

# Striving to Eliminate Unjust Executions: Why the ABA's Individual Rights & Responsibilities Section Has Issued Protocols on Unfair Implementation of Capital Punishment

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*The ABA concluded in 1997 that pervasive unfairness in capital punishment regimes warranted a halt to executions unless all of the systemic problems the ABA identified were corrected. Four years later, with those problems still pervasive, the ABA's Section of Individual Rights and Responsibilities issued protocols designed to facilitate the evaluation of the fairness—or lack thereof—of a jurisdiction's capital punishment system. The protocols are particularly timely because many state legislative bodies are authorizing, or considering authorizing, studies of death penalty implementation. The protocols provide an overview, a list of questions to consider, and recommendations with regard to each topic area they cover. While these are not exhaustive, and are not fully applicable in every death penalty jurisdiction, they should prove invaluable to any group seeking to seriously evaluate the manner in which capital punishment is actually administered today.*

## I. BACKGROUND: WHY THE ABA ADVOCATES A MORATORIUM

When the American Bar Association (ABA) called in 1997 for a moratorium on executions, it did so because of systemic unfairness in the administration of capital punishment. The “last straws” were the elimination of federal funding for resource centers and the passage of the misleadingly titled Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>1</sup> The ABA was particularly disturbed by assertions that the AEDPA would merely eliminate frivolous claims.<sup>2</sup> In reality, frivolous claims had been curbed by the courts long before that.<sup>3</sup> What the AEDPA has done is prevent many people whose constitutional rights have been prejudicially violated from getting any relief.<sup>4</sup>

One recent decision purporting to implement the AEDPA illustrates this situation.<sup>5</sup> On January 18, 2001, the Fifth Circuit denied habeas corpus relief to

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<sup>1</sup> 28 U.S.C. §§ 2261–66 (1994 & Supp. V 1999).

<sup>2</sup> ABA SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES 18 (June 2001), available at [www.abanet.org/irr/finalJune28.pdf](http://www.abanet.org/irr/finalJune28.pdf) [hereinafter THE PROTOCOLS].

<sup>3</sup> *Id.* at 17–18.

<sup>4</sup> *Id.* at 18.

<sup>5</sup> *Neal v. Puckett*, 239 F.3d 683 (5th Cir. 2001).

Mississippi death row inmate Howard Monteville Neal, even though it determined that Neal's constitutional right to effective assistance of counsel had been violated and that the Mississippi Supreme Court had been incorrect in denying Neal relief.<sup>6</sup> The Mississippi Supreme Court had concluded that the ineffectiveness of Neal's trial lawyer in not presenting substantial mitigating evidence likely did not affect the outcome of the sentencing proceeding.<sup>7</sup> The Fifth Circuit disagreed, concluding that if Neal's counsel had been effective and had presented the significant available evidence about Neal's life history, there was a reasonable probability that the jury would have sentenced Neal to life, rather than death.<sup>8</sup> Accordingly, under the applicable Supreme Court standard regarding ineffective assistance of counsel claims,<sup>9</sup> Neal should have been granted relief. Nevertheless, the Fifth Circuit denied federal habeas corpus relief to Neal.<sup>10</sup> It held instead that, under the AEDPA, it was precluded from granting relief.<sup>11</sup> Under the AEDPA, if the Mississippi Supreme Court reasonably refused to hold that *Strickland's* prejudice prong was satisfied, the Fifth Circuit was precluded from ruling in Neal's favor.<sup>12</sup> Since the Fifth Circuit concluded that the state court's decision, although incorrect, was not "unreasonable," it denied Neal relief.<sup>13</sup> Accordingly, he can be executed.<sup>14</sup>

The ABA advocates a moratorium on executions until and unless the systemic unfairness identified in its 1997 resolution is dealt with in accordance with longstanding ABA policies.<sup>15</sup> That resolution identifies problems with the following: quality and performance of counsel in all aspects of capital proceedings; limitations on the courts' ability to adjudicate constitutional claims on their merits; racial discrimination; the execution of people with mental retardation; and executions for crimes committed by juveniles.<sup>16</sup> The ABA continues to bring problems to light through its Death Penalty Moratorium Implementation Project, which aims to highlight the fundamentally unfair manner in which the death penalty is being imposed and is working with jurisdictions throughout the country in addressing concerns.

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<sup>6</sup> *Id.* at 694–95, 697.

<sup>7</sup> Neal v. Mississippi, 525 So. 2d 1279, 1281–85 (Miss. 1988).

<sup>8</sup> Neal v. Puckett, 239 F.3d 683,694 (5th Cir. 2001).

<sup>9</sup> Strickland v. Washington, 466 U.S. 668, 687 (1984).

<sup>10</sup> Neal v. Puckett, 239 F.3d 683, 697(5th Cir. 2001).

<sup>11</sup> *Id.* (citing 28 U.S.C. § 2254(d) (1994)).

<sup>12</sup> *Id.* at 694–95.

<sup>13</sup> *Id.* at 696–97.

<sup>14</sup> *Id.* at 697.

<sup>15</sup> American Bar Association, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, 63 OHIO ST. L.J. 489, 537 app.A (2002); Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 49 (1996).

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

A moratorium would give a state the opportunity to conduct a thorough, calmly conducted review of the fairness of its death penalty system. The state could then consider what to do in light of whatever systemic problems are identified.

## II. WHY THE INDIVIDUAL RIGHTS & RESPONSIBILITIES SECTION IS NOW ISSUING PROTOCOLS

Four years after the ABA's moratorium resolution put a national spotlight on systemic fairness issues concerning the death penalty, the ABA Section of Individual Rights and Responsibilities (Section) has developed protocols that the Section hopes will be useful to state legislatures and commissions considering the fairness of the death penalty (preferably during a moratorium).<sup>17</sup> The Section has prepared these protocols because of our experience in moratorium efforts since 1997. The Section has discovered, as I did in testifying before an Illinois legislative task force in 1999,<sup>18</sup> that many well-intentioned legislators lack basic information about what to look for in evaluating the fairness of a capital punishment system and what possible corrective measures could be implemented.

For example, prior to my testimony at the Illinois hearing about procedural bars to the consideration of meritorious constitutional claims, that subject was totally "off the radar screen" of the legislative committee. But once the committee members heard about this issue, they wanted to learn a great deal more about it and what could be done about it.

The protocols are intended to fill a major gap by providing overviews of various potential systemic problems, identifying questions that should be asked with regard to each, and suggesting recommendations for dealing with each.<sup>19</sup> These are not intended to be exhaustive, however.<sup>20</sup> And some of them will not apply in particular jurisdictions.<sup>21</sup>

## III. SOME KEY RECOMMENDATIONS IN THE PROTOCOLS

With regard to counsel, there should be qualified, motivated, and properly compensated counsel at every stage in the proceedings—including trial, direct appeal, state post-conviction, federal habeas corpus, and clemency.<sup>22</sup> If the federal

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<sup>17</sup> THE PROTOCOLS, *supra* note 2, at 1–2.

<sup>18</sup> *The Death Penalty: Hearing of the Illinois House of Representatives Task Force*, Aug. 25, 1999 (Belleville, Illinois) (testifying on behalf of the American Bar Association).

<sup>19</sup> THE PROTOCOLS, *supra* note 2, at 1 *passim*.

<sup>20</sup> *Id.* at 5 (stating that The Protocols' purpose is rather "to direct attention to areas that experience has shown contribute to errors in administration of the death penalty").

<sup>21</sup> *Id.* (explaining that "issues raised in these protocols are not equally problematic in all capital jurisdictions").

<sup>22</sup> *Id.* at 6 (stating that a "primary reason for the American Bar Association's 1997 call for

government will not provide sufficient funding to enable habeas counsel to perform effectively then the state government should do so.<sup>23</sup>

### A. *Appointment and Compensation of Counsel*

There should be a statewide appointing authority, not consisting of judges—as proposed by a blue-ribbon ABA Criminal Justice Section Task Force in 1989. Judges, whether elected or appointed, are frequently subject to pressures to favor frugality over quality, speed over preparation, and death judgments over fairness. An independent appointing authority could be immunized from such pressures.

The protocols advocate that counsel be paid periodically during the course of proceedings.<sup>24</sup> Lawyers who do not have much in the way of resources are often expected to pay for experts, investigators, and their own expenses without being reimbursed for these necessary expenses within a reasonable time frame. This is not conducive to proper lawyering.

The problems arising from the current manner of appointing counsel have been highlighted in newspaper stories in several states.<sup>25</sup> According to one article, “many counties” in the state of Washington “have failed to provide decent legal representation for poor defendants, even in death-penalty cases,” and in nearly 20% of capital cases since 1981, the “court-appointed lawyers . . . had been, or were later, disbarred, suspended or criminally prosecuted.”<sup>26</sup> The article pointed out that Clark County pays a flat fee for capital cases and thereby encourages defense lawyers to devote little time and effort, since they will get paid exactly the same irrespective of the amount of time they devote to capital cases.<sup>27</sup>

On August 12, 2001, the *Seattle Post-Intelligencer* editorialized, based on the newspaper’s special report, that:

Just as the state is charged with the burden of proving the defendant’s guilt beyond a reasonable doubt, it must also help shoulder the financial responsibility of adequately funding that person’s defense. And \$12,500, the flat rate paid to private attorneys on capital cases in places like Clark County, doesn’t begin to

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a moratorium on executions was the urgent concern that many individuals charged with capital offenses are not provided with adequate counsel at one or more levels of the capital punishment process”).

<sup>23</sup> *Id.* at 7 (“Although lawyers and the organized bar can provide valuable assistance through pro bono services, state governments have primary responsibility—indeed, a constitutional duty—to ensure adequate representation at every level in capital cases through appropriate appointment and compensation measures.”).

<sup>24</sup> THE PROTOCOLS, *supra* note 2, at 14.

<sup>25</sup> For example, see Lise Olsen, *Capital Defense on the Cheap*, SEATTLE POST-INTELLIGENCER, Aug. 8, 2001, at A1.

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

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

cut it. Flat fees encourage lawyers to cut corners, argue for guilty pleas and neglect clients.<sup>28</sup>

Similarly, in Tennessee, *The Tennessean* reported on July 25, 2001, that “[d]ozens of lawyers who have defended clients facing the death penalty in Tennessee have been in trouble themselves—disciplined by the state for unethical, unprofessional or illegal activities,” and eleven remain eligible for appointment in capital cases.<sup>29</sup>

The impact on death row inmates who are appointed such counsel can be fatal. For example, on August 31, 2001, North Carolina executed Ronald Wayne Frye.<sup>30</sup> Long after Mr. Frye’s trial, his trial lawyer “admitted he was drinking heavily during the case, downing nearly a pint of 80-proof rum every afternoon,” and that he had been “in a car wreck about the same time and was found with a near-lethal blood-alcohol level of 0.44%—at 11 a.m.”<sup>31</sup> Due to his counsel’s failure to prepare properly, Mr. Frye was sentenced to death by a jury that knew almost nothing about Mr. Frye’s “nightmarish childhood,” during which “his alcoholic parents gave him away at a diner” at age four.<sup>32</sup> He was beaten “with a bullwhip” by his new father, leaving extreme scars, and he was “shuffled from family to family, six changes in all.”<sup>33</sup>

### *B. State Funding of Resource Centers and Post-Conviction and Federal Habeas Counsel*

The protocols recommend state funding of resource centers—and, as noted above, the funding of proper counsel for all stages of the proceedings, including state post-conviction and federal habeas corpus.<sup>34</sup> State legislators should not merely shrug their shoulders and say they regret that federal funding for resource centers has been eliminated. Nor should they hide behind the fact that the Supreme Court held in *Murray v. Giarratano*,<sup>35</sup> that an indigent death row inmate does not have a constitutional right to appointed counsel in state post-conviction or federal habeas corpus proceedings.<sup>36</sup>

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<sup>28</sup> Editorial, *Create Equity for Capital Cases*, SEATTLE POST-INTELLIGENCER, Aug. 12, 2001, at D6.

<sup>29</sup> John Shiffman, *Troubled Lawyers Still Allowed to Work Death Cases*, THE TENNESSEAN, July 25, 2001, at A1.

<sup>30</sup> Jeffrey Geitleman, *Execution Ends Debatable Case*, L.A. TIMES, Aug. 31, 2001, at A11.

<sup>31</sup> *Id.*

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

<sup>33</sup> *Id.*

<sup>34</sup> THE PROTOCOLS, *supra* note 2, at 14.

<sup>35</sup> 492 U.S. 1 (1989).

<sup>36</sup> *Id.* at 7–8, 12.

The state should ensure that there are resource centers and properly selected and performing counsel that deal with every phase of capital litigation, since it is the state government that prosecutes and executes people.

An egregious example of a state that has utterly failed in this regard is Alabama. By June 2001, thirty of Alabama's 188 death row inmates lacked counsel.<sup>37</sup> Since in many of these (and other) cases it is likely that no capable counsel will be found during the year after their convictions and death sentences become "final" (that is, after the Alabama Supreme Court denies direct appeal and following the denial of certiorari, if applied for), any federal habeas corpus petition that any of them later files—once counsel is found—may be held time-barred. This could occur under a strict reading of the AEDPA, which creates a one-year statute of limitations for filing federal habeas corpus claims once the conviction has become "final."<sup>38</sup>

Although the one-year limitations period is tolled if the inmate has a pending state post-conviction proceeding, the thirty Alabama death row inmates referred to above found it impossible to file state post-conviction papers without the assistance of counsel.<sup>39</sup> As Bryan Stevenson, Executive Director of the Equal Justice Initiative (which represents many Alabama death row inmates and mentors attorneys for many others) has pointed out, a system which does not guarantee that indigent death row inmates get counsel "puts prisoners in the position of investigating new facts and presenting claims of legal error, which is a little tough if you're on death row."<sup>40</sup>

It is therefore possible that many Alabama death row inmates lacking counsel will be deemed to have waived all their constitutional claims, no matter how meritorious. It is unacceptable, in the ABA's opinion, for state officials to claim that there is no problem because *some* Alabama death row inmates have been fortunate enough to get pro bono attorneys from large non-Alabama law firms who have represented them effectively.<sup>41</sup>

Under current circumstances, that is a *non sequitur*. Despite yeoman's efforts by the Equal Justice Initiative, the ABA's Death Penalty Representation Project and others, it has proven impossible to find pro bono lawyers for dozens of Alabama's death row inmates. The state should feel obligated to ensure that capable lawyers with proper resources and mentoring are found for these inmates.<sup>42</sup>

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<sup>37</sup> David Firestone, *Inmates on Alabama's Death Row Lack Lawyers*, N.Y. TIMES, June 16, 2001, at A11.

<sup>38</sup> 28 U.S.C. § 2254(d) (1994 & Supp. V 1999).

<sup>39</sup> Firestone, *supra* note 37, at A11.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (statement of Attorney General Bill Pryor of Alabama that "[t]hey can get some of the best lawyers in the country to represent them").

<sup>42</sup> In December 2001, the Equal Justice Initiative filed a federal lawsuit seeking redress for the complete lack of representation in many post-conviction cases, and for the severe limits on

The fact that pro bono counsel have secured relief for many Alabama death row inmates proves the opposite of what Alabama's "head in the sand" government officials state. It shows that when an Alabama death row inmate does get proper counsel for state post-conviction and federal habeas corpus proceedings, it is very likely that the conviction or death sentence will be reversed, due to serious constitutional violations. This means that, in the absence of such counsel, time-barring or waiver of constitutional claims will certainly lead to the execution of people who, if they did have appropriate counsel, would receive a lesser sentence or would be completely exonerated.

### *C. Enabling Relief to be Granted When Federal Constitutional Rights Have Been Violated*

The protocols advocate that there be an automatic stay of execution during the entire first round of litigation (including direct appeal, state post-conviction, federal habeas corpus, and the ensuing certiorari petitions).<sup>43</sup> And the protocols state that post-conviction counsel should be accorded sufficient time to investigate properly.<sup>44</sup> Although states cannot change the federal statute of limitations, they can change state time limits.

The protocols make a series of recommendations regarding a variety of limits on the courts' ability to decide the merits of meritorious constitutional claims. The ABA says that in deciding whether a constitutional claim has been waived, there should be a knowing, understanding, and voluntary standard—both on direct appeal and in the first round of post-conviction proceedings. Under this approach, a constitutional claim would not be deemed waived when a court-appointed lawyer negligently fails to object at the time called for by state law. Instead, in order to waive a constitutional claim, a lawyer would have to know he is waiving the claim, understand what he is waiving, and voluntarily waive it.

The protocols recommend that state courts give full retroactive effect to United States Supreme Court decisions and consider decisions by federal appeals and district courts.<sup>45</sup> The state courts need not be limited by the same retroactivity doctrines that restrict the federal courts. The unfair impact of these retroactivity doctrines is apparent from what occurred to Virginia death row inmate Joseph O'Dell. Mr. O'Dell's counsel objected, at trial and in every proceeding thereafter, to the trial judge's failure to instruct the jury that, if not sentenced to death, he would *never* be eligible for parole.<sup>46</sup> Counsel sought this instruction after the

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client access and the \$1,000 expense limits for those lawyers who represent Alabama's death row inmates in post-conviction proceedings. See *Death Row Inmates Sue State*, BIRMINGHAM ALABAMA NEWS, Dec. 29, 2001, at A1.

<sup>43</sup> THE PROTOCOLS, *supra* note 2, at 20.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 21.

<sup>46</sup> *O'Dell v. Netherland*, 521 U.S. 151, 154–55 (1997).

prosecution introduced evidence that, after being paroled on earlier occasions, Mr. O'Dell had committed crimes.<sup>47</sup> The prosecution used this evidence to assert that unless sentenced to death, Mr. O'Dell would be dangerous in the future.<sup>48</sup> After the trial judge refused to instruct the jury that Mr. O'Dell would never be eligible for parole, it sentenced Mr. O'Dell to death, and stated that it had found future dangerousness to be an aggravating circumstance.<sup>49</sup> Following Mr. O'Dell's direct appeal to the Virginia Supreme Court and the denial of certiorari (i.e., after his death sentence had become "final" for purposes of retroactivity analysis),<sup>50</sup> the United States Supreme Court upheld, in the case of a South Carolina death row inmate, the very same constitutional claim that Mr. O'Dell had asserted at and after trial.<sup>51</sup> Thus, in *Simmons v. South Carolina*,<sup>52</sup> the Supreme Court held that the trial judge had committed constitutional error in not instructing the jury that Mr. Simmons, if not sentenced to death, would never be eligible for parole.<sup>53</sup>

Following the *Simmons* holding, Mr. O'Dell continued to litigate his claim in federal habeas corpus proceedings.<sup>54</sup> But when his case reached the Supreme Court, it denied him relief.<sup>55</sup> Why? Because the Court's *Simmons* holding, three years earlier, had come after Mr. O'Dell's death sentence had become "final."<sup>56</sup> Therefore, under the anti-retroactivity doctrine that the Supreme Court had formulated, *Simmons* came too late to help Mr. O'Dell.

Accordingly, Mr. O'Dell was put to death by Virginia later in 1997, even though it was indisputable in 1994—when *Simmons* was decided—that his death sentence was unconstitutional. While the State of Virginia cannot change the federal habeas corpus retroactivity doctrine, it can change its own system so that someone in Mr. O'Dell's situation would be able to secure relief from the state courts.

The protocols advocate that state courts allow a petitioner to get a ruling on the merits of constitutional claims in second post-conviction proceedings if these issues were not presented earlier due to counsel's errors, prosecutorial misconduct, newly discovered facts that could not reasonably have been learned earlier, or intervening court decisions.<sup>57</sup>

The states are not bound by the AEDPA's unfair provisions and the Supreme Court's anti-retroactivity rulings that restrict federal court consideration of such

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<sup>47</sup> *Id.* at 154.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

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

<sup>51</sup> *Simmons v. South Carolina*, 512 U.S. 154 (1994).

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

<sup>53</sup> *Id.* at 178.

<sup>54</sup> *O'Dell v. Netherland*, 521 U.S. 151, 154–55 (1997).

<sup>55</sup> *Id.* at 167.

<sup>56</sup> *Id.* at 157, 160.

<sup>57</sup> THE PROTOCOLS, *supra* note 2, at 21.



claims. Under the AEDPA, even the most fundamental travesty of justice that changes the outcome of the life versus death determination in the trial's penalty phase cannot be considered in a successor habeas petition, even if there was no basis for presenting the issue earlier, unless there is *also* such strong evidence of innocence that virtually every reasonable person would agree that the wrong person was convicted. Unlike the AEDPA's authors, state legislators should recognize that a death sentence that is the product of a grossly distorted sentencing proceeding should not be carried out.

#### D. Meaningful Consideration of Clemency

The protocols advocate that clemency authorities undertake an independent consideration of all issues.<sup>58</sup> Clemency authorities should not assume that the merits of these issues have already been considered or that an error deemed harmless in a constitutional analysis can have no bearing on clemency. As discussed to some extent above, limitations imposed by the Supreme Court and the AEDPA frequently preclude the granting of relief even where egregious constitutional violations have occurred.<sup>59</sup> But those limitations do not preclude the granting of clemency. Thus, in the case of Joseph O'Dell, the Virginia clemency authorities could have recognized the unfairness of executing a person whose death sentence was clearly unconstitutional according to the Supreme Court holding handed down after his direct appeal.

Clemency authorities should also consider racial and geographic disproportionality in the imposition of capital punishment—even though the unequal treatment of similar cases may not violate the Constitution. The problem of inconsistencies in the handling of capital cases in different parts of the same state has recently been the focus of numerous news reports and judicial comments.

For example, ABC News' *Nightline* reported on September 13, 2000, that "sometimes what makes all the difference is whether a murder is committed on one side of the street or the other."<sup>60</sup> Thus, in Baltimore County, Maryland, which has "a relatively low crime rate," one is far more likely, on similar facts, to have the prosecution seek and secure the death penalty than in the City of Baltimore, Maryland<sup>61</sup> because the prosecutors in these two Maryland jurisdictions have vastly different views on when seeking the death penalty is appropriate. Baltimore County has "more inmates sitting on Maryland's death row than any other jurisdiction in the state" because its state's attorney, Sandra O'Connor, takes the

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<sup>58</sup> *Id.* at 24.

<sup>59</sup> See *supra* Part III. C.

<sup>60</sup> *Nightline, Crime and Punishment: A Matter of Life and Death Part 2* (ABC News Television Broadcast Sept. 13, 2000) at [http://abcnews.go.com/onair/nightline/transcripts/n100913\\_trans.html-size 54.4K](http://abcnews.go.com/onair/nightline/transcripts/n100913_trans.html-size 54.4K).

<sup>61</sup> *Id.*

view that if she can legally seek the death penalty, she will.<sup>62</sup> In stark contrast, the City of Baltimore's prosecutor, Patricia Jessamy, recognizes that under all capital punishment statutes, the prosecutor has discretion as to whether or not to seek the death penalty in death-eligible cases.<sup>63</sup> She has "the philosophy that only the defendants who commit the most heinous crimes are those defendants that we should seek the death penalty on."<sup>64</sup>

### E. *The Necessity of Comprehensible Jury Instructions*

Commissions or legislative committees should also analyze jury instructions, determine which ones may be misunderstood, and advocate that confusing instructions be revised. For example, many jurors mistakenly think that "mitigating" is the same as "aggravating," and a tremendous number refuse to believe that life without parole exists where it unequivocally does exist. There should be clear instructions on these points. Moreover, the defense should be permitted to show that, in reality, people serving life without parole do not get pardons, clemency, parole, or anything else—even though such relief may theoretically be possible.

### F. *Restoring and Enhancing Judicial Independence*

Judges who adjudicate capital cases sometimes come under political attack as a result of decisions in which they impose or uphold sentences less than death. This threat to judicial independence can cause irreparable harm to judges, capital defendants, and the entire justice system. The protocols recommend that the organized bar educate the public about judges' responsibilities, and support judges who are attacked for rulings in capital punishment cases where the attacks unfairly focus not on the legal issues, but on the nature of the crimes.<sup>65</sup> Although every lawyer knows that you may have a valid constitutional claim even though your crime was egregious, the public needs to be provided this basic information. In addition, it should be considered unethical for any judicial candidate to promise how he or she will deal with capital punishment cases.

### G. *Judicial Intervention to Deal with Ineffective Counsel or Prosecutorial Misconduct*

The protocols advocate that a judge should be proactive in the face of ineffective assistance of counsel or prosecutorial misconduct.<sup>66</sup> A judge should

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<sup>62</sup> *Id.*

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

<sup>64</sup> *Id.*

<sup>65</sup> THE PROTOCOLS, *supra* note 2, at 33.

<sup>66</sup> *Id.*

remove defense counsel whose ineffectiveness is apparent, and should impose meaningful sanctions against prosecutors who are more interested in “winning” than in justice.

#### H. Acting to Minimize the Impact of Racial Discrimination

The protocols recommend that valid studies on racial discrimination in the jurisdiction be reviewed for indicia of discrimination based on either the race of the victim or the race of the defendant.<sup>67</sup> New analyses of racial discrimination should consider all potentially capital cases—not just cases brought as first degree murder cases. Statistically valid evidence of racial discrimination in administering capital punishment—such as the many studies the GAO found valid in 1990<sup>68</sup>—should create a prima facie case of discrimination. The prosecution should have to rebut this with persuasive evidence.

#### I. Juveniles and People with Mental Retardation

The ABA advocates abolishing the death penalty for juveniles and people with mental retardation, and it submitted an amicus curiae brief in *McCarver v. North Carolina*, a case in which the Supreme Court granted certiorari to reconsider the constitutionality of executing people with mental retardation.<sup>69</sup> North Carolina enacted a law in August 2001 barring the execution of people with mental retardation, and made it retroactive to people already on death row.<sup>70</sup> That led the Supreme Court in September 2001 to dismiss the certiorari granted in *McCarver*<sup>71</sup> and to grant certiorari in *Atkins v. Virginia*, which raises the same constitutional issue.<sup>72</sup> The ABA hopes that the Supreme Court will now hold unconstitutional the execution of people with mental retardation.

The protocols go on to say that if executions of people with mental retardation are not banned, a variety of steps to diminish unfairness should be adopted.<sup>73</sup>

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<sup>67</sup> *Id.* at 36.

<sup>68</sup> U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990).

<sup>69</sup> *McCarver v. North Carolina*, 548 S.E.2d 522 (N.C. 2001), *cert. granted*, 532 U.S. 941 (U.S. Mar. 26, 2001) (No. 00-8727).

<sup>70</sup> 2001 N.C. Sess. Laws 346.

<sup>71</sup> *McCarver v. North Carolina*, 548 S.E.2d 522 (N.C. 2001), *cert. dismissed*, 122 S. Ct. 22 (U.S. Sept. 25, 2001) (No. 00-8727).

<sup>72</sup> *Atkins v. Virginia*, 510 S.E.2d 445 (Va. 1999), *cert. granted* 122 S. Ct. 24 (U.S. Sept. 25, 2001) (No. 00-8452).

<sup>73</sup> THE PROTOCOLS, *supra* note 2, at 40.

### J. *The Mentally Ill*

The protocols also make recommendations concerning people with mental illness.<sup>74</sup> The protocols suggest that appropriate, independent experts be appointed, funded, and given adequate time to do a thorough evaluation of a capital defendant who may be mentally ill.<sup>75</sup> There should no longer be cases in which the only “expert” is someone whom the prosecution habitually uses, or in which an “expert” gives an opinion on mental illness without ever meeting the defendant, or after only one brief meeting.

The protocols urge that all participants in the legal system be trained about the nature of various kinds of mental illness, including fetal alcohol disorder and post-traumatic stress disorder.<sup>76</sup> Many defense lawyers, prosecutors, and judges are not familiar with mental illness and its impacts. This ignorance may lead to miscarriages of justice. Moreover, jurors must not only be presented with truly expert opinions on mental illness; they should also be instructed that mental illness should be considered only as a mitigating factor, not as an aggravating factor.

## IV. CONCLUSION

The protocols should be used in evaluating state death penalty systems seriously and methodically. Until such studies are concluded and the public can consider their import, there should be a moratorium on all executions.

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<sup>74</sup> *Id.* at 44.

<sup>75</sup> *Id.* at 45.

<sup>76</sup> *Id.* at 44.