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AMICUS JOURNAL

Fighting for Justice on Death Row

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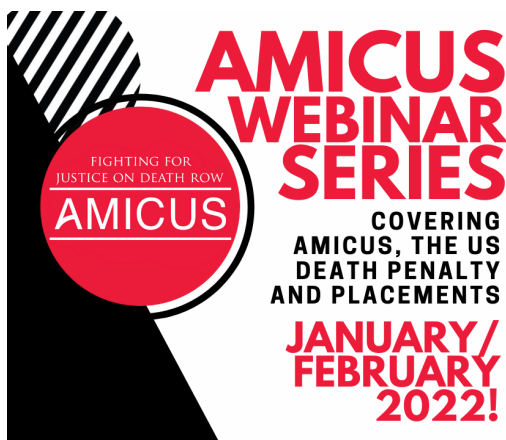
The Amicus Journal is published twice a year in summer and winter. Contributions are not merely welcomed but positively encouraged. See the Notes for Contributors in this issue.

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FRONT COVER

Cover Art by kind permission of Danielle Richards*

I painted in india ink on gesso of Travis Runnels, who was executed in December 2019. While awaiting execution, Travis was housed in what is considered one of the worst prisons in the United States, the Polunsky Unit in Texas. Inmates are kept in solitary confinement for at least twenty-three hours a day. They are taken out only for visitation (behind a plexiglass window), the intermittent shower, and often sparse rec time in what amounts to another concrete cage where they can hope to maybe feel the occasional sunlight if they are lucky. For as long as they are on this unit, they will never touch another human being who isn't a guard.

Travis never denied his guilt in the murder for which he was sentenced. Despite a troubled upbringing and horrific death row conditions, he managed to turn his life around. I haven't met a single person who knew him during this time who didn't speak so highly and so fondly of him. And after his death, many have expressed a deep, gnawing grief in the loss of a truly kind and thoughtful man. His own attorney wrote at length in a blog post praising the man Travis came to be. I painted this to depict the beauty humans are capable of creating and becoming, despite a system built to break them, built to strip away their humanity.

(Danielle Richards)

*Social Media Manager for freerobwill.org.

NOTES FOR CONTRIBUTORS

We welcome articles concerning legal issues relating to the death penalty in all jurisdictions around the world. The occasional Critical Approaches to the Death Penalty section also provides contributors with the opportunity to scrutinise death penalty issues theoretically and from the standpoint of disciplines other than law. Accordingly, we welcome submissions engaging in the disciplines of philosophy, sociology, psychology, economics, politics, religion, feminism, anthropology, and literature.

We also welcome case reports, volunteer reports from death penalty offices, reviews of books which concern the death penalty (both academic and literature), and opinion pieces on specific aspects of capital punishment. We encourage contributors to engage in a dialogue with all aspects of the death penalty, and also to comment on the Amicus Journal and our Amicus charity. Furthermore, we welcome short entrants for our Worldwide Overview and contributors are welcome to submit jurisdictional developments to be included as well.

Please refer to the articles published in the Journal for our house style. All points of law and fact are to be supported through endnote citation to authorities. Citations are to comply with the Blue Book citations. The title is to appear in normal case bold and the chapter headings are to appear in normal case bold. Sub-headings should appear in bold italics. The

author's name should appear in regular type with an asterisk (*) footnote symbol, detailing professional position or affiliation.

Main Articles

Between 5,000-8,000 words.

Shorter Articles and Case Commentaries

Between 2,000-3,000 words.

Book Reviews

Up to 1,000 words per book.

Editorials

Up to 1,000 words.

Letters to the Editor

Up to 800 words.

Worldwide Overview

Up to 100 words.

The Amicus Journal is to be cited as (Issue Number) Amicus Journal (Page) (Year). For example, Stephen Hellman, What Happens When the "Right" Principle of Interpretation Produces the "Wrong" Result, 11 *Amicus Journal* 16 (2005).

Please send letters or other contributions to one of the Editors at admin@amicus-alj.org.



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EDITORIAL

By Mark George QC

In this issue of our Journal, we consider a number of different topics relating to the operation of the US death penalty, including mental health, racism, the use of junk science, death-qualified juries and the spate of federal executions in 2020 and the start of 2021.

Attorneys Jonathan Harwell and Richard Tennant discuss the issues that arose when a Tennessee jury, tasked with considering their verdicts in a Black defendant's trial, retired into a courthouse room which was essentially a shrine to the Confederate cause, replete with Confederate flags and other memorabilia. The door to the jury room had "UDC" prominently displayed on the door, along with the flag of the Confederacy. The United Daughters of the Confederacy was a deeply racist organisation - tellingly only formed nearly forty years after the end of the Civil War, and closely intertwined with the Ku Klux Klan - which led the early Twentieth Century's effort to present the Southern cause as 'just', by setting up memorials all over the South, and celebrating a cause that was, in truth, both treasonous and racist. How, the authors ask, can a jury required to decide its verdict in such surroundings be said to be an unbiased jury, as required by the Sixth Amendment? An appeal is currently pending before the Tennessee Court of Criminal Appeals.

Anyone who has undertaken the Amicus US death penalty training programme will be familiar with the shocking case of Ray Krone, convicted of murder on the basis of evidence of teeth marks on the deceased's body. His case was far from unique. Professor Brandon Garrett of Duke University discusses the problem with junk science in its various guises and how the problems are magnified in capital cases, where most of the forensic science labs are little more than adjuncts of the police department, where the defence suffers from a serious lack of opportunity for their own testing, and where guidance from the Supreme Court has rarely offered proper scrutiny of expert evidence offered on behalf of the State. Wrongful convictions abound and it does not seem beyond doubt that innocent people have been executed on the strength of evidence that was, in truth, valueless.

The lack of constitutional protection for death row inmates suffering from serious mental disorders but not judged to be mentally incompetent is one of the most troubling aspects of the modern death penalty in the US. It has resulted in many seriously ill individuals

remaining on death row for years under sentence of death. Noorzadeh Raja of the Justice Project Pakistan writes about the recent decision of the Supreme Court of Pakistan in the case of *Safia Bano and others v. The State* in which the court considered three appeals by inmates who suffer from serious mental illness. As the author suggests, the judgment is a landmark in the treatment of the seriously mentally ill by the courts in Pakistan and is greatly welcomed.

Meanwhile, in Tennessee - one of the first states to provide protection from execution for those suffering from intellectual disability, well ahead of the US Supreme Court's decision in *Atkins* - efforts to legislate for an exclusion for those suffering from severe mental illness had made considerable progress, before the Covid-19 pandemic meant the abrupt end to the legislative session in early 2020. Sarah Graham McGee, JD, Coordinator of the Tennessee Alliance for the Severe Mental Illness Exclusion, explains the progress similar legislation has made elsewhere in the US and what the future holds for the success of such legislation in Tennessee.

Retired Supreme Court Justice John-Paul Stephens once famously opined that the death qualification process for capital juries amounted to "a procedure that has the purpose and effect of obtaining a jury that is biased in favour of conviction." In his article, Professor Craig Haney of the University of California considers the implications of obtaining juries whose members have all indicated their ability to impose a death sentence in the right circumstances. He reflects on the racial composition of such juries (as most Black *veniremen* are excluded), the fact that these juries do not represent the communities from which they are drawn, and the bias that such a jury has towards the prosecution. This bias manifests itself not just in regard to the guilt or innocence of the defendant, but also in the sentencing phase of the trial, in that they will more readily accept aggravating circumstances advanced by the state and reject mitigation put forward by the defence. He also considers the extent to which - in an era where support for the death penalty has dropped very substantially, from its high point in the 1990s to a situation today where support for the death penalty is at its lowest in four decades - capital juries can, in any sense, be said to reflect the views of society in general rather than those of an increasingly narrow section of the community.

In its 1986 decision in *Batson v. Kentucky*, the US Supreme Court sought to eliminate purposeful discrimination in the jury selection on the grounds of race.

The evidence - including the fact the Supreme Court has only reversed four convictions on this basis in the thirty-five years since *Batson* - suggests that *Batson* has failed miserably in its stated intent. Professor of Law at Columbia University, Jeff Fagan explains some of the shocking methods prosecutors have used to try to get around *Batson* and the inconsistent way state courts have applied *Batson* (if they have bothered at all). Fagan then explores the various attempts at reform in a number of states, which are trying to grapple with these issues, including both implicit and explicit bias. One state, Arizona, has concluded that the best way to deal with the problem is to ban peremptory challenges altogether - a conclusion Fagan believes is the preferred option.

The Covid-19 pandemic had a dramatic effect on state execution rates in 2020. Whereas the previous few years showed an average number of executions in the low twenties each year, in 2020 only seven executions were carried out by five states - three of which were in Texas. Although artificially reduced, these figures were the lowest number of state executions in almost forty years. However, 2020 will be remembered as the year when an embattled and embittered President, who realised he was likely to lose the general election in November of that year, decided to get his revenge in early by ordering the execution of no less than thirteen inmates on federal death row, many of whom had been there for years, for no better reason than to show that he had the power to order their deaths. The killing spree began in mid-July and the last execution was on 15 January 2021, just days before Trump left office. In an excerpt from a longer article published elsewhere, Professor Lee Kovarsky, co-director of the Capital Punishment Center at the University of Texas, examines the historic problems of litigating legal challenges to the federal death penalty, the challenges mounted by those singled out for execution in 2020, and how the US Supreme Court sided with the government to enable the executions. As Prof. Kovarsky points out, there are lessons in all this that states, eager not to be frustrated by challenges from prisoners, are likely to apply in the future.

In 2016, Abdul Latif Nasser was cleared by the US Government for release from Guantánamo Bay, where he had been a prisoner since 2002, but never charged with any offence. However, his transfer to Morocco was deliberately blocked by President Trump on his assuming office and Nasser remained in detention in Guantánamo Bay throughout Trump's period in office, until his release in July 2021. His release is celebrated in a short piece by Bernard E. Harcourt, Professor of Law and Professor of Political Science and part of Mr. Nasser's legal team, and Fonda Shen, a Research Assistant at Columbia Law School.

In the culture section, Amicus volunteer Grace Coupland reviews a number of recent books on the impact prison has on the mental health of inmates, whether those problems have manifested themselves before incarceration or are contributing to them by the conditions prisoners endure. Coupland also reviews a number of new podcasts on prison life, together with a wide array of other books, academic articles, films and reports that will be of interest to anyone wanting to broaden their understanding of the US death penalty.

Fellow Amicus Journal Editorial Board member Russ Stetler reviews Allan V. Horwitz' new book, *DSM: A History of Psychiatry's Bible*, which, of course, refers to the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. Arielle Baskin-Sommers reviews Professor Craig Haney's book, *Criminality in Context: The Psychological Foundations of Criminal Justice Reform* (American Psychological Association, 2020). Finally, Amicus volunteer Val Meo reviews the documentary film *The Phantom*, which reports on the case of Carlos DeLuna, an innocent man executed in Texas in 1989.

This issue's contribution to our "Volunteer Voices" section comes from my colleague at Amicus Training and fellow barrister Maddie Steele, who writes about her experience volunteering at the Public Defender's Office in Oklahoma City and why she keeps going back there.

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DELIBERATING WITHIN A CONFEDERATE MEMORIAL

By Jonathan Harwell* and Richard Tennent**

I. Introduction

In the last decade, Americans have begun to reconsider whether it is proper to publicly display memorials to the Confederate States of America, and to the Confederate leaders who fought to preserve slavery at the cost of over 600,000 deaths. Civil rights activists have fought to remove monuments to the “Lost Cause”, which they identify as symbols of racial oppression. Others similarly wish these monuments removed as they are markers of treason and a betrayal of this nation’s Constitution. However, these removal efforts have inspired significant resistance from those who claim that their heritage is being disrespected or their history erased.

This debate is playing out in a legal context in the town of Pulaski, in Giles County, Tennessee, the birthplace of the Ku Klux Klan. For many decades, jurors have deliberated the guilt or innocence of the accused in a room that is itself a memorial to the Confederacy. Recently, a brave young lawyer, Ethan Baddour, had the audacity to question this practice. His Black client was convicted by an all-white jury that deliberated within a room dedicated to the United Daughters of the Confederacy, in view of a portrait of Jefferson Davis and beneath two flags of the Confederacy.



Entrance to the Jury Deliberation Room

The door to the Giles County jury deliberation room reads “U.D.C. Room.” The “stars and bars” Confeder-

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ate Battle Flag is painted on the door itself. Inside the room, along with a table and chairs for purposes of deliberation, there is a framed portrait of Jefferson Davis, president of the Confederate States of America, and a portrait of Confederate General John Brown. Greeting the jurors after they enter this room is the third official flag of the Confederate States of America, “The Blood Stained Banner,” which contains the well-known and often displayed battle flag of the rebel Army of Northern Virginia. There is also a framed letter from the United Daughters of the Confederacy’s President General expounding on the need to “honor our Confederate Veterans, and share the history of the War Between the States.” Strikingly, there is no memorabilia or pictures regarding any Union generals or soldiers or Presidents of the United States; the American flag is not even displayed.



*Deliberation Room:
Table and chairs for jurors; Portraits of Davis
and Brown in far corner*



*The “Blood Stained Banner,” the third national
flag of the Confederate States of America*

After a trial in which his Black client was convicted by a jury of aggravated assault and resisting arrest (an arrest that was made by a white police officer),

and sentenced to a term of six years of imprisonment, attorney Baddour demanded a new trial based on a violation of his client's right to be tried before an unbiased jury. The case is now pending in front of the Tennessee Court of Criminal Appeals. The authors submitted an amicus brief on behalf of the Tennessee Association of Criminal Defense Lawyers (TACDL) arguing that not only is Mr. Baddour's client entitled to a new trial, but, equally importantly, the citizens of Tennessee are entitled to have this offensive display removed from the Giles County Courthouse.

Memorials operate on multiple levels, including their relationship to the event or person being memorialized; to the time and place of their construction; and to the community that observes or uses the memorial. This case provides an object lesson in the ways in which the Confederate memorials that are defended as a neutral way of remembering and honoring heritage are in fact anything but neutral: they must be understood as having arisen as the result of post-war decisions seeking to shape memory, as having been exploited for intentional purposes of oppression and white supremacy, and as continuing to send powerful messages of exclusion. No trial that occurs in the shadow of the regalia of a treasonous and racist movement can be considered to be consistent with the guarantees of the United States' Constitution. Yet, this message is hardly universally accepted. The Tennessee Attorney General has argued that, in this case, "substantial justice" did not require any relief at all. The Attorney General claims that there was no "discriminatory intent" on the part of the State, given that the exhibits were marked as the property of the U.D.C., not the State, and that there was no evidence that the jury had been influenced by the presence of the memorabilia. Defending this single conviction is apparently more important to the Attorney General than taking any official position criticizing this display.

II. Early Twentieth Century Memorials and the Role of the U.D.C.

A. Overview.

Memorials are not inevitable consequences of historic events.¹ Indeed, when dealing with Confederate memorials, there is almost always a chronological gap: contrary to the belief of many people, the vast majority of extant memorials were not erected in the immediate aftermath of the Civil War, and did not arise out of a simple need to remember recent events or to honor still-living individuals. Rather, they were built decades later, primarily between 1900 and the 1920s, and then again between 1954 and 1970, as part of a renewed

white resistance to Black civil rights.² They filled not a purely informative or nostalgic role, but rather served to support positions in those much-later conflicts.³ Monuments such as these exist not out of happenstance or historical pedantry, but rather, as Eric Foner recently explained, as "an expression of power"⁴ – and of the effort to retain that power.

Historians have explored the first spike in Confederate memorials, which came between 1900 and the 1920s. This crucial period saw the revival of the Ku Klux Klan, the spread of the myth of the "Lost Cause", and the dramatic re-segregation that erased the effects of post-war Reconstruction.⁵ The laundering of history through monuments during this time period served to legitimate structures of repression. These memorials "were part of a campaign to paint the Southern cause in the Civil War as just and slavery as a benevolent institution, and their installation came against a backdrop of Jim Crow violence and oppression of African Americans."⁶ The duality of these structures – looking backward to influence the present and future – has been apparent from the beginning. When the "Silent Sam" Confederate Memorial was erected at the University of North Carolina in 1913 (it was taken down by activists in 2018), one of the dedicators claimed that Confederate veterans had "saved the very life of the Anglo Saxon race in the South" and, as an example of this "saving", he described publicly whipping a Black woman.⁷

B. The Role of the United Daughters of the Confederacy.

The erection of memorials in the early 1900s was widespread. One recent study identified over six hundred Confederate monuments in public squares and courthouses that were erected prior to 1950 – and this list certainly undercounted those displays, as, for example, the Giles County display is not listed. The United Daughters of the Confederacy, founded in 1894, formed the vanguard of these memorialization efforts. As a key part of its efforts to shape historical memory, the United Daughters of the Confederacy erected over seven hundred monuments across the South on public land, including nearly two hundred on the grounds of courthouses.⁸

The U.D.C.'s involvement in memorialization grew out of its organizational values. The U.D.C. held profoundly racist views, and made little effort to keep those hidden.⁹ Indeed, since the 1920's, the U.D.C. has distributed the "Catechism on the History of the Confederate States of America," for the use of children in learning about Confederate history.¹⁰ The 1920 version of the

Catechism set out a clear “Lost Cause” explanation of the War: “[I]t was not slavery, but the vindictive, intemperate anti-slavery movement that was at the bottom of all the troubles.” It also explained the organization’s view of Blacks and their supposedly positive treatment by Southerners: “The Southerners took the negro as a barbarian and cannibal, civilized him, supported him, clothed him, and turned him out a devout Christian.”¹¹

The pervasive efforts of the U.D.C., combined with other propaganda efforts, served to plant a story of a benign antebellum South. This story also (in a cruel twist of logic, justifying present repression based on claims of past innocence and benevolence) implicitly supported economic repression, nearly complete disenfranchisement, and judicial and extrajudicial lynchings. A recently published study reveals that Confederate memorials and lynchings have gone hand-in-hand, finding that those Southern counties that have erected monuments to the “Lost Cause” have a statistically higher rate of lynchings than those that have refrained.¹²

The term “lynching” should be understood for what it is: political terrorist murder, often mass murder. In 1868, in St. Landry Parish, Louisiana, 250 people (mostly freed slaves) were murdered in a two-week spasm of violence that successfully ensured that not a single citizen voted for the Republican party.¹³ The U.D.C. held its first North Carolina convention on October 3, 1897 in Wilmington.¹⁴ Just over a year later, on November 10, 1898, a white racist mob overthrew the elected Republican government of Wilmington, and violently drove out a significant portion of the Black population, while murdering hundreds.¹⁵ The Equal Justice Initiative estimates that more than 4,000 Blacks were murdered in public acts of racial terrorism between 1877 and 1950.¹⁶

The monuments constructed by the U.D.C. “served as physical embodiments of the terror campaign directed at Black communities”¹⁷ and their efforts - embedding physical symbols of the “Lost Cause” mythology on highly visible public land against a backdrop of murderous suppression, were a spectacular success. As one historian has provocatively summarized the work of the U.D.C.: “[T]hey did ... what their fathers, brothers, and husbands failed to do during the Civil War: they won the war for the South.”¹⁸

C. The U.D.C. and the Klan.

The U.D.C. was also intertwined in many ways with the Ku Klux Klan.¹⁹ One former member has called it the “de facto women’s auxiliary of the KKK at the turn

of the century.”²⁰ This connection is especially pertinent with respect to the Giles County courthouse. Pulaski, the county seat of Giles County, is infamous as the founding place of the Ku Klux Klan in late 1865.²¹ In 1917, two years after the release of *Birth of a Nation*, and likely a few years before the Giles County U.D.C. created their shrine to the Confederacy in the courthouse, the U.D.C. erected a plaque in downtown Pulaski honoring the founding of the Ku Klux Klan.²² That plaque was on an office building across the square from the courthouse. Indeed, the KKK plaque can be seen from the U.D.C. Room in the Giles County Courthouse.²³ The physical and ideological connection between the U.D.C. and the Klan in Giles County, incorporated in these twin memorials, is unavoidable.

In sum, the U.D.C. Room is not just an interesting collection of memorabilia that happens to be piled into an extra room in the county courthouse. It is there for a precise reason: as part of a concerted nation-wide effort to spread an ahistorical myth of the Civil War, particularly including a view that Blacks benefited from slavery and that society was harmed by post-war outside efforts to redress inequality, a myth which was promulgated alongside acts of racial terror. That effort was and is anathema to any desire to provide equal justice under law for Blacks and other minority groups. Having a jury sit in the U.D.C. Room is much the same as forcing them to watch *Birth of a Nation* prior to deliberation. As one historian has written: “[A memorial that] stand[s] outside the door of a courthouse [will] send a clear message to all who enter about what the justice system values, and which side it will take.”²⁴ This is so much more true when the memorial is not merely outside the courthouse but rather inside it, integral to the most consequential part of a criminal trial.

III. The Message of the Confederate Flag.

A. The Confederate Flag in the 1950s and 1960s.

There is another layer of problematic meaning arising from the prominence of the Confederate flag in the U.D.C. Room. Again, the emphasis on the flags arises from a specific context and does not flow inevitably from the War itself. In the decades after the Civil War, in fact, the Confederate flag was rarely displayed in public.²⁵ It was not flown at Robert E. Lee’s funeral,²⁶ nor was it regularly flown by the Klan in their war against Reconstruction.²⁷ Rather, as a political symbol, the Confederate Flag re-emerged in opposition to President Truman’s desegregation of the United States’ military during the “Dixiecrat Revolt of 1948.”²⁸ Then, during the 1950s and 1960s, the flag was adopted by white supremacists and segregationists, who displayed it in opposition to Black civil rights.²⁹

The following images show how the Confederate flag was then displayed, and seen, in that far from benign context:³⁰



Segregationists taunt peaceful civil rights protestors as they march from Selma to Montgomery in March 1965. (Spider Martin)



Mississippi Highway Patrolmen watch marchers as they arrive in Montgomery on March 25, 1965. (Alabama Department of Archives and History. Donated by Alabama Media Group / Photo by Spider Martin, Birmingham News)



Students at the University of Alabama burn desegregation literature in Tuscaloosa, Alabama, on February 6, 1965, in response to the enrollment of Autherine Lucy. (Library of Congress/AP)



Young white men with Confederate flag and racist sign jeer at civil rights marchers in the southwest side of Chicago, August 5, 1966. (AP Photo)

There are many other images from the Civil War that could have been displayed in the U.D.C. room, and the choice of the Confederate flag, with all these connotations of opposition to desegregation, was surely not coincidental.

B. Contemporary Use of Confederate Flag.

To a younger generation, the Confederate flag has additional significance. It is now often joined with Nazi and Ku Klux Klan symbols. The message of these symbols is broader than some historical reference to 1940s Germany or the 1860s South. Rather, they have become generic symbols of white supremacy.



"Unite the Right" rally, Charlottesville, Virginia, August 11-12, 2017.³¹

Most recently, during the recent January 6 attack, the Confederate Flag was conspicuously displayed and paraded through the United States' Capitol.





January 6, 2021 attack on the United States Capitol.³²

Whether from the anti-desegregation efforts of the 1950s and 1960s or more recent uses, the Confederate flag now carries an unavoidable message that the person or institution displaying the flag believes that Blacks are not equal to whites; should not be afforded equal treatment; and that efforts to impose equality should be met with resistance and, if necessary, violence. It is difficult to imagine a more pernicious symbol to display to a set of individuals (largely, if not entirely, white) about to decide whether to afford a Black man the protections of the law, including the presumption of innocence and the requirement of proof beyond a reasonable doubt. It is difficult to imagine a symbol better calibrated to send a message to any Black jurors that their opinions are not welcome or a message to any Black defendant that their rights will not be respected.

IV. Influence of Confederate Imagery on Jurors.

It may seem obvious that the Confederate flag and images would negatively influence white jurors towards Black defendants. But these self-evident truths are also supported by empirical science. Dr. Joyce Ehrlinger, then of Florida State University, has completed two studies on the impact of exposure to the Confederate flag on human behavior.³³ In the first study, a politically diverse group of students at Florida State University were exposed either to the Confederate flag, or a neutral control, and then asked about their willingness to vote for four then-candidates for President: Hillary Clinton, Mike Huckabee, John McCain, and Barack Obama.³⁴ White students exposed to the Confederate flag were significantly less willing to vote for Barack Obama than white students who were not exposed to the flag (while their support for McCain and Huckabee was unchanged, and their support for Clinton marginally increased after exposure to the flag).³⁵

In Ehrlinger's second study, the all-white participants were asked their opinions of a fictional Black man, "Robert"; half of the participants were primed with the

Confederate flag, half were not.³⁶ In the story, Robert refused to pay his rent until his landlord repainted his apartment, and demanded money back from a clerk. After reading the story, the participants were asked to evaluate Robert.³⁷ Those participants who read the story while being primed with the Confederate flag rated Robert significantly more negatively than did those participants who were not exposed to the flag.³⁸ Importantly, the participants' negativity was independent of pre-existing levels of prejudice — people expressing non-discriminatory views still viewed Robert more negatively if exposed to the Confederate flag.³⁹ In both studies, the students' exposure to the Confederate flag was brief. In the first study it was displayed on a screen for fifteen ms (15/1,000 of second)⁴⁰; in the second study a folder with a Confederate flag sticker was "accidentally left" on a corner of the desk where the students took the examination.⁴¹

Ehrlinger concluded that "Our studies show that, whether or not the Confederate flag includes other nonracist meanings, exposure to this flag evokes responses that are prejudicial. Thus, displays of the Confederate flag may do more than inspire heated debate, they may actually provoke discrimination."⁴²

V. Legal Consequences.

A. Jury Bias.

The Supreme Court has recently reiterated the dangers posed by racial discrimination to the fair application of the law:

[D]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. The jury is to be a criminal defendant's fundamental protection of life and liberty against race or color prejudice. Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State.⁴³

As this passage suggests, there are two prejudicial aspects to holding deliberations inside a Confederate memorial with a display of Confederate flags and a portrait of Jefferson Davis.

First, the presence of these memorials sends a message to the jurors: that the State endorses (explicitly or implicitly) a certain view of history and a certain view of racial difference. Even if the items are marked as the property of the U.D.C., it is the State of Tennessee that summoned its citizens for jury duty and placed them in that room for deliberations. As outlined above, that message can only have a baleful effect on the jury

deliberations. If a fleeting exposure to a flag can have a statistically significant effect, how much more so will immersion in a virtual shrine to the Confederacy? The context may well encourage some jurors to indulge in improper prejudices (now given official imprimatur) that they might otherwise disregard or be ashamed to voice.

Justice Holmes once wrote: “[A]ny judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the enviroing atmosphere.”⁴⁴ Here, the enviroing atmosphere is contrary to any notion of equal rights under the law. If even a single juror were affected, this would constitute a constitutional violation.⁴⁵

B. Undermining of Validity of Verdicts.

Second, the fact that jury deliberations occur within a Confederate memorial undermines, if not destroys, any confidence that society can have in the verdict of the jury. That is, even if all the jurors were able to rise above their discriminatory surroundings and impose totally impartial justice, both the defendant and the public at large would still be left with doubts as to the validity of the verdict. They would be unsure whether the jury decided on the basis of the facts presented at trial or because they absorbed the implicit message that, beneath the gaze of Jefferson Davis and behind the battle flag of the Confederacy, a Black man need not be afforded the benefit of a fair trial and proof beyond a reasonable doubt. As the Supreme Court recognized in *Pena-Rodriguez*, this *appearance* of racial bias can result in “systemic loss of confidence in jury verdicts.”⁴⁶ One commentator quotes a Black citizen responding to seeing the Confederate flag displayed at a courthouse: “[W]hen we see the Confederate Flag flying over the courthouse, we are reminded of our slave masters fighting to keep us slaves.”⁴⁷ A jury verdict reached under that same flag will carry similar overtones, and not be regarded as legitimate by many members of the public. That loss of confidence alone will carry significant consequences for the rule of law.

VI. Conclusion.

This case presents an especially egregious example – a jury room explicitly decorated with Confederate memorabilia across the street from the founding site of the KKK – but this is only a matter of degree. Throughout the country, the justice system is still deeply intertwined, both visibly and invisibly, with significant structures of historical oppression arising from this nation’s troubled history.



A confederate flag and monument stand outside the courthouse in Marshall County, Alabama; year-long efforts by activists to have it removed have been unsuccessful⁴⁸

It is hoped that the ongoing efforts to remove Confederate monuments can also extend to other aspects of the justice system which send practical and symbolic messages of exclusion and discrimination. Yet, the resistance to these minor, and seemingly obvious, steps is hardly a source of optimism.

Endnotes

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ERROR, FORENSIC EVIDENCE, AND THE DEATH PENALTY

By Brandon L. Garrett*

The dentist, on the stand at a death penalty trial in Virginia, testified to “a very, very, very high degree of probability those teeth left that bite mark”, referring to the defendant, Keith Harward’s teeth. The prosecutor asked the dentist to explain, and he expanded: “My conclusion would be that with all medical certainty, I feel that the teeth represented by these models were the teeth that made these bite marks.” “There are no differences?” asked the prosecutor. The dentist was definitive: “I found absolutely no differences.” The dentist said Harward had unusual and distinctive characteristics on his teeth. One of his teeth “canted sideways” and there was a “hook type area” that seemed to match the bite mark. There was a “chipped area” and a “breakage” that aligned perfectly, they said. There were “no discrepancies.”¹

In 1982, this death penalty case turned into a media sensation, locally dubbed as “the bite mark case.” A man had broken into a home near the navy yards, in Newport News, Virginia, and murdered the man inside with a crowbar, then repeatedly raped his wife. During the assault, he bit her thighs and calves. She survived, called the police, and they swabbed and photographed the bite marks. She was unable to identify the culprit’s face, but described him as a white male wearing a white sailor’s uniform. The *USS Carl Vinson*, a nuclear aircraft carrier, was under construction in the nearby yards — and it had thousands of E-3 sailors on board. Keith Harward was one of them.

In perhaps the most massive dental dragnet ever conducted, dentists examined the teeth of every one of the navy sailors on board the *USS Vinson*. About three



thousand sailors took turns assembling in the mess hall, as two dentists shined flashlights in their mouths, looking for a tell-tale rotated tooth. The dentists examined Harward’s teeth once, and they called him back to take a mold of his teeth, shown in the figure on the left.

When they first compared his teeth to the marks on the victim, they excluded him. The entire undertaking turned up no leads. Although they cleared him during the shipboard “gauntlet”, later, at trial the dentists reported that the bite marks all matched Harward’s teeth. Harward’s death sentence was later overturned on appeal, but he was convicted again at a second trial, based on this dental testimony.

Twenty-five years later, I was looking through transcripts of old murder trials in Virginia, from dusty bound volumes pulled from law library shelves. I wanted to read how forensic experts testified in trials back in the 1980s and 1990s. I found two dozen trials, and while many had problematic forensic testimony, Harward’s stood out. Later I would learn that the dental testimony was all false. Several years later, DNA tests exonerated Harward, and instead included another sailor on the *USS Vinson*, who had gone on to commit other violent crimes. Harward spent thirty-three years in prison for a crime he did not commit. Further, after his exoneration, it emerged that additional forensic evidence was falsified. A lab examiner had testified that blood typing was inconclusive; in fact, the test results excluded him at the time.²

In 2009, a National Academy of Sciences committee tasked by Congress with studying the needs of the forensic science community in the United States, found no forensic discipline, apart from DNA testing, that “has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”³ Forensic analysts were making claims that they could identify individuals without any statistical or scientific research foundation. This unscientific evidence has contributed to countless wrongful convictions. Having read the trial transcripts of DNA exonerees by the hundreds, I have

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found that more often than not, the testimony was exaggerated, overstated, and erroneous.⁴

This problem is heightened in death penalty cases, in which far more forensic evidence may be collected and examined, due to the seriousness of homicide cases and the importance to law enforcement of closing them. Forensics have exposed serious errors in death penalty cases. Twenty-one people serving death sentences have been freed by post-conviction DNA testing. Still others, like Harward, received a death sentence and had it reversed by the time of their exoneration. Twenty-eight persons later freed by DNA tests received lesser sentences at trial, had a death sentence reversed on appeal, or pled guilty to crimes they did not commit, rather than face the death penalty. Many more have been exonerated based on non-DNA evidence. There have been over one hundred more exonerated from death row based on other types of evidence. Other death row inmates continue to seek release based on DNA testing results. One example is Kevin Cooper, sentenced to death decades ago in California, who has sought relief based on a new DNA test, ordered by the Governor in 2018, which matches another unknown person.⁵

Still more troubling is that, while freed by DNA, many of those people were convicted in the first place based on unsound and unreliable forensics. Of the twenty-one people exonerated by post-conviction DNA testing, who had been sentenced to death, fifteen involved forensic evidence used in some fashion as part of the prosecution's case.⁶ Ten cases had microscopic hair comparison evidence, a type so unreliable that the FBI and several state labs conducted landmark and large-scale audits into decades of testing and testimony based on such evidence. Two more had quite similar fiber comparisons. Two had bite mark comparisons. One had fingerprint comparison evidence and blood stain analysis. Some involved more than one type of unreliable forensics. This discussion has focused just on forensic evidence relating to guilt. A large and additional number of cases involve unsound scientific evidence introduced in the sentencing phase, including medical and psychiatric evidence, risk predictions, and more, which can also be highly disputed and error prone.⁷

The crime lab analysts, who typically worked for law enforcement, often described the forensics as though it was "smoking gun" evidence, tell-tale traces pointing straight to the murderer. Further, in some of those cases, forensic evidence that might have pointed to innocence was concealed from the defense. Thus, in

Earl Washington's case, the forensic evidence did not impact the jury because the blood typing that excluded him was concealed from the defense. In some cases, misleading and exaggerated testimony was provided to the jury. In additional cases, people faced the death penalty but later had the sentence reduced, like in Harward's case, or they pleaded guilty to avoid the death penalty.

Modern DNA testing does not prevent these types of forensic errors from occurring. In Ray Krone's case, DNA testing excluded him, but he was still convicted on the strength of bite mark testimony, much like in Harward's case. In Damon Thibodeaux's case, DNA testing excluded him at trial, but an officer theorized that perhaps the evidence had degraded. More recently, Lydell Grant was exonerated in Texas, for a murder conviction and life sentence in 2012. He was convicted of a stabbing outside a bar in Houston, Texas. At the time of the trial, the lab analyst testified that "[n]o conclusions will be made" regarding whether he could have been a contributor to the DNA profile identified from the victim's fingernails. In 2019, new DNA analysis identified a male profile from the DNA, in addition to the victim's, who was not Grant. A DNA database search identified a different person, who had been arrested close to the location of the crime. Grant was released on bond in 2019, based on those new DNA results, and he had his conviction reversed in 2021 by the Texas Court of Criminal Appeals.

We will never know how many innocent people have been executed. Forensic evidence may have contributed to wrongful executions, and it can also help to expose them. In 2006, Sedley Alley was executed in Tennessee, despite requests to test DNA evidence. Lawyers continue to seek DNA testing in support of a posthumous pardon in the case.⁸

How can this continue to happen, even in death penalty cases? The field of forensic science is "the application of scientific or technical practices to the recognition, collection, analysis, and interpretation of evidence for criminal and civil law or regulatory issues".⁹ However, most of the entities that perform such work are crime laboratories that operate as divisions of police departments.¹⁰

The US Supreme Court acknowledged that forensic and DNA evidence has "the potential to significantly improve both the criminal justice system and police investigative practices . . . to exonerate the wrongly convicted and to identify the guilty."¹¹ And yet, constitutional criminal procedure provides very little guidance

concerning the appropriate use of forensic evidence.¹² The US Supreme Court repeatedly has held prosecutors have a constitutional obligation to provide the defense with exculpatory and impeachment evidence.¹³ That obligation is notably underdeveloped in the context of forensic evidence. The US Supreme Court has held that an agency's failure to preserve evidence in a manner that permits forensic testing is a violation of due process only if done in bad faith.¹⁴ In that case, *Arizona v. Youngblood*, the very evidence police had contaminated was subject to DNA testing years later, and it exonerated the person convicted. Despite the rule of *Daubert v. Merrell Dow Pharmaceuticals*, it is vanishingly rare for trial judges to question the reliability or reject forensic evidence offered by the prosecution in criminal cases.¹⁵

Further, there is a lack of standards, training, and oversight, or a research culture, at crime laboratories.¹⁶ This has resulted in wrongful convictions, serious quality-control failures and lab-level misconduct.¹⁷ Absent "effective oversight"¹⁸, there is little chance that forensics will be conducted in a more reliable fashion, even in death penalty cases. Finally, the role of police is also crucial, since often they collect, or fail to collect, evidence for testing. Most crime-scene evidence is not tested, and evidence has often been lost or not tested in important cases.¹⁹ This can be due to misconduct. In the North Carolina case of Henry McCollum and Leon Brown, a fingerprint at the scene was never compared to an alternative suspect, even though it did not match McCollum, Brown, or the victim.

In recent years there have been some changes in response to large scale audits and revelations of misconduct or errors in serious cases. For example, the FBI conducted an audit of thousands of cases involving microscopic hair comparison testing, finding unscientific testimony in 95% of the cases examined, including a series of death penalty cases. In Massachusetts, courts have ordered a sustained inquiry into tens of thousands of cases handled by the two largest drug labs in the state. The Supreme Judicial Court, in response to "egregious misconduct" and "a lapse of widespread magnitude in the criminal justice system", set up procedures to notify defendants and reverse sentences.²⁰ In Texas, the Forensic Science Commission is reviewing old cases involving bite-mark testimony.

Unfortunately, death penalty cases, as I have discussed, may be particularly forensics-dependent and vulnerable to error. Further, the defense needs access to its own forensic experts to test the evidence independently, and it is standard to deny funding for such

access. Often, the defense was left in the dark when false and misleading forensics were presented to the jury. Not only must research be done to improve the accuracy and reliability of forensics, but judges, defense lawyers and prosecutors should be trained in the accepted scientific bounds of forensic testimony, and what makes it invalid or overstated. However, until forensic evidence is seriously regulated, there will be no assurance that reliable evidence will be presented, even in death penalty cases. Forensic error provides just one important reason why there cannot be any assurance that innocent people will not regularly be sentenced to death.

Endnotes

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SAFIA BANO AND OTHERS V. THE STATE: THE SUPREME COURT OF PAKISTAN'S LANDMARK JUDGMENT FOR MENTALLY ILL DEFENDANTS

By Noorzadeh Raja*

Kanizan Bibi has not spoken a word in over a decade. She rarely recognizes her own family members and is unable to dress or care for herself.

Despite this, Kanizan spent three decades languishing on Pakistan's death row, even after her mind had lost the ability to fully grasp the fact and meaning of her confinement. Arrested in 1989 at the age of sixteen for murdering her employer's wife and children, Kanizan was severely tortured in police custody for nearly fifteen days to obtain a false confession which ultimately formed the basis of her death sentence in 1991. Kanizan has always maintained her innocence.

After enduring the harsh conditions of death row for three decades — more than two-thirds of her life — Kanizan Bibi's mental health deteriorated dramatically to the extent that she has not spoken a word in over a decade. Kanizan was diagnosed with schizophrenia in 2000. In 2006, she was transferred to the Punjab Institute of Mental Health (PIMH), where she resided as a patient and received some mental health treatment. In December 2017, however, she was shifted back to a women's ward in Lahore's Central Jail to make space for other patients.

The International Covenant on Civil and Political Rights (ICCPR), which the Government of Pakistan ratified in 2010, urges countries practicing the death penalty to not impose it “on a person suffering from any mental or intellectual disabilities or to execute any such person”. The Human Rights Committee in its Concluding Observations to Pakistan in 2017 expressly noted that “[n]o one with serious psychosocial or intellectual disabilities is executed or sentenced to death, including by establishing an independent mechanism to review all cases where there is credible evidence that prisoners who are facing the death penalty have such disabilities and reviewing the mental health of death row inmates”.

Similarly, the 1984 Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council

(ECOSOC) in 1984 and amplified by further Safeguards in 1989 and 1996, prohibit States from carrying out executions on persons “who have become insane” or are “suffering from mental retardation or extremely limited mental competence.”¹ The exclusion of mentally ill prisoners applies regardless of when the mental health condition arises, and irrespective of whether it reaches a threshold that would result in a finding of incompetence to stand trial. The ban applies notably to prisoners who develop a mental illness during - and, in some cases, because of - their prolonged detention under the harsh conditions of death row.

The Human Rights Committee confirmed in *Sahadath v. Trinidad and Tobago* that if a prisoner suffers from a severe mental illness on the day the authorities issue an execution warrant, that warrant violates Articles 7 of the ICCPR, regardless of the prisoner's state of health at sentencing.² In *Francis v. Jamaica*, the Committee upheld the same principle where the petitioner suffered from a mental health condition that did not amount to legal insanity.³

However, it was not until April 2018 that the Supreme Court of Pakistan took *suo moto* notice of Kanizan Bibi's case and ordered the constitution of a medical board to evaluate her mental health and submit a report to the Supreme Court, on the basis of which her sentence of death could be commuted. Subsequently, the Court clubbed the cases of two other mentally ill prisoners, Imdad Ali and Ghulam Abbas, with Kanizan Bibi's and ordered a medical evaluation of all three mentally ill prisoners.

Imdad, a fifty-seven-year-old severely mentally ill prisoner, had suffered for more than eighteen years on death row without proper treatment. He was sentenced to death in 2002 for fatally shooting a religious teacher. During the course of his incarceration, he had been repeatedly diagnosed with paranoid schizophrenia, and several medical reports had confirmed over the years that he is actively suffering from psychotic symptoms and is “a treatment-resistant case”. He spent the last four years in solitary confinement in the

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hospital cell of district jail, Vehari, owing to the nature of his mental illness. In September 2020, he was shifted to Punjab Institute of Mental Health (PIMH).

Ghulam Abbas was arrested in September 2004 for fatally stabbing his neighbour over a dispute over the payment of the electricity bill in Haji Lal Din area of Rawalpindi. He was sentenced to death by a Sessions Court in May 2006. His subsequent High Court and Supreme Court appeals were dismissed in 2010 and 2016, respectively. In 2018, a Supreme Court review petition was also dismissed. Ghulam's mercy petition was eventually rejected by the Presidency on 22 April 2019. His most recent medical evaluation, by a board constituted by the Supreme Court in September 2020, declared that Ghulam is suffering from schizophrenia.

The medical board's report would assist the court in deciding whether these prisoners are in fact mentally ill and, therefore, whether they are 'fit for execution'. The then-Chief Justice Saqib Nisar observed that it is "beyond sense or reason that we execute mentally ill individuals".

In February 2021, following a series of hearings since September 2020, this principle finally found elucidation in Pakistan's jurisprudence. The Supreme Court of Pakistan commuted the death sentences of Kanizan and Imdad to life imprisonment and delivered a landmark judgment⁴ that reinforces the rights of mentally ill defendants in the criminal justice system. Not only has the Court established key safeguards for mentally ill defendants on death row, it has reiterated and upheld protections that must be afforded to persons with psychosocial disabilities at every stage in the criminal justice system; at the time of arrest, during investigation, trial and sentencing, in order to ensure that they are guaranteed due process. It has also barred the execution of individuals who are severely mental ill.

This unprecedented jurisprudence has brought Pakistan one step closer towards achieving conformity with its international legal obligations, codified in the various United Nations Conventions it has ratified and is bound to abide by under the European Union's GSP+ (Generalised Scheme of Preferences Plus) framework. The United Nations released a statement welcoming the recent landmark judgment, which was endorsed by eight UN Special Rapporteurs, including Agnès Callamard, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; Gerard Quinn, Special Rapporteur on the Rights of Persons with Disabilities; and Nils Melzer, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

On the question of whether a mentally ill condemned prisoner can be executed

The Supreme Court held that "if a condemned prisoner, due to mental illness, is found to be unable to comprehend the rationale and reason behind his/her punishment, then carrying out the death sentence will not meet the ends of justice." However, the Court clarified that not every mental illness shall automatically qualify for an exemption from carrying out the death sentence; it will only be applicable where a medical board consisting of mental health professionals certifies, after a thorough examination and evaluation, that the condemned prisoner no longer has the higher mental functions to appreciate the rationale and reasons behind the sentence of death awarded to him or her. To determine whether a condemned prisoner suffers from such a mental illness, the Federal Government (for Islamabad Capital Territory) and each Provincial Government shall constitute and notify a medical board that is composed of qualified psychiatrists and psychologists from public sector hospitals.

In its deliberation of the question of whether a mentally ill condemned prisoner should be executed, the Supreme Court made specific references to relevant international human rights law instruments, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention on Rights of Persons with Disabilities (CRPD), both ratified by the Government of Pakistan. It also cited Resolution 2000/65, adopted by the United Nations Commission on Human Rights in the year 2000, whereby all the States who still sustain death penalty were urged "not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."

Commuting Kanizan and Imdad's death sentences to life imprisonment

In the case of Kanizan, whose onset of mental illness was after the commission of the offence and after her incarceration, the court reproduced the medical board reports wherein it was identified that Kanizan suffers from a severe lifelong mental illness. The court also noted that she had been imprisoned for over thirty-one years. She had thus served longer than a life sentence. Recognizing the legitimate expectation for life, the court converted her sentence of death to imprisonment for life.

In the case of Imdad Ali, whose mental illness predates the commission of the offence, the Supreme Court observed that the trial court had formed a subjective view on Imdad's mental illness after asking a few questions, without having recourse to the materials annexed with the application filed on behalf of Imdad, and without

considering any argument advanced by counsel. The Court observed that the trial court formed an opinion on a crucial legal issue without considering holistic information and that such a “slipshod” approach could not be condoned. The Supreme Court further noted that the issue of Imdad’s mental illness had not been considered adequately by the High Court either. It noted that, when Imdad’s lawyer did not appear, the High Court asked another lawyer to take up the matter and argue it the very next day. The Court found that this hasty approach cannot be appreciated in matters that involve life and death of a convict. As such, the Supreme Court opined that even without touching upon Imdad’s mental health condition, the above irregularities constitute sufficient reason to suggest that Imdad’s death sentence be converted to life imprisonment.

The Supreme Court also drew attention to the fact that a medical board constituted in 2019 found that Imdad was likely to be mentally ill with schizophrenia at the time of the commission of the offence. Keeping in view the irregularities in the trial and Imdad’s mental condition and relying on the legitimate expectation for life, the court commuted his sentence of death to life imprisonment. The court also noted that Imdad has been imprisoned for the last twenty years and thus has already served out a large portion of his life sentence.

For both Imdad and Kanizan, the Court directed that they be transferred to the Punjab Institute of Mental Health (“PIMH”) for treatment and rehabilitation in accordance with provisions of Prison Rules. When their sentences are completed, the court has directed that they are to be examined again by a medical board that is to be notified by the Government of Punjab. As per the directions of the court, they are to be released from the hospital when the medical board opines “that they are fit for themselves and for the society”. Despite the differing circumstances of Imdad and Kanizan’s cases - one who was noted as mentally ill before the commission of the offence and the other, whose illness is only documented during her incarceration - the Court extended the benefit of commutation of the death penalty to life imprisonment to both mentally ill persons.

Defining mental illness

The Court directed that restrictive terms like “unsoundness of mind” be replaced with internationally recognized definitions of mental illness and mental disorder. It opined that limited definition of the terms “mental disorder” or “mental illness” should be avoided, and the Provincial Legislatures may, in order to better appreciate the evolving nature of medical science, appropriately amend the relevant provisions of the mental health laws to cater to medically rec-

ognized mental and behavioral disorders as notified by the WHO through its latest edition of International Classification of Disease (“ICD”). In this vein, the Court has recognized that outdated and derogatory terms such as “lunatic” and “insane” in Pakistan’s Code of Criminal Procedure, the Pakistan Penal Code and the Prison Rules be replaced with terms that are more inclusive and sensitive.

On the consideration of mental illness as a ground for clemency

In relation to Ghulam Abbas’s case, the Court noted that “though it has come on record that a mercy petition filed by condemned prisoner Ghulam Abbas was rejected by the President of Pakistan yet there is nothing on record to show whether the ground of mental illness was taken into consideration while dismissing the mercy petition.”

The Court directed that a fresh mercy petition be filed on his behalf mentioning his plea of mental illness, along with copies of his entire medical history, copies of the report issued by the medical board constituted by the Court on 21 September 2020 and a copy of the judgment, and that the petition be reconsidered in light of the judgment. The Court stated: “[...] we expect that the mercy petition filed on behalf of condemned prisoner Ghulam Abbas shall be disposed of after taking into consideration all the circumstances including the observations made by this Court in the instant judgment.”

In doing so, the Court has judicially reviewed the entire mercy petitions review process and effectively delineated the minimum guidelines that must be followed in the consideration of mental illness as a ground for clemency. It has set precedent for the rights and protections afforded to mentally ill prisoners at the arrest, investigation, trial, sentencing and clemency stages.

Delineating how the trial court should deal with the plea of an accused that he or she was suffering from mental illness at the time of commission of offence, as well as before the commencement or during trial

The Court held that, where the accused raises any specific plea, permissible under the law, including a plea under section 84 of the Pakistan Penal Code (“PPC”), the onus to prove such plea is on the accused. However, while proving such a plea, the accused may benefit from any material, oral or documentary, produced/relied upon by the prosecution.

Regarding the plea of the accused before or during trial, the Court made several salient observations. Firstly, whenever the trial court is put to notice, either by express claim made on behalf of the accused or through

the court's own observations, regarding the issue of incapability of an accused to understand the proceedings of trial and to make his/her defence, this shall be taken seriously while keeping in mind the importance of procedural fairness and due process guaranteed under the Constitution and the law. To this end, the accused can lead the evidence and adduce evidence in his or her claim. Moreover, the head of the medical board shall appear as a witness in court and can be cross-examined by both the prosecution and the defence. Secondly, while forming a *prima facie* tentative opinion, the court may give due consideration to its own observations in relation to the conduct and demeanor of an accused person. Failure of the parties to raise such a claim, during trial, does not debar the court from forming an opinion on its own regarding the capability of an accused person to face the proceedings of trial. A *prima facie* tentative opinion cannot be formed by the court only on the basis of such questions posed to the accused. The court is required to objectively consider all the material available before it, including the material placed or relied upon by the prosecution.

Once the court has formed a *prima facie* tentative opinion that the accused may be incapable of understanding the proceedings of trial or make his or her defence, it becomes obligatory upon the court to conduct an inquiry to decide the issue of incapacity of the accused to face trial due to mental illness. The court must have the accused examined by a medical board, to be notified by the Provincial Government, that consists of qualified medical experts in the field of mental health. Such experts shall examine the accused and opine on whether the accused is capable to understand the proceedings of trial and make his or her defence. The medical report or opinion must be detailed and structured with specific reference to psychopathology (if any) in the mental functions of consciousness, intellect, thinking, mood, emotions, perceptions, cognition, judgment, and insight.

Charting the way forward

While the Supreme Court's judgment represents a crucial opportunity for the creation and codification of fundamental protections for mentally ill defendants, there are key directives which must be implemented in order for any sustained, meaningful exercise of these safeguards.

The Court has directed the Federal Government of Pakistan and all the Provincial Governments to immediately make necessary amendments in the relevant laws and rules in the light of observations given in this judgment, and has mandated that the Prison Rules should be appropriately amended so as to bring

the jail manuals of all the Provinces in harmony. The Supreme Court has also directed the Federal Government and all the Provincial Governments to immediately establish high security forensic mental health facilities for assessment, treatment and rehabilitation of trial prisoners and convicts who have developed mental ailments during their incarceration. This is the first time that a direction has ever been passed to set up forensic facilities by a superior court. This is also in accordance with Pakistan's 2001 Mental Health Ordinance, which requires such facilities to be set up, as they are essential for the understanding of complex mental disorders. The Court has further directed the Federal Government and all the Provincial Governments to immediately launch training programs and short certificate courses on forensic mental health assessment for psychiatrists, clinical psychologists, social workers, police and prison personnel. Furthermore, the Federal Judicial Academy, Islamabad and all the Provincial Judicial Academies shall also arrange courses for trial court judges, prosecutors, lawyers and court staff on mental illness including forensic mental health assessment.

Endnotes

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- 4 Safia Bano and others v. Home Department Government of Punjab through its Secretary and others CRP 420, 66 (2021) (known as *Safia Bano*).

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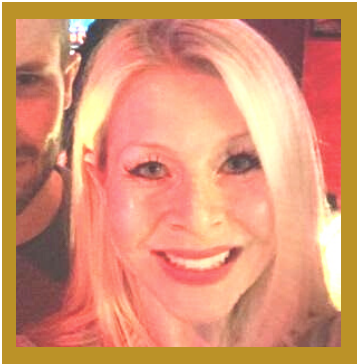
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Champion Individual: Claire Butler

Claire first attended Amicus training in 2006. Since then, Claire's passion for justice has motivated her to volunteer in Louisiana on two occasions. Since, Claire has worked in the Foreign and Commonwealth Office for five years within the International Law sector, and is now a Pro Bono Manager at Simmons and Simmons, who are now aiding Amicus on 46 cases.

Andrew Lee Jones Award Winner: Timothy Peterson

Tim Peterson is a partner in the London Office of Milbank LLP. Tim's practice is centred on representing corporations, financial institutions, and institutional investors. Moreover, Tim has notable experience in mergers and acquisitions and has worked extensively with private equity funds and their portfolio companies in acquisitions and dispositions in Europe and the US.



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Arthur Cox is one of Ireland's leading law firms that has shown great commitment to pro bono work. To date, 150 lawyers have reviewed thousands of legal documents and provided approximately 4,200 pro bono hours to Amicus' projects, which included seven casework projects and essential assistance in challenging the legality of Florida's death penalty laws.

THE DEATH QUALIFICATION PROCESS CONTINUES TO RENDER CAPITAL JURIES LESS REPRESENTATIVE AND MORE UNFAIR

By Craig Haney*

Death penalty juries in the United States wield the power of life and death over capital defendants. However, these juries are selected in a unique manner that many critics have long argued virtually ensures their unrepresentativeness and tilts their decision-making in favor of conviction and a death verdict. This skewing results from the mandatory process of “death qualification” that screens potential jurors explicitly on the basis of their attitudes about the death penalty. Those who hold what are deemed as “disqualifying” attitudes are dismissed from participation.

More than fifty years ago, in *Witherspoon v. Illinois*,¹ the United States’ Supreme Court first established the standard by which prospective jurors could be constitutionally excluded from capital jury service through this process. *Witherspoon* limited the group of prospective jurors who could be legally excused *for cause* on these grounds to those who expressed “unequivocal opposition” (i.e., explicitly said that they could never impose the death penalty, no matter what the facts or circumstances of the case). But the Court stopped short of declaring the practice unconstitutional, famously concluding that the empirical evidence documenting its biasing effects was too “tentative and fragmentary”² to justify such a decision. When litigants returned nearly two decades later, however, with a much more robust empirical record that included studies that documented the prosecution- and guilt-proneness of death-qualified juries, as well as data showing that the process itself — requiring prospective jurors to openly acknowledge their willingness to impose the death penalty — disadvantaged defendants³, the Court again rejected the challenge. In a majority opinion in *Lockhart v. McCree*⁴, penned by Justice Rehnquist, the Court ruled that there were still “serious problems”⁵ with the new studies showing bias and that, in any event, a group of similarly biased jurors “could have ended up” on a capital defendant’s jury “through the ‘luck of the draw.’”⁶

The Post-Lockhart Changed Landscape

Much has changed since *Lockhart* seemed to settle the matter. For one, a Supreme Court case decided

in 2002 requiring that death sentences be premised entirely on facts that have been found by capital jurors eliminated the judge-only death sentencing that had operated in a handful of states.⁷ Death qualification not only represents a standard feature of the modern death penalty trial, but also now shapes the composition of the group whose decision-making is the basis for literally every death sentence meted out in the United States. The increased importance now attached to the role of the capital jury has brought increased scrutiny to the manner in which it is selected.

In addition, one of the key “societal factors” that the Supreme Court continues to look to “in determining the acceptability of capital punishment to the American sensibility is the behavior of juries.”⁸ Thus, in deciding how “our society views” the appropriateness of imposing the death penalty on certain groups (such as the cognitively impaired), the Court has referenced whether or not juries’ decisions to impose the death penalty on the group in question are “uncommon” or “truly unusual.”⁹ However, “the behavior of capital juries” as a constitutional index of the “national consensus” on the death penalty is significantly shaped by the fact that every member of a capital jury has passed through the process of death qualification. Thus, the determination of whether, and how much, existing death penalty laws may offend evolving standards of decency — representing the hallmark of an Eighth Amendment analysis — remains inextricably connected to the effects of the death qualification process.

A different but highly relevant legal development concerns increased critical commentary about the Supreme Court’s approach to the Sixth Amendment’s “fair cross section” provision and the importance of addressing the underrepresentation of racial minorities on capital juries.¹⁰ The *Lockhart* Court ruled that death qualification did not violate the fair cross section provision, because that provision required only that the *venire* from which juries were selected “reflect the composition of the communities at large”¹¹, not the juries themselves. The Court also concluded that persons excludable from capital juries because of their

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death penalty attitudes did not constitute a “cognizable class”, in part because the basis for the exclusion involved an attribute “within the individual’s control.”¹² However, the issue of whether and how the death qualification process resulted in the systematic underrepresentation of already constitutionally protected groups was not directly presented or decided in *Lockhart*. More recently, a number of legal scholars have expressed concern over what Sullivan termed the “demographic dilemma in death qualification”, namely that the process not only “necessaril[ly] result[s] in a jury that does not reflect the view of a substantial portion of the community — the significant opposition in the Black community to capital punishment,” but also operates to “exclude the expressed moral judgment on capital punishment held by this part of the community” and thus “serves to reduce the Black presence in a symbolically important process in the criminal justice system.”¹³

In addition to these inter-related legal issues, several important post-*Lockhart* empirical developments have raised new concerns about the biasing effects of death qualification. New research conducted in the years following *Lockhart* continued to document additional ways that the death qualification process could bias the functioning of the capital jury and undermine the reliability of its decision-making. For example, studies corroborated earlier findings that death qualification tended to produce juries that are more guilt-prone and less due process-oriented.¹⁴ In additional research conducted in several local jurisdictions in Florida, Butler found that, among other things, death-qualified jurors were more likely to endorse racist, sexist, and homophobic attitudes¹⁵, were susceptible to potentially prejudicial pretrial publicity¹⁶, and more responsive to victim impact testimony.¹⁷ Researchers elsewhere also found that death qualification not only eliminated a disproportionate number of women and non-whites but also members of certain religious groups, especially Catholics.¹⁸ Although many of these studies were conducted with local samples from individual jurisdictions that were not necessarily representative of jurors more broadly, the results underscored the fact that there was, if anything, more reason to focus on the biasing effects of death qualification than in the past.

The final empirical development pertains to a gradual but consistent decline in public support for the death penalty from the mid-1980s when *Lockhart* was decided. In fact, the Court’s *Lockhart* decision occurred when support for the death penalty was at or near its highest levels in the United States, with nearly four

out of five persons stating they were “in favor” of it, and a comparatively very small number indicating opposition.¹⁹ However, according to the country’s two most respected national polling organizations (Gallup and the Pew Research Center), although public support remained at this high level for nearly a decade, a modest but steady decline began at the end of the 1990s. That decline has continued to the present, so that death penalty support in the United States is at its lowest level in four decades.²⁰

The implications of this trend in death penalty attitudes for death qualification have remained empirically unclear. That is, although the overall group of death penalty opponents has increased since *Lockhart*, the number of persons who would be legally excludable on the basis of their death penalty attitudes cannot be precisely calculated from general polling data. This is because public opinion polls typically ask respondents to indicate only whether they are “for” or “against” the death penalty, without probing their degree of support or opposition. Not only does categorizing people as favoring or opposing the death penalty fail to “take into account the vast heterogeneity of views underlying this simple dichotomy”²¹, it provides limited insight into the implications of this trend for gauging the effects of death qualification. Because prospective jurors are deemed “excludable” only on the basis of extremely strong views, it is not possible to determine whether and how the overall shift in death penalty support — measured as a simple dichotomy — has affected the death qualification process or the magnitude of its biasing effects.

For example, it is possible that the increase in the number of death penalty opponents overall also has resulted in an increase in the number of persons who say they could never impose the death penalty and/or that their strong opposition would interfere with their ability to perform their duties as jurors. This would, in turn, increase the size of the excludable group and likely increase the magnitude of the resulting biasing effects. Alternatively, the greater number of persons who now express opposition to capital punishment may be made up largely of those who were formerly in favor and who, therefore, are likely to be only mildly or moderately opposed (an attitude that would not result in their disqualification and have little or no impact on the biasing effects of the process).

Absent more recent data, collected after the shift in death penalty attitudes had taken place, it is impossible to know what the potentially biasing effects of death qualification now are.

New Research on the Continued Biasing Effects of Death Qualification

To address some of the implications of these post-*Lockhart* developments, my colleague Mona Lynch and I surveyed the death penalty attitudes of representative samples of jury-eligible persons in the California county with the highest percentage of African American residents in the state.²² In two separate surveys, using participants' responses to a series of questions about their death penalty attitudes, we found that jury pools composed only of those deemed "death-qualified" (and therefore eligible to serve on a capital jury) excluded a very high proportion of persons who expressed any opposition to the death penalty, even though this view had become increasingly mainstream. Death qualification also "white-washed" the pool of eligible jurors by disproportionately excluding African Americans, whose ineligibility to serve was based overwhelmingly on their death penalty opposition. In addition, the death-qualified pools contained a disproportionate number of capital jury-eligible persons who were inclined to ignore or even misuse "mitigating factors" (facts and circumstances that are supposed to lead to life sentences) and to more heavily weigh "aggravating factors" (those that lead to death sentences).

In related research, Eileen Zurbriggen, Joanna Weill, and I conducted statewide death penalty attitude surveys in three states chosen for their demographic and geographical diversity as well as their very different histories with capital punishment — New Hampshire, California, and Florida.²³ Notwithstanding the diversity of the states — a small, largely white, rural state in the Northeast whose citizens have rarely imposed a death sentence (New Hampshire), a very large and diverse Western state where death sentences have been imposed but executions rarely carried out (California), and a large and diverse state in the American South where both death sentences and executions have been meted out in high numbers (Florida) — we found remarkably similar patterns of death qualification bias. Death-qualified respondents in all three states not only endorsed much more punitive criminal justice views in general (as might be expected) but also tended to be less concerned about certain due process protections. They not only held much more positive views of the system of death sentencing in the United States (as also might be expected) but were more willing to endorse beliefs about capital punishment that, if not outright misconceptions, appeared to discount or ignore many of the aspects of the system that are at the forefront of current debates over its legitimacy and viability (e.g., its expense, lack of deterrent effect,

racially unfair administration, and cruelty).

In addition, death-qualified respondents in all three states were far more willing to attribute aggravating significance to virtually all of the types of factors that are introduced into capital penalty phases to support death verdicts. More telling, perhaps, they were correspondingly far less willing to give mitigating significance to most of the numerous factors that are often introduced in capital trials and which represent the only things that typically stand between a capital defendant and a death sentence. Specifically, a majority of death-qualified respondents were unwilling to acknowledge the potential mitigating effect of key factors or circumstances of the sort that the United States' Supreme Court has said should be considered and taken into account in assessing the moral culpability of a capital defendant and used in deciding on his "death-worthiness."²⁴ That is, they were significantly less likely to regard as mitigating the fact that capital defendants had suffered poverty, child abuse, racial/ethnic discrimination, had been subjected to institutional failure in the course of their lives, or that drugs or alcohol played a role in the crime for which they had been committed. They also were significantly more likely to support death penalty imposition on seriously mentally ill defendants than were persons deemed excludable. In this sense, then, death qualification ensures that capital jurors will be significantly less responsive to precisely the kind of evidence that capital defense attorneys are routinely advised to present in their case in mitigation.²⁵

Our data also underscored various ways that the death qualification process ensures that capital juries are unrepresentative of the communities from which they are drawn. As reported, we found that nearly a third of all jury-eligible persons in all three states would likely be excluded based entirely on their death penalty attitudes. Although the excludable group included some who were disqualified on the basis on their strong support for capital punishment,²⁶ there was a notable disproportion: death qualification resulted in the exclusion of more than half of the now sizable number of persons who expressed any opposition to the death penalty and only a small portion of those in favor. Thus, as death penalty opposition becomes more widespread in the United States, death qualification systematically ensures that this increasingly "mainstream" point of view is denied representation on capital juries.

In addition to the systematic exclusion of increasingly mainstream death penalty opponents, death qualifica-

tion results in racial/ethnic underrepresentation that is of special concern in this context. Albeit in slightly different ways, white respondents in each of the three states were more likely to be found “fit to serve” on capital juries than persons of color, who were more likely to be deemed excludable. There are two additional, interrelated dynamics that both help to explain and may operate to exacerbate the effects of the kind of racial/ethnic underrepresentation death qualification continues to incur. The first is the relative inability or unwillingness of white death-qualified jurors to empathize with Black capital defendants.²⁷ The second is the finding that there appear to be heightened levels of both explicit and implicit racial bias present on death-qualified capital juries, leading the researchers who documented them to conclude that “jury selection is a location where racial bias operates” in capital cases.²⁸

Taken together, these findings suggest that the issue of whether a capital defendant lives or dies is entrusted to an increasingly unrepresentative group, one that is disproportionately composed of white men who identify politically as conservative and Republican and who hold criminal justice and death penalty views that are increasingly out-of-step with the rest of society. The present research adds significantly to the empirical database that has been amassed since the US Supreme Court last considered this issue. It is consistent with the conclusions of one federal judge who recently considered the overall implications of such research, namely that the death qualification process operates to “stack the deck against defendants,” and that this central feature of the capital jury selection process, “is not the solution to inherent jury bias but rather a substantial part of the problem.”²⁹ The significant differences we found between death-qualified and excludable respondents in each of the very different three states we studied underscored the ways in which the fairness, accuracy, and diversity of the group of citizens who are permitted to participate on a capital jury continue to be significantly compromised and undermined as a result of this practice.

Endnotes

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- 2 *Id.* at 517.
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- 4 Lockhart v. McCree, 476 U.S. 162 (1986).
- 5 *Id.* at 173.
- 6 *Id.* at 178.

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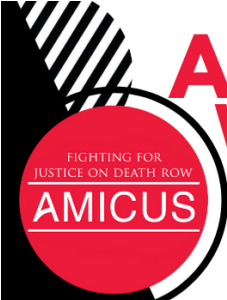
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SEEKING REFORM IN THE DEATH BELT: AN UPDATE ON TENNESSEE'S PURSUIT OF A SEVERE MENTAL ILLNESS EXCLUSION

By Sarah Graham McGee*

Introduction & Background: Why Severe Mental Illness?

Despite what many believe, individuals with severe mental illness are still subject to the death penalty in the United States. In 2006, William Morva was twenty-four years old and delusional when he killed an unarmed hospital security guard, Derrick McFarland, and a sheriff's officer, Corporal Eric Sutphin. Morva was paranoid and his mental health continued to deteriorate in jail, while he awaited trial on earlier charges. In his paranoid state, he believed that the jail employees were trying to kill him. As his condition worsened, he was taken to the regional hospital where he ultimately overpowered the deputy who escorted him there, stole his gun, and wound up killing the two victims over the next day and a half.¹ While his capital sentencing jury did not have complete information, ultimately a psychiatrist diagnosed him with a severe mental illness known as delusional disorder. Despite his severe mental illness, he was sentenced to death and was executed on July 6, 2017. Because those with severe mental illness are still at risk of execution in our nation, a severe mental illness exclusion to the death penalty is necessary to prevent the execution of these individuals, who are at least as disabled as those with intellectual disability — a group whose execution is already unconstitutional.

With the most conservative legislature in the United States,² Tennessee is a challenging state in which to move legislation that seeks to limit the scope of the death penalty in. But in 1990, well before the United States' Supreme Court decided *Atkins v. Virginia*³ in 2002, Tennessee was one of the first states in the country (much less the South!) to exclude individuals with intellectual disability from the death penalty.⁴ Following *Atkins* and *Roper v. Simmons*⁵ (2005), many working to reform the death penalty felt severe mental illness could become "the next frontier" in American capital jurisprudence.⁶ In the mid-2000s, several prominent national organizations (such as the American Bar Association and American Psychiatric Association) officially took the position that individuals

with severe mental illness should never be subject to capital punishment. According to these experts, these individuals should be excluded because they are severely disabled by their illness and are not the "worst of the worst" offenders for whom the death penalty is supposedly reserved.

In 2015, the Tennessee Alliance for the Severe Mental Illness Exclusion (TASMIE), a coalition of mental health advocacy and criminal justice reform agencies,⁷ came together to earnestly pursue a severe mental illness exclusion to the death penalty in Tennessee. Support comes from a wide variety of non-profit organizations, including local chapters of national groups like Mental Health America (MHA), National Alliance on Mental Illness (NAMI), and the National Association of Social Workers. There are local mental health advocacy organizations like the Tennessee Disability Coalition and Tennessee Mental Health Consumers' Association; and the Tennessee Libertarian Party is represented in the TASMIE coalition as well. Local criminal justice reform organizations like the American Civil Liberties Union of Tennessee, Tennessee Conservatives Concerned About the Death Penalty, Tennesseans for Alternatives to the Death Penalty, and Just City Memphis⁸, round out the diverse groups united in their support of a severe mental illness exclusion.

Tennessee's Progress

For the past several years, supportive Republican sponsors championed the bill in both the House and Senate, and a team of dedicated lobbyists pursued its passage through key committees. Each year's successes built upon the last. Despite this continuing momentum, TASMIE organizers have always known that passing the bill would be a huge lift.

The Tennessee General Assembly holds two-year legislative sessions. Bills must move through subcommittees, then full committees, before reaching the full House and Senate floors. Between 2019 and 2020, the severe mental illness exclusion bill (HB1455/

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SB1124)⁹ saw major progress. On March 13, 2019, after contentious testimony where the Tennessee District Attorneys' General Conference spoke against the bill, it still obtained enough votes to move out of the House Criminal Justice Subcommittee. After another year of educating lawmakers and garnering additional bill sponsors, the bill made it through the tough twenty-five-member House Judiciary Committee on March 11, 2020. During the two-year process, two well-respected retired judges spoke on behalf of the bill and calmed the fears of legislators who heard the prosecutors' claims that the exclusion was not necessary because people with severe mental illness are already protected under the current law — or that this bill was a slippery slope towards complete abolition. This progress, the furthest a bill of this kind has ever gone in Tennessee, was wind in the sails of TASMIE's organizational and individual supporters. We wondered if 2020 was the year it would finally become law.

As is well-known now, the spring of 2020 would take a turn for the worse in so many ways. The final favorable vote on the bill to exclude those with severe mental illnesses in Tennessee occurred just days before the legislature recessed indefinitely due to the escalating Covid-19 pandemic. After a thirty-nine billion dollar budget was rushed through¹⁰, hundreds of bills were sidelined as "non-essential" and, ultimately, dead at the end of the two-year session. Time simply ran out. It was a frustrating way to end things given the two favorable votes and strong momentum. With nowhere left to run the bill, TASMIE would have to start over in the 2021-2022 legislative session.

A Nationwide Movement & States' Success

Tennessee is one of many states that have sought a severe mental illness exclusion in the past decade. Between 2016 and 2021, thirteen different states filed severe mental illness exclusion bills, amounting to nearly half of all states that still use capital punishment.¹¹ Several states made impressive runs at passing their bills into law. On January 30, 2020, Virginia's Senate overwhelmingly passed their severe mental illness bill with a thirty-two to seven favorable vote.¹² While Virginia's bill eventually failed in the House that year, just fourteen months later this state became the first southern state to abolish the death penalty completely (absolving the need for a severe mental illness exclusion). The ultimate success finally came when Ohio was the first (and still only) state to pass a severe mental illness exclusion into law in the modern death penalty era!¹³ On January 9, 2021, Ohio Governor Mike DeWine signed the bill into law, after the legislature previously passed the bill with strong bipartisan

support.¹⁴ The passage of Ohio's law was especially impressive given its retroactivity. On the heels of the Ohio victory, Florida introduced legislation that quickly found success when its Republican-sponsored severe mental illness exclusion bill unanimously passed through their Senate's Criminal Justice Committee on March 30, 2021.¹⁵

Prior to Ohio's success, a collaborative documentary film highlighting the states' efforts to exclude people with severe mental illness from the death penalty was released in early 2019. The film, *Too Ill to Execute*¹⁶, features retired judges, legislators, mental health professionals, capital defense attorneys, and a murder victim's family member sharing why they support a severe mental illness exclusion. The film also delved into William Morva's life and severe mental illness. Dr. Richard Briggs, a veteran combat surgeon and Republican State Senator from Tennessee, was featured as the film's legislative voice. He makes a perfect champion for the bill in Tennessee, because - while he philosophically supports the death penalty - he adamantly opposes the execution of those with severe mental illness. While sharing individuals' experiences, *Too Ill to Execute* also highlighted why we need to pass these bills into law. This is because passage would save taxpayers money that could be redirected to prevention and treatment¹⁷; could avoid decades of legal wrangling, and more quickly provide finality for victims' family members; affect only a small percentage of cases; be a mere extension of something we already do with intellectual disability; and still protect society.

Full Circle: Severe Mental Illness Efforts and Intellectual Disability Modernization

While Tennessee's severe mental illness exclusion has not yet passed, the years of education of both the public and legislators laid the groundwork for one of this year's success stories as it relates to death penalty reform in Tennessee. One of TASMIE's members, the Tennessee Disability Coalition, spearheaded an effort to advocate for legislation that would modernize Tennessee's current law concerning intellectual disability and the death penalty. As previously mentioned, Tennessee outlawed executing someone with an intellectual disability long before the US Supreme Court declared the practice unconstitutional — but that was decades ago. This past spring, in April 2021, our legislature modernized its intellectual disability exclusion by removing the seventy IQ score requirement and providing a procedural pathway for those already on death row whose intellectual disability claim had not been fully considered by the courts.¹⁸ After working

with prosecutors who originally opposed the update, a compromise was struck which allowed the bill to pass the House with eighty-nine yes votes and only four nos, while the bill passed the Senate twenty-nine to zero!

Without these updates to the law, Tennessee risked the unconstitutional execution of a person with intellectual disability. Tennessee's early leadership on the issue of intellectual disability, which in part led to *Atkins*, eventually led to the pursuit of a severe mental illness exclusion. And although this exclusion has not yet been accomplished, the education surrounding it paved the way for the resounding passage of the law modernizing Tennessee's intellectual disability statute. With this overwhelming support for a retroactive law pertaining to the death penalty, advocates in Tennessee still believe there is a way forward to passing an exclusion to the death penalty for those with severe mental illness.

Endnotes

1 See Liliana Segura, *Will Virginia Execute a Man Whose Crimes Were Driven by Delusions?*, THE INTERCEPT (27 June 2017), <https://theintercept.com/2017/06/27/will-virginia-execute-a-man-whose-crimes-were-driven-by-delusions/>.

2 The American Conservative Union Foundation (ACUF) annually ranks lawmakers and legislatures based on how closely they adhere to conservative principles. For many years Tennessee has been deemed the most conservative. *State Rankings: Comparing the States on Conservative Policy*, ACUF, (<http://ratings.conservative.org/states>).

3 *Atkins v. Virginia*, 536 U.S. 304 (2002).

4 See DEATH PENALTY INFORMATION CENTER, *State and Federal Info: Tennessee*, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/tennessee>.

5 *Roper v. Simmons*, 543 U.S. 551 (2005).

6 See Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785 (2009).

7 Visit www.tasmie.org for more information.

8 Just City is based in Memphis, home to the majority of Tennessee's death row convictions. More information about their mission and accomplishments can be found here: <https://justcity.org/>.

9 H.B.1455, 111th Leg., Reg. Sess. (Tenn. 2019), available at <https://www.capitol.tn.gov/Bills/111/Bill/SB1124.pdf>.

10 Joel Ebert, *Tennessee legislature tempo-*

rally recesses after 14-hour day filled with rarities amid coronavirus pandemic, THE TENNESSEAN (19 Mar. 2020), <https://www.tennessean.com/story/news/politics/2020/03/19/tennessee-legislature-recesses-2020-session-amid-coronavirus/2880882001/>.

11 As of publication, twenty-seven states still have the death penalty. See DEATH PENALTY INFORMATION CENTER, *State by State*, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>. The states that have filed a severe mental illness exclusion bill are: Arizona, Arkansas, Florida, Indiana, Ohio, Kentucky, Missouri, North Carolina, South Carolina, South Dakota, Tennessee, Texas, and Virginia.

12 Patrick Wilson, *Va. Senate Passes Bill to Bar the Death Penalty for Seriously Mentally Ill*, RICHMOND TIMES-DISPATCH (17 Jan. 2019), https://richmond.com/news/local/government-politics/va-senate-passes-bill-to-bar-death-penalty-for-seriously-mentally-ill/article_c3aa7391-2406-5b91-924d-f6be-819deebd.html.

13 Connecticut passed a severe mental illness exclusion into law in 1973 but abolished the death penalty in 2012.

14 *Gov. DeWine Signs Bills Into Law*, WKBN (9 Jan. 2021), <https://www.wkbn.com/news/ohio/gov-dewine-signs-bills-into-law/>.

15 Unfortunately, the Florida bill failed to move further given its lack of a House sponsor, but the unanimous bipartisan support for a retroactive death penalty-related bill is nonetheless huge progress in a southern state: <https://www.tampabay.com/news/crime/2021/04/19/florida-still-executes-the-mentally-ill-this-bill-would-stop-that/>.

16 To view the film please visit www.tasmie.org/tooilltoexecute.

17 See *Potential Cost Savings of a Severe Mental Illness Exclusion from the Death Penalty: An Analysis of Tennessee Data*, ABA'S DEATH PENALTY DUE PROCESS REVIEW PROJECT (June 2018), <https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/2018-smi-cost-analysis-w-tn-data.pdf>. Tennessee could save up to 1.89 million dollars annually by passing the severe mental illness exclusion.

18 H.B.1062, 112th Leg., Reg. Sess. (Tenn. 2021), available at <https://www.capitol.tn.gov/Bills/112/Bill/HB1062.pdf>.

BEYOND BATSON: REDUCING RACIAL BIAS IN CAPITAL JURY SELECTION

By Jeffrey Fagan*

What people look like, or, rather the race they have been assigned or are perceived to belong to, is the visible cue to their caste. It is the historic flash card to the public of how they are to be treated, where they are expected to live, what kinds of positions they are expected to hold, whether they belong in this section of town or that seat in a boardroom, whether they should be expected to speak with authority on this or that subject, whether they will be administered pain relief in a hospital, whether their neighborhood is likely to be in a toxic waste site or have clean water flowing from their taps, whether they are more or less likely to survive childbirth, ... whether they may be shot by the authorities with impunity.

ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 18 (2020)

In the 1996 capital murder trial of Allen Snyder, Louisiana prosecutors used a succession of peremptory challenges to strike Black prospective jurors. Those prospective jurors had survived prior challenges of exclusion *for cause*, yet were still excluded. There was nothing unusual about this, sadly. After all, striking Black prospective jurors had been an endemic problem in capital trials for decades, leading the US Supreme Court in *Batson v. Kentucky* to outlaw “purposeful discrimination” of prospective jurors based on race.¹ To survive *Batson* scrutiny, prosecutors must offer a race-neutral explanation for striking the juror. *Batson* challenges are common, especially in capital cases, but the standard is not forgiving or friendly to the defense.

But the exclusion of prospective juror Jeffrey Brooks was somehow different. In Snyder’s *voir dire*, the prosecutor struck five Black jurors from the *venire* before coming to Brooks. The defense stated no objections to those exclusions, but did note for the record that all the excluded jurors were Black. One reason to not object was that Brooks was initially accepted by the prosecutor as a juror. At the outset of *voir dire*, Brooks mentioned to the Court that he had a potential conflict due to his teaching schedule, but his school offered an accommodation that the Court accepted with no opposition from the prosecutor. Yet, when it was time to question Brooks as a possible juror, the prosecutor struck Brooks. The prosecution alleged that Brooks

looked “nervous,” but more important, would be motivated to reach a not guilty verdict to avoid a penalty phase and allow him to resume his teaching obligation. The Judge ruled that this reason was race-neutral and allowed the strike *for cause*.²

In a third appeal to the US Supreme Court, Snyder compared Brooks’ strike to two other jurors with prior commitments that, similar to Brooks, would have conflicted with their jury service. Both were white and neither was struck by the prosecutor. In fact, over fifty potential jurors in the *venire* had expressed similar concerns over conflicts with work, school, family, or other commitments.³ For the US Supreme Court, this comparison and the wider context of potential conflicts among the *venire* was enough to conclude that discrimination infected the prosecutor’s decision to exclude Brooks.⁴ As for the potential conflict that would pressure Brooks into an acquittal, the Court found that “highly speculative.”⁵

Batson’s High Bar

Snyder was a rare reversal by the US Supreme Court of a murder conviction based on bias in jury selection. Since the 7-2 *Batson* decision in 1986,⁶ the Supreme Court has overturned four capital convictions based on “egregious racial discrimination in jury selection.”⁷ The *Batson* majority ruled that prosecutors’ race-based challenges in *voir dire* violated the defendant’s rights under the Equal Protection Clause of the Fourteenth Amendment.⁸ A study of *Batson* reversals showed that from 2000 to 2009, federal courts never reversed based on a reason’s facial implausibility.⁹ Including state cases, the pattern of *Batson* rejections suggest that *Batson* is easily avoided by combinations of race-neutral rationales, mixed in with signaling of racial stereotypes and, at times, overt racial discrimination.¹⁰

Peremptory challenges originated as a way to dismiss jurors whose biases disqualified them from jury service. The modern system rewards prosecutors and defense counsel who select jurors who would be sympathetic to their side.¹¹ To be clear, although the bias on the prosecutorial side is primarily race-based, defense

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counsel may also object to pro-prosecution jurors. The systematic exclusion of jurors on the basis of their race from jury *venires* at the time of *Batson* led Justice Marshall to conclude that practice had become “common and flagrant.”¹² A decade later, the depth of the institutional commitment of prosecutors to the exclusion of Black jurors was revealed in a training video developed by Assistant District Attorney in Philadelphia, Jack McMahon. McMahon created a training video for new prosecutors to construct a pro-prosecution jury by systematically excluding Black and women jurors from the *venire*.¹³ The video also teaches line prosecutors how to conceal the racial basis of the strike.¹⁴ Two decades later, in *Foster v. Chatman*, evidence was presented, showing the same targeting of Black prospective jurors for exclusion.¹⁵ The piling on of peremptory challenges can compound the guilt-proneness of the *venire* that had already been scrubbed of populations with doubts about capital punishment through *Witherspoon*¹⁶ and *Lockhart*¹⁷ exclusions.

Discrimination claims require that other correlated non-race factors be ruled out, and that race was the basis for the discriminatory action, once these other possible causes are taken into account.¹⁸ In effect, it requires that courts apply a *but-for* causation analysis to detect discriminatory purpose.¹⁹ In the case of trial and appellate courts, this means an inquiry into the basis for peremptory strikes, that the rationale for those strikes would be articulable, and that that basis clearly distinguishes rejected jurors from those retained.

In *Snyder*, both white jurors with personal conflicts were not struck by the prosecutor. One was a self-employed contractor whose wife was recovering from surgery, requiring him to assume additional parental obligations. The sympathetic prosecutor asked him if he could manage those pressures, but never asked if those pressures would interfere with his ability to participate in the two phases of the capital trial to its conclusion. The other white juror was given similar deference. The prosecutor concluded that Brooks could not manage his conflicts to render a verdict, while the others could.²⁰ If the decision to reject Brooks was not based on race, what else could explain it?

In *Flowers v. Mississippi*, the fourth of the overturned capital convictions for the reasons cited in *Foster*,²¹ the prosecutor dismissed a Black prospective juror because she was acquainted with some of the defendant’s relatives. However, three white prospective jurors were also familiar with several members of the defendant’s family, but the prosecutor accepted them without probing further into the extent of these con-

nections during *voir dire*. However, the depth of the prosecution’s commitment to racializing juror selection in *Flowers* was revealed in what happened leading up to the Supreme Court’s reversal. *Flowers* was tried by prosecutor Doug Evans six times, following hung juries and mistrials. In a county where 53% of the population is Black, prosecutor Evans struck over 85% of the Black jurors in the *venire*.²² Still, even in *Flowers VI*, the Court invoked the prior reversal cases, but failed to address the prosecutorial misconduct at the heart of the *Flowers* trials, both generally and in the sixth trial.

Lower courts and states’ supreme courts have inconsistently, if at all, applied *Batson*. The California Supreme Court reviewed 142 *Batson* motions between 1989 and 2019 and found error only three times.²³ The North Carolina Court of Appeals considered forty-two *Batson* motions between 1986 and 2016, and again found error only three times.²⁴ Only one of the three motions concerned discrimination against Black jurors, the other two claimed wrongful dismissal of white jurors.²⁵

California courts in particular have refused to implement *Batson*’s requirement for comparative juror analysis, deferring to the trial judges’ superior ability to assess the prosecutor’s demeanor by witnessing their colloquy with jurors during the selection process.²⁶ The US Supreme Court agreed, ruling that a defendant cannot make a successful *Batson* claim based on statistics alone.²⁷ Even with the overwhelming evidence in *Flowers VI*, Justice Alito narrowed the reach of the opinion in his concurrence, stating that this was a “highly unusual case ... that were it not for its unique circumstances for the case to be tried once again by the same prosecutor,” he would have affirmed Mississippi’s Supreme Court’s decision to deny *Batson* relief and uphold *Flowers*’ conviction.²⁸ On the merits, Justice Thomas found “*Flowers* presented no evidence whatsoever of purposeful race discrimination.”²⁹

The bias in jury selection also applies to trials of alleged white killers of Black people. In the 2021 trial of men charged with killing Ahmaud Arbery, a Black jogger attacked by three white men effecting a ‘citizens’ arrest’ of a man, whom they claimed resembled a suspected jogger, *voir dire* produced a jury of eleven white men and one Black person. Eight Black prospective jurors were stricken by the defense using peremptory strikes.³⁰ When questioned, the Judge claimed that the defense had provided a “legitimate, nondiscriminatory, clear, reasonably specific and related reason” as to why the potential juror should not be seated.³¹ The Judge’s words implied that each of

these strikes were not a result of explicit racial bias, and were carefully worded to reject a potential *Batson* claim.

It's not surprising, then, that the consequences of racially skewed juries extend to conviction and sentencing. A recent study from Texas shows predominantly white and high-income neighborhoods are over-represented on juries in Harris County,³² the state's largest county and the most active death-sentencing county for many years.³³ In turn, Black defendants are more likely to be convicted and receive longer sentences from juries with more residents of these over-represented neighborhoods.

Today, over 40% of the US population are non-white, but over 95% of prosecutors are white. And the federal judiciary ruling on *Batson* challenges is disproportionately populated by former prosecutors.³⁴ *Batson* remains a very steep hill for a defense lawyer to climb. Justice Marshall, in *Batson*, foresaw the need for structural changes in jury selection to remove the bias in the practice of peremptory challenges, and its spillover effects on the legitimacy of the courts and the law: "Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge."³⁶

Reforming Jury Selection Bias

Despite the seeming dead end of *Batson* as a safeguard against bias in jury selection, and before the Court's holding in *Flowers*, courts and legislatures across the US recognized that *Batson* has made race central to the ways that prosecutors select "perceive, pick and strike jurors."³⁷ *Batson* has brought antidiscrimination law in the jury context. Legislatures and courts, in turn, have begun to recognize *Batson*'s failure and respond to the need for structural reform of the rules and processes of jury selection. Absent reform, the jury as the conscience of the community, the most critical feature of capital trials, will erode.

Two states have explicitly forbidden intentional or implicit discrimination in jury selection. California has passed, and the Governor signed, AB 3070, which would prohibit the discriminatory use of a peremptory challenge to remove a juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.³⁸ The Washington Supreme Court enacted General Rule 47 (GR 37)³⁹ to eliminate implicit bias and intentional racial discrimination

in the use of peremptory challenges in jury selection.

However, rules such as GR 37 or AB 3070 leave the door open to discrimination that is well-disguised and that may appeal to the implicit biases of an appellate court. The rule requires the party exercising the challenge to articulate the reasons for the challenge, and a determination by the Court of whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge."⁴⁰ Perhaps most importantly, the Court need not find purposeful discrimination to deny the peremptory challenge, only "objectively biased" discrimination.⁴¹ Accordingly, the Rule still leaves open to "objective" analysis the possibility that some raced-based challenges might be accepted by the Court. In effect, then, reforms such as GR 37 simply delegate to either a trial or appellate court the determination of the extent of the viral load of racism in a prosecutor's peremptory challenge.

Refereeing the potential biases in peremptory challenges is a difficult and sometimes burdensome job for judges. In California, criminal trials where death or life without parole is a possible sentence, defendants and prosecutors are allowed up to twenty peremptory challenges.⁴² Parties are allowed ten challenges in criminal trials for other offenses.⁴³ In civil trials, that number is six.⁴⁴ Under a similar procedural standard, California Courts could be burdened, if not overwhelmed, by systemic challenges. When combined with the possibility of numerous challenges per case, and an uncertain standard, reforms without clear rules may not achieve the goals of scrubbing race from jury selection.

Rather than leaving the door open to flawed assessments under dubious standards such as the "objective" review incorporated into GR 37, other states have gone further, banning the use of peremptory challenges in civil and criminal trials beginning in 2022:

- On August 23, 2021, the Arizona Supreme Court amended Rule 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure to eliminate peremptory challenges⁴⁵ in criminal and civil trial.

- The Colorado Supreme Court amended the state's Criminal Procedure Rule 24(d)(5) to adopt a law structured similarly to GR 37 in Washington. In doing so, the Court rejected a recommendation of its Advisory Committee on the Rules of Criminal Procedure to reject *Batson* reforms. The Colorado Supreme Court Advisory Committee issued a report on its adoption of the new rule, explaining the logic and necessity of the rule change.⁴⁶ The new standard incorporates definitions

of “improper bias,” and a list of reasons for rejection of a potential juror, that are presumptively invalid.

- A Connecticut select task force recommended to Chief Justice Robinson that the Court adopt a rule based on Washington’s GR 37 rule.⁴⁷

- Similar initiatives are underway or completed in Iowa, Kansas, Massachusetts, Mississippi, New Jersey, New York, North Carolina, Oregon, and Utah.

Rarely in the history of constitutional civil and criminal procedure development has there been such widespread and rapid adoption of substantive reform.

Two states, New Jersey and Connecticut, have formed study commissions in response to court opinions, to conduct empirical assessments of the uses of peremptory challenges, and the resulting bias in jury composition. In *State v. Andjuar*,⁴⁸ the New Jersey State Supreme Court modified *Batson’s* third step⁴⁹ to preclude a peremptory challenge based on “implicit or unconscious racial bias.” The basis of the Court’s ruling is the state Constitution’s fair cross-section guarantee. But the New Jersey Court also was wrestling with a study commission report that showed systemic attrition of minority group prospective jurors not just at *voir dire*, but in two other ways: attrition at the courthouse door, and racially disproportionate removals of minority prospective jurors *for cause*, rather than by peremptory challenges.⁵⁰

The Commission’s report expanded the debate on *Batson* exclusions from potentially racially-tinged peremptory challenges to judicial decisions on removals *for cause*, but also to the composition of the jury pools. The latter is beyond the reach of *Batson*, rooted in a related but separate caselaw originating with *Duren v. Missouri*.⁵¹ The state study, in other words, showed that the sources of minority under-representation can be traced to disparities among those summoned or reporting for jury service, and less to do with biases in disparities produced by biases in the courtroom. The net result is that “people who appear for jury service do not fully represent their communities,” replicating the biasing effects of *Batson* violations.⁵²

The Connecticut Supreme Court also recognized the failure of *Batson* to correct errors in jury claims stemming from the effects of implicit bias and disparate impact that those exclusions have on minority defendants. An African American potential juror, who had claimed fear and distrust of the police, was struck from the *venire* in *State v. Holmes*.⁵³ The rejected juror described his volunteer work with inmates in the state’s prisons, and his observations through that

work that “sometimes people are not given a fair trial” and that “they disproportionately have to go to jail.”⁵⁴ Holmes’ counsel noted that this was the first African American *venire* member to be examined by the prosecution, and that the juror had stated that his personal experience and views, plus the fact that he had family members who had been incarcerated, would not stop him from fair and impartial jury service. This was after a prior *venire* member, a white male, was admitted to the jury after stating that he couldn’t be fair because of “...incidents with police officers.”⁵⁵ In a puzzling finding, the Appellate Court found no evidence that the prosecutor had used the excluded juror’s distrust of the criminal justice system as the basis for his exclusion.⁵⁶

The Supreme Court found that the juror’s negative views of the police and the fairness of the criminal justice system were race-neutral - and therefore permissible reasons under the third *Batson* step for the use of a peremptory challenge. However, the Court then redirected the “systemic concerns about *Batson’s* failure to address the effects of implicit bias and disparate impact” to a newly created Jury Selection Task Force.⁵⁷ The Task Force was charged with considering measures that would promote the selection of diverse juries.⁵⁸ It proposed an ambitious and comprehensive effort to collect data on the management of the jury system. Central to the Task Force’s work is an analysis of the ways in which implicit bias shapes disparities in the jury selection process.⁵⁹ Indeed, the success of the future reforms that emerge from the Task Force’s work depend on the validity of the implicit bias theory.

The tilt toward implicit bias in jury reforms is not surprising given the experience of the struck juror in *Holmes* and the other cases spurring the current wave of reform. Defendant Holmes claims that, given racial disparities in criminal justice contact and punishment, the juror was excluded on the basis of assumptions of bias, if not animus, based on the juror’s experiences. He also claimed that, due to those perceptions, the prosecutor’s exclusion was tied to the candidate juror’s race and the assumptions about the prospective jurors’ beliefs and reliability to be an impartial juror. This is where implicit bias meets disparate impact, in a space where *Batson’s* third step opens the door to race, creating and framing the possibility of a race-neutral explanation for a strike.⁶⁰

Whether the exclusion was the product of discriminatory intent, or a vector of factors including, for example, the prospective juror’s demeanor or the sum of his experiences, that activated an implicit bias, race remains hidden in the prosecutor’s stated reasons for the pe-

remptory strike. Race is, after all, a constructed social category, or perceived social identity, on which observers load observable characteristics, which themselves carry weight about how their actions and decisions are interpreted. It is a nuance, assembled from a cluster of race-based signals, whose predictive power is uncertain. However, discriminatory acts derive from that perceived social identity, and the meaning assigned to it. Professor Evan Rose, in a forthcoming article, argues that overcoming discrimination requires analysis of how decision-makers draw distinctions and make predictions from that perceived social identity.⁶¹ In *Holmes*, as in the *Arbery* trial in Georgia, it seems that the prosecutor was invoking race, based on the lived experience of each struck potential juror, and those of the same race or ethnicity, as much - if not more so - than the juror's words and explanations.⁶² In this formulation, jurors are evaluated as a social classification, constructed from social and political processes and history.⁶³ We learn more about bias in juror selection from studying these decisions, than from explaining race from what is coded in data or actions.

That suggests something different from implicit bias, something closer to the surface in the form of beliefs and concrete actions: *explicit bias*. Implicit bias, with its prescriptions of oversight, transparency, and accountability, all tips the scales toward the status quo. Adopting the evidence on explicit bias, assembled from the patterns of juror strikes and exclusions, has far greater predictive power. This tension exists in the space between Arizona's ban on peremptory challenges and the GR 37 reforms in Washington and AB 1070 reforms in California, where the cure to *Batson's* chronic inadequacy lies. It is the same space occupied by the tensions and differences between implicit and explicit bias. I, for one, prefer Arizona's structural approach.

Endnotes

1 *Batson v. Kentucky*, 476 U.S. 79, 90 (1986).
2 The defense did not object to the first two strikes of the five that preceded Brooks. The Appellate Court in *Snyder's* first appeal ruled that the prosecutor's explanation for the three subsequent strikes were not "readily associated with the suspect class" that was the basis for the discrimination claim. In a second appeal, the Louisiana Supreme Court said that the record simply does not demonstrate that a reasonable factfinder must necessarily conclude the prosecutor lied." *State v. Snyder*, 942 So. 2d 484 (La. 2006), cert. granted, 551 U.S. 1144 (2007). This was the second time *Snyder's* case reached the Supreme Court, so it

is often referred to as *Snyder II*.

3 *State v. Snyder (Snyder III)*, 552 U.S. 472-3, 486 (2008).

4 *Id.* at 484. The Supreme Court was silent on the prosecutor's claim that Brooks' nervous demeanor, combined with his potential work conflict, would bias his ability to serve as a juror and thus prompted his exclusion. *Id.* at 479.

5 *Id.* at 480.

6 *Batson*, *supra* note 1. The Court went on to make a normative claim, stating that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude Black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87. Recent empirical work updates the prophecy of legitimacy harms from systematic exclusions or a portion of the community from jury service. See, Ronald F. Wright, et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 ILLINOIS L. REV 1407, 1410 (2018).

7 *Snyder v. Louisiana (Snyder II)*, *supra* n. 2. See *Foster v. Chatman*, 136 S. Ct. 1737, 1742, 1754-55 (2016) (overturning Foster's conviction based on the strikes of two Black prospective jurors, "misrepresentations of the record, and the persistent focus on race in the prosecution's file," *Id.* at 1754). *Miller-El v. Dretke*, 545 U.S. 231, 240-46, 253, 266 (2005) (providing evolving reasons for strikes of Black jurors that "reek[ed] of afterthought," *Id.* at 246). *Flowers v. Mississippi (Flowers VI)*, 139 S. Ct. at 2235, and text below). In each of the above cases, Justice Thomas has dissented.

8 The *Batson* Court went on to cite two additional harms from the discriminatory exclusion of Black jurors from the jury *venire*. First, the Court condemned the message that "members of his race as a group are not qualified to serve as jurors." *Id.* at 86. Second, the Court noted that the purposeful and discriminatory exclusion of Black jurors "undermined public confidence in the fairness of our system of justice." *Id.* at 85-88.

9 Jeffrey Bellin and Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1066, 1099 (2011). Of the eighteen successful challenges they encountered, ten (including *Snyder*) were based on "undeniable evidence of implausibility based on side-by-side comparisons of similarly situated jurors of different races." *Id.* at 1099.

10 *Id.* at 1106, concluding that "*Batson* is unable to prevent the use of race in jury selection because its dictates are so easily avoided".

11 Bruce Hamilton, *Bias, Batson, and "Back-*

strikes": *Snyder v. Louisiana Through a Glass, Starkly*, 70 LA. L. REV. 965-66, (2010), citing Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 865, 820 (1997) (noting that "[t]wo sets of impartial jurors do not an impartial jury make"). For example, the Fifth Circuit denied an appeal of a criminal conviction based on the prosecutor's use of a spreadsheet noting the race and gender of each juror in the venire. See, e.g., *Broadnax v. Lumpkin*, US Court of Appeals for the Fifth Circuit, 987 F.3d 400 (5th Cir.) at 3 (2021) ("The spreadsheet specified the race and gender of the venire members and bolded the names of prospective Black jurors").

12 *Batson*, *supra* note 1 at 103.

13 Videotape: Jury Selection with Jack McMahon (DATV Prods. 1987), available at: <http://video.google.com/videoplay?docid=5102834972975877286.7>. See, *Commonwealth v. Basemore*, 744 A.2d 717, 729-31 (Pa. 2000) for harsh criticism by the Pennsylvania Supreme Court of McMahon's video and the office of District Attorney Ronald Castille for condoning (if not encouraging) it.

14 *Id.* See, *Bellin and Semitsu*, *supra* note 9 at 1079-80.

15 *Foster v. Chatman*, *supra* note 7.

16 *Witherspoon*, 391 U.S. 510 (1968); Samuel R. Gross, *Determining the Neutrality of Death-Qualified Juries*, 8 L. & HUM. BEH. 7 (1984).

17 *Lockhart*, 476 U.S. 162 (1986); see also, Craig Haney, Aida Hurtado, and Luis Vega, "Modern Death Qualification", 18 L. & HUM. BEH. 619 (1994).

18 See, e.g., *Griggs v. Duke Power*, 401 U.S. 424, 429-33 (1971) (ruling that the tests that were the source of the disparate impact of the decisions "must be related to job performance").

19 See, for example, Ian Ayres, *Three Tests for Measuring Unjustified Disparate Impacts in Organ Transplants*, 48 PERSPECTIVES IN BIOLOGY AND MEDICINE, WINTER SUPPLEMENT: S68-S87 (2005).

20 The Court refused to consider whether the first reason for Brooks' exclusion, his alleged nervousness under questioning, would have been sufficient to justify his exclusion. The prosecutor had cited the work conflicts as the primary reason for rejecting Brooks. *Snyder III*, *supra* note 3, at 484.

21 See *Flowers VI*, 139 S. Ct. 2228, 2235 (2019).

22 *Id.* at 2236-37.

23 Elisabeth Semel et al., *Whitewashing the Jury Box: How California perpetuates the discriminatory exclusion of Black and Latinx Jurors*, BERKELEY LAW DEATH PENALTY CLINIC, available at: [\[washing-the-Jury-Box.pdf\]\(https://www.law.berkeley.edu/wp-content/uploads/2020/06/White-washing-the-Jury-Box.pdf\).](https://www.law.berkeley.edu/wp-content/uploads/2020/06/White-</p></div><div data-bbox=)

24 Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. REV. 1957, 1961 (2016).

25 In the one successful claim of discrimination in the dismissal of Black jurors, the prosecutor gave no reasons for striking two of five Black jurors. *State v. Wright*, 189 N.C. App. 346, 352-54, 658 S.E.2d 60, 64-65 (2008).

26 See *People v. Lenix*, 44 Cal. 4th 602, 622 n.5 (2008). A decade later, in *People v. Rhoades*, Justice Goodwin Liu wondered how forty-two *Batson* claims could have been denied despite meeting the standard of 'strong likelihood of discrimination: "Can it really be that not a single one of those rulings was erroneous under the lower standard set forth in *Johnson v. California*?" *People v. Rhoades*, 8 Cal. P.3d 146 (2019).

27 In *Miller-El I*, the Supreme Court said of the fact that the prosecutor had challenged 91% of the Black jurors versus 13% of the non-Black jurors, "[t]hese numbers, while relevant, are not petitioner's whole case." *Miller-El I*, *supra* note 7.

28 *Flowers VI*, 139 S Ct 2235. at 2251-2 (Alito, J., concurring).

29 *Id.* at 2252, 2255 (Thomas, J., dissenting). Justice Gorsuch joined in part. Justice Thomas went further, stating that: "[t]he racial composition of a jury matters because racial biases, sympathies, and prejudices still exist." *Flowers VI*, 139 S. Ct. at 2274, *Id.* at n.13 (Thomas, J., dissenting).

30 Richard Fausset and Giulia Heyward, *In the Trial Over Ahmaud Arbery's Killing, A Nearly All-White Jury is Selected*, NEW YORK TIMES, November 3, 2021, available at <https://www.nytimes.com/2021/11/03/us/ahmaud-arbery-killing-trial-jury-selection-race.html>.

31 *Id.*

32 Shamena Anwar, Patrick Bayer and Randi Hmalmarsson, *Unequal Jury Representation and Its Consequences*, NBER 28572, August 2021, available at <http://www.nber.org/papers/w28572> (accessed October 14, 2021).

33 Harris County jurors have sentenced nearly 300 people to death since 1974. Harris County executed 130 (22.7%) of the state's 573 executions since 1982, when death sentences resumed following the nationwide *Furman* moratorium. Texas Death Penalty Developments in 2020: The Year in Review, available at <https://tcadp.org/wp-content/uploads/2021/01/Texas-Death-Penalty-Developments-in-2020-FINAL-print-version.pdf>, accessed October 12, 2021.

34 EQUAL JUSTICE INITIATIVE, *Race and the Jury: Illegal Discrimination in Jury Selection*, 4, n.7 (2020), available at [34](https://eji.org/reports/race-and-</p></div><div data-bbox=)

the-jury-overview/ (last accessed October 12, 2021), citing *QuickFacts: United States*, UNITED STATES CENSUS BUREAU, accessed Nov. 18, 2020; REFLECTIVE DEMOCRACY CAMPAIGN, *Tipping the Scales: Challengers Take on the Old Boys' Club of Elected Prosecutors* (Oct. 2019).

35 Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?* CATO INSTITUTE, May 27, 2021, available at <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates> (last accessed October 14, 2021).

36 *Batson v. Kentucky*, *supra* note 6 at 105.

37 Anna Offitt, *Race-Conscious Jury Selection*, 82 OH. ST. J. CRIM. L. 201, 205 (2021).

38 AB 1070 has met resistance. A state senator introduced SB 12, which would have repealed AB 1070 and re-established peremptory challenges in criminal trials. The bill failed in committee in April 2021. See, THE DEATH PENALTY CLINIC, UC BERKELEY SCHOOL OF LAW, *Batson Reform: State by State*. October 15, 2021, available at <https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/>.

39 Wash. Ct. G.R. 37 (2018).

40 Rachel Simon, *Effectuating an Impartial Jury of One's Peers: Why Washington Has More Work to Do to Achieve Peremptory Challenge Reform*, 19 SEATTLE J. SOC. JUST. 201 (2020). See, Wash. Ct. G.R. 37(d) (2018).

41 Rachel Simon, *Id.* at 206. See, Wash. Ct. G.R. 37(d) (2018).

42 Cal. Civ. Proc. Code § 231(a) (2017).

43 *Id.*

44 *Id.*

45 Paul Davenport, *Arizona Supreme Court will be first state to end peremptory challenges to potential jurors*, AP, available at <https://eu.azcentral.com/story/news/local/arizona/2021/08/29/arizona-supreme-court-first-state-end-peremptory-challenges/5644533001/>.

46 Rules of Criminal Procedure Committee, Majority Report for the Adoption of Crim. P. 24(D)(5) Addressing the Exercise of Peremptory Challenges During Jury Selection, https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Criminal_Rules_Committee/Crim%20P%2024%20Majority%20Report.pdf (last visited October 15, 2021).

47 Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson, <https://jud.ct.gov/>

[Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf](https://www.jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf) (last visited October 15, 2021).

48 2021 WL 2932543, at *20, 25 (N.J. July 13, 2021).

49 *Batson v. Kentucky*, *supra* note 6, at 97-98. "Third, "the court must [] determine whether the defendant has carried his burden of proving purposeful discrimination." Additionally, the burden on a *Batson* challenge "requires evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" "

50 Mary R. Rose, *Final Report on New Jersey's Empirical Study of Jury Selection Practices and Jury Representativeness*, NEW JERSEY SUPREME COURT, June 1, 2021, accessed at https://www.njcourts.gov/courts/assets/supreme/judicialconference/Mary_Rose_Final_Report.pdf. Other studies have shown the same. See, e.g., Jacinta M. Gau, *A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries*, 39 JOURNAL OF CRIME AND JUSTICE 75 (2016). See, Mary R. Rose et al., *Jury Pool Underrepresentation in The Modern Era: Evidence from Federal Courts*, 15 J. EMPIRICAL LEGAL STUDIES 378 (2018) (showing that in a sample of 764 counties, nearly all had statistical underrepresentation of levels of attrition but fail all but one proposed method for calculating "not fair and reasonable" underrepresentation under Duren.) These findings on the composition of the jury pools are consistent with the Anwar study in Harris County, on the biasing effects of biases in the composition of the jury pools themselves. See, e.g., Anwar et al., *supra* note 32.

51 439 U.S. 357 (finding that statistical evidence of "systematic exclusion" of "cognizable groups recognized in jurisprudence on jury representativeness" violated a defendant's 6th Amendment Rights. *Id.* at 364. See Mary R. Rose, *supra* note 50. See also, *Berghuis v. Smith*, 559 U.S. 314 (2010) (finding that although Duren established three standards - absolute disparity, comparative disparity, and standard deviation of underrepresentation protected classes - the Court refused to state which standard is preferred, rejecting statistical evidence showed no exclusion of African Americans from the jury pool.)

52 Mary Rose Report, *supra* note 50 at 1. The same patterns of biasing exclusions that produce underrepresentation of distinctive groups on jury *venires* can also instantiate in the composition of the overall jury pool from which the *venires* are drawn, arguing for a form of *Batson* relief in cases alleging violations of *Duren's* fair cross-section requirement. Some argue

that the burden shift in a *Batson* case should apply to *Duren* challenges. See, David M. Coriell, *An (Un) Fair Cross-Section: How the Application of Duren Undermines the Jury*, 100 CORNELL L. REV. 463, 488 and n. 165, 2015. The same concern applies to procedures that exclude jurors at the selection phase based on Lockhart and Witherspoon criteria. See, Gross, *supra* note 16, and Haney et al., *supra* note 17.

53 State of Connecticut v. Holmes, SC 20048 (2019).

54 *Id.* at 5.

55 *Id.* at 9.

56 *Id.* at 10.

57 *Id.* at 4.

58 CONNECTICUT JUDICIAL BRANCH, *Jury Selection Task Force*, available at jud.ct.gov/Committees/jury_taskforce/default.htm#Purpose.

59 *Id.*

60 Recent reviews question the validity of implicit bias to predict discriminatory behavior. Despite evidence that implicit bias accurately measures associations between group categories and the attitudes toward those groups, the measure of implicit bias seems better suited to predict discriminatory attitudes than real-world discriminatory behaviors. See, for a review, Frank Harty and Haley Hermanson, *Implicit Bias Evidence: A Compendium of Cases and Admissibility Models*, 68 DRAKE L. REV. 2 (2020). See, Gregory Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 687, 710 (2009) (stating psychological tests, such as the IAT, designed to measure implicit bias “tells us nothing about the likelihood of bias occurring at the level of judgments, decisions, or behaviors”). See, also, Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 108 (2008).

61 Evan K. Rose, *A Constructivist Perspective on Quantitative Discrimination Research*, Presented at the Race, Ethnicity, Gender and Economic Justice Symposium, Yale University, October 2021 (on file with author).

62 New research conceptualizes race as a complex vector of factors including history, physical appearance and skin color, socio-economic contexts, social ties, and discrimination experiences. See, John A. Garcia, et al., *Race as Lived Experience: The Impact of Multi-Dimensional Measures of Race/Ethnicity on the Self-Reported Health Status of Latinos*, 12 DUBOIS REV. 349 (2015) (showing that multiple measures of race have significant and negative effects on Latinos’ self-reported health and other social outcomes).

63 *Id.* This approach argues that race as a category is a “constructed mode of human categori-

zation.” See, GLENN LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (3rd ed.) 5 (2021).

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THE TRUMP EXECUTIONS

By Lee Kovarsky*

This Essay has been adapted from a much longer article-length piece that is being published in 2022 by Texas Law Review, in Volume 100. The Texas Law Review has given permission to publish the adapted excerpt here.

I. Historical Context

The BOP long struggled to stabilize the size of federal death row because the federal government has struggled to execute *anyone*. Gaps between death-sentencing and execution rates are inevitable, but the gap for federal prisoners centered idiosyncratically on problems with BOP execution protocols — problems that ultimately dominated the Trump Execution litigation.

When George W. Bush (“Bush II”) became president in 2001, there had not been a federal execution for thirty-eight years. After three executions in the first half of his first term, the federal death chamber remained empty until 2020. So why the pause? Death penalty jurisdictions struggle to move people through the final phases of the capital punishment sequence, and those difficulties produce both attrition and delay. There is a general norm against setting execution dates while post-conviction litigation remains pending, and post-conviction litigation over federal sentences can be particularly protracted. Even under normal circumstances, it takes elevated levels of political and bureaucratic will to overcome institutional friction working against executions.

For federal death cases, the friction between 2003 and 2020 was especially high because of problems surrounding the lethal injection protocol. And problems with the lethal injection protocols are but one piece of a much more complex federal abstention puzzle. Even in the waning days of the Bush II administration, there seemed to be insufficient political and bureaucratic will to push any execution through baseline levels of friction, let alone the elevated levels created by the shortage of drug supply. And everything changed in January 2009 — the Obama Administration was considerably less committed to the death penalty than were the Bush and Clinton Administrations before it.

In January 2017, the Trump Administration swept into power. President Trump’s Justice Department both prioritized review of the federal execution protocol and began exploring a pentobarbital-only lethal-injection sequence. On July 25, 2019, Attorney General William Barr announced a new lethal injection sequence consisting of two 2.5gr doses of pentobarbital, and

the Justice Department started to set execution dates on that same day. A visual summary of the execution scheduling appears in the table below.

Last Name	Date Scheduled	Result	Execution Date
Bourgeois	07/25/19	stayed	N/A
Lee	07/25/19	stayed	N/A
Honken	07/25/19	stayed	N/A
Mitchell	07/25/19	stayed	N/A
Purkey	07/25/19	stayed	N/A
Lee	06/15/20	Executed	07/14/20 ¹
Purkey	06/15/20	Executed	07/16/20 ²
Honken	06/15/20	Executed	07/17/20
Nelson	06/15/20	Executed	08/28/20
Mitchell	07/29/20	Executed	08/26/20
Vialva	07/31/20	Executed	09/24/20
LeCroy	07/31/20	Executed	09/26/20
Hall	09/30/20	Executed	11/19/20
Montgomery	10/16/20	stayed	N/A
Bernard	10/16/20	Executed	12/10/20
Bourgeois	11/20/20	Executed	12/11/20
Johnson	11/20/20	Executed	01/14/21
Higgs	11/20/20	Executed	01/15/21
Montgomery	11/23/20	Executed	01/13/21

When the dust settled, the Trump Administration set nineteen execution dates in order to kill thirteen prisoners. Twelve of the thirteen were men. Six were Black, six were white, and one was Native American. They had been on federal death row for an average of eighteen years.

II. The Legal Terrain

Throughout the last six months of the Trump Administration, the federal judiciary weighed and measured the fates of the thirteen federal prisoners condemned to death. These were thirteen fact-bound cases requiring concrete resolution, but they also exposed unsettled constitutional law, statutory meaning, and institutional practice.

A. Lethal Injection Challenges

The most widespread end-stage litigation challenged the use of pentobarbital in the Trump executions. In addition to Eighth Amendment claims, there were also method-of-execution challenges under at least four different federal statutes: the 1994 Federal Death

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Penalty Act (“FDPA”); the Food, Drug, and Cosmetics Act (“FDCA”); the Controlled Substances Act (“CSA”), and the Administrative Procedure Act (“APA”). All of this litigation passed through the courtroom of US District Court Judge Tanya Chutkan.

In November 2019, with fourteen months left in the Trump presidency, Judge Chutkan issued a preliminary injunction on the basis of what one might call an FDPA parity claim: that the BOP’s protocol deviated from a statutory provision requiring that the federal execution proceed in the “manner prescribed by the law of the State in which the sentence is imposed.”³ The prisoners eventually lost the parity challenge to the pentobarbital-only injection sequence, although the D.C. Circuit’s *per curiam* opinion lacked a consensus rationale. (The D.C. Circuit also rejected an APA claim without a precedential rationale.)

When the FDPA parity and APA challenges to the lethal-injection sequence concluded, the BOP began re-setting execution dates. Judge Chutkan thereafter issued a second preliminary injunction on the ground that the BOP’s pentobarbital-only protocols likely violated the Eighth Amendment. The next thirty-six hours revealed just how frustrated the Supreme Court had become with execution delays. It ultimately voted five to four, in a sparsely reasoned opinion, to vacate the district court’s preliminary injunction — thereby paving the way for the BOP to execute Daniel Lee.

The Supreme Court’s treatment of the Eighth Amendment claim was the first data point in a pattern. Wesley Purkey was scheduled for execution two days after Lee. The morning after the BOP put Lee to death (July 15, 2020), Judge Chutkan issued a *third* preliminary injunction against the next several executions, on the ground that the new protocols were likely to violate FDCA, which (she held) requires that executions use *prescribed* pentobarbital. The Supreme Court again awarded emergency relief to the government.⁴ This time the order vacating the preliminary injunction was unreasoned. Lower federal courts heard the message, and ultimately refused to stay executions on the basis of lethal injection challenges every time the federal prisoners made them.

By the conclusion of the Trump Executions, the Supreme Court established that it would intervene aggressively against method-of-execution claims, using procedural vehicles ordinarily reserved for emergencies. Because the emergency intervention was so often unreasoned, however, the Court’s collected work product reads more as primal scream than as mean-

ingful judicial guidance.

B. Other FDPA Parity Litigation

In addition to litigation contesting the pentobarbital-only injection sequence, there were two *other* sources of parity challenges under the FDPA. First, federal courts had to decide straightforward FDPA parity claims involving elements *other than* the use of pentobarbital in executions. Second, the judiciary had to interpret the FDPA requirement that, in the event the sentencing court sat in an abolitionist state, it must designate a practicing jurisdiction for parity purposes.

The FDPA parity provision reads as follows: “[The U.S. Marshal] shall supervise implementation of the sentence in the manner prescribed by the law of the state in which the sentence is imposed.”⁵ It requires federal-state parity not specifically for lethal injection protocols, but more generally for “implementation of the sentence” — and several prisoners made unsuccessful parity claims centered on practices other than the lethal injection sequence. 18 U.S.C. § 3596(a) also contemplates that a federal court sitting in an abolitionist state might impose death, and provides a mechanism for the sentencing court to designate a practicing state for parity purposes. The designation mechanism produced what might have been the period’s most shocking moment, during the end-stage litigation of Dustin Higgs.

Higgs received a federal death sentence from a Maryland district court in 2001. The sentencing court made no designation at sentencing because, in 2001, Maryland was a capital punishment state. In 2013, however, the state legislature abolished the death penalty. The government conceded that the district court lacked authority to amend its original judgment, but asked the court either to designate a practicing state as a “supplement” to its judgment or to make a designation without any reference to the judgment whatsoever. The district court refused, concluding that such an order would be *ultra vires*.

The federal government, however, had not waited for the district court to rule on the motion and put Higgs on the BOP’s execution calendar while the motion was pending. The Fourth Circuit stayed the execution to permit the government to appeal, but the Supreme Court was having none of it. In a maneuver without precedent before or since, it granted a petition for *certiorari* before lower-court judgment, reversed the federal district court without providing reasoning, and remanded the case for the lower courts to designate Indiana (the federal execution site).

C. Savings Clause Litigation

The most typical post-conviction vehicle for federal prisoners is 28 U.S.C. § 2255, which permits the prisoner to file a habeas-like challenge in the court of conviction and sentencing, rather than in the court with territorial jurisdiction over the place of confinement. Section 2255 otherwise applies roughly the same procedural constraints on federal prisoners as §§ 2244 & 2254 apply on those convicted in state courts — including a one-year filing deadline and severe restrictions on successive rounds of post-conviction litigation. Section 2255, however, includes a savings clause permitting a federal prisoner to file a classic habeas petition under § 2241 when the § 2255 “motion is inadequate or ineffective to test the legality of his detention.”⁶ The applicability of the savings clause matters to end-stage litigants because § 2241 petitions are not subject to the limitations appearing in § 2255 — a statute of limitations, prohibitions on successive litigation, and so forth.

The end-stage litigation over the Trump Executions tested the savings clause. If the savings clause activates § 2241, then among the federal courts with power to hear the post-conviction litigation are the courts with territorial power over death row. As a result, the Southern District of Indiana and the Seventh Circuit were especially significant sources of law about the line separating §§ 2254 and 2241. And because some jurisdictions were friendlier than others, the forum-shopping effects were potentially enormous.

The prisoners’ attempts to escape § 2255 were almost entirely unsuccessful. The Seventh Circuit eventually entertained § 2241 petitions from at least seven of the thirteen death-sentenced prisoners. In every case but one, the appeals court refused to find § 2255 “structurally” inadequate or ineffective. Most significantly, the federal judiciary would not allow prisoners to activate the savings clause when some prior § 2255 counsel deficiently forfeited arguments.

D. COVID-19 Litigation

The BOP executed the thirteen federal prisoners in the middle of a lethal, once-in-a-century pandemic. The public and prisoners alike were subject to innumerable health-and-safety restrictions designed to mitigate viral transmission. Federal judges nonetheless established, quickly, that they would not allow the novel coronavirus to derail the executions.

The judiciary’s refusal to allow a COVID-19 disruption was evident from the July 2020 executions: Daniel Lee (July 14), Wesley Purkey (July 16), and Dustin

Honken (July 17). The judiciary refused COVID-based stays from every conceivable angle. Lee asked a district court to reset the execution date on the grounds that COVID-19 interfered with his statutory right to counsel — and the district court denied it. The family of Lee’s victims sought to delay his execution, asking that they not be forced to incur COVID-19 risk in order to attend. The district court granted the stay, but the Seventh Circuit vacated it. Spiritual advisors to Honken and Purkey sought stays on the theory that the decision to move forward with the executions during the pandemic interfered with rights to religious association, which the district court refused.

The next cluster of COVID-19 litigation, initiated after Trump lost the November 2020 election, centered around the pandemic threat to the community affected by the executions. Non-capital prisoners housed alongside those on death row filed class action litigation to enjoin the executions on the ground that each execution was a super-spreader event. Indeed, each federal execution brought nearly one hundred out-of-town BOP employees to Indiana, the execution site, and required that they work closely with some one hundred local BOP staff. Approximately a week after Orlando Hall’s execution, which took place on November 19, 2020, Hall’s spiritual advisor and six members of the execution team tested positive for COVID-19. The available evidence showed that the BOP was not following guidelines about, among other things, contact tracing.

The non-capital prisoner-plaintiffs asked for the judiciary to hit pause on the executions throughout December 2020 and January 2021, but everyone understood that the executions would be unlikely to resume after the Biden administration began. The district court eventually granted only narrow relief, barring the BOP from executing prisoners unless it complied with specified safety practices. The resistance to COVID-based emergency relief was therefore evident throughout the judicial hierarchy — not just in the behavior of Supreme Court justices.

III. Implications

Most Trump Execution litigation reached judicial resolution in skeletal or unreasoned dispositions on the Supreme Court’s shadow docket, which refers to the body of sometimes-irregular orders and summary decisions that the Justices generate without plenary, time-consuming review. The shadow-docket activity plainly discloses that the timing of the Trump-to-Biden presidential transition — what I call the “inaugural margin” — substantially affected the Court’s

decision-making. Indeed, the Trump Executions went forward by dint of political and bureaucratic outliers, the coincidence of which repeats infrequently. For that reason, the more lasting effects of the Trump Executions will not be on the federal death penalty. Instead, the episode will most affect *other* laws and institutional practices — like state executions — similarly sensitive to the Court’s willingness to dictate preliminary relief.

A. Emergency Relief and the Shadow Docket

There is end-stage litigation around virtually every execution because many claims remain unripe until the state sets a date, and because the structure of appointed legal representation can delay claim development. The thirteen subjects of the Trump Executions asked for various forms of emergency relief necessary to allow courts to adjudicate their legal challenges, and the government asked for emergency orders whenever some lower court interfered with its preferred execution calendar. The precise requirements for emergency relief varied somewhat by the form requested, but each generally required some showing of merit, irreparable harm to the movant in the absence of relief, and lesser harm to the counter-party.

End-stage postures place courts in a predicament. Judges must choose between uncomfortably accelerated adjudication and a delay necessary to permit more orderly consideration. For most end-stage litigation over the last twenty years — almost all of which grew out of state executions — federal courts simply decided claims on the merits, on the abbreviated schedule. When it came to the Trump Executions, the Supreme Court broke with established practice. They dissolved lower-court stays at an unprecedented rate, and did so *without* contemporaneous merits dispositions. As a result, the BOP simply executed prisoners while their claims were pending. The available record suggests that the Justices were using the shadow docket to police the inaugural margin, presumably because they believed that executions scheduled beyond the margin would not take place.

One does not have to squint to see that the inaugural margin distorted the Supreme Court’s ordinary decision-making. After the D.C. Circuit Court’s split decision against the FDPA challenge to the pentobarbital-only sequence, the BOP started re-setting execution dates in the summer of 2020. Judge Chutkan entered her second preliminary injunction on July 13, the eve of Daniel Lee’s execution. The D.C. Circuit Court set a lightning briefing schedule (eleven days), but the Supreme Court vacated the injunction through a shadow docket order — the only meaningful expla-

nation the Court ever gave for any of its decision-making during the Trump Executions. Even the *Lee* order, which included a slapdash Eighth Amendment discussion, was formally based on the claimants’ failure to show sufficient harm. That order cleared the way for Lee’s execution, and also removed delay-based threats from several other prisoners.

The use of the shadow docket eventually ranged far beyond challenges to pentobarbital, shutting down margin-threatening litigation about uncertain legal questions — for example, the authority of a district court to facilitate parity-state designation by amending a long-final judgment (Dustin Higgs), whether the FDPA parity provision applies to notice requirements (Lisa Montgomery), whether the BOP could set execution dates while stays were in place (Montgomery), and the appropriate forum for execution-competency litigation (Wesley Purkey). As with the lethal injection litigation, the Supreme Court used shadow-docket orders to void even abbreviated appellate calendaring that compromised the BOP’s ability to conduct executions on preferred dates, or that otherwise threatened the inaugural margin.

B. The Court’s Estimate

The Supreme Court was protecting the inaugural margin because multiple Justices believed that the presidential transition threatened the federal government’s ability to carry out the executions. Those Justices were right. The death penalty is unique among penal sanctions in that its completion requires elevated levels of political and bureaucratic commitment. And modern political and bureaucratic will to complete the capital punishment process is fragile and fleeting. (The Biden administration announced a federal death penalty moratorium less than six months after President Trump’s term ended.)

Certain elements of what we call Trumpism might survive President Trump’s political life, but there are reasons to believe that Trump’s use of the death penalty is among those qualities more unique to the man than to the movement. (I assume that Trump does not recapture the presidency in some subsequent national election, in which case federal executions become more likely.) Executions are opportunities to spread constitutive ideas across communities, concluding dramatic arcs of transgression and revenge that saturate media and captivate the public.

President Trump’s political and governance strategies centered capital punishment in ways that other administrations, Democratic and Republican, are un-

likely to reproduce. His projected worldview opposes what his supporters might describe as the cosmopolitanism and equivocation of death penalty skeptics. In the community that a Trump signal helps define and cohere, righteous state killings represent strength and resolve, a clear line separating good and evil, and belief in free will over structural disadvantage. Indeed, that worldview — with its emphasis on public displays of statist strength — is a hallmark of President Trump’s campaigning and political positioning across issues.

Of course, future Republican presidents are likely to appoint judges and prosecutors that view the death penalty as an acceptable part of American punishment practice. President Trump was unique not because he had atypical Republican punishment preferences, but because his voluble enthusiasm for the death penalty was such an essential part of his political signaling and community building.

The Trump Executions resulted not just from unusual levels of political will, but also bureaucratic resolve. President Trump’s BOP leadership immediately committed the Bureau to finding lethal injections drugs necessary to administer a lawful protocol. His first Attorney General, Jeff Sessions, was an avid supporter of the death penalty, and worked with the BOP to kick-start new protocols in the spring of 2017.

But the pivotal bureaucratic figure, and the biggest administrative outlier, was Trump’s second attorney general, William Barr. AG Barr supervised and announced the roll-out of the 2019 execution protocol — personally declaring that “we owe it to the victims and their families” to execute the designated offenders. Barr and his close subordinates personally made the decisions about whom to schedule, and what the tactics for securing public acceptance would be. Barr was also the public face of the litigation.

AG Barr was an able bureaucrat with a long history of federal service, including his prior stint in the George H.W. Bush (“Bush I”) Administration. He was generally associated with a constellation of tough-on-crime practices, and capital punishment was one of the brightest stars. AG Barr was also intimately involved in the initialization of the modern federal death penalty — at levels of both policy and implementation. But perhaps the most important piece of AG Barr’s bureaucratic history centered on his role in promoting a uniform execution protocol during the waning days of the Bush I Administration. Barr helmed an effort to promulgate a uniform execution protocol during his first AG stint, which culminated in a final regulation in

1993.⁷ The 1994 FDPA, however, re-codified a parity rule, undermining the 1993 regulation. For Barr, then, the 2019 execution protocols were some unfinished business.

C. Spillover Effects

Because the Trump Executions litigation resulted in so little precedent about the federal death penalty, and because the federal government’s resolve to carry out death sentences will almost certainly dissipate, the longer-term influence of the Trump Executions will be in other institutional contexts. That influence will be most salient with respect to executions *in the states*. After *Lee*, the Supreme Court continued to send hostile messages to prisoners challenging lethal injection protocols. The tone and posture of its shadow-docket orders unmistakably communicates to the states that they need not fear method-of-execution challenges. And so does the analysis in *Lee* — which includes hastily-drafted language that casually but substantially overstates the holding in *Bucklew*.

In fact, the decisional law coming out of the Trump Executions bodes poorly for *any* state prisoner in an end-stage posture. Supreme Court language from the Trump Execution cases seems to suggest that the last-minute status of litigation weighs heavily against death-sentenced prisoners, without respect to fault. In *Lee*, there could be no serious argument that the end-stage posture of the litigation was the prisoners’ fault. With *Lee* as a north star, however, lower courts began to apply a context-free presumption against all end-stage claims, irrespective of prisoner fault. What remains to be seen is how seriously federal courts carry this practice forward. A fault-independent presumption would substantially degrade enforcement of constitutional rights even in cases where claims ripen *before* the state schedules the execution — let alone in cases where claims do not ripen until the end-stage window begins.

The Trump Executions also normalized emergency shadow-docket relief from the Supreme Court, accelerating the Court’s expanding role in politically charged cases with high-stakes preliminary relief. Those backing laws and practices geared to address short-term risks and gains, and who do so under threat of litigation, will have to think more carefully about the Court’s ideological composition — at least for the foreseeable future. And the opaque, abbreviated quality of shadow-docket activity in divisive cases will doubtlessly raise even more questions about the Court’s neutrality and legitimacy.

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I do not suggest that the Supreme Court's shadow-docket practice during the Trump Executions was a strict proximate cause for all the shadow-docket activity discussed above. Both the Trump Execution practice and the above-cited examples likely trace to the same shifts in the Court's ideological concentration. But the Supreme Court's aggressive use of its shadow docket to protectively grant emergency relief in the federal government's favor has normalized a formerly exotic practice

Conclusion

The Trump Executions left quite a mark on America's legal culture and psyche. As far as the federal death penalty goes, they were historically aberrant, landing in federal courts because of outlier political and bureaucratic behavior. Because they nonetheless have important atmospheric and structural effects, perhaps they will mostly meaningfully influence areas of law *other than the federal death penalty*. The Court sent signals that states need not fear execution-method litigation in virtually any form, and that all end-stage claims — without respect to prisoner fault — might be subject to presumptions against relief. And the Court normalized a shadow-docket practice through which the Justices inject themselves into high-profile and divisive cases with high-stakes preliminary relief.

Endnotes

- 1 This execution was formally scheduled for July 13. The July 13 death warrant expired and a new death warrant was issued for the next day, but there was no time to challenge the latter warrant's validity.
- 2 This execution was formally scheduled for July 15. The July 15 death warrant expired and a new death warrant was issued for the next day, but there was no time to challenge the latter warrant's validity.
- 3 See Memorandum Opinion, *In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-00145, ECF 50, at 2 (Nov. 20, 2019).
- 4 See *Barr v. Purkey*, 141 S. Ct. 196 (2020).
- 5 18 U.S.C. § 3596(a).
- 6 28 U.S.C. § 2255(e).
- 7 See 58 Fed. Reg. 4898 (1993), codified at 28 C.F.R. pt. 26.

NINETEEN YEARS LATER: A FREED GUANTÁNAMO BAY DETAINEE IS REUNITED WITH HIS FAMILY IN MOROCCO

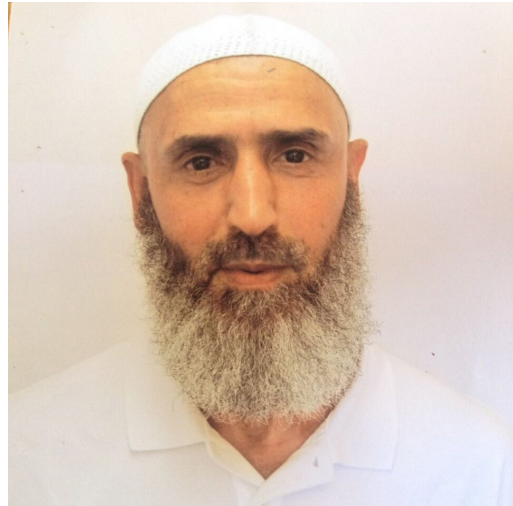
By Bernard Harcourt* and Fonda Shen**

On July 19, 2021, Abdul Latif Nasser, indefinite detainee at Guantánamo Bay since 2002, became the first person the Biden-Harris administration released. Mr. Nasser was represented by attorneys Thomas A. Durkin (Durkin & Roberts), Bernard E. Harcourt (Columbia Law School), Mark Maher (Reprieve), and Shelby Sullivan-Bennis.

Mr. Nasser was airlifted from the military base the evening of July 18, 2021. Carol Rosenberg and Charles Savage of the *New York Times* broke the news at dawn the next morning. Mr. Nasser was reunited with his family shortly thereafter to celebrate the first day of Eid al-Adha, often called the Greater Eid.¹ Mr. Nasser was able to spend the Muslim holy day with his family for the first time since he was captured and detained almost two decades ago.

The federal government had held Mr. Nasser at Guantánamo Bay since May 2002, never charging him with any crime during his two decades of imprisonment there. In 2016, Mr. Nasser was cleared for transfer to Morocco by the Periodic Review Board, which is an interagency parole-like process that determines whether detainees at Guantánamo are suitable for transfer out of the prison to either their home countries or another willing host country.² Senior officials from the Departments of Defense, Homeland Security, Justice, and State, the Joint Staff, and the Office of the Director of National Intelligence form the panel and had agreed he posed no risk to the United States.

Despite this unambiguous decision in favor of Mr. Nasser's release by this exacting panel, he would remain a prisoner for the next four years of the Trump Administration. The bureaucratic processes required for Mr. Nasser's transfer to Morocco had concluded on December 28, 2016, when Morocco confirmed the required security assurances. But given the thirty-day notice required by Congress, President Obama's Secretary of Defense, Ash Carter, left the final decision regarding transfer to his successor.



Shortly after taking office, President Trump declared that his administration would keep all detainees at Guantánamo and followed through by eliminating the Office of the Special Envoy for Guantánamo Closure at the Department of State responsible for transfers and signing an Executive Order that mandated the continued operation of the prison.³

For the four years of the Trump presidency, Mr. Nasser was in the peculiar position of having exhausted the Periodic Review Board process, the only process open to Guantánamo Bay detainees, and yet still being prohibited from release.

On January 11, 2018, Mr. Nasser and ten other individuals detained at Guantánamo Bay filed a Motion for Order Granting Writ of Habeas Corpus, known as the "Mass Petition" in response to President Trump's declaration of his intent to keep Guantánamo Bay indefinitely open.⁴ The petition, filed in the US District Court for the District of Columbia, argued that the perpetual detention of individuals at Guantánamo Bay violated the Due Process Clause of the Constitution, and that the AUMF, which authorizes limited military detention, can no longer support such detention.

* Isidor and Seville Sulzbacher Professor of Law and Professor of Political Science, Columbia University.

** Research Assistant, Columbia University and Program Coordinator, Initiative for a Just Society at the Center for Contemporary Critical Thought.

On October 23, 2020, Mr. Nasser filed a Supplemental Brief to the federal court to include the argument that the continued and indefinite detention of an individual already cleared by the PRB violated the Suspension Clause.⁵ On June 30, 2021, Mr. Nasser and the US Government filed a Joint Status Report⁶ in which the government claimed that the Departments of Defense and State were still undertaking the steps required for Mr. Nasser's transfer in accordance with the 2011 Executive Order authorizing the Periodic Review Board and asked the court to defer from making further decisions in Mr. Nasser's pending case.⁷ No further documents were filed in Mr. Nasser's case until July 19, 2021, when the US Government filed a Notice to the court confirming that the United States had relinquished custody of Mr. Nasser to the Government of Morocco.⁸

While he was held briefly by Moroccan authorities on the day of his return as a matter of routine protocol, he was quickly released to reunite with his family. In the days after his return to Morocco, Mr. Nasser made it known that he would take July 19, the day of his release, as his new birthday.

"He is ecstatic," said Columbia Professor Bernard E. Harcourt to the *New York Times*.⁹ He and his co-counsel, Thomas Anthony Durkin, spoke with Mr. Nasser by phone at his home in Casablanca.

The US Department of State issued a press statement on the same day announcing the transfer, praising the Moroccan government for their collaboration in repatriating Mr. Nasser, and encouraging other nations in similar positions to follow suit in collaborating with the United States to reduce the population at Guantánamo Bay.¹⁰ At the time of the writing of this article, how-

ever, the Biden-Harris administration has not released any additional Guantánamo Bay detainees. There are still thirty-nine individuals detained at Guantánamo, of which only twelve have been charged with war crimes.

Endnotes:

- 1 Carol Rosenberg, *A freed Guantánamo Bay detainee is reunited with his family in Morocco*, THE NEW YORK TIMES, <https://www.nytimes.com/2021/07/20/us/politics/guantanamo-bay-nasser.html> (last visited Nov. 8 2021).
- 2 *Unclassified Summary of Final Detention*, PERIODIC REVIEW BOARD, https://www.prs.mil/Portals/60/Documents/ISN244/20160711_U_ISN244_FINAL_DETERMINATION_PUBLIC.pdf
- 3 Exec. Order No. 13823 (Feb. 2 2018).
- 4 Tofiq Nasser Awad Al Bihani, et al. v. Donald J. Trump, et al., No. 09-cv-00745-RCL (filed 01/11/18) (Motion for order granting writ of habeas corpus).
- 5 Abdullatif Nasser v. Donald Trump et al., No. 05-cv-764-CKK (filed 10/23/20) (Petitioner Nasser's Supplemental Brief Modifying His Position In This Ongoing Litigation In Light Of The Dc Court Of Appeals' Opinion In Ali V. Trump).
- 6 Abdullatif Nasser v. Joseph R. Biden JR. et al., No. 05-cv-00764-CKK (Filed 06/30/21) (Joint Status Report).
- 7 Exec. Order No. 13567 (Mar. 7 2011).
- 8 Abdullatif Nasser v. Joseph R. Biden JR. et al., No. 05-cv-00764-CKK (Filed 07/19/21) (Notice).
- 9 Rosenberg, *supra* note 1.
- 10 *Press Release, Transfer of GTMO Detainee to Morocco*, U.S. DEPARTMENT OF STATE (Jul. 19 2021) <https://www.state.gov/transfer-of-gtmo-detainee-to-morocco>.

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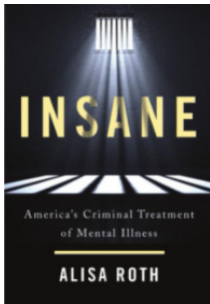
By Grace Coupland*

In light of this edition of the Amicus Journal's focus on mental health, this section will highlight the cultural objects containing narratives relating to the mental health of prisoners and those on death row. Mental health is a particularly relevant issue when discussing incarceration or the death penalty: the Institute of Psychiatry estimates that over half of all incarcerated people have poor mental health, including depression, post-traumatic stress disorder, and anxiety. In order to better understand this topic from the outset, Amicus has compiled a list of books, podcasts, documentaries and academic articles which shine a light on this issue from the perspective of those impacted by criminal justice.

Books

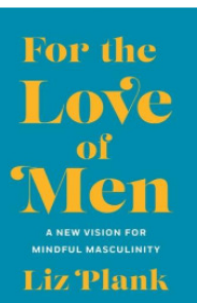
***Insane (2018)* by Alisa Roth**

In this comprehensive summary of mental health in the American criminal justice system, Alisa Roth shows why and how the prison system abuses, punishes, and denies treatment to mentally ill incarcerated people. She cites federal studies that show that more than half of incarcerated prisoners in America suffer from mental illness. Roth introduces the reader to incarcerated people whose mental illnesses have driven them into the justice system, and how - once within the system - they are made sicker. She paints a portrait of the lives ruined in prisons, and the ill people who never got the treatment they deserved. *Insane* reminds us of the moral, medical, and economical issues with incarcerating the mentally ill.



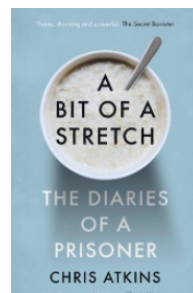
***For the Love of Men (2019)* by Liz Plank**

With men making up 98% (Statista, 2021) of death row inmates, Liz Plank's empathetic account of male mental health could not be more relevant to this edition's topic. Plank shines a light on how the ritualistic "toughening up" of young boys is damaging to men's mental health. In the absence of encouraging discussions



on male emotional well-being, she argues, it is unsurprising that some turn to crime or violence as an outlet. Whilst Plank acknowledges that this is the case, the book spends time focusing on the disease rather than just its symptoms, arguing that men deserve more than the basic tropes they have been given to describe their emotional experience. *For the Love of Men* does not focus on the mental plight of incarcerated males particularly, yet it manages to provide the context by which those important conversations must be held.

***A Bit of a Stretch (2020)* by Chris Atkins**



After becoming embroiled in an illegal funding scheme for his latest film, documentary-maker Chris Atkins is sentenced to prison for five years. Whilst serving his sentence in HMP Wandsworth, Chris kept a diary. With the prison understaffed, Chris goes into detail about the toll spending twenty-three hours a day in solitary confinement takes on the emotional wellbeing of inmates. This powerful account of prison life is a scathing denunciation of how our criminal justice system treats incarcerated people.

Podcasts

Secret Life of Prisons

This podcast does not just touch on the experience of those going into prison, but also addresses specific topics such as missing holidays, and the importance of being able to speak to family and friends on the telephone. In particular, episode seventeen (Future Prisons) touches on the emotional trauma of young people in prison, from the perspective of Courtney, who went to prison when she was a teenager.



Future Prison

Released by the Prison Radio Association, *Future Prison* is a podcast that hears stories directly from young men and women who have been in

* Amicus Office Volunteer.

prison. They describe their lowest moments, and the challenges they faced mentally both inside and outside prison. The podcast brings together these people with senior figures from the Ministry of Justice to discuss their experiences. It touches on issues such as racism and sexism within the justice system.



Mental: The Podcast to Destigmatize Mental Health - Episode 210, Crime

In this episode, Bobby Temps is joined by the brilliant forensic psychologist Kerry Daynes to discuss crime and how it relates to mental health. More widely, each episode of this podcast focuses on a new condition or topic regarding the mind and how to better manage mental health.

Documentaries

Institutionalized: Mental Health Behind Bars (Vice, 2015)

In this short documentary, Vice News travels to Chicago's Cook County Jail, currently confining 9,000 people – 30% of which are estimated to have mental health illnesses. In this short documentary, Vice examines the current state of the mental health care system in place, despite devastating budget cuts and a lack of community-based resources. They find that people are being referred to the criminal justice system for low-level, non-violent crimes rather than ever getting treatment for their illness.

Academic Articles

PRS Burton, NP Morris, ME Hirschtritt, Mental Health Services in a US Prison during the COVID-19 Pandemic (2021)

This report describes how mental health services were impacted during the early stages of the COVID-19 pandemic, and how to maintain high-quality mental health care in prison settings.

LN Miley, E Heiss-Moses, JK Cochran, An examination on the effects of mental disorders as mitigating factors on capital sentencing outcomes (2020)

This study analyses capital cases in North Carolina to examine whether presentation to the jury of extreme mental or emotional disturbance mitigated against a sentence of death.

PUBLICATIONS IN 2021

Books

A Descending Spiral: Exposing the Death Penalty in 12 Essays by Marc Bookman

This book offers 'powerful, wry essays' to expose the absurdities which undermine the credibility of the death penalty.

Let the Lord Sort Them: The Rise and Fall of the Death Penalty by Maurice Chammah

In this book, Maurice Chammah charts the rise and fall of capital punishment through the eyes of those it touched – such as the lawyers who work to defend and prosecute those on death row in America.

Two Truths and a Lie: A Murder, A Private Investigator, and Her Search for Justice by Ellen McGarrahan

In this memoir, a journalist turned private investigator returns to a case that has haunted her for decades – a death row execution that might have killed an innocent man.

Right Here, Right Now: Life Stories From America's Death Row by Lynden Harris

This biography collects the powerful, first-person stories of dozens of men on death rows across America – from childhood experiences, violence and mental illness, to coming to terms with their executions.

Modern Literature and the Death Penalty, 1890-1950 by Katherine Ebury

This book examines how the cultural and ethical power of literature offered early twentieth-century readers opportunities for thinking through capital punishment in the UK, Ireland, and the US between 1890 and 1950.

Films / Documentaries

The Phantom - Available on Netflix

This documentary follows the case of Carlos DeLuna, arrested in 1983 for a murder he consistently protested that he did not commit.

The Penalty – Available on Amazon Prime and Netflix
The Penalty is a documentary following three people with extraordinary experiences of America's modern death penalty.

SISTER – Available on Vimeo

This documentary documents the influences that

shaped Sister Helen Prejean's path to becoming a vocal advocate for justice against the death penalty.

Podcasts

On the Issues – Death Penalty Information Center
This explores factual, legal, and ethical issues relating to capital punishment.

The Appeal – Jordan Smith and Liliana Segura (The Intercept) (Episode 64: Documenting the Death Penalty)

For the past three years, Jordan Smith and Liliana Segura have collected and assembled data on how widespread, racially biased, and arbitrary the death penalty remains today. In this podcast, they talk about their findings.

LifeLines Death Penalty Podcast

This podcast is an exploration into the diverse stories and issues connected to capital punishment in the US. Each episode focuses on a different story relating to the death penalty – including interviews with those with knowledge of the system.

Reports

Amnesty International, Death Sentences and Executions 2020 (2021)

This report covers the judicial use of the death penalty for the period of January to December 2020.

DPIC, DPIC Mid-Year Review (2021)

This report highlights the use of the death penalty in the United States during the first half of 2021.

DPIC, DPIC Special Report: The Innocence Epidemic (2021)

This analysis of 185 death-row exonerations shows that most wrongful convictions are not merely accidental. In fact, the biggest dangers are police and prosecutorial misconduct and knowingly false testimony.

Corinna Barrett Lain, Three Observations about the Worst of the Worst, Virginia-Style (2021)

This report reveals that the death penalty is rarely reserved for the 'worst of the worst' and is often handed down to those who are mentally ill, have substandard representation, or other unlucky

defendants.

Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection (2021)

This report uncovers present-day evidence of racial discrimination in jury selection, including racially biased use of peremptory strikes or training of prosecutors to exclude racial minorities from juries.

American Bar Association, The State of Criminal Justice (2021)

This report examines and reports on major issues and significant changes in the criminal justice system within the year 2021.

The Sentencing Project, National Black Women's Justice Institute, Cornell Center on the Death Penalty Worldwide, In the Extreme: Women Serving Life Without Parole and Death Sentences in the United States (2021)

This report determined that the number of women serving sentences of life without the possibility of parole soared 43% between 2008 and 2020, with extreme sentences even more disproportionately imposed on Black women charged with killing their partners.

DPIC, DPIC Analysis: 13 Exonerated in 2020 From Conviction Obtained by Wrongful Threat or Pursuit of the Death Penalty (2021)

A DPIC analysis of data from the National Registry of Exonerations has found that law enforcement use or threat of capital prosecution against suspects or witnesses contributed to the wrongful convictions of 10% of the people exonerated in the United States and more than one-fifth of all murder exonerations in 2020.

National Geographic, Sentenced to Death, but Innocent (2021)

This feature story in the March 2021 issue of the magazine chronicles the stories of fifteen death-row exonerees and illuminates the pervasive issue of innocence and the death penalty in the US

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BOOK REVIEW: "DSM: A HISTORY OF PSYCHIATRY'S BIBLE"

Baltimore: Johns Hopkins University Press, 2021, 215 pages including 23 pages of notes, 20 pages of references, and a seven-page index; \$35

By Allan V. Horwitz
Reviewed by Russell Stetler*

Mental health experts have been ubiquitous in American death penalty cases throughout the modern era.¹ Early on, the Supreme Court recognized a right to mental health assistance in capital cases, whether it is relevant to culpability or penalty.² The failure to discover and present powerful mental health evidence was a critical and prejudicial deficiency cited by the High Court when it began overturning death sentences for ineffective assistance of counsel in the first decade of the twenty-first century.³ Testifying mental health experts in capital cases may opine on all the traditional issues addressed in criminal law, not only with regard to the instant case, but in prior adjudications that may be challenged when they are offered as aggravating evidence by the prosecution.⁴ In addition, in capital cases, they most frequently provide mitigation evidence, testifying to conditions that may inspire compassion and empathy, or that help jurors to appreciate the world as the client experiences it.⁵ In turn, lawyers and other members of the capital defense team need to understand the frameworks that the defense and prosecution mental health experts themselves employ, both in their current practices and from what they learned at the time of their professional training. Professor Allan V. Horwitz's book on the history of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (the "DSM") is a concise guide to understanding those frameworks.⁶

Horwitz is not a psychiatrist but instead an emeritus professor of sociology at Rutgers University in New Jersey. According to the book jacket, he is the author or coauthor of eleven books on mental health. Here is his description of what he has written:

This book traces traces the evolution of the DSM from its predecessors that arose in the nineteenth and first half of the twentieth centuries to the emergence of the first analytically oriented manuals in 1952 and 1968, and to the incarnation of the medical model that has marked each DSM since 1980. It tells a tale of how diagnostic criteria, which must appear

to portray evidence-based empirical research, in fact emerge from uncertainty, factionalism, intense political conflicts, economic considerations, and other interests.⁷

Understanding this historical evolution is not only significant to capital teams for insights into the worldview of the experts they encounter but also for deconstructing the multigenerational records of capital clients and their families.⁸

Capital defense teams are expected to have at least one member who is qualified by training and experience to screen for mental disorders and impairments,⁹ and who can help to identify experts who fit the needs of the client and the case.¹⁰ This qualification should include an understanding of the historical diagnostic systems, even though it has long been recognized in capital defense practice that a current diagnosis is rarely needed or useful.¹¹ Nonetheless, as Horwitz shows, the DSM has evolved in its own world, with quite different stakeholders influencing its revisions and different constituencies viewed as the primary populations in need of psychiatric services.¹² The first DSMs arose when psychiatrists mainly treated individuals in mental asylums: in 1950, there were over half a million people in hospitals for the prolonged care of the mentally ill.¹³ However, after World War II, psychiatrists increasingly cared for a larger and more diverse group of outpatients with milder disorders.¹⁴ The arrival of tranquilizers in the 1950s and 1960s, often prescribed by primary-care physicians in addition to psychiatrists, helped to demonstrate that mental conditions were present in a large segment of the U.S. population.¹⁵ This context helps to explain the huge expansion of diagnostic categories as the DSM evolved (summarized in Figure 1).

Fig. 1. The expanding diagnostic categories

DSM	Year	Number of diagnoses
I	1952	106 ¹⁶
II	1968	182 ¹⁷
III	1980	265 ¹⁸
III-R	1987	292 ¹⁹
IV	1994	297 ²⁰
IV-TR	2000	no change ²¹
5	2013	"nearly 300" ²²

* Amicus Journal Editorial Board.

It is important, nonetheless, to recognize the many additional factors that influenced the diagnostic expansion, including the overall goal of producing an evidence-based manual reflecting scientific research, using a medical disease model;²³ giving clinicians a tool for practical treatment and researchers a tool for standardized study protocols;²⁴ providing pharmaceutical companies what they needed to market their psychotropic products;²⁵ enabling clinicians to obtain reimbursement from third-party payers as insurance plans supplanted patient payments for psychiatric services;²⁶ and allowing researchers to satisfy the requirements of government funding through the National Institute of Mental Health and the Food and Drug Administration.²⁷

Horwitz also discusses at length the internal debates within the mental health community: the theoretical debates between Freudian psychoanalytic traditions (dominating DSM-I and DSM-II but virtually absent from psychiatric training after 1980)²⁸ and the empiricist, evidence-based approach that developed from the decoding of DNA (1953) to the decoding of the human genome (2003) leading to the intense interest in brain chemistry and genetics, the development of non-invasive scanning technology to study the brain in real time, and other advances in neurobiology.²⁹ He also dissects the influence of external groups, including the public uproar beginning in 1973 over the inclusion of homosexuality under the sexual deviation subclass of sociopathic personality disturbance in DSM-II,³⁰ the activism of Vietnam veterans and feminists supporting the inclusion of Posttraumatic Stress Disorder in DSM-III and the expansion of its criteria in subsequent revisions,³¹ and the parents who feared the loss of critical services for their children when Asperger's Syndrome was subsumed under Autism Spectrum Disorders in the DSM-5.³² The DSM increasingly looked more hefty and scientific, but it was, as Horwitz concludes in his final chapter, always a social construct.³³

One of the conspicuous absences in Horwitz's book is the failure to discuss the prevalence of mental illness in America's jails and prisons. In fairness, the mental health providers in the carceral setting may have had little or no influence on the revision of the DSM and may have just seemed irrelevant to his survey. However, since Horwitz notes the striking decline in the hospitalized and asylum-based psychiatric patient population from its peak of 577,000 in 1950,³⁴ the reader needs to be aware that these patients did not simply become insurance-supported, medicated outpatients. In fact, America's jails and prisons have become the principal care providers for the indigent mentally ill.³⁵ A 1999 survey by the Bureau of Justice Statistics at the

Department of Justice made headlines in the New York Times when it estimated that there were 283,800 incarcerated people with mental disorders (roughly 16% of the incarcerated population).³⁶ In September 2006, the Bureau of Justice Statistics released a new report, indicating that at midyear 2005, *more than half* of all prison and jail inmates in the United States had a mental health problem.³⁷ The dramatic difference between the 1999 and 2006 estimates derived from methodology. In 1999, BJS counted only those incarcerated people who had been diagnosed and treated within the preceding twelve months.³⁸ In 2006, BJS counted not only those with a documented *history* (i.e., clinical diagnosis or treatment recorded in the inmate's medical chart), but also those whose reported *symptoms* in the preceding twelve months met the criteria in the DSM-IV-TR.³⁹ The data came from personal interviews with jail inmates in 2002 and state and federal sentenced prisoners in 2004.⁴⁰ The estimated numbers are staggering: 705,600 inmates in state prisons, 70,200 inmates in federal prisons, and 479,900 inmates in local jails.⁴¹

There are three specific areas of DSM history that are of particular interest to capital defense teams: personality disorders, complex trauma, and the broad discussion of dimensionality versus categorical approaches. I will end this brief review with some comments about each of these areas.

The personality disorders are stigmatizing labels that are applied to virtually every capital client who is evaluated by carceral mental health staff or prosecution experts.⁴² They are, by definition, inflexible, long-standing maladaptive patterns of behavior that do not respond to psychotherapy or medication.⁴³ The most commonly applied label, Antisocial Personality Disorder, is attached to a large percentage people who are or have been incarcerated.⁴⁴ As Horwitz observes, the personality disorder diagnoses reflect character traits, not symptoms,⁴⁵ all are "riddled with negative value judgments,"⁴⁶ and they describe "unpleasant, difficult, or dangerous people."⁴⁷ There were eleven types of personality disorder in DSM-II, and twelve in DSM-III.⁴⁸ When DSM-III introduced its multi-axial system, the personality disorders were relegated to Axis II (with the developmental disorders), but clinicians could still bill for them.⁴⁹ Researchers, on the other hand, ignored them.⁵⁰ Although the DSM-5 did away with Axis II, it retained the personality disorders, incongruously, from the DSM-IV.⁵¹ Clinicians can still bill for them,⁵² and they will remain in the toolkit of carceral mental health staff and prosecution mental health experts.

Capital defense practitioners have long recognized

that trauma is nearly as prevalent in their client population as the near universal risk factor of poverty.⁵³ However, the chronic trauma to which this client population has so frequently been exposed developmentally is quite different from the single-incident acute triggers (such as a rape, a natural disaster, or a near-fatal car accident). Developmental exposure in itself is different from adult exposure: resiliency presumes that an individual has already developed into a capable and mature person. Trauma specialists have urged recognition of this difference through the concept of complex trauma, and many hoped that some iteration of this concept would be adopted in the DSM-5. Instead, according to Horwitz,

The DSM-5 changes to the PTSD diagnosis . . . constituted a rare example of an attempt to reduce the number of diagnoses through narrowing the scope of relevant traumas and limiting traumatic exposure to actual events. The revised criteria set reversed the consistently growing expansion of PTSD from the DSM-III to the DSM-III-R and DSM-IV.⁵⁴

By contrast, the World Health Organization approved the addition of Complex PTSD in the eleventh revision of its manual, the International Classification of Disease.⁵⁵

Throughout his history of the DSM, Horwitz highlights the ongoing debate over whether mental disorders are best seen as dimensional or categorical – that is, continuous on a spectrum or discrete disease entities.⁵⁶ Prior to World War II, before there was a DSM, the dichotomous, categorical, approach prevailed.⁵⁷ The first two DSMs moved in the direction of continuous conditions.⁵⁸ The categorical model returned in DSM-III,⁵⁹ but the debate did not end. Horwitz offers this summary of the forces that influenced the latest resolution:

When researchers involved in the DSM-5 revision attempted to make fundamental changes in the manual, they found that the DSM categories had become so important to clinicians that they could not be dislodged. One reason was that practitioners worried that a dimensional system would threaten insurance reimbursement. The researchers who proposed a new dimensional system also underestimated the extent to which medical thinking and culture emphasizes dichotomies. While medical diagnoses are often uncertain and ambiguous, most diseases are distinct from – not continuous with – health. Even such dimensional conditions as blood pressure and cholesterol levels are divided at cut points that indicate likely pathology. Regardless of whether any illness is dichotomous or continuous in nature, clinicians must make decisions to treat or not

to treat it. Therefore, the constraints of medical practice lead physicians, including psychiatrists, to think in black and white. Perhaps most important, diagnostic categories make medical disorders seem more real to the public, to physicians in other medical specialties, to insurance companies, and to federal regulators. Any system that must legitimize its diagnoses as medical diseases will inevitably rely on categories rather than dimensions.⁶⁰

The problem, of course, is that most medical diagnosis can rely on objective markers, such as blood tests, biopsies, histological analyses, and physical examinations, whereas the majority of psychiatric disorders have no such markers. Medicine has a reliable and valid means of distinguishing flu from Covid, when there is no such definitive test for patients presenting psychotic symptoms. The development of noninvasive scanning technologies has permitted us to study brains that were once examined only post-mortem or in emergency surgery, and this breakthrough has permitted neuropsychiatry to reach greater understanding of the role of neuroanatomy and neurochemistry in some disorders. However, to the extent that the evidence from imaging must still rely on correlations with diagnoses reached by clinical observation of symptoms, this technological revolution is a long way from offering definitive objective conclusions about treatment.

In the litigation context, categories inevitably create controversy, invite a battle of the experts, and often reflect badly on the mental health professions generally.⁶¹ Even experts retained by the same party will often disagree about diagnoses. The disorders of capital clients rarely fit into neat diagnostic boxes, and in capital defense diagnosis is almost never required, except for a diagnosis of intellectual disability that prohibits execution. Intellectual disability is itself an example where what Horwitz calls the “cut points” in medical diagnosis have changed over time. Although the three core criteria (significantly subaverage intellectual functioning, deficits in adaptive behavior, and developmental onset) have not changed, Figure 2 illustrates the dramatic change in “cut points” for the first criterion.

Fig. 2. Changing IQ “cut points”⁶²

Degree of Disability	DSM-I (1952)	DSM-III (1980)
Mild	70-85	50-70
Moderate	50-70	35-49
Severe	<50	20-34
Profound		<20

Meanwhile, more recently, the Supreme Court of the United States has pointedly observed that intellectual disability is a condition, not a number.⁶³ That observation was made with respect to IQ scores (moving the

emphasis instead to deficits in adaptive behaviors), but there has been similar recognition that development onset should not be an arbitrary age in light of what we now know about brain development in adolescence and early adulthood.⁶⁴

With regard to both intellectual disability and youth (the two instances in which the Supreme Court has held that there are categorical exemptions from execution), the categories merely anchor points on a dimensional spectrum from the perspective of mitigation. Even if an individual does not meet the criteria for exemption, intellectual impairment and youth are always mitigating circumstances. In the same year that the Supreme Court barred the execution of people with intellectual disability (2002), President George W. Bush's Commission on Special Education discussed the dimensionality of intellectual limitations, noting "the model for identification is like that used for obesity or hypertension, not measles or meningitis. The disorder is always a matter of degree on a dimension, not a disorder that you have or do not have, and identification is ultimately a judgment based on the need for services."⁶⁵

Mitigation rests on individualized frailties, rather than fitting someone into a faceless category, so mental health mitigation must describe the symptomatology and phenomenology of the disorder rather than simply invoke quasi-medical nomenclature. Capital defense teams need to be steeped in the DSM and its history, but not dependent on its attempt to create scientific-sounding classifications for highly heterogeneous conditions whose symptoms wax and wane. Horwitz's history of the DSM is an important reminder of the disparate forces and struggles that have produced psychiatry's so-called bible, but it remains a "fundamentally social document that both influences and reflects the changing internal and external dynamics surrounding psychiatry."⁶⁶

Endnotes

- 1 See, for example, George E. Dix, *Participation by Mental Health Professionals in Capital Murder Sentencing*, 1 INT'L J. L. & PSYCHIATRY 283, 283 (1978).
- 2 *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985) (holding that denial of expert psychiatric assistance to indigent defendant where sanity was a significant factor at both guilt and penalty phases of trial constituted a denial of due process).
- 3 *Williams v. Taylor*, 529 U.S. 362, 370 (1999) (noting that Williams was "borderline mentally retarded," with "mental impairments" possibly "organic in origin"); *Wiggins v. Smith*, 539 U.S. 510, 518, 523 (2003)

(noting that social service records documented "borderline retardation" and that testing determined Wiggins to have "an IQ of 79 [and] difficulty coping with demanding situations"); *Rompilla v. Beard*, 545 U.S. 374, 390-93 (2005) (noting that Rompilla had a "third grade level of cognition after nine years of schooling," suffered from "organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions," and that Rompilla's "IQ was in the mentally retarded range"); *Porter v. McCollum*, 558 U.S. 30, 36 (2009) (per curiam) (explaining that Porter had "substantial difficulties with reading, writing, and memory," along with "cognitive defects," and that state experts could not "rule out a brain abnormality"); *Sears v. Upton*, 561 U.S. 945, ___ (2010) (per curiam) (quoting an expert's opinion that "Sears performs at or below the bottom first percentile in several measures of cognitive functioning and reasoning" partly due to "significant frontal lobe brain damage," and explaining that Sears had "problems with planning, sequencing and impulse control").

4 These issues include competency to stand trial and to aid and assist counsel, responsibility (not guilty by reason of insanity, diminished capacity, extreme emotional disturbance, etc.), mental status at the time of the offense (including capacity to premeditate, deliberate, and form specific intent), capacity to make a knowing and intelligent waiver of rights (including right to remain silent when questioned in custody, right to counsel, right to be present, right to trial and appeal, right to testify and to represent oneself), and the voluntariness and reliability of all statements to law enforcement. See Russell Stetler, *Mental Disabilities and Mitigation*, CHAMPION, Apr. 1999, at 49, 50. See also Richard G. Dudley, Jr., and Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 985 (2008) (offering examples of the range of referral questions that mental health experts might be asked to address).

5 Stetler, *Mental Disabilities*, *supra* note 4, at 50-51.

6 ALLAN V. HORWITZ, DSM: A HISTORY OF PSYCHIATRY'S BIBLE (2012).

7 *Id.* at 9.

8 See, for example, RICHARD BURR ET AL., A PRACTITIONER'S GUIDE TO REPRESENTING CAPITAL CLIENTS WITH MENTAL DISORDERS AND IMPAIRMENTS (2008), ch. 6, "The History of the DSM: A Key to Multigenerational Investigation," at 95-106. This chapter emphasized the importance of using past editions of the DSM to translate prior diagnoses into the signs and symptoms that historical psychiatrists, psychologists, and social workers were observing. While this

practice guide provides some history of the past diagnostic schemes, Horwitz's account of the internal and external influences on the manual's revision is not only more thorough but also up to date (through the DSM-5 published in 2013).

9 AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. 2003), Guidelines 4.1.A.2, The Defense Team and Supporting Services, & 10.4.C.2.b, The Defense Team, 31 HOFSTRA L. REV. 913, 952, 1000 (2003); see also SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 5.1, Qualifications of the Defense Team, 36 HOFSTRA L. REV. 677, 682-683 (2008) (describing in more detail the areas of mental health knowledge required of a core member of the capital defense team).

10 *Id.*

11 See Stetler, *Mental Disabilities*, *supra* note 4, at 50-51. A notable exception, of course, is a diagnosis of intellectual disability. See *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring execution of people who meet the criteria for intellectual disability).

12 Horwitz, *supra* note 6, at 10, 50.

13 *Id.* at 10, 26.

14 *Id.* at 26.

15 *Id.* 35 (Meprobamate [Miltown, Equinal] arrived in 1955 and within one year 5% of Americans had used it); 38 (benzodiazepines [Librium, Valium] displaced Meprobamate in the 1960s); 50 (outpatient visits for psychiatric care grew into the millions); 68 (diagnosed depression doubled from four million in 1962 to eight million in 1968).

16 *Id.* at 31.

17 *Id.*

18 *Id.* at 59.

19 *Id.* at 87.

20 *Id.* (noting only eight new diagnoses and five more in total than III-R).

21 *Id.* at 86 (noting only minor text revisions).

22 *Id.* at 162 (22 general classes of disorders; nearly 300 specific diagnoses).

23 *Id.* at 8.

24 *Id.* at 9.

25 *Id.* Since the 1970s, the Food and Drug Administration has required a diagnosis for marketing these drugs.

26 *Id.* at 49 (rise in insurance-paid treatment from 38% in mid-1960s to 68% in 1980s), 151.

27 *Id.* at 46, 123.

28 *Id.* at ix, 61.

29 *Id.* at 45, 68, 118.

30 *Id.* at 3, 29-30, 40.

31 *Id.* at 80-81, 90, 97. PTSD triggers expand-

ed from "outside the range of usual human experience" (DSM-III) to "the person experienced, witnessed, or was confronted with events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others" and "the person's response involved fear, helplessness, or horror" (DSM-IV). Symptoms began with intrusive thoughts (DSM-III) and expanded to include repressed memories (DSM-III-R), perhaps prefiguring what psychologist Bessel van der Kolk described more recently, "Traumatized people simultaneously remember too little and too much." BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 179 (2014).

32 Horwitz, *supra* note 6, at 139-140 (including the unprecedented designation of a grandfather clause to permit continuing services for those who had a diagnosis under DSM-IV but would otherwise have been excluded under the criteria of DSM-5).

33 The first two DSMs were spiral bound booklets of fewer than 150 pages, whereas those that followed were 500-page hardbacks with symptom lists, decision rules, and operational definition. *Id.* at 64. Chapter seven (The DSM as a Social Construct) nonetheless asserts that there has been "steady, in uneven, progress." *Id.* at 144, 156.

34 Horwitz, *supra* note 6, at 26.

35 Russell Stetler, *Mental Health Evidence and the Capital Defense Function: Prevailing Norms*, 82 UMKC L. REV. 407, 413-414 (2014); TERRY KUPERS, M.D., *PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE CAN DO ABOUT IT* (1999) ("deinstitutionalization" of the mentally ill population and corresponding higher prevalence of mental health problems among the incarcerated, exacerbated by changes in conditions of confinement).

36 Fox Butterfield, *Prisons Brim with Mentally Ill*, Study Finds, N.Y. TIMES, July 12, 1999, A10; BUREAU OF JUST. STATS., U.S. DEP'T OF JUSTICE, NCJ 174463, *MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS* (July 1999) [hereinafter BUREAU OF JUST. STATS.].

37 DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUST. STATS., U.S. DEP'T OF JUSTICE, NCJ 213600, *MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES* (2006), available at: <https://bjs.ojp.gov/press-release/mental-health-problems-prison-and-jail-inmates> (last visited Aug. 31, 2021).

38 BUREAU OF JUST. STATS., *supra* note 36.

39 JAMES & GLAZER, *supra* note 37. As noted in Fig. 1, *supra*, the only changes between the DSM-IV, in use in 1999, and the DSM-IV-TR, in use in 2006, were minor text revisions, not diagnostic criteria.

40 JAMES & GLAZER, *supra* note 37.

41 *Id.*
42 See, generally, Kathleen Wayland & Sean D. O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519 (2013).
43 Horwitz, *supra* note 6, at 76.
44 Mark D. Cunningham & Thomas J. Reidy, *Antisocial Personality Disorder and Psychopathy: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behavior in Sentencing Evaluations*, 19 BEHAV. SCI. & L. 333, 340 (1998) (estimates of incarcerated males who meet criteria for ASPD range from 49% to 80%).
45 Horwitz, *supra* note 6, at 76.
46 *Id.* at 77.
47 *Id.*
48 *Id.* at 76-77.
49 *Id.* at 77.
50 *Id.*
51 *Id.* at 131.
52 *Id.*
53 Stetler, *Mitigation Evidence in Death Penalty Cases*, CHAMPION, Jan.-Feb. 1999, 35, 37:

Abuse and trauma histories are virtually universal. The overwhelming majority of capital clients have suffered trauma outside the realm of ordinary human experience, whether it occurs within the home, as in incest and sexual abuse, or in the wider social setting, where growing up as an inner-city person of color means witnessing violent death of peers and loved ones. Whether they have suffered violence or helplessly witnessed violence to others, they live with the intrusive memories and remain hypervigilant in the expectation that random violence may visit them again at any moment. Maltreatment may involve trauma in the form of psychological battering (i.e., rejecting, terrorizing, ignoring, isolating, and corrupting) as well as physical abuse.

Citation omitted. See also Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923 (2008) (“Psychological trauma lies at the heart of death penalty cases.”)

54 Horwitz, *supra* note 6, at 155-156.
55 ICD-11 (effective January 1, 2022): “Complex post traumatic stress disorder (Complex PTSD) is a disorder that may develop following exposure to an event or series of events of an extremely threatening or horrific nature, most commonly prolonged or repetitive events from which escape is difficult or impossible (e.g. torture, slavery, genocide campaigns, prolonged domestic violence, repeated childhood sexual or physical abuse).” Available at:

<https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/585833559> (last visited Sept. 1, 2021).
56 Horwitz, *supra* note 6, at 7, 88, 128, 131, 132, 139, 148, 149.
57 *Id.* at 148.
58 *Id.*
59 *Id.*
60 *Id.* at 149.
61 See, for example, Scott E. Sundby, *The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123 (1997) (two-thirds of defense witnesses who “backfired” were professional experts).
62 AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-I) 24 (1952); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed.) (DSM-III) 26 (1980).
63 Hall v. Florida, 572 U.S. 701, ___ (2014) (finding Florida’s rigid rule requiring an IQ of 70 or below created an unacceptable risk of executing a person with intellectual disability).
64 In 2021, the leading professional organization focused solely on intellectual disability and developmental disorders, the American Association on Intellectual Disability and Developmental Disorders, increased the age of onset from eighteen to twenty-two. See R. J. Schalock, R. Luckasson, & M. J. Tassé, *Twenty Questions and Answers About the 12th Edition of the AAIDD Manual: Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Support* (2021): “The age of onset criterion ‘before the individual attains age twenty-two’ found in the twelfth edition of the AAIDD Manual is based on recent research that has shown that important brain development continues into our twenties. Research using advanced imaging techniques has documented that a number of critical areas of the human brain continue their growth and development into early adulthood, including cortical gray matter volume, corpus callosum, and white matter.” Available at: https://www.aaid.org/docs/default-source/intellectualdisability/12th-ed-twenty-questions-faq.pdf?sfvrsn=a6403421_4 (last visited Sept. 2, 2021). Reprinted in 41 AMICUS J. 47, 49 (2021). A DSM-5 text revision, scheduled for publication in March 2022, will clarify that deficits in adaptive functioning need not be directly related to the intellectual impairments in Criterion A, so that the DSM will conform to the AAIDD definition.
65 PRESIDENT’S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, DEP’T OF EDUCATION, A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 21 (2002).
66 Horwitz, *supra* note 6, at 145.

BOOK REVIEW: "CRIMINALITY IN CONTEXT: THE PSYCHOLOGICAL FOUNDATIONS OF CRIMINAL JUSTICE REFORM"

American Psychological Association, 2020

By Craig Haney

Reviewed by Arielle Baskin-Sommers*

Under the Trump Administration, the United States witnessed a staggering increase in the number of executions that were carried out by the federal government. That number was more than the previous fifty-six years combined. In a powerful dissent, Supreme Court Justice Sonia Sotomayor simply stated that "[t]his is not justice." She highlighted issues related to the cruelty inflicted during the administration of lethal cocktails and the circumvention of standard appeal processes. However, concern over the death penalty extend to other issues, including the biases found in death penalty convictions. For instance, individuals from low-income backgrounds are more likely to receive the death penalty than those with higher incomes. Black individuals who have a white victim are more likely to receive the death penalty than white individuals with a Black victim. And, the majority of Black individuals who have been exonerated are victims of official police misconduct.¹ Thus, it is clear that this punishment is not being applied fairly, regardless of one's views on the morality and legitimacy of the death penalty. Factors such as poverty, race, and geography should not control who is sentenced to death. The fact that they are raises serious questions about the appropriateness of this sanction. Instead, if justice is to be provided to all, then understanding the contextual factors that contribute to criminal behavior and criminal justice system contact is important so that changes can be made and justice served.

Craig Haney's book, *"Criminality in Context: The Psychological Foundations of Criminal Justice Reform,"* is a comprehensive review of important contextual factors that influence behavior and justice system involvement. Haney starts with a historical overview of the United States' justice system's focus on individual responsibility (the "crime master narrative"). He then examines the science behind the way context influences crime, from social history to situational context to structural influences (e.g., racism). Finally, Haney ends the book by suggesting ways to move towards a more scientifically-informed justice system by chang-

ing community-based and correctional system practices. This survey of important sociological and psychological research on the initiation and maintenance of criminal behavior can provide undergraduates, emerging psychologists, and legal professionals with a solid understanding of how individuals operate within important ecological systems. Notably, it also demonstrates how the criminal justice system must consider the influence of these ecological systems. Though this book is not focused on the death penalty *per se*, Haney has testified as an expert in death penalty cases over the past four decades to foster an understanding of the importance of contextual variables in the sentencing decisions jurors are called upon to make.

The core thesis of Haney's book is that, to understand criminality, we must take into account the environments that an individual traverses over the course of their life, as well as the risk factors associated with these environments. The early chapters in the book (Chapters Two to Three) focus on the experience of trauma as an important risk factor for criminality. For example, Abram et al. (2013) found that 92.5% of justice-involved youth reported exposure to at least one type of trauma, 84% had exposure to multiple traumas, and 56.8% experienced trauma repeatedly.² Not all traumas are necessarily related to involvement in criminality, but one general domain of trauma, exposure to violence, is one of the most robust predictors of such involvement. In the United States, approximately 30% of youth report exposure to violence.³ However, as Haney very importantly notes, exposure to violence is not equally distributed across individuals. In the United States, these exposures are predominantly clustered in lower socioeconomic communities. Between 80% and 100% of residents in poor, urban neighborhoods report being exposed to violence.⁴ And, unfortunately, Black and Latinx individuals disproportionately incur the impact of violence exposure and economic disadvantage.

In Chapters Five to Seven, Haney highlights how pov-

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erty and structural racism can place shackles on people even before the cuffs of the criminal justice system are introduced. In Chapter Five, Haney comments that "... disadvantaged neighborhoods can produce criminogenic effects in part because they maximize the pressures to engage in crime, in part because they increase people's proximity to illegal activities, and in part because there are fewer resources and stable institutions to serve as countervailing pressures to refrain".⁵

Further, numerous scholars have documented that every aspect of the lives of minoritized groups in the United States can be imbued with racism. Banking, housing, and voting practices that discriminate against lower-income individuals and racial minorities make it difficult to achieve upward mobility and to have a voice in civic practices. Inequities based on income and race occur at every stage of the justice system, from policing to case processing to incarceration, and even in the laws themselves. Therefore, Haney's focus on the larger structural influences of poverty and racism on criminality is especially timely.

Haney ends the book (Chapters Eight to Ten) by discussing how the science of context can help dismantle unjust policies and practices within communities, the police, the law, and corrections. He highlights the importance of improving the infrastructure of communities by increasing access to community resources and jobs as essential tools for combating crime. Additionally, a focus on context has important implications for how we think about legal responsibility. For instance, psychological research shows that adolescents display heightened sensitivity to the influence of peers.⁶ Numerous studies show that adolescents, compared to adults, make riskier decisions when with peers than when by themselves.⁷ This type of work influenced the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012) (barring mandatory life without parole sentences for crimes committed prior to age eighteen). However, as Haney notes, with respect to federal guidelines, contextual factors tend to be "de-emphasized" and even "prohibited" when determining criminal justice responses to criminal behavior.⁸ Thus, Haney calls for the reform of sentencing guidelines based on the evidence that context strongly influences behavior. Finally, Haney comments on the role of prisons in perpetuating criminality. Prisons in the United States are ecological contexts that deny individuals the potential for healthy development and replicate the structural inequalities that contribute to criminality, making it harder for individuals to leave prison and become prosocial members of the larger society. Consequently, reforming the physical and psychological

ecology of prisons is a necessary step.⁹

A focus on the contextual factors that promote criminality is certainly important. However, one cannot dismiss the role of individual differences, and I would stress these differences more than Haney does. Perhaps Haney is attempting to counteract the harmful misrepresentations of individual responsibility that have been promoted by politicians, the media, and even some scholars. However, a failure to consider the intersection between the person and the environment will necessarily limit our ability to explain why some individuals engage in criminal behavior and how best to intervene. Haney does acknowledge individual differences, albeit without fully developing the argument to the same extent as he does with regard to contextual factors. In Chapter Eight, Haney states that "... the capacity to perceive and take advantage of viable options can be significantly limited by a person's troubled and traumatic past history".¹⁰ That is exactly right. For example, perception, attention, learning, and memory vary across individuals and understanding their part in the development of criminal behavior helps identify people most at risk. In a recent study, my lab found that individuals with high rates of exposure to violence and who did not physiologically habituate to the presentation of repeated information (i.e., learn) were most at risk for engaging in violent behavior.¹¹ Thus, while exposure to violence is a strong predictor of criminality and should be addressed broadly, it is equally important to know who such exposure is most likely to affect, and how it does so, in order to develop the most efficacious prevention and intervention efforts.

A main emphasis of Haney's is a denial of the "but not everyone" argument. Often, when context is raised, people will argue that "not everyone in a poor neighborhood or who has been traumatized, commits crimes." Haney contends that noting the different reactions to similar conditions perpetuates the narrative that actions are fully an individual choice. He thinks that the only way to combat this narrative is to shift away from considering the individual and focus only on the overall environment. However, putting forth an incomplete science weakens the important stance that context matters for understanding criminality. Decades of well-validated, rigorous, and thoughtful research has shown that familial (e.g., ineffective discipline, low parental warmth), peer (e.g., deviant peers), neighborhood (e.g., high levels of exposure to violence), cognitive (e.g., deficits in executive functioning, abnormalities in attention), emotional (e.g., poor emotional regulation, blunted emotions), personality

(e.g., impulsivity, disinhibition), and biological (e.g., neurochemical, autonomic, and brain-based irregularities) factors put someone at risk for criminal behavior. This research clearly demonstrates that causal models cannot focus on single risk factors (e.g., neighborhood disadvantage) or single domains of risk factors (e.g., biological abnormalities) if they are to adequately explain criminality across individuals.

Haney goes on to argue that considering individual differences, such as cognitive-affective factors that are subserved by biological systems, is unnecessary because “[t]here are as yet no practical, positive applications for this kind of knowledge”.¹² Recent studies, including my own work with incarcerated people, suggests the importance of incorporating cognitive-affective dysfunction into the study of criminality, and reveals the ways in which individual context interacts with the community and social context in the production of anti-social behavior. The most successful interventions for criminality in juveniles are multisystemic, targeting environmental and individual factors.¹³ Further, for individuals who exhibit severe and persistent engagement in criminal behavior, directly addressing cognitive-affective dysfunction is essential for promoting personalized behavioral change.¹⁴

Ultimately, understanding contexts as well as individual differences at cognitive-affective and biological levels is critical for changing the policies and practices of the justice system. Some of the most progressive Supreme Court decisions have cited psychological and neuroscientific evidence of neurodevelopmental differences between juveniles and adults. Some prisons in Connecticut opened up specialized units for incarcerated individuals aged eighteen to twenty-five, based on the evidence that brains are still developing and that providing life skills training is important for re-entry.¹⁵ And, some of the most effective interventions for addressing criminal behavior consider the individual and the environment. Haney’s book provides a valuable review of the contextual factors that contribute to criminality. Situating individuals within that context to understand the biopsychosocial factors that contribute to behavior is the next essential step in understanding criminality and in serving justice.

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FILM REVIEW: "THE PHANTOM" - HOW TEXAS SENTENCED AN INNOCENT MAN TO DEATH

By Valentina Meo*

The Phantom retells the harrowing trial and execution of Carlos DeLuna, who was charged with armed robbery and the murder of Wanda Lopez in 1983. This story details a fascinating, but ultimately infuriating, look at the fatal miscarriage of justice in Texas. With a runtime of just one hour and twenty-two minutes, this Netflix-like documentary is just a short summary of the investigation that, fourteen years too late, unravels the true culprit and clears DeLuna's name.

The documentary begins by recounting the night of the robbery, playing the 911 call from Wanda Lopez, and the police chase that led to the arrest of DeLuna on the same night. DeLuna was accused of the murder simply based on the fact that he had about \$140 in cash on him, a similar amount taken from the register, and because he was found hiding underneath a car a short distance away from the site of the murder.

The case against him was based entirely on two eye-witness accounts and the powerful 911 call Ms. Lopez made on the night she was murdered, which indicated that she was cooperating with her robber by handing the money over. DeLuna himself testified at trial, and after his alibi was found to have been fabricated, indicated that he did not commit the murder. Instead, he named the killer - a notoriously violent criminal called Carlos Hernandez. At the time, an attempt appears to have been made to locate Hernandez, but the police claimed that nothing came of it. Carlos Hernandez was dubbed to be a "Phantom" by the prosecutors, who claimed that DeLuna was a predator who would hurt women again. With this argument, they managed to convince the jury to reach a "guilty" verdict.

There were several factors that should have raised doubts over DeLuna's guilt. Firstly, no blood was found on him, despite the apparent proximity of the perpetrator to the victim during the stabbing. Crime scene photos showed significant amounts of the victim's blood on the scene and it appeared that some of the wounds were inflicted posthumously. Also, despite having a criminal record for robbery, Carlos did not have a violent criminal history. Raising all of these

claims, he turned to the Supreme Court: unfortunately, his appeal was unsuccessful, and he was executed in 1989.

The exploration into Carlos DeLuna's character is done well, through a combination of interviews with his family members and letters he sent to a journalist, who had taken an interest in his case. These testimonies offer a glimpse into DeLuna's character, his childhood growing up in a violent area of Texas and the fear he felt in the days leading up to his execution. The use of DeLuna's own words through the letters and interviews is well done and provides a voice to someone who had not been given one before. Further to that, the documentary explores the ineffectiveness of lethal injection as a method of execution, and details the last minutes of DeLuna's life, in which he continued to claim his innocence and the assertion that Carlos Hernandez had committed the crime.

The documentary then fast-forwards to fourteen years later, to a study done about the Texas death row at the Columbia Law School and the search for "The Phantom" Carlos Hernandez, and analyses the pitfalls within the court system and flawed police conduct that allowed for fatal mistakes to be made in this case.

While the video editing leaves much to be desired, the story is both compelling and maddening in the way it recounts the events that transpired and ultimately provide a succinct argument against the use of the death penalty.

"Maybe one day the truth will come out" said Carlos DeLuna regarding his innocence during an interview he conducted while on death row. It seems that through this movie and the research conducted by Columbia Human Rights Law Review, the truth seems to have been exposed.

* Amicus UK Office Volunteer.

WHO KILLED WANDA LOPEZ?

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CITY OF CORPUS CHRISTI
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THE PHANTOM

GRANTON DEVELOPMENT...
CORPUS CHRISTI POLICE...
WANDA LOPEZ...
MURDER...
PHANTOM...
CORPUS CHRISTI...
POLICE...
CORPUS CHRISTI, TEXAS

OXFORD
FILMS

grain



Hobby
Investments



GREENWICH
PRODUCTIONS

VOLUNTEER VOICES

By Maddie Steele*

April 2016 was the first time I set foot on the red soil of Oklahoma. I had spent the previous two years working at a specialist mental health and mental capacity law firm, saving every penny to fund my placement with Amicus. I was placed in a pre-trial office – the Oklahoma County Public Defender’s Office – in Oklahoma City. When I arrived, there were eleven live capital murder cases, one of which was due for trial in June. During my first week in the office, it became very clear to me that every single one of our clients had some form of mental disorder, be it PTSD, schizophrenia, bipolar, schizoaffective disorder, drug induced psychosis or intermittent explosive disorder, to name a few. Each one of them had a story; a story of being let down by the system, misdiagnosed, never diagnosed or ignored, when cries for help were made by their family members.

The inequality of arms between the prosecution and defence in death penalty cases, when it comes to mental health experts, or experts of any kind, was something that shocked me the first time I was in Oklahoma. One of the murder cases I worked on - although not a death penalty case, as the client was seventeen at the time of the offence - highlighted this very problem.

I was assisting the attorney in preparing for a competency hearing – a hearing where the court would determine if the defendant was fit to stand trial. Part of this preparation included multiple visits to the county jail to meet with the client and ascertain if he could provide us with clear instructions. At the end of each of these visits, some of which were multiple hours long, we were no clearer on whether he understood what had happened on the day of the murder, let alone what his defence might be.

I soon found out that the prosecution intended to rely on two expert psychologists at the competency hearing. Both were going to testify that our client was fit to stand trial and was able to assist in his defence. Upon learning this, I remember exclaiming to the lead attorney that they must have assessed the wrong person as - although I am certainly no expert - the person I had met couldn’t possibly be deemed fit.

I then learned that the defence application for its own expert had been denied by the court and therefore the

only expert testimony the Judge would hear would be from two prosecution experts. The lead attorney then made the decision to call me as a witness (note the previous sentence stating I am not an expert). I testified as to the presentation of our client during our meetings and his inability to give anything close to clear instructions to assist in his own defence. I was then cross-examined by the prosecutor who, despite the matter not being a death penalty case, decided to focus a great deal of his questions on my views of the death penalty in America and my reason for being in Oklahoma in the first place. When he did eventually ask me more specific questions about our client, I simply told him that the person the psychologists had seen was not the person I had spent many hours with, if they believed he was well enough to actively participate in his defence and stand trial. Despite this clear disparity between the resources of the prosecution and defence, our client was deemed unfit to stand trial and was moved to the state secure hospital for treatment.

During my first visit to Oklahoma, the majority of my time was spent assisting the lead attorney with a case that was due for trial a couple of months into my placement. Our client had been assessed by a psychiatrist, psychologist and human developmentalist. He had been diagnosed with intermittent explosive disorder, characterised by sudden explosive outbursts of violence and aggression which appear grossly disproportionate to the situation (DSM-5). What was astonishing to me about this case, was that it had taken our client being charged with a capital offence for him to finally be diagnosed. Despite the clear warning signs in his younger years, right through to his behaviour as an adult - recorded by his teachers, employers and staff in the correctional system - absolutely nothing had been done in an attempt to ascertain why he behaved the way he did, again highlighting how he had been let down by the adults responsible for caring for him and the system as a whole. It raises the question: had he been diagnosed earlier and had treatment been offered, would he find himself facing a capital charge?

Some readers will be aware of the US Supreme Court case of *Atkins v. Virginia* [2002]. This was the landmark ruling in which the court decided that executing those suffering from intellectual disability violated the Eighth Amendment. In practice, this means that, if it

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can be shown that the defendant is intellectually disabled, the death penalty is taken off the table. The judgment in that case makes for intriguing reading, particularly if, like me, you have an interest in mental health and criminal culpability. During my placement, I was tasked with drafting a pre-trial motion barring the death penalty for those suffering severe mental illness at the time of the offence. What struck me during my research, was how abundantly clear it was to me that the court's rationale for barring the death penalty for those with intellectual disability, could be directly applied to those suffering with severe mental illness. It seemed completely absurd that a similar ruling had not been made in respect of mental illness. Fortunately, some states are taking steps towards eliminating, or have already eliminated, the death penalty as a sentencing option for those suffering severe mental illness. One can only hope that more will follow suit.

Throughout this article I have referred a few times to "my first time in Oklahoma". That is because, despite the emotional turmoil I experience every time I am faced with a case where the client has been tragically let down and it being plainly clear, that their mental health has played a significant - if not leading - role in the offence, I just can't seem to stay away from that red soil.

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