

# Imposition of the death penalty upon the poor, racial minorities, the intellectually disabled and the mentally ill

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Presentation at program of the High Commissioner for Human Rights of the United Nations, United Nations Headquarters, New York, April 24, 2014

The death penalty is imposed in the United States upon the poorest, most powerless, most marginalized people in the society. Virtually all of the people selected for execution are poor, about half are members of racial minorities, and the overwhelming majority were sentenced to death for crimes against white victims. Many have a significant intellectual disability or suffer from a severe mental illness. Many others were the victims of brutal physical, sexual and psychological abuse during childhood and lived on the margins of society before their arrests. Some are innocent. They are subject to discretionary decisions by law enforcement officers, prosecutors, judges and jurors that are often influenced by racial prejudice. Because of their poverty, they are often assigned lawyers who lack the skills, resources and inclination to represent them capably in capital cases.

One does not need to look far for illustrative examples. As of this writing, the state of Georgia plans to execute Warren Hill, an African American man, despite the fact that he is intellectually disabled.<sup>1</sup> The United States Supreme Court has held that the Constitution does not allow the execution of a person who is intellectually disabled (once called “mentally retarded”),<sup>2</sup> but Georgia requires that a person facing

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<sup>1</sup> It has been delayed in doing so while the state’s supreme court considered and rejected his challenge to the secrecy of its lethal injection procedures. *Owens v. Hall*, 758 S.E.2d 794 (Ga. 2014).

<sup>2</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) (using the term “mental retardation”).

death prove intellectual disability beyond a reasonable doubt. Although four experts testified at the hearing on the issue that Hill was not intellectually disabled, they all later changed their opinions when they reviewed additional information about him. As a result, all nine experts who have examined Hill have found that he is intellectually disabled.

Nevertheless, the state and federal courts have held that they are powerless to prevent a patently unconstitutional execution.

Before the Supreme Court held that the mentally retarded could not be executed, a Florida court found that Freddie Lee Hall had been “mentally retarded his entire life.”<sup>3</sup> But after the Supreme Court’s decision, the Florida courts held that he is not retarded and could be executed because of an IQ score above 70.<sup>4</sup> However, the United States Supreme Court held that Florida could not treat an IQ score above 70 as final and conclusive and, instead, must consider other evidence of intellectual disability. Other states have fashioned their own definitions of intellectual disability. The Texas Court of Criminal Appeals held that someone with the severe mental limitations of Lennie in John Steinbeck’s *Of Mice and Men* (1973) would be exempt from the death penalty, but not others who were diagnosed by psychologists as intellectually disabled.<sup>5</sup> This definition allowed Texas to execute Marvin Wilson in 2012, even though he had an IQ of 61, which is below the first percentile in human intelligence, sucked his thumb, and could not tell the difference between left and right.<sup>6</sup>

Glenn Ford, a black man, was released in March 2014 after 30 years on death row in Louisiana’s notorious Angola Prison for a crime he did not

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<sup>3</sup> *Hall v. Florida*, 134 S.Ct. 1986, 1991 (2014).

<sup>4</sup> *Id.*; Andrew Cohen, “Supreme Court case may stop states that still execute mentally disabled”, *The Atlantic*, Feb. 28 2014, available from [www.theatlantic.com/health/archive/2014/02/supreme-court-case-may-stop-states-that-still-execute-the-mentally-ill/283969/](http://www.theatlantic.com/health/archive/2014/02/supreme-court-case-may-stop-states-that-still-execute-the-mentally-ill/283969/).

<sup>5</sup> *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004).

<sup>6</sup> Andrew Cohen, “Of mice and men: the execution of Marvin Wilson”, *The Atlantic*, Aug. 8, 2012, available from [www.theatlantic.com/national/archive/2012/08/of-mice-and-men-the-execution-of-marvin-wilson/260713/](http://www.theatlantic.com/national/archive/2012/08/of-mice-and-men-the-execution-of-marvin-wilson/260713/).

commit.<sup>7</sup> As a result of his poverty, Ford was assigned two lawyers to represent him at his capital trial. The lead attorney was an oil and gas lawyer who had never tried a case, criminal or civil, before a jury. The second attorney had been out of law school for only two years and worked at an insurance defence firm on slip-and-fall cases. As often happens in capital cases, the prosecutors used their preemptory strikes to keep blacks off the jury. Despite a very weak case against him, Ford, virtually defenceless before an all-white jury, was sentenced death.

Ford is just one of many people who were found guilty beyond a reasonable doubt in capital and non-capital cases but were actually not guilty at all. States have already executed innocent people – like Carlos DeLuna and Cameron Todd Willingham in Texas<sup>8</sup> – and will continue to do so as long as they have the death penalty.

Missouri executed John Middleton in July 2014, despite questions about his guilt and his mental competence. United States Appeals Court Judge Kermit Bye, dissenting from a decision vacating a stay granted by a lower court, stated, “Missouri is positioned to execute a man who may very well be incompetent. That fact simply cannot be denied or overstated. But, for some reason, that fact has been ignored.”<sup>9</sup> Florida executed John

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<sup>7</sup> Andrew Cohen, “Freedom after 30 years on death row”, *The Atlantic*, March 11, 2014, available from [www.theatlantic.com/national/archive/2014/03/freedom-after-30-years-on-death-row/284179/](http://www.theatlantic.com/national/archive/2014/03/freedom-after-30-years-on-death-row/284179/); Andrew Cohen, “Glenn Ford’s first days of freedom after 30 years on death row”, *The Atlantic*, March 14, 2014, available from [www.theatlantic.com/national/archive/2014/03/glenn-fords-first-days-of-freedom-after-30-years-on-death-row/284396/](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 Center*, March 13, 2014, [www.brennancenter.org/analysis/meaning-exoneration-glenn-ford](http://www.brennancenter.org/analysis/meaning-exoneration-glenn-ford).

<sup>8</sup> James S. Liebman, *The Wrong Carlos: Anatomy of a Wrongful Execution* (Columbia University Press 2014); and “The wrong Carlos”, available from <http://thewrongcarlos.net/>; Maurice Possley, “Fresh Doubts over a Texas Execution,” *Washington Post*, Aug. 3, 2014, available from <http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution/>; David Grann, “Trial by fire: did Texas execute an innocent man?”, *The New Yorker*, Sept. 7 2009, available from [www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann?printable=true](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann?printable=true).

<sup>9</sup> Chris McDaniel, “After delays, Missouri carries out sixth execution this year”, St. Louis Public Radio, July 16, 2014, available from

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 earth in that capacity. The federal Court of Appeals in Atlanta 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.<sup>10</sup>

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

## Poverty and poor lawyering

Georgia plans to execute Robert Wayne Holsey, an African American, even though he was represented at his trial by a lawyer who drank a quart of vodka every night of trial and was preparing to be sued, criminally prosecuted, and disbarred for stealing client funds.<sup>11</sup> 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 penalty phase.<sup>12</sup> The lawyers

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<http://news.stlpublicradio.org/post/after-delays-missouri-carries-out-sixth-execution-year>.

<sup>10</sup> *Ferguson v. Secretary*, 716 F.3d 1315, 1342 (11th Cir. 2013).

<sup>11</sup> Marc Bookman, “This man is about to die because an alcoholic lawyer botched his case”, *Mother Jones*, April 22, 2014, available from [www.motherjones.com/politics/2014/04/alcoholic-lawyer-botched-robert-wayne-holsey-death-penalty-trial?page=2](http://www.motherjones.com/politics/2014/04/alcoholic-lawyer-botched-robert-wayne-holsey-death-penalty-trial?page=2).

<sup>12</sup> *Id.*

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 neighbours called his childhood home ‘the Torture Chamber.’”<sup>13</sup>

Holsey was by no means the first person sentenced to death at a trial where he was represented by a drunken lawyer. Ronald Wayne Frye, executed by North Carolina, was represented by a lawyer who drank 12 shots of rum a day during the penalty phase of the trial.<sup>14</sup> 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 slept through testimony (three people were sentenced to death in Houston at trials in which their lawyers slept<sup>15</sup>), lawyers who were not in court when crucial witnesses testified, and lawyers who did not even know their client’s names.<sup>16</sup>

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<sup>13</sup> *Holsey v. Warden*, 694 F.3d 1230, 1275 (11th Cir. 2012) (Barkett, J., dissenting).

<sup>14</sup> Jeffrey Gettleman, “Execution ends debatable case”, *Los Angeles Times*, Aug. 31, 2001, available from <http://articles.latimes.com/2001/aug/31/news/mn-40577>.

<sup>15</sup> Even though George McFarland’s lawyer was snoring, the presiding judge took no action, saying, “The Constitution does not say that the lawyer has to be awake.” John Makeig, “Asleep on the job: slaying trial boring, lawyer said”, *Houston Chronicle*, August 14, 1992, p. A35. McFarland’s conviction and death sentence were twice upheld by the Texas Court of Criminal Appeals. *Ex parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005); *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996). Carl Johnson was executed even though his lawyer, Joe Frank Cannon, slept during parts of trial. David Dow, “The state, the death penalty, and Carl Johnson”, *37 Boston College Law Review* 691 (1996). Cannon also slept during the trial of Calvin Burdine. The Texas Court of Criminal Appeals upheld the conviction and sentence, but the federal court of appeals set aside the conviction, holding, over a bitter dissent, that a sleeping lawyer is absent from trial and thus a denial of counsel. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc).

<sup>16</sup> See Stephen B. Bright and Sia M. Sanneh, “Fifty years of defiance and resistance after *Gideon v. Wainwright*”, *122 Yale Law Journal* 2150 (2013), available from [www.yalelawjournal.org/essay/fifty-years-of-defiance-and-resistance-after-gideon-v-wainwright](http://www.yalelawjournal.org/essay/fifty-years-of-defiance-and-resistance-after-gideon-v-wainwright); Kenneth Williams, “Ensuring the capital defendant’s right to competent counsel: it’s time for some standards!”, *51 Wayne Law Review* 129 (2005); Jeffrey L. Kirchmeier, “Drink, drugs, and drowsiness: the constitutional right to effective assistance of counsel and the Strickland prejudice requirement”, *75 Nebraska*

There are lawyers who never read their state's death penalty statute, lawyers who filed one client's brief in another client's death penalty appeal without changing the names, and lawyers who missed deadlines that cost their clients review of their cases.

James Fisher Jr. spent 26 1/2 years in the custody of Oklahoma – most of it on death row – without ever having a fair and reliable determination of his guilt. The lawyer assigned to represent him tried his case *and 24 others*, including another capital murder case, during September 1983.<sup>17</sup> 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.<sup>18</sup> On appeal, the Oklahoma Court of Criminal Appeals pronounced itself “deeply disturbed by defence counsel’s lack of participation and advocacy during the sentencing stage,” but it was not disturbed enough to reverse the conviction or sentence.<sup>19</sup>

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 defence by repeatedly reiterating the state’s version of events, and was disloyal by “exhibiting actual doubt and hostility toward his client’s case.”<sup>20</sup> The Court of Appeals would not reach the same result today, because Congress has severely restricted its power to review state court judgments and grant habeas corpus relief.<sup>21</sup>

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*Law Review* 425, 455-462 (1996); Bruce A. Green, “Lethal fiction: the meaning of ‘counsel’ in the Sixth Amendment”, 78*Iowa Law Review* 433 (1993).

<sup>17</sup> *Fisher v. Gibson*, 282 F.3d 1283, 1293 (10th Cir. 2002).

<sup>18</sup> *Id.* at 1289.

<sup>19</sup> *Fisher v. State*, 739 P.2d 523, 525 (Okla.Crim.App.1987).

<sup>20</sup> *Id.*, at 1289, 1300, 1308.

<sup>21</sup> The Antiterrorism and Effective Death Penalty Act, adopted in 1996, restricts federal review of convictions and death sentences imposed in the state courts in many ways. Among its provisions is one that provides that habeas relief may not be granted unless the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” 28 U.S.C. § 2254(d)(1) (2006). The Supreme Court has held that a “state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011), quoting

Today, Fisher would probably be executed. And Robert Holsey's death sentence would almost certainly have been set aside if the federal courts had considered his case before the restrictions were adopted.

James Fisher was assigned another bad lawyer for his retrial in 2005. The lawyer was drinking heavily, abusing cocaine and neglecting his cases.<sup>22</sup> The lawyer physically threatened Fisher at a pretrial hearing and, as a result, Fisher refused to attend his own trial.<sup>23</sup> He was again convicted and sentenced to death, but this time Oklahoma's highest criminal court recognized the disgraceful incompetence of his lawyer and set the conviction aside.<sup>24</sup> Prosecutors agreed to Fisher's release in July 2010, provided that he be banished from Oklahoma forever.<sup>25</sup>

Juan Balderas was sentenced to death in Houston in March 2014. He was represented by Jerome Godinich, an attorney who missed the statute of limitations in two federal habeas corpus cases five years earlier, depriving his clients of any review of their cases by independent, life-tenure federal judges.<sup>26</sup> Both clients were executed. Yet, despite such gross malpractice, the Texas Bar took no action, nor did the Texas Court of Criminal Appeals. The trial court judges in Houston continued appointing Godinich to defend poor people accused of crimes, including in capital cases. He has been the lawyer in as many as 350 criminal cases at one time.

Micah Brown was sentenced to death in May 2014, represented by Toby Wilkinson, who filed appellate briefs in two capital cases in 2006 that contained gibberish, repetitions, and rambling arguments. In one case,

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*Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). The Court added in Richter: "If this standard is difficult to meet, that is because it was meant to be." *Id.*

<sup>22</sup> *Fisher v. State*, 206 P.3d 607, 610-11 (Okla. Crim. App. 2009).

<sup>23</sup> *Id.* at 610.

<sup>24</sup> *Id.* at 612-613.

<sup>25</sup> Dan Barry, "In the rearview mirror, Oklahoma and death row", *New York Times*, Aug. 10, 2010, available from [www.nytimes.com/2010/08/11/us/11land.html](http://www.nytimes.com/2010/08/11/us/11land.html).

<sup>26</sup> Lise Olsen, "Lawyers' late filings can be deadly for inmates", *Houston Chronicle*, March 22, 2009, available from [www.chron.com/news/houston-texas/article/Slow-paperwork-in-death-row-cases-ends-final-1736308.php](http://www.chron.com/news/houston-texas/article/Slow-paperwork-in-death-row-cases-ends-final-1736308.php).

Wilkinson clearly lifted passages from one of his previous cases so that in places the brief discussed the wrong crime and used the wrong names. In the other case, Wilkinson included portions of letters sent to him by his client.<sup>27</sup> No matter how egregiously lawyers handle a capital case, Texas judges keep appointing them to represent others.

Lawyers have missed the statute of limitations in at least seven other cases in Texas. In 2014, the federal courts refused to consider an appeal in the case of Louis Castro Perez, who was sentenced to death in Texas, because his lawyer – without telling Perez or other counsel on the case – did not file a notice of appeal.<sup>28</sup> One judge dissented, pointing out that the lawyer’s failure to file a notice of appeal was “an egregious breach of the duties an attorney owes her client” and that Perez had made a strong showing that he may have been sentenced to death in violation of the Constitution.<sup>29</sup> In Florida, lawyers assigned to represent condemned inmates have missed the statute of limitations in 34 cases, depriving their clients of any review of their cases by federal courts.<sup>30</sup>

Many people are sentenced to death and executed in the United States not because they committed the worst crimes, but because they had the misfortune to be assigned the worst lawyers. Over 100 people sentenced to death in Houston, Harris County, Texas, have been executed in the last 40 years. The reason is no secret: Harris County judges appoint incompetent lawyers to represent people facing the death penalty<sup>31</sup> and,

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<sup>27</sup> Maro Robbins, “Convict’s odds today may rest on gibberish”, *San Antonio Express-News*, Aug. 24, 2006.

<sup>28</sup> *Perez v. Stephens*, 745 F.3d 174 (5th Cir. 2014).

<sup>29</sup> *Id.* at 182, 187, 191-92 (Dennis, J., dissenting).

<sup>30</sup> *Lugo v. Secretary*, 750 F.3d 1198, 1216-18, 1222-26 (11th Cir. 2014) (Martin, J., dissenting) (listing the 34 cases).

<sup>31</sup> For example, one lawyer repeatedly appointed by judges in Houston had 20 clients sentenced to death due largely to his failure to “conduct even rudimentary investigations.” Adam Liptak, “A lawyer known best for losing capital cases”, *New York Times*, May 17, 2010, available from [www.nytimes.com/2010/05/18/us/18bar.html?\\_r=0](http://www.nytimes.com/2010/05/18/us/18bar.html?_r=0). Houston judges repeatedly appointed Ron Mock, despite his poor performance in capital cases. Sara Rimer and Raymond Bonner, “Texas lawyer’s death row record a concern”, *New York Times*, June 11, 2000, available from [www.nytimes.com/2000/06/11/us/texas-lawyer-s-](http://www.nytimes.com/2000/06/11/us/texas-lawyer-s-)

after they are sentenced to death, the condemned are assigned equally bad lawyers to represent them in post-conviction proceedings. There is not even the pretence of fairness.<sup>32</sup>

United States Supreme Court Justice Ruth Bader Ginsburg has said, “I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.”<sup>33</sup> United States Circuit Judge Boyce Martin has pointed out that defendants with “decent lawyers” often avoid death sentences, while those assigned bad lawyers are sentenced to death.<sup>34</sup>

It is disturbing how commonly courts and prosecutors are willing to overlook the gross incompetence of counsel when it occurs, and how doggedly they try to defend the death sentences that result. Trial judges, who are elected in most states, are often the ones who appointed the incompetent lawyers. And they appoint them in case after case, as Texas judges have done with Jerome Godinich and Toby Wilkinson. Prosecutors have no incentive to demand that their courtroom adversaries be qualified and effective. The poor quality of counsel in

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[death-row-record-a-concern.html](#). Sixteen people represented by Mock were sentenced to death. Andrew Tilghman, “State bar suspends troubled local lawyer,” *Houston Chronicle*, Feb. 12, 2005. Another favorite was Joe Frank Cannon, who was known for trying cases like “greased lightning” and not always being able to stay awake during trials; 10 people represented by Cannon were sentenced to death. Paul M. Barrett, “Lawyer’s fast work on death cases raises doubts about the system”, *Wall Street Journal*, Sept. 7, 1994.

<sup>32</sup> Stephen B. Bright, “Death in Texas: not even the pretense of fairness”, *The Champion* 1 (July 1999), available from [http://library.law.yale.edu/sites/default/files/death\\_in\\_texas\\_champion\\_99.pdf](http://library.law.yale.edu/sites/default/files/death_in_texas_champion_99.pdf); 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 Texas Law Review* 1805 (2000), available from <http://library.law.yale.edu/sites/default/files/electedjudges.pdf>.

<sup>33</sup> Ruth Bader Ginsburg, “In pursuit of the public good: lawyers who care”, lecture at the District of Columbia School of Law, April 9, 2001, available from [www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp\\_04-09-01a.html](http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_04-09-01a.html).

<sup>34</sup> *Moore v. Parker*, 425 F.3d 250, 268 (6th Cir. 2005) (Martin, J., dissenting).

capital cases is well known, but very little, if anything is being done about it in many states.

## Racial discrimination

The death penalty is one of America's most prominent vestiges of slavery and racial oppression.<sup>35</sup> It was essential to the institution of slavery. Michigan abolished the death penalty in 1846, and other northern states repealed their death statutes or restricted the use of the death penalty before the Civil War. But that could not be done in the South – in states that had a captive population. After the Civil War, the death penalty continued to be imposed on African Americans; some crimes were punishable by death depending upon the race of the offender and the victim. Slavery was perpetuated through the system of convict leasing: Black people were arrested on minor charges – such as loitering, not having proper papers, or theft, and then leased to the railroads, coal mines and turpentine camps.<sup>36</sup>

Today, the courts remain the part of American society least affected by the civil rights movement of the mid-20th 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. It is well known and well documented that a person of colour 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

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<sup>35</sup> See Stephen B. Bright, "Discrimination, death and denial: the tolerance of racial discrimination in the infliction of the death penalty", 35 *Santa Clara Law Review* 433 (1995), available from [http://library.law.yale.edu/sites/default/files/discrimination\\_death.pdf](http://library.law.yale.edu/sites/default/files/discrimination_death.pdf).

<sup>36</sup> Douglas A. Blackmon's *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (Doubleday, 2008) describes how slavery was perpetuated until World War II in Alabama through convict leasing; David M. Oshinsky's, *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (Free Press, 1996), describes convict leasing in Mississippi and other southern states.

sentence, whether it is jail instead of probation or the death penalty instead of life imprisonment without the possibility of parole.<sup>37</sup>

The two most important decisions made in every death penalty case are made by prosecutors: whether to seek the death penalty and whether to resolve the case through a plea bargain for a sentence less than death. Those decisions are often influenced by race. Some people who are intellectually disabled or mentally ill reject plea offers with little or no understanding of what they are doing and are later sentenced to death at trial.

Prosecutors continue to use their discretionary strikes to prevent or minimize the participation of members of racial minorities on juries. A Supreme Court decision purportedly preventing such discrimination by requiring prosecutors to give race-neutral reasons for their strikes is widely regarded as a farce. After calling the 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.’”<sup>38</sup> And, indeed, just such a “cheat sheet” of pat race-neutral reasons to justify the strike of any minority jury member came to light in North Carolina. A one-page handout titled “*Batson* Justifications: Articulating Juror Negatives” containing a list of reasons a prosecutor could give for strikes of minorities was distributed at the Conference of District Attorneys’ statewide trial advocacy course called

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<sup>37</sup> See, for example, Amy E. Lerman and Vesla M. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control* (University of Chicago Press 2014); Cynthia E. Jones, “‘Give us free’: addressing racial disparities in bail determinations”, 16 *New York University Journal of Legislation and Public Policy* 919 (2013); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (Free Press 2010).

<sup>38</sup> *People v. Randall*, 671 N.E.2d 60, 65 (Ill. App. 1996). A judge discusses the reluctance of judges to find that prosecutors intentionally discriminated and then lied about it by giving pretextual reasons for their strikes – the finding the Supreme Court requires to prohibit a strike motivated by race – in 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 *Harvard Law & Policy Review* 149 (2010).

“Top Gun II.”<sup>39</sup> A North Carolina court found that a prosecutor had used reasons from the list to justify striking African Americans in four capital cases.<sup>40</sup> The court also found that in capital cases in North Carolina, “prosecutors strike African Americans at double the rate they strike other potential jurors.”<sup>41</sup> The probability of such a disparity occurring in a race-neutral process is less than one in ten trillion.<sup>42</sup> The court found a history of “resistance” by prosecutors “to permit greater participation on juries by African Americans.” It continued:

That resistance is exemplified by trainings sponsored by the North Carolina Conference of District Attorneys where prosecutors learned not to examine their own prejudices and present persuasive cases to a diverse cast of jurors, but to circumvent the constitutional prohibition against race discrimination in jury selection.<sup>43</sup>

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.<sup>44</sup> But 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 that has a much greater impact on racial minorities, surely states should eliminate any chance that racial prejudice might play a role. But there is only one way to do that: by eliminating the death penalty.

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<sup>39</sup> *State v. Golpin*, Cumberland Co., NC, Superior Nos. 97 CRS 42314-15, 98 CRS 34832, 35044, 01 CRS 65079, at 73-74, ¶¶ 68-72 (Dec. 13, 2012), available from [https://www.aclu.org/files/assets/rja\\_order\\_12-13-12.pdf](https://www.aclu.org/files/assets/rja_order_12-13-12.pdf).

<sup>40</sup> *Id.* at 74-77, ¶¶ 72-79.

<sup>41</sup> *Id.* at 112-201, ¶¶ 171-393. The Court found that prosecutors statewide struck 52.8 per cent of eligible black venire members and 25.7 per cent of all other eligible venire members. *Id.* at 153, ¶ 254.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 4-5.

<sup>44</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Turner v. Murray*, 476 U.S. 28, 37 (1986).

## Death for people with intellectual limitations and mental illnesses

There are other equally troubling questions. How much uncertainty is acceptable with regard to executing people of low intelligence and people who are mentally ill? Are juries able to measure precisely the degree of culpability of an intellectually disabled person? Are they able to discern whether people are so intellectually disabled (or “mentally retarded”) that they are exempt from the death penalty,<sup>45</sup> or not quite intellectually disabled enough, so that it is acceptable to execute them? Is a jury capable of determining whether profoundly mentally ill people are so impaired that their culpability is reduced, so that they should be spared the death penalty, or so dangerous that they should be executed?

Different people on different juries make those decisions, but it is impossible for them to make them consistently or to know which ones are reaching the right conclusions. Intellectual disability cannot be precisely measured. Psychiatrists and psychologists do not fully understand mental illness and often disagree with regard to its existence, severity and influence on behaviour. Capital cases are often influenced by the passions and prejudices of the moment, which distort the decision-making process.

As a result, there are many intellectually disabled and mentally ill people on death rows throughout the country. Among them is Andre Lee Thomas, sentenced to death in Texas. He suffers from schizophrenia and psychotic delusions and has gouged out both his eyes.

After engaging in bizarre behaviour and attempting suicide, 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.” 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. He then

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<sup>45</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that execution of the intellectually disabled, then called the “mentally retarded,” violates the Eighth Amendment).

stabbed himself in the heart which, he thought, would assure the death of the demons that had inhabited his wife and children.

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. In jail, five days after the killings, Thomas read in the Bible, "If the right eye offends thee, pluck it out." Thomas gouged out his right eye. After being sentenced to death and sent to death row, he gouged out his left eye and ate it.<sup>46</sup>

Scott Panetti, sentenced to death in Texas, suffered from schizophrenia, fragmented personality, delusions and hallucinations for which he was hospitalized numerous times before committing the crimes for which he was sentenced to death. He was unable to overcome his mental illnesses even though he took medication that could not have been tolerated by a person not suffering from extreme psychosis. One day, he dressed in camouflage, drove to the home of his estranged wife's parents and shot and killed them in front of his wife and daughter. He was found competent to stand trial and allowed to represent himself. He wore a cowboy suit during trial and attempted to subpoena Jesus Christ, John F. Kennedy, and a number of celebrities, some dead and some alive. His behaviour at trial was described as bizarre, scary and trance-like, rendering his trial "a judicial farce."<sup>47</sup>

Since his trial in 1995, the courts have debated whether Mr. Panetti understands the relationship between his punishment and the crimes he committed, just as courts often wrestle with whether mentally ill people are capable of participating in a trial, cooperating with their lawyers and making decisions in their cases. Some experts testify that they are capable, and other experts testify they are not. 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 behaviour, paranoia, delusions, treatment with psychotropic drugs, hospitalizations,

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<sup>46</sup> Marc Bookman, "How crazy is too crazy to be executed?", *Mother Jones*, February 12, 2013, available from [www.motherjones.com/politics/2013/02/andre-thomas-death-penalty-mental-illness-texas](http://www.motherjones.com/politics/2013/02/andre-thomas-death-penalty-mental-illness-texas); *Ex Parte Andre Lee Thomas*, 2009 Westlaw 693606 (Tex. Crim. App. March 18, 2009) (Cochran, J., concurring).

<sup>47</sup> *Panetti v. Quarterman*, 551 U.S. 930, 936-37 (2007).

electroshock therapy, suicide attempts or self-mutilation. Judges, if they are free from political influences in deciding the issue, try to comprehend the incomprehensible and parse legal concepts when dealing with manifestations of mental disorders. But at best, their rulings are “a hazardous guess.”<sup>48</sup>

The more fundamental question is why people like Andre Lee Thomas and Scott Panetti, who are undoubtedly profoundly mentally ill, are subject to the death penalty. Of course they committed horrendous crimes, took innocent lives that left others suffering and scarred for life, and must be isolated to protect society. But through no fault of their own, they are tormented souls suffering from devastating afflictions that leave them unable to think and reason like people who are not so afflicted. That is greater punishment that any court can impose.

The intellectually disabled and mentally ill are at an enormous disadvantage in the criminal courts. Some have no family support, and others have families afflicted with the same limitations or disorders that they have. Their court-appointed lawyers may know nothing about their disabilities, have no idea how to interact with them, and know nothing about how to conduct an investigation of the disability or which experts to consult. In many cases, they do not have adequate resources for expert consultation or testing.

The Alabama lawyers who represented Holly Wood, who was convicted of the murder of his ex-girlfriend, did not present his limited intellectual functioning as a reason he should be spared the death penalty. It would not have been difficult. Special education teachers who had Mr. Wood in their classes at the local school would have testified that his IQ was probably “low to mid 60s,” that Wood was “educable mentally retarded or trainable mentally retarded,”<sup>49</sup> and that, even at the time of his trial, he could read only at the third-grade level and could “not use

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<sup>48</sup> *Ford v. Wainwright*, 477 U.S. 399, 412 (1986), quoting *Solesbee v. Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting).

<sup>49</sup> *Wood v. Allen*, 542 F.3d 1281, 1324 (11th Cir. 2008) (Barkett, J., dissenting) (quoting testimony of teachers), *denial of relief affirmed*, 558 U.S. 290 (2010).

abstraction skills much beyond the low average range of intellect.”<sup>50</sup> Alabama executed Mr. Wood, a black man, in 2010.

## Conclusion

The United States promises equal justice for all in its Constitution and its pledge of allegiance and above the entrance to its Supreme Court. Yet poverty, race and mental impairment influence the selection of those who will be subject to what Justice Arthur Goldberg called the “greatest conceivable degradation to the dignity of the human personality.”<sup>51</sup> The use of the death penalty is not just degrading to the person who is tied down and put down. It is also degrading to the society that carries it out. It coarsens the society. It shows a lack of reverence for life. It tells children that the society solves its problems through violence. And, as Dr. Martin Luther King, Jr., said, capital punishment is society’s final statement that it will not forgive.

Equal justice has lost out in the courts to other interests. Finality – not justice – has become the ultimate goal of the American legal system. Processing cases in as little time as possible – not competent representation, equal justice or protection of the most vulnerable – is the concern of most courts, even in cases where life and death are at stake. Technicalities and procedural rules made up by the Supreme Court and Congress now prevent enforcement of the Bill of Rights in most capital cases, particularly those with bad lawyers.

However, there is growing recognition that this is not moral, just or right. Former President Jimmy Carter, who as Governor of Georgia signed into law in March 1973 Georgia’s death penalty statute, called on November 12, 2013 for an end to capital punishment, because it is being imposed on the poor, members of racial minorities and people with diminished mental capacity.<sup>52</sup> Supreme Court Justice John Paul Stevens,

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<sup>50</sup> *Id.* (Barkett, J., dissenting) (quoting the testimony of a psychologist of evaluated Wood).

<sup>51</sup> Arthur Goldberg, letter to the editor, *Boston Globe*, Aug. 16, 1976.

<sup>52</sup> “Remarks by former U.S. President Jimmy Carter at the National Symposium on the Modern Death Penalty in America”, Nov. 12, 2013, available from [www.cartercenter.org/news/editorials\\_speeches/death-penalty-speech-111213.html](http://www.cartercenter.org/news/editorials_speeches/death-penalty-speech-111213.html); American Bar Association, *National Symposium on the Modern Death*

who voted to uphold the death penalty in 1976, observed before leaving the Court that the procedural protections for those facing death have been reduced, that there remains a strong probability that race influences who is sentenced to death, and that the death penalty carries with it a “real risk of error” with irrevocable consequences. He concluded that “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.’”<sup>53</sup>

The death penalty has recently been abandoned by Connecticut, Illinois, Maryland, New Jersey, New Mexico and New York, and governors have declared moratoriums on the death penalty in Colorado, Oregon and Washington.<sup>54</sup> The number of death sentences imposed by courts has declined from over 300 people per year in the mid 1990s to 80 or less in 2011, 2012 and 2013.<sup>55</sup> It is becoming increasingly apparent that the death penalty is being abandoned by most states, just as it has been abandoned by most nations. But it is equally apparent that poverty, race, intellectual disability and mental illness will influence who is condemned to die until the United States joins the rest of the civilized

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*Penalty*, available from [www.americanbar.org/groups/individual\\_rights/projects/death\\_penalty\\_due\\_process\\_review\\_project/national\\_syposium\\_death\\_penalty\\_carter\\_center.html](http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/national_syposium_death_penalty_carter_center.html) (including videos of presentations by President Carter and others).

<sup>53</sup> *Baze v. Rees*, 553 U.S. 35, 83 (2008) (Stevens, J., concurring), quoting Justice White’s concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring).

<sup>54</sup> John W. Hickenlooper, Governor, State of Colorado, “Executive order: death sentence reprieve”, May 22, 2013, available from [www.deathpenaltyinfo.org/documents/COexecutiveorder.pdf](http://www.deathpenaltyinfo.org/documents/COexecutiveorder.pdf); “Gov. John Kitzhaber of Oregon declares a moratorium on all executions”, available from [www.deathpenaltyinfo.org/gov-john-kitzhaber-oregon-declares-moratorium-all-executions](http://www.deathpenaltyinfo.org/gov-john-kitzhaber-oregon-declares-moratorium-all-executions); Governor Jay Inslee of Washington, “Governor Inslee’s remarks announcing a capital punishment moratorium”, available from [www.deathpenaltyinfo.org/documents/InsleeMoratoriumRemarks.pdf](http://www.deathpenaltyinfo.org/documents/InsleeMoratoriumRemarks.pdf).

<sup>55</sup> DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2013: YEAR END REPORT 1 (2013), available at <http://deathpenaltyinfo.org/documents/YearEnd2013.pdf>. The most death sentences were imposed 1994 and 1996, when 315 people were sentenced to death. *Id.*

world in making permanent, absolute, and unequivocal the injunction:  
thou shalt not kill.