CAPITAL PUNISHMENT, MENTAL ILLNESS, AND INTELLECTUAL DISABILITY: THE FAILURE TO PROTECT INDIVIDUALS WITH MENTAL DISORDERS FACING EXECUTION

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Introduction

On September 25, 1992, just days after his family tried to have him committed to a psychiatric hospital, Kelsey Patterson shot two people, removed all of his clothing except for a pair of socks, then waited in the street for the police to arrest him.[2] Prosecutors charged him with capital murder. During his trial, Mr. Patterson frequently spoke of "remote control devices" and "implants" that controlled his behavior.[3] The prosecution conceded that he was severely mentally ill. Nevertheless, he was convicted and condemned to death.

The courts found him "competent" to be executed. On May 18, 2004, after he was escorted to the room where he was put to death, the warden asked him if he had a final statement. Reporters described Kelsey Patterson's response as follows:

> Statement to what? Statement to what? ... They're doing this to steal my money. My truth will always be my truth. No kin to you ... undertaker ... murderer. Go to hell. Get my money. Give me my rights. Give me my rights. Give me my life back.

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2 Janet Elliott, "Parole Panelists Who Urged Mercy Defer to Perry," *Houston Chronicle, May 20, 2004.*

3 Mike Tolson, "Plea Rejected, Mentally Ill Man Executed," *Houston Chronicle*, May 19, 2004.

He continued to mumble until the flow of lethal chemicals stopped his speech.[4]

The case of Kelsey Patterson illustrates all too well the gap between international norms and state practice regarding mentally disabled offenders facing the death penalty. At a formal level, there is little dispute that severely mentally ill or intellectually disabled offenders should be exempt from the application of the death penalty. The UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty ("Safeguards"),[5] adopted in 1984, provide that the death penalty shall not be carried out "on persons who have become insane." In subsequent resolutions, the Economic and Social Council, Human Rights Commission, and General Assembly have called on states to eliminate the death penalty for persons suffering from mental or intellectual disabilities.[6] Human rights treaty bodies and regional commissions have likewise found that states have an obligation not to execute individuals with intellectual disabilities or serious mental illnesses.[7] Commentators have argued that the prohibition on the execution of the insane is so well-established that it has attained the status of customary international law.[8]

States rarely proclaim their right to execute those who suffer from mental disorders.[9] Nevertheless, executions of mentally ill offenders have recently been documented in China, Pakistan, Brazil, and the United States—and there is every reason to believe that thousands

4 Texas Execution Information Center, Execution Report: Kelsey Patterson. 2004. Available from http://www.txexecutions.org/reports/322-Kelsey-Patterson.htm?page=2. (accessed 24 August 2016). An excellent summary of Mr. Patterson's case is provided in Amnesty International, *Another Texas Injustice: The Case of Kelsey Patterson, Mentally Ill Man Facing Execution*, March 18, 2004. Available from https://www.amnesty.org/en/documents/AMR51/047/2004/en/. (accessed 24 August 2016).

5 ECOSOC. 25 May 1984. *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*. Res 1984/50 [hereinafter "ECOSOC Safeguards"].

6 ECOSOC. *Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*. Res 1989/64 (24 May 1989); UNCHR Res 67 (2003) UN Doc E/CN.4/RES/2003/67; UNGA, *Moratorium on the Use of the Death Penalty*. Res. 69/186 (18 Dec. 2014).

7 See, e.g., *Francis v. Jamaica*, Communication No. 606/1994, U.N. Doc. CCPR/C/54/D/606/1994, Aug. 3, 1995; *Sahadath v. Trinidad and Tobago*, Communication No. 684/1996, CCPR/C/74/D/684/1996, Apr. 15, 2002; *Tamayo Arias v. United States, para. 165, Case 12.873, Report No. 44/14, Inter-American Commission on Human Rights, Jul. 17, 2014.*

8 William Schabas. 1993. "International Norms on Execution of the Insane and the Mentally Retarded." *Criminal Law Forum 4(1):95-117:pp. 114.*

9 In this essay, I use the terms "mental disorders" and "mental disabilities" to encompass individuals with mental illnesses as well as those with intellectual disabilities or cognitive disorders caused by brain injury.

of individuals with mental disorders remain on death row around the world.[10] Researchers in the United States have estimated that anywhere from 15% to 50% of individuals in US prisons are mentally ill.[11] In the United Kingdom, a recent study found that 25% of women and 15% of men in prison reported symptoms indicative of psychosis.[12] Little research has been conducted on the topic in the Global South, but available studies indicate large numbers of mentally ill offenders. For example, authors of a recent study of the prison population in nine Latin American countries concluded:

> The prevalence of psychiatric conditions among prisoners in Latin America is greatly underestimated, and because of the lack of awareness about mental illness among service providers in Latin American prisons, oftentimes these conditions go unrecognized or are not treated properly.[13]

The lack of data regarding prisoners with intellectual disabilities is even more striking. Little research has been conducted on the prevalence of intellectual disabilities among the prison population in the Global South. In many retentionist states, trained psychiatrists are scarce: Sierra Leone, for example, has only one psychiatrist to address the needs of a population traumatized by violent conflict.[14] The Privy Council for the Commonwealth Caribbean has repeatedly decried the shortage of qualified forensic psychiatrists to conduct

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10 In 2005, the UN Secretary General noted that "even though most responding countries state that the insane and the mentally retarded are shielded from the infliction of the death penalty and especially from execution, reports of mentally ill and retarded persons facing the death penalty have continued to emerge during the five years covered by the seventh survey." ECOSOC Report of the Secretary-General, *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, (2005) UN Doc E/2005/3.

11 *See Treatment Advocacy Center. How Many Individuals with Serious Mental Illness are in Jails and Prisons?, Available from* http://www.treatmentadvocacycenter.org/problem/consequences-of-non-treatment/2580 (accessed 24 August 2016); *Olga Khazan, "Most Prisoners Are Mentally Ill," The Atlantic,* April 7, 2015, available from http://www.theatlantic.com/health/archive/2015/04/more-than-half-of-prisoners-are-mentally-ill/389682/. (accessed 24 August 2016).

12 *See Prison Reform Trust*, *Mental Health Care in Prisons, available from* http://www.prisonreformtrust.org.uk/projectsresearch/mentalhealth (accessed 19 May 2016).

13 Santiago Almanzar, Craig L. Katz, and Bruce Harry. 2015. "Treatment of Mentally Ill Offenders in Nine Developing Latin American Countries." *J. American Academy of Psychiatry and the Law* 43:340–49.

14 Emmanuel Akyeampong, Allan G. Hill, and Arthur Kleinman, eds. 2015. *The Culture of Mental ILlness and Psychiatric Practice in Africa. Bloominton: Indiana University Press.* Mental health providers are scarce in other Sub-Saharan African countries, as well. *See Atalay Alem, Lars Jacobsson, and Charlotte Hanlon. 2008. "Community-based mental health care in Africa: mental health workers' views." World Psychiatry 7(1):54-57. Available from www.ncbi.nlm.nih.gov/pmc/articles/PMC2327237/. (accessed 16 February 2015).*

mental health assessments.[15] The identification and assessment of such prisoners is made more complicated by the lack of suitable test instruments normed on the local population. In Malawi, for example, researchers have yet to develop a test to assess intellectual functioning in the adult population. Of the more than 200 persons sentenced to death there in the past 20 years, not a single one was assessed prior to trial to determine if he was intellectually disabled. There is every reason to believe that such practices are the norm, rather than the exception, in other retentionist states.

Amnesty International estimates that there are currently 20,292 persons on death rows around the world.[16] Even if only 15% were mentally ill or intellectually disabled—an extraordinarily conservative estimate—that would amount to over 3,000 individuals who, according to international standards, should not be subjected to the death penalty.[17] Yet these prisoners remain largely undetected and ignored by both national criminal justice systems and the international community.

Definitions

Perhaps because it is a taboo subject in many countries, most lawyers, judges and juries have a poor understanding of mental health and how it relates to capital prosecutions. While individuals who are actively psychotic or profoundly intellectually disabled may be easily identifiable, most mentally disabled prisoners do not meet these criteria. The symptoms of mental illness change over time, and an individual who is seriously mentally ill may have periods when he or she functions quite normally. Similarly, most prisoners with intellectual disabilities cannot be identified through casual conversation. They may be able to work, marry, read and write, and keep abreast of current events. Moreover, many mentally ill and intellectually disabled persons have learned coping strategies to prevent others from detecting their impairments. These factors make it very difficult for

15 Report of the Secretary-General. 2005. *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty. UN Doc E/2005/3.*

16 Amnesty International. 2016. *Death Sentences and Executions 2015.* p. 7.

17 By all indications, the prevalence of mental illness among the death row population is even higher than among the prison population.

the layperson to successfully identify offenders with mental disorders that may be relevant to their culpability as well as their eligibility for capital punishment.

At the outset, it is important to understand the distinction between mental illness and intellectual disability. Intellectual disability is also known as mental retardation or learning disability. In more antiquated penal codes, it may be known as "idiocy." The World Health Organization defines intellectual disability as follows:

> A condition of arrested or incomplete development of the mind…especially characterized by impairment of skills manifested during the developmental period, skills which contribute to the overall level of intelligence, i.e. cognitive, language, motor, and social abilities.[18]

By contrast, mental illness is a medical condition that disrupts a person's thinking, feeling, mood, ability to relate to others and daily functioning. Serious mental illnesses include major depression, schizophrenia, bipolar disorder, obsessive-compulsive disorder, post-traumatic stress disorder and borderline personality disorder.

The Relevance of Mental Health in Death Penalty Cases

Mental health has a direct bearing on four separate—but related—questions that should be posed in every capital proceeding. The first relates to an offender's *sanity. The central tenet of this doctrine is that* an individual may not be held criminally liable if she or he could not appreciate the nature or wrongfulness of their actions at the time of the offense. For example, the Criminal Code of Ghana excludes from criminal responsibility individuals whose "idiocy, imbecility, or any mental derangement or disease affecting the mind" prevents them from understanding the nature or consequences of their actions.[19] Although states have adopted varying definitions of the state of mind necessary to exempt an individual from criminal liability, an

18 World Health Organization. 1996. *I CD-10 Guide for Mental Retardation. p. 1.*

19 Ghana Criminal Code of 1960, art. 27, amended by Act No. 646 of 2003.

overwhelming majority embrace this concept. Research conducted by Death Penalty Worldwide indicates that only one country—North Korea—has failed to recognize this principle.

The second question relates to an offender's *fitness to stand trial*. A prisoner who cannot understand the character or consequences of his legal proceedings is not "fit" or "competent" to stand trial. Under the Nigerian penal code, for example, a person found to be of "unsound mind" who is not "capable of making his defence" may be sent to a psychiatric hospital, and the trial will be postponed until the person regains "sound mind."[20] This is a fairly standard response to offenders who are deemed to mentally ill to participate in their own defense.

The third question asks whether an offender has a mental or intellectual disability that exempts him or her from capital punishment altogether. This is the inquiry mandated by the UN Safeguards and resolutions described above. Significantly, this question should be asked *before* any death sentence is imposed, as well as *after a*n offender is sentenced to death and before the execution is carried out. The fourth and final question asks whether the offender suffers from any mental impairment that *mitigates* responsibility for the offense, even where it does not operate as a categorical bar to execution. In many states that retain the death penalty, these last two questions are simply ignored, usually because criminal justice stakeholders are not adequately trained in concepts of mental health and their relevance to capital litigation.

A casual observer may wonder why a state cannot fulfill its international obligations by applying the time-honored legal definitions of "sanity" and "fitness" to stand trial described above. After all, don't these concepts identify the most mentally ill offenders? Moreover, if a prisoner is found to be insane, she or he cannot be convicted of any crime, let alone a capital crime—and a person who is unfit to stand trial is similarly protected so long as mental illness prevents them from participating in their defense. Clearly, these provisions protect a certain subset of floridly mentally ill persons.

20 Nigeria Criminal Procedure Act, arts. 222-224, Laws of the Federation of Nigeria Ed. 2000 Ch. 80, June 1, 1945, as updated to Dec. 31, 2000.

In practice, however, many mentally ill and intellectually disabled offenders fail to meet the criteria set forth in the definitions of "sanity" and "fitness." As an initial matter, the definitions of "insanity" in most penal codes do not encompass individuals with mild intellectual disabilities. Individuals with intellectual disabilities are not psychotic; they do not have delusional belief systems or experience hallucinations as a result of their disability. Individuals with intellectual disability may have trouble processing information, responding to social cues, and exercising good judgment—particularly under stress. But they can often understand the wrongfulness of their actions, and for this reason they may not meet the legal definition of "insanity." As Justice Stevens explained in the seminal case of *Atkins v. Virginia:*

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they 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. ... Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.[21]

In other words, someone who is intellectually disabled (and who does not also suffer from a mental illness) does not commit a crime in the grips of a delusion that she is slaying a demon. Rather, she may overreact in a situation that calls for a more moderated response. Or she may commit a crime at the suggestion of a more dominant (and intelligent) co-defendant. Definitions of "insanity," however, are not typically focused on such nuances.[22] In most countries, the definition of insanity is either limited to individuals with serious mental illnesses or is so vague that its application to individuals with intellectual disabilities is unclear.

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21 *Atkins (n 32) (citations omitted).*

22 There are notable exceptions: Jamaica's penal code provides that a person suffering from "abnormality of mind" due to "a condition of arrested or retarded development or any inherent cause induced by disease or injury" so as to "substantially impair his mental responsibility" cannot be convicted of murder. Jamaica Offences Against the Person Act, art. 5(1), 2005. This provision is sometimes called a "diminished capacity" defense.

Moreover, the definitions of "insanity" and "fitness" are limited in other ways. First, they are fixed to specific points in time. Definitions of "fitness to stand trial" focus exclusively on a prisoner's mental competency at the time of trial—and once a prisoner's mental health is restored, he or she may be prosecuted and condemned to death. Definitions of "insanity" do not exempt from punishment *all* persons who are mentally ill, but only those were unable to control their actions or understand the wrongfulness of their actions at the time of the offense. Yet, as noted above, the symptoms of mental illness wax and wane over time, and someone who appears "normal" two weeks after the commission of a crime may have been severely mentally ill at the time of the offense. For this reason, mentally ill individuals may fall through the cracks of the system unless they are evaluated by competent mental health professionals—who, as noted above, are in short supply in many countries.

China's legislation on this point is illustrative: it provides that no criminal responsibility attaches to a "mental patient" if he or she "causes harmful consequences at a time when he or she is unable to recognize or control his or her own conduct." However, a mental patient "whose mental illness is of an intermittent nature shall bear criminal responsibility if he commits a crime when he is in a normal mental state."[23] But what about persons who develop mental illnesses *after they are convicted and sentenced to death?* Prison conditions, combined with the enormous stress of living under a death sentence, often exacerbate pre-existing mental illnesses or cause previously healthy prisoners to develop mental disorders.[24] Yet research conducted by Death Penalty Worldwide indicates that only a handful of retentionist states have adopted legislative provisions designed to prevent the execution of prisoners who have become mentally ill while awaiting execution.[25]

23 Criminal Law of the People's Republic of China (as amended to 25 February 2011) art. 18.

24 UNSG Report 2009 (n 41), para. 91 ("It is not uncommon for a person to become insane subsequent to conviction and sentence of death, and in such cases execution is forbidden by the third safeguard.").

25 These countries include Algeria, Antigua and Barbuda, Cuba, Ethiopia, Guatemala, Japan, Jordan, Syria, Tajikistan, and Thailand. This review was conducted by searching the database maintained by Cornell Law School's *Death Penalty Worldwide*, which tracks legislation in 88 retentionist states and territories, including legislation regarding the application of the death penalty to individuals with mental or intellectual disabilities. See *Death Penalty Worldwide*, available from www.deathpenaltyworldwide.org. (accessed 24 August 2016).

Some offenders suffer from less serious mental impairments and may not be fully exempt from capital punishment. For this group, the fourth question noted above—namely, whether the offender suffers from any mental impairment that *mitigates* responsibility for the offense—must be explored prior to sentencing. A person with a brain injury, for example, may be emotionally volatile and less able to exercise impulse control. A person with very low intelligence may have difficulty processing information and responding appropriately in times of stress, even though he or she does not meet the definition of intellectual disability. A person who has experienced great loss or the stress associated with privation, abuse, or community violence, may experience heightened impulsivity and greater susceptibility to drug and alcohol addiction. In these examples, the affected person may be more inclined to commit a crime because of a mental disorder, even when that disorder is not completely debilitating. Mental health as mitigation does not seek to excuse criminal behavior, but to explain it—and by doing so, justify the imposition of a lesser sentence.

In countries with a mandatory death penalty, judges are prohibited from considering mental health as mitigating in the way I have just described. But even in countries where judges could, in theory, take such evidence into account, it is rarely presented—with a few notable exceptions. In the United States, legal defense teams frequently consult multiple mental health experts in preparing for the sentencing phase of trial. Experts in brain injury, intellectual disability, trauma, mental illness, fetal alcohol spectrum disorder, and other mental disorders evaluate prisoners, prepare detailed reports, and testify at trial. And in the Commonwealth Caribbean, courts have found that the defendant has the right to a mental health evaluation in all death penalty cases.[26] In many other countries, issues of mental health (apart from sanity and fitness) are almost never explored. This is attributable, in part, to a lack of resources and suitable experts. It is also the consequence of a lack of awareness and training regarding the relevance of mental health as a mitigating factor.

Addressing these challenges is no easy task. The first hurdle is reaching consensus on which mentally disabled prisoners should be completely

26 *Pipersburgh v. The Queen* UKPC 11 (2008); Inter-American Court of Human Rights, *Dacosta Cadogan v. Barbados*, 128 (10), Sep. 24, 2009, available from http://www.corteidh.or.cr/docs/casos/articulos/seriec_204_ing.pdf. (accessed 24 August 2016).

exempt from capital punishment. A decade ago, the UN Secretary-General recommended "clarifying the safeguards to be applied to the mentally ill as opposed to the insane or the mentally retarded," after noting that the application of these prohibitions was clouded by competing interpretations.[27] And in his 2009 report on the implementation of the third Safeguard, the Secretary General observed:

> The real difficulty with the safeguard lies not in its formal recognition but in its implementation. Whereas with juvenile offenders or pregnant women, the determination that a person belongs to the protected category is relatively straightforward, there is an enormous degree of subjectivity involved when assessing such concepts as insanity, limited mental competence and "any form of mental disorder". The expression "any form of mental disorder" probably applies to a large number of people sentenced to death.[28]

Nevertheless, the international community has done little to advance a dialogue about mental illness and intellectual disability. A useful starting point for this dialogue would be the recently revised United Nations Standard Minimum Rules for the Treatment of Prisoners ("Mandela Rules"). Rule 39.3 provides:

> Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner's mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act underlying the disciplinary charge. Prison administrations shall not sanction any conduct of a prisoner that is considered to be the direct result of his or her mental illness or intellectual disability.

Rule 39 recognizes that mental disorders must be considered as a mitigating factor ("how a prisoner's mental illness or developmental disability may have *contributed* to his or her conduct"*)* and as a justification for imposing no penalty at all ("*Prison administrations shall*

27 UNSG Report 2005, *supra*.

28 ECOSOC. 2009. *Report of the Secretary-General: Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*. UN Doc E/2010/10.

not sanction any conduct ... that is considered to be the direct result of his or her mental illness or intellectual disability"). And in order to make this assessment, prison administrations must be informed by the opinion of competent experts in the field.

Another challenge is resource constraints and lack of human capacity. But even in states with limited resources and few qualified psychiatrists, there are ways to enhance the protection of persons with mental disabilities. In Malawi, for example, where (to the author's knowledge) there are currently no qualified psychiatrists, a team of lawyers and mental health workers have created a questionnaire to screen the death row population for intellectual disabilities, brain damage and mental illness. The questionnaire is administered by volunteers, students, and paralegals, some of whom have received basic training on mental health. If the prisoner's responses indicate a possible mental disorder, the team alerts a mental health worker, who then interviews the prisoner. To assess intellectual functioning, mental health workers have begun to administer the Raven's Progressive Matrices, a nonverbal intelligence test that can be used with illiterate prisoners in a variety of cultural settings. Although the Raven's has not been normed on the Malawian population, it is nonetheless useful as a screening tool to identify prisoners who may be intellectually disabled.

Malawian paralegals have been trained to interview family members, friends, and neighbors of prisoners to identify risk factors for intellectual disability (such as a mother's use of alcohol while pregnant) and symptoms of delayed development as well as mental illness. This information is then provided to mental health workers, who can develop a more complete picture of the prisoner's mental health. In a number of recent death penalty cases, Malawian courts have considered mental disorders as mitigating factors justifying a lesser sentence.[29] For example, in the case of a mother convicted of poisoning her two children and trying (but failing) to kill herself, the High Court observed that the "homicide was committed in circumstances that strongly suggest that the convict was mentally imbalanced." The court noted that "[e]vidence of 'mental or emotional disturbance',

29 See, e.g., *R. v. Makolija, No. 12 of 2015 (Nyirenda, J), Mar. 4, 2015; R. v. N'dala, No. 42 of 2015 (Nyirenda, J), Aug. 8, 2015.*

even if it falls short of meeting the definition of insanity, may nonetheless make an offender less culpable on a murder charge and this should be considered in mitigation of sentence."[30]

The Malawi model could prove instructive for states facing similar resource constraints. At an international level, diplomats, scholars and jurists should devote greater attention and resources to the challenges of implementing international protections for persons with mental disabilities. At a minimum, states should be urged to adopt legislation or administrative regulations that mandate competent mental health evaluations of prisoners facing the death penalty, both before and after trial. International experts in the field of mental health should develop partnerships with their colleagues in the Global South to build capacity to conduct such evaluations. Through these efforts, we can build awareness of the prevalence of mental disabilities in the prison population, and reduce the risk that mentally disabled prisoners will be subjected to capital punishment.

30 *R. v. Makolija*, No. 12 of 2015 (Nyirenda, J), Mar. 4, 2015, p. 10.