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A Comparative Study on Death Penalty Statutes and Their Effects on Certain Minority Groups in Light of *Furman v. Georgia*

Analise Nuxoll

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A Comparative Study on Death Penalty Statutes and Their Effects on Certain Minority Groups in Light of *Furman v. Georgia*

By Analise Nuxoll*

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I. INTRODUCTION

“‘You have determined that the sex factor, that a male is more violent than a female because that’s just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?’ Dr. Quijano replied, ‘Yes.’”¹ This small excerpt from the United States Supreme Court case *Buck v. Davis* is just one example of the ways that the death penalty in the United States is discriminatory.² In 1995, a Texas jury convicted David Buck, a black man, of killing his former girlfriend and her friend.³ During the sentencing phase, for the jury to determine Buck’s future dangerousness, the presiding judge appointed psychologist Dr. Walter Quijano to testify.⁴ Dr. Quijano used seven factors to establish Buck’s future dangerousness, one of which was race.⁵ The Supreme Court of the United States heard this case in 2017, and determined that the racial prejudice displayed in Buck’s trial “cannot be dismissed as ‘*de minimis*.’”⁶ The Court reversed Buck’s case on the basis of ineffective assistance of counsel.⁷ While this was a victory for Buck and a victory for anti-death penalty proponents, this decision is only a small step toward rectifying the prejudicial death penalty system in the United States.

* Analise Nuxoll is a third-year student at Pepperdine University School of Law. She would like to thank Peter Baker, the Director of the American Studies Program in Washington D.C., for encouraging her interest in anti-death penalty work. She would also like to thank the Northern Virginia Capital Defenders Office for pursuing justice for each of its clients. Lastly, she would like to thank Yoori Chung and NAALJ for their thoughtful edits and hard work.

¹ *Buck v. Davis*, 137 S. Ct. 759, 769 (2017) (internal citations omitted) (quoting App. 36a at 170a).

² *Research Confirms That Entrenched Racism Manifests in Disparate Treatment of Black Americans in Criminal Justice System*, VERA INST. OF JUST. (May 3, 2018), <https://www.vera.org/newsroom/research-confirms-that-entrenched-racism-manifests-in-disparate-treatment-of-black-americans-in-criminal-justice-system>.

³ *Id.* at 767.

⁴ *Id.* at 786.

⁵ *Id.*

⁶ *Id.* at 777.

⁷ *Id.* at 780.

Capital punishment has been a controversial public policy issue for many years.⁸ The first recorded execution in North America happened in 1608, and since then, the death penalty has been the topic of many debates.⁹ Statistics show that the death penalty has been arbitrarily applied against racial minorities, lower socio-economic classes, and those with mental disorders.¹⁰ Although the Supreme Court has ruled discriminatory death penalty statutes to be unconstitutional, several states continue to apply discriminatory statutes against criminal defendants.¹¹ Part One of this comment will address the recent history of the death penalty in the United States, focusing on *Furman v. Georgia*,¹² which placed a four-year moratorium on the death penalty in 1972.¹³ Part Two examines which states still have death penalty statutes and the reasons for choosing the selected states for further analysis.¹⁴ Part Two also addresses the difference between facial and as-applied attacks on the state statutes and the reason for analyzing the statutes under as-applied unconstitutionality. Part Three explains the thought behind choosing to examine the death penalty's effect on racial minorities, low socio-economic classes, and those with mental disorders, and these groups' history with the death penalty.¹⁵ Part Four analyzes

⁸ Matthew Hine, *Is death penalty ethical, humane, fair, effective, or even practical?* Opinion, USA TODAY (Aug. 8, 2018) <https://www.usatoday.com/story/opinion/2018/08/08/death-penalty-ethical-humane-fair-effective-practical/922707002/>.

⁹ *Historical Timeline—History of the Death Penalty*, PROCON.ORG, <http://deathpenalty.procon.org/view.timeline.php?timelineID=000025> (last updated Aug. 13, 2013, 12:58 PM). The Supreme Court has weighed issues of which methods of execution are humane; which crimes the death penalty applies to; how old defendants have to be to receive the death penalty; whether or not judges can overturn the type of punishment a jury decides on; and whether or not a low IQ precludes people from receiving the death penalty. *Id.* These are only a sampling of issues that the courts and the public have debated over the years since the death penalty was reinstated. *Id.*

¹⁰ *Arbitrariness*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/arbitrariness#Evidence> (last updated July 16, 2015).

¹¹ *Id.*

¹² *Furman v. Georgia*, 408 U.S. 238 (1972).

¹³ See *infra* notes 18–79 and accompanying text.

¹⁴ See *infra* notes 80–118 and accompanying text.

¹⁵ See *infra* notes 119–51 and accompanying text.

three specific state statutes (Alabama, Ohio, and Texas) in light of the constitutional qualifications set by *Furman v. Georgia* and how those statutes negatively impact racial minorities, low socioeconomic classes, and those with mental disorders.¹⁶ Ultimately, this comment argues that the remaining death penalty statutes are unconstitutional under the elements set forth in *Furman v. Georgia*. While the statutes may seem legal on its face, an examination of the as-applied effects on the three aforementioned groups reveals that the statutes are invalid and should be replaced.¹⁷

II. RECENT HISTORY OF THE UNITED STATES DEATH PENALTY

A. *Roots of the Eighth Amendment*

The Framers of the United States Constitution adopted the Eighth Amendment prohibition of “cruel and unusual” punishment from the English Bill of Rights.¹⁸ In early cases involving the Eighth Amendment, the Court “focused on particular methods of execution to determine whether they were too cruel to pass constitutional muster.”¹⁹ The Court recognized that this clause could evolve with time and “acquire meaning as public opinion becomes enlightened by a humane justice.”²⁰ Chief Justice Warren said that the “[a]mendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”²¹ These ideals regarding the Eighth Amendment likely influenced the Court’s decision in *Furman v. Georgia*, which placed a de facto four-year moratorium on the death penalty.²²

¹⁶ See *infra* notes 152–250 and accompanying text.

¹⁷ *Id.*

¹⁸ U.S. CONST. amend. VIII.

¹⁹ *Gregg v. Georgia*, 428 U.S. 153, 170 (1976).

²⁰ *Id.* at 171 (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

²¹ *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

²² *Furman v. Georgia*, 408 U.S. 238, 240 (1972).

B. Furman v. Georgia: Elements to a Constitutional Death Penalty

In 1972, the Supreme Court granted certiorari on three death penalty cases—two for rape, and one for murder—to determine if carrying out the sentence of death in these cases was constitutional.²³ The cases were collectively referred to as *Furman v. Georgia*.²⁴ There were nine separate opinions,²⁵ but per curiam, the Court held that Georgia's death penalty statute was unconstitutional and violated the Eighth Amendment.²⁶ The Supreme Court then “effectively voided 40 death penalty statutes, thereby commuting the sentences of 629 death row inmates around the country and suspending the death penalty because existing statutes were no longer valid.”²⁷ The Court ruled that for the death penalty to be legal once more, states must tailor their death penalty laws to guarantee constitutional and nondiscriminatory implementation.²⁸ The Court recognized patterns of discrimination in the way that the death penalty was being implemented.²⁹

“Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.”³⁰ This recognition of the discriminatory nature of the death penalty formed the basis of the elements necessary to create valid death penalty statutes.³¹ While the Court recognized that the death penalty was not being dealt even-handedly, only two of the Justices believed that it should be

²³ *Id.* at 239.

²⁴ *Id.*

²⁵ *Id.* Capital punishment is a nuanced subject, and there were nine separate opinions that go into great detail regarding the minutia of the death penalty. *Id.*

²⁶ *Id.* at 240.

²⁷ *Introduction to the Death Penalty*, DEATH PENALTY INFO. CTR. (Feb. 1, 2018), <https://deathpenaltyinfo.org/part-i-history-death-penalty>.

²⁸ *Furman*, 408 U.S. at 256–57.

²⁹ *Id.*

³⁰ *Id.* at 249–50 (internal quotations omitted) (quoting President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 143 (1967)).

³¹ *Id.*

abolished completely, while three believed that the idea of the death penalty could be salvageable once the statutes were rewritten as to not violate the Eighth Amendment.³²

To comply with the Eighth Amendment's cruel and unusual clause, a punishment must comport with human dignity, and the Court laid out four elements for a constitutional death penalty that does not violate the cruel and unusual clause.³³ The Court states that the "primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings."³⁴ For this element, the Court considers pain and physical suffering, the severity of the punishment, and whether the judicial system is treating people as "objects to be toyed with and discarded."³⁵ The second element is that the "State must not arbitrarily inflict a severe punishment."³⁶ This element is based on the "notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others."³⁷ For example, "when a severe punishment is inflicted in the great majority of cases, there is little likelihood that the State is inflicting it arbitrarily."³⁸ The third element is that "a severe punishment must not be unacceptable to contemporary society."³⁹ "Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity."⁴⁰ "[T]he judicial task is to review the history of a challenged punishment and to examine society's present practices"⁴¹ The final element of a constitutional death penalty is that "a severe punishment must not be excessive."⁴² "The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the

³² *Id.* at 240.

³³ *Id.* at 282 (Brennan, J., concurring).

³⁴ *Id.* at 271 (Brennan, J., concurring).

³⁵ *Id.* at 273.

³⁶ *Id.* at 274.

³⁷ *Id.*

³⁸ *Id.* at 276 (internal quotations omitted) (citing *Wilkerson v. Utah*, 99 U.S. 130 (1878)).

³⁹ *Id.* at 277.

⁴⁰ *Id.*

⁴¹ *Id.* at 278–79.

⁴² *Id.* at 279.

pointless infliction of suffering.”⁴³ These four elements in *Furman* were to govern the laws regarding the death penalty in the future.⁴⁴

C. Gregg v. Georgia: Reimplementation of the Death Penalty

In the 1976 ruling in *Gregg v. Georgia*, the Supreme Court ended the four-year moratorium on the death penalty.⁴⁵ The Court discussed the response of the states in the wake of the decision in *Furman v. Georgia*.⁴⁶ The Court noted that “[t]he most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*.”⁴⁷ The Court says this because instead of just remaining without the death penalty, many states chose to rewrite their death penalty statutes in order to comply with the new constitutional standard.⁴⁸ “The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.”⁴⁹ *Gregg v. Georgia* looked at the underlying reasoning in *Furman*, and the Court concluded that

the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance . . . it is possible to construct capital-sentencing systems capable of meeting *Furman*’s constitutional concerns.”⁵⁰

⁴³ *Id.*

⁴⁴ *Id.* at 282.

⁴⁵ *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

⁴⁶ *Id.* at 179–81.

⁴⁷ *Id.* at 179.

⁴⁸ *Id.*

⁴⁹ *Id.* at 179–80.

⁵⁰ *Id.* at 195.

With this ruling, the Supreme Court made it possible for states to construct constitutional death penalty statutes,⁵¹ and the United States entered the modern age of the death penalty.

D. The Death Penalty in 2017

Thirty states and the federal government currently have death penalty statutes.⁵² Since 1976, 1,493 inmates have been executed in the United States.⁵³ The use of the death penalty has declined since its peak in 1999.⁵⁴ Currently, nineteen states have abolished the death penalty, seven of which have done so since 2007, which shows the national trend toward abolishing this punishment.⁵⁵ Despite the abolishment of capital punishment in certain regions, states still interested in executing prisoners are trying to find alternative ways to perform the death penalty.⁵⁶ States including Arizona, Texas, Alabama, and Missouri have been experimenting with different ways to create the cocktail⁵⁷ for lethal injections.⁵⁸ Since 2014, debate has

⁵¹ *Id.* at 206–07.

⁵² *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Mar. 29, 2019). Most statistics used in this paper come from the Death Penalty Information Center, a bipartisan DC think tank that does not consider itself pro-death penalty or anti-death penalty. *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Mark Berman, *Five things to know about the death penalty's decline*, WASH. POST, Mar. 28, 2014, <http://www.washingtonpost.com/news/post-nation/wp/2014/03/28/five-things-to-know-about-the-death-penaltys-decline/>.

⁵⁶ See *infra* notes 152–250 and accompanying text.

⁵⁷ *State by State Lethal Injection*, DEATH PENALTY INFO. CTR. (Feb. 1, 2018), <https://deathpenaltyinfo.org/state-lethal-injection>. The lethal cocktail can be a mixture of many kinds of drugs. *Id.* Each state has its own formula. *Id.* Up until 2009, however, “most states used a three-drug combination . . . an anesthetic (usually sodium thiopental, until pentobarbital was introduced at the end of 2010), pancuronium bromide (a paralytic agent, also called Pavulon), and potassium chloride (stops the heart and causes death).” *Id.* But, because of drug shortages, some states now use a “lethal dose of an anesthetic,” or a three-drug cocktail with midazolam hydrochloride, or a two-drug cocktail with midazolam and hydromorphone, or a single, two-drug, or three drug cocktail involving pentobarbital. *Id.*

intensified over the death penalty due to several faulty executions.⁵⁹ Several faulty executions within the last couple of years have revived public debate about the death penalty, though there have been several botched executions since *Furman*.⁶⁰ Different countries used to supply the United States with the mixture of drugs used in capital punishment, but now these countries are refusing to sell the drugs to the United States.⁶¹ Doctors and other healthcare professionals have objected to the use of lethal injections because of their obligations to provide society with moral protection.⁶² Yet, only a doctor can administer the lethal cocktail.⁶³ A recent poll shows that despite the fact that Americans support the death penalty, “few want the

⁵⁸ Heide Brandes & Jon Herskovitz, *U.S. Executions Set for Possible Delay after Oklahoma Court Decision*, REUTERS, Mar. 26, 2014, <http://www.reuters.com/article/2014/03/26/us-usa-execution-oklahoma-idUSBREA2P28B20140326>.

⁵⁹ Amherst College, *3 Percent of All Executions Since 1900 Were Botched, Amherst College Study Finds* (May 25, 2012), https://www.amherst.edu/news/news_releases/2012/05.2012/node/398298. From 1900 to 2011, studies show that approximately three percent of executions are botched in some way. *Id.* A couple of recent examples include Clayton Lockett, executed by Oklahoma, who died 43 minutes after the execution began, of a heart attack, while still in the execution chamber. *Botched Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (last visited Feb. 1, 2018). Oklahoma was warned against experimenting with midazolam yet carried the execution out anyway. Eric Eckholm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. TIMES, Apr. 29, 2014, <https://www.nytimes.com/2014/04/30/us/oklahoma-executions.html>. Also in 2014, Dennis McGuire experienced repeated cycles of snorting, gurgling, and arching his back and made choking sounds after being injected with hydromorphone and midazolam in Ohio. *Family Sues in Protracted Ohio Execution*, N.Y. TIMES, Jan. 25, 2014, <https://www.nytimes.com/2014/01/us/family-sues-in-protracted-ohio-execution.html>.

⁶⁰ *Botched Executions*, *supra* note 59.

⁶¹ Holly Williams, *Meet the Woman behind a Shortage of Execution Drugs*, CBS NEWS, Apr. 30, 2014, <http://www.cbsnews.com/news/meet-the-woman-behind-a-shortage-of-execution-drugs/>.

⁶² Sandeep Jauhar, *Why It's O.K. for Doctors to Participate in Executions*, N.Y. TIMES, Apr. 21, 2017, <https://www.nytimes.com/2017/04/21/opinion/why-its-ok-for-doctors-to-participate-in-executions.html>.

⁶³ *Id.*

executed to suffer.”⁶⁴ Sixty-two percent of Americans polled supported the death penalty, but only forty-three percent of said-supporters believe that suffering should be involved.⁶⁵ Since the reinstatement of the death penalty in 1976, the average amount of time an inmate spends on death row has increased.⁶⁶ At the end of 2011, sixteen and a half years was the average time between sentencing and execution.⁶⁷

According to a 2008 survey, the highest support for capital punishment is from white, evangelical Protestants, while the lowest support for capital punishment lies with African-Americans.⁶⁸ It is believed that this divide over the death penalty is rooted in history.⁶⁹ As the former governor of Arkansas, George Hays, said in 1927, “If the death penalty were to be removed from our statute-books . . . the tendency to commit deeds of violence would be heightened owing to this negro problem.”⁷⁰ Another example of institutionalized racism playing a role in the death penalty is that some Southern states tried to use the death penalty in rape cases where the victim was white and the defendant was black.⁷¹ In a Pew poll result, whites increased their support for the death penalty when told that blacks faced unfair treatment.⁷² Whites are less susceptible to persuasion of innocence, whereas African Americans are more responsive to racial appeals as

⁶⁴ Emily Swanson, *Americans Favor The Death Penalty, But Few Want The Executed To Suffer*, HUFFINGTON POST, Jan. 25, 2014, http://www.huffingtonpost.com/2014/01/25/death-penalty-poll_n_4661940.html.

⁶⁵ *Id.*

⁶⁶ Angela April Sun, “*Killing Time*” in *the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row Are Cruel and Unusual*, 113 COLUM. L. REV. 1585, 1586–87. (2013).

⁶⁷ *Id.*

⁶⁸ Monica K. Miller & R. David Hayward, *Religious Characteristics and the Death Penalty*, 32 L. & HUM. BEHAV. 113, 117 (2008), <https://link.springer.com/article/10.1007/s10979-007-9090-z>.

⁶⁹ Jamelle Bouie, *The Disturbing Reason Why So Many White Americans Support The Death Penalty*, BUSINESS INSIDER, Mar. 29, 2014, <http://www.businessinsider.com/death-penalty-support-2014-3>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

well as reasons that do not have to do with race.⁷³ The use of capital punishment encourages institutionalized racism and proves that it does exist.⁷⁴ Recent Supreme Court cases have held up the legality of capital punishment.⁷⁵ In *Baze v. Rees*, Ralph Baze, a convicted murderer in Kentucky, filed suit claiming that lethal injection violates his Eighth Amendment right against “cruel and unusual punishment.”⁷⁶ The Kentucky Supreme Court held that lethal injection was safe from “wanton” and unnecessary infliction of pain, torture, or lingering death.⁷⁷ The Supreme Court affirmed the lethal injection protocol as constitutional.⁷⁸ With this affirmation of legality from the Supreme Court, the United States remains one of the fifty-seven countries worldwide that still implement capital punishment.⁷⁹

III. SURVEY OF THE STATES

As stated above, there are thirty states that still have death penalty provisions.⁸⁰ Each state with the provision and citation is listed below.⁸¹ This contextualizes the death penalty as a national problem, and not just a regional or a political issue. The states that still implement the death penalty do not perfectly follow party lines—some states are Republican-leaning, while others are Democratic-leaning, and as displayed in the chart, the thirty states are scattered across the United States and not clustered in a certain part of the country.

⁷³ Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. OF POL. SCI. 996, 996 (2007).

⁷⁴ *Id.*

⁷⁵ *United States Supreme Court Decisions: 2007–2008 Term*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/united-states-supreme-court-decisions-2007-2008-term> (last updated Oct. 1, 2008).

⁷⁶ *Baze v. Rees*, 553 U.S. 35, 47 (2008).

⁷⁷ *United States Supreme Court Decisions: 2007–2008 Term*, *supra* note 75.

⁷⁸ *Id.*

⁷⁹ *Death Penalty*, AMNESTY INT’L (Feb. 1, 2018), <https://www.amnesty.org/en/what-we-do/death-penalty/>.

⁸⁰ *Facts About the Death Penalty*, *supra* note 52.

⁸¹ See *infra* notes 83–112 and accompanying text.

Another interesting note about the thirty states that still have death penalty statutes is that almost all of the statutes provide for an alternative to the death penalty—life without possibility of parole.⁸² This is important to note because by eliminating the death penalty, or by applying the death penalty statutes in a more justice-centered way, defendants who have been convicted by a jury of a heinous crime will not be allowed their freedom. Instead, these defendants will be convicted to life without possibility of parole, and the death penalty would not be an option for the jury or judge in the sentencing phase or would be a more fairly applied death penalty that does not single out certain groups for a more extreme punishment.

STATE	PROVISION	CITATION
Alabama	(a) The following are capital offenses: (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant. (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant. (3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or a murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant ⁸³	Ala. Code § 13A-5-40 (1981)
Arizona	A. If the state has filed a notice of intent to seek the death penalty and the defendant is: 1. Convicted of first degree murder . . . and was at least eighteen years of age at the time of the commission of the offense, the defendant shall be sentenced to death	Ariz. Rev. Stat. Ann. § 13-751 (2012)

⁸² *Id.*

⁸³ ALA. CODE § 13A-5-40 (1981).

	or imprisonment in the custody of the state department of corrections . . . ⁸⁴	
Arkansas	(a) A person commits capital murder if: (1) Acting alone or with one (1) or more persons: (A) The person commits or attempts to commit: (i) Terrorism, . . . (ii) Rape, . . . (iii) Kidnapping, . . . (iv) Vehicular piracy . . . ⁸⁵	Ark. Code Ann. § 5-10-101 (West 2017)
California	(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: (1) The murder was intentional and carried out for financial gain. (2) The defendant was convicted previously of murder in the first or second degree . . . (3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree. ⁸⁶	Cal. Penal Code § 190.2 (West 2001)
Colorado	(1)(a) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment, unless the defendant was under the age of eighteen years at the time of the commission of the	Colo. Rev. Stat. Ann. § 18-1.3-1201 (West 2014)

⁸⁴ ARIZ. REV. STAT. ANN. § 13-751 (2012).

⁸⁵ ARK. CODE ANN. § 5-10-101 (West 2017).

⁸⁶ CAL. PENAL CODE § 190.2 (West 2001).

	offense or unless the defendant has been determined to be a mentally retarded defendant pursuant to part 11 of this article 1.3, in either of which cases, the defendant shall be sentenced to life imprisonment. ⁸⁷	
Florida	(1)(a) Except as provided in paragraph (b), a person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in [section] 921.141 results in a determination that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole. ⁸⁸	Fla. Stat. Ann. § 775.082 (West 2017)
Georgia	(a) Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed . . . where a statutory circumstance is found but a recommendation of death is not made, the jury shall decide whether to recommend a sentence of life imprisonment without parole or life imprisonment with the possibility of parole. ⁸⁹	Ga. Code Ann. § 17-10-31 (West 2009)
Idaho	[E]very person guilty of murder of	Idaho Code

⁸⁷ COLO. REV. STAT. ANN. § 18-1.3-1201 (West 2014).

⁸⁸ FLA. STAT. ANN. § 775.082 (West 2017).

⁸⁹ GA. CODE ANN. § 17-10-31 (West 2009).

	the first degree shall be punished by death or by imprisonment for life, provided that a sentence of death shall not be imposed unless the prosecuting attorney filed written notice of intent to seek the death penalty . . . whenever the death penalty is not imposed the court shall impose a sentence. ⁹⁰	Ann. § 18-4004 (West 2000)
Indiana	Sec[tion] 9 (a) The state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). ⁹¹	Ind. Code Ann. § 35-50-2-9 (West 2016)
Kansas	(a) If a defendant is charged with capital murder, the county or district attorney shall file written notice if such attorney intends, upon conviction of the defendant, to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death. ⁹²	Kan. Stat. Ann. § 21-6617 (West 2011)
Kentucky	(1) When a person is convicted of a capital offense, he shall have his punishment fixed at death, or at a term of imprisonment for life without benefit of probation or parole, or at a term of imprisonment for life without benefit of probation or parole . . . (4) In all cases in which	Ky. Rev. Stat. Ann. § 532.030 (West 1974)

⁹⁰ IDAHO CODE ANN. § 18-4004 (West 2000).

⁹¹ IND. CODE ANN. § 35-50-2-9 (West 2016).

⁹² KAN. STAT. ANN. § 21-6617 (West 2011).

	the death penalty may be authorized the judge shall instruct the jury in accordance with subsection (1) of this section. The instructions shall state, subject to the aggravating and mitigating limitations and requirements of KRS 532.025, that the jury may recommend upon a conviction for a capital offense a sentence of death, or a term of imprisonment for life without benefit of probation or parole ⁹³	
Louisiana	A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. ⁹⁴	La. Code Crim. Proc. Ann. art. 905.3 (2017)
Mississippi	(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases: (a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity . . . (b) Murder which is perpetrated by a person who is under sentence of life imprisonment . . . (c) Murder which is perpetrated by use or detonation of a bomb or explosive device ⁹⁵	Miss. Code Ann. § 97-3-19 (West 2017)
Missouri	1. In all cases of murder in the first	Mo. Ann.

⁹³ KY. REV. STAT. ANN. § 532.030 (West 1974).

⁹⁴ LA. CODE. CRIM. PROC. ANN. art. 905.3 (2017).

⁹⁵ MISS. CODE ANN. § 97-3-19 (West 2017).

	degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider . . . (2) if a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, whether the evidence as a whole justifies a sentence of death or a sentence of life imprisonment without eligibility for probation, parole, or release except by act of the governor. ⁹⁶	Stat. § 565.032 (West 2017)
Montana	In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances . . . and shall impose a sentence of death if the trier of fact found beyond a reasonable doubt, or the defendant pleaded guilty to the offense and admitted to, one or more aggravating circumstances and the court finds that there are no mitigating circumstances sufficiently substantial to call for leniency. ⁹⁷	Mont. Code Ann. § 46-18-305 (West 2017)
Nebraska	The panel of judges for the sentencing determination proceeding shall either unanimously fix the sentence at death or, if the sentence of death was not unanimously agreed upon by the panel, fix the sentence at life imprisonment. Such sentence determination shall be based upon the following considerations: (1) Whether the aggravating circumstances as determined to exist justify imposition of a sentence of	Neb. Rev. Stat. Ann. § 29-2522 (West 2017)

⁹⁶ MO. ANN. STAT. § 565.032 (West 2017).

⁹⁷ MONT. CODE. ANN. § 46-18-305 (West 2017).

	death; (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. ⁹⁸	
Nevada	4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished: (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances . . . or; (b) By imprisonment in the state prison: (1) For life without the possibility of parole. ⁹⁹	Nev. Rev. Stat. Ann. § 200.030 (West 2013)
New Hampshire	I. Whenever the state intends to seek the sentence of death for the offense of capital murder, the attorney for the state, before trial or acceptance by the court of a plea of guilty, shall file with the court and serve upon the defendant, a notice: (a) That the state in the event of conviction will seek the sentence of death; and (b) Setting forth the aggravating factors enumerated in paragraph VII of this section and any other aggravating factors which the state will seek to	N.H. Rev. Stat. Ann. § 630:5 (2018)

⁹⁸ NEB. REV. STAT. ANN. § 29-2522 (West 2017).

⁹⁹ NEV. REV. STAT. ANN. § 200.030 (West 2013).

	prove as the basis for the death penalty. ¹⁰⁰	
North Carolina	(a) A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction . . . poison, lying in wait, imprisonment, starving, torture, or by any kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine ¹⁰¹	N.C. Gen. Stat. Ann. § 14-17 (West 2018)
Ohio	(A) Whoever is convicted of or pleads guilty to aggravated murder . . . shall suffer death or be imprisoned for life, . . . except that no person who raises the matter of age pursuant to section 2020.023 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. ¹⁰²	Ohio Rev. Code Ann. § 2929.02 (West 2008)
Oklahoma	A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be	Okla. Stat. Ann. tit. 21 § 701.9 (West

¹⁰⁰ N.H. REV. STAT. ANN. § 630:5 (2018).

¹⁰¹ N.C. GEN. STAT. ANN. § 14-17 (West 2018).

¹⁰² OHIO REV. CODE ANN. § 2929.02 (West 2008).

	punished by death, by imprisonment for life without parole, or by imprisonment for life. ¹⁰³	1976)
Oregon	The state and the defendant or the counsel of the defendant shall be permitted to present arguments for or against a sentence of death and for or against a sentence of life imprisonment with or without the possibility of release or parole. ¹⁰⁴	Or. Rev. Stat. Ann. § 163.150 (West 2018)
Pennsylvania	(a)(1) After a verdict of murder in the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment . . . (c)(1)(iv) The verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstance which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases. ¹⁰⁵	42 Pa. Stat. and Cons. Stat. Ann. § 9711 (West 2017)
South Carolina	(A) A person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life . . . (B) When the State seeks the	S.C. Code Ann. § 16-3-20 (2010)

¹⁰³ OKLA. STAT. ANN. tit. 21 § 701.9 (West 1976).

¹⁰⁴ OR. REV. STAT. ANN. § 163.150 (West 2018).

¹⁰⁵ 42. PA. STAT. AND CONS. STAT. ANN. § 9711 (West 2017).

	death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding . . . (C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence ¹⁰⁶	
South Dakota	In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted to hear additional evidence in mitigation and aggravation of punishment. ¹⁰⁷	S.D. Codified Laws § 23A-27A-2 (2018)
Tennessee	(a) First degree murder is: (1) A premeditated and intentional killing of another; . . . (c) A person convicted of first degree murder shall be punished by: (1) Death; (2) Imprisonment for life without possibility of parole; or (3) Imprisonment for life. ¹⁰⁸	Tenn. Code Ann. § 39-13-202 (West 2014)
Texas	(a) A person commits [capital murder] if the person commits a murder as defined under Section 19.02(b)(1) and: (1) the person murders a peace officer or fireman	Tex. Penal Code Ann. § 19.03 (West 2011)

¹⁰⁶ S.C. CODE ANN. § 16-3-20 (2010).

¹⁰⁷ S.D. CODIFIED LAWS § 23A-27A-2 (2018).

¹⁰⁸ TENN. CODE ANN. § 39-13-202 (West 2014).

	who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman; (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat ¹⁰⁹	
Utah	[I]n all proceedings before a jury, under this section, it shall be instructed as to the punishment to be imposed upon a unanimous decision for death and that the penalty of either an indeterminate prison term of not less than 25 years and which may be for life or life in prison without parole, shall be imposed if a unanimous decision for death is not found. ¹¹⁰	Utah Code Ann. § 76-3-207 (West 2017)
Virginia	In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile,	Va. Code Ann. § 19.2-264.2 (West 2017)

¹⁰⁹ TEX. PENAL CODE ANN. § 19.03 (West 2011).

¹¹⁰ UTAH CODE ANN. § 76-3-207 (West 2017).

	horrible, or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. ¹¹¹	
Wyoming	(a) Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate, any sexual assault, sexual abuse of a minor, arson, robbery, burglary, escape, resisting arrest, kidnaping or abuse of a child under the age of sixteen (16) years, kills any human being is guilty of murder in the first degree. (b) A person convicted of murder in the first degree shall be punished by death, life imprisonment without parole or life imprisonment according to law . . . Upon conviction of a person for murder in the first degree in a case in which the state seeks the death penalty, the judge shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death, life imprisonment without parole or life imprisonment. ¹¹²	Wyo. Stat. Ann. §§ 6-2-101, 6-2-102 (West 2011)

While this is a national issue that occurs all across the United States, the focus is on three specific states that embody the problem with the death penalty. A large portion of these states have not utilized the death penalty in a while, but it does not necessarily mean that they are immune to mistakes.¹¹³ The states that will be specifically

¹¹¹ VA. CODE ANN. § 19.2-264.2 (West 2017).

¹¹² WYO. STAT. ANN. §§ 6-2-101, 6-2-102 (West 2011).

¹¹³ To date, 161 people have been exonerated from death row. This happens due to varying events, such as DNA evidence, recanted testimony, and new

analyzed in Part Four are states that: a) actively seek the death penalty, and b) have litigation arising from their use of the death penalty within the last year, due to c) specifically targeting one of the affected groups listed above. For example, California, while having a death penalty statute, has not executed anyone since 2006.¹¹⁴ The states that will be analyzed are Alabama, Ohio, and Texas. These states have demonstrated a commitment to the death penalty and over the last couple of years, have become among the leading states in the number of executions performed.¹¹⁵

While these state statutes may seem constitutional on their face, the way they are applied to racial minorities, people of low socio-economic status, and those with mental disorders can be unconstitutional. As shown above, almost all of the statutes give the opportunity for jurors or judges to choose life without possibility of parole as an alternative to the death penalty. When given this choice, jurors and judges are more likely to give the death penalty to a racial minority, an impoverished person, or someone with mental disorders, while Caucasians, the wealthy, and people within majorities are less likely to receive it.¹¹⁶

In the conventional account of the basic principles of constitutional adjudication, constitutional challenges can be sorted into two distinct categories: “facial” challenges and “as-applied” challenges. A facial attack is typically described as one where “no application of the statute would be constitutional.” In contrast, courts define an as-applied challenge as one “under which the plaintiff argues that a statute, even though generally constitutional, operates

evidence. This often happens in states that do not utilize the death penalty often, including Delaware, California, and Illinois. *Innocence Cases*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/innocence-cases> (last visited Feb. 1, 2018).

¹¹⁴ *Inmates Executed, 1978 to Present*, CAL. DEP’T OF CORRECTIONS & REHABILITATION, https://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last updated Oct. 2, 2015).

¹¹⁵ *Facts About the Death Penalty*, *supra* note 52.

¹¹⁶ Peggy O’Hare, *Study figures odds of a killer getting death*, CHRON, Mar. 4, 2010, <http://www.chron.com/news/houston-texas/article/Study-figures-odds-of-a-killer-getting-death-1709939.php>.

unconstitutionally as to him or her because of the plaintiff's particular circumstances.¹¹⁷

The death penalty statutes are per se valid. On their face, they seem as though they follow the terms set forth in *Furman v. Georgia*. Upon further review and looking at the specific situations that the death penalty is utilized in, it is clearly an unconstitutional use of capital punishment.¹¹⁸

IV. RACE, SOCIO-ECONOMIC STATUS, AND MENTAL DISORDERS

Imposition of the death penalty is arbitrary and capricious. The decision of who shall live and who shall die for his crime turns less on the nature of the offense and the incorrigibility of the offender and more on inappropriate and indefensible considerations: the political and personal inclinations of prosecutors; the defendant's wealth, race and intellect; the race and economic status of the victim; the quality of the defendant's counsel; and the resources allocated to defense lawyers.¹¹⁹

This quote by Gerald Heaney, a federal judge for the United States Court of Appeals for the Eighth Circuit, in my opinion, summarizes the fight to equalize the effects of the death penalty. The death penalty has never operated in a vacuum. A defendant's immutable qualities have always been taken into consideration, which has led to the death penalty being applied discriminatorily against racial minorities, low socio-economic classes,¹²⁰ and those with mental disorders.¹²¹ Studies have shown that despite our criminal justice

¹¹⁷ Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill Rts. J. 657, 657 (2010).

¹¹⁸ See *infra* notes 119–51 and accompanying text.

¹¹⁹ John W. Whitehead, *The Death Penalty Is a Miscarriage of Justice: It Should Be Abolished*, RUTHERFORD INST. (Aug. 15, 2011), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/the_death_penalty_is_a_miscarriage_of_justice_it_should_be_abolished.

¹²⁰ See *infra* notes 132–39 and accompanying text.

¹²¹ See *infra* notes 140–51 and accompanying text.

system slogans such as “equal justice under law,” this unfortunately is not the case.¹²²

A. Reason for Selecting Race as a Factor

Race has been a highly contentious topic in the realm of criminal justice in the past several years.¹²³ Mark Maurer, the Executive Director of The Sentencing Project, stated that “[t]here are many indicators of the profound impact of disproportionate rates of incarceration in communities of color.”¹²⁴ There is a bias in capital punishment cases against minority defendants.¹²⁵ “The most common disparity or ‘race effect’ is that capital charging and sentencing decisions are applied more punitively in cases involving one or more white victims than they are in similar cases with no white victims.”¹²⁶

As the graph from the Death Penalty Information Center displays below, it is not only the race of the defendants executed that is disproportionate, but also the race of the victims in capital punishment cases.¹²⁷ Equal Justice Initiative suggests that the numbers imply that the public places a higher value on the lives of white people than the lives of minorities.¹²⁸ “Each year in Alabama, nearly 65% of all murders involve black victims, yet 73% of the people currently awaiting execution in Alabama were convicted of

¹²² PROCON.ORG, *supra* note 9 (based on “equal protection of the laws” as stated in the Fourteenth Amendment).

¹²³ Marc Maurer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, AM. BAR ASS’N HUMAN RIGHTS MAG., https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/fall2010/justice_for_all_challenging_racial_disparities_criminal_justice_system.html (last visited Feb. 1, 2018).

¹²⁴ *Id.*

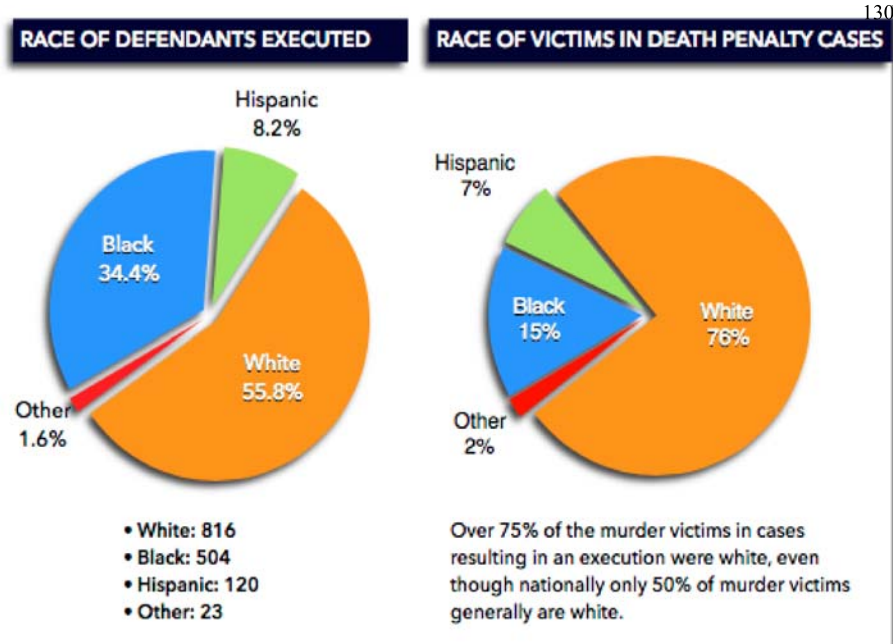
¹²⁵ David C. Baldus, Catherine M. Grosso, George Woodworth, & Richard Newell, *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, 101 J. OF CRIM. L. & CRIMINOLOGY 1227, 1227–335 (2011) <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7412&context=jclc>.

¹²⁶ *Id.*

¹²⁷ *Facts About the Death Penalty*, *supra* note 52.

¹²⁸ *Race and Poverty*, EQUAL JUST. INITIATIVE, <https://eji.org/death-penalty/race-and-poverty> (last visited Feb. 1, 2018).

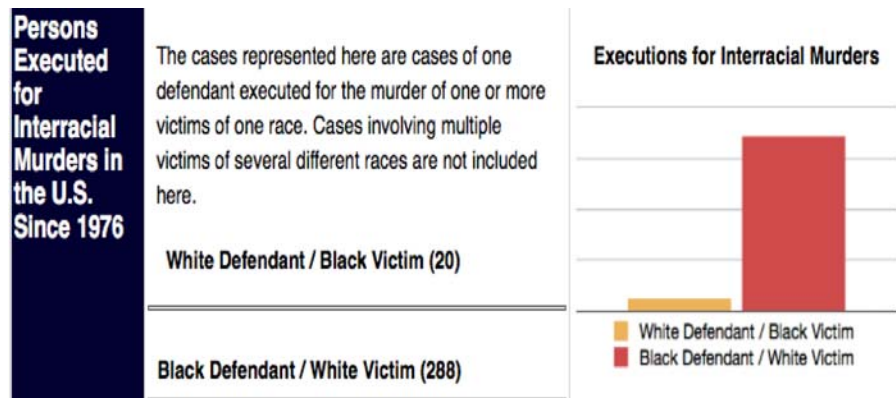
crimes in which the victims were white.”¹²⁹ Capital punishment is used disproportionately against people of color.



Another graph that displays the stark contrast between the sentencing in interracial murders is displayed below. It creates another clear picture of disparate sentencing for black defendants who kill white victims. There are very few white people that have been executed for killing a black person. However, if a black person kills a white person, the chances of them getting executed is much higher. The racial disparity in punishments given to a defendant is proof that there are problems with the death penalty. For this reason, race is a factor used to filter the *Furman* factors.

¹²⁹ *Id.*

¹³⁰ *Facts About the Death Penalty*, *supra* note 52.



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B. Reasoning for Choosing Low Socio-Economic Status as a Factor

Socioeconomic status is defined as “the social standing or class of an individual or group . . . often measured as a combination of education, income and occupation.”¹³² Studies have shown that a low socioeconomic status affects which punishment the prosecutor pursues.¹³³ Scott Phillips, a sociology and criminology professor at the University of Denver, “suggests legally irrelevant factors tend to seep into such cases, ‘such as whether the victim is low-status or high status. People who kill someone who’s ‘important’ are more likely to get the death penalty.’”¹³⁴ The poor are discriminated against in capital punishment cases, typically due to lack of proper counsel, though the National Coalition to Abolish the Death Penalty (NCADP) notes that this has less to do with the quality of public defenders than with the caseloads of public defenders.¹³⁵ Public defenders cannot give the proper amount of time that is necessary to

¹³¹ *Id.*

¹³² *Socioeconomic Status*, AM. PSYCHOL. ASS’N, <http://www.apa.org/topics/socioeconomic-status/> (last visited Feb. 1, 2018).

¹³³ O’Hare, *supra* note 116.

¹³⁴ *Id.*

¹³⁵ *Delaware Supreme Court Unanimous Reversal of Conviction and Death Sentence of Jermaine Wright*, NAT’L COALITION TO ABOLISH THE DEATH PENALTY (May 22, 2014), <http://www.ncadp.org/blog/entry/delaware-supreme-court-unanimous-reversal-of-conviction-and-death-sentence>.

defend a capital punishment case due to the high number of other cases.¹³⁶ The American Civil Liberties Union (ACLU) also advocates for inmates who are on death row due to poor legal representation and the ACLU believes that every defendant deserves a fair trial, free of bias due to socio-economic status.¹³⁷ In *Roper v. Simmons*, the United States Supreme Court indicated that the death penalty “must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”¹³⁸ The ACLU notes that quality of representation is a better indicator of who will get the death penalty, rather than the seriousness of the crime.¹³⁹

C. Reason for Choosing Mental Disorders as a Factor

There are many types of mental disorders, but I will focus on specifically mental illness and intellectual disabilities.¹⁴⁰ First, the mentally ill are usually not capable of providing their lawyers with the details necessary to provide an adequate defense or they believe that they are capable of defending themselves.¹⁴¹ The NCADP addresses the injustice of capital punishment for the mentally ill.¹⁴² Mental illness disrupts a person’s thinking, and this not only can affect their actions when they commit a crime, but it will also affect their ability to aid their defense.¹⁴³ In addition, people who are

¹³⁶ *Id.*

¹³⁷ *The Case Against the Death Penalty*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/case-against-death-penalty> (last updated 2012).

¹³⁸ *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

¹³⁹ *Effective Counsel*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/capital-punishment/effective-counsel> (last visited Feb. 1, 2018).

¹⁴⁰ *Mental Health Conditions*, NAT’L ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/Learn-More/Mental-Health-Conditions> (last visited Feb. 1, 2018).

¹⁴¹ Sarah Swig, *Mental Illness and the Death Penalty*, NAT’L COALITION TO ABOLISH THE DEATH PENALTY (Sept. 29, 2014), <http://www.ncadp.org/blog/entry/mental-illness-and-the-death-penalty1>.

¹⁴² *Id.*

¹⁴³ *Id.*

mentally ill are “more likely to give false confessions” during a police interrogation, or lie on the witness stand.¹⁴⁴

The second category is intellectual disability. An intellectual disability “is a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18.”¹⁴⁵ The Court in *Atkins v. Virginia* deemed the death penalty unconstitutional for those with intellectual disability—at the time called mental retardation¹⁴⁶—due to it being a violation of the “cruel and unusual” clause of the Eighth Amendment.¹⁴⁷ In *Atkins v. Virginia*, the Court decided that criminal defendants with mental retardation did not “act with the level of moral culpability that characterizes the most serious adult criminal conduct.”¹⁴⁸ Despite the outcome of this case, “people with intellectual disabilities are at a higher risk of wrongful convictions and death sentences.”¹⁴⁹ The reasons vary, from falsely confessing to the crime, to hiding their disability from their lawyers.¹⁵⁰ Over the past year, there have been many reconsiderations of the death penalty for people with intellectual disabilities who have been deemed unfit to receive the death penalty.¹⁵¹

V. SPECIFIC STATE STATUTES: ALABAMA, OHIO, AND TEXAS

Due to the nature of the death penalty in Alabama, Ohio, and Texas, I have chosen to further analyze these states’ statutes. These three states a) actively seek the death penalty and b) have litigation

¹⁴⁴ *Id.*

¹⁴⁵ *Definition of Intellectual Disability*, AM. ASS’N ON INTELL. & DEV. DISABILITIES, <http://aaid.org/intellectual-disability/definition#.Wl2MBiOZOLI> (last visited Feb. 1, 2018).

¹⁴⁶ Rosa’s Law, 124 STAT. 2643 (2010).

¹⁴⁷ *Atkins v. Virginia*, 536 U.S. 304, 307 (2002).

¹⁴⁸ *Id.*

¹⁴⁹ *Intellectual Disability and the Death Penalty*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/intellectual-disability-and-death-penalty> (last visited Feb. 1, 2018).

¹⁵⁰ *Id.*

¹⁵¹ *News, DEATH PENALTY INFO. CTR.*, <https://deathpenaltyinfo.org/news/past/33/2017> (last visited Feb. 1, 2018).

arising from their use of the death penalty within the last year due to c) specifically targeting one of the affected groups listed above.¹⁵²

A. Ohio

Ohio satisfies the elements for further analysis. Ohio has actively sought the death penalty since its reinstatement in 1976 and has executed fifty-five people.¹⁵³ In 2017, Ohio executed two people and attempted to execute three.¹⁵⁴ However, the warden called off the third execution because of the inability to find a vein in the sickly inmate.¹⁵⁵ Different groups have proposed policy changes to Ohio's use of the death penalty due to its "unfair and arbitrary" nature.¹⁵⁶ This coalition believes that the three-year moratorium on the death penalty was not enough time to address Ohio's problems with capital punishment.¹⁵⁷ Ohio's death penalty statute¹⁵⁸ reads constitutionally. Those who are convicted or plead guilty to aggravated murder can receive the death penalty as long as they are eighteen years old or older at the time of the crime.¹⁵⁹ This statute is facially constitutional because Ohio does not single out a specific group to bear the brunt of capital punishment.¹⁶⁰ However, the use of the death penalty in Ohio has disproportionately affected the three groups mentioned above.

¹⁵² See *infra* notes 119–51 and accompanying text.

¹⁵³ *State by State Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state_by_state (last visited Feb. 1, 2018).

¹⁵⁴ Chris Kenning, *Ohio Delays Another Execution After Struggling to Find Vein*, U.S. NEWS, Nov. 15, 2017, <https://www.usnews.com/news/us/articles/2017-11-15/ohio-death-row-inmate-to-face-execution-despite-illness>.

¹⁵⁵ Tracy Connor, *Ohio cancels execution of Alva Campbell after failing to find vein*, NBC NEWS, Nov. 15, 2017, <https://www.nbcnews.com/storyline/lethal-injection/ohio-set-execute-inmate-alva-campbell-who-needs-wedge-pillow-n820956>.

¹⁵⁶ *Diverse Coalition Urges Ohio Governor to Halt Resumption of Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6822> (last visited Feb. 1, 2018).

¹⁵⁷ *Id.*

¹⁵⁸ OHIO REV. CODE ANN. § 2929.02 (West 2008).

¹⁵⁹ *Id.*

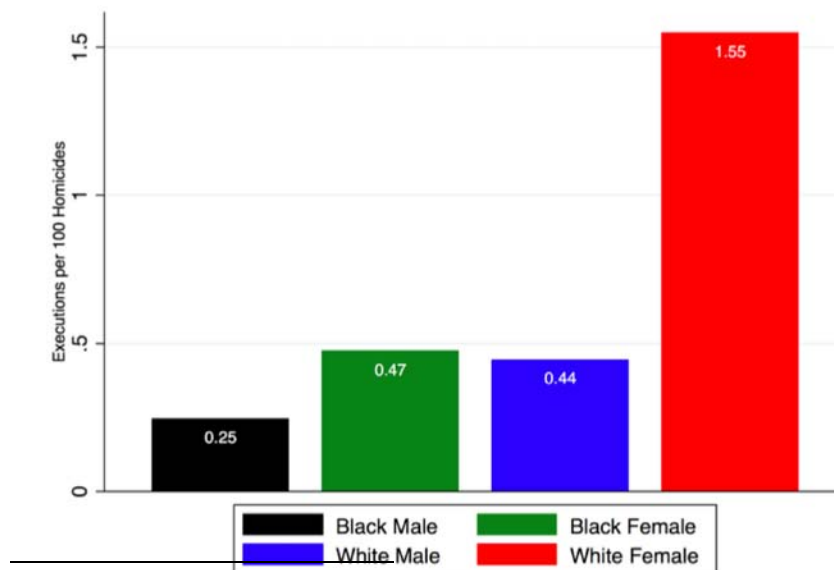
¹⁶⁰ *Id.*

1. Race

Ohio currently has 138 people on death row.¹⁶¹ Almost 56% of the men and women on death row are black,¹⁶² while only 12.8% of the state is black.¹⁶³ The figure below is the most succinct way of displaying the problems with Ohio's death penalty. This graph, from Frank Baumgartner's research on the impact of race and gender in Ohio executions, shows that there is a disparity between what punishment the state gives the defendant based on the race of the victim. For example, it appears that the state places the greatest value on lives of white women, with black women and white men with a much lower value, and lastly, black men, with the lowest value awarded on their lives.

¹⁶⁴

Figure 1. Comparison of Likelihood of Execution by Race and Gender of Victim



¹⁶¹ *December 2017 Report*, OHIO DEP'T OF REHABILITATION & CORRECTION, <http://www.drc.ohio.gov/Portals/0/Reentry/Reports/Monthly/2017/Dec%202017%20Fact%20Sheet.pdf?ver=2017-12-21-135231-917> (last updated Dec. 2017).

¹⁶² *Id.*

¹⁶³ *Quick Facts Ohio*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/OH/RHI225216#viewtop> (last updated July 1, 2017).

¹⁶⁴ Frank Baumgartner, *The Impact of Race, Gender, and Geography on Ohio Executions*, University of North Carolina at Chapel Hill (Jan. 28, 2016), <https://fbaum.unc.edu/articles/Baumgartner-OhioExecutions-2016.pdf>.

The use of race of the defendants and of the victims shows that Ohio has not followed the elements in *Furman* that are focused on human dignity. The first element of *Furman* is not satisfied. The punishment cannot be so severe as to be degrading to the dignity of human beings.¹⁶⁵ Here, the obvious racial imbalance is not acceptable and is degrading to black men, who, from this graph, do not appear to have a high value placed on their lives. This is a human dignity problem where there is only a small minority of humans who are being targeted by unfair state practices. The second element of *Furman* is not arbitrarily inflicting a severe punishment.¹⁶⁶ Here, there seems to be an element of arbitrariness because certain defendants, depending on the gender and race of victim, have a higher chance of getting the death penalty while other defendants have a lower chance of getting the death penalty. The third element is that the punishment must not be unacceptable to a contemporary society.¹⁶⁷ Race is a suspect classification.¹⁶⁸ There have been countless Supreme Court cases that have discussed that classifications made due to race are unconstitutional.¹⁶⁹ Contemporary society does not approve of racism, and here, it seems that Ohio gives the death penalty at a higher rate to black men and to people who have killed white women. Lastly, the death penalty cannot be excessive.¹⁷⁰ Here, this element could be satisfied because arguably this is not excessive, and the state can argue that this is more than the infliction of suffering. The state can argue that this is retribution for the crimes that are committed and a deterrence for future crimes.

2. Low Socioeconomic Status

¹⁶⁵ *Furman v. Georgia*, 408 U.S. 238, 271 (1972) (Brennan, J., concurring).

¹⁶⁶ *Id.* at 274.

¹⁶⁷ *Id.* at 277.

¹⁶⁸ *See Furman v. Georgia*, 408 U.S. 238, 255 (1972).

¹⁶⁹ A selection of cases that have been evaluated under strict scrutiny because of race, a suspect classification: *Korematsu v. United States*, 323 U.S. 214 (1944), *Shelley v. Kraemer* 334 U.S. 1 (1948), *Brown v. Board of Education* 347 U.S. 483 (1954), *Loving v. Virginia* 388 U.S. 1 (1967), and *Batson v. Kentucky* 476 U.S. 79 (1986).

¹⁷⁰ *Furman*, 408 U.S. at 279.

Ohio also discriminates against those with a low socioeconomic status, though its statute does not encourage or allow this.¹⁷¹ A main indicator of whether defendants will receive the death penalty is if they are impoverished and are assigned a court-appointed attorney that is over-worked, and the defendant gets poor representation. Ohio has a high rate of wrongful convictions.¹⁷² “Nine death row inmates in Ohio have been exonerated since 1979, four of them in the past four years. All but two of the nine had served at least a quarter-century before their exonerations, and three had served 39 years in prison.”¹⁷³ This is a troubling statistic considering how many executions there have been in Ohio since 1976.¹⁷⁴

3. Mental Disorders

Ohio ended its moratorium on the death penalty in July 2017¹⁷⁵ and has a schedule to execute twenty-six more people through 2020,¹⁷⁶ with 138 people on death row.¹⁷⁷ The Fair Punishment Project conducted a report on the men on Ohio’s death row and concluded that, “these men are among the most impaired and traumatized among us—a pattern replicated across America’s death

¹⁷¹ Scott Martelle, *Ohio has a troubled death penalty system yet intends to resume executions anyway*, L.A. TIMES, July 21, 2017, <http://www.latimes.com/opinion/opinion-la/la-ol-ohio-death-penalty-kasich-moratorium-20170721-story.html>.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Baumgartner, *supra* note 164 at 1. Ohio has executed 53 men between 1976 and 2014. *Id.*

¹⁷⁵ Mike Brickner, *Tomorrow Ohio Plans to Restart Executions with Drugs Known to Torture*, AM. CIV. LIBERTIES UNION (July 25, 2017), <https://www.aclu.org/blog/capital-punishment/execution-methods/tomorrow-ohio-plans-restart-executions-drugs-known-torture>.

¹⁷⁶ *New Report: Prisoners on Ohio’s Execution List Defined By Intellectual Impairment, Mental Illness, Trauma, and Young Age*, FAIR PUNISHMENT PROJECT (Aug. 29, 2017), http://fairpunishment.org/prisoners-on-ohios-execution-list/#_ftn65.

¹⁷⁷ *Death Row*, OHIO DEP’T OF REHABILITATION & CORRECTION, <http://www.drc.ohio.gov/death-row> (last updated Jan. 8, 2018).

rows”¹⁷⁸ and that “[a]t least six men appear to suffer from a mental illness, and at least 11 have evidence of intellectual disability, borderline intellectual disability, or a cognitive impairment, including brain injury.”¹⁷⁹ For example, one man on death row, James Frazier, received “social security benefits based on a mental retardation diagnosis” and had an IQ of 72.¹⁸⁰ Another example of a man on Ohio’s death row who is suffering from a mental disorder is David Sneed, who suffers from “severe manic bipolar disorder and a schizoaffective disorder involving hallucinations and delusions.”¹⁸¹

In order for Ohio’s death penalty to be constitutional, it needs to follow *Furman*’s four elements. The first element is that it must not be degrading to the dignity of human beings and use people as objects.¹⁸² In the cases of Frazier and Sneed, both of whom suffer from mental disorders, the death penalty seems to be degrading to their dignity. These are men who likely do not understand the seriousness of their offenses, due to their mental illness and mental disability. To give them a punishment that they possibly do not understand is offensive to their dignity as human beings, despite the crimes that they committed. The second element of *Furman* is also not satisfied here because a state cannot arbitrarily inflict the death penalty.¹⁸³ The percentage of men on death row in Ohio that suffer from a mental disorder goes to show that the death penalty is arbitrarily inflicted, and people with mental disorders who cannot aid in their own defense have a higher chance of receiving the death penalty instead of life without parole. Defendants that are able to help their attorneys with important details regarding their lives and cases have a better defense than someone who is not lucid enough to be of assistance. The third element of *Furman* is that the death penalty must not be unacceptable to contemporary society.¹⁸⁴ Since *Atkins v. Virginia* in 2002, it appears that society does not believe

¹⁷⁸ FAIR PUNISHMENT PROJECT, *supra* note 176.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (quoting Sneed v. Johnson, No. 1:-4CV 558, 2007 WL 709778, at *34 (N.D. Ohio Mar. 2, 2007)).

¹⁸² *Furman v. Georgia*, 408 U.S. 238, 271 (1972) (Brennan, J., concurring).

¹⁸³ *Id.* at 274.

¹⁸⁴ *Id.* at 277.

that a contemporary society should be executing those who are mentally retarded, or in the current term, intellectually disabled. If this is unacceptable to society, then people like Frazier and Sneed should not be on death row. The final element of *Furman* is that the punishment cannot be excessive.¹⁸⁵ This means that the punishment must be more than the pointless infliction of suffering. Here, in Ohio, it seems like a good portion of the inmates on death row, and especially Frazier and Sneed, are on death row to suffer. Both suffer from mental disorders that caused a lack of competence during trial and an inability to comprehend their crimes. If the defendant lacks the moral culpability and does not understand why they are being put to death, this is excessive and is a pointless infliction of suffering.

Ohio's death penalty statute is facially constitutional. However, when the statute is applied to defendants in Ohio's criminal justice system, it unfairly targets racial minorities, low socio-economic classes, and those with mental disorders. In each of these groups, the usage of the death penalty does not satisfy the *Furman* elements that are required for a constitutional death penalty.

B. Alabama

Alabama also satisfies the requirements to be analyzed. Alabama has actively sought the death penalty since its reinstatement in 1977, and since, has executed 61 people.¹⁸⁶ This makes Alabama the seventh out of all the states for executions, and Alabama has the fourth largest death row population.¹⁸⁷ Alabama has litigation arising out of its use of the death penalty specifically-targeting one of the aforementioned groups.¹⁸⁸ On February 22, 2018, corrections officials halted the execution of Doyle Hamm, a man with a history of epilepsy and head injuries.¹⁸⁹ Mr. Hamm was suffering from lymphatic cancer as well, and the botched execution left him with a

¹⁸⁵ *Id.* at 279.

¹⁸⁶ *Facts About the Death Penalty*, *supra* note 52.

¹⁸⁷ *Id.*

¹⁸⁸ Chandrika Narayan, *Alabama's aborted execution was 'botched and bloody,' lawyer says*, CNN, Feb. 28, 2018, <https://www.cnn.com/2018/02/27/us/alabama-aborted-execution/index.html>.

¹⁸⁹ *Id.*

limp, where an IV likely hit his femoral artery.¹⁹⁰ He also began peeing blood, from where an IV likely hit his bladder, and he was overall emotionally traumatized.¹⁹¹ This is an example of the problems in Alabama's death penalty scheme and why it is part of the analysis.

1. Race

Race plays a key role in Alabama death penalty cases.¹⁹² Equal Justice Initiative (EJI), a law firm that deals with mass incarceration, death penalty, and other criminal justice issues, reported that not only are black defendants incarcerated and sent to death row at a higher rate than white defendants,¹⁹³ but there are also problems with illegal racial discrimination in jury selection.¹⁹⁴ Alabama's death row consists of 51% black inmates, while 48% of the inmates are white.¹⁹⁵ As previously mentioned, the true disparity lies within the victims' race.¹⁹⁶ "Each year in Alabama, nearly 65[%] of all murders involve black victims, yet 73[%] of the people currently awaiting execution in Alabama were convicted of crimes in which the victims were white."¹⁹⁷ Also, "[f]ewer than 5[%] of all murders in Alabama involve black defendants and white victims, but over 52[%] of black death row prisoners have been sentenced for killing someone white."¹⁹⁸ Furthermore, black jurors are systematically removed from juries, though *Batson v. Kentucky* ruled that peremptory strikes could not be used to remove a minority from a jury.¹⁹⁹ In 2010, EJI reported on racial discrimination in jury selection, "which is most comprehensive study of racial bias in jury selection since the United

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Race and Poverty*, *supra* note 128.

¹⁹³ *Id.*

¹⁹⁴ *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUST. INITIATIVE, <https://eji.org/reports/illegal-racial-discrimination-in-jury-selection> (last visited Feb. 1, 2018).

¹⁹⁵ *Race and Poverty*, *supra* note 128.

¹⁹⁶ *Facts About the Death Penalty*, *supra* note 52.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Batson v. Kentucky*, 476 U.S. 79, 99 (1986).

States Supreme Court tried to limit the practice in *Batson v. Kentucky* in 1986.”²⁰⁰ In this report, the EJI found that “in Houston County, Alabama, [eight] out of [ten] African Americans qualified for jury services have been struck by prosecutors from death penalty cases.”²⁰¹ The systematic preclusion of African-Americans from juries robs black defendants of having a trial of their peers, and a cross-section of the county in which they reside.²⁰² “‘The underrepresentation and exclusion of people of color from juries has seriously undermined the credibility and reliability of the criminal justice system, and there is an urgent need to end this practice,’ said Bryan Stevenson, EJI’s Executive Director.”²⁰³ The death penalty continues to negatively and unjustly impact racial minorities through this practice, as well as other factors in Alabama’s judicial system.²⁰⁴ For example, there are nineteen appellate court judges in Alabama and none are black, and only “two out of [forty-two] elected district attorneys is black.”²⁰⁵ The power imbalance involving minorities is present in these practices and facts.

2. Low Socio-Economic Status

People who have a low socio-economic status in Alabama are more susceptible to the death penalty.²⁰⁶ EJI discusses the issues that plague the poor in Alabama within the criminal justice system. EJI reports that there is “no statewide indigent defender system in Alabama” and that, “Alabama has always had very low compensation rates for capital trial attorneys.”²⁰⁷ EJI cites to a report where, “in 72.5[%] of felony cases, the attorney did not file a single motion, and in 99.4[%] of cases, the attorney did not request funds for experts or

²⁰⁰ *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, *supra* note 194.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Race and Poverty*, *supra* note 128.

²⁰⁵ *Id.*

²⁰⁶ *The Crisis of Counsel in Alabama*, EQUAL JUST. INITIATIVE, <https://eji.org/alabama-inadequate-counsel-death-penalty-cases> (last visited Feb. 1, 2018).

²⁰⁷ *Id.*

investigators.”²⁰⁸ This data reveals that the poor in Alabama are receiving legal services, but because the legal services are horrendously underfunded, people in the lower socio-economic classes are already at a disadvantage when going to trial.²⁰⁹

Alabama Appellate Court Justices and Bar Presidents wrote in an amicus brief to the Supreme Court that, “[o]ur capital system in Alabama is in disarray. Without counsel to vigorously represent death row inmates in state post-conviction, we know that there have been instances where justice was not served.”²¹⁰ This comment is a disturbing glimpse into the divide amongst people who can and cannot afford lawyers. This lack of equality in the death penalty system for lower socio-economic classes leads to a higher death penalty conviction rate.²¹¹ Moreover, if the trial attorney does not provide adequate representation, the state does not provide additional help for those on death row.²¹² Instead, condemned inmates have no legal assistance for post-conviction claims.²¹³ The system is complicated and most inmates are unable to navigate the complex procedural rules of filing these claims.²¹⁴ Essentially, if the system fails to supply defendants with adequate counsel at the trial level, there is no way to remedy the damage that an underfunded and overworked attorney may cause with their lack of experience or time.

3. Mental Disorders

Alabama has a history of executing defendants that display proof of a mental disorder.²¹⁵ Recently, the United States Supreme Court stayed the execution for Vernon Madison based on his lack of competency.²¹⁶ Due to dementia and “his severely impaired mental

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See *infra* notes 216–24 and accompanying text.

²¹⁶ *U.S. Supreme Court Stays Alabama Execution to Consider Vernon Madison’s Competency to be Executed*, DEATH PENALTY INFO. CTR.,

condition,” Madison has no memory of the crime he committed.²¹⁷ Furthermore, Madison’s jury sentenced him to life in prison without possibility of parole, but due to a judicial override,²¹⁸ Madison received the death penalty.²¹⁹ Now, due to a change in Alabama law, a judicial override is no longer permitted and no state allows the practice anymore.²²⁰

When examining the three groups unjustly affected by Alabama’s death penalty, it is clear that Alabama’s death penalty statute does not satisfy the four *Furman* elements. By excluding racial minorities from juries, failing to provide adequate representation to people who cannot afford lawyers and refusing to recognize the lack of mental capacity of people being executed, Alabama fails the first element of *Furman*. Secondly, the statistics shown above prove that the death penalty is given arbitrarily in Alabama; thus, the second prong of *Furman* is not satisfied.²²¹ The third prong of *Furman* is satisfied because there is declining support for the death penalty.²²² Lastly, the fourth prong is not satisfied because Alabama excessively sentences people to death.²²³ This excessive sentencing is exemplified in the rates of people with mental disorders on death

<https://deathpenaltyinfo.org/node/6992> [hereinafter *Vernon Madison*] (last visited Mar. 4, 2018).

²¹⁷ *Id.*

²¹⁸ Valerie Hans, *Judicial Override in Death Penalty Sets Dangerous Precedent*, THE HILL (Mar. 6, 2017), <http://thehill.com/blogs/pundits-blog/crime/322513-judicial-override-in-death-penalty-sets-dangerous-precedent>. A judicial override typically happens during the sentencing phase of a trial. In most states, the jury can choose between life without possibility of parole or the death penalty. Mitigating and aggravating factors are set forth during the sentencing phase, and after weighing the evidence the jury decides the sentence. If a jury chose life without possibility of parole, states with judicial override allowed judges to change the sentence from life without possibility of parole to the death penalty. The use of the practice was incredibly rare, and in the last two years, the final two states to have judicial override—Florida and Alabama—finally abolished the practice. *Id.*

²¹⁹ See *Vernon Madison*, *supra* note 216.

²²⁰ See Hans, *supra* note 218.

²²¹ *Furman v. Georgia*, 408 U.S. 238, 274 (1972).

²²² *Less Support for Death Penalty, Especially Among Democrats*, PEW RES. CENTER (Apr. 16, 2015), <http://www.people-press.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/>.

²²³ *Furman*, 408 U.S. at 279.

row, as well as Alabama's inability to exonerate innocent people that have been sentenced to death row.²²⁴ Alabama's death penalty statute, while facially constitutional, does not adequately fulfill the four elements of *Furman*; therefore, its death penalty is unconstitutional.

C. Texas

Texas satisfies the three requirements for analysis. First, Texas leads the country in the number of executions with a total of 548 executions since the death penalty's reinstatement.²²⁵ Texas also has the third highest death row population with 243 people on death row.²²⁶ In Texas, a defendant can get the death penalty for a felony they did not commit.²²⁷ These facts confirm that Texas actively seeks the death penalty. The second and third requirements are that there is litigation arising out of the death penalty against one of the groups being analyzed. In 2017, a Texas prosecutor, who got a death sentence against Jeffery Wood, asked that his sentence be reduced to life in prison.²²⁸ Not only did Wood not kill anyone, but also his IQ was below average with a score of eighty.²²⁹ This is an example of the contentiousness of Texas' death penalty and the efforts of some to make sure it is constitutional as-applied.

1. Race

According to the Texas Coalition to Abolish the Death Penalty (TCADP), which publishes an annual report, informed the public that

²²⁴ See *Vernon Madison*, *supra* note 216.

²²⁵ *Facts About the Death Penalty*, *supra* note 52.

²²⁶ *Id.*

²²⁷ *State by State Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state_by_state (last visited Mar. 4, 2018).

²²⁸ *Texas District Attorney Asks State to Spare Life of Man She Prosecuted Under Controversial "Law of Parties,"* DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6944> (last visited Mar. 4, 2018).

²²⁹ *Id.*

in 2017, “[o]ver the last five years, 70% of death sentences have been imposed on people of color.”²³⁰

New Death Sentences by Race of Defendant						Total Sentences by Race
	2013	2014	2015	2016	2017	
African-American	7	5	0	3	1	16
Hispanic	1	2	1	0	0	4
Asian	0	0	1	0	0	1
Total People of Color	8	7	2	3	1	21
White	1	4	1	0	3	9
Total Sentences	9	11	3	3	4	30

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This chart from the TCADP displays the racial disparity among the defendants sentenced to death. In the last five years, it is clear that African-Americans make up the majority of new sentences, and that people of color make up more than two thirds of the new death sentences in Texas.²³² “African-Americans comprise only 12.6% of the population of Texas, [yet] they constitute 44% of death row inmates.”²³³ This is a disproportionately high number of African-Americans on death row, which suggests that there is underlying racism within Texas’ criminal justice system and specifically death penalty cases. Of the seven executions in 2017, four cases concerned white victims, two cases concerned Latino victims, and one case concerned a Latino and an African-American victim.²³⁴ “In total, 381 executions in Texas concerned cases with white victims, 90 involved Latino victims, and 73 involved African-American victims.”²³⁵ This data, once again, reveals which racial groups the criminal justice system cares about, and which victims the criminal justice system chooses to avenge.

²³⁰ *Texas Death Penalty Developments in 2017: The Year in Review*, TEX. COALITION TO ABOLISH THE DEATH PENALTY, 1, 5 (2017), <http://tcadp.org/wp-content/uploads/2017/12/Texas-Death-Penalty-Developments-in-2017-Year-in-Review.pdf>.

²³¹ *Id.*

²³² TEX. COALITION TO ABOLISH THE DEATH PENALTY, *supra* note 230 at 5.

²³³ *Id.* at 6.

²³⁴ *Id.* at 9.

²³⁵ *Id.*

2. Low Socio-Economic Status

There are also examples of people on death row in Texas who have suffered because they are of low socio-economic status. For example, a disbarred California attorney and a probate and real estate lawyer represented a man who was executed in 2017, TaiChin Preyor, during the appeals process.²³⁶ This was a shocking miscarriage of justice, because Preyor should have received adequate legal representation. Instead, because Preyor was too poor to obtain a lawyer, he was appointed an attorney who was not suited to represent him on appeal. This is only one example of the ways that people of low socioeconomic status suffer at the hands of the death penalty in Texas.

3. Mental Disorders

The last group the death penalty unjustly treats is people who suffer from mental disorders.²³⁷ For example, in 2017, James Bigby was executed despite evidence that he was a paranoid schizophrenic.²³⁸ This is not an isolated incident.²³⁹ Texas has had a pattern of executing people with mental illness.²⁴⁰ “At least 30 individuals with documented histories of paranoid schizophrenia, bipolar disorder, and other persistent and severe mental illnesses have been executed by the State of Texas.”²⁴¹ The United States Supreme Court overruled the Texas Court of Criminal Appeals in a case where the defendant, Bobby James Moore, was intellectually disabled and sentenced to death.²⁴² The Supreme Court disagreed with the state court’s analysis of the factors, remanded the case, and held that “any judicial determination of whether a death-sentenced prisoner is

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ TEX. COALITION TO ABOLISH THE DEATH PENALTY, *supra* note 230 at 8.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Texas Prosecutors Agree Bobby Moore is Intellectually Disabled, Should Be Resentenced to Life*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6914> (last visited Feb. 1, 2018).

intellectually disabled must be ‘informed by the medical community’s diagnostic framework.’”²⁴³

Although this state’s implementation of the death penalty against certain groups proves that while Texas’ death penalty statute may be facially constitutional, its constitutionality as applied is questionable. The way the Texas death penalty statute is applied does not follow the *Furman* elements. First of all, Texas’ death penalty is severe and degrading to human beings because severely mentally ill people are receiving the death penalty in Texas.²⁴⁴ There are also people who do not receive proper representation, which is degrading because Texas is sentencing people to death who did not have a fair trial.²⁴⁵ Texas does not satisfy the second prong of *Furman* because it is arbitrarily applied and affects minorities more than white defendants.²⁴⁶ It also has an element of arbitrariness when used against lower socio-economic classes and the mentally ill.²⁴⁷ Most Texans are in favor of the death penalty,²⁴⁸ so the third prong of *Furman* is satisfied in this case because Texans do not believe that the death penalty is unacceptable to contemporary society.²⁴⁹ Lastly, the fourth prong of *Furman* is not satisfied because executing someone mentally ill or with an intellectual disability is a pointless infliction of suffering.²⁵⁰ While one of the prongs of *Furman* is satisfied, it is clear that Texas’ death penalty statute does not satisfy the other prongs, and is therefore, not constitutionally applied.

VI. CONCLUSION

While the death penalty might be at an all-time low, several of the states that still utilize the death penalty are violating the four factors of *Furman* determining what is a constitutional death penalty.

²⁴³ *Id.*

²⁴⁴ *Furman v. Georgia*, 408 U.S. 238, 271 (1972) (Brennan, J., concurring).

²⁴⁵ TEX. COALITION TO ABOLISH THE DEATH PENALTY, *supra* note 230 at 7.

²⁴⁶ *Furman*, 408 U.S. at 274.

²⁴⁷ See *supra* notes 237–47 and accompanying text.

²⁴⁸ Ross Ramsey, *UT/TT Poll: Voters Less Open to Open Carry*, THE TEXAS TRIBUNE (Feb. 24, 2015), <https://www.texastribune.org/2015/02/24/uttt-poll-voters-less-open-open-carry/>.

²⁴⁹ *Furman*, 408 U.S. at 277.

²⁵⁰ *Id.* at 279.

The state statutes surveyed above are facially constitutional.²⁵¹ However, the statutes, as applied, violate the Constitution and specifically affect three different groups: racial minorities, the low socio-economic class, and people with mental disorders. These three groups have suffered due to the arbitrary application of the death penalty. While these states have a good statute to start with, in the future, it may be necessary for them to decide how to proceed with the death penalty to keep the statutes constitutional on its face and as as-applied. To ensure constitutionality of its statutes, these states should have protections for groups that are vulnerable to receiving the death penalty. It should be up to the individual states to decide whether these protections are in the form of amending state laws or increasing funding for defense attorneys on death penalty cases. The *Furman* factors are weighed to ensure that the death penalty is constitutionally applied. It is important for there to be protections for groups that have disproportionately received the death penalty in the past to maintain a fair justice system and to avoid these mistakes in the future.

²⁵¹ See *supra* notes 83–112 and accompanying text.