

# Equal Justice Initiative

## Criminal Justice Issues and Prisoners' Rights

<https://eji.org/issues/death-penalty/>

## Policy Issue Resources

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The question we need to ask about the death penalty in America is not whether someone deserves to die for a crime. The question is whether we deserve to kill.

EJI won Anthony Ray Hinton's release after he spent 30 years on death row for a crime he did not commit. (Bernard Troncale)

The death penalty in America is a flawed, expensive policy, defined by bias and error. It targets the most vulnerable people in our society and corrupts the integrity of our criminal justice system. From police officers to family members of murder victims, Americans are recognizing that the death penalty does not make us safer.

EJI provides legal assistance to people on death row, many of whom are [innocent or wrongly convicted](#). We provide representation at trial, on appeal, and in postconviction proceedings to people facing execution. We have documented widespread [racial bias](#) in the administration of the death penalty and we challenge racial discrimination in jury selection, sentencing, and throughout the system. We protect [vulnerable people](#) facing execution, including people with mental illness who are uniquely at risk, and we produce reports about capital punishment and the ways in which [public safety](#) can be undermined by relying on this expensive and flawed punishment.

### Related Case

Mr. McMillian was wrongly convicted and sentenced to death for a crime he didn't commit.

190 people have been exonerated and released from death row since 1973.<sup>1</sup> Death Penalty Information Center, [Innocence Database](#).

1,548 people have been executed in the U.S. since 1973.<sup>2</sup> Death Penalty Information Center, [Execution Database](#).

For every eight people executed, one person on death row has been exonerated.

The same factors drive [wrongful convictions](#) in non-capital cases and death penalty cases, including:

In death penalty cases, perjury/false accusations and official misconduct are the leading causes of wrongful convictions.<sup>3</sup> Robert Dunham, [The Most Common Causes of Wrongful Death Penalty Convictions: Official Misconduct and Perjury or False Accusation](#) Death Penalty Information Center (May 31, 2017). A record 111 exonerations in 2018 involved witnesses who lied on the stand or falsely accused the defendant. In 50 of these cases, the defendant was falsely accused of a crime that never happened.<sup>4</sup> The National Registry of Exonerations, [Exonerations in 2018](#) (Apr. 9, 2019).

Misconduct by police or prosecutors (or both) was involved in 79% of homicide exonerations in 2018. Concealing evidence that casts doubt on the defendant's guilt is the most common type of misconduct, which includes police officers threatening witnesses, forensic analysts faking test results, and prosecutors presenting false testimony.<sup>5</sup> The National Registry of Exonerations, [Exonerations in 2018](#) (Apr. 9, 2019).

Official misconduct is more common in death penalty cases, especially if the defendant is Black. Data shows that 87% of Black exonerees who were sentenced to death were victims of official misconduct, compared to 67% of white death row exonerees.<sup>6</sup> Robert Dunham, [The Most Common Causes of Wrongful Death Penalty Convictions: Official Misconduct and Perjury or False Accusation](#) Death Penalty Information Center (May 31, 2017).

A person doesn't have to be innocent to be wrongly sentenced to death. The intense pressure to obtain a death sentence and the political stakes for police, prosecutors, and even judges can cause serious legal errors that contribute to wrongful convictions and death sentences. In Alabama alone, over 160 death sentences have been invalidated by state and federal courts, resulting in conviction of a lesser offense or a lesser sentence on retrial.

### Related Case

Inadequate legal assistance, racial bias, and prosecutorial indifference to innocence make Mr. Hinton's case a textbook example of injustice.

The failure to provide adequate counsel to capital defendants and people sentenced to death is a defining feature of the American death penalty. Whether a defendant will be sentenced to death typically depends on the quality of his legal team more than any other factor.

Some lawyers provide outstanding representation to capital defendants. But few defendants facing capital charges can afford to hire an attorney, so they are appointed lawyers who are frequently overworked, underpaid, and inexperienced in trying death penalty cases.

Capital cases are especially complex, time-intensive, and financially draining. Lawyers representing indigent capital defendants often face enormous caseloads, caps on fees, and a critical lack of resources for investigation and expert assistance. Too often they fail to adequately investigate cases, call witnesses, and challenge forensic evidence.<sup>7</sup> Stephen B. Bright, [Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer](#), 103 Yale Law Journal 1835, 1835, 1843 (1994). Capital defense lawyers have slept through parts of trial, shown up in court intoxicated, or done no work to prepare for sentencing.<sup>8</sup> R. Rosie Gorn, [Adequate Representation: The Difference Between Life and Death](#), American Criminal Law Review (2018).

Few states provide enough funding for capital defense counsel, and most death penalty states don't require lawyers to meet the minimum training and experience guidelines set by the American Bar Association.<sup>9</sup> American Bar Association, [Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases](#) (2003).

Inadequate defense lawyers contribute to wrongful convictions and death sentences, and by failing to object at trial, they make it harder to correct errors on appeal. After that first appeal, there's no right to counsel. That leaves people sentenced to death with little hope for relief in postconviction proceedings, where they have to present new evidence and navigate complicated procedural rules.<sup>10</sup> ACLU, [Slamming the Courthouse Doors: Denial of Access to Justice and Remedy in America](#) (Dec. 2010).

## Related Report

The death penalty is a direct descendant of racial terror lynching.

The death penalty in America is a direct descendant of lynching. Racial terror lynchings gave way to executions in response to criticism that torturing and killing Black people for cheering audiences was undermining America's image and moral authority on the world stage.<sup>11</sup> Stephen B. Bright, [Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty](#) 35 Santa Clara Law Review 433, 439 (1995).

By 1915, court-ordered executions outpaced lynchings for the first time. Two-thirds of people executed in the 1930s were Black, and the trend continued. African Americans share of the South's population fell to just 22% by 1950, but 75% of people executed in the South were Black.<sup>12</sup> James W. Clarke, [Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South](#), 28 British Journal of Political Science 269, 287 (Apr. 1998).

In 1972, the Supreme Court struck down the death penalty because it looked too much like self-help, vigilante justice, and lynch law.<sup>13</sup> [Furman v. Georgia](#), 408 U.S. 238, 308 (Stewart, J., concurring). If any basis can be discerned for the selection of these few to be sentenced to die, the Court wrote in *Furman v. Georgia*, it is the constitutionally impermissible basis of race.

Southern lawmakers accused the Court of destroying our system of government and quickly passed new death penalty laws. There should be more hangings. Put more nooses on the gallows, proponents of Georgia's new law insisted. It wouldn't be too bad to hang some on the court house square, and let those who would plunder and destroy see.<sup>14</sup> David Garland, [Peculiar Institution: America's Death Penalty in an Age of Abolition](#) 232, 247-48 (2010). The Supreme Court upheld Georgia's new death penalty statute in 1976,<sup>15</sup> [Gregg v. Georgia](#), 428 U.S. 153, 184 (1976). and racial bias in the death penalty persisted.

A decade later, the Court considered statistical evidence presented in *McCleskey v. Kemp* showing that Georgia defendants were more than four times as likely to be sentenced to death if the murder victim was white than if the victim was Black. The Court accepted the data was accurate, but it refused to reverse the death sentence because it concluded that racial bias in sentencing is an inevitable part of our criminal justice system.<sup>16</sup> [McCleskey v. Kemp](#), 481 U.S. 279, 312 (1987).

African Americans make up 41% of people on death row and 34% of those executed,<sup>17</sup> Death Penalty Information Center, [Race and the Death Penalty by the Numbers](#), but only 13% of the population is Black.<sup>18</sup> U.S. Census Bureau, [QuickFacts](#) (July 1, 2018).

More than 8 in 10 lynchings between 1889 and 1918 and legal executions since 1976 have occurred in the South.<sup>19</sup> EJI, [Lynching in America](#); Death Penalty Information Center, [Executions by State and Region Since 1976](#).

75% of executions for murder were in cases with white victims.<sup>20</sup> Death Penalty Information Center, [Race](#).

Race still influences who is sentenced to death and executed in America today. The data in Georgia has actually gotten worse: people convicted of killing white victims are 17 times more likely to be executed than those convicted of killing Black victims.<sup>21</sup> Death Penalty Information Center, [Study Finds Staggering Race-of-Victim Disparities in Georgia Executions and that the Death-Penalty Appeals Process Makes Them Worse](#) (Sept. 18, 2019).

## Related Report

Nearly 150 years after Congress passed the Civil Rights Act of 1875 to eliminate racial discrimination in jury selection, people of color continue to be excluded from jury service because of their race.

In capital trials, the accused is often the only person of color in the courtroom. Illegal racial discrimination in jury selection is

widespread, especially in the South and in capital cases thousands of Black people called for jury service have been illegally excluded from juries.

Southern lawmakers today invoke states rights to defeat anti-discrimination bills just like they did to block federal anti-lynching laws. And regional data demonstrates that the modern death penalty in America mirrors the racial violence of the past.<sup>22</sup> Stephen B. Bright, [Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty](#) 35 Santa Clara Law Review 433, 439 (1995).

## Related Case

EJI won a ruling from the Supreme Court recognizing that people with dementia are protected from execution.

In 1976, the Supreme Court reinstated capital punishment so long as it is imposed only on people who deserve it. The Court has since barred the death penalty for certain groups of people who are not culpable enough to deserve execution.

At least 44 people with intellectual disability were executed before the Supreme Court banned such executions in 2002.<sup>23</sup> Death Penalty Information Center, [List of Defendants with Intellectual Disability Executed in the United States \(1976-2002\)](#)

366 people who were children at the time of their offense were executed before such executions were banned in 2005.<sup>24</sup> Victor L. Streib, [The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-February 28, 2005](#) (Oct. 7, 2005).

Mental health experts estimate at least 20% of people on death row today have a serious mental illness.<sup>25</sup> Mental Health America, [Position Statement 54: Death Penalty And People With Mental Illnesses](#) (June 14, 2016).

In 2002, the Court in *Atkins v. Virginia* barred the execution of people with intellectual disability because they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct and because their disabilities in areas of reasoning, judgment, and control of their impulses [can] jeopardize the reliability and fairness of capital proceedings.<sup>26</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

But because the Court left to the State[s] the task of developing appropriate ways to enforce the constitutional restriction, some states created narrow definitions that permit the execution of people who meet the clinical criteria for intellectual disability.<sup>27</sup> Death Penalty Information Center, [Continuing Issues: Determining Intellectual Disability After Atkins](#).

Three years after *Atkins*, the Court applied the same reasoning in *Roper v. Simmons* to bar the execution of children because juvenile offenders cannot with reliability be classified among the worst offenders.<sup>28</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.

When *Roper* was decided, 71 people were on death row for juvenile crimes. Two-thirds were people of color, and more than two-thirds of the victims were white.<sup>29</sup> Victor L. Streib, [The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-February 28, 2005](#) (Oct. 7, 2005).

## Related Article

Executing people with mental illness presents the same concerns about culpability and reliability that led the Court to bar the death penalty for children and people with intellectual disability. People who have a mental illness or disability that significantly impairs their cognitive or volitional functioning at the time of the offense should be exempted from capital punishment because they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.

People with mental illness are more vulnerable to police pressure, are less able to give meaningful assistance to their counsel, and are typically poor witnesses. People who have a mental illness that causes delusions are more likely to insist on representing themselves at trial; they are prone to outbursts in front of their juries and some are so heavily medicated that they appear to have no remorse.<sup>30</sup> American Civil Liberties Union, [Slamming the Courthouse Doors: Denial of Access to Justice and Remedy in America](#) (Dec. 2010).

There's a greater risk that people with mental illness will be executed without review of their convictions or sentences even though the law forbids executing people who are mentally incompetent. Nearly 10% of the people executed since 1976 have been so-called volunteers who gave up their appeals,<sup>31</sup> Death Penalty Information Center, [Execution Volunteers](#) (April 23, 2019). and over 75% of those who waive their appeals suffer from documented mental illness.<sup>32</sup> John H. Blume, [Killing the Willing: Volunteers, Suicide and Competency](#), 103 Michigan Law Review 939, 962 (2005).

Mental health experts estimate at least 20% of people on death row today have a serious mental illness.<sup>33</sup> Mental Health America, [Position Statement 54: Death Penalty And People With Mental Illnesses](#) (June 14, 2016). At least 10% of the people currently sentenced to death nationwide are military veterans, many of whom suffer from documented trauma disorders.<sup>34</sup> Richard C. Dieter, [Battle Scars: Military Veterans and the Death Penalty](#), Death Penalty Information Center (Nov. 2015).

EJI believes that executing people with mental illness is cruel and misguided. Rather than executing people who are themselves victims of trauma, violent injury, or disease as a symbol of society's moral outrage about violent crime, we should dedicate our resources to providing mental health care and support that would actually reduce violent crime in our communities.

## Related Resource

Over 250 conservative activists signed a statement calling for an end to capital punishment.

After more than three decades of research examining whether the threat of a death sentence deters people from committing aggravated murders, there is no reliable evidence that the death penalty deters murder or that it protects police. The National Research Council of the National Academies concluded that studies claiming the death penalty has a deterrent effect are fundamentally flawed.<sup>35</sup> National Research Council of the National Academies, [Deterrence and the Death Penalty](#) 2 (Daniel S. Nagin & John V. Pepper eds., 2012). Studies have shown that murder rates, including murders of police officers, are consistently higher in states that have the death penalty, while states that abolished the death penalty have the lowest rates of police officers killed in the line of duty.<sup>36</sup> Death Penalty Information Center, [Capital Punishment and Police Safety](#) (2017).

The likelihood of a death sentence or execution depends more on the county where the crime happened than the severity of the offense. Only 2% of the counties in the U.S. have been responsible for the majority of cases leading to executions since 1976. And only 2% of the counties are responsible for the majority of today's death row population and recent death sentences. But all state taxpayers have to bear the substantial financial costs of death penalty cases in the handful of counties that cling to this outdated and ineffective policy.<sup>37</sup> Death Penalty Information Center, [The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases At Enormous Costs to All](#) (Oct. 2013).

The death penalty is far more expensive than a system in which life imprisonment without parole is the maximum sentence. Sophisticated studies at the state level show that the death penalty costs taxpayers more than life without parole.<sup>38</sup> Death Penalty Information Center, [State Studies on Monetary Costs](#) (2017). Republicans leading a movement for abolition in some of the most conservative states in the country have condemned the death penalty as an expensive government program that is ineffective in deterring crime.<sup>39</sup> Reid Wilson, [Red States Move to End Death Penalty](#), The Hill (Feb. 4, 2019).

The death penalty draws attention away from effective public safety policies and distorts elections of judges and prosecutors by privileging tough on crime rhetoric and candidates. A nationwide survey of police chiefs put the death penalty last among their priorities for reducing violent crime below increasing the number of police officers, reducing drug abuse, and creating a better economy. Surveyed law enforcement officials said they did not believe the death penalty is a deterrent to murder, and they rated it as one of most inefficient uses of taxpayer dollars in fighting crime.<sup>40</sup> Death Penalty Information Center, [Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis](#) (Oct. 2009).

Use of the death penalty and public support for it are declining. New death sentences have remained near record lows since 2015 after peaking at more than 300 per year in the mid-90s. Executions have declined significantly over the past two decades.<sup>41</sup> Death Penalty Information Center, [The Death Penalty in 2018: Year End Report](#) (July 2019).

Eleven of the 23 states that have abolished the death penalty have done so [since 2004: New Jersey](#) (2007), New York (2007), [New Mexico](#) (2009), [Illinois](#) (2011), [Connecticut](#) (2012), [Maryland](#) (2013), [Delaware](#) (2016), [Washington](#) (2018), [New Hampshire](#) (2019), [Colorado](#) (2020), and [Virginia](#) (2021). In 2019, California joined Oregon (2011) and Pennsylvania (2015) in imposing a [moratorium](#) on executions.

Public support for the death penalty has been waning steadily a record low 49% of Americans said they supported the death penalty in 2016.<sup>42</sup> Death Penalty Information Center, [Public Support for the Death Penalty Drops Below 50% for First Time in 45 Years](#) (Sept. 30, 2016).

And the near-universal opposition to capital punishment among 2020 Democratic presidential candidates signifies a major shift from 1992, when Bill Clinton left the campaign trail to oversee an execution in Arkansas. Smart on crime policy solutions, including alternatives to the death penalty, are edging out the rhetoric of tough on crime even in very conservative states.<sup>43</sup> Gideon Resnick & Sam Stein, [The 2020 Democratic Field, Minus Joe Biden, Embraces a Death Penalty Moratorium](#) The Daily Beast (March 14, 2019).

Learn More

Facts about death sentences, executions, inadequate counsel, and judge override.

EJI has been documenting facts about Alabama's death penalty for more than 30 years. We have reported on the state's failure to provide effective lawyers to people facing the death penalty and on its unique and arbitrary practice of judge override. We provide information about death sentences and executions in Alabama including that the state consistently has one of the highest per capita execution rates in the nation.

EJI has been challenging the death penalty for more than 30 years. We represent people who have been sentenced to death and have won relief for over 130 people. We advocate across the globe and build support for abolition with projects like *Just Mercy*.

Alabama is an outlier, with the nation's highest death sentencing and execution rates.

EJI won an important victory when the Supreme Court recognized that people with dementia, like our client Vernon Madison, are protected from execution.

EJI's research shows that people of color continue to be excluded from jury service because of their race, especially in death penalty cases.

122 Commerce Street Montgomery, AL 36104 [\(334\) 269-1803 \[emailprotected\]](#)

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