

MAKING THE CASE AGAINST DEATH: INTRODUCTION TO THE SYMPOSIUM ON THE DEATH PENALTY IN FLORIDA

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I. INTRODUCTION

“The death penalty is modern lynching; they took me to the tree six times.”
Derrick Jamison²

On October 15, 2021, Nova Southeastern University (“NSU”) Law Center hosted a virtual symposium titled *The Death Penalty in Florida: The Case Against Death*.³ The one-day event presented the case against the use of the death penalty in Florida and nationwide. The symposium’s panelists presented information to challenge the continued use of the death penalty. The event featured nationally recognized activists, advocates, scholars, and exonerees to discuss the legal and racial issues, in addition to the social, moral, and financial costs, to highlight the clear dangers of maintaining the death penalty.

1. Associate Dean for Diversity, Inclusion, & Public Impact, Director of the Caribbean Law Program, and Professor of Law.

2. *Race and the Death Penalty in Florida*, FLORIDIANS FOR ALTS. TO DEATH PENALTY, <http://www.fadp.org/race-fact-sheet/> (last visited Mar. 25, 2022) (“[Derrick Jamison is] a Black Florida resident who spent twenty years on Ohio’s death row for a crime someone else committed. He survived six execution dates before being exonerated and freed.”); Alexandra Gross, *Derrick Jamison*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3323> (last updated July 23, 2020) (“[Derrick Jamison] once came within 90 minutes of execution.”).

3. *The Death Penalty in Florida: The Case Against Death*, NSU FLA. SHEPARD BROAD COLL. L. (Oct. 15, 2021), <http://www.law.nova.edu/alumni/2021-deathpenalty-symposium.html>.

[This program was] a collaboration of Nova Southeastern University Shepard Broad College of Law; Members’ Advisory Committee of the Lifelong Learning Institute from Nova Southeastern University Dr. Kiran C. Patel College of Osteopathic Medicine; Barry University’s Department of Sociology & Criminology and Anti-Racism and Equity; Amnesty International USA; Witness to Innocence; and Floridians for Alternatives to the Death Penalty.

Florida is one of twenty-four states that has not abolished the death penalty and has the highest number of exonerees. Dr. Laura Finley, Professor of Sociology & Criminology at Barry University, presented this information to lay a foundation for the discussion of the work of Floridians for Alternative to the Death Penalty (“FADP”). Dr. Finley also discussed the research work of the Death Penalty Information Center (“DPIC”) to catalogue the methods of executions still in use in the United States, especially the controversial use of lethal injections. To close remarks, Dr. Finley noted that sixty two percent of Floridians favor life imprisonment without parole over the use of the death penalty.

Mr. Mark Elliott, Executive Director of FADP, noted that the shift in public opposition to the death penalty is accompanied by an increasing awareness of the issues attendant to the death sentence, particularly, its continued inhumane and costly use in Florida and elsewhere. Mr. Elliott noted that Floridians spend over \$50 million per year to maintain the death penalty. Mr. Elliott discussed the exoneration of Derrick Jamison after Mr. Jamison survived six execution dates and the youngest people executed by electric chair in Florida were *only* sixteen years old, and all four were Black.⁴ Describing the exoneration of thirty people in Florida as a miracle, Mr. Elliott urged the event’s attendees to visit FADP’s website and to become involved in anti-death advocacy groups in Florida.⁵

A. *Legal Issues Panel Summary*

Four speakers on the legal issues panel explored how the laws and legal system regrettably preserved the death penalty in Florida. Ms. Linda Harris, an NSU Law alumna, noted the origins of the death penalty began with the Code of Hammurabi in the eighteenth century, B.C., and the long practice of capital punishment in Florida started in 1827 with the execution of Benjamin Donica. Ms. Harris discussed the evolution in the methods of execution, which started with hanging individuals, to the electric chair, and finally to lethal injection. In addition, Ms. Harris chronicled the constitutional challenges to Florida’s death penalty from *Furman v. Georgia*,⁶ through *Hurst v. Florida*,⁷ as well as the 2017 Florida death penalty sentencing statute, § 921.141(2) of the Florida Statutes.⁸ Further, she pointed out three key issues

4. *Death Row*, FLA. DEP’T CORR., <http://www.dc.state.fl.us/ci/deathrow.html> (last visited Mar. 25, 2022).

5. *Race and the Death Penalty in Florida*, *supra* note 2.

6. 408 U.S. 238 (1972).

7. 136 S. Ct. 616 (2016).

8. FLA. STAT. § 921.141(2) (2021).

with the death penalty: (1) the rate of error; (2) the cost; and (3) racial disparities. With regard to racial disparities, Ms. Harris stated that in Florida, prosecutors are three times more likely to seek the death penalty when the victim is White than when the victim is Black. Furthermore, she emphatically remarked that never in the history of Florida has a White person been executed for the killing of a Black person.⁹

The next speaker on the legal issues panel, Mr. Jonathan Perez, a third-year law student at NSU Law, Goodwin Alumni Editor, and Articles Editor for the *Nova Law Review*, discussed the death penalty's lack of deterrent effect. Mr. Perez addressed this topic in 2020 through his Note published in the *Nova Law Review* titled *Barbaric Retributivism: New Hampshire and Washington Are Two of the Latest States to Abolish the Death Penalty. Here Is Why Florida Should Follow Suit*.¹⁰ Mr. Perez's Note provides data showing that the abolition of the death penalty directly correlates with a decrease in murder rates in jurisdictions where it had since been abolished.¹¹ In his Note, Mr. Perez analyzed a 2018 study that compared eleven different countries that abolished the death penalty.¹² The results of the study concluded that there was an average decline of nearly six murders per 100,000 per year amongst the eleven countries that participated in the study.¹³ Similarly, in the United States since 1999, death penalty states have experienced a twenty-eight percent higher average murder rate as compared to non-death penalty states. Therefore, using the results from both this data and the 2008 survey discussed above, one could reasonably conclude that the death penalty does not deter people from murder.

Brian Stull, Senior Staff Attorney for the American Civil Liberties Union ("ACLU") Capital Punishment Project and the third speaker on this panel, posited a *new beginning* in the battle for justice within the criminal

9. There is some dispute over this assertion. See JAMES M. DENHAM, A ROGUE'S PARADISE: CRIME AND PUNISHMENT IN ANTEBELLUM FLORIDA, 1821–1861, 139 (2005) (stating that Ferdinand McCaskill was executed for killing a Black man in 1857); David Moye, *Florida Executes White Man for Killing Black Victim For the First Time Ever*, HUFFPOST (Aug. 24, 2017, 4:52 PM), http://www.huffpost.com/entry/mark-asay-executed-florida_n_599f2403e4b05710aa5ad65b (reporting the execution of Mark Asay by lethal injection on August 24, 2017 for "two racially motivated, premeditated murders . . .").

10. Jonathan Perez, Note, *Barbaric Retributivism: New Hampshire and Washington Are Two of the Latest States to Abolish the Death Penalty. Here Is Why Florida Should Follow Suit*, 45 NOVA L. REV. 115 (2020).

11. *Id.* at 133.

12. *Id.*; see ABDORRAHMAN BOROUHAND CTR., WHAT HAPPENS TO MURDER RATES WHEN THE DEATH PENALTY IS SCRAPPED? A LOOK AT ELEVEN COUNTRIES MIGHT SURPRISE YOU (2018), <http://www.iranrights.org/library/document/3501>.

13. Perez, *supra* note 10, at 133; see ABDORRAHMAN BOROUHAND CTR., *supra* note 12.

punishment system. Recalling the right to a jury as postulated by Sir William Blackstone in his commentaries, Mr. Stull evoked the *lofty promise* of the right to a unanimous jury in death penalty cases. Mr. Stull noted the United States Supreme Court's rejection in 2020 of state statutes that permitted non-unanimous jury verdicts in death penalty cases.¹⁴ Mr. Stull explained that for forty years, Florida allowed non-unanimous jury verdicts for death sentences, and these verdicts resulted in ninety-two executions. The Florida Supreme Court struck down this practice in 2016,¹⁵ and in 2017 the Florida Legislature amended § 921.141(2) of the Florida Statutes to require unanimous jury decisions for the death sentence.¹⁶ Mr. Stull made note that this statutory amendment did not grant relief to all 290 people currently sitting on death row following a non-unanimous jury verdict. Of those individuals, only 157 received relief under the new statutes because their cases were not final until after June 2002.

The final issue that Mr. Stull raised was the disqualification of jurors who oppose the death penalty. This disqualification excludes twice as many Black jurors as White jurors. As a result, he concluded that death qualification is not race neutral, and therefore perpetuates racism in the criminal justice system.

The final speaker on the legal issues panel, Melissa Minsk Donoho, Chief Assistant and Managing Attorney for the Florida Regional Conflicts Counsel Office, shared her experiences working on death penalty cases in Broward County, Florida. Ms. Donoho stated that her office is working on ten death penalty cases and five *Hurst* resentencing cases. Based on her practice, Ms. Donoho opined that the change of Broward State Attorney has not yielded the progressive changes once anticipated, and that she is not optimistic those changes will occur. For example, a newly created Death Review Panel has denied all four of her offices' requests to avoid seeking the death sentence. While remarking that these results were disheartening, Ms. Donoho noted the legislature has not yet amended the requirement of a unanimous jury in Florida Statute § 921.141, even though the Florida Supreme Court backtracked on this requirement in 2020.¹⁷ Ms. Donoho ended the discussion stating "[t]he death penalty is certainly not the way [that] we as a society should treat people."

14. *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (per curiam).

15. *Id.*

16. S.B. 280, 2017 Leg., Reg. Sess. (Fla. 2017).

17. *State v. Poole*, 297 So. 3d 487, 503–04 (Fla. 2020) (per curiam) (holding that § 921.141(3)(b) does not require "a finding of fact, but a moral judgment" and thus is not subject to the *Hurst v. State* requirement of a unanimous jury recommendation).

B. *Keynote Address by Sister Helen Prejean*

In the keynote address, Sister Helen Prejean, Founder of the Ministry Against the Death Penalty, shared her experiences recounted in *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*.¹⁸ Sister Prejean recounted her experiences corresponding with, counseling, and witnessing the execution of Robert Lee Willie, and stated that the experience changed her life's work. She reflected, "[t]he journey in *Dead Man Walking* is the journey into the deep moral ambivalence that most of us feel about the death penalty."

Sister Prejean noted that although her observation of Robert Lee Willie's execution was overwhelming, this experience led her to study and read about death penalty issues as well as interacting with anti-death penalty and human rights activists. Thereafter, she came to realize that the American public needs to deal morally with the death penalty, but unfortunately most Americans have not thought about it. Initially her book was going to deal with the facts showing how racism and poverty put people on death row. Instead, with the urging of her editor, the book details her emotional and spiritual journey.

Sister Prejean noted that while there is power in storytelling, it is important to talk to people to convey the journey more fully "from the outrage of the crime and the suffering of the victims' families into the horror of the execution chamber." In her story, she also acknowledges her own mistake of not initially talking to the victims' families. In her contact with the victims' parents, Sister Prejean learned that victims' families can be angry and remain in that state or can transform so that they can forgive. By sharing her journey, Sister Prejean hoped to awaken the public to the death penalty, the nature of mercy, and the path of forgiveness.

Sister Prejean then discussed what happens when political rhetoric demonizes murderers who commit atrocious crimes and noted that this political rhetoric has found its way into United States Supreme Court cases like *Gregg v. Georgia*.¹⁹ She remarked that even in those cases, prosecutors still do not need to seek the death penalty, and in fact, if they did not, this change alone would end the use of the death penalty.

Sister Prejean stated, "all human beings have the potential to change." From a faith perspective, "that is the divine spark within us"; from a human

18. SISTER HELEN PREJEAN, *DEAD MAN WALKING: THE EYEWITNESS ACCOUNT OF THE DEATH PENALTY THAT SPARKED A NATIONAL DEBATE* (Random House, Inc., N.Y., 1993).

19. 428 U.S. 153 (1976).

rights perspective, “that is the inalienable right to life.” A discussion on the evolution of consciousness on the death penalty within the Catholic Church and the global community followed. In 1948, when the United Nations proclaimed the Universal Declaration of Human Rights, few nations had abolished the death penalty.²⁰ Today, 108 out of 195 nations no longer have the death penalty.²¹ Following this humanitarian trend, Pope Francis revised the Catechism of the Roman Catholic Church in 2018 to proclaim, “the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person.”²²

Despite this global status, nearly half of the United States retains the death penalty.²³ Changing this trend requires education, especially for district attorneys and jurors. Sister Prejean noted that public pressure was key to convincing a district attorney not to pursue the death penalty for a mentally ill person who killed two priests in Pueblo, Colorado. Similarly, Sister Prejean noted the importance of educating jurors on their rights and how they do not have to be pressured into voting for a death sentence

The discussion emphasized that jurors need to be aware that the death penalty is broken because, among other things, there are currently 185 people who were wrongfully convicted, sent to death row, and later exonerated.²⁴ Innocent defendants assume they will not be convicted, but the prosecutors possess the evidence. More than ninety percent of wrongful death penalty convictions result from prosecutorial misconduct.

It is important to recognize the deep racism in the criminal justice system. Sister Prejean said, “[t]here is a direct line between slavery, lynching, mass incarceration, and the death penalty.” Currently in the United States, nearly fifty-eight percent of death row prisoners are People of Color while

20. *Limiting the Death Penalty*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/limiting-the-death-penalty> (last visited Mar. 25, 2022).

21. *Death Penalty*, AMNESTY INT’L, <http://www.amnesty.org/en/what-we-do/death-penalty/> (last visited Mar. 25, 2022).

22. Letter from the Off. of the Congregation for the Doctrine of the Faith to the Bishops (Aug. 2, 2018), <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802b.pdf>.

23. *States with the Death Penalty, Death Penalty Bans, and Death Penalty Moratoriums*, BRITANNICA PROCON.ORG, <http://deathpenalty.procon.org/states-with-the-death-penalty-and-states-with-death-penalty-bans/> (last updated Mar. 24, 2021) (noting that twenty-four states retain the death penalty, three states have death penalty moratoria, and twenty-three states and the District of Columbia have abolished the death penalty).

24. *Innocence*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/policy-issues/innocence> (last visited Mar. 25, 2022) (“Since 1973, at least 186 people who had been wrongly convicted and sentenced to death in the U.S. have been exonerated.”).

forty-two percent are White.²⁵ Moreover, Sister Prejean emphasized that of the people executed since 1977, “eight out of ten of them were put to death because they killed a White person.”²⁶

Next, Sister Prejean commented on the impact of the defense counsel’s competence. Sister Prejean recounted the example of Dobie Gillis Williams, a Black man who was convicted of the murder of a White woman.²⁷ Defense counsel in that case failed to raise an objection to the seating of an all-White jury and thus failed to preserve the issue for appeal.²⁸ Sister Prejean recognized that poor people cannot choose their lawyers; rather, they “have to take any lawyer they are given.” Rich defendants, on the other hand, do not go to death row because the district attorney will not want to fight that battle against a wealthy defendant who can mount a formidable defense. In those cases, the district attorneys will offer a plea bargain to avoid losing on numerous pretrial motions. Still, Sister Prejean heralded public defenders as heroes, especially those who represent defendants out of principle and who fight against the death penalty.

Near the end of her talk, Sister Prejean stated that while we are working toward shutting down the death penalty in this country, there have been many setbacks, particularly during the Trump Administration.²⁹ From 2020 to 2021, there were thirteen federal executions after a seventeen-year hiatus.³⁰ Sister Prejean noted that these thirteen executed prisoners did not just die; they were killed. The execution of Lisa Montgomery, on January 13, 2021, was particularly tragic.³¹ Ms. Montgomery was a mentally ill woman

25. NGOZI NDULUE, *ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY* 28–29 (Robert Dunham ed., 2020), <http://documents.deathpenaltyinfo.org/pdf/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf>.

26. *See id.* at 29–30 (stating that two-hundred and ninety-five Black prisoners were executed for the murder of White victims, compared to twenty-one White prisoners executed for the murders of Black victims).

27. SISTER HELEN PREJEAN, *THE DEATH OF INNOCENTS: ANY EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS* 18–19 (Canterbury Press 2005).

28. *Id.* at 20.

29. ‘*This is Not Justice*’ — *Federal Execution Spree Ends with Planned Execution of African-American on Martin Luther King Jr’s Birthday*, DEATH PENALTY INFO. CTR. (Jan. 18, 2021), <http://deathpenaltyinfo.org/news/this-is-not-justice-federal-execution-sprees-ends-with-planned-execution-of-african-american-on-martin-luther-king-jr-s-birthday>.

30. *Id.*; *Chaos Surrounds Attempts to Resume Federal Executions*, DEATH PENALTY INFO. CTR. (July 13, 2020), <http://deathpenaltyinfo.org/news/chaos-surrounds-attempts-to-resume-federal-executions>.

31. ‘*This is Not Justice*’ — *Federal Execution Spree Ends with Planned Execution of African-American on Martin Luther King Jr’s Birthday*, *supra* note 29.

whose execution was pushed back from December 2020 to just a week before President Biden took office on January 20, 2021.³²

Sister Prejean exclaimed “we, as a nation, *are* waking up” due to education about racism and the testimony of death row exonerees. On March 24, 2021, Virginia was the twenty-third state—and the first southern state—to abolish the death penalty.³³ This change in consciousness arose out of the efforts of Virginians for Alternatives to the Death Penalty, George Floyd’s murder, Black Lives Matter, and the moving of Confederate monuments.³⁴ Prior to this abolition, Sister Prejean stated, Virginia, the largest and longest-lasting slave state, carried out more executions than any state in the history of our nation.³⁵

Sister Prejean claims the seeds that were sowed in Virginia to eliminate the death penalty are now being sown in Florida. It is important to educate Floridians about how broken the death penalty system is and to raise the moral and economic issues. Hopefully, through these efforts, the death penalty will soon end in Florida.

C. *Racial Issues Panel Summary*

Ngozi Ndulue, Director of Research and Special Projects, Death Penalty Information Center, started the racial issues discussion by introducing a September 2020 Death Penalty Information Center Report titled, *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty*.³⁶ Ms. Ndulue notes that the report examines the racial history of the death penalty and explores the role that race continues to play in the death penalty.³⁷ As shown in the report, the victim’s race is a key factor that determines whether a person convicted of murder receives the death penalty.³⁸ Ms. Ndulue points out that the roots of this phenomena arose from the colonial

32. *Id.*

33. *Virginia Becomes 23rd State and the First in the South to Abolish the Death Penalty*, DEATH PENALTY INFO. CTR. (Mar. 24, 2021), <http://deathpenaltyinfo.org/news/virginia-becomes-23rd-state-and-the-first-in-the-south-to-abolish-the-death-penalty>.

34. Madeleine Carlisle, *Why It’s So Significant Virginia Just Abolished the Death Penalty*, TIME (Mar. 24, 2021, 3:24 PM), <http://time.com/5937804/virginia-death-penalty-abolished/>.

35. *See id.*

36. *See* NDULUE, *supra* note 25, at 1.

37. *Id.*

38. *Id.* at 3.

South where “very specific and specified differential crimes . . . would result in the death penalty.”³⁹

Although the death penalty and lynching have had a disproportionate effect on Black people, it also affected other ethnic groups such as Native Americans and Mexican Americans. In the United States–Dakota war, thirty-eight men were executed on December 26, 1862, the largest mass execution in United States history.⁴⁰ Similarly, the westward expansion of the United States resulted in “hundreds of lynchings and episodes of mob violence that occurred in the Southwest between 1848 and 1928.”⁴¹ Ms. Ndulue emphasized that there is a “connection between legal executions, lynchings, and mob violence.” Thus, lynchings were treated as an alternative to legal executions.⁴²

This connection is illustrated in the story of the Groveland Four that is depicted in *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America*.⁴³ The book discusses the intersection between mob violence and the death penalty.⁴⁴ It also shows the duplicity of law enforcement’s alternate roles in preventing, allowing, and even participating in mob violence.⁴⁵ Ms. Ndulue noted, “[t]hese multiple roles played by law enforcement were sometimes the only hope for some type of protection and safety, not actually being that for the Black community at that time, until today.”

As shown in the *Devil in the Grove*, the work of the National Association for the Advancement of Colored People Legal Defense Fund (“NAACP LDF”) initially started to advocate for the civil rights of Black men who were being punished for alleged rapes or sexual improprieties to White women.⁴⁶ For example, a Virginia study showed that between 1930 and 1969, eighty-percent of the executed prisoners were Black men and that only Black men were executed for rape or attempted rape.⁴⁷ Accordingly, the NAACP LDF broadened its focus from getting legal representation for Black men facing executions to challenging the entire death penalty system.⁴⁸

39. *See id.*

40. *Id.* at 23.

41. NDULUE, *supra* note 25, at 25.

42. *See id.* at 26.

43. GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* 1 (2012).

44. *Id.* at 10.

45. *Id.* at 149.

46. *Id.* at 10.

47. *Id.* at 19; *see also* Note, *Capital Punishment in Virginia*, 58 VA. L. REV. 97, 114 (1972).

48. KING, *supra* note 43, at 12.

These challenges to the death penalty led to United States Supreme Court cases that included a tacit recognition of the role of race in the application of the death penalty and how that phenomenon relates to extrajudicial killings.⁴⁹ Historically, those southern counties with the largest number of lynchings have the highest number of legal executions.

This connection is also evident in the race of the victim and execution. Ms. Ndulue reported that in “about [seventy five percent] of the cases in which there has been an execution, the victim in the case was White” even though about half of the homicide victims were White.⁵⁰ Thus, the punishment for murder differs based on the race of the person killed.

Ms. Ndulue highlighted the fact that the complexion of the defendant is relevant when the victim is White. A study in Philadelphia showed that defendants with “more traditionally stereotypically African American traits” such as a darker complexion, broader lips, and kinkier hair, were more likely to get the death penalty than defendants with lighter skin and other less stereotypically African American features.⁵¹ Ms. Ndulue concluded that not just race but racial stereotypes play a role in the criminal justice system.

Finally, Ms. Ndulue explained that race plays a clear role at trial. First, death qualification ensures the selection of jurors “with more anti-Black racial bias” and excludes jurors of color. Second, a less diverse jury is more likely to convict a defendant of color and is less receptive to mitigating evidence. As a result, Ms. Ndulue noted “a majority of folks who are having their cases . . . reversed based on intellectual disability are People of Color.” Finally, it takes more time for the exoneration of Black defendants convicted of murder and there is more jail time for Black exonerees after being wrongfully convicted.⁵²

The second speaker on the racial issues panel, Dr. Matthew Barry Johnson, Associate Professor of Psychology at John Jay College of Criminal Justice, started by discussing his anti-death penalty work in New Jersey starting in the early 2000s.⁵³ Dr. Johnson worked on a campaign that led to the abolition of the death penalty in New Jersey in 2007.⁵⁴ Through this work, Dr. Barry noticed convergences between anti-death penalty movements and

49. See *Furman v. Georgia*, 408 U.S. 238, 242, 310 (1972) (per curiam); *Gregg v. Georgia*, 428 U.S. 153, 168 (1976).

50. NDULUE, *supra* note 25, at 29.

51. *Id.* at 46.

52. *Id.* at 48.

53. Matthew B. Johnson, Member, Nat’l Ass’n of Black Psych., New Jersey Resolution to Abolish the Death Penalty (July 2022), in 46 *PSYCH DISCOURSE*, Fall 2012.

54. *New Jersey Abolishes the Death Penalty*, DEATH PENALTY INFO. CTR. (Dec. 11, 2007), <http://deathpenaltyinfo.org/news/new-jersey-abolishes-the-death-penalty>.

movements against mass incarceration and police brutality.⁵⁵ All of these efforts, including working for victims' rights, are part of the fight for criminal justice reform.

After New Jersey's abolition of the death penalty, Dr. Johnson focused his research on wrongful conviction and published a book in 2021 titled *Wrongful Conviction in Sexual Assault: Stranger Rape, Acquaintance Rape, and Intra-familial Child Sexual Assaults*.⁵⁶ His book focused on the fact that the primary reason for exoneration is the wrongful conviction for sexual assault.⁵⁷ In this book Dr. Johnson links this phenomenon to "the history of lynching and discrimination against African American defendants."

Next, Dr. Johnson recognized three African-American freedom fighters who were anti-death penalty activists—Frederick Douglass, Thurgood Marshall, and Coretta Scott King. Frederick Douglass, a well-known slavery abolitionist, was also an anti-death penalty advocate. At the same time that Mr. Douglas was working against slavery, he also campaigned against state executions. In particular, Dr. Johnson recited and discussed a resolution made by Frederick Douglass at an Anti-Capital Punishment Meeting in Rochester, New York, in 1858.

Similarly, Thurgood Marshall fought life and death battles to argue against the death penalty in the United States Supreme Court. Dr. Johnson also focused on a famous passage from Justice Marshall's dissent in *Gregg v. Georgia*.⁵⁸ Dr. Johnson surmised that Justice Marshall's statement about the death penalty in that case reflected the Justice's awareness of "racial bias and hostility" and "the selfish ambitions of prosecutors and politicians." Dr. Johnson also believed that this statement reflected the Justice's understanding that the death penalty was "arbitrarily applied" and thus "inherently cruel."

Finally, Dr. Johnson discussed Coretta Scott King's anti-death penalty advocacy. In 1981, Mrs. King opposed the death penalty and provided three reasons. First, Mrs. King stated that the death penalty makes it impossible to reverse miscarriages of justice. Second, capital punishment assumes there is no redemption for the murder. Third, Mrs. King noted the racial inequities in the imposition of the death penalty. Dr. Johnson concluded by stating that although he drew inspiration from the three persons mentioned, the work of many others could have also been highlighted.

55. MATTHEW BARRY JOHNSON, *WRONGFUL CONVICTION IN SEXUAL ASSAULT: STRANGER RAPE, ACQUAINTANCE RAPE, AND INTRA-FAMILIAL CHILD SEXUAL ASSAULTS* 77 (2021).

56. *Id.*

57. *Id.* at xi.

58. 428 U.S. 153, 231–241 (1976) (Marshall, J., dissenting).

The final speaker, Kristina Roth, Senior Advocate for the Criminal Justice Program of Amnesty International USA, discussed the forty-year effort of her organization to abolish the death penalty globally and the fact that the United States is the “only active executioner in the Americas.” Like the earlier speakers, Ms. Roth noted racism in the death penalty’s roots and the criminal justice system. Ms. Roth explained that racism impacts the trials of Black defendants, results in bias in the jury, and supports the arbitrary application of the death penalty.

Ms. Roth then discussed the importance of studies that show disparities in the capital punishment system. Ms. Roth noted a study from 1976 to 2021 that showed that Black people were thirty-four percent of those executed and that today, fifty-eight percent of the inmates on death row are People of Color.⁵⁹ All-White juries sentenced some of the Black men convicted, and many of those on federal death row were sentenced after the 1994 wide-reaching expansion of the Federal Death Penalty Act.

Also, in 1994, Congress considered the Racial Justice Act,⁶⁰ which would have allowed challenges to a death sentence based on evidence of racial discrimination in its administration. These acts have been enacted in various states, including Kentucky, North Carolina, and California, except that North Carolina repealed its statute.⁶¹ In 2021, advocates sought to make such legislation retroactive, but Ms. Roth noted that such efforts have been unsuccessful.

Ms. Roth reported that although some cases and legislation have been fruitful, the death penalty in the United States is still racially biased. This bias violates the “right to freedom from discrimination and the right to equal protection of the law.” Moreover, under the International Convention on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, the United States has an obligation to “respect, protect, and fulfill these rights.”⁶² Thus, racial bias is one of many reasons that Amnesty International opposes the death penalty in the United States.

59. *Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim> (last visited Mar. 25, 2022).

60. Racial Justice Act, H.R. 4017, 103d Cong. (1994).

61. Kentucky Racial Justice Act, KY. REV. STAT. ANN. §§ 532.300–532.309; North Carolina Racial Justice Act, N.C. GEN. STAT. § 15A-2010 (2009), *repealed by* Act of June 19, 2013, ch. 154, § 5(a), 2013 N.C. Sess. Laws 368, 372; California Racial Justice Act, CAL. PEN. CODE § 745 (West 2021).

62. *See* International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195.

D. *Closing Comments: Florida's Regrettable History with the Death Penalty*

Florida's long history with the death penalty is laced with racism and subjugation. From 1608 to 2002, almost sixty-three percent of those executed in Florida were Black, and thirty-five percent were White.⁶³ In addition, for executions between 1976 and 2014, seventy-two percent were for crimes involving White homicide victims even though only fifty-six percent of all homicide victims during that period were White.⁶⁴ Moreover, “[h]omicides involving White female victims are six and a half times more likely to result in an execution than homicides involving Black male victims.”⁶⁵ This information supported the conclusion that “the race and the gender of the victim is a determining factor in deciding who faces execution in Florida,” and on that basis, “Florida’s death penalty system is arbitrary.”⁶⁶

The intersections of race and the death penalty are tragically apparent in the case of Celia, a biracial woman who murdered a White master on December 10, 1847.⁶⁷ According to historical accounts, Jacob Bryan was her master and father.⁶⁸ There was also speculation that Mr. Bryan was the father of Celia’s four children.⁶⁹ Celia, who had no last name on record, killed Jacob Bryan five years after freeing Celia and the rest of his slaves.⁷⁰

Purportedly, the incident took place after Mr. Bryan attempted to discipline Celia.⁷¹ Mr. Bryan tried to punish Celia, who at the time was making a hoe-handle with an instrument called a drawing knife.⁷² Celia tried to resist with the hoe-handle and later struck Mr. Bryan in the head with the drawing knife, killing him instantly.⁷³

63. *The ESPY List: US Executions 1608–2002*, BRITANNICA PROCON.ORG, <http://deathpenalty.procon.org/us-executions/> (last updated Aug. 19, 2021).

64. Frank R. Baumgartner, *The Impact of Race, Gender, and Geography on Florida Executions*, UNIV. N.C. CHAPEL HILL (Jan. 14, 2016), <http://fbaum.unc.edu/articles/Baumgartner-Florida-executions-Jan2016.pdf>.

65. *Id.*

66. *Id.* at 6.

67. H. Franklin Robbins, Jr. & Steven G. Mason, *Florida's Forgotten Execution: The Strange Case of Celia*, FLA. SUP. CT. HIST. REV., Spring/Summer 2014 at 9, 9–10; *In re Estate of Jacob Bryan*, No. 47-99B (Fla. Duval County Probate Ct. 1847).

68. Robbins & Mason, *supra* note 67, at 9.

69. *Id.*

70. *Id.* (“On November 25, 1842 . . . Jacob Bryan executed a ‘deed of manumission’ whereby he freed all the slaves who comprised his family.”).

71. *Id.*

72. *Id.*

73. Robbins & Mason, *supra* note 67, at 9.

Judge Thomas Douglas, the first judge of Florida's Eastern Circuit Court, presided over Celia's trial in the spring of 1848.⁷⁴ The jury found her guilty of manslaughter but made a recommendation of clemency.⁷⁵ Despite the jury's recommendation, Judge Douglas sentenced Celia to death on May 26, 1848.⁷⁶ Judge Douglas may have felt legally compelled to pronounce a death sentence based on the 1840 territorial slave code.⁷⁷ After Celia's sentencing, appeals were made to Florida's Governor, William D. Moseley, to exercise clemency before Celia's scheduled hanging on August 11, 1848.⁷⁸ Even though the Governor delayed Celia's execution until September 22, 1848, no action was taken to set aside Celia's death sentence. Celia was hanged at noon on the execution date.⁷⁹

Like many of the death penalty cases discussed during this symposium, Celia's implicitly racist and tragic case elicits a sense of dread based on Celia's life circumstances and the arbitrariness of the death sentence.⁸⁰ As similarly shown in modern statistics, Celia was sentenced because she was a Black woman who killed a White person.⁸¹ Although Celia may have received adequate representation, that assistance did not save her.⁸² Indeed, according to newspaper accounts, there was concern that granting Celia clemency could embolden other enslaved Blacks to do the same to their White masters.⁸³

The abolition of Florida's death penalty is long overdue. Based on statistics, it is clear that the death penalty punishes African American defendants more frequently for killing White victims. This phenomenon has a lineage that rests in racism, slavery, slave codes, and lynchings. The death penalty uses unjust and arbitrary punishment in a criminal justice system that imposes disproportionate sentences on Black defendants, excludes people of color from juries, and nullifies exculpatory and mitigating circumstances.

74. *Id.* at 10; *In re Estate of Jacob Bryan*, No. 47-99B (Fla. Duval County Probate Ct. 1847).

75. Robbins & Mason, *supra* note 67, at 9.

76. *Id.*

77. *Id.* (“[I]f any slave, free Negro or mulatto, shall be guilty of man-slaughter of any white person . . . they shall suffer death.” (alteration and omission in original)) (citing An Act Relating to Crimes and Misdemeanors Committed by Slaves, Free Negroes and Mulattoes, § 38, 1828 Fla. Laws 174).

78. *Id.*

79. *Id.*

80. See Robbins & Mason, *supra* note 67, at 12.

81. *Id.* at 9; see also *Racial Demographics*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/death-row/overview/demographics> (last visited Mar. 25, 2022).

82. Robbins, Jr. & Mason, *supra* note 67, at 9.

83. See *id.*

This one-day conference featured nationally recognized activists, advocates, and scholars to make this case against death. The evidence is in, and the case is closed. At last, it is time to render the final verdict against the death penalty in Florida and elsewhere.

THE DEATH PENALTY IN FLORIDA: THE CASE AGAINST DEATH

FRIDAY, OCTOBER 15, 2021¹

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KEYNOTE SPEAKER

*Sister Helen Prejean*²

PANELISTS

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*Dr. Laura Finley*⁴
*Mark Elliot*⁵
*Linda Harris*⁶
*Jonathan Perez*⁷
*Brian Stull*⁸
*Melissa Minsk Donoho*⁹
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*Dr. Matthew Barry Johnson*¹¹
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1. This event was coordinated and sponsored by Nova Southeastern University Shepard Broad College of Law; Nova Law Review; Members' Advisory Committee of the Lifelong Learning Institute from Nova Southeastern University Dr. Kiran C. Patel College of Osteopathic Medicine; Barry University's Department of Sociology & Criminology and Anti-Racism and Equity; Amnesty International USA; Witness to Innocence; and Floridians for Alternatives to the Death Penalty.

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9. Chief Assistant and Managing Attorney for the Florida Regional Conflicts Counsel Office.

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12. Senior Advocate, Criminal Justice Program, Amnesty International USA.

I. INTRODUCTION

DR. PHYLLIS SCOTT: Good morning. I am honored to have the opportunity to welcome each of you to this important event. Those attending this event, thank you for taking the time to join in the conversation and contributing to a dialogue on a subject that has, over the years, aroused heated debates; taken the lives of innocents; cost taxpayers millions of dollars [in] funds that could have been used in other progressive ways; deepened discriminatory practices; and in many states, including Florida, violated the Constitution.

The rule issued by our courts [is] that the death penalty does not invariably violate the Constitution if administered in a manner designed to guard against arbitrariness and discrimination. Many states agreed, including Florida. This statement, rendered in a society where institutionalized racism is entrenched throughout the halls of justice—and in a society that has held little regard for the poor—was painfully laughable. That one statement gave way for minority groups and the poor to be further victimized; yet the debate actually continues. That one statement needs to be reexamined, and I am so glad you are all gathered here to have that conversation.

Despite all of the debates, what cannot be debated is that this form of punishment does not deter crime. What cannot be debated is [that] the economic inequalities and inequities [are] to the disadvantage of the poor. What cannot be debated is that there is a disproportionate number of persons from minorit[y] groups sitting on death row, who have, in the past, also been executed. What cannot be debated is the cost of such penalties. It is extraordinary to our society. We are better than this. Thus, what can be debated is whether, as a society, are we striving to cultivate a fair and just society. What can be debated is [the] price are we willing to pay for change.

On behalf of the Barry University Anti-Racism and Equity Coalition, I welcome you to this forum and hope you walk away enlightened, inspired, and with a stronger commitment to stand up for justice. Thank you.

DR. LAURA FINLEY: I just wanted to give us an introductory sense of where we are at with the death penalty in the United States. [The death penalty] is a centuries old practice. It has been found in many historic societies and came to the [pre-United States] colonies through practices the colonists were accustomed to in England and other places. However, there has always been opposition to the death penalty, and in fact, I am quite proud to say that my home state of Michigan was the first state in the United States to abolish the death penalty in 1846. Since then, there have been surges, or waves, in abolition of the death penalty.

We still retain the death penalty in the United States at the federal level, and although we very rarely actually assign somebody a death sentence at the federal level, there was a surge of death sentences under President Trump. President Biden and his administration have said they oppose the death penalty at the federal level, so there may be some change on that front.

We also have the death penalty in twenty-four states currently, and three states are on a governor-issued moratorium. What that means is they still technically retain the death penalty, but they are not currently issuing death sentences. We [therefore have] many states we still need to work on in terms of the death penalty. Florida is of course one of [these states]. [Florida is] a retention state and some of us are involved in efforts to change that situation, hence part of today's effort.

This is a map of which states still retain the death penalty—as you can see there are twenty-four— [and three states] are under a moratorium. There are waves of abolition, and the most recent positive movement for those of us who are death penalty abolitionists is that Virginia, in March of 2021, abolished the death penalty. Virginia is the first southern state to abolish the death penalty, [which] is huge because southern states overwhelmingly use the death penalty. For a southern state to abolish it is a big move.

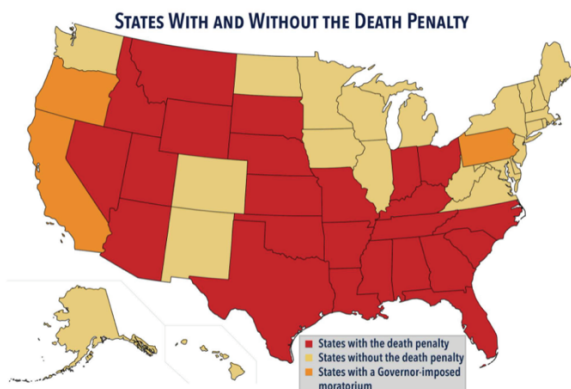


Figure 1: Map of States and Death Penalty Status¹³

13. *The Death Penalty in 2021: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 16, 2021), <http://reports.deathpenaltyinfo.org/year-end/YearEndReport2021.pdf>.

There are a variety of methods of execution, and as Dr. Scott mentioned briefly, there are a lot of issues with the death penalty, some of which we are going to touch on and some we probably would not give as much attention to, not because they are not important, but simply because you can only do so much in a six-hour window on an issue that is super complex. As Dr. Scott mentioned, there are cost-related issues, issues of arbitrariness—these may come up a little bit, but [are] not always the focus of our efforts but they are important.

One of the controversial issues now is the methods that we use to execute people. This [information] is from the Death Penalty Information Center—a wonderful resource about everything death penalty. [Of] the primary methods of execution most commonly used in the United States, it is most often lethal injection.¹⁴ Several states still authorize use of electrocution, lethal gas, hanging, and firing squads; those are used far less frequently, but may be still authorized in those states.¹⁵

[The use of lethal injection as a method of execution] is controversial in many ways, but one of those is that the protocols involve use of three different chemicals, one of which is very hard to acquire right now. One of the reasons it is hard to acquire because it is primarily produced in places that now oppose the death penalty. A lot of this particular chemical comes from the European Union. The European Union has outlawed the death penalty and said *we do not want to send those chemicals to the United States for use of execution*. Several pharmaceutical companies in the United States that produce these kinds of chemicals have also said *we no longer want to participate in this*. That is leading to a shortage of the chemicals being used for lethal injection, which would seemingly be a good thing, because it might tell states, *hey maybe just do not do it, maybe do not execute people*. Instead, [those states are] using dubious methods of acquiring some of these chemicals and/or turning back to some of these older methods, like firing squad. In some cases, lethal gas like cyanide is being proposed to be used more, for instance in Arizona. That is harkening back to things that happened during the Holocaust. It is a very disturbing trend. This is where we are today in terms of states that retain the death penalty and methods that are being used.

One thing that is important is that in Florida, most people do not support the death penalty, or they support life in prison without parole as opposed to a death sentence [for] crimes that would make someone eligible for a death sentence. [According to Floridians for Alternatives to the Death

14. *Authorized Methods by State*, DEATH PENALTY INFO. CTR. <http://deathpenaltyinfo.org/executions/methods-of-execution/authorized-methods-by-state> (last visited Mar. 25, 2022).

15. *Id.*

Penalty (FADP),] sixty two percent of Floridians now favor life without parole as opposed to an execution. If public opinion is what we want to base our policy on, [then our policy in not following public opinion] in the state of Florida.

MARK ELLIOTT: Public opinion has shifted and there is a growing awareness. We have known for some time that the end of the death penalty in Florida is inevitable. What is now becoming clear is it is going to happen sooner, rather than later. I have been working on this probably twenty years now and I have seen an acceleration recently that is just mind blowing as far as the people and the organizations coming together, and [the] networking and planning on this. Underlying it all is—there is a saying I heard once—*the more you know about the death penalty, the less you like it*. That was true for me; that has been true for almost anyone that find[s] out more about the death penalty.

That is why this event today is so exciting. You are going to hear from people with a variety of perspectives, a lot of them with direct experiences, on the death penalty. This event provides the chance to learn more and to really find out how this affects people in all walks of life. Criminal legal reform or criminal justice reform is a hot issue today.

The death penalty is the linchpin that sits on top of criminal justice reform efforts. The death penalty is totally about punishment; it is not about redemption, reform, rehabilitation, or restoration. Bryan Stevenson, the Director of the Equal Justice Initiative in Montgomery, Alabama, said it well: “Only in a state where the government is intoxicated with the power to kill, would a sentence of life in prison without parole seem like leniency.” That is the reality for things below this to get new looks, new energy, and new reforms; the death penalty has to come off the top of it. This is what holds it all back.

To find out more about Florida’s death penalty, please visit the <http://www.fadp.org> website. There are actions you can take—there is a lot going on right now—we have fact sheets available; we have sign on letters for murders of family members, law enforcement, a variety of different groups and perspectives. Speaking of groups, we have a page we just put up: a preliminary list of groups that support ending the death penalty in Florida. If you belong to a group who supports ending the death penalty (or would), please get in touch with us. Our email address is at the bottom of every page on our site. Let us know. We will send you a form. We will get you added to that list.

One of the issues going to be raised today that strikes me is, if I supported the death penalty, and I found out that one innocent person was on

death row, that would be it for me. I could never support a government program that would kill innocent people and a lot of times arbitrarily. In Florida, we have thirty innocent people who have been released from death row, most of them with a lot of opposition to from the state. It was a miracle, and a lot of times, it was just luck, a lot of work and pro bono attorneys and so forth, and people writing notes with the little teeny pencils they have in the cell to try to get some attention to their predicament of being on death row for a crime that someone else committed. It happens a lot and it happens more in Florida than any other state.

You are going to hear from some of those folks today. They are extraordinary and their stories are powerful. This is the reality. That is what people do not always know and understand is the reality of it: this system does not work the way most people think it does; it is the worst of the worst. It just does not work that way. The main thing people on death row have in common is they could not afford a lawyer at the time of their arrest. It is just a mess. It is not what like people think it is or in theory is supposed to be. It just does [not] work that way. I could spend the hour and a half talking about that, but I am not going to do it. I am going to let some of the other folks really deliver the information that can help you answer questions about the death penalty. If someone asks *well, why do you think this or why do you think that*, you are going to get those answers today. Some extraordinary people are on this program.

I have a friend who was on death row for twenty years in Ohio. He had six execution dates. The last one, he came within just a few hours being executed. His name is Derrick Jamison. He had his last meal, wrote his last words, and then they stayed the execution. He was exonerated and released, but not before he saw—I do not how many—a dozen or two dozen of his friends who he got to know on death row marched out and executed. He told me, “The death penalty is modern day lynching. They took me to the tree six times.” That was his direct experience. That is the way he saw it and that has a lot to do with what it really is. You are going to hear about the legacy of lynching and how that simply just transformed into today’s death penalty. Even though it is also about due process and legalities, it is still just a remnant from lynching.

If you go on the Florida Department of Corrections website for death row, they have a list of the four youngest people ever executed in Florida.¹⁶ All four were killed in the electric chair. All four were sixteen years old. And this happened not that long ago. What they do not have on their website is that

16. *Death Row*, FLA. DEP’T CORR., <http://www.dc.state.fl.us/ci/deathrow.html> (last visited Mar. 25, 2022).

all four children were Black. Two of them were thirteen years old when they were tried and convicted. One of them—Fortune Ferguson, Jr.—was thirteen years old when he was brought into court. He was arrested, tried, and convicted within twenty-four hours. Maybe it was due process, maybe it was legal, but it is essentially legalized lynching. That is the reality of it. Maybe it takes a little longer with more legal steps, but this is the roots of it. This is where it came from. That is how it is still applied. The same people are subjected to it by the same people; it just has the trappings of legality. I looked for years to find some redeeming value or virtue of having the death penalty and I have never found one. There is nothing that stands the light of truth and inspection; the death penalty is totally unnecessary.

We, Floridians, spend over \$50 million a year just to have the death penalty, and that is over and above the cost of sentencing those same people to life in prison. How could that money to be used? We have got 14,000 unsolved homicides that could be solved; we could help murder victims' families in real and immediate ways instead of telling them, *one day you are going to feel better. Years from now you [are] going to get justice. We are going to kill this person and you get to come and watch.* That is just so crazy.

This event is all about people learning more about the death penalty and what to do about it. That is important. On our website you will see ways you can end the death penalty for people with serious mental illness. Almost everyone thinks that it is already illegal to execute and get the death penalty for someone who is seriously mentally ill, but that is not the case in Florida. It is not supposed to be happening nationally, but Florida has found loopholes and ways to work around that, so we are sentencing people who committed a crime while they were seriously mentally ill. They are going to death row, and some of them, unfortunately, have been executed. So please take action. Get involved. Take a look at the petition. If you want to sign it, sign it. If you want to contact us about the group you belong to and they will join the list of organizations in Florida that want to end the death penalty, that will be a big help. That is power. That is what it looks like; all of you and all the groups working together to end the death penalty. That is how it is going to take place. It is a new day in Florida. Thank you all. Let us move forward together and get across the finish line and end this madness once and for all.

DR. LAURA FINLEY: There is so many complex issues with the death penalty that will come up through the day. Just to be clear, those of us who seek to abolish the death penalty do not necessarily believe our prisons are amazing places either. We are also about prison reform, criminal justice reform, [and] we recognize there are certainly some deep issues within our criminal justice systems. But the ultimate sanction—the death penalty—is

something we believe no longer should exist for some of the reason[s] that you have already heard and more that you will hear throughout the day.

Next, we will turn the event over to experts on legal issues. Exploring what are the legal issues related to, why we have the death penalty, and why do prosecutors seek it in certain cases and not in others.

II. LEGAL ISSUES PANEL

OLYMPIA DUHART:¹⁷ It is truly past time to make the case against death. The law can be used as a tool for oppression or an instrument of justice and change. In today's symposium, we are going to explore the many different arguments advanced by these amazing social justice warriors who pursue justice through legal reform and beyond, in an effort to confront the persistent threat of the death penalty. As we put the death penalty on trial [today], we are going to hear from different distinguished experts, including some of NSU's best advocates, students and alum—some seasoned and some new to the death penalty abolition movement—acclaimed scholars, national advocates, and importantly people who survived being on death row despite their actual innocence.

Our work today is consistent with NSU's core value of community. We take a special pride in exchanging with the community through professional and intellectual support that complements our educational mission. Today's symposium is a prime example of this effort. Really this event represents the best of community collaboration, impact collaboration.

JANE CROSS:¹⁸ I am going to introduce the legal issues panel. We have four amazing people. I am going to give their names in the order that they are going to speak and then I am going to turn it over to them. The first panelist is Linda Harris. She is an NSU Law alumnus, and she is also the former treasurer of NSU [Black Law Students Association]. Ms. Harris is going to talk about the history of the death penalty in Florida. Following Ms. Harris will be Jonathan Perez, who is an NSU law student and Articles Editor [as well as the Goodwin Alumni Editor] for [the] *Nova Law Review*. Mr. Perez is going to talk about data on deterrence and the death penalty. Next, we are going to have Brian Stull who is a staff attorney for the ACLU Capital Punishment Project. Mr. Stull is going talk about Florida specific legal practices in death penalty cases. Then we have Melissa Minsk Donoho, who

17. Associate Dean for Faculty Development and Professor of Law.

18. Acting as an NSU Shepard Broad College of Law representative for this panel.

is Chief Assistant and Managing Attorney for the Florida Regional Conflicts Counsel Office. She is going to talk about current trends in Florida death penalty practice.

I want to just briefly tell you how I came to looking at the death penalty. My specialty is Caribbean law and I have written about the mandatory death penalty in the Commonwealth Caribbean. There is a case called *Pratt v. Attorney General for Jamaica*,¹⁹ decided 1993, which basically [made] it illegal to execute someone after they have been sentenced for more than five years. That particular precedent was basically put into place because of the work of the Death Penalty Project, which is a human rights organization in Britain. Activism does work, and it does get the law changed.

LINDA HARRIS: As mentioned before, I am going to give a very brief history of capital punishment in Florida. I will probably be using the terms capital punishment and the death penalty interchangeably. So basically, I am saying the same thing. I [a]m [also] going to give a very brief overview of the death penalty in general.

You have already heard a lot about the death penalty and where it came from. [The death penalty] has been around since the Code of Hammurabi. The first legislated code is going back as far back as the eighteenth century [B.C.]. The American use of the death penalty was essentially the remnant of the colonists from Britain bringing that over, and it has evolved to the death penalty laws that [we] see today.

With that, I am going to start talking about the history of capital punishment in Florida. As of 2020, Florida is one of twenty-five states in the United States that have the death penalty. In Florida, the first known execution was in 1827 when Benjamin Donica was hung for murder. In 1923, a bill was placed that allowed all executions to no longer be done by hanging, and to then be done by the electric chair. In June of 1972, the Supreme Court struck down the death penalty nationwide in a court case called *Furman v. Georgia*.²⁰ Subsequently, [Florida] reintroduced a death penalty statute. [Florida] was actually the first state to reintroduce the death penalty after the Supreme Court struck it down nationwide in that *Furman v. Georgia* case.²¹ Four years later, in 1976, the Supreme Court reinstated the death penalty nationwide when it upheld a Georgia [death penalty] statute in *Gregg v. Georgia*.²² The pertinent

19. [1993] UKPC 1, [1994] 2 A.C. 1, 20, 23 (appeal taken from Jam.).

20. 408 U.S. 238 (1972).

21. *Florida: History of the Death Penalty*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida> (last visited Mar. 25, 2022); *Furman*, 408 U.S. at 238.

22. 428 U.S. 153 (1976).

Florida [case], *Proffitt v. Florida*,²³ upheld the reintroduction of the death penalty in Florida.

In 1979, Florida was the first state to carry out a non-voluntary execution following the *Gregg* case.²⁴ From there, [Florida had] a botched string of executions in the 1990's that essentially led the [Florida Supreme] Court and not only the court, but also the Florida legislature to say, *maybe we should not be using old sparky*, that is the term some people affectionately refer to as the electric chair. I do not think it was a nice name. In 2000, the Florida legislature decided, after those botched executions, that lethal injection was the way to go. In the year 2020, we shifted from using the electric chair to using lethal injection.

Florida has a very interesting history with the death penalty. [Florida has] one of the highest rates of folks on death row, and we have also had numerous issues and constitutional challenges to our death penalty. Now, I am going to briefly go over some of those. In 1982, in *Enmund v. Florida*,²⁵ the Court ruled that Florida violated the Eighth Amendment when it attempted to apply the death penalty to defendants who were minor participants in a crime that resulted in murder.²⁶ Essentially, the Court said if these defendants did not attempt to kill [or] intend to kill the victim [and] they were not active participants in the victim's murder, then it is cruel and unusual punishment to give these particular defendants the death penalty.

In *Hitchcock v. Dugger*,²⁷ a case in 1987, the Court ruled that Florida's death penalty statute was unconstitutional because it did not allow the advisory jury or the sentencing judge to consider reasons the defendant offered to spare his life unless those reasons were listed among the mitigating factors the legislature had set out in the state's death penalty statute.²⁸

Then, in 2014, in *Hall v. Florida*,²⁹ the Court ruled that Florida unconstitutionally impaired the enforcement of the Eighth Amendment's prohibition against subjecting persons with intellectual disabilities to the death penalty by applying a hard cut off of seventy—an IQ cut off—to deny death row prisoners' intellectual disability claims.³⁰ And in 2016, in *Hurst v. Florida*, the Court ruled that a Florida sentencing statute, at the time, violated the Sixth Amendment right to a jury trial because it required that a judge,

23. 428 U.S. 242 (1976).

24. *Florida: History of the Death Penalty*, *supra* note 104.

25. 458 U.S. 782 (1982).

26. *Id.* at 801.

27. 481 U.S. 393 (1987).

28. *Id.* at 398–99.

29. 572 U.S. 701 (2014).

30. *Id.* at 724.

rather than a jury, make findings of fact as to whether the prosecution had proven that a defendant was eligible to face the death penalty.³¹ That is just a brief, truncated history of some of the [cases] that have affected death penalty cases in Florida.

Until 2016, Florida was one of only three states that permitted trial judges to impose the death penalty based on a jury's non-unanimous recommendation for death.³² The Florida Supreme Court in the *Hurst* case ruled th[is] particular practice violated Florida's constitution.³³ [However], in March of 2017, the Florida legislature decided to adopt a new sentencing law that requires a unanimous jury recommendation for death before the judge could impose a death sentence.³⁴ As previously mentioned, we are always finding loopholes in the state of Florida in order to get around getting rid of the death penalt[y]. You can see that in the history of Florida and the way that we have handled death penalty legislation.

Lastly, I would like to talk about a few issues about the death penalty, [which] is why we are here. Even though my main purpose was to talk about the legal history of death penalty cases in Florida, I want to talk about some of the impacts and the effects of the death penalty.

First, I want to talk about the rate of error. Since 1973, there have been thirty exonerations of people from death row in the state of Florida. That is the highest of any state in the United States of America. Essentially, what that means: For every three people on death row, [Florida has] exonerated one innocent person. If [even] one innocent person has the potential of being put on death row, that should be enough to eliminate the practice. If we can[not] make sure the people that the state wants to put to death, at a minimum, did what [the state] said they did, the state should not have the ability to then take the life of an innocent person if you cannot guarantee that this person did it. Now, I personally do not support the death penalty. That is the whole purpose of this panel. I want you to understand that the rate of error is so, so very high. You can[not] take death back; you can[not] come back from death. Once we kill this person, there is no coming back from that.

Secondly, I want to talk about the cost. I am not going to give you specific figures because I went to law school, and I did not become a mathematician for that reason. Florida taxpayers pay well over fifty-one million dollars annually to enforce the death penalty. That number is well above any of the costs associated with keeping somebody in prison [or] seeking life imprisonment for a particular defendant.

31. *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016).

32. *Hurst v. State*, 202 So. 3d 40, 61 (Fla. 2016) (per curiam).

33. *Id.* at 69.

34. FLA. STAT. § 921.141(2) (2021).

Lastly, I would like to discuss some of the racial issues. As previously mentioned, the death penalty, overall, has not been distributed fairly. There are a lot of racial disparities in the way the death penalty has been applied. Specifically, the way it has been applied to Florida, prosecutors are over three times more likely to seek the death penalty when a victim is White [compared to] when the victim is an African American. Never in the history of Florida has a White person been executed for killing an African American. Never. Not once.

I am going to give you some specific numbers about Duval County. Eighty percent of the people sentenced to death from Duval County were African American from 2009 to 2011. It was 100% in the year of 2012.³⁵ Like I said and as previously mentioned, [the death penalty] disproportionately affects African Americans. This is pretty much the history of the death penalty [in Florida].

JONATHAN PEREZ: My name is Jonathan Perez, and I am a 3L, currently at Nova's [Shepard Broad College of Law]. I am on law review. I had an article published over the winter dealing with the death penalty here in Florida. It is titled, *Barbaric Retributivism: New Hampshire and Washington Are Two of the Latest States to Abolish the Death Penalty. Here Is Why Florida Should Follow Suit*.³⁶ I am going to talk about the lack of deterrent effect of the death penalty. It is ironic that, in my opinion, most supporters of the death penalty like to point to the deterrent effect—that is, effective in deterring crime—when there is really not a lot of evidence to support that assertion. In my [Note], I quote Cesare Beccaria, the Italian criminologist a lot. He said: “For a punishment to be just, it must have only that degree of intensity that suffices to deter men from crime.”³⁷ The critical question, in my opinion, is *not* whether the death penalty in-and-of-itself deters crime, because the death penalty does not exist in a vacuum. [Rather], it is whether it is more effective at deterring crime than life imprisonment without the possibility of parole. In my [Note], I cite to a few studies and trends that tend to say [the death penalty] is not more effective.

The first study I point to is one conducted in Iran in 2018. The study examined eleven countries that had abolished the death penalty at least ten years prior to the conduction of the study. The study plotted the murder rates

35. *Corrections Offender Network: Death Row Roster*, FLA. DEP'T CORR., <http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx> (last visited Mar. 25, 2022).

36. Jonathan Perez, Note, *Barbaric Retributivism: New Hampshire and Washington Are Two of the Latest States to Abolish the Death Penalty. Here Is Why Florida Should Follow Suit*, 45 NOVA L. REV. 115 (2020).

37. *Id.* at 116.

in the eleven countries over the course of the ten years.³⁸ The findings demonstrated that death penalty abolition correlated, on average, with a decline in murder rates in all eleven countries. In fact, a country in this set which abolished the death penalty can expect an average of approximately six less murders per 100,000 people a decade after abolition.

This trend is also present within the United States. Collectively, the murder rate in death penalty states has been higher than the murder rates in non-death penalty states in every single year since 1990.³⁹ The difference is not particularly close either. Death penalty states have had a twenty eight percent higher murder rate on average than non-death penalty states since 1999.⁴⁰ The highest difference came in 2007, when there was a forty-seven percent difference.⁴¹ So, the trends extrapolated from the study in Iran are also present within the United States.

Another study, conducted in 2008, examined the opinions of leading criminology experts on the deterrent effects of the death penalty. That study found that 88.2% of criminologists [who] were surveyed do not believe that the death penalty deters murder. That is a level of consensus comparable to the agreement among scientists regarding global climate change.

There is an abundance of evidence that supports the assertion that the death penalty, for all its might, does not succeed in its endeavor to deter crime. As I stated earlier, [the death penalty] cannot be looked at [and] does not exist in a vacuum. The question is whether or not it is more effective at deterring crime than life in prison without parole.

BRIAN STULL: I am so pleased and proud to be a part of this conference making the case to take down, and to do away with, the death penalty. A friend of mine from the Alabama ACLU put it aptly: *What we are trying to do with the death penalty and many other parts of the criminal punishment system is we are trying, as lawyers, to tear down the unjust system. But at the same time, we are fighting within that unjust system—battling for fairness for the people who are still stuck in before we get rid of the death penalty [and] who are facing death sentences, executions, and residing on death row.*

38. *Id.* at 113; ABDORRAHMAN BOROUHAND CTR., *supra* note 12.

39. *Murder Rate of Death Penalty States Compared to Non-Death Penalty States*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states> (last visited Mar. 25, 2022).

40. *See id.*

41. *See id.*

So, I start with Tracy Chapman; yes, we need a new beginning.⁴² My main goal is overall we need to get rid of the death penalty and so many aspects—if not in the entirety—of our criminal punishment system. My presentation today, however, is going to be about battling within that system for fairness.

First, I want to talk about promises that were made long ago within the system that we currently have. These are promises that we still have to fight for today. They often have become broken promises that relate to the whole broken criminal punishment system. I say criminal *punishment* system intentionally, instead of criminal justice system. These problems and broken promises are especially troubling with [regard to] the death penalty.

[We begin with] the first promise [of] a White guy, [Sir William Blackstone], in a powdered wig in England, back in pre-revolution times, talking about the right to [a] jury. It sounds pretty good: “[The right to a] jury is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the UNANIMOUS CONSENT of twelve of his neighbors and equals.”⁴³

[This understanding of the jury] was what was influencing the Framers of the United States Constitution when they adopted the Sixth Amendment—which provides rights during a criminal trial, including the right to an impartial jury—as part of the Bill of Rights. When the Framers came up with that right and put it in our Constitution, they were talking about the right that they understood from Blackstone, the preeminent scholar and jurist in England—whose law we were borrowing—that this is a right to a unanimous jury. So, these are some of the promises.

The United States Supreme Court has talked about this promise as well. They have talked about the jury and given it some of the highest praise. In *Flowers v. Mississippi*,⁴⁴ the Supreme Court stated: “Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.”⁴⁵ In *Flowers*, which was just a couple of years ago, the Court threw out the conviction and death sentence in Mississippi of Curtis Flowers, because the prosecutor was discriminating against Black jurors.⁴⁶ And that is just a side note. I am really talking about the promise of the jury right now, and how it plays out in Florida.

In 2020, the court also made clear something that advocates have been saying for many, many years and we have all known for many years. The

42. TRACY CHAPMAN, *New Beginning*, on NEW BEGINNING (Elektra 1995).

43. 3 WILLIAM BLACKSTONE, COMMENTARIES *218.

44. 139 S. Ct. 2228 (2019).

45. *Id.* at 2238.

46. *Id.* at 2252.

court threw out Louisiana and Oregon statutes that allowed non-unanimous jury verdicts. The court also recognized and made clear that these statutes were enacted to support White supremacy. And what do I mean by that? In the time of post-reconstruction, when the states who were wanting to join the Union realized they had to pass laws that allowed for some semblance of equal rights and equal treatment, these states recognized they were going to have to allow Black people to serve on juries. But they did not want the Black people on those juries to have a voice, so they came up with a non-unanimous jury. [In essence], they said, *it is okay, the majority of the jurors are going to be White anyway* (given the population numbers at that time); *so, we [will] let you on the jury, but you are not going to have a voice*. Last year, the Supreme Court finally threw out those statutes.

These are lofty promises about the right to a unanimous jury that even the United States Supreme Court has endorsed, but they are not consistently applied, and [as a result], they are leaving people in shallow graves. I will discuss two examples. The first begins with a question: Notwithstanding this history, notwithstanding Blackstone, notwithstanding the United States Supreme Court's recognition of the problems with non-unanimous jury verdicts, what two states have historically permitted death sentences based on non-unanimous juries? Florida is shamefully one of those states, and the other is Alabama. [Looking at a map from] 1862 underscores that this is a practice meant to uphold White supremacy.

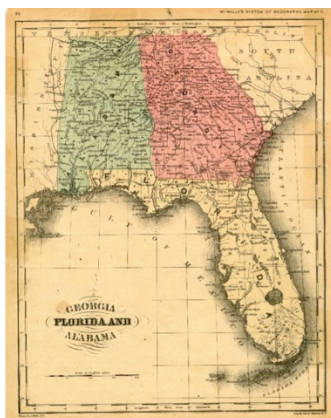


Figure 2: McNally's Map of Georgia, Florida, and Alabama, 1862.⁴⁷

47. McNally's Map of Georgia, Florida, and Alabama, 1862, FLA. MEMORY, <http://www.floridamemory.com/items/show/323074> (last visited Mar. 25, 2022).

For forty years, right out of the box, as soon as states were trying to refashion the death penalty [system], Florida was first. Florida started its system and used this system which allowed non-unanimous jury death sentences for forty years. Florida executed ninety-two people under this regime, almost all of which were for killing White people. That was going on for a very long time, until *Hurst v. Florida* in 2016, when the United States Supreme Court said a jury has to make all of the decisions that are necessary for a death sentence.⁴⁸ The Court sent the case back to the Florida Supreme Court, where many of us were arguing: because of Blackstone, because of our legal history, that means a unanimous jury.

The Florida Supreme Court agreed. In *Hurst v. State*, the court declared, *when we say jury, we mean unanimous jury. We are going to put an end to this.*⁴⁹ The legislature agreed as well—although, I wish they had abolished the death penalty—but they put that protection in.⁵⁰ So, are we putting an end to this, or are we not putting an end to this? The answer is *sort of*.

At the time of these rulings, there were still over 350 people on Florida's death row. Many of [them]—in fact, about 290 of [them]—had non-unanimous jury verdicts for their death sentence. [Consider] James Belcher, sixty-two-year-old Black man. Mr. Belcher is a father, former basketball standout, [and a] neighborhood coach. He was raised in tough Brooklyn projects. He was convicted of murder and sexual assault in Duval County for a crime that happened in 1996. When his case went to the jury—think about those juries that are deciding this; think about those Louisiana juries where they did [not] want everyone to have a voice—nine people said [Mr. Belcher] should be sentenced to death, but three said no, he should be spared.⁵¹

Then we have Steven Evans whose crime was three months later in 1996. A fifty-four-year-old Black man who has three children, a history of trauma as a child, and head injuries, [was] convicted of kidnapping and murder. He was sentenced to die [despite] a holdout juror who says, *I want him to have life*. But that juror is overridden by the majority who say he should have a death sentence. [Mr. Evans] is sentenced to death.

Which of these two men, then—Mr. Evans or Mr. Belcher—now gets relief, now that the Florida Supreme Court has said, *this is not allowed*? Which one? Is it the one whose crime occurred first, or the one whose crime occurred three months later?

48. 136 S. Ct. 616, 624 (2016).

49. 202 So. 3d 40 (Fla. 2016).

50. See FLA. STAT. § 921.141(2) (2021).

51. *Belcher v. State*, 851 So. 2d 678 (Fla. 2003).

The answer is Mr. Belcher.⁵² His crime came first—Mr. Evans’ came second—but only Mr. Belcher is going to get the benefit of this new rule; [this is] because of retroactivity principles that the Florida Supreme Court decided to apply here. The Court said Mr. Belcher’s case was not final until after June of 2002. This was a significant date because that is when the United States Supreme Court started talking about this jury right in death penalty cases,⁵³ and so the Florida Supreme Court should have been on notice of the problem by then. [Therefore, Mr. Belcher] gets relief. He is not sentenced to death anymore and he [is] going to have a new trial on whether he can be sentenced to death. Mr. Evans, however, whose crime was months later in 1996, gets no relief because his sentence became final before 2002.

Overall, [there are] 290 cases. Who gets first relief? A bunch [get relief], but a bunch do not. There are 157 whose cases became final after June 2002—they *do* get relief—but 133 do not because their cases came too early in the system.⁵⁴ Notwithstanding what Blackstone was telling us about this, or what we knew about this from the Sixth Amendment, these 133 cases came too early and do not get relief. This is the *height of arbitrariness* that the death penalty represents. I want to submit this as my “Exhibit A” against the death penalty.

Then, the problem with this also is—talking about battling injustice in the system—this has already gone to the Florida Supreme Court. It has already gone to the United States Supreme Court. This is not going to change. It is just going to remain as evidence that Florida’s death penalty is irrevocably broken. It is racist and it is arbitrary.

Moving on to a more hopeful example called the problem with death qualification. In *Furman v. Georgia*, the Court said that the jurors in death penalty cases serve as the *conscience of the community*.⁵⁵ That makes sense. Jurors are saying, *what do we want for our community?*

The phrase *jury of peers* is another way that we have stated this promise, and that is related to the fair cross-section requirement that says when you [are] bringing in people for the jury, you can [not] just have all White

52. See *Belcher v. State*, 228 So. 3d 530 (Fla. 2017).

53. See *Ring v. Arizona*, 546 U.S. 584 (2002).

54. See *Florida Prisoners Sentenced to Death After Non-Unanimous Jury Recommendations, Whose Convictions Became Final After Ring*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/stories/florida-prisoners-sentenced-to-death-after-non-unanimous-jury-recommendations-whose-convictions-became-final-after-ring> (last visited Mar. 25, 2022); *Florida Death-Penalty Appeals Decided in Light of Hurst*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/stories/florida-death-penalty-appeals-decided-in-light-of-hurst> (last updated Jan. 23, 2020).

55. 408 U.S. 238, 299 (1972) (Brennan, J., concurring).

people who are called for jury. You must have a diverse pool that reflects the community [in which] the case is being tried.

However, did you know if you oppose the death penalty, you could never serve on a capital jury? That is, when you take out all those people who oppose the death penalty, we say, *Those are not your peers, they cannot be on your jury*. This was challenged in *Lockhart v. McCree*⁵⁶ in 1986, where the United States Supreme Court heard—and rejected—that challenge.⁵⁷ The Court said it does not matter; these people who are against the death penalty are not a cognizable group, so their exclusion from jury panels does not pose a problem for the Sixth Amendment.

Since then, a lot of people have been doing a lot of studies about what impact death qualification has. There have been studies done in South Carolina,⁵⁸ Louisiana,⁵⁹ and [soon-to-be-released] studies in Florida, we are showing consistently that death qualification excludes Black jurors by a two to one margin over White jurors. [This means] forty percent of qualified Black jurors that show up, ready to serve, with no other conflict and no other for-cause challenge—forty percent—are excluded by death qualification. [By comparison], only twenty percent of similarly situated White jurors are excluded.

Is death qualification race neutral? I would submit, *no*. I would submit that the numbers speak for themselves. Moreover, for people who are proximate to the racism in our criminal punishment system—who have been victims of that racism—of course they are going to be skeptical of that system. Of course, they are going to say it is not fair. And the death penalty—the most egregious and most severe exercise of that power—is not proper for our government to undertake. Our government does not deserve to wield that power.⁶⁰ If you are Black, and that is your position about death penalty, that is an earned distrust,⁶¹ and therefore, [death qualification] is not race neutral.

56. 476 U.S. 162 (1986).

57. *Id.* at 165.

58. Ann M. Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. UNIV. L. REV. 299, 333–34 (2017).

59. Aliza Plenar Cover, *The Eighth Amendment's Lost Jurors*, 92 IND. L.J. 113, 137 (2016).

60. See BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 313 (2015) (“[T]he death penalty is not about whether people deserve to die for the crimes they commit. The real question of capital punishment in this country is, do we deserve to kill?”).

61. See, e.g., Doug Dennis, *40 Percent of Black Americans Distrust the Criminal Justice System: Why I'm One of Them*, VOX (Dec. 21, 2016, 8:00 AM), <http://www.vox.com/first-person/2016/12/21/13854666/criminal-justice-police-distrust>.

Finally (and on a more hopeful note), although we lost in *Lockhart*, nevertheless, with this new data showing this disproportionate exclusion, advocates and lawyers are still hopeful we can win this battle to show that death qualification is wrong and can return just a little bit of fairness to the system.⁶²

MELISSA MINSK DONOHO: I will share what I can with you this morning. I practice every day at the courthouse. I work in, basically, a public defender's office. There are two public defender offices in Florida: The elected public defender and then a conflict counsel. Whenever the public defender conflicts off the case, then conflict counsel gets the case, so we do the same thing. Currently in our office we have ten death penalty cases for trial and five *Hurst* re-sentencings, which are cases where people had non-unanimous death recommendations in the past and are back for new sentencings.

The interesting thing for me is that I do not feel optimistic as a practitioner, but when Mark Elliott spoke about his hope, I felt maybe some happiness. But as a practitioner, it does not feel that way. I feel like the courts have gone back twenty years. I feel like the Florida Supreme Court has continued to take rights away. Instead of being futuristic and progressive, we are going backwards. Maybe I will find some more hope after today, but I have been doing this since 1997 and [although] it felt like we were moving forward for a while, now it just feels like we are moving backwards.

I want to speak about what is going on locally, right here in Broward County. We recently had elections and got a new state attorney, and just so everybody knows, we have laws in place where the prosecutor has total discretion about when to seek the death penalty and against whom to seek the death penalty. It is a subjective process. The person who is the state attorney at the time gets to make that choice.

I was hopeful that we were getting a new progressive prosecutor and that does not seem to be the case. Since [Harold Pryor] became the prosecutor (Mike Satz was the prosecutor before) in the last six weeks, we have received four notices of new intents to seek death penalty in Broward County. That is just my office, not the public defender office; they probably have their own equal [number] of cases.

So where do we start [for progressive change]? I just battle it out in the courtroom and with individual prosecutors. If we cannot find a way to stop the beginning of the process, we are not changing the legislature right now to abolish it. That is, do we go prosecutor by prosecutor and vote in people who

62. See NDULUE, *supra* note 25, at 66–67; Cover, *supra* note 142, at 156.

do not want to seek [the death penalty] as often? That is something we all have to do, but as it stands right now, I am not optimistic about it.

Now, the new prosecutor has created what he calls a *Death Review Panel*, which is new, because [the prior prosecutor] Mr. Satz previously did not do that. [The Death Review Panel] gives us an opportunity to present mitigation on the front end—take our clients, investigate their backgrounds, and give the state attorney a reason to dismiss it or drop seeking the death penalty—and just move forward on a regular first-degree murder case. We have been doing that and, accordingly, have submitted about at least four memos requesting that the State Attorney not seek the death penalty. All of our requests have been denied.

We have not been granted one request to waive the death penalty on our current clients. That is disheartening as well, [especially] when we thought there was some local change and a fresh, new look at things. From a practitioner's perspective, we are putting all our [cards] on the table we have been showing our hand, in a way, for a possibility that our client[s] have a good review [of] why the prosecutor should not be seeking the death penalty against them. So far, we have not been very productive in that regard.

However, there are some tools we have, and maybe some new tools. There is a good note that the legislature has not gone back on unanimity. As my colleagues have talked about, *Hurst* said we need to have a unanimous jury and the legislature has kept it that way. The Florida Supreme Court has gone back on that and, frankly, at any point the legislature could change again and go back to non-unanimity. We, as practitioners, worry about this all the time.

I have had plenty of clients and I just would like to say that having been to death row and sitting in the local jails, on the phones with my clients, traveling around, meeting their families, and working hard to fight that fight every day—when you get to know a person, like I have gotten to know a lot of these clients—you realize they are not their worst day. The death penalty is certainly not the way we, as a society, should treat people.

JANE CROSS: There has been news about the [shooter] in the Marjory Stoneman Douglas [mass school shooting] case regarding whether the prosecutor is going to ask for the death penalty. Do you have any information on that case or know anything about it?

MELISSA MINSK DONOHO: Yes, they are seeking the death penalty on [Nikolas] Cruz for sure. The Defense has offered that he will accept life in prison without the possibility of parole, but the prosecutor's office will not offer that plea. Basically, he would change his plea from not guilty to

guilty and [on the condition that he is] sentenced to life. But the prosecutor's office will not do that. They are continuing to seek death against him.

Victims have rights, and the prosecutor's office takes very seriously the victims' request of how to proceed in a case. The families of the victims of the Cruz case have mixed feelings about it. There are some families that do not want them to seek death and there are some that do. [At this time], the prosecutor's office is continuing to seek it. Additionally, I think they feel that if you cannot seek the death penalty in the Cruz case, when can you seek it?

The Cruz case is the pinnacle of cases; if you let that go [without seeking death], it trickles down to everything else. In other words, you cannot let the worst of the worst cases, in their view, go, because then, what do you do with all the rest? There is always that backdrop of family and the victim's rights and the victim's say in the case. [On the other hand], I have had victims who did not want the death penalty and the State attorney still pursued it.

JANE CROSS: If you could see organizing to put pressure on the Broward State Attorney, what do you think would be the most effective tactic?

MELISSA MINSK DONOHO: I think that he is young, and he seems like a very nice guy and very, very reachable. People can sit down with him and talk to him. I was in a meeting a couple weeks ago about jail overcrowding, with the Chief Judge, Prosecutor, and Public Defender. We were talking about how to reduce jail overcrowding and at some point, I blurted out, *why are you filing a million death penalty cases?* Of course, he said, *well, it is not a million* and I said *okay, well you know I tend to exaggerate*. He looked at me across table and said, *it [is] the law*. I had to pick my jaw up off the floor. *It is not the law*. It is subjective. He has the choice to make that decision. In my opinion, he needs to be educated. He needs to be held accountable for his promises when he was campaigning as a progressive prosecutor.

Somebody could literally call him out on that. I have got the numbers. The Public Defender has the numbers. There is the newspaper; I am happy to talk to somebody, but we need people to get out there, make the case, put it in the paper, get his attention, talk to him, and call him out on what he is doing and why he is not holding true to his campaign promises.

We should not let people [who] win on progressive platforms [get away with], turn[ing] around and not follow[ing] through [with promises]. With that said, I do think people can sit down with him—he will give you the time of day, and he will sit down with you—so there are ways to do that for sure. And I hope people will.

JANE CROSS: Just one final question I wanted to ask Brian: In terms of the racial composition of juries, are they now predominantly White in death penalty cases (based on your research)?

BRIAN STULL: Our research is more about who is excluded. But if you exclude more people of color and Black people using death qualification, you are going to have less diverse juries. That is going to be the result. [Look at] Duval County, which has a pretty high percentage (thirty percent Black people on the jury rolls). When you start with a relatively small number, and then a large number for White jurors (above sixty percent), and you are excluding at different rates, you might not see it as much in the final jury. But the [political] right talks about the fair cross-section from which the jury is selected, and that cross section is basically being carved out of Black jurors and other jurors of color because they oppose the death penalty. It is because of trust and the distrust that is earned.

III. KEYNOTE ADDRESS

DR. LAURA FINLEY: Sister Helen Prejean is known around the world for her tireless work against the death penalty. She has been instrumental in sparking national dialogue on capital punishment and in shaping the Catholic Church's vigorous opposition to all executions. Born on April 21, 1939, in Baton Rouge, Louisiana, she joined the Sisters of Saint Joseph in 1957. After studies in the United States and Canada, she spent the following years teaching high school and serving as the religious education director at Saint Francis Cabrini Parish in New Orleans, as well as the formation director for her religious community.

In 1982, she moved into the Saint Thomas housing project in New Orleans in order to live and work with the poor. While there, Sister Helen began corresponding with Patrick Sonnier, who had been sentenced to death for the murder of two teenagers. Two years later, when Patrick was put to death in the electric chair, Sister Helen was there to witness his execution.⁶³

In the following month, she became spiritual advisor to another death row inmate, Robert Lee Willie, who was to meet the same fate. After witnessing these executions, Sister Helen realized that this lethal ritual would remain unchallenged unless its secrecy was stripped away.

And so, she sat down and wrote a book, *Dead Man Walking: An Eyewitness Account of The Death Penalty in the United States*. *Dead Man*

63. Ramona Anne Caponegro, *Sister Helen Prejean*, BRITANNICA, <http://www.britannica.com/biography/Sister-Helen-Prejean> (last visited Mar. 25, 2022).

Walking hit the shelves in 1993 when national support for the death penalty was over eighty percent, and in Sister Helen's native Louisiana, closer to ninety percent.⁶⁴ The book ignited a national debate on capital punishment and inspired an Academy Award-winning movie, a play, and an opera. Sister Helen also embarked on a speaking tour that continues to this day.

Sister Helen works with people of all faiths and those who follow no established faith, but her voice has had a special resonance with her fellow Catholics. Over the decades, Sister Helen has made personal approaches to two Popes, John Paul II and Pope Francis, urging them to establish the Catholic church's position as unequivocally opposed to capital punishment under any circumstances.

After Sister Helen's urging, under John Paul II, the catechism was revised to strengthen the Church's opposition to executions, although it allowed for a very few exceptions. Not long after meeting with Sister Helen in August of 2018, Pope Francis announced new language of the Catholic catechism which declares that the death penalty is inadmissible in all cases because it is an attack on inviolability and dignity of the person.⁶⁵

Today, although capital punishment is still on the books in thirty states in the United States, it has fallen into disuse in most of those states. Prosecutors and juries alike are turning away from death sentences, with the death penalty becoming increasingly a geographical freak.

Sister Helen continues her work, dividing her time between educating the public, campaigning against the death penalty, counseling individual death row prisoners, and working with murder victims' family members.

Sister Helen's second book, *The Death of Innocents: An Eyewitness Account of Wrongful Executions*, was published in 2004, and her third book, *River of Fire: My Spiritual Journey*, in 2019.⁶⁶

SISTER HELEN PREJEAN: Here is the thing: I was totally unprepared. It is like I got catapulted down a laundry chute. From being a nun that taught in school and led Bible study in a Catholic Parish—down this laundry chute (or down the rabbit hole, or whatever you want to call it)—here I am on death row in Louisiana with Patrick Sonnier, a man I have written a letter to.

64. See Jessica Derr, *The Nun Is in Over Her Head: A Conversation with Sister Helen Prejean*, ARCADIA UNIV. (Oct. 25, 2018), <http://www.arcadia.edu/blogs/because-arcadia/post/nun-over-her-head-conversation-sister-helen-prejean>; PREJEAN, *supra* note 18.

65. Letter from the Off. of the Congregation for the Doctrine of the Faith to the Bishops, (Aug. 2, 2018), <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802b.pdf>.

66. Caponegro, *supra* note 146.

And here I am again, a little over two years later in the execution chamber. This is in 1984. I had written him a letter in 1982 thinking I was only going to be writing letters. *Hey Sister, you want to be a pen pal with somebody on death row? Yeah, sure, I am an English major, I can write some nice letters.*

I did not know the guy was really going to be executed. When we started writing, we had not had an execution in Louisiana since 1961. There had been an unofficial, nationwide moratorium on the death penalty. It started in 1967, continued throughout the 1970s, and I had not even noticed that the Supreme Court brought the death penalty back in 1976. So here I am, writing this guy, he is writing back, and I say *yeah, I will come visit you*, and I start visiting him.

And then, right after midnight, April 5, 1984, I am in that execution chamber with this man who is going to be electrocuted to death. I am telling him, *Look at my face. Look at my face when they do this. I will be the face of love. I [will] be the face of Christ for you.* It is the dignity. He is being treated like disposable human waste: *You are so irredeemable; you are so evil; we can [not] even trust that we can put you in prison; we have to kill you for society's sake.*

I am there. When you are there and present in that situation—just in the moral exigency of it—you say, *Look at me, Look at my face.*

I came out of that execution chamber that night and I did not know how thoroughly changed I was. At first, you do not know; you cannot process all that is happening to you. Immediately in the parking lot, prison officials bring in a prison vehicle after the execution and deposit you at the gates. First thing I did was throw up.

I had never watched a protocol—cold, calculated, step-by-step protocol—where a live human being who had potential in him—who was better than the worst thing he had ever done in his life—was deliberately killed.

When I wrote *River of Fire*—which was about waking up to justice and becoming an activist, that the gospel of Jesus was going to have to be more than simply being charitable to people around me and praying that poor people will have a great reward one day in heaven.⁶⁷ I woke up to justice, which is what *River of Fire* is about.⁶⁸ In the Preface, I described this scene:

They killed a man with fire one night.
Strapped him in a wooden chair and pumped electricity through his
body until he was dead.

67. SISTER HELEN PREJEAN, *RIVER OF FIRE: MY SPIRITUAL JOURNEY* (2019).

68. *Id.*

His killing was a legal act.
No religious leaders protested the killing that night.
But I was there. I saw it with my own eyes.
And what I saw set my soul on fire—a fire that burns in me still.⁶⁹

No religious leaders protested the killing that night. We had an Archbishop, Philip M. Hannan, who supported the death penalty, so no other bishops in Louisiana could publicly protest it.

While Tim Robbins was working on the film, *Dead Man Walking*, he kept saying—and it was true—*The nun is in over her head*.⁷⁰ I found out while outside the prison gates that night, having witnessed the execution—that my life had been transformed. I stopped going to meetings that did not deal with urgent moral human rights issues, such as the deliberate killing of citizens by the government. That is what my life had to be about.

I did not know what I was going to do; I was completely overwhelmed. I did not know I was going to write a book. And I began doing what all of you do. I began moving into circles of people who were working on the issue. I began reading and I began learning. That led to my going out to the public, going into Dennis Kalob's sociology class at Loyola University, New Orleans. That is where I really learned to hone-in and learn how to talk to the public. While writing *Dead Man Walking*, at first, I focused only on the human rights of the person being executed and delayed for too long talking about the horror of the crime. But I was met with nothing but resistance when I focused solely on the offender. You have to remember, in the 1980s everybody *and their cat* was supporting the death penalty. They would say: *What about the victims? What about the victims? You do not care about the victims!*

When I wrote *Dead Man Walking*, I had an excellent editor at Random House. Thank you, Jason Epstein! Thank you, Jesus for giving me this good Jewish editor to work with a Catholic nun to write a book about the death penalty. When Jason looked at the first draft of *Dead Man Walking*, he said the same thing to me that the young college students at Loyola were saying: *Helen, nobody is going to read your book. You wait far too long before you talk about the crime. You [ha]ve got to talk about the crime and your own outrage at the crime in the first ten pages of this book, or everybody's going to say, well, she's a Catholic nun, she believes in Jesus, believes in forgiveness, and they [wi]ll expect every religious platitude is going to come out of your mouth in this book and they are not going to read it. Face the crime and your own outrage.*

69. *Id.* at xiii.

70. Derr, *supra* note 147.

Oh, what a crime it was. Patrick Sonnier and his brother Eddie, in cold blood, had shot a teenage couple in the back of their heads and raped the young girl. This young couple, David LeBlanc, who was seventeen, and Loretta Ann Bourque, who was eighteen, had gone to a homecoming football game and were not seen alive again. Earlier that night, David's mother had said to him, (because it was early November in Louisiana which can be chilly): *Here son, I got this new blue shirt for you, it is going to help keep you warm tonight.* And later his daddy said, *Yeah, but it could not keep him alive.*

The killing of two teenage kids who were just beginning to bud in their lives—with their bodies found in this sugar cane field, just lying there. That was the crime that this man—the man I am connected with on death row—that is what he and his brother had done.

My journey began. The journey in *Dead Man Walking* is the journey into the deep moral ambivalence that most of us feel about the death penalty.

The starting point with an un-awakened public cannot be to simply give them statistics. This is what I have learned over thirty-five years of crisscrossing this nation and talking to people: Most people have not thought about the death penalty. With the busy lives we have, who is thinking deeply about murderers on death row, and whether we ought to kill them? If anything, you know that the usual wisdom is: *they deserve it.* Instead, people think, *let us turn attention to at-risk kids, to education; let us deal with the other urgent issues of our day.*

The journey is going to have to take people deeply and in an imaginative way into the moral crux of this life and death issue. Facts are important but, believe me, you never would have heard of *Dead Man Walking* if I had not had that good editor, Jason Epstein, who taught me how to tell the story, and how to take people with you on your whole journey, and having to learn everything as you go. You have got to make the statistics real.

In the first draft of *Dead Man Walking*, I put all the facts in the footnotes about racism and about how only poor people are on death row, and why rich people are never sentenced to death. And Jason taught me that the secret of good writing is that people are going to read for the story. When people start reading DMW, they wonder if the person is going to be executed.

And I tried to weave facts into the storytelling so that by the end of the book, most people will know the most important truths about how the death penalty operates. And scholars will dig into the footnotes. But you have got to weave in fact with story, as every good journalist knows.

I had no idea about the potential power of a book. I am a Louisiana Cajun. We talk to each other, like I am talking to you now. There is real power in talking to each other: It is live, so you can adjust as you go, you can feel the crowd. And you do not notice, but I really have a feel for you, even

through this cyber space stuff, because I know who you are. I know why you have gathered, and I know what else you are doing on this day. I have got a feel for live audiences; Talking with people through live communication is the best. By comparison, I always thought books were kind of passive.

But oh man, I am going to tell you: call it the power of the universe or call it the power of God, but something took *Dead Man Walking* and propelled it into spaces I never thought it would go and it was Jason who helped me chart the journey for the ordinary reader.⁷¹ To take them from the outrage of the crime and the suffering of the victims' families into the horror of the execution chamber.

Plus, I was making a huge mistake by initially staying away from the victims' families, and it was Jason who spotted this. I did not know what to do with the families. They lost their kids and I was the spiritual advisor to the two men who killed them, and I figured, I am the last person in the world they want to see. I did not want to get into a big ole argument with them about the death penalty. I have never done anything like this before and I am staying away. And Jason looked down at that first draft, and he said, *Helen, you [a]re letting yourself off too easy by simply saying you had never done this before. It was cowardice, wasn't it? You were scared, were [not] you?*

Yeah.

When you write your book, do n[o]t just take people with you on the peaks of the waves where you do everything with perfection. Take them in the troughs where you make mistakes.

It is probably one of the biggest mistakes of my life that I was avoiding talking about the murders and the families of those two precious kids. And then, at the pardon board, when I did meet the families just days before the scheduled execution, it was the worst possible time to meet them. Things could not have been more polarized.

Is Patrick Sonnier going to live or die? You sign the blooming book when you go into a pardon board hearing in Louisiana. Maybe it is the same here in Florida. *Are you for life, you want him to live? Or you want him to die?* It is a life-or-death thing, and you sign a book stating which side you are on. Well, all the signatures are on the side of, *Yeah, we want to see him executed.* And that is when I met the victims' families.

The Bourque family was there; their daughter had been killed. They were furious with me. They were the ones who got up and said, *Yeah, we want the execution to proceed.* Mr. Bourque, the father, had been to the press saying, *I want to see the person who killed my child, [die].*

71. PREJEAN, *supra* note 18.

Who does not understand that? We all can understand the rage after you have lost your child to a senseless and brutal murder. Ask somebody, *What would you like to see happen to the person who killed your child?* Of course, they are going to say what Mr. Bourque said, unless they are some kind of saint, and they have a reservoir in their soul where they have already been to some deep places and know that is not going to bring them peace. But vengeance is the starting place for most victims' families. I get it.

I have got to say though, in the African American community, often vengeance is *not* the starting point. First of all, they know not [to] expect justice from the government, especially from district attorneys. I have to make that little addendum right there. But most people are like Mr. Bourque.

So, I stayed away. *And when does the nun show up? Oh, to save the poor murderer's life to hold his hand but she was [not] there for us.*

But human beings can always surprise us. That is what David's father, Lloyd, did. I met David while we were walking outside while the pardon board was voting. *Sister, where you been? All this time I had nobody to talk to. My wife and I would even go to different Catholic churches on Sunday hoping some priests would say the death penalty is wrong. In my gut, I know it is wrong, but I have not had anybody to talk to. Where you been? You [ha]ve just been with those two brothers.*

I realized I made a terrible mistake. Eventually David and I would go pray together in this little chapel. David is really the one who taught me the journey that is possible in a human heart, where you start with this anger and outrage and all you want to do is kill the person who killed your loved one, then you can never move on. And to move to a place where you realize that if you keep that anger all the time, you will lose who you are. And that is what was happening with Lloyd. He was so angry all the time that he was losing who he truly was. He said, *I [ha]ve always been a kind person who loved to help people, yet I am snapping at my wife, I [a]m making her cry, I [a]m angry all the time.* Then at one point he put up his hand: *STOP*, and said, *nuh-uh, they killed my boy, but I am not going to let them kill me.*

David then made his way on the road to forgiveness—*forgive*—which means “to give before”—to not let what happened to you take over your soul, so that now you are an angry, vengeful creature yourself and all you can do is feed on that and thus lose your life. It is the great wisdom in all the spiritual traditions: Buddhist, Christian, and I do not know the Quran as well, but I know this—every chapter of the Quran, with the exception of chapter one, which is introductory, begins with the mercy of God. The nature of mercy is to know: *I realize this evil has happened to me, but there is more to life than seeking endless retaliation.* To have a depth of soul that can take [in] that evil

and not be overcome by it. Lloyd LeBlanc taught me the meaning of *forgiveness*.

Dead Man Walking is about a journey.⁷² It is for people who have not thought about the death penalty. When I give public talks, many people who are for the death penalty, [show up]. [People who] read *Dead Man Walking*, at the start, are for the death penalty.⁷³ All they know is what they have been told. They know the political rhetoric of why we have to do this, how these people deserve to die, the demonizing of people that have done murders, and make them into this evil irredeemable person. You have to absolutize evil in order to have ordinary citizens say *it is okay, kill them*. We do it with terrorists. Consider everybody sitting in Guantanamo right now: it is because of that demonizing effect, if we call you a terrorist against our nation, there is no good in you and we have to rid ourselves from you in order to be safe.

That was the political rhetoric; that was what people were hearing, especially after the death penalty was reinstated in 1970's. In the eighties, we were executing people left and right in Louisiana and I know Florida has killed a lot of people because my friend Mike Radelet was very involved with the people on death row. He went through last visits with fifty inmates on the nights before their execution before moving from the University of Florida to the University of Colorado in 2001. He is a great sociologist and a great writer. You attorneys want him if you ever have a death penalty trial to just talk to the jury about this whole pattern of how this thing works *or does not work*. And to say that you are going to go after the worst of the worst is an impossible criterion which, from the beginning, has never been able to have clarity about what we mean by "the worst of the worst." The Supreme Court, in *Gregg*, said we are going to seek death for only "the worst of the worst".⁷⁴ It was a cruel joke.

I mean, you do [not] go for the death penalty for *ordinary* murders; not your *garden variety* murders; only *the worst of the worst*. If somebody kills my mother—*oh, but it did [not] happen during a felony, it did [not] have these aggravating circumstances*. Whenever a unique, irreplaceable human being has been ripped from the universe, and is irreplaceable, that is always the worst of the worst. *Oh, someone killed my mother, but the murderer was not the worst of the worst*. What?

Just like on our poor suffering planet right now, every twenty minutes, a new species is lost that can never be replaced. It is the worst of the worst when something—or someone—is irreplaceable.

72. *Id.*

73. *Id.*

74. *Gregg v. Georgia*, 428 U.S. 153, 182 (1976).

And then, the other thing that I have come to realize more clearly after seeing the executions of thirteen people by Donald Trump and former Attorney General William Barr in their last six months in office, is how completely arbitrary and capricious the death penalty can be.⁷⁵ The faults in *Gregg* are the extremely vague criterion—death only for the *worst of the worst*—coupled with complete discretionary power of the prosecutors to seek death or not and of government officials to decide who on death row will be killed.⁷⁶ I am sure you can point out counties in Florida where you have prosecutors that cut notches on their belts because they are determined to go for the death penalty from square one in a trial.

Prosecutors never *need* to seek death. And the fact is, if you do not have a prosecutor seeking death, you will not have the death penalty. And that is what smart lawyers, like so many of you, are figuring out: do not let it come to trial. Get to district attorney, go duck hunting with that district attorney as the late Georgia Defender Millard Farmer used to do. Have a relationship with the client and find mitigation in his or her life so that when the whole story is told to the jury, they can see there is more to this person than this one single act. It is a great fallacy when we try to make the identification of the essence of a person in one act.

One time, one of the wardens at the Louisiana State Prison, where I have been going for a number of years, said to me *Sister Helen, you know which guys make our best trustees, like what crime they come in here for?* I said no. He said, *Murder. Most people in this prison for murder did not know when they got up in the morning that they were going to murder somebody. Here they are in a bar, they get in a fight, they are mad, they are drinking, they got a gun—BANG! They murder somebody and here they are. And then, in the discipline of the prison—as imperfect as it is—over time, they learn to read (many of them), they reflect, and they become good guys. We can trust them to be trustees; they do not need a guard with them.*

All human beings have the potential to grow and change for the better. From the point of view of faith: that is a divine spark in us. From the point of view of human rights, that is the inalienable right to life that everyone has, simply because we are human beings.

It took 1,500 years of dialogue within the Catholic Church to align its teaching on the death penalty with the principles of the Universal Declaration of Human Rights. The Declaration in Article 3 states that everyone, simply

75. See Michael Tarm & Michael Kunzelman, *Trump Administration Carries out 13th and Final Execution*, ASSOC. PRESS, <http://apnews.com/article/donald-trump-wildlife-coronavirus-pandemic-crime-terre-haute-28e44cc5c026dc16472751bbde0ead50>, (Jan. 15, 2021).

76. *But see Gregg*, 428 U.S. at 189.

by virtue of being a person, has an inalienable right to life—*inalienable*—which means life cannot be alienated or taken away.⁷⁷ Governments, therefore, have no authority to bestow these rights on people based for good behavior, nor take those rights from people for bad behavior.

And so, within my Catholic Church, there has been a lot of dialogue. How does dialogue happen? Just like here, just like in our society. There is a great Biblical psalm, *Truth Springs Up from the Ground*—as societies evolve, people evolve in consciousness and conscious. Look at the rapid evolution we have had in this society over the space of twenty-something years to recognize that gay and transgender people have human rights. How did that happen? It is because ordinary people relate to each other and share with each other and learn from other.

The *evolving standards of decency that mark the progress of a mature society*—we are always going to be on our way, and that is what happened with the Catholic Church. And it was not just because of the action of the Popes; it is because consciousness builds in a society through dialogue. Truth springs from the ground of the people.

The truth had been rising for a number of years. A big worldwide influence has been the Universal Declaration of Human Rights, enacted in 1948.⁷⁸ Forty years ago, there was a handful of countries that did not have the death penalty. Today, roughly 108 to 195 nations in the world do not have the death penalty.

What happens? So, with the Catholic Church, they kept holding onto the traditional teaching that was in the catechism, which acknowledged the state's right to take life. Once you have that as a principle—that governments have that right to take the lives of their own citizens—then you can leave it up to them to set the criteria, the procedures, and set up the rules for the legal system.

We can never give governments that right. That is finally the point that was reached in August 2018 when Pope Francis—after all these dialogues, always happening—reached the point of saying, *no matter how terrible or grave the crime, we can never give over to governments the right to execute their citizens*. It is principle. And for the first time, Catholic teaching on the death penalty coincided with the Universal Declaration of Human Rights.

Many of you are defense lawyers and people in the legal community doing your best to save lives. You are the M*A*S*H unit out there, where it

77. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

78. *Id.* at 2.

really makes a difference in a case of whether a human being is going to live or die.

Over the years I have learned a few things about the art of persuasion. When I am communicating with people in the system like district attorney, I try to appeal to the angels of their better nature and have an honest conversation with them about why they wish to go for the death penalty. Once, in Pueblo, Colorado, two priests had been killed by a mentally ill person, and the whole community wrote and called that district attorney urging him not to seek the death penalty. Their public action as a community persuaded the district attorney to not seek the death penalty. It was persuasive. We persuade others by writing letters to the editor and by getting the stories out there. Any defense lawyer knows that when attorneys stand before a jury, the one who tells the whole story wins the case.

That defense lawyer, standing there with her or his hand on the shoulder of the person who is being considered disposable human waste, educates the jury about his life, and shows there is more to him than this horrible act that he has done—acknowledging the horror of what he has done, but showing there is more to this human being.

And then you have the attorneys like David Wymore in Colorado who, in capital cases, really gets in there with jurors in the voir dire and from the very beginning, tells them about a juror's right not to give in to pressure to return a death [penalty] verdict. Jurors do not even have to [explain] why they are voting for mercy. Each juror has the right—even the duty—to vote his or her conscience and to resist the pressure from other jurors to vote for death. In one of my books, I tell the story of an anguished juror who voted for the death of Robert Sawyer, executed in Louisiana in 1993.⁷⁹ In the jury deliberations, he was the only one holding out for life. But the other jurors kept saying, *look, we cannot go home until we get this unanimous decision. You are standing in the way.* He gave in to the pressure and voted for death. Then, the night Sawyer was executed, that juror, ex-juror then, was on the phone with the defense lawyer; he is drunk, and he is crying, saying, *I knew what I should have done. I gave in to the pressure and I voted for death, and now they are killing this man.*

A lot of times the jurors simply do not know how and why the death penalty system is broken. They do not know why we have now 185 people who were wrongfully convicted and sent to death row and later exonerated, and that number is regularly growing. You have already heard from the exonerees at this conference. Listen to their stories. Because as Louisiana Attorney Denny LeBoeuf, a really wonderful criminal defense attorney and

79. PREJEAN, *supra* note 18.

good friend of mine says, *The most vulnerable one walking into the courtroom for a death penalty trial is the defendant who is actually innocent, because they know they are innocent, and they say, as soon as they hear my story, you know, I am not even going to be convicted, much less get sentenced to death.* And what they do not know is that politically driven prosecutors are going to present a counter-narrative and make sure the defendant's narrative never gets told to the jury.

The prosecutors are in possession of the evidence. They have the rape kit. They can destroy it or not. They can say that it just disappeared along with all the rest of the forensic evidence. They have the original police report. And in over ninety percent of cases of those 185 wrongfully convicted people, it was because of prosecutorial misconduct—and prosecutors barely get a slap on the wrist for it. There is hardly any accountability for that, nor is there any guarantee that exonerated people who finally get out are going to be given any remuneration from the state. It changes from state to state and often they are thwarted in that effort.

It is really important when you write a book that you do not come off as the expert where people can resist and reject you, *oh yeah, tell me more, yeah, you are the expert, do you not think those . . . ought to all be killed?* The readers can come along with you much more easily when the readers can learn right along with you.

They have got to learn, first of all, about the deep racism in the system. There is a direct line between slavery, lynching, mass incarceration, and the death penalty. After the killing of George Floyd, our eyes began to open to systemic racism in law enforcement. And now in our nation we are deepening our understanding of how the legacy of slavery affects every institution in the country.

Most people have just a superficial understanding: *Look, these people did really terrible crimes and they deserve to die.* Simple justice: they kill, they die. There is a total lack of reflection, and so what we have to do is take them deeper. And just say, *well look on death row: it is roughly fifty percent White, fifty percent Black; it looks fair, doesn't it?* And then we have got to show how the deep racism is in the system. Overwhelmingly—you look at the over 1,500 people in this country, who have been gassed, shot, electrocuted, hanged, or lethally injected since 1977—eight out of every ten of them were put to death because they killed a White person.

In order to have the death penalty, in order to zero in on what many prosecutors say are the *worst of the worst*, the murder has to have happened to someone who has status in the community. Roughly, that is whether the person is White or not. That is what the track record shows, overwhelmingly, when you kill a White person, prosecutors are more likely to seek death. When

people of color are murdered—I witnessed this in New Orleans—it is hardly a blip on the screen. Often the murders were not even investigated by the police, or by the district attorney. *It is only a Black life.*

Long before our consciousness of Black Lives Matter, it was just the opposite when it comes to picking what is the worst of the worst murder. *Did you kill a White person or not?* People do not have a clue about this. How could they? The art of entering dialogue with the public is to get into these things with them. *Did you know? I understand that you did not because I did not know.* When you can say, *look, I only recently learned about this too, I am still learning about this,* you can take people with you. Then you can have real dialogue.

Another thing jurors and the larger public need to understand, and most do not have a clue about—I learned this from Patrick Sonnier—is how crucial the quality of defense is at trial. The Constitution lays out all your rights when you go into trial for your life, but that is just a document. All the words are printed in a document, and the one that makes that document come alive for you is that person by your side, the defense attorney.

In *The Death of Innocents*, I wrote about two men who were executed, who likely were innocent.⁸⁰ One was Dobie Gillis Williams, a Black man from the little town of Many, Louisiana. A White woman was killed in her bathroom—her husband claimed that her last words were *a Black man came through the bathroom window and killed me.* The conviction was based only on the word of the husband; there was no forensic evidence linking Dobie; and Dobie looks out and sees an all-White jury that will determine his fate. The defense attorney was cowed—overwhelmed—and made no objection to the seating of the jury. When somebody with high prominence in the community has been killed, the defense attorney has to deal with a whole community that, by and large, wants to see the death penalty. You are no Clarence Darrow; you are just a regular human being doing your best. You do not get invited to the cocktail parties in town when you are defending *that scum.*

As a defense lawyer, if you do not raise a formal objection at trial about that all-White jury being seated, the appellate court cannot even consider it. It is not in the trial transcript. There was not a formal objection. That means it has already been decided that those twelve people are going to be the best we can do for you, even if you do not have a chance. Poor people have to take any lawyer they are given, and you know this is true in Florida. There are very few funds for independent forensic testing, or even for DNA tests.

80. SISTER HELEN PREJEAN, *THE DEATH OF INNOCENTS: ANY EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS* (Canterbury Press 2005).

That is why you never find a rich person on death row; it is not that rich people do not do terrible crimes, but they are not going to get an overwhelmed attorney to [represent] them from the beginning. With a rich person, the district attorney is going to think fifty times before he or she decides takes on that defendant and go for the death penalty. They know they are going to get a hundred pretrial motions; they know they are going to be fought every inch of the way and they do not want the public to see them lose. They are going to offer a plea bargain in a flash.

But a poor person? It is the public defender by his or her side that makes all the difference. That is why I love defense lawyers. Any chance I get to talk with them, I want to talk with them because they are the ones who stand in the breach. They go through so much. What is the latest thing I heard? I think maybe here in Florida where personal injury law firms are trying to draw off young people out of law school from criminal defense and suck them into being an injury lawyer where starting pay is \$70,000. Law school graduates can make more money and have more job security by avoiding defending poor people. There is money in it. There is job security in it. And to go into public defense? Public defenders are heroes. I love them. For you public defenders sitting out there, I do not know how much love you have ever gotten from a nun, but you have got this nun's love for what you do. Of course, you do not need my love; you do what you do out of principle because you are who you are. Not for the money.

Where are we with the death penalty now in this country? We are shutting it down. It cannot happen too soon. On the other hand, on the federal level, after a seventeen-year hiatus, look at the horror stories that came out with the thirteen Trump/Barr executions in 2020–2021.⁸¹ They first announced they were going to kill these people, and then they set out and methodically they did it. Why did they do it? Because of that discretionary power that is given to the prosecutors and to the Attorney General to kill or not.

Because it is up to them: if you do not pursue death, a person lives. Look at the vagaries of this, the built-in weakness to leave it up to human beings to decide death or not. All of the Trump executions were tragic, but none more so than the killing of Lisa Montgomery, a mentally ill woman who experienced nothing but horrendous abuse while growing up. I am close to some of the lawyers and investigators who defended her, and they are still in grief and mourning about what happened to her.

Her date of execution had been in December of 2020. It got pushed back to January. And when they told her the later date of the execution, she

81. Tarm & Kunzelman, *supra* note 158.

kind of looked away for a moment and just said, *eight days*. She would die just eight days before President-elect Biden would come into office and undoubtedly allow her to live. But Trump was President with Barr doing his work for him, and that meant she was going to die. And all thirteen died before they left office—no, they did not just die, they were killed.

And we, as a nation *are* waking up. The testimony of the death row exonerees is helping us a lot. The education about racism is helping us a lot. Look at Virginia. I am about to go there for the celebration of their abolition of the death penalty. They are going to honor that little energizer bunny, Virginians for Alternatives to the Death Penalty, who kept standing up and getting plowed over during thirty years of executions, but who stayed at it. Look at the transformative effects of what went on in Virginia—and is going on in Florida. And I want to just say this about hope: when we are acting, when we are involved in helping change happen, hope flows through us. But if we stand on the side, passively watching, we just keep getting overwhelmed with news pouring over us, which can paralyze us. When we reach out to take hold of a rope with even the smallest action, then hope becomes an active verb in us.

In Virginia, George Floyd's death, Black Lives Matter, and the moving of Confederate monuments into the basements of museums changed consciousness about race. Virginia, the largest and longest-lasting slave state, carried out more executions than any state in the history of our nation, bolstered most recently by an unspeakably terrible Fourth Circuit that upheld whatever prosecutors wanted. I was there for the killing of Joseph O'Dell in 1997. All he was asking for was a DNA test on the rape kit that had never been tested. He had Barry Scheck willing to do it for him for free. Virginia refused. They executed him, and then they destroyed the rape kit. O'Dell did not have a chance.

But what happened in Virginia? One of the things we see happening is that district attorney's around the country—like Larry Krasner in Philadelphia—are beginning to speak publicly about how the death penalty system is broken. And no small issue is its cost. We cannot separate moral issues from purely economic ones. How we spend our tax money *is* a deeply moral issue—like when we spend millions to kill one person when half the homicides in America are never solved. Look at what we could be doing with these resources. Look at education. When people are educated, they are more inclined to take mainstream jobs, and they do not commit crimes. More and more conservatives are speaking out about the financial waste of the death penalty.

The waking up that went on in Virginia is sowing the seeds of waking up that we can see here in Florida. And that is why I want to be with you today

and have a chance to talk to you. I *so* believe in what you are doing in Florida. And I do believe that one of these days, hopefully soon, the death penalty is going to end in Florida. Thank you for the privilege of being with you today.

DR. LAURA FINLEY: [question from the Zoom chat]: Are there some blind spots you see in death penalty abolitionist work right now?

SISTER HELEN PREJEAN: It is very hard for me, as someone who has so many blind spots of my own, to talk about other people's blind spots. When abolitionists talk with each other, they can help each other figure it out and where our blind spots are. We are getting there. Abolitionists in the United States have been learning from each other and tweaking the message for many years, and there are many unquestionable signs that we are doing better and better at getting the message through to the public.

DR. LAURA FINLEY: I have a couple other questions and comments that I want to share with you. From Celeste Fitzgerald, who I know you been colleagues and friends with for any years. She wanted you to know that we have new strategic plan for *Floridians for Alternatives to the Death Penalty* here in Florida. It is a new day here in this state. That includes a new bill to end the death penalty for folks with serious mental illness in 2023. We will be talking about that here at the conference later today.

SISTER HELEN PREJEAN: All the incremental steps toward life are important. Who knows what that door is going to open up as you get into the discussion with people about that! That is great.

DR. LAURA FINLEY: [question from the Zoom chat] Do you think *Dead Man Walking* can be used in law school classes?

SISTER HELEN PREJEAN: Yes. It is a readable book and students will find it to be a refreshing break from what they usually are assigned in their classes. The stories are gripping, and students can see how the courts work in practice, not just in theory.

DR. LAURA FINLEY: [question from the Zoom chat] How do we teach forgiveness to those who have been wrongfully convicted or accused?

SISTER HELEN PREJEAN: We cannot teach them forgiveness. That question is totally the wrong way to put it; *we* do not teach forgiveness. What we can do for them is stand by their side in their humanness and all they

have been through and help them to find resources in the community so they can love again; they can be agents in their own life again; and life can flow through them again because look at what they are up against. Just look at what they have been up against. Forgiveness can only come when they are ready for it, and we cannot tell them when they are ready.

The exonerees have many, many things they need to work through. Juan Roberto Melendez-Colon in Florida said when he got off of death row, his sister offered him any room in her house, and he chose a little bitty room up near the attic. He realized he chose a room the size of a cell because he could not handle too much space. Think of all the things he had to deal with. For seventeen years, eight months, and one day on death row, he had every decision made for him—he never even touched a doorknob—so what we can give them are resources they need to tap into their greatness and their humanness again. But it is not ours to say they need to forgive. No, we can never do that.

DR. LAURA FINLEY: [question from the Zoom chat] Do private prisons hold more death row inmates than government prisons? I know the answer to that is, but I think the question more broadly was, is there a profit motive on the death penalty, i.e., somebody financially gaining from that?

SISTER HELEN PREJEAN: There are no death-sentenced prisoners being held in private prisons in the United States. However, we definitely have a problem with other prisoners being housed by profit-minded companies. The people who profit from the death penalty are those who argue that it is an effective weapon for fighting crime, or who argue that it actually renders help to families of the victims.

DR. LAURA FINLEY: [question from the Zoom chat] We are outliers from the rest of the globe in terms of having a death penalty. Can you add a little bit more about that international perspective?

SISTER HELEN PREJEAN: Sandra Day O'Connor was the first one on the Supreme Court that actually began to talk about international human rights. On the other hand, we had justices like Antonin Scalia, who was fond of saying things like *we do not get our wisdom from Europeans, they are not even Christian; they follow Freud more than they follow Jesus. We do not need to look to international rights; we have got our own.*⁸²

82. See also Justice Anton Scalia, Panelist, Politics and the Death Penalty at the University of Chicago & Pew Research Center Conference: A Call for Reckoning: Religion

IV. RACIAL ISSUES PANEL

NGOZI NDULUE: We are talking about race and the death penalty, and the Death Penalty Information Center, in September 2020, issued a report called, *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty*.⁸³ My remarks are going to be shaped around the individual sections of that report, which are, first of all, talking about the racial history of the death penalty and exploring the role that race continues to play in the death penalty. When we are talking historically, it is not just so we know what was in the distant past. In fact, these issues are ever-present as Sister Helen touched on. Rather, it is thinking about the big picture: about connecting the racial bias in the death penalty to some of the issues that have been getting a lot more attention in recent time.

At the Death Penalty Information Center, our job is to provide information, analysis, and context to what is going on with the death penalty. Even before my time, we knew at DPIC that there was a lot of information about racial bias in the death penalty. It is one of the things that is pretty universally acknowledged, particularly when we think about the race of the victim and how that affects whether you get the death penalty or not. But we thought that it was important to think about this in the context of what we say that we are doing with the death penalty and what we have done throughout history. We started at the very beginning, and if we do that—we know that race matters from the very beginning—if we think about early United States history, there are different capital crimes for White people and Black people. A lot of times we focus on the deep South, which we definitely see some patterns there, but it was not limited to the Deep South, even in the colonial times, nor the colonies, where we were seeing disproportionate use of capital punishment against Black defendants.

The Colonies of the Deep South were more likely to have very specific and specified differential crimes that would result in capital punishment. But you still had the ways that the death penalty was being used in practice, being affected by race, even in the North. There is also this idea of using executions to send a message, so you would have more gruesome and torturous executions of Black defendants. Also, this idea of using the death penalty for social control to ensure that there were not going to be rebellions, to seeing crimes that were being committed by enslaved people against their masters as kind of

and the Death Penalty (Jan. 25, 2002), (transcript available at <http://www.pewforum.org/2002/01/25/session-three-religion-politics-and-the-death-penalty/>).

83. NDULUE, *supra* note 25, at 1.

a *petite treason* [as] they called it. So, there is this idea that there was something about disloyalty and upsetting the social order.

Although I will be talking about Black history and the effect of the death penalty on Black people, we also know that there is often a disproportionate effect on all groups considered [as] *other*. When we think about Native American sovereignty, there is a long history of the death penalty playing a role in pushing back attempts at Native Americans to keep their sovereignty and helping the United States in its quest on genocide and pushing people out of their lands.

The largest mass execution in United States history in 1862 was after the United States-Dakota war. Thirty-eight men were executed in a mass hanging on the day after Christmas, 1862. It is interesting too, because this is about crimes that were committed in the course of the war. But they were supposed to be limited to people who had committed crimes against civilians. Also interesting, President Lincoln was involved in granting clemency to a certain number of the people—there over three hundred who originally could have been executed—whittling it down to thirty-eight. But there were also political concerns about the clemency process, which we have seen throughout history and we continue to see to this day. I do not want to ignore the importance of the death penalty used to challenge and eat away at Native American sovereignty, we see that continuing to this day.

We also are going to be talking a lot about the connection between the death penalty and vigilante violence and lynching, and we see that as well in the Southwest, specifically thinking about Mexican Americans or people of Mexican descent, in the Southwest as well.

When we are thinking about the death penalty in context, we need to think about that connection between legal executions, lynchings, and mob violence. Often in popular telling of the story of lynchings, it is this idea of a disorganized mob that gets together, is very angry, and comes and commits a lynching. But there was often official sanction—either explicit or implicit—people turning the other way. People, for example, leaving the seventy-year-old lone sheriff's deputy at the jail for when they were pretty sure the mob was going to come.

This is Ed Johnson's [lynching] case in Tennessee, where there was this kind of wink-wink, nudge-nudge about, *oh, the mob overpowered law enforcement here and got the person out of jail, despite all the best efforts*. We have these connections between lynching's and legal executions, where [lynchings] were seen as alternatives. In some places where there was a lynch mob and the local officials thought, *this is not great for public relations, this makes us look kind of disorganized and not civilized*, [the officials] promised

folks who would otherwise have been the lynch mob that they will get a quick and speedy legal execution.

There are also places where officials were considering abolishing the death penalty, and in that consideration, there was this the idea of, *if we abolish it, we are going to have more lynchings again; lynchings are not great for public appearances, so we really need this death penalty for that reason*. We will see how those ideas persisted into modern day.

The Equal Justice Initiative has done a great job of documenting these racial terror lynchings. If you have not been to the Equal Justice Initiative Legacy Museum and Memorial in Alabama, please visit, because it really tells us the story that has for so long been untold or told without the proper context and without connecting it to the legacy of lynching today. We see this [legacy] in the post-Civil War Era with those laws that were supposed to provide different capital crimes depending on race. They were not permissible under the Fourteenth Amendment. These newly passed [civil rights] amendments were supposed to give, at least, surface-level equality. However, this was a time where extralegal violence was on the rise as well as public executions and capital trials that really were *show* trials. Theoretically, they were applying the same laws, but we knew they were not applying the same laws to everybody.

If we think about the civil rights era and the work that the NAACP Legal Defense Fund did to bring civil rights issues to the surface, one of the things that was important was the treatment of Black men in the South who were being accused of rape of White women or some type of sexual impropriety against White women. [Such accusations] were often a death sentence, either literally in the courts, or by lynching. For a Florida example, the story of the Groveland Four is instructive. *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America* gives a great detailed history of the case.⁸⁴ It discusses how the official death penalty and mob violence interacted, and how law enforcement officials—the people you were supposed to be able to look to for protection—were at some points supposedly quelling the violent mobs, while at other points, implicitly, allowing mob violence. [Worse], at some points, a particular sheriff would actually engage in that violence.

These multiple roles played by law enforcement were sometimes the only hope for some type of protection and safety, not actually being that for the Black community at that time, until today. It is a great illustration. It is also an illustration of how the politics of the death penalty also had something to do with the economics. There were these orange or citrus groves and there

84. KING, *supra* note 43.

was a need for cheap labor. Sister Helen brought up the connection between the criminal legal system and economic systems where, when the Black community started trying to organize and trying to escape that role, there was also the sense of the need to bring people down a peg to make it clear what is going on. A false accusation was the precipitating factor that allowed for making an example out of the Groveland Four and sending a message to the wider community. We can think about Black Wall Street and the Tulsa Massacre and other examples.

But we also see the increasing role of the NAACP LDF, which started saying, *we are doing these civil rights cases, we are focusing on these innocent people with very flimsy evidence that are facing executions*, but then realized there needed to be a broader challenge to the entire system of the death penalty. In doing so, they really wanted to slow down the system of executions and death sentences by getting people lawyers and getting them representation. Eventually, [the NAACP LDF] ended up bringing cases to the United States Supreme Court.

Before I get into the modern era, I want to talk about race effects as far as crimes [resulting] in executions. Black men accused of rape of White women was a clear prelude to a death sentence or lynching. Virginia was a great example, and this is not dissimilar to trends throughout the country. For example, there was a study of the people between 1930–1969, who were executed for rape, which found Black men accounted for more than eighty percent of the executions for murder. And, not even talking about within a certain time period—whether in the modern era or historical part of the death penalty—there is no record of any White man ever being executed for the rape of a Black woman, and when we are talking about this, we are talking about rape that does not also include murder. Today, you cannot get the death penalty for a non-murder crime generally, but [historically], while it was still possible, there was never a case of a White man getting executed for the rape of a Black woman. We know the opposite was very true where we see the combination of a Black man and an accusation by a White woman was often a sure sign that there [would] be an execution or lynching.

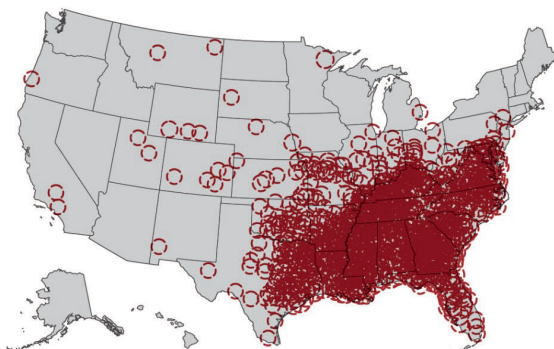
Putting that specific case aside, this was one of the starkest racial disparities that you can see at the time that [NAACP] LDF was bringing these challenges, but throughout the country, regardless of the underlying crime, it was still clear that race played a huge role in the death penalty. In *Furman v. Georgia*⁸⁵ in 1972—we are coming up on fifty years—the United States Supreme Court, not specifically relying on race, but just talking about the way that the death penalty was applied and saying that it was arbitrary and

85. 408 U.S. 238 (1972).

capricious, found that the way the death penalty was being applied across the country was violating the Eighth Amendment as cruel and unusual and that made states start from scratch. Florida was one of the first states that reinstated the death penalty by adopting new statutes.

But in *Furman*, some of the opinions by the Justices said, *if there is anything that we could say about why, if there is any kind of through-line that that explains how the death penalty is being applied, it is really race.*⁸⁶ The whole Court did not specifically support that, but that is true. The other thing that was in there—those seeds of lynching and violence whether there as well because Justice Stewart in his concurrence in *Furman* says, *well, I mean, retribution is a legitimate purpose of the criminal legal system, so if we do not have an avenue for retribution, there are sown the seeds of anarchy, vigilante violence, and lynch law.*⁸⁷ So, the lynchings were there, and in *Gregg v. Georgia*,⁸⁸ Justice Stewart writes the majority opinion and quotes that piece about, *well, if we do not have the death penalty, if we do not have a way to channel people's retributive impulses, we end up with chaos, including lynch law.*⁸⁹

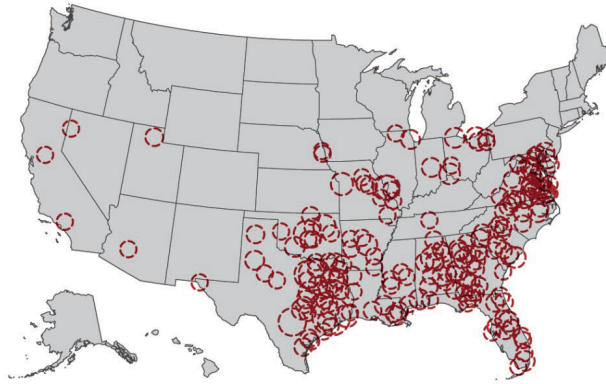
I think the idea that its very presence today is clear. We see here in a map that is from our report where we see the places that had the highest number of lynchings of Black people are also the places that have the highest numbers of executions of Black people. County by county is a little bit harder, but state by state it is very clear. There are also other correlations that we see throughout the history of lynching. That history of lynching and where that fits in our minds right now is very present.



| Lynchings of Black Victims Between 1883 and 1940

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86. *Furman*, 408 U.S. at 310.
 87. *Furman*, 408 U.S. at 308 (Stewart, J., concurring).
 88. 428 U.S. 153 (1976).
 89. *Id.* at 237–38 (Marshall, J., dissenting).

Figure 3: Lynching of Black Victims by County—1883 and 1940⁹⁰



1 Executions of Black Defendants Between 1972 and 2020

Figure 4: Executions of Black Defendants by County—1972 and 2020⁹¹

This is some commentary from a judge in Texas, not a criminal judge, but still a judge, on Facebook posting about somebody who was accused of killing a police officer being arrested. The comment says, “time for a tree and a rope.”⁹² There was an outcry—this was in the end of 2016 when this comment was made—and the judge got a slap on the wrist. The judge explained, *I do [not] understand why people were so angry, it was from a commercial about Wild West justice or something not racial at all.* Okay, sure.

In our report, we also talked about the case of Andrew Ramseur in North Carolina in 2010, when he is challenging the North Carolina Racial Justice Act, where we see the commentary about *Oh, in my day, you know, [we would have just] strung him up.* This idea is present in our minds and our psyches and in our courtrooms, though we would not acknowledge that. We see some of the results of that. We know that the people who are being executed are being executed for the death of White people. About seventy-five percent of the cases in which there has been an execution, the victim in the case was White. That is not saying that seventy-five percent of victims of homicide are White—it is about half—so this is disproportionate. We are just

90. NDULUE, *supra* note 25, at 12.

91. *Id.* at 13.

92. *Texas Judge Comments 'Time for a Tree and a Rope' Following Arrest of Suspected Cop Killer*, FOX 29 (Nov. 23, 2016), <http://foxsanantonio.com/news/local/texas-judge-comments-time-for-a-tree-and-rope-following-arrest-of-suspected-cop-killer>.

punishing the crimes as they are being committed. We are punishing crimes differently depending on who the crime is committed against.

We also have sovereignty issues that we are going to skip over since I am already over my time. But we know that the race of victims effects our most consistent findings. There have been these detailed statistical studies of jurisdiction after jurisdiction and we [are] finding this almost everywhere. Race of defendants—we have [not] found them as much—but there have been strong findings that the race of the defendant matters. That combination too is one that is serious.

An example of this is when we are thinking about interracial crime, and this is example from a study of Philadelphia. I just want to mention, and this is for anybody who has ever heard the phrase *Black-on-Black* crime, it is ridiculous because most crime is intra-racial because of our patterns of segregation, who we live with, who we marry. We basically are still a pretty segregated society, so crimes are committed against people close to you most often, right? Nobody is talking about *White-on-White* crime, so why are we talking about it? That is my diversion. What researchers found in this study of Philadelphia is that when the victim was Black and the defendant was Black, appearance did not matter. But when the victim was White and the defendant was Black, it was very clear that appearance mattered. A defendant who had more traditionally stereotypically African American features—darker skin, kinkier hair, wider lips, etc.—was much more likely to get the death penalty than a lighter skin, less stereotypical of the African American person with less stereotypically African American features. We know it is not even just race, it is color. It is this idea that we [are] activating these stereotypes about crime, criminality, and future dangerousness.

I will end this with a slide where we think about race, retribution, and empathy. There is so much that is going on when there is this life-or-death decision being made in a case. There is a recent study by Justin D. Levinson [and co-authors] which was in 2019, that specifically looked at retribution.⁹³ They studied 500 jury-eligible people and the conclusion was that we [are] automatically associating payback and retribution with Black people and mercy and leniency with White people.⁹⁴ That is the association—the easier association on our brain—and also the stronger your anti-Black implicit bias, the more that you [are] co-signing the ideas of retribution. If you think about that, and you think about the way that capital cases work, we know that this can have a serious effect.

93. Justin D. Levinson et al., *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 839 (2019).

94. *Id.*

Race is going to matter at every stage, but thinking about jury selection, juries have to be death qualified to sit on a capital case. That means that they are able to impose a death sentence; there is a specific legal standard around that. But if you think about that, the people who most strongly believe in the death penalty—if they are the people who most strongly believe in retributive justice—you [are] going to end up, by design, with people with more of an anti-Black racial bias. There are also studies that default qualified juries are more likely to convict when the evidence is ambiguous. And we also know that death qualification takes out more people of color because people of color are less likely to support or be willing to impose a death penalty. We know that a less diverse jury is actually more conviction-prone, less likely to deliberate for a long time and less receptive to mitigation that is being presented and based on race too.

There was a California study about Latin defendants, and it was showing that the predominantly White juries were less receptive to their mitigating evidence. The idea is that these issues are going to compound throughout the course of the case, and we are going to see the huge impact of race throughout the case.

Some of the places where we see this is about intellectual disability. You are not supposed to be sentenced to death. You are not supposed to be executed if you have an intellectual disability. But just because you are not supposed to does not mean that is not how things are working, because we know people have.

We also see that the majority of folks who are having their cases, after the fact, reversed based on intellectual disability are people of color. We also know that race has an effect when we are talking about wrongful conviction. If we think about the people who have been exonerated on death row, we know the majority are people of color. We know that official misconduct, including police misconduct and prosecutorial misconduct is much more likely to be a factor in their case. And if we think about the connection between policing in communities that are majority people of color and how that can connect to the way that false confessions happen, [and] the way that false statements happen, that is clear. And we also know that people take longer to get exonerated if they are Black; Black exonerees spend more time between conviction and exoneration.

DR. MATTHEW BARRY JOHNSON: I want to make a few comments before I read my prepared presentation.

I am going to talk about my anti-death penalty work over the years. I began in the early 2000s. I am a professor at John Jay College of Criminal Justice in New York City, part of the CUNY system. I actually live and do

most of my work in New Jersey. In the early 2000s, I joined a campaign to abolish the death penalty in New Jersey. I joined it because I thought it was an important endeavor. I did not join it with the intention that we were going to abolish the death penalty, but that is actually what happened in 2007, as a result of the organizing and relentless work that was conducted. I learned a tremendous amount through that process.

Early on, I had some doubts about diving into the death penalty work because of my concern about other areas of criminal justice reform that I thought might be more critical and maybe should be prioritized. However, through my anti-death penalty work within New Jersey in terms of abolishing the death penalty, it was very apparent how there was a tremendous convergence in working against the death penalty, and also being concerned about working to fight back against mass incarceration, to fight back against police brutality and to stand up for victims of crime and violence. I would imagine all of us here today have some appreciation for these linkages and how it is important that we continue to advance this work to abolish the death penalty and the impact that will have on these other criminal justice reform issues.

One of the things—I did not develop it, but I maybe advanced it, during that time, was the whole idea of secondary trauma from state executions. I published a paper on how people other than the death row condemned inmates are often harmed by state executions.⁹⁵ However, that is not what I am going to talk about today.

After the abolition of the death penalty in New Jersey in 2007, I remained in contact with many other people who are working on these issues. But I began to focus most of my research on wrongful conviction. And I do want to mention, earlier this year I published a book titled, *Wrongful Conviction in Sexual Assault: Stranger Rape, Acquaintance Rape, and Intra-familial Child Sexual Assaults*,⁹⁶ which, the short story is, focused on the fact that, number one, most of the exonerations in the United States are related to people who were wrongfully convicted for sexual assaults. That finding is linked, in my book to, the history of lynching and discrimination against African American defendants.

Our struggle, to oppose the government's deliberate taking of the lives of its citizens, is complex and multifaceted. Today, I want to focus on one aspect of this journey to abolition. Our challenge to the death penalty draws

95. Amanda Gil et al., *Secondary Trauma Associated with State Executions: Testimony Regarding Execution Procedures*, 34 J. PSYCHIATRY & L. 25, 25 (2006).

96. JOHNSON, *supra* note 30 at 18.

from social science data, legal arguments, and invokes human rights, moral, and ethical perspectives.

But today, I choose to focus on the people who convey our message: the activists—heroines and heroes—the campaigners who devote their time and energy to this grand effort. In particular, I will name and recognize African American freedom fighters who have asserted our message. I will name and comment on three. But I could have easily named another three (or another three). The three I am going to talk about briefly today are Frederick Douglass, Thurgood Marshall, and Coretta Scott King.

Frederick Douglass is significant because of his time. I first learned of Frederick Douglass's anti-death penalty advocacy from a source written by the Attorney Steven Bright.⁹⁷ Douglass is quoted as stating,

[L]ife is the great primary and most precious and comprehensive of all human rights—that whether it be coupled with virtue, honor, and happiness, or with sin, disgrace, and misery, the continued possession of it is rightfully not a matter of volition; that it is . . . [not] to be deliberately nor voluntarily destroyed, either by individuals, or combined in what is called Government.⁹⁸

Now, I became acquainted with this statement from Douglass early in my period of tenure doing anti-death penalty work. I knew prior to reading this quote, that Douglass was as brilliant as he was courageous. I was amazed at the clarity of this nineteenth century statement, as it resonated for me in the twenty-first century. A few days later, after my initial amazement by the statement, I returned to it because I wanted to check and see exactly what year Douglass made this statement. And I learned that he made a statement in 1858, which is even more remarkable in my mind.

Douglass was a brilliant orator, journalist, and organizer who physically fought his own enslavers and became one of the most admired men in the nineteenth century. He was best known as a slavery abolitionist. And although he worked tirelessly to bring an end to the system of human enslavement in the United States, even before the Civil War and emancipation, he devoted time to campaigning against state executions. Whenever I question whether my efforts to challenge the death penalty were prioritized properly, I remind myself that Douglass campaigned against the death penalty, while

97. Stephen Bright is currently a Visiting Professor of Law at Georgetown Law Center, formerly the President and Senior Counsel of Southern Center for Human Rights in Atlanta.

98. FREDERICK DOUGLASS, *Resolutions Proposed for Anti-Capital Punishment Meeting*, Rochester, in *SELECTED SPEECHES AND WRITINGS* 369, 275–76 (Philip S. Foner eds., 1999).

simultaneously advancing the fight against the United States system of state-supported human enslavement.

Next, I want to talk about Thurgood Marshall. Thurgood Marshall carried out the fight against capital punishment throughout his adult life. He, in fact, risked life and limb litigating against the death penalty, often in front of all White juries and in Jim Crow courthouses, where his personal safety was in serious jeopardy, if he was not out of town by dark.

And from these life and death battles he rose to the highest court to the land, where he labored through legal arguments to abolish the death penalty. His famous quote from his *Gregg v. Georgia*⁹⁹ dissent remains true, and it outlines the work that is before us. Marshall said, “the American people, fully informed of the purposes of the death penalty and its liabilities, would in my view, reject it as morally unacceptable.”¹⁰⁰ I believe wholeheartedly in that statement and I think that lays out our work for us—that what we need to do, what we have to do, and what we will do—is that we will inform the American people of the liabilities that surround the death penalty until it is brought to an end.

Now, what did Marshall mean by this? He knew that the death penalty was biased, based on race and other non-legal factors. Not only was it racial bias and hostility, but also the selfish ambitions of prosecutors and politicians. He knew it was arbitrarily applied and thus, it was inherently cruel. He knew it was no deterrent and thus, it did not contribute to any legitimate penological objectives.

Thirdly and finally, I am going to talk about Coretta Scott King and her personal authority on the death penalty from her lived experience. Coretta Scott King is widely known as a widow of the slain civil rights icon, Martin Luther King. However, she was no mere follower of her husband. She and Martin, in their early life, were together initiated and engaged in civil rights activism. After the assassination of her husband in 1968, Coretta continued to campaign for civil rights, for non-violence and peace, for LGBTQ rights, and also against apartheid.

Coretta’s anti-death penalty advocacy is not widely known but was firm and substantial. In a 1981 speech at Delta College, Coretta Scott King advanced her position on state executions. Coretta was a murder victim family member, whose family had endured one of the most notorious murders in the United States history. And with her powerful voice, she stated:

I remain firmly and unequivocally opposed to the death penalty for those convicted of capital offenses. An evil deed is not redeemed

99. *Gregg v. Georgia*, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting).

100. *Id.* at 232.

by an evil deed in retaliation. Justice is never advanced in the taking of a human life. Morality is never upheld by legalized murder.¹⁰¹

Coretta added three additional practical reasons to support her convictions. First, Coretta said that “capital punishment makes irrevocable any possible miscarriage of justice.”¹⁰² It is important for us today to appreciate her wisdom here, as she made this statement prior to the DNA informed exonerations that did not begin until a decade later.

Her second point: the death penalty makes the “unwarranted assumption that a wrongdoer is beyond redemption.”¹⁰³ Who is qualified to make such a judgment?

Coretta’s third point is the continuing lack of equity in the use of capital punishment.¹⁰⁴ In noting this, she cited evidence of racial discrimination associated with defendants, as well as associated with victims of murder, as the prior panelists described in some detail.¹⁰⁵

In closing, I want to say that I continue to draw inspiration from the work of these three. And I could have also highlighted others. For example, it would be equally compelling and important, had I highlighted Ida B. Wells, Reverend Jesse Jackson, and Mumia Abu-Jamal. Or, I could have highlighted James Weldon Johnson, Maulana Karenga, and Bryan Stevenson. Or, I could have highlighted Mary Talbert, Benjamin Todd Jealous, Christina Swarns and many, many others. Whenever I tire, I go back to their work, and it helps me continue. So that is my prepared presentation and thank you very much.

KRISTINA ROTH: Of course, it is wonderful to be here and thank you for having the event. I am so glad to see our Amnesty members coming together with folks on the ground to celebrate World Day Against the Death Penalty that just happened this past weekend on October 10, 2021. It is a delight to be here to talk about race and be with friends like Ngozi and meet new ones like Dr. Matthew. I am Kristina Roth with Amnesty International, U.S.A., and I lead AUSA’s work on police accountability, looking closely at the use of force by law enforcement as well as what we [are] here to talk about today. I thank my co-panelists for seeing the linkage between these two issues, extrajudicial executions at the hands of law enforcement are very much also considered lynching’s of today.

101. Coretta Scott King, Address at San Joaquin Delta College: The Death Penalty is a Step Back. (Sept. 26, 1981).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

I am sure you all have been given a background on Amnesty. Just in case you have not, Amnesty International has been working to eliminate the death penalty for over forty years around the globe. When we started this work, just sixteen countries had abolished the death penalty—this ultimate violation of human rights in law—and today, over half of the countries around the world have eliminated the ultimate cruel, humane, and degrading treatment.¹⁰⁶ Our movement is ten million activists strong (globally), committed to advancing the full realization of human rights. Back to the international piece, the United States is the only active executioner in the Americas, and so we really are an outlier there.

I know Dr. Matthew mentioned Ben Jealous, and he is one of the initial—if not the founder of—Amnesty’s work to abolish the death penalty here in the United States, so giving some kudos to him as well for my ability to be here today representing this institution.

Based on the racist roots of the death penalty that Ngozi shared, it should serve as no surprise to any of us that these sentiments still fester throughout our criminal legal system today and are glaring in death penalty in particular. The death penalty has been inextricably intertwined with racism, from death qualification—as Ngozi spoke about—prohibiting Black people from serving on juries for those accused of capital offenses, wrongful convictions, exonerations, or executed by the state.

Racism has marred and prejudiced trials of Black defendants for as long as we have had a death penalty, and racism shows up as a factor in determining the future dangerousness. Duane Buck, as an example for us to think of, from his trial in 1997, where based on expert testimony, he was convicted of the death penalty.¹⁰⁷ It contributed to his receiving a death sentence over a life sentence, specifically.¹⁰⁸

Racism has showed up in jurors who believed that based on a defendant’s race, that they were guilty and deserve the death penalty, invoking racial slurs, like in cases of Gary Sterling, who was executed by the State of Texas in 2005, and Keith Tharp, whose execution was stayed by the Supreme Court in 2017, but died of natural causes in prison in 2020.¹⁰⁹ And even despite the precedent of *Batson v. Kentucky*¹¹⁰—that prevents potential jurors

106. *Death Penalty*, *supra* note 21.

107. *Duane Buck, Whose Death Sentence Was Tainted by Racial Bias, Is Resentenced to Life*, DEATH PENALTY INFO. CTR. (Oct. 4, 2017), <http://deathpenaltyinfo.org/news/duane-buck-whose-death-sentence-was-tainted-by-racial-bias-is-resentenced-to-life>.

108. *Id.*; *see also* *Buck v. Davis*, 137 S. Ct. 759, 780 (2017).

109. *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018); *see also* *Sterling v. Dretke*, 545 U.S. 1155, 1155 (2005) (petition for rehearing denied).

110. 476 U.S. 79 (1986).

from being struck on the basis of race—for Curtis Flowers’ first four trials between 1997 and 2007, the prosecution used all thirty-six peremptory challenges to strike Black jurors from serving as jurors.¹¹¹ Curtis Flowers is a free man today, but the system, purported to uphold equal justice under the law, kept him on Georgia’s death row for twenty-three years, before gaining his freedom eventually in 2020.¹¹²

Now, there have been some bright spots. In 2018, the Washington state Supreme Court found the death penalty was invalid because it imposed the death penalty in an arbitrary and racially biased manner.¹¹³ The Court cited a study that had been mandated on the effect of race, which is somewhat of a blow to the 1987 ruling *McCleskey v. Kemp*,¹¹⁴ that affirmed the disparities in the state’s capital punishment system based on race were not enough to demonstrate intentional discrimination, at least in the individual case. It has made it more difficult throughout the years for these studies that are excellent and important and informative to necessarily contribute to what we would expect to see in advancing the very clear and real discrimination of the system.

From 1976 to May of 2021, Black people in the United States made up thirty-four percent of those people executed, far exceeding the Black population percentage in the United States in the same period.¹¹⁵ Today, fifty-eight percent of those on federal death row—twenty-six out of every forty-five men—are people of color, including eighteen of which who are Black men.¹¹⁶ Some of those Black men were convicted and sentenced to death by all-White juries. Many of those on federal death row were also sentenced under a broad expansion of the Federal Death Penalty Act in 1994,¹¹⁷ part of the same set of policies that have accelerated mass incarceration and inflicted immeasurable harm on Black and Brown communities.

Now, at the same time, Congress advanced the 1994 Crime Bill¹¹⁸—and, I am sure based off of our last presidential election, many of you have

111. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2228 (2019).

112. *See id.* at 2252.

113. *State v. Gregory*, 427 P.3d 621, 642 (Wash. 2018) (holding the death penalty unconstitutional, as administered, because it was “imposed in an arbitrary and racially biased manner.”)

114. 481 U.S. 279 (1987).

115. *Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/executions/overview/executions-by-race-and-race-of-victim> (last visited Mar. 25, 2022).

116. *Racial Demographics*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/death-row/overview/demographics> (last visited Mar. 25, 2022).

117. Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591–3599.

118. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

heard of that—it also considered the Racial Justice Acts.¹¹⁹ Given proof of significant racial discrimination in the administration of the death penalty the Racial Justice Act then would have required the prosecutor to show a non-race-based reason or explanation for the death sentence. And in fact, in 1994, the Racial Justice Act passed the House of Representatives as part of that same now-famed 1994 Crime Bill, but a threat of a filibuster from the Republican Party caused the Senate to remove or strike this part from the bill.¹²⁰ I feel like we are living in a familiar moment where folks are dragging their feet about a particular thing and things are getting held up in the Senate.

After Congress had that effort in the Racial Justice Act in 1994,¹²¹ North Carolina also, many years later, had a Racial Justice Act that allowed capital defendants to challenge their death sentences if they could successfully prove that race was a significant factor in decisions to seek or impose the death penalty at the time of their trials. The law was unfortunately repealed in 2013, but before then, four men on the state's death row were re-sentenced to life from death, which is certainly important.¹²²

Nonetheless, the work in North Carolina helped to inspire California to try their hand at a Racial Justice Act, and in 2020, California enacted a Racial Justice Act to prohibit the state from seeking or obtaining a criminal conviction based on race, ethnicity, or national origin.¹²³ Now, California—this is actually quite remarkable, in that the law that was passed in California—their racial justice act is an expansion upon that which was endeavored both at the federal level and in North Carolina because it applied to anyone who faced a criminal conviction, which obviously is a much larger population. It is also quite impressive that the bill—the year it was proposed—passed actually that year as well, which is unusual, I could say for something this significant.

This year, in 2021, advocates have attempted to make the bill or the law retroactive. They offered another piece of legislation since what was enacted last year was only prospective, so that those who have been sentenced already or already incarcerated might still seek relief under this law. However, their efforts have fallen short thus far. I am certain, though, that the fight will continue in the coming years.

119. See, e.g., Kentucky Racial Justice Act, KY. REV. STAT. ANN. §§ 532.300–532.309 (West 2021).

120. H.R. 4017.

121. H.R. 4017.

122. North Carolina Racial Justice Act, N.C. GEN. STAT. § 15A-2010 (West 2009), repealed by Act of June 19, 2013, ch. 154, § 5(a), 2013 N.C. Sess. Laws 368, 372.

123. California Racial Justice Act, CAL. PENAL CODE §§ 745, 1473, 1473.7 (West 2021).

So, all this is to say, we have seen through the case work and through both steps forward and steps back, and we have seen attempts to change the law to address specifically the issue of race and bias beyond what our case law already says. But in the United States, the death penalty has proven time and time again to be racially biased, which also violates our right to freedom from discrimination and the right to equal protection of law. The United States has a legal obligation to respect, protect, and fulfill these human rights, and has ratified the International Convention on Civil and Political Rights¹²⁴ and the International Convention on the Elimination of All Forms of Racial Discrimination,¹²⁵ which explicitly would protect these rights (though clearly the United States, violates international law the time, so I would be remiss to make it seem as though this is particularly onerous, for our record).

For as long as we have a death penalty in the United States, racial bias will affect people of color's—and particularly Black people's—ability to have a fair trial. So, while race is among the multitude of reasons why Amnesty opposes the death penalty, in all cases and we [will] continue to work and shed light on this issue in our efforts to abolish the death penalty in the United States and everywhere that it exists.

DR. LAURA FINLEY: I just wanted to reiterate, again, the point that we have been making throughout the day, was that the death penalty is a broken system, and this is one more facet of why the system is so broken and it has been broken since it is started, which is what you all so nicely put. I remember reading at one point that, of all the lynchings, fifty percent of cases police were actually involved with that lynching, so it was very much a system problem. In about ninety percent of cases, they at least knew something was about to happen and yet again lacked a political will to do anything. I do not know if you want to comment again about how the system is—we are well aware of the flaws in the system and the courts continue to say no, we do not want to get rid of the death penalty.

DR. MATTHEW BARRY JOHNSON: Yeah, I [would] like to make a brief comment about the complicity of law enforcement in lynchings. I think Ngozi mentioned this idea that these lynchings were sort of a spontaneous act of a mob and there were some that had that character; there were some that occurred at night and under the cloak of darkness. But there were many, many lynchings that were announced in the press days, in advance, and special

124. International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

125. International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195.

transportation and rail service was made available for people to come to observe the lynching; and schools were closed so children could observe the lynchings.

I do not know if this is new to everyone, but it was for me when I first learned about this because I saw this as this kind of vigilante justice at night or something like that, that kind of, you know, apology for it. But these were well-publicized events oftentimes, and photographs were taken of the lynched people—the people that were lynched—and the photographs were produced as postcards that commemorated the activity. The people in the local community would purchase the postcards and mail them to people and inform other people, ‘*see, this is a lynching we had last Saturday afternoon.*’ This history of lynching really remains untold. So, that was my comment.

NGOZI NDULUE: Yes, absolutely, and I think that the popular assumptions about lynching are that a spontaneous mob just happened—could [not] be prevented—but I think all the things that folks are talking about is saying that there is official sanction, even if not, and so, in many ways, there was that parable system of, you kind of had your options like, *well, we could have a lynching or we could have this show trial that just results in a speedy execution, right?* And that was in some ways a political decision that happened, like press, press about this and issues there. So, it is definitely a question that is not just a matter of the past. If you think about that, and you think about that study about retribution, and how that is so racially coated in our minds it is not surprising to think that this idea of, *[you] must make an example of somebody, you must use the criminal legal system to make that statement,* is there and there is also a lot of great studies about it. Brandon Garrett at Duke Law School has a study about what the homicide rate’s effect is on executions and death sentences, and what it showed was the places where there are more death sentences are places where the White homicide victimization rate goes higher in comparison to the Black homicide victimization rate.¹²⁶ Black people are much more likely to be victims of homicide, right? But when there is suddenly a gap getting less there, that is when—because there is this idea of a White Community threat is being felt and that is why *we need more death sentences, we need more of these tough on crime policies*—so we cannot really talk about the nation’s death penalty without talking about our nation’s continued racial injustice and how that is affecting the way we even think about crime and punishment.

126. See BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* (2017).

KRISTINA ROTH: I do not want to take up too much more time on this, but I just wanted to add, in a different lens to think about it now, as well. As we think about those individuals who are sentenced to death for the murder of a police officer, that is also an important way to look at this coin. In today's world, we think about Troy Davis, we think about all kinds of huge cases where there are compelling reasons why the individual may not have committed the crime. But the idea that the person who was harmed is a police officer who was killed brings a really different sort of tone to the conversation.

I want to shout out some important research from the Death Penalty Information Center. Certainly, we know that the death penalty is [not] a deterrent to crime, and that there is [not] really correlation in that officers are increasingly safer in places that do or do not have a death penalty.¹²⁷ We should think about that as far as how that argument comes up. But we certainly do think about, is this population—is someone that there is a need to preserve this particular punishment to protect this population.

DR. LAURA FINLEY: Thank you, and we did have a question in the Q&A. The person wanted to know if any of you can speak to the case of Julius Jones from Oklahoma, who is awaiting execution and is innocent.

NGOZI NDULUE: Yeah, I could say a little bit. He was actually one of—this case was one of the examples that we wrote about in our report. Julius Jones in Oklahoma is actually currently—I think there is a new clemency petition that was just filed today—so he has an execution date; has been requesting clemency; has a positive recommendation on that but is still in jeopardy. His case is that situation where the victim was a White man, it was very racially coated, there were some jurors who clearly had racist beliefs, and yet he still has not gotten relief on that. Now also putting into the broader context of the state and the county's histories, as far as race—the prosecutorial misconduct that I think has come up a couple times—Cowboy Bob Macy was the prosecutor who used the number of people who are sentenced to death under his watch as a badge of honor and was using campaign posters and who also was involved in significant misconduct at the time. There are so many issues that, in Julius Jones' case, to prove that you have a wrongful conviction, to actually get courts to recognize your claims of innocence, how hard it is despite the fact that we have at least 186 people who have been exonerated from death row and that we know that it is this uphill battle that innocent

127. *Deterrence*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/policy-issues/deterrence> (last visited Mar. 25, 2022).

people do get sentenced to death. I think Julius Jones' case shows some important examples there of what is broken here.

DR. LAURA FINLEY: I think that is very important, and we have time for one more question if anyone has one, I [will] just ask everybody on the panel if there was one takeaway that you wanted people to do—like something you can do after they [have] learned about all this today—what would be the one thing you [would] like to see people do.

DR. MATTHEW BARRY JOHNSON: I would like to see people join an organization that is on the ground in their locality, their state, and get involved. There is so many things that need to be done in so many different ways, people can help out. And it is very rewarding, though it is difficult work, it is very rewarding; you learn a lot, you develop lifelong friendships with people. So that would be my message.

DR. LAURA FINLEY: Thank you and folks if you were joining us later, you might not have heard earlier, but one of our sponsors is Floridians for Alternatives to the Death Penalty (FADP). That is our statewide anti-death penalty coalition. If either of the other panelists want to speak to what would you like people to do.

KRISTINA ROTH: Well, I think this is a bit more my area than Ngozi's, so I [will] take the mic. Though I will shout out that I think that the research that Death Penalty Information Center has provided on this topic, particularly under Ngozi's leadership in this report, is really, really important for us to think about the historical context and the arc of this issue, particularly with regard to race. There are so many issues with the death penalty, and they [are] well documented through important research so as we endeavor to take action, I think it is just as important that we learn and understand. We may already be compelled to oppose the death penalty, but those who are around us, they may not have heard the right reason yet. So, I encourage you to continue to learn and find and try different arguments with those individuals in your life.

But naturally as someone who represents Amnesty International, I agree that you should get involved with organizations in your locality to do what you can. I think Amnesty's work is twofold: we are engaged with some cases, but not all death penalty cases, and we do not only work on cases where there is an active execution date. At this moment, we also are working on a long-term case of Rocky Myers. He [is] a Black man with an innocence claim, and also there was racism involved in his trial. The prosecutor has pictures

taken at a KKK rally, so it feels like there is some racial elements going on there. We [will] be bringing some of these claims to the UN Special Rapporteur later this year.

I think it is important to look at the cases as specific examples—as I know Sister Helen spoke about from some of the time I saw her—it is important to see it in actual effect, look at the cases and understand someone's life and how the system resulted in these particular and in their conviction and continues to deny them relief, where there are clearly issues that took place at the trial phase. But we also do engage in the work in the legislative manner, and I know folks from FADP will probably be talking about those opportunities. But there are opportunities as well if you are the one kind of person that wants to go talk to your lawmakers about it. At AUSA, we [are] deeply engaged and working to end the federal death penalty, but there are also efforts that are taking place around the States and so please contact Laura if you want to be involved with Amnesty or she can direct you to me if you [are] not a Floridian.

NGOZI NDULUE: And I [will] just note that something that comes through from both of my co-panelists' comments, is that so much of this is state and local, right? 1.2%—we have a 2% report, about 2% of the counties are responsible for more than half of executions and more than half of the people on death row—it is even less by now, it is probably about 1.2% right now. People who have worked to be talking about prosecutor's races, people who have worked on state legislation—there is so much that we think that it is big issues that we do not necessarily have a voice in. But I would just want folks to take the information that we can provide and use that to educate and inform on the state and local level, and even with the Federal death penalty there is activity going on there as well. So much is in our backyard, I do not think we always realize that.

DR. LAURA FINLEY: That was great, and we could have gone on forever because you all have lots more to say. But thank you for joining us. Thank you to all three of you, we really appreciate it.

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DR. LAURA FINLEY: That was great, and we could have gone on forever because you all have lots more to say. But thank you for joining us. Thank you to all three of you, we really appreciate it.



Vol. 46 No. 1 *Nov & Dec* *Review* *Journal* *Southeastern University* 2002
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