have convinced the jury to impose life imprisonment instead of death: Holsey was intellectually limited and as a child had been "subjected to abuse so severe, so frequent, and so notorious that his neighbors called his childhood home 'the Torture Chamber.'"[113]

James Fisher, Jr. spent twenty-six and one-half years in the custody of Oklahoma—most of it on death row—without ever having a fair and reliable determination of his guilt.[114] The lawyer assigned to represent him tried his case *and twenty-four others*, including another capital murder case, during September 1983.[115] The lawyer made no opening statement or closing argument at either the guilt or sentencing phase and uttered only nine words during the entire sentencing phase.[116] On appeal, the Oklahoma Court of Criminal Appeals pronounced itself "deeply disturbed by

109. *See Death Penalty Representation*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-penalty-representation (last visited Feb. 27, 2015).

110. Tracy Connor & Shamar Walters, *Georgia Executes Robert Holsey After Supreme Court Denies IQ Appeal*, NBC NEWS (Dec. 9, 2014), http://www.nbcnews.com/storyline/lethal-injection/georgia-executes-robert-holsey-after-supreme-court-denies-iq-appeal-n264921.

111. Marc Bookman, *This Man's Alcoholic Lawyer Botched His Case. Georgia Executed Him Last Night Anyway*, MOTHER JONES (Apr. 22, 2014, 5:00 AM), www.motherjones.com/politics/2014/04/alcoholic-lawyer-botched-robert-wayne-holsey-death-penalty-trial?page=2.

112. *Id.*

113. Holsey v. Warden, 694 F.3d 1230, 1275 (11th Cir. 2012) (Barkett, J., dissenting).

114. *Is James Fisher Guilty? After 2 Death Sentences, 26 Years in Custody We'll Never Know Because of His Ineffective Lawyers*, SECOND CLASS JUSTICE (Oct. 23, 2010), http://www.secondclassjustice.com/?p=198.

115. Fisher v. Gibson, 282 F.3d 1283, 1293 (10th Cir. 2002).

116. *Id.* at 1289.

defense counsel's lack of participation and advocacy during the sentencing stage," but it was not disturbed enough to reverse the conviction or sentence.[117]

Nineteen years later, a United States Court of Appeals set aside the conviction and death sentence, finding that Fisher's lawyer was "grossly inept," had "sabotaged" Fisher's defense by repeatedly reiterating the state's version of events, and was disloyal by "exhibiting actual doubt and hostility toward his client's case."[118]

These are but two of the many examples of scandalous representation provided to poor people facing the death penalty. Ronald Wayne Frye, executed by North Carolina, was represented by a lawyer who drank twelve shots of rum a day during the penalty phase of the trial.[119] And there are other cases of intoxicated lawyers, drug-addicted lawyers, lawyers who referred to their clients with racial slurs in front of the jury, lawyers who were not in court when crucial witnesses testified, and lawyers who did not even know their clients' names.[120] Lawyers assigned to represent condemned inmates have missed the statute of limitations for filing federal habeas corpus petitions in eighty cases, depriving their clients of any review of their cases by federal courts.[121]

How do the courts, the bar, and the legal profession as a whole allow lawyers to continue to practice when they cannot file their papers on time, which is about as basic as it gets when it comes to practicing law? Courts and prosecutors appear to have come to accept this gross ineptness by capital defense counsel. It has become part of the culture. They are indifferent to injustice.

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117. Fisher v. State, 739 P.2d 523, 525 (Okla. Crim. App. 1987).

118. *Fisher*, 282 F.3d at 1298, 1300, 1308.

119. Jeffrey Gettleman, *Execution Ends Debatable Case*, L.A. TIMES (Aug. 31, 2001), http://articles.latimes.com/2001/aug/31/news/mn-40577.

120. *See* Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2169–70 (2013); Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with it and How to Fix It*, 33 CONN. L. REV. 919, 933–34 (2001); Jeffrey L. Kirchmeier, *Drinks, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 455–58 (1996).

121. Lugo v. Secretary, 750 F.3d 1198, 1216 (11th Cir. 2014) (Martin, J., concurring) (listing thirty-four capital cases in Florida in which lawyers missed the statute of limitations); Ken Armstrong, *When Lawyers Stumble, Only Their Clients Fall*, WASH. POST, Nov. 16, 2014, at A1.

Another reason for arbitrariness is the impossibility of measuring the mental state or level of intellectual functioning of a person accused of a capital crime. In some states, the jury is asked to determine whether the defendant is a future danger to society[122] or whether the crime was outrageously and wantonly vile, horrible and inhuman.[123] Are juries capable of discerning whether an intellectually disabled person is also capable of meeting these elements? Are juries able to determine whether a profoundly mentally ill person is so impaired that their culpability is reduced? Or does the person's mental illness make them a future danger and is thus a reason for imposing death?

This is not like deciding who ran the red light, who fired the shot, or other factual questions that juries decide. Psychiatrists and psychologists are not in agreement with regard to issues of mental impairment and intellectual disability.[124] The prosecution will always present an expert who says the person is malingering, even in cases in which, long before any criminal act, there was bizarre behavior, paranoia, delusions, treatment with psychotropic drugs, hospitalizations, electroshock therapy, suicide attempts, or self-mutilation.[125]

In his dissenting opinion in *Atkins v. Virginia*, Justice Scalia predicted that many defendants would feign mental retardation.[126] But if defendants are going to pretend to be mentally retarded, they really have to start planning at a young age. One of the elements of mental retardation is that the person shows func-

122. *See, e.g.*, TEX. CODE OF CRIM. PROC. art. 37.071, § 2(b)(1) (2014) (indicating that jury must answer whether there is "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

123. *See, e.g.*, GA. CODE ANN. § 17-10-30(b)(7) (2012).

124. *See* Ake v. Oklahoma, 470 U.S. 68, 81 (1985) ("[P]sychiatrists disagree widely and frequently on what constitutes mental illness . . . and on likelihood of future dangerousness.").

125. *See, e.g.*, State v. Moody, 94 P.3d 1119, 1148 (Ariz. 2004) (recounting that the psychiatrist for the prosecution in the capital murder trial testified that the defendant was malingering, not insane); *Ex parte* Thomas (No. WR-69859-01), 2009 WL 693606, at **1–3 (Tex. Crim. App. Mar. 18, 2009) (explaining that the defendant long exhibited bizarre behavior, self-mutilated, suffered from delusions and paranoia, took psychotropic drugs, was hospitalized, and attempted suicide before committing murder but a psychiatrist and psychologist both diagnosed him as malingering).

126. 536 U.S. 304, 353–54 (2002) (Scalia, J., dissenting).

tional deficits during the developmental period, that is, during childhood.[127]

It is hard to imagine that Andre Lee Thomas, who has gouged out both his eyes and committed truly bizarre crimes, was malingering.[128] Thomas, sentenced to death in Texas, suffers from schizophrenia and psychotic delusions.[129] Thomas stabbed and killed his wife and two children, acting upon a voice that he thought was God's telling him that he needed to kill them using three different knives so as not to "cross contaminate" their blood and "allow the demons inside them to live."[130] He used a different knife on each one and carved out the children's hearts and part of his wife's lung, which he had mistaken for her heart, and stuffed them into his pockets.[131] He then stabbed himself in the heart, which he thought would assure the death of the demons that had inhabited his wife and children.[132]

After being hospitalized for his chest wound, he was taken to jail, where he gave the police a calm, complete, and coherent account of his activities and his reasons for them.[133] In jail, five days after the killings, Thomas read in the Bible, "If the right eye offends thee, pluck it out."[134] Thomas gouged out his right eye.[135] After being sentenced to death and sent to death row, he gouged out his left eye and ate it.[136]

Florida executed John Ferguson, a black man, who suffered from schizophrenia, in 2013, even though he believed that he was the Prince of God and that after execution, he would be resurrected and return to this planet in that capacity.[137] The Court of Ap-

127. *Id.* at 308 n.3 (providing definitions of mental retardation from the American Association on Mental Retardation and the American Psychiatric Association, both of which require manifestations of significantly subaverage intellectual functioning and limitations in adaptive skills before age eighteen).

128. *Ex parte* Thomas, 2009 WL 693606 at *3 n.11.

129. *Id.* at *1.

130. *Id.* at *2.

131. *Id.*

132. *Id.*

133. *Id.* at *3.

134. *Id.*

135. *Id.*

136. Marc Bookman, *How Crazy Is Too Crazy To Be Executed?*, MOTHER JONES (Feb. 12, 2013, 6:02 AM), www.motherjones.com/politics/2013/02/andre-thomas-death-penalty-mental-illness-texas.

137. David Ovalle, *Miami Killer John Errol Ferguson Executed*, MIAMI HERALD (Aug. 5,

peals for the Eleventh Circuit treated this as nothing more than an unusual religious belief:

> While Ferguson's thoughts about what happens after death may seem extreme to many people, nearly every major world religion—from Christianity to Zoroastrianism—envisions some kind of continuation of life after death, often including resurrection. Ferguson's belief in his ultimate corporeal resurrection may differ in degree, but it does not necessarily differ in kind, from the beliefs of millions of Americans.[138]

The court warned against treating unusual religious beliefs as proof of mental illness.[139] But religious delusions and obsessions are frequent manifestations of mental illness.[140] The court's holding was merely an effort by judges to gloss over the fact that Florida and other states are executing people who are out of touch with reality.

CONCLUSION

The death penalty today is questioned by many people. Jimmy Carter, who signed it into law in Georgia, recently raised questions, saying he was now convinced that the death penalty is no longer appropriate.[141] Justice Stevens, the only living member of the 1976 Supreme Court which upheld the death penalty, recently came to the conclusion, "The imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the

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2013, 8:30 PM), www.miamiherald.com/news/local/community/miami-dade/article1953840.html; Emergency Resolution in Opposition to the Scheduled Execution of John Ferguson, A Mentally Ill Florida Death Row Inmate, NAT'L LAWYERS GUILD (Oct. 2012).

138. Ferguson v. Secretary, 716 F.3d 1315, 1342 (11th Cir. 2013).

139. *Id.* at 1343.

140. *See* Ronald Siddle et al., *Religious Delusions in Patients Admitted to Hospital with Schizophrenia*, 37 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 130 (2002).

141. Jimmy Carter, Remarks by former U.S. President Jimmy Carter at the National Symposium on the Modern Death Penalty in America (Nov. 12, 2013), https://www.cartercenter.org/news/editorials_speeches/death-penalty-speech-111213.html; *National Symposium on the Modern Death Penalty*, AM. BAR ASS'N, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/national_syposium_death_penalty_carter_center.html (last visited Feb. 27, 2015) (including videos of presentations by President Carter and others at the symposium).

Eighth Amendment.'"[142] Justice Powell voted to uphold the death penalty in *Furman* and *Gregg*, and wrote the majority opinion in *McCleskey v. Kemp*, which upheld the death penalty by a 5-4 vote despite the racial disparities in its application in Georgia.[143] After retiring from the Court, he told his biographer that he regretted both his vote in that case and that the United States still had the death penalty.[144] Five states—New Jersey in 2007, New Mexico in 2009, Illinois in 2011, Connecticut in 2012, and Maryland in 2013—have repealed the death penalty.[145] The New York Court of Appeals held that state's death penalty unconstitutional,[146] after nine years of having the death penalty in New York and spending millions of dollars to put seven people on death row, none of whom were executed.[147] And governors of three states—Colorado, Oregon, and Washington—have declared moratoria on the death penalty.[148]

The end of the death penalty is inevitable, but the question is, how much longer? Justice Goldberg said, "the deliberate, institutionalized taking of human life by the state is the greatest conceivable degradation to the dignity of the human personality."[149] The death penalty is not only degrading to the person who is tied down and put down, but it is degrading to the society that carries

142. Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring)).

143. *See* McCleskey v. Kemp, 481 U.S. 279, 312-13 (1987); Gregg v. Georgia, 428 U.S. 153, 187 (1976); *Furman*, 408 U.S. at 414, 461–65 (Powell, J., dissenting).

144. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994); *Justice Powell's New Wisdom*, N.Y. TIMES, Jun. 11, 1994, http://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html.

145. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Feb. 27, 2015).

146. People v. LaValle, 817 N.E.2d 341, 359 (N.Y. 2004).

147. Stephen B. Bright, *The Future of the Death Penalty in Kentucky and America*, 102 KY. L.J. 739, 743 (2013–2014), *available at* http://law-apache.uky.edu/wordpress/wp-content/uploads/2014/07/5-Bright.pdf.

148. Executive Order: Death Sentence Reprieve, No. D 2013-006 (May 22, 2013), *available at* http://www.deathpenaltyinfo.org/documents/COexecutiveorder.pdf; *Oregon Governor Declares Moratorium on All Executions*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/oregon-governor-declares-moratorium-all-executions (last visited Feb. 27, 2015); Jay Inslee, Governor, State of Washington, Governor Inslee's Remarks Announcing a Capital Punishment Moratorium (Feb. 11, 2014), *available at* http://www.governor.wa.gov/sites/default/files/speeches/20140211_DeathPenaltyMoratorium.pdf.

149. Arthur Goldberg, *Death Penalty and the High Court*, ST. PETERSBURG TIMES, Aug. 17, 1976, at 10.

it out. It coarsens society, telling future generations that problems can be solved with more violence.

The Constitutional Court of South Africa, in deciding on the constitutionality of that nation's death penalty, said that South Africa was a nation in transition from hatred to understanding, and from vengeance to reconciliation.[150] In the society South Africans were building, the court ruled, there was no place for the death penalty.[151] We are being asked to decide that question in the United States. Of course, crime cannot go unpunished, and it does not go unpunished in the eighteen states that have abolished the death penalty or in the vast majority of counties in the United States which have not imposed a single death sentence since 1976.[152] Society must be protected, but incapacitation of those who commit crimes is possible in "super maximum" prisons with sentences as long as life imprisonment without the possibility of parole. What purpose is the primitive penalty of death serving in a modern society? When we look closely at the issues—race, poverty, arbitrariness, conviction of the innocent, mental illness, and intellectual disability—from both a moral and practical standpoint, it will not be long before we join South Africa and the rest of the civilized world in making permanent, absolute, and unequivocal the injunction: "Thou shall not kill."

150. *See State v. Makwanyane* 1995 (2) SACR 1 (CC) at 85 (S. Afr.).
151. *Id.* at 184.
152. DIETER, *supra* note 12, at 7.