The Future of the Death Penalty in Kentucky and America

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The Kentucky Bar Association's Second Annual Forum on Criminal Law Reform in the Commonwealth of Kentucky

Keynote Address:
The Future of the Death Penalty in Kentucky and America

Stephen B. Bright

It is great to be home again. I want to thank Dean Brennan, Professor Lollar, Public Advocate Ed Monahan, and the Kentucky Bar for having me. But I particularly want to thank this law school. The land grant universities have made great contributions to this country and its people. When I came to this law school in 1971 the tuition was $250 a semester. Attending the College of Law and getting the great legal education that I received here freed me to go out and do whatever I wanted as a lawyer. I am immensely grateful for that.

It is increasingly obvious that the end of capital punishment in the United States is inevitable. I tell my friends in the South: You may not like marriage equality, but it is the future. You may love the death penalty, but it is the past. I would like to address three aspects of capital punishment. First is the emerging consensus against the death penalty and the factors that have contributed to it. Second is the inconsistency and lack of fairness and reliability in the imposition of the death penalty because of prosecutorial discretion and inadequate legal representation for many of those facing the death penalty. Finally, I will discuss the continuing influence of racial prejudice and the impossibility of measuring culpability for the intellectually disabled and mentally ill.

I. The Emerging Consensus Against the Death Penalty

The American Bar Association and the Jimmy Carter Presidential Library had a national symposium on capital punishment on November 12, 2013 in Atlanta. The symposium examined where we are forty-one years after the

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1 President and Senior Counsel for the Southern Center for Human Rights; Harvey Karp Visiting Lecturer, University of Georgia School of Law. On Nov. 15, 2013, Professor Bright gave the keynote address at the Kentucky Bar Association's Second Annual Forum on Criminal Law Reform in the Commonwealth of Kentucky at the University of Kentucky College of Law.

Supreme Court's 1972 decision in *Furman v. Georgia*, which struck down the death penalty as it was then practiced throughout the United States, and thirty-six years after the Court's 1976 holding in *Gregg v. Georgia* and its companion cases, that allowed the resumption of capital punishment.

Jimmy Carter, who as governor of Georgia signed into law the state's death penalty statute that was upheld in 1976, called for an end to capital punishment. He said that the death penalty is imposed on the poor, on racial minorities, and on people with diminished mental capacity. He pointed out that the only country in the Western Hemisphere—the only member of NATO—that has the death penalty is the United States. He also observed that 97% of all executions in the world take place in four countries: China, Saudi Arabia, Iran, and the United States. The company we keep tells us something about the compatibility of this punishment with our values.

Dorothy Toth Beasley, who as an Assistant Attorney General argued *Furman* for the State of Georgia in 1972 and went on to a distinguished career as a lawyer and an appellate judge, agreed that it is time to abandon the death penalty because it has not worked.

Just a week earlier, Justice John Paul Stevens spoke at the University of Georgia. He is the only member of the Supreme Court who was a part of the *Gregg v. Georgia* decision in 1976 and is still alive today. Justice Stevens said that while he had voted to uphold the death penalty in 1976, and thought it was the right vote then, he no longer believes that the death penalty is constitutional. At the time of *Gregg*, it was the belief of the Justices that there were, or would be, safeguards that would protect against the constitutional defects identified in *Furman*. But, in fact, some of the protections were never realized and some of the ones that were in place, such as careful review in habeas corpus proceedings
by federal courts, have been blocked by procedural rules or severely restricted. Justice Stevens mentioned his concurring opinion in Baze v. Rees, a case out of Kentucky in which the Court held that lethal injection does not violate the Constitution. In his concurring opinion, near the end of his career on the Court, Justice Stevens said that he had reached the same conclusion that Justice Byron White reached in Furman: that the "needless extinction of life with only marginal contributions to any discernible social or public purposes ... would be patently excessive' and violative of the Eighth Amendment." Justice Stevens followed others on the Court who voted to uphold the death penalty, but later expressed their regrets. Justice Harry Blackmun voted to uphold the death penalty in both Furman and Gregg. However, twenty-two years after Furman he concluded that despite the efforts of the states and the Court, "the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake" and announced that he would no longer "tinker with the machinery of death." Justice Lewis F. Powell, Jr. also voted to uphold the death penalty in Furman and Gregg and wrote the majority opinion in McCleskey v. Kemp, which upheld the death penalty by a 5–4 vote despite the racial disparities in its infliction in Georgia. After retiring from the Court, he told his biographer that he regretted his vote in that case and that the United States still had the death penalty.

Mark Earley, who was a Republican Attorney General of Virginia from 1998 to 2001 also spoke at the Carter Center symposium. Earley described himself as a "cavalier supporter" of the death penalty when he took office, but after fifteen executions he changed his mind because the deck was always stacked

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10 Id. at 83. Justice White wrote in Furman that the infrequent imposition of the death penalty was a "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring).

11 Callins v. Collins, 530 U.S. 1141, 1144-45 (1994) (Blackmun, J., dissenting). "Experience," Justice Blackmun said, "has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing." Id. at 1144 (citations omitted).


against the defendant. Virginia has executed 110 people since 1976 and ranks second to Texas in the number of executions carried out since then. Yet Earley predicted that the days of the death penalty are numbered in Virginia. And that appears to be the case—in the last five and one-half years, only four people have been sentenced to death in Virginia, and there are only ten people on Virginia's death row today.

This is consistent with trends all across the country in the last fifteen years. In early 2000, George Ryan, the Republican governor of Illinois, who had been a supporter of capital punishment when he was a legislator, declared a moratorium on the death penalty in Illinois. It was sparked by the near execution of a man named Anthony Porter. On the day before Porter's execution there was a question about whether he was mentally competent to be executed—that is, whether he had an adequate understanding of why he was being put to death. If a condemned inmate does not understand why he is being put to death, he is treated until such time that he does understand, and once he understands, he is then put to death. That was the reason that Porter was not executed.

After Porter's execution was stayed, journalism students at Northwestern University not only proved that Porter did not commit the crime—and could not possibly have committed the crime—but they found, and got a confession from, the person who did commit the crime. That was the third exoneration by students in journalism classes at Northwestern. Some people say that Porter's
exoneration shows that the system works. But the system is not working when an innocent person like Anthony Porter spends sixteen years on death row for a crime he did not commit and is exonerated not by anything the police, the prosecution, the judiciary, the defense, or anyone else in the legal system did—but because some students, who instead of taking chemistry that semester, took journalism and decided as a class project to see if the people on death row were guilty of the crimes of which they had been convicted. Porter's was the thirteenth exoneration in Illinois, which had carried out twelve executions. Illinois got it wrong more often than it got it right on the most fundamental issue of guilt and innocence.

Governor Ryan appointed a commission to study the death penalty and it found four more innocent people. In 2003, Governor Ryan pardoned those four people and commuted the sentences of the 167 who remained from death to life imprisonment because of the many flaws that had been documented. Then, in 2011, the Illinois legislature voted to repeal the state's death penalty and Governor Pat Quinn signed it into law.

Five other states have recently abandoned the death penalty. The New York Court of Appeals held that state's death penalty was unconstitutional after nine years of having the death penalty in New York and spending millions and millions of dollars to put seven people on death row—none of whom were executed. In 2007, in New Jersey, a commission including prosecutors, lawyers, law enforcement, victim's families, business people, and legislators concluded that capital punishment takes too long, costs too much, re-victimizes the victims, and serves no legitimate law enforcement punishment. It found that there was little to show for the death penalty in terms of executions, and it carried with it the grave risk of the ultimate injustice: the execution of an innocent person. New Mexico repealed the death penalty in 2009, Connecticut did the same in 2012, and Maryland repealed its death penalty statute in 2013.

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24 Id.
25 Id.
29 Id.
There has been no effort to reintroduce the death penalty in any of those states or the twelve others that do not have the death penalty. The trend has been in one direction. The New York experience provides an example of the shift in attitudes toward the death penalty. In 1994, Mario Cuomo was defeated in his fourth run for Governor of New York because of his opposition to the death penalty. His opponent, George Pataki, promised that if he was elected, he would sign into law the death penalty, unlike Cuomo who had repeatedly vetoed legislation providing for the death penalty. Pataki also criticized Cuomo for refusing to extradite an inmate in the New York prisons to Oklahoma to be executed and promised to send the prisoner to Oklahoma. Pataki was elected, the death penalty was enacted and Pataki returned the man to Oklahoma where he was executed. Yet once the New York Court of Appeals declared the death penalty unconstitutional, there has been no effort in the New York legislature to pass a new death penalty statute. And when Cuomo's son ran for governor in 2010 against a fellow who carried a baseball bat around to show how tough he was, the death penalty did not even come up as an issue and Andrew Cuomo was elected.

The death penalty has not just been rejected by people like President Carter; Justices Stevens, Blackmun, and Powell; and by legislators, but also by prosecutors and jurors. There has been a steep decline in the imposition of the death penalty at trials and in executions by the states. This puts into perspective the importance and value of the death penalty to society. As Justice White observed in Furman, if the death penalty is imposed infrequently, it is serving negligible law enforcement purposes. In the mid 1990s juries were sentencing over 300 people to death per year. By 2001, the imposition of the death penalty by juries was down to 150 per year—half of what it had been just five years earlier. It declined to 100 by 2010, eighty in 2011, and seventy-seven in 2012.

35 See Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring); see also supra notes 9–10 and accompanying text.
36 Death Penalty Info. Ctr., The Death Penalty in 2013: Year End Report 1 (2013), available at http://deathpenaltyinfo.org/documents/YearEnd2013.pdf. The most were years 1994 and 1996, when 315 people were sentenced to death in the United States. Id. Eighty were sentenced to death in 2013. Id.
37 Id.
38 Id.
The number of executions in a year has dropped from a high of ninety-eight in 1999 to the mid-fourties since 2007. Most of those executions have taken place in a few states. Eighty-two percent were in the South—the states of the old Confederacy. Texas, Virginia, Oklahoma, and Florida are responsible for 60% of all the executions carried out since 1976. And just 2% of all the counties in the United States account for the majority of people who have been executed since 1976. That is, sixty-two of the 3143 counties in the United States account for over half the executions that have taken place. And 20% of the counties in the United States account for all of the 3125 people on death row. So while thirty-two states have laws providing for the death penalty, only 20% of the counties are responsible for the people that are under death sentences.

There has been a similar decline in imposition of the death penalty in Kentucky. Seventeen death sentences were imposed in Kentucky between 2000 and 2006, but in the last seven years, only four people have been sentenced to death: two in 2010 and one each in 2011 and 2012. Kentucky has executed only three people since 1976, and two of those were volunteers—people who gave up their appeals and wanted to be executed. Seven people on Kentucky's death row died of natural causes. In short, Kentucky is spending millions of dollars to carry out one execution every twelve years, and only one involuntary execution every thirty-seven years. And this was done by a system found deficient by the American Bar Association's assessment team. It raises the question of whether it is really worth the cost to accomplish so little.

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41 See id. at 3.
42 Id.
44 Id. at n.17.
45 Death Sentences in the United States From 1977 By State and By Year, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/death-sentences-united-states-1977–2008 (last visited Jan. 26, 2014) (noting that for those sentenced to death more than once, only the most recent sentence is counted).
46 Id.
48 Id.
A major reason for the decline in imposition of the death sentences and executions is the disturbing number of exonerations that have occurred.\textsuperscript{50} We know today that many people who were found guilty beyond a reasonable doubt in capital and non-capital cases were actually not guilty at all. Kirk Bloodsworth was sentenced to death for the sexual molestation of a four-year-old girl. He maintained his innocence, but nobody believed him, and he was sentenced to death. Years later his lawyer, Robert E. Morin, found that the evidence in the case had not been destroyed. The perpetrator had left a small semen stain on the little girl's clothes. Morin obtained DNA testing (there was no DNA testing at the time of Bloodsworth's trial) which revealed that Bloodsworth was not the person who committed the crime.\textsuperscript{51} That exoneration and many others have made it impossible to avoid recognizing that the courts, which many thought were making correct decisions, are making huge mistakes on the most basic issue of whether those accused of crimes are actually guilty of them. As the Canadian Supreme Court said in refusing to extradite a person to the United States to face the death penalty, as most countries do: the courts are, and will always remain, fallible and reversible, while death will always be final and irreversible.\textsuperscript{52} States have already executed innocent people—like Carlos DeLuna\textsuperscript{53} and Cameron Todd Willingham in Texas,\textsuperscript{54} and Troy Davis in Georgia—\textsuperscript{55} and will continue to execute innocent people so long as they have the death penalty.

It is unnecessary to risk the execution of innocent people with the availability of the sentence of life imprisonment without the possibility of parole. A state can still enforce its criminal laws. It can protect the community from people it believes to be guilty of heinous crimes without the financial and emotional costs of trials and the appeals in death penalty cases. And if mistakes are later discovered, the innocent are still alive to be released and allowed to live the remainder of their lives.


\textsuperscript{51} See generally Tim Junkin, BLOODSWORTH: THE TRUE STORY OF ONE MAN'S TRIUMPH OVER INJUSTICE (2005).

\textsuperscript{52} United States v. Burns, 2001 SCC 7 (Can.).


\textsuperscript{55} The Innocence Project, Troy Davis Executed in Georgia Despite Substantial Evidence Pointing to Innocence (Sept. 21, 2011), http://www.innocenceproject.org/Content/Troy_Davis_Executed_in_Georgia_Despite_Substantial_Evidence_Pointing_to_Innocence.php.
II. The Inconsistent, Unfair, and Unreliable Imposition of the Death Penalty

One reason the death penalty was struck down in 1972 was that it was randomly and arbitrarily inflicted. As Justice Potter Stewart said, being sentenced to death was like "being struck by lightning." There was no reason why one person received the death sentence while hundreds of other people, who committed similar or more aggravated crimes, did not. That is still true today. The major reasons for it are the discretion exercised by prosecutors and differences in the competence of lawyers assigned to represent people facing the death penalty.

The two most important decisions made in every death penalty case are made by prosecutors—whether to seek the death penalty and whether to offer a plea bargain that would resolve the case with a sentence less than death. Many prosecutors do not ever seek the death penalty. Even in Georgia, Alabama, and in the rest of the South, there are prosecutors who think the death penalty is law enforcement quackery and do not spend the time and money to pursue it.

On the other hand, there are prosecutors who seek the death penalty every time they have the opportunity. One reason Texas has carried out so many executions has been several aggressive prosecutors who sought the death penalty at every opportunity and usually refused to plea bargain. Harris County, which includes Houston, has executed more people than any state except Texas itself. Those people were sentenced to death during the tenure of District Attorneys Johnny Holmes and Chuck Rosenthal. Rosenthal had to resign in 2008 in a scandal that involved campaign money, an affair with his assistant, and, most disturbing, emails with racial slurs, racist cartoons, and racist jokes. The man who had been making the decision to seek the death penalty in Harris County for four years was a crude racist. After the scandal, Patricia Lykos, a former judge, became the district attorney. Once she took office, there were far fewer death sentences imposed in Harris County. Lykos's office sought
the death penalty in only two of twenty-eight capital cases in 2010 and Lykos acknowledged: "In the vast majority of cases, we don't seek the death penalty." Harris County did not change, the police department did not change, nothing changed except the district attorney.

Then there is the prosecutor's decision to plea bargain. As the Supreme Court has said, "ours is a system of pleas, not a system of trials." Most capital and other criminal cases are resolved with plea bargains. Cases involving serial killers, multiple victims, and horrible crimes are resolved with plea bargains, but other, less aggravated cases go to trial and end up with the death penalty. It usually depends upon the willingness of the prosecutors in the different cases to resolve the cases with plea bargains.

It is impossible to prevent this inconsistency. Prosecutors in Kentucky, as in most states, are elected in judicial circuits. The fifty-seven Commonwealth's Attorneys are independent of one another. Each has his or her own approach to the death penalty. So the practices in deciding whether to pursue the death penalty or resolve capital cases with plea bargains will vary from one circuit to another depending on the different prosecutors.

Whether the death penalty is imposed in a case also depends upon the quality of legal representation provided the accused. A person accused of a crime depends on his or her lawyer to investigate the prosecution's case, mount a defense, and protect every right that a criminal defendant has. Yet defendants have been sentenced to death not because they committed the worst crimes but because they had the misfortune to be assigned the worst lawyer. There are no greater and more egregious violations of the right to counsel than some that occurred here in Kentucky, but were not corrected by the courts.

When I take up the right to counsel in my class I ask my students to consider: How does a person facing the death penalty enforce the right to counsel? It is the person's most fundamental right, upon which all other rights depend, but what if the person is assigned an incompetent lawyer? The case of Gregory Wilson provides a vivid example. What was Gregory Wilson, who was facing the death penalty in Covington, Kentucky, to do when the judge assigned William Hagedorn to be his lawyer?

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62 Judge Boyce Martin observed in a capital case from Kentucky that defendants with "decent lawyers" often avoided death sentences, while those assigned bad lawyers were sentenced to death. He concluded, "the idea that the death penalty is fairly and rationally imposed in this country is a farce." Instead, "the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair." Moore v. Parker, 445 F.3d 250, 268 (6th Cir. 2005) (Martin, J., dissenting).

Hagedorn had been suspended from practice several times. He practiced out of his home, where a Budweiser beer sign was hanging on the wall. Would you go to that lawyer for even the most minor legal matter? If you were going to get a will or a divorce and you went to the home of an attorney who had no office and there was a Budweiser beer sign hanging on the wall, would you stay? Or would you ease on down the street and find a law office with some mahogany and some law books that indicated that the attorneys in it are serious about practicing law?

There were other reasons for concern. The police had recently raided Hagedorn’s home and collected eight bags of stolen property from under the floor. But what really upset Gregory Wilson was when he called the number Hagedorn gave him and it was answered, “Kelly’s Keg.” Kelly’s Keg is a bar across the street from the courthouse. The number Hagedorn gave Wilson worked fairly well; when Wilson called it the bartender would answer and summon Hagedorn to the phone. But Hagedorn would not always remember the conversation the next day.

So Gregory Wilson complained to Chief Judge Raymond Lape about Hagedorn and asked for a real lawyer. Judge Lape responded that Wilson, who could not afford a lawyer, was welcome to have any lawyer he wanted, but until he retained one he would be represented by Hagedorn. Wilson continued to object through trial. As the Kentucky Supreme Court noted in reviewing the case on appeal, “[a]t many points during the trial, Wilson repeated his assertion that his court-appointed standby counsel were, to use Wilson’s words, ‘unprepared, ill-trained, ill-equipped, and lacked the necessary competence and experience’” and asked for “competent counsel.” Of course, Wilson’s efforts to replace Hagedorn did not help the attorney-client relationship. The trial was a mockery of justice. Hagedorn was not there for part of the trial. In one memorable part of the transcript, the Judge asked Hagedorn if he wanted to cross-examine a witness and Hagedorn responded that he would like to cross-examine but he had not seen the witness’ direct testimony. Students, if you have not taken Evidence yet, let me just say, before you cross-examine a witness you should observe the direct testimony. Nevertheless, the Judge offered to summarize the direct. And that is what he did and Hagedorn asked a few questions on “cross-examination.”

In another case, Jeffrey Leonard was represented by one of the ten lawyers who represented people sentenced to death in Kentucky and were later disbarred or resigned from the bar. The lawyer knew so little about Jeffrey

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Leonard that he did not know his name, and Leonard was tried under the name ‘James Slaughter.’ The lawyer did not know many other things about Leonard, including that he was brain damaged.66

Yet, the convictions and death sentences in both cases were upheld by the Kentucky and federal courts.67 In any system that makes even a pretense of fairness, surely these cases are scandalous embarrassments, front-page news.68 The bar, the judiciary, the entire government of Kentucky should be asking: Why did this happen? How did it happen? How can we make sure it never happens again? These cases should be investigated the same way the National Transportation Safety Board examines an airplane crash—to see what went wrong and how it can be prevented in the future. In a system of justice, these cases would be summarily reversed and sent back for new trials with competent counsel. But they were not reversed because the representation was just a little bit worse than in other cases, and because the courts have accepted a standard of legal representation that is so low that they will allow it to dip even a little bit lower in these cases.

There is abundant evidence that people who are well represented are seldom sentenced to death. In Virginia, criminal defendants were represented for years by appointed lawyers who were not well compensated and were provided little or no resources for experts and investigators. Many people were sentenced to death and over 100 were executed.69 Then Virginia created four regional capital defender offices.70 Now, people are represented by lawyers who know how to represent people in capital cases. The lawyers have investigators and social workers on staff who specialize in discovering mitigating evidence. That is a major reason that so few people have been sentenced to death in Virginia recently.71 The capital unit of the Defender Association of Philadelphia has not had a single client sentenced to death since it began taking 20% of the capital cases

give–up–license.

66 See Slaughter v. Parker, 467 F.3d 511, 512 (6th Cir. 2006) (Cole, J., dissenting from denial of rehearing en banc).

67 See Wilson v. Parker, 515 F.3d 682 (6th Cir. 2008); Wilson v. Com., 975 S.W.2d 901 (Ky. 1998); Wilson v. Com., 836 S.W.2d 872 (Ky. 1993); Slaughter v. Parker, 450 F.3d 224 (6th Cir. 2006); Slaughter v. Com., 744 S.W.2d 407 (Ky. 1987).

68 Judge Boyce Martin described Wilson’s case as a “particularly ugly example of why ‘the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair.’” in his dissent upon the Sixth Circuit’s denial to rehear Gregory Wilson’s case. See Wilson v. Rees, 624 F.3d 737 (6th Cir. 2010) (Martin J., dissenting) (citations omitted).

69 See Number of Executions by State and Region Since 1976, supra note 15.


71 There have been four death sentences in the last five and a half years in Virginia. See supra note 17.
in Philadelphia in 1993, while defendants represented by undercompensated court-appointed lawyers continue to be sentenced to death in other cases there.\textsuperscript{72} Even in Texas, the Regional Public Defender for Capital Cases was created in 2008 and has taken on representation of people in death penalty cases in more and more counties in Texas.\textsuperscript{73} Its clients are not sentenced to death because they have capable lawyers who know what they are doing.

The ABA assessment says that the Kentucky public defenders are under-funded and over-worked.\textsuperscript{74} That is true here and all over this country. And for the same reason: a government that seeks to convict and execute people has no incentive to pay for lawyers, investigators, mitigation specialists, and experts to frustrate those very goals. Moreover, as Attorney General Robert F. Kennedy said, "the poor man charged with crime has no lobby."\textsuperscript{75} For those reasons, the legal profession and the judiciary must take the lead and demand that there are well-funded public defenders and well-funded capital defender offices if there is going to be a death penalty. A capital trial requires competent counsel who specialize in the defense of capital cases and have resources for investigation and experts. If Kentucky is going to pursue the death penalty—for that one involuntary execution every thirty-seven years—then it must pay the price to do it as close to right as it possibly can. But that is unlikely.

\section*{III. Race and Impossible Questions About Intellectual Disabilities and Mental Health}

Capital punishment is bound up in the terrible history of race in the United States. The death penalty was essential to the institution of slavery. Michigan abolished the death penalty in 1846,\textsuperscript{76} and other northern states did so or restricted the death penalty to murder cases before the Civil War.\textsuperscript{77} But that could not be done in the South. It could not be done in a slave-holding state


like Kentucky because it had a captive population—people who were already prisoners—and the only punishments left were the death penalty, flogging, and other brutal physical treatment. After the Civil War, the death penalty and lynchings were used to terrorize blacks and maintain white supremacy. Some crimes were punishable by death depending upon the race of the offender and the victim. Slavery was perpetuated after the Civil War through convict leasing.78 Black people were arrested on minor charges—such as loitering, not having proper papers, theft—and then leased to the railroads, plantations, coal mines, and turpentine camps.

Lynchings were eventually replaced by the perfunctory capital trial, where the mob was told to “just let the law take its course.” Everyone knew what was going to happen: the cases would be quickly tried, the lawyers assigned to defend the accused would give only token representation, the juries would be all white males, and the defendant would be sentenced to death. Historian George Wright’s book on the death penalty and legal lynchings in Kentucky describes a trial that lasted only one hour and right after it the person was taken behind the courthouse and hung.79 A Courier-Journal editorial said that it was pretty hasty, but at least they did not lynch the defendant—that was seen as a great move forward.80 This is the legacy of the criminal courts that are still influenced by race in sentencing people to death and in contributing to today’s mass incarceration, which falls so heavily on people of color.

Justice William J. Brennan, Jr. had the remarkable ability, from his lofty place on the Supreme Court, to describe a conversation between a lawyer and a client facing the death penalty in some county jail:

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey’s past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey’s victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey’s, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants


80 See id. at 240–41 (1990) (discussing brutal accounts of “legal lynchings” in the Kentucky as told by journalists for Louisville’s Courier-Journal and other newspapers of the time); see also Bush v. Kentucky, 107 U.S. 110 (1883) (reversing and remanding with directions to set aside the indictment against John Bush, a black man accused of murder in Lexington, Kentucky).
Those conversations continue until this day. Justice Brennan concluded that no matter how much the Court's decision allowing Georgia to maintain the death penalty despite such racial disparities would be criticized, "these painful conversations will serve as the most eloquent dissents of all." 82

The Supreme Court has held that states must minimize the risk of race coming into play in the decisions that lead to imposition of the death penalty. 83 But this raises the question of how much racial bias is acceptable in a decision as big as life and death. We tolerate so many insect parts in our cereal, and so much arsenic in our water, but how much racial bias does society tolerate in the process through which it condemns people to die? Should we eliminate any chance that racial prejudice plays a role? If we do, there is only one way to do it, and that is to eliminate the death penalty. It is the only way it can be done.

There are other equally troubling questions. How much uncertainty is tolerable with regard to executing people of low intelligence and people who are profoundly mentally ill? Are juries able to measure precisely the degree of disability and culpability of an intellectually disabled person? Are they able to distinguish between people so intellectually disabled that they are exempt from the death penalty, 84 and those not quite intellectually disabled enough so that it is acceptable to execute them? How should profoundly mentally ill people be sentenced? Do their disorders and impairments reduce their culpability so that they should be spared the death penalty or make them a danger to society so that they should be executed? 85 Different people on different juries make those decisions, but it is impossible for them to make them consistently. Intellectual disability cannot be precisely measured. Psychiatrists and psychologists do not fully understand mental illness and certainly do not agree with regard to it. How can juries in capital cases, which are so often influenced by the passions of the moment, make these immensely difficult decisions?

Prosecutors often assert that capital defendants claiming intellectual disability or mental illness are malingering, that there is really nothing wrong with them. When jurors accept that argument, they may impose the death sentences. But once the condemned arrive on death row, it may be apparent from daily observation that some of them are totally out of touch with reality, others

82 Id. at 345.
84 See Atkins v. Virginia, 536 U.S. 304 (2002) (holding that execution of the intellectually disabled, then called the "mentally retarded" violates the Eighth Amendment).
85 See TEX. CODE CRIM. PRO. ANN. art. 37.071 §2(b)(1) (West 2006 & Supp. 2013) (providing for the death penalty if "there is probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").
are a danger to themselves or others, and some have additional manifestations of mental illness. In those cases, the prison doctors diagnose them as mentally ill and treat them with psychotropic drugs—sometimes even against their will. It may be necessary to help prevent them from harming themselves or others or make it possible for them to take care of themselves by eating and bathing. There may be no question that they are mentally impaired, but the legal determination by the jury was that they were feigning illness. These are tragic mistakes.

How does a jury factor in the unspeakable abuse—sexual, psychological, and physical—of so many people facing the death penalty in assessing culpability? Abuse, neglect and deprivation do not excuse or justify crimes, but they are relevant to sentencing "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse." But, again, how do juries calibrate culpability when considering abuse and how do they do it consistently? It cannot be done because different people will assess it in different ways.

IV. Conclusion

One of the most disturbing things in the American Bar Association's Kentucky report was that the error rate was 64% in capital cases in Kentucky. Fifty of the seventy-eight cases in which the death penalty has been imposed have been reversed by the state or federal courts. One would expect and hope that the greatest care would be taken in the capital cases. But that has not happened in Kentucky. That gives a particular urgency to the need for Kentucky to pursue providing competent counsel, ensuring prosecutorial accountability, requiring full discovery, improving jury instructions, and other reforms discussed in the ABA assessment. They are important not just for death penalty cases, but to ensure fairness and reliability in all criminal cases.

But there is also the larger question of what kind of society and state Kentuckians want. Kentucky has been a leader in the past. At a critical time in our nation's history, when southern states were engaged in massive resistance to racial integration, Governor Bert T. Combs signed an executive order requiring the integration of public accommodations in Kentucky. It can join those states leading the country into the future by abandoning the death penalty.

88 Id.
Winston Churchill was one of many people over the centuries that said we judge a society by how it treats its criminals and its prisoners. Does a society torture its prisoners? The George W. Bush administration tried to dodge the issue by redefining torture. But a country either engages in torture or it does not. And if it tortures, it tells us something about that society. Does that society kill its prisoners? That tells us something as well. The Constitutional Court of South Africa, in deciding on the constitutionality of the death penalty in South Africa, said that South Africa was a nation in transition from hatred to understanding, and from vengeance to reconciliation. And in the society they were building in South Africa, there was no place for the death penalty.

It is increasingly clear that the death penalty's demise is inevitable. The question for Kentucky is whether it is going to wait and be among the last states to abandon the practice, or is it going to be among the leaders in turning its back on this primitive form of punishment. The better angels of our nature, as President Lincoln said, may finally be ready to recognize what Supreme Court Justice Arthur Goldberg said long ago: "The deliberate institutionalized taking of human life by the state is the greatest conceivable degradation to the dignity of the human personality." But the use of the death penalty is not just degrading to the person who is tied down and put down. It is degrading to the society that carries it out. It coarsens the society. It tells children how the society solves its problems—through violence—and about its reverence for life.

The death penalty—like branding, lashing, confining people in stocks, and cutting off limbs, fingers, and ears—is a relic of another era. These primitive punishments were all used and accepted in colonial times before there were any prisons, but only the death penalty continues to be used today. More modern, humane, and constructive responses to crime are available today. When Kentucky and other states consider these factors and recognize these realities, they will join the rest of the civilized world in making permanent, absolute, and unequivocal the injunction: thou shalt not kill.

90 See Winston Churchill, Speech in House of Commons, 20 July 1910, 19 Parl. Deb., H.C. (5th ser.) 1354 (1910) ("The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country.").

91 See Torture Memos: Rationalizing the Unthinkable (David Cole ed., 2009); The Torture Papers: The Road to Abu Ghraib (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

92 State v. Makwanyane 1995 (3) SA 391 (CC) (S. Afr.).
