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Merchants and Thieves, Hungry for Power: Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities

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"Merchants and Thieves, Hungry for Power": Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities

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I. Introduction

In spite of the Supreme Court's decisions in *Ford v. Wainwright*,[1] *Atkins v. Virginia*,[2] *Panetti v. Quarterman*,[3] and *Hall v. Florida*,[4] persons with severe psychosocial and intellectual disabilities continue to be given death sentences, in some cases leading to actual execution.[5] Although the courts have been aware

1. 477 U.S. 399 (1986).

2. 536 U.S. 304 (2002).

3. 551 U.S. 930 (2007).

4. 134 S. Ct. 1986 (2014).

5. Before *Atkins,* at least thirty-five mentally retarded defendants were executed in the years after the Supreme Court reinstated the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976). *See* ROSA EHRENREICH & JAMIE FELLNER, HUM. RTS. WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 2 (2001) (explaining that the exact number of mentally retarded individuals on death row has not been quantified, but it may be as high as 300). On the "back stories" of several cases in Texas in which individuals with intellectual disabilities have been executed *since* the decision in *Atkins*, see Lane Florsheim, *How Texas Keeps Putting the Intellectually Disabled on Death Row*, NEW REPUBLIC (May 14, 2014), https://newrepublic.com/article/117765/ death-penalty-mentally-disabled-how-do-states-keep-doing-it (last visited Sept. 8, 2016) (describing how mentally disabled individuals such as Marvin Wilson, a murderer with an IQ of sixty-one, are executed based on faulty science that the state uses to determine mental competency) (on file with the Washington and Lee Law Review). *See also* Lincoln Caplan, *Last Chance for Warren Lee Hill*, N.Y. TIMES (Feb. 19, 2013), http://takingnote.blogs.nytimes.com/2013/02/19/last-chance-for-warren-lee-hill/?_r=0 (last visited Sept. 8, 2016) (relaying the story of a mentally retarded individual in Georgia who was sentenced to death under circumstances

of this for decades—dating back at least to the infamous Ricky Rector case in Arkansas[6]—these base miscarriages of justice continue and show no sign of abating. Scholars have written clearly and pointedly on this issue (certainly, more frequently since the *Atkins* decision in 2002),[7] but little has changed. And the stakes in this should be clear to all: "In some form or fashion, evidence of mental state is pertinent to virtually every capital case."[8]

This is not a surprise to anyone in the criminal justice system, as the treatment of persons with mental disabilities has long been a scandal. When I titled a recent book, *Mental Disability and the Death Penalty: The Shame of the States*,[9] I did so consciously, because we should all be profoundly ashamed of a system that shames persons with disabilities as well as those who advocate for them. As I stated in that book, there is no question that this cohort of defendants "receive substandard counsel, are treated poorly in prison, receive disparately longer sentences, and are regularly coerced into confessing to crimes (many of which they did not commit)."[10] What may be most scandalous of all is that we know

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similar to Marvin Wilson and Robert Ladd) (on file with the Washington and Lee Law Review); Kira Lerner, *Texas is About to Execute an Intellectually Disabled Man*, THINKPROGRESS (Jan. 29, 2015), http://thinkprogress.org/justice/2015/01/29/3616830/robert-ladd-execution/ (last visited Sept. 8, 2016) (reporting on the case of Robert Ladd, a murderer with the IQ of sixty-seven to whom Texas just denied a stay of execution) (on file with the Washington and Lee Law Review).

6. *See Death for the Mentally Disabled*, ECONOMIST (Mar. 8, 2014), http://www.economist.com/news/united-states/21598681-can-you-execute-man-whose-iq-71-death-mentally-disabled (last visited Sept. 8, 2016) (describing how the defendant, going off to his execution, left behind his last-meal dessert, a piece of pecan pie, to have "later") (on file with the Washington and Lee Law Review).

7. *See, e.g.*, Christopher Slobogin, *What* Atkins *Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003) [hereinafter *What* Atkins *Could Mean*] (writing about potential changes to death penalty law now that *Atkins* outlawed the execution of mentally retarded individuals).

8. Clive A. Stafford Smith & Rémy Voisin Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55, 91 (1999).

9. MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES (2013) [hereinafter MENTAL DISABILITY AND THE DEATH PENALTY].

10. *Id.* at 45.

that this is "a scandal of little interest to most lawyers, most citizens, and most judges."[11]

As time passes within this "scandal" framework, several snapshots emerge.[12] Perhaps the most important one is the corrupt stench of prosecutorial misconduct that aids and abets this scandalous shame with absolutely no consequences to the lawyers involved (other than, in some cases, promotions and re-elections by wider margins than previously).[13] There can no longer be any question—if there ever was—that this misconduct is "a leading cause of wrongful convictions."[14] This prosecutorial misconduct, of course, does not stand alone, for it could not. It is aided and abetted by the courts, sometimes via explicit judicial bias (examples of racial bias by judges such as the infamous Edith Jones are well

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11. Michael L. Perlin, *"Life Is in Mirrors, Death Disappears": Giving Life to* Atkins, 33 N.M. L. REV. 315, 315 (2003) [hereinafter *Life Is in Mirrors*].

12. For a sampling of recent press stories about this issue, see Susan Greene, *Court Finds Government Misconduct Tainted Colorado Death Penalty Case*, COLO. INDEP. (Nov. 22, 2013), http://www.coloradoindependent.com/145028/government-misconduct-found-in-david-bueno-death-penalty-case (last visited Sept. 8, 2016) (on file with the Washington and Lee Law Review); Dahlia Lithwick, *You're All Out*, SLATE (May 28, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/orange_county_prosecutor_misconduct_judge_goethals_takes_district_attorney.html (last visited Sept. 8, 2016) (on file with the Washington and Lee Law Review); Sarah Rumpf, *Texas Bar Alleges Prosecutorial Misconduct in Case of Man Executed in 2004*, BREITBART (Mar. 20, 2015), http://www.breitbart.com/texas/2015/03/20/texas-bar-alleges-prosecutorial-misconduct-in-case-of-man-executed-in-2004/ (last visited Sept. 8, 2016) (on file with the Washington and Lee Law Review).

13. Prosecutorial misconduct amounts to a constitutional violation if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986). The Supreme Court has acknowledged that "the *Darden* standard is a very general one." Parker v. Matthews, 132 S. Ct. 2148, 2155 (2012). However, the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254 (2012), "recognizes . . . that even a general standard may be applied in an unreasonable manner." Panetti v. Quarterman, 551 U.S. 930, 953 (2007). *See also infra* notes 141–146 and accompanying text (discussing *Panetti*). I have discussed aspects of this before in Michael L. Perlin, *"Power and Greed and the Corruptible Seed": Mental Disability, Prosecutorial Misconduct, and the Death Penalty*, 43 J. AM. ACAD. PSYCHIATRY & L. 266 (2015) [hereinafter *Power and Greed and the Corruptible Seed*].

14. Susan A. Bandes, *The Lone Miscreant, The Self-Training Prosecutor, and Other Fictions: A Comment on* Connick v. Thompson, 80 FORDHAM L. REV. 715, 727–28 (2011) [hereinafter *The Lone Miscreant*].

known[15]) but more often by what I call *passive* judicial complicity.[16] By way of example, an Arizona reporter found that "even when they *do* make findings of prosecutorial misconduct, judges often do not report the offenders to the Bar for investigation and potential disciplinary hearings."[17] In his song *Hurricane,* Bob Dylan

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15. *See, e.g.*, Anna Arceneaux, *Montez Spradley, an Innocent Man Once on Death Row, Is Free*, ACLU (Sept. 10, 2015, 12:00 PM), https://www.aclu.org/blog/speak-freely/montez-spradley-innocent-man-once-death-row-free (last visited Sept. 8, 2016) (explaining how the jury voted to sentence Montez Spradley to life in prison, but the judge used a judicial override to sentence him to death) (on file with the Washington and Lee Law Review); Brandi Grissom, *Complaint: Judge's Death Penalty Remarks Show Racial Bias*, TEX. TRIB. (June 4, 2013), https://www.texastribune.org/2013/06/04/complaint-judges-comments-show-bias-death-penalty/ (last visited Sept. 8, 2016) (reporting how Judge Jones told law students that "racial groups like African-Americans and Hispanics are predisposed to crime") (on file with the Washington and Lee Law Review). For an astonishing story of how a judge in a death penalty case exchanged hundreds of texts with the district attorney who was prosecuting the defendant, see *Gardiner & Scheinberg*, NAT'L COUNCIL OF CERTIFIED DEMENTIA PRACS., https://cases.nationalcdp.org/gardiner-scheinberg/ (last visited Sept. 8, 2016) (on file with the Washington and Lee Law Review).

16. To the best of my knowledge, this phrase—"passive judicial complicity"—does not appear in the legal literature in this context. There is significant commentary on judicial complicity in the sanctioning of Jim Crow segregation. *See* Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren,* Brown, *and a Theory Of Racial Redemption*, 19 B.C. THIRD WORLD L.J. 73, 135–36 (1998) (explaining the various legal doctrines cited by the Supreme Court in refusing to protect civil rights during the years of the Warren Court). *See generally* Robert M. Cover, *Book Review*, 68 COLUM. L. REV. 1003, 1005–08 (1968) (reviewing RICHARD HILDRETH, ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION (1856)). On domestic violence, see Zanita E. Fenton, *Mirrored Silence: Reflections on Judicial Complicity in Private Violence*, 78 OR. L. REV. 995 (1999). On judicial complicity in improper convictions generally, see Hans Sherrer, *The Complicity of Judges in the Generation of Wrongful Convictions*, 30 N. KY. L. REV. 539 (2003). The phrase "passive complicity" is used mostly in the context of affirmative action law, see, e.g., Leonard M. Baynes, *Life after* Adarand*: What Happened to the Metro Broadcasting Diversity Rationale for Affirmative Action in Telecommunications Ownership?*, 33 U. MICH. J.L. REF. 87, 107 (1999–2000) (noting that the discrimination plaintiffs need to show in such cases "could either be by the governmental actor or by its 'passive complicity' in the discrimination of others"), but the first use appears to be as it relates to the failure of the free world to respond to the mass murder of Jews during World War II. Victoria Barnett. *See generally Provocative Reconciliation*, 117 CHRISTIAN CENTURY 942 (2001).

17. Michael Kiefer, *When Prosecutors Get Too Close to the Line*, ARIZ. REPUBLIC (Oct. 27, 2013), http://www.nimodopress.com/blog/2014/4/21/4dwgoz41k0vp18u7808bb61jz6yv61 (last visited Sept. 8, 2016) (on file with the Washington and Lee Law Review).

castigated the Passaic County press for its complicity in the case of the falsely-convicted Ruben "Hurricane" Carter, singing "Bello and Bradley and they both baldly lied/And the newspapers, they all went along for the ride."[18] Here I argue that it is the judiciary that regularly "goes along for the ride."

In this Article I seek to answer *why* persons with mental disabilities are so often improperly brought to trial and convicted in death penalty cases. In answering this question, I focus on ongoing prosecutorial misconduct, sometimes aided and abetted by judicial bias and judicial complicity.[19] Here, I assess why we blind

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18. Bob Dylan & Jacques Levy, *Hurricane*, BOB DYLAN, http://www.bobdylan.com/us/songs/hurricane (last visited Sept. 8, 2016) (on file with the Washington and Lee Law Review). I discuss the implications of this song for the teaching of criminal law and procedure in Michael L. Perlin, *Tangled up in Law: The Jurisprudence of Bob Dylan*, 38 FORDHAM URB. L.J. 1395, 1404–07 (2011).

Carter was convicted and his conviction was affirmed. *See* State v. Carter, 255 A.2d 746, 753–55 (N.J. 1969) (affirming Carter's conviction despite numerous evidentiary issues and prosecutorial missteps). He moved for a new trial based upon the State's failure to disclose evidence and the testimonial recantation by the star witnesses against him, but his motions were denied. State v. Carter, 347 A.2d 383, 388 (Passaic-County Ct. 1975) (ruling that constitutional due process concerns are satisfied if the defendant had "the benefit and guidance of a competent attorney," even if there were errors during the trial, because even "the best of counsel makes mistakes"); State v. Carter, 345 A.2d 808, 829 (N.J. Super. Ct. Law Div. 1974) (stating that the withheld evidence tape did not necessarily constitute exculpatory evidence, so a new trial was not mandated). The New Jersey Supreme Court vacated the trial court's decision based on the failure to disclose key evidence. *See* State v. Carter, 354 A.2d 627, 635 (N.J. 1976) (ordering a new trial on the basis that the withheld October 11 tape had the capacity to affect the jury's decision and substantially prejudice Carter's trial). Carter was again convicted, and that conviction was upheld by the state Supreme Court by a 4–3 vote. State v. Carter, 449 A.2d 1280, 1284 (N.J. 1982) (affirming the conviction despite a strongly worded dissent that referred to the case as presenting unparalleled Brady violations). Ultimately, his application for a writ of habeas corpus was granted—the court found that his conviction was "predicated upon an appeal to racism rather than reason, and concealment rather than disclosure." Carter v. Rafferty, 621 F. Supp. 533, 534 (D.N.J. 1985).

19. There are other factors as well:

- Explicit juror bias, what I call sanism, in individual cases. *See, e.g.*, Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence*, 8 NOTRE DAME J. L., ETHICS & PUB. POL'Y 239, 257 (1994) [hereinafter *Sanist Lives*] (describing sanism as "an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry"); *see also infra* note 137 (defining sanism further).

ourselves to these realities, and how they make it utterly impossible for the death penalty to ever be administered in a "fair" way, especially in cases involving defendants with mental disabilities. I will also examine these issues through the lens of therapeutic jurisprudence and will conclude that our current system utterly rejects the bedrock principles of that school of jurisprudence—voice, validation, and voluntariness—in ways that contribute to true mockeries of justice. It is noteworthy that this analysis could not be done without recognition of the pervasive problem of ineffective assistance of counsel in the cases of which I speak.

- The consistently pretextual positions of four current Supreme Court judges in all matters dealing with the overlap between mental disability and criminal behavior, culminating in Justice Alito's bizarre dissent in *Hall*. On pretextuality in the way that judges deal with cases involving defendants with mental disabilities, see Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 639 (1993); MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY (2013). *See infra* note 137 (defining pretextuality); *infra* text accompanying note 179 (discussing "therapeutic jurisprudence" in the context of pretextuality).
- The lack of availability of trained counsel—from the very first stages of the lawyer-client relationship—that can accurately identify mental disability, and then (a) strategically plan mental disability-based defenses and/or mitigation strategies, and (b) engage appropriate experts to assist in trial preparation and trial. *See* MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 9, at 57–58 (expounding on the problem magnified by *Murray v. Giarratano*, 492 U.S. 1 (1976), in which the Supreme Court held that there is no constitutional right to collateral review or to the assistance of counsel in collateral proceedings).
- The lower courts' penurious interpretations of *Ake v. Oklahoma*, 470 U.S. 68 (1985) (right of indigent defendant to independent psychiatrist to aid in presentation of insanity defense), in cases involving defendants with intellectual disabilities or severe neurological disorders, making the proceedings in these cases—in which it is virtually impossible for these defendants (post-*Giarratano*) to even comprehend the substantive law or the process in the expedited time procedures that are increasingly imposed—an utter sham. *See, e.g.*, Nancy Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55 n.99 (1990) (stating that an "indigent defendant is entitled to state-provided access to a psychiatrist at both guilt and sentencing phases of capital trial"). I will address these issues in a subsequent article.

My title comes, in part, from the second verse of Bob Dylan's brilliant song, *Changing of the Guards*: "Fortune calls/I stepped forth from the shadows, to the marketplace/Merchants and thieves, hungry for power, my last deal gone down."[20] The song, per the great Dylanologist Oliver Trager, is about "control of a world ruled by power and death,"[21] and I think that is just about right. There is no question that the criminal trial process is a "marketplace" (consider the new academic attention paid to the question of the "due process of plea bargaining"), and that death penalty trials result when one's "last deal" was not able to have "gone down." But, to the point, I believe that the prosecutoriate—"hungry for power"—serve all too often as both "merchants and thieves" in this process. I hope that this Article sheds some light on this loathsome state of affairs.

II. Mental Disability, the Death Penalty and Prosecutorial Misconduct[22]

There is no question that the death penalty is disproportionately imposed in cases involving defendants with mental disabilities (referring both to those with mental illness and with intellectual disabilities, more commonly referred to as mental retardation).[23] In the words of Sixth Circuit Court of Appeals Judge Gilbert Stroud Merritt, Jr.: "The greatest threat to justice and the Rule of Law in death penalty cases is state prosecutorial malfeasance—an old, widespread, and persistent habit."[24]

Persons with mental disabilities are significantly over-represented at every level of the criminal justice system.[25]

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20. Bob Dylan, *Changing of the Guards*, BOB DYLAN, http://www.bobdylan.com/us/songs/changing-guards (last visited Sept. 8, 2016) (on file with the Washington and Lee Law Review).

21. OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 104 (2004).

22. Portions of the following section are adapted from *Power and Greed and the Corruptible Seed*, *supra* note 13.

23. *Id.* at 266–67.

24. Gilbert Stroud Merritt, Jr., Symposium, *Prosecutorial Error in Death Penalty Cases*, 76 TENN. L. REV. 677, 677 (2009).

25. Edward A. Polloway et al., *Special Challenges for Persons with Disabilities in the Criminal Justice System: Introduction to the Special Issue*, 19

Estimates of those with intellectual disability range from 10–30%, and of those with mental illness from 10–70%.[26] These wide ranges reveal another truth, which is that our databases about these populations are deeply flawed.[27]

Mental disability confounds all stages of the criminal justice system: from pre-contact to initial contact to intake and interrogation, to prosecution and disposition, and to incarceration.[28] In the context of capital punishment, these coalesce most vividly in the context of the false confessions.[29] While there are many reasons why persons with mental disabilities are sentenced to death for murders that they did not commit, and other reasons why they are sentenced to death in cases where individuals without mental disabilities might have been spared the death penalty,[30] the most prevalent issue is that of false confessions. Of the first 130 exonerations that the New York-based Innocence Project obtained via DNA evidence, 85 involved people convicted after false confessions.[31]

EXCEPTIONALITY 211, 212 (2011).

26. *See* Julie D. Cantor, *Of Pills and Needles: Involuntarily Medicating the Psychotic Inmate When Execution Looms*, 2 IND. HEALTH L. REV. 119, 136 (2005) (providing anecdotes about how inmates on death row can descend into psychosis as they linger away in prison).

27. For one rigorous study, see Henry Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVS. 761, 764 (2009) (reporting that a jail study revealed that the rate of current serious mental illness for male inmates was 14.5% and for female inmates it was 31%). More recent estimates calculate 40% of Rikers Island inmates have some sort of mental illness. *See* Bandy X. Lee & Maya Prabhu, *A Reflection on the Madness in Prisons*, 26 STAN. L. & POL'Y REV. 253, 254 (2015) (noting how the rising levels of inmates with mental illness at Rikers Island are providing increasingly difficult challenges for prison officials).

28. Polloway et al., *supra* note 25, at 214–17.

29. *See, e.g.*, Richard Leo & Richard Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (reporting the stories of Jack Carmen, David Vasquez, Johnny Lee Wilson, and other individuals who were sentenced to death after a false confession).

30. For an overview of these cases, see the Death Penalty Information Center's articles on mental illness and the death penalty. *Mental Illness*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/mental-illness-and-death-penalty (last visited Sept. 8, 2016) (on file with the Washington and Lee Law Review).

31. Tracey Maclin, *A Criminal Procedure Regime Based on Instrumental Values*, 22 CONST. COMMENT. 197, 230 n.68 (2005).

Mental disability is a commonly recognized risk factor for false confessions. Valid and reliable evidence has taught us that false confessors have been found to score higher on measures of anxiety, depression, anger, extraversion, and psychoticism as well as being more likely to have seen a mental health professional or taken psychiatric medications in the year prior.[32] One of the leading articles on this phenomenon notes that "an inability to distinguish fact from fantasy due to a breakdown in reality monitoring, a common feature of major mental illness," is a major contributing factor to such false confessions.[33] And there is no disputing Allison Redlich's conclusion that "legal safeguards for persons with mental disorders afford little protection during the investigation phase" of a criminal case,[34] the period of time during which such false confessions are most likely to occur.[35]

As the Supreme Court emphasized in *Atkins,* defendants with intellectual disabilities "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[36]

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32. Gisli Gudjonsson et al., *Custodial Interrogation, False Confession, and Individual Differences: A National Study Among Icelandic Youth*, 41 PERSONALITY & INDIVIDUAL DIFFERENCES 49 (2006); Gisli Gudjonsson et al., *Confessions and Denials and the Relationship with Personality*, 9 LEG. & CRIMINOLOGICAL PSYCHOL. 121 (2004); Gisli Gudjonsson et al., *Interrogation and False Confession Among Adolescents in Seven European Countries: What Background and Psychological Variables Best Discriminate Between False Confessors and Non-False Confessors?*, 15 PSYCHOL., CRIME & L. 711 (2009).

33. Saul Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 14 (2010). From 1990 to 2013, 2000 defendants were found to have been falsely convicted; 300 of the exonerations were the results of DNA testing. These facts "defy common belief" that wrongful convictions are "extremely rare" occurrences. Rachel Pecker, Note, *Quasi-Judicial Prosecutors and Post-Conviction Claims of Innocence: Granting Recusals to Make Impartiality a Reality*, 34 CARDOZO L. REV. 1609, 1612 (2013).

34. Allison D. Redlich, *Law & Psychiatry: Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 PSYCHIATRIC SERVS. 19 (2004).

35. *See generally* JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000). *See also* Jennifer J. Ratliff et al., *The Hidden Consequences of Racial Salience in Videotaped Interrogations and Confessions*, 16 PSYCHOL. PUB. POL'Y & L. 200, 200–01 (2010) (reporting how 15% of false confessions took place during the initial interrogation phase).

36. Atkins v. Virginia, 536 U.S. 304, 318–19 (2002).

When discussing false convictions in death penalty cases of individuals with mental disabilities, Professor John Blume and his colleagues considered the following, in addition to the false confessions issue: (1) the difficulties such individuals have assisting counsel; (2) their often inappropriate demeanor; and (3) their vulnerability to exploitation by codefendants and/or snitches.[37]

III. Prosecutorial Misconduct

There is typically great political incentive for prosecutors to seek the death penalty and for trial judges to impose it.[38] Professor James Liebman explains:

> In all capital-sentencing jurisdictions, but particularly in ones where the political rewards of capital punishment are high and direct (for example, where elections for district attorney and trial judge are frequent and partisan and where voters favor the death penalty) and in ones that believe themselves to be under siege from violent crime, such offenses create incentives to move swiftly and surely from arrest to conviction to capital verdict.[39]

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37. *See* John H. Blume, Sheri L. Johnson & Susan E. Millor, *Convicting Lennie: Mental Retardation, Wrongful Convictions, and the Right to a Fair Trial*, 56 N.Y.L. SCH. L. REV. 943, 954–58 (2012) (explaining how defendants with mental illness often act "tough" or "hardened" to conceal their confusion, which complicates any effective defense from their counsel, makes them appear heartless in front of the jury, and makes them vulnerable to the tricks of other codefendants).

38. Of course, the starting point is the reality that it is the prosecutor who decides whether or not to pursue the death penalty in a given case. *See* Pecker, *supra* note 33, at 1619 (describing how the extent of prosecutorial discretion has led the Supreme Court to refer to prosecutors as "judicial or quasi-judicial officers").

39. James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L. J. 315, 322 (2002). In a footnote, Liebman quotes a newspaper article by Tina Rosenberg about Philadelphia district attorney Lynne Abraham's self-confessedly "passionate" commitment to capital punishment, notwithstanding her doubts whether it deters crime, and her use of it more often per homicide than any other prosecutor in the nation, which follows from her conclusion that it gives citizens "the feeling of control demanded by a city in decay," especially in light of her observation that "[w]e feel our lives are not in our own hands . . . This is Bosnia". *Id.* at 322 n.36 (quoting Tina Rosenberg, *Deadliest D.A.*, N.Y. TIMES, July 16, 1995, at 22). For more information on the special issues raised in jurisdictions in

In this context, is important to note how the imposition of the death penalty is basically a county-by-county issue, resulting in this anomaly: over a twenty-two year period, *sixty-six* American counties accounted for 2,569 of the 5,131 death sentences imposed.[40] Perhaps even more astonishingly, just 16% of the nation's counties (510 out of 3,143) accounted for 90% of its death verdicts in the period.[41] Police, prosecutors, judges, and juries operate with "strong incentives to generate as many death sentences as they can—reaping robust psychic, political, and professional rewards—while displacing the costs of their many consequent mistakes onto capital prisoners, post-trial review courts, victims, and the public."[42]

There is often "acute (and ever intensifying) political pressure" on prosecutors "to seek the death penalty."[43] Because defendants with mental disabilities most engage a community's fears, this

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which prosecutors are elected, see Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 947 (1994). For more information on the incentives in some jurisdictions supporting the pursuit of death penalties by prosecutors, see Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999 (2009).

40. James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 264–65 n.40 (2011).

41. *See id.* at 265 (noting that, statistically, juries composed of 10% of American residents were responsible for 38% of the capital sentences). Philadelphia is discussed in this context in depth in Robert Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 260–61 (2012) (relaying the categorizing process that Philadelphia defense attorneys use to properly defend capital cases). *See generally* Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307 (2010).

42. James Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2032 (2000); *see also* Liebman & Clarke, *supra* note 40, at 295 ("Local prosecutors stand to gain by imposing as many death verdicts as possible, regardless of the verdicts' failure rate on appeal, because they quickly realize the political gains, and the costs of review and reversal are slow to materialize and shouldered by others."). Professor J. Amy Dillard is clear: "Prosecutors abuse their discretion when they choose to seek death in order to seat a death-disposed jury." J. Amy Dillard, *And Death Shall Have No Dominion: How to Achieve the Categorical Exemption of Mentally Retarded Defendants from Execution*, 45 U. RICH. L. REV. 961, 1005 (2011).

43. Brian L. Vander Pol, Note: *Relevance and Reconciliation: A Proposal Regarding the Admissibility of Mercy Opinions in Capital Sentencing*, 88 IOWA L. REV. 707, 709 & n.2 (2003).

pressure is certainly not diminished in cases of defendants with mental disabilities.[44] And of course, because prosecutors "reap political benefits from being tough on crime but do not typically have to pay for expensive appeals, they have an incentive to seek the death penalty in marginal cases that may be hard to defend on appeal."[45] They adopt a "conviction psychology," one that presumes guilt in all cases.[46] And these tactics, sadly, inevitably play well with jurors.[47]

Consider the 2014 exoneration of two African-American mentally disabled death row inmates—one with an IQ in the 60s, and the other with an IQ of 49—who were exonerated by DNA evidence, some twenty years after the Supreme Court denied *certiorari* on their cases (over a stinging dissent by Justice Blackmun), when it was determined that their confessions were coerced and that they were factually innocent.[48] The District Attorney who prosecuted the case—Joe Freeman Britt—was profiled later on "Sixty Minutes" as the nation's "deadliest D.A. because he sought the death penalty so often."[49] Notwithstanding

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44. *See* Deborah C. Scott, et al., *Monitoring Insanity Acquittees: Connecticut's Psychiatric Security Review Board*, 41 HOSP. & COMMUNITY PSYCHIATRY 980, 982 (1990) (noting that persons with mental disabilities are "the most despised and feared group in society").

45. Gershowitz, *supra* note 41, at 347–48.

46. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1010 n.208 (2009); *see also* George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 110–19 (1975) (defining "conviction psychology" as the mindset of a prosecutor who does not believe that an innocent person would ever end up a criminal defendant).

47. *See* RANDALL COYNE & LYN ENTEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 553 (4th ed. 2012) (discussing former Oklahoma City District Attorney Robert Macy, who, according to journalistic accounts, "lied, . . . bullied, [and] spurned the rules of a fair trial, concealing evidence, misrepresenting evidence," and yet consistently won re-election with more than 70% of the vote).

48. *See* McCollum v. North Carolina, 512 U.S. 1254, 1254 (1994) (Blackmun, J., dissenting) ("That our system of capital punishment would single out Buddy McCollum to die for this brutal crime only confirms my conclusion that the death penalty experiment has failed."); *see also* Jonathan Katz & Erick Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES (Sept. 2, 2014), at A1 (noting that the DNA evidence proved their neighbor—whose involvement had been overlooked by the police, despite his confession to a rape and murder at a concurrent time—had been responsible for the heinous crime).

49. *See* Matt Schudel, *Joe Freeman Britt, Prosecutor Who Sent Dozens to Death Row, Dies at 80*, WASH. POST (Apr. 16, 2016), https://www.washingtonpost.com/national/joe-freeman-britt-prosecutor-who-sent-dozens-to-death-row-

the DNA evidence, he told the press recently that he "still believed the men were guilty,"[50] indicating that he "could not understand why much faith is put in DNA evidence."[51] Revealingly, in discussing the issue of the false confession, Britt said: "When we tried these cases, every time they would bring in shrinks to talk about how retarded they were[ ]. . . . It went on and on, blah-blah-blah."[52] The current DA—a distant cousin—subsequently called Britt a bully, to which Britt replied, "If I was a bully, he is a pussy. How about that?"[53]

There are two back-stories here—to the best of my knowledge, generally unreported in the popular press—that need be shared as well. First, during the North Carolina state legislative election campaign in November 2010,

> the state Republican Party mailed a flyer that depicted mug shots of two death row inmates, Wayne Laws and Henry McCollum, to households in districts with contested races. The flyer described their brutal crimes and cautioned the targeted voters that because of their 'ultra-liberal' representative, Laws

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dies-at-80/2016/04/15/b246f27e-025b-11e6-b823-707c79ce3504_story.html (last visited Sept. 8, 2016) (attributing the quote "[g]o after them and tear that jugular out" to Britt, as stated in the "60 Minutes" interview) (on file with the Washington and Lee Law Review).

50. *Id.*

51. Richard Oppel, *As Two Men Go Free, a Dogged Ex-Prosecutor Digs In*, N.Y. TIMES (Sept. 8, 2014), at A1, A13. On prosecutorial misconduct in other cases involving potentially-exculpatory DNA evidence, see Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 178 (2007) (discussing Mitchell v. Gibson, 262 F.3d 1036, 1063 (10th Cir. 2001)).

52. *Id.*

53. *Id.* Other examples abound. Rachel Pecker notes:

> In a recent Illinois exoneration, the district attorney resisted a finding of innocence after DNA excluded five male defendants who had falsely confessed to the crime when they were teenagers. She explained, "[a]s a prosecutor, I have a duty to the victims in this case." Another prosecutor explained, "[t]he taxpayers don't pay us for intellectual curiosity. They pay us to get convictions."

Pecker, *supra* note 33, at 1618 n.38 (quoting Erica Goode, *When DNA Evidence Suggests 'Innocent,' Some Prosecutors Cling to 'Maybe,'* N.Y. TIMES (Nov. 16, 2011), at A19 and Andrew Martin, *The Prosecutor's Case Against DNA*, N.Y. TIMES (Nov. 27, 2011), § 6, at 44)..

> and McCollum "might be moving out of jail and into [y]our neighborhood sometime soon."[54]

Second, in the case of *Callins v. Collins*,[55] in dissenting from the Court's decision to not grant *certiorari,* Justice Blackmun famously said that he would "no longer tinker with the machinery of death," and would never vote again to affirm a death penalty conviction.[56] In response to Justice Blackmun, Justice Scalia sneered at the decision to announce this manifesto in the case before the court, noting that it was "less brutal" than many others, counterpointing with the facts of the *McCollum* case:

> The death-by-injection which Justice BLACKMUN describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which Justice BLACKMUN did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the eleven year-old girl raped by four men and then

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54. Barbara O'Brien & Catherine M. Grosso, *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go Where the* McCleskey *Court Wouldn't,* 2011 MICH. ST. L. REV. 463, 500–01 (2011) (quoting Rob Christensen, *Potshots Turn Nasty in N.C. Legislative Races: Democrats and Republicans Resort to Outdated Charges, Fear-Mongering,* CHARLOTTE OBSERVER (Oct. 21, 2010), http://www.charlotteobserver.com/2010/10/21/1776187/potshots-turn-nasty-in-nc-legislative.html#ixzz1I7LpvV1v (last visited July 19, 2016) (on file with the Washington and Lee Law Review)). Of course, how a state legislator could free a convicted prisoner was never explained, but the campaign was successful.

55. 510 U.S. 1141 (1994).

56. *Id.* at 1145 (Blackmun, J., dissenting). Justice Blackmun further stated:

> For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative.

Id.

> killed by stuffing her panties down her throat. See *McCollum v. North Carolina,* cert. pending, No. 93–7200.[57]

It clearly never occurred to Scalia that McCollum might have been innocent of the crime with which he was charged. In commenting on these events, Dahlia Lithwick has perceptively observed:

> It was once the case that McCollum was held out, to the collective members of the Supreme Court, as the very worst of the worst, deserving of death because of the heinousness of his crimes. Having shown that he never committed that crime, it seems high time to ask whether, in the view of some Supreme Court Justices, that would have even made a difference had we executed him.[58]

We should think about *McCollum* in the context of Justice Scalia's jaw-dropping assertion that "this Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."[59]

I turn my attention now to the trial bench. How do trial judges respond in those jurisdictions in which they have the opportunity to alter sentences?[60] According to a report done by the Equal

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57. *Callins*, 510 U.S. at 1142–43 (Scalia, J., concurring).

58. *See* Dahlia Lithwick, *A Horrifying Miscarriage of Justice in North Carolina,* SLATE (Sept. 5, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/henry_lee_mccollum_cleared_by_dna_evidence_in_north_carolina_after_spending.2.html (Sept. 3, 2014, 5:37 PM) (last visited June 21, 2016) [hereinafter *A Horrifying Miscarriage of Justice*] (noting that the denial of certiorari occurred decades before DNA evidence proved McCollum's innocence) (on file with the Washington and Lee Law Review). Again, as Lithwick points out, there is nothing in Justice Blackmun's dissent from the denial of certiorari in McCollum's case. *See* McCollum v. North Carolina, 512 U.S. 1254, 1255 (1994) (Blackmun, J., dissenting) (suggesting that McCollum was factually innocent; his opinion is premised on McCollum's unquestioned developmental disability).

59. *In re* Davis, 557 U.S. 952, 955 (2009) (Scalia, J., dissenting).

60. In three states (Florida, Alabama, and Delaware), judges have the ability to overturn jury sentences in death penalty cases. *See* Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. ST. L. REV. 793, 794 (2011) (reporting that, while Florida judges have the ability to reverse the jury's determination in either direction, they usually choose to override verdicts that hand down life sentences instead of death penalties). As this Article went to press, the Delaware Supreme Court found that the state capital sentencing statute unconstitutionally allowed a judge (and not a jury) to find an aggravating

Justice Institute, in Florida (a state where judges are elected), there has not been a single judicial override of a jury-imposed death penalty in twelve years; in Alabama (another judicial election state), 92% of judicial overrides are to impose death sentences in cases in which jurors recommended life imprisonment; on the other hand, in Delaware (where judges are appointed), no judge has *ever* imposed a death sentence via judicial override.[61] Importantly, judges override juries to impose the death penalty more often in a judicial election year.[62]

IV. Outcomes of Misconduct

Prosecutorial misconduct is rampant.[63] In one Arizona study, prosecutorial misconduct was alleged in half of all capital cases, and was found by appellate courts to be reversal-worthy in forty-

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circumstance for the weighing phase. *See* Rauf v. State, No. 39, 2016 WL 4224252, at *1 (Del. Aug. 2, 2016) (holding that the statute was unconstitutional because these unconstitutional provisions could not be severed).

61. *See* Sherrilyn A. Ifill, *Using the Death Penalty to Get Re-Elected*, ROOT (July 20, 2011), http://www.theroot.com/articles/politics/2011/07/judges_death_penalty_used_for_reelection/ (last visited Sept. 8, 2016) (reporting that Alabama judges usually exercised their override power when the victim was white) (on file with the Washington and Lee Law Review). For a further discussion of judicial override and the death penalty, see DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 48 (2010).

62. *See* Ifill, *supra* note 61 (noting that thirty-eight states still elect their judges); *see also* Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017 (1999) (giving examples of judges citing their decisions to override jury life sentences in their campaigns or being voted out of office for their failure to impose or uphold death verdicts). *See generally* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995); Daniel Richman, *Framing the Prosecution*, 87 S. CAL. L. REV. 673, 697 n.88 (2014) (discussing Claire S.H. Lim, *Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Judges*, 103 AM. ECON. REV. 1360, 1361–62 (2013) (comparing the sentencing variation among elected and appointed judges in Kansas)). On this variation in the area of sentencing of sex offenders (coming to a similar conclusion), see Heather Ellis Cucolo & Michael L. Perlin, *"They're Planting Stories in the Press": The Impact of Media Distortions on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185 (2013).

63. On how available statistics "significantly underreport the extent of prosecutorial misconduct," see David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 212 (2011).

percent of that cohort.[64] The important question, though, is what happens when there *is* prosecutorial misconduct? In a study of the thirteen executions that have occurred in California since the death penalty was reinstated there in 1977, "prosecutorial misconduct has been raised as a significant issue in seven—more than half."[65] This cohort of cases includes at least one case in which the prosecutor lied—there is no other word for it—to the jury about the consequences if a "not guilty by reason of insanity" verdict were to be entered,[66] lies that the California Supreme Court later deemed to be "harmless error."[67] Certainly, this sort of judicial behavior bespeaks the sort of complicity discussed earlier.

As I have previously written:

> Other cases from other jurisdictions show this same judicial sanctioning of lies on the consequences of a successful insanity plea. In only one jurisdiction [Florida] have convictions been reversed in such circumstances, the reviewing court in one case noting that 'the prosecution cannot suggest to the jury that an

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64. Michael Kiefer, *Prosecutorial Misconduct Alleged in Half of Capital Cases,* ARIZ. REPUBLIC (Oct. 28, 2013 11:09 AM), http://www.azcentral.com/news/arizona/articles/20131027milke-krone-prosecutors-conduct-day1.html (last updated Nov. 25, 2013) (last visited Sept. 8, 2016) (noting the Ninth Circuit's ruling that the prosecution has the burden of reporting any exonerating evidence that they find) (on file with the Washington and Lee Law Review).

65. Natasha Minsker, *Prosecutorial Misconduct in Death Penalty Cases*, 45 CAL. W. L. REV. 373, 375 (2009) [hereinafter *Prosecutorial Misconduct in Death Penalty Cases*]; *see also* Natasha Minsker & Daniel Ballon, *Forum Column*, SAN FRANCISCO DAILY J. (Oct. 18, 2007).

66. Minsker, *supra* note 65, at 382–87 (discussing People v. Babbitt, 45 Cal. 3d 660 (1988)). As reported in MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 9, at 246 n.129, the prosecutor's comments included the following:

> "We are letting justice be decided on the basis of how well a psychiatrist can sell their bag of tricks," and, "they [psychiatrists] are so vain as to think they are capable of all these magical, mystical things they say they are capable of."
>
> "[W]e have a social cancer in our community now, and it is this very process of allowing psychiatrists to come in and make their moral pronouncements disguised as medical opinion in the hopes of persuading jurors to let people off the hook."
>
> "I'm going to find this guy crazy and let him go home."
>
> "[E]very time somebody gets mad, they are free to commit any crime they want, and they can be found not guilty by reason of insanity."

67. MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 9, at 705.

> acquittal would result in the defendant's release from an asylum in just a few months.'[68]
>
> Often, even where prosecutorial misconduct in such is found, the errors are deemed harmless, not of constitutional magnitude, or improperly preserved. Nearly seventy years ago, Judge Jerome Frank charged that 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules.' Little has changed since.[69]

Convictions in cases replete with serious prosecutorial misconduct are regularly affirmed, whether they are based on inflammatory statements to jurors in closing arguments,[70] on

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68. *Power and Greed and the Corruptible Seed*, *supra* note 13, at 268 (quoting Nowitzke v. State, 572 So. 2d 1346, 1354 (Fla. 1990)). *See, e.g.*, Lautner v. Berghuis, 694 F. Supp. 2d 698, 729 (W.D. Mich. 2010) (stating that inappropriate questions directed to an expert witness can be harmless, since juries are "free to disregard the expert testimony and draw [their] own conclusions from the evidence and lay testimony" (citation omitted)); McGregor v. Gibson, 219 F.3d 1245 (10th Cir. 2000) (basing the decision on the fact that federal habeas relief is not mandated by state law errors), *overruled en banc on other grounds*, 248 F.3d 946 (10th Cir. 2001). In *Lautner*, the prosecutor also warned that the defendant would go free if found not guilty for reason of insanity, stating, "Now folks are we going to turn [defendant] loose on society by reason of insanity[?]" *Lautner*, 694 F. Supp. 2d at 730. In *McGregor*, the prosecutor indicated to prospective jurors that Mr. McGregor would walk out of the courtroom a free man if the jury found him not guilty by reason of insanity. *McGregor*, 219 F.3d at 1256.

69. *Power and Greed and the Corruptible Seed*, *supra* note 13, at 268; *see also* State v. Maestas, 299 P.3d 892, 915 (Utah 2012) (using the beyond a reasonable doubt standard to determine whether an error was harmless enough for the reviewing court to leave the conviction in place); Morris v. Hedgpeth, No. EDCV 09–00664 VAP (SS), 2011 WL 3861650, at *24–25 (C.D. Cal. July 26, 2011) (explaining that prosecutorial misconduct can violate the Constitution and still not violate due process if the error was harmless); People v. Cruz, 605 P.2d 830 (Cal. 1980) (stating that, to preserve allegations of prosecutorial misconduct on appeal, the defense counsel must have objected during the trial and requested jury admonitions).

70. For examples of these cases, see generally *U.S.* ex rel. *Tenner v. Gilmore*, No. 97 C 2305, 1998 WL 721115 (N.D. Ill. Oct. 8, 1998); *Dunigan v. Yarborough*, No. ED CV 04-00498-CAS (VBK), 2009 WL 6824504 (C.D. Cal. Sept. 3, 2009); *Commonwealth v. Keaton*, 45 A.3d 1050 (Pa. 2012); *People v. Babbitt*, 755 P.2d 253 (Cal. 1988). In *Frederick v. State*, the court found no error where the prosecutor had argued that defendants who claimed mental illness "had a motive to absolve themselves of criminal liability." 37 P.3d 908, 946 (Okla. Crim. App. 2001). *See also* Terry Ganey, *Questions Raised about Hulshof's Performance in 1996 Murder Case*, COLUMBIA (MO.) DAILY TRIBUNE (June 7, 2009, 5:50 AM) (updated Jan. 23, 2013 1:13 PM),

failure to turn over documentary evidence,[71] on mischaracterization of expert testimony on mental state,[72] or on mischaracterization of the prevailing legal standard for an insanity defense.[73] These affirmances are common in cases where the insanity defense is proffered,[74] where the incompetency status is raised,[75] where extreme emotional disturbance is alleged,[76] and where mitigation is sought at the penalty phase[77]—in short, in

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http://www.columbiatribune.com/news/perspectives/questions-raised-about-hulshof-s-performance-in-murder-case/article_fef7d9d4-8fb6-5678-b4fd-5849b01a3bcc.html (last visited Sept. 8, 2016) (quoting judge on post-conviction relief application in a case of a factually innocent defendant who had been convicted of murder as saying, "We now know that none of what Mr. Hulshof [the district attorney] said in the final summary was true") (on file with the Washington and Lee Law Review).

71. *See, e.g.*, Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003) (stating that the state's failure to preserve evidence did not necessarily prejudice the trial); Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001) (refusing to grant a new trial on the basis that minimal effort by the defense counsel should have discovered the evidence that the prosecution withheld), *reh'g & suggestion for reh'g en banc denied* (6th Cir. 2001). *Coleman* was reversed based on a violation of the Supreme Court's effectiveness-of-counsel standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). On the application of *Strickland* in death penalty cases involving defendants with mental disabilities, see MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 9, at 123–38. On the question of violations of *Brady v. Maryland*, 373 U.S. 83 (1963), in general, see *infra* notes 127–128. An expose of the New Orleans District Attorney's office characterizes it as beset by "a culture of indifference about disclosing exculpatory evidence." Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, and the System that Protects Them*, HUFFPOST POLITICS (Aug. 1, 2013, 2:18 PM) (updated Aug. 5, 2013), http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html (last visited June 23, 2016) (on file with the Washington and Lee Law Review).

72. *See* People v. Smith, 107 P.3d 229, 240 (Cal. 2005) (distinguishing between instances in which improper expert testimony is prejudicial or not); People v. Blacksher, 259 P.3d 370, 399 (Cal. 2011) (ruling that, although the expert testimony was improperly admitted, the defendant was still required to establish prejudice).

73. *See* Fleenor v. Farley, 47 F. Supp. 2d 1021, 1055 (S.D. Ind. 1998) (holding that the misstatement given to the jury was not serious enough to invalidate due process).

74. *See generally* Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989).

75. *See generally* State v. Neyland, 12 N.E.3d 1112 (Ohio 2014).

76. *See generally* Bowling v. Commonwealth, 873 S.W.2d 175 (Ky. 1993).

77. *See generally* People v. Smithey, 978 P.2d 1171 (Cal. 1999); Berry v. Epps, No. 1:04CV328-D-D, 2006 WL 2865064 (N.D. Miss. Oct. 5, 2006); Lang v. Cullen, 725 F. Supp. 2d 925 (C.D. Cal. 2010). *Lang* was also reversed on a *Strickland* violation. *Id.* at 1087 ("As respects the bifurcated claim of ineffective

cases where a defendant's mental disability is raised. Although there are some instances of reversals,[78] in this cohort they are a distinct minority.[79] Courts simply say that the role of the reviewing court is "to act only as a kind of constitutional backstop to ensure that trial errors do not so infect the trial as to render it fundamentally unfair."[80] This behavior on the part of courts is judicial complicity at its worst.

The scandalous level of inadequacy of counsel[81] made available to this cohort of defendants is well known. As Stephen Bright has concluded, "[t]he death penalty will too often be punishment not for committing the worst crime, but for being assigned the worst lawyer."[82] Similarly, the *Harvard Law Review* has unequivocally charged: "The utter inadequacy of trial and appellate lawyers for capital defendants has been widely recognized as the single most spectacular failure in the

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assistance of counsel at the penalty phase, the court finds that trial counsel provided deficient performance at the penalty phase.").

78. For reversals based on the issue of adequacy of counsel, see Lang, 725 F. Supp. 2d at 942, *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001), and *Littlejohn v. Trammel*, 704 F.3d 817, 822 (10th Cir. 2013). For an intermediate appellate reversal on the misconduct issue, see *Gall v. Parker*, 231 F.3d 265, 314 (6th Cir. 2000), *superseded by statute on other grounds in Parker v. Matthews*, 132 S. Ct. 2148 (2012) (explaining that the prosecutor's comments were "peppered with the type of 'know-nothing appeals to ignorance' that deprive defendants of their right to a fair consideration of their insanity defense").

79. For other cases finding no error, see *Walker v. Gibson*, 228 F.3d 1217 (10th Cir. 2000), *cert. denied*, 533 U.S. 933 (2001) *abrogated by Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001), *Sneed v. Johnson*, No. 1:04CV 588, 2007 WL 709778 (N.D. Ohio Mar. 2, 2007), and *Hamilton v. Ayers*, 458 F. Supp. 2d 1075 (E.D. Cal. 2006).

80. Fleenor v. Farley, 47 F. Supp. 2d 1021, 1053 (S.D. Ind. 1998). *See also* Leslie A. Harris, *Putting a Hold on the Death Penalty*, 24 HUM. RTS. (Winter 1997) ("Congress has systematically dismantled the federal safeguards that serve as a constitutional backstop to state proceedings.").

81. *See* Michael L. Perlin, *The Executioner's Face Is Always Well-Hidden: The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 204 (1996) [hereinafter *The Executioner's Face Is Always Well-Hidden*] (stating that *Strickland v. Washington* established a "pallid, nearly-impossible-to-violate, adequacy standard," requiring simply that counsel's efforts be "reasonable" under the circumstances (citing Strickland v. Washington, 466 U.S. 668, 668 (1984))).

82. Stephen Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 695 (1990).

administration of capital punishment."[83] I have written about inadequacy in this context before and have concluded that it is truly a "farce and mockery" to perpetuate a system in which grossly unqualified lawyers are appointed to represent defendants facing the death penalty, especially in cases where defendants have mental disabilities.[84] It is essential that this paper be contextualized in that reality. It is important to add an additional confounding factor here, in the context of the "harmless error" cases.[85] This doctrine is at play in appellate matters in which there was no objection raised or error preserved at trial.[86] Such substandard counsel, simply put, fails to object to objectionable evidence and prosecutorial behavior, making the likelihood of reversal—always a slim possibility—even slimmer. Per Professor Sharon Dolovich, the case law reflects not just "serious incompetence but even *incapacitation* on the part of counsel."[87]

Since 1908, the ABA Canons of Professional Ethics has recognized that the prosecutor's duty to see that justice is done includes an obligation not to suppress facts capable of establishing the innocence of the accused.[88] In language that has been repeated countless times, "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."[89] Nonetheless, prosecutorial misconduct is the basis for over a fifth

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83. Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1923 (1994).

84. MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 9, at 135.

85. *See* United States v. Vonn, 535 U.S. 55, 62 (2002) (stating that the government has the opportunity to show that the deviation did not affect the defendant's substantial rights to the extent that the deviation requires reversal); *see also* Neder v. United States, 527 U.S. 1, 18 (1999) (asking whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error"); Fed. R. Crim. P. 52(a) ("[A]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

86. *See generally* (Judge) Harry Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167 (1995).

87. Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 436 (2004) (emphasis added).

88. ABA CANONS OF PROFESSIONAL ETHICS, Canon 5 (1908), *reprinted in* OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES WITH THE CANONS OF PROFESSIONAL ETHICS ANNOTATED AND THE CANONS OF JUDICIAL ETHICS ANNOTATED (American Bar Association 1957), at 2–3.

89. *Id.*

of all death penalty reversals,[90] and there is little disputing Professor Angela Davis's conclusion that "prosecutorial misconduct is widespread and unchecked."[91]

Scholars and critics have frequently focused on "prosecutorial misconduct . . . [and] the injustice of subjecting . . . persons with serious mental disorders to capital punishment" as essential elements of the "pervasive unfairness" in the modern implementation of the death penalty.[92] But what has mostly escaped attention is the way that prosecutorial misconduct festers in especially deadly ways in the trial of cases involving this cohort of defendants; in the words of Dr. Saby Ghoshray, "the deadly cocktail of racial disparity, inadequate counsel, and prosecutorial misconduct continues to interject lethal consequences for mentally incapacitated prisoners."[93]

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90. *See* Marshall J. Hartman & Stephen L. Richards, *The Illinois Death Penalty: What Went Wrong?*, 34 J. MARSHALL L. REV. 409, 423 (2001) (explaining that the other two major categories for reversals were judicial error and defense counsel error, at 50% and 19%, respectively); *see also* Susan S. Kuo & C.W. Taylor, *In Prosecutors We Trust: UK Lessons for Illinois Disclosure*, 38 LOY. U. CHI. L.J. 695, 704 n.63 (2007) (noting that the most common prosecutorial actions of misconduct involved suppressing mitigating or exonerating evidence).

91. ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 135 (2007). As Professor Davis has explained elsewhere,

> Defining the universe of prosecutorial misconduct is a difficult endeavor. Because it is so difficult to discover, much prosecutorial misconduct goes unchallenged, suggesting that the problem is much more widespread than the many reported cases of prosecutorial misconduct would indicate. As one editorial described the problem, 'It would be like trying to count drivers who speed; the problem is larger than the number of tickets would indicate.

Angela Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 278 (2007). For other discussions of prosecutorial misconduct, see generally Bresler, *supra* note 39, at 954; Kim Wherry Toryanski, *No Ordinary Party: Prosecutorial Ethics and Errors in Death Penalty Cases*, 54 FED. LAW. 45 (Jan. 2007).

92. Brent E. Newton, *A Case Study in Systemic Unfairness: The Texas Death Penalty, 1973–1994*, 1 TEX. F. ON C.L. & C.R. 1, 2–3 (1994); *see also* Shannon Heery, *If It's Constitutional, Then What's the Problem?: The Use of Judicial Override in Alabama Death Sentencing*, 34 WASH. U. J. L. & POL'Y 347, 381 (2010) (discussing imposition of the death penalty in Alabama). Appeals often focus on both issues. *See, e.g.*, Leigh B. Bienen, *Capital Punishment in Illinois in the Aftermath of the Ryan Commutations: Reforms, Economic Realities, and a New Saliency for Issues of Cost*, 100 J. CRIM. L. & CRIMINOLOGY 1301, 1352 n.207 (2010) (discussing People v. Ramsey, 942 N.E. 2d 1168 (Ill. 2010)).

93. Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards*

Professor Alafair Burke and others have raised the question of whether many cases of prosecutorial misconduct may be more attributable to cognitive bias[94] than intentional malfeasance,[95] but in this context, that attribution, while intellectually interesting, in no way minimizes the harm done by some prosecutors.[96]

Why should prosecutors reform their ways? There is often absolutely no accountability.[97] In some jurisdictions, convictions

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of Decency: The Supreme Court's Capital Jurisprudence Post-Roper, 45 J. CATH. LEGAL STUD. 561, 617 (2006).

94. Cognitive biases are heuristic cognitive-simplifying devices that distort our abilities to consider information rationally. *See generally* Michael L. Perlin, *"Wisdom Is Thrown into Jail": Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness,* 17 MICH. ST. U.J. MED. & L. 343, 365 n.127 (2013), and sources cited. The heuristic at play here is the *confirmation* bias through which we focus on information that confirms our preconceptions. *See generally* Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & CIV. RTS. L. REV. 1, 38–39 (2012) [hereinafter *Preventing Sex-Offender Recidivism*] (quoting Eden B. King, *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCHOL. PUB. POL'Y & L. 54, 58 (2011)). Cognitive bias can also lead prosecutors "to uphold their colleagues' (other prosecutors') decisions, as they would want those prosecutors to do for them." Pecker, *supra* note 33, at 1623 (citing Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 294 (2001)).

95. *See* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 492–98 (2009) (explaining reasons why prosecutors who are otherwise conscientious and ethical might withhold evidence); *see also* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006) [hereinafter *Loyalty to One's Convictions*] (noting how prosecutors have a "tendency to develop a fierce loyalty to a particular version of events"); Alafair Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594 (2006) (discussing tests that have shown the effect that cognitive bias has on test subjects); Ellen Yaroshefsky, *Keynote Address: Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 343, 348 (2010) (extrapolating on the necessity of zealous defense counsel to keep prosecutors from committing intentional or unintentional violations).

96. On the "strong temptations" that prosecutors face to "shirk" their ethical duties, see Bibas, *supra* note 46, at 1015, and see generally *Loyalty to One's Convictions*, *supra* note 95; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 138–48 (2004).

97. *See, e.g.*, Keenan et al., *supra* note 63, at 212–13 (explaining how the "harmless error" standard forces the defendant to not only prove prosecutorial

are rarely reversed on the basis of prosecutorial misconduct.[98] For those in jurisdictions where it is an elective office, convictions enhance re-electability.[99] Even if the misconduct is noticed, the defendant's conviction is still likely to stand. And there is no stigma to the miscreant prosecutor since he is virtually never mentioned by name in any subsequent appellate opinion.[100] Sanctions are nearly non-existent; by way of example, "a *Chicago Tribune* article found that not one prosecutor was convicted of a crime, disbarred, or publicly sanctioned in 381 murder cases where the conviction was reversed due to prosecutorial misconduct."[101] Although scholars have written frequently and persuasively about ethical breaches in such cases (and the need to monitor such breaches), their words are generally met with overwhelming indifference.[102]

This leads to a further inquiry: To what extent are prosecutors to blame for this state of affairs? I believe that at least four global charges can be leveled against members of the prosecutoriate with regard to the specific issue of the misuse and/or exploitation of evidence of mental disability in death penalty cases: (1) the misuse of evidence to play on the fears and emotions of jurors; (2) the use of baseless expert witness testimony; (3) the suppression of

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misconduct but also its prejudicial effect, if he wishes to get a verdict overturned).

98. *See, e.g.*, Michelle Ghetti & Paul Killebrew, *With Impunity: The Lack of Accountability of a Criminal Prosecutor*, 13 LOY. J. PUB. INT. L. 349, 353–54 (2012) (noting that, of 150 reported cases in Louisiana in which prosecutorial misconduct was found, there were only twenty in which convictions were reversed).

99. *See* Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 405 n.31 (2006) (reporting that "more than [ninety-five] percent of chief prosecutors on the state and local level are elected").

100. *See* Ghetti & Killebrew, *supra* note 98, at 357–58 (comparing criminal cases, where the prosecutor's name is omitted, to civil cases, where the lawyer's name is included and is available for public ridicule if he commits large errors).

101. Jeffrey L. Kirchmeier et al., *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1370 n.251 (2009) (citing Adam Liptak, *Prosecutor Becomes Prosecuted*, N.Y. TIMES, June 24, 2007, at 4).

102. For more on the lack of consequences for prosecutorial misconduct, see generally Bresler, *supra* note 39; Myrna S. Raeder, Symposium: *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413 (2007); Toryanski, *supra* note 91.

evidence; and (4) the improper use of antipsychotic medications at trial. This Article discusses these charges in subsequent sections.

V. "Some Prosecutors Consciously Misuse Mental Disability Evidence to Play on the Fears of, to Scare, and to Exploit the Ignorance of Jurors."[103]

As I have discussed in the context of the subset of cases in which an insanity defense is raised, prosecutors can lie with impunity as to the likely *denouement* of an insanity acquittal. Further, Stephen Bright has noted that, in the death penalty context, "most prosecutors and other public officials exploit the victims of crime and the death penalty for political gain by stirring up and pandering to fears of crime."[104] As I noted in an earlier publication, "Professor Evan Mandery has pointed out how prosecutors have systematically opposed legislation that would exclude persons with serious mental illness from being eligible for the death penalty."[105]

Jamie Fellner has carefully criticized the ways that prosecutors often "vigorously challenge the existence of mental retardation, minimize its significance, and suggest that although a capital defendant may 'technically' be considered retarded, he nonetheless has 'street smarts'—and hence should

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103. *Power and Greed and the Corruptible Seed*, *supra* note 13, at 9.

104. Stephen Bright, *The Death Penalty as the Answer to Crime: Costly, Counterproductive and Corrupting*, 36 SANTA CLARA L. REV. 1069, 1076 (1996).

105. MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 9, at 121 (citing Evan J. Mandery, *Executing the Insane, Retribution, and Temporal Justice*, 43 CRIM. L. BULL. 981, 981–82 n.7 (2007) (quoting Andrea Weigl, *Limit to Death Penalty Sought; Bill Would Protect the Mentally Ill*, NEWS & OBSERVER, May 13, 2007, at B1 (noting opposition by prosecutors to a North Carolina bill excluding the mentally ill from the reach of the state death penalty statute), and Mike Smith, *Bill Would Ban Executions of Mentally Ill*, THE ASSOCIATED PRESS, Jan. 23, 2001 (noting that the Indiana Prosecuting Attorneys' Council opposes an Indiana bill to exclude the mentally ill on grounds that jurors "should be able to hear evidence and decide the issue of mental illness during the sentencing phases of capital cases" and out of concern with the "ever expanding list of what constitutes mental illness"))). *See generally, What* Atkins *Could Mean*, *supra* note 7; Emily Randolph, *"Furiosis Solo Furore Punitur": Should Mentally Ill Capital Offenders Be Categorically Exempt from the Death Penalty?*, 3 MENT. HEALTH L. & POL'Y J. 578 (2014) (arguing that such offenders should be exempt from the death penalty).

receive the highest penalty."[106] In 2014, *Hall v. Florida*[107] held that Florida's "bright line" test of a seventy IQ as the "gold standard" for executability was unconstitutional as it created an "unacceptable risk" that persons with intellectual disabilities would be executed, and was contrary to all professional judgment.[108] In support of the majority's views, Justice Kennedy noted that neither Florida nor its supporting *amici* could "point to a single medical professional who supports this cutoff," and that Florida's rule "goes against unanimous professional consensus."[109] In dissent, Justice Alito dismissed this universal expert position as not reflecting the position of the American people but, "at best, represent[ing] the views of *a small professional elite.*"[110] As such, there is certainly some support in the U.S. Supreme Court for this position that Fellner ably and appropriately decries.[111]

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106. Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation*, 28 HUM. RTS. 9, 12 (2002).

107. 134 S. Ct. 1986 (2014).

108. *Id.* at 1990.

109. *Id.* at 2000.

110. *Id.* at 2005 (emphasis added). *See* MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (3d ed. 2016), § 17-4.2.3, at 17-117, 17-118 (critiquing Justice Alito's opinion in this context). In a recent article, Nancy Haydt, a veteran death penalty defense lawyer, notes drily that Justice Alito thus "suggests that the general public has experience and training in mental disorders." Nancy Haydt, *The DSM-5 and Criminal Defense: When Does a Diagnosis Make a Difference?*, 2015 UTAH L. REV. 847, 849 n.17 (2015).

111. Justice Alito's dissent was joined by Chief Justice Roberts, Justice Scalia and Justice Thomas. *Hall*, 134 S. Ct. at 2001; *see also generally* Christopher Slobogin, *Scientizing Culpability: The Implications of* Hall v. Florida *and the Possibility of a "Scientific Stare Decisis"*, 23 WM. & MARY BILL RTS. J. 415 (2014) (discussing *Hall*). The Supreme Court has since granted *certiorari* in *Moore v. Texas*, 136 S. Ct. 2407 (2016), on the question of "[w]hether it violates the Eighth Amendment and this Court's decisions in *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002), to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed." Question 1, Petition for Writ of Certiorari. Texas, in the case *Ex Parte* Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2007), had created a standard based on the characteristics of Lennie, a fictional character in John Steinbeck's novel *Of Mice and Men*. *See* Adam Liptak, *Supreme Court to Consider Legal Standard Drawn From 'Of Mice and Men,'* N.Y. TIMES (Aug. 22, 2016), http://www.nytimes.com/2016/08/23/us/politics/supreme-court-to-consider-legal-standard-drawn-from-of-mice-and-men.html?_r=0 (last visited Sept. 8, 2016) (reporting on how Texas developed a standard that does not reflect current medical advances in determining mental disabilities) (on file with the Washington

VI. Some Prosecutors Consciously Seek out Expert Witnesses Who Will Testify—with Total Certainty—to a Defendant's Alleged Future Dangerousness, Knowing that Such Testimony Is Baseless.

The worthless and baseless testimony of Dr. James Grigson on questions of future dangerousness, and how that testimony led inexorably to the improper executions of defendants with mental disabilities, is well known.[112] Dr. Grigson was decertified by the American Psychiatric Association and the Texas Society of Psychiatric Physicians in 1995,[113] but he continued to testify in death penalty proceedings for years after that.[114] A simple Westlaw search reveals *fifty-seven* such cases from 1995 until his death in 2004.[115] To the best of my knowledge, there have been no sanctions brought against any of the prosecutors who retained him to testify in this cohort of cases.

In this context, it is also essential to consider what Robert Sanger recently unearthed about expert testimony in cases assessing whether a defendant met the standards set down in *Atkins v. Virginia*.[116] In his comprehensive article, Sanger examines the ways that:

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and Lee Law Review).

112. *See* MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 9, at 19–28 (discussing Dr. Grigson). On the science attendant to risk assessments of future dangerousness, see Melissa Hamilton, *Back to the Future: The Influence of Criminal History on Risk Assessments*, 20 BERKELEY J. CRIM. L. 75 (2015). On risk assessment evaluations in general, see John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006).

113. *See* Gardner v. Johnson, 247 F.3d 551, 556 n.6 (5th Cir. 2001) (explaining the circumstances behind Dr. Grigson's loss of his license).

114. *See* Russell Dean Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 257 n.331 (2004) (discussing Sterling v. Cockrell, No. Civ.A. 3:01-CV-2280, 2003 WL 21488632, at *20 (N.D. Tex. Apr. 23, 2003) (noting that state offered to make Dr. Grigson available as forensic psychiatric expert)).

115. This result was derived from searching for "<("dr. james grigson") (james +2 grigson) & da(aft 1995 & bef 2004)>(ALLSTATES database)" on February 8, 2016; Dr. Grigson died in 2004.

116. *See generally* Robert Sanger, *IQ, Intelligence Tests, "Ethnic Adjustments" and* Atkins, 65 AM. U.L. REV. 87 (2015). In a recent article, I re-examine Sanger's masterful article in the particular context of prosecutorial misconduct. *See generally* Michael L. Perlin, *"Your Corrupt Ways Had Finally Made You Blind": Prosecutorial Misconduct and the Use of "Ethnic Adjustments" in Death Penalty Cases of Defendants with Intellectual Disabilities*, 65 AM. U.L. REV. 1437 (2016).

> Since *Atkins*, some prosecution experts have begun using so-called "ethnic adjustments" to artificially raise minority defendants' IQ scores, making defendants who would have been protected by *Atkins* and its progeny eligible for the death penalty. [This] Article details this practice, looking at several cases in which prosecutors successfully persuaded courts to accept testimony that adjusted a defendant's IQ score upward, based on his or her race, and considers arguments put forth by prosecutors for increasing minority defendants' IQ scores in this manner.[117]

Sanger concludes that this practice is "logically, clinically, and constitutionally unsound."[118] I agree and would add only that it is also, I believe, immoral.[119]

VII. Some Prosecutors Suppress Exculpatory Psychiatric Evidence.[120]

Over the years, there have been multiple examples of cases in which prosecutors have concealed psychiatric evidence that: (1) might have made trial impossible; (2) might have cast doubt on the veracity of state's witnesses; (3) created doubt as to the

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117. Sanger, *supra* note 116, at 87–88.

118. *Id.* at 146; *see also* Susan Unok Marks, *Courts' Elusive Search for the Meaning of Intellectual Disability for Evaluating* Atkins *Claims*, 26 U. FLA. J.L. & PUB. POL'Y 347, 379 (2015) ("In reviewing the cases that have raised *Atkins* claims, it is striking how many of the cases reported significantly troublesome conditions during the defendants' childhood.").

119. *See* Jennifer Bard, *Diagnosis Dangerous: Why State Licensing Boards Should Step in to Prevent Mental Health Practitioners from Speculating Beyond the Scope of Professional Standards*, 2015 UTAH L. REV. 929, 929 (suggesting that "state licensing boards be held responsible for assuring mental health professionals do not testify beyond the scope of medical support or evidence" in death penalty cases under such circumstances). On prosecutorial use of "corrupt science" more broadly, see Kevin C. McMunigal, *Prosecutors and Corrupt Science,* 36 HOFSTRA L. REV. 437 (2007).

120. In *Brady v. Maryland*, the Supreme Court ruled that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The goal advanced by imposing meaningful sanctions for *Brady* violations is "not merely to punish the individual prosecutor but to ensure that the government does not feel empowered to violate constitutional mandates with impunity." Cynthia Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence,* 100 J. CRIM. L. & CRIMINOLOGY 415, 442 (2010).

voluntariness of the state's witnesses; and (4) created doubt as to the voluntariness of the defendant's confession.[121]

VIII. Some Prosecutors Sanction the Improper Use of Antipsychotic Medications at Trial so as to Make Defendants Appear Less Remorseful and as to Make Them Less Capable of Consulting with Counsel.

In 1992, the Supreme Court held, in *Riggins v. Nevada,*[122] that the involuntary administration of antipsychotic medication to a competent defendant proffering an insanity defense violated his due process rights.[123] Although the Court did not set down a bright-line test articulating the state's burden in sustaining forced

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121. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C.L. REV. 693, 701 n.42 (1987) (discussing *Ashley v. Texas*, 319 F.2d 80 (5th Cir. 1963), which addressed suppression of evidence that both defendants were legally incompetent to stand trial); Powell v. Wiman, 287 F.2d 275, 278 n.17 (5th Cir. 1961) (addressing evidence of mental illness of key witness, including three different hospitalizations in mental institutions); Wallace v. State, 501 P.2d 1036, 1037 (Nev. 1972) (noting a psychiatric report revealing defendant's mental illness that was relevant both to voluntariness of confession and to degree of guilt). Sanctions in *any Brady* case are virtually nonexistent. *See* Rosen, *supra*, at 730 (analyzing five-year study of *Brady* violations and finding only nine disciplinary actions taken); *see also* Kuo & Taylor, *supra* note 90, at 704–05, (discussing research reported in Rosen). A 1999 investigation by the Chicago Tribune identified 381 homicide cases nationally in which *Brady* violations produced conviction reversals. Keenan et al., *supra* note 63, at 220 (discussing Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999), http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story (last visited June 14, 2016) (on file with the Washington and Lee Law Review)). In not a single case was a prosecutor publicly sanctioned. *Id.*

There are similar patterns in other nations as well. *See generally* Rosen, *supra* note 121, at 714 n.116; Michael L. Perlin, *Mental Disability, Factual Innocence and the Death Penalty*, *in* CONTEMPORARY TRENDS IN ASIAN CRIMINAL JUSTICE: PAVING THE WAY FOR THE FUTURE 21 (Korean Institute of Criminology ed. 2014).

On the possible existence of an Eighth Amendment right to discovery in capital cases as a means of dealing with *Brady* violations, see Sanjay K. Chhablani, *Beyond* Brady*: An Eighth Amendment Right to Discovery in Capital Cases*, 38 N.Y.U. REV. L. & SOC. CHANGE 423 (2014).

122. 504 U.S. 127 (1992). *See generally* PERLIN & CUCOLO, *supra* note 110, at § 8-7.2 (discussing this case).

123. *Riggins*, 504 U.S. at 137–38. An estimated two-thirds of prisoners and 40% of jail inmates with mental disabilities have reported taking prescription medication. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (2015).

drugging of a detainee at trial, the Court found that this burden would be met had the state demonstrated either (1) medical appropriateness, and, considering less intrusive alternatives, "essential for the sake of Riggins's own safety or the safety of others," or (2) a lack of less intrusive means by which to obtain an adjudication of the defendant's guilt or innocence.[124] The Court found that the use of drugs below may well have impaired the defendant's trial rights, as their side effects might have affected not just the defendant's outward appearance, but also "the content of his testimony . . . , his ability to follow the proceedings, or the substance of his communication with counsel."[125]

At trial, Riggins had been medicated with 800 milligrams of the drug Mellaril, considered to be within the "toxic range";[126] an expert in the case testified that that was sufficient dosage with which to "tranquilize an elephant."[127] In his concurrence, Justice Kennedy went further than the majority by focusing on the potential impact of these drugs' side effects on a defendant's fair trial rights, since the drugs could alter his demeanor in a way that "will prejudice his reactions and presentation in the courtroom," and render him "unable or unwilling" to assist counsel.[128] If the medication inhibits the defendant's capacity to react to the proceedings and to demonstrate "remorse or compassion," the prejudice suffered by the defendant can be especially acute at the sentencing stage.[129] Here, Justice Kennedy relied on the research of William Geimer and Jonathan Amsterdam, whose research demonstrated that assessment of remorse might be the dispositive factor to jurors in death penalty cases.[130]

Think of the range of issues that must be considered in such a case:

- At the Symposium at which a version of this Article was given, Lloyd Snook, Joseph Giarratano's trial lawyer, told

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124. *Riggins*, 504 U.S. at 135–36.

125. *Id.* at 137.

126. *Id.*

127. *Id.* at 143 (Kennedy, J., concurring).

128. *Id.* at 142.

129. *Id.* at 144.

130. *Id.* (citing William Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 51–53 (1988)).

how the excessive amounts of Thorazine given to the defendant left him "drooling."[131] Dora Klein has noted astutely that "jurors cannot reasonably be expected to disregard the days or perhaps weeks that they observed the defendant sitting before them sedated and drooling, or agitated and twitching."[132]

- In *Atkins*, the Supreme Court held that the demeanor of defendants with intellectual disabilities "may create an unwarranted impression of lack of remorse for their crimes."[133] In his concurrence in *Riggins*, Justice Kennedy focused on this issue extensively: "assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies."[134]
- Some eleven years after *Riggins,* the Supreme Court weighed the right to refuse treatment balance in cases involving an incompetent defendant, in *Sell v. United*

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131. Presentation by Lloyd Snook, Washington and Lee Law Review Symposium (Feb. 6, 2016).

132. Dora Klein, *Trial Rights and Psychotropic Drugs: The Case Against Administering Involuntary Medications to a Defendant During Trial*, 55 VAND. L. REV. 165, 207 (2002).

Whether or not a defendant "drools" has acquired totemic significance in these sorts of cases. In the trial of Andrew Goldstein for the murder of Kendra Webdale (after whom New York's outpatient commitment statute, "Kendra's Law," was named), jurors, who initially rejected Goldstein's insanity defense, "reported crediting testimony that Goldstein did not froth at the mouth or drool, and considered his lack of drooling significant to their responsibility determination." *See* Amanda Pustilnik, *Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness*, 96 J. CRIM. L. & CRIMINOLOGY 217, 248 (2005); *see also Life Is In Mirrors*, *supra* note 11, at 334–35 ("Jurors often expect people with mental retardation to be extremely low functioning and may not be expecting a quiet, mild-mannered individual. When the defendant fails to exhibit any stereotypical behaviors (such as drooling, giggling, smiling with a vacant appearance, rocking), jury members may think that the mental retardation defense is untrue or unwarranted."). For a case example in which the prosecutor—with impunity—mocked the defendant's mental illness claim in a death penalty case, see *Sheppard v. Bagley*, 657 F.3d 338 (6th Cir. 2011), *cert. denied sub nom. Sheppard v. Robinson*, 132 S. Ct. 2751 (2012); *see, e.g.*, Brief of Petitioner-Appellant at 30–64, *Sheppard v. Bagley*, No. 09-3472 (6th Cir. 2010), ECF No. 57; Reply Brief of Petitioner-Appellant, *Sheppard v. Bagley*, No. 09-3472 (6th Cir. 2010), ECF No. 72.

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

134. Riggins v. Nevada, 504 U.S. 127, 144 (1992).

> *States*,[135] and the Court stressed the need to inquire as to whether such drugs would interfere with the defendant's ability to aid his counsel in preparation of trial.[136] In a series of books and articles, I have written about the impact of *sanism* and *pretextuality*[137] on the way defendants with mental disabilities are treated in the criminal justice system.[138] An overmedicated defendant—appearing bored, apathetic, remorseless—is precisely the sort of defendant that jurors will more likely sentence to death.[139]

Thus, for almost twenty-five years, prosecutors have been on notice that the administration of such medications to defendants at their trials may violate due process. What has their track record been? A brief inquiry into relevant cases suggests that *Riggins* has been regularly ignored by prosecutors in a wide range of fact-settings and alleged crimes.[140]

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135. 539 U.S. 166 (2003).

136. *Id.* at 181; *see, e.g.*, John Hayes, Sell v. United States*: Is Competency Enough to Forcibly Medicate a Criminal Defendant*, 94 J. CRIM. L. & CRIMINOLOGY 657, 657 (2004); Tobias Schad, *Insane in the Membrane: Arguing Against the Forcible Medication of Mentally Ill Pre-Trial Defendants*, 23 J.L. & POL'Y 351, 354–58 (2014). On the use of alternatives to medication in this context, see Adam Dayton, United States v. Ruiz-Gaxiola*: When Criminal Defendants Say No to Drugs*, 7 B.Y.U.L. REV. 477, 489–91 (2012).

137. Sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry. *See, e.g.*, Michael L. Perlin, *On "Sanism"*, 46 SMU L. Rev. 373, 374–75 (1992) (providing this definition). Pretextuality refers to the way that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." Michael L. Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 5 (1999) (quoting in part Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 133 (1991)).

138. *See Preventing Sex-Offender Recidivism*, *supra* note 94, at 17–24.

139. *See Sanist Lives*, *supra* note 19, at 242 ("[T]he most mentally disabled persons (those regularly receiving doses of powerful antipsychotic medications) are treated the most harshly, and . . . jurors tend to *over*-impose the death penalty on severely mentally disabled defendants.").

140. Consider some of the relevant post-*Riggins* cases (not all of which involve the death penalty). *See, e.g.*, Commonwealth v. Gurney, 595 N.E.2d 320, 325 (Mass. 1992) (noting reversible error to bar defendant from introducing

IX. Some Prosecutors Seek the Imposition of the Death Penalty on Defendants Who Are, by Any Objective Standard, Incompetent to be Executed.

In *Panetti v. Quarterman,* the Supreme Court expanded the Eighth Amendment's prohibition against carrying out a death sentence upon a prisoner whose mental illness "obstruct[ed] a rational understanding of the State's reason for his execution."[141] The Court clarified that defendants must have the opportunity to submit adequate expert evidence to respond to evidence on competency "solicited by the state court" as part of the defendant's "constitutionally adequate opportunity to be heard."[142] In doing so, the Court expanded upon the test initially set out in 1986 in *Ford v. Wainwright* that had been interpreted to hold that competency-to-be-executed depends only on three findings: (1) that the prisoner is aware he committed the murders, (2) that he is aware he is going to be executed, and (3) that he is aware of the reasons the state has given for his execution.[143]

Although the *Panetti* Court does not state this directly, it was at least clear in the Fifth Circuit (the federal circuit that includes Texas, the state in which Panetti was convicted) that the *Ford* test was no test at all. Panetti's lawyers told this to the court in their petition for *certiorari*: "Two decades have passed since this Court decided *Ford*, and the Fifth Circuit has yet to find a *single* death row inmate incompetent to be executed. During this same period, the State of Texas has executed 360 people."[144] Again, how have

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evidence about impact of antipsychotic medication that he was taking at time of trial); *see also* People v. Posby, 574 N.W.2d 398, 399 (Mich. App. 1997), *vacated*, 459 Mich. 21 (1998), *reh'g denied*, 549 Mich. 1228 (1998) (noting denial of defense counsel's request to have defendant taken off antipsychotic medication for three days so that he could testify in unmedicated state deprived defendant of right to fair trial); State v. Odiaga, 871 P.2d 801, 805 (Idaho 1994), *cert. denied*, 513 U.S. 952 (1994), *superseded by statute* IDAHO CODE ANN. § 1-205 (West 2012), *as stated in* State v. Payne, 146 Idaho 548 (2008) (noting that denial of defendant's motion to terminate antipsychotic medication violated constitution). For a later case, see *United States v. Sampson*, 820 F. Supp .2d 202, 248 (D. Mass. 2011) (noting evidence relating to Sampson's appearance at trial can be factored into the cumulative prejudice analysis, relying on *Riggins*).

141. Panetti v. Quarterman, 551 U.S. 930, 957–58 (2007).

142. *Id.* at 952.

143. *Id.* at 956.

144. Petition for Writ of Certiorari, *Panetti*, No. 06-6407, 2006 WL 3880284

prosecutors behaved in the wake of *Panetti*?[145] Although the *Panetti* prosecutorial misconduct intersection has not been extensively explored, the case of *Cole v. Roper*[146] should make it clear that *Panetti* is in no way a panacea for the problems raised here.

X. The Outcomes

Prosecutors' associations have been globally indifferent to efforts to sanction those who violate the law and the spirit of justice in such cases.[147] A startling exception to this global indifference came in the form of a Supreme Court amicus brief filed by six former Tennessee prosecutors, who argued that the behavior of the trial prosecutor in the case of Abu-Ali Abdur'Rahman had crossed a line that had "taint[ed] all members of the Tennessee bar."[148] But this action by prosecutors is a lonely exception.[149]

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at *26.

145. *Panetti* has been cited favorably in a case involving egregious *Brady* violations. *See* Douglas v. Workman, 560 F.3d 1156, 1193 (10th Cir. 2009)

> The prosecutor's conduct at issue here, then, is akin to a fraud on the federal habeas courts; that is, the prosecutor took affirmative actions to conceal his tacit agreement with the state's key witness until it was too late, procedurally, for Mr. Douglas to use that undisclosed agreement successfully to challenge his capital conviction.

146. 783 F.3d 707, 711 (8th Cir. 2015) (concluding that the state's incorrect decision of due process claims did not result in an unreasonable application of *Panetti,* and that state court's failure to hold a more formal hearing regarding competency to be executed did not warrant habeas relief).

147. *See, e.g.*, Steve Weinberg, *Turning on Their Own: A Group of Former Prosecutors Cites a Colleague's Pattern of Misconduct*, CTR. FOR PUB. INTEGRITY (June 26, 2003, 12:00 AM), http://www.iwatchnews.org/2003/06/26/5522/turning-their-own (last updated June 18, 2016) (last visited Oct. 1, 2016)) [hereinafter *Turning on Their Own*] (noting a unique *amicus curiae* brief filed on behalf of a Tennessee death row inmate (on file with the Washington and Lee Law Review).

148. *Id.*

149. *See id.* (discussing the actions of these Tennessee prosecutors); *see also* Steve Weinberg, *Unbecoming Conduct: A Prosecutor in Nashville Is Accused of Manipulating Evidence to Send a Defendant to Death Row*, LEGAL AFFAIRS, Nov.–Dec. 2003, at 29 (discussing denial of *certiorari* in *Abdur'Rahman v. Bell*, 537 U.S. 88 (2002)). *See generally* Abdur'Rahman v. Bell, 999 F. Supp. 1073 (M.D. Tenn. 1998) (noting that prosecutor's misconduct included suppression and misrepresentation of evidence of defendant's major mental illness);.

Judicial sanction is rare as well.[150] In a study of 707 cases in which California courts explicitly found prosecutorial misconduct, the offending prosecutors were "almost never discipline[d]."[151] In his exhaustive study of cases involving prosecutorial misconduct in jury argument, Professor Bennett Gershman (a former prosecutor) was able to find only one decision in which such conduct resulted in discipline.[152] Another study of 318 cases involving homicide defendants who received new trials because of prosecutorial misconduct found that one prosecutor was fired (but was reinstated on appeal), another received a thirty day in-house suspension, and a third's license was suspended for thirty days for *other* misconduct in the case; not one of the 315 others received any kind of sanction from a state disciplinary agency.[153] Perhaps this should not be surprising as, remarkably, the legal profession has never addressed the unique ethical issues that arise in death penalty cases.[154]

Thoughtful critics have carefully crafted potentially ameliorative recommendations, but there has been neither a response from organized prosecutors' associations nor by the organized judiciary.[155] Consider this wide range of suggestions

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150. On why judges are "disincentivized" from reporting prosecutorial misconduct, see Keenan et al., *supra* note 63, at 210–11.

151. *Compare* Lara Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 399 n.12 (2011) (quoting Northern California Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009* (2010)), *with* Keenan et al., *supra* note 63, at 205 (asserting that the Supreme Court believes that "disciplinary procedures effectively deter prosecutorial misconduct").

152. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 445 (1992) (reporting the results of his study); *accord* Christopher Slobogin, *The Death Penalty in Florida*, 1 ELON L. REV. 17, 33 (2009) (noting that "in virtually none of the [Florida] cases in which prosecutors misbehaved were disciplinary measures taken" (footnote omitted)).

153. COYNE & ENZEROTH, *supra* note 47, at 553–54. Two were indicted and both indictments were dismissed pre-trial.

154. *See generally Prosecutorial Misconduct in Death Penalty Cases*, *supra* note 65, at 400.

155. On the contrary, a report done by the California District Attorneys' Association argues, vainly, "innocent prisoners are not being executed," and "claims of wrongful convictions are based on misleading, exaggerated data." *Compare* CA. DIST. ATTY'S ASSOC., PROSECUTORS' PERSPECTIVE ON CALIFORNIA'S DEATH PENALTY 27 (2003), http://www.cjlf.org/deathpenalty/DPPaper.pdf, *with* Paul C. Giannelli, *Impact of Post-Conviction DNA Testing on Forensic Science*, 35 NEW ENG. L. REV. 627, 627 (2001) ("When DNA evidence was first offered at trial,

made by Professor Jeffrey Kirchmeier and his colleagues, by Center Director for the ACLU of California Center for Advocacy & Policy Natasha Minsker, Professor Myrna Raeder, Professor H. Mitchell Caldwell, and students in the Yale Law School Prosecutorial Ethics and Accountability Project:

- prosecutor offices should reevaluate their training programs for new and long-time capital attorneys regarding ethics in capital cases and how to deal with pressures to achieve convictions and death sentences;
- such offices should responsibly evaluate their methods for internal sanctioning of lawyers who behave improperly in capital cases;
- courts, prosecutor offices, and ethics committees should together ensure that prosecutors who egregiously violate ethics rules in capital cases are not allowed to act as counsel in further capital cases;
- states should pass laws mandating that the death penalty may not be sought a second time against a defendant when a prosecutor previously committed egregious misconduct such as intentionally withholding exculpatory evidence;[156]
- the "harmless error" analysis should not be applied to evaluate misconduct in death penalty cases;
- prosecutors should not charge death for the purpose of securing a plea bargain to a lesser sentence;
- prosecutors should provide open-file discovery and scrupulously disclose to the defense any and all information that might be beneficial to the defense, either during the guilt or the penalty phase;
- prosecutors should not seek to mislead the jury about the legal requirements for finding in favor of death or about the legal consequences of their decision not to find for death;

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it was vigorously championed by most prosecutors. When the same evidence was offered by the defense, however, other prosecutors objected." (footnote omitted)).

156. *See* Kirchmeier et al., *supra* note 101, at 1382–84. On the issue of training, see *The Lone Miscreant*, *supra* note 14, at 727–28 (discussing self-regulation of prosecutors).

- prosecutors should refrain from public comments that could prejudice the defendant in a death penalty case;[157]
- prosecutorial offices should be required to adopt written policies governing the introduction of forensic and other expert testimony;
- prosecutors presenting specific expertise would be required to obtain training in such disciplines;
- prosecutorial offices should implement procedures through which one or more prosecutors with experience in forensic or social science evidence review the introduction of all evidence whose reliability has been questioned;[158]
- state bar associations must promulgate effective and enforceable rules defining the ethical obligations of prosecutors;[159] and
- states should create independent commissions for prosecutorial oversight.[160]

But again, there have been few actions voluntarily taken by prosecutors to implement any of these suggestions. In short, prosecutors have virtually carte blanche authority to misinform jurors, to play to irrational and sanist fears, and to employ unscrupulous experts. There are virtually no voices raised in opposition, and courts are largely compliant with this state of affairs.

XI. Therapeutic Jurisprudence[161]

157. *Prosecutorial Misconduct in Death Penalty Cases*, *supra* note 65, at 399–402.

158. Raeder, *supra* note 102, at 1450–51.

159. *See* Keenan et al., *supra* note 63, at 241–42 ("The ABA should begin a dialogue with states and the Department of Justice about expanding Rule 3.8 to more completely address the unique ethical challenges that face prosecutors . . . These responsibilities are not adequately addressed in the Model Rules . . . .").

160. *See generally* H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 98–101 (2013).

161. Portions of the following section are adapted from Michael L. Perlin, *"Yonder Stands Your Orphan with His Gun": The International Human Rights*

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ).[162] Therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.[163] It asks whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[164] The law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns,"[165] and inquiries into therapeutic

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and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes, 46 TEX. TECH L. REV. 301 (2013), and Michael L. Perlin & Alison J. Lynch, *"All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257 (2014). Further, it distills the work of the author over the past two decades, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993).

162. For works discussing this legal theory, see generally, e.g., DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008); PERLIN & CUCOLO, *supra* note 110, §§ 2-6, at 2-43–2-66. Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. *See* David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 27, 32–33 (1992) (using the term "therapeutic jurisprudence").

163. Michael L. Perlin, *"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 912 (2009) [hereinafter *His Brain Has Been Mismanaged*]; *see also,* Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence, in* DISPUTES AND DILEMMAS IN HEALTH LAW 91 (Ian Freckelton & Kate Peterson eds., 2006) (for a transnational perspective).

164. Michael L. Perlin, *"Everybody Is Making Love/Or Else Expecting Rain": Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481, 508–11 (2008); Michael L. Perlin, *"And My Best Friend, My Doctor, Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005) [hereinafter Perlin, *Best Friend*].

165. David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993). *See also, e.g.*, David Wexler, *Applying the Law Therapeutically*, 5 APPL. & PREVENT. PSYCHOL. 179, 184 (1996).

outcomes "does not mean that therapeutic concerns 'trump' civil rights and civil liberties."[166]

One of the central principles of TJ is a commitment to dignity.[167] Professor Amy Ronner describes the "three Vs": voice, validation, and voluntariness,[168] arguing:

> What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions. [169]

In a recent article about dignity and the civil commitment process, Professors Jonathan Simon and Stephen Rosenbaum embrace therapeutic jurisprudence as a modality of analysis, and focus specifically on this issue of voice: "When procedures give people an opportunity to exercise voice, their words are given respect, decisions are explained to them, their views taken into

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166. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Michael L. Perlin, *"Where the Winds Hit Heavy on the Borderline:" Mental Disability Law, Theory and Practice, Us and Them*, 31 LOYOLA L.A. L. REV. 775, 782 (1998).

167. BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005). On dignity in the sentencing process generally, see MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 9, at 214–15.

168. Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008). On the importance of "voice," see also Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 588 (2008).

169. Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002). *See generally* AMY D. RONNER, LAW, LITERATURE AND THERAPEUTIC JURISPRUDENCE (2010) (advocating the use of therapeutic jurisprudence to integrate psychology, mental health, and other related enterprises to enrich and shape the law).

account, and they substantively feel less coercion."[170] How does this "play out" in the context of what I am discussing in this paper?

Sadly, little has been written about the death penalty from a TJ perspective.[171] Bruce Winick has argued persuasively that TJ supports a policy that prohibits the execution of seriously mentally ill offenders as not adequately serving the goals of retribution and deterrence.[172] Also, Cynthia Adcock—a law professor who spent thirteen years representing death penalty defendants—listed those affected by the process: lawyers, prosecutors, experts, jurors, trial judges and court staff, family members, friends, prison employees, the governor, ministers, witnesses to the execution, and "finally, the inevitable scores who stand outside the prison gates and elsewhere in protest of the execution and others who just mourn the death of another prisoner killed by their government,"[173] and she concluded that there was evidence of "psychological devastation caused by the death penalty on those who the lawmakers do not intend to be the target of death penalty laws." [174] But there is so much more to consider.

Think of the issue of medicating incompetent death row prisoners so as to make them competent to be executed; this use of state-sanctioned psychiatry violates dignity and also delegitimizes the process involved, making that process anti-therapeutic not solely for those incompetent persons facing death, but for all

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170. Jonathan Simon & Stephen A. Rosenbaum, *Dignifying Madness: Rethinking Commitment Law in an Age of Mass Incarceration*, 70 U. MIAMI L. REV. 1, 51 (2015).

171. On the related question of the TJ implications of the death penalty for the families of victims, see Marilyn Peterson Armour & Mark S. Umbreit, *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison*, 96 MARQ. L. REV. 1 (2012). On TJ and the victims of crime in general, see Antony Pemberton & Sandra Reynaers, *The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements, Justice: An Introduction*, *in* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION 233 (Edna Erez et al. eds., 2011).

172. Bruce Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 854–58 (2009).

173. Cynthia F. Adcock, *The Collateral Anti-Therapeutic Effects of the Death Penalty*, 11 FLA. COASTAL L. REV. 289, 291–92 (2010).

174. *Id.* at 293. *See* David C. Yamada, *Therapeutic Jurisprudence and the Practice of Legal Scholarship*, 41 U. MEM. L. REV. 121, 138–39 (2010) (discussing Adcock's work, and noting that Adcock "reminds us of emotional consequences of law and legal systems that are all too easy to ignore").

subject to the same penalty.[175] Think of the ways that prosecutors play on the fears of and exploit the ignorance of jurors in these cases; these actions rob defendants of dignity and deny them a voice.[176] Similarly, prosecutors who call expert witnesses knowing that the "scientific bases" of the experts' testimony is baseless (perhaps, at this point in time, fraudulent) similarly invalidate the legitimacy of the proceedings in question.[177]

Think further of the issues related to adequacy of counsel. As stated flatly by Judge Juan Ramirez and Professor Amy Ronner, "the right to counsel is . . . the core of therapeutic jurisprudence."[178] "Any death penalty system that provides inadequate counsel and that, at least as a partial result of that inadequacy, fails to insure that mental disability evidence is adequately considered and contextualized by death penalty decision-makers, fails miserably from a therapeutic jurisprudence perspective."[179] If counsel in death penalty cases fails to meet constitutional minima, it strains credulity to argue that such a practice might comport with TJ principles. TJ is the perfect mechanism "to expose [the law's] pretextuality"[180] because this pretextuality is clear in the death penalty context.

In short, our entire capital punishment system mocks those principles of TJ that we must embrace if we are to have a coherent and legitimate criminal procedure system.

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175. I touch on this briefly in Michael L. Perlin, *"Good and Bad, I Defined These Terms, Quite Clear No Doubt Somehow": Neuroimaging and Competency to Be Executed After* Panetti, 28 BEHAV. SCI. & L. 621 (2010).

176. *See* James W. Gunson, Comment, *Prosecutorial Summation: Where Is the Line Between "Personal Opinion" and Proper Argument?*, 46 ME. L. REV. 241, 252 (1994) (observing that abusive comments by prosecutors' remarks are impermissible because they "engender . . . in the jury feelings of prejudice, fear, and loathing towards the defendant; remarks are also objectionable because they disturb the decorum of . . . the dignity of the prosecutorial office").

177. *See* MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 9, at 153 (calling on bar associations to "sanction prosecutors who continue to use such baseless, false, and potentially fatal testimony" as offered by witnesses such as Dr. Grigson).

178. Juan Ramirez Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville's Tribute to the Sixth Amendment*, 41 CAL. WESTERN L. REV. 103, 119 (2004).

179. *The Executioner's Face Is Always Well-Hidden*, *supra* note 81, at 235.

180. Michael L. Perlin, *"Things Have Changed": Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 544 (2003).

XII. Conclusion

The picture painted in this Article is fairly gloomy. I remain, however, an optimist and hope that one of the most egregious of cases, the *McCollum* case,[181] may signal a turn-around. There are still many who adhere to the magical thinking that authentically innocent individuals cannot be convicted, and certainly not in a death penalty case, when there are allegedly so many additional constitutional protections available to defendants—what used to be called (and the phrase sounds faintly atavistic now) super due process.[182]

Although the Innocence Project has done a heroic, almost other-worldly, job in putting the lie to this bromide,[183] their work has not yet significantly shifted public attitudes, especially in the death belt. But it is possible—again, I remain an optimist after all these years—that *McCollum* (about whom there was never any doubt as to guilt in *any judge's* mind; indeed, even Justice Blackmun assumed that he was)[184] will serve the same "shock the conscience" role that the Birmingham church bombings, the Triangle shirtwaist factory fire, and the Willowbrook exposures did in other areas of social policy.[185] At least, I hope that it does.

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181. *See supra* notes 48–59 and accompanying text (discussing the *McCollum* case).

182. *See* Margaret Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980) (using the term "super due process" and discussing its meaning). The California District Attorneys' Association adheres to this magical thinking. *See* CA. DIST. ATTY'S ASSOC., PROSECUTORS' PERSPECTIVE ON CALIFORNIA'S DEATH PENALTY 27 (2003), http://www.cjlf.org/deathpenalty/DPPaper.pdf (discussing prosecutors' thoughts and conclusions concerning California's death penalty).

183. *See, e.g.*, Maclin, *supra* note 31, at 230 n.68 (revealing that the vast amount of innocent prisoners are convicted after false confessions).

184. *See A Horrifying Miscarriage of Justice*, *supra* note 58 ("It was once the case that McCollum was held out to . . . the Supreme Court, as the very worst of the worst, deserving of death because of the heinousness of his crimes.").

185. *See* Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 66 n.10 (1991) (citing PHILLIP FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: THE POLITICS AND PRACTICES OF THE AMERICAN FEDERATION OF LABOR, 1900–09, at 21 (2d ed. 1973), which addressed the death of workers in the Triangle Shirtwaist factory fire of 1911 that led to the appointment of the New York State Factory Investigating Commission); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 33–34 (1985) (noting that the 1963 church bombing killed four youths in Birmingham, Alabama

Certainly, if we incorporate a mode of therapeutic jurisprudential analysis, that will make ameliorative change more likely. If TJ principles are applied to questions that revolve around adequacy of counsel, and the use of medication so as to make defendants "competent to be executed," then we will have taken major steps towards bringing about this change.[186] I have written often about how TJ is the best possible tool to "expose pretextuality and strip bare the law's sanist facade" in other areas of the law;[187] I believe that this is just as so in the context of the death penalty.[188] But until then, we are faced with the reality that prosecutors in the cohort of cases that I discuss here violate the law and the codes of ethics with impunity, and are often rewarded for it, which is a state of affairs about as contrary to the principles of TJ as one can imagine.

Although the legacy of the *Giarratano* case is still uncertain at best, I can certainly say with confidence that mental disability makes the whole notion of meaningful post-conviction review for the death penalty defendant utterly pretextual, especially in the cases of defendants who have no counsel and proceed *pro se.*[189]

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and served as the impetus for the passage of civil rights laws); *see also* Michael L. Perlin, *"Chimes of Freedom": International Human Rights and Institutional Mental Disability Law*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 423, 425 (2002) (discussing how conditions at Willowbrook State School were exposed to a stunned nation some thirty years ago by the then-fledgling investigative reporter Geraldo Rivera).

186. I do not believe that the death penalty can *ever* be a valid penalty. But, as long as a majority of the Supreme Court has seen fit to not return to the teachings of *Furman v. Georgia*, 408 U.S. 238 (1972) (declaring death penalty, as implemented, unconstitutional under the Eighth and Fourteenth Amendments), it is essential, I believe that the process be as "valid" as possible, using that word in the way used by Professor Ronner. *See supra* note 169 ("If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation.").

187. *See, e.g.*, Perlin, *Best Friend, supra* note 164, at 751 (applying TJ principles to right to refuse treatment law); *His Brain Has Been Mismanaged, supra* note 163, at 915 (applying those principles to insanity defense law); Michael L. Perlin & Meredith R. Schriver, *"You Might Have Drugs at Your Command": Reconsidering the Forced Drugging of Incompetent Pre-trial Detainees from the Perspectives of International Human Rights and Income Inequality*, 8 ALB. GOV'T L. REV. 381, 399 n.104 (2015) (applying those principles to the law governing the drugging of defendants incompetent to stand trial).

188. On the pretextual use or misuse of social science data in death penalty cases, see Perlin, *Sanist Lives, supra* note 19, at 263.

189. *See supra* note 136 and accompanying text (discussing the inability of

Again, I believe this all starts at the doorstep of the prosecutor and of the judge who closes his or her eyes and ears to the stench of prosecutorial misconduct. The narrator of *Changing of the Guards*, the Dylan song that inspired my title, says, in the stanza in question, "I stepped forth from the shadows."[190] Prosecutors who misbehave in death penalty cases involving defendants with mental disabilities and the judges who sanction that behavior have, traditionally, stayed in the "shadows." I hope this article, to some extent, helps bring them out.

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defendants with certain disabilities, or on certain medications, to meaningfully participate in their own defense).

190. Dylan, *supra* note 20.

NOTES