

LINCOLN MEMORIAL UNIVERSITY LAW REVIEW

VOLUME 2 SPRING 2015

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FOREWORD

CAPITAL PUNISHMENT: ITERATING TOWARD PERFECTION, WHEN PERFECTION IS UNATTAINABLE

*Charles E. MacLean**

We look back now with haughty disdain and self-righteous indignation at the law of capital punishment as it existed in America just a very short time ago: regularly executing convicts who were mentally ill¹ or retarded,² under the age of eighteen,³ or found guilty of non-homicide offenses.⁴ Not long ago in America, all-White juries and White judges, after hearing racially charged arguments from White prosecutors, took mere minutes to convict minority defendants who had been represented by patently ineffective

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¹ *Ford v. Wainwright*, 477 U.S. 399 (1986).

² *Atkins v. Virginia*, 536 U.S. 304 (2002).

³ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁴ *Coker v. Georgia*, 433 U.S. 584 (1977).

counsel.⁵ To many, this sounds horrific, and we may ask ourselves, “How could it have been like that in America?”

That was the reality just a few short years ago. The broken American capital punishment system of several decades ago began to change only after courageous legal researchers and scholars spoke up and confronted the hidden and tragic realities on America’s death rows. In this volume, a new group of young scholars and researchers pick up the mantle from those who came before and stand on their shoulders to confront the injustice and inequality played out still in today’s American capital punishment system. Tomorrow’s scholars will stand on the shoulders of the scholars whose vision and creativity is captured on these pages in the Lincoln Memorial University Law Review.

When a society chooses, through its criminal justice system, to execute certain criminals who have violated the law, that society must ensure that the system by which death is imposed is just, accurate, race-neutral, and defensible. If a society chooses to allow capital punishment to continue, the system must ensure that only the “worst of the worst”⁶ are executed, and that procedures are in place to compel the system’s decision-makers – prosecutors, judges, jurors – to

⁵ E.g., *Missouri v. Kinder*, 942 S.W.2d 313 (Mo. 1996). The White presiding judge in *Kinder*, while campaigning for his seat during pendency of the trial, had issued a press release stating in pertinent part, “The [other] party places far too much emphasis on representing minorities . . . people who dont’ [sic] want to work, and people with a skin that’s any color but white.” *Missouri v. Kinder*, Appellant’s Brief, No. 75082 (Mo. 1996) (excerpted at <http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides#7>). See also *Peek v. Florida*, 488 So. 2d 52, 56 (Fla. 1986) (wherein the White presiding judge, as the penalty phase was set to begin, stated in court, “Since the nigger mom and dad are here anyway, why don’t we go ahead and do the penalty phase today instead of having to subpoena them back at cost to the state”). See generally David Baldus, et al., *Comparative Review of Death Sentences: An Empirical study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 61 (1983).

⁶ *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting).

elevate law and reason over emotion and revenge. Of course, as humans, we are incapable of creating a perfect and error-free capital punishment system. One might then ask, if we cannot create a perfect capital system, then why have one at all? Conversely, since we cannot create a perfect capital punishment system, how much injustice and error should society accept before capital punishment becomes fundamentally unjust? These questions tear at the fabric of the death penalty system in America. They also, however, raise more questions.

Why do we ask such searching questions only of our capital punishment system? When a person is put to death by a constitutionally infirm and discriminatory system, most of us can perceive the need for change, and many of us call for change, but injustice permeates more than just the capital punishment system. Blacks are imprisoned today at twice the rate of Whites in *every* FBI crime category except driving under the influence of alcohol and other alcohol-related offenses.⁷ In a 2007 study, seven states reported an incarceration rate for Blacks that was ten times higher than that for Whites.⁸ Thus, we should be intolerant of discrimination no matter where it arises in the criminal justice system, and not just in capital cases. Arguably, there is only marginally less injustice when an unjustly convicted person is sentenced to life imprisonment instead of death. Perhaps the next steps to be taken by some of the researchers in this volume will be to address unjust convictions with a depth and breadth that spans the entire criminal justice system.

When society became uneasy with public executions, we moved them indoors. When society confronted the fact that execution by hanging, electrocution, or the firing squad

⁷ FBI, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 2012, table 43A (2013).

⁸ Marc Mauer & Ryan S. King, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE & ETHNICITY, table 6 (The Sentencing Project July 2007).

was unnecessarily painful and cruel, we substituted death by lethal injection. When a three-drug protocol occasionally led the condemned to suffer extreme pain and suffering, some states moved to a one-drug protocol. But these purported solutions are proverbial pats on the head, because the flaws and injustices reside at the core of the death penalty system. Thus, we must ask whether our society, like so many across the globe, should abolish the death penalty altogether.

Capital punishment as a research focus is a glum endeavor. Tragedy abounds on all sides of death penalty cases, and many would rather that the practice remain hidden from plain view, “off our radar” in execution chambers, and in the bowels of correctional facilities. This is precisely why the courageous young researchers who penned the student notes in this volume in conjunction with a 2013 Death Penalty Seminar at Lincoln Memorial University’s Duncan School of Law have contributed to the American capital punishment debate in extraordinary ways. Their efforts give life to the late Justice Thurgood Marshall’s concept that since “death is different,”⁹ our procedures and the quantum of due process must be of the highest order. Simply put, the research presented here *is* of the highest order.

Sheena Foster probes the special challenges and evidentiary dilemmas facing capital defendants suffering from Autism and Asperger’s Syndrome and their variants. Foster wisely concludes that evidence and expert testimony regarding a defendant’s disabilities must be admissible because otherwise, capital jurors may misinterpret visible symptoms of these mental illnesses as evidence of disinterest, lack of remorse, lack of empathy for the victim, or worse. Foster calls for broader admissibility to ensure these special defendants can truly have their cases heard by fully informed jurors.

Paige Coleman argues that America is perilously close to losing international credibility because we are so out-of-step

⁹ *Ford*, 477 U.S. at 411.

with the rest of the industrialized world on how we approach capital punishment. Most recently, America was the only remaining death penalty nation, other than Somalia, that continued to allow executions of criminals whose crimes were committed when they were juveniles. As Coleman notes, it is appropriate for us to consider other nations' approaches to the death penalty as we reconsider our own approaches.

Nick Davenport's thought-provoking note illuminates the links between Natural Law, the Declaration of Independence, and the American death penalty system. He posits, as Natural Law adherents explain, that by voluntarily continuing to live in America, we at least impliedly adopt and accept the criminal justice system's strictures, including the principle that the death penalty is an accepted penalty for the "worst of the worst." As Davenport argues, part of the price of living in and benefiting from this ordered society is that each of us tacitly accepts the risk that serious violations of criminal law can yield very serious consequences.

Ivy Gardner's thoughtful note demonstrates that cost-benefit arguments, although they may play a reasonable role in grander discussions of the capital punishment system as a whole, have no rightful place in individual capital cases and therefore should be suppressed. The issues in the penalty phase of a capital case are properly about the nature of the offense and the nature of the offender. There is no room in the sentencing equation for an argument that the decision maker should rule for or against execution because it is cheaper or more expensive than life imprisonment. As Gardner notes, such economic arguments, where a defendant's life is at stake, are at best unseemly, and at worst, unconstitutional.

Kendall English's note focuses on the *Atkins v. Virginia* decision and the constitutionality of executing capital defendants who suffer from developmental disabilities or mental retardation. As English concludes, the *Atkins* case has left the door open for states to set their own standards for determining which defendants are too mentally retarded to be

constitutionally executed, and in so doing, the Court has utterly failed to give the states any guidance on specific standards that might pass constitutional muster.

Randall Noe, a career Tennessee law enforcement officer, who has lost coworkers and friends through violent crimes, presents a moving and insightful history of Tennessee's experience (some may call it Tennessee's experiments) with capital punishment. Noe's insights into and connections with the topic were not merely the product of research at arm's length. Rather, they were earned the old-fashioned way – up close and personal.

The Supreme Court's struggle with capital punishment, at least since 1976, has not been easy or always in the same direction. In one case, all nine Supreme Court justices issued separate written opinions.¹⁰ Nor has the Court's struggle been solely or even predominantly about constitutional jurisprudence. Rather, the Court has engaged in a practice that appears more like an exercise of judicial will than a principled jurisprudential quest. At times, it seems like the Court has arrived at a pre-ordained outcome while struggling to find a constitutional hook to support its decision. Shouldn't it be the other way around? That is certainly not the kind of constitutional analysis the Court should typically perform.

In a very real sense, "death is different." Perhaps it is not enough to be an originalist and adhere only to the text and intent of the Framers. Perhaps it is not enough to be a "living Constitution" devotee and explain with a wave of the hand that the Framers intended these concepts to be malleable and adaptable over time as circumstances change. That makes the Supreme Court—not the people—in charge of telling us what the Constitution means now—and forever—in the death penalty area.

Ultimately, one's take on capital punishment is an individualized and complex equation that incorporates

¹⁰ *Furman v. Georgia*, 408 U.S. 238 (1972).

religious, ethical, and moral concepts within a legal context. It is a personal matter, indeed. Perhaps there is no one right answer, and perhaps our approach to terrestrial justice on Earth is doomed, as a product of humans who err, to be imperfect. But that does not moot the quest for perfection. Perhaps the “safest” religious, ethical, moral, and even legal path is to admit perfection is unattainable and simply abolish capital punishment as an option. But once a society has fervently decided to exact the most final retribution on its “worst of the worst” offenders that society must just as firmly bind itself to engage in that quest toward perfection, because “death is different.”

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AUTISM IS NOT A TRAGEDY... IGNORANCE IS: SUPPRESSING EVIDENCE OF ASPERGER'S SYNDROME AND HIGH-FUNCTIONING AUTISM IN CAPITAL TRIALS PREJUDICES DEFENDANTS FOR A DEATH SENTENCE

*Sheena Foster**

A jury is an unpredictable group. Each of the twelve jurors on a case could have a different and separate reason for reaching a verdict. The jury in each criminal case is asked to determine the guilt or innocence of a defendant, and in some cases that guilty verdict could lead to a death sentence for the accused. With a person's life at stake, the criminal justice system should take every possible precaution to make sure the jury is properly informed (while not misled) to make this decision. If a defendant suffers from mental deficiency or diminished capacity, relevant evidence in that regard must be presented to the jury for the twelve jurors to reach a properly informed decision. Evidence of mental deficiency or disability can be relevant to defendant's mental culpability - *mens rea* - for the crime, but these defects or disorders also explain a

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defendant's mannerisms and responses, both outside of court, and in full view of the judge and jury. For this reason, jurors should always be allowed to view or hear evidence that relates to a defendant's mental defect, disorder, or disability. Particularly in cases involving social disorders such as Asperger's Syndrome ("AS") and High-Functioning Autism ("HFA"), introducing the diagnosis to the jury could explain why the Defendant had particular reactions to other witnesses or victims before, during, or after the crime and why the defendant seems to lack remorse or normal social functioning in the courtroom. Without knowing and understanding a defendant's mental disorder, the jurors could misinterpret the defendant's social actions or lack of remorse as evidence of guilt.

I. MENTAL/SOCIAL DISORDERS

A number of mental/social disorders are closely related to and are parts of autistic spectrum disorders, including autism, HFA, AS, Deficits in Attention Motor Control and Perception ("DAMP") syndrome, and other disorders that are based purely on observable behaviors.¹ These disorders are complex and new research regarding these disorders is surfacing constantly. Many of these disorders are related; one disorder could be mistaken for another, or an individual could be suffering from more than one of these or related disorders at the same time.²

Asperger's Syndrome and HFA have been characterized as milder forms of autism, but each disorder varies widely in degree.³ Characteristics of AS include social isolation, oddness, obsessive special interests, eccentric or pedantic use of language, physical clumsiness, and sensory

¹ Maria Rhode, *Asperger's Syndrome: A Mixed Picture*, 31 PSYCHOANALYTIC INQUIRY 288, 288 (2011); Lotta Dellve, Lars Cernerud, and Lillemor R.-M. Hallberg, *Harmonizing Dilemmas: Siblings of Children with DAMP and Asperger Syndrome's Experiences of Coping with Their Life Situations*, 14 SCAND J CARING SCI 172, 172 (2000).

² Rhode, *supra* note 1, at 288.

³ *Id.*

hypersensitivity.⁴ For example, a coin collector who lives for his hobby, has no close friends, feels overwhelmed by bright lights and loud noises, has difficulties communicating with people, and is bewildered by social cues would fit the typical profile of a person suffering from AS or HFA.⁵

A problem arises in the court system when dealing with defendants who suffer from AS. First, the disorder is widely misunderstood by the general population and by most jury members. The disorder also varies in degree from person to person and there is no way to objectively measure such degrees as this disorder is based purely on observable behaviors.⁶ While low-functioning Autism will almost undoubtedly qualify a defendant as intellectually disabled and incompetent to stand trial, AS and HFA likely will not.⁷ The overlap between autism and mental retardation seems obvious, but courts in capital punishment states routinely hold there is no such correlation.⁸ The Supreme Court of Florida has held that while a diagnosis of AS serves purposes for mitigation, AS is considered a mere “mental illness [and] does not serve as a bar to execution.”⁹ The court’s decision was rendered in a case involving a defendant with AS, who was only eighteen years old and had the developmental and emotional age of twelve to thirteen.¹⁰ Louisiana has even included in its state law that a diagnosis of autism is not equivalent to a finding of mental retardation.¹¹ With courts making blanket decisions about AS and whether or not it rises to the level of mentally retarded, the need increases for the

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859, 896-97 (2009) (citing Eric Fombonne, *Epidemiology of Autistic disorder and Other Pervasive Developmental Disorders*, 66 J. CLIN. PSYCHIATRY 3, 4 (Supp. 10) (2005)) (Almost 70% of persons suffering from a disorder under the autistic spectrum meet the diagnostic medical criteria to be classified as mentally retarded, and 30% do not.).

⁸ Farahany, *supra* note 7, at 898.

⁹ Schoenwetter v. State, 46 So. 3d 535, 563 (Fla. 2010).

¹⁰ *Id.* at 543-44.

¹¹ LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(2)(a) (2008).

public, especially jurors, to be aware of AS, its symptoms, and how it affects behaviors and thoughts.

II. PSYCHIATRIC EXPERT TESTIMONY

Many courts have excluded evidence of psychiatric experts involving AS and HFA claiming any probative value would be substantially outweighed by the danger of confusing the jury causing members of the jury to speculate on how the disorder affected the defendant.¹² However, when the jury does not have this information, the jurors are left to assume the defendant has a normal brain which is socially functional. This situation actually creates a higher danger of juror confusion, because many social mannerisms exhibited by a person suffering from AS or HFA are very similar to reactions associated with a guilty mind.

If a defendant looks down at the table during the entire trial, jurors could interpret it to mean the defendant is ashamed and cannot bear to face the victims, witnesses, attorneys, or judge. In reality, looking down at the table may be something very common for persons with AS or HFA because isolation is a characteristic of both disorders.¹³ A jury lacking knowledge of the defendant's mental conditions is very dangerous for the accused, who could be unfairly viewed in a different light just because of the mannerisms that are symptoms of these mental conditions. There is no existing danger, as prosecutors argue, in equipping the jury with relevant facts about the defendant's mental conditions. The danger of prejudice lies with *not* introducing the evidence.

Reports have found persons suffering from AS or HFA have a greater history of violent behaviors¹⁴ and a greater tendency toward violent crime, including murder.¹⁵ Several different hypotheses have been suggested to explain the association of AS with violent crime, including "lack of

¹² *Minnesota v. Anderson*, 789 N.W.2d 227, 235 (Minn. 2010).

¹³ Rhode, *supra* note 1, at 288.

¹⁴ M. R. Woodbury-Smith, *High functioning autism spectrum disorders, offending and other law-breaking: findings from a community sample*, 17 J. FORENSIC PSYCHIATRY & PSYCHOL. 108 (2006).

¹⁵ D. M. Schwartz-Watts, *Asperger's disorder and murder*, 33 J. AM. ACAD. PSYCHIATRY & L. 390, 390 (2005).

empathy, social naiveté, excessive interests getting out of control,” and sexual preoccupations.¹⁶ However, this evidence does not prove having AS or HFA equates to a lack of intent. Expert psychiatric evidence would give the jury better insight into how the individual’s mind operates on a daily basis. The jury would still be free to determine, using the evidence presented, whether the defendant acted with the requisite intent. No expert can testify as to whether a person is guilty of a crime. This determination has always been and will be left to the jury.

Most states require the prosecution to prove intent to kill as an element of a murder conviction, and the jury must consider the defendant’s subjective state of mind to determine beyond a reasonable doubt whether that requisite intent existed at the time of the crime.¹⁷ In states that do not recognize the doctrine of diminished capacity, the jurors are left to speculate as to the mental state and brain functioning of a defendant whose mental state falls just shy of qualifying for an insanity defense. Minnesota courts, in particular, have held that psychiatric testimony cannot be used to disprove a defendant’s subjective state of mind – at the time of the crime – during the guilt phase of trial.¹⁸ “Without the doctrine of diminished capacity, an offender is either wholly sane or wholly insane, and criminal liability cannot be based on the degree of sanity an offender possesses.”¹⁹ However, as most psychiatrists would agree, mental health is not a black or white issue, but operates along a continuum,²⁰ yet this black or white/sane or insane decision is left up to a lay jury as it tries

¹⁶ Stewart S. Newman & Mohammad Ghaziuddin, *Violent Crime in Asperger Syndrome: The Role of Psychiatric Comorbidity*, 38 J. AUTISM & DEV. DISORDERS 1848, 1849 (Nov. 2008) (citing Y. Kohn, et. al., *Aggression and sexual offense in Asperger’s syndrome*, 35 ISRAEL J PSYCHIATRY 293 (1998)).

¹⁷ PAUL H. ROBINSON, CRIMINAL LAW 140-41 (1997).

¹⁸ *Minnesota v. Anderson*, 789 N.W.2d 227 (Minn. 2010) (citing *Minnesota v. Peterson*, 764 N.W.2d 816, 821-22 (Minn. 2009); *Minnesota v. Bird*, 734 N.W.2d 664, 677-678 (Minn. 2007); *State Minnesota v. Provost*, 490 N.W.2d 93, 104 (Minn. 1992); *Minnesota v. Brom*, 463 N.W.2d 758, 763-64 (Minn. 1990); *Minnesota v. Jackman*, 396 N.W.2d 24, 29 (Minn. 1986).

¹⁹ *Anderson*, 789 N.W.2d at 237.

²⁰ *Minnesota v. Bouwman*, 328 N.W.2d 703, 706 (Minn. 1982).

to decide the mental state of a defendant without proper expert evidence on the issue. Determining the subjective mental state of the defendant without the aid of an expert seems challenging at best. Add on the fact that the defendant might be exhibiting unexplained, odd, and guilty-looking mannerisms, and the task approaches impossibility.

III. THE M'NAGHTEN TEST FOR INSANITY

Most jurisdictions use some variation of the M'Naghten test to determine whether a defendant is insane for purposes of trial. This test comes from an English case in 1843 in which the House of Lords held that the defendant would be able to assert an insanity defense if, "at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, [he] did not know he was doing what was wrong."²¹ Therefore, if the defendant failed to know that what he was doing was either wrong or illegal or did not know the nature and quality of his act, he should receive a verdict of not guilty by reason of insanity. This M'Naghten Rule addresses awareness, an essential component of *mens rea* or intent, but awareness alone cannot suffice to fully explain a defendant's mental state. The human mind is a complex system of many mechanisms a lay jury could not be expected to comprehend. What if the mechanism that separates the knowing from the acting, the feedback loop, is the mechanism impaired?²² Assessing a defendant's awareness is not enough to understand his mental state.²³

"For defendants whose mental illness manifests itself by an inability to self-govern, it is unjust that their knowledge of the act's guilty nature denies them reprieve."²⁴ Schwarz describes how intent formation, having the express purpose of committing the crime, and awareness of the illegality of the

²¹ ROBINSON, *supra* note 18, at 512 (citing M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843)).

²² Charlotte Schwarz, *Irreconcilable Differences: Mens Rea and Mental Illness*, 20 WRITING IN & ABOUT MED. 41, 44 (Spring 2009).

²³ *Id.*

²⁴ *Id.*

crime, work in a feedback loop, but each is neurologically distinct.²⁵ This creates a fundamental asymmetry between law and medicine, as the law seeks to analyze guilt.²⁶ Situations that are more grey than black and white must be explained by an expert before any layperson on a jury can begin to understand the concepts at issue.

The underpinnings of such neurological and psychiatric diagnoses as AS and HFA are complex neural systems which remain at odds with M'Naghten's one-dimensional constraint to deliver an unequivocal verdict, and the gradients of mental illness are overlooked, resulting in a forced conformity.²⁷ In a society where death is still a viable punishment for crime, every level of mental illness must be examined during trial. The jury can still weigh the facts before them, but justice requires that the jury have *all* of the facts relevant to guilt. State prosecutors will argue that introducing evidence of mental illnesses that do not rise to the level of insanity might cause the jury to associate the mental illness with a lack of intent, but the jurors are left to weigh those facts. If our justice system leaves any room for error, that error should be on the side of life.

IV. IN MINNESOTA V. ANDERSON, A MINNESOTA COURT SUPPRESSED EVIDENCE OF ASPERGER'S SYNDROME

In *Minnesota v. Anderson*, Minnesota courts denied expert testimony which would have established that the defendant was suffering from AS and suppression of this testimony stripped Anderson of a fair trial.²⁸ Minnesota state courts have held that introduction of probative psychiatric testimony is overshadowed by the risk of confusing juries as to the legal elements of intent and premeditation, and that legal definitions of each are outside of a psychiatrist's practice.²⁹ However, in Anderson's case, and likely many

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Minnesota v. Anderson*, 789 N.W.2d 227, 234 (Minn. 2010).

²⁹ Brittany E. Bachman, CRIMINAL LAW: SUBJECTIVE INQUIRY INTO A DEFENDANT'S STATE OF MIND: SHOULD PSYCHIATRIC EXPERT TESTIMONY BE ALLOWED TO DISPROVE MENS REA?-- MINNESOTA V.

other similar cases, defense attorneys sought to introduce evidence of AS to help the jury understand how the disorder affected many parts of Anderson's life.³⁰

The suppressed expert testimony would have explained that AS impairs an individual's ability to socialize, communicate, empathize, or understand and respond properly to social cues,³¹ and persons with AS lack an understanding of what is socially acceptable.³² The court in *Anderson* believed that this was lay evidence, and that the jury could determine this type of general information without the help of an expert.³³ Both AS and HFA are rare, complex, and misunderstood disorders. Expert testimony would be absolutely necessary to avoid juror confusion, yet the state's attorney argued the evidence would lead to exactly that. As the jurors viewed Anderson's demeanor and facial expressions, they had no way of knowing these reactions were a result of his disorder. The judge even said to Anderson: "You have shown no remorse, no empathy, and I have no sympathy for you."³⁴ The jurors would have surely perceived Anderson differently if they had known of his inability to empathize and respond to social cues. Suppressing such evidence was clear error and unfairly prejudiced Anderson during his trial.

Persons affected by AS or HFA have an odd, pedantic manner of speaking³⁵ and poor nonverbal communication.³⁶ As Anderson's attorneys argued, although it fell upon deaf ears, these symptom-driven actions and mannerisms, both in the courtroom and in his behavior toward witnesses around the time of the event, can and will look negatively upon the defendant. Anderson's appearance was described as odd and

ANDERSON, 789 N.W.2d 227 (Minn. 2010), 38 WM. MITCHELL L. REV. 491, 503 (2011).

³⁰ *Anderson*, at 227.

³¹ *Id.* at 235.

³² *Id.* at 233.

³³ *Id.* at 233-34.

³⁴ Bachman, *supra* note 30, at 510-11.

³⁵ A. Klin, D. Pauls, R. Shultz & F. Volkmar, *Three diagnostic approaches to Asperger's syndrome: Implications for research*, 35 J. AUTISM & DEV. DISORDERS 221, 223 (2005).

³⁶ See L. Wing, *Asperger's Syndrome: A clinical account*, 11 Psychol. Med. 115 (1981).

scary, and this was unfairly prejudicial against him all because of his mental and social disorder. The expert testimony, if it had been admitted, would have allowed the jury to understand his appearance and actions.

V. A NON-TESTIFYING DEFENDANT IS STILL AT RISK WHEN EXPERT TESTIMONY IS SUPPRESSED

The argument for introduction of expert testimony remains even if the defendant does not take the witness stand to testify. The defendant sits at counsel table and is visible to the jury throughout the entire trial. Especially in cases where a death sentence could be imposed, juries are likely to observe the defendant closely in an attempt to find some type of justification in his behavior for the verdict they will render. Accordingly, first impressions are extremely important.

Just as a job applicant wants to put the best foot forward in the initial interview, a defendant needs to be free from a tainted first impression. The influences shaping a juror's thoughts and feelings about a particular case begin long before trial.³⁷ Indeed, "the decision-making process for a juror in any particular case begins as soon as the juror enters the courtroom and starts making assessments of the people and information that are presented."³⁸ Therefore, the defendant is being judged as soon as the jury members are walking through the door. This assessment will occur whether or not the defendant testifies.

Once the guilt phase of trial is completed, most states have much more lenient evidence rules with regard to mitigating factors. There is a lower burden of proof for mitigating factors, and relevance, as a hurdle to admissibility, in a capital case is lower in the sentencing phase than at any other time or any other type of trial. However, even when evidence of AS or related disorders is admitted during the sentencing phase of trial for mitigation purposes, the attempt to explain behavior is too little, too late. By the sentencing phase of trial, the jurors have already sat through many hours

³⁷ Richard C. Waites, *Are Jurors Equipped to Decide the Outcome of Complex Cases?*, 29 AM. J. TRIAL ADVOC. 19, 29 (2005) (citing Richard C. Waites, *COURTROOM PSYCHOL. & TRIAL ADVOC.* 535-37 (2003)).

³⁸ *Id.*

of trial, and they have already made up their minds as to the defendant's guilt. The picture of the defendant is firmly situated inside the jurors' minds, and any alternative explanation for the defendants' behavior is likely futile.

Another scholar of jury decision making conducted a study of capital trial jurors and premature decision making. What he found was quite telling. "One half of the capital jurors take a stand on the defendant's punishment before they even see the full inventory of evidence, of arguments, and of instructions for making the punishment decision."³⁹ Furthermore, those jurors who do take an early stand "are absolutely convinced of their early stands and stick with them consistently thereafter."⁴⁰ The same scholar also noted that even during the penalty phase deliberations, "the same inability, or unwillingness, to keep the decisions separate appears to allow jurors to justify a death sentence simply by pointing to the evidence of the defendant's guilt."⁴¹ Therefore, not only is it too late by the sentencing phase to change jurors' minds, but the jurors will also point back to the fact that he was guilty in order to justify their sentencing decisions. Thus, the defendant's uphill battle only steepens as the trial progresses. Opponents might argue juries are specifically told not to decide on punishment before the sentencing phase and are asked if they will keep an open mind throughout the trial, but studies show that regardless of how the jurors answer that question, one half have already made up their mind and will stick with that conclusion until the end.

Danger also exists in the defense looking like they are grasping at straws and trying to find any and every little thing to excuse the defendant's behavior. A juror might wonder why mental condition is even being raised, because if it was an important fact, then it would have been raised earlier during

³⁹ William J. Bowers, Marla Sandys, & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1529 (1998).

⁴⁰ *Id.* at 1529.

⁴¹ Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1019 (2001).

the guilt phase. They may assume, therefore, mental condition is unimportant.

VI. IN EDWARDS V. ROPER, THE DEFENDANT WAS
DIAGNOSED WITH ASPERGER'S SYNDROME ONLY AFTER
HIS TRIAL

For some, the diagnosis of AS or other developmental disorders comes too late. That was the case for Kimber Edwards, who is currently sitting on "death row."⁴² Edwards was convicted of the first-degree murder of his ex-wife, and the trial court entered a death sentence in accordance with the jury's recommendation.⁴³ Prior to trial, Edwards was evaluated by three medical experts to determine whether he was competent to stand trial, and whether he had a mental disease or defect that could provide a defense or significant mitigating evidence.⁴⁴

All three experts determined Edwards was competent to stand trial; however, one of the experts, Dr. Cross, alerted the defense team that Edwards had a 25-point difference between his verbal and performance IQ scales which was indicative of a developmental disability.⁴⁵ Another expert, Dr. Stacy, diagnosed Edwards with a pervasive developmental disorder (not otherwise specified).⁴⁶ Yet, all three experts reached the same conclusion; the defendant was competent to stand trial and free from any mental disease or defect that could provide a defense or mitigation evidence. The findings of the experts and their conclusions seem to be at odds. No complete social history was formed, nor was a specific diagnosis given prior to trial.⁴⁷ Edwards' case continued with no evidence introduced of AS in either the guilt or penalty phase. He was convicted and received a sentence of death.⁴⁸

⁴² Missouri v. Edwards, 116 S.W.3d 511 (Mo. 2003).

⁴³ *Id.* at 520.

⁴⁴ Edwards v. Roper, No. 4:06-CV-1419, 2009 WL 3164112, at *4 (E.D. Mo. Sept. 28, 2009).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at *1-3.

The post-conviction team began investigations and again three medical experts were retained. Dr. Cross had been on the team of three that had examined Edwards prior to trial. The team was finally able to compile a complete social history of the defendant and diagnose him with AS.⁴⁹ Dr. Logan, an on-board expert, opined that evidence of AS could have been offered to explain Edward's abnormal demeanor and his inability to reach an amicable agreement with his ex-wife regarding child support and custody issues,⁵⁰ yet this evidence was not even offered during the penalty phase for purposes of mitigation.

The defense attorneys for Edwards' trial even noted abnormal behaviors during their representation. The entire defense team found it extremely difficult to communicate with the defendant, and he demanded that his lawyers pursue irrelevant, time-wasting inquiries.⁵¹ Edwards also threatened to withhold exculpatory information from his attorneys unless they satisfied his demands.⁵² His attorneys had to spend many hours wasting time and going through boxes of irrelevant material just to try to regain the defendant's cooperation.⁵³ Edwards even asked the court to remove his lawyers at various times through his trial.⁵⁴ These behaviors are similar to characteristics of AS. Edwards's special interest became the trial, and he obsessed and needed to control it. This obsession prejudiced his opportunity to receive a fair trial, and the jury heard no mention of any mental or social disorder.

The need for introduction of AS evidence was clear in Edwards's case, but the appellate court was left with little discretion to do anything about it. Edwards's post-conviction team tried to allege ineffective assistance of counsel, but to win on such an argument they were required to prove the attorney's conduct fell below an objective standard of reasonableness, and Edwards was prejudiced because of the failure.⁵⁵ To get past the first prong of this test the post-

⁴⁹ *Id.* at *4.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at *4 n.6.

⁵⁴ *Edwards*, 2009 WL 3164112 at *4.

⁵⁵ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

conviction team would have to “show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”⁵⁶ This is a high burden, and the post-conviction team’s argument for ineffective assistance of counsel was unsuccessful.⁵⁷

The defense team did a reasonable job with the facts they were given and the medical records at hand, and it is almost impossible to speculate how a diagnosis of AS would have affected the outcome of the case. There are very few capital punishment cases nationwide involving similar issues and the medical studies surrounding AS are relatively new. Thus it is of utmost importance juries be properly informed as to the defendant’s medical condition so as to give an informed and unprejudiced decision regarding the defendant’s guilt and corresponding sentence.

VII. DEFENSE ATTORNEYS CAN CHOOSE NOT TO INTRODUCE PSYCHIATRIC EVIDENCE AND THIS WILL BE DEEMED PROPER TRIAL STRATEGY

With the growing complexity of scientific data to be introduced during a capital trial, the need for expert psychiatric testimony increases. However, some defense attorneys have chosen either not to elicit an expert diagnosis and analysis or completely leave out expert psychiatric testimony altogether. The following cases illustrate how the decision by the attorney can negatively affect the case, but the courts are unwilling to classify such an attorney’s conduct as ineffective assistance of counsel.

⁵⁶ *Id.* at 694.

⁵⁷ *Edwards*, 2009 WL 3164112 , at *12-13.

A. JACKSON V. UNITED STATES

A potentially autistic North Carolina man was convicted of murder and sentenced to death in 1995.⁵⁸ In preparation for trial, the government issued written notice to the defense that the government would only seek to introduce mental health experts in rebuttal to those introduced by the defense team.⁵⁹ Upon review of the government's potential rebuttal evidence, the defense team decided to withdraw its notice of intent to introduce mental health experts.⁶⁰ The defense team also failed to elicit any further mental health evaluations concerning Jackson's childhood and development.⁶¹ This trial strategy was deemed proper and in no way rising to the level of ineffective assistance of counsel.⁶² In other words, if a defendant does not receive the proper mental evaluations before trial, he is probably just out of luck.⁶³

However, denying expert testimony has not been the only problem for defendants and their assistance of counsel.⁶⁴ In some cases, the defense team introduces very damaging expert testimony, and this is still proper trial strategy.

B. MORTON V. SECRETARY, FLORIDA DEPT. OF CORRECTIONS

In a Florida case, Alvin Morton received a sentence of death for two 1992 murders.⁶⁵ Upon appeal, Morton received a new sentencing hearing.⁶⁶ During his first trial, Morton had a

⁵⁸ Jackson v. United States, No. 4:06-CV-1419, 2010 WL 2775402, at *1 (W.D.N.C. July 13, 2010).

⁵⁹ *Id.* at 6.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Jackson v. United States, 638 F.Supp.2d 514, 599-600 (W.D.N.C. 2009).

⁶³ *See id.*

⁶⁴ United States v. Cronic, 466 U.S. 648, 665 (1984) (discussing counsel's lack of criminal trial experience, "Every experienced criminal defense attorney once tried his first criminal case[. . .] but it does not justify a presumption of ineffectiveness. . .").

⁶⁵ Morton v. Sec'y, Florida Dept. of Corr., 684 F.3d 1157, 1162 (11th Cir. 2012).

⁶⁶ *Id.* at 1164.

psychiatric expert testify for mitigation purposes.⁶⁷ This expert testified that Morton had a mixed personality disorder with emotional instability.⁶⁸ After giving the diagnosis, the expert seemed to totally undermine Morton's plea for mercy.⁶⁹ The expert said Morton's "ability to develop into a more fully functioning individual was extremely limited,"⁷⁰ and that "given the state of the art and what we know, I would have a difficult time saying we could cure [Morton's] disorder."⁷¹

The expert went on to compare Morton's situation with that of a serial killer, which only made Morton look even worse to the jury.⁷² During the new sentencing hearing, Morton's attorney decided that even though the expert testimony did more harm than good, they would have the expert testify again at the second sentencing hearing.⁷³ Morton was again sentenced to die.⁷⁴ The appellate courts subsequently held that offering damaging expert testimony as to Morton's mental condition was proper trial strategy.⁷⁵

Again, these cases illustrate the importance of a correct diagnosis and helpful expert testimony.⁷⁶ Without these two things, a defense attorney's case is at a great disadvantage.⁷⁷

VIII. IN *PEOPLE V. MACKLEM*, PROSECUTORS REBUTTED EVIDENCE OF ASPERGER'S SYNDROME WITH IRRELEVANT BUT PERSUASIVE NEUROLOGICAL EVIDENCE

In *People v. Macklem*, the State of California originally sought the death penalty, but subsequently dropped the

⁶⁷ *Id.* at 1163.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1164.

⁷⁵ *Id.* at 1163.

⁷⁶ See *Morton v. Sec'y, Florida Dept. of Corr*, 684 F.3d 1157 (11th Cir. 2012); *Jackson v. United States*, 2010 WL 2775402, at *1 (W.D.N.C. 2010).

⁷⁷ *Id.*

pursuit for a death sentence in the joinder motion to consolidate the murder of Macklem's ex-girlfriend and the assault upon his prison cellmate.⁷⁸ Macklem was diagnosed with AS as a juvenile.⁷⁹

At the age of 18, Macklem killed his ex-girlfriend, Sarah Beagle.⁸⁰ While awaiting trial, Macklem also attacked his cellmate with a PVC pipe.⁸¹ Luckily for Macklem, the trial court allowed expert testimony about AS in front of the jury.⁸² The expert was allowed to testify about Macklem's mental state and how AS affected a person's thinking and behaviors.⁸³ Unfortunately for Macklem, the prosecutors came up with a way to rebut this evidence and convince the jury that the AS evidence was, in essence, "hogwash."⁸⁴ The state offered psychological evidence that there were no neurological, structural, or functional abnormalities that would explain or affect the defendant's behavior.⁸⁵ Yet AS and similar disorders in the autistic spectrum are characterized and diagnosed purely by observable behaviors.⁸⁶ An absence of visible deformities or damage to the brain does not equate to the lack of mental disorder.

Medical scholar Charlotte Schwarz published an article in 2009 attempting to explain how jurors respond to different types of expert psychiatric testimony.⁸⁷ She noted that use of neuro-scientific data in courts is becoming more routine as psychiatry has shifted toward biological models.⁸⁸ New medical technology has produced functional magnetic resonance imaging (fMRI), an increasingly accessible scanning technique that measures changes in brain blood-oxygen levels

⁷⁸ California v. Macklem, 57 Cal.Rptr.3d 237, 243 (2007).

⁷⁹ *Id.* at 680.

⁸⁰ *Id.* at 679-81.

⁸¹ *Id.* at 681.

⁸² *Id.* at 684.

⁸³ *Id.*

⁸⁴ *Id.* at 685.

⁸⁵ *Id.*

⁸⁶ Rhode, *supra* note 1, at 288.

⁸⁷ Schwarz, *supra* note 22.

⁸⁸ *Id.* at 42.

to indirectly chart thought and behavior.⁸⁹ Despite these advances, Schwarz cautions, “the admissibility and immediacy of this data create a misleading aura of scientific infallibility,”⁹⁰ because “there is not and will never be a brain correlate for responsibility.”⁹¹ Schwarz’s article points out what most people already know: a jury is an unpredictable group who will make decision based on whatever they wish, regardless of law or science.

Included in Schwarz’s article was Jessica Gurley and David Marcus’s examination of 396 mock jurors and how they responded to various categories of psychiatric and psychological evidence.⁹² The subjects studied were significantly more likely to declare a defendant not guilty by reason of insanity when the mock attorneys presented neuro-images or brain injury testimony to the jury.⁹³ The fMRI scans give the jury a visual connection to testimony about brain functions, but the scans are too variable from person to person to serve as a means for identifying culpability; what one would classify as normal brain features have yet to be determined.⁹⁴

There are certain brain deficiencies and mental illnesses such as mood disorders caused by disease of the basal ganglia that have detectable physiological traits; however, they are the exception, not the rule.⁹⁵ Observable defects from neural images do not directly correspond to severity of a condition, but their vividness has a disproportionate effect on jurors who tend to discount less tangible chemical imbalances.⁹⁶ The mock jurors were four

⁸⁹ *Id.* at 42 (citing Seiji Ogawa, *Oxygenation-sensitive Contrast in Magnetic Resonance Image of Rodent Brain at High Magnetic Fields*, 14.1 MAGNETIC RESONANCE MED. 68-78 (1990)).

⁹⁰ Schwarz, *supra* note 22, at 42.

⁹¹ *Id.* at 42 (citing Eyal Aharoni, *Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience*, 1124.1 *Annals of the New York Academy of Sciences*, 145-160, 145 (2008)).

⁹² Jessica Gurley & David Marcus, *The Effects of Neuroimaging and Brain Injury on Insanity Defenses*, 26.1 BEHAV. SCI. & L., 85-97 (2008).

⁹³ Schwarz, *supra* note 22, at 42.

⁹⁴ Gurley & Marcus, *supra* note 92, at 86.

⁹⁵ Schwarz, *supra* note 22, at 42.

⁹⁶ *Id.*

times more likely to convict a psychopath than a defendant with visible damage from head trauma.⁹⁷ There is no rational explanation for this result. A psychopath's condition could render him or her insane, and the person with visible damage from head trauma could reasonably have little or no mental effect from the damage. It seems unjust that the lack of visible damage or visible charting of blood-oxygen levels could keep some defendants from receiving a fair trial.

The inherent problems of mixing the medical and legal fields as described by Schwarz seem to be a big part of Macklem's problems. Even though the defense was able to introduce the evidence of AS, the prosecution had no problem rebutting the evidence by pointing out no neurological or structural abnormalities existed.⁹⁸ Macklem had a number of circumstances working against him. He had no visible damages or defects for the expert to show, his mental condition exists purely through observable behaviors, and there already exists a certain stigma around disorders in the autistic spectrum. Autism and its milder forms are highly complex and greatly misunderstood by most of society. Hollywood movies feature characters with autism, and some of these characters are extremely smart.⁹⁹ Many people assume that someone with AS or HFA is highly intelligent, has an excellent memory, and is good with numbers. It is quite difficult to fit this stereotype with any lesser form of culpability. In general, people believe that intelligent persons should be held responsible for their actions.

Macklem was found to have an average IQ even though he tested below average in areas of memory, thought processing, and academic skills.¹⁰⁰ Luckily for him, the trial judge allowed expert testimony of how AS affects persons with the disorder. The expert was able to testify that AS is demonstrated by "impaired social interaction, attention problems, rigid behaviors, and fantasy thoughts."¹⁰¹ The expert also explained that persons with AS generally have few

⁹⁷ Gurley & Marcus, *supra* note 92, at 93.

⁹⁸ Macklem, 57 Cal.Rptr.3d 237 at 245.

⁹⁹ See e.g., RAIN MAN (MGM 1988); TEMPLE GRANDIN (HBO Films 2010).

¹⁰⁰ *Id.* at 684.

¹⁰¹ *Id.*

friends, struggle with romantic relationships, go into rages and act out, and cannot explain or understand their behavior.¹⁰² He also noted that persons with AS are capable of manipulating situations to get what they want and generally do not care about how their behavior impacts or affects others.¹⁰³

This information was helpful considering that Macklem, before the crime, had conversations with his ex-girlfriend where she asked him to kill her to put her out of her misery.¹⁰⁴ Macklem often fantasized about killing her because he thought he would be helping her.¹⁰⁵ Sarah was also depressed about the death of a family member, and Macklem thought that by killing Sarah, she would be with that family member again.¹⁰⁶ The expert testimony likely helped connect the dots and explain part of Macklem's thought process and also why Macklem would have lacked remorse or sympathy for Sarah or her family.

Surely, the expert testimony did not fall upon deaf ears because Macklem only received a sentence of 25 years to life. He was eligible for the death penalty, and the state of California is not shy about pursuing it, but after discovery had begun, the prosecutors chose not to pursue it. The record does not reflect the state's reason for dropping pursuit of a death sentence, but if prosecutors knew what the expert testimony was going to entail, then it was a smart move on their part. Macklem's case stands for the proposition that evidence of AS should be introduced in every criminal trial, especially when death is a possible sentence. Competent psychiatric testimony/evidence may have saved Macklem's life.

IX. CONCLUSION

Being diagnosed with a disorder in the autism spectrum does not equate to a lack of intent to commit a crime, but it does have a direct effect on a person's mind and how the

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 679.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

mind perceives things. Not all persons with AS are automatically incompetent to stand trial or not guilty by reason of insanity. Evidence of AS is needed merely to help the jury make an informed decision. Suppressing such evidence denies the jury of highly relevant and crucial information. By hearing/viewing evidence of how AS affects persons, the jury is able to connect all the dots and properly decide whether the defendant had the subjective intent to commit the crime. Persons with AS do not deserve a “get out of jail free card,” but they deserve to offer before the jury all evidence relevant to culpability and mitigation.

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WHEN ONE LIVES IN A GLASS HOUSE, ONE SHOULD NOT THROW STONES: HOW CONTINUING TO ALLOW CAPITAL PUNISHMENT WHILE TRYING TO FOSTER HUMANITARIANISM ON A GLOBAL SCALE CAN NO LONGER CO-EXIST

*Paige Coleman**

The use of capital punishment has been a part of America's criminal justice system since the seventeenth century when colonists brought the practice from Europe where it was generally morally acceptable.¹ Similarly, when drafting the United States Constitution, specifically the Eighth Amendment's prohibition against "cruel and unusual punishment,"² our discerning forefathers intimated that the death penalty did not violate the Eighth Amendment, because the punishment, at least at the time, was neither cruel nor

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¹ Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1092 (2002).

² U.S. CONST. amend. VIII.

unusual.³ Ever consistent with our country's long-standing tradition of borrowing both law and policy from other nations, it was not seen as a public policy issue or an illegality to prescribe death for a host of crimes including, but not limited to the following: adultery, witchcraft, sodomy, and, of course, murder.⁴ Nevertheless, the United States of America has evolved and what may not have been seen as cruel or unusual in the eighteenth century very well may be in the twenty-first.

Abolition of capital punishment has subsequently become a vogue issue and a popular debate topic.⁵ This changing tide notwithstanding, the United States has failed to wholeheartedly embrace an abolishment of the death penalty and the Supreme Court has yet to completely rule against the death penalty within the context of the Eighth Amendment.⁶ Because of this, the United States has pitted itself against many international communities and, at least to some extent, this rift has given way to a renewed debate among the Supreme Court Justices concerning what impact, or lack thereof, international pressure or law or sentiment should have on future decisions relating to the death penalty.⁷

In *Roper v. Simmons*, an eighteen-year-old defendant was convicted and sentenced to death for a murder he committed as a juvenile.⁸ After successfully petitioning for a writ of habeas corpus, the Missouri Supreme Court granted relief and the Supreme Court of the United States ultimately granted certiorari.⁹ The Court held that to execute a person who was a minor at the time of the crime's commission does not fit within the parameters of the Eighth and Fourteenth

³ Koh, *supra* note 1, at 1091-92.

⁴ *Id.* at 1092.

⁵ *Id.* at 1093.

⁶ Franklin E. Zimring, *Postscript: The Peculiar Present of American Capital Punishment in, Beyond Repair?*, AMERICA'S DEATH PENALTY 212, 213 (Stephen P. Garvey ed., 2003).

⁷ William A. Schabas, *International Law and the Abolition of the Death Penalty in, Beyond Repair?* AMERICA'S DEATH PENALTY 178, 210 (Stephen P. Garvey ed., 2003).

⁸ 543 U.S. 551, 558 (2005) (the defendant was only seventeen when he committed the murder).

⁹ *Id.* at 559.

Amendments, and is, therefore, cruel, unusual, and unconstitutional.¹⁰

The *Roper* opinion is noteworthy for many reasons, but within the context of this article, it signifies the Court's willingness to consider the "overwhelming weight of international opinion" against use of the death penalty in some situations¹¹. Justice Kennedy wrote the majority opinion and stated that while international sentiment was certainly not controlling, it was a "respected and significant confirmation for the Court's determination"¹² This case, if nothing else, leaves the door open for future courts to not only consider domestic sentiment for or against capital punishment, but also to consider global sentiment when seeking to quantify standards of decency.

I. INTRODUCTION

Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favour the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favourable aspect, while the poor defendant often has a lawyer assigned by the court. Sometimes such assignment is considered part of political patronage; usually the lawyer assigned has had no experience whatever in a capital case.¹³

Debates regarding the death penalty are naturally predicated on both the content and the meaning of the Eighth Amendment to the United States Constitution, and "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."¹⁴ The Eighth Amendment derives "its meaning from the evolving standards of decency that

¹⁰ *Id.*

¹¹ *Id.* at 554.

¹² *Id.*

¹³ *Furman v. Georgia*, 408 U.S. 238, 251 (1972) (quoting the Warden of Sing Sing, James E. Lawes).

¹⁴ *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

mark the progress of a maturing society.”¹⁵ Much jurisprudence regarding the death penalty within the framework of an Eighth Amendment argument has been centered around the ever elusive evolving standards of decency concept. For many, the argument is such that only the American evolving standards of decency are applicable. Others argue the net should be cast wider such that it would, at a minimum, consider evolving standards of decency for the human race at large.

At least for the Supreme Court, evolving standards of decency have been solely those held by the United States with very little deference given to international law. The opinion in *Trop* left little, if any, room for doubt on the subject holding that only the “American [notions] of decency . . . are dispositive and the sentencing practices of other countries are [not] relevant.”¹⁶ The Supreme Court opinion went further by establishing that the practices of other democracies can be relevant to whether the American people would view the practice as tolerable.¹⁷ The definitiveness in *Trop* notwithstanding, subsequent Supreme Court holdings concerning the use of capital punishment have been less definitive. This has at least left the door open, even if only slightly, for the counterargument that favors an international, human race based context when assessing the evolving standards of decency.

For purposes of this article, I contend that the counter argument must prevail. A global definition of these standards must be considered because the death penalty, within the context of the American system of justice, does not exist inside a vacuum. To believe otherwise would be to disregard variables such as: an ever shrinking global community, international pressure, international treaties prohibiting use of the death penalty, and rulings from International Courts regarding the American death penalty. It seems illogical to conclude that the United States, a country that profoundly embraces diversity and multiculturalism and readily embarks upon humanitarian missions in other countries when an injustice is being done to the citizenry of those countries,

¹⁵ *Id.* at 101.

¹⁶ *Stanford v. Kentucky*, 492 U.S. 361, 405 (1989).

¹⁷ *Id.*

continues to endorse such a narrow-minded view of what embodies the evolving standards of decency. Despite the apparent absurdity, this is indeed the case. International law, policy, and procedure regarding the death penalty had traditionally been given only tangential reference within the American system of justice.

This article will seek to establish that the United States cannot continue, without ever increasing difficulty, to both encourage democracy on a global scale and participate in the sanctioning of those countries that have, in the opinion of our nation's leaders, committed crimes against humanity, while at the same time allowing capital punishment in its own backyard. This article will seek to establish the practices of encouraging democracy on a global scale and sanctioning those countries that have, in the opinion of our nation's leaders, committed crimes against humanity. These practices whether via humanitarian aid or military force, cannot continue at all, or at least without immense difficulty, if the United States continues to allow capital punishment. Then, once it has been established that capital punishment in the United States cannot continue, at least not while also seeking to further humanitarianism, this article will look towards justifying the abolishment of capital punishment via three separate premises: One, borrowing that which is being done or has been done by other like-minded nations or democracies and appears successful, desirable, and achievable to the United States is not a novel idea and it is logical to do the same when assessing the evolving standards of decency. Two, the death penalty cannot be sustained because it is unconstitutional for reasons that span well beyond the Eighth Amendment's prohibition against cruel and unusual punishment. Finally, from a textual standpoint, the mother of the United States Constitution, that is the Declaration of Independence, requires that the dignity of life for all men must be protected.

II. ENCOURAGING DEMOCRACY ON A GLOBAL SCALE AND SANCTIONING THOSE COUNTRIES THAT HAVE COMMITTED CRIMES AGAINST HUMANITY CANNOT CONTINUE WITHOUT IMMENSE DIFFICULTY, IF THE UNITED STATES CONTINUES TO ALLOW CAPITAL PUNISHMENT.

The United States is geographically and judicially isolated from the international opinion of the death penalty as a form of criminal punishment. A March 2012 survey revealed that one hundred and forty-one countries (141) had completely banned the use of capital punishment in both law and practice, whereas only fifty-seven countries continued to allow use of the death penalty.¹⁸ In addition to those countries banning capital punishment outright, another thirty-six countries have done so in practice despite having no formal legislation renouncing their use of the death penalty.¹⁹ In sum, as of 2012, the number of countries that do not execute prisoners was nearly five times higher than the number of countries that practice capital punishment.²⁰ Suffice it to say that the global trend has clearly been to extinguish capital punishment as a practice and the United States has not kept pace with the trend.²¹

Europe has prohibited use of the death penalty due to pressure from the Council of Europe which requires abolishment of the death penalty for any country wishing to become or remain a member of the European Union.²² Asia and the Middle East, like the United States, still practice capital punishment.²³ Specifically, in 2012, the United States, China, Iran, North Korea and Yemen ranked as the top five

¹⁸ VICTOR STREIB, *DEATH PENALTY IN A NUTSHELL* 280-81 (4th Ed. 2013).

¹⁹ *Id.* at 281.

²⁰ Simon Rogers & Mona Chalabi, *Death Penalty Statistics, Country by Country*, THE GUARDIAN DATA BLOG (Dec. 13, 2013, 7:00 AM), <http://www.guardian.co.uk/news/datablog/2011/mar/29/death-penalty-countries-world#> (citing statistics from Amnesty International).

²¹ STREIB, *supra* note 18, at 280.

²² *Id.* at 281.

²³ *Id.*

nations based on the number of executions performed.²⁴ Excluding China, because government secrecy precludes an accurate representation of the true number, at least six hundred and eighty (680) executions occurred in 2012.²⁵ Of these, 314 occurred in Iran, 129 in Iraq, 79 in Saudi Arabia, and 43 in the United States.²⁶

Two American idioms frame the issue at hand: those that live in glass houses ought naught throw stones and if one lies down with dogs, one is likely to get up with fleas. The threshold question is: How can the United States continue to police the world against what our nation collectively, legislatively, or judicially views as immoral or illegal activity (i.e., throw stones), subject the rest of the world to America's evolving standards of decency, and then contradict this same practice (i.e., living in a glass house) in terms of the death penalty? The second question is, if the United States continues to be one of the top countries executing prisoners (lie down with dogs), will we not, at some point, be viewed in the same light from a human rights perspective as the other members of the group (wake up with fleas)?

In short, the United States cannot live in a glass house and then throw stones at all the evils in the world because doing so will destroy our own house. The answer to the threshold question is quite simple; continuing with capital punishment in the United States cannot continue without substantial change because such blatant hypocrisy will continually lessen the credibility of our nation. When seeking to further advance our values of freedom, democracy, and the veneration of human rights in spite of the obvious contradiction will only allow the reputation of the United States as a world leader to continue to fall from grace. This is obviously not an acceptable answer, but neither is the converse, which is to continue our slumber with the dogs, resulting in a flea infestation rendering the United States as a nation to be avoided by those without fleas. Accordingly, the only option available is to change the company we keep and become a nation fully supportive of the policies that we preach

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

by abolishing the use of capital punishment in the United States.

III. BORROWING LEGAL PRINCIPLES AND POLICIES USED BY OTHER COUNTRIES IS NOT A NEW PRACTICE, AND IT IS LOGICAL TO DO THE SAME WHEN ASSESSING STANDARDS OF DECENCY.

The Court in *Roper* has proven to be very insightful as this argument too is best begun by again quoting from the opinion. "The [constitution] sets forth...innovative principles original to the American experience...These doctrines and guarantees...remain essential to our present-day self-definition and national identity."²⁷ However, we do not honor the Constitution because "we know it to be our own. It does not lessen our fidelity to [it] or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage freedom."²⁸

Both the Supreme Court and the Legislature have not only given due deference to the international consciousness, and even to the laws and policies of other nations when ruling or enacting laws because, quite frankly, our Nation was founded upon borrowed principles. In fact, the first ten amendments to the United States Constitution came from the English Bill of Rights.²⁹ The Eighth Amendment to the United States Constitution is nearly identical to that of the English Bill of Rights which states, "excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."³⁰ The English Bill of Rights reflected the ideals surrounding the laws of Edward the Confessor who, in turn, was influenced by France as he spent most of his childhood in Normandy.³¹

²⁷ *Roper*, 543 U.S. at 577-79.

²⁸ *Id.*

²⁹ Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.).

³⁰ 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 267 440, 441 (1689).

³¹ *Recent Cases, Constitutional Law--Cruel and Unusual Punishment Provision of Eighth Amendment as Restriction Upon State Action Through the Due Process Clause*, 34 MINN. L. REV. 134, 135 (1950).

In short, the United States is, and always has been, a hodge-podge of different cultures spanning far beyond just that of our English origins, which include the often forgotten American Indian presence that was here long before the Colonists and the Spanish conquistadors. Lastly, our Nation is bordered by Canada and Mexico thereby making it a near impossibility not to at least purport to listen to the consciousness of those two countries specifically.

Even with the United States' longstanding tradition of borrowing jurisprudence from those countries that have undeniably influenced us, there remain staunch holdouts among the Supreme Court Justices that seem unwilling to give the tradition proper deference. Justices Thomas and Scalia joined Chief Justice Rehnquist in his dissenting view in the *Atkins* case where he said, "[w]hile it is true that some of our prior opinions have looked to the climate of international opinion to reinforce a conclusion regarding evolving standards of decency; we have since explicitly rejected the idea that the sentencing practices of other countries could serve to establish the Eighth Amendment prerequisite, that [a] practice is accepted among our people."³² Justice Thomas stood strong in this opinion, referencing it again in 2002 with a concurring opinion in support of the Supreme Court of Florida's denial of a writ of certiorari.³³ Similarly, in his dissenting view in a later case that, while not specifically dealing with the death penalty, did center around Eighth Amendment jurisprudence, Justice Scalia again downplayed the weight of consideration, if any, that should be afforded to international law. His dissent claimed that "[c]onstitutional entitlements do not spring . . . into existence . . . because foreign nations decriminalize conduct" and [t]he Court's discussion of . . . foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'³⁴ Not surprisingly, Justices Rehnquist and Thomas both joined him in this dissenting view as well.

³² *Atkins v. Virginia*, 536 U.S. 304, 324-25 (2002) (quoting *Stanford v. Kentucky*, 492 U.S. 361 (1989) which emphasized that "American conceptions of decency ... are dispositive").

³³ *Foster v. Florida*, 537 U.S. 990 (2002).

³⁴ *Lawrence v. Texas*, 539 U.S. 558, 598 (2003).

Conversely, and more attuned to the rich tradition surrounding the practice, there are those that believe international law has an important place in the jurisprudence of the United States. Justice Ruth Bader Ginsburg, in an article that she co-wrote in 1999, said that “[e]xperience in one nation or region may inspire or inform other nations or regions . . . , as generally holds true for human rights initiatives.”³⁵ She went further by explaining how such countries as India, Germany, and the European Court of Justice have all referenced or borrowed decisions made by the Supreme Court of the United States in one form or another.³⁶ Yet, as Justice Ginsburg pointed out, the United States is not as willing to look “beyond one’s own shores.”³⁷ In response to the mere notion that the United States Supreme Court should look further than our own shoreline, the Court said, “[w]e think such comparative analysis inappropriate to the task of interpreting a constitution.”³⁸

In Justice Ginsburg’s opinion, “comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.³⁹ We are the losers if we neglect what others can tell us about endeavors to eradicate bias For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.”⁴⁰

If abolishment of the death penalty in the United States is the bull’s eye, which I contend in this article that it should be, then recent Supreme Court jurisprudence surrounding the controversial topic is most certainly the dart, and the Court is beginning to narrow in on the target. In fact, the Court’s degradation of capital punishment began almost immediately after reinstating the practice in 1976. For example, in 1977, the Supreme Court held it unconstitutional to impose the death sentence for the crime of rape where the victim was an adult

³⁵ Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 *CARDOZO L. REV.* 253, 282 (1999).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

and not killed during the commission of the crime.⁴¹ In 1982, the Court held that without proof that a killing occurred, or an attempt therein, regardless of whether the person intended to take a life, the death penalty cannot be sustained.⁴² In 1986, the Court disallowed further execution of any person declared to be insane;⁴³ in 2002, death as a consequence for a mentally retarded individual was declared unconstitutional;⁴⁴ and finally, in the 2005 *Roper v. Simmons* case, the Supreme Court held it violated the Eighth Amendment's prohibition against cruel and unusual punishment, and therefore unconstitutional, to execute a person who was, at the time the crime was committed, a juvenile.⁴⁵

In *Roper*, Justice Kennedy wrote that both a recent state trend toward abolition of capital punishment for juvenile offenders and an international trend toward the same goal played a role in the ultimate holding.⁴⁶ Understanding how domestic and international trends affect the United States' Government or Jurisprudence requires little more than an elementary level government or civics class; it is quite easy to see. Additionally, paying attention to our Nation's consciousness and ruling with it in mind, even slightly, is not a new notion for the Supreme Court; nor is it unusual for the Legislature to enact laws based on the pulse of our nation. One specific example, as it relates to the Eighth Amendment's cruel and unusual punishment provision, was referenced earlier but is equally as applicable to the argument at hand particularly when the preceding words are included. In *Trop*, writing for the majority, Chief Justice Warren said, "[where] the words of the Amendment are not precise, and...their scope is not static[,] the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁴⁷

⁴¹ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) ("We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.").

⁴² *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

⁴³ *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

⁴⁴ *Atkins*, 536 U.S. at 321.

⁴⁵ *Roper*, 543 U.S. at 578-79.

⁴⁶ *Id.* at 552-604.

⁴⁷ *Trop*, 356 U.S. at 100-01.

But how is one to establish that which is ever evolving? The opinion in *Coker* gives at least some insight into this question. The *Coker* court held that evolving standards of decency must be measured, wherever possible, using “objective factors.”⁴⁸ The factors elucidated by the opinion included: public attitudes regarding a particular punishment, legislative attitudes, and jury trends as reflected in their sentencing decisions.⁴⁹ Yet, nowhere in the opinion does it specifically say these criteria must be American notions or ideas. Of course, jury trends would likely involve those trends occurring within our own justice system, but even major trends or shifts in other democratic societies with similar justice systems would be, at the very least, relevant to a discussion about the death penalty being within a human rights context. Even if the jury trend argument is a stretch, and I do not believe that it is, the remaining two factors given by the *Coker* opinion, public attitudes and legislative attitudes are equally more important on a global scale than they would be if viewed only from the American perspective.

IV. THE DEATH PENALTY CANNOT BE SUSTAINED BECAUSE IT IS UNCONSTITUTIONAL FOR REASONS SPANNING WELL BEYOND THE EIGHTH AMENDMENT.

According to the United States Constitution, it, along with “the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁵⁰ Further, redress is statutorily available, generally in the form of a habeas corpus petition, for any person “in custody in violation of the Constitution or laws or treaties of the United States.”⁵¹ Thus,

⁴⁸ *Coker*, 499 U.S. at 592.

⁴⁹ *Id.*

⁵⁰ U.S. CONST. art. VI, cl. 2 (capitalization intentionally left as it appears within the document).

⁵¹ 28 U.S.C. § 2254(a) (West, WestlawNext current through P.L. 113-49, 2013).

it is unconstitutional to execute any individual in violation of any treaty to which the United States is a party, and even for textualists such as Justices Scalia and Thomas, who believe that interpretation of the Constitution can be done only through an understanding of its original public meaning, this interpretation would be difficult to circumvent.

Such treaties do exist although they are very often shrouded with administrative and interpretive hyperbole. Particularly applicable to a current day argument against use of the death penalty in violation of an international treaty is that the death penalty is discriminatory which violates the International Convention of the Elimination of All Forms of Racial Discrimination (ICERD).⁵² The treaty, which called for all ratifying nations to review their laws and policies in an effort to identify any that have a discriminatory effect and then to take appropriate remedial action was ratified by the United States in 1994.⁵³ In so doing, our nation was bound to the terms just as a citizen would be bound to a constitutional provision. Although a thorough and exhaustive discussion of discrimination within the American death penalty scheme is not possible within the confines of this paper, suffice it to say that there is a great deal of evidence to support a finding that it is rampant and very likely unavoidable. Allowing it to continue is in violation of the Constitution.

Additionally, in 1948, battered from having recently endured two World Wars and with a renewed sentiment towards the globalization of human rights on their side, the United Nations General Assembly adopted the Universal Declaration of Human Rights.⁵⁴ The Declaration, which was drafted by a committee of nine members, including former first-lady Eleanor Roosevelt as the committee's chairperson, proved to be the springboard for what is modern day human rights jurisprudence.⁵⁵ One of the major objectives of the

⁵² See STREIB, *supra* note 18, at 287-88.

⁵³ *Id.*

⁵⁴ The United Nations, Website Regarding the Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/history.shtml> (last visited March 12, 2013).

⁵⁵ *Id.* (listing the other drafters as: Dr. Charles Malik (Lebanon), Alexandre Bogomolov (USSR), Dr. Peng-Chang (China), Rene Cassin (France), Charles Dukes (United Kingdom), William Hodgson

document was an initiative to globally abolish capital punishment.⁵⁶ To this end, the drafters desired to unequivocally set forth the idea that every human being, regardless of nationality or race or gender, has a right to life and must not be forced to endure torture or inhumane treatment. The Universal Declaration of Human Rights is a tangible representation of “the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights.”⁵⁷ As a result of this document and our nation’s involvement in its development, it is not surprising that many of the laws affecting the use of capital punishment are generally derived from the Universal Declaration of Human Rights (“UDHR”).

Where the United States is concerned, the treaty was ratified but only with conditions that were clearly included to avoid any entanglement with the American death penalty.⁵⁸ Adding further fuel to the fire, President Clinton, in 1998, issued an executive order which stated that any treaty enforcing human rights would be fully recognized and implemented by the United States, including the larger treaty of which the UDHR is a part, the International Covenant on Civil and Political Rights (ICCPR). To date, both have been little more than lip service, but the time may be ripe for a constitutional challenge in this area.

V. THE DECLARATION OF INDEPENDENCE IS SPECIFIC: ALL MEN ARE CREATED EQUAL AND ALL MEN POSSESS CERTAIN UNALIENABLE RIGHTS, INCLUDING THE RIGHT TO LIFE. THIS RIGHT BELONGS TO ALL MEN, NOT ONLY AMERICAN MEN.

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty

(Australia), Hernan Santa Cruz (Chile), and John P. Humphrey (Canada)).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See STREIB, *supra* note 18, at 284.

and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men[.]”⁵⁹

Admittedly, the Declaration of Independence does not contain a provision regarding enforcement. Nonetheless, as an important historical document, and the physical representation of the birth of the United States, it “set forth the constitutional obligation to protect life, liberty, and the pursuit of happiness” as well as the requirement that these rights, applicable to all men, be protected on an equal basis.⁶⁰ Simply stated, the Declaration of Independence elucidated that men form governments in an effort to “secure their coequal interests in ‘unalienable rights[.]’”⁶¹ As such, the drafters of the document necessarily meant that the rights are “innate, rather than created by states or nations [and] the Declaration recognize[d] that some dignity interests precede the Constitution.”⁶²

Any argument suggesting that there is a dignity interest more important or deserving of protection than life is doomed to fail. Without life, there is no reason to strive for anything else because, quite obviously, there is nothing left. The birth of the United States of America was predicated upon the notion that all men are equal and deserving equally of certain rights, one of which is life. The Declaration did not specify that only Americans are created equally, that only American life should be protected, and only American rights protected. Quite the opposite, the Declaration was specific in applying these rights, and the protection thereof, to all men. Consequently, when pontificating about whether or not to include international law in any dialogue about evolving standards of decency, the United States Supreme Court must remember that the mother of the Constitution, the Declaration of Independence, applies the rights and protection of them to all men and the Court should do the same.

⁵⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁶⁰ Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 694-95 (2012).

⁶¹ *Id.*

⁶² *Id.* at 698.

VI. CONCLUSION

As an adolescent, I could not fully appreciate that the choices one makes today are the seeds of a flower called consequence and, once planted, they bloom for one's entire life. As adults, we understand this because our seeds were long ago planted and we live with the bloom of consequence, be it good, bad, or indifferent, on a daily basis. Thus, collectively, we give adolescents a chance to act in a way that we would deem inappropriate, at least on certain issues, because they are still maturing and experiencing and growing and need the time to falter so that life's lessons will be impressionable ones. We offer advice, support, and even punishment in an effort to fully develop the gardening skills of our youth with the hope that, in the future, if allowed to bloom, their gardens will be brilliant.

America is a young country and our garden is still growing.

We stand shoulder to shoulder with powerful, exemplary nations, but we do so in spite of the fact that they, as the adults, tolerate certain policies and practices from the United States, those which stand in opposition to their own, because we are still growing. This tolerance, much like that which we give to the adolescent is short lived. The United States must evolve and begin to act in a responsible and civilized manner before too many of the seeds we have planted in the past turn out to be bad consequences in the future and we find ourselves left only with the company that we did not mean to keep.

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**“HE WHO WISHES TO PRESERVE HIS LIFE AT
OTHERS’ EXPENSE SHOULD ALSO BE READY TO
GIVE IT UP FOR THEIR SAKE.”¹
HOW NATURAL LAW AND THE DECLARATION OF
INDEPENDENCE JUSTIFY CAPITAL PUNISHMENT.**

*Nicholas Davenport, V**

I. INTRODUCTION

“What gives a state the right to imprison a person?”² The simplest answer is that the person broke the law.³ Justifying punishment, however, is not, and should not, be so simple. It is generally accepted that our government is allowed to punish persons who commit crimes.⁴ Professor John Bronsteen⁵ demands that a “developed theory”⁶ is needed to justify punishment by society. The purpose of this article is to

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¹ JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, AT 36 [1762] (G.D.H. Cole trans., Barnes and Noble 2005).

² John Bronsteen, *Retribution's Role*, 84 *IND. L.J.* 1129, 1129 (2009).

³ *Id.*

⁴ *See id.*; *see also* Kyron Huigens, *The Jurisprudence of Punishment*, 48 *WM. & MARY L. REV.* 1793 (2007).

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⁶ Bronsteen, *supra* note 2, at 1154-55 (suggesting theories such as neo-Kantian, Rawlsian social contract theory, and fair play).

provide a justifying theory for capital punishment in the United States.

Generally speaking, the death penalty debate focuses on whether it is right or wrong, and whether the United States should continue to punish by death. Some people advocate for the death penalty because of concepts like retribution and punishment. Others believe the death penalty serves no legitimate purpose and risks executing innocent people; for instance, one scholar states that

[T]he death penalty is discriminatory in administration in a country rife with background racial discrimination, that it cannot be fairly and effectively administered when used as sparingly as it is usually used, that having a death penalty creates too great a gulf between the United States and other democratic nations, or that there is insufficient evidence that the death penalty has greater deterrent value than life in prison without parole.⁷

The focus on capital punishment involves whether we should continue to have the death penalty. It is not surprising that debates regarding capital punishment are generally focused on whether the United States should continue to allow it as a practice; but the far better debate would focus on whether, and to what extent, there is a moral justification for the practice that goes beyond the notions of “retribution” and “punishment.”⁸ For instance, some death penalty advocates “may believe that the death penalty is what some murderers, i.e., the worst of the worst, deserve by dint of their wrongdoing.”⁹ However, the “he deserves it” approach is more difficult to justify; additionally, one must subscribe to a

⁷ Claire Finkelstein, *A Contractarian Argument Against the Death Penalty*, 81 N.Y.U. L. REV. 1283, 1284 (2006); see generally, Death Penalty Focus website, <http://www.deathpenalty.org/index.php>.

⁸ See Finkelstein, *supra* note 7, at 1288 (analyzing the terms “deterrence” and “retribution” as applied to the death penalty).

⁹ Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 422 (2005).

moral basis in order to support the fact that the person “deserves” death.

This article seeks to clarify America’s relationship with capital punishment through one of the country’s most important documents. This article will distinguish America’s philosophy on capital punishment from the rationales of other countries that also have the death penalty. Unlike in the movie “National Treasure,”¹⁰ the actual Declaration of Independence does not contain a treasure map, but it does contain evidence of a concept that reveals why America implements capital punishment.

I. THE DECLARATION OF INDEPENDENCE, THE “RIGHT TO LIFE,” AND ESTABLISHING AMERICAN MORALS.

A. A RIGHT TO LIFE IS PROVIDED TO ALL AMERICANS.

The Declaration of Independence enshrines three basic rights: life, liberty, and the pursuit of happiness.¹¹ “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.”¹²

“The right to life is the only fundamental right, from which all other rights are derived.”¹³ The Constitution, specifically the Bill of Rights, provides all other American rights. Why would the Founding Fathers not list the “right to life” in the Bill of Rights, but list the “right to life” in the Declaration?¹⁴

The authority of the Declaration of Independence is not usually described as fundamental law; therefore, using the

¹⁰ NATIONAL TREASURE, Director Jon Turteltaub, Walt Disney Pictures, Jerry Bruckheimer Films, Junction Entertainment, Saturn Films (2004).

¹¹ *Life, Liberty, and the Pursuit of Happiness*, Principles of a Free Society website, Ayn Rand Center for Individual Rights, <http://principlesofafreesociety.com/life-liberty-pursuit-of-happiness/> last accessed Mar. 14, 2013.

¹² THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

¹³ *Life, Liberty, and the Pursuit*, *supra* note 11.

¹⁴ Compare U.S. CONST. amend. I- XXVII, with THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

Declaration as a primary reference in legal argument rarely occurs. Some might argue that the Declaration is only an emancipation document that does not carry legal authority in the common use of the term “law;” however, there are those that disagree. Professor John Eidsmoe, who is an attorney, an author, and a professor of constitutional law and legal history at Faulkner University’s Thomas Goode Jones School of Law in Montgomery, Alabama, describes it as “fundamental law:”

[t]he role of the Declaration of Independence in American law is often misconstrued. Some believe the Declaration is simply a statement of ideas that has no legal force whatsoever today. Nothing could be further from the truth. The Declaration has been repeatedly cited by the U.S. Supreme Court as part of the fundamental law of the United States of America.¹⁵

If fundamental law is characterized as a base law from which all other law extends, then the Declaration is perhaps “fundamental law.” However, it is more accurate to characterize the Declaration of Independence similar to the Utah Supreme Court’s opinion regarding its Declaration of Rights. Utah’s Supreme Court articulated that its Declaration of Rights¹⁶ “was never meant to establish a comprehensive or positive law but merely to reaffirm various natural rights that exist independent of any constitution.”¹⁷ Nonetheless, determining the role of the Declaration as it applies to capital punishment is rather unique. At first glance, it appears that capital punishment is in direct contradiction with a “right to life.” To understand this dichotomy, one must analyze a

¹⁵ John Eidsmoe, *Christianity and the Constitution: The Faith of Our Founding Fathers*, pp. 360-361 (1995); Earl Taylor, Jr., *The Declaration of Independence Part of American Law*, Newsletter to National Center for Constitutional Studies, June 1998, <http://www.nccs.net/newsletter/jun98nl.html>.

¹⁶ UTAH CONST. ART. 1 § 1

¹⁷ *Am. Bush v. City of S. Salt Lake*, 140 P.3d 1235, 1283 (Utah 2006) (citing *Utah v. Gardner*, 947 P.2d 630, 636 (Utah 1997)).

concept that goes beyond fundamental law and into natural rights.¹⁸

B. THE DECLARATION OF INDEPENDENCE IS A DOCUMENT FROM WHICH AMERICAN MORALITY ORIGINATED.

Since a “right to life” is provided in the Declaration and such right is a prerequisite to all other rights granted in the Bill of Rights,¹⁹ it is important for Americans to analyze the need and justifications for the death penalty with all American principles, especially the Declaration. “The Declaration matters, and it is important that we bring to it the same level of critical analysis that we apply to the Constitution and to other legal texts.”²⁰

The Declaration is a document that reflects the moral values of its authors, who were the founders of American government. Principles stated in the Declaration are now the roots of American moral code. “[T]he Declaration was an act of all the American people, creating an entity, the United States of America, which presented itself as one nation to the world.”²¹ The “right to life, liberty, and the pursuit of happiness”²² is a designation of morality. It is a moral standard set forth by America at its inception to dictate what is important. It is important to know that morality can be, and often is, just a standard set forth by society. Morals can, but need not be, universal concepts that are unchangeable. For instance, “defenders of the death penalty continue to refer to moral desert,” which is a condition in which one is deserving

¹⁸ One law review author does not agree with analyzing the Declaration of Independence solely through a natural law perspective. He states, “The importance of the Declaration of Independence to American law has been obscured by dubious associations with natural rights jurisprudence.” Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701 (2001).

¹⁹ See U.S. CONST. amend. I-XXVII.

²⁰ Larson, *supra* note 19, at 702.

²¹ *Id.* at 723.

²² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

of something, whether good or bad, "as...real, and not infinitely subject to public manipulation"²³

The argument among Americans on whether the death penalty is right or wrong should be discussed based on perceived morals stated in the Declaration. However, how is moral generally defined? Merriam-Webster Dictionary defines "moral" as "of or relating to principles of right or wrong in behavior."²⁴ Morals, therefore, according to this definition, are merely a standard of action set by a group of people. Generally, morality is not just a single universal code; rather, there are several potential definitions of morality, for instance

[w]hen a person simply claims that morality prohibits or requires a given action, then the term "morality" is genuinely ambiguous. It is not clear whether it refers to (1) a guide to behavior that is put forward by a society, either one's own or some other society; (2) a guide that is put forward by a group, either one to which the person belongs or another; or (3) a guide that a person, perhaps himself, regards as overriding and wants adopted by everyone in his group, or (4) is a universal guide that all rational persons would put forward for governing the behavior of all moral agents.²⁵

As Professor Gert noted, there are essentially two main types of morality: normative morality and descriptive morality.²⁶ Descriptive morality is a type of morality put forth by a society, a group, a church, or an individual for her own behavior.²⁷ The set of people who subscribe to that moral code

²³ R. George Wright, *The Death Penalty and the Way We Think Now*, 33 LOY. L.A. L. REV. 533, 537 (2000).

²⁴ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/moral>, last accessed Jan. 20th 2012 at 3:02p.m.

²⁵ Bernard Gert, *The Definition of Morality*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Fall 2012 Ed., Edward N. Zalta ed., <http://plato.stanford.edu/archives/fall2012/entries/morality-definition/>.

²⁶ *Id.*

²⁷ *Id.*

live by it, and adhere to those morals.²⁸ Normative morality, on the other hand, is a universal concept.²⁹ This type of morality is a code of conduct that would be put forward by any rational person under the same circumstances.³⁰ An example of normative morality in terms of the death penalty is a statement that the death penalty is immoral because “the rest of the civilized world knows better.”³¹ “Indeed, it is possible that ‘morality’ in the normative sense has never been put forward by any particular society, by any group at all, or even by any individual who holds that moral rules should never be violated for non-moral reasons.”³² Gert states, “the only feature that the descriptive and normative senses of ‘morality’ have in common is that they refer to guides to behavior that involve, at least in part, avoiding and preventing harm to others.”³³

There are two additional moral approaches that are ancillary to Gert’s normative and descriptive classifications. First, Deontology is one approach to morality; this is the best approach, according to Professor Peter Brandon Bayer.³⁴ Professor Bayer contends that the Founding Fathers were deontologists.³⁵ The Deontology theory asserts that government is legitimate only if it governs according to eternal moral precepts.³⁶ Deontology requires a sacrifice to abide by morality no matter the circumstances.³⁷ Interestingly, Professor Bayer offers that such a sacrifice is evident in the Declaration:³⁸

For the preservation of those moral principles,
the Founders pledged their “Lives,”

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ David McCord, *Imagining A Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 16 (1998).

³² Gert, *supra* note 25, at § 2, sent. 2.

³³ Gert, *The Definition of Morality*, *supra* note 25.

³⁴ Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution is a Suicide Pact*, 20 WM. & MARY BILL RTS. J. 287 (2011).

³⁵ *Id.* at 288.

³⁶ *Id.* at 287.

³⁷ *Id.* at 292.

³⁸ *Id.*

“Fortunes,” and “sacred Honor,”³⁹ meaning that it is the duty of all Americans-their “sacred Honor”-to sacrifice, if necessary, their lives and property to defend legitimate government.⁴⁰

A second moral theory is Consequentialism, which is a moral philosophy that relies on the consequences of one’s actions for determining morality.⁴¹ Therefore, if the consequence for an act is a “good” result, then such an act is moral. However, while Consequentialism applies to capital punishment, its application does not offer in-depth insight.

The referents of both labels [deontology and consequentialism] . . . are usually caricatures, used to oversimplify philosophical positions for the sake of convenience and less innocently to provide people with a plausible pretext for rejecting ideas they do not understand.⁴²

Theories like Consequentialism and Deontology are overly simplistic when justifying the death penalty and do not provide a complete understanding of an all-encompassing approach.⁴³ As such, for the purposes of this article, a more encompassing and less restrictive philosophical approach is necessary to answer the capital punishment dilemma between the death penalty and the right to life. Natural rights embedded in the Declaration of Independence serve this purpose.

II. AMERICAN CRIMINAL LAW IS DICTATED BY MORAL BELIEFS.

Morality in its various forms is so intertwined with law that it is nearly impossible to evaluate each concept

³⁹ *Id.* at 292 (citing DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776)).

⁴⁰ *Id.*

⁴¹ *Id.* at 293.

⁴² *Id.* at 293 (citing Allen W. Wood, KANTIAN ETHICS at 259).

⁴³ *Id.*

independently.⁴⁴ One well known theorist, Immanuel Kant, believed that laws lacking moral support are not law, rather only commands.⁴⁵ Law is one method by which society demands certain action that corresponds with morality. “When we credibly attempt to punish an offender who knows, or reasonably should have known, that it was illegal to have stolen, raped, or murdered, we are trying to tell him that his actions matter to this community constituted by shared laws.”⁴⁶

Basically, American criminal law creates and enforces written law in order to avoid or prevent harm. Punishment for non-conformity in an attempt to prevent harm is generally summed into four categories: incapacitation, deterrence, rehabilitation, and retribution.⁴⁷ However, these four categories only penetrate so far when justifying punishment for the death penalty; morality is the underlying theory that provides authority for the notion that certain acts should result in deterrence, incapacitation, rehabilitation, and retribution.⁴⁸ Since morality is the basis of the aforementioned punishments, the moral debate⁴⁹ is often the subject of

⁴⁴ *Id.* at 369 (explaining that “Like morality, concepts of law ‘cannot be understood in isolation from one another,’ although they can be described discretely.”).

⁴⁵ *Id.* (citing Allen W. Wood, KANTIAN ETHICS 108-09 (2008) (quoting Immanuel Kant, LECTURES ON ETHICS, in Cambridge Edition of the Writings of Immanuel Kant 27:273 (1992)).

⁴⁶ Markel, *supra* note 9, at 427-28.

⁴⁷ Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1154 (2003).

⁴⁸ *See*, Markel, *supra* note 9, at 426. “In the past, retribution theorists asserted that “the fact that a person has committed a moral offence provides a sufficient reason for his being made to suffer.” *Id.* This understanding of retribution as a purely interpersonal moral doctrine has waned over time.” *Id.*

⁴⁹ The moral debate extends in a multitude of directions. For example, two popular, but contrary, views for defining driving forces behind moral actions are utilitarianism and deontology. “Utilitarianism, holds that morality is defined by the consequences of one's actions or that increasing overall welfare generally equates to doing the right thing;” Bronsteen, *supra* note 2, at 1130.

“[However,] deontology, [which] defines morality independent of

criminal law disputes, especially the death penalty, because it is the ultimate punishment in criminal law. If the death penalty changes, it will be due to a change in law, which, in turn, indicates a change in societal morals.

Morality, when translated, becomes the law, which is then written and enforced by a sovereign power. However, the law operates by separation of powers through the executive, legislative, and judicial branches. Morality's ability to change law can often be a lengthy process. This long process is exemplified by the capital punishment debate through past attempts to abolish the death penalty. The law can be slow to evolve to meet social morals, especially in eradicating moral concepts that are based on founding concepts of the United States, like the "right to life."

When law is or becomes contrary to moral beliefs, social and political stability are undermined.⁵⁰ It is important to keep laws updated in accordance with society's progressing moral code lest instability ensue,⁵¹ otherwise the instability results in unjust punishment of citizenry. However, there is controversy as to what branch of government should adjust the law to conform to moral preference. For instance, one notion contends that the legislative branch should ensure that laws reflect morality:

[t]raditional jurists contend that the positive law is itself systemically moral and that judges can and should decide all cases--including those that present controversial moral issues of liberty and equality--within the constraints of the standards, rules, and precedents in the positive law.⁵²

consequences and suggests that moral acts are done for their own sake rather than in order to achieve any particular end." *Id.*

⁵⁰ Alice Ristoph, *Third Wave of Legal Moralism*, 42 ARIZ. ST. L.J. 1151 (2010).

⁵¹ *Id.*

⁵² Evelyn Keyes, *Two Conceptions of Judicial Integrity: Traditional and Perfectionist Approaches to Issues of Morality and Social Justice*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 233, 233 (2008).

However, there is an alternative argument that the judicial branch should ensure that laws reflect morality, which avers

that judges should, therefore, read the Constitution 'morally,' i.e., they should construe the principles of liberty and equality in the Constitution in accordance with the community's best construction of the moral requirements of decency and fairness and should implement the true democratic conditions of liberty and equality.⁵³

Adjusting criminal law based on changes in society's moral fabric generally occurs in one of two ways. First, the legislature can make or amend the positive law. This type of law-making process is said to be in accordance with public opinion because political representatives are elected to act for their constituents. Second, the judiciary may alter criminal law in some instances, especially those issues that involve interpretation of the law. For example, the Supreme Court has abolished some execution methods as violating the Eighth Amendment's⁵⁴ "cruel and unusual punishments" language.⁵⁵ The Court has held: "To constitute cruel and unusual punishment, an execution method must present a 'substantial' or 'objectively intolerable' risk of serious harm."⁵⁶ Of course, the previous statement is subject to broad interpretation. It could be assumed that the Supreme Court may one day abolish the death penalty based on changing morals. Perhaps the Court will use the "right to life" language in the Declaration to justify such an opinion; however, considering natural law theories from which this phrase originates, such a decision from the Supreme Court is unlikely.

⁵³ *Id.* at 234.

⁵⁴ U.S. CONST. amend. VIII.

⁵⁵ See *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (declaring "disemboweling, beheading, quartering, dissecting, and burning alive" are not allowed as execution techniques).

⁵⁶ *Baze v. Rees*, 553 U.S. 35, 35-6 (2008).

III. MURDER VIOLATES A PERSON'S "RIGHT TO LIFE," BUT EXECUTION BY THE STATE DOES NOT VIOLATE THE MORAL "RIGHT TO LIFE" CONCEPT.

At common law, murder was defined as "the unlawful killing of another human being with 'malice aforethought.'"⁵⁷ The intent to kill and the intent to commit a felony were sub-categories of the single concept of "malice aforethought."⁵⁸ At its most basic description, murder is one person taking the life of another through some volitional act. This act violates the victim's "right to life." One West Virginia Supreme Court Justice, in dissent, has described murder as "an ordinary natural law crime."⁵⁹

When a convicted murderer is put to death, there is no violation of the right to life.⁶⁰ This dichotomy seems contradictory at first glance but, in fact, it is not contradictory to the right to life language in the Declaration. A person's "right to life" under the Declaration is different from rights granted in the Constitution. The Declaration, as previously established, is not the same type of legal authority as the Constitution. The Constitution limits government action or conduct against citizens; it does not apply to non-state actor wrongs against other private citizens. Moreover, the Declaration was not intended to necessarily limit government; rather, it attempts to create a moral structure within which both society and its government will thrive.

The Declaration is much broader than the Constitution and applies to capital punishment differently. It can be inferred that the Declaration imposes a duty not to kill on both

⁵⁷ *Schad v. Arizona*, 501 U.S. 624, 640 (1991); see 3 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 21-22 (1883).

⁵⁸ *Id.*

⁵⁹ *West Virginia v. Hobbs*, 282 S.E.2d 258, 276 (W. Va. 1981) (Neely, J., dissenting).

⁶⁰ Not everyone agrees that a violation of the right to life occurs when a convicted murderer is sentenced to death: "Executions undermine the very respect for life they purport to foster." David McCord, *Imagining A Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 13 (1998). While Americans subscribe to natural rights by virtue of the Declaration of Independence, a person's belief system allows him or her to oppose such theories internally, while society acts on an adjacent moral level.

government and citizenry. The Constitution imposes a duty only on the government not to kill unjustly -- unjustly meaning through either deprivation of due process or cruel and unusual methods of punishment.⁶¹ For example, a private citizen can murder another private citizen and not violate that particular victim's constitutional rights; however, such a victim's right under the Declaration's "right to life" language is violated. Such a moral violation⁶² occurs under the Declaration because of the natural rights theory known as the social contract. From a natural law perspective, there is no violation when the state seeks retaliation because according to natural law that person's right to life is voluntarily forfeited based on the act of killing.⁶³

Notwithstanding natural law, there are other theories that can justify punishment but that do not necessarily flow from the Declaration. First, Utilitarianism offers one such approach:

[f]or utilitarians the good that can be done is preventing the criminal, by incapacitation, from committing future criminal acts, plus deterring other potential criminals, and minus the harm punishment does to the criminal; but what a criminal supposedly "deserves" is merely revenge and does no good.⁶⁴

A second approach is retribution theory, which focuses singularly on justice based on a theory of revenge. To put it in Latin, *lex talionis*⁶⁵ or "an eye for an eye"⁶⁶ is the principle of

⁶¹ See generally, U.S. CONST. amends. V & VIII.

⁶² One commentator asserts that dignity is "the premier value underlying the last two centuries of moral and political thought, an essential 'basis of human rights.'" Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172 (2011).

⁶³ See ROUSSEAU, *supra* note 1.

⁶⁴ Andrew Oldenquist, *Retribution and the Death Penalty*, 29 U. DAYTON L. REV. 335 (2004).

⁶⁵ "The principle or law of retaliation that a punishment inflicted should correspond in degree and kind to the offense of the wrongdoer, as an eye for an eye, a tooth for a tooth; retributive justice." Dictionary.com,

<http://dictionary.reference.com/browse/lex+talionis>.

retribution. Professor Oldenquist suggests that most people are not well-informed when subscribing to the retribution approach. "Most people's reasons for capital punishment are retributivist; they talk about deterrence because it seems a respectable kind of reason that relies on crime statistics and they don't know what to say when told retribution is revenge."⁶⁷

IV. AMERICAN SOCIETY CAN PUNISH INDIVIDUALS BY DEATH, BECAUSE OF NATURAL LAW AND SOCIAL CONTRACT THEORY.

Justifying capital punishment is difficult and rightly so. One can use terms of art such as "retribution," "deontology," "consequentialism," and "deterrence." However, these terms are limited in application. They do not, for example, provide a solution as to why America is in the minority of the world, since most countries have abolished punishment by death.⁶⁸ Countries such as China, Iran, Saudi Arabia, Iraq, the United States of America, Yemen, North Korea, Somalia, Taiwan, and several others still retain the death penalty.⁶⁹ However, there is a distinguishing factor between the United States and the other countries listed above. Unlike the other countries, the United States still has the death penalty because of natural law, the philosophical concept that embodies various theories that are mostly encompassed in a general theory known as the "social contract."⁷⁰

⁶⁶ The phrase "eye for an eye" is generally used when referencing Biblical scripture. See *Exodus* 22:24 (New Living Trans. 2d ed.).

⁶⁷ Oldenquist, *supra* note 65, at 337.

⁶⁸ Amnesty International, <http://www.amnesty.org/en/death-penalty>, last accessed Jan. 20th 2015 at 6:30 p.m.

⁶⁹ *Id.*

⁷⁰ ROUSSEAU, *supra* note 1, at 13.

A. PHILOSOPHERS WHO INFLUENCED THE FOUNDING FATHERS' "RIGHT TO LIFE" LANGUAGE IN THE DECLARATION, NATURAL RIGHTS, AND POLITICAL PHILOSOPHY THAT OFFERED THE BASIS FOR AMERICA'S FOUNDING.

"[T]he Founders inspired and justified both the Revolution and ensuing fundamental principles of American law, especially due process, on the best applicable precepts of enduring morality they knew."⁷¹ Moral influence on the Founding Fathers in large part likely came from theorists such as Rousseau, Hobbes, Locke, and Mill, whose works offer original and intelligent explanations into the American social and political structure as well as America's moral fabric. These theorists believed in a concept known as natural law. "Natural law theory is a label that has been applied to theories of ethics, theories of politics, theories of civil law, and theories of religious morality."⁷² One can look to the plain language of the Declaration to derive evidence to support natural law's influence in the document.

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.⁷³

This aforementioned language and the natural rights concept were successful in establishing a separation between America and Britain. However, its meaning and impact established more than just independence; it established a mindset, morals, and a society. In order to fully understand the justification that

⁷¹ Bayer, *supra* note 35, at 328.

⁷² Mark Murphy, *The Natural Law Tradition in Ethics*, (Sept. 23, 2002), <http://plato.stanford.edu/entries/natural-law-ethics/> (last substantive revision Sept. 27, 2011) (last accessed Mar. 23, 2012).

⁷³ THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776).

natural law provides for the death penalty, one must become further acquainted with the philosophical ideas from these natural law theorists whose voices resonated in the minds of the Founding Fathers.

B. ROUSSEAU'S "THE SOCIAL CONTRACT," LOCKE'S "TWO TREATISES ON GOVERNMENT," MILL'S "ON LIBERTY," AND HOBBS' "LEVIATHAN," OFFER CLARITY AND UNDERSTANDING ON NATURAL RIGHTS JUSTIFICATIONS FOR CAPITAL PUNISHMENT.

The social contract is exactly like it sounds - a contract. On one side of the contract is the individual; on the other side of the contract is a collective unit comprised of all individuals.⁷⁴ In his work, "The Social Contract,"⁷⁵ Jean Jacques Rousseau offered two basic concepts upon which he builds his well-known theory. First, each man seeks to preserve himself; man in his natural state has free will and acts to protect himself because no one else will protect him.⁷⁶ Rousseau's second concept, the common good, offers a way for each man to alter his method of self-preservation by submitting through an exercise of free will to a civil body, but in return he receives rights, and with those rights comes protection.⁷⁷ In essence, self-preservation becomes preservation of the civil state, and the civil state in return offers to help preserve each individual through rights and interests. "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole."⁷⁸

The social contract takes man from a natural state of anarchy and free will and provides a structured system where free will impulses are tempered with human thought.⁷⁹ The

⁷⁴ ROUSSEAU, *supra* note 1, at 13-14.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 14

⁷⁹ Oldenquist, *supra* note 63 (suggesting that humans are innately social, as opposed to being social through adoption of societal conventions).

social contract is mutually beneficial to all because the natural state of man exploited the weaknesses of all men.⁸⁰ Under the social contract, weakness is counteracted by collective action and thought. Rousseau articulates that “only[] when the voice of duty takes the place of physical impulses and right of appetite, does man, who so far had considered only himself, find that he is forced to act on different principles, and to conduct his reason before listening to his inclinations.”⁸¹ The obligation of each participant under the contract is to conform to the “civil state,” as compared to the natural state where man only conformed to his own free will. “As nature gives each man absolute power of his members, the social compact gives the body politic absolute power over all its members also[.]”⁸²

After man leaves his natural free state and enters the civil state, there are boundaries of action; however, each man still has liberties. But liberty to act is no longer unfettered as it was in the state of nature. Rousseau argues that punishment is required to preserve the civil state when man goes outside the boundaries set by the civil state (i.e., when man violates the collective morals).⁸³ Rousseau addresses the concept of the death penalty directly in his work.

The death penalty is justified because the wrongdoer has provided “consent” to be punished or perhaps die for his breach of the contract. “He who wishes to preserve his life at other’s expense should also, when it is necessary, be ready to give it up for their sake.”⁸⁴ As a result, if a person acts within

⁸⁰ See ROUSSEAU, *supra* note 1.

⁸¹ *Id.* at 19.

⁸² ROUSSEAU, *supra* note 1, at 31.

⁸³ Other well-known theorist St. Thomas Aquinas agrees with Rousseau declaring that “[t]herefore if a man is dangerous and infectious to the [other members], on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good, since a little leaven corrupted the whole lump.” Wright, *supra* note 24, at 554 (citing THOMAS AQUINAS, SUMMA THEOLOGICA II (Fathers of the English Dominican Province trans., 1929), reprinted in FRANCISCO DE VITORIA, REFLECTION ON HOMICIDE & COMMENTARY ON SUMMA THEOLOGICA II-II q. 64, 240 (John P. Doyle trans., 1997)).

⁸⁴ ROUSSEAU, *supra* note 1, at 36.

his former state of nature⁸⁵ (self-preserving) to the detriment of another (for instance, through murder), then the civil state must punish him, because the person harmed, and the person harming had given up their right to act impulsively. The civil state can act⁸⁶ because “by the social compact we have given the body politic existence and life; we have now by legislation to give it movement and will.”⁸⁷ In short, the act of punishment is justified because the wrongdoer and victim both consented to the civil state’s social contract for protection and for punishment.⁸⁸

i. JOHN LOCKE

John Locke also shared Rousseau’s principles of justification for punishment in a civil society. In *Two Treatises of Government*, Locke explained: Punishment is permitted to correct transgressions not for oneself but for mutual security.⁸⁹ More relevantly, “[e]ach [t]ransgression may be *punished* to that *degree*, and with so much [*s*]everity as will suffice to make it an ill bargain to the [o]ffender, give him cause to repent, and terrifie others from doing the like.”⁹⁰ The former statement is what is, in modern terms, called deterrence. Of course, deterrence⁹¹ is commonly used as justification for the death penalty.

⁸⁵ There is another perspective that believes detrimental human action in the civil state is not a reversion to the previous state of nature, but rather only a skewed action under the civil state. For example, “To say that the defendant, at the time of the offense, was operating at a sub-human, animalistic level and yet engaged in premeditation and deliberation or malice aforethought is to indulge in patent self-contradiction.” Wright, *supra* note 24, at 555.

⁸⁶ Markel, *supra* note 9, at 432 (noting a more modern term for civil state action and punishment is known as “democratic self defense”).

⁸⁷ ROUSSEAU, *supra* note 1, at 39.

⁸⁸ *See id.*

⁸⁹ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 312 (Peter Laslett ed., Cambridge Univ. 1960).

⁹⁰ *Id.* at 315.

⁹¹ There are skeptics on whether the death penalty has deterrent value. *See e.g.*, Walter Berns et al., *The Death Penalty: A Philosophical and Theological Perspective*, 30 J. MARSHALL L. REV. 463, 468 (1997) (stating “If we make the admittedly unlikely assumption that the

Locke also addressed retribution, insinuating that in the state of nature, a type of vigilantism is necessary. However, the right to punish a transgressor in a structured civil state is turned over to the government. Locke explains the civil state's collective protection scheme: "[e]xecution of the [l]aw of [n]ature is in that state, put into every [m]an's hands, whereby everyone has a right to punish the transgressors of that [l]aw to such a [d]egree, as may hinder its [v]iolation."⁹² The individual right of retribution that existed in the state of nature no longer exists and is replaced with a right to punish in the civil state. The right to punish becomes more complex in the civil state, as compared to the state of nature. In the state of nature, a wrongdoing was only an act against the person. In comparison, a wrongdoing in the civil state is a crime both against the person and the body politic, but the wrong can only be righted by the body politic, which seeks punishment on behalf of the victim and all others in society.⁹³

ii. JOHN STUART MILL

In his work, *On Liberty*,⁹⁴ John Stuart Mill also explored the body politic. For instance, does man give up all rights to the civil body to seek retribution? Mill articulated an answer this way:

[e]veryone who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct toward the rest. The conduct consists, first, in not injuring the interest of another; or rather certain interests, which either by express legal provision or by tacit

number of murderers is equal to the number of murders, this means that 99.9 percent of the murderers are not, or have not been, executed, which is not much of a 'message.'").

⁹² LOCKE, *supra* note 90, at 312.

⁹³ *Id.*

⁹⁴ JOHN STUART MILL, *ON LIBERTY* [1859] (Charles W. Elliot ed., 2004).

understanding, ought to be considered as rights.⁹⁵

It appears that Mill agrees with Locke's perspective that action by individuals who injure others is not allowed; further, it appears that Mill agrees with Locke's perspective that the benefit for exercising restraint of personal vigilante retribution is "protection by society."⁹⁶

Mill avers that society will attempt to control human action by either, or both, a written moral code (law) or a tacit understanding.⁹⁷ The most interesting aspect of Mill's "tacit understanding" language is that no collective body can judge tacit understanding, but rather it is determined within each individual with the expectation of consensus among all. Unlike law, which is interpreted and enforced by the civil state, tacit understanding is in each individual's mind. Therefore, two sets of moral code exist: one that is prescribed by society, and another which is a moral code of the individual. These sets of moral codes are similar to Bernard Gertz's descriptive and normative morality, discussed above.

If one, globally-adopted moral code ("macro morality") could govern all human action, then no crime would exist, because all human action would follow the predetermined morality, i.e., no one would breach the social contract. Man cannot give up all of his state of nature impulses; such impulses will often result in breaking the law, or in other words, violating the civil body's code of conduct. Therefore, in regard to Mill's issue, how much free will does man submit to the sovereign? The answer is not enough to prevent breaches of civil code (morals). Man's state of nature still exists, and reverting to the previous state of nature often violates the social contract and must result in punishment. In other words, breaching the social contract is immoral.

iii. THOMAS HOBBS

"The Founding Fathers were heavily influenced by English philosopher Thomas Hobbes in establishing America's

⁹⁵ *Id.* at 75.

⁹⁶ *Id.*

⁹⁷ *Id.*

first principles, most notably the recognition of unalienable rights, the social compact, and limited government."⁹⁸ Hobbes was a natural law theorist.⁹⁹

The paradigmatic natural law view holds that (1) the natural law is given by God; (2) it is naturally authoritative over all human beings; and (3) it is naturally knowable by all human beings. Further, it holds that (4) the good is prior to the right, that (5) right action is action that responds nondefectively to the good, that (6) there are a variety of ways in which action can be defective with respect to the good, and that (7) some of these ways can be captured and formulated as general rules.¹⁰⁰

In his work, *Leviathan*, Hobbes creates a metaphor for the civil state in the form of an artificial man with arms, legs, and a head.¹⁰¹ Each part of the artificial man, which Hobbes called the "leviathan," performs the functions of the state.¹⁰² Every part of the "leviathan" is made up of each person in that state, and each person has desires and reason. The good of man corresponds with the good of the state.

[T]he Hobbesian view what is good is what is desired, Hobbes thinks that humans are similarly constructed so that for each human (when he or she is properly biologically functioning) his or her central aim is the avoidance of violent death.¹⁰³ Thus Hobbes is

⁹⁸ Michael Warren, *America's Survival Guide*, http://www.americassurvivalguide.com/thomas_hobbes.php

⁹⁹ Murphy, *supra* note 73, at § 2.1.

¹⁰⁰ Murphy, *supra* note 73 at § 1.4.

¹⁰¹ THOMAS HOBBS, *LEVIATHAN PARTS I & II*, (A.P. Martinich ed. 2005).

¹⁰² *Id.* at 9.

¹⁰³ Similar to Hobbes' "violent death" terminology, Nancy Bothne, Midwest Director for Amnesty International, says that each person has the "right to be free of fear." Berns et al., *supra* note 90, at 471 ("To be free from fear is a concept that is a pretty incredible concept.

able to build his entire natural law theory around a single good, the good of self-preservation, which is so important to human life that exceptionlessly binding precepts can be formulated with reference to its achievement.¹⁰⁴

Similar to Rousseau, Hobbes takes the position that self-preservation is the most important element of human action. It is simple logic to connect between murder (the act of taking another's life) and the violation of natural law.

Robert Kraynak, a professor at Colgate University, believes that Hobbes' theory of natural law "gave citizens a standard for determining if the written laws and customs of their nation or any other nation were just or unjust, right or wrong, human or inhumane."¹⁰⁵ Kraynak submits that Hobbes' theory of natural law has translated into what is now called "liberties or rights."¹⁰⁶ Therefore, the notion of self-preservation at the natural law level has now been converted into a right or liberty to individual "life."¹⁰⁷ The Declaration of Independence contains this right. "We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."¹⁰⁸

A violation of a person's "right to life" is a breach of the social contract and violates natural law. The United States adopted natural law in the Declaration as a set of morals. Consequently, capital punishment is morally justified through natural law according to the previously discussed theorists.¹⁰⁹

It deals not only with a relationship of the state to individuals, but with individuals to individuals.").

¹⁰⁴ Murphy, *supra* note 73, at 2.1.

¹⁰⁵ Robert P. Kraynak, *Thomas Hobbes: From Classical Natural Law to Modern Natural Rights*; Natural Law, Natural Rights, and American Constitution website, <http://www.nlnrac.org/earlymodern/hobbes>.

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*

¹⁰⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁰⁹ *Contra* Kleven Thomas, *Is Capital Punishment Immoral Even If It Deters Murder?* 46 SANTA CLARA L. REV. 599 (2006) (concluding "... capital punishment is immoral even if it does deter murder.")

The Founders did not make up the right to life. Rather, the concept was borrowed from theorists such as Thomas Hobbes. In short, the Founders did not create natural rights, but adopted them. Quite the contrary, natural rights have created and shaped the United States into its current form: one that allows the death penalty.

V. THE CONTRACTARIAN VIEW VERSUS SOCIAL CONTRACT THEORY- MORAL JUSTIFICATION OF CAPITAL PUNISHMENT.

There is minimal authority for justification theories regarding punishment outside the well-known death penalty justifications.

The absence of any well-developed contractarian theory of punishment seems all the more puzzling in light of two salient facts: First, there is a robust contractarian tradition that emerged in seventeenth century political philosophy, first with the writings of Thomas Hobbes, later in the Enlightenment version of this same tradition in the writings of Locke and Rousseau"¹¹⁰

Perhaps the absence of the contractarian viewpoint in American capital punishment discourse is most unusual because of its origin and relation to beginning principles of the United States.

A. MORAL JUSTIFICATION

Punishment under a contractarian theory is generally easier to understand than other concepts that operate with death penalty arguments, such as retribution theory¹¹¹ or religious theories. The act of punishment needs moral

¹¹⁰ Claire Finkelstein, *Punishment as a Contract*, 8 OHIO ST. J. CRIM. L. 319, 322 (2011).

¹¹¹ See Markel, *supra* note 9, at 423.

support.¹¹² Contractarian theory provides support for punishment in a different manner than other theories.¹¹³ The basic nature of a contract is that the obligation is either fulfilled or unfulfilled, and if it is unfulfilled, action may be taken to rectify the breach.¹¹⁴ However, a source of morality must be added to a basic contract viewpoint for there to be moral support for punishment. Of course, in the case of American capital punishment, this article establishes that the Declaration of Independence offers a moral element to the social contract view of punishment.

The contractarian view espoused by Claire Finkelstein in the article *Punishment as Contract* is different from an argument for social contract justification.¹¹⁵ Finkelstein says that “it is unlikely that rational contractors would accept the death penalty.”¹¹⁶ Essentially, a contractarian view presumes voluntary entry into a contract.¹¹⁷ This article is unique from Finkelstein’s assertion of punishment based on contract, because pure contractarian view lacks moral justification compared with social contract theory developed in the Declaration of Independence. Finkelstein is correct in her assertion that “rational agents simply do not regard losing their lives for the sake of protecting their property as a trade-off worth making.”¹¹⁸ This would not make sense either for Rousseau or Hobbes because it would preclude the basic notions of “self preservation”¹¹⁹ and “avoidance of violent death.”¹²⁰ The social contract is assumed by the fact one is alive. Therefore, an American citizen does not enter the social contract voluntarily; rather it is inherently part of being born an American citizen. While Finkelstein’s contractarian view is similar to social contract theory, there are important differences that differentiate social contract theory under the

¹¹² Finkelstein, *supra* note 108, at 324 (stating “[t]he practice of punishment therefore stands in need of justification if the background moral objections to it are to be overridden.”).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 324-25.

¹¹⁶ *Id.* at 335.

¹¹⁷ *See id.* at 324.

¹¹⁸ *Id.* at 335.

¹¹⁹ ROUSSEAU, *supra* note 1, at 3, 5, 13.

¹²⁰ HOBBS, *supra* note 97, at part 1, ch. 13.

Declaration from pure contract theory flaws, such as lacking a moral foundation or origin and lacking consent to enter the contract because consent is assumed in social contract theory.¹²¹

B. CASE EXAMPLES OF THE “RIGHT TO LIFE,” SOCIAL CONTRACT THEORY, AND JUSTIFIED PUNISHMENT.

The effect of natural rights, specifically social contract theory, on the “right to life” is that they transform the “right to life” from a plain language interpretation to a term of art. Basically, the “right to life” is conditional-- not unconditional. For example, the defendant in *Kansas v. Kleypas*,¹²² who appealed to the Kansas Supreme Court, argued that his “right to life”¹²³ under the Kansas Constitution would be violated by the death penalty. In his argument, the defendant distinguished his “right to life” from a right to due process guaranteed by the Fourteenth Amendment.¹²⁴ The defendant further argued that “our [Kansas] state constitution simply does not contemplate the taking of a life by the State under any circumstances.”¹²⁵ He contends that the Kansas Constitution confers upon him an absolute “right to life.”¹²⁶ However, the Court rejected his argument, stating that “[the] argument, though somewhat novel, has been soundly rejected by other state courts.”¹²⁷ Most interestingly, the court noted that the defendant’s absolute “right to life” argument “stretches” the language of the Kansas Constitution outside of its intended meaning, and such an argument is not within the

¹²¹ See ROUSSEAU, *supra* note 1, at 13.

¹²² *Kansas v. Kleypas*, 40 P.3d 139, 252-53 (Kan. 2001) (overruled as to some conclusions of law but not the “right to life” conclusion stated in this text) (overruling recognized by *Kansas v. Marsh*, 548 U.S. 163 (2006)).

¹²³ *Kleypas*, 40 P.3d at 252-53 (citing KAN. CONST. BILL OF RIGHTS § 1 (“All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”)).

¹²⁴ See U.S. CONST. amend. XIV.

¹²⁵ *Kleypas*, 40 P.3d at 253.

¹²⁶ *Id.*

¹²⁷ *Id.*; see, e.g., *Ruiz v. Arkansas*, 772 S.W.2d 297 (Ark. 1989); *Missouri v. Newlon*, 627 S.W.2d 606, 612-13 (Mo. 1982); *Slaughter v. Oklahoma*, 950 P.2d 839, 861-62 (Okla. Crim. App. 1997).

spirit or letter of the language.¹²⁸ This conclusion leads one to infer that other Supreme Courts would conclude similarly when presented with the same question.

One dissenting judge in *Rhode Island v. Blood* mischaracterized natural law and its application to murder. In this Rhode Island case, the defendant killed a family member.¹²⁹ The dissenting judge declared that killing a family member is a “gross violation of the natural law.”¹³⁰ This characterization in the context of this article is inaccurate for two reasons. First, a gross violation of natural law does not exist; there is either a violation of natural law or no violation at all. Secondly, under natural law and the “right to life,” there is no difference between murdering a family member and murdering any other person in society – everyone has a right to live, even the murderer himself, until, of course, he or she commits the murder and breaches the social contract.

The main purpose of the social contract is protection. Everyone benefits from protection of the civil state. There are two obvious instances that highlight the moral justification of capital punishment through the context of natural rights. First, capital punishment for murderers of law enforcement officials is morally justified because police are necessary for self-preservation under the civil state. The act of murdering a police officer under Hobbes’ view is like severing the hand of the Leviathan or the “artificial man.”¹³¹ Essentially, the police provide the protection that a person would have provided on his or her own under the state of nature. However, it is a better exchange for everyone to defend each other through a civil body rather than trying to preserve ourselves alone.

Another obvious example that justifies punishment by death via the social contract would be killing a person who is weaker, such as a child. A child enters the world and bargains for safety, protection, or in the event that protection fails, retribution, in exchange for his or her relinquishment of free will under the state of nature discussed by Hobbes and Rousseau.

¹²⁸ *Kleypas*, 40 P.3d at 253.

¹²⁹ *Rhode Island v. Blood*, 37 A.2d 452, 454 (R.I. 1944) (Condon, J., dissenting).

¹³⁰ *Id.* at 465.

¹³¹ See HOBBS, *supra* note 99, at 9.

An example of a capital execution is the tragic case involving Ernest John Dobbert Jr. and his daughter, Kelly Ann.¹³² Dobbert brutally abused Kelly Ann until she died.¹³³ Both Dobbert and Kelly Ann had a right to life, but when Dobbert decided to deny Kelly Ann her right to life, he also forfeited his own right to life under the social contract. Therefore, when examining the “right to life” language with natural rights concepts, Dobbert relinquished his right, thus prompting the civil state to act¹³⁴ to both avenge the death of Kelly Ann and preserve the civil state from further harm. The Florida governor at the time of Dobbert’s execution commented and described the connection between the state and its citizens regarding such executions:

Ernest Dobbert has been executed because of his brutal actions toward his own children. I hope that this indication of the seriousness of child abuse will be an example of the value which the people of Florida place upon the lives of infants and young people in our state, and a measure of the lengths the people of Florida are prepared to go to prevent and punish such crimes.¹³⁵

Consider Locke’s position on such crimes: “each transgression may be punished to that degree and with so much severity as will suffice to make it an ill bargain to the offender, give him cause to repent and terrify others from doing the like.”¹³⁶ It appears that Governor Graham is essentially describing the same idea espoused by Locke.

¹³² *Dobbert v. Florida*, 432 U.S. 282, 284 (1977).

¹³³ *Id.* at 285.

¹³⁴ The natural life, says Blackstone, “cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.” *New Jersey v. Kociolek*, 129 A.2d 417, 420 (N.J. 1957) (citing 1 *Blk.Com.* 133).

¹³⁵ Executedtoday.com,

<http://www.executedtoday.com/2009/09/07/1984-ernest-dobbert-child-abuser/>, last accessed Mar. 31 2013, quoting former Governor of Florida, Bob Graham.

¹³⁶ LOCKE, *supra* note 88, at 315.

VI. THE CHRISTIAN INFLUENCE: CHRISTIAN FAITH AS AN ALTERNATIVE MORAL THEORY IN THE CAPITAL PUNISHMENT REALM.

This section offers one alternative moral influence to the capital punishment debate. An in-depth analysis of the Christian faith would encompass several works and require extensive research and analysis. However, mentioning such an alternative theory bolsters the natural rights argument as a legitimate justification for capital punishment and it also provides a more comprehensive understanding; further, and more importantly, it provides a basis for another common source of American morality to compare against natural rights.

Throughout its history, the United States has recognized a higher source of power – God; for example, the Pledge of Allegiance contains the phrase “One nation under God;”¹³⁷ “in God We Trust,” was first printed on U.S. coins in 1864; the U.S. Supreme Court has, since the early 1820’s, opened session with “God save the United States and this Honorable Court;” and ever since George Washington, during his inaugural oath, first added “so help me God,” so too has every President since then.¹³⁸ Christianity has likely influenced the United States more than any other religious faith.¹³⁹ President Dwight D. Eisenhower espoused a high regard for the Declaration but considered it second to the Bible: “Fellow Americans, we venerate more widely than any other document, except only the Bible, the American Declaration of Independence.”¹⁴⁰

When debating American capital punishment, Christianity and its principles are almost always applicable.

¹³⁷ 4 U.S.C. § 4 (2013).

¹³⁸ America Acknowledges God, Foundation For Moral Law, available at, <http://morallaw.org/resources/america-acknowledges-god/>

¹³⁹ See, e.g., *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

¹⁴⁰ Bayer, *supra* note 35, at 336 (2011) (citing Dwight David Eisenhower, *Report by the President to the American People on His European Trip* (Sept. 10, 1959), in WILLIAM J. FEDERER, *TREASURY OF PRESIDENTIAL QUOTATIONS* 322 (2004).

Christian followers have a connection to capital punishment because Jesus was executed. The story about Jesus' short trial and execution offers insight into societal desire to punish by death and the political motivation which services that need. The Book of Matthew, chapter 27, verses 11-26 describe Jesus' sentencing:

[n]ow it was the governor's custom each year during the Passover celebration to release one prisoner to the crowd - anyone they wanted. This year there was a notorious prisoner, a man named Barabbas. As the crowds gathered before Pilates' house that morning, he asked them, "which one do you want me to release to you - Barabbas, or Jesus who is called the Messiah? The crowd shouted back, "Barabbas!" Pilate responded, "Then what should I do with Jesus who is called the messiah? They shouted back, "Crucify him!"¹⁴¹

It can be said that Jesus' sentencing and execution is the antithesis of America's ambition for a capital punishment process. An innocent man (Jesus) dies. A killer (Barabbas) was released into society. No appeal or due process occurred. Lastly, execution by crucifixion is cruel and unusual.¹⁴²

It would be difficult to argue that Christianity is not a moral code. In large part, Christianity as a basis for morals is more prevalent in the United States - at least, consciously - than natural rights; it is certainly referenced more often. However, Christianity is unclear about its position on whether it is for or against the death penalty. Should we forgive or punish according to Scripture? America's uncomfortable association with the death penalty in modern times is likely attributable, at least in part, to Christianity and its principles.

Christianity fuels two differing sides of the death penalty argument. Consider the following passages and their apparent contradiction to one another. The first passage is from Exodus, Chapter 22 verse 24: "an eye for an eye, tooth for

¹⁴¹ *Matthew* 27:11-26 (New Living Trans. 2d ed.).

¹⁴² See *In Re Kemmler*, 136 U.S. 436, 446 (1890).

a tooth, a hand for a hand, a foot for a foot.”¹⁴³ Now compare the previous pro-death penalty passage with one that endorses forgiveness¹⁴⁴ instead of retribution: “Get rid of all bitterness, rage, anger, harsh words, and slander, as well as all types of evil behavior.”¹⁴⁵ “Instead, be kind to each other, tenderhearted, forgiving one another, just as God through Christ has forgiven you.”¹⁴⁶ The natural rights position is clear on capital punishment; it is not only allowed, but required. Christianity is ambiguous on the topic of capital punishment, as evidenced by the ambiguity of various Bible verses.

While Christianity is the basis of numerous moral discussions about capital punishment, it is mutually exclusive in text. The language of the Bible is subject to interpretation. It is difficult for opponents to discern whether or not one actually believes the scripture and is enforcing it, or whether that person believes in or against the death penalty and is using scripture to support his or her position. As such, natural rights are not as ambiguous, nor as controversial, as Christianity. Furthermore, natural rights are adopted by virtue of being American. Christianity, on the other hand, is not adopted by virtue of citizenship; rather, it is voluntarily adopted. In other words, a person can, of course, be an American but not a Christian; however, one cannot be an American and not be subject to natural law, because of the Declaration of Independence’s incorporation of natural rights and its involuntary social contract.

An issue arises when participants in the death penalty process are Christians who subscribe to the forgiveness text as the most important tenet of the Bible.

¹⁴³ *Exodus* 22:24 (New Living Trans. 2d ed.); see also *Numbers* 35:31; *Leviticus* 24:16-17.

¹⁴⁴ For an interesting account of execution and the Christian Faith, see e.g., Jill Jones, *The Christian Executioner: Reconciling "An Eye for an Eye" with "Turn the Other Cheek"*, 27 PEPP. L. REV. 127, 127 (1999) (What made the Texas execution (Karla Faye Tucker) so dramatic was the fact that the “pickax killer” was a born-again Christian); see also Michael Graczyk, *Tucker Face to Face with Jesus*, ARIZ. REP., Feb. 4, 1998, at A1.

¹⁴⁵ *Ephesians* 4: 31-32 (New Living Trans. 2d ed.).

¹⁴⁶ *Id.*

In Florida, one criminal judge dramatically highlighted the struggle that some practitioners face regarding whether they can participate in capital sentencing by writing a series of letters to the public in the local newspaper. In one such letter he declared, “[b]ecause God has given me a new life in Jesus Christ, I choose not to condone our use of capital punishment.”¹⁴⁷

Punishment under a natural rights theory may not correspond with religious moral principles, especially for those charged with the task of carrying out the execution. As such, it is possible that man’s moral codes can contradict one another. The dilemma then becomes which path to follow; in other words, which morals to adopt.

VII. CONCLUSION

Summing up the death penalty in few words is almost impossible; however, the following passage is an admirable attempt. “We pity him [subject of execution], but we also appreciate the anger of his countrymen and the dramatic necessity of his death. The dramatic necessity would appear to rest on its moral necessity.”¹⁴⁸ This passage draws on the social contract theory to find the death penalty is a necessary evil. Social contract theory, when supported by the moral nature of the Declaration, offers Americans a developed and unique argument to justify decisions and actions surrounding the death penalty.

As established previously, every American has a right to life when they enter the social contract pursuant to the Declaration’s language. However, breach of this social contract through murder violates another’s right to life, as inferred from Rousseau, Locke, Mill, and Hobbes, and subjects the

¹⁴⁷ Jones, *supra* note 143, at 134 (citing Talbot D’Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611, 639 n.154 (1987)).

¹⁴⁸ Berns et.al, *supra* note 92, at 469.

murderer to morally justified punishment.¹⁴⁹ Punishment is necessary and consented to by the wrongdoer to accomplish the key goal of self-preservation of all individuals in the state. Therefore, the death penalty serves a purpose of “self-preservation”¹⁵⁰ under the social contract by offering the bargained-for protection guaranteed by the civil state in exchange that Man leaves his state of nature.

Considering the Founding Fathers’ sources of philosophical influences, the “right to life” is not absolute; it is subject to forfeiture by the act of murder under the social contract. The death penalty serves a necessary function under natural law theory that adheres to deep-rooted morals of American society encompassed in the Declaration of Independence. Therefore, given the origins of America’s founding, it is not surprising that America still has the death penalty.

¹⁴⁹ See Wright, *supra* note 24, at 535 (concluding the death penalty is, under our social circumstances, not morally justifiable, even in principle).

¹⁵⁰ See ROUSSEAU, *supra* note 1, at 13-6.

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TO LIVE OR TO DIE: MONEY IS NOT AN OPTION- COST-BENEFIT EVIDENCE AND ARGUMENTS SHOULD BE HELD INADMISSIBLE IN CAPITAL CASE SENTENCING

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I. INTRODUCTION

The death penalty has sparked heated debate for centuries. The debate has centered on religious beliefs, constitutional issues, moral values, and cost concerns. The national economic crisis has put the costs of executions at the forefront of the debate in recent years. Courts and juries have begun to consider the cost of execution versus the cost of life in prison without parole in the realm of capital sentencing.¹ These new considerations have no place in death penalty

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¹ See *Judge: Execution, prison costs irrelevant*, UPI, Oct. 15, 2010, available at http://www.upi.com/Top_News/US/2010/10/15/Judge-Execution-prison-costs-irrelevant/UPI-37711287115415 (quoting John C. Blue, a Connecticut Superior Court Judge, rejecting the defendant's request to allow testimony on the cost of the state of execution compared to the cost of life imprisonment); *Tennessee v. Cobbins, State's Response to Motion to Permit Evidence at Sentencing Relating to Economic Costs of the Death Penalty*, Knox County, Tenn. (May 12, 2009), available at <http://web.knoxnews.com/pdf/051309carjack.pdf>.

jurisprudence. One's life, criminal or not, should never be taken – or spared – based on dollars and cents.

Section II of this note presents a scenario in which a defendant has been convicted of murder and is now entering the sentencing phase of his trial. Section III evaluates the available cost studies of executions around the country. Section IV focuses on the actual language used in a recent trial regarding the cost of the death penalty versus life imprisonment.

Section V considers the various constitutional arguments surrounding the consideration of execution costs in the sentencing phase of capital cases. Section VI attempts to balance the positive and negative aspects of considering execution costs from both the prosecution and the defense perspectives. Section VII concludes by evaluating ways to allow the cost considerations while protecting both the defendant's and the state's rights in a capital case.

II. DOES JOHN DESERVE LIFE IN PRISON BECAUSE IT IS CHEAPER?²

Jane, a six-year-old girl, is outside playing on her swing set in the backyard. John, a sixty- five-year-old man, comes out of the woods and starts pushing her on the swing. Jane is thrilled that John is pushing her because her father was killed in a car accident when she was three, leaving her with no father figure in her life. After five minutes on the swing, John asks Jane if she would like to walk with him to see his puppy, Izzy. Jane loves puppies and is excited to meet a new one. Jane goes with John and is not seen again for ten years.

For those ten years, John keeps Jane in a storm cellar on his property a little over ten miles from Jane's childhood home. He rapes Jane on the first day and continues to do so at least twice a week, sometimes more. He keeps her handcuffed to the floor of the cellar for the next several years, and feeds her soup and crackers once a day. John tortures Jane, burning her with his cigarette or making small slits in her tiny arms with his hunting knife.

² This story is fictional and describes a horrific crime the author wants readers to consider throughout the note.

Jane screams for help for the first few days until John binds her mouth with a dirty oil rag and threatens to kill her "Mommy" if she is not quiet. Jane endlessly shakes with fear every time she hears a noise at the cellar door. Jane is living her own hell, at the age of six, with no end in sight.

One day, after ten years of being tortured and raped, Jane decides that she has to find a way out of the cellar and away from John. She waits until she hears John's old truck start up and back out of the driveway. She slowly comes out of the cellar, which John stopped locking a few months before, and smiles at the sight of daylight for the first time in ten years. She begins to walk toward the road not knowing fully what her plan is once she sees another person. Jane gets about half a mile down the road when she hears John's old truck coming back. She tries to run but her legs are so fragile that she has a hard time getting her footing. She falls down right as John gets to her.

John gets out of the truck yelling, grabs Jane by her matted hair, and slings her in the bed of his truck like a ragdoll. A young woman, Julie, drives by and sees the exchange between John and Jane and notices Jane is crying hysterically. She does not stop but watches as John pulls into his driveway and around the back of his house. Julie calls the local police department and describes to them what she has just witnessed and tells them the location of John's home.

John takes Jane back to the cellar and is so angry he begins to strike her with his belt. Jane is crying hysterically which makes John even more upset and he begins to strike her with his fists and kick her. When she does not stop crying, John takes Jane's head and bashes it up against the cellar wall until she is no longer crying and her body goes limp.

John crawls out of the cellar, with a smile on his face, and begins walking back to his house at the same time law enforcement is pulling into his driveway. Law enforcement sees that he is covered in blood, immediately places him under arrest, and begins looking for the young girl described by Julie. They find a gruesome bloody scene in the cellar with Jane's limp body lying on the floor. John has finally allowed Jane to escape her hell. She is dead.

John eventually confesses to the kidnapping, torture, rape, and murder of Jane. He gives law enforcement chilling details of the last ten years and shows no remorse for his

actions or for killing the sixteen-year-old Jane. After being convicted of first degree murder, along with other crimes, John sits in the courtroom for his sentencing.

The judge gives the jury its instructions and explains to them the process of determining whether John should be sentenced to death or life in prison. The defense has asked the judge to include an instruction detailing the costs of executing John and the costs of sentencing John to life in prison. This instruction is important to the defense because the statistics show that it is cheaper to allow John to live in prison for the rest of his life than to execute him, and the defense believes that the jury will spare John's life because it is the cheaper option for society during the tough economic times.

This story is a horrific description of the brutal murder of a young sixteen-year-old girl, who was taken from her childhood home at the age of six. A young girl, tortured and raped repeatedly over ten years, and then brutally beaten when she tried to escape. A man, who has no remorse for taking the life of such an innocent child, and is going to live or die based on, among other things, the jury's feelings about money and the cost-benefit of the death penalty versus life imprisonment. Money should not be relevant when determining whether John lives or dies.

III. STATISTICS SHOW EXECUTIONS ARE MORE EXPENSIVE THAN LIFE IMPRISONMENT.

This note is not simply about the actual costs of execution, the actual costs of life in prison or primary based on statistics. This note is about whether these costs should be allowed to be a deciding factor in determining when a person should live or die. With that being said, it is still important to evaluate the costs of each and assess the costs both nationally and state by state.³

³ The following states have abolished the death penalty: Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *See* ALASKA STAT. § 12.55.125(a) (2013); CONN. GEN. STAT. ANN. § 53a-46a (West 2014); HAW. REV. STAT. § 706-656(1) (2013); IOWA CODE ANN. § 902.1 (West 2013); ME. REV. STAT. tit. 17-A, § 1251

There is no national consensus for the cost of capital punishment.⁴ A number of states have never even evaluated their costs associated with capital punishment.⁵ “Of the states where reliable estimates are available, the differing methodologies used, assumptions made, and applicable statutes make generalizations difficult.”⁶ The 2009 Report from the Death Penalty Information Center puts the numbers in perspective:

The high costs to the state per execution reflect the following reality: For a single death penalty trial, the state may pay \$1 million more than for a non-death penalty trial. But only one in every three capital trials may result in a death sentence, so the true cost of that death sentence is \$3 million. Further down the road, only one in ten of the death sentences handed down may

(2013); MD. CODE ANN., CRIM. LAW § 2-201(b) (West 2014); MASS. GEN. LAWS ANN. ch.265, § 2 (West 2013) *invalidated by* Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984) (declaring death penalty statute unconstitutional); MICH. COMP. LAWS ANN. § 750.316(1) (West 2013); MINN. STAT. ANN. § 609.185(a) (West 2013); N.J. STAT. ANN. § 2C:11-3 (West 2013); N.M. STAT. ANN. § 31-18-14 (West 2013); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2013) *invalidated by* People v. LaValle, 817 N.E.2d 341 (N.Y. 2004) (declaring death penalty statute unconstitutional); N.D. CENT. CODE § 12.1-32-01 (2013); R.I. GEN. LAWS § 11-23-2 (2013); VT. STAT. ANN. tit. 13, § 2303 (West 2013); State v. Provost, 896 A.2d 55 (Vt. 2005) (declaring death penalty statute unconstitutional); W. VA. CODE § 61-2-2 (2013); WIS. STAT. ANN. § 973.0135(1)(B), § 940.01(1) (West 2013). See also NPR Staff and Wires, *Illinois Abolishes the Death Penalty*, NPR (March 09, 2011), available at <http://www.npr.org/2011/03/09/134394946/Illinois-abolishes-death-penalty>.

⁴ Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis – A Report from the Death Penalty Information Center* (2009) page 17, available at <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf> (last visited Mar. 3, 2014) [hereinafter *Dieter*].

⁵ *Id.*

⁶ *Id.*

result in an execution. Hence, the cost to the state to reach that one execution is \$30 million.⁷

All studies that have been conducted regarding the cost of capital punishment have concluded that execution is much more expensive than sentencing a person to life in prison; a capital trial, due to many factors but most notably the length of capital trials, is much more extensive and expensive, and there is, generally, far more appellate and other post-conviction review of death penalty cases than cases seeking only life imprisonment.⁸ According to the Death Penalty Information Center, there are several ways one can approach how much capital punishment actually costs.⁹ First, the costs of each individual step in a capital case could be calculated, including the investigation, trial, and appeals; however, this number would only include a minority of the cases that actually go through the whole system.¹⁰ A second approach is to “measure the extra cost to the state of arriving at one death sentence or one execution.”¹¹ Lastly, the total extra costs to the state for maintaining a capital punishment system could be assessed on a yearly basis.¹²

Each of the above approaches has its own pros and cons. In the first approach, by evaluating each individual step of a capital case, researchers would be able to break the statistics down further to determine the most costly step in the process. This further evaluation would allow legislatures to target costly areas within the process and take steps to facilitate lowering the costs of capital cases within their state. However, as stated above, this evaluation method only calculates cases that go through the entire process and not all capital cases. The second approach would allow states to evaluate capital cases on a case by case basis and determine the exact price of one execution. This method, however, limits the calculation to one death sentence when a state may have

⁷ *Id.* at 14 (internal citations omitted).

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

numerous executions that cost the state a tremendous amount of money.

The third approach allows a state to evaluate costs on a yearly basis which would give the state the ability to budget more efficiently. The problem with this method is that not every state will have an execution every year. Rather, if a state goes without an execution for several years and then has a person sentenced to death, the extra money needed for that sentence may not be available within the budget. The third approach is also too broad in calculating all extra costs associated with a capital case. Out of the three, the first method seems to encompass the entire realm of capital case expenses in its calculations and may be the best evaluation method.

Several states have conducted research regarding the cost of their executions. California spends \$137 million per year on the death penalty, system wide, while life in prison costs only \$11.5 million per year.¹³ Since 1977, California has averaged less than one execution every two years making the actual cost per execution over \$250 million.¹⁴ New York had no executions but spent \$170 million over a nine-year period of time prior to abolishing capital punishment.¹⁵ New Jersey had no executions but spent \$253 million over a twenty-five year period of time prior to abolition.¹⁶ Between 1978 and 1999, Maryland spent \$186 million on capital cases but only had five executions, thus, each execution cost \$37 million.¹⁷

Different features of a capital punishment system are also telling of the exponential cost associated with having this system over a system only offering life in prison as a maximum punishment. Maryland sought, but did not impose, the death penalty in 106 cases which cost the state \$71

¹³ See California Commission on the Fair Administration of Justice, *Report and Recommendations on the Administration of the Death Penalty in California*, at 10 (June 30, 2008), available at <http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf> [hereinafter *California Commission*].

¹⁴ *Id.*

¹⁵ Dieter, *supra* note 4, at 14 n.40.

¹⁶ *Id.* at 14 n.41.

¹⁷ *Id.* at 15 n.42.

million.¹⁸ “The average cost for the defense at trial in a federal death case is \$620,932, about eight times that of a non-capital federal murder case.”¹⁹ In Kansas, the trial costs for capital cases are about sixteen times greater than for non-capital cases, while the appeal costs are twenty-one times higher.²⁰ California spends over \$60 million annually to house 670 inmates on death row.²¹

These staggering numbers reflect several things. First, there are more people on death row than ever before and each individual on death row costs an additional \$90,000 above what it would cost to house them for a life in prison sentence.²² Second, despite the reinstatement of the death penalty in 1976, since then, there have been fewer executions per year.²³ Third, correctional facilities now have higher overall operating costs.²⁴ All of these factors taken together contribute to a higher cost per execution.²⁵ Since capital punishment was reinstated in 1976, “the country has spent about \$2.5 billion beyond the costs that would have been incurred if life in prison was the most severe penalty.”²⁶

IV. CONSTITUTIONAL PROTECTIONS FOR DEATH ELIGIBLE DEFENDANTS OUTLINED BY THE SUPREME COURT

Over time, the Supreme Court has developed numerous constitutional protections for death penalty eligible

¹⁸ *Id.* at 16 n.47.

¹⁹ J. Gould & L. Greenman, OFFICE OF DEFENDER SERVICES OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *Update on Cost, Quality, and Availability of Defense Representation in Federal Death Penalty Cases* at 25 (2008), available at

<http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/UpdateFederalDeathPenaltyCases.aspx>.

²⁰ Legislative Division of Post Audit State of Kansas, *Performance Audit Report - Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections* at 13 (2003), available at <http://www.kslpa.org/docs/reports/04pa03a.pdf>.

²¹ *California Commission*, *supra* note 13, at 70.

²² *Dieter*, *supra* note 4, at 15.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 17.

defendants because death is different from any other punishment that a criminal defendant may face. Capital defendants are afforded protection against arbitrary and capricious death sentences. Evidence considered during the sentencing phase must be both relevant and reliable. The sentencing phase of a capital trial is subject to the harmless error doctrine and should all but guarantee a capital defendant an errorless sentence of death. These constitutional safeguards are critical to capital sentencing and do not leave room for consideration of economic evaluations regarding the cost of execution versus life imprisonment.

A. DEATH IS DIFFERENT

The United States Supreme Court has long recognized that “death is different.”²⁷ In 1972, the Supreme Court, for the first time, emphasized that death is exceptional in terms of punishment for crimes.²⁸ In his concurring opinion, Justice Brennan stated “death is ... an unusually severe punishment, unusual in its pain, in its finality, and in its enormity.”²⁹ In another concurring opinion, Justice Stewart stated that the death penalty differed “from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability.”³⁰

The Supreme Court has also noted several times that death is “qualitatively different.”³¹ In *Woodson v. North Carolina*, the Court noted that “[d]eath, in its finality, differs

²⁷ See, e.g., *Lankford v. Idaho*, 500 U.S. 110, 125 (1991); *Clemons v. Mississippi*, 494 U.S. 738, 750 n.4 (1990); *Booth v. Maryland*, 482 U.S. 496, 509 n.12 (1987); *Solem v. Helm*, 463 U.S. 277, 289 (1983); *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980). See also, Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 370, 397-401 nn.200-206 (1995) (collecting cases for the proposition that “death is different”).

²⁸ *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring).

²⁹ *Id.*

³⁰ *Id.* at 306 (Stewart, J., concurring).

³¹ *California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

more from life imprisonment than a 100-year prison term differs from one of only a year or two.”³² The Court summed up why death is different in its opinion in *Gardner v. Florida*:

[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.³³

Death is deliberate. Death is final.

B. A SENTENCE OF DEATH CANNOT BE HANDED DOWN IN AN ARBITRARY & CAPRICIOUS MANNER

Since “death is different,” the Supreme Court has developed a “greater level of scrutiny of the capital sentencing determination.”³⁴ Courts must strive to make sure executions are not handed out in an arbitrary or capricious fashion.³⁵ A sentence of death is to be reviewed by appellate courts to avoid arbitrary or unfair application of the death penalty.³⁶

The Supreme Court has developed two general conditions to minimize the risk of arbitrary action in capital

³² *Woodson*, 428 U.S. at 305.

³³ *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (internal citations omitted).

³⁴ *Ramos*, 463 U.S. at 998-99.

³⁵ *Id.*

³⁶ *See Hopper v. Evans*, 456 U.S. 605, 611 (1982) (and cases cited therein).

sentencing.³⁷ First, courts must set boundaries on the sentencer's judgment to "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."³⁸ Second, sentencers must be allowed "to consider any relevant mitigating factor" that might prevent the sentencer from imposing the death penalty.³⁹

i. THE CLASS OF PERSONS DEATH ELIGIBLE MUST BE
NARROWED

States must adopt statutes and courts must implement procedures that distinguish between those defendants who deserve to be executed and those who do not.⁴⁰ The statutes and procedures should also guide juries in deciding on which factors support a sentence of death and those factors which do not.⁴¹

At the sentencing phase, narrowing occurs when the sentencer is required to determine whether aggravating circumstances justify imposing the death penalty.⁴² A defendant cannot receive a death sentence unless the trier of fact convicts the defendant of murder and finds at least one aggravating circumstance at either the guilt or penalty phase.⁴³ An aggravating circumstance must be narrowly tailored

³⁷ *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007).

³⁸ *Zant*, 462 U.S. at 877; see also *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion).

³⁹ *Abdul-Kabir*, 550 U.S. at 246.

⁴⁰ *Godfrey*, 446 U.S. at 427 (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring))).

⁴¹ *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006) (a state statute for capital sentencing must: "(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime.")

⁴² *Zant*, 462 U.S. at 878 (statutory aggravating circumstances "circumscribe the class of persons eligible for the death penalty").

⁴³ *Brown v. Sanders*, 546 U.S. 212, 216 (2006).

enough that it does “not apply to every defendant convicted of a murder. . . .”⁴⁴

A statute can be effective in limiting the sentencer’s discretion if the statute provides: (1) “clear and objective standards”; (2) “specific and detailed guidance”; and (3) “an opportunity for rational review of the process for imposing a sentence of death.”⁴⁵ The Court in *Woodson* noted procedures that do not give credence to the character of an individual defendant or the particular offense “treats all persons convicted of a designated offense not as uniquely individual human beings, but as *members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.*”⁴⁶

ii. JURIES MUST BE ALLOWED TO CONSIDER MITIGATING EVIDENCE

As noted above, the Supreme Court has time and time again stated that juries must be allowed to consider mitigating evidence that may excuse the imposition of death on a defendant.⁴⁷ The Eighth and Fourteenth Amendments give a defendant the right to present mitigating evidence in capital cases.⁴⁸ In *Lockett*, the Court held a sentencer is obliged to think about mitigating evidence the defendant offers concerning “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”⁴⁹

All relevant mitigating evidence must be allowed to be presented to juries in capital cases and the defendant must be afforded wide latitude to present the mitigating evidence.⁵⁰

⁴⁴ *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).

⁴⁵ *Godfrey*, 446 U.S. at 428 (quoting, respectively, *Gregg*, 428 U.S. at 198; *Coley v. Georgia*, 204 S.E.2d 612, 615 (Ga. 1974); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976); and *Woodson*, 428 U.S. at 303 (opinion of Stewart, Powell, & Stevens, JJ.)).

⁴⁶ *Woodson*, 428 U.S. at 304 (plurality opinion) (emphasis added).

⁴⁷ *Abdul-Kabir*, 550 U.S. at 246. *See also* *Sumner v. Shuman*, 483 U.S. 66, 81-82 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982); *Gregg*, 428 U.S. at 197.

⁴⁸ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

⁴⁹ *Id.*; *see also* *Marsh*, 548 U.S. at 173-74.

⁵⁰ *Roper v. Simmons*, 543 U.S. 551, 568 (2005). *See also* *Abdul-Kabir*, 550 U.S. at 264 (statutory requirement that jury consider only

Sentencers in capital cases “must give independent weight” to each mitigating circumstance.⁵¹ However, when evaluating mitigating factors, the sentencer does not have free discretion.⁵² In *Brown*, the Court upheld the trial court’s instruction warning the jury to not be swayed by “mere sympathy” when making the determination to give a death sentence.⁵³ The *Brown* Court concluded that a reasonable juror would interpret the instruction to mean that he or she should ignore emotional responses that are not rooted in the aggravating and mitigating evidence and that states may prohibit juries from basing their sentencing decisions on factors not presented at the trial.⁵⁴

It is imperative that capital sentencing juries avoid an arbitrary and capricious application of the death sentence. If the above statistics were to swing the other direction and show that executions were less expensive than imprisoning a person for life, juries allowed to consider these cost evaluations may begin to arbitrarily put defendants to death because it is cheaper for society to do so. By allowing these costs to be considered, regardless of the side to which the pendulum swings, courts open themselves up to a direct violation of the Supreme Court’s rule against arbitrarily applying the death penalty.

Allowing juries to consider the cost of execution versus the cost of life in prison without parole does not meet the Supreme Court requirement of narrowing the class of death eligible persons. To consider the statistics as they are now, juries would not sentence any defendants to death because it is cheaper for society to keep them in prison for the rest of their

particular kinds of mitigating evidence was unconstitutional); *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007) (sentencer may not be precluded from “giving meaningful effect to mitigating evidence”); *Lockett*, 438 U.S. at 608 (plurality opinion) (sentencer cannot be precluded from considering character or circumstance of defendant’s record).

⁵¹ *Lockett*, 438 U.S. at 605 (plurality opinion); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987).

⁵² *California v. Brown*, 479 U.S. 538, 542-43 (1987).

⁵³ *Id.*

⁵⁴ *Id.* (The jury in *Brown* had been instructed not to be swayed by “mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.”).

lives. It is understandable why a defendant would want to offer the statistics as mitigating evidence. However, the purpose of aggravating and mitigating evidence is to allow the jury to evaluate the individual defendant and the crime itself. Even though the statistics would be an extremely powerful mitigating argument to keep the defendant alive, the statistics do not go toward the individual defendant or the murder itself and should not be considered by a jury when determining whether to impose a sentence of death.

C. SENTENCING EVIDENCE MUST BE RELEVANT AND RELIABLE

The Eighth Amendment demands any part of a capital case be analyzed under a higher level of scrutiny if that part of the case affects the sentencing determination.⁵⁵ A heightened standard of reliability is required when determining whether death is the most appropriate punishment.⁵⁶ Constitutional standards “require inquiry into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim’s family.”⁵⁷ Unless the evidence is both relevant and reliable, it should not be considered during the sentencing phase of a capital case.

The Federal Rules of Evidence demand that only material that relates closely to the facts of a case be considered by the trier of fact.⁵⁸ Rule 402 clearly states that relevant evidence is admissible while irrelevant evidence is not.⁵⁹ Relevant evidence means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁶⁰ Trial judges are also given the discretion to find relevant evidence inadmissible if the probative value of the evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or

⁵⁵ *New York v. Arthur*, 673 N.Y.S.2d 486, 493-94 (N.Y. 1997).

⁵⁶ *Id.* at 494.

⁵⁷ *Tennessee v. Sims*, 45 S.W.3d 1, 14 (Tenn. 2001).

⁵⁸ FED. R. EVID. 401, 402, & 403.

⁵⁹ FED. R. EVID. 402.

⁶⁰ FED. R. EVID. 401.

misleading to the jury.⁶¹ The United States Supreme Court has stated that mitigating evidence is admissible in capital cases and only has to meet a low threshold test for relevance to be admitted.⁶²

Execution cost-benefit evidence does not meet the relevance test under either the Federal Rules of Evidence or precedent. This evidence is irrelevant because it does not have a tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence. Jurors can make the same sentence determination with this evidence as they would without the evidence. Also, this evidence does not relate to the “existence of any fact that is of consequence” but only relates to how much a state may pay for its capital punishment system to be implemented.

Even if the cost-benefit evidence is found to be relevant, courts should still find it inadmissible under Rule 403. By allowing parties to discuss the cost of executions during the sentencing phase of a capital trial, juries may confuse the issues involved in this phase. The issue in the sentencing phase of a capital trial is to determine whether the defendant receives the death penalty or a lesser punishment. The issue is not one of how much an execution may cost and it is critical that jurors not be allowed to confuse these two issues at such a crucial part of a capital case.

The cost of an execution versus the costs of life imprisonment has no relevance to a capital sentencing phase. Only relevant aggravating and mitigating evidence that reflects on the individual defendant or the crime itself should be considered in the penalty phase of a capital case. A Connecticut Superior Court Judge recently dealt with the relevance of these costs evaluations and stated:

Economic arguments tailored to specific individuals are not only irrelevant but perverse. From an economic view, it will thus be more expensive to incarcerate the younger defendant

⁶¹ FED. R. EVID. 403.

⁶² *Roper*, 543 U.S. at 568; *see also* *Tennard v. Dretke*, 542 U.S. 274, 284-88 (2004) (rejecting the Fifth Circuit’s test for “constitutional relevance”).

for the remainder of his life and – in strict economic terms – more cost-effective to execute him. . . . This argument plainly makes no moral sense.⁶³

Overall, statistics tend to be an unreliable source of information. “Statistics is as much an art as it is a science.”⁶⁴ One author, Darrell Huff, has coined statistical manipulation as “statisticulation,” or in other words the use of statistical information to misinform society.⁶⁵ Statistics are vulnerable to various manipulations and distortions.⁶⁶ “The secret language of statistics, so appealing in a fact-minded culture, is employed to sensationalize, inflate, confuse, and oversimplify.”⁶⁷ “A well-wrapped statistic is better than Hitler’s “big lie”[;] it misleads, yet it cannot be pinned on you.”⁶⁸

To illustrate how easy it is to manipulate the same statistics to fit one’s agenda, Huff proposes the following example:

You can, for instance, express exactly the same fact by calling it a one percent return on sales, a fifteen percent return on investment, a ten-million-dollar profit, an increase in profits of forty percent, or a decrease of sixty percent from last year. The method is to choose the one that sounds best for the purpose at hand and

⁶³ *Judge: Execution, prison costs irrelevant*, UPI, Oct. 15, 2010, available at http://www.upi.com/Top_News/US/2010/10/15/Judge-Execution-prison-costs-irrelevant/UPI-37711287115415 (quoting John C. Blue, a Connecticut Superior Court Judge, rejecting the defendant’s request to allow testimony on the cost of the state of execution compared to the cost of life imprisonment)(internal quotations omitted).

⁶⁴ Darrell Huff, *HOW TO LIE WITH STATISTICS* 120 (W.W. Norton & Company 1954) available at <http://www.horace.org/blog/wp-content/uploads/2012/05/How-to-Lie-With-Statistics-1954-Huff.pdf>.

⁶⁵ *Id.* at 100.

⁶⁶ *Id.*

⁶⁷ *Id.* at 8.

⁶⁸ *Id.* at 9.

trust that few who read it will recognize how imperfectly it reflects the situation.⁶⁹

Going on this proposition, the statistics regarding the cost of the death penalty and the cost of life in prison without parole are fatally flawed. The statistics that are available are based on a judicial system where the death penalty is the ultimate penalty. If life in prison without parole was the ultimate penalty, the statistics would show that penalty to be much more expensive than the lesser penalty of life in prison with the option for parole. These statistics are developed to promote anti-death penalty arguments and can be skewed in a variety of ways to lend credence to any proposition one may want to propose. To allow a jury to consider statistics that can fluctuate, as needed, while deciding whether or not a defendant lives or dies is absurd.

The individual execution costs will vary depending on the age of the defendant, the execution procedure used by the state in which the execution is carried out, etc. This dynamic shows that the statistical numbers can always be skewed and used in ways that promote whatever policy argument or reasoning one may want to promote. To determine whether one lives or dies based on flawed, irrelevant, unreliable statistics or statistics that can easily be altered should not be allowed in capital cases.

D. AN ERROR IN CAPITAL SENTENCING MAY BE CONSTITUTIONALLY HARMLESS BUT IT IS STILL AN ERROR

The harmless error doctrine was first developed by the United States Supreme Court in 1967.⁷⁰ In *Chapman*, the Court decided that even though an error is constitutional, that does not render that error resistant to the harmless error analysis.⁷¹ The Court also found that some constitutional errors were so fundamental as to defy harmless error analysis and to thus be automatically reversed.⁷² The *Chapman* Court established the rule for determining whether an error was in fact a harmless

⁶⁹ *Id.* at 82.

⁷⁰ *Chapman v. California*, 386 U.S. 18 (1967).

⁷¹ *Id.* at 22.

⁷² *Id.* at 23.

error: “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”⁷³

In 1988, the Court held that the *Chapman* test was equally applicable in the penalty phase of a capital case.⁷⁴ The Court, in *Satterwhite*, held: “it is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion given to the sentencer.”⁷⁵ The only time the Court has found automatic reversible error in a capital case is where a juror has been found to be so pro-capital punishment that he is effectively unable to not impose a death sentence.⁷⁶

The purpose of the harmless error test “reflect[s] a balancing of the defendant’s interests in an error-free proceeding against the societal interest in finality and judicial economy.”⁷⁷ James Scoville has summed it up nicely: “any error in capital sentencing implicates some constitutional concerns...the constitutionally compelled sentencing discretion in capital punishment proceedings may be undermined by error regardless of whether an independent constitutional right is violated.”⁷⁸

Allowing a jury to consider the cost of execution versus the cost of life imprisonment should be deemed an error. One can call it “harmless error” but it is still an error and it is an error in a case that determines whether a person lives or dies. We should strive for a perfect system and an error in death sentencing is a permanent mistake and is greater than any other mistake allowed in criminal jurisprudence.

⁷³ *Id.* at 24.

⁷⁴ *Satterwhite v. Texas*, 486 U.S. 249 (1988).

⁷⁵ *Id.* at 258.

⁷⁶ The term “Morgan Precept” comes from the case of *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

⁷⁷ James C. Scoville, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740, 744 (1987) (quoting *United States v. Hasting*, 461 U.S. 499, 502 (1983) (criticizing lower court for its failure “to strike the balance between disciplining the prosecutor on the one hand, and the interest in the prompt administration of justice and the interests of the victim on the other”)).

⁷⁸ *Id.* at 757.

V. SHOULD JURIES BE ALLOWED TO EVALUATE EXECUTION COSTS IN CAPITAL CASE SENTENCING?

There are valid arguments on both sides regarding these cost evaluations. A juror, as a taxpayer, has a vested interest in the cost of all trials, especially costly capital murder trials. The statistics available calculate the average cost of executions and do not allow jurors to evaluate what the individual trial they are sitting for will cost. There is no national standard or national agency that calculates the cost of executions on average around the nation so the statistics provided are fundamentally flawed since they are not a national average but only an average for a few states.

A. JURIES HAVE A VESTED INTEREST IN COSTS

As taxpayers, every juror in every trial has a vested interest in the cost of that prosecution. The costs of a trial include the prosecutor's salary, court-appointed defense counsel, the judge's salary, law enforcement salaries, and other various trial costs. These costs are high in a normal criminal trial but, due to many factors such as the length of a capital trial and the cost of mandatory expert witnesses, are exponentially increased in a capital murder trial as shown in the statistics above. As the expense of trials increase, local taxes likely will be increased to cover the extra costs.

When calculated, the actual cost per execution per year to individual taxpayers is actually quite minimal.⁷⁹ The United States has spent around \$2.5 billion on capital cases since 1976.⁸⁰ Taxpayers spent, on average, thirty-one cents per year on capital cases from 1976 to 2010.⁸¹ Individual taxpayers pay

⁷⁹ To determine the following calculations, the author used the statistics included in Section II and divided them by the individual state and national census figures, respectively. Note only population of eighteen and over was used in these calculations since author intends to calculate taxpayer expense. U.S. DEPARTMENT OF COMMERCE. UNITED STATES CENSUS BUREAU, 2010 Population Estimates, available at <http://www.census.gov>.

⁸⁰ Dieter, *supra* note 4, at 15.

⁸¹ \$2.5 billion over 34 years (1976-2010) = \$7,352,411 per year/population of 234,564,071 = \$.31 cents per year.

around \$4.90 a year for capital cases in California.⁸² Taxpayers in New York and New Jersey paid less than \$1.50 per year for their capital punishment system prior to their states' abolition of the death penalty.⁸³ Maryland taxpayers paid around \$2.00 per year for their capital punishment system.⁸⁴ These figures show that the actual cost to individual jurors, as taxpayers, is nominal and goes to show that jurors do not have the vested interests that one might think when looking at the larger overall state costs.

While the jurors may have a vested interest as taxpayers, the "death penalty itself is not on trial" when it comes to cost evaluations.⁸⁵ The better venue to evaluate the cost of execution compared to the cost of life in prison without parole is within the legislature, whether it is on a federal or an individual state level. Leland Price, Tennessee Assistant District Attorney General, recently stated, "public debate among our policy makers concerning the economic costs of the death penalty is one thing, presenting such evidence to a capital jury trying to make an individualized sentencing decision is another."⁸⁶

By allowing jurors, as taxpayers, to evaluate the cost of execution versus life in prison without parole, courts allow the jurors' personal finances to come into the sentencing equation. A capital murder trial is not the place for personal finances to have such a huge impact on whether or not the defendant lives or dies. In times of economic hardship, the decision to render the death penalty would shift in light of individual jurors' financial situations instead of being evaluated in terms of the individual convicted of murder and the circumstances surrounding the crime itself.

⁸² *California Commission*, *supra* note 13 (\$137 million per year/population of 27,958,916 = \$4.90 per year).

⁸³ *Dieter*, *supra* note 4 at, 15-16 (New Jersey: \$252 million over 20 years = \$10,080,000 per year/population of 6,726,680 = \$1.50 per year; New York: \$170 million over 9 years = \$18,888,888 per year/population of 15,053,173 = \$1.25 per year).

⁸⁴ *Id.* at 17 (\$186 million over 20 years = \$9,300,000 per year/population of 4,420,588 = \$2.10 per year).

⁸⁵ *Tennessee v. Cobbins*, 2009 WL 2115350, State's Response to Motion to Permit Evidence at Sentencing Relating to Economic Costs of the Death Penalty, Knox County, Tenn. (May 12, 2009).

⁸⁶ *Id.*

B. NO CASE BY CASE STATISTICS ARE AVAILABLE

There are no individual death penalty trial cost statistics available. Each case is different in facts, investigation methods, trial strategy, appeals, and post-conviction procedures. Therefore, the cost of each capital murder case differs from the next and can differ tremendously.

In *Lockett*, the Supreme Court determined that the jury in a capital murder trial is to make a decision appropriate for the individual defendant in light of the crimes he has committed.⁸⁷ The Court reasoned “[g]iven that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.”⁸⁸

To allow non-individualized cost evaluations to play a part in a jury’s decision to determine whether the defendant lives or if the defendant is executed is contrary to Supreme Court capital murder jurisprudence. The Court has made clear that capital case sentencing determinations are to be made on an individual defendant and individual crime basis. Since individual case statistics are unavailable in the death penalty arena, courts should not allow juries to consider the difference in execution and life in prison without parole in terms of cost. Juries should only be allowed to consider the characteristics of the individual defendant and the circumstances of the individual crime committed.

C. NO NATIONAL STANDARDS FOR EVALUATION OF COSTS

No national evaluation standard exists for evaluating the cost of executions and life in prison without parole in each state. With no national evaluation standard in place, all fifty states could implement a different method of evaluation. If different evaluation methods are used, the number of variables considered during the statistical analysis can make

⁸⁷ *Lockett*, 438 U.S. at 605. See also *Sims*, 45 S.W.3d at 29 (holding that evidence regarding the nature and circumstances of the crime or relating to the defendant’s character and background is admissible in order to meet the constitutional requirement that sentencing be conducted in an individualized manner.).

⁸⁸ *Lockett*, 438 U.S. at 605.

the eventual statistics inconsistent among the various states. The different parts that would have to be pieced together to gather a comprehensive economic picture on the costs of execution will vary widely from jurisdiction to jurisdiction depending on the evaluation method.

As mentioned above, not all death penalty states have statistics available regarding the cost of execution or the cost of life in prison without parole. If death penalty states want to begin to allow juries to consider the costs of executions during the sentencing phase of capital cases, they should develop a national committee to determine how these costs are calculated and the variables that must be considered when making these calculations. These steps would make the statistics more reliable and allow juries to make true determinations regarding the actual costs involved instead of relying on fluffed numbers as they stand now.

VI. HOW DO WE AVOID THE TROUBLES OF FLAWED STATISTICS THAT MAY DETERMINE WHETHER ONE IS SENTENCED TO LIFE OR TO DEATH?

Courts have three options in determining how cost-benefit evidence is admitted into the sentencing phase of a capital trial: (1) courts may allow only the capital defendant to present the evidence; (2) once a defendant offers the statistical evidence, the courts may choose to allow the prosecution to respond to the argument; or (3) courts may choose to completely exclude any cost-benefit evidence or arguments. While each of these options have their benefits, ultimately courts should follow the latter and not allow execution cost-benefit evidence or arguments at the sentencing phase of capital cases.

A. ONLY THE CAPITAL DEFENDANT CAN PRESENT STATISTICAL EVIDENCE OF EXECUTION COST

Courts may decide to only allow the defense to admit the information regarding cost of execution versus life imprisonment. This information can be a valuable asset to a capital defendant and potentially spare the defendant's life.

Defense attorneys owe a duty to each client to protect their constitutional rights and freedoms. This duty does not become less important when a client is charged with capital murder. If anything, the duty becomes more important to spare the life of the client. Defense counsel must attempt to sway the jury to spare the life of his or her client and make jurors aware of any information that may possibly sway their sentencing decision in favor of life in prison. To this point, it is imperative for defense counsel to take all avenues available to avoid a sentence of death and offering this statistical information for jury consideration is an avenue that must at least be attempted.

A capital defendant has a valid argument that these statistics are a form of mitigating evidence that should be considered by the jury during the sentencing phase. As the statistics stand now, the defendant can make a powerful argument to the jury to sentence him to a term of life in prison because that sentence would save the jurors, as taxpayers, a tremendous amount of money. If a court finds this argument to be persuasive and determines the information to be mitigating, defendants around the country could be spared from execution.

If one's life is being determined by twelve people, those people should be allowed to consider anything and everything while making their determination to take the life of another. Human nature and compassion seems to say that courts should not deny a defendant the right to plea for his life in any manner necessary. If this plea includes using statistical data that may curtail a jury from sentencing a defendant to death, then so be it.

B. ONCE THE DEFENDANT OPENS THE DOOR, THE PROSECUTION CAN RUN THROUGH IT

Courts may decide to allow the defendant to admit the information regarding the cost of execution first and then allow the prosecution to counter the information with their own arguments. It would only seem fair to allow the prosecution to counter any arguments made by the defendant, especially statistical arguments.

Since the statistics are in favor of the capital defendant, the only avenue the prosecution has available is to tug at the

emotions of the jury. They may remind the jury of how heinous the defendant's actions were. The prosecution may also introduce the costs to the victim and the victim's family. They may agree the cost of executing the defendant is high; however, that cost can in no way outweigh the cost of losing a relative.

Why should the defendant be given the chance to live based on the cost of executions when the defendant took the life of an innocent person? How low do the costs have to drop before you will deliver justice for the innocent life taken by the defendant? The judicial system is supposed to seek justice; are you going to allow money to alter what the system is designed to do? These are all questions the prosecution may ask the jury when trying to counter a capital defendant's arguments regarding the cost of execution.

A prosecutor may focus on the fact that the cost of a punishment should never matter, especially when a person's life has been taken by another. Cost of punishment may be a valid consideration in misdemeanor or lower felony cases when the options are limited to incarceration or probation or community service. However, the cost of execution versus the cost of life imprisonment has no place in capital sentencing.

A prosecutor may explain to the jury that the majority of these costs are sunk costs that, in reality, never affect the individual jurors as taxpayers. The trial costs, including prosecutorial salaries, law enforcement salaries, judge salaries, are costs that are going to be paid whether those individuals are working on a capital case or on a misdemeanor case. These individuals do not receive overtime pay for the extra time put into a capital trial. Therefore, the jurors should not put a tremendous amount of faith into a defendant's arguments based on execution costs.

C. EXECUTION COST-BENEFIT EVIDENCE AND ARGUMENTS SHOULD BE INADMISSIBLE IN CAPITAL CASES

Courts should not allow the information regarding the cost of execution and life in prison without parole into the realm of death penalty jurisprudence. The courts have juggled the many constitutional safeguards surrounding the death penalty along with the moral realms of the death penalty for

years. To allow economic evaluations to come into play is opening death penalty jurisprudence up to further attack.

Death *is* different. The decision of whether or not to take a person's life is the ultimate decision a capital juror has to make. This decision will forever weigh on a juror's mind.

Allowing parties to present execution cost arguments to a capital jury is arbitrary and capricious in and of itself. Today, if used, the statistics could potentially allow all capital defendants to escape execution. The statistics may drastically change tomorrow and potentially allow all capital defendants to receive a death sentence because it is cheaper for society to execute. Depending on the statistics of the day, you live or you die. This is the exact thing the Supreme Court has tried to avoid in developing the protections afforded by defendants from arbitrary and capricious actions by the courts.

By allowing cost-benefit evidence and arguments into the sentencing phase of a capital case, courts will make the decision a personal decision for the jurors to make instead of a decision based on the circumstances surrounding the crime and the individual defendant. The purpose of the sentencing phase is to allow the jury to determine one's punishment based on aggravating and mitigating circumstances. Execution statistics do not fit under either of those categories and should not be admissible in the sentencing phase of a capital trial. The punishment decision is not a personal decision; it is a decision to be made based on the evidence submitted at trial regarding the crime itself and the character of the defendant - nothing more, nothing less.

One could go on for days about the relevance and reliability of statistics. Suffice it to say, the statistics offered above are neither relevant nor reliable and have absolutely no business being admitted into a capital case. The cost statistics are completely irrelevant to the crime of murder or any circumstances that might surround the crime. The statistics are also irrelevant to the character or background of a capital defendant. These statistics can be twisted to promote one public policy and twisted again to meet another. A famous quote sums up the reliability of statistics nicely: "There are three kinds of lies: lies, damned lies, and statistics."⁸⁹ The cost

⁸⁹ Former British Prime Minister Benjamin "Disraeli would often apply with justice and force: "There are three kinds of lies: lies,

of execution statistics are irrelevant and unreliable and should not find their way into death penalty jurisprudence.

Since capital trial errors are evaluated under the harmless error doctrine, it would likely be impossible for appellate courts to properly evaluate the effects of allowing this statistical information and determine if a harmful error had actually occurred. With the cost-benefit evidence being questionable, at best, trial courts should avoid putting appellate courts in the predicament of trying to guess what jurors are thinking as they make sentencing determinations.

As previously stated, the admittance of execution cost evidence should be deemed an error. Harmless or harmful, an error is still an error. The judicial system should strive to be a perfect system even if that goal seems unattainable at times. An error of this magnitude can easily be avoided by courts holding that cost-benefit evidence and arguments regarding executions are inadmissible.

VII. CONCLUSION

The death penalty has been under attack for many years and the resulting debate has focused on various topics that put people's values into play. To allow an economic element into the sentencing phase of capital cases will only open the death penalty up for further criticism. Money should not be an option when determining whether a person lives or dies.

damned lies, and statistics.'" MARK TWAIN, CHAPTERS FROM MY AUTOBIOGRAPHY- XX 471 (1907), *available at* <http://www.gutenberg.org/files/19987/19987-h/19987-h.htm>.

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HELP WANTED: STATES LEFT WITH THE DAUNTING TASK OF APPLYING THE *ATKINS* HOLDING FOR THE EXEMPTION OF MENTALLY RETARDED DEFENDANTS FROM THE DEATH PENALTY

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I. INTRODUCTION

In its decision in *Atkins v. Virginia*, the United States Supreme Court ruled the execution of a mentally retarded defendant who has committed a capital crime is unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution.¹ The Court left to the individual states the obligation to determine how to apply the holding of *Atkins*.² Because of this, the states differ on the definition of mental retardation, which party bears the burden of proof, the standard of proof to be applied, and when the determination of retardation should be made. Leaving the states to their own

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¹ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

² *Id.*

devices has denied some defendants full protection under the Eighth Amendment. It is not necessary to enact a standard mental retardation definition, because there are case-by-case details that should be taken into consideration in proving the existence of mental retardation of that individual defendant; however, states should enact laws that uphold the Court's holding in *Atkins* by establishing that (1) the defendant bears the burden of proof; (2) the standard of proof be preponderance of the evidence, and (3) the determination of mental retardation must be made prior to trial.

II. INTRODUCTION TO THE DEATH PENALTY AND HOW IT APPLIES TO THE MENTALLY RETARDED

The United States Supreme Court has continuously expressed that "death is different" when it comes to deciding death penalty appeals.³ Since 1976, 1,350 people have been executed in the United States.⁴ From 1976 to 2002, of those executed, at least forty-four were defendants with mental retardation.⁵ In fact, it was not until 2002 that the United States Supreme Court acknowledged that mental retardation limits a defendant's culpability to a degree that renders the death penalty cruel and unusual under the Eighth Amendment to the United States Constitution.⁶

In its 2002 landmark, *Atkins v. Virginia*, the Supreme Court ruled that it was unconstitutional to execute a mentally retarded defendant.⁷ Unfortunately, in its decision, the Supreme Court failed to advise the states which burden of proof standard should be used in determining a defendant's

³ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

⁴ Death Penalty Info. Ctr., *Number of Executions by State And Region Since 1976*, DEATHPENALTYINFO.ORG (last visited April 5, 2013), <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>.

⁵ Death Penalty Info. Ctr., *List of Defendants With Mental Retardation Executed In The United States*, DEATHPENALTYINFO.ORG, <http://www.deathpenaltyinfo.org/list-defendants-mental-retardation-executed-united-states> (last visited April 5, 2013).

⁶ *Atkins*, 536 U.S. at 321; Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders And Excluding Them From Execution*, 30 J. LEGIS. 77, 82 (2003).

⁷ *Atkins*, 536 U.S. at 321.

alleged mental retardation.⁸ The Supreme Court's failure to define the standard of proof to apply and which party bears the burden of proof, has denied mentally retarded capital defendants equal protection and due process rights under the Fourteenth Amendment. Chillingly, the failure by United States Supreme Court to establish a standard of proof means the difference between the defendant's life and death.⁹

Therefore, states should enact laws treating allegations of mental retardation as an affirmative defense, so like in other affirmative defense cases, the defendant bears the burden of proof. The states should further pass legislation standardizing the proof required to be introduced by a capital defendant. The standard of proof the states should adopt would be the preponderance of the evidence standard. The preponderance of the evidence standard would afford all capital defendants alleging mental retardation protection under the United States Constitution.

The United States Supreme Court also failed to set forth in the *Atkins* decision when the determination as to a defendant's alleged mental retardation should be made, causing inefficiency both in time and expense. Further, it creates bias in the judicial system in some states. The states, therefore, should uphold the United States Supreme Court decision in *Atkins* and require that the determination as to a defendant's mental retardation be made prior to trial. Such a procedure would be more likely to lead to a fair trial for mentally retarded defendants and create an efficient judicial process.

While the United States Supreme Court has righted the wrong illustrated in the 1976 decision in *Penry v. Lynaugh*, it did not provide practical recommendations to the states when applying *Atkins*, and therefore the states should endorse the *Atkins* holding to its fullest and intended effect so that mentally retarded defendants convicted of a capital crime are not denied their afforded protection under the United States Constitution.

⁸ James Gerard Eftink, et al, *Mental Retardation As A Bar To The Death Penalty: Who Bears The Burden of Proof?*, 75 MO. L. REV. 537, 568 (2010).

⁹ *Id.*

III. THE EXECUTION OF MENTALLY RETARDED PRIOR TO THE DECISION IN *ATKINS V. VIRGINIA* WAS BASED ON A "NATIONAL CONSENSUS"

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment; however, whether or not it was intended by its founders, the amendment has been dynamic because its scope has been manipulated based on society's progression.¹⁰ When the Supreme Court reviewed the case of *Penry v. Lynaugh*, one of the factors the Court seriously considered in determining whether the execution of a mentally retarded man was unconstitutionally cruel and unusual was society's evolving standard of decency.¹¹

John Paul Penry was charged with the 1979 brutal rape, beating, and fatal stabbing with a pair of scissors of a woman in Texas.¹² Penry, who had been on parole for another rape conviction at the time he committed the murder, was found competent to stand trial even though he was found to be "mildly to moderately retarded" and had "the mental age of a six-and-a-half year old."¹³ At his trial, doctors testified that Penry suffered from organic brain damage likely caused at birth and had an IQ at the time of trial of fifty-four.¹⁴ Penry, who was twenty-two years old at the time he committed the crime, had not only the mental age of a six-and-a-half year old child, but also the social maturity of a nine or ten-year-old child.¹⁵ Still, the jury found Penry competent to stand trial, convicted him, and sentenced him to death.¹⁶

¹⁰ Donald E. d'Entremont, *Constitutional Law-Defendant's Mental Retardation Does Not Preclude Imposition of the Death Penalty As Long As the Sentencer Considers All Relevant Mitigating Evidence-Penry v. Lynaugh*, 109 S. Ct. 2934 (1989), 24 SUFFOLK U. L. REV. 221, 224 (1990) [hereinafter *d'Entremont*].

¹¹ *Id.* at 224.

¹² *Penry v. Lynaugh*, 492 U.S. 302, 307 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 308.

¹⁶ *Id.*

The Texas Court of Criminal Appeals affirmed Penry's conviction and sentence on direct appeal, determining that the death penalty was not prohibited due to Penry's allegation of being mentally retarded.¹⁷ Penry took his case to the District Court, which denied relief.¹⁸ Thus, Penry appealed to the Court of Appeals for the Fifth Circuit, which affirmed the District Court's judgment.¹⁹

Penry's case finally reached the United States Supreme Court in 1989, to determine, *inter alia*, whether it was cruel and unusual punishment to execute a mentally retarded person.²⁰ Here, Penry argued his mental retardation acted as a mitigating factor, and therefore he should have been sentenced to a penalty less than death.²¹ In a five-to-four decision, the Supreme Court found mental retardation is a factor that may lessen a defendant's culpability for a capital offense, but it could not be concluded in Penry's case that the Eighth Amendment precluded the execution of a mentally retarded person of Penry's ability.²²

In support of its decision, the Supreme Court stated while mental retardation could be considered and given effect as a mitigating factor in sentencing, there was not enough evidence in Penry's specific case to establish a national consensus against execution of the mentally retarded.²³ The Court examined federal and state laws prohibiting such executions, public opinion surveys, and the position of the American Association on Mental Retardation, and found no consensus at the time against executing mentally retarded defendants.²⁴ Therefore, the Court reasoned the states could continue to execute mentally retarded defendants until state legislatures reached a consensus prohibiting such executions.²⁵

¹⁷ Penry v. Texas, 691 S.W.2d 636, 654-55 (Tex. Crim. App. 1985).

¹⁸ Penry, 492 U.S. at 312.

¹⁹ Penry v. Lynaugh, 832 F.2d 915, 926 (5th Cir. 1987), *aff'd in part, rev'd in part*, 492 U.S. 302 (1989) *abrogated by* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

²⁰ Penry, 492 U.S. at 313.

²¹ *Id.* at 315.

²² *Id.* at 340.

²³ *Id.*

²⁴ *d'Entremont*, *supra* note 10, at 226.

²⁵ *Id.*; Linda L. Hinton, *Criminal Law-Imposing the Death Penalty on Capital Defendants Who Are Mentally Retarded Is Not Prohibited by the Eighth Amendment To The Constitution If Instructions To The Jury Allow*

While the state legislatures never did reach a consensus prohibiting such executions, the Supreme Court came to that decision thirteen years after *Penry* when it was asked to decide the case of *Atkins v. Virginia*.

IV. THIRTEEN YEARS AFTER *PENRY*, THE UNITED STATES SUPREME COURT GOT IT RIGHT IN *ATKINS* BY BANNING THE EXECUTION OF MENTALLY RETARDED DEFENDANTS

Thirteen years after the decision not to exclude the mentally retarded from being sentenced to death was reached in *Penry*, the Supreme Court decided that the death penalty could no longer be used against the mentally retarded. In a six-to-three decision, the Supreme Court reasoned in *Atkins v. Virginia*, that executing a mentally retarded person violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.²⁶

Daryl Renard Atkins was convicted in Circuit Court in Virginia of abduction, armed robbery, and capital murder and was facing the death penalty.²⁷ In the penalty phase, the defense relied on testimony from a forensic psychologist who had evaluated Atkins and concluded that he was “mildly mentally retarded” based on interviews with people who knew Atkins, a review of school and court records, and by conducting an intelligence test, which indicated that Atkins had a full scale IQ of fifty-nine.²⁸ The jury sentenced Atkins to death anyway, but the Virginia Supreme Court ordered a second sentencing hearing because the trial court had used a misleading verdict form.²⁹ At the resentencing, the forensic psychologist testified again.³⁰ However, the prosecution presented an expert rebuttal witness who expressed the opinion that Atkins was not mentally retarded, but rather was of “average intelligence, at least,” and diagnosable as having

For The Consideration Of Mental Retardation As Mitigating Factor, 39 DRAKE L. REV. 921, 928-29 (1990).

²⁶ *Atkins*, 536 U.S. at 307.

²⁷ *Id.*

²⁸ *Id.* at 308-09.

²⁹ *Id.* at 309.

³⁰ *Id.*

antisocial personality disorder.³¹ The jury again sentenced Atkins to death.³² The Supreme Court of Virginia affirmed Atkins' death sentence stating it was "not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score."³³ Because of the gravity of the concerns of the dissenters to the Virginia Supreme Court's decision, and due to the dramatic shift of the state legislative landscape that occurred since the *Penry* decision, the Supreme Court decided to grant Atkins certiorari.³⁴ Justice Stevens delivered the opinion of the Court stating:

Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.³⁵

³¹ *Id.*

³² *Id.*

³³ *Id.* at 310 (citing *Atkins v. Com.*, 534 S.E.2d 312, 321 (Va. 2000).

³⁴ *Atkins*, 536 U.S. at 310.

³⁵ *Id.* at 306-07.

V. INTERPRETATIONS POST-*ATKINS* BY THE STATES HAVE
RESULTED IN AN UNDERMINING OF THE *ATKINS*
HOLDING

After the decision was handed down in *Atkins*, the individual states were left to decide how to apply the holding to their own death penalty sentences.³⁶ Each state has been left to define mental retardation, to decide the necessary proof in determining whether a defendant is mentally retarded, and to determine whether or not a defendant could be sentenced to the death penalty, because the United States Supreme Court did not create a bright-line rule for any of those factors.³⁷ As a result, no uniform definition of mental retardation has been established.³⁸ Some states, such as Idaho, have applied a definition of mental retardation that is viewed by some as so limiting that it offends a defendant's rights under the United States Constitution.³⁹ In Idaho, mental retardation is based on a fixed IQ number, although experts agree that an IQ number alone does not determine mental retardation.⁴⁰ An Idaho defendant with an IQ of 71 or above could be set to be executed if convicted, even if that defendant could otherwise qualify as being mentally retarded.⁴¹ Other states, such as California, do not specify a certain IQ for determining mental retardation.⁴² Rather, California defines mental retardation as "significantly subaverage [sic] general intellectual functioning

³⁶ Anna M. Hagstrom, *Atkins v. Virginia: An Empty Holding Devoid of Justice for the Mentally Retarded*, 27 LAW & INEQ. 241, 241-42 (2009) [hereinafter *Hagstrom*].

³⁷ *Id.* at 242.

³⁸ *Id.*

³⁹ Am. Civil Liberties Union, *Mental Retardation And The Death Penalty*, ACLU.ORG (Sept. 4, 2003), <http://www.aclu.org/capital-punishment/mental-retardation-and-death-penalty> (last visited Oct. 19, 2013) [hereinafter *Mental Retardation And The Death Penalty*].

⁴⁰ See IDAHO CODE ANN. § 19-2515A(1)(b) (West, WestlawNext current through 2013); *Mental Retardation And The Death Penalty*, *supra* note 39.

⁴¹ IDAHO CODE ANN. § 19-2515A(1)(b) (West, WestlawNext current through 2013); *Mental Retardation And The Death Penalty*, *supra* note 39.

⁴² Sara Catania, *Death Row's IQ Divide*, L.A. TIMES OPINION (May 8, 2007), <http://www.latimes.com/news/opinion/commentary/la-oe-catania8may08,0,1060490.story>.

existing concurrently with deficits in adaptive behavior and manifested before the age of 18."⁴³

Inconsistencies also result, depending on when the determination of mental retardation is made.⁴⁴ In Louisiana and Virginia, prosecutors have argued the determination should always be made post-conviction by the same jury that found the defendant guilty.⁴⁵ In Louisiana, the determination of mental retardation can be made pre-trial by a judge but only if the prosecutor agrees the determination be made then, otherwise it is left to sentencing by the jury.⁴⁶ In Virginia, the determination is made by the jury or the judge in non-jury trials during the defendant's sentencing.⁴⁷ However, efficiency in the administration of justice dictates that a pre-trial determination on a defendant's mental retardation would save time and money associated with the prosecution of a death penalty trial.⁴⁸

Additionally, there have been irregularities among the states in establishing the standard of proof necessary to determine whether a defendant should be sentenced to death.⁴⁹ Currently sitting on death row in Georgia is Warren Hill, an inmate with an IQ of 70, who was granted a stay of execution on February 19, 2013, within thirty minutes of his scheduled time to receive a lethal injection.⁵⁰ In 1991, Hill was

⁴³ CAL. PENAL CODE § 1376 (West, West, WestlawNext current with urgency legislation through Ch. 526, except Ch. 352, of 2013 Reg.Sess.).

⁴⁴ *Mental Retardation And The Death Penalty*, supra note 39; see also John H. Blume et al., *Of Atkins and Men*, 18 CORNELL J.L. & PUB. POL'Y 689, 693 (2009).

⁴⁵ LA. CODE CRIM. PROC. ANN. art. 905.5.1(C)(1)-(2) (West, WestlawNext current through 2013 Reg Session); VA. CODE ANN. § 19.2-264.3:1.1 (West, WestlawNext current through 2013 Reg. Session); *Mental Retardation And The Death Penalty*, supra note 39.

⁴⁶ LA. CODE CRIM. PROC. ANN. ART. 905.5.1(C)(1) (West, WestlawNext current through 2013 Reg. Session); Death Penalty Info. Ctr., *States That Have Changed Their Statutes To Comply With the Supreme Court's Decision in Atkins v. Virginia*, DEATHPENALTYINFO.ORG (last visited Mar. 3, 2013), <http://www.deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia>.

⁴⁷ VA. CODE ANN. § 19.2-264.3:1.1 (West, WestlawNext current through 2013 Reg. Session).

⁴⁸ *Mental Retardation and the Death Penalty*, supra note 39.

⁴⁹ *Hagstrom*, supra note 36, at 266.

⁵⁰ Ed Pilkington, *Georgia Inmate Warren Hill Granted Stay of Execution 30 Minutes Before Lethal Injection*, GUARDIAN.CO.UK,

sentenced to death after he killed his cellmate in prison.⁵¹ Hill was incarcerated at the time for killing his eighteen-year-old girlfriend.⁵² In Georgia, a defendant who alleges intellectual disability for avoiding the death penalty must prove the disability beyond a reasonable doubt.⁵³ Hill was sentenced to the death penalty after he was unable to prove beyond a reasonable doubt that he was mentally retarded.⁵⁴ The beyond a reasonable doubt standard is one in which experts say is almost impossible to achieve when using that standard to assess mental retardations.⁵⁵ Even those doctors who diagnosed Hill with an IQ of 70, which constitutes mild mental retardation, found it impossible to meet this standard.⁵⁶ All three of the doctors who examined Hill have reversed their opinion that Hill had not met the legal definition of “mentally retarded” and that their original evaluation of the Hill was “extremely and unusually rushed.”⁵⁷ Georgia continues to hold capital defendants to the strictest standard of proof to show intellectual disability should preclude the death penalty.⁵⁸ Georgia is an outlier, as twenty-eight of the thirty-

<http://www.guardian.co.uk/world/2013/feb/20/warren-hill-stay-of-execution> (last visited Feb. 20, 2013); Death Penalty Info. Ctr., *Georgia Disabilities Expert Calls for Halt to Execution of Inmate With Mental Retardation*, DEATHPENALTYINFO.ORG, <http://www.deathpenaltyinfo.org/georgia-disabilities-expert-calls-halt-execution-inmate-mental-retardation> (last visited Mar. 3, 2013); Eric Jacobson, *The Supreme Court Must Stop the Execution of Warren Hill*, HUFF POST CRIME, http://www.huffingtonpost.com/eric-jacobson/warren-hill-execution_b_2665094.html (last visited Feb. 11, 2013).

⁵¹ Huffington Post, *Warren Hill Execution Stayed: Georgia Death Row Inmate Spared in Last Minute Decision*, HUFF POST CRIME, (Feb. 19, 2013, 11:32 PM), http://www.huffingtonpost.com/2013/02/19/warren-hill-execution-stayed_n_2720700.html [hereinafter *Warren Hill Execution Stayed: Georgia Death Row Inmate Spared in Last Minute Decision*].

⁵² *Id.*

⁵³ GA. CODE ANN. § 17-7-131 (West 2015); *Warren Hill Execution Stayed: Georgia Death Row Inmate Spared in Last Minute Decision*, *supra* note 51.

⁵⁴ *Warren Hill Execution Stayed: Georgia Death Row Inmate Spared in Last Minute Decision*, *supra* note 51.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

three states with the death penalty use a lower standard for proving mental retardation.⁵⁹

One of those states which require a lower standard of proof for avoiding the death penalty based on mental retardation is Arizona. On January 3, 2013, “after more than 13 years and two trials,” the Arizona Supreme Court ruled that Shawn Grell could not be executed because he was mentally retarded.⁶⁰ Grell’s sentence was reduced to life in prison without possibility of parole for the 1999 murder of his two-year-old daughter by lighting her on fire after dousing her with gasoline.⁶¹ At trial, Grell’s attorneys failed to prove by Arizona’s clear and convincing evidence standard that he was mentally retarded.⁶² But on appeal, the Arizona Supreme Court ruled that Grell was mentally retarded using a lower standard of preponderance of the evidence.⁶³ The Arizona Attorney General’s Office plans to appeal the Arizona Supreme Court’s ruling based on the fact that Grell was not found mentally retarded under the higher legal standard of clear and convincing evidence required by state law, but instead by a standard of preponderance of the evidence.⁶⁴ The Arizona Attorney General intends to seek legislation that would clarify the standard for future cases involving defendants who claim to be mentally retarded since Grell was found mentally retarded by preponderance of the evidence even though the statute in Arizona requires a defendant to

⁵⁹ The New York Times, *An Intolerable Burden of Proof*, THE OPINION PAGES (Nov. 29, 2011), available at http://www.nytimes.com/2011/11/30/opinion/an-intolerable-burden-of-proof.html?_r=0 (last visited Aug. 8, 2012).

⁶⁰ *Arizona v. Grell*, 291 P.3d 350, 357 (Ariz. 2013); Jim Walsh, *Arizona Court Reduces Shawn Grell’s Death Sentence to Life*, AZCENTRAL.COM (Jan. 9, 2013), <http://www.azcentral.com/community/mesa/articles/20130109arizona-court-reduces-shawn-grell-death-sentence-life-brk.html> (hereinafter Walsh).

⁶¹ *Grell*, 291 P.3d at 357; *Walsh*, *supra* note 60.

⁶² *Grell*, 291 P.3d at 351; *Walsh*, *supra* note 60; ARIZ. REV. STAT. ANN. § 13-753(g) (West, WestlawNext legislation effective June 20, 2013 of the First Regular Session of the Fifty-first Legislature).

⁶³ *Grell*, 291 P.3d at 357; *Walsh*, *supra* note 60 (“Teachers and school officials were reluctant to label Grell as retarded for fear of angering his mother, referring to behavioral disorders instead when assigning him to special-education classes.”).

⁶⁴ ARIZ. REV. STAT. ANN. § 13-753; *Grell*, 291 P.3d at 357; *Walsh*, *supra* note 60.

prove mental retardation by a clear and convincing evidence standard.⁶⁵

Those defendants on death row prior to the decision in *Atkins* have also met obstacles in appealing their sentences. The Fifth Circuit denied Bruce Webster, an inmate on federal death row for the 1994 kidnapping, rape, and murder of an Arkansas teen, an appeal to prove he was mentally retarded, because he had exhausted his appeals to the point where new evidence to prove his intellectual disability was not allowed unless that new evidence could show that Webster was innocent.⁶⁶ The allegedly weak weight of Webster's new evidence, including three doctors who diagnosed him as mentally retarded, and the fact he had applied for Social Security Disability benefits due to his mental retardation the year prior to the murder he committed, was not the reason for the denial by the Fifth Circuit and affirmation by the United States Supreme Court.⁶⁷ Rather, a 1996 federal criminal law severely limiting the number of appeals an inmate can make stopped Webster from possibly establishing his mental retardation post-*Atkins*.⁶⁸

Even inconsistencies in applying the bare bones ruling of *Atkins* (no death penalty sentence for the mentally retarded) have been felt since its decision was entered. In August 2012, Marvin Wilson, a defendant with an IQ of 61, was executed in Texas.⁶⁹ Generally, an IQ of around 70 or as high as 75

⁶⁵ ARIZ. REV. STAT. ANN. § 13-753; *Grell*, 291 P.3d at 357; *Walsh*, *supra* note 60.

⁶⁶ *United States v. Webster*, 421 F.3d 308, 309 (5th Cir. 2005); Scott Goldstein, *High Court Denies Appeal of Mentally Retarded Man Who Helped Rape, Kill Arlington Teen*, THE DALLAS MORNING NEWS (Dec. 7, 2010, 6:54 AM), <http://www.dallasnews.com/news/community-news/arlington/headlines/20101207-high-court-denies-appeal-of-mentally-retarded-man-who-helped-rape-kill-arlington-teen.ece> [hereinafter *Goldstein*].

⁶⁷ *United States v. Webster*, 421 F.3d 308, 312 (5th Cir. 2005); *Goldstein*, *supra* note 66.

⁶⁸ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No.104-132, 110 Stat 1214 (1996); *Goldstein*, *supra* note 66.

⁶⁹ David R. Dow, *Supreme Court Outlawed Executing Mentally Retarded, But Texas Does It Anyway*, U.S. NEWS (Aug. 14, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/08/14/supreme-court-outlawed-executing-mentally-retarded-but-texas-does-it-anyway.html> (last visited Aug. 19, 2012) [hereinafter *Dow*]; Kate Randall, *Texas Executes Mentally Disabled Death Row Prisoner*, WORLD SOCIALIST WEBSITE (Aug. 8, 2012),

indicates limited intellectual functioning.⁷⁰ Texas allowed for the execution of Wilson, convicted of murdering a police informant in 1992, using precedent from the Texas Court of Criminal Appeals decision established in *Ex parte Briseno*.⁷¹ In *Ex parte Briseno*, a mentally retarded defendant was executed because his retardation was deemed to be *mild*.⁷² From this 2004 case, Texas uses a “*Briseno* factors” test to determine mental retardation.⁷³ These “*Briseno* factors” are arguably subjective and stereotypical and without any scientific data to back them up.⁷⁴ These factors include but are not limited to asking people who knew the defendant whether they thought he was “mentally retarded” to whether the crime committed required forethought.⁷⁵

On February 29, 2012, Arizona executed Robert Moorman, who was diagnosed as being mentally retarded and having attended special education classes while in public school.⁷⁶ Moorman was sentenced to death for the 1984 murder of his adoptive mother who he killed while out on a three-day furlough while serving a nine-year prison term for

<http://www.wsws.org/Fen/articles/2012/08/wils-a08.html> (last visited Aug. 19, 2013) [hereinafter *Randall*].

⁷⁰ Am. Ass’n of Intellectual and Dev’l Disabilities, *Definition of Intellectual Disability*, AIDD.ORG, http://www.aidd.org/content_100.cfm?navID=21.

⁷¹ *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004); Dustin Volz, *Court Also Rejects Appeal for Man Scheduled to Die Next Week*, Tucson Sentinen.com (Feb. 29, 2012, 11:31 AM),

http://www.tucsonsentinel.com/local/report/022912_az_executions/man-put-death-after-last-minute-appeals-fail/, David R. Dow, *Supreme Court Outlawed Executing Mentally Retarded, But Texas Does It Anyway*, U.S.NEWS (Aug. 14, 2012, 4:45 AM),

<http://www.thedailybeast.com/articles/2012/08/14/supreme-court-outlawed-executing-mentally-retarded-but-texas-does-it-anyway.html>.

⁷² *Briseno*, 135 S.W.3d at 18; *Dow*, *supra* note 68.

⁷³ *Briseno*, 135 S.W.3d at 8; *Randall*, *supra* note 68.

⁷⁴ *Briseno*, 135 S.W.3d at 8; *Randall*, *supra* note 68.

⁷⁵ John H. Blume et. al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 712 (2009).

⁷⁶ Michael Kiefer, *Execution to Conclude Shocking Arizona Murder Case*, NEWS (Feb. 25, 2012, 10:19 PM),

<http://www.azcentral.com/news/articles/20120224arizona-murder-case-execution-moormann.html> [hereinafter *Kiefer*].

the 1984 kidnapping and molesting of a nine-year-old girl.⁷⁷ A defendant in Arizona, by clear and convincing evidence, must prove the criteria of being mentally retarded to avoid the death penalty under *Atkins*.⁷⁸ One doctor witness, who often testifies against inmates, said Moorman was “absolutely” mentally disabled, which would make it illegal for Arizona to execute him because of *Atkins*.⁷⁹ Other doctors said that Moorman’s intellect was just above someone who is legally considered mentally disabled.⁸⁰

Ten years after the *Atkins* decision, Alabama reduced the sentence of one of their longest serving death row inmates because of the defendant’s intellectual disability. Bobby Tarver, convicted in 1982 of murdering a taxi cab driver, had his death sentence overturned by a federal judge because of Tarver’s mental retardation.⁸¹ In 2003, Melanie Anderson’s sentence to the death penalty for the 1994 beating and torture death of her boyfriend’s three-year-old niece was reversed to life in prison after she was deemed mentally retarded.⁸²

VI. STATES SHOULD REQUIRE THAT A DEFENDANT BEAR THE BURDEN OF PROOF IN SHOWING MENTAL RETARDATION AS AN AFFIRMATIVE DEFENSE

Currently, only fourteen of the thirty-three states with the death penalty have enacted statutes shifting the burden of

⁷⁷ *Arizona v. Moorman*, 744 P.2d 679, 681-82 (Ariz. 1987); *Kiefer*, *supra* note 76 (Moorman’s representatives said he killed his adoptive mother after years of suffering sexual abuse from her).

⁷⁸ ARIZ. REV. STAT. ANN. § 13-753(G); *Arizona v. Grell*, 291 P.3d 350, 352 (Ariz. 2013).

⁷⁹ *Moorman*, 744 P.2d at 688; *Kiefer*, *supra* note 76.

⁸⁰ *Moorman*, 744 P.2d at 688; *Kiefer*, *supra* note 76.

⁸¹ *Tarver v. Thomas*, No. 07-00294-CG-B, 2012 WL 4461710, at *20 (S.D. Ala. Sept. 24, 2012); Brendan Kirby, *Judge Changes Sentence of Mobile County’s Longest-Serving Death Row Inmate to Life*, BLOG.AL.COM (Dec. 6, 2012, 3:53 PM),

http://blog.al.com/live/2012/12/judge_changes_sentence_of_mobi.html.

⁸² *North Carolina v. Anderson*, 94 CRS 5669, 95 CVR 887 (N.C. Gen. Ct. Justice Superior Ct. Div. July, 29, 2003); Jerry Lankford, *A Look at Capital Punishment and Wilkes County Moratorium on Executions Possible*, THE RECORD (June 11, 2003),

http://www.therecordofwilkes.com/news.asp?edition_number=187&pg=F.

proving mental retardation to the defendant.⁸³ Since the decision in *Atkins*, three states have not set a standard of proof at all, but still require that the defendant prove his or her mental retardation.⁸⁴ Historically, the prosecution bears the burden of proof in criminal cases; however, as to certain defenses, various jurisdictions assign one or more of the burdens to the defense.⁸⁵ When it comes to proving an affirmative defense, federal courts have upheld statutory law requiring the defendant to bear the burden of proof.⁸⁶ A defendant uses an affirmative defense to admit that he has acted in the way in which he has been accused, but that his conduct was justifiable, excusable, or could be mitigated for a particular reason, and therefore should reduce or negate the crime which he has been charged with.⁸⁷ Mental retardation should, therefore, be considered an affirmative defense and shift the burden of proof to the defendant because it is offered by the defendant to excuse or mitigate his actions in an effort to avoid being sentenced to death. In further support that the burden should be borne by the defendant, it should be noted that no state statute currently exists that places the burden on the prosecution to prove that the defendant is not mentally retarded.⁸⁸ Once the states enact legislation placing the burden of proof with the defendant, the question becomes what that standard of proof should be.

⁸³ Yamilka M. Rolon, *Mental Retardation And The Death Penalty*, J. AM. ACAD. PSYCHIATRY & L. ONLINE (June 2008), <http://www.jaapl.org/content/36/2/250.full> (hereinafter Rolon).

⁸⁴ *Pruitt v. Indiana*, 834 N.E. 2d 90, 102 (Ind. 2005); Rolon, *supra* note 82.

⁸⁵ 1 JONES ON EVIDENCE § 5:18 (7th ed. 2012).

⁸⁶ Matthew S. Gray, *Proof Issues*, 84 GEO. L.J. 1248, 1252 (1996).

⁸⁷ Scott R. Poe, *Inconsistent Methods for the Adjudication of Alleged Mentally Retarded Individuals: A Comparison of Ohio's and Georgia's Post-Atkins Frameworks for Determining Mental Retardation*, 54 CLEV. ST. L. REV. 405, 421 (2006) [hereinafter *Poe*].

⁸⁸ *Missouri v. Johnson*, 244 S.W.3d 144, 150 (Mo. 2008).

VII. STATE SHOULD REQUIRE THAT A DEFENDANT PROVE MENTAL RETARDATION USING A PREPONDERANCE OF THE EVIDENCE STANDARD TO AVOID UNDERMINING THE HOLDING OF *ATKINS*

Because the United States Supreme Court did not set a standard of proof to be applied by the states in *Atkins*, state legislatures are permitted to enact any or no laws mandating what standard their state will apply as long as it is “appropriate.”⁸⁹

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”⁹⁰

Since the *Atkins* decision, three states with the death penalty have not set a standard of proof.⁹¹ Six states with the death penalty have enacted statutes requiring a preponderance of the evidence standard, with eighteen death penalty states keeping their pre-*Atkins* preponderance of the evidence standard.⁹² Four states with the death penalty require a clear

⁸⁹ Ed Pilkington, *Georgia Lawyers Rush To Save ‘Mentally Retarded’ Death Row Inmate*, THE GUARDIAN (Feb. 17, 2013, 9:56 AM), http://www.guardian.co.uk/world/2013/feb/17/warren-hill-georgia-inmate-execution#cb=f39e0ebe6227d6&origin=http%3A%2F%2Fwww.guardian.co.uk%2Ff3928fdbf733eb8&domain=www.guardian.co.uk&relation=parent&error=unknown_user.

⁹⁰ *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

⁹¹ *Pruitt*, 834 N.E. 2d at 102; Rolon, *supra* note 83.

⁹² *Rolon*, *supra* note 83; The National Judicial College, *Case and Statute References for Mental Retardation*, JUDGES.ORG (last visited April 12, 2013), <http://www.judges.org/capitalcasesresources/bookpdf/appendices/Case%20and%20Statute%20References%20for%20Mental%20Retardation.pdf>; *see* *Smith v. Alabama*, 2007 Ala. LEXIS 91, 32-33 (Ala. May 25, 2007) (citing *Morrow v. Alabama*, 928 So. 2d 315, 323 (Ala. Crim. App. 2004); *see also* *Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1341 n.21 (N.D. Ala. 2006)); A.C.A. § 5-4-618(a)(2),(c) (2008); CAL. PEN. CODE. § 1376(b)(3) (2008); COLO. REV. STAT. § 18-1.3-1102(2) (2008); *see also* *Colorado v. Vasquez*,

and convincing evidence standard.⁹³ Only one state with the death penalty, Georgia, requires that a defendant prove mental retardation beyond a reasonable doubt standard.⁹⁴

First, we must look at the standards of proof that fail to uphold the intention of *Atkins* to move toward the correct standard of proof that should rest upon the defendant. Placing a standard of proof of beyond a reasonable doubt upon a defendant is unconstitutional because it makes it almost impossible for those capital defendants with mental retardation from proving their condition.⁹⁵ For example, a capital defendant who alleges mental retardation in Georgia has to introduce more evidence than a capital defendant alleging mental retardation in any other state and that proof must show with “virtual certainty” that the defendant is mentally retarded.⁹⁶ Consequently, doubt can easily be

84 P.3d 1019 (Colo. 2004); DEL. CODE ANN. tit. 11, § 4209(d)(3); IDAHO CODE ANN. § 19-2515A(3) (2008); 725 ILCS 5/114-15(b) (2009); *Bowling v. Kentucky*, 163 S.W.3d 361, 382 (Ky. 2005); LA. CODE CRIM. PROC. Art. 905.5.1(C)(1) (2008); MD. CODE ANN., Crim. Law § 2-202(b)(2)(ii); *see Chase v. Missouri*, 873 So.2d 1013, 1029 (Miss. 2004); MO. REV. ST. § 565.030.4(1) (2008); NEB. REV. STAT. § 28-105.01(4) (2008); NEV. REV. STAT. ANN. § 174.098.5(b) (2008); N.C. GEN. STAT. § 15A-2005(c), (f) (2008) (standard of proof is preponderance of the evidence if determined by a jury, clear and convincing evidence if determined by a court); *Ohio v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002); *Murphy v. Oklahoma*, 54 P.3d 556, 568 (Okla. Crim. App. 2002); *Blonner v. Oklahoma*, 2006 OK CR 1, 6-8 (Okla. Crim. App. 2006); *see Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003); S.D. CODIFIED LAWS § 23A-27A-26.3 (2009); TENN. CODE ANN. § 39-13-203(c) (2008); *Ex Parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004); UTAH CODE ANN. § 77-15a-104(11)(a); VA. CODE ANN. § 19.2-264.3:1.1(C); WASH. REV. CODE § 10.95.030(2) (2008).

⁹³ *Rolon, supra* note 83; The National Judicial College, *Case and Statute References for Mental Retardation*, JUDGES.ORG (last visited April 12, 2013),

<http://www.judges.org/capitalcasesresources/bookpdf/appendices/Case%20and%20Statute%20References%20for%20Mental%20Retardation.pdf>; ARIZ. REV. STAT. § 13-703.02(G) (2007); FLA. STAT. ANN. § 921.137(4) (2008); IND. CODE ANN. § 35-36-9-4(b) (2008); N.C. GEN. STAT. § 15A-2005(c), (f) (2008).

⁹⁴ *Rolon, supra* note 83; O.C.G.A. § 17-7-131(c)(3) (2008)

⁹⁵ Andrew Cohen, *Executing The Mentally Retarded: The Night The Lights Went Out In Georgia*, THE ATLANTIC (Feb. 13, 2013, 11:54 AM), <http://www.theatlantic.com/national/archive/2013/02/executing-the-mentally-retarded-the-night-the-lights-went-out-in-georgia/273088/>.

⁹⁶ *Poe, supra* note 87, at 420.

introduced by expert testimony and an effective opposing expert can raise doubt enough to sentence a defendant to death who would otherwise be considered mentally retarded.⁹⁷ The United States Supreme Court has never “suggested much less held, that a burden of proof standard on its own can so wholly burden an Eighth Amendment right as to eviscerate or deny that right.”⁹⁸ Because of their disabilities in areas of reasoning, judgment, and control of their impulses, the mentally retarded do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.⁹⁹ Requiring such a high standard of proof such as Georgia’s standard denies a capital defendant protection and due process and undermines the *Atkins* holding.

Clear and convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.”¹⁰⁰ At least one state has found that a clear and convincing evidence standard placed on a defendant trying to prove mental retardation is unconstitutional under *Atkins*.¹⁰¹ In *Pruitt v. State*, the Supreme Court of Indiana reasoned that assigning the clear and convincing evidence standard to a defendant to prove his allegation of mental retardation in avoiding a sentence of death was a violation of the Eighth Amendment because “the defendant’s right not to be executed if mentally retarded outweighs the state’s interest as a matter of federal constitutional law.”¹⁰² The Indiana Supreme Court analogized the *Pruitt* case with *Cooper v. Oklahoma*, which found that requiring a defendant to prove his competence to stand trial by a clear and convincing evidence standard was a violation of his right to due process.¹⁰³

In *Cooper v. Oklahoma*, the United States Supreme Court unanimously decided that a defendant did not have to prove his competency to stand trial by a clear and convincing

⁹⁷ The New York Times, *An Intolerable Burden of Proof*, THE OPINION PAGES (Nov. 29, 2011), http://www.nytimes.com/2011/11/30/opinion/an-intolerable-burden-of-proof.html?_r=0.

⁹⁸ *Id.*

⁹⁹ *Atkins*, 536 U.S. at 306.

¹⁰⁰ BLACK’S LAW DICTIONARY, (9th ed. 2009).

¹⁰¹ *Pruitt*, 834 N.E.2d at 103.

¹⁰² *Id.*

¹⁰³ *Id.* (citing *Cooper v. Oklahoma*, 517 U.S. 348, 369 (1996)).

standard because it was too high of a burden.¹⁰⁴ The Court reasoned that assigning a burden of clear and convincing evidence to the defendant places a “significant risk of an erroneous determination that the defendant is competent.”¹⁰⁵ Further, the Court found that a clear and convincing evidence standard allocates a large share of the risk to the defendant.¹⁰⁶ The Court reasoned the clear and convincing evidence standard was such a harsh standard that it violates a defendant’s right to due process of law and that the standard assigned should be a preponderance of the evidence standard.¹⁰⁷ While the *Cooper* case was to determine competency to stand trial, it should still be looked to for guidance in deciding the standard to assign a capital defendant alleging mental retardation because the issues are analogous.

The “more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.”¹⁰⁸ To avoid an erroneous decision being made in a decision as important as life or death of a defendant, states should require that at a maximum the standard of proof assigned to a capital defendant alleging an affirmative defense of mental retardation is the standard of preponderance of the evidence. A standard of preponderance of the evidence means “superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”¹⁰⁹ Currently, the majority of states that have enacted legislation requiring the capital defendant prove their mental retardation by a certain burden of proof have chosen that burden to be by a preponderance of the evidence.¹¹⁰

States should treat a determination of mental retardation similar to the United States Supreme Court’s

¹⁰⁴ *Cooper*, 517 U.S. at 369.

¹⁰⁵ *Id.* at 363.

¹⁰⁶ *Id.* at 366.

¹⁰⁷ *Id.*

¹⁰⁸ *Cruzan by Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 283 (1990).

¹⁰⁹ BLACK’S LAW DICTIONARY (9th ed. 2009).

¹¹⁰ Mary Hollingsworth, *State v. Grell: Placing the Burden on Defendants to Prove Mental Retardation in Capital Cases*, 49 ARIZ. L. REV. 775, 778 (2007).

treatment of competency for trial and require that the standard of proof that a capital defendant must prove be by a preponderance of evidence.¹¹¹ The argument for this treatment is: the risk to a capital defendant who must meet a burden higher than preponderance of the evidence is dire, whereas the risk to the state is modest.¹¹²

When the burden of proof is at the lower standard of preponderance of the evidence, success by capital defendants claiming mental retardation is not frequent, which illustrates that a preponderance of the evidence standard is not just a “free pass” for a capital defendant alleging mental retardation trying to avoid the death penalty.¹¹³ For example, in Virginia, which requires a capital defendant prove mental retardation by a preponderance of the evidence, the success rate is zero percent for the six capital defendants who have alleged mental retardation to avoid the death penalty.¹¹⁴ Similarly, Alabama, which has a preponderance of the evidence standard, has only a twelve percent success rate for the twenty-six capital defendants who have alleged mental retardation to avoid the death penalty.¹¹⁵

Therefore, subjecting a capital defendant to prove an allegation of mental retardation at any standard higher than preponderance of the evidence would shift the allocation of risk, and would be dire for the defendant’s defense. All states with the death penalty should refine their legislation by joining the majority of states and mandate that the standard of proof be preponderance of the evidence to avoid deflating the *Atkins* holding.

¹¹¹ *Cooper*, 517 U.S. at 355.

¹¹² *Id.* at 364-65.

¹¹³ Kenneth Williams, *Most Deserving Of Death? An Analysis Of The Supreme Court’s Death Penalty Jurisprudence*, (last visited April 5, 2013), available at

<http://books.google.com/books?id=nAxAOUWyacUC&pg=PA100&lpg=PA100&dq=mentally+retarded+states+preponderance&source=bl&ots=WTEvuCtXqP&sig=j4XANVEpcPCjQeVDvnOUuvLS7zk&hl=en&sa=X&ei=iwBiUbiFJJHM9ATPyoDYBQ&ved=0CDwQ6AEwAg#v=onepage&q=mentally%20retarded%20states%20preponderance&f=false>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

VIII. STATES SHOULD ENACT STATUTORY LAW REQUIRING THAT THE DETERMINATION OF A DEFENDANT'S ALLEGED MENTAL RETARDATION BE DECIDED PRIOR TO THE TRIAL COMMENCING

The determination of whether a capital defendant is mentally retarded by the standard of preponderance of the evidence should be made prior to trial. This would eliminate any bias that may occur by the factfinder if the determination was made after the guilt phase and to encourage efficiency of resources, time, and expense. Mental retardation is a "threshold issue that determines whether a defendant is eligible for capital punishment at all."¹¹⁶ Currently, in many states, the same jury that finds a defendant guilty during the guilt phase of the trial decides whether to impose the death penalty by considering any aggravating or mitigating factors.¹¹⁷ Consideration of a capital defendant's mental retardation during the penalty phase, in addition to being made by the same jury that found a defendant guilty during the guilt phase, can cause a higher risk of wrongful execution, because "[m]entally retarded defendant[s] may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."¹¹⁸ While the determination of a mental retardation includes fact-finding, mental retardation itself "is not the functional equivalent of an element of a crime;" therefore, determination by a jury is not constitutionally required under the Sixth Amendment of the United States Constitution and may be left to the judge to decide prior to trial.¹¹⁹

Proceeding as a noncapital case conserves significant resources by reducing litigation expenses and expediting the

¹¹⁶ Howell v. Tennessee, 151 S.W.3d 450, 465 (Tenn. 2004).

¹¹⁷ *Id.*

¹¹⁸ Jessica Hudson, et al., *Lightning but No Thunder: The Need for Clarity in Military Courts Regarding the Definition of Mental Retardation in Capital Cases and for Procedures in Implementing Atkins v. Virginia*, 55 NAVAL L. REV. 359, 374 (2008) (citing *Flores*, 93 P.3d at 1269 (quoting *Atkins*, 536 U.S. at 320-21)) [hereinafter *Hudson*].

¹¹⁹ *Grell*, 135 P.3d at 706.

overall proceedings.¹²⁰ Trying a capital defendant is more time consuming, expensive, and leads to a greater use of state legal resources because the government must avoid errors, which could prove fatal, in trying a death penalty case.¹²¹ Allowing a trial judge to issue a pre-trial determination as to a capital defendant's mental retardation is "economical in terms of the time and cost that might be saved by avoiding a capital trial."¹²² In light of that fact, "every effort must be made to avoid a death-penalty trial, as early in the proceedings as possible, where capital punishment is precluded as a matter of law."¹²³ Additionally, should a determination of mental retardation be made by the judge prior to trial, an otherwise capital defendant could decide to plea, thus expediting the judicial process.¹²⁴

Therefore, to provide full constitutional protection to a capital defendant and to encourage efficiency of the criminal system in applying *Atkins*, the states should enact legislation

¹²⁰ See *New Mexico v. Flores*, 93 P.3d 1264, 1269 (N.M. 2004) (recognizing that a capital murder trial consumes significantly more resources than a non-capital trial and that it would be beneficial to all parties to resolve the question of whether the defendant is eligible for the death penalty as early as possible); *Hudson*, *supra* note 118, at 391.

¹²¹ Nicci Lovre-Laughlin, *Lethal Decisions: Examining the Role of Prosecutorial Discretion in Capital Cases in South Dakota and the Federal Justice System*, 50 S.D. L. REV. 550, 574 (2005).

¹²² *Pennsylvania v. Sanchez*, 36 A.3d 24, 80 (Pa. 2011) *cert. denied*, 133 S. Ct. 122 (2012).

¹²³ *Id.*; *Flores*, 93 P.3d at 1269; see *Atkins*, 536 U.S. at 320 (categorically prohibiting the execution of mentally retarded offenders). By placing the mental retardation determination in the hands of the judge for a pretrial decision, "significant resources [could be] saved in terms of trial preparation, motion practice, voir dire, trial time, mitigation research, etc.," if the defendant is found to have mental retardation. *United States v. Nelson*, 419 F.Supp.2d 891, 893 (E.D. La. 2006); see also *Morrow v. Alabama*, 928 So.2d 315, 324 (Ala. Crim. App. 2004) (stating that pretrial *Atkins* determination by the court spares the parties from "the onerous burden of a futile bifurcated capital sentencing procedure") (quoting *Louisiana v. Williams*, 831 So.2d 835, 860 (La. 2002), *superseded by statute as stated in Louisiana v. Turner*, 936 So.2d 89, 103 (La. 2006)); *Hudson*, *supra* note 118, at 390 (noting the economic benefits of having a judge resolve *Atkins* claims pretrial).

¹²⁴ *Hudson*, *supra* note 118, at 372.

that leaves determination of a capital defendant's alleged mental retardation to the judge prior to the guilt phase.

IX. CONCLUSION

The United States Supreme Court condemned the execution of mentally retarded capital defendants in *Atkins* because it studied the national consensus, which illustrated that the goals of the criminal justice system cannot be met by a person, who because of his mental limitations, cannot understand the consequences or wrongfulness of his actions. Because the Supreme Court left it to the states to apply the *Atkins* holding, the states should enact certain laws to protect the Court's intention of not violating a capital defendant's Eighth and Fourteenth Amendment rights under the United States Constitution. States should enact legislation that (1) shifts the burden of proof to the defendant because an allegation of mental retardation is an affirmative defense that should be borne by the defense, (2) sets a standard of preponderance of the evidence as the maximum standard of proof a capital defendant must meet to prove mental retardation because any higher standard of proof would unfairly allocate an erroneous risk to the defense that could mean death for someone who would otherwise be exempted from the death penalty, and (3) requires the determination of mental retardation be made prior to the penalty phase to encourage efficiency in time and expenses and to discourage bias. Justice requires no less.

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TENNESSEE'S CAPITAL PUNISHMENT HISTORY AND TODAY'S MERITED REPRIEVE FOR ITS DEATH PENALTY

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I. INTRODUCTION

This paper provides an overview of Tennessee's capital punishment history. It ends with the existence of the state's death penalty in a condition of reprieve due to its value for constitutional justice when properly put to use against the worst-of-the-worst and as a tool for plea bargainers. History shows that the state's death penalty resided at times of ebb on a "death row" of its own upon the pages of the Tennessee Code Annotated. Despite a lengthy evolution process spurred on by Tennessee's legislatures, governors, and courts over time, it is possible that the penalty is on "death row" because it is controversial, dark, and ugly. The death penalty may never again flow and may reach the day of ultimate ebb when its death warrant is signed. However, the death penalty has weathered many efforts toward reform, will likely never be considered "innocent," and may possibly be redeemed to provide for better future application. Although the death penalty has never quite lived up to its potential as a deterrent, today it remains a vital part of constitutional justice and an effective tool that merits reprieve from its own "death row."

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II. BRIEF HISTORICAL HIGHLIGHTS

Although the precise origins of capital punishment remain unclear within the dark recesses of pre-history, "capital punishment has been used to penalize various forms of conduct"¹ since the dawn of civilization. "Simply put, capital punishment penalizes those convicted of certain crimes by killing them."²

"The United States inherited the bulk of its criminal law, including the tradition of capital punishment, primarily from England but also from other European countries."³ As the states were forming, the newly created state sometimes adopted the law of the state from which it parted. Tennessee gained statehood in 1796, and its body of law derived from North Carolina of which it was originally a part.⁴ A look at the history of the death penalty in Tennessee indicates the intent of the state to utilize the death penalty as a means of punishment and as a deterrent to specific criminal acts.⁵ "Until 1829, the only penalty available for conviction of murder was death."⁶ "An act passed in 1829 divided murder into first and second degree [and] provided a mandatory death sentence for those convicted of first degree murder.⁷ The death penalty was not allowed for second degree murder, and a sentencing range of ten to twenty-one years was set instead.⁸ Tennessee legislators enacted an important change in the state's homicide law in 1838 and the state became the first in the nation to give juries the discretion to sentence defendants to death or life for first degree murder.⁹ If the trial jury found mitigating circumstances in the case, and stated so in its verdict, it became the

¹ RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* 3 (4th ed. 2012).

² *Id.*

³ Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 614 (1983).

⁴ Margaret Vandiver & Michael Coconis, "Sentenced to the Punishment of Death": *Pre-Furman Capital Crimes and Executions in Shelby County, Tennessee*, 31 U. MEM. L. REV. 861, 867 (2001).

⁵ Roy B. Morgan, Jr., Note, *The Death Penalty in Tennessee – Recent Developments*, 8 MEM. ST. U. L. REV. 107 (1977-1978).

⁶ Vandiver & Coconis, *supra* note 4, at 870.

⁷ *Id.* at 870-71.

⁸ *Id.* at 871.

⁹ *Id.*

statutory duty of the court to sentence the defendant to life.¹⁰ This change lasted just twenty years. "By 1858, the punishment for first degree murder was again mandatory death."¹¹

"Like other slave states, Tennessee had separate statutes for crimes committed by whites and those committed by slaves, and, often by free blacks."¹² The separate laws for black and whites show how the state's criminal justice system reflected the political and economic systems of the time.¹³ In post-Civil War 1865, the Tennessee legislature rewrote many of the old laws and omitted "reference[s] to race . . ."¹⁴

Punishment by death is not ultimately effective as a penalty unless carried out or executed. The public nature of applying the penalty and methods of death have changed over time. "All executions in America were public until the 1830's."¹⁵ A decade earlier, concerns began to be expressed about the propriety of such public spectacles.¹⁶ "The crowds that gathered to witness public executions were large and often unruly, disrespectful, drunken and dangerous [attendees of] festivals of disorder [that] subverted morals, increased crimes, excited sympathy with the criminal, and wasted time."¹⁷ The methods varied by state, but Tennessee chose public hanging as its first method of execution.¹⁸ In response to an 1879 hanging in Morristown, Tennessee a local newspaper writer wrote:

[W]e would be glad indeed if we knew this was the last public execution that would ever occur in Tennessee. The whole scene here was demoralizing and in no respect did it in our opinion bring any good result. We favor hanging for deliberate murder, but we hope the law making power will speedily pass a law to require it done privately.¹⁹

¹⁰ *Id.*

¹¹ *Id.* at 872.

¹² *Id.* at 867.

¹³ *Id.* at 918.

¹⁴ *Id.* at 873-74.

¹⁵ *Id.* at 875.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 877.

¹⁹ *Hamblen's Only Hanging Took Place Sept. 26, 1879, DAILY GAZETTE & MAIL, Nov. 13, 1955, at 14 (reprint from Oct. 1, 1879, on file with author).*

Pennsylvania, the first northeastern state to abolish public executions, did so in 1834.²⁰ “[T]he South and southern border states maintain[ed] the old tradition of public executions longer than the rest of the country.”²¹ As early as 1849, a resolution was introduced to require the Tennessee Senate Judiciary Committee to look into moving executions inside of prison walls, but it was rejected by that committee.²² “[In] 1883, [Tennessee] executions were moved from public spaces to the relative privacy of prison yards, [and] those who could witness the execution were specified.”²³ The 1883 legislation that caused this change also contained an unfunded mandate that required each county to construct a private area for executions.²⁴ After a proposal by Governor Patterson in 1909, the Tennessee legislature moved executions from the county of conviction to the state prison.²⁵

“Many states changed their methods of execution from hanging to electrocution in the late nineteenth and early twentieth centuries in an attempt to provide a quicker and more reliable method of imposing death.”²⁶ In 1911, Governor Hooper expressed to the legislature his desire to see Tennessee’s method of execution changed from hanging to electrocution as a progression of decency and humanity.²⁷ In 1913, the Tennessee General Assembly passed a bill changing the method of execution to the electric chair, and appropriated \$5,000 for the cost of the death chamber, apparatus, machinery, and appliances necessary to conduct electrocutions.²⁸ In 1916, the first electrocution in Tennessee took place.²⁹ Electrocution continued as the sole method of execution through 1960 when Tennessee entered a forty-year-long, self-imposed, unofficial moratorium.³⁰

In 1999, Tennessee changed its method of execution from electrocution to lethal injection, but maintained electrocution as a

²⁰ Vandiver & Coconis, *supra* note 4, at 875.

²¹ *Id.*

²² *Id.* at 876.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 876-77.

²⁶ *Id.* at 877.

²⁷ *Id.*

²⁸ *Id.* at 877-78.

²⁹ *Id.* at 878, 894.

³⁰ *Id.*

choice for those sentenced before the end of 1998.³¹ In 2000, Tennessee carried out its first execution by lethal injection.³² Since 2000, Tennessee executed four death row inmates by lethal injection and one who volunteered for electrocution.³³

In 2011, Tennessee's supply of sodium thiopental was seized by the Drug Enforcement Agency because of improper import procedures of the foreign-made drug.³⁴ Sodium thiopental is used to induce general anesthesia as part of the state's multi-drug lethal injection protocol.³⁵

In 2012, death row inmates in Tennessee and two other states sued the Food and Drug Administration (FDA) and others "for improperly allowing shipments of a misbranded and new drug [sodium thiopental] to enter the United States for use in state lethal injection protocols."³⁶ The district judge in the case agreed with the inmates' contention.³⁷ In addition, the judge found the FDA had acted contrary to law by not refusing such imports.³⁸ The judge made note that the FDA's mission is to ensure that all drugs are safe and effective, regardless of why the drug is being administered, and that the law does not create an exception for drugs purchased by a state to use in its lethal injection protocol.³⁹ Moreover, the judge felt the FDA "failed to provide a reasoned explanation for departing from [its] own regulations . . . to ensure illegal, foreign shipments of [sodium] thiopental were not admitted in to [sic] the United States."⁴⁰ Finally, the judge found the FDA's "seemingly callous indifference to the health consequences of those imminently facing the executioner's needle . . . utterly disappointing."⁴¹ Two years after Tennessee's

³¹ Deborah Fins, *Death Row U.S.A.*, 57 (Fall 2012), available at

http://www.naacpldf.org/files/publications/DRUSA_Fall_2012.pdf.

³² Death Penalty Info. Ctr. Searchable Execution Database at Robert Coe, <http://www.deathpenaltyinfo.org/robert-coe>, (last visited Mar. 30, 2013); see *State v. Coe*, 655 S.W.2d 903 (Tenn. 1983).

³³ Death Penalty Info. Ctr. Searchable Execution Database, <http://www.deathpenaltyinfo.org> (last visited Feb. 24, 2013).

³⁴ Bridgit Bowden, *Arkansas, Tennessee have Lethal Injection Drug Taken by the DEA*, WPLN NEWS, July 25, 2011, <http://wpln.org/?p=29072>.

³⁵ *Beaty v. Food & Drug Admin.*, 853 F. Supp.2d 30, 34 (D.C. Cir. 2012).

³⁶ *Id.* at 32.

³⁷ *Id.* at 37.

³⁸ *Id.*

³⁹ *Beaty*, 853 F. Supp.2d at 43 n.9.

⁴⁰ *Id.* at 43.

⁴¹ *Id.*

supply of sodium thiopental was seized, the state experienced a lack of pancuronium bromide, a strong muscle relaxant also used in the multi-drug lethal injection protocol.⁴² Before revising the state's choice of drugs, the Tennessee Department of Corrections is "monitoring steps taken by other states to carry out executions with other drugs."⁴³

III. ABOLITION?

Death penalty abolition efforts are a significant element of the history of Tennessee's death penalty. In 1807, Governor Sevier stated "[h]umanity and policy call aloud for a revisal of . . . our laws . . . to abolish the inhuman and prompt mode of punishing with death."⁴⁴ Similarly, in 1837, Governor Cannon proposed that the legislature should "entirely [abolish] punishment by death in our state, and . . . [substitute] in its stead confinement . . . during life."⁴⁵ In 1845, Governor Brown also stated his position in favor of the abolition of capital punishment to the legislature.⁴⁶ He expressed that a just and rational society should regard the ancient barbarities of the death penalty with the deepest level of abhorrence and that relaxation of such laws would not lead to increases in crime.⁴⁷ Despite the sentiments of these state executives, no immediate legislation was advanced.

"In 1915, Tennessee did something no other southern state has done before or since: it abolished the death penalty for murder by legislative vote."⁴⁸ The bill excluded murder committed by a prisoner serving a life term, and was vetoed by Governor Rye.⁴⁹ A motion to sustain the Governor's veto passed the House despite its previous vote in favor of the bill; however, the Governor had delayed his veto past the five-day period provided by the Tennessee Constitution, and the bill became law.⁵⁰ Tennessee's experiment with partial abolition of the death penalty was short-lived.⁵¹ A week into his term in 1919,

⁴² Associated Press, *Tennessee Searches for Lethal Injection Drugs*, CITIZEN TRIBUNE, Jan. 14, 2013 at A3 (on file with author).

⁴³ *Id.*

⁴⁴ Vandiver & Coconis, *supra* note 4, at 888.

⁴⁵ *Id.* at 889.

⁴⁶ *Id.* at 890.

⁴⁷ *Id.*

⁴⁸ *Id.* at 878.

⁴⁹ *Id.* at 880-81.

⁵⁰ *Id.* at 881.

⁵¹ *Id.* at 881-83.

Governor Roberts sent word to the legislature about his perceptions for the potential of lawless vigilantism and lynch mob vengeance taking the place of the state sanctioned death penalty for murderers.⁵² Governor Roberts stated that “[t]he assassin now knows that he will not forfeit his life by commission of the most atrocious crime upon his innocent victim.”⁵³ He urged passage of a bill already introduced to reinstate the death penalty for first degree murder and the legislature responded quickly with majority votes from both bodies to pass the bill.⁵⁴

After an approximate forty-year lull in death penalty abolition activity, in 1959, Governor Clement requested in an address to the legislature that it give abolition of capital punishment serious consideration.⁵⁵ After a failed legislative attempt to abolish the death penalty in 1961, a 1965 abolition bill with Governor Clement’s endorsement overwhelmingly passed the Senate only to be defeated by a single vote in the House.⁵⁶

In 1972, as a result of the Supreme Court of the United States’ decision in *Furman v. Georgia*⁵⁷ finding the imposition of the death penalty as practiced nationwide violated the Eighth and Fourteenth Amendments of the United States Constitution, the punishment went on hiatus across the board.⁵⁸ In 1973, the Tennessee Legislature enacted new first degree murder and death penalty statutes in an attempt to remedy the former laws which *Furman* had rendered unconstitutional.⁵⁹ The new Tennessee death penalty statute⁶⁰ added aggravating and mitigating circumstances patterned after the Model Penal Code.⁶¹ “After *Furman*, states sought to resuscitate their capital statutes by revising them to address the concerns raised in *Furman*;

⁵² *Id.* at 881-82.

⁵³ *Id.* at 882.

⁵⁴ *Id.* at 882-83.

⁵⁵ *Id.* at 892-93.

⁵⁶ *Id.* at 893-94; S.B. 344/H.B. 293 84th Gen. Assemb. (Tenn. 1965).

⁵⁷ 408 U.S. 238 (1972).

⁵⁸ Am. Bar Ass’n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Tennessee Death Penalty Assessment Report; An Analysis of Tennessee’s Death Penalty Laws, Procedures, and Practices*, 8 (2007), available at http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/tennessee/finalreport_authcheckdam.pdf.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Am. Bar Ass’n, *supra* note 58, at 9-10; Model Penal Code § 210.6(3)-(4) (Proposed Official Draft 1962).

many of the states turned to [Model Penal Code] § 210.6 as a template for their revised statutes, hoping in part that the prestige of the Institute would help to validate these new efforts.”⁶² The American Law Institute’s current position statement is, “the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”⁶³

In 1974, the Tennessee Supreme Court found the 1973 statutes unconstitutional and the legislature responded with amendments.⁶⁴ In 1977, the Tennessee Supreme Court declared the 1974 death penalty statute unconstitutional and the legislature again responded with amendments.⁶⁵ The Tennessee murder and death penalty statutes faced no further declarations of unconstitutionality, and, with other changes discussed below, remain current.⁶⁶

In 2007, the Tennessee Legislature created the Tennessee Committee to Study the Administration of the Death Penalty.⁶⁷ Its work continued for fourteen months, and it yielded several proposals to the legislature.⁶⁸ The committee recommended “the creation of an independent commission to oversee capital defense services in Tennessee to ensure that attorneys representing those charged with capital murder are competent, trained, monitored, and compensated adequately.”⁶⁹ The bill to enact this measure died in committee.⁷⁰ Another recommendation would

⁶² The Am. Law Inst., *Report of the Council to the Membership of The American Law Institute on the Matter of the Death Penalty*, Annex B, 2 (2009), available at http://www.ali.org/doc/Capital%20Punishment_web.pdf; see also *Furman v. Georgia*, 408 U.S. 238 (1972).

⁶³ The Am. Law Inst., *Publications Catalog; Model Penal Code*, available at <http://www.ali.org/index.cfm?fuseaction=publications.ppage&nodeid=92>, (last visited Feb. 24, 2013), (choosing to not endorse abolition of capital punishment per se).

⁶⁴ Am. Bar Ass’n, *supra* note 58, at 11; *State v. Hailey*, 505 S.W.2d 712 (Tenn. 1974).

⁶⁵ Am. Bar Ass’n, *supra* note 58, at 12; *Collins v. State*, 550 S.W.2d 643 (Tenn. 1977).

⁶⁶ TENN. CODE ANN. §§ 39-13-202, 204 (2012).

⁶⁷ Am. Civil Liberties Union, *The Tennessee Death Penalty Study Committee Considers Final Report: Committee Members Urge Action*, (Feb. 18, 2009), available at <http://www.aclu.org/capital-punishment/tennessee-death-penalty-study-committee-considers-final-report-committee-members>.

⁶⁸ *Id.*

⁶⁹ *Id.*

[r]equire . . . the district attorney general to make available to the defendant for inspection and copying all relevant documents, tangible objects and statements, together with complete files of all investigative agencies, [and] [r]equire...the district attorney general to give notice to the defendant of any expert witnesses that the state reasonably expects to call as a witness at trial, [and] specifies that the district attorney general is not required to disclose written materials drafted by the prosecuting attorneys or their legal staff for their own use at trial.⁷¹

The bill to enact this measure also died in committee.⁷²

A third recommendation would “require . . . all statements made by a person during a custodial interrogation relating to a homicide . . . be electronically recorded and preserved.”⁷³ The bill to enact this measure received much more attention, but was also sent to die in committee.⁷⁴ The only recommendation of the committee enacted by the legislature “require[d] the administrative office of the court to propose a realistic time within which post-conviction relief petitions in capital cases are finally disposed of if it is determined the one-year statutory time limit is not realistic.”⁷⁵ The new law became sub-parts (e)(1)-(3) of Tennessee’s Final Disposition of [Post-Conviction] Petitions statute and went into effect July 8, 2009.⁷⁶ Two other states with similar study committees “found their death penalty

⁷⁰ Tenn. Gen. Assemb. Legis. Archives, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1679&ga=106>.

⁷¹ Daniel Potter, *Death Penalty Study Committee Issues Recommendations*, WLPN NEWS, Feb. 19, 2009, available at <http://wpln.org/?p=4849>.

⁷² Tenn. Gen. Assemb. Legis. Archives, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1402&ga=106>.

⁷³ Tenn. Gen. Assemb. Legis. Archives, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0261&ga=106>(follow “Summary for SB 0261/HB 0596” hyperlink).

⁷⁴ *Id.*

⁷⁵ Tenn. Gen. Assemb. Legis. Archives, <http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SB0260&ga=106> (follow Summary for SB 0260/HB 0597” hyperlink).

⁷⁶ TENN. CODE ANN. § 40-30-111(e)(1)-(3) (2012).

systems so broken and rife with error that repeal of the death penalty was recommended."⁷⁷ A recommendation to abolish the death penalty was noticeably absent from the Tennessee committee's efforts.⁷⁸

Regardless of the committee's lack of an abolition recommendation, legislation was proposed in 2010 that would "remove . . . the death penalty as a possible punishment for first degree murder."⁷⁹ This bill died in committee.⁸⁰ Abolition was revisited in 2011 with proposed legislation that would "remove...the jury's ability to sentence a defendant convicted of first degree murder to death."⁸¹ This bill also met its demise in committee.⁸²

In reviewing these ancient or recent efforts, the possibility of abolition of Tennessee's death penalty has remained a constant topic of concern. The drumbeat heartily stirring abolition efforts to a fevered frenzy may again resound in Tennessee, but for now THE status quo is maintained.

IV. OTHER TWEAKS IN DEATH PENALTY-RELATED LAW

Other tweaks in death penalty-related law from Tennessee's capital punishment history are important to note. In 1841, then Governor James K. Polk suggested to the legislature "that a law was needed to enable him to commute death sentences to life as well as to grant pardons."⁸³ In 1842, the legislature responded to his request with legislation allowing the governor to reduce a death sentence to life when he thought a full pardon was not warranted.⁸⁴ A law enacted in 1858 granted the Tennessee Supreme Court the power to recommend the commutation of death sentences to the governor

⁷⁷ Am. Civil Liberties Union, *supra* note 67.

⁷⁸ Death Penalty Info. Ctr., *Tennessee; History of the Death Penalty; Milestones in Abolition Efforts*, <http://www.deathpenaltyinfo.org/tennessee-1#resources>.

⁷⁹ Tenn. Gen. Assemb. Legis. Archives, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB3111&ga=106>.

⁸⁰ *Id.*

⁸¹ Tenn. Gen. Assemb. Legis. Archives, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB2079&ga=107>.

⁸² *Id.*

⁸³ Vandiver & Coconis, *supra* note 4, at 879.

⁸⁴ *Id.*

when in its opinion extenuating circumstances were found in particular cases.⁸⁵

Some amendments to Tennessee's statutory scheme merit attention:

In 1988, the Tennessee Legislature amended the first degree murder statute by...classif[ying] as first degree murder the killing of a child less than thirteen years old if the child's death result[ed] from one...or more incidents of a protracted pattern or multiple incidents of *child abuse* committed by the defendant against such child or if such death result[ed] from the cumulative effects of such pattern or incidents.⁸⁶

This amendment was referred to as the Scotty Trexler law.⁸⁷ Scotty was a twenty-one month-old child murdered in Hawkins County in 1987 by protracted and severe child abuse inflicted upon him by his mother's live-in boyfriend who babysat him.⁸⁸ Although initially charged with first degree murder, Scotty's abuser's charges had to be reduced because the statute required premeditation which could not be proved.⁸⁹ The presiding jurist, Judge James Beckner, impacted by Scotty's plight and the unavailability of harsher justice, stepped outside of the usual neutral cloak of the robe and advocated for the law's change with testimony before the committee that drafted the 1988 amendment.⁹⁰ Scotty's murderer is due to be released in March of 2015.⁹¹ In 1995, an amendment "deleted all reference to the requisite age of a child abuse victim in order for the defendant to be convicted of first degree murder."⁹²

Among other notable points, the Tennessee Legislature, in 1989, allowed a viable fetus to be considered a murder victim.⁹³ In 1990, the Legislature enacted "a new statute prohibiting defendants

⁸⁵ *Id.*

⁸⁶ Am. Bar Ass'n, *supra* note 58, at 15-16, (emphasis in original)(quoting 1988 Tenn. Pub. Acts 802, §1).

⁸⁷ Bill Grubb, *Who Was Scotty Trexler?*, THE ROGERSVILLE REVIEW, Aug. 3, 2011, <http://therogersvillereview.com/story/11904>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Am. Bar Ass'n, *supra* note 58, at 16.

⁹³ TENN. CODE ANN. § 39-13-210(a) (1989).

with mental retardation from being subject to the death penalty."⁹⁴ A 1993 amendment added life imprisonment without the possibility of parole as a sentencing option for first degree murder.⁹⁵ In 2002, after the 9/11 terrorist attacks on homeland targets, "the . . . Legislature added 'act[s] of terrorism' to the list of offenses constituting first degree murder."⁹⁶ In 2011, the Legislature amended the provision related to a fetus as a victim to "include a human embryo or fetus at any stage of gestation in utero."⁹⁷

V. RACE AS AN ISSUE

Equal justice under law is such a lofty goal that the phrase is engraved on the west pediment of the United States Supreme Court Building in Washington, D.C.⁹⁸ The United States Constitution provides "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁹⁹ "[E]qual protection applies to the federal government through judicial interpretation of the Due Process Clause of the Fifth Amendment and to state and local governments through the Fourteenth Amendment."¹⁰⁰ Equal, as an adjective, does not hold its ground in an imperfect world. In an ideal state, equal numbers would be demonstrated in the racial demographics of death row inmates. However, a look at statistics readily shows racial disparity in demographic comparisons. Nationwide, as of fall 2012, the death row population was 43.17% white, 41.93% black, and 14.91% other.¹⁰¹ Overall *estimated* nationwide prison population at the end of 2011 was 35.66 % white, 40.16% black, and 24.17% other.¹⁰² Overall nationwide citizen population in 2010

⁹⁴ Am. Bar Ass'n, *supra* note 58, at 17; *See also* TENN. CODE ANN. § 39-13-204 (1990).

⁹⁵ *Id.* at 16.

⁹⁶ *Id.* at 17 (quoting 2002 Tenn. Pub. Acts 849, §2(a)).

⁹⁷ 2011 Tenn. Pub. Acts 408, § 2.

⁹⁸ Office of the Curator, Supreme Court of the United States, *The West Pediment Information Sheet*, (Updated: Aug. 28, 2003), available at <http://www.supremecourt.gov/about/westpediment.pdf>.

⁹⁹ U.S. CONST. amend. XIV, § 1.

¹⁰⁰ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW*, 718 (3d ed. 2009).

¹⁰¹ Fins, *supra* note 31, at 1.

¹⁰² E. Ann Carson & William J. Sabol, *Prisoners in 2011*, 7 (Dec. 2012), available at <http://bjs.gov/content/pub/pdf/p11.pdf>.

was 72.4% white, 12.6% black, and 15% other.¹⁰³ Tennessee's death row population as of fall 2012 was 52% white, 43% black, and 5% other.¹⁰⁴ Tennessee's overall prison population as of mid-2012 was 52.08% white, 45.49% black, and 2.4% other.¹⁰⁵ Tennessee's overall citizen population in 2010 was 77.56% white, 16.66% black, and 5.78% other.¹⁰⁶ Even more disparate is the number of executions in Tennessee for the period of July 1916, through December 2, 2009, which show forty-five white individuals executed, or 34.35%, while eighty-six black individuals were executed, or 65.65%.¹⁰⁷

While statistical disparity is evinced above based on racial classification, disparity does not mean inequity based on general murder suspect demographics. Statistics from 2001 through 2011 for national murder offenders based on crime occurrence data show racial demographics of 32.5% white, 37% black, 1.7% other, and 28.9% unknown.¹⁰⁸ Tennessee's encompassing murder arrest statistics from 2002 through 2011 show racial demographics of 39.1% white, 59.7% black, and 1.2% other.¹⁰⁹ Regarding statistics, some would say where there is smoke, there are mirrors. Others would say, based on the statistics regarding persons who actually commit murders in the United States and Tennessee, that where there is smoke, there is fire; and where there is fire, it should be fought. A defender of the death penalty wrote:

[S]tatistics of overrepresentation fail to prove racial bias. The relevant population for comparison is not the general population, but rather the population of murderers. If the death penalty is administered

¹⁰³ Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, *Overview of Race and Hispanic Origin*, 4 (March, 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

¹⁰⁴ Fins, *supra* note 31, at 33.

¹⁰⁵ Tenn. Dep't of Corr., *FY 2012 Statistical Abstract*, 24 (Oct. 2012), available at <http://www.tn.gov/correction/pdf/StatisticalAbstract2012.pdf>.

¹⁰⁶ U.S. Census Bureau, *2010 Census Interactive Population Search-Tennessee*, <http://www.census.gov/2010census/popmap/ipmtext.php?fl=47>.

¹⁰⁷ Tenn. Dep't of Corr., *Tennessee Executions*, available at <http://www.tn.gov/correction/media/tnexecutions.html>.

¹⁰⁸ See *infra* Table 1, Race of United States Murder Offenders Based on Crime Report Data, 2001-2011, (unknown category due to race being unknown at the time of the crime).

¹⁰⁹ See *infra* Table 2, Race of Tennessee Murder Arrestees Based on Arrest Data, 2002-2011.

without regard to race, the percentage of African American death row inmates found at the end of the process should not exceed the percentage of African American defendants charged with murder at the beginning. The available statistics indicate that is precisely what happens.¹¹⁰

In 1987, the Supreme Court of the United States, by a vote of five-to-four, decided a case on point regarding the “question [of] whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that [a defendant’s] capital sentence is unconstitutional under the Eight or Fourteenth Amendment.”¹¹¹ The Court stated a narrow and necessary burden of proof:

[A] defendant who alleges an equal protection violation has the burden of proving “the existence of purposeful discrimination.” A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination “had a discriminatory effect” on him. Thus, to prevail under the Equal Protection Clause, [the defendant] must prove that the decisionmakers [sic] in *his* case acted with discriminatory purpose.¹¹²

The Court was asked to rely on historical evidence, and Justice Lewis Powell noted that “[a]lthough the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.”¹¹³ The Court found that a statistical study was clearly insufficient to support an inference that any of the decision-makers in the case acted with discriminatory purpose, and that the State as a whole did not act with a discriminatory purpose in selecting or reaffirming “a particular course of action at least in part ‘because of’, not merely ‘in spite of’, its

¹¹⁰ Paul G. Cassell, *In Defense of the Death Penalty*, in *DEBATING THE DEATH PENALTY* 183, 201 (Hugo Bedau & Paul Cassell eds., 2004).

¹¹¹ *McCleskey v. Kemp*, 481 U.S. 279, 282-83 (1987).

¹¹² *Id.* at 292 (emphasis in original) (citing *Whitus v. Georgia*, 385 U.S. 545, 550 (1967); *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

¹¹³ *Id.* at 298 n.20.

adverse effects upon an identifiable group.”¹¹⁴ For the defendant’s claim to prevail, he “would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect,” and there was no evidence that the Georgia Legislature enacted the capital punishment statute to “further a racially discriminatory purpose.”¹¹⁵ The Court concluded this part of the case by holding the defendant failed to demonstrate the State maintained capital punishment because of its statistically suggested disproportionate impact, and, as there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment, it would not infer a discriminatory purpose on the part of the State of Georgia; the Court thus rejected the equal protection claims.¹¹⁶ The Court also held, “[t]he Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.”¹¹⁷

Along similar lines, a gender disparity claim by a male defendant would likely be seen as frivolous, yet grossly disproportionate statistics are available. The gender percentages for those on death row in the United States as of October 1, 2012, were 98% male and 2% female.¹¹⁸ Those numbers for Tennessee were 98.88% male and 1.12% female.¹¹⁹ The estimated gender percentages for those incarcerated for all crimes in the United States as of December 31, 2011, were 93.26% male and 6.74% female.¹²⁰ The gender percentages for those suspected of murder from 2001-2011 were 65.1% male, 7.2% female, and 27.7% unknown.¹²¹ The gender percentages for those arrested for murder in Tennessee from 2002 through 2011 were 88.9% male and 11.1% female.¹²² The overall citizen population gender demographics as of 2010 for the United

¹¹⁴ *Id.* at 297-98.

¹¹⁵ *Id.* at 298 (emphasis in original).

¹¹⁶ *Id.* at 298-99.

¹¹⁷ *Id.* at 319.

¹¹⁸ Fins, *supra* note 31, at 1.

¹¹⁹ *Id.* at 57.

¹²⁰ Carson & Sabol, *supra* note 102, at 7.

¹²¹ See *infra* Table 3, Sex of United States Murder Offenders Based on Crime Report Data, 2001-2011, (unknown category due to gender being unknown at the time of the crime).

¹²² See *infra* Table 4, Sex of Tennessee Murder Arrestees Based on Arrest Data, 2002-2011.

States were 49.2% male and 50.8% female.¹²³ The overall citizen population gender demographics as of 2010 for Tennessee were 48.75% male and 51.25% female.¹²⁴

No one would consider doing away with the death penalty because males are disproportionately represented on death row. This is because males disproportionately commit more murders in general as the statistics above show. Likewise, abolition, mitigation, or leniency should not be based on race if its members are disproportionately responsible for originating the crimes for which they are arrested, convicted, and imprisoned. Similarly, no one fathoms trying to narrow statutory language, sentencing guidelines, and aggravating factors to be more inclusive of females. Such language is gender neutral. Yet, the number of women in prison in general is growing at an alarming rate.¹²⁵ "The female prison population grew by 832% from 1977 to 2007, [while] the male prison population grew 416% during the same time period."¹²⁶ Nevertheless, as the statistics above demonstrate, females remain grossly underrepresented on death row and in prisons in comparison to males. This, like with race, is not inequity or discrimination, as fire is being fought where it burns.

VI. TENNESSEE CAPITAL CASES REACH THE NATION'S CAPITAL

A few death penalty issue cases that merited the attention of the Supreme Court of the United States originated in Tennessee. In *Payne v. Tennessee*, the Court reconsidered whether the Eighth Amendment barred the admission of victim impact evidence during the penalty or sentencing phase of a capital trial.¹²⁷ Previous Court opinions had held "the harm . . . a capital defendant causes a victim's

¹²³ Lindsay M. Howden & Julie A. Myer, *Age and Sex Composition: 2010*, 2 (May, 2011), available at <http://www.census.gov/2010census/popmap/ipmtext.php?fl=47>.

¹²⁴ *Id.* at 7.

¹²⁵ Women's Prison Ass'n Inst. on Women & Crim. Justice, <http://www.wpaonline.org/institute/index.htm> (last visited March 27, 2013).

¹²⁶ Women's Prison Ass'n Inst. on Women & Crim. Justice, *Quick Facts: Women & Criminal Justice-2009*, 1 (2009), available at <http://wpaonline.org/pdf/Quick%20Facts%20Women%20and%20CJ%202009.pdf>.

¹²⁷ *Payne v. Tennessee*, 501 U.S. 808, 811 (1991).

family do[es] not in general reflect on the defendant's 'blameworthiness,' and that only evidence relating to 'blameworthiness' is relevant to the capital sentencing decision."¹²⁸ The Court held, "[w]e are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."¹²⁹ The Court rationalized that it wanted to return individualism back to victim families, give them a "face," allow the State the full moral force of its evidence, and allow the jury necessary information used to determine proper punishment.¹³⁰ The Court opined, "there is nothing unfair about allowing the jury to bear in mind harm [caused by the defendant to a victim's family] at the same time as it considers mitigating evidence introduced by the defendant."¹³¹ The Court further held:

Under the aegis of the Eighth Amendment, we have given the broadest latitude to the defendant to introduce relevant mitigating evidence reflecting on his individual personality, and the defendant's attorney may argue that evidence to the jury [W]e now reject the view [of prior precedent] that a State may not permit the prosecutor to similarly argue to the jury the human cost of the crime of which the defendant stands convicted "[J]ustice, though due to the accused, is due to the accuser also" We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar.¹³²

Another Tennessee case later reached the Supreme Court of the United States and was decided in 2006. Paul Gregory House (House) was convicted of a 1985 murder and sentenced to death, but new revelations raised doubts about his guilt.¹³³ The Court found

¹²⁸ *Id.* at 819.

¹²⁹ *Id.* at 825.

¹³⁰ *Id.*

¹³¹ *Payne*, 501 U.S. at 826.

¹³² *Id.* at 826-27 (emphasis in original) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

¹³³ *House v. Bell*, 547 U.S. 518, 521 (2006).

House presented sufficient evidence to demonstrate actual innocence so as to allow “access to a federal court to pursue habeas corpus relief based on constitutional claims that are procedurally barred under state law.”¹³⁴ As a result of evidence developed by House’s lawyers subsequent to his trial, the Court remanded the case for further proceedings with the federal district court ordering Tennessee to retry or release him.¹³⁵ After a stint on bail awaiting retrial, the State, in 2009, dropped all charges.¹³⁶

A third case of interest of Tennessee origin was decided by the United States Supreme Court in 2009. The issue raised by Gary Cone (Cone) was whether his right to due process was violated when the State of Tennessee suppressed evidence supporting his claim of drug addiction that included witness statements and police reports which potentially corroborated his defense at trial and should have bolstered mitigation of the death penalty he then received.¹³⁷ “Cone asserted an insanity defense, contending that he had killed [an elderly couple in their home] while suffering from acute amphetamine psychosis, a disorder caused by drug addiction.”¹³⁸ The Court found that Cone had not procedurally defaulted his *Brady* claim, that it had been fully considered by the state courts, and that it was ripe for federal adjudication.¹³⁹ While the Court agreed that the withheld documents in violation of *Brady* were not material to Cone’s alleged insane mental state, it found the trial court failed to adequately consider whether that same evidence was material to mitigation efforts during sentencing.¹⁴⁰ The Court vacated the decision of the Court of Appeals and remanded the case to the District Court to determine in the first instance whether there was a reasonable probability that the withheld evidence would have altered at least one juror’s assessment of the appropriate penalty for Cone’s crimes.¹⁴¹ Currently, Mr. Cone remains a resident of Tennessee’s Death Row.¹⁴²

¹³⁴ *Id.* at 521-22; *See also* COYNE & ENTZEROTH, *supra* note 1, at 41.

¹³⁵ COYNE & ENTZEROTH, *supra* note 1, at 41.

¹³⁶ *Id.* at 42.

¹³⁷ *Cone v. Bell*, 556 U.S. 449, 451 (2009); *see* *Brady v. Maryland*, 373 U.S. 83 (1963).

¹³⁸ *Id.*

¹³⁹ *Id.* at 452-69.

¹⁴⁰ *Id.* at 452.

¹⁴¹ *Id.*

¹⁴² *Fins*, *supra* note 31, at 57.

VII. THE REALITY OF CAPITAL PUNISHMENT TODAY

Within Tennessee's capital punishment history, not unlike the rest of the United States, one can observe the influences on death penalty jurisprudence through what Chief Justice Warren described as the "evolving standards of decency that mark the progress of a maturing society."¹⁴³ The ebb and flow of change regarding capital punishment in Tennessee was highlighted in previous sections of this paper. Reiterated from above, Tennessee did not execute anyone from 1960 through 2000.¹⁴⁴ From 2000 through 2012, Tennessee executed six people.¹⁴⁵ Eighty-nine people remain under the care of the Tennessee Department of Correction on Death Row.¹⁴⁶ I agree with what Justice Stewart opined over forty years ago that "the [death] penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."¹⁴⁷ However, "capital punishment, under contemporary standards, is not to be viewed as disproportionate to the severity of the crime of murder."¹⁴⁸ Accordingly, I disagree with Justice Stewart's statement "that [death] sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder"¹⁴⁹

Supreme Court Justice Lewis Powell, a wise jurist in his sunset eighties, while elaborating on his then-held opinions about capital punishment, made statements that closely parallel my own beliefs on the subject. Justice Powell voted in favor of the death penalty during his term on the Court.¹⁵⁰ After his retirement in 1987, Justice Powell expressed concern about the problem of excessively repetitious litigation in capital cases, and felt that if death sentences could not be enforced even where innocence of the defendant and fairness of his or her trial was not seriously in doubt, then perhaps legislative bodies should reconsider whether it was in the public's interest to retain a

¹⁴³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁴⁴ *Vandiver & Coconis*, *supra* note 4, at 887, 894.

¹⁴⁵ Death Penalty Info. Ctr. Searchable Execution Database, <http://www.deathpenaltyinfo.org/views-executions> (last visited Feb. 24, 2013).

¹⁴⁶ *Fins*, *supra* note 31, at 57.

¹⁴⁷ *Furman v. Georgia*, 408 U.S. 238, 313 (1972).

¹⁴⁸ *Morgan*, *supra* note 5, at 108-09.

¹⁴⁹ *Furman*, 408 U.S. at 309.

¹⁵⁰ *COYNE & ENTZEROTH*, *supra* note 1, at 216.

punishment enforced so haphazardly.¹⁵¹ He stated, "Capital punishment, though constitutional, is not being enforced, [and] . . . it reflects discredit on the law to have a major component . . . that is simply not enforced."¹⁵² Justice Powell later unequivocally related he had come to think capital punishment should be abolished, not because it was intrinsically wrong, but because it could not be fairly and expeditiously enforced.¹⁵³ His sense of dignity and his conception of the majesty of the law were offended by the endless waiting, perpetual litigation, last-minute stays, and midnight executions.¹⁵⁴ Justice Powell felt the spectacle of non-enforcement bred cynicism about the law's announced purposes and contempt for courts that could not or would not carry those purposes to fruition.¹⁵⁵ He felt it better to bar the whole ugly mess rather than continue an indecent, embarrassing, and wasteful charade.¹⁵⁶ The totality of Justice Powell's views describe the perceived reality about capital punishment now, two decades later.

Furthermore, our country's think tank for model law utopia, The American Law Institute, recognized the dystopia of "the current intractable institutional and structural obstacles to ensur[e] a minimally adequate system for administering capital punishment,"¹⁵⁷ and withdrew the death penalty section of the Model Penal Code without unequivocally endorsing opposition to such penalties.¹⁵⁸

VIII. PLEA BARGAINING

While Justice Powell's sentiments, in total, are spot on for the current state of capital punishment jurisprudence, I disagree with the ideas that the death penalty is of no use at all or that it is completely unworkable. The threat of a death sentence is a great plea bargaining tool. When a defendant's life is "saved" by a plea bargained sentence

¹⁵¹ Lewis Powell, *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1046 (1989) reprinted in COYNE & ENZEROTH, *supra* note 1, at 216.

¹⁵² Don J. DeBenedictis, *The Reasonable Man*, A.B.A.J., Oct. 1990, at 68-9 reprinted in COYNE & ENTZEROTH, *supra* note 1, at 216.

¹⁵³ JOHN C. JEFFERIES, JR., JUSTICE LEWIS POWELL, JR., (1994) reprinted in COYNE & ENTZEROTH, *supra* note 1, at 217.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ The Am. Law Inst., *supra* note 63.

¹⁵⁸ *Id.*

of life without the chance of parole or “death by imprisonment,” both sides can argue a win. My experience with the death penalty as a bargaining tool was influenced in particular by two cases that impacted the Tennessee judicial district where I have spent my career in law enforcement.

The first case involved the carjacking and execution style murder of three of the four members of the Lillelid family in Greene County in 1997.¹⁵⁹ The parents along with their six-year-old daughter and two-year-old son were carjacked by a group of six young Kentuckians at an Interstate 81 rest area, transported to a nearby rural road, and each of the family members were then shot.¹⁶⁰ The bodies of the children were ritualistically placed in an inverted-cross fashion atop the bodies of their parents before the Lillelids were run over with their own van.¹⁶¹ The family was left for dead as the murderers fled; however, the two-year-old boy survived his injuries. Unfortunately, he was blinded in the eye where he had been shot and suffered impaired motor skills.¹⁶² The Lillelid murders became a salient incident that sparked a growing outcry for execution of convicted killers.¹⁶³ Third Judicial District Attorney General, Berkeley Bell (General Bell), filed notice that the State would seek the death penalty for the four of the six defendants who were adults.¹⁶⁴ The defendants later agreed to enter guilty pleas after the State agreed not to seek the death penalty but life in prison without the chance of parole instead.¹⁶⁵ A newspaper reporter related General Bell’s rationale:

While many have said justice in the case could be obtained only through executing the killers, prosecutor

¹⁵⁹ Robert Moore, *Court Rejects Lillelid Killer’s Appeal*, CITIZEN TRIBUNE, March 15, 2013, at A1.

¹⁶⁰*Id.*

¹⁶¹ *Id.* at A1, A6.

¹⁶² *10 Years Ago Today...An Unforgettable Tragedy*, GREENEVILLE SUN, April 6, 2007, available at http://www.greenevillesun.com/Local_News/article/10-Years-Ago-Today--An-Unforgettable-Tragedy-id-276122.

¹⁶³ *Outcry For Death Penalty*, WGRV 1340 LOCAL NEWS, April 20, 1997, available at <http://www.greeneville.com/trial/>, (scroll down menu at left by date).

¹⁶⁴ *Grand Jury Indicts-Death Penalty Sought*, WGRV 1340 LOCAL NEWS, Sept. 3, 1997, available at <http://www.greeneville.com/trial/>, (scroll down menu at left by date).

¹⁶⁵ *Lillelid Murder Suspects Plead Guilty*, WGRV 1340 LOCAL NEWS, Feb. 20, 1998, available at <http://www.greeneville.com/trial/>, (scroll down menu at left by date).

Bell said after the six entered guilty pleas . . . that Tennessee's death penalty is "in name only." With almost 40 years elapsed since an execution, Bell said a death sentence in Tennessee is an effective sentence of "life in prison without parole." Bell said he had concerns a jury would be torn at sentencing because an alleged shooter—Bryant—would be ineligible for execution because of juvenile status, yet the four adults would face execution regardless of their shooting a victim or not. "Credibility problems" for two key prosecution witnesses—one with an existing criminal history, the other with a just-discovered felony record—also helped swing a decision to offer the six removal of the death penalty from sentencing consideration in exchange for their complete admissions of guilt.¹⁶⁶

Scattered appeals continue into 2013 as the defendants protest their plea deals.¹⁶⁷

The second case involved the line-of-duty murder of Hawkins County Deputy Gerald Monroe Gibson in 2000.¹⁶⁸ Deputy Gibson had been part of the team effort to serve an arrest warrant for attempted burglary on a suspect who barricaded himself in his home.¹⁶⁹ Deputy Gibson stepped from cover to attempt to shoot a teargas canister into the suspect's home and was shot in the head by the suspect.¹⁷⁰ General Bell also sought the death penalty in this case.¹⁷¹ A similar ensuing plea bargain was struck, the defendant entered a guilty plea, and he received a sentence of life without parole.¹⁷² General Bell stated:

¹⁶⁶ Gina Stafford, *Innocence Lost – Chance Encounter Led to Unthinkable Tragedy*, KNOXVILLE NEWS SENTINEL, Feb. 22, 1998, available at <http://www.angelfire.com/tn/finagen/web.html>.

¹⁶⁷ Moore, *supra* note 159, at A1, A6.

¹⁶⁸ *Wlodarz Pleads Guilty to Slaying Deputy Gibson, Receives Life in Prison Without Parole*, THE ROGERSVILLE REVIEW, Sept. 20, 2001, available at http://www.therogersvillereview.com/news/article_b208d7d9-8634-59cd-8bdf-7b670c4c52c2.html.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

All in all with the factors involved in the case, particularly for closure for the family [so] they can leave all of this behind and not have to relive it again, [w]e felt that the second alternative, that is death in the penitentiary by natural causes, was the appropriate course to take. It is very important for these types of cases to be over [A]fter our discussions with the family, we felt that putting it all behind us was very important and that is the basic reason that we decided to end it this way. [W]e reached an agreement . . . and proceeded as expeditiously as possible to close the matter out.¹⁷³

These two cases evince the typical effectiveness of having the death penalty as a tool to sculpt a plea bargain to the mutual benefit of each party to the adversarial process. For my part, retention of capital punishment is preferred for the worst-of-the-worst to choose between the plea bargain or the gamble of a trial. Whether a defendant rolls the dice for trial and loses or takes the deal, the punishment fits the crime: death by execution or death by imprisonment.

IX. WHAT IF IT WERE YOUR FRIEND?

Most people have not personally known a murder victim or the members of the victim's immediate or impacted family, and it is my prayer that such remains a constant in as many lives as possible. Hawkins County Deputy Gerald Monroe Gibson was a colleague I considered a friend. We were acquainted as agents in the "war on drugs" who worked together on a few joint cases and who co-attended some advanced training. "Bubba," as Deputy Gibson was affectionately known, was a gifted conversationalist who made friends easily and who treated adversary criminals with respect. He was someone I looked up to as a mentor. I will always remember something that Bubba told me. During a war story swapping session, he was bemoaning the many hours spent building probable cause for a barely successful drug search warrant case. During the search, he had located only a few marijuana roaches from an ashtray. Not to be

¹⁷³ *Id.*

dissuaded for too long, he commented, "At least, by God, they knew we were there!"¹⁷⁴

I distinctly remember the gut-wrenching feeling I experienced in reaction to Bubba's murder. I was called out to travel to Hawkins County to offer critical incident stress peer support the night of his death, and the knot in my stomach was not from motion sickness due to traveling the winding rural roads to the top of the fog-covered mountain near where he died. The nausea did not leave for days after attending his funeral and honors burial. Yet I was many gradients away from the immense impact this line-of-duty murder inflicted onto his wife, his two daughters, his fellow team member in whose arms Bubba died, his other co-workers, his immediate family, friends, and community.

Aside from basal humanity, the defendant who executed Deputy Gibson exhibited no known redeeming qualities. A valuable life was sacrificed, and a likely remorseless, unrepentant life carries on at the taxpayers' expense. Such a murderer even gains royalty-like "cred" in prison ranks as a cop killer. A 2007 survey showed 68% of Tennessee voters endorse the death penalty for murder.¹⁷⁵ As a distant residual victim of this crime due to the loss of a friend, and even from that distance or more, something would be missing if the death penalty was *always* off the table as a potential term in the contract for proper treatment of each other we have as humans in a civilized society.

X. CONCLUSION

In conclusion, it is my hope that we carry on utilizing a variation of Deputy Gibson's sage words: with God's help, let others know in a positive way that we are here. As for Tennessee's death penalty, today it remains a vital part of constitutional justice and an effective tool that merits reprieve.

¹⁷⁴ Conversation with Gerald Monroe Gibson, Deputy, Hawkins Cnty. Sheriff's Dep't, in Morristown, Tenn. (Nov. 12, 1999).

¹⁷⁵ Mem. from Roy Occhiogrosso, James Delorey, & Gretchen Wagner, Global Strategy Group to Deborah T. Fleischaker, Dir., Death Penalty Moratorium Implementation Project, Am. Bar Ass'n 2 (Feb. 21, 2007), *available at* <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/tennessee/survey.authcheckdam.pdf>.

TABLE 1: RACE OF UNITED STATES MURDER OFFENDERS BASED ON
CRIME REPORT DATA, 2001-2011

YEAR	TOTAL	WHITE	%	BLACK	%	OTHER	%	UNKN	%
2011 ¹⁷⁶	14548	4729	32.5	5486	37.7	256	1.8	4077	28
2010 ¹⁷⁷	15094	4849	32.1	5770	38.2	251	1.7	4224	28
2009 ¹⁷⁸	15760	5286	33.5	5890	37.4	245	1.6	4339	27.5
2008 ¹⁷⁹	16277	5334	32.8	5943	36.5	273	1.7	4727	29
2007 ¹⁸⁰	17040	5278	31	6463	37.9	245	1.4	5054	29.7
2006 ¹⁸¹	17399	5339	30.7	6843	39.3	295	1.7	4922	28.3

¹⁷⁶ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2011, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2011 (2012), *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-3>.

¹⁷⁷ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES, 2010, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2010 (2011), *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtbl03.xls>.

¹⁷⁸ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2009, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2009 (2010), *available at* http://www2.fbi.gov/ucr/cius2009/offenses/expanded_information/data/shrtable_03.html.

¹⁷⁹ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2008, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2008 (2009), *available at* http://www2.fbi.gov/ucr/cius2008/offenses/expanded_information/data/shrtable_03.html.

¹⁸⁰ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2007, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2007 (2008), *available at* http://www2.fbi.gov/ucr/cius2007/offenses/expanded_information/data/shrtable_03.html.

¹⁸¹ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2006, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2006 (2007), *available at* http://www2.fbi.gov/ucr/cius2006/offenses/expanded_information/data/shrtable_03.html.

2005 ¹⁸²	17029	5452	32	6379	37.6	299	2	4899	28.8
2004 ¹⁸³	15935	5339	33.5	5608	35.2	271	1.7	4717	29.6
2003 ¹⁸⁴	16043	5132	32	5729	35.7	308	1.9	4874	30.4
2002 ¹⁸⁵	15813	5356	33.9	5579	35.3	274	1.7	4604	29.1
2001 ¹⁸⁶	15488	5174	33.4	5521	35.6	273	1.8	4520	29.2
TOTAL	176426	57268	32.5	65211	37	2990	1.7	50957	28.9

¹⁸² FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2005, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2005 (2006), *available at* http://www2.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_03.html.

¹⁸³ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2004, EXPANDED HOMICIDE DATA TABLE 2.5, MURDER OFFENDERS BY AGE, SEX, & RACE, 2004 (2005), *available at* http://www2.fbi.gov/ucr/cius_04/documents/04tbl2-5a.xls.

¹⁸⁴ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2003, EXPANDED HOMICIDE DATA TABLE 2.5, MURDER OFFENDERS BY AGE, SEX, & RACE, 2003 (2004), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2003/table2-5_offenders03.xls

¹⁸⁵ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2002, EXPANDED HOMICIDE DATA TABLE 2.6, MURDER OFFENDERS BY AGE, SEX, & RACE, 2002 (2003), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2002/table2-6_offendersage02.xls.

¹⁸⁶ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2001, EXPANDED HOMICIDE DATA TABLE 2.6, MURDER OFFENDERS BY AGE, SEX, & RACE, 2001 (2002), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2001/table2-6_offendersage01.xls.

TABLE 2: RACE OF TENNESSEE MURDER ARRESTEES BASED ON ARREST
DATA, 2002-2011

YEAR	TOTAL	WHITE	%	BLACK	%	OTHER	%
2011 ¹⁸⁷	295	128	43.4	164	55.6	3	1
2010 ¹⁸⁸	272	114	41.9	154	56.6	4	1.5
2009 ¹⁸⁹	368	141	38.3	222	60.3	5	1.4
2008 ¹⁹⁰	327	119	36.4	201	61.5	7	2.1
2007 ¹⁹¹	313	110	35.1	202	64.5	1	0.3
2006 ¹⁹²	342	113	33	224	65.5	5	1.5
2005 ¹⁹³	358	140	39.1	210	58.7	8	2.2
2004 ¹⁹⁴	329	132	40.1	192	58.4	5	1.5

¹⁸⁷ TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2011, 24, (2012), *available at* http://www.tbi.state.tn.us/tn_crime_stats/publications/Crime%20in%20Tennessee%202011.pdf.

¹⁸⁸ TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2010, 26, (2011), *available at* http://www.tbi.state.tn.us/tn_crime_stats/documents/2010CIT.pdf.

¹⁸⁹ TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2009, 24, (2010), *available at* http://www.tbi.state.tn.us/tn_crime_stats/documents/CrimeinTN2009.pdf.

¹⁹⁰ TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2008, 26, (2009), *available at* http://www.tbi.state.tn.us/tn_crime_stats/publications/2008%20Crime%20in%20Tennessee.pdf.

¹⁹¹ TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2007, 24, (2008), *available at* http://www.tbi.state.tn.us/tn_crime_stats/publications/Crime%20in%20TN%202007.pdf.

¹⁹² TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2006, 26, (2007), *available at* http://www.tbi.state.tn.us/tn_crime_stats/publications/2006%20All%20Agencies%20Combined.pdf.

¹⁹³ TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2005, 27, (2006), *available at* http://www.tbi.state.tn.us/tn_crime_stats/publications/Crime%20in%20TN%202005%20Complete.pdf.

¹⁹⁴ TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2004, 25, (2005), *available at* http://www.tbi.state.tn.us/tn_crime_stats/publications/Crime%20in%20Tennessee%202004.pdf.

2003 ¹⁹⁵	316	137	43.4	177	56	2	0.6
2002 ¹⁹⁶	353	146	41.4	207	58.6	0	0
TOTAL	3273	1280	39.1	1953	59.7	40	1.2

¹⁹⁵ TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2003, 25, (2004), available at http://www.tbi.state.tn.us/tn_crime_stats/publications/2003_CIT_Complete.pdf.

¹⁹⁶ TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2002, 22, (2003), available at http://www.tbi.state.tn.us/tn_crime_stats/publications/Crime%20in%20TN%202002.pdf.

TABLE 3: SEX OF UNITED STATES MURDER OFFENDERS BASED ON
CRIME REPORT DATA, 2001-2011

YEAR	TOTAL	MALE	%	FEMALE	%	UNKN.	%
2011 ¹⁹⁷	14548	9458	65.2	1138	7.8	3925	27
2010 ¹⁹⁸	15094	9972	66.1	1075	7.1	4047	26.8
2009 ¹⁹⁹	15760	10391	65.9	1197	7.6	4172	26.5
2008 ²⁰⁰	16277	10568	64.9	1176	7.2	4533	27.8
2007 ²⁰¹	17040	10975	64.4	1206	7.1	4859	28.5
2006 ²⁰²	17399	11508	66.1	1151	6.6	4740	27.2
2005 ²⁰³	17029	11117	65.3	1246	7.3	4666	27.4
2004 ²⁰⁴	15935	10262	64.4	1130	7.1	4543	28.5
2003 ²⁰⁵	16043	10218	63.7	1123	7	4702	29.3
2002 ²⁰⁶	15813	10285	65	1108	7	4420	28
2001 ²⁰⁷	15488	10126	65.4	1086	7	4276	27.6
TOTAL	176426	114880	65.1	12636	7.2	48883	27.7

¹⁹⁷ See *supra* note 176.

¹⁹⁸ See *supra* note 177.

¹⁹⁹ See *supra* note 178.

²⁰⁰ See *supra* note 179.

²⁰¹ See *supra* note 180.

²⁰² See *supra* note 181.

²⁰³ See *supra* note 182.

²⁰⁴ See *supra* note 183.

²⁰⁵ See *supra* note 184.

²⁰⁶ See *supra* note 185.

²⁰⁷ See *supra* note 186.

TABLE 4: SEX OF TENNESSEE MURDER ARRESTEES BASED ON ARREST
DATA, 2002-2011

YEAR	TOTAL	MALE	%	FEMALE	%
2011 ²⁰⁸	295	263	89.2	32	10.8
2010 ²⁰⁹	272	241	88.6	31	11.4
2009 ²¹⁰	368	325	88.3	43	11.7
2008 ²¹¹	327	299	91.4	28	8.6
2007 ²¹²	313	282	90.1	31	9.9
2006 ²¹³	342	302	88.3	40	11.7
2005 ²¹⁴	358	314	87.7	44	12.3
2004 ²¹⁵	329	290	88.1	39	11.9
2003 ²¹⁶	316	276	87.3	40	12.7
2002 ²¹⁷	353	317	89.8	36	10.2
TOTAL	3273	2909	88.9	364	11.1

²⁰⁸ See *supra* note 187.

²⁰⁹ See *supra* note 188.

²¹⁰ See *supra* note 189.

²¹¹ See *supra* note 190.

²¹² See *supra* note 191.

²¹³ See *supra* note 192.

²¹⁴ See *supra* note 193.

²¹⁵ See *supra* note 194.

²¹⁶ See *supra* note 195.

²¹⁷ See *supra* note 196.