

**IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT OF SEDGWICK COUNTY, KANSAS**

STATE OF KANSAS,)	
)	
)	
Plaintiff,)	Case No. 14 CR 3129
)	
v.)	
)	
CORNELL MCNEAL)	
)	
Defendant.)	
)	
)	

**EXHIBITS H THROUGH N TO
DEFENDANT'S PREHEARING BRIEF**

Exhibit H

Homicides, Capital Prosecutions, and Death Sentences in Kansas, 1994 to 2021

Frank R. Baumgartner¹
University of North Carolina at Chapel Hill
March 4, 2022

Introduction

In this report, I review statistical comparisons of homicides and capital prosecutions.

I use data on homicides from the Centers for Disease Control (CDC) and the Federal Bureau of Investigation (FBI) to assess their characteristics in terms of numbers over time, distribution across the counties of the state, and demographic characteristics of the offenders and victims. I then compare these with the 129 cases where capital charges have been filed in Kansas, the 75 cases where death notices were filed, and the 15 cases where a death sentence was imposed. This allows a comparison of rates of capital prosecution at three stages from filing charges to imposing a sentence of death. My study finds important disparities both with regards to the race and gender of the victims of the crime, and in the combined racial characteristics of the offender and victim of the crime. It further demonstrates a very low rate of usage of the death penalty, no statistical correlation at all between homicides and death sentences over time, and very little correlation across counties. I conclude with a discussion of the implications of these facts.

Kansas Death Sentences in the Modern Era

Kansas has imposed 15 death sentences in the period since the current death penalty law took effect in 1994. Table 1 lays out summary demographic factors associated with these cases. All of those sentenced to death were male; 11 were white and four were black; two have passed

¹ My qualifications are set forth in my report entitled Media Coverage of Sedgwick County Capital Prosecutions, submitted on February 4, 2022.

away while under sentence of death, four had their death sentences reversed on appeal, and nine remain on death row today. The 15 offenders were sentenced for crimes involving 37 victims.² These victims had the following demographic characteristics: 24 female and 13 male; 33 white, two black and two Hispanic; 20 white females, 13 white males, two black females, two Hispanic females, and no black or Hispanic males. Every offender but one (Scott Cheever) had at least one female victim, and 11 of the 15 offenders had at least one white female victim. Looking at the combined races and genders of the offenders and the victims, and remembering that all the offenders are male, we see ten cases involving a white offender with at least one white victim; three cases with a black offender and at least one white victim (of which two included a white female victim); one case with a black offender and two black female victims; and one case with a white offender and Hispanic victim. No cases of a white offender killing a black victim led to a sentence of death and no cases with a black male victim led to a sentence of death. Table 1 summarizes the demographics and dates associated with the 15 modern death sentences in Kansas.^{3 4}

² Note that Jonathan and Reginald Carr were each convicted of the same crime, involving 5 victims; these victims are counted twice in the present analysis. Including them only once leads to a total of 32 victims.

³ Note that in my media report, the victim of Douglas Belt was listed as a white female. In light of her Hispanic surname and the classification by the BIDS counsel, I have classified her here as a Hispanic female. This change only reinforces the point in my media study that homicides with white female victims generate greater news coverage; the Belt case generated 60 news stories (see Table 1, p. 14, of my media report), lower than the average of 77 stories for cases with white female victims, and much lower than the average of 124 stories with a death sentence, all of which (other than the Belt case,) had a white female victim.

⁴ The CDC, census, and police reports ask about Hispanic ethnicity separately from race, asking whether individuals are “White/Hispanic” or “White/Non-Hispanic.” Generally, the FBI and CDC data does not consistently record the Hispanic ethnicity category. In the Kansas murder data set of capitally charged cases, two female victims have Hispanic surnames, but only one of these victims was identified in the police reports as “White/Hispanic.” As noted below, because of the lack of reliable CDC homicide data by ethnicity I am not able to calculate reliable CDC or FBI percentage rates. For this reason, I excluded Hispanic victims from all analyses after Table 1. It is possible that there is additional discrimination against Hispanic victims or defendants not captured here.

Table 1. Death Sentences in Kansas since 1994

Name	County	Status	Sex	Race	Birth	Crime	Sentence	Exit	Victims
Michael Marsh	Sedgwick	Resentenced to Life with possibility of parole (Hard 40)	M	W	8/12/1975	6/17/1996	4/16/1998	4/3/2009	2WF
Gavin Scott	Sedgwick	Resentenced to Life with possibility of parole (Hard 40)	M	W	3/4/1978	9/13/1996	8/21/1998	3/24/2010	1WM; 1WF
Stanley Elms	Sedgwick	Resentenced to Life with possibility of parole (Hard 40)	M	W	8/19/1976	5/4/1998	2/10/2000	11/19/2004	1WF
Johnathan Daniel Carr	Sedgwick	Currently On Death Row	M	B	3/30/1980	12/11/2000	11/15/2002		3WM; 2WF
Reginald Dexter Carr	Sedgwick	Currently On Death Row	M	B	11/14/1977	12/11/2000	11/15/2002		3WM; 2WF
John Edward Robinson Sr.	Johnson	Currently On Death Row	M	W	12/27/1943	6/3/2000	1/21/2003		3WF
Douglas Stephen Belt	Sedgwick	Natural Death	M	W	11/19/1961	6/24/2002	11/17/2004	4/13/2016	1HF
Phillip Cheatham	Shawnee	Resentenced to Life with possibility of parole (Hard 25)	M	B	1/6/1973	12/13/2003	10/28/2005	3/20/2010	2BF
Sidney John Gleason	Barton	Currently On Death Row	M	B	4/22/1979	2/21/2004	8/28/2006		1WM; 1 HF
Scott Denver Cheever	Greenwood	Currently On Death Row	M	W	8/19/1981	1/19/2005	1/23/2008		1WM
Gary Wayne Kleypas	Crawford	Currently On Death Row	M	W	10/8/1955	3/30/1996	12/3/2008		1WF
Justin Eugene Thurber	Cowley	Currently On Death Row	M	W	3/14/1983	1/5/2007	3/20/2009		1WF
James Kraig Kahler	Osage	Currently On Death Row	M	W	1/15/1963	11/28/2009	10/11/2011		4WF
Glenn Cross Frazier	Johnson	Natural Death	M	W	11/23/1940	4/13/2014	11/10/2015	5/15/2021	2WM; 1WF
Kyle Trevor Flack	Franklin	Currently On Death Row	M	W	6/18/1985	4/20/2013	5/18/2016		2 WM; 2WF

Homicides

How do Kansas death sentences compare to homicides? We can use FBI statistics to note the general characteristics of homicides in Kansas. While Kansas reinstated the death penalty in 1994, it did not report homicide statistics to the FBI Supplemental Homicide Reports system during the years of 1994 through 2004.

In order to estimate whether the lack of reporting from 1994 through 2004 affects any conclusion, I also summarize homicide reports from the Centers for Disease Control (CDC), which uses death certificates for all US deaths to compile a list which includes the cause of death. Homicide is listed as a specific cause of death and this data is available for the period of 1959 through 2004. I have compiled a list of all Kansas homicides from the CDC reports from 1994 through 2004. Note that the CDC and FBI numbers differ in certain important ways. The CDC data relate to the state and county of residence of the decedent, where the FBI numbers refer to where the crime occurred. The CDC data have information about the victim but include no information about the offender. The CDC data captures slightly more cases than the FBI data, as the FBI data relate only to those homicides that are known to the police, whereas the CDC data are derived from death certificates, which are nearly universal. In spite of these differences, the two data sources tend to produce very similar numbers when aggregated on a yearly basis or by county (particularly for larger counties). In particular, as the following analysis demonstrates, the proportions of victims of a given demographic group tend to be very similar.

Table 2 shows the number of homicides across different demographic groups. Both CDC and FBI homicide numbers are reported, with the CDC numbers referring to the period of 1994 to 2004 and the FBI numbers relating to the period of 2005 to 2019. Table 2 also shows the numbers of death sentences, using the same information as in Table 1 above for white and black

victims. This allows the calculation of a rate of death sentencing per 100 homicides of each type, and these rates are presented in the final two columns, separately for the CDC and FBI comparisons.

Table 2. Kansas Homicides and Death Sentences Compared.

Label	CDC		FBI		Death Sentences		Rate per 100 (CDC)	Rate per 100 (FBI)
	N	%	N	%	N	%		
<i>Total by Victims</i>	1,572	100.0	2,137	100.0	37	100.0	2.35	1.73
By Victim Gender ⁵								
Male	1,145	72.8	1,577	73.8	13	35.1	1.14	0.82
Female	427	27.2	558	26.1	24	64.9	5.62	4.30
By Victim Race ⁶								
Black	643	41.9	739	37.0	2	5.4	0.31	0.27
White	892	58.1	1,260	63.0	33	89.2	3.70	2.62
By Victim Race and Gender ⁷								
Black Male	528	34.4	618	30.9	0	0.0	0.00	0.00
White Male	595	38.8	848	42.4	13	37.1	2.18	1.53
Black Female	115	7.5	121	6.1	2	5.7	1.74	1.65
White Female	297	19.3	412	20.6	20	57.1	6.73	4.85
<i>Total by Offenders</i>			2,014	100.0	15	100.0		0.74
By Offender Gender ⁸								
Male			1,535	87.9	15	100.0		0.98
Female			211	12.1	0	0.0		0.00
By Offender Race ⁹								
Black			675	40.4	4	26.7		0.59
White			996	59.6	11	73.3		1.10
By Offender-Victim Race Combinations ¹⁰								
White kills Black			103	6.5	0	0.0		0.00
Black kills Black			447	28.0	1	7.1		0.22
White kills White			842	52.8	10	71.4		1.19
Black kills White			202	12.7	3	21.4		1.49
Black male kills White female			66	4.1	2	14.3		3.03

Note: CDC data cover the period of 1994 through 2004. FBI data cover the period of 2005 through 2019. Homicide data not shown for Hispanics, as these are not consistently recorded in

⁵ N = 1,572 (CDC); 2,135 (FBI); and 37 (Death Sentences)

⁶ N = 1, 535 (CDC); 1,999 (FBI); and 35 (Death Sentences)

⁷ N = 1, 535 (CDC); 1,999 (FBI); and 35 (Death Sentences)

⁸ N = 1,746 (FBI) and 15 (Death Sentences)

⁹ N = 1,671 (FBI) and 15 (Death Sentences)

¹⁰ N = 1,594 (FBI) and 14 (Death Sentences). Douglas Belt's victim was a Hispanic female and is not included.

the FBI and CDC databases. Percentages by race, gender, and by offender-victim combination exclude those with missing information and therefore sum to 100.0 within each group. (See the footnotes to the table for the N's, which are generally close to the overall Ns, indicating small numbers of missing observations.) Rates are calculated as the number of death sentences per 100 homicides. CDC homicide data relate to the victim only, as the CDC collects no information about homicide offenders.

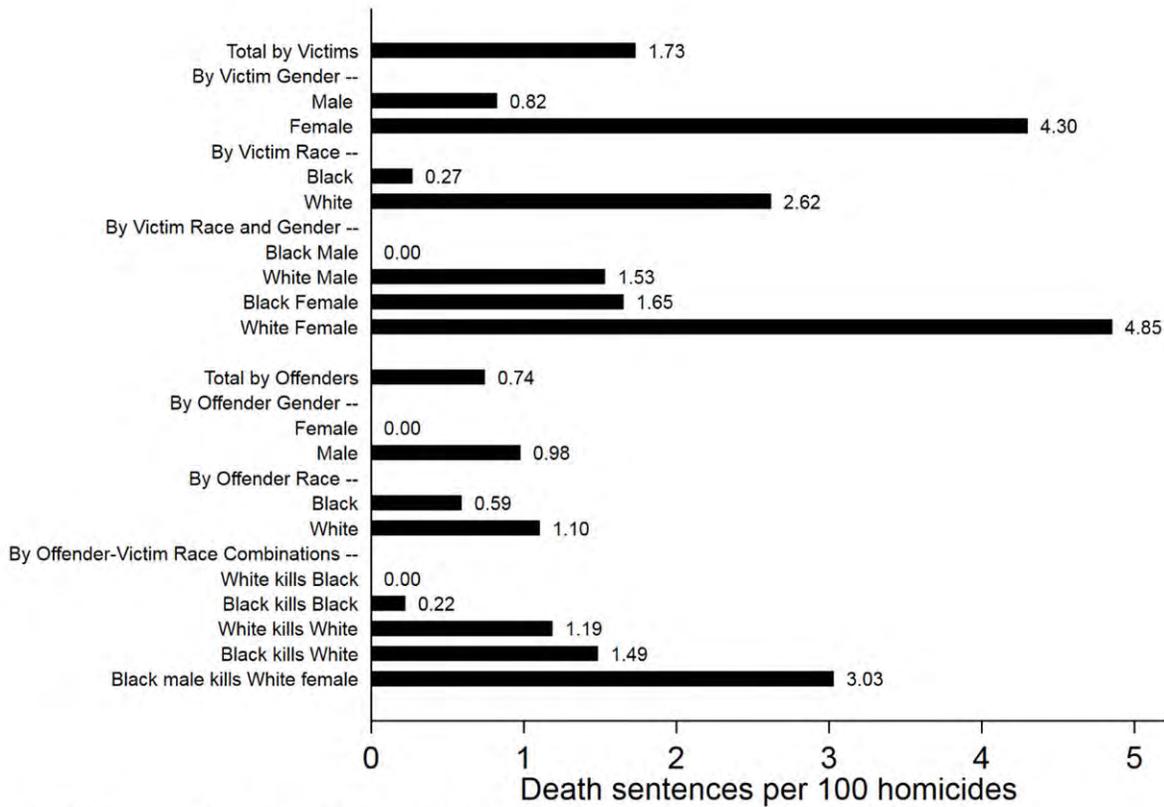
Although the FBI data is missing for some years of interest, the data above demonstrates that the demographic characteristics of the homicides in the missing years would likely have been similar to the years that the FBI reported, so we can rely on the FBI reports. I reach this conclusion by comparing the shares of homicides with different types of victims in the CDC and the FBI reports, knowing that these cover different time periods. We can see these comparisons by looking at the first few rows of Table 2. Looking first at the rows labeled “Male” and “Female,” the CDC reports 72.8 percent of all homicide victims in Kansas are male, and the FBI reports 73.9 percent. Looking at the rows indicating the race of the victims (which exclude a small number of victims of other races), the CDC reports 41.9 percent black victims, where the FBI reports 37.0 percent black. Black males are 34.4 percent of all victims in the CDC data, and 30.9 percent in the FBI reports. White females constitute 19.3 percent of all victims in the CDC dataset, and 20.6 percent in the FBI reports. Without reviewing each individual cell in the table, the point is that there is a high correspondence between the two data sources.

I focus here on the FBI dataset because it contains something the CDC dataset does not have: information about the offender. My focus will be on rates of death sentencing per 100 homicides. Recall that the FBI dataset covers only the period from 2005 to 2019, so it excludes homicides in the relevant years of 1994 to 2004, as well as 2020 and 2021, when data are not yet reported. Thus, the rate per 100 homicides that I report is likely to be higher than the actual rate that I would report if the FBI dataset covered all relevant years. The conclusions I will draw in this report, however, do not depend on this overall rate. Rather, the relevant inquiry is the

comparison of how the rates differ from one another. (That is, if the rate of death sentencing per 100 homicides with male victims is x , and the rate of death sentencing per 100 homicides with female victims is y , how do these two rates, x and y , compare?). I am therefore confident, given the close correspondence between the FBI statistics and the CDC statistics discussed above, that this is a valid methodology.

Figure 1 presents a graphical summary of the numbers shown in the last column of Table 2. That is, it presents a graphical illustration of the most important elements of Table 2. For the actual numbers underlying Figure 1, the reader can therefore refer to the cell entries in Table 2. (See the appendix, Figure A-1 for a similar figure using the CDC numbers, drawing from the CDC rates shown in Table 2.)

Figure 1. Death Sentences per 100 Homicides, by Demographics of Victim and Offender.



Note: Rates calculated using FBI homicide statistics, 2005 to 2019.

Figure 1 first shows that 1.73 percent of all homicide victims in Kansas were associated with a crime leading to a death sentence.¹¹ Looking across victim gender, this rate was 0.82 for male victims and 4.30 for female victims; clearly, very different rates of use. Looking next at the comparison by victim race, homicides with white victims have a death-sentencing rate of 2.62, which is almost 10 times that of homicides with black victims, 0.27. Although 618 black males were the victim of homicide according to the FBI in the period of 2005 to 2019, and an additional 528 were reported by the CDC in the period of 1994 through 2004, not a single homicide with a black male victim has led to a death sentence. By contrast, 1.43 percent of those with white male victims, 1.65 percent of those with black female victims, and 4.85 percent of those with white female victims have led to a death sentence.

Looking at offenders in the bottom half of Figure 1, the overall rate of death sentencing is 0.74. (There are fewer offenders than victims, which explains why the rate is higher when looking at victims as compared to when comparing by offenders.) This rate is zero for female homicide offenders, and 0.98 for male offenders; Table 2 shows that the FBI reports 211 female homicide offenders since 2005. Looking next at the race of the offenders, white offenders have a higher rate of death sentencing than black offenders, 1.10 compared to 0.59. This may be related to the fact that most homicides occur among the same racial group, and there has been no death sentence in Kansas for a crime involving a black male victim, as discussed in the previous paragraph. Looking at the offender-victim combinations shows that crimes with white offenders and black victims have a death sentencing rate of zero and crimes with black offenders and black victims have a rate of 0.22. White-on-white crimes, by contrast, have a rate of 1.19, and crimes

¹¹ Note that if we add the CDC homicides from the earlier period to the FBI homicides listed, the rate is much lower, approximately 0.4 percent. However, the main interest here is how the rates compare across different race- and gender-based categories.

with a black offender and a white victim have a rate of 1.49 percent. In the special and historically significant subset of cases where a black male offender has a white female victim, the rate is 3.03 percent. Table 2 and Figure 1 clearly show very substantial differences in the rates of use of the death penalty depending on the demographics of those involved, particularly the victims.

Capital Charging, Death Notices, and Death Sentences Compared

The data reported in the section above relate to death sentences actually imposed. The state has seen 129 cases charged with capital murder in the period since 1994, and prosecutors have filed death notices in 75 of these cases.¹² Therefore, we can perform a similar analysis to that above with regard to which types of cases lead to capital charges, death notices, and death sentences. This allows us to assess whether the differences in rates of use of the death penalty relate to the first stage (which cases are deemed capital-eligible); the second stage (whether a death notice is served); or the third stage assessed above (whether a death sentence is imposed). Table 3 shows data similar to Table 2 above, but shows the numbers of homicides as well as the numbers of cases charged capitally, where death notices were served, and death sentences imposed. It then shows the rates of each of these three outcomes per 100 homicides. Note that the homicide and death sentencing data shown here are identical to that reported in Table 2. Table 3 simply adds the other two stages of the death-sentencing process. For clarity of presentation, it omits the CDC homicide data. Also note that because the FBI homicide values

¹² Fifty-two capital-charged individuals saw no death notice, and decisions regarding whether to file a death notice are pending in two additional cases. In the following sections, I analyze the numbers of capital charges, death notices, and death sentences. Data for capital charges is complete, but two cases are missing with regard to whether the state plans to file a death notice, and these are categorized as no death notice having yet been filed. Similarly, six cases have a death notice but are pending, with no sentence yet having been imposed. They are treated as cases without a death sentence.

for Hispanics are not comparable to the capital charging information, these numbers are not reported.

Table 3. Homicides, Capital Charges, Death Notices, and Death Sentences in Kansas.

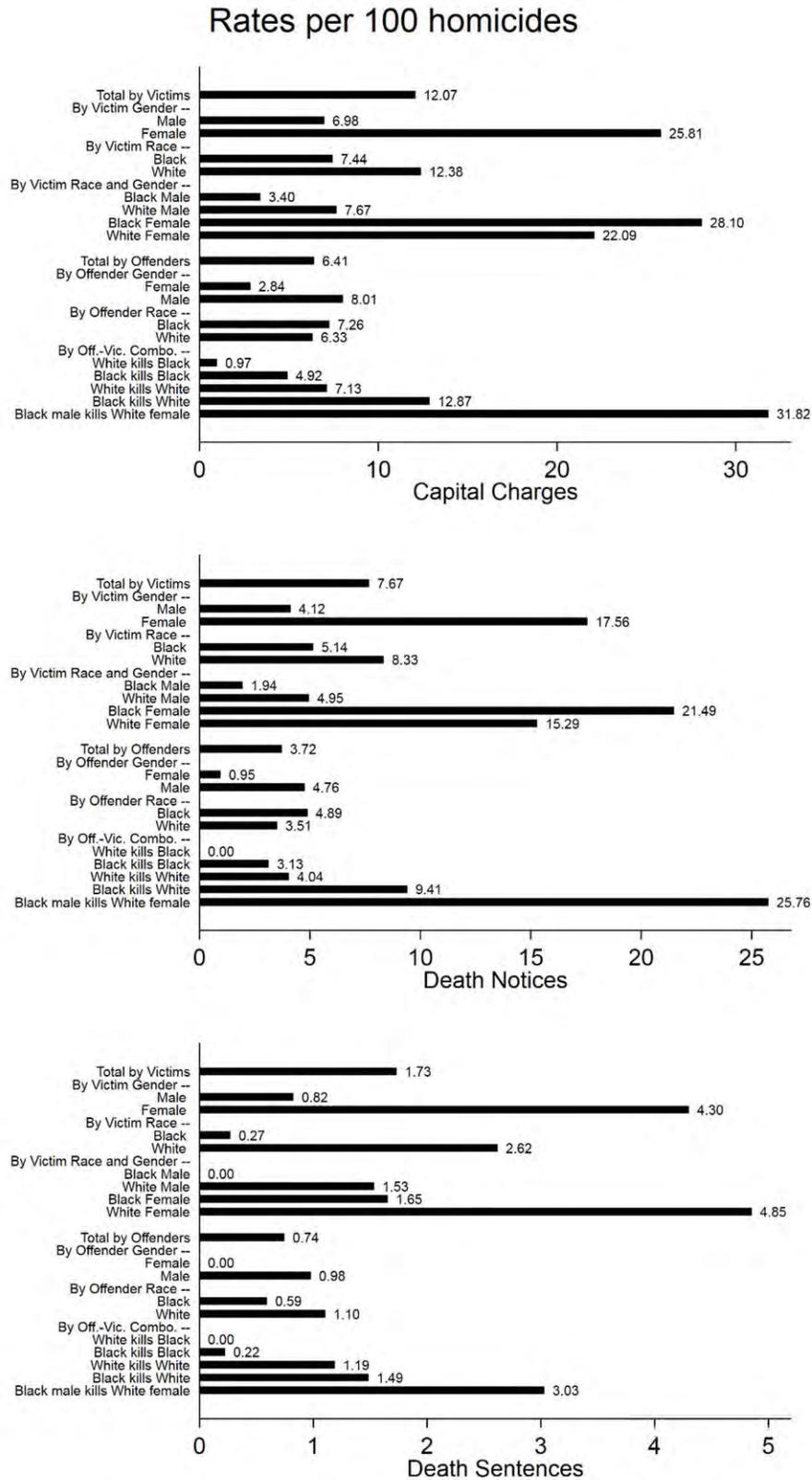
Label	Homicides	Capital Charges	Death Notices	Death Sentences	Rate per 100 Homicides		
					Charges	Notices	Sentences
<i>Total by Victims</i>	2,137	258	164	37	12.07	7.67	1.73
By Victim Gender							
Male	1,577	110	65	13	6.98	4.12	0.82
Female	558	144	98	24	25.81	17.56	4.30
By Victim Race							
Black	739	55	38	2	7.44	5.14	0.27
White	1,260	156	105	33	12.38	8.33	2.62
By Victim Race and Gender							
Black Male	618	21	12	0	3.40	1.94	-
White Male	848	65	42	13	7.67	4.95	1.53
Black Female	121	34	26	2	28.10	21.49	1.65
White Female	412	91	63	20	22.09	15.29	4.85
<hr/>							
<i>Total by Offenders</i>	2014	129	75	15	6.41	3.72	0.74
By Offender Gender							
Female	211	6	2	0	2.84	0.95	-
Male	1535	123	73	15	8.01	4.76	0.98
By Offender Race							
Black	675	49	33	4	7.26	4.89	0.59
White	996	63	35	11	6.33	3.51	1.10
By Offender-Victim Race Combinations							
White kills Black	103	1	0	0	0.97	-	-
Black kills Black	447	22	14	1	4.92	3.13	0.22
White kills White	842	60	34	10	7.13	4.04	1.19
Black kills White	202	26	19	3	12.87	9.41	1.49
Black male kills White female	66	21	17	2	31.82	25.76	3.03

Note: Homicides data from the FBI; see Table 2. As noted above, reliable homicides rate data is not available for Hispanic victims. In the capital murder data set there were 23 Hispanic male victims in cases with capital charges, 10 Hispanic male victims in case with death notices filed, and 0 Hispanic male victims in cases where the death penalty was imposed. There were 16 Hispanic female victims in cases with capital charges, 6 Hispanic female victims in cases with death notices filed, and 2 Hispanic female victims in cases where the death penalty was imposed. There were 15 Hispanic defendants charged with capital murder, and death notices were

filed in 6 cases with Hispanic defendants. There have been no death sentences in cases with Hispanic defendants. There were no Native American cases in the Kansas capital murder data set, and only two (2) Asian defendant cases. In cases with capital murder charges filed there were only three Asian victims, two Asian women and one Asian man. The three Asian victim cases stem from the same case, with an Asian-American offender; this case was death noticed and remains pending in district court.

Each of the categories laid out in the columns described in Table 3 is a subset of the previous one; in order for a capital charge to occur, there must first be a homicide; for a death notice to be served, there must first be a capital charge, and in order for a death sentence to be imposed, there must first be a death notice. Looking at rates per 100 victims, capital crimes constitute 12.07 percent of all homicides; death notices are served in 7.67 percent of the cases; and death sentences are imposed in 1.73 percent of the cases. Looking at the rates per offender, these numbers are 6.41, 3.72, and 0.74 percent, respectively. Table 3 then shows these rates for each of the categories shown, just as in Table 2. Figure 2 summarizes the information in Table 3.

Figure 2. Rates of Capital Charges, Death Notices, and Death Sentences.



Note: Rates calculated from Table 3.

Figure 2 makes clear that there are great similarities across the three stages of the capital prosecution process. Looking first at victim gender, crimes with female victims are much more likely to lead to capital charges, death notices, and death sentences: rounding to the nearest whole number, they show rates of 26, 18, and four percent respectively whereas crimes with male victims show rates of seven, four, and one percent. Similarly, crimes with white victims show higher rates at all three stages: 12, eight, and three, as compared to seven, five, and 0.3 when the victims are black. Crimes with male offenders show a similar pattern compared to those with female offenders: eight, five, and one percent of homicides with male offenders, compared to three, one, and zero percent of those with female offenders. By offender race, we see a more complicated story, but this could be because only four black and 11 white people have been sentenced to death. Two of the four black offenders had white victims, and two had white female victims. Such crimes among black offenders, are relatively rare. Of the 675 black offenders listed in Table 3, 447 (or 66 percent) had black victims. In this group, 0.2 percent received a death sentence (a single person). Whites constituted 30 percent of the victims of black offenders (202 cases), and three of these offenders were sentenced to death, a rate of 1.5 percent. Finally, within that last group, two of the offenders sentenced to death had a white female victim, though there were just 66 such victims state-wide (white female victims constitute 66 of 675 killed by black offenders). The death-sentencing rate there is three percent.

When we look at the race-gender combinations of the victims of homicide, Figure 2 shows very stark differences in all cases: crimes with male victims, especially black male victims, are much less likely to lead to capital charges, death notices, or death sentences. Crimes with female victims have much higher rates. Crimes with black female victims lead to high rates of capital charges and death notices, but not to death sentences. Crimes with white female

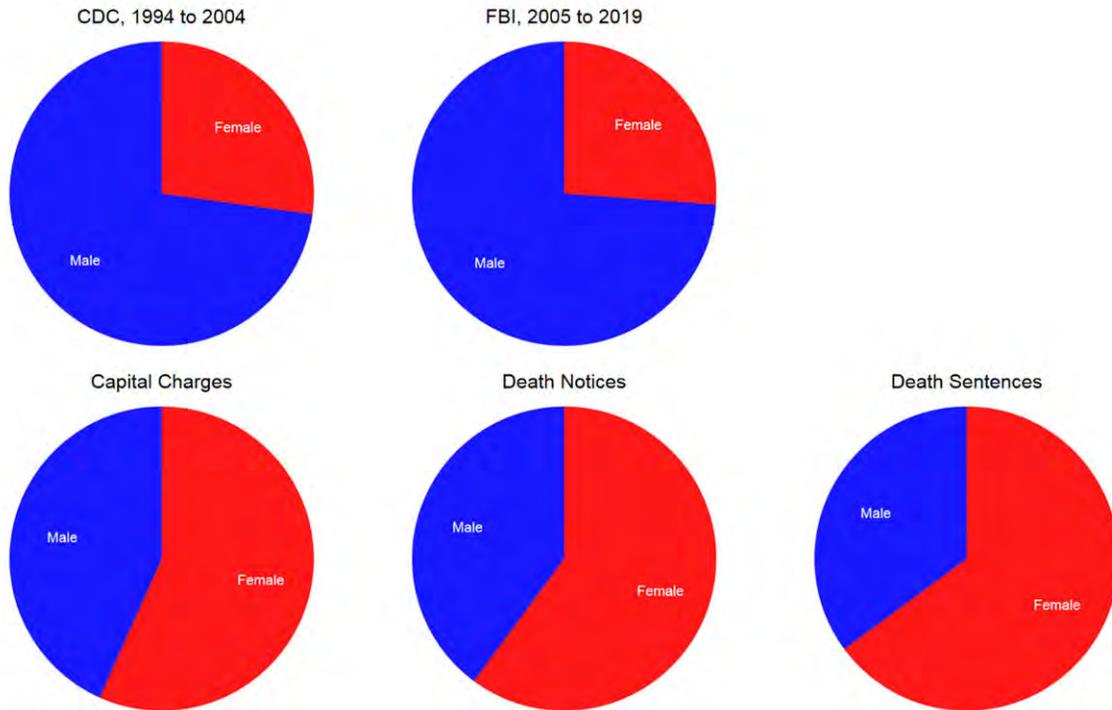
victims have rates of capital charging and death noticing similar or even slightly lower than those with black female victims. They are much more likely to lead to a death sentence, however. Note for example that Table 3 shows rates of 28.1 and 21.5 percent of charges and notices for black female victim cases compared to 22.1 and 15.3 percent for white female cases. Looking at the last stage, however, the imposition of a death sentence, just two cases had black female victims (a rate of 1.7 percent), whereas 20 cases had white female victims, 4.9 percent.

Finally, looking at the combined offender-victim races and genders, as shown in the bottom panels of Table 3 and Figure 2, a very consistent pattern emerges. Rounding to the nearest whole number, black offenders with black victims have rates of five percent capital charges, three percent death noticed, and 0.2 percent death sentenced, whereas black male offenders with white female victims have rates of 32, 26, and three percent, respectively. Note that Kansas homicide statistics show 103 cases where a white offender killed a black victim, but just one of these cases was deemed capital-eligible by prosecutors. The case was never death noticed, however, and the state has not condemned a single white offender for the crime of killing a black victim. The rate of capital eligibility in this category, just one out of 103 (0.97 percent), compares to 4.9 percent of cases with a black-black combination, 7.1 percent of white-white homicides, 12.8 percent of black-white cases, and 31.8 percent of black male–white female homicides.

We can visualize the patterns apparent in Table 3 in another way. The following section shows a series of simple pie charts. These charts convey visually the relative make-up of different groups of cases: homicides cases, capitally charged cases, cases with death notices, and cases with a death sentence. In each pie chart, the share of cases sums to 100 percent, so it illustrates the relative composition of each subset. Gender data is available for almost all cases,

and a small number of cases are excluded here that involve individuals of races other than white or black. So the race comparisons can be considered as the share, summing to 100 percent, of all cases with white or black offender and/or victims. This is the vast majority of cases in the state of Kansas. The data are the same as those reported in Table 3. Figure 3 shows victim gender.

Figure 3. Homicides and Capital Cases Compared: Victim Gender.

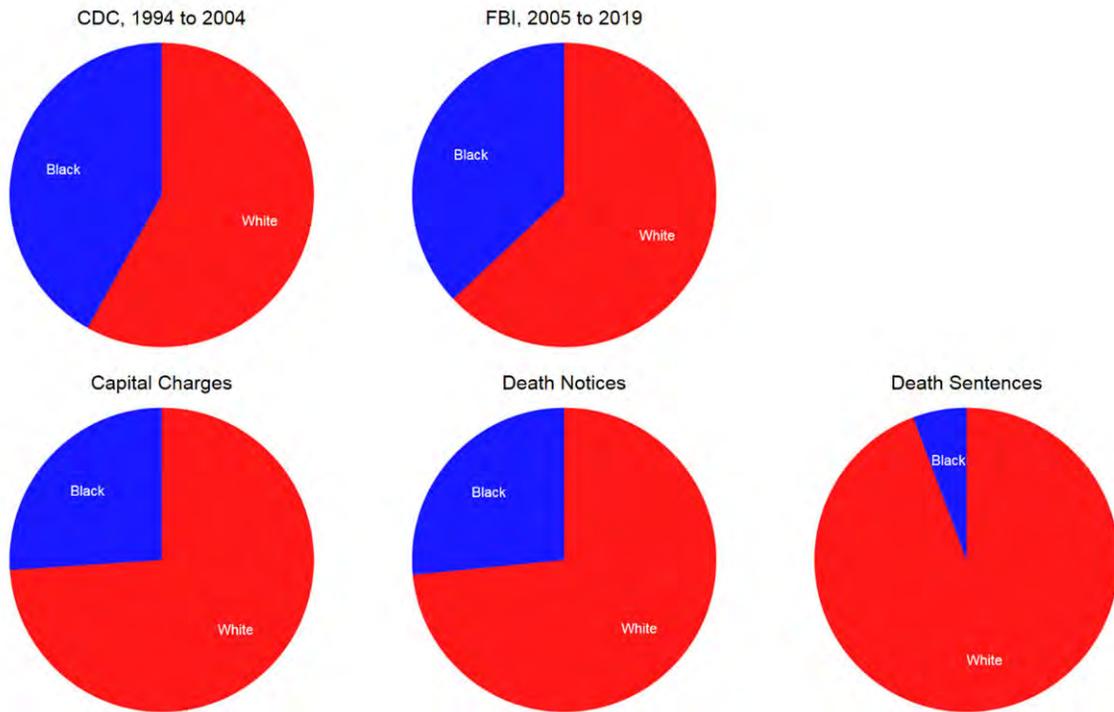


Source: Table 3.

The top row of Figure 3 shows that women constitute roughly a quarter of homicide victims in Kansas (CDC and FBI). In the bottom row, we see that they constitute a much larger share of cases with capital charges, death notices, or death sentences.

Figure 4 shows the equivalent comparison by race; note it includes only black and white victims, excluding victims of other races.

Figure 4. Homicides and Capital Cases Compared: Victim Race.

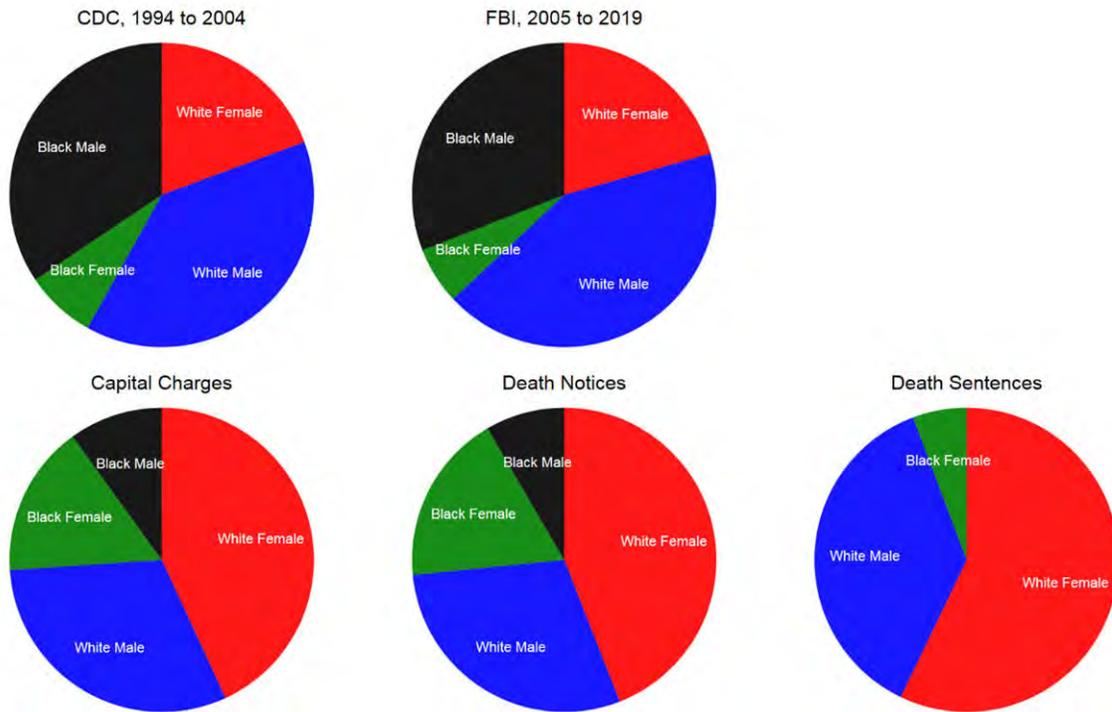


Source: Table 3.

Blacks represent roughly 40 percent of all homicide victims in Kansas, but many fewer in those cases that proceed capitally, and a tiny share of those where a death sentence is imposed.

Figure 5 shows combined race-gender statistics in the same format.

Figure 5. Homicides and Capital Cases Compared: Victim Race and Gender.



Source: Table 3.

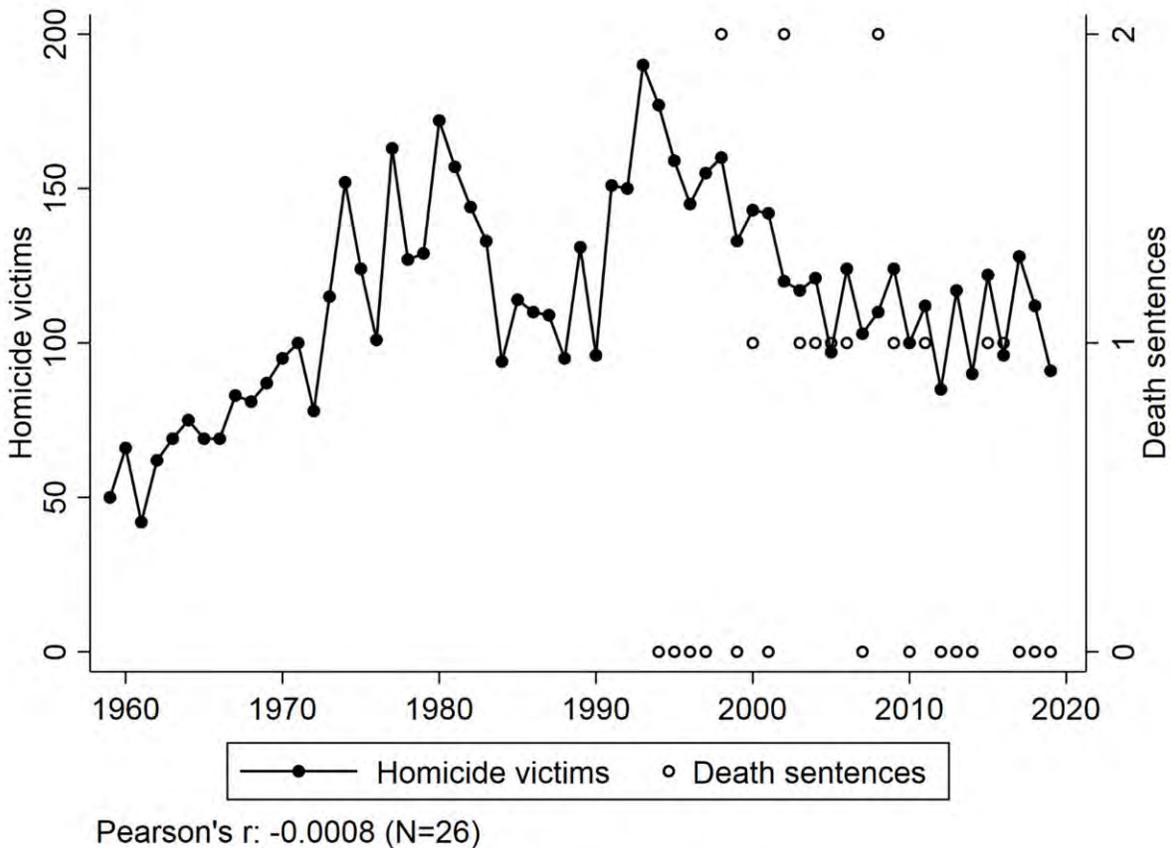
Black men completely disappear from the graph at the bottom-right, reflecting the fact that no death sentence has been imposed on an offender with a black male victim. Black men represent approximately a third of all homicide victims, shown in the upper row, but only small shares of those with capital charges and death notices. White female cases, on the other hand, move from a relatively small share of homicides (shown in the upper row; roughly 20 percent) to a plurality of those with capital charges and death sentences, and a majority of the death-sentenced cases. White male victims are the single largest group in the homicides charts at the top; they constitute smaller shares of the capital charges and death notices, but return to approximately their original share of homicides when considering death sentences actually imposed. Thus, for white male victims, we see a roughly equal share of death sentenced cases as homicides in general, and similarly for black female victims. White female victims are dramatically over-represented in the death sentenced cases compared to homicides, and black

males, who represent the second-largest share of all homicide victims, completely disappear from the cases where death sentences are imposed. These are dramatic and important differences.

Homicides and Death Sentences over Time

The 15 death sentences imposed by the State of Kansas are listed in Table 1. Figure 6 compares the timing of these with the numbers of homicide victims by year. It uses the CDC homicide figures through 2004 and the FBI totals for the period after 2004.

Figure 6. Homicide Victims and Death Sentences over Time.



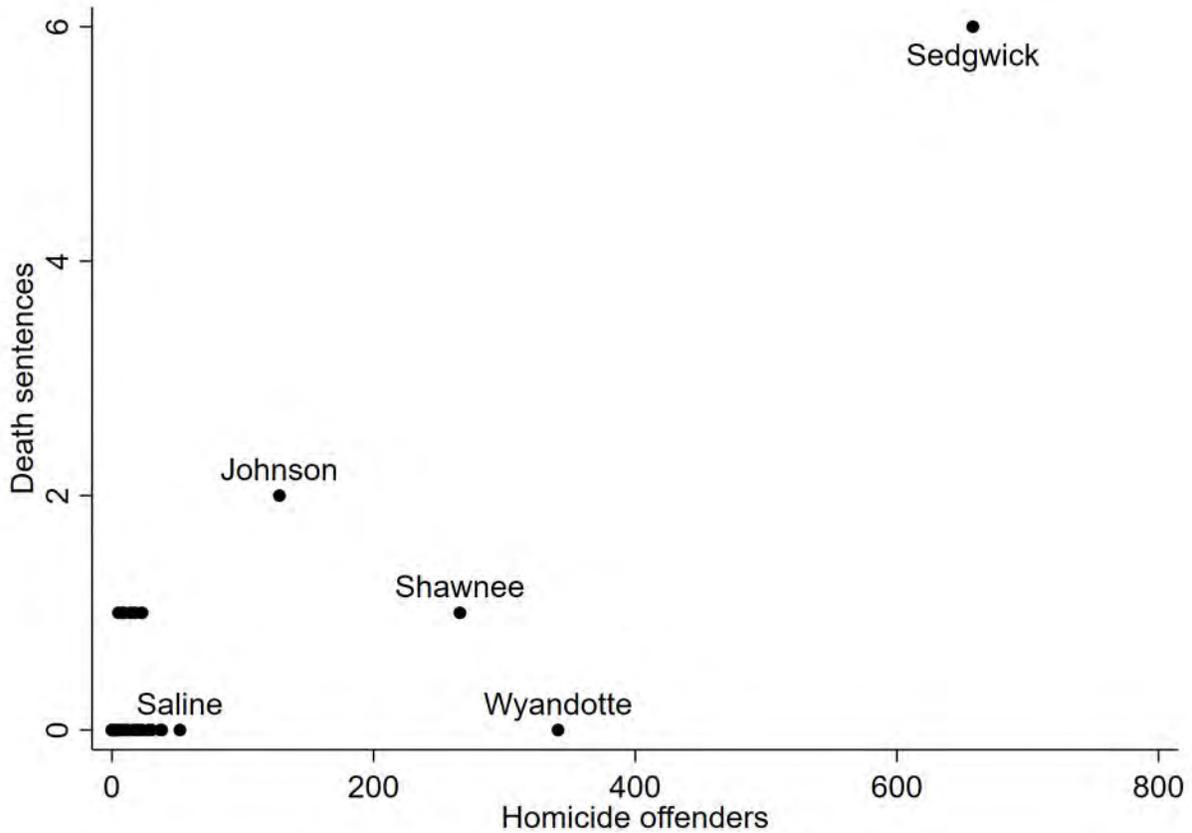
The hollow circles at the bottom of Figure 6 represent the 14 years during which no death sentences were imposed across the state of Kansas. During those years, there was an average of 124 homicide victims per year. A single death sentence was imposed in nine years, represented in Figure 6 with the hollow circles corresponding to 1 death sentence (on the right-hand axis); in

these nine years there was an average of 117 homicide victims. Three years saw the imposition of two death sentences each (indicated by the hollow circles at the top of the graph, corresponding to two on the right-hand axis), and these years saw an average of 130 homicide victims. Overall, the correlation between homicides and death sentences is almost exactly zero (-0.0008), meaning that there is no tendency for homicides to be higher or lower depending on the number of death sentences. The complete lack of connection between homicides and death sentences suggests no causal relation between the two.

Homicides, Capital Prosecutions, and Death Sentences by County

Just as there is little connection between homicides and death sentences across time, there is little connection from place to place either. Table 1 made clear that Sedgwick County has seen six death sentences; Johnson, two; several others have seen just one; and the vast majority of the 105 counties in Kansas have seen none. Figure 7 shows how these numbers correlate with the number of homicide offenders in each of these counties.

Figure 7. Homicide Victims and Death Sentences by County.



Note: Many Kansas counties have very few homicides, and zero or just one death sentence across the entire time period from 1994 through 2021. Each is represented by a dot in the figure, but many of these dots overlap; these appear in the lower-left area of the Figure. Table A-1 in the Appendix provides the exact numbers for all Kansas counties.

Sedgwick County has the greatest number of homicide offenders and is the outlier with regards to death sentences, with six imposed since 1994. Wyandotte County is the second highest with regards to homicides, but it has seen no death sentences at all. Shawnee, Johnson, and Saline counties are next with regards to homicides, but there is no correlation with death sentences, as they have one, two, and no death sentences, respectively.

Table 4 shows the homicide values described above as well as the numbers and rates of capital charges, death notices, and death sentences for the largest counties in the state. The data

are the same used in previous sections, but presented here separately for each of the top homicides counties in the state.

Table 4. Homicides, Capital Charges, Death Notices, and Death Sentences by County, Selected Counties.

County	Victims	Offenders	Capital Charges	Death Notices	Death Sentences	Charge Rate	Notice Rate	Sentence Rate
Wyandotte	364	341	27	18	0	7.9	5.3	-
Sedgwick	664	658	25	18	6	3.8	2.7	0.9
Johnson	138	128	11	8	2	8.6	6.3	1.6
Shawnee	287	266	9	3	1	3.4	1.1	0.4
Saline	57	52	5	2	0	9.6	3.8	-
All Others	624	566	52	26	6	9.2	4.6	1.1

Note: See Appendix Table A-1 for a complete version of this Table, showing all 105 counties in the state.

Table 4 shows that the patterns, or lack thereof, shown in Figure 7 are the result of complex processes associated with prosecutorial decision-making. Wyandotte County has more capital charges than Sedgwick; 27 compared to 25. It has the same number of death notices (18). It has zero death sentences, however, whereas Sedgwick has six. The column labeled Charge Rate shows the number of capital charges per 100 homicide offenders; these rates vary quite substantially, from 3.4 percent in Shawnee County to 9.6 percent in Saline. Death Notice Rates also vary widely, with Shawnee County having a rate of just 1.1 and Johnson County having a rate of 6.3. Finally, Sentence Rates are quite variable as well, with many counties having rates of zero but Johnson County having a rate of 1.6 and Sedgwick 0.9. Table A-1 lays out the full data for all 105 counties in the state, making clear that there is significant variability across the geographic units of the state. Of course, because so many counties have seen very few homicides across the period of study, some of the numbers may be affected by random fluctuations. Table 4, with its focus on the larger counties, provides a more substantive demonstration of the wide variability in application of the death penalty across the counties of Kansas. While Sedgwick County does have the highest number of homicide offenders and the highest number of death

sentences, it is not the highest user of the death penalty by other metrics. Wyandotte has the greatest number of capital charges; Saline has the highest rate of capital charges per 100 homicide offenders; Johnson has the highest rate of death notices and death sentences per 100 homicide offenders. In sum, the patterns are inconsistent.

Not only are the patterns laid out in Table 4 inconsistent, but they also show substantively wide variability. Whether we look at capital charging rates, death notice rates, or death sentencing rates per 100 homicide offenders, there is little consistency across the counties of the state. These differences are greater at the death sentencing stage than at the capital charging stage, but even there, some counties have charging rates equal to 8 percent or more of all homicides occurring in the county, whereas other counties have rates below 4 percent. The fact that Table 4 is limited to the largest counties in the state, but nonetheless shows differences of this magnitude, suggests that there is substantively very wide variability in the use of the death penalty across the geographic units of the state, rather than equal application with some small residual random variability.

Figures 8, 9, and 10 illustrate the extremely low use of the death penalty across Kansas counties and the lack of connection between homicides and its use. Figure 8 shows the number of death sentences, generally zero. Figure 9 shows the number of homicides, which is considerably more variable. And Figure 10 shows the rate of death sentences per 100 homicide offenders (see Table A-1 for the raw numbers). In each Figure, these comparisons make clear that there is little connection between homicides and the use of the death penalty.

Figure 8. Death Sentences.

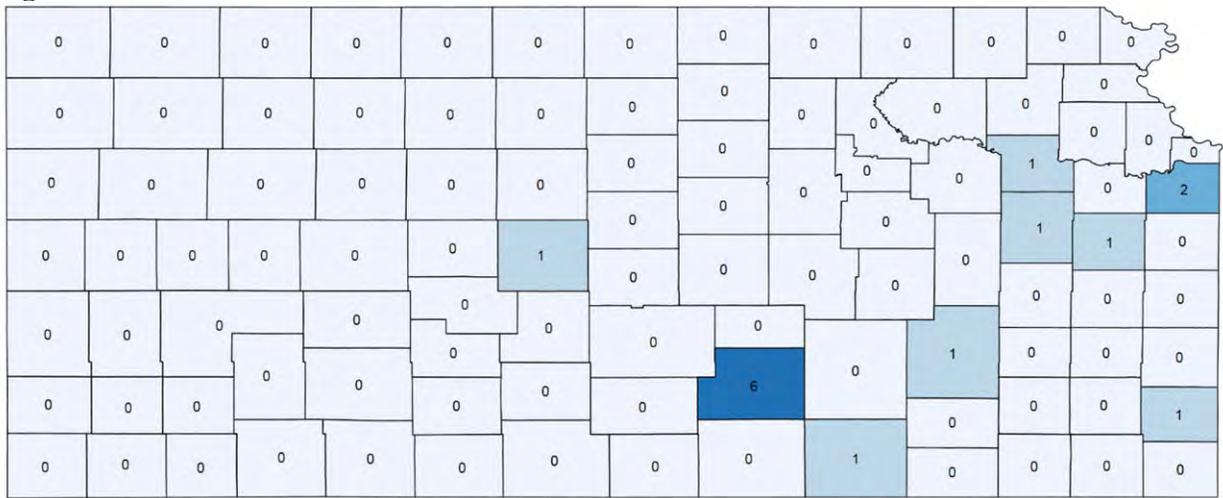


Figure 9. Homicide Offenders.

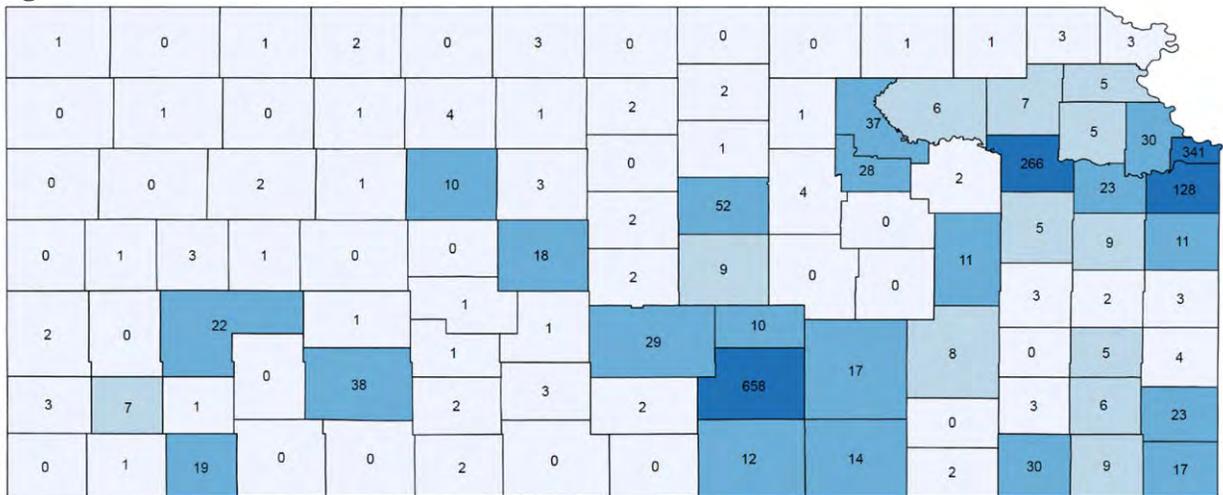
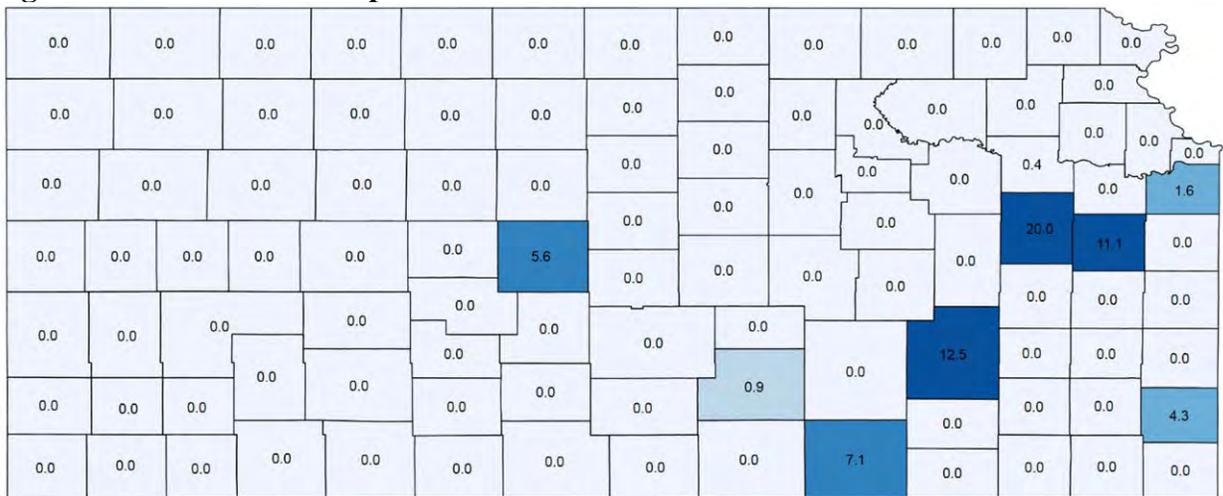


Figure 10. Death Sentences per 100 Homicide Offenders.



Conclusions

In completing this analysis, I have identified three important issues with respect to use of the death penalty in Kansas: general lack of use; capricious or random and arbitrary selection of cases for death sentencing; and racial and gender biases affecting the process.

First, capital punishment is extremely rare. Table 1 showed that there have been 15 death sentences in the state since 1994, but Table 2 showed that there have been 3,709 homicides (1,572 as reported by the CDC during the period of 1994 through 2004 and an additional 2,137 reported by the FBI from 2005 through 2019). Of course, none of those death sentences has led to an execution, so the rate of executions is zero, and the rate of sentencing is 0.4 percent: fewer than one-half of one percent of homicides have led to a death sentence.¹³

Second, I have reviewed correlations among homicides and death penalty usage numbers (capital charging, death noticing, and death sentencing) across time as well as across the geographical units of the state, counties. There is virtually no correlation between homicides and death sentencing behavior, when considered over time. Figure 6 showed that correlation to be almost exactly zero: -0.0008 to be exact. Figure 7 showed what appears to be a correlation between homicides and death sentencing, but further analysis showed that that was driven by just a single county: Sedgwick County has the most homicides as well as the most death sentences, by far. But when we consider the different stages of the process and consider all the counties of the state, or even only the largest five counties, this apparent correlation falls apart. Further, the variability of death sentencing across even the largest counties is not a matter of small random fluctuation around some consistent rate, as might be expected in any naturally occurring variable. Rather, the random component is very high. Rates of charging, noticing, and sentencing, when

¹³ 15 death sentences / 3,709 homicides = 0.00404, or 0.404 percent.

considered per 100 homicide offenders, differ widely. These substantively large variations in rates of death penalty use, even controlling for the number of homicides, suggest a system that is substantially driven by random chance.

Finally, what factors seem to be driving these differences, other than randomness? Unfortunately, here we see something like what the US Supreme Court saw in the *Furman v. Georgia* decision that caused the Court to invalidate all existing US death penalty laws. As here, rates were very low; the justices were concerned about a small number of offenders being selected from a large number of homicide offenders as if they were “struck by lightning.” Moreover, like at the time of *Furman*, very significant racial and gender biases are apparent. Not a single one of the 15 individuals selected by the State of Kansas for the death penalty killed a black male victim, yet black male victims are present in over 30 percent of all homicides in the state.¹⁴ By contrast, crimes with white female victims were by far the most likely to lead to a death sentence. My analysis above showed strong race effects, gender effects, and race-gender effects with regard to the characteristics of the victims. These effects were also apparent when considered alongside the race and gender of the offender, a significant factor since most crimes have offenders and victims of the same race.

The Kansas death penalty system has never led to a single execution in the almost 30 years it has been in operation. Only a miniscule proportion of homicides have led to a death sentence (0.4 percent). There is strong reason to believe that the distinguishing features that separate the death-sentenced cases from those not leading to a death sentence are the racial and gender characteristics of the victims in the crime, as well as the combined race and gender of the offender and victim, considered together. A system used extremely rarely, and that appears to be

¹⁴ See Table 2, showing 34.4 percent of all homicides with known race and gender of the victims being black males during the CDC reporting period, and 30.9 percent during the FBI reporting period.

statistically disconnected from patterns of homicides, but potentially has much to do with race and gender, is far from the “evenhanded, rational, and consistent imposition of death sentences under law,” imagined by the Supreme Court when it upheld reinstatement of the death penalty in *Jurek v. Texas*.

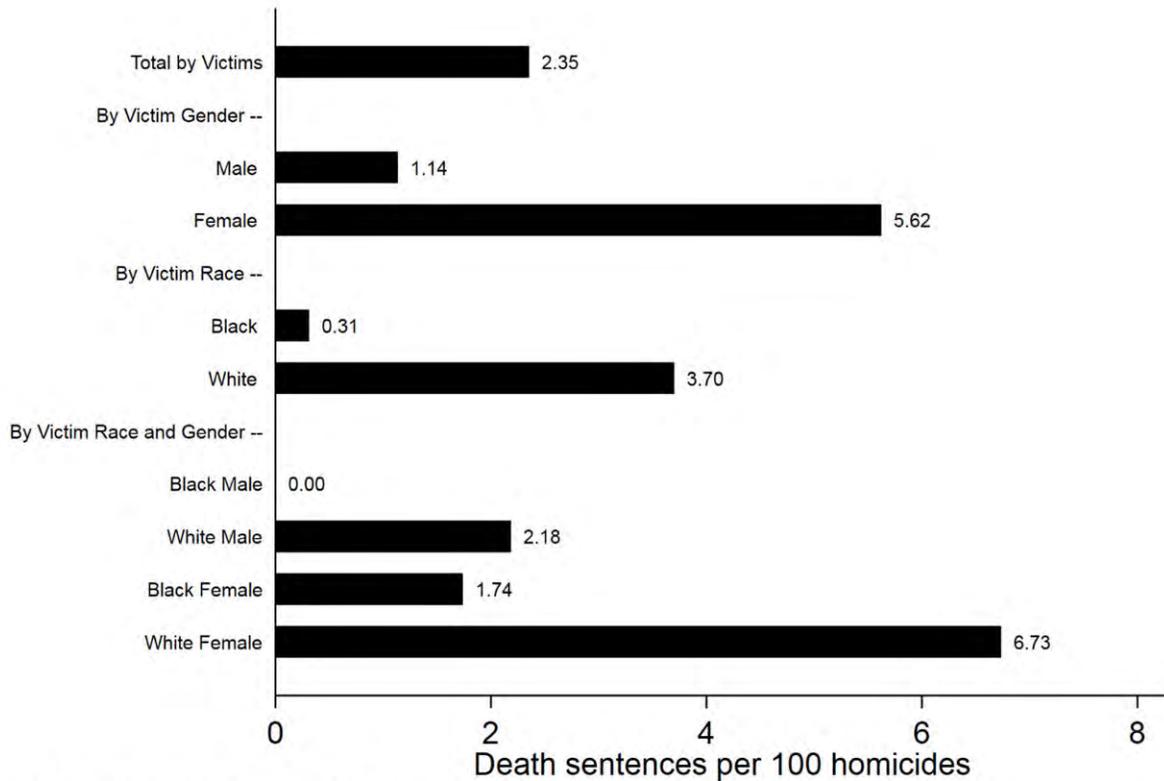
Submitted,

A handwritten signature in black ink, appearing to read "Frank Baumgartner", written in a cursive style.

Frank R. Baumgartner

Appendix

Figure A-1. Homicides and Death Sentences Compared, CDC Homicide data.



Note: Rates calculated using CDC homicide statistics, 1995 to 2004.
CDC does not include information about offenders, so only victim comparisons are shown.

Note: Data from Table 2. See Figure 1 for the corresponding figure based on FBI homicides data.
Note that the CDC does not have information about offenders, so this Figure refers only to victims.

Table A-1. Homicides, Charges, Death Notices, and Death Sentences by County.

County	Victims	Offenders	Charges	Notices	Sentences	Charge Rate	Notice Rate	Sentence Rate
Sedgwick	664	658	25	18	6	3.8	2.7	0.9
Wyandotte	364	341	27	18	0	7.9	5.3	-
Shawnee	287	266	9	3	1	3.4	1.1	0.4
Johnson	138	128	11	8	2	8.6	6.3	1.6
Saline	57	52	5	2	0	9.6	3.8	-
Ford	41	38	0	0	0	-	-	-
Riley	38	37	1	1	0	2.7	2.7	-
Montgomery	38	30	3	2	0	10.0	6.7	-
Leavenworth	32	30	3	1	0	10.0	3.3	-
Reno	30	29	4	1	0	13.8	3.4	-
Geary	28	28	3	0	0	10.7	-	-
Douglas	29	23	1	1	0	4.3	4.3	-
Crawford	24	23	2	2	1	8.7	8.7	4.3
Finney	22	22	0	0	0	-	-	-
Seward	23	19	1	1	0	5.3	5.3	-
Barton	21	18	6	2	1	33.3	11.1	5.6
Cherokee	17	17	4	1	0	23.5	5.9	-
Butler	17	17	1	0	0	5.9	-	-
Cowley	14	14	1	1	1	7.1	7.1	7.1
Sumner	13	12	0	0	0	-	-	-
Lyon	11	11	0	0	0	-	-	-
Miami	11	11	1	0	0	9.1	-	-
Ellis	10	10	0	0	0	-	-	-
Harvey	19	10	4	2	0	40.0	20.0	-
McPherson	10	9	1	0	0	11.1	-	-
Labette	12	9	1	1	0	11.1	11.1	-
Franklin	12	9	1	1	1	11.1	11.1	11.1
Greenwood	9	8	1	1	1	12.5	12.5	12.5
Grant	8	7	1	0	0	14.3	-	-
Jackson	7	7	0	0	0	-	-	-
Pottawatomie	6	6	1	1	0	16.7	16.7	-
Neosho	6	6	0	0	0	-	-	-
Jefferson	6	5	0	0	0	-	-	-
Osage	10	5	1	1	1	20.0	20.0	20.0
Allen	6	5	0	0	0	-	-	-
Atchison	5	5	1	0	0	20.0	-	-
Bourbon	5	4	1	1	0	25.0	25.0	-
Dickinson	4	4	2	2	0	50.0	50.0	-
Rooks	4	4	0	0	0	-	-	-

Wilson	4	3	0	0	0	-	-	-
Stanton	3	3	0	0	0	-	-	-
Pratt	3	3	0	0	0	-	-	-
Doniphan	3	3	1	0	0	33.3	-	-
Russell	3	3	0	0	0	-	-	-
Coffey	3	3	0	0	0	-	-	-
Scott	3	3	0	0	0	-	-	-
Smith	3	3	0	0	0	-	-	-
Linn	3	3	0	0	0	-	-	-
Brown	3	3	0	0	0	-	-	-
Cloud	2	2	0	0	0	-	-	-
Hamilton	2	2	0	0	0	-	-	-
Anderson	2	2	0	0	0	-	-	-
Rice	2	2	0	0	0	-	-	-
Wabaunsee	2	2	0	0	0	-	-	-
Kiowa	2	2	0	0	0	-	-	-
Chautauqua	2	2	1	0	0	50.0	-	-
Comanche	2	2	0	0	0	-	-	-
Ellsworth	2	2	0	0	0	-	-	-
Kingman	2	2	0	0	0	-	-	-
Norton	2	2	0	0	0	-	-	-
Mitchell	2	2	0	0	0	-	-	-
Gove	2	2	0	0	0	-	-	-
Ottawa	1	1	0	0	0	-	-	-
Nemaha	1	1	0	0	0	-	-	-
Trego	1	1	0	0	0	-	-	-
Haskell	1	1	2	1	0	200.0	100.0	-
Pawnee	1	1	0	0	0	-	-	-
Osborne	1	1	0	0	0	-	-	-
Stevens	1	1	0	0	0	-	-	-
Decatur	1	1	0	0	0	-	-	-
Hodgeman	1	1	0	0	0	-	-	-
Marshall	1	1	0	0	0	-	-	-
Edwards	1	1	0	0	0	-	-	-
Lane	1	1	0	0	0	-	-	-
Clay	1	1	1	1	0	100.0	100.0	-
Wichita	1	1	1	1	0	100.0	100.0	-
Thomas	1	1	0	0	0	-	-	-
Cheyenne	1	1	0	0	0	-	-	-
Graham	2	1	0	0	0	-	-	-
Stafford	1	1	0	0	0	-	-	-

Wallace	0	0	0	0	0			
Sheridan	0	0	0	0	0			
Rawlins	0	0	0	0	0			
Washington	0	0	0	0	0			
Lincoln	0	0	0	0	0			
Morris	0	0	0	0	0			
Chase	0	0	0	0	0			
Gray	0	0	0	0	0			
Logan	0	0	0	0	0			
Marion	0	0	0	0	0			
Phillips	0	0	0	0	0			
Ness	0	0	0	0	0			
Meade	0	0	0	0	0			
Greeley	0	0	0	0	0			
Republic	0	0	0	0	0			
Clark	0	0	0	0	0			
Elk	0	0	0	0	0			
Woodson	0	0	0	0	0			
Morton	0	0	0	0	0			
Jewell	0	0	0	0	0			
Harper	0	0	0	0	0			
Kearny	0	0	0	0	0			
Sherman	0	0	0	0	0			
Rush	0	0	0	0	0			
Barber	0	0	0	0	0			

Note: Rates are calculated per 100 offenders.

Exhibit I

EXPERT REPORT OF TRICIA ROJO BUSHNELL

I, Tricia Rojo Bushnell, hereby state as follows:

I. Background and Qualifications

I am 39 old and reside in Kansas City, Missouri. I am fully competent to testify as to the facts and opinions set forth herein.

I am currently the Executive Director of the nonprofit the Midwest Innocence Project, headquartered in Kansas City, Missouri, where I have been employed since 2013. As Executive Director, I am responsible for managing all aspects of the Midwest Innocence Project's work, and I serve as its lead attorney. I am also currently the President and an Executive Board Member of the Innocence Network, an affiliation of 68 innocence organizations around the country and world.

I have spent 15 years working in the field of wrongful convictions as both an attorney and law professor. After graduating from Bucknell University in 2004 with a degree in Political Science and German, I received my J.D. from NYU School of Law in 2007. While in law school, I began working on the case of Emmanuel Gissendanner, an individual who had been sentenced to death in Alabama for a crime our investigation revealed he did not commit. I continued to work on Mr. Gissendanner's case pro bono when I began my legal career as an associate at the law firm of Kirkland & Ellis. I left that position in 2008 to begin a fellowship with the Equal Justice Initiative of Alabama, where I represented individuals sentenced to death, juveniles sentenced to life without parole, and sex offenders challenging the collateral consequences of their conviction. Upon completion of that fellowship, I took a position as an Assistant Clinical Professor at the University of Wisconsin Law School, where I taught in both the Wisconsin Innocence Project and Criminal Appeal Project clinics. I transitioned from the law school to my

current organization, the Midwest Innocence Project, in 2013. More information about my career and qualifications is detailed in my resume, attached hereto as Exhibit A.

The Midwest Innocence Project (“MIP”) is one of many innocence organizations across the United States that investigates claims of wrongful conviction and pursues exoneration for the wrongfully convicted in state and federal prisons. Founded in 2001 through the University of Missouri-Kansas City School of Law, MIP operates primarily in Kansas, Missouri, Iowa, Nebraska, and Arkansas. I have served as MIP’s lead litigator since joining in 2013, first in my role as Legal Director and continuing in my current role as Executive Director. In my time with MIP, I was a member of the legal teams that secured the exonerations of Floyd Bledsoe, Lamonte McIntyre, and Olin “Pete” Coones, Jr., three innocent Kansans who served over 67 years combined for crimes they did not commit. I was also involved in the exoneration or release of nine other innocent clients in MIP’s region and continue to litigate cases today. In addition to legal work, I am also responsible for overseeing all aspects of the organization, including research and policy initiatives, and I continue to teach in law school clinics, most recently at Washington University-St. Louis School of Law.

II. Scope of My Testimony as an Expert Witness

I have been retained to analyze and provide expert testimony regarding the topics of wrongful convictions, “actual innocence,” and exonerations in Kansas and in the United States as a whole. I am not being compensated for my time, and I am issuing this report in my individual capacity, not on behalf of the Midwest Innocence Project or any other organization.

III. Data on Death Penalty and Innocence

A. Nationwide Data Shows the Threat of Wrongful Convictions

1. History of wrongful convictions

The criminal legal system does not have a 100% success rate. Not only does the system fail to convict factually guilty individuals, it also convicts innocent people for crimes they did not commit. The work of innocence organizations and wrongful conviction scholars has focused on this second instance, seeking to identify the scope of the problem, the causes of wrongful convictions, and ways to prevent such convictions in the first place.

One of the first studies of wrongful conviction in the United States, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice*,¹ was published in 1932 by attorney and Yale law professor Edwin Borchard. Borchard identified many of the same factors in wrongful convictions that are still prevalent today, including official misconduct, eyewitness identification, and false confessions. These aspects and others will be discussed in more detail in Section IV below. In the 90 years since Borchard publish his study, our understanding of wrongful convictions has only grown, especially since the advent of DNA testing and the first DNA-based exoneration in 1989.²

DNA-based exonerations are exonerations in which DNA testing of physical evidence from the crime scene, such as a weapon left behind by the perpetrator or semen in a rape kit, excludes the defendant as the individual who could have left the DNA behind or, in some instances, conclusively identifies the real perpetrator. Since the first DNA-based exoneration in

¹ Edwin Borchard, CONVICTING THE INNOCENT. SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE (1931).

² Rob Warden, *First DNA Exoneration: Gary Dotson*, NORTHWESTERN PRITZKER SCHOOL OF LAW CTR. ON WRONGFUL CONVICTIONS, <https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html> (last visited Feb. 2, 2022).

1989, 551 individuals have been exonerated with the use of such scientific evidence.³ However, DNA is just one avenue to exoneration and the limited availability of physical evidence that can be tested for probative DNA in a criminal case means that the vast majority of individuals who are exonerated do not have DNA evidence in their case. As such, in the first ten years following the first DNA exoneration, a total of 67 individuals in the United States were exonerated by DNA,⁴ representing but a fraction of the 397 total exonerations in that time.⁵ In the decades since, those numbers have grown to a total of 551 DNA exonerations since 1989, as compared to 2,944 total exonerations respectively.⁶ Those 2,944 exonerations include the exoneration of 186 death sentenced individuals. When compared to the number of individuals who have been executed, this equals a rate of one exoneration of an individual from death row for every 9 individuals executed.⁷

Despite this increased awareness of wrongful convictions,⁸ the exact number of innocent individuals currently incarcerated is still unknown. Scholars in the field often refer to this unknown population as a “dark number.” There are obvious difficulties in estimating the number of wrongfully accused, including the limited access to counsel to investigate and prove

³ See *Exonerations By Year: DNA & Non-DNA*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> (last visited Feb. 2, 2022).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ The Death Penalty Information Center (DPIC), a nonprofit that tracks data about death sentences given and executions carried out across the U.S. along with other data reports that a total of 8752 death sentences have been issued since 1973. *Sentencing Data*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year> (last visited Feb. 2, 2022). The DPIC also reports 186 exonerations of death row inmates in the same time period. See *Innocence Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence-database> (last visited Feb. 2, 2022).

⁸ Claims of innocence and wrongful convictions can be seen in many places of popular culture, from movies to Netflix series to podcasts. See A.O. Scott, ‘*Just Mercy*’ Review: Echoes of Jim Crow on Alabama’s Death Row, N.Y. TIMES (Jan. 10, 2021), <https://www.nytimes.com/2019/12/24/movies/just-mercy-review.html>; *What to Expect from ‘The Innocence Files,’ Netflix’s New Documentary Series*, INNOCENCE PROJECT (Apr. 15, 2020), <https://innocenceproject.org/netflix-innocence-files-documentary-series-bite-marks-wrongful-conviction/>; *In the Dark*, APM REPORTS, <https://features.apmreports.org/in-the-dark/>.

innocence,⁹ the high legal standards and barriers a defendant must overcome, and the length of time it takes to secure an exoneration.¹⁰ Estimating the number of wrongfully convicted persons is therefore not as simple as dividing the number of exonerated persons by the number of felonies committed in the years those exonerees were convicted.¹¹ Instead, because the specific number of wrongfully convicted is an unknowable quantity, researchers have attempted to arrive at an estimation of the wrongfully convicted as a percentage of the U.S. prison population as a whole based on available data. Researchers using any of the various methodologies are conscious of the obvious limitations of their studies and have taken steps to ensure their estimate is a conservative representation rather than an over-estimation of the wrongfully convicted.

2. Methodological challenges

Researchers seeking to quantify the number of wrongfully convicted individuals in prison have used a variety of methodologies. All of the studies are in agreement—no matter the calculation methods, the risk of wrongful convictions is real and the rate of wrongful convictions is non-zero. A 2007 study, for example, analyzed the level of agreement between judges and

⁹ As of writing, there are 68 member organizations in the Innocence Network, an affiliation of organizations working to exonerate wrongfully convicted individuals in the US and around the world. *Member Directory*, Innocence Network, <https://innocencenetwork.org/directory> (last visited Feb. 2, 2022). Within prosecutor's offices, there are currently 41 conviction integrity units that have secured at least one exoneration. *Conviction Integrity Units*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> (last visited Feb. 2, 2022). Comparatively, there are 2.3 million individuals incarcerated in the United States. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (MAR. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

¹⁰ Among the 2,994 exonerations recorded by the National Registry of Exonerations, the average time spent in prison before exoneration is 9 years. *Exonerations in the United States*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Feb. 2, 2022). The average time served for exonerated Midwest Innocence Clients is 26 years. The vast majority of MIP's cases take years to resolve. In the case of Emmanuel Gissendanner, which I began working on as a law student in 2006, his case was not resolved and he was not released until 2019, 13 years after his post-conviction appeal began.

¹¹ This method of calculation was the method used in an op-ed by prosecutor Joshua Marquis to arrive at the unquestionably low estimate of 0.027% which Justice Scalia cited in his concurrence in *Kansas v. Marsh*, 548 U.S. 163 (2006). See also *How Many Innocent People Behind Bars? Nobody Knows*, Innocence Project (Mar. 25, 2008), <https://innocenceproject.org/how-many-innocent-behind-bars-nobody-knows/>.

juries post-verdict and estimated a wrongful conviction rate of 3%.¹² Another examined newly-available DNA evidence and its exculpatory effects.¹³ While still vulnerable to the “dark number” bias, this second methodology capitalizes on recent scientific developments and has led to estimated wrongful conviction rates of 8–11.6%.¹⁴

Outside these two studies, researchers have historically followed two known methodologies: the survey method and the exoneree method. The first methodology—the survey method—relies on anonymized reports by people who are incarcerated or practitioners in the criminal legal system. This method involves one of two forms: anonymous surveys of incarcerated people about whether the validity of their conviction, and surveys of law enforcement and legal professionals in the criminal legal system regarding their perceptions of the rate of wrongful convictions. Researchers using the survey method correct for expected inaccuracies in the reported data, though the numbers reported may still be vulnerable to response biases.¹⁵

The second methodology relies on using the known number of individuals exonerated of a particular crime in a particular time frame and extrapolating to the general population of persons convicted for those or similar crimes within the relevant time period. Because it relies only on confirmed exonerations (thus risking the existence of a high “dark number”), this

¹² Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305 (2007).

¹³ See, e.g., John Roman et al., *Post-Conviction DNA Testing and Wrongful Conviction*, URB. INSTITUTE JUSTICE POL'Y CTR. (June 2012), <https://www.urban.org/sites/default/files/publication/25506/412589-Post-Conviction-DNA-Testing-and-Wrongful-Conviction.PDF>; Kelly Walsh et al., *Estimating the Prevalence of Wrongful Conviction*, URB. INSTITUTE (Sept. 2017), <https://www.ojp.gov/pdffiles1/nij/grants/251115.pdf> (estimating an 8-15% wrongful conviction rate in Virginia); *Id.* (analyzing Roman study and adjusting to estimate 11.6% wrongful conviction rate).

¹⁴ Walsh, *supra* note 13, at 10.

¹⁵ Researchers have long known and understood the problem of response bias in self-reported survey results and have developed a number of ways to statistically detect and correct for reporting bias. See, e.g., Robert Rosenman, Vidhura Tennekoon, & Laura G. Hill, *Measuring Bias in Self-Reported Data*, 2 INT'L J. OF BEHAV. HEALTHCARE RES. 320 (Oct. 31, 2011), <https://dx.doi.org/10.1504%2FIJBHR.2011.043414>.

methodology—called the “exonerree calculation” method—almost certainly underestimates the wrongfully convicted.

The exoneree calculation method, despite its flaws, has led to one of the most scientifically rigorous estimates of wrongful conviction: a study by Samuel Gross which was published by the National Academy of Sciences.¹⁶ The Gross study is published in a peer-reviewed scientific journal rather than a law review, and provides the most precise estimate to date for a specific population. This study estimated that 4.1% of criminal defendants who are sentenced to death are wrongfully convicted. The study also determined that individuals on death row are more likely to be exonerated than those removed from death row and resentenced to life or a term of years.¹⁷ This means that the population sample chosen is likely to have a small dark number and a significant assurance of accuracy. It is my opinion that the 4.1% identified by the Gross study is the most accurate and relevant estimate of the number of wrongfully convicted individuals on death row. The study in question was focused directly on capital murder cases and the estimate was the result of a rigorous and peer-reviewed methodology. The estimate falls on the lower end of the broad estimates arrived at by earlier studies and is rigorously defensible based on the data.

B. Posthumous Exonerations

The issue of wrongful convictions sheds light on, but does not answer, the ultimate question of whether a state or the federal government has executed persons who are innocent of the crime for which they were convicted. Based on all available information to us, the answer to

¹⁶ Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants who are Sentenced to Death*, 111 PROCEEDINGS OF THE NAT'L ACAD. OF SCI. 7230 (May 20, 2014), <https://www.pnas.org/content/111/20/7230>.

¹⁷ “We find, consistent with expectations that death-sentenced defendants who are no longer under threat of execution had a rate of exoneration approximately one eighth of that for defendants who remained on death row” *Id.* at 7232.

this question is an undeniable yes. Applying the previously-discussed 4.1% estimated wrongful conviction rate to the 8,752 death sentences imposed across the United States since 1973 indicates a total of 358 individuals have been wrongly convicted and sentenced to death across the United States¹⁸—almost twice the 186 individuals that have been exonerated and released from death row.¹⁹ Since the Supreme Court reinstated the death penalty in 1976, the federal government and the states have executed 1,542 people.²⁰ In my opinion, with the data we have available, including not only rates of wrongful convictions but facts and questions surrounding known executions, the idea that every single one of the 1,542 executed persons have all been guilty and properly deserving of the death penalty is unsupportable. Such an argument would require that the system catch 100% of its errors and correct them before they are too late to remedy. The length of time of time and procedural posture of known non-death sentenced capital exonerations prove otherwise.²¹ The criminal legal system is a human one, relying upon a multitude of human actors in different positions to act as checks on the system to “catch”

¹⁸ *Sentencing Data*, *supra* note 7..

¹⁹ *Innocence Database*, *supra* note 7.

²⁰ *Executions by State and Region Since 1976*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976> (last visited Feb. 3, 2022).

²¹ Take, for example, the case of recent MIP client Kevin Strickland, who was exonerated in Missouri on November 23, 2021, after spending 43 years in prison for a crime he did not commit. *A Man who was Wrongfully Convicted of 3 Murders in 1979 is Now Free*, NPR (Nov. 24, 2021, 7:49 AM), <https://www.npr.org/2021/11/24/1058811665/kevin-strickland-released-wrongful-conviction>; Alisha Ebrahimji, *After Spending 43 Years in Prison for a Triple Murder He says He Didn't Commit, a Missouri Man is Finally Free*, CNN (Nov. 25, 2021, 9:23 AM), <https://www.cnn.com/2021/11/23/us/kevin-strickland-triple-murder-wrongful-conviction-freed-trnd/index.html>; *Kevin Strickland Exonerated After 42 Years in Missouri Prison*, BBC (Nov. 23, 2021), <https://www.bbc.com/news/world-us-canada-59396598>. Mr. Strickland had been convicted of capital murder, but the State had waived the death penalty. At the time of his exoneration, Mr. Strickland had filed over 16 unsuccessful appeals, including a direct appeal and numerous postconviction and state and federal habeas appeals. Had he been sentenced to death, Mr. Strickland would have already exhausted the appeal process required before an execution date is set and he would not have lived to see his own exoneration.

wrongful death sentences, but none of those humans are perfect, nor is the criminal legal system as designed infallible.²²

While no person in the U.S. executed since 1973 has been formally exonerated by the legal system posthumously, this is not because no innocent persons have been executed in that time. On the contrary—the lack of legal exoneration post-execution rests more squarely on the limits of the legal system and the lack of resources to continue pursuing an exoneration when there are others who still seek help. In regard to the limits of the legal system, under most of the legal mechanisms used to obtain an exoneration, a court would no longer have jurisdiction to hear a case because the individual’s death would render them no longer in the custody and control of the state.²³ Indeed, this same limitation has prevented the exoneration of innocent individuals like MIP client Laquanda “Faye” Jacobs, who was forced to choose between pursuing her exoneration in federal court or to accept an offer of time-served when she was resentenced pursuant to *Miller v. Alabama*.²⁴ Ms. Jacobs chose to accept the offer for immediate release to return home to care for her ailing mother, meaning the only mechanism available for exoneration—like the only mechanism available to most executed individuals—is to have her conviction overturned by a pardon.

²² The pardon process, for example, which is said to be a check on the system is inherently a political choice, and one that takes electoral expediency and political pressures more into account than the interests of justice. *See, e.g.*, Editorial Board, *Missouri’s Governor Uses His Pardon Power – but Not for Two Innocent Black Men in Prison*, WASH. POST. (Aug. 5, 2021, 3:03 PM), <https://www.washingtonpost.com/opinions/2021/08/05/missouri-governor-pardon-power-mccloskeys-innocent-black-men-prison/>; Editorial Board, *Short Takes on Pardons and Pleas for Pandemic Precautions*, ST. LOUIS POST DISPATCH (Aug. 6, 2021), https://www.stltoday.com/opinion/editorial/editorial-short-takes-on-pardons-and-pleas-for-pandemic-precautions/article_1fe80887-67d3-576f-9455-3a8451e53aaa.html.

²³ *See* Samuel Wiseman, *Innocence after Death*, 60 CASE W. RES. L. REV. 687 (2010), available at <https://scholarlycommons.law.case.edu/caselrev/vol60/iss3/16>.

²⁴ Marlisa Goldsmith, *Arkansas Native Fights to Have Her Name Cleared from Crime She Says She Didn’t Commit*, THV11 (Nov. 16, 2021, 12:41 PM), <https://www.thv11.com/article/news/local/arkansas-fights-name-cleared-crime-she-says-didnt-commit/91-6432419c-01f9-4daa-b6c0-757eebf12b22#:~:text=Faye%20Jacobs%20was%20released%20from,says%20she%20didn't%20commit.&text=LJTTLE%20ROCK%2C%20Ark.,says%20she%20didn't%20commit>.

In light of these limitations, it is no wonder that most organizations that focus on exonerations and death penalty defense choose to devote their limited resources to fighting for the living. Once the state has carried out an execution, the rights of the condemned are extinguished and there is no avenue for judicial exoneration.²⁵

C. Posthumous Pardons

For the executed then, the only path to a formal recognition of innocence is a posthumous pardon. On the federal level, the power to pardon rests with the President. In the states, the pardon power is vested in the governor, or a board appointed by the governor.²⁶ There is little to no constitutional or statutory process required by law for a pardon, and in most states the act is entirely discretionary with no requirements that a request even be reviewed or acknowledged in any way. This level of discretion has led to a pardon process that can be highly political, allowing politicians to earn political favor without directly addressing of injustice in the criminal legal system.

Beyond the limits of the clemency process in general, most states and the federal government have no defined process for requesting or receiving a pardon posthumously. The Department of Justice Office of the Pardon Attorney's policy is to not accept or investigate requests for posthumous pardons, although several presidents have granted them in recent

²⁵ There are incredibly rare instances of posthumous DNA testing, but even those avenues are not generally available to an executed defendant. In the case of Tim Cole, the court entertained a motion for DNA testing posthumously, and after Cole died in prison while serving a 25-year sentence. *Timothy Cole*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/timothy-cole/>. See also Wiseman, *supra* note 23. Post-humous DNA testing was also conducted in the case of Ledell Lee, who was executed in Arkansas. Although such testing revealed the presence of an unknown man's DNA on the murder weapon. Despite this, Lee has not been exonerated. Heather Murphy, *4 Years After an Execution, a Different Man's DNA Is Found on the Murder Weapon*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/05/07/us/ledell-lee-dna-testing-arkansas.html>.

²⁶ In Kansas this power is vested in the Governor. Kan. Const. Art. 1, § 7. Procedures for review of pardon requests and administrative timelines are laid out by statute. KAN. STAT. ANN. § 22-3701.

years.²⁷ This policy suggests posthumous pardons are not issued with a frequency that would enable researchers to use them as a metric of wrongful convictions. However, historic examples where known innocents were executed and later pardoned prove the risk of executing an innocent person is not speculative.²⁸ In 1987, Nebraska pardoned William Jackson; Jackson had been hanged in 1887 for the murder of man who was later found alive.²⁹ In 2009, South Carolina pardoned Thomas and Meeks Griffin; the Griffins were electrocuted in 1915 based on perjured testimony.³⁰ And in 2011, Colorado pardoned Joe Arridy, executed in 1939 by lethal gas; an “overwhelming body of evidence” supported Arridy’s innocence, “including false and coerced confessions, the likelihood that Arridy was not in [town] at the time of the killing, and an admission of guilt by someone else.”³¹

States have been more willing to admit to the execution of an innocent when the execution took place many decades ago, but a shocking number of recent executions also feature the hallmarks of wrongful convictions.³² The Death Penalty Information Center has identified nine persons executed since 2015 who were likely innocent, including two who were executed in 2020.³³ Despite the evidence of innocence in those cases, posthumous pardons have been less

²⁷ A total of 6 posthumous pardons have been granted by U.S. Presidents since 1999, primarily to prominent historical figures. Recipients of posthumous pardons from presidents include Susan B. Anthony, boxer Jack Johnson, and first African American graduate of the Army War College Henry Ossian Flipper. *Policies*, OFFICE OF THE PARDON ATTORNEY, <https://www.justice.gov/pardon/policies>.

²⁸ *Posthumous Pardons*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence/posthumous-pardons> (last visited Feb. 2, 2022).

²⁹ *Id.* Notably, when found, the victim was alive and living in Kansas. *Id.*

³⁰ *Id.*

³¹ *Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s*, OFFICE OF GOV. BILL RITTER, JR., 1 (Jan. 7, 2011), <https://files.deathpenaltyinfo.org/legacy/documents/ArridyPardon.pdf>.

³² *The Case Against the Death Penalty*, ACLU (2012), <https://www.aclu.org/other/case-against-death-penalty> (last visited Feb. 2, 2022).

³³ *Executed But Possibly Innocent*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent> (last visited Feb. 2, 2022). Consider just one egregious example: In 2018, Georgia executed Carlton Michael Gary despite substantial physical evidence of innocence. DNA testing excluded Gary as the origin of semen on the clothing of a victim who identified him at trial, and a suppressed police report revealed that the victim had initially said her room was dark and she could not describe her attacker. Prosecutors consulted with an expert regarding a bite mark on a victim, but they did not call the expert after he

likely to occur in the case modern day executions. Although every state's governor or a commission of some sort have the power to grant posthumous pardons, only around 175 have been issued in the entirety of U.S. history; of that 175, approximately 21 have been granted to executed individuals and none were for executions in the post-Furman era.³⁴

D. Wrongful Executions in the U.S.

As noted above, 1,542 people have been executed since 1976, or the “modern death penalty era.”³⁵ Death penalty proponents seeking to deny wrongful convictions and wrongful executions argue that science and scientific evidence have progressed in the last several decades to the point where errors could not happen today. This argument overlooks several key points. First, it is uncertain whether future scientific developments will be able to conclusively disprove any “bad science” currently used to convict. Indeed, as discussed more fully in Section IV.C below, the limits of many forensic sciences, such as toolmark and fingerprint evidence, are still in flux and have yet to be established. Second, even in the face of “good science” proving innocence, the challenges with actually obtaining an exoneration in a legal system that bars the presentation of such evidence still loom large.

Death penalty proponents further point to the rise of acceptance and use of DNA evidence and the fact that individuals have been exonerated from death row through DNA evidence as proof that there is little to no risk of an innocent person being executed. This view ignores the reality that DNA testing and other forms of “fool-proof” evidence are far from

concluded Gary could not have made the markings. Finally, size 10 shoeprints from a crime scene were suppressed because they could not have belonged to Gary, who wore size 13½ shoes.

³⁴ Scott D. Seligman, *Justice for the Dead*, THE ATLANTIC (Oct 26, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/posthumous-pardons-justice-dead/620485/>; *Posthumous Pardons*, *supra* note 28.

³⁵ *Sentencing Data*, *supra* note 7.

available in every case. Further, DNA evidence, long considered the gold-star standard of scientific evidence, is itself subject to interpretation and has and will continue to lead to wrongful convictions.

In short, there is no evidence to support the notion that an innocent person has not been executed in America since the re-institution of the death penalty post-*Furman*. On the contrary, the limits of the criminal legal system and the known causes of wrongful convictions make it exceedingly likely. One need look no further than national headlines surrounding cases like Troy Davis and Cameron Todd Willingham for examples.³⁶

IV. The Death Penalty Increases The Chance of a Wrongful Conviction

The very existence of the death penalty leads to more wrongful convictions. Whether the individual is sentenced to death or not, the use of the death penalty as an option itself increases the likelihood of a wrongful conviction. Innocent defendants will do anything they can to avoid such a penalty, including pleading guilty or confessing to crimes they did not commit.

Prosecutors feeling pressure to obtain a conviction in a death-eligible crime may use the death penalty as a tool to secure a conviction. A sentence legally limited to use in “the worst of the worst” crimes, cases where the death penalty are involved are high stakes and high stress, creating a scenario ripe for error and exacerbating already known causes of wrongful convictions.

At its most basic level, the use of the death penalty has led individuals to plead guilty to crimes they did not commit. A 2019 study by the Innocence Project in New York revealed that

³⁶ See Maurice Possley, *A Dad was Executed for Deaths of His 3 Girls. Now a Letter Casts More Doubt.*, WASH. POST (Mar. 9, 2015), https://www.washingtonpost.com/politics/letter-from-witness-casts-further-doubt-on-2004-texas-execution/2015/03/09/d9ebdab8-c451-11e4-ad5c-3b8ce89f1b89_story.html; Sara J. Totonchi, *Too Much Doubt to Execute: Remembering Troy Davis, 10 Years Later*, SOUTHERN CTR. FOR HUMAN RIGHTS (Sept. 21, 2021), <https://www.schr.org/too-much-doubt-to-execute-remembering-troy-davis-10-years-later/>.

11% of exonerations obtained through DNA evidence absolved persons who pleaded guilty.³⁷ The problem of coerced guilty pleas in the U.S. is widely known, and data shows that roughly 95% of felony convictions are obtained via pleas.³⁸ Thus, while some innocent persons end up on death row because they reject a guilty plea to maintain their innocence, many are still incarcerated because they chose to take a guilty plea rather than face possible execution. Of the 2,880 known exonerations since 1989, 629 were of people who pleaded guilty. Of those, 57 involved murder charges and many of them involved persons who pleaded guilty specifically to avoid the death penalty.³⁹ Tragically, these guilty pleas can be incredibly difficult to unwind, not only because of the effect of the plea on legal mechanisms for relief, but because in most states, individuals not sentenced to death are not entitled to post-conviction counsel and will thus not have resources to prove their innocence.

Moreover, Black defendants are more likely to be erroneously convicted of capital offenses than white defendants.⁴⁰ Black and Latinx defendants are exonerated at disproportionately high rates, even to their overrepresentation among prisoners.⁴¹ Critically, the risk of wrongful conviction is greatest when the defendant is nonwhite and the victim is white.⁴²

³⁷ Glinda Cooper & Vanessa Meterko, *Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases*, 31 FED. SENT'G REP. 234 (2018–2019).

³⁸ Lindsey Devers, *Plea and Charge Bargaining*, U.S. DEP'T OF JUST. BUREAU OF JUST. ASSISTANCE (Jan. 4, 2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf>.

³⁹ See, e.g., Johnny Lee Wilson, a man with intellectual disabilities who confessed after hours of interrogation and pled guilty for a murder in Missouri in 1986; John Sosnovske who pled no contest to avoid the death penalty for a murder actually committed by serial killer Keith Jespersion in 1990; and Derrick Allen who entered an Alford plea to avoid the death penalty in 1999. These cases are by no means the only examples of cases where exonerees entered a guilty plea to avoid death, and there exist among the incarcerated population an unknown number of innocent but un-exonerated persons who also pled guilty to avoid capital punishment. See also *Exonerations in the United States*, *supra* note 10.

⁴⁰ Talia Roitberg Harmon, *Race For Your Life: An analysis of the role of race in erroneous capital convictions*, 29 CRIM. JUST. REV. 76, 78 (2004); *Racial Bias and the Conviction of the Innocent*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 114, 118 (Saundra Westervelt & John Humphrey eds., 2001)

⁴¹ Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 66 (2008).

⁴² See Samuel Gross & Robert Mauro, *DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 12 (Northeastern University Press 1989) (“Something about capital cases makes them particularly susceptible to racial prejudice, at least with respect to the race of the victim.”).

There is also substantial reason to believe that wrongful convictions are more prevalent in death penalty cases. This increased prevalence is due to a combination of factors, including community and political pressures on police and prosecutors in high stake cases that exacerbate known causes of wrongful convictions,⁴³ which include police and prosecutorial misconduct, use of false confessions,⁴⁴ eyewitness misidentifications, and faulty forensic evidence. A review of each of these factors is below.

A. Official Misconduct

Official misconduct is a leading cause of wrongful convictions, having been a contributing factor in 54% of known exonerations.⁴⁵ And the rate of misconduct has been found to be higher in cases involve more serious crimes,⁴⁶ putting cases that involve a potential death sentence at even higher risk of some form of misconduct. Indeed, the death penalty is intrinsically linked to official misconduct. Of the 186 death row exonerations that have occurred since 1973, 69.2 percent (128) involved misconduct by police, prosecutors, or other government officials.⁴⁷ Official misconduct was even more likely in cases involving defendants of color and cases in which exonerations took a decade or more, suggesting both a high degree of racial bias

⁴³Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996).

⁴⁴ An analysis of death penalty exonerations between 2007 and 2017 found that among death penalty exonerations, the most common factors contributing to the wrongful conviction were official misconduct (misconduct by a police officer, prosecutor or related government official) in 28% of cases, Perjury or False Accusation in 76% of cases, and false or misleading forensic evidence in 32% of cases. *DPIC Analysis: Causes of Wrongful Convictions*, DEATH PENALTY INFO. CTR. (May 31, 2017), <https://deathpenaltyinfo.org/stories/dpic-analysis-causes-of-wrongful-convictions>.

⁴⁵ Samuel Gross, Maurice Possley, Kaitlin Jackson Roll & Klara Huber Stephens, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police, and other Law Enforcement*, NAT'L REGISTRY OF EXONERATIONS (Sept. 1, 2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

⁴⁶ *Id.* at IV.

⁴⁷ *Id.*

and a low degree of remorse among those responsible.⁴⁸ And in counties with multiple wrongful convictions, either official misconduct or perjury was present in 90.3 percent of all death row exonerations.⁴⁹

Research also suggests the relationship between the death penalty and misconduct also flows the other way—simply having the death penalty as an option facilitates official behavior that increases the risk of wrongful convictions, even if the prosecutor chooses not to pursue capital charges. False confessions occur at a higher rate when the accused is threatened with death, and prosecutors frequently leverage the threat of death to secure guilty pleas.⁵⁰ It is incredibly difficult to maintain one’s innocence when, for example, officials display photos of death row, point to the location on the arm where the needle is inserted during a lethal injection, then promise life in exchange for a confession.⁵¹

Johnson County District Attorney Steve Howe provided firsthand insight into the cold calculations that lead to such behavior during testimony before the Kansas legislature in 2017. After touting the usefulness of the death penalty as leverage to obtain guilty pleas in return for life without parole, Howe stated that such plea bargains helped his office “*avoid[] the costs of four trials and the appeals process.*”⁵² This logic prioritizes efficiency over accuracy; when combined with the effectiveness of the threat of death in procuring confessions and guilty pleas, it ensures that as long as the death penalty remains a tool in the prosecutor’s belt, there will be a greater risk of wrongful convictions, regardless of whether capital charges are ever filed.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1062–65, 1097 (2010); Lauren Morehouse, *Confess or Die: Why Threatening a Suspect With the Death Penalty Should Render Confessions Involuntary*, 56 AM. CRIM. L. REV. 531, 533–34 (2019).

⁵¹ Morehouse, *supra* note 50, at 538.

⁵² *Hearing on HB 2167 Before the House Comm. On Corrections and Juvenile Justice*, Feb. 13, 2017 (emphasis added).

And Kansas is no stranger to official misconduct. Of the four Kansans recently exonerated with assistance from the Midwest Innocence Project and its partners, three were convicted of crimes qualifying for capital murder: Floyd Bledsoe, Lamonte McIntyre, and Olin “Pete” Coones, Jr. And all three of those convictions, described in more detail below, were obtained through state misconduct.

Similarly, in June 2021, a three-person disciplinary panel of the Kansas State Bar voted unanimously to disbar prosecutor Jacqie Spradling for her intentional misconduct in the criminal trials of Dana Chandler and Jacob Ewing.⁵³ In the opinion for the appeal of one of the two cases, Kansas Supreme Court Justice Biles remarked, “Taken as a whole, this prosecution unfortunately illustrates how a desire to win can eclipse the state’s responsibility to safeguard the fundamental constitutional right to a fair trial owed to any defendant facing criminal prosecution in a Kansas courtroom.”⁵⁴ The disciplinary panel found further that Spradling knowingly and intentionally engaged in a deliberative pattern of serious misconduct.⁵⁵ Spradling was also one of the prosecuting attorneys in the case of Amman Reu-El King Phillip f/k/a Phillip Cheatham, whose death penalty was overturned in 2013 and pled guilty to avoid another trial and possible death sentence.⁵⁶

Finally, because wrongful death sentences are strongly correlated with official misconduct, locations with higher rates of misconduct run a higher risk of executing an

⁵³ Chandler and Ewing were not exonerated but were granted new trials for the misconduct.

⁵⁴ *State v. Chandler*, 307 Kan. 657, 695 (2018). Tim Carpenter, *Panel urges disbarment of Kansas attorney for deliberate misconduct in two high-profile trials*, KAN. REFLECTOR (Jun. 4, 2021), <https://kansasreflector.com/2021/06/04/panel-urges-disbarment-of-kansas-attorney-for-deliberate-misconduct-in-two-high-profile-trials/>.

⁵⁵ *Id.*

⁵⁶ Steve Fry, *Cheatham Defense Attorney Challenges Death Penalty in Kansas*, TOPEKA-CAP. J. (Mar. 7, 2014, 1:31 PM), <https://amp.cjonline.com/amp/16677514007>.

innocent.⁵⁷ In Kansas, Wyandotte County is an area of particular concern due to the pattern of misconduct revealed in Lamonte McIntyre’s case (discussed in more detail below). Wyandotte and Sedgwick are the two counties with the most capital cases,⁵⁸ and Wyandotte and Sedgwick together make up four of the fourteen exonerations in Kansas so far.⁵⁹ And the dramatic and persistent misconduct revealed in Lamonte’s case suggests the worrying probability that other, undiscovered wrongful convictions have occurred in Wyandotte County.

B. Eyewitness Misidentification

There is little testimony more damning and weighted more highly by the jury than victim or a witness on the stand pointing to the defense table and indicating the defendant as the perpetrator. However, once thought to be the gold standard in evidence presented at trial, science has shown that eyewitness identifications of a person unknown to the witness can be one of the least reliable forms of evidence available.⁶⁰ Eyewitness misidentification was a factor in 28% of known exonerations (822 of the 2946) recorded by the Exoneration Registry, and a factor in 69% of the first 375 DNA exonerations (258 of 375).⁶¹ Both the prevalence of misidentification in these cases, as well as numerous scientific and psychological studies, have proven there are

⁵⁷ Location matters in the context of the death penalty generally, with most death sentences concentrated in only a handful of counties due to factors like the authority and discretion of the local prosecutor and political pressures on local officials. *Glossip v. Gross*, 576 U.S. 863, 918–21 (2015) (Breyer, J., dissenting). These same factors naturally have a similar influence on rates of official misconduct.

⁵⁸ Kansas Judicial Council, *Report of the Kansas Judicial Council Death Penalty Advisory Committee on Certain Issues Related to the Death Penalty* (Nov. 12, 2004), pgs. 9–11. See also Kansas Judicial Council, *Report of the Judicial Council Death Penalty Advisory Committee* (Feb. 13, 2014).

⁵⁹ NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View=%7BBB8342AE7-6520-4A32-8A06-4B326208BAF8%7D&FilterField1=State&FilterValue1=Kansas>.

⁶⁰ See John T. Wixted, Laura Mickes & Ronald P. Fisher, *Rethinking the Reliability of Eyewitness Identification*, PERSPS. ON PSYCHOL. SCI. (2018), doi: 10.1177/1745691617734878.

⁶¹ *DNA Exonerations in the United States*, THE INNOCENCE PROJECT, <https://innocenceproject.org/dna-exonerations-in-the-united-states/>.

severe limitations on humans' ability to remember visual information about, and details of, events.⁶²

A now commonly understood problem with eyewitness identifications occurs when the witness is identifying a person of a different race than themselves, referred to as a cross-racial identification. Research shows that people are far worse at identifying a person of a race not their own, as when a white witness identifies a black suspect.⁶³ For example, a 1998 study of conducted in convenience stores found that two to three hours after interacting with a customer, clerks could correctly identify customers of their own race 53–64% of the time.⁶⁴ When asked to identify customers of a different race, however, the accuracy dropped precipitously, to as low as 25%.⁶⁵ Other studies since have obtained similar results, confirming that witnesses are far better able to identify members of their own racial group than members of another racial group, a phenomenon which compounds the problem of an already low accuracy rate for eyewitness identifications.⁶⁶ This phenomenon is borne out in the exoneration data: of the DNA

⁶² Scholars have long known of the issues with eyewitness misidentification despite the fact that courts and jurors give so much weight to such testimony. Edwin Borchard who investigated 65 cases of wrongful conviction in 1932 found eyewitness misidentification was responsible for roughly 45% of his 65 case studies. Edwin Borchard, *CONVICTING THE INNOCENT. SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* (1931). Despite this, courts throughout the last century and even now have failed to correct problematic identifications or allow experts to testify on the science of eyewitness identifications so as to provide the jury with better context for an identification.

⁶³ See Gary L. Wells and Deah S. Quinlivan, *The Eyewitness Post-Identification Feedback Effect: What is the Function of Flexible Confidence Estimates for Autobiographical Events?*, *APPLIED COGNITIVE PSYCHOL.* (2009); Gary L. Wells et al., *Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay*, *J. OF EXPERIMENTAL PSYCHOL. APPLIED* 42 (2003), <https://doi.org/10.1037/1076-898X.9.1.42>

⁶⁴ White and Hispanic clerks had a same racial group accuracy of 54% and 53% respectively while African American clerks had an accuracy of 64%. Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: a Field Study*, 18 *J. OF APPLIED SOC. PSYCHOL.* 972 (Sept. 1988), <https://doi.org/10.1111/j.1559-1816.1988.tb01187.x>.

⁶⁵ White clerks identified Black customers with only 40% accuracy and Hispanic customers with 34% accuracy. Black clerks identified Hispanic customers with 45% accuracy and white customers with 55% accuracy. Hispanic clerks identified white customers with 36% of white customers correctly, and 25% of Black customers correctly. *Id.*

⁶⁶ See, e.g., Peter J. Hills & J. Michael Pake, *Eye-Tracking the Own-Race Bias in Face Recognition: Revealing the Perceptual and Socio-Cognitive Mechanisms*, *COGNITION* 586 (Dec. 2013), <https://doi.org/10.1016/j.cognition.2013.08.012>.

exonerations in which eyewitness identifications were a factor, 42% involved a cross-racial identification.⁶⁷

In 2014 the National Academy of Sciences (NAS) issued a report entitled “Identifying the Culprit: Assessing Eyewitness Identification.”⁶⁸ This report was the culmination of an effort to review the existing research on eyewitness identification and its accuracy. Based upon a review of both the scientific literature about vision and memory as well as applied research directed at the specific problem of eyewitness identification, the report identified the key variables—“system”⁶⁹ and “estimator”⁷⁰ variables—that contribute to the accuracy of eyewitness identifications, and issued a series of best practice recommendations for police and criminal justice practitioners to avoid future misidentifications and wrongful convictions, such as recording the circumstances and procedures used in every eyewitness identification, to allowing expert testimony on the science of vision and memory. The report also discussed significant issues with the standard for reviewing eyewitness identifications under the current legal test in practice.⁷¹

⁶⁷ “Cross-racial identification” means the identification of one person by a person of a different race. *Cross Racial Identification and Jury Instruction*, THE INNOCENCE PROJECT (May 20, 2008), <https://innocenceproject.org/cross-racial-identification-and-jury-instruction/#:~:text=Cross%2Dracial%20identification%20is%20when,racial%20bias%20exists%20in%20identification>.

⁶⁸ *Identifying the Culprit: Assessing Eyewitness Identification*, NAT’L ACADEMIES OF SCI (2014), <http://nap.edu/18891>.

⁶⁹ System variables are variables that can be controlled during an identification, such as the procedures used to obtain an identification like a lineup or “6-pack” photo identification that is controlled by police. *Id.* at 16.

⁷⁰ Estimator variables are conditions related to the actual crime that are not controlled by the police such as the race of the perpetrator compared to that of the victim, level of light available, viewing angle, etc. In other words, estimator variables are those conditions that affect how the memory is imprinted in the mind of the witness, while system variables are those that may distort the memory of the witness or affect their recollection of the event at a later date. *Id.* at 16.

⁷¹ The test used by the courts requires judges to examine five factors including (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’ degree of attention; (3) the accuracy of the witness’ prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the identification procedure. All of the DNA exonerees mentioned above who were convicted with an eyewitness identification had this test applied in their case and still arrived at an erroneous result, leading the NAS

While providing a series of recommendations to make eyewitness identification procedures less prone to error, the report recognizes that there is no way to make eyewitness identification error-proof, and significant risk remains in deriving a high level of certainty from eyewitness identifications.

C. Flawed Science

Faulty forensic “science” is another significant source of wrongful convictions. Although some areas of forensics, most notably DNA or chemical analysis, are reliable,⁷² many other areas lack the study, objectivity, neutrality, and repeatability necessary to truly be called a science.⁷³ Invalid forensic evidence was a factor in 24% of the total number of exonerations known by the Exoneration Registry, 43% of exonerations achieved with the use of DNA testing, and 26% of exonerations of persons who were charged with murder.⁷⁴

to call for reform of the legal framework for eyewitness identifications. *Manson v. Braithwaite*, 423 U.S. 98 (1977); *Identifying the Culprit*, *supra* note 68, at 31–44.

⁷² Despite the fact that these practices do qualify as “scientific,” they are themselves still prone to error and abuse, as in the cases of forensic laboratory technician Fred Zain in West Virginia who falsified hundreds of serology reports to obtain convictions, Annie Dookhan, the Boston forensic chemist who falsified results in drug chemistry tests leading to her own prosecution and conviction, and Sonja Farak, the Massachusetts state chemist who stole control samples to feed her methamphetamine habit. Jeremy C. Fox, *Nearly 110 Drug Convictions Vacated in Connection with Annie Dookhan Scandal*, THE BOS. GLOBE (Jun. 25, 2021), <https://www.bostonglobe.com/2021/06/25/metro/nearly-110-drug-convictions-vacated-connection-with-annie-dookhan-scandal/>; Maggie Mulvehill, *More Cases Connected to Sonja Farak’s Drug Lab Work Expected to be Dropped* THE BOS. GLOBE (Oct. 25, 2020), <https://www.bostonglobe.com/2020/10/25/metro/more-cases-connected-sonja-faraks-drug-lab-work-expected-be-dropped/>; *A Trail of Misconduct and the Need for Reform*, THE INNOCENCE PROJECT (May 7, 2010), <https://innocenceproject.org/a-trail-of-misconduct-and-the-need-for-reform/>. See also MARYLAND COMMISSION ON CAPITAL PUNISHMENT: FINAL REPORT TO THE GENERAL ASSEMBLY (Dec. 12, 2008) (recognizing the hazard of intentionally false forensic testimony and analysis, including in 11 cases of persons who had been executed across the country), http://fbaum.unc.edu/teaching/POLI195_Fall09/MD_death-penalty-commission-final-report.pdf.

⁷³ For example, the NAS has said of bite mark analysis, microscopic hair comparison, shoe print comparisons, handwriting comparisons, and firearm and tool-mark comparisons do not “have the capacity to consistently and with a high degree of certainty demonstrate a connection between evidence and a specific individual or source.” Committee on Identifying the Needs of the Forensic Scis. Community, Nat’l Res. Council, *Strengthening Forensic Science in the United States: A Path Forward*, NAT’L ACADEMY OF SCIS., 87 (2009), <https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf>.

⁷⁴ *Interactive Data Display*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>; *DNA Exonerations in the United States*, *supra* note 57.

In 2009, the NAS released a report summarizing a massive effort to analyze the state of forensic practices in the U.S. and the validity of conclusions drawn by experts in various fields therein.⁷⁵ The report was a damning indictment of the accuracy and use of forensics nationwide. The report broadly concluded that outside of nuclear DNA analysis, many of the most commonly used forensic techniques used at trial had not undergone the necessary testing to establish the reliability and validity to support the claims made by experts testifying about them in court.⁷⁶ Even when an expert uses a scientifically-accepted method of analysis, there exists a risk that experts may overstate what the evidence actually shows. Likewise, experts may exaggerate or misrepresent their findings in response to pressure from police or prosecutors, or in effort to gain additional engagements with the attorney or office that hired the expert.⁷⁷

Forensic evidence carries special weight with juries, and thus special danger of wrongful convictions, because of what has commonly been termed the “CSI effect.”⁷⁸ Popular culture is rife with television and movies portraying forensics as an actual science with almost infallible omniscient capacity to solve crimes and bring perpetrators to justice, despite the reality being far from that vision.⁷⁹ Society and prospective jury members are inculcated in the belief that these sort of presentations are commonly made at trial and in some studies have been found to be less likely to convict if no forensic evidence of the sort they expect was presented at trial.⁸⁰ Similarly it can be inferred that jurors are societally inclined by these same influences to believe

⁷⁵ *Strengthening Forensic Science in the United States: A Path Forward*, NAT’L ACAD. SCIS. (2009), <https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf>.

⁷⁶ *See id.* at 7–8.

⁷⁷ Belinda Buscombe, *When the Evidence Lies*, TIME MAG. (May 13, 2001).

⁷⁸ *See* N.J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction about Forensic Science Affects the Public’s Expectations about Real Forensic Science*, 47 *Jurimetrics J.* 357 (2007).

⁷⁹ Several of the largest television franchises of all time, including *Law and Order*, *CSI*, *NCIS* and their various spinoffs and derivatives all prominently feature forensics as a feature to help catch the killer.

⁸⁰ Schweitzer & Saks, *supra* note 74, at 116.

individuals presented to them as forensic experts far above and beyond any weight that should be given to their testimony, and studies have shown that jurors give expert witnesses more weight than their testimony objectively provides.⁸¹

D. False Confessions

False confessions were a factor in 362 (12%) of known exonerations, 109 (29%) of DNA exonerations, and 248 (22%) of known exonerations for murder.⁸² False confessions may only relate to part of an alleged crime and often are admitted at trial over objections of the defense. In some cases, a false confession by one individual ends with others being wrongfully convicted.⁸³ To juries, and likely to the courts who are evaluating whether the evidence should be admissible, a confession is indicative of guilt, even if recanted later. Once entered into evidence, a false confession can seal the fate of the defendant.

According to an analysis from 2019, 36% of exonerations for people under the age of 18 at the time a crime was committed involved a false confession, compared to about 10% of cases for exonerees over the age of 18.⁸⁴ The power dynamic at play when a police officer interviews a juvenile may often induce them to say what they think the interrogator wants to hear, or what

⁸¹ Brian C. Smith et al., *Jurors' Use of Probabilistic Evidence*, 20 L. & HUM. BEHAV. 49, (1996), <https://psycnet.apa.org/doi/10.1007/BF01499132>.

⁸² % Exonerations By Contributing Factor, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>. The higher prevalence in cases involving murder or DNA exonerations may exist because individuals are more likely to plead guilty to avoid a threatened death penalty even when innocent. *Id.*; see also *DNA Exonerations in the United States*, *supra* note 57.

⁸³ See, e.g., the case of Christopher Ochoa, whose coerced confession to a rape-murder resulted in the wrongful conviction and sentence to life imprisonment for both himself and his friend Richard Danziger, *Christopher Ochoa*, Innocence Project, <https://innocenceproject.org/cases/christopher-ochoa/> (last visited Feb. 3, 2022), and the case of the "Beatrice Six," where several Nebraskans were wrongfully convicted for a rape-murder after authorities coerced confessions from three of them using threats and false promises. *Civil Trial Begins for "Beatrice Six"*, INNOCENCE PROJECT (Jan. 8, 2014), <https://innocenceproject.org/civil-trial-begins-for-beatrice-six/>.

⁸⁴ *Age and Mental Status of Exonerated Defendants who Confessed*, NAT'L REGISTRY EXONERATIONS (Mar. 17, 2020), <https://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf>; see also *False Confessions More Prevalent among Teens*, INNOCENCE PROJECT (Sept. 9, 2013), <https://innocenceproject.org/false-confessions-more-prevalent-among-teens/>.

they think will allow them to finally go home. This effect may often be at work on adults who falsely confess, and even more often on those with a mental disability.⁸⁵ Of the exonerees with intellectual disabilities in that 2019 analysis, 70% of their cases involved a false confession, indicating that the coercive power of the interrogator played a strong role in inducing the false confession.⁸⁶ Indeed, a review of multiple DNA exonerations revealed that defendants convicted for “knowing facts only the perpetrator could know” often had been interrogated for hours, with police coercing the defendant into parroting back information or phrases as part of the defendant’s “confession.”⁸⁷

⁸⁵ *Age and Mental Status*, *supra* note 80.

⁸⁶ *Id.*

⁸⁷ Fabiana Alceste et al., *Facts Only the Perpetrator Could Have Known? A Study of Contamination in Mock Crime Interrogations*, 44 L. & Hum. Behav. 128 (2020). For example, David Vasquez was wrongfully convicted for murder after hours of police interrogation where officers fed him information, as evidenced by following excerpt from the interrogation:

Det. 1: Did she tell you to tie her hands behind her back?

Vasquez: Ah, if she did, I did.

Det. 2: Whatcha use?

Vasquez: The Ropes?

Det. 2: No, not the ropes. Whatcha use?

Vasquez: Only my belt.

Det. 2: No, not your belt... Remember being out in the sunroom, the room that sits out to the back of the house? ...and what did you cut down? To use?

Vasquez: That, uh, clothesline?

Det. 2: No, it wasn't a clothesline, it was something like a clothesline. What was it? By the window? Think about the Venetian blinds, David. Remember cutting the Venetian blind cords?

Vasquez: Ah, it's the same as rope?

Det. 2: Yeah.

Det. 1: Okay, now tell us how it went, David – tell us how you did it.

Vasquez: She told me to grab the knife, and, and, stab her, that's all.

Det. 2: (voice raised) David, no, David.

Vasquez: If it did happen, and I did it, and my fingerprints were on it...

Det. 2: (slamming his hand on the table and yelling) You hung her!

Vasquez: What?

Det. 2: You hung her!

Vasquez: Okay so I hung her.

Death Row Exonerations for People with Intellectual Disabilities, ACLU, <https://www.aclu.org/other/death-row-exonerations-people-intellectual-disabilities> (last visited Feb. 3, 2022).

While the young and intellectually disabled are over-represented in the pool of exonerated false confessors, they are not the only members. Other factors such as threats of the death penalty and lies by the interrogator can also induce sound-minded adults to falsely confess. Take the case of Chris Ochoa, who not only falsely confessed and pleaded guilty to a crime he did not commit to avoid the death penalty, he also falsely testified against his innocent co-defendant. Both Chris and his co-defendant were exonerated by DNA evidence in 2002.⁸⁸ Chris did not otherwise experience intellectual limitations, and, after exoneration, Chris attended law school and became a lawyer in hopes of helping others like him.⁸⁹

False confessions have also occurred in Kansas, including in the case of Eddie Lowery, whose wrongful conviction took over twenty years to correct.⁹⁰ In 1982, when he was just 22 years old, Eddie was convicted of the rape of a 74-year-old woman after detectives coerced him into making a false confession.⁹¹ Eddie served 10 years in prison before being paroled in 1991. Twelve years later, Eddie and his counsel secured DNA testing which excluded Eddie as the perpetrator, and his conviction was vacated.⁹²

E. Jailhouse Informants

Jailhouse informants or “snitches” can, and do, lead to wrongful convictions. An analysis from 2015 found that 8% of the known exonerees at that time were convicted with a jailhouse

⁸⁸ Maurice Possley, *Christopher Ochoa*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3511> (last updated May 26, 2020).

⁸⁹ Dennis Chaptman, *Christopher Ochoa, Exonerated in Texas Crimes, Earns Law Degree*, U. WISC.-MADISON NEWS (May 10, 2006), <https://news.wisc.edu/christopher-ochoa-exonerated-in-texas-crimes-earns-law-degree/>.

⁹⁰ Hurst Laviana, *Settlement Reached in Wrongful Conviction*, THE WICHITA EAGLE (Aug. 08, 2014), <https://www.kansas.com/news/local/crime/article1026672.html>.

⁹¹ *Eddie Lowery*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3394> (last updated Mar. 14, 2019).

⁹² *Id.*

informant.⁹³ A 2015 analysis found that 15% of all the exonerees of murder known at the time were convicted using a jailhouse informant. Twenty-six of them had been sentenced to death.⁹⁴ Jailhouse informants often come forward on their own with information they claim to have overheard or have been told voluntarily by the defendant. In many other cases, like the case of MIP client Olin “Pete” Coones discussed more in depth below, they are intentionally contacted or placed by police and prosecutors with the goal of obtaining a confession from the defendant. In either circumstance there are substantial reasons beyond just the proven cases of lying informants and corruption to worry that a jailhouse informant has fabricated a statement from the defendant.

V. The Death Penalty & Wrongful Convictions Across The U.S.

Capital punishment is not imposed consistently across the United States. As of December 2021, 23 states and the District of Columbia have abolished the death penalty, while three other states and the federal government have declared a moratorium on the carrying out of death sentences.⁹⁵ In the 24 states that continue to use capital punishment, however, a great deal of disparity exists in how it is imposed.

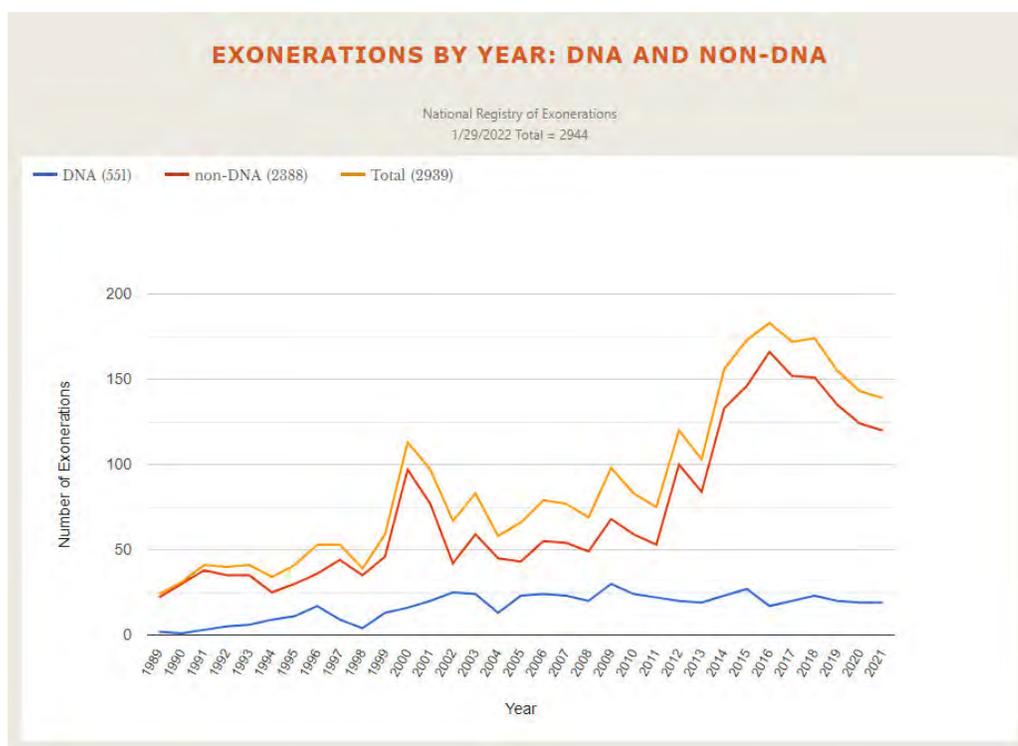
Pursuing the death penalty is a prosecutorial choice and counties with the highest use of the death penalty consistently have the highest reversal rates; in some cases, serious signs of sustained prosecutorial misconduct have led to multiple death row exonerations. And while geographic differences in use of the death penalty indicate issues of arbitrariness, differences over time in the rate of exonerations indicate that the risk of wrongful execution since 1976 is far

⁹³ Samuel Gross & Kaitlin Jackson, *Snitch Watch*, NAT’L REGISTRY EXONERATIONS (May 13, 2015), <https://www.law.umich.edu/special/exoneration/Pages/Features.Snitch.Watch.aspx>.

⁹⁴ *Id.*

⁹⁵ *State by State*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last accessed Feb. 2, 2022).

greater than researchers once thought. As discussed *supra* the best estimate for the rate of wrongful conviction in the U.S. is the 4.1% identified in the Gross study, but the true rate is unknown.⁹⁶ Since this estimate was established, the rate of exonerations nationwide continues to rise. In the first 10 years after the first DNA exoneration in 1989, the Exoneration Registry has documented 397 exonerations.⁹⁷ From 1999 – 2008 that number reached 757, and from 2009 – 2018, 1,333 individuals were exonerated in the U.S.⁹⁸ In 2014, the year Gross’ 4.1% statistic was published, the Exoneration Registry documented 156 exonerations for the calendar year. The following year in 2015, 173 exonerations took place, followed by 183 in 2016, 172 in 2017, 174 in 2018, and 155 in 2019.⁹⁹



⁹⁶ *Rate of False Conviction, supra* note 16.

⁹⁷ *Interactive Data Display, supra*, note 9.

⁹⁸ *Id.*

⁹⁹ The drop off in exonerations recorded in 2020 and 2021 (143 and 132 exonerations recorded respectively) is most likely caused by the Coronavirus crisis and ensuing lengthy court delays, closures, and extended timelines across the criminal justice system, however both of those years still had more recorded exonerations than any year preceding 2014, the highest of which was 120 in 2012. See *Exonerations in the United States, supra* note 10.

B. States' and National Reaction to the Wrongful Conviction Crisis

Despite the procedural reforms and protections put in place in the modern death penalty era, a good number of states have decided to abolish the death penalty altogether. Since 1972, 15 states have abolished the death penalty either by a legislative statute or court ruling, a further 3 states have put in place moratoriums on the carrying out of death sentences by executive order.¹⁰⁰ The federal government also maintained a moratorium on executions until 2020 when outgoing President Donald Trump authorized 13 executions before the moratorium was reinstated by President Joe Biden.¹⁰¹ These abolishing states and governors widely cited the risk of wrongful executions as a reason for abolishing the death penalty.

Indeed, the unavoidable risk of executing an innocent led Illinois to abolish the death penalty in 2011. While Illinois had reinstated the death penalty after the Supreme Court's decision in *Gregg v. Georgia*, by 2000, the state had exonerated more inmates than it had executed.¹⁰² Alarmed, Illinois imposed a moratorium on executions, during which it exonerated seven additional persons on death row, for a total of twenty.¹⁰³ As a result, on March 9, 2011, Governor Pat Quinn signed legislation abolishing the death penalty, citing "the numerous flaws that can lead to wrongful convictions."¹⁰⁴

¹⁰⁰ States that have abolished the death penalty since 1972 include Colorado, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Virginia, and Washington. California, Oregon and Pennsylvania have instituted moratoriums. *State by State*, *supra* note 91.

¹⁰¹ Alana Wise, *The Justice Department is Pausing Federal Executions After they Resumed under Trump*, NPR, (July 1, 2021), <https://www.npr.org/2021/07/01/1012366520/the-justice-department-is-pausing-federal-executions-after-they-resumed-under-tr>.

¹⁰² *Illinois*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/illinois>.

¹⁰³ *Id.*

¹⁰⁴ John Schwartz and Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 9, 2011, available at <https://www.nytimes.com/2011/03/10/us/10illinois.html>.

Similarly, in 2008, the Maryland Commission on Capital Punishment, a body created by the legislature to investigate the death penalty found that “Despite the advance of forensic sciences, particularly DNA testing, the risk of execution of an innocent person is a real possibility.”¹⁰⁵ Maryland went on to impose the strictest death penalty requirements in the nation and eventually abolishing the death penalty completely by legislation in 2013.¹⁰⁶ In New Jersey, the legislature enacted a moratorium on executions in 2005 and abolished the death penalty in 2007 after the New Jersey Death Penalty Study Commission found “[t]he penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.”¹⁰⁷

Still other states have imposed moratoriums on executions after similar government investigations into the risk of wrongful executions. After a seven-year study on wrongful executions in Pennsylvania concluded in 2018, Governor Tom Wolfe enacted a still-ongoing moratorium on executions in the state, announcing “If the Commonwealth of Pennsylvania is going to take the irrevocable step of executing a human being, its capital sentencing system must be infallible. Pennsylvania’s system is riddled with flaws, making it error prone, expensive, and anything but infallible.”¹⁰⁸ Likewise, California Governor Gavin Newsom enacted a still-ongoing executive moratorium on executions in 2019,¹⁰⁹ and a November 2021 report released by the legislature-created Committee on Revision of the Penal Code concluded that the death penalty is

¹⁰⁵ *Final Report to the General Assembly*, MARYLAND COMM. ON CAPITAL PUNISHMENT (Dec. 12, 2008), <https://www.ncsl.org/Portals/1/Documents/cj/Maryland2008Report33956.pdf>.

¹⁰⁶ *Maryland*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/maryland>.

¹⁰⁷ *New Jersey Death Penalty Study Commission Report*, N. J. DEATH PENALTY STUDY COMMISSION, (Jan. 2, 2007), https://www.njleg.state.nj.us/committees/dpsc_final.pdf at 1.

¹⁰⁸ *Death Penalty Moratorium Declaration Memorandum*, PENNSYLVANIA OFFICE OF THE GOVERNOR (Feb. 13, 2015), <https://www.governor.pa.gov/newsroom/moratorium-on-the-death-penalty-in-pennsylvania/>.

¹⁰⁹ Scott Shafer & Marisa Lagos, *Gov. Gavin Newsom Suspends Death Penalty in California*, NPR, (Mar. 12, 2019), <https://www.npr.org/2019/03/12/702873258/gov-gavin-newsom-suspends-death-penalty-in-california>.

“beyond repair” and recommended the abolition of the death penalty, due in part to the immense risk of wrongful executions and past sentences of innocent California defendants to death.¹¹⁰

Legal organizations such as the American Bar Association (ABA) and the American Legal Institute (ALI) have also raised significant concerns about states’ use of capital punishment. In 2007 the ABA completed a three-year study on death penalty systems in eight states and renewed its call for a moratorium on the use of the death penalty, calling all such systems “deeply flawed.”¹¹¹ Likewise, in 2009 the ALI council issued a final report to the membership that recommended withdrawing Section 210.6 of the Model Penal Code, the section providing for capital punishment for murder.¹¹²

Each of these state and organizational investigations supports the proposition that the death penalty comes with the sobering and inherent risk of executing an innocent person.

It is my professional opinion, in accordance with these studies and reports, that there is no system for carrying out the death penalty will completely eliminate the risk of executing another innocent person. This opinion is further supported by the evidence that jurisdictions with a higher use of the death penalty are more error prone, as well as by the increasing number of exonerations over time as science improves and awareness rises.

¹¹⁰ *Id.*

¹¹¹ *ABA Reports on Flawed Death Penalty Systems and Calls for Nationwide Moratorium*, ACLU OF NORTHERN CALIFORNIA (Oct. 29, 2007), <https://www.aclunc.org/publications/aba-reports-flawed-death-penalty-systems-and-calls-nationwide-moratorium-article>.

¹¹² *Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty*, AM. L. INST. (Apr. 15, 2009), https://www.ali.org/media/filer_public/3f/ae/3fae71f1-0b2b-4591-ae5c-5870ce5975c6/capital_punishment_web.pdf.

VI. Wrongful Convictions in Kansas

Kansas is not immune to wrongful convictions. Since 1989, the Exoneration registry has recorded 14 Exonerations within the state of Kansas.¹¹³ However, this number is indicative more of the level of resources available to innocent defendants than it is the number of innocent people convicted in Kansas. Currently, the Midwest Innocence Project is the only innocence network member operating in Kansas and its five attorneys simultaneously manage cases in 4 other states. Comparatively, California has three Innocence Network Member organizations active in the state, as well as other Innocence organizations with dozens of attorneys and staff.¹¹⁴ Likewise, as a smaller state with fewer resources, no state-specific effort to estimate the wrongful conviction rate within Kansas alone has been attempted. As such, the best estimate of wrongful convictions in Kansas remains the 4.1% from Samuel Gross' 2014 study of death row exonerees.

The 14 exonerees who have been freed in Kansas do however provide helpful insight into the wrongful conviction issue in Kansas. As experienced nationally, Kansas has also seen an increase in the rate of exonerations in recent years. Ten of the 14 exonerations in Kansas have been obtained in the last decade. All of the 14 exonerees involved serious criminal convictions, including murder, sexual assault, and attempted murder. Three of the 14 exonerees' cases involved a false or mistaken eyewitness identification. Nine of the 14 involved official misconduct of some kind. Eleven of the 14 involved perjury or a false accusation by a witness, expert, or informant.

Moreover, while there has yet to be an exoneration of an individual sentenced to death in

¹¹³ *Interactive Data Display, supra*, at note 9.

¹¹⁴ Innocence Network member organizations in California include the Northern California Innocence Project, The California Innocence project and the Loyola Law School Project for the Innocent, a Clinic at Loyola Law School. *Member Directory, supra* note 9.

Kansas, that does not mean there is not a wrongfully convicted person on death row within this state's boundaries or that this will never happen in the future. The same issues that led to the incarceration and execution of innocent individuals in other states exist in Kansas, as well. In fact, of the four Kansans recently exonerated with assistance from the Midwest Innocence Project and its partners, three were convicted of crimes qualifying for capital murder: Floyd Bledsoe, Lamonte McIntyre, and Olin "Pete" Coones, Jr. And all three of those convictions were obtained through state misconduct. Floyd, Lamonte, and Pete were at risk of being murdered at the hands of the very state whose misconduct led to their wrongful convictions.

A. Floyd Bledsoe

Floyd Bledsoe served over sixteen years for a crime the State knew from the beginning he had not committed. In 2000, Floyd was convicted of first-degree murder, aggravated kidnapping, and aggravated indecent liberties with a child in the shooting death of his 14-year old sister-in-law. Had the State chosen to, it could have pursued the death penalty, as the aggravated indecent liberties with a child charge made the crime eligible for a capital murder charge under K.S.A. 21-3439(7)(b).

In November 1999, just north of Oskaloosa, Kansas, the body of Floyd's sister-in-law was found under a pile of trash with four gunshot wounds. Floyd's brother, Tom, initially confessed to the brutal rape and murder, but once in jail, recanted and blamed Floyd. All of the evidence pointed to Tom: he was unaccounted for during the time the victim disappeared, the murder weapon was a gun from Tom's truck, Tom led police to the body, and he confessed not only to police, but also to his minister and his parents. Floyd had an alibi, and no physical evidence connected him to the crime. Yet the State ignored all of this, instead choosing to support Tom's jail-cell recantation and pursue charges against Floyd. At trial, the prosecution's

entire case hinged on the testimony of Tom. After officers who testified they believed Tom’s recantation, the jury ultimately convicted Floyd, and he was sentenced to life in prison.

After his conviction, Floyd repeatedly and consistently continued to assert his innocence in appeal after appeal. In 2004, after the Kansas Supreme Court upheld Floyd’s convictions on direct appeal, a hearing was held on a K.S.A. 60-1507 motion for new trial alleging that Floyd’s trial counsel provided him with a constitutionally inadequate defense for failing to present the evidence implicating Tom. Although the motion was denied, the Kansas Supreme Court found that the prosecution had nonetheless improperly discussed facts not in evidence and misstated facts and that Floyd’s defense attorney made numerous mistakes. Yet, while the court determined that Floyd’s counsel’s performance fell below “the constitutional threshold of objective reasonableness,” it ruled that the errors were not sufficiently prejudicial.

In 2008, Floyd received temporary relief; a United States District Court judge granted Floyd’s federal habeas petition on the grounds of ineffective assistance of counsel and he was released on bond while the state appealed the decision.¹¹⁵ Tragically, a year later, the 10th Circuit Court of Appeals reversed the decision, and reinstated Floyd’s conviction and sentence.¹¹⁶ As a result, Floyd—who had already served 9 years for a crime he did not commit—returned to prison, his hope for the future unclear.

At that moment, in 2009, Floyd had exhausted all his appellate avenues—direct appeal, post-conviction, and federal habeas. And had he been sentenced to death, he would have been eligible for the State to set an execution date. Had that occurred, he would not have been alive to pursue the DNA testing that ultimately proved his innocence six years later.

¹¹⁵ *Bledsoe v. Bruce*, No. 07-3070-RDR, 2008 WL 2549029 (D. Kan. June 23, 2008).

¹¹⁶ *Bledsoe v. Bruce*, 569 F.3d 1223 (10th Cir. 2009).

In 2015, Floyd was exonerated after the results of DNA testing of semen taken from the victim's vaginal swab exclude Floyd and implicated Tom. After the results of the test were known, Tom, knowing he would soon be investigated for the murder, committed suicide. In his suicide note, Tom confessed to raping and killing the victim and claimed that the County Attorney urged him to pin the crime on Floyd. The County Attorney had "told [Tom] to keep [his] mouth shut." Tom's letter included a diagram he drew of the murder scene and details that led detectives to an empty shell casing left at the scene that had never been uncovered during the initial investigation. Tom wrote, "Floyd is innocent... tell [him] I am sorry."

Additional evidence of State misconduct emerged, including an undisclosed order signed by the prosecutor, the sheriff, and the Kansas Bureau of Investigation prior to Floyd's trial, agreeing that there would be no DNA testing on the evidence they had collected. For 15 years, the prosecutor's office knew it had the means to prove Floyd's innocence and definitively identify the perpetrator, and it said nothing.¹¹⁷

B. Lamonte McIntyre

Lamonte McIntyre similarly was convicted of a crime he did not commit because of law enforcement and prosecutor misconduct. On April 15, 1994, victims Donald Ewing and Doniel Quinn were shot and killed as they sat in a car in Wyandotte County, Kansas.¹¹⁸ No physical evidence or motive connected Lamonte to the crimes. Yet, the investigation conducted by Detective Roger Golubski was closed just six hours later with Lamonte's arrest; witness interviews lasted just 19.5 minutes.

¹¹⁷ Karen Dillon, *Web of lies, indifference to justice led to wrong Kansas brother being imprisoned for more than 15 years*, LAWRENCE JOURNAL-WORLD, Dec. 13, 2015, available at <https://www2.ljworld.com/news/2015/dec/13/web-lies-and-indifference-justice-led-wrong-brothe/>

¹¹⁸ *State v. McIntyre*, 259 Kan. 488, 489 (1996).

Lamonte's conviction was the direct result of misconduct that would take another 23 years to come to light. It is now clear that for decades, Golubski terrorized poor Black women, making them submit to sexual acts through force or with threats of arrest or harm to them or their loved ones, and coercing them to fabricate evidence to close his cases.¹¹⁹

Lamonte's was one of those cases.¹²⁰ Several years before the 1994 double homicide, Golubski sexually assaulted Lamonte's mother by threatening to arrest her and her then-boyfriend. Out of fear, she moved and changed her number to get away. Later, when Golubski needed to close the double murder of Ewing and Quinn, Golubski, with the help of prosecutor Terra Morehead, framed her son, Lamonte.¹²¹

Lamonte was ultimately convicted based upon the testimony of two eyewitnesses who saw the shooting and testified that Lamonte was the shooter. Golubski used coercion or improper suggestion to force both of them to identify Lamonte. One of those witnesses, Niko Quinn, immediately recanted, and went to Morehead to tell her that Lamonte looked nothing like the perpetrator. Morehead also threatened Niko, who ultimately succumbed and testified to support the State's false narrative. A third witness, Stacey Quinn, recognized the shooter as someone other than Lamonte, and told police and Morehead, but there is no record of any interview of Stacey; the prosecutor sent her away without ever disclosing her existence to the defense. The false and fabricated testimony of two coerced witnesses and years of misconduct from Golubski ended in Lamonte behind bars for a crime he did not commit.

Twenty-three years later, during a 2017 post-conviction evidentiary hearing, "in the face

¹¹⁹ Complaint at 2, *McIntyre v. United Government of Wyandotte County*, 2020 WL 1028303 (D. Kan. Mar. 3, 2020) (2:18-cv-02545-KHV-KGG).

¹²⁰ *Id.*

¹²¹ *Id.*

of a cascade of evidence of police and prosecutorial misconduct, Wyandotte County District Attorney Mark Dupree abruptly rose and announced that the prosecution agreed that [Lamonte’s] conviction should be vacated.”^{122, 123}

While Lamonte is now free, the end of this case could have been very different. Had the crime occurred just a few months later, Lamonte would have turned 18 years old and Kansas would have reinstated the death penalty. Because this was a double murder, it would have been eligible to be charged as a capital crime under K.S.A. 21-3439(6). Given the corruption and fabrication of evidence, there is no reason to believe the prosecutor would not have sought death in this case. Like many death row exonerations, Lamonte’s wrongful conviction took decades to correct, which could be far too late for the State to correct a manifest injustice.

C. Olin “Pete” Coones, Jr.

Exoneree Olin “Pete” Coones, Jr., was also a victim of official misconduct in Wyandotte County, Kansas who could have been charged with capital murder under K.S.A. 21-3439(6) and sentenced to death.¹²⁴ In January 2009, Coones was convicted and sentenced to 50 years to life in prison. In a bizarre plot, Kathleen Schroll killed her husband and committed suicide, but staged their deaths to frame Coones.

Prosecutor Edmond Brancart concealed evidence of Schroll’s lack of credibility and motive to lie in order to convict Coones. Schroll was in serious debt, facing imminent arrest for embezzlement, and under investigation for elder abuse against Coones’ grandfather. Police had

¹²² *Lamonte McIntyre*, NAT’L REGISTRY EXONERATIONS (updated Feb. 24, 2020), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5216>.

¹²³ Dupree also announced, in light of Lamonte’s case, he would be establishing a conviction integrity unit within his office. Roxana Hegeman, *Prosecutor Wants Probe Of KCK Detective In Wrongful Conviction*, NPR KCUR, Nov. 10, 2017, <https://www.kcur.org/community/2017-11-10/prosecutor-wants-probe-of-kck-detective-in-wrongful-conviction>.

¹²⁴ *Olin Coones*, NAT’L REGISTRY EXONERATIONS (updated Feb. 22, 2021), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5866>.

obtained 120 checks written on Coones' grandfather's account, and a handwriting analyst testified there was "strong evidence" 115 of them were forged by Schroll; Schroll had also embezzled more than \$11,000 from the credit union where she worked and was going to be confronted by her supervisor just hours before her death.

The prosecution also knowingly presented false testimony from a jailhouse informant, Robert Rupert. Rupert claimed that Coones confessed to him while they were briefly in the same jail pod. Many of the details of the "confession" did not match the evidence, and the Butler County District Attorney's Office told Brancart that Rupert was unreliable and mentally unstable. Nonetheless, Brancart threatened to jail Rupert if he didn't cooperate against Coones, and he put Rupert's false tale in front of the jury.

Following Coones' post-conviction evidentiary hearing in 2020, Wyandotte County District Judge Bill Klapper found "rife" prosecutorial misconduct: Brancart failed to disclose threats and promises he made to Rupert and Rupert's full criminal history, and he suborned perjury related to whether he'd previously interviewed Rupert.

Coones' case follows the pattern of others exonerated after a sentence of death. The testimony of jailhouse informants like Rupert are a leading cause of wrongful capital convictions.¹²⁵ As is the case with the State's allowance of Rupert's testimony against Coones and their suppression of exculpatory evidence, more than half of all death row exonerations involved both official misconduct *and* perjury or false accusation.¹²⁶

In November of 2020, after a re-investigation by Wyandotte County District Attorney Mark Dupree's Conviction Integrity Unity, and with the assistance of MIP and private attorneys,

¹²⁵ *The Snitch System*, CENTER ON WRONGFUL CONVICTIONS (Winter 2004-2005), <https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf>.

¹²⁶ See *Innocence Database*, *supra* note 4.

Coones was exonerated after serving more than 10 years in prison. He passed away just five days ago, only 108 days after his release. Had Coones been sentenced to death, he may never have experienced freedom at all.

VII. Wrongful Convictions and Executions Have Significant Collateral Effects

The effects of a wrongful conviction are staggering, and are by no means limited to the wrongfully convicted person. Family of the wrongfully convicted are irreparably damaged or traumatized; the community loses trust in the criminal justice system; and victims must face the fact that their real attacker remains free and they may have helped put an innocent person behind bars. There is no way to lessen most of this impact beyond reducing wrongful convictions to the maximum extent possible.

A. Effect of Wrongful Convictions on the Individual

The wrongfully convicted have their freedom taken away, their reputation destroyed, and are thrown into one of the worst incarceration systems in the developed world. If they are extremely lucky, someday their case may get picked up by an attorney or organization that is willing to investigate their case. If they are luckier still there may be evidence available that can help prove their innocence. But for every minute in between, the wrongfully convicted person languishes in an environment that damages their body and their mind. In addition, the exonerated person faces significant difficulty in returning to normal life.

Psychological research into the effects of incarceration shows the immense toll that the years of imprisonment the wrongfully convicted have suffered. Long term incarceration can result in dependence on an institutional structure, hyper-vigilance, distrust of others, and

suspicion, as well as social withdrawal and isolation.¹²⁷ For the wrongfully convicted, the trauma can be even worse than for those who committed the crime for which they were convicted. In one study, 14 of 18 participants met the diagnostic criteria for “enduring personality change following catastrophic experience.”¹²⁸ No one comes out unscathed and several studies examining the psychological effects of wrongful conviction have noted a high incidence of Post-Traumatic Stress Disorder (PTSD).¹²⁹ For some, the psychological effects and depression caused by their time in prison prove too much even though they eventually win exoneration. Suicide rates among the formerly incarcerated are higher than the public at large, likely due to the trauma they suffered and long-term impacts, and the wrongfully convicted do not escape that trend.¹³⁰

A recent review of academic scholarship identified eight key themes with respect to the “extreme and long-lasting” psychological impact of being wrongfully accused of a crime.¹³¹ The review revealed negative impacts on the accused in areas of self-identity, stigma, psychological and physical health, relationships with others, attitude towards the justice system, impact on finances and employment, lasting impacts of traumatic experiences in custody, and adjustment

¹²⁷ Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, NATIONAL POLICY CONFERENCE PAPER: FROM PRISON TO HOME (Jan. 30, 2001), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/42351/Haney.pdf.

¹²⁸ Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, CANADIAN J. OF CRIMINOLOGY AND CRIM. JUSTICE (Jan. 2004), <https://doi.org/10.3138/cjccj.46.2.165>.

¹²⁹ Samantha K. Brooks & Neil Greenberg, *Psychological Impact of Being Wrongfully Convicted: A Systematic Literature Review*, MED., SCI. & L. (2020), <https://journals.sagepub.com/doi/pdf/10.1177/0025802420949069>.

¹³⁰ Anne Bukten & Marianne Riksheim Stavseth, *Suicide in Prison and After Release: a 17 Year National Cohort Study*, EUROPEAN JOURNAL OF EPIDEMIOLOGY (Aug. 24, 2021), <https://link.springer.com/article/10.1007/s10654-021-00782-0>; Axel Haglund et al, *Suicide after release from prison - a population-based cohort study from Sweden*, J. OF CLIN. PSYCHIATRY (Oct. 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4520329/>. Even well-known exonerees who have been out for years are not immune. In 2016, beloved advocate and exoneree Darryl Hunt died by suicide, 13 years after his exoneration. Max Blau, *Tragedy of Darryl Hunt: how exonerated man came to take his own life*, THE GUARDIAN (Mar. 19, 2016), <https://www.theguardian.com/us-news/2016/mar/19/darryl-hunt-exonerated-self-inflicted-gunshot>. His case is sadly not unique. See Matthew Clarke, *Tragic Justice: Wrongfully Convicted Prisoners Die Shortly After Exoneration*, PRISON LEGAL NEWS (Mar. 9, 2017), <https://www.prisonlegalnews.org/news/2017/mar/9/tragic-justice-wrongfully-convicted-prisoners-die-shortly-after-exoneration/>.

¹³¹ Brooks & Greenberg, *supra* note 125 at 44–54.

difficulties upon release.¹³² Victims of overturned convictions have described deep resulting trauma from the experience of wrongful imprisonment, with a 2003 study of sixty exonerees imprisoned for an average of twelve years finding that “nearly half [of the exonerees] suffer[ed] from depression, anxiety disorder or some form of post-traumatic stress disorder.”¹³³

No exoneree comes out unscathed. In a recent conversation at a Midwest Innocence Project virtual event, exonerees Floyd Bledsoe and Ricky Kidd and MIP client Laquanda “Faye” Jacobs discussed their continued struggles post-incarceration.¹³⁴ Each of them acknowledged their struggles with PTSD and its impacts on their relationships and day-to-day life. Ricky described having nightmares of still being locked up and drinking coffee to stay up and prevent the nightmares. “It continues to show re-show itself on a regular basis,” he explained. Floyd expressed an inability to have close relationships and a default of keeping people at arm’s length. “All three of us will smile,” he said, “but behind smiles, we have a lot of pain.”

Physically, years or decades of inadequate nutrition and healthcare leave many exonerees with debilitating health conditions. In 2021, MIP client and exoneree Pete Coones died just 108 days after his exoneration. While he was only 64 years-old, he re-entered the free world in a body that was broken, having succumbed to cancer that went undiagnosed and untreated during his 12 years of wrongful incarceration.¹³⁵ Just two months before, exoneree and MIP client John Brown died of congestive heart failure that was the result of decades of untreated high blood

¹³² *Id.*

¹³³ Leslie Scott, *It Never, Ever Ends: The Psychological Impact of Wrongful Conviction*, AM. U. CRIM. L. BRIEF 5, no. 2 (2010):10-22 at 13 (citing Ann Zimmerman, *A Convict Freed By DNA Evidence Tries to Find a Life*, WALL ST. J., Oct. 30, 2007) (brackets in original).

¹³⁴ *2021 Faces of Innocence Virtual Gala*, MIDWEST INNOCENCE PROJECT at 1:17, <https://youtu.be/5sV43IISogg?t=4652> (last visited Feb. 2, 2022).

¹³⁵ Emily Crane, *Kansas man, 64, who spent 12 years in prison after a wrongful murder conviction dies of cancer - just 108 days after being exonerated and released*, DAILY MAIL (Feb. 22, 2021), <https://www.dailymail.co.uk/news/article-9287645/Kansas-man-exonerated-murder-dies-108-days-release.html> (last visited Feb. 2, 2022).

pressure while he was incarcerated.¹³⁶ He had been exonerated just 109 days earlier. Most recently, exoneree Kevin Strickland has filed a lawsuit against the prison’s healthcare provider for failing to provide adequate health care, the results of which have left him in a wheelchair.¹³⁷

In addition to suffering the negative and well-documented physical and mental health impacts of incarceration, wrongfully convicted persons suffer the additional harm of knowing that they should not be in prison and that they have done nothing wrong. Says Professor John Wilson of Cleveland State University: “Looking at the spectrum of traumatization to [the wrongfully convicted’s] psyche—the many ways in which these injuries permeate their being—I believe that the injuries from a wrongful conviction and incarceration are permanent. I think they’re permanent scars. And even though counseling and psychotherapy and treatments are helpful, I don’t think you can undo the permanent damage to the soul of the person, to their sense of self, to their sense of dignity.”¹³⁸ Professor Adrian T. Grounds of the University of Cambridge identified similar results from a clinical study of eighteen wrongfully-convicted men who were released from long-term imprisonment, finding “a pattern of disabling symptoms and psychological problems, one often compounding the next, that were severe and similar in all eighteen cases” and dividing the results into “five basic categories of common mental health problems suffered by the participants: Post-Traumatic Stress Disorder (PTSD), Enduring Personality Change, Other Psychiatric Disorders, Psychological/Physical Suffering, and Re-adjustment Issues.”¹³⁹ Wrongfully convicted individuals may additionally struggle to re-connect

¹³⁶ *John Brown Story MIP Faces of Innocence Gala*, MIDWEST INNOCENCE PROJECT, <https://www.youtube.com/watch?v=cGIhi2g2lio> (last visited Feb. 2, 2022).

¹³⁷ Luke Nozicka, *Kevin Strickland sues Missouri prison healthcare provider for neglecting medical needs*, KANSAS CITY STAR (Jan. 18, 2022), available at <https://www.kansascity.com/news/local/crime/article256890752.html>.

¹³⁸ Scott, *It Never Ends*, *supra* note 129 at 13.

¹³⁹ *Id.* at 14 (citing Adrian Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME & JUSTICE 1, 22–41 (2005)).

with family members or their communities, which results in further isolation and trauma, and can be additionally harmed by perceptions of outsiders who do not acknowledge the validity of their exonerations.

Lost in these studies are the stories of marriages and relationships that fell apart—or never happened because of the wrongful conviction. Love was lost or extinguished as family and friends moved on with their lives or mistakenly concluded, perhaps, that their loved ones really were guilty. Birthdays, anniversaries, holidays, and the milestones of life that are all missed because of a life the State stole away.

And these impacts are all the more severe for those on death row. Researchers have noted a common trend popularly termed “Death Row Phenomenon” which encapsulates a series of psychological effects of being placed on death row, from mental and physical deterioration, hopelessness, depression, and psychotic delusions to suicidal tendencies.¹⁴⁰ For the wrongfully convicted who end up on death row, the torment may be even more extreme. To date, there have been 186 exonerations from death row, with the average time served before exoneration being 11.5 years.¹⁴¹ Exonerees from death row face lifelong mental health issues and difficulties that persist for the remainder of their lives. Like exonerees from lesser sentences, death penalty exonerees face lasting impacts from their wrongful convictions that go far beyond the obvious and apparent.

¹⁴⁰ Karen Harrison & Anouska Tamany, *Death Row Phenomenon, Death Row Syndrome, and their Affect on Capital Cases in the US*, INTERNET J. OF CRIMINOLOGY (2010), https://web.archive.org/web/20110713050059/http://www.internetjournalofcriminology.com/Harrison_Tamony_%20Death_Row_Syndrome%20IJC_Nov_2010.pdf; Hans Toch et al, *Living on Death Row: The Psychology of Waiting to Die*, AM. PSYCHOLOGICAL ASSOC., (2018).

¹⁴¹ *About Innocence*, WITNESS TO INNOCENCE, <https://www.witnesstoinnocence.org/innocence>. (last visited Feb. 2, 2022).

In addition to the mental and physical damage, formerly incarcerated people also face substantially higher rates of unemployment and reliance upon government programs or family, as well as being nearly 10 times more likely to experience homelessness than the general population.¹⁴² Even exonerated individuals experience difficulty in obtaining housing, work, medical care, and a stable economic foundation. Convictions, even though vacated, still appear in records and they must explain away decades of missing credit, work, and housing history. Because of these continued support needs, the Midwest Innocence Project has added social workers to its team.

Kansas is one of the few states that does compensate the wrongfully convicted to the tune of \$65,000 per year for each year wrongfully imprisoned and \$25,000 per year for each year wrongfully on parole.¹⁴³ This financial assistance cannot make up for the emotional toll of incarceration, however, nor can it erase what the wrongfully convicted missed, such as opportunities for personal and educational growth, time with family members, some of whom may pass away during their time incarcerated, and drastic changes in society and culture that impede finding work, housing, or basic necessities. Despite their legal vindication, exonerates may also still face hatred and distrust from members of their community or even family who still believe them guilty.

B. Effect of Wrongful Convictions on Family Members

The impacts of a wrongful conviction go beyond the wrongfully convicted person themselves. Family members most often experience negative psychological stresses similar to

¹⁴² Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, BROOKINGS INSTITUTION, (Mar. 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.; Lucious Couloute, *Nowhere to Go, Homelessness Among Formerly Incarcerated People*, PRISON POL'Y INST. (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html>.

¹⁴³ K.S.A. § 60-5004.

and related to what has occurred to their loved one. In addition, families of the wrongfully accused face societal stigma because of the supposed actions of their loved ones, as well as financial difficulties, both from the costs imposed on families by incarceration, the potential loss of breadwinner, and oftentimes the tremendous burden of appeals and lawyers in an attempt to free their family member.

Still other studies have documented the psychological effects of wrongful convictions on the accused's family members. These studies have noted "secondary trauma" and higher than average instances of anxiety and depression.¹⁴⁴ Effects differ from romantic partners to parents or children based on their relationship at with the wrongfully convicted as well as such factors as their age at the time of the conviction, length of wrongful sentence served, and other factors. Some research indicates the impact on children of the wrongfully accused is likely more extreme than other family members, noting that children too young to understand at the time of conviction often by the time they reach 5th or 6th grade begin to experience, "involvement in criminal behaviors, poor education, social isolation, bullying victimization, suicidal ideation, reduced levels of professional accomplishment and development, fear-of-intimacy, and fear of speaking out."¹⁴⁵

The financial impact on families of the wrongfully convicted is one of the most apparent, and most obvious, consequence of wrongful convictions. The majority of defendants in the United States are represented by appointed attorneys or public defenders, indicating they qualify for indigent defense,¹⁴⁶ and those who do not qualify often choose to retain private counsel in

¹⁴⁴ Grounds, *supra* note 124.

¹⁴⁵ St. Jean Jeudy, *Dissertation: Psychosocial Consequences of Wrongful Conviction on Children*, WALDEN UNIVERSITY (2019), <https://www.proquest.com/openview/ff15489bc5189abfe91ee35ceb85878b/1?pq-origsite=gscholar&cbl=18750&diss=y>.

¹⁴⁶ R. Greenbaum, *Investigating Innocence: Comprehensive Pre-trial Defense Investigation to Prevent Wrongful Convictions*, UC IRVINE (2019).

hopes of a better outcome. These families who already qualify for indigent services must face the prospect of moving forward without the income of the incarcerated family member and with the additional expense of providing for that family member, including the cost of telephone calls. And for families who believe in their loved ones' innocence, they may seek additional appeal and post-conviction counsel, accumulating legal costs that are often unrecoverable even if their loved one is eventually exonerated.¹⁴⁷

C. Effect of Wrongful Convictions on the Community

Wrongful convictions have a corrosive effect on communities and their trust for the criminal justice system, a fact the federal government acknowledges in its “Upholding the Rule of Law and Preventing Wrongful Convictions” program.¹⁴⁸ Every time the wrong person is convicted, the real perpetrator goes free. In 165 of the 375 DNA exonerations, the true perpetrator was identified.¹⁴⁹ Those 165 actual perpetrators went on to be convicted of 154 additional violent crimes, including 83 sexual assaults, 36 murders, and 35 other violent crimes while the innocent sat behind bars for their earlier offenses.¹⁵⁰

¹⁴⁷ Rosalie Chan & Belle Lin, *The High Cost of Phone Calls in Prisons Generates \$1.4 Billion a Year, Disproportionately Driving Women and People of Color Into Debt*, BUSINESS INSIDER, (Jun. 30, 2021), <https://www.businessinsider.com/high-cost-prison-communications-driving-debt-racial-wealth-gap-2021-6>; Katrina Vanden Heuvel, *The Staggeringly High Price of a Prison Phone Call*, THE WASH. POST, (Nov. 30, 2021), <https://www.washingtonpost.com/opinions/2021/11/30/staggeringly-high-price-prison-phone-call/>.

¹⁴⁸ The program description notes: “While experts widely acknowledge that wrongful convictions constitute a small percentage of all findings of guilt by our nation’s court systems, irreversible damage is sustained by those who are wrongly convicted. This damage extends far beyond the individuals wrongfully convicted, as systemic errors cause harm to all those involved in the case, including the families of wrongfully convicted people and the victims of the original crimes. Wrongful convictions also erode the public’s confidence in the criminal justice system. In addition, wrongful convictions impact public safety by delaying or preventing the identification of the persons who actually committed these crimes. BJA’s URLPWC Program seeks to address all these areas.” *Upholding the Rule of Law and Preventing Wrongful Convictions (URLPWC) Program*, BJA, <https://bja.ojp.gov/program/urlpwc/overview> (last visited Feb. 2, 2022).

¹⁴⁹ *DNA Exonerations In The United States*, *supra* note 57.

¹⁵⁰ *Id.*

In addition to this human cost, there is a financial one. The United States spends nearly \$80 billion a year on prisons,¹⁵¹ and the estimated lost wages of incarcerated persons nationwide surpasses \$70 billion per year.¹⁵² According to a report requested by the Kansas state legislature, the average cost per-inmate, per-year in the Kansas Correctional System is \$30,100/year in an adult correctional institution, and \$154,285/year in the juvenile system.¹⁵³ Under this assumption, the state of Kansas spent \$3,190,600 on just the 14 known exonerees—who collectively spent over 106 years wrongfully imprisoned—not including other wrongfully convicted persons who undoubtedly are still incarcerated in the Kansas correctional system, or the additional \$6,890,000.00 in restitution costs they would be entitled to under the State’s compensation law, or the State’s missed opportunity for property and income taxation.

D. Wrongful Convictions for Death Eligible Offences in Kansas

To date, at least three of the 14 Kansas exonerees were convicted for offenses that could have been death penalty eligible if the prosecutor had chosen to pursue it. As discussed extensively throughout this report, however, it is unlikely that these are the only persons wrongfully convicted for death eligible offences in the entire state. The dark number of unknown wrongfully convicted persons in Kansas is large, given the few resources in the state to pursue post-conviction relief for the wrongfully convicted and the lack of academic study aimed directly at the issue as it stands in Kansas. It is my professional opinion, there is no system for carrying

¹⁵¹ *Following the Money of Mass Incarceration*, PRISON POL’Y INST. (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

¹⁵² *The Economic Burden of Incarceration In the United States*, INST. FOR JUSTICE RESEARCH & DEV. AT F.S.U., https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/Economic_Burden_of_Incarceration_IJRD072016_0_0.pdf.

¹⁵³ *Follow-Up Information: Cost Per Inmate and Age of Correctional Facilities*, REPORT TO THE KANSAS LEGISLATURE HOUSE COMMITTEE ON APPROPRIATIONS (2020), http://kslegislature.org/li/b2021_22/committees/ctte_h_apprprtns_1/documents/testimony/20210224_05.pdf.

out the death penalty that will completely eliminate the risk of executing another innocent person or eliminate the harms such wrongful convictions create.



Tricia J. Rojo Bushnell

Exhibit A

Tricia J. Rojo Bushnell, J.D.
Midwest Innocence Project, Kansas City, MO

PROFESSIONAL PROFILE

Tricia J. Rojo Bushnell is the executive director at the Midwest Innocent Project, where she serves as the organization's lead attorney.

Ms. Bushnell is an appellate attorney specializing in wrongful conviction and death penalty cases. She has written and filed briefs on these topics in state and federal courts, including the United States Supreme Court, in addition to her litigation and appellate work.

ACADEMIC CREDENTIALS

- **NEW YORK UNIVERSITY SCHOOL OF LAW**, New York, NY , J.D., May 2007
- **BUCKNELL UNIVERSITY**, Lewisburg, PA, B.A., May 2004
- **UNIVERSITY OF ZURICH**, Zurich, Switzerland, October 2002 - July 2003

LEGAL EXPERIENCE

MIDWEST INNOCENCE PROJECT, Kansas City, MO

Executive & Legal Director, June 2016–Present

Legal Director, December 2013–Present

Responsible for the oversight of all staff, programing, and development. Serve as lead counsel and investigate and litigate postconviction and state and federal habeas cases for individuals claiming innocence of the crimes for which they were convicted. Responsible for the exonerations of six wrongfully convicted individuals following successful litigation and the release of two others through clemency and resentencing proceedings. Participated in efforts leading to the commutation of Missouri death sentence in 2015 and the stay of execution and appointment of a board of inquiry into an additional Missouri death penalty case in 2017. Draft amicus briefs on behalf of the Innocence Network.

Notable cases include: Strickland v. State, Case No. 16CR79000361 (Jackson Co. 16th Circuit 2021) (Finding the defendant actually innocent under a new law permitting prosecutors to file a motion to vacate a judgement); Jimerson v. Payne, 957 F.3d 916 (8th Cir. 2020) (Affirming reversal of convictions on basis of a Youngblood violation); Coones v. Kansas, Case No. 2019 CV 727 (Wyandotte Co. Dist. Ct.) (The first case involving a conviction integrity unit in the state of Kansas resulting in a reversal of conviction based upon new evidence of innocence and state misconduct.); Ex rel Kidd v. Korneman, Case No. 18DK-CC00017 (DeKalb Co. Cir. Ct.) (Finding actual innocence is a claim for relief in Missouri and overturning conviction on that basis.).

UNIVERSITY OF WISCONSIN LAW SCHOOL, Madison, WI
Assistant Clinical Professor, February 2012 - December 2013
Clinical Instructor/Staff Attorney, May 2010 - February 2012

Supervised and instructed Wisconsin Innocence Project and Criminal Appeals Project clinic students in investigating and litigating criminal postconviction and appellate cases. Taught seminar on Race, Poverty, and the Criminal Justice System. Responsible for the exoneration of 1 wrongfully convicted individual and the reversal of 2 other convictions on constitutional grounds. Drafted and filed amicus briefs on behalf of the Innocence Network in Bullcoming v. New Mexico and Williams v. Illinois, two United States Supreme Court cases considering the testimony of surrogate forensic analysts.

EQUAL JUSTICE INITIATIVE, Montgomery, AL
Fellow, October 2008 - May 2010

Represented indigent clients facing the death penalty, juveniles sentenced to life without parole, and sex offenders facing residency restrictions in postconviction and § 1983 litigation. Provided research for merits brief in Sullivan v. Florida, a United States Supreme Court case considering life without parole sentences for juveniles. Drafted and edited the fifth edition of the *Alabama Capital Postconviction Manual*. Researched and drafted a report on juror discrimination in the Southeast.

KIRKLAND & ELLIS, Los Angeles, CA
Associate, September 2007 - October 2008
Summer Associate, May 2006 - August 2006

Drafted and filed pleadings and motions, conducted depositions, completed discovery, and participated in hearings in white collar criminal proceedings, complex commercial matters, and constitutional litigation. Represented pro bono clients in death row postconviction case, prisoners' rights litigation, and guardianship matters.

PROFESSIONAL APPOINTMENTS

May 2021 - Present, Adjunct Professor, Washington University in St. Louis School of Law

April 2020 - April 2021, Adjunct Professor, Drake University School of Law

December 2015 - August 2018 - Subcontractor, Habeas Resource Counsel, 8th Circuit Court of Appeals

January 2015 - May 2018, Adjunct Professor, UMKC School of Law

December 2015 - August 2018, Consultant, multiple cases involving wrongfully convicted individuals

BAR ADMISSIONS & PROFESSIONAL ASSOCIATIONS

- Admitted to practice in Missouri, Iowa
- Inactive bar admissions in California, Alabama, and Wisconsin
- Innocence Network Executive Board (2018- Current), President (2019-Current)
- Founding Board Member, LEC Acts (Latinx Education Collaborative), (2020-Current)
- Pinnacle Prize Recipient (2021)
- Missouri Lawyers Media, 2021 Legal Champion (2021)
- Diverse Business Committee, Greater Kansas City Chamber of Commerce (2016-2020)
- Board of Directors, ACLU-MO (2013-2018); President (2016-2018)
- Kansas City Business Journal “Best of the Bar,” (2018)
- Board of Directors, ACLU-WI (2011-2013)
- Member, National Association of Criminal Defense Lawyers
- Member, National Hispanic Bar Association

REPRESENTATIVE PRESENTATIONS

Innocence in Missouri, State of Litigation, Lathrop Gage, Kansas City, MO (July 2021).

Keynote, *Leading United: Diversity & Inclusion Panel*, 2020 Midwest Leadership Conference, Central Exchange, Kansas City, MO (July 2020).

Race As An Estimator Variable In Wrongful Convictions, 2019 Innocence Network Conference, Atlanta, GA (April 2019).

Presenter, Restorative Justice Symposium, Kansas Journal of Law & Public Policy (March 2019).

Incarceration & Sentencing, Federal Bar Association Conference, Kansas City, Kansas (February 2019).

Faculty, *Capital Mitigation Skills Workshop*, Bureau of Justice Assistance, Kansas City, MO (January 2016-2019).

Interview with Robin Steinberg, TedxKC, Kansas City, MO (December 2018).

Culturally Competent Case Narratives, Film and the Law Series, UMKC School of Law, Kansas City, MO (May 2018).

The Collateral Consequences of Wrongful Convictions, 2018 Innocence Network Conference, Memphis, TN (March 2018).

All Mixed Up: Probabilistic Genotyping and Innocence Cases, 2017 Mid-America DNA Conference,

Columbia, MO (April 2017).

2016 Annual Meeting of the Missouri Bar, *Plenary: Spotlight on Justice: Addressing the Causes and Prevention of Wrongful Convictions*, Lake Ozark, MO (September 2016).

Faculty, Missouri State Public Defender, *Litigating Eyewitness Misidentifications*, Columbia, Missouri (August 2016).

Lawyers Association of Kansas City, Young Lawyers Division, *Annual Luncheon Keynote*, Kansas City, MO (July 2016).

Faculty, *Appellate Advocacy Training*, Ohio Public Defender, Dayton, OH (March 2016).

Faculty, Missouri State Public Defender, *Post-Conviction Training*, Kansas City, MO (November 2015).

Nebraska Crime Labs: An Overview and What Lawyers Need to Know, 2015 Nebraska State Bar Annual Meeting, Omaha, NE (October 2015)

Innocence: What Is It and How Do We Pursue It? 2015 Mid-America DNA Conference, Columbia, MO (April 2015)

Innocence: The DNA Exonerations, Bacon-Thomas Lecture, Shook, Hardy & Bacon, Kansas City, MO (December 2014)

Using DNA to Exonerate in Complicated Cases, 2013 Innocence Network Conference, Charlotte, North Carolina (April 2013).

First Monday Supreme Court Review: A Review of Miller/Graham, University of Wisconsin Alumni Weekend CLE Program, Madison, WI (October 2012).

Teaching Legal Resilience: Perseverance in the Face of Loss, The Evolving Art of "Practice-Ready": The Past, Present, and Future of Clinical Education, Saint Louis University School of Law (November 2012).

Criminal Injustice: Racial Disparities, Dane County, and the Death Penalty, University of Wisconsin Black Law Student Associations' 2nd Annual Event Series in Honor of Black History Month, University of Wisconsin Law School (February 2012).

Alternatives to the Prison-Industrial Complex, 30th Annual Civil Liberties and Public Policy Conference: From Abortion Rights to Social Justice, Hampshire College (April 2011).

Exhibit J

Report of Floyd Bledsoe

February 4, 2022

I. INTRODUCTION

I have been asked by legal counsel for Defendant Cornell McNeal to provide expert testimony in the matter of *State v. McNeal*, Case No. 14-CR-3129, with respect to the destructive impact of wrongful convictions. The opinions contained within this report are my own opinions, supported by my unique experience. I am not being compensated for my work or my testimony in this matter.

II. BACKGROUND.

I have lived my entire life in the state of Kansas. I was born in Oskaloosa, Kansas and am a current resident of Hutchinson, Kansas. I have four sons and a daughter, and I care a great deal about their future and the future of this state.

In November 1999, I was 23 years old and married with two sons, a two-year-old and a nine-month old. But on November 5, 1999, my then-wife's sister Camille Arfmann was raped and murdered. Three days later, my brother confessed to the crime, gave the murder weapon to the police, and led them to where her body was hidden.

My brother recanted his confession while in jail. In doing so, he implicated me, telling the police that I had killed Camille. My parents provided an alibi for my brother, and I was eventually arrested and charged with first degree murder, aggravated kidnapping, and aggravated indecent liberties. My trial lasted four days. I maintained my innocence, but I was found guilty on all counts and sentenced to life in prison.

I spent sixteen years in prison for a crime that I did not commit. I had to forfeit my parental rights to my two sons while I was incarcerated. I lost the 40 acres of farmland that I had previously used to support myself and my family, as well as the all of the livestock, vehicles, and tools on that land. I also lost an additional \$28,000 in court costs and restitution.

In 2015, the Paul E. Wilson Project for Innocence at the University of Kansas School of Law and the Midwest Innocence Project took my case. DNA testing was performed on the rape kit from the original investigation; the results excluded me and matched to my brother. The results of the testing were released publicly, and my brother committed suicide shortly thereafter. He left notes confessing to the crime and stating that I was innocent. On December 8, 2015, Kansas 2nd District Chief Judge Gary Nafziger vacated my conviction.

Since my release, I have given numerous interviews and testimony with respect to the Kansas criminal justice system, specifically with respect to false convictions. I have testified before the Kansas House Committee on Corrections and Juvenile Justice, the Kansas House Judiciary Committee, and the Kansas State Senate regarding these issues, including successful advocacy for the passage of Kansas House Bill 2579 in 2018.

III. EXPERT OPINIONS

My wrongful imprisonment had severe, harmful, and lasting impacts on my mental, physical, and financial health. My work within the actual innocence advocacy space, and with other exonerees, has demonstrated that these consequences are not unique to my own experience being wrongfully incarcerated.

A. Incarceration and wrongful conviction have a deep and severe negative impact on exonerees' mental health.

Prior to my wrongful conviction, I—like many wrongfully convicted—lived a happy and fulfilling life. I was happily married with two sons, owned 40 acres to support my dairy farming, and had strong relationships with my community and family. In four short days of trial, that security and sense of belonging was taken away from me. I did nothing wrong. I did nothing to deserve my arrest or my imprisonment.

The mental toll of prison was excruciating. Although I participated in programs and activities as I was able, the reality of my incarceration did not change. My then-wife would not visit me, and she eventually divorced me. I did not see my sons the entire time I was in prison. I will never get back the years I missed as they grew up. While wrongfully imprisoned, I became depressed. I quickly learned that the Kansas prison system does not encourage mental health treatment and witnessed those seeking treatment get penalized. Only after prisoners reached an absolute breaking point would the prison force them to seek treatment, oftentimes when the individual was so far gone that they feared or rejected treatment. I lived in constant fear of the chaos and violence inside the prison. At one point, I was beaten so violently by five other prisoners that I had a concussion, and my teeth bit completely through my lip. I was constantly anxious, a symptom of incarceration that I still struggle with, and to this day I have post-traumatic stress disorder that triggers flashbacks to the time I spent in prison. At times I feel like a completely different person than I was before I was wrongfully convicted.

The intense toll prison took on my mental health was exacerbated by the fact that I knew, without question, that I did not kill Camille. Worse, I knew that my brother had falsely accused me, and that the police believed that false accusation and targeted me in their investigation, even when a wealth of evidence and my brother's own original confession indicated I was innocent. Because twelve jurors and a district attorney made a mistake, I spent sixteen years in a fog of violence, anxiety, and depression.

B. Prison takes an immense toll on prisoners' physical health.

In addition to the negative impact it imposes on prisoners' psychological well-being, prison has an undeniably harmful effect on prisoners' physical health. Life expectancy for prisoners decreases with each month spent in prison,¹ meaning that individuals who are exonerated and released not only lose the years they were wrongfully incarcerated, but that the years they are given back when they are released are cut short as well.

¹ Patterson, Evelyn J., *The Dose—Response of Time Served in Prison on Mortality: New York State, 1989–2003*, *Am. J. of Public Health*, 103(3) (2003) (finding 15.6 percent increase in the odds of death for parolees compared to people who had never been to prison, equivalent to a two-year decline in life expectancy for every year served inside prison).

I saw friends of mine sicken and die within a year while in prison. I, like others who are or have been incarcerated, have experienced poor dental care services. Additionally, I received inadequate treatment for my scoliosis. The prison would not allow me to possess or use my back brace because it contained metal. I was told by prison officials that the prison was seeking an alternative brace—one that did not contain metal—but they could not find one and as a result my spine was left untreated and began to deteriorate. Prison exacerbates existing health problems of, and increases the risks of new ailments on, prisoners, and I and other exonerees have suffered physically as a result of our wrongful convictions.

C. The financial burden of incarceration is overwhelming, even after release.

I personally lost \$28,000.00 in court costs and restitution; sixteen years of income from my dairy farm (approximately \$28,000.00 annually) and additional jobs for other farmers (approximately \$3,000.00 annually); my 40 acres of land sold to pay for legal fees and a wrongful death settlement with Camille's family; and all of my personal property on my farm, such as livestock, vehicles, and tools.

While I have been fortunate to have legal advocates to represent me in a wrongful incarceration lawsuit against the state of Kansas, which allowed me to recover some of these economic losses, other exonerees have not been as fortunate. Even exonerees who have received restitution from the state miss out on years of contributing to their retirement accounts, in addition to missing out on years of advancing their skills to move upward in their jobs and increase their annual income. I have witnessed individuals who were hesitant, or refused, to hire me because of my conviction, regardless of my exoneration. I know other exonerees have experienced the same.

IV. CONCLUSION

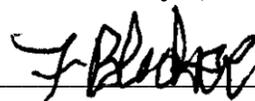
It is difficult to overstate the devastating and lasting impacts that wrongful conviction has had on my and others exonerees' mental, physical, and financial well-being. Incarceration has been proven time and again to have an overwhelmingly deteriorative effect on prisoners' mental health. That mental and emotion toll on the wrongfully convicted is exacerbated by the knowledge that the conviction itself should never have happened.

Likewise, the physical impact that incarceration has on prisoners is proven to increase health risks and decrease life expectancy. To impose these physical and mental hardships on a person who had done nothing to warrant incarceration is wrong and causes irreparable damage.

Finally, on top of the mental and physical costs of wrongful convictions, the financial hardship caused by wrongful conviction can be devastating.

I am lucky to have received a life sentence and not a death sentence. Regardless of a sentence of life or death, however, the destructive effects of wrongful incarceration are undeniable.

Dated February 4, 2022



Floyd S. Bledsoe

Exhibit K

Media Coverage of Sedgwick County Capital Prosecutions

Frank R. Baumgartner
University of North Carolina at Chapel Hill
February 4, 2022

Qualifications

I currently hold the Richard J. Richardson Distinguished Professorship in Political Science at the University of North Carolina at Chapel Hill. I received my BA, MA, and PhD degrees in political science at the University of Michigan (1980, 1983, 1986). I have been a faculty member since 1986 and have taught at the University of Iowa, Texas A&M University, Penn State University, and UNC-Chapel Hill, where I moved in 2009. I taught at Penn State from 1999 through 2009 and served as Head of the Political Science Department there from 1999 through 2004. I regularly teach courses at all levels and many of those courses involve significant instruction in research methodology.

My research generally involves statistical analyses of public policy problems, often based on originally collected or administrative databases. I have published over a dozen books and more than 80 articles in peer-reviewed journals. I have been fortunate to receive a number of awards for my work, including six book awards, awards for database construction, and so on. I am a fellow of the American Academy of Arts and Sciences, an honorary society dating back to 1780. I am co-author of two books about the death penalty. The first, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press, 2008), focused on public opinion toward capital punishment and the impact of the “innocence” argument. My co-authors and I were awarded the Gladys M. Kammerer Award for the best publication in the field of US national policy from the American Political Science Association for this book in 2008. The second book, *Deadly Justice: A Statistical Portrait of the Death Penalty* (Oxford University

Press, 2018), provides a statistical overview of a broad range of questions relating to the “modern” (post-*Furman*) application of the death penalty: demographic characteristics of the offenders and victims, rates of use, comparison to homicide numbers, geographical patterns, eligible crimes in different states, cost, deterrence, and so on. The book derives from, and is the main text in, a course I teach about the death penalty that regularly enrolls over 400 students at UNC-Chapel Hill.

I have also published a number of death penalty-related studies in law reviews and peer reviewed academic journals. Many of these articles relate to race- and gender-based disparities in the application of the death penalty. I am the co-author of another book, *Suspect Citizens: What 20 Million Traffic Stops Tell Us about Policing and Race* (Cambridge University Press, 2018; winner of the C. Herman Pritchett Best Book Award from the Law and Courts Section of the American Political Science Association in 2019). This book, and numerous related articles published in peer review journals, also delves deeply into the analysis of race- and gender-based disparities in criminal justice outcomes.

Finally, many of my research projects and publications have made use of content analysis of public media sources. This includes *Agendas and Instability in American Politics* (1993, winner of the Aaron Wildavsky Award for an enduring contribution to the field of public policy), *The Decline of the Death Penalty* (cited above), *Suspect Citizens*, and many of my published journal articles. I have extensive experience in analyzing criminal justice and other public policy databases, racial and gender-based disparities, and in the use of media content analysis and study of media coverage of public policy issues.

A Large Academic Literature Documents the Distorted Views on Crime Presented in Media Coverage

Scholars have long noted that media coverage of crime distorts the public vision and understanding of crime. Simply put, the particular crimes that are more commonly portrayed and discussed in the media are far from an accurate or random sample of all crimes. Rather, they reinforce culturally dominant and racially biased views of who perpetrates crime and who is victimized. Minorities are over-represented in the media as offenders, and whites, particularly white females, are more commonly portrayed as victims in the media compared to their actual rates of crime victimization. In sum, crimes that fit a racial stereotype are, for various reasons discussed below, more likely to appear in the news than other crimes. This has a predictable and direct effect on public attitudes.

Eduardo Bonilla-Silva, author of a book tellingly entitled “Racism without Racists”, introduced the term of “color-blind racism.” By this, he means a “new” form of racially hostile attitudes and behaviors that differ from the overt racism of the Jim Crow and pre-Civil Rights eras. This modern racism is more palatable in polite conversation, consistent with modern cultural norms that no longer allow public expressions of overt racism. He brought our collective attention to the issue of “story-lines” or “narratives” that constitute “accepted truths” concerning racial differences (though they may not be true) (see Bonilla-Silva 1997, 2017). Bonilla-Silva, Lewis, and Embrick (2004) point to certain culturally powerful “narratives” and “story-lines” that are widely accepted cultural myths. When these stories are so culturally dominant that they are considered to “make sense” or even correspond to “common sense,” they are easier to accept, and audiences take them at face value. By contrast, stories that do not fit the expected story-line are ignored because they generate cognitive dissonance or confusion for the reader. Many of the most powerful “story-lines” or “narratives” portray the black male as a typical criminal, and the

white female as the crime victim. Stories that fit those stereotypes are more likely to appear in the popular media because they reinforce, rather than challenge, our collective cultural expectations, wrong as these may be. Middle-class white readers find these stories to be interesting, believable, acceptable, and non-threatening to the readers' self-image or understanding of how the world works, according to Bonilla-Silva's research.

These cultural and psychological processes are key to understanding why media outlets play such an important role in constructing public understandings of crime. That is because of their dual role in the system: the media help to generate and amplify these culturally accepted stories on the one hand, and they seek to provide content that their audience will find acceptable and appealing on the other. These dual features of the media create a positive feedback loop that becomes self-perpetuating. By promoting a myth, the myth becomes more widely accepted. By presenting what the audience wants to see or hear, the media perpetuate the most widely held understandings.

Many members of the public have little direct experience with crime, so they gather their understandings of it from the media, television shows, movies, and other sources. Study after study has shown that media sources present a distorted view of common characteristics of crime, particularly with regards to race and gender. Judging from the media coverage of crime, one would reach the conclusion that crime is far more racially distinct than it is in reality; that victims are more commonly white than the statistics actually indicate; and that offenders are more likely to be black than is in fact the case. Kelly Welch (2007) reviews racial stereotyping in the media and summarizes: "Blacks do account for a disproportionate amount of crime arrests and are disproportionately convicted and incarcerated. But *public estimates of Black criminality*

surpass the reality. The media perpetuate ideas linking race with criminality, which have also been reinforced by political agendas” (286) (emphasis added).

Robert Entman’s studies (1990, 1992, 1994) correspond well with those of Bonilla-Silva and colleagues; Entman carefully examines the idea of “modern” as opposed to “historical” racism in media portrayals. He notes for example (1992) that black television announcers often provide sympathetic portrayals of issues affecting the black community. On the other hand, television news continues to present crime victims as disproportionately white and offenders disproportionately as black. Further, he notes, going beyond the issue of crime, that political demands by blacks are more often presented as extreme compared to similar demands by whites, and that coverage of racial issues in television news promotes a false view that structural racism is no longer a problem. Entman’s studies matter because they show the complexity of these issues and the continued distortion of crime portrayals, presenting crime as largely an issue affecting white victims and being driven by violent black offenders. Trends are prevalent in the television news content Entman analyzed, but are not borne out in official crime statistics (see Entman, 1990, 1992, 1994).

These results have been replicated by many; media portrayals of crime over-emphasize black males as offenders; white people and white females in particular as victims; violent crime occurring among strangers; crime occurring in urban areas, and they correspondingly under-represent minorities as victims; minority crime victims as complex individuals deserving of compassion; white people as perpetrators; and the high percentage of crimes that occur among family members and acquaintances (for a small sampling of a very large literature see Entman, 1990, 1992, 1994; Liska and Baccaglini 1990; Oliver 1994; Chermak 1995; Gilliam et al. 1996; Rober et al. 1998, 2003; Robinson 2000; Gilliam and Iyengar 2000; Mastro and Robinson 2000;

Gilliam et al. 2002; Dixon et al. 2003; Lundman 2003; Eschholz et al. 2004; Yanich 2004; Britto et al. 2007; Dixon and Azocar 2007; Moriearty 2010; Ghandnoosh 2014; Sonnett et al. 2015; White, Stuart, and Morrissey 2021; White et al. 2021).

Andrew Baranauskas (2020) summarizes the essential role of the mass media in social understandings of crime: “The media is a vital source of information about crime. Most people do not have direct experience with crime; the proportion of people who are victims, offenders, and agents of the criminal justice system is low relative to the population at large. As such, most people rely on the media for crime information” (Baranauskas 2020, 394).

For example, Baranauskas conducted a review of media coverage of crime in four urban areas and reported this: “Findings suggest that newspaper articles reporting crime in disadvantaged black neighborhoods are likely to use intense language to describe the normalcy of crime and the terrible nature of crime in these areas. Reports of crime originating in affluent White neighborhoods are likely to highlight the unusual, shocking nature of the violence” (Baranauskas 2020, 393). Note that Baranauskas’ study was based on four newspapers, including *The Kansas City Star* (see Baranauskas 2020, 400 and *passim*).

Sommers (2016) compares media reports of missing persons with actual occurrences of such situations according to the FBI. Black victims constitute just 13 percent of the news stories, but 36 percent in the FBI statistics, and whites are the victims in 68 percent of the news stories compared to 60 percent of the FBI statistics (Table 6, p. 301). White females are 50 percent of all the news stories, clearly an over-representation of their share in the FBI statistics, though the FBI does not provide a full breakdown by race and gender combined (Table 10, p. 304). Sommers concludes: “On the whole, the results provide striking support for Missing White Woman Syndrome” (p. 309).

Lundman (2003) focused specifically on the race-gender combinations of offender and victim in a study of news coverage and showed that the black male offender – white female victim combination was by far the most likely to generate newspaper coverage.

Valerie Callanan (2012, 95) summarizes racial biases in media coverage of crime:

The ratio of positive or benign crime-related portrayals (such as victim or criminal justice official) to negative depictions (such as suspect) remains significantly higher for whites than people of color (Dixon, Azocar, and Casas 2003; Dixon and Linz 2000; Romer, Jamieson, and DeCoteau 1998). Moreover, how suspects of color are portrayed differs from whites. For example, television news accounts are more likely to show black suspects in a mug shot, handcuffed, or resisting arrest than white suspects (Entman 1990). Latinos are mostly absent in mass media accounts of crime, but when they are depicted, it is more negative than positive (Dixon and Linz 2000). These patterns have also been documented in content analyses of crime reality shows such as *Cops* (Mastro and Robinson 2000; Oliver 1994) and in television crime dramas (Britto, Hughes, Saltzman, and Stroh 2007; Eschholz, Mallard, and Flynn 2004). In contrast, whites, women in particular, are far more likely to be portrayed as victims in crime news than are African Americans or Latinos (Chermak 1995; Dixon and Linz 2000; Romer et al. 1998), and homicides that involve a black perpetrator and a white victim are disproportionately covered in newspapers, especially if a white woman was killed by a black man (Lundman 2003). (Callanan 2012, 95).

The racial bias associated with media coverage of crime extends to the ways in which criminal defendants are portrayed, not only to their relative representation in media coverage. One recent study found that white defendants were more likely to be pictured in a business suit, whereas black defendants appeared more commonly in a police mug-shot or in a prison jumpsuit (GSG, 2021, slide 2). The news stories included pictures of photos of family or friends four times as often in cases with white victims as in cases with black victims (CSG, 2021, slide 3). Sonnett, Johnson, and Dolan (2015) further document the importance of visual cues in media coverage of crime in a study of coverage of the aftermath of Hurricane Katrina. Television news coverage of the event differed dramatically across different networks in the ways in which they portrayed black survivors of the disaster. They all had in common, however, a tendency to “tell stories of desperation and violence with images of black residents even as these story lines

exaggerate the facts of the situation after the disaster” (Sonnett, Johnson, and Dolan 2015, p. 342).

Moriearty (2010) reviews media coverage of the juvenile “super-predator” idea with its associated and inflammatory ideas of “wilding,” the idea that there was “new breed” of young criminal who were devoid of morals, hope, and decency. Bogert and Hancock (2020) explain the great reach and huge impact of the super-predator idea, which they term a “media myth.” Byfield (2014) provides a book-length treatment of the highly racialized and inflammatory media environment surrounding the “Central Park Jogger” case, one which led to the wrongful conviction of five young black men. She suggests that the extensive media attention, and its inflammatory character, was part of the atmosphere surrounding a criminal trial that led to a wrongful conviction.

Distorted Views on Crime Distort Public Attitudes

These highly consistent studies generate further findings about the impact of these biases in media coverage on public attitudes toward race and crime. Callanan (2012) summarizes: “A large body of research argues that the high amount of violence in mass media elevates the public’s fear of criminal victimization. It is well documented that crime content is a pronounced feature of mass media and distorts the reality of crime...” (2012, 93). Reviewing the literature since the 1960s, she concludes: “In short, television cultivates a view of the world that is more reflective of recurrent media messages than reality” (94). Much of this relates to fear of crime. “Moreover, most networks attempt to reach a large audience so programming typically targets the white middle-class. Consequently, non-whites are more likely to be portrayed in a negative light relative to whites (Entman 1990; 1994)” (Callanan 2012, 94). Colbrun and Melander (2018) show that not only are minorities over-represented in media stories about crime, but their

photographic representations are systematically more inflammatory, leading to a social understanding of crime that portrays members of minority communities as much more frightful and dangerous than is warranted by any analysis of crime. Dixon (2008) shows how individuals with high racial stereotyping respond powerfully to media portrayals with minority or unidentified offenders and white victims. However, those individuals did not respond at all to stories with black victims. So the media focus on black offenders and white victims has a powerful effect by stimulating stereotypical views of crime and perpetuating these social expectations far beyond what a rational analysis of crime statistics would support.

Jon Hurwitz and Mark Peffley have written extensively about white and black Americans' attitudes concerning race and crime. They document conclusively that racial stereotypes, exactly the kind of portrayals so often presented in the media according to the authors reviewed above, affect public opinion and people's beliefs about different racial groups and about crime (see Peffley and Hurwitz 2007, 2010; Hurwitz and Peffley 1997). Dixon and Azocar (2007) provide further evidence about the power of the linkages between media coverage of crime and public attitudes. Quillian and Pager (2010) note that individuals are unable to assess the objective risk that they face for rare events, including crime victimization, and that media stereotypes amplify these perceptions dramatically. This process of "stereotype amplification," they assert, is driven by cultural stereotypes, individual attitudes (motivational biases), and media distortions (see Quillian and Pager 2010, Figure 1, p. 83). They analyzed survey data about the estimated risk of crime victimization with actual victimization data. Black and white participants responded very differently to questions about estimated risk of crime victimization. Although all respondents over-estimated the risks, white respondents were more affected by the racial composition of their neighborhood in how much they over-estimated the risk. As the black

population increased in white respondents' neighborhoods, white fear of crime victimization increased dramatically and disproportionately compared to actual risk. Black respondents showed no such increase in their over-estimates.

Media Coverage of Sedgwick County Capital Prosecutions

I undertook a study of news coverage of Sedgwick County capital prosecutions to examine whether there was any observed relationship between race and gender of defendants and victims and media coverage of capital cases. Sedgwick County has seen 24 capital prosecutions in the modern period of the death penalty, starting from the reinstatement of the death penalty in Kansas in 1994 through 2019. A capital prosecution can be a highly newsworthy event, and in this study I review news coverage of each of these 24 cases. I first explain the methodology of the study, then lay out the results, and conclude by considering these results in the context of the published literature on media coverage of race and crime.

The study

I began with a list of capital prosecutions from Sedgwick County from 1994, supplied by an attorney with Kansas Board of Indigents' Defense Service. This list of capitally prosecuted cases is consistent with the list provided by the Sedgwick County District Attorney's Office. Included within the analysis is every case where a death notice had been filed. Information about race of the defendant, race of the victim, sentencing outcome, and whether the case proceeded to trial was provided by Professor Jeffrey Fagan, who is conducting a separate study of capital charging and sentencing practices in Sedgwick County.

I recruited two UNC-Chapel Hill students, Kaylee O'Brien and Kristen Thrower, to perform the media searches under my direct supervision. They used the resources connected with the UNC library system to access the on-line database Newsbank. Newsbank allows the

computerized search of hundreds of newspapers around the world. Kansas newspaper the *Wichita Eagle* is available for search through that database from 1984 to present. The students and I developed a standard procedure for any search based on the name of the defendant and the dates of the crime, verdict, and death sentence. Those can be summarized as follows.

For any defendant, the students used a keyword search based on these parameters:

([Last name of offender] OR [Last name of first victim] OR [last name of second victim...])

AND (murder* OR homicid* OR kill* OR crime)

The Newsbank system allows a date range to be applied. In order to capture media coverage of the entire period of prosecution for each case, we defined the relevant time period as beginning with the date of the crime and ending one month following the date of the verdict. Occasionally, the search terms generated a large number of incorrect or false hits; in these cases, the students were instructed to revise the search terms to attempt to eliminate the false hits while retaining the accurate ones. Often, this involved adding the first name of the offender or the victim, or a nickname if those appeared in the initial results. For example, the victim in one case was named Kevin Easter, and including only the last name generated many hits related to the Easter holidays, clearly unrelated to the topic; in that case we added the first name to the search string and this eliminated the false hits while retaining the accurate ones. When the students were satisfied that the searches were accurate, they finalized the searches and saved all of the results in PDF files that included up to 20 news stories per file. They then read through these individual stories to verify that they were “on-topic” and identified the cases that were inaccurate or included only a passing mention of the event. An example would be a story on a different crime which might note at the end something like: “This is the second homicide in the county this year; the previous one was *x*.” Students were instructed to retain any stories that had any significant

discussion of the case, but to exclude stories that were mostly on other topics and merely had an “incidental” mention of the case with no description of it. They also eliminated duplicate stories; occasionally in the Newsbank database the identical story is listed twice, and those were eliminated from our counts. In sum, the students were instructed to refine their searches based on reviews of initial results, finalize the search and save the documents, read through the documents to identify false hits, incidental mentions, and duplicates, and to calculate the total number of accurate hits, which was defined as the number of hits generated by the search string minus the false hits, incidental mentions, and duplicates.

For the six cases where a death sentence was imposed, the students conducted an additional search identical to the previous one with two changes. First, we added these keywords to the search string: [OR "appeal*" OR "death sentence" OR "death row"]. Second, we changed the dates to begin the day after the previous search ended (that is, these searches began one month and one day after the trial verdict) and end on December 31, 2021. These searches therefore covered the period after the initial trial and through any appeals or other stories post-conviction. The students followed the same previously-described procedures to eliminate false hits, incidental mentions, and duplicate stories, and they saved their results in the same manner.

I asked one of the students to replicate the work of the other (and vice versa) for several cases and in those cases the results were identical or differed only by one observation. I concluded from this replication check and my own review of their results that their searches produced accurate and useful counts of newspaper coverage of these cases in the *Wichita Eagle*.

Results

Table 1 below lists the cases included in the study, the demographic characteristics of the defendants and victims, the outcome of the prosecution (on-going, plea agreement, non-capital

trial, or capital trial), the dates of the crime, verdict, and (if applicable) the death sentence, and the number of stories published in the *Wichita Eagle*.

Table 1. *Wichita Eagle* Coverage of Sedgwick County Capital Prosecution Defendants.

Name	Sex	Race	Victims	Outcome	Crime	Verdict	Death Sentence	Newspaper Stories		
								Trial	Appeals	Total
Donesay, Sakone	M	A	1WM	Trial	1/8/1996	12/14/1998		40	0	40
Marsh, Michael	M	W	2WF	Cap Trial	6/17/1996	12/30/1997	4/16/1998	53	33	86
Scott, Gavin	M	W	1WM,1WF	Cap Trial	9/13/1996	8/17/1998	8/12/1999	37	42	79
Elms, Stanley	M	W	1WF	Cap Trial	5/5/1998	11/23/1999	11/19/2004	20	24	44
Noyce, David	M	W	1WM,1WF	Plea	9/14/1998	2/11/1999		9	0	9
Oliver, Cornelius	M	B	2BM,2BF	Trial	12/6/2000	12/31/2001		55	0	55
Bell, Earl	M	B	2BM,2BF	Trial	12/7/2000	2/15/2002		61	0	61
Carr, Reginald	M	B	3WM, 2WF	Cap Trial	12/14/2000	11/4/2002	11/15/2002	173	102	275
Carr, Jonathan	M	B	3WM, 2WF	Cap Trial	12/14/2000	11/3/2002	11/15/2002	171	27	198
Belt, Douglas	M	W	1WF	Cap Trial	6/24/2002	11/1/2004	11/17/2004	52	8	60
Moore, Gregory	M	W	1WM	Cap Trial	4/9/2005	6/28/2006		34	0	34
Gentry, Everett	M	B	1WF	Plea	6/9/2006	7/14/2006		40	0	40
Burnett, Theodore	M	B	1WF	Cap Trial	6/9/2006	5/23/2008		54	0	54
Robinson, Elgin	M	B	1WF	Cap Trial	6/9/2006	10/22/2008		118	0	118
Marshall, Marquis	M	B	1WM,1BM	Cap Trial	11/30/2012	10/2/2013		19	0	19
Bluml, Anthony	M	W	1WM,1WF	Plea	11/15/2013	5/15/2015		26	0	26
Schaberg, Kisha	F	H	1WM,1WF	Plea	11/15/2013	5/15/2015		26	0	26
Smith, Braden	M	W	1WM,1WF	Plea	11/15/2013	9/14/2015		31	0	31
Ellington, Andrew	M	W	1WM,1WF	Plea	11/15/2013	6/23/2015		29	0	29
Nguyen, Vinh	M	A	1AM,2AF	On-going	6/23/2014			12	0	12
Edwards, Steven	M	B	1HM,1HF	Plea	10/16/2014	5/9/2016		12	0	12
McNeal, Cornell	M	B	1BF	On-going	11/14/2014			24	0	24
Alvarado-Meraz, Luis	M	H	2HM	Cap Trial	1/15/2015	10/5/2018		8	0	8
Pepper, John	M	W	1BF	Trial	7/15/2019	10/29/2021		21	0	21

Note: Race: A = Asian or Asian American; B = Black; H = White Hispanic; W = White Non-Hispanic. Sex: M = Male; F = Female. Newspaper stories: Trial = stories appearing from the date of the crime to one month following the date of the verdict. Appeals = stories appearing from one month and one day after the verdict until December 31, 2021. Total = sum of Trial and Appeals values.

Table 1 shows that nine defendants had a single victim, ten had two, one defendant had three victims, two defendants had four victims, and two defendants had five victims. Sixteen had male victims, and 20 of the 24 had at least one female victim, 14 of which had at least one white female victim. In cases with at least one female victim, the average number of news stories was 63, compared to 25 stories for cases with no female victims. The average news coverage of cases with white female victims was 77 stories, more than two-and-a-half times the stories for cases with no white female victim (average 29).

One could expect news coverage to vary depending on whether the case ended in a plea, a non-capital trial, a capital trial, or a death sentence, and indeed the number of stories is highly correlated with these outcomes: for the seven cases ending in a plea agreement, there was an average of 25 stories; for the four cases leading to a non-capital trial, 44 stories; for the 11 cases with a capital trial, 89 stories; and for the subset of six capital trials where a death sentence was imposed, 124 stories appeared, on average.

All six cases leading to a death sentence had a white female victim. This makes it impossible to tell whether the higher news coverage of cases with female, or white female, victims is due to the characteristics of the victims or the fact that the cases went further in the death-sentencing process. The presence of a white female victim is correlated with the outcome of the case. None of the four non-capital trial cases had a white female victim. In comparison, white female victims were found in six of the seven plea cases, eight of 11 capital trials, and all six cases resulting in the death penalty.

It is clear from these statistics that media coverage is highly associated with the presence of female, and particularly white female, victims, and also with the legal process. Capital trials are highly newsworthy events, and death sentences even more so. Heightened media attention

follows both the legal process and the characteristics of the victims. Because the cases with white female victims were the only cases in Sedgwick County to lead to a death sentence, we cannot dissociate the prosecutorial and legal processes with the media coverage; they are highly interconnected. Do prosecution decisions follow media attention, does media attention follow prosecution decisions, or do both prosecutions and media attention correlate with the presence of white female victims? Because the decisions are so highly correlated, and given the extensive literature both on the media coverage reviewed in this report as well as widespread findings throughout the literature on increased rates of use of the death penalty in cases with white female victims,¹ all three of these things are most likely true. Institutions throughout our culture promote higher levels of attention and concern in homicide cases with white female victims. This applies to media coverage as well as to prosecutorial decision-making.

Relevance to the State of Kansas

The studies reviewed in this report reveal a powerful and consistent cultural norm has long affected national media coverage of race and crime. The studies related to entertainment, literature, film, television and news media throughout the United States. There is no reason to think that Kansas would be exempt from the national trends described here. We can also point to two particular elements that clearly show the relevance to the state of Kansas.

One is the fact that one of the studies reviewed here (Baranauskas 2020) explicitly mentions Kansas-focused data sources, as one of the four cities / media outlets in that study was

¹ An extensive literature shows that death-sentences and executions are much more common in cases with white female victims than in other homicides. See these articles and the citations within them: Frank R. Baumgartner et al., *These Lives Matter, Those Ones Don't: Comparing Execution Rates by the Race and Gender of the Victim in the US and in the Top Death Penalty States*. *Albany Law Review* 79, 3 (2016): 797–860; Frank R. Baumgartner et al., *Deadly Justice: A Statistical Analysis of the Death Penalty*, Oxford University Press 2018, chapter 4, pp. 69–86.

an analysis of the *Kansas City Star*.² A second is the prominent and highly public apology that the *Kansas City Star* published on December 22, 2020 (see Fannin 2020). According to this apology, and according to the editor of the paper himself, for much of its history, the *Kansas City Star* “disenfranchised, ignored and scorned generations of Black Kansas Citians. It reinforced Jim Crow laws and redlining. Decade after early decade it robbed an entire community of opportunity, dignity, justice and recognition” (Fannin 2020, n.p.). According to the story, their own internal review of the history of news reporting included this:

Reporters were frequently sickened by what they found — decades of coverage that depicted Black Kansas Citians as criminals living in a crime-laden world. They felt shame at what was missing: the achievements, aspirations and milestones of an entire population routinely overlooked, as if Black people were invisible....

In the pages of *The Star*, when Black people were written about, they were cast primarily as the perpetrators or victims of crime, advancing a toxic narrative. Other violence, meantime, was tuned out. *The Star* and *The Times* wrote about military action in Europe but not about Black families whose homes were being bombed just down the street.

Even the Black cultural icons that Kansas City would one day claim with pride were largely overlooked. Native son Charlie “Bird” Parker didn’t get a significant headline in *The Star* until he died, and even then, his name was misspelled and his age was wrong. (Fannin 2020, n.p.).

The public apology from December 2020 included a number of focused articles reviewing different elements of the paper’s coverage. One focused on how it has covered police and crime. Its title: “‘Brutes’ and murderers: Black people overlooked in KC coverage — except for crime.” The subtitle: “Black people were written about mostly as criminals, one-sided negative portrayals with an incalculable effect on generations of Kansas Citians” (see Adler 2020). In other words, the precise elements of biased portrayals of race and crime discussed in this report were explicitly acknowledged in a major regional newspaper.

²Another study included a story from the *Wichita Eagle* as an example of sensationalized, racially biased “superpredator” media reporting in the 1990s (Moriearty, 865 n. 90).

Conclusions

Media coverage of crime presents a racially distorted view, heavily biased towards white females—and heavily biased against black males. This has been shown in many studies of newspapers and television news, as well as in studies of relevant entertainment such as television crime shows and popular movies. Kansans are not immune to these trends; indeed some of the published work reviewed in this report refers explicitly to Kansas media, and the *Kansas City Star* public apology for its historical record of racially biased reporting over many decades is telling of the racially-biased media presence in Kansas.

My own study of newspaper coverage of capital homicide prosecutions in Kansas shows the powerful media bias that corresponds with imposition of the death penalty. Cases with female victims, particularly those with white female victims, generate more news coverage and different, more severe, prosecutorial outcomes. All six death sentences in Sedgwick County had white female victims, and each of these cases reflected heightened newspaper coverage. Because death-resulting capital trials are highly newsworthy, it is difficult to precisely identify whether the heightened news coverage was more a result of the white female victim(s) or of the nature of the proceedings. However, the relevant literature makes clear, and my review of the cases not leading to a death sentence demonstrates, that news outlets routinely pay more attention to crimes that fit racially-biased social and cultural stereotypes.

It is clear that these stereotypes prioritize white females and demonize black men. As demonstrated by my study, white female victims are considered far more newsworthy than victims of other races, as are black males accused of a crime. Moreover, the self-perpetuating cycle of biased coverage is highly concerning when considered alongside the media's powerful effect on the social and prosecutorial mindset. While it is difficult to quantify the exact effects of media coverage on police investigations and prosecutors' decisions to seek the death penalty in

Kansas, multiple studies have demonstrated that the public's response to a crime—a response often influenced by racially-biased media—can lead to rushed, less thorough investigations and a prosecutorial urge to appear tough on crime by seeking the death penalty. This tendency further highlights the dangers and problems associated with racially-biased media coverage.

The media cycles promulgating racial stereotypes are, by nature, difficult to break. Biased media coverage affirms these racially-biased and inaccurate narratives in effort to garner interest and readership, then the disproportionate coverage of white female victims and black male criminals further entrenches those stereotypes and results in even higher amounts of biased media coverage. As shown by my study and review of relevant literature, the media plays a significant role in the furthering of harmful and inaccurate racial stereotypes, and that bias is undeniable in the context of capital crimes.

References

- Adler, Eric. 2020. 'Brutes' and murderers: Black people overlooked in KC coverage — except for crime. *Kansas City Star*. 22 December.
<https://www.kansascity.com/news/local/article247235584.html>
- Baranauskas, Andrew. 2020. War Zones and Depraved Violence: Exploring the Framing of Urban Neighborhoods in News Reports of Violent Crime. *Criminal Justice Review* 45, 4: 393-412.
- Bogert, Carroll, and Lynnell Hancock. 2020. Superpredator: The Media Myth that Demonized a Generation of Black Youth. *The Marshall Project*. 20 November.
<https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth>
- Bonilla-Silva, Eduardo, Amanda Lewis, and David G. Embrick. 2004. I Did Not Get That Job Because of a Black Man...: The Story Lines and Testimonies of Color-Blind Racism. *Sociological Forum* 19, 4: 555–81.
- Bonilla-Silva, Eduardo. 1997. Rethinking Racism: Toward a Structural Interpretation. *American Sociological Review* 62, 3: 465–480.
- Bonilla-Silva, Eduardo. 2017. *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America*, 5th ed. New York: Rowman and Littlefield.
- Britto, Sarah, Tycy Hughes, Kurt Saltzman, and Colin Stroh. 2007. Does 'Special' mean Young, White and Female? Deconstructing the Meaning of 'Special' in Law and Order: Special Victims Unit. *Journal of Criminal Justice and Popular Culture* 14, 1: 39–57.
- Byfield, Natalie. 2014. *Savage portrayals: Race, media and the Central Park jogger story*. Philadelphia: Temple University Press.
- Callanan, Valerie. 2012. Media Consumption, Perceptions of Crime Risk and Fear of Crime: Examining Race/Ethnic Differences. *Sociological Perspectives* 45, 1: 93-115.
- Chermak, Steven. 1995. *Victims in the News: Crime and the American News Media*. Boulder, CO: Westview Press.
- Colburn, Alayna, and Lisa A. Melander. 2018. Beyond Black and White: An analysis of newspaper representations of alleged criminal offenders based on race and ethnicity. *Journal of Contemporary Criminal Justice* 34, 4: 383–398.
- Dixon, Travis L. 2008. Who is the victim here? The psychological effects of overrepresenting white victims and black perpetrators on television news. *Journalism* 9, 5: 582-605.
- Dixon, Travis L., and Christina L Azocar. 2007. Priming Crime and Activating Blackness: Understanding the Psychological Impact of the Overrepresentation of Blacks as Lawbreakers on Television News. *Journal of Communication* 57: 229–253.
- Dixon, Travis L., and Daniel Linz. 2000. Overrepresentation and Underrepresentation of African Americans and Latinos as Lawbreakers on Television News. *Journal of Communication* 50, 2: 131–54.
- Dixon, Travis L., Christina L. Azocar, and Michael Casas. 2003. The Portrayal of Race and Crime on Television Network News. *Journal of Broadcasting & Electronic Media* 47, 4: 498–523.
- Entman, Robert M. 1990. Modern Racism and the Images of Blacks in Local Television News. *Critical Studies in Mass Communication* 7, 4: 332–45.
- Entman, Robert M. 1992. Blacks in the News Television, Modern Racism and Cultural Change. *Journalism Quarterly* 69, 2: 341–361.

- Entman, Robert M. 1994. Representation and Reality in the Portrayal of Blacks on Network Television News. *Journalism Quarterly* 71, 3: 509–20.
- Eschholz, Sarah, Matthew Mallard, and Stacey Flynn. 2004. Images of Prime Time Justice: A Content Analysis of ‘NYPD Blue’ and ‘Law and Order.’ *Journal of Criminal Justice and Popular Culture* 10, 3: 161–80.
- Fannin, Mike. 2020. The truth in Black and white: An apology from The Kansas City Star. *Kansas City Star*. 22 December. <https://www.kansascity.com/news/local/article247928045.html>
- Ghandnoosh, Nazgol. 2014. *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*. Washington, DC: The Sentencing Project.
- Gilliam Jr., Franklin D., Nicholas A. Valentino and Matthew N. Beckmann. 2002. Where You Live and What You Watch: The Impact of Racial Proximity and Local Television News on Attitudes about Race and Crime. *Political Research Quarterly*, 55, 4: 755-780
- Gilliam, Franklin D., Jr., and Shanto Iyengar. 2000. Prime Suspects: The Influence of Local Television News on the Viewing Public. *American Journal of Political Science* 44, 3: 560-573.
- Gilliam, Franklin D., Shanto Iyengar, Adam Simon, and Oliver Wright. 1996. Crime in Black and White: The Violent, Scary World of Local News. *Harvard International Journal of Press / Politics* 1: 6–23.
- Global Strategy Group (GSG). 2021. *Innocent Until Proven Guilty? A look at media coverage of criminal defendants in the U.S.* <https://globalstrategygroup.com/a-look-at-racial-bias-and-inequity-in-media-coverage-of-criminal-defendants-in-the-u-s/>
- Hurwitz, Jon, and Mark Peffley, Mark. 1997. Public perceptions of race and crime: The role of racial stereotypes. *American Journal of Political Science* 41, 2: 375–401.
- Liska, Allen E., and William Baccaglini. 1990. Feeling Safe by Comparison: Crime in the Newspapers. *Social Problems* 37, 3: 360-374.
- Lundman, Richard J. 2003. The Newsworthiness and Selection Bias in News about Murder: Comparative and Relative Effects of Novelty and Race and Gender Typifications on Newspaper Coverage of Homicide. *Sociological Forum* 18, 3: 357–86.
- Mastro, Dana and Amanda L. Robinson. 2000. Cops and Crooks: Images of Minorities on Primetime Television. *Journal of Criminal Justice* 28, 5: 385–96.
- Moriearty, Perry L. 2010. Framing Justice: Media, Bias, and Legal Decisionmaking. *Maryland Law Review* 69, 4: 849-909.
- Oliver, Mary Beth. 1994. Portrayals of Crime, Race and Aggression in ‘Reality-Based’ Police Shows: A Content Analysis. *Journal of Broadcasting & Electronic Media* 38, 2: 179–92.
- Peffley, Mark, and Jon Hurwitz. 2007. Persuasion and Resistance: Race and the Death Penalty in America. *American Journal of Political Science* 51, 4: 996–1012.
- Peffley, Mark, and Jon Hurwitz. 2010. *Justice in America: The Separate Realities of Blacks and Whites*. New York: Cambridge University Press.
- Quillian, Lincoln, and Devah Pager. 2010. Estimating Risk: Stereotype Amplification and the Perceived Risk of Criminal Victimization. *Social Psychology Quarterly* 73, 1: 7—104.
- Robinson, Matthew. 2000. The Construction and Reinforcement of Myths of Race and Crime. *Journal of Contemporary Criminal Justice* 16, 2: 133–156.
- Romer, Daniel, Kathleen Hall Jamieson, and Nicole J. DeCoteau. 1998. The Treatment of Persons of Color in Local Television News: Ethnic Blame Discourse or Realistic Group Conflict? *Communication Research* 25, 3: 286–305.

- Romer, Daniel, Kathleen Hall Jamieson, and Sean Aday. 2003. Television News and the Cultivation of Fear of Crime. *Journal of Communication* 53, 1: 88–104.
- Sonnett, John, Kirk A. Johnson and Mark K. Dolan. 2015. Priming Implicit Racism in Television News: Visual and Verbal Limitations on Diversity. *Sociological Forum* 30, 2: 328-347.
- White, Kailey, Forrest Stuart, and Shannon L Morrissey. 2021. Whose Lives Matter? Race, Space, and the Devaluation of Homicide Victims in Minority Communities. *Sociology of Race and Ethnicity*. 7, 3:333-349.
- Yanich, Danilo. 2004. Crime Creep: Urban and Suburban Crime on Local TV News. *Urban Affairs Quarterly* 26:535-563.

Exhibit L

Report on the capacity of the Kansas State Board of Indigents' Defense to guarantee effective representation to persons facing the death penalty.

March 4, 2022

The authors of this report were asked by the counsel for Cornell McNeal to study the procedures and mechanisms for providing legal representation to individuals facing capital punishment in the State of Kansas, and assess whether the system as currently designed and constituted can guarantee effective legal representation to all persons in danger of execution. We reviewed the statutes, regulations, procedures, and mechanisms for providing legal representation to persons facing imposition or execution of sentences of death, interviewed administrators, lawyers, investigators, and mitigation specialists, and examined portions of the litigation record in some cases. Based on our assessment, in spite of the competent lawyers and professional staff presently in the system, we find that the system cannot guarantee effective representation to every person who may face capital charges and sentences in the future. In the absence of such a guarantee, the Kansas system for administering capital punishment will inevitably produce arbitrary and unreliable death sentences.

I. Qualifications.

This study was undertaken by Professor Sean O'Brien, University of Missouri, Kansas City School of Law, and Marc Bookman, Executive Director of the Atlantic Center for Capital Representation. Their CVs are attached, and their qualifications are briefly summarized here.

Professor O'Brien has nearly four decades of capital defense experience in Missouri, Kansas, and other jurisdictions across the United States. He was the Public Defender in Jackson County, Missouri, in the late 1980's, and from 1990 through 2005, he was Executive Director of the Missouri Capital Punishment Resource Center, later known as the Death Penalty Litigation Clinic, from 1990 through 2005, when he joined the faculty of UMKC School of Law, where he teaches Criminal Law, Criminal Procedure, Postconviction Remedies, and supervises clinic students working on wrongful convictions and death penalty cases. He has been admitted pro hac vice to represent indigent persons facing the death penalty in state and federal trial, appeal, postconviction, and federal habeas corpus proceedings in numerous jurisdictions, including Kansas. Prof. O'Brien was the lead researcher and author of the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, Introduction*, 36 HOFSTRA L.

REV. 677, 678 (2008) (hereafter “*Supplementary Guidelines*”), and he has qualified as an expert witness on issues regarding quality of capital defense counsel in state or federal courts in Alabama, Georgia, Idaho, Iowa, Kansas, Louisiana, Missouri, Pennsylvania, Wyoming and in the United States Court of Military Justice. He has also testified as an expert on capital punishment issues before the Kansas, Missouri and Nebraska Legislatures, and served as an expert consultant to indigent defense governing boards in Illinois, Kansas, Missouri, North Carolina and Oregon. He has received numerous awards recognizing his work on behalf of indigent defendants, including an honorary degree in Humane Letters from Benedictine College in Atchison, Kansas.

Marc Bookman has decades of successful experience as a capital trial lawyer in the Homicide Unit of the Defender Association of Philadelphia, Pennsylvania before he founded the Atlantic Center for Capital Representation, where he serves as Executive Director. He has taught at countless death penalty conferences and hands-on trainings across the nation, including those sponsored by the Defender Association, the National Legal Aid Association, the National Association for Criminal Defense Lawyers, the NAACP Legal Defense Fund, the Bureau of Justice Assistance, the National Institute of Trial Advocacy, and the annual Bring-Your-Own-Case trainings coordinated by ACCR. Mr. Bookman is also an avid writer who has published essays in *The Atlantic*, *Mother Jones*, *VICE* and *Slate* on various aspects of capital jurisprudence, and is a nationally recognized expert in the field of capital litigation.

Both Mr. Bookman and Prof. O’Brien are frequent lecturers at capital defense training programs throughout the United States.

The authors reviewed documents and materials describing the structure and operation of the Kansas Board of Indigents’ Defense, including *A Report on the Status of Public Defense in Kansas*, THE BOARD OF INDIGENT DEFENSE SERVICES, September, 2020, and appendices; *Report of the Judicial Council Death Penalty Advisory Committee*, February 13, 2014; *Report of the Judicial Council Death Penalty Advisory Committee*, December 4, 2009; *Report of the Judicial Council Death Penalty Advisory Committee*, January 29, 2004; KANSAS LEGISLATOR BRIEFING BOOK, I-3, *Board of Indigents’ Defense Services*, KANSAS LEGISLATIVE RESEARCH DEPARTMENT (2012); *State of Kansas Board of Indigents’ Defense Services Permanent Administrative Regulations*, KAR § 105-1-1 et seq., and Kansas Statutes affecting the death penalty regarding homicide (K.S.A. § 21-5401

et seq.), Sentencing (K.S.A. § 21-6617 et seq.), Execution of Death Sentences (K.S.A. § 22-4001 et seq.), Habeas Corpus (K.S.A. § 60-1507), and Indigent Defense Services Act (K.S.A. § 22-4501 et seq.). As active capital litigators, the authors have some previous familiarity with Kansas capital litigation in which juries imposed or rejected the death penalty, and Kansas capital cases that resulted in negotiated pleas. In addition, the authors requested and obtained additional information from the Kansas State Board of Indigents' Defense Services.

The authors also interviewed attorneys, investigators, mitigation specialists, and administrators knowledgeable about the structure and operation of the system for providing legal representation and related resources to individuals potentially facing the death penalty in the State of Kansas. We considered all the information we learned in addressing the questions we were asked to address.

II. Post-Furman representation in Kansas death penalty cases.

A. The Kansas Death Penalty System.

Kansas has had an uneasy relationship with capital punishment since the turn of the Twentieth Century. Kansas has not executed a prisoner for more than half a century, and has actively used the death penalty for only fifteen of the last 115 years.

A brief history is in order. The Kansas legislature abolished the death penalty on January 30, 1907, and it remained so until it was reinstated by the legislature in 1935. Between 1944 and 1954, ten men were executed; Governor George Docking declared a moratorium on executions during his administration from 1957 until 1960, after which there were five executions between 1962 and 1965 (Lowell Lee Andrews, executed November 30, 1962, Richard Hickock and Perry Smith, executed April 14, 1965, and George York and James Latham, executed on June 22, 1965). Kansas's death penalty statute was invalidated in 1972, this time by the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). Of all the death penalty states that reinstated the death penalty following *Furman*, Kansas was the last to do so; it did not pass another death penalty statute until 1994—more than twenty years after *Furman*.¹ No one has been executed in Kansas since the death penalty was reinstated.

¹ New York reinstated the death penalty in 1995, a year after Kansas. However, New York's highest court found the death penalty statute unconstitutional in *People v. LaValle*, 3 N.Y. 88, 817 N.E. 341 (2004). In 2007, remaining death sentences were reduced to life imprisonment, all execution equipment has been removed, and New York has not reenacted a new death penalty statute. New York has executed no one since the execution of Eddie Mays in

The result of this historical experience is that when Kansas reinstated the death penalty, a dedicated death penalty defense bar had not existed in the State of Kansas in living memory. No licensed attorney in the State of Kansas has ever litigated a postconviction death penalty case through its completion, and only one Kansas lawyer has previous experience representing death-sentenced clients in postconviction appeals—outside the State of Kansas. In other words, Kansas never has been, and likely never will be, Texas.²

The death penalty statute currently in effect in Kansas allows for the death penalty for Capital Murder, which is defined as the “intentional and premeditated killing” of a person in one of seven enumerated circumstances which include kidnapping, contract homicide, homicides committed by prisoners, homicides in commission or rape or sodomy, the killing of a police officer, the killing of more than one person, or the killing of a child under the age of 14 in the commission of a kidnapping or aggravated kidnapping with the intent to commit a sex offense. K.S.A. § 21-5401(a). The decision to seek the death penalty is in the sole discretion of the county or district attorney prosecuting the case, or the attorney general in a case in which the county or district attorney has a conflict of interest. K.S.A. § 21-6617(s). The death penalty process is triggered when the prosecuting attorney within ten days of arraignment files with the court and opposing counsel a notice of intent to seek the death penalty. *Id.* There is no set time interval between the initial arrest and arraignment; it is not unusual for the arraignment to occur more than a year after the defendant has been taken into custody on a capital charge. We found no guidelines and no process for review of a prosecutor’s decision to seek death, and we found no provision in Kansas law for judicial review of the sufficiency of the evidence to support a decision to seek the death penalty.

When a person is found guilty of capital murder, “the court, upon motion of the prosecuting attorney, shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death.” K.S.A. § 21-6617(b). The penalty phase of the proceedings “shall be conducted by the trial judge before the trial jury as soon as practicable.” *Id.* The defendant may waive a jury, in which case “the sentencing proceeding shall be conducted by the court.” *Id.* At the sentencing hearing, the prosecuting attorney may present “[o]nly such evidence of aggravating circumstances as the state has made known to the

1963. New York: History of the Death Penalty, Death Penalty Information Center, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-york>.

² Law professor David Dow, himself a seasoned capital defense lawyer, points out that much of the death penalty process involves “a foreign language even to most practicing attorneys.” David R. Dow, *Why Texas is So Good at the Death Penalty*, Politico, May 15, 2014.

defendant prior to the sentencing proceeding shall be admissible evidence of aggravating circumstances.” K.S.A. § 21-6617(c). Aggravating circumstances are enumerated by statute:

Aggravating circumstances shall be limited to the following:

- (a) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.
- (b) The defendant knowingly or purposely killed or created a great risk of death to more than one person.
- (c) The defendant committed the crime for the defendant’s self or another for the purpose of receiving money or any other thing of monetary value.
- (d) The defendant authorized or employed another person to commit the crime.
- (e) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.
- (f) The defendant committed the crime in an especially heinous, atrocious or cruel manner. A finding that the victim was aware of such victim’s fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim’s death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious or cruel. Conduct which is heinous, atrocious or cruel may include, but is not limited to:
 - (1) Prior stalking of or criminal threats to the victim;

- (2) preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel;
 - (3) Infliction of mental anguish or physical abuse before the victim's death;
 - (4) torture of the victim;
 - (5) continuous acts of violence begun before or continuing after the killing;
 - (6) desecration of the victim's body in a manner indicating a particular depravity of mind, either during or following the killing; or
 - (7) any other conduct the trier of fact expressly finds is especially heinous.
- (g) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.
- (h) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.

K.S.A. § 21-6624.

The defense may present evidence of mitigating circumstances, only some of which are defined by statute:

- (a) Mitigating circumstances shall include, but are not limited to, the following:
 - (1) The defendant has no significant history of prior criminal activity.
 - (2) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.

- (3) The victim was a participant in or consented to the defendant's conduct.
 - (4) The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.
 - (5) The defendant acted under extreme distress or under the substantial domination of another person.
 - (6) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.
 - (7) The age of the defendant at the time of the crime.
 - (8) At the time of the crime, the defendant was suffering from posttraumatic stress syndrome caused by violence or abuse by the victim.
- (b) Pursuant to hearing under K.S.A. 2013 Supp. 21-6617, and amendments thereto, mitigating circumstances shall include circumstances where a term of imprisonment is found to be sufficient to defend and protect the people's safety from the defendant.

K.S.A. § 21-6625.

In addition to the statute defining mitigating circumstances, the Cruel and Unusual Punishment Clause of the 8th Amendment to the Constitution requires that the sentencer be allowed to consider and give mitigating effect to any aspect of the defendant's background and character tendered in mitigation of the sentence. *Lockett v. Ohio*, 438 U.S. 536 (1978). *Furman* and *Lockett* together fundamentally altered the landscape of capital litigation in America. Cases since *Lockett* have strictly applied its principle to overturn death sentences where statutes, jury instructions and rules of evidence precluded juries from considering specific matters in mitigation of punishment. See, e.g., *Skipper v. South Carolina*, 476 U.S. 1 (1986) (exclusion of evidence that the defendant was a well-behaved, good prisoner violated the Eighth

Amendment); *Green v. Georgia*, 442 U.S. 95 (1979) (exclusion of reliable mitigating evidence based on Georgia's hearsay rule violated the Eighth Amendment); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sentencing statute precluding the trial judge's consideration of the defendant's turbulent family history violated the Eighth Amendment); *Mills v. Maryland*, 486 S. Ct. 367 (1988) (jury instruction precluding consideration of mitigating factors not unanimously found by the jury violated Eighth Amendment). The Constitution requires the court to allow the sentencer to consider and give effect to mitigating evidence and circumstances even if they are outside the statute; "give effect to" mitigating evidence means that the sentencer must be empowered to assess a life sentence based on any such circumstance it finds to exist. *Penry v. Johnson*, 532 U.S. 782 (2001). Mitigation evidence need not "explain" the crime or even have any causal connection of "nexus" to the crime; the jury must be allowed to consider any aspect of the defendant's background, character, mental health or culture that might humanize him in their eyes. *Tennard v. Dretke*, 542 U.S. 274 (2004). Justice Kennedy described the scope of mitigating evidence and circumstances as "potentially infinite." *Ayers v. Belmonte*, 549 U.S. 7, 21 (2006). All the foregoing cases guide counsel's preparation and presentation of the penalty phase of the trial. The defense lawyer is the only participant in the criminal justice system who is obligated to investigate and present evidence in mitigation of punishment. This is why the Supreme Court places on defense counsel the duty "to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003), quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989). This duty of diligence continues through appellate, postconviction and federal habeas corpus representation. *McCleskey v. Zant*, 499 U.S. 467, 498 (1991) ("petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief").

After hearing evidence in aggravation and mitigation of punishment, to impose a sentence of death, a jury must unanimously "find[] beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 2014 Supp. 21-6624, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." K.S.A. § 21-6617(e). If the jury does not so find unanimously, "the defendant shall be sentenced to life without the possibility of parole." *Id.* "A judgment of conviction resulting in a sentence of death shall be subject to automatic review by and appeal to the supreme court of Kansas," K.S.A. § 21-6619(a), which shall "shall consider the question of sentence as well as any errors asserted in the

review and appeal.” K.S.A. § 21-6619(a) & (b). Upon reviewing a sentence of death, that court must determine:

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
- (2) whether the evidence supports the findings that an aggravating circumstance or circumstances existed and that any mitigating circumstances were insufficient to outweigh the aggravating circumstances.

K.S.A. § 21-6619(c).

A prisoner whose conviction and sentence of death are affirmed on appeal may move to vacate, set aside, or correct the conviction and or sentence in the court which imposed the sentence. K.S.A. § 60-1507(a). Since reenacting the death penalty, the legislature has amended § 1507 to impose time limitations:

- (1) Any action under this section must be brought within one year of:
 - (A) The final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction; or
 - (B) the denial of a petition for writ of certiorari to the United States supreme court or issuance of such court’s final order following granting such petition.
- (2) The time limitation herein may be extended by the court only to prevent a manifest injustice.
 - (A) For purposes of finding manifest injustice under this section, the court’s inquiry shall be limited to determining why the prisoner failed to file the motion within the one-year time limitation or whether the prisoner makes a colorable claim of actual innocence. As used herein, the term actual innocence requires the prisoner to show it is more likely

than not that no reasonable juror would have convicted the prisoner in light of new evidence.

(B) If the court makes a manifest-injustice finding, it must state the factual and legal basis for such finding in writing with service to the parties.

(3) If the court, upon its own inspection of the motions, files and records of the case, determines the time limitations under this section have been exceeded and that the dismissal of the motion would not equate with manifest injustice, the district court must dismiss the motion as untimely filed.

K.S.A. § 60-1507. The time limits and the limitations on expanding the time limits exponentially increases the complexity of an already complicated case, and adds significantly to counsel’s burden of delivering competent legal representation to a client under sentence of death.

Postconviction review has a “unique role to play in the capital process.” ABA Guideline 1.1 (2003), commentary. Because of “the general tendency of evidence of innocence to emerge only at a relatively late stage in capital proceedings,’ jurisdictions that retain capital punishment must provide representation in accordance with the standards of these Guidelines, as outlined in Subsection B, ‘*at all stages of the case.*’” ABA Guideline 1.1 (2003), commentary (emphasis added). Specifically, postconviction counsel “must be prepared to thoroughly reinvestigate the entire case to ensure that the client was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law.” *Id.* This is emphasized multiple times:

Like trial counsel, counsel handling state collateral proceedings must undertake a thorough investigation into the facts surrounding all phases of the case. It is counsel’s obligation to make an independent examination of all of the available evidence—both that which the jury heard and that which it did not—to determine whether the decisionmaker at trial made a fully informed resolution of the issues of both guilt and punishment.

Id. As of this writing, 186 men and women convicted and sentenced to death in the United States have been exonerated through postconviction investigation.

Postconviction review is so critical to the fairness and reliability of a death penalty sentencing scheme that at least one state has expressly codified that death-sentenced prisoners are entitled to “effective assistance of [post-conviction] counsel.” *Grayson v. State*, 118 So. 3d 118, 126 (Miss. 2013). The United States Supreme Court, too, has recognized that “[w]ithout the help of an adequate attorney,” death-sentenced prisoners will face substantial difficulties in vindicating certain post-conviction claims. *Martinez v. Ryan*, 566 U.S. 1, 11 (2012). The Court explained:

A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an “obvious truth” the idea that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence”). Effective trial counsel preserves claims to be considered on appeal, see, e.g., Fed. Rule Crim. Proc. 52(b), and in federal habeas proceedings, *Edwards v. Carpenter*, 529 U.S. 446, (2000).

Martinez v. Ryan, at 12.

As of the time of writing this report, one case has advanced to hearing under K.S.A. § 60-1507, and another is on appeal from the denial of postconviction relief in the trial court. One additional state habeas corpus petition has been filed. The remaining men on death row are pending on direct appeal or in the investigation stage of state habeas corpus proceedings. None has entered federal habeas corpus proceedings and there is no formal plan to facilitate transition to new counsel at

that time, even though some clients will have only weeks remaining on their federal statute of limitations period within which to file a federal petition.

B. Kansas indigent defense generally

A person charged with any felony in the State of Kansas “is entitled to have the assistance of counsel at every stage of the proceedings against such defendant and a defendant in an extradition proceeding, or a habeas corpus proceeding pursuant to K.S.A. § 22-2710, and amendments thereto, is entitled to have assistance of counsel at such proceeding.” K.S.A. § 22-4503(a). The system for representing indigent people charged with criminal offenses in Kansas state courts is administered through the Kansas State Board of Indigent Defense Services (BIDS), which provides representation to 85% of adults charged with crimes in Kansas state courts. BIDS Executive Director Heather Cessna, *A Report On The Status of Public Defense*, September, 2020, p. 10 (hereafter “*Status Report*”). Indigent representation is provided by public defenders who are full-time state employees stationed in seventeen offices around the state, or by private counsel, who are compensated at a rate of \$65 to \$80 an hour.³ KANSAS LEGISLATOR BRIEFING BOOK, 2019, p. 2 (hereafter *Briefing Book*). This program consists of two groups: contract counsel, who accept assignments from BIDS for an agreed-upon rate, and non-contract counsel who are appointed by the courts and paid the statutory rate of \$80 per hour. Contract counsel are typically private attorneys or firms that contract with the Board to accept appointed cases at rates reduced from market value where the public defender has a conflict or is unable to otherwise handle the case, or where there is no public defender office in place. Neither contract nor non-contract assigned counsel are directly supervised by BIDS. Instead, BIDS audits assigned counsel claim forms when submitted and facilitates payments to those counsel for cases handled after the case has been completed.

In counties with full time defenders, sometimes potential conflicts of interest preclude the public defender from representing two or more defendants charged in the same crime. Sparsely populated areas of the state are typically served by private appointed counsel. It appears that the primary criteria used by BIDS to

³ The hourly rate for counsel has fluctuated over the years, and had been higher in the past. In 1988, the Kansas legislature raised the statutory rate of compensation from \$30 per hour to \$50 per hour in response to a Kansas Supreme Court ruling. In 2006, the Legislature approved an increase in compensation rates from \$50 per hour to \$80 per hour for assigned counsel beginning in FY 2007, but in 2007, the \$80 minimum per hour compensation rate was repealed after BIDS was able to negotiate a rate of \$62 per hour with some lawyers. The Executive Director’s September, 2020 report puts non-contract counsel compensation at \$80 per hour. The *Briefing Book* did not discuss hourly compensation for private counsel in death penalty cases, though the authors have reliable anecdotal information that the hourly rate for private counsel had been \$110 per hour when Kansas revived the death penalty in 1994, and since BIDS has offered private counsel between \$60 per hour and \$150 per hour to represent clients facing the death penalty.

determine whether an area will be served by private appointed lawyers or by full time public defender officers is cost per case. Where private lawyers deliver cheaper cost-per case services, the system uses private lawyers. Where public defenders deliver cheaper cost-per-case services, the system uses public defenders. BIDS is required to monitor cost per case of the private appointed bar and public defenders. *Briefing Book*, p. 2. We saw no indication that quality of representation was considered at any point.

The *Briefing Book* describes offices established to represent indigent persons facing the death penalty:

Death Penalty Defense Unit

The Death Penalty Defense Unit was established after the reinstatement of the death penalty. BIDS determined it was more cost effective to establish an office with attorneys specializing in the defense of capital cases rather than relying on contract or assigned counsel. The Unit has its main office in Topeka and a branch office in Wichita.

Capital Appeals and Conflicts Office

The primary function of the Capital Appeals and Conflicts Office is to handle representation throughout the long and complex appellate process that follows the imposition of a death sentence. The Office also handles noncapital cases from the Appellate Defenders Office, as time allows. This office is located in Topeka.

Capital Appeals Office

The Capital Appeals Office was established in 2003 to handle additional capital appeals. Specifically, the office was created to handle the appeals of Reginald and Jonathan Carr, who were both convicted of murder in Sedgwick County and sentenced to death. Due to conflict-of-interest rules, the existing Capital Appeals and Conflicts Office could only represent one of the two men. The establishment of the Capital Appeals Office resolved that conflict.

State Habeas Office

The State Habeas Office was established in FY 2015 to handle death penalty defense after a death sentence is upheld by the Kansas Supreme Court and petition for a writ of certiorari has been unsuccessful for the defense.

Another 11 regional trial-level public defender offices represent indigent clients in noncapital cases; they generally do not provide representation in death penalty cases, although Darryl Stallings was defended at his capital trial by the Johnson County Regional Public Defender Office. Also, most of the lawyers assigned to death penalty units informed us that they are also handling cases that do not involve the death penalty because of system wide caseloads and staffing shortages.

The legislator briefing book indicates that there are “caps,” i.e., maximum dollar amounts of compensation for services, that limit what lawyers can be paid for various kinds of representation. It does not indicate whether the system uses caps for attorney compensation in death penalty cases.

C. BIDS Funding and Staffing Problems.

The *Status Report* identifies pressing issues of funding and staffing that threatens the quality of legal representation in Kansas criminal cases. In FY 2020, BIDS handled a grand total of 26,237 cases: 11,456 through the public defender system, and 14,781 through the assigned counsel program. *Id.*, p. 11. In a nutshell, Director Cessna cites high employee turnover, retention and recruitment problems stemming from low pay, “and chronically high and ethically concerning caseloads.” *Id.*, p. 11.

Turnover & recruitment/retention problems. In the spring of 2019, the turnover rate for public defenders was as high as 25%, and since has hovered around 15%, which, according to Director Cessna, “represents a significant impact on our ability to consistently keep our public defender offices fully staffed with highly experienced attorneys and support staff. When asked to name the single biggest issue negatively impacting their work, the top three responses were workload (24.7%), poor pay and/or lack of raises/promotions (22.3%), and compassion fatigue and/or burnout (15.2%).” *Status Report*, p. 12. The survey also found that 55% of respondents had “considered leaving their public defender offices *within the past year.*” *Status Report*, p. 13 (emphasis in original). Again, the same three concerns—pay, workload, and burnout—were the primary reasons given for considering leaving. *Id.* Of defenders responding to the Well-Being Survey, 87% were unsure or did not see themselves working in a Kansas public defender office in ten years. *Id.*, pp. 13-14. Not surprisingly, respondents attributed this to the same three factors.

Caseloads. Caseload-per-attorney far exceeds the 1973 National Advisory Commission on Criminal Justice Standards, which set goals at “no more than 150 felonies per year, no more than 400 misdemeanors per year, and no more than 25

appeals per year.” *Status Report*, p. 15, citing NAC Standard 13.12.⁴ On average, system-wide, each lawyer handled 205 felony cases in fiscal year 2020. *Id.*, p. 20. In Sedgwick County, that average was 278 felony cases handled per lawyer. Only three offices are at or near the outdated NAC maximum caseload standard of 150 felony cases per year. *Id.* A lawyer working full time and taking no vacation would only have about 7.5 hours to devote to a single felony case. *Id.*, p. 21. A 2017 study of Louisiana Public Defender Caseloads found that a lawyer should spend about 22 hours on a low-level felony, and 200 hours on a felony case potentially punishable by life imprisonment. *Id.* One BIDS employee said, “I want to do high-quality work. I have too many cases to meet that goal in every case.” *Status Report*, p. 18. Another employee reported that “Investigators get no training, when I asked previously I was denied.” *Id.*, Appendix, p. 24.

Kansas public defenders may refuse to accept new court appointments “when it is determined jointly by the public defender and the director that the current active caseload would preclude the public defender from providing adequate representation to new clients.” K.A.R. § 105-21-3(b). There were 26 such shutdowns in FY 2020. *Status Report*, p. 22. Offices in Topeka, Salina, and Wichita each shut down multiple times due to turnover and overwhelming caseloads. *Id.* When this occurs, the cases must go to private attorneys in the assigned counsel program at a substantially higher cost-per-case, adding additional stress to an already over-stressed budget. *Id.*, p. 23.

Assigned counsel, while more expensive than full-time attorneys on a cost-per-case basis, are not adequately compensated at the BIDS \$80 per hour rate, which represents only 36% of the market rate for private counsel. *Status Report*, at 25.⁵ The system faces a looming crisis of attrition among private appointed counsel. *Id.*, p. 26.

Director Cessna’s *Status Report* describes an indigent defense system staffed by people who want to do good work for their clients, but are unable to do so because of a combination of workload, staff turnover, and resources. Undoubtedly, good work is being done, but there is also no doubt that good work is not being done for every client, and that as current problems persist, a growing portion of the agency’s clients are in danger of receiving substandard, ineffective representation. Although the *Status Report* does not specifically address death penalty offices and staff, it clearly did not exclude them. In the BIDS Well-Being Survey Report,

⁴ The NAC Standards have not been updated in 50 years, and overestimate the number of cases a lawyer in contemporary times can competently defend due to harsher sentences, increased complexity of criminal law, and advances in information technology and forensic science which add to counsel’s workload.

⁵ Even at the time the compensate rate was adopted in 2006, it represented only 53% of the market rate for lawyer fees in Kansas at that time. *Status Report*, p. 25.

August, 2020, one respondent asked for caseload caps for DPDU [Death Penalty Defense Unit] attorneys. *Status Report*, Appendix, p. 27. Workload issues also came up during the authors' interviews with death penalty representation unit staff. In fact, several of the death penalty representation staff we spoke with indicated that they were working on noncapital cases, and noncapital defender offices often represent potentially capital clients for a year or more before the cases become eligible for assignment to qualified counsel in the capital representation division. It is impossible to say that the death penalty defense unit is isolated or protected from the general caseload crises, and there is no doubt that clients facing the death penalty are adversely affected by attorney workloads.

III. Death Penalty Defense Capabilities

A. Additional demands for death penalty cases

Death penalty representation is a skilled specialty requiring expertise, time, and resources above and beyond that required for a typical non-capital case. As previously discussed, the Supreme Court held that “in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The Court’s conclusion that a capital case decision-maker must be allowed to consider any aspect of the defendant’s background and character,

. . . rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 305. Therefore, in capital cases, “the [sentencer’s] ‘possession of the fullest information possible concerning the defendant’s life and characteristics’ is ‘[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence.’” *Lockett v. Ohio*, 438 U.S. at 602-03.

Justice William Brennan foreshadowed the impact that the Supreme Court's death penalty jurisprudence would have on the duties of capital defense lawyers in his concurring opinion in *Furman v. Georgia*:

In the United States, as in other nations of the western world, "the struggle about [the death penalty] has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries."

Furman v. Georgia, 408 U.S. 238, 297 (1972) (Brennan, J., concurring), quoting T. Sellin, *The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute* 15 (1959). Justice Brennan's observations regarding the influences on American society's movement away from extreme punishment also guide counsel's approach to investigating and developing a case in mitigation of an individual client's punishment. An effective case in mitigation of punishment will include stories from the defendant's life that reveal his "personal value and dignity," coupled with a scientific "understanding of the motive forces" of the client's conduct and life trajectory. However, the unfettered constitutional right to offer mitigating evidence "does nothing to fulfill its purpose unless it is understood to presuppose *the defense lawyer* will unearth, develop, present and insist on consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'" Louis D. Bilonis & Richard A. Rosen, *Lawyers, Arbitrariness and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1316-17 (1997), quoting *Woodson v. North Carolina*, *supra*, at 304 (emphasis added). Therefore, "[t]he duty to investigate, develop and pursue avenues relevant to mitigation of the offense or penalty, and to effectively communicate the fruits of those efforts to the decision-makers, rests upon defense counsel." *Supplementary Guidelines*, 36 HOFSTRA L. REV. at 678.

1. Mental Health

A Department of Justice report published in 2006 found that in mid-2005, “more than half of all prison and jail inmates had a mental health problem.” Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics Special Report, p. 1 (September, 2006), online at <https://bjs.ojp.gov/content/pub/pdf/mhppji.pdf> (Hereafter *BJS Report*).⁶ “These estimates represented 56% of State prisoners, 45% of Federal prisoners, and 64% of jail inmates.” *Id.* Because state prison and jail inmates with mental health problems were more likely than prisoners without mental health problems to have current or past violent offenses, *id.*, p. 7, mental health problems are likely even more prevalent among prison and jail inmates charged or convicted of capital murder. Effective capital defense lawyers know that “the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that ‘[i]t must be assumed that the client is emotionally and intellectually impaired.’” *ABA Guidelines*, at Guideline 10.5, commentary (quoting Rick Kammen & Lee Norton, *Plea Agreements: Working with Capital Defendants*, *ADVOCATE* (Ky.), Mar. 2000, at 31.

A capital client’s mental health impairments never affect just one discrete aspect of the case. Confinement on a capital charge is a significant stressor that often increases the client’s predisposition to symptoms such as avoidance and paranoia. For this reason, “[t]he quality of the client’s cooperation may depend significantly on counsel’s skill and sensitivity in developing a human and emotional relationship with him.” Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 322 (1983). Just as in the mental health field, defense counsel “must consciously work to establish the special rapport with the client that will be necessary for a productive professional relationship over an extended period of stress.” *ABA Guideline 1.1*, commentary. Rapport describes a dynamic relationship between the interviewer and the subject, in which “patients [clients] feel accepted with both their assets and liabilities.” BENJAMIN JAMES SADOCK & VIRGINIA ALCOTT SADOCK, *KAPLAN & SADOCK’S SYNOPSIS OF PSYCHIATRY 1* (9th ed. 2003) (Hereafter “*Synopsis of Psychiatry*”). In law as in medicine, rapport is “a relationship between the [client

⁶ “Mental health problems were defined by two measures: a recent history or symptoms of a mental health problem. They must have occurred in the 12 months prior to the interview. A recent history of mental health problems included a clinical diagnosis or treatment by a mental health professional. Symptoms of a mental disorder were based on criteria specified in the Diagnostic and Statistical Manual of Mental Disorders, fourth edition (DSM-IV).” *BJS Report*, p. 1.

or witness] and [the defense team] that reflects warmth, genuine concern, and mutual trust.” *Id.*, at 2. In addition to facilitating investigation and overcoming barriers to disclosure, “rapport can be the key to persuading a client to accept a plea that avoids the death penalty.” ABA Guideline 4.1, commentary. A federal judicial study commission found that client rapport and communication is “vastly more time consuming and demanding in a death penalty case.” COMM. ON DEFENDER SERVS., JUDICIAL CONFERENCE OF THE U.S., FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (1998), <http://www.uscourts.gov/dpenalty/4REPORT.htm> [hereinafter *Spencer Report*]. Because of “the enormous stress that the risk of a death sentence imposes on both the client and the lawyer,” the committee urged that “special care must be taken in order to avoid a rupture of the professional relationship that would force counsel to withdraw, delaying the trial.” *Id.*

2. *Specialized skills, multidisciplinary teams, experts*

The focal point of counsel’s investigation in the post-Furman era of capital litigation is the client’s life history. The commentary to ABA Guideline 10.7 makes it clear that counsel’s duty to investigate includes “extensive and generally unparalleled investigation into personal and family history.” *ABA Guidelines*, at Guideline 10.7(A), commentary (quoting Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, CHAMPION, Jan.-Feb. 1999, at 35). This indispensable investigation cannot be conducted competently without a multidisciplinary team. See, e.g., Cessie Alfonso & Katharine Baur, *Enhancing Capital Defense: The Role of the Forensic Social Worker*, CHAMPION, June 1986, at 26; Dennis N. Balske, *The Penalty-Phase Trial: A Practical Guide*, CHAMPION, Mar. 1984, at 42; James Hudson, Jane Core & Susan Schorr, *Using the Mitigation Specialist and the Team Approach*, CHAMPION, June 1987, at 33; Kevin McNally, *Death is Different: Your Approach to a Capital Case Must Be Different, Too*, CHAMPION, Mar. 1984, at 12-13; Russell Stetler & Kathy Wayland, *Dimensions of Mitigation*, CHAMPION, June 2004, at 31.

This careful investigative approach is an integral aspect of the standards articulated in the Supplementary Guidelines:

The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client’s character, history, record and any circumstances

of the offense, or other factors, which may provide a basis for a sentence less than death. The investigation into a client's life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socioeconomic, historical, and political factors.

Supplementary Guidelines, at Guideline 10.11(B). Obviously, such an investigation is significantly different from the kinds of investigation lawyers typically conduct in the vast majority of noncapital criminal defense cases, and it requires specialized training, knowledge, and expertise.

The client's life history will reveal many events that are independently mitigating, but will also provide valuable data for experts and jurors who strive to understand the defendant and his vulnerabilities. Traumatic or stressful conditions and events in his early life can help them better understand him. *Synopsis of Psychiatry* at 6. See also Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 925 (2008). It has long been recognized that a competent mitigation investigation must include the family history going back at least three generations, and must document genetic history, patterns, and effects of familial medical conditions. Lee Norton, *Capital Cases: Mitigation Investigations*, CHAMPION, May 1992, at 45; Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 974-77 (2008). Daniel J. Wattendorf & Donald W. Hadley, *Family History: The Three-Generation Pedigree*, 72 AM. FAM. PHYSICIAN 441, 447 (2005). This is a time consuming, painstaking process that cannot be done using traditional investigators, who simply lack the knowledge to understand what is relevant and skill to conduct an

appropriate interview or record search. “Both tasks require special knowledge and expertise which the attorney may not (and probably does not) possess. Therefore, one of the first steps in the preparation of any capital case is securing the assistance of an individual with the skills that make him or her competent to conduct the life history investigation.” *Norton, Mitigation Investigations*, at 43. Mental health experts recognize that “[f]amily members, friends, and spouses can provide critical data such as past psychiatric history, responses to medication, and precipitating stresses that patients may not be able to describe themselves.” *Synopsis of Psychiatry*, at 5. Such evidence will be lost or overlooked if counsel does not employ a qualified, multidisciplinary team.

A significant misconception among people not experienced in capital defense is that a traditional investigator and a mental health expert together can cover the ground necessary to develop an adequate understanding of the client. That is absolutely not the case. One mitigation specialist observed:

[A] significant legal blind spot existed between the roles played by the private investigator and the psychiatrist, the two standard information getters in the trial process. Neither one was suited to the task at hand here—namely discovering and then communicating the complex human reality of the defendant’s personality in a sympathetic way.

But if getting this human and sometimes intangible information is important enough to warrant a specialist, the question is: what specialist? This is the dilemma [counsel] faced. [A]nd he ended up deciding that the intelligent application of a journalist’s skills in an interdisciplinary process might solve his problem.

Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, CAL. DEATH PENALTY MANUAL, N6-N10, at N7 (Cal. State Pub. Def. Supp. July, 1982). Put simply, traditional investigators lack the skills, training, and understanding of mental health issues, and mental health experts do not gather records or travel extensively and interview potential witnesses in their homes. Even if they were willing to, at standard expert witness rates, it would be cost-prohibitive.

Because it had long since become routine for capital defense teams to include a mitigation specialist, the ABA Guidelines were revised in 2003 in part to recognize the absolute necessity of a defense team that includes “no fewer than two attorneys qualified in accordance with ABA Guideline 5.1, an investigator, and a mitigation specialist.” ABA Guideline, at Guideline 4.1.A.1. Mitigation specialists have been described as “human service experts working on capital defense teams represent[ing] the disciplines of social work, psychology, and counseling,” and who “demonstrate both sound clinical skills for interviewing and assessment and a thorough working knowledge of the court system.” Hudson et al., *The Team Approach*, at 33.

One area of concern with respect to the staffing of mitigation experts in the death penalty defense offices is the ratio of mitigation specialists to attorneys. The Topeka and Wichita trial offices share two mitigation specialists, which means each mitigation specialist is responsible for six cases and responding to the needs of twelve or more lawyers. The DPDU has contracted with outside mitigation specialists in two cases, but the workload remains heavy. One mitigation specialist told us, “There needs to be two of me.” We were also unable to confirm whether all of the mitigation staff are adequately trained and have the requisite expertise. The authors identified and interviewed one mitigation specialist who had a Master’s Degree in psychology. The other mitigation specialists who were described to us were people who have a J.D. degrees and their training in mental health, witness interviewing, investigation, and record gathering was unclear.

3. Costs, Resources, and Time Constraints

Death penalty defense work is complex and expensive. In addition to the gravity and complexity of it, the sheer volume of the work is compounded by the fact that the prosecution is nearly always represented by well-funded and skilled specialists. The defense team must not only prepare an affirmative case for life, but must also investigate and prepare to meet the prosecution’s case for death. A committee of federal judges reported that prosecution resources are a significant factor driving the need for fully staffed defense teams:

Judges generally reported that prosecution resources in death penalty cases seemed unlimited. Typically, at least two and often three lawyers appeared for the prosecution in federal death penalty cases, who were assisted in court by one or more “case agents” assigned by a law

enforcement agency. Investigative work and the preparation of prosecution exhibits for trial, including charts, video and audiotapes, is generally performed by law enforcement personnel. Law enforcement agencies also performed scientific examinations and provided expert witnesses at no direct cost to the prosecution. In some cases, which arose from joint state and federal investigations, state law enforcement agencies contributed resources to the prosecution effort.

Spencer Report. Kansas has no statutory or regulatory provision to ensure parity of resources between prosecution or defense.

Many of the problems identified in the *BIDS Status Report* reflect a system that is underfunded. Low hourly rates for private counsel may drive away some of the best candidates for capital representation. Inadequate funding for staff leads to high caseloads. Low salaries lead to low morale, turnover, and discontinuity of representation. There are many other ways that funding pressures affect the quality of representation that clients receive, and we saw some of those cost-cutting measures in place in the Kansas system. In noncapital offices, BIDS is declining appointments, turnover is high, and morale is low.

While the individuals who were interviewed for this report suggested that funding the capital offices is a priority for BIDS, there are clear signs that the capital defense offices are also affected by funding and resource issues. It was common for personnel assigned to capital defense offices to report that they were handling some noncapital cases in addition to their capital caseloads. Clients charged with death eligible crimes are sometimes represented by noncapital trial offices until the prosecution formally files notice of intent to seek the death penalty. The delay in the appointment of qualified counsel by more than a year at the trial level, and additional delay at the postconviction level, creates potential for substantial prejudice to the client. Mitigating witnesses or settlement opportunities may be lost, and the staffing cannot ensure adequately monitoring of client's mental health and well-being during times before a qualified, fully staffed team is assigned to the case. In addition, this delay in appointment of capital qualified counsel weakens or eliminates the defense's ability to convince the prosecution not to death notice a case. Without a mitigation specialist and the other resources that should be devoted to a capital case, the defense is at a significant disadvantage in any efforts to convince the prosecution not to issue a death notice.

IV. BIDS' Capital Defense Delivery System Risks Arbitrary Executions.

The authors interviewed staff attorneys, unit directors, and professional support staff on January 5 and 6, 2022, to learn about the operation of the capital division. All of the individuals interviewed seemed dedicated to capital defense. The lawyers we interviewed had the necessary qualifications for their positions. The authors' investigation left the authors with the firm impression that the lawyers and staff we interviewed appeared to be dedicated professionals who seek to do good work for their clients. All had positive words for BIDS Executive Director Heather Cessna, the first director to have a public defender background. While they support Director Cessna, there was broad skepticism about the ability to get the legislature to fund the needs of indigent defense in Kansas. The attorneys interviewed chose death penalty representation out of a sense of duty; for many, it is a calling more than a profession. One staff attorney said, "the salary and benefits aren't what make me want to be here."

In spite of the dedication and professionalism of the staff, it is equally clear that the system is at the edge of its capacity, if not beyond its ability, to deliver consistent, high-quality representation to persons facing the death penalty. The system needs more lawyers, more money, more support staff, and more time. One rogue prosecutor deciding to seek death in any case in which there was an arguable aggravating circumstance could disrupt the entire system. The private capital defense bar that is willing to take capital appointments (and that is capable of doing them well) is thin. There is often substantial delay before qualified trial and postconviction counsel are assigned to cases, and there are unrealistic, inflexible deadlines for filing postconviction claims, putting clients at substantial risk of prejudice. The authors also have concerns about BIDS's independence, and its insulation from political influences on its advocacy and funding. Finally, there is substantial evidence of substandard representation in the cases of people already sentenced to death in Kansas in cases decided by the Kansas Supreme Court.

A. Staffing and funding.

Every staff attorney, mitigation specialist, investigator, and office director we interviewed reported that caseloads are too high, there are not enough offices to handle all the cases, and salaries are too low. Two attorneys reported that they took pay cuts to join the DPDU.

DPDU Director Mark Manna advised that he hopes to achieve a caseload of two pending trial cases per lawyer. This is a reasonable objective if the goal is to

enable counsel to perform in accordance with prevailing standards. However, every lawyer we interviewed is responsible for twice that workload, some had even more. Manna himself carries five active trial cases in addition to his duties as Director. He reported that the number of pending cases is in the double digits, and two more appointments would force him to contemplate a shut down. Most attorneys have twice the number of death penalty cases that Director Manna would consider manageable, in addition to noncapital cases for which some lawyers are responsible.

Interviews with DPDU counsel show that even these caseload numbers are misleading because of the need for lawyers to step in and assist other lawyers who are overwhelmed on their own cases. One seasoned trial attorney who transferred to Kansas from another state reported that he was lead counsel on three cases, and co-counsel on two additional cases. This experienced lawyer described himself as striving to be effective, but “on the verge of workload overload,” worried about things falling through the cracks.

Other lawyers echoed these concerns. One lawyer reported, “I’m on five cases right now. It feels heavy.” He has three capital trials scheduled in the next year. In order to meet with each client about once a month, it requires a lot of driving time. [In comparison, the authors both do substantial death penalty defense training around the country, and encourage weekly client contact by the defense team, and during stressful periods, daily if possible.] This lawyer said that not many people want to transfer into the capital unit because “the salary and caseload is a turn off.” He reported that the salary gap between him and his counterparts in district attorneys’ offices is about \$20,000.

Although the authors did not travel to Wichita to interview DPDU staff, both assisted lawyers in that office with time and resource issues in a pending trial case with a trial date for which these lawyers could not be prepared. One staff attorney told the authors that the Wichita office “is getting hammered right now.” That office has only two lawyers, but Sedgwick County has pursued the death penalty at trial more than any other county, and it has increased the rate of filing death notices.⁷ To help with the pressure, every lawyer in the Wichita office has had to

⁷ In the first 19 years of the death penalty in Kansas, between 1994 and 2012, Sedgwick County prosecutors filed death notices in a total of 13 cases, less than one per year. Under Sedgwick County District Attorney Marc Bennett’s tenure, the office filed death notices in eight cases between 2013 and 2020. Five of those eight cases remain pending.

join as co-counsel in at least one Wichita case to prop that office up. At least two more lawyers are needed in Wichita.

One lawyer who has been with BIDS for many years succinctly described the consequence of the understaffing and excessive caseloads: “there were too many cases assigned to too few lawyers, and that led to no supervision of investigation or expert assistance.”

B. Unbridled Prosecutorial Discretion.

DPDU Director Manna described a defense delivery system that is at the edge of its capacity or beyond, only two cases away from having to shut the office down for new appointments. New death penalty case filings are higher than they have ever been. They have gone up across the state overall in the last six years. He reported that some prosecutors are motivated to file death notices for the sole purpose of leveraging guilty pleas, which significantly adds to caseload and workloads. A 2003 legislative audit in Kansas found that the estimated cost of a death penalty case was 70 percent higher than the cost of a comparable non-death penalty case.⁸ A 2014 study revealed that the average cost to BIDS in a death penalty case that ended in a guilty plea cost \$130,595, while the average jury trial in a case in which the death penalty was never sought cost BIDS substantially less, \$98,963. *Report of the Judicial Council Death Penalty Advisory Committee* at 7, Approved by the Judicial Council February 13, 2014.

Several attorneys interviewed identified prosecutorial discretion as a barrier to providing consistent and effective representation to defendants facing the death penalty. There are 105 prosecutors with the authority to decide to seek death. Nothing discourages them from filing capital charges; even in counties with fewer prosecutors, on request the Attorney General will step in with lawyers and resources. DPDU attorneys can’t discern what motivates prosecutors to invite the Attorney General to step in, or whether the Attorney General has any criteria for agreeing to such requests. The other common problem is that prosecutors do not always announce their intention to seek the death penalty before filing a formal notice after arraignment, which may delay the DPDU assignment to the case or appointment of qualified capital counsel for more than a year. This delays capital expertise and resources for the client during the initial phase of case preparation,

⁸ *Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections*, STATE OF KAN. LEGISLATIVE DIV. OF POST AUDIT (Dec. 2003), <https://www.kslpa.org/wp-content/uploads/2019/08/r-04-03.pdf>.

which can make the difference between life and death for the client. Another concern, noted above, is that a rogue prosecutor filing death notices in any conceivably death eligible case could overwhelm the BIDS capital defense capabilities. As Director Manna said, without the addition of more attorneys, the DPDU is two appointments away from declining new appointments.

C. Qualified Private Lawyers Are Too Few.

The private capital defense bar that is willing to take capital appointments (and do them well) is thin. The authors were able to identify few attorneys in the pool of private appointed counsel who are qualified to do the work. The authors are aware of other qualified lawyers who would accept appointments, but decline to participate in the system because the hourly rates will not sustain their law practices. One Kansas lawyer with death penalty trial experience told us that assigning death penalty cases to the private bar “would be catastrophic” because there are “less than a handful of lawyers who could do a death penalty case and not [mess] it up.”

These observations are consistent with our interviews with DPDU lawyers. DPDU attorneys noted that while some private counsel are familiar with the ABA Guidelines, most are not; and those in active cases are underfunded and undertrained. In one case, second chair is a private attorney whom DPDU counsel described as “not the kind of person you or I would want to file a capital case with because he has little familiarity with the [ABA] Guidelines.” Private lawyers do not always engage a mitigation specialist at the outset of the case, which is contrary to prevailing performance standards.⁹ In another case that is likely to be death noticed, appointed counsel has not requested co-counsel. According to DPDU counsel, defendants represented by private appointed counsel may be “materially at a detriment on resources, counsel, training.” Private appointed counsel may not request resources because they don’t know what to ask for, and those lacking in experience do not look at issues as an experienced capital defense lawyer would. Private counsel’s working relationship with prosecutors in one case “breathes of punch pulling.” One DPDU lawyer summarized the problem as “some hack lawyers doing very poor work,” especially in counties where BIDS has no offices.

⁹ “[I]t is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible—well before the prosecution has actually determined that the death penalty will be sought.” ABA Guideline 1.1, commentary.

There are no formal processes to make sure that the people hired to do these cases know what they're doing or have the time to do justice to the case. The attorney selection process was not well thought out at the very beginning, there is no oversight, and there are not enough specialized capital defense attorneys to keep up with the pace of new cases coming through the system. When asked about defense counsel compliance with performance standards set out in the ABA Guidelines, a former BIDS Capital Conflicts Office lawyer said that while some BIDS regulations make reference to the ABA Guidelines, with respect to some "we're not doing that and we haven't done that," and she is even more worried about what private counsel are doing. Even Director Cessna, who reviews funding requests by some private appointed counsel, speculates that these lawyers either don't know what to ask for, or have been trained by previous administrations that the answer will be no.

D. Systemic Delays in Appointing Qualified Trial Counsel

There is often substantial delay before qualified trial counsel are assigned to cases. BIDS lawyers revealed that DPDU counsel may not be appointed until more than a year after the client is arrested, during which time representation is provided by a noncapital office or private appointed counsel. A defense team that is not adequately trained or tuned in to this special obligation of capital teams puts the client at substantial risk, especially early in the case when the prosecutor may not have made up his mind about seeking the death penalty, or when the client may have an opportunity to avoid the death penalty by providing information or assisting the prosecution. This is important because the BIDS system of appointing counsel exposes virtually every capital client to this risk.

All responders reported substantial delays in assigning cases to capital qualified lawyers. At the trial level, for example, potentially capital cases are not always assigned to the capital unit until after arraignment, and after the prosecution files the statutory notice of intent to seek the death penalty. In Kansas, the preliminary hearing in a capital case often takes place more than a year after the client's arrest, the arraignment may take place weeks later, and the prosecution has a ten-day time period beyond that to elect whether to issue a death notice. As a result, clients who face the death penalty may be without qualified counsel for a substantial period of time during which crucial decisions are made and important relationships are formed. In many cases, opportunities to avoid the death penalty through early plea discussions with the prosecution will be lost. In all cases with

delayed appointments of capital counsel, the investigation into death penalty sentencing issues will be delayed, premature and uninformed decisions regarding competence and mental health defenses may be made, and the defendant is deprived of qualified representation on the issue of whether the prosecution will seek the death penalty, contrary to ABA Guidelines. Because “effective advocacy by defense counsel . . . may persuade the prosecution not to seek the death penalty[;] . . . it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible—well before the prosecution has actually determined that the death penalty will be sought.” *ABA Guidelines*, Guideline 1.1, History of Guideline.

The substantial delay in assigning counsel to defendants facing the death penalty in some cases injects a high potential for arbitrary decision-making in the imposition of the death penalty.

E. Delays in Appointing Qualified Postconviction Counsel.

The State Habeas Office was created by BIDS more than twenty years after Kansas reinstated the death penalty. Our investigation into appellate representation established that appellate counsel focus on the trial record and legal issues, and spend no time whatsoever on continuing the fact development in the case. One former capital appellate lawyer told us that appellate counsel may speak to clients once a month on the telephone, and that they needed to try to make it to the prison two or three times a year, but could not always make that. She described client visits as “more maintenance” than mitigation development. There was no attempt to work on the clients’ defense or mitigation cases during the direct appeal process. The appellate division employs no investigators or mitigation specialists and does not have a budget for any form of fact development. The support staff is one paralegal who answered the phones and formatted briefs.

The State Habeas Office was created in 2015 at the urging of appellate and conflicts office lawyers who urged the administration to do something to prepare for the movement of cases into state postconviction proceedings. One appellate lawyer found a room filled with unattended boxes of disorganized trial files and realized that they represented a brewing crisis. Staff counsel exchanged alarmed e-mails with BIDS management about the need to get started on postconviction investigation as soon as possible. One lawyer reported that the requests to create postconviction investigation and representation capacities “met with push-back,” and to this day the delay in resourcing postconviction cases “could go on a lot

longer than what they [the lawyers] were comfortable with.” Attorneys described the development of the current system of postconviction representation services as the product of “bottom-up management.” The administration was brought along reluctantly, and still has not agreed to entry of postconviction lawyers into the case at the earliest possible time. This presents a substantial risk to the clients, who face one-year statutes of limitations for filing state and federal habeas corpus actions that are ticking away in tandem. The risk of forfeiting constitutional claims on procedural technicalities remains unacceptably high. Attorney Julia Spainhour agreed to accept the position as Director of the State Habeas Office in 2017. Director Spainhour said, “We had such horrendous boxes of crap that we got dumped on us, there was no method to preserve trial records.”

Prompt appointment of qualified postconviction is important because Kansas statute imposes a one-year statute of limitations on §1507 motions that begins at the finality of the opinion on direct appeal. Once a petition is filed, it cannot be amended without a court order allowing it, based on a finding of good cause or just cause. There are also rules about amending the petition so that it relates back to the original filing. A former Capital Conflicts Office attorney described the “just cause” or “good cause” standard as subjective. In practice, she said, the ability to show good cause to amend a petition for relief “depends on where your judge is and what he had for breakfast that morning.” The unrealistic, inflexible deadlines for filing postconviction claims put clients at substantial risk of prejudice.

Julia Spainhour, the Director of the State Habeas Office, reported that her office has great difficulty obtaining the files her office needs to do its job properly in the limited time available to investigate and prepare time-limited petitions for habeas corpus. There is no uniform system for maintaining or digitizing files within BIDS, and the process of rounding up disorganized boxes of paper files is a significant obstacle to timely investigation. Her office has two petitions on file and in active litigation, three cases which are still under investigation, and they are assisting private counsel on one additional case. The State Habeas Office has four other lawyers, two of whom have attended training specific to mitigation work and are being used as life history investigators, gathering records, and developing mental health narratives. That office has no psychologists or social workers on staff, and no clerical support staff. Director Spainhour has not contracted with outside mitigation specialists; everything is being done in house.

When asked what she would suggest to improve the BIDS system for delivering representation to persons facing the death penalty, she replied, “Other than just revamping the entire system, I don’t know what I could suggest. We’ve been focused on picking up the pieces.”

F. Concerns About Professional Independence and Insulation from Political Influences

The authors also have concerns about BIDS’s independence, and its insulation from political influences on its advocacy and funding. Until recently, the Executive Director of BIDS was always a political appointee, never someone with a grounding in indigent defense work. Heather Cessna, appointed Executive Director in October, 2019, is the first director with experience as a Kansas public defender, and everyone we spoke to is pleased with her expertise and management to date. One unit director told us that it is much less difficult to make a case for budget needs with Ms. Cessna; her predecessor required extensive education on operational concerns. However, although funding requests start off on more optimistic footing internally, new funding has not magically appeared.

The Kansas indigent defense management structure is controlled by the Board of Indigent Defense, made up of nine non-salaried members appointed by the Governor and confirmed by the legislature for three-year terms. Five of the members must be attorney members, one from the 1st Congressional District, and one each from the four counties exceeding 100,000 in population (Johnson, Sedgwick, Shawnee, and Wyandotte). The remaining four positions are filled by non-lawyer public members, one each from the four Congressional Districts in Kansas. The Executive Director is an employee-at-will of the Board. Only one current board member is a defense attorney with capital representation experience.

Director Cessna and DPDU Director Mark Manna are both employees at will, and either could be removed by the Board or even by the Governor. Directors Cessna and Manna have positively influenced the delivery of indigent defense services, but there are no structures in place to insulate from pressure by politicians to cut funding or otherwise temper their advocacy for BIDS clients. The authors prepared a detailed questionnaire for the BIDS administration inquiring about structural protections against political interference with the funding or legitimate functions of indigent defense offices, but responses have not been received at the time of this report.

G. Evidence of Concerns in Existing Death Sentences.

Finally, there is substantial evidence of substandard representation in the cases of people already sentenced to death in Kansas. One case that demonstrates how easy it is for a client facing the death penalty to fall through the cracks is the incompetent defense of Phillip Cheatham, Jr., by private lawyer Dennis Hawver, who had never previously defended a capital case. Hawver had never even read the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Hawver did no investigation, requested no resources, did not engage co-counsel, did not look into his client's alibi, and at Mr. Cheatham's death penalty trial called him a "professional drug dealer" and "shooter of people." Hawver admitted startling ignorance of the Kansas death penalty statute and procedure, and his ignorance of constitutional limitations on the death penalty. The Kansas Supreme Court disbarred him for incompetence, stating:

But in this court's view the essentially uncontroverted findings and conclusions regarding Hawver's previous disciplinary history, his refusal to accept publicly financed resources to aid in his client's defense, and his inexplicable incompetence in handling Cheatham's case in the guilt and penalty phases of the trial are more than sufficient to require disbarment. See ABA Standard 4.51 (disbarment generally appropriate when a lawyer's course of conduct demonstrates "the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client"). We hold that disbarment is the appropriate discipline.

In re Hawver, 300 Kan. 1023, 1056, 339 P.3d 573, 597 (2014). Hawver was not a public defender or a private appointed counsel, but his prejudicial performance on behalf of his capital client reflects the absence of systemic protections for clients against incompetent defense lawyers. There is no structure in place to prevent what happened to Mr. Cheatham from happening to other persons in danger of execution. It could happen again.

Another case in which BIDS was involved raises similar concerns about the absence of structural protections for defendants needing legal representation in cases involving the death penalty. In *State v. James Kahler*, the BIDS Executive

Director ordered the DPDU to move to withdraw on the grounds of non-indigence, without attempting to establish what his defense would cost and whether he truly had the resources to fund a death penalty defense involving a quadruple homicide. The Director gave the client a list of lawyers to hire to defend him. Mr. Kahler ended up going to trial with retained counsel who had no previous capital experience. He received a death sentence without the benefit of qualified death penalty counsel.

There were also problems reported within the BIDS system that are red flags for substandard representation. More than one lawyer who was interviewed referred to the level of practice under Ron Evans, the previous DPDU Director, as “The Dark Days.” In the case of Sidney Gleason, Mr. Evans declined the trial court’s offer of individual voir dire, and he delegated the presentation of the penalty phase of Mr. Gleason’s trial to his inexperienced co-counsel the night before the penalty phase commenced. One lawyer advised that the § 1507 motion for death row prisoner Gary Kleypas was written and filed by private appointed counsel after doing little or no investigation. Although Mr. Kleypas is now represented by BIDS counsel on appeal from the denial of that motion, his current counsel are frustrated by the lack of investigation in the case and are looking for ways to reopen the record in the case in the face of daunting procedural obstacles.

It was not the authors’ intention to comb through case records to look for evidence of deficient lawyer performance. The problems that are discussed in the previous portions of the report will be reflected in the litigation that follows in state and federal habeas corpus proceedings. But based on reports by the qualified lawyers whom the authors interviewed, there are cases in which trial lawyers allowed mentally ill clients to restrict the scope of their investigation, cases in which lawyers simply hired expert witnesses and turned the case over to them for investigation, and multiple cases reflecting a tendency for trial lawyers to repeatedly rely on the same psychological experts to do competency and neuropsychological evaluations, without putting context around the case for the expert so they know what to look for. One seasoned postconviction lawyer reported:

Many of the cases I’ve worked on highlight a complete abandonment of any real investigation, not only social or family history but criminal involvement with social services. . . There's just been an abandonment of the

accepted ways of developing a defense in a criminal case. Several instances where experts were hired and met with clients in the jail, did some testing, then the expert wasn't contacted until two months before the trial, at the last minute where there was no cohesion through the penalty to the guilt phase. . . . there were too many cases assigned to too few lawyers and that led to no supervision of investigation or expert assistance.

Conclusion

Our investigation revealed a system that is at or beyond capacity to provide consistently effective representation to all persons facing the death penalty in Kansas. In spite of the existing dedicated staff in the death penalty representation offices funded through BIDS, there are already clients who have not received the kind of representation that is essential to avoid arbitrary and capricious infliction of the punishment of death. Caseloads are too heavy to guarantee adequate investigation and preparation in every case. Low salaries dampen morale, contribute to turn-over, and impede recruitment of capable capital defense attorneys. Staffing needs to increase at all levels, including paralegals, investigators and mitigation specialists in addition to lawyers. The lack of structural protections against political influence hinders the implementation of effective, permanent solutions. All these factors together prevent BIDS from performing the role that is necessary to prevent the arbitrary and capricious infliction of capital punishment in the State of Kansas. Without substantial increase in resources and structural reform to the system for providing indigent defense, the death penalty in the State of Kansas cannot be administered with fairness and reliability.



Sean D. O'Brien



Marc Bookman

MARC BOOKMAN

Atlantic Center for Capital Representation

1315 Walnut Street, Suite 905

Philadelphia, PA 19107

(215) 732-2227

MBookman@atlanticcenter.org

MarcBookman12@gmail.com

EDUCATIONAL BACKGROUND

University of North Carolina at Chapel Hill

Juris Doctorate (May 1982)

University of Pennsylvania

Bachelor of Arts, English (May 1978), Magna Cum Laude

EMPLOYMENT HISTORY

Atlantic Center for Capital Representation

Executive Director (July 2010 to present)

The Atlantic Center for Capital Representation is a non-profit resource center for capital trial teams in Pennsylvania and nationally: the Center conducts direct representation, litigates systemic issues relevant to capital representation, consults with trial teams, provides training for capital lawyers, mitigation specialists, and investigators, and works on legislation to level the playing field for capital defense.

Mexican Capital Legal Assistance Program (MCLAP)

Attorney (January 2011 to present)

MCLAP attorneys aid Mexican nationals facing possible death sentences or executions at trial and post-conviction.

Federal Death Penalty Resource Counsel Project

Attorney (January 2020 to present)

The Project monitors all federal death penalty cases and consults with counsel in areas ranging from the DOJ authorization process to developing mitigation and working with experts.

Defender Association, Philadelphia, PA

Assistant Defender (1983 to July 2010)

Member of the Homicide Unit since 1993: responsible for capital and non-capital murder cases from initial arraignment through trial and sentencing. Litigated: broader pre-trial and victim impact discovery practice, right to quash aggravating circumstances, constitutional limitation of felony murder aggravator, limitations on use of juvenile death penalty prior to Roper v. Simmons. Previously completed several rotations in the Special Defense Unit, handling high profile, specialized cases. Tried dozens of jury and bench trials.

SELECTED CAPITAL TRAINING EXPERIENCE - FACULTY

Habeas Assistance And Training, New York City, Austin, Knoxville, Atlanta, Los Angeles, Orlando, New Orleans, Durham and Philadelphia, 1999 to Present

Conducted training sessions with practicing capital trial and post-conviction attorneys in courtroom, interview and investigative techniques relevant to capital representation.

Boulder Capital Voir Dire Conference 2016 to Present

Taught Morgan Method voir dire to practicing capital trial lawyers.

NAACP Legal Defense Fund, Airlie, VA, 1996 to 2018

Conducted training sessions and offered lectures on various aspects of capital representation at the annual, national Airlie Conference.

Pennsylvania Association of Criminal Defense Lawyers, Carlisle, Harrisburg, Pittsburgh and King Of Prussia, PA, 1995 to Present

Presented numerous lectures, individual consultations and training sessions regarding all aspects of capital trial representation.

Representing The Accused In A Capital Trial, Chapel Hill, Durham, Philadelphia, Houston, 1998 to Present

Conducted individual training sessions and consultations sponsored by the National Institute of Trial Advocacy on all aspects of a Capital Trial.

Making The Case For Life, Oklahoma City, September, 2005; Las Vegas, September, 2006 and 2007, Charlotte 2014, Las Vegas 2017, 2019

Lectured on Youth as Mitigation, Juvenile Development, and Resolution of Difficult Cases.

Capital Case Defense Seminar, Monterey and San Diego, 2006 to Present

Lectured on Limitation of Victim Impact Evidence, Pre-Trial Litigation, Closing Arguments, and Resolution Of Capital Cases.

National Consortium For Capital Defense Training, Philadelphia, 2006

Lectured on The Proper Use of A.B.A. Guidelines in capital trial defense.

The Persuasion Institute, 2003- 2008, 2014, 2016, 2018

Provided individual consultation and training on persuasive writing for capital practitioners.

National Seminar On The Development And Integration Of Mitigation Evidence, New Orleans, Washington D.C. and Philadelphia 2004 to Present

Lectured on resolution of capital cases through use of mitigation.

American Bar Association Annual Meeting, Chicago, 2001

Participated in panel discussion on judicial and prosecutorial misconduct in capital cases.

UMKC School Of Law, April 2009

Lectured on the art of storytelling in the defense of capital cases

Bring Your Own Case Capital Trainings, 2010 to Present

Capital defense teams across Pennsylvania brought specific capital cases to trainings in Philadelphia.

Lectured on Various Aspects of Capital and Criminal Defense Litigation at Yale, Harvard, Temple, Georgetown and University Of Pennsylvania Law Schools – 2004 to Present

SELECTED PUBLICATIONS

Smoke, 77 UMKC Law Review 1051 (2008-2009)

The Confessions of Innocent Men, The Atlantic, August 2013

How Crazy Is Too Crazy To Be Executed, Mother Jones, February 2013

When A Kid Kills His Longtime Abuser, Who's The Victim? Mother Jones, November 2015

Does An Innocent Man Have The Right To Be Exonerated?

The Atlantic, December 2014

***The 14-Year-Old Who Grew Up In Prison*, VICE July 2016**

***Three Murders In Philadelphia*, Slate May 2017**

A Descending Spiral: Exposing the Death Penalty in 12

Essays, The New Press, May 2021

SEAN D. O'BRIEN
Professor
University of Missouri-Kansas City School of Law
500 E. 52nd Street
Kansas City, Missouri 64110
(816) 235-1644

BAR MEMBERSHIP:

Missouri; United States Court of Appeals, Sixth, Eighth and Tenth Circuits; United States Supreme Court

EDUCATION:

University of Missouri-Kansas City, J.D., 1980
Alumni Achievement Award, 2002.

Northwest Missouri State University, B.A., *magna cum laude*, 1977.
Major, English; Minor, Speech Communications
Distinguished Alumni Award, 2006

Benedictine College, Humane Letters (Honorary), 2005

ACADEMIC POSITIONS:

Professor, UMKC School of Law, Criminal Law, Criminal Procedure, Problems and Issues in the Death Penalty, Post-conviction Remedies, Legal Investigation (Adjunct, 1995-2005; Visiting Professor, 2005-2007, Associate Professor, Sept. 1, 2007; Tenure awarded September 1, 2009); Professor, Sept. 1, 2016

Member, University of Missouri-Kansas City Doctoral Faculty

Adjunct Professor of Law, Washburn University School of Law, Death Penalty Seminar (2004-2005)

Advocate in Residence, Washburn University School of Law (April, 2005)

Director, UMKC School of Law Death Penalty Representation Clinic (1989-present)

Director, Capital Defense Internships, Center for Capital Punishment Studies, Westminster University, London (1994-2005)

Director, UMKC School of Law Public Defender Trial Clinic (1985-1989)

Director, UMKC School of Law Public Defender Appeal Clinic (1983-1985)

The Persuasion Institute, Cornell Law School, Faculty member (2003-Present)

The Supreme Court Advocacy Institute, New York University, Faculty member (2009-present)

The Anthony G. Amsterdam Capital Post-Conviction Skills Seminar, National Institute of Trial Advocacy, Faculty Member (2002-present)

PROFESSIONAL POSITIONS:

Member, ABA Task Force on Postconviction Remedies (2009-present)

Regional Resource Counsel, Administrative Office of the United States Courts, Defender Services Division. As part of the Habeas Assistance and Training Counsel Project, I assist with training lawyers appointed under the Criminal Justice Act to represent indigent habeas corpus petitioners under sentence of death (2002-present)

President/Executive Director, Public Interest Litigation Clinic (Formerly the Missouri Capital Punishment Resource Center). The Clinic represents death row inmates, produces specialized training programs for lawyers defending death cases, supervises clinical law students, and consults on criminal justice issues. PILC also publishes a bi-monthly newsletter and an annually supplemented capital case defense manual. (1989–2007; Board Member, 1989-2010)

Public Defender, Jackson County, Missouri. I was responsible for operation of an urban public defender office, and directed or assisted the defense of many capital cases. (January, 1985--September, 1989)

Assistant Public Defender, Jackson County, Kansas City, Missouri. I defended poor people in felony cases, including capital cases, in trial, appeal and post-conviction proceedings. Chief Appellate Counsel, June, 1983, to December, 1984. (March, 1981--December, 1984).

Member, National Association of Criminal Defense Lawyers (1990-present)

President, Missouri Association of Criminal Defense Lawyers (1992-93)

Chairman, Missouri Bar Criminal Law Committee (1989 - 1992)

Expert Witness on Standards of Performance: I have qualified to testify as an expert witness on standards of performance for defense counsel in state or federal courts in Alabama, Arkansas, Georgia, Idaho, Iowa, Kansas, Louisiana, Missouri, Nebraska, Pennsylvania, Wyoming and U.S. Court of Military Justice, in the Kansas, Missouri and Nebraska legislatures, and the Oregon Public Defender Commission.

PROFESSIONAL AWARDS:

Class of 2018 *Outstanding Professor*, UMKC Law School, 2018

Missouri Bar Foundation *Spurgeon Smithson Award*, 2016

UMKC Elmer Pierson *Outstanding Teacher Award*, 2012

Daniel L. Brenner *Faculty Writing Award*, 2010

National Association of Sentencing Advocates and Mitigation Specialists *Sentencing Project Award*, 2009

Northwest Missouri State University *Distinguished Alumni Award*, 2006

Kansas City Metropolitan Bar Association *Lifetime Achievement Award*, December, 2005

Jackson County Record Kansas City *Legal Leaders Award*, 2005

The Lawyers Association of Kansas City, *Justice Charles Whittaker Award*, 2004

Missouri Lawyer Weekly *Lawyer of the Year*, 2003

ACLU *Civil Liberties Award*, 2003

University of Missouri-Kansas City *Alumni Achievement Award*, 2002

National Coalition to Abolish the Death Penalty, *Legal Service Award*, 1998.

Missouri Association for Social Welfare, *Annual Recognition Award*, 1994

Missouri Coalition to Abolish the Death Penalty *Annual Recognition Award*, 1994

Missouri Association of Criminal Defense Lawyers *Annual Recognition Award*, 1994

National Lawyers Guild *Social and Economic Justice Award*, 1993

UMKC Law Foundation *Don Quixote Award*, 1987

PUBLICATIONS:

SSRN author page:

https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=850294

Sean D. O'Brien, Dana Cook, & Quinn C. O'Brien, *In-Person and Face-to-Face: Criminal Defense Standard for Investigation*, (in progress), accepted for publication, 49 Hofstra L. Rev. ____ (2021).

Sean D. O'Brien, Elizabeth Vartkessian & Marla Sandys, *Psychological Defenses and Mitigation of Punishment*, in FORENSIC SCIENCE REFORM: THE PSYCHOLOGY AND SOCIOLOGY OF WRONGFUL CONVICTIONS (Wendy J. Koen & C. Michael Bowers, Elsevier, 2019), ISBN: 978-0-12-802655-7

Sean D. O'Brien & Quinn C. O'Brien, *I Know What You Did Last Summer: A User's Guide for Internet Investigations*, THE CHAMPION, p. 18 (June, 2017)

Strange Justice for Victims of the Missouri Public Defender Funding Crisis: Punishing the Innocent, 61 ST. LOUIS U. L. J. 725 (2017)

Sean D. O'Brien & Kenneth Ferguson, *Symposium: Traumatic Brain Injury and the Law: Introduction*, 84 UMKC L. REV. 287 (2016)

Sean D. O'Brien & Kathleen Wayland, Ph.D., *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 HOFSTRA L. REV. 751 (2015).

Kathleen Wayland & Sean D. O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guideline-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519 (2014).

Sean D. O'Brien & Mary Kay Kisthardt, *Symposium: Mental Health, Psychology and the Law: Introduction*, 82.2 UMKC L. REV. 1 (2014).

Furman v. Georgia and Roper v. Simmons, in READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD (Linda H. Edwards, Aspen 2012) ISBN-13: 978-0735587755

Punishment, in LAW AND POPULAR CULTURE: TEXT, NOTES, AND QUESTIONS (David Ray Papke, 2nd Ed. LexisNexis 2012)

Sean O'Brien, Penny White, Bradley MacClean, Mary Ann Green, Ann Shorts, *Unique Ethical Dilemmas in Capital Representation*, 7 TENN. J. L. & POL. 203 (2010)

The Missouri Public Defender Crisis: Shouldering the Burden Alone, 75 MO. L. REV. 853 (summer, 2010)

Death Penalty Stories: Lessons in Life-Saving Narratives, 77 UMKC L. REV. 831 (2009).

Mothers and Sons: The Lloyd Schlup Story, 77 UMKC L. REV. 1021 (2009)

When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Capital Defense Teams, 36 HOFSTRA L. REV. 693 (Spring 2008). (Selected for Daniel L. Brenner Faculty Writing Award [Related presentations at Oklahoma Criminal Defense Lawyers' Association (Oklahoma City, April 23, 2009); Death Penalty Seminar, Tennessee Association of Criminal Defense Attorneys, (Murfreesboro, TN, April, 2009); Life in the Balance, the National Legal Aid and Defender Association (New Orleans, LA, March, 2009); Death Penalty Defense Seminar, Florida Association of Criminal Defense Lawyers (Orlando, FL, March, 2009); California Attorneys for Criminal Justice Death Penalty Seminar (Monterey, CA, February, 2009); Capital Punishment Training Conference sponsored by the NAACP Legal Defense & Education Fund (Warrenton, VA, July, 2006 & 2007); Annual Meeting, National Association of Sentencing Advocates and Mitigation Specialists (Baltimore, MD, June, 2006); Making the Case for Life, the National Association of Criminal Defense Lawyers (Oklahoma City, OK, October, 2005, and Las Vegas, NV, 2006); National Habeas Corpus Seminar, the Administrative Office of the U.S. Courts (Pittsburgh, PA, August, 2005 and 2006, and Nashville, TN, August, 2007); National Seminar on the Development and Integration of Mitigation Evidence, the Habeas Assistance and Training Counsel Project (Salt Lake City, UT, April, 2005; Washington, DC, March, 2006 and 2007).]

Capital Defense Lawyers: The Good, the Bad and the Ugly, 105 MICH. L. REV. 1 (March, 2007).

Presumed Guilty: Innocence and the Death Penalty, Address to the Miscarriages of Justice Conference, Current Perspectives (February 20, 2007), in 7 J. INST. JUST. & INT'L STUD. 14 (2007).

Kansas v. Marsh: Putting the Guesswork Back Into Capital Sentencing, 105 MICH. L. REV. FIRST IMPRESSIONS 90 (Oct. 2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/obrien.pdf>.

Finding Redemption, 92 ABA JOURNAL 59 (August, 2006) (Winner, American Bar Association Ross Essay Contest)

Racism in White Decision, NATIONAL LAW JOURNAL, Nov. 1, 1999, p. A-25.

Voir Dire and Jury Selection, MISSOURI CRIMINAL PRACTICE DESKBOOK (MoBar CLE Publications, 1996; revised 2005).

Jury Instructions, MISSOURI CRIMINAL PRACTICE DESKBOOK (MoBar CLE Publications, 1996; revised 2005).

Addressing the Needs of Attorneys for the Damned, 58 U.M.K.C. L. REV. 517 (Summer, 1990).

Investigating Psychological Defenses, MOBAR CRIMINAL PRACTICE INSTITUTE, October,

1990.

A Step Toward Fairness in Capital Litigation, 16 WM. MITCHELL L. REV. 633 (1990).

Trial Objections, MO. CRIM. PRACTICE DESKBOOK, (MoBar, January, 1989).

Jury Instructions, MO. CRIM. PRACTICE DESKBOOK (MoBar, 1989, 1996 and 2008).

Voir Dire, MO. CRIM. PRACTICE DESKBOOK (MoBar, 1989, revised, 1996 and 2008).

NOTEWORTHY CASES:

Lloyd E. Schlup v. Delo, 513 U.S. 298 (1995), protecting the right of innocent death row prisoners to challenge their convictions in federal court. After a subsequent hearing, the district court issued the writ of habeas corpus discharging Schlup from his conviction.

Stewart v. Ramon Martinez-Villareal, 523 U.S. 637 (1998), preserving the right of mentally ill prisoners to challenge their competence for execution.

State of Missouri ex rel. Joseph Amrine v. Donald Roper, 102 S.W.3d 541 (Mo. 2003) (en banc), establishing the right to relief on free-standing claims of innocence. Joseph Amrine was the 111th person to exonerated from death row in the United States; Joe was released from prison on July 28, 2003.

In re Bobby Lewis Shaw, Executive Clemency proceedings; Missouri Governor Mel Carnahan on June 2, 1993, commuted the death sentence of a mentally ill man convicted of stabbing three prison guards, the first capital clemency in Missouri since 1947.

State v. Theodore White, Jr., 81 S.W.3d 561 (Mo. App. 2002), creating a prosecutorial misconduct exception to Missouri procedural bar doctrine (Client exonerated and released after trial by jury, February 7, 2005).

State v. Larna Edwards, 60 S.W.3d 602 (Mo. App. 2000), establishing right to accurate jury instructions on the defense of battered woman syndrome in homicide cases.

Wrongful Convictions Corrected: I have been directly responsible for litigation that won the freedom of wrongly convicted persons, including **Lloyd E. Schlup**, *Schlup v. Delo*, 513 U.S. 298 (1995), **Larna Edwards**, 60 S.W.3d 602 (Mo. App. 2000), **Theodore White, Jr.**, *State v. White*, 81 S.W.3d 561 (Mo. App. 2002), **Joseph Amrine**, *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003), **James Boyd**, 143 S.W.3d 36 (Mo. App. 2004), **Dale Helmig**, *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. App. 2011), **Rodney Lincoln**, Released by order of Missouri Gov. Eric Greitens June 1, 2018, and **Ricky Kidd**, *Kidd v. Pash*, DeKalb County No. 18DK-CC00017 (filed Aug. 14., 2019). As co-counsel, investigator, or expert witness, I was instrumental in winning the freedom of **Eric Clemmons**, *Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997), **Ellen**

Reasonover, *Reasonover v. Washington*, 60 F. Supp. 2d 937 (E.D. Mo. 1999), **Darryl Burton**, *In re Burton v. Dormire*, Cole County No. 06AC-CC00312 (Aug. 18, 2008), **Reggie Griffin**, *State ex rel. Griffin v/ Denney*, 347 S.W.3d 73 (Mo. 2011), **George Allen**, *State ex rel. Koster v. Green*, 388 S.W.3d 603 (Mo. App. 2012), **Gabriel Drennen**, *Drennen v. State*, 213 WY 118, 311 P.3d 116 (2013), **Kirk Wilson**, *Wilson v. State*, 51 Kan. App.2d 1, 340 P.3d 1213 (2014), **Lamonte McIntyre**, *McIntyre v. State*, Wyandotte County No. 2016CV508 (October 13, 2017), and **Lawrence Callanan**, *State ex rel. Callanan v. Griffith*, No. SC95443 (Mo., May 29, 2020) (unpublished).

Unconstitutional death sentences corrected: I have been directly responsible for litigation that removed men, women and children from death row in Missouri and across the country, including **Patrick Trimble**, *Trimble v. State*, 693 S.W.2d 267 (Mo. App. 1985), **Bobby Lewis Shaw** (Executive Clemency, June 6, 1993, the first Missouri clemency since 1947), **Chuck Lee Mathenia**, *In re Mathenia*, Washington County No. CV1093-250CC (filed March 17, 1994), **Ed T. “Butch” Reuscher, III**, *State v. Reuscher*, 887 S.W.2d 588 (Mo. 1994) (Writ of habeas corpus subsequently granted by the Court—the first in modern history), **Lloyd Schlup**, *Schlup v. Delo*, 513 U.S. 298 (1995), **Roosevelt Pollard**, *Pollard v. Delo*, 513 U.S. 1107 (1995), **Marvin Jones**, *In re Jones*, (unreported opinion finding Jones incompetent to be executed, 1995), **Heath Wilkins**, 145 F.3d 1006 (8th Cir. 1998), **Ramon Martinez-Villareal**, *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), **Faye Copeland**, *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000), **Joseph Amrine**, *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003), **Steven Parkus**, *In re Competency of Parkus*, 219 S.W.3d 250 (Mo. 2007), **James Harlow**, *Harlow v. Murphy*, No. 05CV39B (D. Wyo. Filed Feb. 15, 2008), **Dale Eaton**, *Eaton v. Wilson*, No. 09CV261J (D. Wyo. Filed Nov. 20, 2014). In all of the foregoing cases, I won postconviction relief and represented the client until release or a non-capital sentence was assessed. As an expert witness, I helped teams permanently remove prisoners from death row, including **Max Hoffman** (Idaho, 2001), **Roger Gillette** (Mississippi, 2008), **Kahn Phan** (Georgia, 2012), **Angela Johnson** (U.S.-Iowa, 2012), **David Card** (Idaho, 2013), **Garret Dotch** (Alabama, 2017), **Dwight Loving** (U.S. Military; sentence commuted by President Obama Jan. 20, 2017), **Mickey Thomas** (Arkansas, 2018), and **John Powell** (Missouri, 2021).

Juveniles Sentenced to Life Without Parole Released: This is a new project for me in 2020, working with students and the MacArthur Justice Center to advocate for the parole of prisoners who were sentenced to die in prison for crimes committed when they were juveniles. Our first success is **Lisa Harris**, released Feb. 22, 2021; **Brandon Juarez** came home on September 29, 2021.

PRESENTATIONS:

Representing Difficult Clients, Pennsylvania Association of Criminal Defense Lawyers, Webinar, December 10, 2021.

Representing Traumatized Clients, with Dr. Kathleen Wayland, Advancing Real Change Webinar, December 1, 2021.

Just Mercy in an Era of Mass Incarceration, Cockefair Chair Course, UMKC, October 7, 14, & 29, 2021.

Bearing Witness to Our Client's Trauma, with Cathleen Price & Helgi Maki, Osgoode Hall Law School, York University, Toronto, ON Canada & ReeltimeCLE Webinar, September 21 and October 20, 2021.

Ethical Constraints on Investigation, UMKC CLE, Hot Topics in Law & Practice, June 25 & August 27, 2021.

Representing Traumatized People: The Importance of Understanding Trauma in our Clients and Cases, UMKC Film & the Law Series, *The Exonerated: The Trauma of Wrongful Convictions*, June 2, 2021.

Responding to Aggravating Evidence in Death Penalty Trials, Guest Lecture, University of Texas-Austin Capital Representation Project, April 7, 2021.

Cultural Competence as a Standard of Practice, UMKC CLE and BLSA Film & the Law Series, *Just Mercy*, March 9, 2021.

Debunking Deadly Diagnoses, Bring-Your-Own-Case Capital Defense Training Webinar, National Association of Criminal Defense Lawyers, February 16, 2021.

Working with Difficult Clients, Capital Defense Training, Public Defender Association of Philadelphia, the Atlantic Center for Capital Representation, and Penn State University Dickinson Law School, January 13-15-2021.

Countering Antisocial Personality Disorder & Other Psychiatric Labels, With Dr. Kathleen Wayland, Maricopa County Public Defender and Arizona Federal Public Defender, December 25 & 15, 2020.

Selecting and Working with Mental Health Experts, with Dr. Kathleen Wayland, National Webinar, Advancing Real Change, December 1, 2020.

Working with Difficult Clients, and *Recognizing Symptoms of Impairment* (with Dr. Kathy Wayland), sponsored by Federal Public Defender, Western District of Missouri, October 16, 2020.

Implicit Bias, Just Mercy, National Webinar, Reel Time CLE & North Carolina Bar Association, September 18, 2020.

Countering Antisocial Personality Disorder, Part II: Working with Experts, with Dr.

Kathleen Wayland, National Webinar, Advancing Real Change, August 11, 2020.

ETHICS: What are the ethical obligations of the lawyer who relies on agents to perform the investigative function? UMKC Film & the Law Series, The Brian Banks Story, July 30, 2020.

Countering Prejudicial Psychiatric Diagnoses, with Dr. Kathleen Wayland, National Webinar, Advancing Real Change, July 7, 2020.

Confronting Systemic Racism: Mass Incarceration and the School to Prison Pipeline, NAACP, Hutchinson, Kansas, July 2, 2020 (Webinar).

Just Mercy and Access to Justice: Practical Skills Training for Illuminating Bias, Confronting Systemic Racism, and Doing the Hard Work that Needs to be Done, Reel Time CLE, June 26, 2020 (webinar).

Ethical Constraints on Investigation, UMKC CLE Review of the Law 2020, Kansas City, Mo., June 19 & 23, 2020 (Webinar).

Illuminating Bias, UMKC CLE Film & the Law Series: Just Mercy, co-sponsored with Reel Time CLE, Kansas City, May 13, 2020 (Webinar).

Internet Investigation, National Federal Habeas Corpus Seminar, Training Branch, Defender Services Division, Administrative Office of the U.S. Courts and Advancing Real Change, Baltimore, MD, April 21 & May 19, 2020 (Webinar).

Keynote Address: Implicit Bias in the Prosecution and Defense of Death Penalty Cases, National Legal Aid and Defender Association, Biloxi, Mississippi, March 3, 2020.

Inherent Problems in American Criminal Justice: How the U.S. Became Home to the Largest Incarceration System in the World, UMKC BLSA & UMKC CLE, Film & the Law: When They See Us, Kansas City, MO, February 9, 2020.

Behaviors as Symptoms, and *Experts 101*, California Attorneys for Criminal Justice Annual Death Penalty Defense Seminar, San Diego, CA, February 13-16, 2020.

Dealing with mental health experts: Interviewing Experts, Choosing new experts and Drafting Referral Questions, UT-Austin School of Law, January 16-20, 2020.

Working with Mental Health Experts, Atlantic Center for Capital Representation and Pennsylvania Public Defender Association Annual Capital Case Defense Seminar, Philadelphia, Pennsylvania, December 12-14, 2019

No, Your Client Does not have ASPD (“no matter what that hack says”), National Federal Habeas Corpus Seminar, Training Branch, Defender Services Division,

Administrative Office of the U.S. Courts, Pittsburgh, Pennsylvania, August 8-11, 2019).

The Lloyd Schlup Story: Briefing on the Merits in the Supreme Court, The Supreme Court Advocacy Institute, New York University, New York, June 13-16, 2019.

Dealing with mental health experts; Choosing new experts and drafting referral questions; Interviewing prior experts, The Mitigation Skills Workshop, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, UMKC School of Law, May 30-June 2, 2019.

Forensic Mental Health; Debunking the Anti-Social Label, Making Sense of Science: Forensic Science and the Law, National Association of Criminal Defense Lawyers, Las Vegas, Nevada, April 5-6, 2019.

Challenging harmful and unreliable mental health diagnoses, Annual Seminar on the Development and Integration of Mitigation Evidence in Death Penalty Cases, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Philadelphia, Pennsylvania, March 14-17, 2019.

Signs and Symptoms of Mental Illness, with Dr. David Freedman, and *Deconstructing Prejudicial Psychiatric Language*, with L.A. Public Defender Denise Gragg, Capital Case Defense Seminar, California Attorneys for Criminal Justice and California Public Defender Association, Monterey, California, February 15-20, 2019.

Choosing new experts, Interviewing Prior Experts and drafting referral questions, Administrative Office of the U.S. Courts and UT-Austin School of Law, January 15-20, 2019.

The Client and Experts: Understanding Trauma and Mental Health as Foundation for Reliable Evaluations, The Atlantic Center for Capital Representation and the Philadelphia Public Defender, Philadelphia, PA, December 6-8, 2018.

Bridging Communication Gaps with Our Clients, 2018 Capital Case Seminar, Los Angeles County Public Defender, Los Angeles, CA, October 19, 2018.

Challenging Government Expert's Methodology, National Habeas Corpus Seminar, Administrative Office of the U.S. Courts, Baltimore, MD, August 9-12, 2018.

Planning, Preparing and Presenting Mental Health Claims and Evidence, The Anthony G. Amsterdam Capital Postconviction Skills Seminar, Administrative Office of the U.S. Courts and Loyola School of Law, Los Angeles, CA, July 12-15, 2018.

Introduction to the Workshop – How Narrative Works in Post-Conviction Practice, The Persuasion Institute, Cornell University Law School, Ithaca, NY, June 15-17, 2018.

Dealing with mental health experts. Choosing new experts and drafting referral questions. Interviewing prior experts, Mitigation Skills Workshop, UMKC Law School and Administrative Office of the U.S. Courts, Kansas City, Mo., May 17-20, 2018.

The Ethics of Dealing with Difficult Clients, UMKC CLE Film & the Law Series, North Kansas City, Missouri, May 2, 2018.

Dealing with Difficult Clients, and *The Ethics of Dealing With Difficult Clients* (with Marc Bookman), Pennsylvania Association of Criminal Defense Lawyers, Harrisburg, April 26, 2018.

Deconstructing Drive-By Diagnoses of Antisocial Personality Disorder, Annual Seminar on the Development and Integration of Mitigation Evidence in Death Penalty Cases, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Miami, Florida, April 20, 2018.

Emerging Best Practices: How Mitigation Investigation and Presentation Have Changed over the Past Forty Years, (with David Bruck & Richard Burr), University of Texas Law School, Austin, April 6, 2018.

Identifying, Investigating & Litigating Ineffective Assistance of Counsel Claims, National Innocence Project Network Conference, National Association of Criminal Defense Lawyers, Memphis, Tennessee, March 22, 2018.

Emerging Issues in Neuropsychology (with Dr. Dale Watson), and *Early Childhood Development, Including Developmental Disabilities*, Capital Case Defense Seminar, California Attorneys for Criminal Justice and California Public Defender Association, Monterey, California, February 15-19, 2018.

Dealing with mental health experts. Choosing new experts and drafting referral questions. Interviewing prior experts, Mitigation Skills Workshop, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Kansas City, Missouri, January 12-15, 2018.

The Ethics of Working with Difficult Clients, and *Trauma, Mental Health Issues and Working with Experts*, Philadelphia Public Defender & Atlantic Center for Capital Representation Annual Seminar, Philadelphia, Pennsylvania, Nov. 30-Dec. 2, 2017.

Mitigation Evidence as a Gateway to Federal Habeas Corpus Relief, and *Challenging the Government Expert's Methodology*, National Habeas Seminar, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Atlanta, Georgia, August 10-13, 2017.

Victim Outreach: How to Respond to and Interview Crime Victims, UMKC CLE Film and the Law Series: Conviction, Kansas City, May 17, 2017.

Working with Difficult Clients, Authorized Capital Case Conference, Training Branch, Administrative Office of the U.S. Courts, St. Louis, May 24-26, 2017.

Limiting the Scope of Rebuttal Mental Health Testimony, (with Federal Defender Sean Bolser), and *How Implicit Bias Leads to Harmful, Inaccurate Psychiatric Diagnoses*, (with Dr. Kathleen Wayland), Annual Seminar on the Development and Integration of Mitigation Evidence in Death Penalty Cases, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Baltimore, Maryland, April 6-9, 2017.

When the Innocent Plead Guilty: Obtaining Post-conviction Relief in Plea Cases (with Nina Morrison, NY Innocence Project), Annual Postconviction Training Seminar, The National Innocence Project Network, National Association of Criminal Defense Lawyers and the Department of Justice, San Diego, March 23, 2017.

Proper Investigation of Evidence of the Client's Neuropsychological Development (with Dale Watson, Ph.D.), and *Using Client Life History to Interpret Symptoms and Behavior* (with Indiana Federal Public Defender Monica Foster), Capital Case Defense Seminar, California Attorneys for Criminal Justice and California Public Defender Association, San Diego, CA, Feb. 17-20, 2017.

Identifying, Interviewing and Working with Mental Health Experts, Mitigation Skills Workshop, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Kansas City, Missouri, January 12-15, 2017.

Trauma, Mental Health Issues, and Working with Experts, and *The Ethics of Working with the Client to Resolve the Case*. Philadelphia Public Defender and the Atlantic Center for Capital Representation, Dec.14-17, 2013, Philadelphia, PA.

Investigating and Litigating Deficient Performance, National Habeas Seminar, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Washington, DC, August 11-14, 2016.

Introduction to the Workshop – The Use of Narrative Tools in Post-Conviction Practice, The Persuasion Institute, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Cornell University School of Law, Ithaca, New York, July 22-24, 2016.

Planning, Preparing, and Presenting Mental Health and Mitigation Claims and Evidence, The Anthony G. Amsterdam Postconviction Skills Workshop, Loyola School of Law, Los Angeles, California, June 22-23, 2016.

Federal Habeas Corpus Update, National Association of Criminal Defense Lawyers, the Department of Justice, and the National Innocence Project Network, San Antonio, TX, April 7, 2016.

The Link Between Mental Health and Mitigation, and Implicit Bias and Mental Health Examinations, Annual Seminar on the Development and Integration of Mitigation Evidence in Death Penalty Cases, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, New Orleans, LA, March 31-April 4, 2016.

Death Penalty Mitigation Investigation: Legal and Professional Standards, and Dealing with Mental Health Experts: Interviewing Prior Experts, Selecting New Ones, and Drafting Referral Questions, Mitigation Skills Workshop, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Kansas City, Missouri, January 14-17, 2016.

Developing Client Relationships and Recognizing Symptoms of Mental Illness, and Roadblocks to Success – Understanding the Norms to Constitutional Adjudication – Opportunity, Resources and Time, Missouri Public Defender Postconviction Skills Workshop, Kansas City, Missouri, November 17-19, 2015.

Avoiding Prejudicial Labels, and Case Budgeting, National Habeas Seminar, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Charlotte, North Carolina, August 13-16, 2015.

Death is Different in Every Way: Eighth Amendment Law, the Federal Death Penalty Act and the Lawyer's Role in a Capital Representation, Regional Federal Capital Trial Training Program, District of Kansas and Western District of Missouri, Kansas University, August 13-14, 2015

Planning, Preparing, and Presenting Mental Health and Mitigation Claims and Evidence, The National Habeas College, NITA and Loyola School of Law, Los Angeles, July 1.6-19, 2015.

Important Considerations in Presenting your Case to the Court at the Merits Stage, Supreme Court Advocacy Institute, NYU, June 21, 2015.

Storytelling in Innocence Cases, The National Innocence Project Network Conference, Orlando, Florida, May 1, 2015.

Using Social Media to Investigate Innocence Cases, with Quinn O'Brien, The National Association of Criminal Defense Lawyers, Orlando, Florida, April 30, 2015.

Prong I of Strickland v. Washington: Proving Prevailing Professional Norms, with Russell Stetler, and *Your Client Is Not a Psychopath (and He Is Not Antisocial or Narcissistic Either)*, the Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Baltimore, April 10-12, 2015.

The Capital Defense Team as an Investigative Unit, Capital Defense College at the

Center for American and International Law, Plano Texas, March 23, 2015.

Deconstructing Diagnosis of Antisocial Personality Disorder and Psychopathy, and Lay Witnesses as Experts, California Attorneys for Criminal Justice, Monterey, California, February 13-16, 2015.

Legal and Investigative Standards Governing Investigation and Presentation of Mitigating Evidence in Death Penalty Cases, and Investigating Multigenerational Evidence of Mental Disorders, Mitigation Skills Workshop, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, UMKC Law School, January 15-18, 2015.

Vicarious Trauma for Capital Defense Teams, Federal Public Defender for the District of Arizona, December 10, 2014.

Trauma, Mental Health Issues, and Working with Experts, (with Russell Stetler & Michael Wiseman), Atlantic Center for Capital Representation, Philadelphia, Pa., November 21, 2014.

Recantation Evidence: How to Obtain it and Use it Effectively, (with Quinn O'Brien and Justin Brooks), National Association of Criminal Defense Lawyers, Washington, DC, September 26, 2014.

Where Mental Health Meets the Law: Psychopathy and Competent Legal Practice, Thomson-Reuters Webinar, September 11, 2014.

The Use of Narrative Tools in Postconviction Practice, the Persuasion Institute, Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Cornell Law School, September 5, 6 & 7, 2014.

American Capital Punishment Defense: A Case Study, Japan Federal Bar Association, Osaka and Tokyo, Japan, August 18. 21 and 22, 2014.

Important Considerations in Presenting Your Case to the United States Supreme Court, New York University, June 15, 2014.

Procedural Issues in Innocence Cases and Panel Discussion: Ethical Issues in Innocence Cases, (with Tricia Bushnell and Quinn O'Brien) UMKC Law School and Kansas City Metropolitan Bar Association *Film and the Law Series*, Kansas City, MO, May 21, 2014.

Deconstructing the Government's Mental Health Case, (with Russell Stetler, National Mitigation Coordinator), the Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, New Orleans, LA, May 16, 2014.

Deconstructing and Avoiding Prejudicial Psychiatric Evaluations (with Dr. Kathleen

Wayland), and *Law for Mitigation Specialists* (with Denise Young), the Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, Philadelphia, PA, March 28-30, 2014.

Representing the Mentally Impaired Client: What You See is What You Don't Get, (with Dr. Kathleen Wayland & Dr. Shawn Agharkar); *Deconstructing Prior Mental Examinations*, and *The New DSM-5* (with Dr. George Woods), California Attorneys for Criminal Justice, Monterey, California, February 14-17, 2014.

Investigating Multigenerational Evidence of Mental Disorders, the Training Branch of the Defender Services Division of the Administrative Office of the U.S. Courts, UMKC Law School, January 18, 2014.

The Standard of Care in Mitigation Investigation, Arkansas Capital Defense Training, Arkansas Association of Criminal Defense Lawyers, Fayetteville, AR, November 16, 2013

Rebutting Pseudo-Scientific Stereotypes of Capital Defendants (with Prof. Stefan H. Krieger), ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Tenth Anniversary Symposium, Hofstra Law School, October 21, 2013.

ABA Guidelines: Death is Different (with Danalynn Recer); and *Trauma, Mental Health Issues, and Working with Experts* (with Dr. Kathleen Wayland), Philadelphia Public Defender and the Atlantic Center for Capital Representation, Sept. 26-29, 2013, Philadelphia, PA.

The duty to conduct and present mitigation evidence (with Russ Stetler), and *Integrating mitigation themes in innocence cases*. Tenth National Seminar on the Development and Integration of Mitigating Evidence, Baltimore, MD, April 5-7, 2013

Keynote Address: The Ethics of Guild Lawyering, The National Lawyers Guild Midwest Regional Conference, Kansas City, March 22-24, 2013.

Telling the Client's Story: Trial as Narrative, and *Using the ABA Guidelines to Defeat Prejudicial Psychiatric Labels*, California Attorneys for Criminal Justice, Monterey, CA, Feb. 15-18.

Keynote Address: Death is Different: Using the ABA Guidelines to Meet the Standard of Care in Death Penalty Cases and Social History Investigation, Texas Association of Criminal Defense Lawyers and the U.S. Department of Justice Capital Training Consortium, San Antonio, TX, Feb. 4-6, 2013

Keynote Address: Capital Defense Practice; Defending Against Prosecutorial Misconduct; and Preserving Legal Issues for Appellate Review, Life in the Balance

Annual Death Penalty Seminar, National Legal Aid and Defender Association, October 30, 2012.

Capital Trial Practice: Effectively Telling the Client's Story, Los Angeles Public Defender Annual Capital Defense Training Seminar, September 28, 2012.

Litigating Innocence and Using the Supplementary Guidelines on the Mitigation Function of Capital Defense Teams to Avoid or Rebut a Diagnosis of ASPD, National Habeas Seminar, Administrative Office of the U.S. Courts, Washington, DC, August 16-19, 2012.

Planning, Preparing and Presenting Mental Health and Mitigation Evidence in Death Penalty Cases, The National Institute of Trial Advocacy Habeas College, Loyola School of Law, Los Angeles, CA, July 26-29, 2012.

Prevailing Standards of Performance for Defense Counsel in Death Penalty Cases, Washburn University Law School, Topeka, KS, July 20, 2012.

Presenting Your Case to the Supreme Court at the Merits Stage, The Supreme Court Advocacy Institute, New York, June 7-10, 2012

Ethical Duties of Lawyers and Nonlawyers When Former Clients Claim Ineffective Assistance of Counsel; Law for Mitigation Specialists; and Mitigation standards, past and present, Annual Seminar on the Development and Integration of Mitigating Evidence in Death Penalty Cases, Administrative Office of the U.S. Courts, Atlanta, GA, April 26-29, 2012.

Keynote address and Getting into Court with New Science, The National Innocence Project Network Conference, Kansas City, MO, March 29-30, 2012.

Trauma, Mental Health Issues, and Working with Experts, Philadelphia Public Defender Association, Philadelphia, PA, March 15-16, 2012.

Collateral Damage, AEDPA for the Uninitiated and Psychopathy and Antisocial Personality Disorder, California Attorneys for Criminal Justice Annual Capital Defense Seminar in Monterey, California; February 16-19, 2012.

Keeping the Client Whole, Oregon Association of Criminal Defense Lawyers Annual Death Penalty Defense Seminar, Pendleton, OR, October 21-22, 2011.

Mental Health and Trauma Issues in Capital Defense, Office of the Public Defender of the State of Delaware, Dover, DE, October 14, 2011.

Developing and Presenting Mental Health Evidence, The Habeas College, UMKC Law School, Kansas City, MO, September 15-18, 2011.

Why Psychopathy Isn't Mitigating, Litigating Actual Innocence, and Multi-Dimensional Mitigation: Doing Your Clients Justice, National Habeas Seminar, Charlotte, NC, August 18-21, 2011.

Presenting Your Case to the Supreme Court at the Merits Stage, Supreme Court Advocacy Institute, NYU, New York, June 12-14, 2011.

Where Do We Go from Here? Post-2255 Litigation Options, 2011 Capital Habeas Project Bring-Your-Own Case Training, Indianapolis, May 12-14, 2011.

Challenging Psychopathy Evidence, and Getting the Time and Money We Need, Eighth National Seminar on the Development and Integration of Mitigation Evidence, Habeas Assistance and Training Counsel Project, Chicago, Illinois, March 31, April 3, 2011.

Negotiations in Capital Trial and Postconviction Cases, Standards of Performance for Mitigation Specialists, and Pervasive Developmental Defects, California Attorneys for Criminal Justice Annual Capital Defense Seminar in Monterey, California, Feb. 14-17, 2011.

The Unique Issues Surrounding Competency to Be Executed, Counsel's Ethical Responsibilities in Representing Clients with Severe Mental Illness, and Strategy Issues in Competency Litigation, Fourth National Seminar on Mental Health and the Criminal Law in New Orleans, Louisiana, Jan. 10-12, 2011.

Standards of Performance for the Mitigation Function of Capital Defense Teams, Oklahoma Office of Indigent Defense, Oklahoma City, OK, Dec. 8-10, 2010.

Challenging the anti-social personality diagnosis, Federal Capital Trial Strategy Session (Training Branch, Defender Services Division of the Administrative Office of the U.S. Courts), Austin, TX, Nov. 12, 2010.

Litigating Confession Claims Post-Berghuis & Shatz, and Litigating Innocence in Non-DNA and DNA Cases, National Federal Habeas Corpus Seminar (Administrative Office of the U.S. Courts), Cleveland, OH, August 26-29, 2010.

Unique Ethical Dilemmas in Capital Representation, National Public Defense Symposium, ABA Standing Committee on Legal Aid and Indigent Defense & The U. of Tenn. College of Law, Knoxville, TN, May 20-21, 2010.

Accounting for Aggravation and Other Bad Facts, Second Annual 2255 Training, Federal Capital Habeas Project, Indianapolis, IN, May 13-15, 2010.

Keynote Address: What is the Standard of Care in Mitigation Development in Death

Penalty Cases? and *When the Client Wants to Die*, The Seventh National Seminar on the Development and Integration of Mitigation Evidence: New Science, New Strategies, Seattle, WA, April 24 & 25, 2010.

Planning, Preparing and Presenting Mental Health and Mitigation Evidence in Death Penalty Cases, The National Institute of Trial Advocacy Habeas College, Golden Gate University School of Law, San Francisco, CA, March 13, 2010.

Broke and Broken: Missouri Public Defender Crisis, University of Missouri, Columbia, February 26, 2010.

Capital Defense Mental Health Training: Dealing with Government's Experts, Witnesses, and Evidence, UMKC Law School, November 12-15, 2009.

The Persuasion Institute, Cornell University School of Law, September 11-13, 2009.

Ethical Duties of Capital Defense Lawyers, Florida Public Defender Association's Annual Life Over Death Seminar, September 11, 2009.

Supreme Court Update (with Keir Weyble and John Blume), *Funding Motions, Discovery, Expanding the Record* (with Denise Young), and *Litigating Innocence Post-Osborne*, 14th Annual National Habeas Seminar, Pittsburgh, PA, August 20-23, 2009.

The James Harlow Case: Using Narrative Techniques in Law School Clinical Representation, Lewis & Clark Law School Storytelling Conference, Portland, OR, July, 2009.

Ethics or No Ethics? (with Larry Fox) NAACP Legal Defense Fund Annual Capital Punishment Conference, Airlie House Conference Center, Warrenton, VA, July, 2009.

Supreme Court Advocacy Institute, NYU, New York, NY, June 12-14, 2009.

Ethical Duties in Mitigation Development, and Avoiding Landrigan, Habeas Assistance and Training Counsel Project, Philadelphia, PA, April 16-19, 2009.

Serving Under-represented Populations Through Law School Clinical Programs, Salmon P. Chase School of Law, University of Northern Kentucky, March 3, 2009.

When the Client Wants to Die: Landrigan v. Schriro, California Attorneys for Criminal Justice Annual Death Penalty Seminar, Monterey, CA, February 14, 2009.

Keynote Address: Telling the Client's Story: The Big Picture, and *Telling the Client's Mental Health Story*, Oregon Criminal Defense Lawyers' Association Annual Death Penalty Defense Seminar, Welches, OR, October 17-18-2008.

Capital § 2255 Cases: Getting Resources, Case Budgeting and Investigating Cases Even When Funds Are Scarce, (with Naomi Terr and Miriam Gohara); *Non-DNA Innocence Claims*; and *Aggravation as Mitigation: Turning Bad Facts to Your Advantage*, Thirteenth Annual Federal Habeas Corpus Seminar, St. Louis, MO, August 21-24, 2008.

A New Tool to Meet an Old Need: The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, NAACP Legal Defense & Education Fund 29th Annual Capital Punishment Training Conference, Warrenton, Virginia, July 13, 2008.

Planning, Preparing and Presenting Mental Health Evidence, The Anthony G. Amsterdam Post-Conviction Skills Seminar, San Francisco, CA, June 12-15, 2008.

Keynote Address: The Development, Integration and Presentation of Mitigating Evidence in Capital Cases, and *Investigating, Developing and Presenting Evidence of Prison Culture*, (with Craig Haney, JD, Ph.D.), Habeas Assistance and Training Project, Baltimore, MD, May 31 and June 1, 2008.

How to Get a Really Old, Procedurally Barred Non-DNA Case Back into Court and Win It, Annual Innocence Network Conference, Santa Clara University School of Law, CA, March 26-28, 2008.

Guidelines for Capital Mitigation Symposium, Hofstra Law School, Hempstead, New York, Dec. 5, 2007.

Making the ABA Guidelines Work, Arizona Capital Representation Project, Tucson and Phoenix, Arizona, May 24-25, 2007.

Funding the Mitigation Investigation in Capital Cases, Annual National Seminar on the Development and Integration of Mitigation Evidence sponsored by the Habeas Assistance and Training Counsel Project, Washington, DC, March, 2007.

Prosecutorial Misconduct in Innocence Cases, Eastern Jackson County Bar Association, March 31, 2005.

Telling a New and Persuasive Story, National Institute of Trial Advocacy and the Texas Association of Criminal Defense Lawyers Houston, TX, February 22-25, 2005.

Building the Mitigation Case, Washburn University School of Law, Victim-offender Reconciliation in Capital Cases; *Telling the Client's Story*; *Working With Mitigation Specialists*, Topeka, Kansas, November 11-13, 2004.

The American Bar Association Guidelines on the Performance of Counsel in Capital Cases, Arkansas Association of Criminal Defense Lawyers, Fayetteville, AR, September 30, 2004.

Jury Selection in Capital Cases, Lecture and Demonstration, Arizona Association of Criminal Defense Lawyers, Phoenix, Arizona, April 22-23, 2004.

Investigating Penalty Phase Defense: Working With a Multi-Disciplinary Team, National Institute of Trial Advocacy, New Orleans, LA, April 19-22, 2004.

Telling the Client's Story, National Institute of Trial Advocacy, San Antonio, Texas, February 18-21, 2004.

Representing the Innocent Capital Prisoner (co-presentation with Barry Scheck); *Alternative Dispute Resolution in Capital Cases*; *Surviving the Capital Case*; California Attorneys for Criminal Justice, Monterey, California, February 12-16, 2004.

Common Obstacles to Constitutional Trials in Arkansas Death Penalty Cases (with Cathi Compton & Ruth Friedman), *Choosing a Strategy that Makes Sense—When, Where, and How to Get Relief* (with Denise Young & Ruth Friedman); *Funding Issues Revisited: Strategies for Funding the Defense Team in Your Case* (with Didi Salling & Denise Young), Arkansas Public Defender Commission & Arkansas Association of Criminal Defense Lawyers, Jan. 22-23, 2004.

Litigating Innocence, Federal Public Defender Training Group, National Habeas Seminar, Chicago, Illinois, August 22, 2003.

Keynote Address: Abolitionists in the Mainstream, NAACP Legal Defense & Education Fund Annual Arlie House Conference, Warrenton, Virginia, July 17, 2003.

Mitigation Investigation and Mental Health Assessments in Capital Cases (with William A. O'Connor, Ph.D.), Federal Public Defender, Eastern District of Arkansas, Little Rock, June 26-27, 2003.

Telling the Client's Story, The Persuasion Institute, New York University, May 15-17, 2003.

Common Ethical Issues in the Defense of Capital Cases, University of Arkansas-Little Rock, May 9, 2003.

Jury Selection in High Publicity Cases, KCMBA, Lake Ozark, Missouri, May 3, 2003; Kansas Association of Trial Attorneys, Overland Park, Kansas, April 11, 2003.

Litigating Competency Issues in Capital Trial, Appeal and Postconviction Cases, Federal Public Defender Training Group, National Habeas Seminar, Nashville, Tennessee, August 22, 2003.

Defending Battered Women in Criminal Cases, The Missouri Bar, Lake of the Ozarks

March 1, 2002.

Representing Habeas Petitioners in Capital Cases, The National Institute of Trial Advocacy, Orlando, Florida, January 2-6, 2002.

Competency to Be Executed: Interdisciplinary and Ethical Considerations, American Academy of Psychiatry and the Law, Boston, Massachusetts, October 25-28, 2001.

Executing the Mentally Retarded, Yale Law School, First Monday in October Lecture Series, October 2, 2001.

Defending Capital Cases: the Impact of Missouri's New Bar on Executing the Mentally Retarded, Kansas City Metropolitan Bar Association, June 22, 2001.

Jurors' Perceptions of Mitigating Evidence, Clarence Darrow Death Penalty Defense College, University of Michigan Law School, May 15, 2001.

The Key Ingredients of Wrongful Convictions: Eyewitness Testimony, Federal Public Defender Training Group, National Habeas Seminar, Nashville, Tennessee, August, 2000.

Federal Habeas Corpus—Common Issues Under the Antiterrorism and Effective Death Penalty Act, NAACP Legal Defense & Education Fund Annual Airlie House Conference, Warrenton, VA, July, 2000.

What Every Lawyer Should Know about the DSM-IV, and Investigating and Presenting Pleas for Executive Clemency, Federal Public Defender Training Group, National Habeas Seminar, Atlanta, Georgia, August, 1999.

Litigating Incompetency to Be Executed, Federal Public Defender Training Group, National Seminar on Mental Illness and the Criminal Law, Washington, DC, July, 1999.

Approaching Survivors of Homicide, National Legal Aid and Defender Association, Life in the Balance (Atlanta, Georgia, March, 1999).

Capital Defense in a Cruel and Unusual Era: Successful Plea Bargaining Techniques; Dealing with Survivors of Homicide, California Attorneys for Criminal Justice/California Public Defender Association, Monterey, California, February, 1998.

Westminster University School of Law, London--First Annual A.J. Bannister Memorial Lecture, "Issues of Concern in the American System of Capital Punishment," December 3, 1997.

Keynote Address: The Importance of Investigation in Capital Cases, Working with Mental Health Experts, and Cross-Examination of State's Expert Witnesses, Indiana

Public Defender Council 1997 Defending Death Cases, Indianapolis, September, 1997.

Anti-terrorism and Effective Death Penalty Act: Opt-in Provisions, NAACP Legal Defense & Education Fund Airlie House Conference, Warrenton, VA, August, 1997.

Winning Strategies in Capital Trials, University of Arkansas-Little Rock, May, 1997.

Keynote Address: Success in Spite of the New Habeas, Seeking Justice in the Seventh Circuit; Training for Appointed Counsel in Capital Post-conviction Cases, Chicago, IL, April, 1997.

The New Federal Habeas: What State Legislatures Should Do in Response, National Conference of State Legislators Annual Convention, St. Louis, MO, August, 1996.

Approaching the Families of Homicide Victims, NAACP Legal Defense & Education Fund Annual Death Penalty Defense Conference, Georgetown University, Washington, DC, August, 1996.

Litigating Under the New Habeas, University of Missouri-Kansas City, sponsored by Public Interest Litigation Clinic and the Administrative Office of the U.S. Courts, Kansas City, MO, May, 1996.

Keynote address:, *Defending Condemned Prisoners*, Washington Council of Lawyers, Georgetown University School of Law, Washington, DC, May, 1996.

Counseling Clients and Co-workers Through the Execution of a Client, Kentucky Department of Public Advocacy, Frankfort, KY, March, 1996.

Dealing with Survivors of Homicide and Investigating Petitions for Executive Clemency, National Legal Aid and Defender Association Annual Life in the Balance, St. Louis, MO, March, 1996.

Court-Appointed Attorney Fees and Expenses in Capital Cases, Defender Services Committee of the United States Courts, Miami, Florida, December, 1995.

Successful Practice in the United States Supreme Court, Missouri Association of Criminal Defense Lawyers and the Missouri Bar, St. Louis, MO, April, 1995.

Keynote Address: Life in the Balance; Jury Selection: Aggravating and Mitigating Factors, and *Investigating Postconviction Claims of Innocence*, National Legal Aid and Defender Association Annual Death Penalty Defense Seminar, Kansas City, MO, March, 1995.

Recent Decisions Affecting Capital Cases, Missouri Capital Punishment Resource Center and Missouri Association of Criminal Defense Lawyers, Kansas City, MO, February,

1995.

Procedural Bars--Preventing Losses on Federal Habeas Corpus, and Hot Issues: Getting Out Front on New Issues, Kansas Association of Criminal Defense Lawyers, Death Penalty Seminar, Wichita, KS, September, 1994.

Significant Developments in the Criminal Law, University of Missouri-Kansas City School of Law CLE Annual Review of the Law, June, 1994.

The Constitution and Innocence: The Right to Present Exculpatory Evidence, Illinois Appellate Defender Annual Death Penalty Training Seminar, Edwardsville, IL, April, 1994.

Writing Persuasive Appellate Briefs, Missouri Bar and Missouri Association of Criminal Defense Lawyers, Kansas City, MO, April, 1994.

Federal and State Postconviction Relief: Practice Tips Under Missouri Rules 29.15 and 24.035, Missouri Bar and Missouri Association of Criminal Defense Lawyers Springfield, MO, October, 1993.

Independent Judiciary and the Rule of Law in the United States, Greater Kansas City Chamber of Commerce International Visitors' Council, Kansas City, MO, August, 1993.

Executive Clemency in Death Penalty Cases, NAACP Legal Defense & Education Fund Annual Airlie House Conference, Warrenton, VA, August, 1993.

Significant Developments in the Criminal Law, University of Missouri-Kansas City School of Law CLE Annual Review of the Law, June, 1993.

Investigating and Presenting Psychological Defenses, Missouri Bar and Missouri Association of Criminal Defense Lawyers, Kansas City, MO, October, 1992.

Preparing Pleadings in Federal Habeas Corpus Cases, University of Missouri-Kansas City and Missouri Association of Criminal Defense Lawyers, Kansas City, MO, September, 1992.

Significant Developments in the Criminal Law, University of Missouri-Kansas City School of Law CLE Annual Review of the Law, June, 1992.

Cross-Examination of Trial Lawyers in Postconviction Hearings, Missouri State Public Defender Appellate Training Conference, March, 1992.

How State Court Lawyers Help--or Hurt--Their Clients' Federal Cases, Missouri State Public Defender Appellate Training Conference, March, 1992.

Representing Clients Under Sentence of Death, Missouri Association of Criminal Defense Lawyers, Kansas City, MO, October, 1991.

Losers in the Capital Punishment Lottery, The Brenner Forum Series, All Souls Unitarian Church, Kansas City, MO, September, 1991.

Protecting the Record for Appellate Review, Missouri Public Defender Trial Skills Workshop, Columbia, MO, November, 1990.

Missouri Approved Instructions: Recent Modifications, Missouri Bar and Missouri Association of Criminal Defense Lawyers, Kansas City, Springfield and St. Joseph, MO, October, 1990.

Significant Developments in the Criminal Law, University of Missouri-Kansas City School of Law CLE, Kansas City, MO, June, 1990.

Cross-examination of Expert Witnesses, University of Missouri-Kansas City School of Law CLE, Kansas City, MO, March, 1990.

Trial Objections: Preserving the Record for Appellate Review, Missouri Bar and Missouri Association of Criminal Defense Lawyers (Kansas City, MO, October, 1990).

Picking Jurors Who Will Vote for Life, and Talking to Survivors of Homicide: Sensitivity Training for Criminal Defense Lawyers, National Legal Aid and Defender Association Annual Meeting, Kansas City, MO, October, 1989.

Record Preservation in Capital Cases: The Importance of Federal Issues, Missouri Public Defender Death Penalty Training Program, St. Louis, MO, November, 1988.

Missouri Appellate/Postconviction Practice: The New Unified System, University of Missouri-Kansas City School of Law and Missouri Association of Criminal Defense Lawyers, Kansas City and St. Joseph, MO, October, 1988.

Voir Dire: Challenges for Cause, Missouri Public Defender System, St. Louis, MO, November, 1987.

Record Preservation, Missouri Public Defender Trial Skill Workshop, Columbia, MO, June, 1985.

Exhibit M

COST OF THE DEATH PENALTY IN KANSAS

Philip J. Cook and Frank R. Baumgartner

March 4, 2022

I. Qualifications.

Philip J. Cook.

I am the Terry Sanford Professor Emeritus of Public Policy and Professor Emeritus of Economics at Duke University. My curriculum vitae is attached as Appendix A.

I received my PH.D. in Economics from the University of California Berkeley in 1973. In that year I accepted a faculty position at Duke University in public policy and economics. I was promoted through the ranks from assistant professor to full professor with tenure, and ultimately awarded a distinguished professorship in 1996.

I am the former Senior Associate Dean for Faculty at the Sanford School of Public Policy. I served as director of the School's predecessor, the Sanford Institute of Public Policy, for a total of seven (7) years. I have held visiting positions at Harvard University, the University of Maryland, the Russell Sage Foundation, and the Collegio Carlo Alberto, among others.

I was appointed Research Associate of the National Bureau of Economic Research in 1991. I have been honored by election as Fellow of the American Society of Experimental Criminology, Fellow of the American Society of Criminology, and Member of the National Academy of Medicine. I have received a number of awards for my research, including, in 2020, the Stockholm Prize in Criminology.

I have published over 100 articles in peer reviewed journals. My research has been published in the leading journals in economics, public policy, medicine, law, and criminology, including the *American Economic Review*, *Quarterly Journal of Economics*, *Economic Journal*, *Journal of Policy Analysis and Management*, *Journal of the American Medical Association*, *American Journal of Public Health*, *Law & Contemporary Problems*, *UCLA Law Review*, *Criminology*, *Journal of Public Economics*, *Journal of Law and Contemporary Problems*, and the *Journal of Quantitative Criminology*. I am also author or editor of several books, including *Gun Violence: The Real Costs* (Oxford University Press) and *Lessons from the Economics of Crime: What Reduces Offending?* (MIT Press).

I have served as a member of nine expert panels convened by the National Academy of Sciences, Engineering, and Medicine. These panels produced and published consensus reports on a variety of topics including injury prevention, violence prevention, and alcohol control. Most relevant to my current testimony is that I served on the expert panel that produced the report titled *Deterrence and the Death Penalty* (National Academy Press 2012).

I have completed two studies of the costs of the death penalty in North Carolina based on my extensive data collection and analysis. The more recent of these was published in the *American*

Law and Economics Review in 2009. While I have served as an expert witness several times, I have not previously provided testimony in conjunction with a lawsuit challenging the death penalty.

Frank R. Baumgartner.

I currently hold the Richard J. Richardson Distinguished Professorship in Political Science at the University of North Carolina at Chapel Hill. I received my BA, MA, and PhD degrees in political science at the University of Michigan (1980, 1983, 1986). I have been a faculty member since 1986 and have taught at the University of Iowa, Texas A&M University, Penn State University, and UNC-Chapel Hill, where I moved in 2009. I taught at Penn State from 1999 through 2009 and served as Head of the Political Science Department there from 1999 through 2004. I regularly teach courses at all levels, many involving significant instruction in research methodology. My curriculum vitae is attached as Appendix B.

My research generally involves statistical analyses of public policy problems, often based on originally collected data or administrative databases. I have published over a dozen books and more than 80 articles in peer-reviewed journals. I have been fortunate to receive a number of awards for my work, including six (6) book awards, awards for database construction, and so on. I am a fellow of the American Academy of Arts and Sciences, an honorary society dating back to 1780. I am a co-author of two books about the death penalty. The first, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press, 2008), focused on public opinion toward capital punishment and the impact of the “innocence” argument. My co-authors and I were awarded the Gladys M. Kammerer Award for the best publication in the field of US national policy from the American Political Science Association for this book in 2008. The second book, *Deadly Justice: A Statistical Portrait of the Death Penalty* (Oxford University Press, 2018), provides a statistical overview of a broad range of questions relating to the “modern” (post-*Furman*) application of the death penalty: demographic characteristics of the offenders and victims, rates of use, comparison to homicide numbers, geographical patterns, eligible crimes in different states, cost, deterrence, and so on. The book derives from, and is the main text in, a course I teach about the death penalty that regularly enrolls over 400 students at UNC-Chapel Hill. *Deadly Justice* includes a chapter entitled “Why Does the Death Penalty Cost So Much?”, co-authored with Mr. Justin Cole, currently a student at Yale Law School. That chapter was based on a comprehensive review of studies of the cost of the death penalty.

I have also published a number of death penalty-related studies in law reviews and peer-reviewed academic journals. Many of these articles relate to race- and gender-based disparities in the application of the death penalty. I am the co-author of another book, *Suspect Citizens: What 20 Million Traffic Stops Tell Us about Policing and Race* (Cambridge University Press, 2018; winner of the C. Herman Pritchett Best Book Award from the Law and Courts Section of the American Political Science Association in 2019). This book, and numerous related articles published in peer review journals, also delves deeply into the analysis of race- and gender-based disparities in criminal justice outcomes.

II. Introduction.

Analysis of studies across the nation on the cost of the death penalty are clear: administration of the death penalty is more costly than not. Additional costs are incurred at every stage of litigation, from investigation to post-conviction.

This is also true in Kansas. The modern death penalty was re-instituted in Kansas in 1994 but has been rarely used. Since its adoption, there have been over 3,500 criminal homicides in Kansas,¹ but no executions. There are currently nine (9) people imprisoned in Kansas with a death sentence,² the most recent of whom was sentenced in 2016.³ Two (2) other individuals who were sentenced to death since 1994 died of natural causes while incarcerated, and four (4) individuals have been resentenced to life without the possibility of parole (“LWOP”). But, despite the fact that death sentences are rare, the cost of maintaining the death penalty in Kansas amounts to millions of dollars each year.

This report explains why the death penalty is costly and seeks to quantify the cost by reviewing literature on the cost of the death penalty, discussing available estimates from two previous cost studies performed in Kansas, and building off the previous Kansas studies with an examination of additional data gathered in the years since the conclusion of the last study.

In 2003, the state of Kansas released the Legislative Post Audit report (“2003 Report”) which compared costs in 22 cases, some death penalty and some first-degree murder cases.⁴ In 2014, the Judicial Council Death Penalty Advisory Committee reviewed additional costs incurred in the death penalty cases analyzed by the 2003 Report as well as in all capital-eligible cases filed between fiscal years 2004 and 2011 (“2014 Report”).⁵ The new analysis in our report builds off of the State’s 2003 and 2014 studies and focuses on the five-year period between 2014, the year that Mr. McNeal was charged, and 2018. During that time the State incurred costs associated with ongoing appeals of previous death sentences, as well as active capital cases defined as those

¹ Between 1994 and 2019, the National Vital Statistics System recorded 3,469 homicides in Kansas (WISQARS.CDC.gov). The Kansas Bureau of Investigation reports 193 murders in 2020.

² Death Penalty Information Center, State and Federal Info Kansas, *see* <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/kansas>.

³ Steve Fry, *Kyle Flack, who killed 3 adults and a toddler, sentenced to the death penalty in Kansas capital murder case*, The Topeka Capital Journal (May 18, 2016), <https://www.cjonline.com/story/news/politics/state/2016/05/18/kyle-flack-who-killed-3-adults-and-toddler-sentenced-death-penalty-kansas-capital/16587105007/>; *see also* <https://www.doc.ks.gov/newsroom/capital>.

⁴ Leg. Post Audit Comm., *Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections* (Dec. 2003), https://www.ncsl.org/Portals/1/Documents/cj/KS_2003_CostsReport33956.pdf (“2003 Report”).

⁵ Judicial Council Death Penalty Advisory Comm., *Report of the Judicial Council Death Penalty Advisory Committee* (Feb. 13, 2014), <https://kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/2015%20Reports/death%20penalty%20cost%20report%20final.pdf> (“2014 Report”).

that were ongoing, charged, or in a retrial posture during this time period. The Counties that had one or more active capital cases between 2014 and 2018 include: Barton, Chautauqua, Franklin, Geary, Harvey, Johnson, Labette, Pratt, Riley, Saline, Sedgwick, Shawnee, and Wyandotte. Within these counties, all investigation, prosecution, and adjudication costs were requested for all active capital and non-capital first degree homicide cases.⁶

Cost data were requested from the following entities: 1) county attorney offices; 2) county clerk offices; 3) county accounting departments; 4) district courts; 5) police departments; 6) sheriff departments; 7) the Kansas Department of Corrections; 8) the Kansas State Board of Indigents' Defense Services (BIDS); 9) the Kansas Supreme Court; 10) the Attorney General's office; 11) the Kansas Bureau of Investigation; and 12) the Kansas Court of Appeals. These requests sought to capture costs from the initial investigation into a capital or non-capital homicide case, through any trial, incarceration, and appeals. The general responsiveness and level of detail provided differed greatly among these entities. The results of these requests are briefly summarized in the attorney declaration attached as Appendix C.

This data collection spanned more entities than the previous studies, but faced similar challenges, including non-centralized databases, inconsistent record keeping, and a failure to track costs by case. The results of the previous studies and this supplemental study make clear one thing: no one can provide a comprehensive accounting of the full cost of the death penalty to the State of Kansas. However, the data available demonstrate that maintaining the death penalty in Kansas is significantly more costly than pursuing other forms of punishment and costs the State and its taxpayers millions of dollars each year.

III. Analysis

1. Conclusions of Cost Studies Across the Country

In the following section, we first explain how we identified the studies used and then review their estimates of overall cost, breaking down these estimates where possible to show which parts of the process seem to be generating most of the cost or savings. This section is based on a chapter in Professor Baumgartner's 2018 book, *Deadly Justice: A Statistical Portrait of the Death Penalty*, and is co-written with Justin Cole, currently a student at Yale Law School and co-author of the original book chapter, which this section updates.

In order to find studies on the cost of the death penalty, we first referred to a page on the Death Penalty Information Center ("DPIC") website that focuses specifically on cost.⁷ We started with all the articles listed in the main sections on this page: "State Studies on Monetary Costs," "State Studies on Time Costs," "DPIC Reports on Costs," and "DPIC Testimony and Presentations on Costs." We then conducted Google Scholar searches for relevant terms such as "death penalty

⁶ Additional costs were sought both in the two years leading up to 2014 and through January 1, 2020, in order to identify any other costs that were not otherwise captured in the period of 2014 to 2018.

⁷ See *Costs*, DEATH PENALTY INFO. CTR., deathpenaltyinfo.org/policy-issues/costs (last visited Feb. 11, 2022).

costs,” “cost of capital punishment,” and “price of capital punishment.” Because the DPIC site is relatively complete, these searches yielded few additional hits. We identified 25 published studies, most of which focus on a single state. The vast majority of the studies were published in academic journals or law reviews, but a few were published in highly professional and systematic journalistic or legislative reviews. We did not include any studies that focused on individual cases or that were of relatively small empirical scope. All the studies reviewed focus on comparisons of the cost of capital cases with non-capital murder trials. Some provide overall cost estimates, and many of them break down the source of the costs by the different phases of the trial or postconviction appeals. In the following sections, we provide a tabular summary of the studies, their time and geographical scopes, the number of cases reviewed, and their cost estimates.

a. Overall Cost Estimates.

Of the 25 studies we reviewed, 15 provide some estimate of the overall cost of a death sentence, an execution, or the entire death penalty system as compared with a first-degree murder trial or a system where capital punishment is not considered or available as an option. All of the studies are in states where the death penalty is legally available, so the comparison is across cases where the State seeks the death penalty to otherwise similar cases where the death penalty is not sought. The studies use slightly different definitions of cost, as we describe below. Table 1 summarizes these results. Where it is possible to give a precise dollar amount, we do so. Where there is only an indication of “more” spending in the capital case, we indicate this with a plus sign (+). We use a minus sign (–) in the rare cases where there are savings.⁸

⁸ See FRANK R. BAUMGARTNER, MARTY DAVIDSON, KANEESHA R. JOHNSON, ARVIND KRISHNAMURTHY & COLIN P. WILSON, *DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY* app. E (2018), <http://fbaum.unc.edu/books/DeadlyJustice/AppE-Cost.pdf> (replicating the three tables in this report with footnotes explaining each cost estimate).

Table 1. Overall Cost Estimates

Basic Characteristics of Cost Studies				Comparative Costs		
Author and Year	Geographic Scope	Time Period Examined	Cases Sampled	Death Penalty Trials as Compared to Non-Death Penalty Trials	Death Sentence as Compared to a Sentence of Life without Parole	Death Penalty as Compared to a Scenario Where the Maximum Punishment Is Life without Parole
California Commission on the Fair Administration of Justice (2008)	California	1978–2007	1,644	+	+	+\$125,500,000 per year
Minsker (2009)	California	1996–2006	338	+	+	
Alarcón and Mitchell (2011)	California	1978–2010	1,940	+\$1,000,000 per case	+	+\$4,000,000,000 over 31 years (+\$129,000,000 per year)
Marceau and Whitson (2013)	Colorado	1999–2010	154	+123.5 days per case		
Gould and Greenman (2010)	Federal	1998–2004	214	+\$308,376 per case		
Palm Beach Post Capital Bureau (2000)	Florida	1979–1999		+		+\$51,000,000 per year
Office of Performance Evaluations (2014)	Idaho	1998–2013	251	+3.1 months per case		
Indiana Legislative Services Agency (2015)	Indiana	1995–2013	124	+\$342,940 per case		
Legislative Division of Post Audit (2003)	Kansas	1994–2003	22	+\$316,000 per case	+	+
Judicial Council (2014)	Kansas	1994–2011	63	+17.1 days per case		
Cohen et al. (2019)	Louisiana	2007–2016				+\$750,000–\$4,000,000 per case

Roman et al. (2008)	Maryland	1978–1999	1,136	+640,000 per case	+\$851,000 per death sentence	+\$1,491,000 per case
Dieter (2009)	National Survey			+	+	+
Goss, Strain, and Blalock (2016)	Nebraska	1973–2014	119		+	+\$14,600,000 per year
Miethe (2012)	Nevada	2009–2011	138			
Nevada Legislative Counsel Bureau (2014)	Nevada	2000–2012	28	+\$375,000–\$389,000 per case	–\$5,000 per death sentence to +\$86,000 per death sentence	\$375,000–\$475,000 per case
Forsberg (2005)	New Jersey	1982–2004		+	+	+\$253,300,000 over 24 years (+\$11,000,000 per year)
Cook and Slawson (1993)	North Carolina	1990–1991	77	+\$47,793 per case		
Cook (2009)	North Carolina	2005–2006	1,034	+		+\$11,000,000 per year
Collins et al. (2017)	Oklahoma	2004–2010	184			+\$110,000 per case
Kaplan (2013)	Oregon	1984–2013		+	+	+
Dieter (2010)	Pennsylvania	1976–2009		+	+	
Morgan (2004)	Tennessee	1993–2003	240	+	+	+
Washington State Bar Association (2006)	Washington	1981–2005	254	+		
Collins et al. (2015)	Washington	1997–2014	147	+		+\$1,150,000 per case

Key: [+] means an item is more expensive; [-] means an item is less expensive; [=] means the expenses are equivalent; blank means there was no relevant information on the category in the study.

The first column of the table lists the author or authors of the study, as well as the date that the study was published. All but one of these studies were published in the twenty-first century, indicating that the cost of the death penalty has only begun to attract attention in recent years. The second column notes the geographical scope of each cost study. Most of the studies (23 of 25) limit their analysis to one state.⁹ The third column contains the time period that was examined by each study. There are two important points to highlight here. First, most of the studies focus on a time period of a decade or more, but a fair number limit their analysis to a period of only a few years. Second, the vast majority of the studies examine the death penalty prior to 2012, and the data reported does not always take inflation into account. We have not made adjustments for inflation in the table, but report the dollar values listed in the articles we review. For these reasons, it would be fair to consider the cost estimates as low or conservative ones. Real costs are undoubtedly higher.

The fourth column lists the total number of cases examined in each study. The number listed is the total number of homicide cases. For the first entry in the table, the study reviewed 1,644 homicide cases in California between 1978 and 2007. Only a fraction of these cases were prosecuted capitally, and then only a fraction of those led to a death penalty. The *N* reported in the table is the total number of homicide cases the study reviewed, not the number of death sentences. The fifth column compares the cost of a death penalty trial to the cost of a first-degree murder trial where the death penalty was not sought. Of course, not every death penalty trial ends in a death sentence, and trials that end in death sentences are more expensive than those that do not. To account for this, a weighted average of trial costs in these two categories was compiled and then compared to the costs of first-degree murder trials where the death penalty was not sought to get this figure. Some studies examined both trials and pleas. When pleas were included, they were incorporated through a weighted average into both the costs of death penalty trials and the costs of first-degree murder trials where the death penalty was not sought.

The sixth column compares the cost of a capital trial that ends without a death sentence with a capital trial that ends with a death sentence. The costs encompassed by this category are appellate costs garnered in direct appeals, state postconviction proceedings, and federal postconviction proceedings as well as incarceration costs. This category is especially interesting because most people who receive death sentences do not actually end up being executed; thus, the death penalty is effectively an expensive form of LWOP, at least in those cases. The seventh column looks at both the trial and the postconviction phases of a death penalty case and compares the overall cost of a death sentence, an execution, or the entire death penalty system with a first-degree murder trial where capital punishment is not considered. The entries indicate whether the cost estimate is for the entire system, indicating the additional costs of maintaining a death penalty system over a system where there is no capital punishment, or if the estimate is per case. Per-case estimates refer to the additional costs of seeking death over seeking a punishment of life without parole.

⁹ The study by Gould and Greenman (2010) focuses solely on federal death penalty cases and the one by Dieter (2009) is a national survey of police chiefs.

Overall costs of the entire system are perhaps the most important indicators: what does it cost a state to maintain a capital punishment system, per year? Reading down the last column and looking at those estimates, we see approximately \$125-129 million per year in California; \$51 million in Florida; \$15 million in Nebraska; \$11 million in New Jersey; and \$11 million in North Carolina. The per-case estimates are also high, \$750,000 to \$4 million in Louisiana; \$1.5 million in Maryland; \$375,000 to \$475,000 in Nevada; and \$110,000 in Oklahoma. No estimates are negative; the death penalty is always more expensive. How much higher ranges depending on the state. Unsurprisingly, the states with more active death penalty systems show higher costs, as California faces costs over \$100 million per year, Florida sees over \$50 million, and New Jersey is lower at \$11 million. New Jersey, however, maintained these costs over a quarter century and carried out just one execution; that single execution came at a cumulative estimated cost of a quarter-billion dollars. The similar estimates for California, over a longer time period, include a global estimate of more than \$4 billion. As the state has carried out just 13 executions in the period since 1976, this amounts to a price tag of over \$300 million per execution, similar to the New Jersey figure. And once again, these numbers do not take inflation into account. Kansas, of course, has not carried out a single execution in the modern era, so the costs associated with the maintenance of a death penalty are related to no executions at all.

b. Trial Phase Cost Estimates.

The 25 studies listed in Table 1 also break down the costs associated with the different phases of the trial process. Table 2 summarizes these results.

Table 2. Costs Associated with Each Phase of the Death Penalty Trial

Basic Characteristics of the Studies				Costs of the Various Components of Death Penalty Trials					
Author and Year	Geographic Scope	Time Period Examined	Cases Sampled	Death Penalty Trials as Compared to Non-Death Penalty Trials	Defense	Prosecution	Experts	Court	Jury
California Commission on the Fair Administration of Justice (2008)	California	1978–2007	1,644	+	+				+
American Civil Liberties Union of Northern California (2009)	California	1996–2006	338	+	+	+	+	+	+
Alarcón and Mitchell (2011)	California	1978–2010	1,940	+\$1,000,000 per case	+	+	+	+	+
Marceau and Whitson (2013)	Colorado	1999–2010	154	+123.5 days per case	+			+	+24.5 days per case
Gould and Greenman (2010)	Federal	1998–2004	214	+\$308,376 per case	+\$231,753 per case		+\$77,754 per case		+
Palm Beach Post Capital Bureau (2000)	Florida	1979–1999		+	+	+			
Idaho Legislature Office of Performance Evaluations (2014)	Idaho	1998–2013	251	+3.1 months per case					

Legislative Division of Post Audit (2003)	Kansas	1994–2003	22	+\$316,000 per case	+	+	+	+	+
Judicial Council (2014)	Kansas	1994–2011	63	+17.1 days per case					
Roman et al. (2008)	Maryland	1978–1999	1,136	+640,000 per case	+	+			+
Dieter (2009)	National Survey			+	+	+	+	+	+
Goss, Strain, and Blalock (2016)	Nebraska	1973–2014	119		+		+	+	+
Miethe (2012)	Nevada	2009–2011	138		+1,166 hours per case				
					+ \$116,600–\$145,750 per case				
Nevada Legislative Counsel Bureau (2014)	Nevada	2000–2012	28	+\$375,000–\$389,000 per case	+\$176,891–\$225,834 per case	+\$7,212–\$10,699 per case	+\$49,000–\$61,025 per case	+	+
Forsberg (2005)	New Jersey	1982–2004		+	+\$2,300,000 per year	+\$4,600,000–\$7,800,000 per year	+	+	+
Cook and Slawson (1993)	North Carolina	1990–1991	77	+\$47,793 per case	+	+	+	+	+
Cook (2009)	North Carolina	2005–2006	1,034	+	+\$13,180,385 over 2 years	+26,680 hours over 2 years	+\$3,024,000 over 2 years	+691 days over 2 years	\$224,640 over 2 years
Collins et al. (2017)	Oklahoma	2004–2010	184		+\$32,700 per case	+\$17,684 per case	+	+	
Kaplan (2013)	Oregon	1984–2013		+	+	+	+		
Dieter (2010)	Pennsylvania	1976–2009		+	+	+	+		+
Morgan (2004)	Tennessee	1993–2003	240	+	+	+	+	+	+

Washington State Bar Association (2006)	Washington	1981–2005	254	+	+\$246,000 per case	+217,000 per case		+\$46,640– \$69,960 per case	+
Collins et al. (2015)	Washington	1997–2014	147	+	+\$493,500 per case	+\$55,900 per case	+	+\$80,000 per case	

Key: [+] means an item is more expensive; [-] means an item is less expensive; [=] means the expenses are equivalent; blank means there was no relevant information on the category in the study.

Just as in Table 1, the first four (4) columns of Table 2 provide the basic characteristics of each of the studies. The fifth column is also contained within Table 1. The remaining columns, however, deal specifically with various phases of a death penalty trial as compared with a first-degree murder trial where capital punishment is not considered.

Eight (8) studies provide some specific numerical estimate of the costs associated with the defense, and six (6) studies provide some estimate of the costs associated with the prosecution. Each of these shows that attorney costs are substantially higher for capital trials than for first-degree murder trials where capital punishment is not considered. Unsurprisingly, among those studies that provide a precise cost estimate for the defense, costs range from an additional \$32,700 per case in Oklahoma to an additional \$493,500 per case in Washington. For those that provide information on the prosecution, costs range from an additional \$7,212 per case in Nevada to an additional \$217,000 per case in Washington.

Three (3) studies provide some specific numerical estimates explicitly associated with expert testimony, and three (3) studies provide some estimate of court costs, either direct monetary costs or costs in terms of time. Each of these shows that both expert and court costs are substantially higher during capital trials than during first-degree murder trials where capital punishment is not considered. Even studies that do not provide specific numerical data provide some indication that these components are more expensive in capital trials. As science has improved, the defense has increasingly relied on experts who specialize in everything from mental health to hair follicle analysis to bite marks to eyewitness testimony in an attempt to avoid the death penalty for their client. As a result, the prosecution has naturally countered with its own array of experts. Court costs are also higher in capital trials. More capital trials change venues, which is costly. More importantly, capital trials last much longer, which means not only that daily costs of writing transcripts or providing security increase but also that opportunity costs arise. The more time a capital trial takes, the less time there is for other trials in that same courtroom or by that judge. This does not appear as a direct cost in a state budget, but it is nonetheless important, particularly as many states are experiencing significant delays in their criminal justice system associated with the COVID-19 pandemic. With this in mind, additional expert costs range from \$49,000 to \$77,754 per case, and additional court costs range from \$46,640 to \$80,000 per case.¹⁰

Two (2) studies provide some specific numerical estimate of the costs associated with voir dire, or jury selection. Marceau and Whitson (2013) compared six (6) capital prosecutions with 148 noncapital cases in Colorado and found that jury selection took 24.5 days longer in the capital trials. Many more potential jurors are required; individuals who are categorically opposed to the death penalty and would refuse to consider a death sentence are excused, as are many others due to financial hardship, a problem that is far more severe because of the greater length of capital trials. Missing work or childcare responsibilities for a longer time is also more onerous. Once the trial begins, jurors are paid for every day they work, which added up to \$224,640 over two years in North Carolina.

¹⁰ “Additional court costs” are those associated with longer trials: court reporters, court staff, courtroom security, and so on.

It is clear that costs are high and that they stem not from a single easily controlled source but from virtually every element of the trial and investigation. Contrary to popular belief, the costs of the death penalty are not limited to the appeals that come after a conviction; rather, the costs accumulate from the very instant that a case becomes capital.

c. Postconviction Cost Estimates.

We found 19 studies that break down the costs associated with the different phases of the postconviction process; these are a subset of those listed in the previous table. Table 3 summarizes these results.

Table 3. Costs Associated with Each Phase of the Death Penalty Postconviction Process

Basic Characteristics of the Cost Studies				Costs of the Various Phases of the Postconviction Process of the Death Penalty					
Author and Year	Geographic Scope	Time Period Examined	Cases Sampled	Death Sentence as Compared to a Sentence of Life without Parole	Direct Appeal	Postconviction at the State Level	Postconviction at the Federal Level	Incarceration	New Death Row Complex
California Commission on the Fair Administration of Justice (2008)	California	1978–2007	1,644	+	+	+		+\$90,000 per inmate per year	+\$402.6 million overall
Minsker (2008)	California	1996–2006	338	+	+	+		+\$90,000 per inmate per year	+\$356 million overall
Alarcón and Mitchell (2011)	California	1978–2010	1,940	+	+	+\$200,000–\$300,000 per death sentence	\$1.11 million per death sentence	+\$90,000 per inmate per year	+\$402.8 million overall
Idaho Legislature Office of Performance Evaluations (2014)	Idaho	1998–2013	251		+1.2 years per death sentence	+1.4 years per death sentence		+	
Legislative Division of Post Audit (2003)	Kansas	1994–2003	22	+	+			-	
Judicial Council (2014)	Kansas	1994–2011	63		+			+\$24,690 per inmate per year	
Cohen et al. (2019)	Louisiana	2007–2016		+				+\$50,880 per inmate per year	

Roman et al. (2008)	Maryland	1978–1999	1,136	+851,000 per death sentence	+\$340,000 per death sentence	\$43,000 per death sentence	+\$96,000 per death sentence	+\$372,000 per inmate over a lifetime
Dieter (2009)	National Survey			+	+	+		+
Goss, Strain, and Blalock (2016)	Nebraska	1973–2014	119	+	+	+	+	+\$619,000 per year
Nevada Legislative Counsel Bureau (2014)	Nevada	2000–2012	28	–\$5,000 per death sentence to +\$86,000 per death sentence	+	+	+	=
Forsberg (2005)	New Jersey	1982–2004		+	+	+	+	+
Cook and Slawson (1993)	North Carolina	1990–1991	77		+\$13,561 per death sentence	+	+	–\$17,000 per inmate over a lifetime
Cook (2009)	North Carolina	2005–2006	1,034		+	+	+	+\$169,617 over the 2-year time period
Kaplan (2013)	Oregon	1984–2013		+	+		+	
Dieter (2010)	Pennsylvania	1976–2009		+	+	+		
Morgan (2004)	Tennessee	1993–2003	240	+	+	+	+	=
Washington State Bar Association (2006)	Washington	1981–2005	254		+\$118,511 per death sentence	+		
Collins et al. (2015)	Washington	1997–2014	147		+	+		–\$474,000 per inmate over a lifetime

Key: [+] means an item is more expensive; [-] means an item is less expensive; [=] means the expenses are equivalent; blank means there was no relevant information on the category in the study.

Just as in Table 1, the first four columns of Table 3 describe the basic characteristics of all the studies. The fifth column is also contained within Table 1. The remaining columns, however, deal specifically with various phases of the postconviction process when a death sentence was handed down as compared with the postconviction process when a sentence of LWOP was issued.

Four (4) studies provide some specific numerical estimate of the costs associated with direct appeals, three (3) provide some estimate of the costs associated with postconviction proceedings at the state level, and two (2) provide some estimate of the costs associated with postconviction proceedings in federal courts. Each of these shows that the various appeals are expensive. For direct appeals, costs range from an additional \$13,561 to \$340,000 per death sentence; for postconviction appeals at the state level, an additional \$43,000 to \$300,000 per death sentence; and for postconviction appeals at the federal level, from \$96,000 to \$1.1 million per death sentence.¹¹

Ten studies provide some specific numerical estimate of the costs associated with incarceration. Eight (8) of these indicate that incarceration is more expensive for those who are given the death penalty. Of course, in states such as California, like Pennsylvania, and many other jurisdictions, which rarely executes those they condemn, it is clear that costs accumulate but there are few or no offsetting savings. Virginia¹² and Texas, which historically have executed a higher proportion of their death row inmates, may not have the same high costs associated with incarceration rates of prisoners sentenced to death. However, just two (2) studies out of 19 found what many would assume to be true logically: that incarcerating prisoners who had received LWOP was more expensive because death row prisoners are executed prior to their natural death. While, theoretically, one might expect to see lower incarceration costs for those sentenced to death as opposed to LWOP, several factors make this less likely: few of those condemned are executed; death rows are expensive to operate; and many inmates spend decades on death row before being executed (or seeing their sentence reversed).

2. Why the Kansas Death Penalty is Costly

As in other states, and consistent with the United States Supreme Court's ruling that "death is different," capital cases in Kansas are more complex and involve more procedural safeguards than otherwise similar murder cases. As a result, litigating capital cases is more costly to state and local governments than if defendants had been prosecuted for murder without the possibility of a death sentence.

¹¹ The Maryland study focuses only on "costs to Maryland taxpayers," JOHN ROMAN, AARON CHALFIN, AARON SUNDQUIST, CARLY KNIGHT & ASKAR DARMENOV, *THE COST OF THE DEATH PENALTY IN MARYLAND 1* (2008), <http://www.deathpenaltyinfo.org/CostsDPMaryland.pdf>, while the California study discusses costs to federal taxpayers, Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 *LOY. L.A. L. REV.* S41, S88-94 (2011).

¹² In March 2021, the state of Virginia repealed the death penalty statute and converted all existing death sentences to life without parole.

What cases are capital eligible?

Kansas law, as enacted in 1994, states that the death penalty is reserved for “intentional and premeditated killing” in one (1) of seven (7) circumstances. In addition, it is required that there be one or more aggravating circumstances, and that the defendant is an adult. Prosecutors are not required to seek the death penalty in cases that are capital eligible, and must indicate their intention to seek the death penalty no later than seven days after the time of arraignment.¹³

How are capital cases sentenced?

A bifurcated trial is required for cases where the prosecutor seeks the death penalty. The jurors must be death-penalty “qualified” during the jury-selection process, meaning potential jurors may be excluded if they would be unable to recommend the death penalty.¹⁴ If the jury decides the defendant is guilty of capital murder during the first phase, then that same jury is seated for a sentencing trial.¹⁵ During the sentencing trial, the jury is presented with evidence on both aggravating and mitigating circumstances to determine whether the defendant should be put to death or be sentenced to life without parole.¹⁶ A sentence of death requires a unanimous finding that one or more aggravating circumstances exist and that the aggravating circumstances outweigh the mitigating circumstances, beyond a reasonable doubt.¹⁷ The trial judge may only impose the death penalty if the jury so recommends.¹⁸

In what specific ways are capital-trial proceedings more costly than if the prosecutor had decided to proceed non-capitally?

As the Kansas’s Judicial Council Death Penalty Advisory Committee summarized in a 2009 Report, “[t]he capital case requires more lawyers on both the prosecution and defense teams, more experts on both sides, more pre-trial motions, longer jury selection time, and a longer trial.”¹⁹ The 2009 Report further describes the post-conviction process as “litigated for years . . . difficult, and time consuming.”²⁰

¹³ Kan. Stat. Ann. § 21-6617.

¹⁴ See Kan. Stat. Ann. § 22-3410(2)(i) ; 2003 Report, at 5.

¹⁵ Kan. Stat. Ann. § 21-6617; see also 2003 Report, at 5

¹⁶ Kan. Stat. Ann. § 21-6617(c) and (e); Kan. Stat. Ann. § 21-6624 (aggravators); Kan. Stat. Ann. § 21-6625 (mitigators); see also 2003 Report, at 5.

¹⁷ Kan. Stat. Ann. §21-6617(e); 2003 Report, at 6.

¹⁸ Kan. Stat. Ann. § 21-6617; Kan. Legislative Research Department, *Death Penalty in Kansas*, 2 (Jan. 27, 2021), http://www.kslegresearch.org/KLRD-web/Publications/JudiciaryCorrectionsJuvJustice/memo_genl_deboer_death_penalty.pdf (“2021 Report”).

¹⁹ Judicial Council Death Penalty Advisory Comm., *Report of the Judicial Council Death Penalty Advisory Committee*, 9 (Dec. 4, 2009), <https://kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/2009%20Reports/Death%20Penalty.pdf> (“2009 Report”).

²⁰ *Id.*

A non-exhaustive list of the ways in which capital-trial proceedings differ includes the following:

- Representation. Because capital trials tend to be complex and require specialized expertise, two (2) attorneys are typically appointed for the defense through BIDS. BIDS provides these attorneys either through the existing public defender offices or by appointing private counsel.²¹ Public defense in capital cases is conducted at the trial-level by the capital defender office, on direct appeal by one (1) of two (2) capital appellate offices, and in post-conviction by the state habeas office.²² Appointed counsel consists of either contract counsel who contract with BIDS to accept cases at rates reduced from market value when the public defender has a conflict or is unable to otherwise take on the case, or of non-contract assigned counsel who are private attorneys who meet established regulatory criteria²³ and who voluntarily serve on appointments panels in each judicial district.²⁴ Contract counsel typically cost more per case than do public defenders.²⁵ Only in rare cases does the defendant retain private counsel for all or part of the proceedings. The trial defense team generally also include—at minimum—a fact investigator and a mitigation specialist.²⁶ On the opposing side, the State is also typically represented by two (2) or more prosecutors.
- Motion practice. In every stage of a capital case, defense counsel have a duty to consider all legal claims potentially available and, if counsel decides to raise an issue, they must “present the claim as forcefully as possible[.]”²⁷ This involves litigating all possible legal and factual bases related to the issue, making supplemental presentations, and ensuring a complete record of the claim has been made. “Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case.”²⁸ As a member of the Death Penalty Advisory Committee put it in the 2004 Report, “[s]ince the law regulating the imposition of death is much more expansive it requires several dozen motions in, each case... More motion hearings are required and the hearings take longer

²¹ The Board of Indigents’ Defense Services, *A Report on the Status of Public Defense in Kansas*, 1 (Sept. 2020), <http://www.sbids.org/forms/Report%209-30-2020.pdf> (“BIDS Report”).

²² *Id.* at 9

²³ See Kan. Admin. Regs. § 105-3-2(a)(4).

²⁴ BIDS Report, at 10

²⁵ *Id.* at 23

²⁶ Am. Bar. Ass’n, American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1028 (Rev. Ed. 2003), Guideline 4.1 commentary (“ABA Guidelines”); *see also* Judicial Council Death Penalty Advisory Comm., *Report of the Judicial Council Death Penalty Advisory Committee*, 24 (Jan. 29, 2004), https://kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/Previous%20Judicial%20Council%20Studies/PDF/Death_Penalty_Adv_Comm_Jan04.pdf (“2004 Report”).

²⁷ ABA Guidelines 10.8(B)(1).

²⁸ ABA Guidelines 10.8 commentary

than in a non-death case.”²⁹ As another committee member and trial judge noted “it is certainly not unusual for over 100 motions to be filed in a typical capital case.”³⁰ Based on our analysis of data from the 2014 Report, trials in which the death penalty is sought were preceded by 15 days of motions, compared with five (5) days for trials in which the death penalty was not sought.³¹

- Jury selection. Pools of potential jurors are usually larger in capital cases. Indeed, the 2003 Report found that capital cases averaged 230 jurors at the start of jury selection, compared to 89 jurors at the same point in other first-degree-murder cases.³² The larger pool is in part because voir dire of potential capital jurors typically includes questioning by the prosecution on willingness to impose a death sentence, which often results in the exclusion of jurors who would otherwise be qualified to serve. Jury selection in capital cases in Kansas hence may take longer than it takes to pick a jury in a non-death case.³³
- Trial. Capital trials typically last longer, with more expert witnesses. The 2003 Report estimated that death penalty cases were an average length of 28 days, compared to nine (9) days in non-death cases (from the start of jury selection to the end of trial).³⁴ The 2014 Report provided details for jury trials, showing 16 days for trials in which the death penalty was sought, and seven (7) days for murder cases in which the death penalty was not sought.³⁵
- Sentencing phase. If the jury finds a defendant guilty of capital murder, then it continues to serve for a second phase of the trial to determine a sentencing recommendation of death or life without parole. The 2003 Report found that a separate sentencing proceeding added an average of six (6) days to trials.³⁶ Further, during the penalty phase a capital defense team is required both to put forward a mitigation presentation and to rebut the prosecution’s case on aggravation.³⁷ This testimony may require witnesses familiar with evidence relating to a client’s life and development as well as expert and lay witnesses who can provide medical, psychological, or sociological insights relevant to the client’s mental health, life history, and culpability, or otherwise support a sentence less than death or rebut aggravating evidence.³⁸ A member of the Death Penalty Advisory Committee summarized this issue by stating that in “a homicide in which death is not being sought as a punishment, I do not necessarily need to know my client’s life history. In ‘death’ cases it is essential that the defense team know all aspects of the accused’s

²⁹ 2004 Report, at 11.

³⁰ *Id.* at 13

³¹ 2014 Report, Appendix D.

³² 2003 Report, at 15.

³³ 2004 Report at 11

³⁴ 2003 Report, at 15.

³⁵ 2014 Report, Appendix D.

³⁶ 2003 Report at 15.

³⁷ ABA Guidelines 10.11.

³⁸ *Id.*

family history...school records ...work history[.]”³⁹ This same committee member also noted that death penalty cases typically require more experts, who are not always local.⁴⁰

- Direct appeal to the Kansas Supreme Court. A conviction for capital murder resulting in a death sentence entitles a defendant to automatic review by and appeal to the Kansas Supreme Court.⁴¹ The Kansas Supreme Court is required to consider both the sentence and any errors asserted, and is further “authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby.”⁴² In the 2014 Report, the Kansas Supreme Court estimated that justices spend five (5) times more hours on capital cases than non-capital cases, and that a justice writing the opinion in a capital case spends 20 times the number of hours than in a non-capital case.⁴³ As retired Kansas Supreme Court Justice Six put it “[t]he gargantuan dimensions of a death case, the voluminous trial court record, the great number of issues, and the length of the briefs, not only take over your professional life but also occupy ‘personal family time’ during resolution of the issues on appeal.”⁴⁴ On the defense side, these appeals are handled by the BIDS’ Capital Appeals Office, the Capital Appeals and Conflicts Office, or appointed counsel. On the state side, these appeals are typically handled by the Attorney General’s Office.
- Post-conviction proceedings. If the Kansas Supreme Court affirms the death sentence, other challenges to the verdict or sentence may be brought through both state and federal courts. On the defense side, state appeals are handled either by the Kansas Capital Habeas Office or appointed counsel and on the government side, state appeals are typically handled by the Attorney General’s Office. It should be noted that the Kansas Supreme Court did not affirm any death sentence since the death penalty was reinstated in 1994 until 2015 (Robinson).
- Re-trial and re-sentencing. Since the death penalty was reinstated in 1994, appeals of death sentenced cases have been more successful than appeals of murder convictions that resulted in a sentence of life imprisonment. In this respect the experience in Kansas mirrors that of other states. Indeed, a 2000 study found that there is a nationwide reversal rate of over two (2) out of every three (3) capital judgments due to serious error.⁴⁵ Sometimes the result is to return the case to the state district court for re-trial or re-sentencing, which may be as costly, or even exceed the costs of the original trial.

A flow chart outlining the appeals process following a death sentence is attached as Appendix D.⁴⁶

³⁹ 2004 Report, at 10-11.

⁴⁰ *Id.* at 11.

⁴¹ Kan. Stat. Ann. §21-6619.

⁴² *Id.*

⁴³ 2014 Report, at 11.

⁴⁴ 2004 Report, at 10.

⁴⁵ See Leibman, et al. “A Broken System, Error Rates in Capital Cases 1973-1995” (Columbia University June 2000 research study); see also 2004 Report, at 33.

⁴⁶ 2003 Report, at 6.

Are there additional corrections costs associated with the death penalty?

In the past, Kansas has incarcerated death-sentenced defendants in a maximum-security prison with other prisoners who are being held in administrative segregation. That requirement has now been eased, so that administrative segregation is no longer a requirement.⁴⁷ However, as of the writing of this report, the Kansas Department of Corrections website still lists the nine (9) prisoners serving death sentences as remaining in “special management,” or segregated custody.⁴⁸ In 2009, the Judicial Council Death Penalty Committee estimated that housing a prisoner in administrative segregation costs roughly \$1000 more per a year than housing a prisoner with the general population.⁴⁹

Kansas has not executed anyone since 1965, so there has been no attrition of the number of people serving death sentences due to execution. It appears, then, that if the death penalty had been abolished in, say, 2014, there would have been some subsequent savings associated with moving death-sentenced prisoners out of administrative segregation. Now if administrative segregation is no longer used for death-sentenced prisoners, that potential savings would no longer apply in the future.

Is there any way in which the death penalty may reduce the cost of litigating murder cases?

There is no persuasive empirical evidence supporting the conclusion that the death penalty reduces the cost of litigating murder cases.

First, some suggest that some number of defendants in capital murder cases may be more likely to plead guilty as part of a bargain to avoid the death penalty, which one would think would save the state the cost of a trial. However, this potential savings has not been demonstrated.⁵⁰

Moreover, the costs incurred by a case that is charged capitally begin to incur immediately, given the more substantial pre-trial motion practice, investigation, and attorney team size; it is quite possible that a case that is prosecuted capitally and ultimately settled through a guilty plea would end up being more costly to the state than if it had been prosecuted non-capitally and went to trial.

Second, some have argued that the threat of the death penalty has some deterrent value, and in particular reduces the number of (premeditated) murders. If so, in addition to the obvious benefit to public safety, the resulting reduction in the number of murders would result in savings that should be netted out against the extra costs described above. But persuasive evidence for this deterrent effect is lacking, and there are plausible mechanisms by which abolition of the death

⁴⁷ Kan. Dep’t. of Corrections, Policy Memorandum 21-01-001 (Jan. 19, 2021), <https://www.doc.ks.gov/kdoc-policies/AdultIMPP/chapter-12/12-136/view>.

⁴⁸ <https://www.doc.ks.gov/facilities/faq/custody>.

⁴⁹ 2009 Report, at 13.

⁵⁰ Kuziemko, I. (2006). “Does the Threat of the Death Penalty Affect Plea-Bargaining in Murder Cases? Evidence from New York’s 1995 Reinstatement of Capital Punishment,” 8 American Law and Economics Review 116.

penalty may actually reduce the murder rate. For example, if the death penalty were abolished, then criminal-justice-system resources currently devoted to capital cases would become available to prosecute other cases more intensively with the potential of preventing violent crime.⁵¹ In any event, the evidence on the net effect of the death penalty on the murder rate is so weak as to be irrelevant to reaching a conclusion on this matter.⁵²

Summing up.

In Kansas, as in other states, capital cases are more costly to adjudicate than they would have been if the death penalty had not been an option. These extra “super due process” costs have been documented in several earlier studies.⁵³

3. Analysis of Costs in Kansas

a. The definition of “cost”

We are interested in estimating the “cost” of the death penalty, but that term requires careful definition to be meaningful. The definition that is used here follows an earlier study of the costs of the death penalty in North Carolina,⁵⁴ and is similar to the definition used in the 2014 Report.

- State and local. “Cost” is the expenditures by state and local agencies in Kansas. Excluded from the accounting are private expenditures (by the defendant and his family, for example) or voluntary contributions by private citizens. Also excluded are any costs to the federal judicial system.
- Cash accounting. The accounting method utilized here to assess new costs is “cash accounting,” as opposed to “accrual accounting.”⁵⁵ The difference is largely a matter of timing. Cash accounting records a cost at the time of payment. Accrual accounting records a cost at the time it is obligated, even if payment is in the future. In the case of the death penalty, accrual accounting is speculative. When a death sentence is imposed, it is likely to initiate a costly process in the state and possibly federal courts that may continue for decades. The trajectory of the case following sentencing is highly uncertain, and may depend in part on future US Supreme Court rulings and new state laws. Documenting actual expenditures for some period of time (cash accounting) entails fewer assumptions and is as relevant to understanding the cost burden of the death penalty as accrual accounting.

⁵¹ See 2003 Report; 2004 Report, 2014 Report, 2021 Report.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498 (2009).

⁵⁵ Jae K. Shim Ph.D., Joel G. Siegel Ph.D. CPA, et al., *Barron's Accounting Handbook* (Nov 1, 2014).

- Counterfactual. We seek to estimate the extra cost of processing capital murder cases that resulted from the procedural requirements associated with the death penalty. We focus on the 5-year period 2014 to 2018. One way to understand this accounting is as a comparison between actual costs and the costs that would have been incurred if the state had abolished the death penalty at the beginning of that period. In this hypothetical scenario, it is necessary to specify the alternative regime in some detail. In particular, we assume that the death sentence is no longer an option for cases that are capital eligible under current law. Conviction for capital murder would then result in LWOP. For the nine (9) individuals currently on death row, the death sentence would be replaced with LWOP.

b. Review of previous cost estimates for Kansas

Several reports on death penalty costs in Kansas have been issued by state agencies. The most notable studies have been the 2003 Report and the 2014 Report. Some additional information was provided by the Kansas Legislative Research Department in the 2021 Report. Each of these reports provides relevant information.

2003 Performance Audit Report. The 2003 Report estimates some costs for 22 murder cases that were tried and resulted in convictions between 1994 and 2003. During this period, there were 79 cases that met the statutory criteria for capital murder, of which 53 were capital charged, which is to say that the prosecutor filed notice of the intent to seek the death penalty.⁵⁶ The sample for this study included all 14 capital charged cases that went to trial. Seven (7) of those resulted in the death penalty and seven (7) in conviction but a sentence other than death.⁵⁷ In addition, the sample included eight (8) murder cases that were tried non-capitally, convicted, and given a long sentence.⁵⁸ Cases that were settled by guilty plea rather than trial were not included in this analysis.

Cost information was solicited from state and local agencies involved in all phases of the investigation and processing of murder cases, including local law enforcement officials, local courts and prosecutors, state courts, the Kansas Attorney General's Office, the Kansas Bureau of Investigation, BIDS, Legal Services for Prisoners, and the Department of Corrections.⁵⁹ For the most part, these agencies did not keep records of resources expended on specific cases, and instead provided rough estimates of costs incurred.⁶⁰

The report uses the accrual accounting perspective and attempts to project the costs of cases following conviction. At the time of the report, none of the death penalty cases had completed the entire appeals process and only two (2) had completed the first appeal.⁶¹ Although the Report

⁵⁶ 2003 Report, at 4, 22.

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 32.

⁵⁹ *Id.* at 1.

⁶⁰ As the 2003 Report notes, no agency tracks court costs or prosecutorial costs related to death penalty cases. *Id.* at 30.

⁶¹ 2003 Report at 2.

concluded that actual cost figures for death penalty and non-death penalty cases in Kansas are impossible to obtain due to limitations such as a failure to keep case-specific time records, difficulty predicting future appeals, and a failure of the Kansas Supreme Court to estimate time spent on capital cases, it did estimate that the median death penalty case cost the state \$1.2 million through execution, about 70 percent more than the estimated cost of a median non-death penalty case.⁶²

Here is a summary of the actual costs estimated for investigation and trial:

Table 4: Investigation and Trial costs to state and local government (all figures in thousands)

	Capital trial Conviction Death sentence N=7	Capital trial Conviction Other sentence N=7	Capital trial Conviction All cases N = 14	Non-capital trial Conviction Long prison sentence N=8
Total	\$5,205	\$2,034	\$7,239	\$878
Mean	\$744	\$291	\$517	\$110
Median	\$657	\$276	\$363	\$86

Source: 2003 Report, at 38.

The report notes that the samples are necessarily small, and that the costs of investigation and trial differ widely depending on the complexity of the case.⁶³ It appears that among the 14 capital trials, those that ultimately resulted in a death sentence were systematically more complex than the others since they were more costly. Ideally, there would be some way to adjust for the complexity of the case before making comparisons, but that was not attempted in the report. In the third column of Table 4 above, the 14 cases are combined. The combined category represents all capital trials in Kansas between 1994, when the death penalty was reinstated, and 2003. These 14 cases can be compared to the eight (8) cases that were utilized in this study to represent capital-eligible cases that were prosecuted non-capitally and resulted in a conviction at trial. Note that the average cost through conviction of the capitally prosecuted cases was nearly five (5) times as high as for the cases that were not prosecuted capitally (\$517,000 compared to \$110,000). This large difference in average costs is at least in part due to the “super due process” requirements that are unique to capital cases, discussed above.

We are seeking to understand how much those 14 capital trial cases would have cost the state if the death penalty had not been an option, but all else were the same. The sample of eight (8) non-capital murder cases serves as a valid basis for estimating the counterfactual if it is similar to the group of capitally prosecuted cases with respect to average complexity. We note that the

⁶² *Id.* at 10.

⁶³ *Id.* at 10-11.

eight (8) cases were capital eligible, at least at the time they were prosecuted, but detailed information about these cases is lacking. If we assume that they are similar to the 14 capital cases, then it is possible to compute the extra cost borne by the State as a result of proceeding capitally in the 14 capital cases. The 14 capital cases cost on average \$407,000 more than the average case that was not prosecuted capitally. The total extra cost for the period in question, 1994 – 2003, is then \$5,698,000, or about \$570,000 per year statewide. Thus, without the death penalty, processing these 14 murder cases through trial and conviction would arguably have been much less costly.

Finally, during that same 10-year period the death penalty imposed additional costs. The 2003 Report does not consider the additional costs of capital processing for eligible cases that resulted in a plea deal. In addition, the cost of the direct appeals to the Kansas Supreme Court for the seven (7) death-sentenced cases should be included and netted against the average cost of appeal for the murder cases that resulted in a lesser sentence. Those appeals were underway in 2003 but only completed for two (2) of these cases.

2014 Report by the Judicial Council Death Penalty Advisory Committee. The 2014 Report adopts a cash accounting framework for fiscal years 2004-2011 and, unlike the 2003 Report, includes all capital-eligible cases filed between 2004-2011.⁶⁴ During that eight-year period, the State incurred costs associated with 41 capital-eligible cases initiated during this period, and costs associated with appeals of death sentences and the consequences of those appeals. The 2014 Report also includes an accounting of the number of days that capital cases were in the trial court for any reason, including pre-trial motions, trial, and initial sentencing. These “court days” tabulations include both the cases included in the 2003 Report, and the “new” cases initiated during fiscal years 2004-2011.

The Committee sent surveys regarding 63 total cases (41 new capital eligible cases and 22 originally reviewed in the 2003 Report) to the Kansas Supreme Court, Attorney General’s Office, BIDS, Kansas Bureau of Investigation, district courts, local prosecutors’ offices, county clerks’ offices, and local sheriff and police departments.⁶⁵ A number of entities, including local prosecutors, police departments, and the Attorney General’s Office, either did not respond or could not provide the requested information as no case-specific records were kept.⁶⁶ The Committee was able to tabulate data on the number of days each case was in the trial court using docket sheets.⁶⁷

The following tabulations are based on the data presented in the 2014 Report and its detailed appendixes.

⁶⁴ 2014 Report, at 1; 5.

⁶⁵ *Id.* at 3.

⁶⁶ *Id.* at 3-4.

⁶⁷ *Id.* at 12.

Budgetary cost of defense and district trial court work through initial trial phase.

For the fiscal years 2004-2011, 41 cases that were deemed capital-eligible were initiated in Kansas courts. Of these, five (5) were eventually dismissed, and two (2) involved underage defendants, leaving the 34 cases that were the focus of the 2014 Report.⁶⁸ Prosecutors sought the death penalty in 19 of these cases, including 10 that went to trial.⁶⁹ We designate these cases as “capitally prosecuted” or just “capital.” As discussed above, a capital case requires a more extensive defense regardless of whether the case ultimately goes to trial. For the remaining 15 cases, six (6) went to trial.

The Committee grouped the 34 cases according to whether the prosecutor had sought the death penalty (“capital cases”) or not (“non-capital cases”). There were four (4) cases that were classified as “non-capital cases” in the 2014 Report even though the prosecutor had *initially* sought the death penalty. In our judgment those cases should be classified as “capital,” since they did generate extra costs for the early phase of the prosecution. We re-computed the relevant statistics accordingly. In practice, the statistical impact of this reclassification is small.

The Committee canvassed a number of state and local agencies to obtain cost estimates for these cases. The most comprehensive response was from BIDS. BIDS provided defense-cost estimates for 32 of the 34 cases, only lacking data on two (2) of the non-capital prosecutions.⁷⁰ Table 5, below, reports averages for these cases, grouped as in Table 4. The average defense cost for capital cases was \$257,000 and for non-capital cases was \$59,000 implying a difference of \$198,000. Since there were 19 capital cases initiated during the period 2004-2011, the implication is that the overall “extra” defense cost was \$3,762,000, or \$470,000 per year.

Table 5. Average BIDS Costs at trial phase for capital-eligible cases initiated FY 2004-2011
(all figures in thousands)

	Capital cases	Non-Capital Cases	Difference
Trial	\$367 (n=10)	\$97 (n=5)	\$271
Plea	\$135 (n=9)	\$35 (n=8)	\$99
Overall	\$257 (n=19)	\$59 (n=13)	\$198

Source: Computed from data in 2014 Report, Appendix A

Note: No data are available for 2 of the non-capital cases.

Table 6, below, shows similar cost data based on responses received from the district courts. District courts reported the operating costs associated with court days, including salary

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at Appendix A.

⁷⁰ *Id.* at 1, 7, Appendix A.

information.⁷¹ Extra costs to the district courts are associated with the extra days in court required for a capital prosecution. By the same computation as before, “extra” district court costs averaged \$38,000 per capital case. Since there were 19 capital cases, the total was added up to \$722,000, or about \$90,000 per year.

Table 6. Average District-Court Costs at trial phase for capital-eligible cases initiated FY 2004-2011 (all figures in thousands)

	Capital cases	Non-capital cases	Difference
Trial	\$69 (n=10)	\$17 (n=4)	\$52
Plea	\$16 (n=7)	\$3 (n=6)	\$13
Overall	\$47 (n=17)	\$9 (n=10)	\$38

Source: Computed from data in 2014 Report, Appendix A

Note: No data are available for 2 of the capital cases and 5 of the non-capital cases.

Combining defense costs and district court costs implies a combined average “extra” cost of \$560,000 per year incurred by the state during the 8-year period under consideration.

These estimates do not include the extra burden on prosecutors when representing the state for capital cases. The prosecutorial time devoted to a case during pre-trial and trial is in part indicated by the number of days in court (see below), as well as the time and effort devoted by the defense.

The 2014 Report also provided updated data on the costs of the 22 cases analyzed in the 2003 Report.⁷² BIDS reported that the costs of appeals for the seven (7) death-sentenced cases amounted to \$1,057,000, compared with just \$56,000 for the seven (7) cases that were initially capitally prosecuted but did not result in a death sentence, and therefore proceeded as a non-capital case on appeal.⁷³ Even smaller were the costs associated with the cases that were tried non-capitally, with a total of \$1,000 in representation costs on appeal.

All seven (7) of the death-sentenced cases incurred new costs in trial court following their direct appeals. In some cases the death penalty was vacated and the case returned for re-sentencing. The total cost to BIDS of trial-court representation was \$817,000, including resentencing.⁷⁴ There were zero costs associated with trial-court proceedings for cases that did not receive the death penalty.

⁷¹ 2014 Report, at 5.

⁷² *Id.* at 9-10.

⁷³ *Id.* at Appendix C.

⁷⁴ *Id.*

Total defense representation costs for the seven (7) cases sentenced to death prior to 2004 was \$1,874,000. There were essentially no costs for the murder cases that were convicted following a non-capital trial. The death-penalty-related cost averages to about \$234,000 per year for the period 2004-2011.

Days in court.

The Committee tabulated data on district-court appearances from court dockets for the 34 cases that formed the focus of the 2014 Report and the 21 cases that formed the focus of the 2003 Report (removing 1 juvenile case) for a total sample of 55 cases. Recall that the 2003 Report’s sample of cases is not comprehensive. It included all capital cases that went to trial but excluded those that were settled by plea. For that reason, the estimate of “extra” court days understates the true total. The case list used in the 2014 Report is comprehensive.

For each case, the number of days in which there were district court proceedings were tabulated. This count included court days for motions, trial, and sentencing. In Table 7, cases are grouped according to whether or not the prosecutor ever sought the death penalty (denoted “capital case”), and whether the case went to trial or was settled by a guilty plea. While the Committee classified four (4) cases in which the death penalty was initially sought but eventually withdrawn as non-capital, we classified these cases as capital. Our rationale is that those cases were capitally prosecuted for a while, which would have generated extra costs.

Table 7. Average number of court days for capital-eligible murder cases initiated between 1994 - 2011

	Capital cases	Non-Capital cases	Difference
Trial	39.5 [N=24]	16.2 [N=13]	23.4 [N=37]
Plea	15.2 [N = 9]	5.6 [N=9]	9.7 [N=18]
Overall	32.9 [N = 33]	11.8 [N=22]	21.1 [N=55]

Source: *Computed from data in 2014 Report, Appendix D*

Averages are much higher for cases that were prosecuted capitally both for those that went to trial and those that were settled by a guilty plea. In particular, the capitally prosecuted cases that went to trial utilized between 17 and 90 days in court with an average of 39.5, whereas the range for non-capital trials was from nine (9) to 30 with an average of 16.2 days.⁷⁵ Processing a capital case through trial takes on average over 23 additional days in district court than processing a

⁷⁵ *Id.* at Appendix D.

non-capital case through trial.⁷⁶ (That estimate presumes that the sample of capitally prosecuted cases is a reliable basis for estimating the number of court days that would have been required if they had been prosecuted non-capitally.) All together, capital prosecutions required 561.6 “extra” days in district court, or an average of over 31 additional days per year.

For cases that were settled by plea agreement, the capital cases required 9.7 more court days on average than the non-capital cases, adding substantially to the burden on court usage.

During that period, the trial courts also had proceedings in cases in which a death sentence was vacated on appeal, but no data is available on the number of court days for those proceedings.

Budgetary costs for appeals.

The 2014 Report also tabulates defense representation costs for appeals following convictions for cases initiated during fiscal years 2004-2011. Five (5) defendants were sentenced to death, and they generated almost all of the costs of representation on appeal: a total of \$844,000.⁷⁷ An additional five (5) cases were prosecuted capitally but did not result in a death penalty; representing them on appeal cost BIDS \$72,000, less than 10% of total cost of the death-sentenced cases.⁷⁸ The 15 cases that were not prosecuted capitally cost \$54,000 in BIDS cost of representation on appeal.

It is clear that for capital-eligible murder cases, the great bulk of representation costs on appeal are due to cases that are actually sentenced to death. If the death penalty had not been available, the savings to the state for extra representation costs associated with appeals and subsequent trial-court proceedings would have been about \$2,718,000, or \$340,000 per year during the period 2004-2011, as follows:

- \$1,057,000 – BIDS appellate representation of seven (7) sentenced to death before 2003
- \$817,000 – BIDS representation of those seven (7) defendants in subsequent trial-court proceedings
- \$844,000 – BIDS appellate representation of five (5) sentenced to death, 2003-2011
- \$2,718,000 – total, representation of all death-sentenced defendants, 2003-2011

The 2014 Report does not include estimates of the cost of representing the State during appeals and subsequent proceedings in trial court, although that cost is clearly substantial. It does offer some information on the Kansas Supreme Court’s burden associated with reviewing appeals. In response to a query, the Court estimated that over the previous three (3) years, the staff had devoted 13,600 hours to appeals of death-penalty cases.⁷⁹ Generally speaking, the Court devotes 20 times as much time to death-penalty appeals than other murder cases.

⁷⁶ 2014 Report, at 13.

⁷⁷ *Id.* at A-1.

⁷⁸ *Id.* at A-1.

⁷⁹ *Id.* at 11.

Summary estimate for the period 2004-2011.

The 2014 Report provides data to estimate several of the cost elements for the period 2004-2011. Gathering the estimates detailed above indicates a total of \$7,202,000 for this 8-year period, or \$900,000 per year:

- \$3,762,000 – Extra costs of defense at trial, capital cases filed 2004-2011
- \$722,000 – Extra district court costs for capital cases filed, 2004-2011
- \$2,718,000 – Representation of all death-sentenced defendants following sentencing
- \$7,202,000 – Total, defense representation and district court costs

We note again that these costs reflect actual expenditures by state and local government agencies during the period in question. The total omits several important costs for which no information was provided in the 2014 Report, including the extra costs of prosecution in capital cases, state representation during appeal of death sentences, and the cost to the Kansas Supreme Court of appellate review of death penalty cases. If data on these items were available, the annual figure would be well over \$1 million during that period.

c. New Kansas Cost Study on Costs During 2014-2018

Since the 2014 Report, the death penalty has continued to generate extra costs to state and local government, both from murder cases in which the prosecutor chose to seek the death penalty, and from appeals and other litigation involving defendants who were previously sentenced to death. In this section, we focus on the 5-year period 2014-2018, and seek to estimate the extra death-penalty-related cost of processing murder cases. As explained above, we use a cash-accounting framework for this period and pose the question of how much money the State would have saved on processing murder cases if the death penalty had been abolished before 2014.

Court activity related to the death penalty, 2014-2018.

During these five (5) years, 22 capital-eligible murder cases were filed in Kansas district courts. In nine (9) of these cases the prosecutor filed notice of seeking the death penalty. One of the defendants was sentenced to death (Cross) and three ended in a plea agreement. Eleven (11) of the 22 filed cases were not resolved during the 5-year window, and in fact five (5) of the capitally prosecuted cases are still pending as of 2022.

Ten other capital-eligible cases were filed before 2014 but were concluded in district court during the 5-year window of interest and hence generated costs during that period. One of these cases (Flack) was filed in 2013 and the defendant was convicted and sentenced to death in 2016.

In sum, there were a total of 17 capital murder cases that were resolved or filed during the period 2014-2018. Only two (2) of these cases were both filed and resolved during that period.

As of January 1, 2014, there were eight (8) death-sentenced prisoners in Kansas whose cases were under appeal before the Kansas Supreme Court or otherwise litigated during the 2014-2018 window.⁸⁰

Extra Costs of Defense.

To review, the extra cost generated by the death penalty to the State includes, but is not limited to, the following items:

1. The extra cost of defense during the trial phase in capital cases, and representation of death-sentenced defendants during direct appeal and subsequent litigation;
2. The extra cost of prosecution during the trial phase in capital cases, and representation of the State during direct appeal and subsequent litigation involving death-sentenced defendants; and
3. The extra cost to the district courts resulting from the greater number of days in court (associated with motion practice and longer trials) and Kansas Supreme Court (due to death penalty appeals), as well as the likelihood that death-sentenced cases return to district court following a successful appeal.

Unfortunately, there is scant data available for quantifying these costs. The best available information is on the costs of indigent defense, which is provided by BIDS. The annual BIDS budgets break out the budget for “Capital Defense.”

“Capital Defense represents individuals charged with capital cases, administers a system by which courts may appoint qualified attorneys to represent indigents charged with capital offenses, serves as a resource for attorneys assigned to capital cases, develops training programs and materials for persons involved in capital cases, maintains statistical records about the use of capital punishment, and provides expert and investigative services to trial counsel in capital cases.

“Expenditures for the unit include costs of in-house defense, contracts with private attorneys in conflict cases or because of staff overload, and costs associated with capital cases on appeal.”⁸¹

The actual budget for Capital Defense doubled between FY2014 and FY2018 and was still larger in FY2019, reaching nearly \$3 million in that year. This increase is associated with the increasing costs of death-penalty appeals and other litigation from cases that had first been sentenced years before.

⁸⁰ Kleypas, Robinson, J. Carr, R. Carr, Gleason, Cheever, Thurber, Kahler.

⁸¹ Kansas Legislative Research Department, *Budget Analysis Report FY17, Board of Indigent Defense Services*, 233, <http://www.kslegresearch.org/KLRD-web/Publications/BudgetBookFY17/2017BudgetAnalysisRpts/BIDS.pdf> (“FY2017”).

Fiscal Year Budget (all figures in thousands)

2014	1,185.4 ⁸²
2015	1,523.5 ⁸³
2016	1,662.2 ⁸⁴
2017	1,943.3 ⁸⁵
2018	2,430.6 ⁸⁶
2019	2,966.7 ⁸⁷

The Kansas fiscal year begins July 1, while our 5-year window follows the calendar year. An estimate of total BIDS expenditures on capital defense for the five (5) calendar years (2014-2018) is \$9,635,600, which includes half of the FY2014 budget and half of the FY2019 budget. Thus the expenditure for indigent defense during this period averaged \$1,927,800 annually, or close to \$2 million.

The BIDS summary budget does not distinguish between defense expenditures during the trial phase, and defense expenditures for death-sentenced defendants. During the trial phase, the counterfactual (no death sentence, so no “super due process” requirements) would apply to cases in which the prosecutor was seeking the death sentence. Defense representation would have been costly even if the death sentence were not available. Based on the data from the 2014 Report, we estimate that the cost of defense of capital-eligible murder cases in which the prosecutor did not seek the death penalty averaged \$59,000. An adjustment for general inflation implies an increase to over \$69,000 (based on Consumer Price Index, which increased 17.6% from 2007 to 2016). That estimate can be applied to the two (2) capital cases that were filed and resolved during the window, and a share of these expenses to the 15 cases that were either resolved during the window (but filed earlier), or filed during the window (but not resolved). We assume that half the total expense of defense was incurred for those cases. The 15 partial cases are then the equivalent of 7.5 complete cases, for a total of 9.5. The implied cost (9.5 x \$69,000)

⁸² Kansas Legislative Research Department, *Budget Analysis Report FY16, Board of Indigent Defense Services*, 1206, <https://www.kslegresearch.org/KLRD-web/Publications/BudgetBookFY16/2016BudgetAnalysisRpts/BIDS.pdf>.

⁸³ FY2017, at 233.

⁸⁴ Kansas Legislative Research Department, *Budget Analysis Report FY18, Board of Indigent Defense Services*, 942, <https://www.kslegresearch.org/KLRD-web/Publications/BudgetBookFY18/2018BudgetAnalysisRpts/BIDS.pdf> (“FY2018”).

⁸⁵ Kansas Legislative Research Department, *Budget Analysis Report FY19, Board of Indigent Defense Services*, 240, <http://www.kslegresearch.org/KLRD-web/Publications/BudgetBookFY19/2019BudgetAnalysisRpts/BIDS.pdf> (“FY2019”).

⁸⁶ Kansas Legislative Research Department, *Budget Analysis Report FY20, Board of Indigent Defense Services*, 1135, <http://www.kslegresearch.org/KLRD-web/Publications/BudgetBookFY20/2020BudgetAnalysisRpts/BIDS.pdf>.

⁸⁷ Kansas Legislative Research Department, *Budget Analysis Report FY21, Board of Indigent Defense Services*, 1180, <https://www.kslegresearch.org/KLRD-web/Publications/BudgetBookFY21/2021BudgetAnalysisRpts/BIDS.pdf>.

is \$655,500, the cost of defending these cases without possibility of the death penalty. No such deduction is needed for the cost of death-penalty appeals and other litigation following sentencing, since the cost of representing LWOP-sentenced defendants on appeal has generally been negligible in practice.

Much of the BIDS Capital Defense budgets support representation of death-sentenced defendants on appeal. It is informative in this respect to read some of the notes in the BIDS budget justification:

- In the FY2018 budget request, BIDS requested \$380,000 as a supplement in FY2017 “in order to provide counsel for state capital habeas proceedings in two capital punishment cases: the John E. Robinson case (\$200,000) and the Scott Cheever case (\$180,000).”⁸⁸
- The 2017 Legislature added \$1.1M for FY2018 and \$1.4M for FY2019 for state capital habeas proceedings, estimated by case as: Robinson (\$350,000 in each FY2018 and FY2019), Cheever (\$200,000 in each FY2018 and FY2019), Gleason (\$250,000 in FY2018 and FY2019), the Carr brothers (\$250,000 in each FY2018 and FY2019), and Kleypas (\$300,000 in FY2019).⁸⁹

Additionally, from FY2017 to FY2019, the capital defense unit increased in staff size from 18⁹⁰ positions to 27 in-house capital defense positions. As noted before the increase, “two capital habeas unit attorneys oversee seven cases and four death penalty unit attorneys oversee ten cases.”⁹¹ The capital defense program has been a growing fraction of the overall BIDS budget and number of full time employees.

In sum, the BIDS capital defense budget for the 5-year window was \$9,635,600. From this amount we deduct an estimate of the cost of defending the capital cases under the counterfactual assumption that they had been prosecuted non-capitally, \$655,500. The net amount is then \$8,980,100.

Extra cost of prosecution and representation of the State.

The Attorney General’s Office is responsible for representing the State of Kansas in appeals before state and federal appellate courts, and for providing legal advice, support, and aid to Kansas counties and district attorneys (The 2003 Report found that the bulk of prosecution costs in capital cases was incurred by the State as opposed to local jurisdictions).⁹² Unfortunately the Attorney General’s Office has not provided budget information or other information relevant to

⁸⁸ FY2018, at 946.

⁸⁹ FY2018, at 949, 953; FY2019, at 237

⁹⁰ FY2019, at 250;

⁹¹ FY2019, at 243; FY2021, at 1089.

⁹² 2003 Report, at 9-10.

cost of representation.⁹³ Local jurisdictions also failed to provide any data on the costs of prosecution.

In the absence of any directly relevant data, we can only estimate the extra cost of prosecuting capital cases to the State during appeals and post-conviction proceedings for death-sentenced defendants. Some guidance is provided by the 2003 Report, which found that defense expenditures were 5.3 times as high as prosecution expenses in capital cases.⁹⁴ That was for the trial phase, and does not necessarily apply to litigation following a death sentence. Assuming the ratio applies to both, and that it is a reasonable approximation during the period under consideration, we can estimate the cost of prosecution and representation of the state to have been \$1,818,000 during 2014-2018. From that must be deducted the counterfactual cost of prosecuting the capital cases non-capitally. Assuming the cost for a non-capital prosecution is similar to the cost of defense in such cases, we use the same deduction of \$655,500. As a result, we estimate the extra costs of prosecution due to the death penalty for 2014-18 was \$1,162,500.

Extra cost in District Courts.

We can follow a similar strategy to estimate the costs in the District Courts from 2014-2018. Based on our analysis of the 2014 Report, we estimated that the extra costs of capital cases to the District Courts amounted to \$38,000 per case.⁹⁵ Multiplying this by the 9.5 cases during our 5-year period, and taking inflation into account, results in a total estimate of \$425,000.

Summary estimate of Extra Costs 2014-2018.

We estimate that Kansas state and local agencies incurred the following extra costs between 2014-2018:

- \$8,980,100 –Defense in capital cases and subsequent representation of death-sentenced defendants;
- \$1,162,500 – Prosecution in capital cases and representation of the State for appeal of death sentences;
- \$425,000 District courts; and
- \$10,567,600 – Total sum of defense, prosecution, and district court costs.

Our conclusion is that these extra costs amounted to approximately \$2.1 million per year to state and local agencies.

⁹³ See Appendix C.

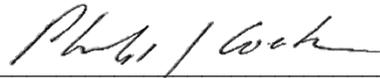
⁹⁴ 2003 Report, at 12, Appendix D (showing the prosecution cost for the 14 capital cases totaled \$750,000, and the defense totaled \$3,962,000).

⁹⁵ 2014 Report, Appendix A.

This estimate understates the true total of public costs, since it omits the costs to the Kansas Supreme Court of processing death-penalty appeals, and the extra costs of holding death-sentenced prisoners in administrative segregation, which was required from 2014-2018.

We deliberately excluded any extra costs to private citizens, including defendants and their families. We also excluded the costs to federal courts; for example, the Supreme Court of the United States heard several appeals of rulings by the Kansas Supreme Court concerning the constitutionality of the death penalty during the period under consideration.

The bottom line is that the death penalty cost government agencies in Kansas over \$2 million per year during the period 2014-2018. If the death penalty had been abolished before 2014, that amount could have been returned to taxpayers or reallocated to serving other public purposes.



Philip J. Cook



Frank R. Baumgartner

REFERENCES

- Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 Loy. L.A. L. Rev. S41 (2011).
- Baumgartner, Frank R., Marty Davidson, Kaneesha R. Johnson, Arvind Krishnamurthy, and Colin P. Wilson. 2018. *Deadly Justice: A Statistical Portrait of the Death Penalty*. New York: Oxford University Press. See especially Chapter 14, Why Does the Death Penalty Cost So Much?, co-authored with Justin Cole.
- Cal. Comm'n on the Fair Admin. of Just., *Report and Recommendations on the Administration of the Death Penalty in California* (June 30, 2008), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs>.
- Ben Cohen, Calvin Johnson & William P. Quigley, *An Analysis of the Economic Cost of Maintaining a Capital Punishment System in the Pelican State*, 21 Loy J. Pub. Int. L. 1 (2019).
- Peter A. Collins, Robert C. Boruchowitz, Matthew J. Hickman & Mark A. Larrañaga, *An Analysis of the Economic Costs of Seeking the Death Penalty in Washington State* (2016), <http://www.deathpenaltyinfo.org/documents/WashingtonCosts.pdf>.
- Peter A. Collins, Matthew J. Hickman & Robert C. Boruchowitz, *An Analysis of the Economic Costs of Capital Punishment in Oklahoma* (2017), <https://deathpenaltyinfo.org/files/pdf/Report-of-the-OK-Death-Penalty-Review-April-2017-a1b.pdf>.
- Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 Am. L. & Econ. Rev. 498 (2009).
- Philip J. Cook & Donna B. Slawson, *The Costs of Processing Murder Cases in North Carolina*, Terry Sanford Inst. of Pub. Pol'y Duke Univ. (Aug. 17, 2016), <https://deathpenaltyinfo.org/files/pdf/northcarolina.pdf>.
- Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis* (2009), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/smart-on-crime-reconsidering-the-death-penalty-in-time-of-economic-crisis>.
- Richard C. Dieter, *Testimony Before the Pennsylvania Senate Government Management and Cost Study Commission* (June 7, 2010), <https://deathpenaltyinfo.org/stories/testimony-of-richard-c-dieter-executive-director-death-penalty-information-center-before-the-pennsylvania-senate-government-management-and-cost-study-commission-on-the-costs-of-the-death-penalty-and-its-lack-of-return>.

Mary E. Forsberg, *Money for Nothing? The Financial Cost of New Jersey's Death Penalty*. N.J. Pol'y Persp. (Nov. 2005), <http://sentencing.nj.gov/downloads/pdf/articles/death3.pdf>.

Ernest Goss, Scott Strain & Jackson Blalock, *The Economic Impact of the Death Penalty on the State of Nebraska: A Taxpayer Burden?* (2016), <http://www.gossandassociates.com/app/download/5744800/Goss+Death+Penalty+final.pdf>.

The High Price of Killing Killers, Palm Beach Post (Jan. 4, 2000), <https://deathpenaltyinfo.org/stories/the-high-price-of-killing-killers>.

John G. Morgan, *Tennessee's Death Penalty: Costs and Consequences*, Comptroller of the Treasury Office of Rsch. (July 2004), <http://www.deathpenaltyinfo.org/documents/deathpenalty.pdf>.

John Roman, Aaron Chalfin, Aaron Sundquist, Carly Knight & Askar Dardenov, *The Cost of the Death Penalty in Maryland* (2008), <http://www.deathpenaltyinfo.org/CostsDPMaryland.pdf>.

Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services Judicial Conference of the United States: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* (2010), <https://deathpenaltyinfo.org/documents/FederalDPCost2010.pdf>.

Judicial Council Death Penalty Advisory Committee. 2014. *Report of the Judicial Council Death Penalty Advisory Committee* (Topeka, KS: Kansas Judicial Council).

Judicial Council Death Penalty Advisory Committee. 2004. *Report of the Judicial Council Death Penalty Advisory Committee* (Topeka, KS: Kansas Judicial Council).

Justin F. Marceau & Hollis A. Whitson, *The Cost of Colorado's Death Penalty*, 3 Univ. of Denv. Crim. L. Rev. 145 (2013).

Kansas Legislative Research Department. 2021. *Death Penalty in Kansas* (Topeka, KS: Kansas Legislative Research Department).

Kansas Legislative Division of Post-Audit. 2003. *Performance Audit Report. Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections*.

Aliza B. Kaplan, *Oregon's Death Penalty: The Practical Reality*, 17 Lewis & Clark L. Rev. 1 (2013).

Legislative Division of Post Audit. 2003. *Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections* (Topeka, KS: Legislative Division of Post Audit).

- Legis. Servs. Agency, *The Cost of Seeking the Death Penalty in Indiana* (2015).
- Natasha Minsker, *The Hidden Death Tax: The Secret Costs of Seeking Execution in California* (2009).
- National Research Council. 2012. *Deterrence and the Death Penalty*, ed. Daniel S. Nagin and John V. Pepper (Washington, DC: The National Academies).
- Off. of Performance Evaluations Idaho Legis., *Financial Costs of the Death Penalty* (2014), <http://www.legislature.idaho.gov/ope/publications/reports/r1402.pdf>.
- State of Nev. Legis. Council Bureau, *State of Nevada Performance Audit: Fiscal Costs of the Death Penalty* (2014), <http://www.deathpenaltyinfo.org/documents/NevadaCosts.pdf>.
- Terance D. Miethe, *Estimates of Time Spent in Capital and Non-Capital Murder Cases: A Statistical Analysis of Survey Data from Clark County Defense Attorneys* (2012), <http://www.deathpenaltyinfo.org/documents/ClarkNVCostReport.pdf>.
- Wash. State Bar Ass'n., *Final Report of the Death Penalty Subcommittee of the Committee on Public Defense* (2006), https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/death-penalty-report.pdf?sfvrsn=120301f1_14.

APPENDIX A

December 8, 2021

PHILIP JACKSON COOK

Terry Sanford Professor Emeritus of Public Policy Telephone: 919 613-7360
Professor Emeritus of Economics and Sociology FAX: 919 681-8288
Sanford School of Public Policy
Box 90545
Duke University E-mail: pcook@duke.edu
Durham, NC 27708

Education:

B.A. (with high distinction) University of Michigan, 1968
Ph.D. (Economics) University of California, Berkeley, 1973

Positions held:

2017-	Terry Sanford Professor Emeritus of Public Policy, Professor Emeritus of Economics
2018-2019	Visiting scholar, Collegio Carlo Alberto, Turin, Italy (4 months total)
2014-15	Fellow, Russell Sage Foundation, New York
2009-2013	Senior Associate Dean for Faculty, Sanford School of Public Policy
2008-9	Schelling Visiting Professor of Public Policy, University of Maryland
2003	Residency, Bellagio Study and Conference Center (September-October)
2000	Visiting Scholar, Kennedy School of Government, Harvard University
1997-99	Director, Sanford Institute of Public Policy; Chair, Department of Public Policy Studies
1994-2017	ITT/Terry Sanford Professor of Public Policy
1992-2017	Professor of Public Policy Studies, Economics, & Sociology, Duke University
1989-90	Visiting Professor, Fuqua School of Business, Duke University
1985-89	Director, Institute of Policy Sciences and Public Affairs, Duke University and Chairman, Department of Public Policy Studies

- 1984-2017 Professor of Public Policy and Economics, Duke University
- 1979-84 Associate Professor; 1973-79 Assistant Professor, Duke University
- 1982 Expert (part time) Office of Policy and Management Analysis, Criminal Division, U.S. Department of Justice
- Fall 1980 Visiting Scholar, Institute for Research in Social Science, University of North Carolina, Chapel Hill

Fellowships and Academic Honors:

Stockholm Prize in Criminology, 2020
 Fellow of the Academy of Experimental Criminology, 2012-
 Raymond Vernon Memorial Prize for best paper in *JPAM*, 2008
 Richard A. Stubbing Teacher Mentor Award, 2008
 Member, National Academy of Medicine (formerly Institute of Medicine), 2001-
Who's Who in America 2001 and subsequent issues
 Fellow of the American Society of Criminology, 2000-
 Vernon Prize for best paper in *Journal of Policy Analysis & Management* (v. 16), 1997
 Research Associate, National Bureau of Economic Research 1996-
Who's Who in Economics 3rd edition (1996)
 Kenneth J. Arrow Award (for best paper published in health economics), 1994
 National Science Foundation Fellowship, 1968-1970
 Special Career Fellowship (Ford Foundation), 1968-1972
 National Merit Scholar, 1964-1968
 Sims Award, Economics Department, University of Michigan, 1967
 Phi Beta Kappa

Publications

A. Health and Safety Regulation

1. Books and Edited Volumes

PJ Cook and JW Vaupel, eds. Law and Contemporary Problems, Autumn 1976. Symposium entitled "Valuing Lives: When and How Should Society Spend its Scarce Resources to Decrease Mortality"

PJ Cook, ed. Law and Contemporary Problems, Winter 1988. Symposium entitled "Vice."

PJ Cook and A Scharff, Recommendations Concerning Administration and Rate Structure for Excise Taxation in Romania Distributed by Tax Advisory Program, US Treasury Department, August 1994.

Paying the Tab: The Economics of Alcohol Policy Princeton, NJ: Princeton University Press, 2007. Paperback edition 2016.
Chapters 10 and 12 serialized in Milken Economic Review 10(1) First Quarter, 2008

PJ Cook and K Krawiec, eds. Law and Contemporary Problems. Symposium entitled "Organs and Inducements" 77(3), 2014.

2. Articles

PJ Cook and D Graham "The Demand for Insurance and Protection: The Case of Irreplaceable Commodities" Quarterly Journal of Economics, February 1977, 143-156. Reprinted in Georges Dionne and Scott Harrington (eds.) Foundations of Insurance Economics Kluwer Academic Press, 1991.

"The Value of Human Life in the Demand for Safety: Comment" The American Economic Review, September 1978, 710-711.

"Discussion" (on Martin Bailey's paper on Safety Decisions and Insurance) American Economics Association Papers and Proceedings, May 1978, 300.

"The Effect of Liquor Taxes on Drinking, Cirrhosis, and Auto Fatalities," in Mark Moore and Dean Gerstein, eds. Alcohol and Public Policy: Beyond the Shadow of Prohibition, National Academy of Sciences, 1981, 255-285; and in Richard Zeckhauser and Derek Leebaert, eds. What Role for Government? Duke University Press, 1983, 203-220.

PJ Cook and G Tauchen "The Effect of Liquor Taxes on Heavy Drinking" Bell Journal of Economics, Autumn 1982, 379-390.

"Alcohol Taxes as a Public Health Measure" British Journal of Addiction, September 1982, 245-250; and in Marcus Grant, Martin Plant, and Alan Williams, eds. Economics and Alcohol, Croom Helm Ltd., 1983.

PJ Cook and G Tauchen, "The Effect of Minimum Drinking Age Legislation on Youthful Auto Fatalities, 1970-77" Journal of Legal Studies 13, January 1984, 169-190. *reprinted in The Economics of Health Behaviours*, John H. Cawley and Donald S. Kenkel, eds., Cheltenham, UK: Edward Elgar Publishing Ltd., 2008.

"Increasing the Federal Alcohol Excise Tax" in Dean Gerstein, ed. Toward the Prevention of Alcohol Problems: Government, Business, and Community Action, National Academy Press, Washington, DC, 1984, 24-32.

"The Economics of Alcohol Consumption and Abuse" in Louis Jolyon West, ed. Alcoholism and Related Problems: Issues for the American Public, Prentice-Hall, 1984, 56-77.

"The Impact of Distilled Spirits Taxes on Consumption, Auto Fatalities and Cirrhosis Mortality" Control Issues in Alcohol Abuse Prevention: Strategies for States and Communities in Harold D. Holder, ed., Advances in Substance Abuse, Suppl: 1, Jai Press, Greenwich, CT, 1987, Pages 159-167.

"Comment" in John D. Graham (ed.) Preventing Automobile Injury: New Findings for Evaluation Research, Dover, MA: Auburn House Publishing Company, 1988, pp. 181-183.

DC Chapman, PJ Cook *et al.* "The Cultural Dimensions of Alcohol Policy Worldwide", Health Affairs, summer 1989, 48-62.

"The Social Costs of Drinking," in The Expert Meeting on the Negative Social Consequences of Alcohol Abuse Norwegian Ministry of Health and Social Affairs, Oslo, Norway, 1991.

PJ Cook and MJ Moore "Taxation of Alcoholic Beverages" in M. Hilton and G. Bloss, eds. Economic Research on the Prevention of Alcohol-Related Problems, NIAAA, NIH Publication No. 93-3513, 1993, 33-58.

PJ Cook and MJ Moore "Economic Perspectives on Reducing Alcohol-Related Violence" in Susan E. Martin, ed. Alcohol and Interpersonal Violence: Fostering Multidisciplinary Perspectives NIH Publication No. 93-3496, 1993, 193-212.

PJ Cook and MJ Moore "Violence Reduction through Restrictions on Alcohol Availability" Alcohol Health & Research World 17(2), 1993, 151-156.

PJ Cook and MJ Moore "Drinking and Schooling" Journal of Health Economics, 12, 1993, 411-429. *reprinted in* The Economics of Health Behaviours, John H. Cawley and Donald S. Kenkel, eds., Cheltenham, UK: Edward Elgar Publishing Ltd., 2008.

P.J. Cook and O-J Skog, "Alcool, alcoolisme, alcoolisation" by S. Ledermann" Alcohol Health & Research World 19(1), 1995, 30-32.

"Social Costs of Alcohol, Tobacco and Drug Abuse" and "Tax Laws, Alcohol" in J.H. Jaffe, ed. The Encyclopedia of Drugs and Alcohol, New York: Macmillan Publishing Co, 1996.

"Comment" in Brookings Papers on Economic Activity: Microeconomics, 1994 162-166.

PJ Cook and MJ Moore "This Tax's for You" National Tax Journal September 1994, pp. 559-573.

KE Warner, PJ Cook, *et al.* "Criteria for Determining an Optimal Cigarette Tax: the Economists' Perspective" Tobacco Control Winter 1995 4(4), 380-86.

PJ Cook, A Parnell, MJ Moore, D Pagnini. "The Effects of Short-Term Variation in Abortion Funding on Pregnancy Outcomes" Journal of Health Economics 1999 18(2), 241-258. *reprinted in* The Economics of Health Behaviours, John H. Cawley and Donald S. Kenkel, eds., Cheltenham, UK: Edward Elgar Publishing Ltd., 2008.

PJ Cook and MJ Moore, "Alcohol" in AJ Culyer and JP Newhouse, eds. Handbook of Health Economics Vol 1B (New York: North-Holland) 2000, 1629-1673.

PJ Cook and MJ Moore, "Environment and Persistence in Youthful Drinking Patterns" in J Gruber, ed. Risky Behavior Among Youths: An Economic Analysis (Chicago: University of Chicago Press), 2001, 375-437.

PJ Cook and MJ Moore, "The Economics of Alcohol Abuse and Alcohol-Control Policies" Health Affairs 21(2), March/April 2002: 120-133.

"Pricing and Taxation of Alcohol: What is the 'Right' Tax Rate? Comment on *Alcohol: No Ordinary Commodity*" Addiction, 98 (10), October 2003: 1356-7.

PJ Cook, J Ostermann, and FA Sloan "The Net Effect of an Alcohol Tax Increase on Death Rates in Middle Age" American Economic Review 95(2), May 2005: 278-281.

PJ Cook and P Reuter "When is Alcohol Just Another Drug" Addiction 102, June 2007: 1182-88.

PJ Cook and R Hutchinson "Smoke Signals: Adolescent Smoking and School Continuation" in Marina Bianchi (ed.) Advances in Austrian Economics Vol. 10, The Evolution of Consumption: Theories and Practices 2007: 157-188.

C Carpenter and PJ Cook “Cigarette Taxes and Youth Smoking: New Evidence from National, State, & Local Youth Risk Behavior Surveys” Journal of Health Economics 27(2), March 2008: 287-299.

“A Free Lunch” Journal of Drug Policy Analysis 1(1), article 2.
<http://www.bepress.com/jdpa/vol1/iss1/art2>

Comment on “Explaining change and stasis in alcohol consumption”
17:6 of Addiction Research & Theory Journal 17:6, December 2009.

“Leave the minimum drinking age to the states” in Natasha A. Frost, Joshua D. Freilich, and Todd R. Clear (eds.) Contemporary Issues in Criminal Justice Policy Belmont, MA: Wadsworth, 2009: 99-106.

FJ Chaloupka, PJ Cook, RM Peck, and JA Tauras “Enhancing compliance with tobacco control policies” in Peter Bearman, Kathryn M. Neckerman, and Leslie Wright, eds. After Tobacco New York: Columbia University Press, 2011: 325-350.

P.J. Cook and Maeve Gearing, “The minimum drinking age: 21 as an artifact” in Helene R. White & David L. Rabiner (eds.) College Student Drinking and Drug Use: Multiple Perspectives on a Complex Problem, Guilford Press 2011.

PJ Cook and Christina Piette Durrance, “The virtuous tax: Lifesaving and crime-prevention effects of the 1991 federal alcohol tax” Journal of Health Economics 32, 2013: 261-267.

PJ Cook and KD Krawiec, “A primer on kidney transplantation: Anatomy of the shortage” Law & Contemporary Problems 77(3) 2014: 1-24.

Frattoni, S, KM. Pollack, PJ Cook, M. Salomon, E Omaki and AC Gielen
“Public opinion concerning residential sprinkler systems for 1- and 2-family homes”
Injury Epidemiology 2015.

PJ Cook and KD Krawiec “If We Allow Football Players And Boxers To Be Paid For Entertaining The Public, Why Don’t We Allow Kidney Donors To Be Paid For Saving Lives?” Law & Contemporary Problems, 81(3), 2018: 9-35. Abstracted as “If Football Players Get Paid Why Not Kidney Donors?” Regulation Spring, 2018: 12-17.

J MacDonald Gibson, M Fisher, A Clonch, JM MacDonald, and PJ Cook "Children Drinking Private Well Water Have Higher Blood Lead Than Those with City Water"
Proceedings of the National Academy of Sciences for July 6,
2020 <https://doi.org/10.1073/pnas.2002729117>

3. Editorial and commentary

"Increasing the Federal Excise Taxes on Alcoholic Beverages" Journal of Health Economics 7(1), March 1988, 89-91.

PJ Cook and ME Gearing "The Breathalyzer Behind the Wheel" New York Times (Opinion) Aug. 30, 2009.

Alcohol Retail Privatization: A Commentary, American Journal of Preventive Medicine, vol. 42 no. 4 (April, 2012), pp. 430-432

Drug Policy Research. (letter to the editor) Issues in Science and Technology. Sept. 22, 2012.

Commentary: Evidence from a high-income country, Addiction (2012)

PJ Cook and KD Krawiec Kidney Donation and the Consent of the Poor. Loyola Law Review, New Orleans 66, 2020.

B. Economics of State Lotteries

1. Book

CT Clotfelter and PJ Cook Selling Hope: State Lotteries in America Harvard University Press, 1989. Paperback edition, 1991.

2. Articles

CT Clotfelter and PJ Cook "Implicit Taxation in Lottery Finance" National Tax Journal, December, 1987

CT Clotfelter and PJ Cook "Redefining 'Success' in the State Lottery Business" Journal of Policy Analysis and Management 9(1), Winter 1990, 99-104.

CT Clotfelter and PJ Cook "On the Economics of State Lotteries" Journal of Economic Perspectives, Fall, 1990, 105-120.

Reprinted (in shorter version) in The Conference Board Economic Times 2(4), April 1991. Reprinted (in revised version) in Samuel H. Baker and Catherine S. Elliott, eds. Readings in Public Finance 2nd ed., Cincinnati: South-Western College Publishers, 1997, 457-472.

CT Clotfelter and PJ Cook "What Kind of Lottery for North Carolina?" Popular Government 56(4), Spring 1991, pp. 25-29.

CT Clotfelter and PJ Cook "Lotteries in the Real World", Journal of Risk and Uncertainty 4(3), July 1991, 227-232. Reprinted in Leighton Vaughan Williams (ed.) The Economics Of Gambling And National Lotteries Edgar Elgar Publishers, 2012.

CT Clotfelter and PJ Cook "Lotteries", in Peter Newman, Murray Milgate, and John Eatwell, eds. The New Palgrave Dictionary of Money and Finance Macmillan Press, London, 1992.

PJ Cook and CT Clotfelter "The Peculiar Scale Economics of Lotto" American Economic Review, June 1993, 634-643.

CT Clotfelter and PJ Cook "The Gambler's Fallacy in Lottery Play", Management Science, December 1993. Reprinted in Leighton Vaughan Williams (ed.) The Economics Of Gambling And National Lotteries Edgar Elgar Publishers, 2012.

CT Clotfelter, PJ Cook, J Edell, and M Moore, State Lotteries at the Turn of the Century: Report to the National Gambling Impact Study Commission. June 1, 1999.

CT Clotfelter and PJ Cook, "Ends and Means in State Lotteries: The Importance of a Good Cause" in Alan Wolfe and Erik C. Owens, eds. Gambling: Mapping the American Moral Landscape Waco: Baylor University Press, 2009, 11-38.

3. OpEd. Pieces (with Charles T. Clotfelter)

New York Times, August 20, 1987;

The Atlanta Constitution, February 12, 1989;

The News and Observer (Raleigh), May 27, 1990;

Newsday, July 24, 1990;

San Diego Union, April 1991.

The News & Observer (Raleigh), February 14, 1999

The News & Observer (Raleigh), March 1, 2007

C. Crime and Criminal Justice Policy

1. Monographs and Edited Volumes

Robbery in the United States, National Institute of Justice, September 1983.

PJ Cook and D Slawson The Costs of Adjudicating Murder Cases in North Carolina Administrative Office of the Courts, Raleigh, NC, 1993.

PJ Cook, J Ludwig, and J McCrary (eds.) Controlling Crime: Strategies and Tradeoffs Chicago: University of Chicago Press, 2011.

PJ Cook, S Machin, O Marie and G Mastrobuoni (eds.) Lessons from the Economics of Crime: What Reduces Offending? Cambridge, MA: MIT Press, 2013.

2. Symposium editor

"Explaining the growth in the prison population" Criminology and Public Policy 8(1), February 2009.

3. Articles

"The Correctional Carrot: The Prospect of Reducing Recidivism through Improved Job Opportunities" Policy Analysis, January 1975, 11-54.

Reprinted in The Economics of Crime, edited by Isaac Ehrlich and Zhiqiang Liu Northampton, MA: Edward Elgar Publishing, Inc., 2006.

"Punishment and Crime: A Critique of Recent Findings on the Preventive Effects of Punishment" Law and Contemporary Problems, Winter 1977, 164-204; and in Ralph Andreato and John Siegfried, eds. The Economics of Crime, John Wiley, 1980, 137-180.

"The Clearance Rate as a Measure of Criminal Justice System Effectiveness" Journal of Public Economics 11, 1979, 135-142; and in Egon Bittner and Sheldon L. Messinger, eds. Criminology Review Yearbook, Volume 2, Sage Publications, 1980.

"The Implications of Deterrence and Incapacitation Research for Policy Evaluation" in Cleon Foust and Robert Webster, eds. An Anatomy of Criminal Justice, D.C. Health, Lexington, 1980, 55-77.

"Research in Criminal Deterrence: Laying the Groundwork for the Second Decade" in Norval Morris and Michael Tonry, eds. Crime and Justice: An Annual Review of Research, Volume 2, University of Chicago, 1980, 211-268.

"Costs of Crime" in Sanford H. Kadish, ed. Encyclopedia of Crime and Justice, Macmillan Publishing Company, 1983.

"The Use of Criminal Statutes to Regulate Product Safety: Comment on Wheeler" Journal of Legal Studies, August 1984, 619-622.

PJ Cook and G Zarkin "Crime and the Business Cycle" Journal of Legal Studies, January 1985.

JQ Wilson and PJ Cook "Unemployment and Crime--What is the Connection?" The Public Interest, 79, Spring, 1985, 3-8.

PJ Cook and G Zarkin "Homicide and Economic Conditions" Journal of Quantitative Criminology, March 1986, Vol. 2, No. 1.

"The Demand and Supply of Criminal Opportunities" in Michael Tonry and Norval Morris, eds. Crime and Justice: An Annual Review of Research, Vol. 7, University of Chicago Press, 1986, 1-28.

"Criminal Incapacitation Effects Considered in an Adaptive Choice Framework" in Derek Cornish and Ron Clarke, eds. The Reasoning Criminal, New York: Springer-Verlag, 1986, 202-216.

PJ Cook and JH Laub "The (Surprising) Stability of Youth Crime Rates" Journal of Quantitative Criminology 2 (3) September 1986, 265-278.

"The Economics of Criminal Sanctions" in Martin L. Friedland (ed.) Sanctions and Rewards in the Legal System, University of Toronto Press, 1987.

PJ Cook and JH Laub "Trends in Child Abuse and Juvenile Delinquency" in Francis X. Hartman, ed. From Children to Citizens: The Role of the Juvenile Court, Springer-Verlag, New York, 1987, Vol. II, Chapter 7, pp.109-127.

"Notes on an Accounting Scheme for a Juvenile Correctional System" in Francis X. Hartman (ed.) From Children to Citizens: The Role of the Juvenile Court, Springer-Verlag, New York, 1987, Vol. II, Chapter 19, pp. 362-370.

PJ Cook and J Laub, "The Unprecedented Epidemic in Youth Violence" in Michael Tonry and Mark H. Moore eds., Youth Violence University of Chicago Press, 1998, 101-138.

PJ Cook, "The Epidemic of Youth Gun Violence" Perspectives on Crime and Violence: 1997-1998 Lecture Series (Washington, DC: National Institute of Justice), 1998, 107-125.

"Forward" to BC Welsh, DP Farrington, and LW Sherman (eds.) Costs and Benefits of Preventing Crime (Boulder, CO; Westview Press) 2001.

PJ Cook and JH Laub, "After the Epidemic: Recent Trends in Youth Violence in the United States" in Michael Tonry ed. Crime and Justice: A Review of Research Chicago, University of Chicago Press, 2002: 117-153.

"Meeting the Demand for Expert Advice on Drug Policy" Criminology and Public Policy 2(3), July 2003: 565-570.

"Comment" on "Catching Cheating Teachers" in William G. Gale and Janet Rothenberg Pack, eds., Brookings-Wharton Papers on Urban Affairs 2003 Washington, DC: Brookings Institution Press, 2003: 210-215.

PJ Cook and N Khmilevska, "Cross-National Patterns in Crime Rates" in Michael Tonry and David P. Farrington, eds. Crime and Punishment in Western Countries, 1980-1999 Chicago: University of Chicago Press, 2005: 331-345.

PJ Cook and J Ludwig “Assigning Youths to Minimize Total Harm” in Kenneth A. Dodge, Thomas J. Dishion, and Jennifer E. Lansford (eds.) Deviant Peer Influences in Programs for Youth: Problems and Solutions The Guilford Press, 2006: 67-89.

“Symposium on Deterrence: Editorial Introduction” Criminology & Public Policy 5(3), August 2006: 413-416.

“Crime” in Robert P. Inman, ed. MAKING CITIES WORK: Prospects and Policies for Urban America Princeton University Press, 2009: 297-327.

“Robbery” in Michael Tonry (ed.) Handbook on Crime and Justice Oxford University Press, 2009.

Crime Control in the City: A Research-Based Briefing on Public and Private Measures Cityscape: A Journal of Policy Development and Research 11(1), March, 2009: 53-80.

Potential Savings from Abolition of the Death Penalty in North Carolina American Law and Economics Review 10, 2009: doi: 10.1093/aler/ahp022.

PJ Cook, DC Gottfredson, and C Na “School crime control and prevention” in Michael Tonry, ed. Crime and Justice University of Chicago Press, 2010.

“Property crime – yes; violence – no: Comment on Lauritsen and Heimer” Criminology & Public Policy 9(4), November 2010: 693-697.

“Comment” on “What do economists know about crime?” in R. DiTella, S. Edwards, and E. Schargrodsky The Economics of Crime: Lessons for & from Latin America Chicago: University of Chicago Press, 2010: 302-304.

PJ Cook and J MacDonald “Public safety through private action: An economic assessment of BIDs” The Economic Journal 121, May, 2011: 445-462.

“Co-Production in deterring crime,” Criminology & Public Policy 10(1), Feb, 2011:103-8.

P.J. Cook and J. Ludwig, “Economical Crime Control,” in Controlling Crime: Strategies and Tradeoffs, edited by P.J. Cook, J. Ludwig, and J. McCrary (2011), University of Chicago Press

P.J. Cook and J. MacDonald, “The role of private action in controlling crime,” in Controlling Crime: Strategies and Tradeoffs, edited by P.J. Cook, J. Ludwig, and J. McCrary (2011), University of Chicago Press, Chicago: 331-363.

P.J. Cook & J. Ludwig, “The Economist's guide to crime busting” The Wilson Quarterly (Winter, 2011), pp. 62-66.

S. Bushway, P.J. Cook, and M. Phillips, The overall effect of the business cycle on crime, German Economic Review, vol. 13 no. 4 (2012), pp. 436-446

P.J. Cook, M O'Brien, A.A. Braga, J. Ludwig, Lessons from a partially controlled field trial, Journal of Experimental Criminology, vol. 8 no. 3 (2012), pp. 271-287

P.J. Cook, The Impact of Drug Market Pulling Levers Policing on Neighborhood Violence An Evaluation of the High Point Drug Market Intervention (commentary), Criminology & Public Policy, vol. 11 no. 2 (2012), pp. 161-164

D. Gottfredson, P.J. Cook, and C. Na, School-based crime prevention, in The Oxford Handbook of Crime Prevention, edited by Brandon C. Walsh and David P. Farrington (2012), pp. 269-287, Oxford University Press, New York

PJ Cook, S Machin , O Marie and G Mastrobuoni, "Crime economics in its fifth decade" in Lessons from the Economics of Crime: What Reduces Offending? Cambridge, MA: MIT Press, 2013.

Bushway S., P.J. Cook, M. Phillips. The net effect of the business cycle on crime and violence. In Rosenfeld R., Edberg M., Fang X., Florence C. S. (Eds.), Economics and youth violence: Crime, disadvantage, and community (pp. 23-52).New York: New York University Press, 2013.

PJ Cook, S Kang, AA Braga, J Ludwig, and M O'Brien An experimental evaluation of a comprehensive employment-oriented prisoner reentry program. Journal of Quantitative Criminology Published on-line Dec. 20th 2014.

Will the Current Crisis in Police Legitimacy Increase Crime? Research Offers a Way Forward. Psychological Science in the Public Interest, 16(3), 2015: 71-74.

PJ Cook and S Kang. Birthdays, schooling, and crime: Regression-discontinuity analysis of school performance, delinquency, dropout, and crime initiation. American Economic Journal: Applied Economics. 8(1) Jan., 2016: 1-27.

P.J. Cook, Behavioral science critique of HOPE. Criminology & Public Policy, 15(4); Nov. 2016.

4. Commentaries

P.J. Cook and J. Ludwig, More prisoners vs. more crime is the wrong question, Brookings Policy Brief no. 185 (December, 2011)

P.J. Cook interview with Reuben van Oosten, "Economics of Crime" (in Dutch) Economisch Statistische Berichten (ESB) (February 2017)

“High Volume Stops and Violence Prevention” in Ingrid Ellen and Justin Steil (eds.) The Dream Revisited: Segregation and Opportunity in the Twenty-First Century New York: Columbia University Press, 2019: 159-160.

D. Weapons and Violent Crime

1. Monographs and Edited Volumes

PJ Cook and D Nagin Does the Weapon Matter? An Evaluation of a Weapon - Emphasis Policy in the Prosecution of Violent Offenders Institute of Law and Social Research, Washington, DC, 1979.

Annals of the American Academy of Political and Social Science, May 1981. Issue entitled "Gun Control" (special editor).

PJ Cook and J Ludwig Guns in America: Results of a Comprehensive National Survey on Firearms Ownership and Use Washington, D.C.: The Police Foundation, 1997.

Law and Contemporary Problems (special editor) "Kids, Guns, and Public Policy" 59(1): Winter 1996.

PJ Cook and J Ludwig Gun Violence: The Real Costs New York: Oxford University Press, 2000.

J Ludwig and PJ Cook (eds.) Evaluating Gun Policy: Effects on Crime and Violence Washington, DC: Brookings Institution Press, 2003.

PJ Cook and KA Goss The Gun Debate: What Everyone Needs to Know New York: Oxford University Press, 2014. 2nd ed. 2020.

PJ Cook and HA Pollack (eds.) The Underground Gun Market in RSF: The Russell Sage Foundation Journal of the Social Sciences 3(5) December, 2017.

J Roman and PJ Cook (eds) Improving Data Infrastructure to Reduce Firearms Violence NORC, 2021.

2. Articles

"A Strategic Choice Analysis of Robbery" in Wesley Skogan (ed.) Sample Surveys of the Victims of Crimes, Ballinger, 1976, 173-187.

"Causal Linkages between Gun Control Ordinances and Crime: A Conceptualization and Review of the Literature" Hearings on the Treasury Department's proposed gun

regulations, before the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives, 95th Congress, 2nd Session, Appendix 4, May 4 and 18, 1978.

"The Effect of Gun Availability on Robbery and Robbery Murder: A Cross-Section Study of Fifty Cities" Policy Studies Review Annual, Volume 3, Sage Publications, 1979, pp. 743-781. Also published in Hearings; see above.

"Reducing Injury and Death Rates in Robbery" Policy Analysis, 6(1) Winter 1980, 21-45.

PJ Cook and J Blose "State Programs for Screening Handgun Buyers" Annals of the American Academy of Political and Social Science, May 1981, 80-91. Reprinted in M. Gittell, ed. State Politics and the New Federalism (NY: Longman, 1986).

"The Effect of Gun Availability on Violent Crime Patterns," Annals of the American Academy of Political and Social Science, May 1981; and in Federal Regulation of Firearms (A Report prepared by Congressional Research Service for the U.S. Senate Judiciary Committee) USGPO, May 1982; and in Neil Alan Weiner, Margaret A. Zahn and Rita J.Sagi, eds., Violence: Patterns, Causes, Public Policy (San Diego: Harcourt Brace Jovanovich, 1990).

PJ Cook and K Hawley "North Carolina's Pistol Permit Law: An Evaluation" Popular Government, May 1981, 1-6.

"Guns and Crime: the Power of Long Division" Journal of Policy Analysis and Management, Fall 1981, 120-125.

"The 'Saturday Night Special': An Assessment of Alternative Definitions from a Policy Perspective" Journal of Criminal Law and Criminology 72:4, Winter 1981, 1735-1745.

"The Role of Firearms in Violent Crime" in Marvin E. Wolfgang and Neil A. Weiner, eds. Criminal Violence (Sage Publications, 1982), 236-289; also titled "The Influence of Gun Availability on Violent Crime Patterns" in Norval Morris and Michael Tonry, eds. Crime and Justice: An Annual Review of Research, Volume 4, University of Chicago Press, 1983, 49-90.

"The Case of the Missing Victims: Gunshot Woundings in the National Crime Survey" Journal of Quantitative Criminology, March 1985, 91-102.

"Is Robbery Becoming More Violent? An Analysis of Robbery Murder Trends Since 1968" Journal of Criminal Law and Criminology, 76 (2), Summer 1985, 480-489.

"The Relationship Between Victim Resistance and Injury in Noncommercial Robbery" Journal of Legal Studies, XV (1), June 1986, 405-416.

"Robbery Violence" Journal of Criminal Law & Criminology, 78(2), 1987, 357-376.
Reprinted in Robert Hornsby and Richard Hobbs (eds.) Gun Violence Ashgate Publishing Ltd. Forthcoming.

"The Technology of Personal Violence" in Michael Tonry, ed. Crime and Justice: An Annual Review of Research Vol. 14, University of Chicago Press, 1991.
Reprinted (in part) in Lee Nisbet (ed.) The Gun Control Debate: You Decide 2nd ed. (Chicago: Prometheus Books, 2001).

"Notes on the Availability and Prevalence of Firearms" American Journal of Preventive Medicine 9(3,supp), 1993.

PJ Cook and MH Moore "Gun Control" in James Q. Wilson and Joan Petersilia, eds. Crime (San Francisco: ICS Press, 1995), 267-294.

PJ Cook, S Molliconi, and T Cole "Regulating Gun Markets" Journal of Criminal Law & Criminology 86(1), 1995, 59-92.

PJ Cook and T Cole "Editorial: Strategic Thinking About Gun Markets and Violence" Journal of the American Medical Association 275(22), June 12, 1996, 1765-7.

PJ Cook and J Leitzel "Perversity, Futility, Jeopardy: An Economic Analysis of the Attack on Gun Control" Law and Contemporary Problems 59(1): Winter 1996: 91-118.

PJ Cook, J Ludwig, and D Hemenway, "The Gun Debate's New Mythical Number: *How Many Defensive Uses Per Year*" Journal of Policy Analysis and Management 16(3) Summer 1997, 463-9.

PJ Cook and J Leitzel, "Gun Control" New Palgrave Dictionary of Economics and Law, 1998.

J Ludwig, PJ Cook, and TW Smith, "The Gender Gap in Reporting Household Gun Ownership" American Journal of Public Health, v. 88, no. 11, Nov. 1998: 1715-1718.

PJ Cook and MH Moore, "Guns, Gun Control, and Homicide: A Review of Research and Public Policy" in M. Dwayne Smith and Margaret A. Zahn, eds., Homicide: A Sourcebook of Social Research Sage Publications, 1998, 277-296. Also in M. Dwayne Smith and Margaret A. Zahn, eds., Studying and Preventing Homicide: Issues and Challenges, Sage Publications, 1998, 246-273.

PJ Cook and J Ludwig, "Defensive Gun Uses: New Evidence from a National Survey" Journal of Quantitative Criminology 14(2), 1998: 111-131 .

SP Teret, DW Webster, JS Vernick, TW Smith, D Leff, GJ Wintemute, PJ Cook, DF Hawkins, AL Kellermann, SB Sorenson, S DeFrancesco, "Support for New Policies to

Regulate Firearms: Results of two national surveys” New England Journal of Medicine 339, Sept. 17, 1998: 813-818.

AL Kellermann and PJ Cook, “Armed and Dangerous: Guns in American Homes” in MA Bellesiles, ed., Lethal Imagination: Violence and Brutality in American History New York University Press, 1999, 425-440.

PJ Cook, B Lawrence, J Ludwig, and T Miller, “The Medical Costs of Gunshot Wounds” Journal of the American Medical Association 282(5), August 4, 1999, 447-454.

J Ludwig and PJ Cook, “Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act” Journal of the American Medical Association 284(5), August 2, 2000: 585-591.

J Ludwig and PJ Cook, “The Benefits of Reducing Gun Violence: Evidence from Contingent-Valuation Survey Data” Journal of Risk and Uncertainty 22(3), 2001: 207-226.

PJ Cook, MH Moore, and A Braga, "Gun Control" in James Q. Wilson and Joan Petersilia, eds. Crime: Public Policies For Crime Control, ICS Press, Oakland CA., 2002: 291-329.

PJ Cook and A Braga, "Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets" Arizona Law Review 43(2) 2001:277-309. *Reprinted with minor changes as* “New Law Enforcement Uses for Comprehensive Firearms Trace Data” in Bernard E Harcourt (ed.) Guns, Crime, and Punishment New York: NYU Press, 2003: 163-187.

PJ Cook and JA Leitzel, "'Smart' Guns: A Technological Fix for Regulating the Secondary Gun Market" Contemporary Economic Problems 20(1) January 2002: 38-49.

PJ Cook and J Ludwig, "The Costs of Gun Violence Against Children" The Future of Children 12(2), Summer/Fall 2002: 87-99.

PJ Cook and J Ludwig, "Litigation as Regulation: Firearms" WK Viscusi, ed. Regulation Through Litigation Washington, DC: Brookings Institution Press, 2002: 67-93

AA Braga, PJ Cook, DM Kennedy, and MH Moore "The Illegal Supply of Firearms" in Michael Tonry ed. Crime and Justice: A Review of Research Chicago, University of Chicago Press, 2002: 229-262.

PJ Cook and J Ludwig, "The Effects of Gun Prevalence on Burglary: Deterrence vs Inducement" in J Ludwig and PJ Cook (eds.) Evaluating Gun Policy Washington, DC: Brookings Institution Press, 2003: 74-118.

PJ Cook and J Ludwig, "Pragmatic Gun Policy" in J Ludwig and PJ Cook (eds.)

Evaluating Gun Policy Washington, DC: Brookings Institution Press, 2003: 1-37.

PJ Cook and J Ludwig, "The Effects of the Brady Act on Gun Violence" in BE Harcourt (ed.) Guns, Crime, and Punishment in America New York: NYU Press, 2003: 283-298. *reprinted in* Steven D. Levitt and Thomas J. Miles (eds.) Economics of the Criminal Law Edward Elgar Publishing, 2007.

PJ Cook and Jens Ludwig "Fact-Free Gun Policy" University of Pennsylvania Law Review 151(4), April 2003: 1329-1340.

D Azrael, PJ Cook, and M Miller "State and Local Prevalence of Firearms Ownership: Measurement, Structure, and Trends" Journal of Quantitative Criminology 20(1) March 2004: 43-62.

PJ Cook and J Ludwig "Does Gun Prevalence Affect Teen Gun Carrying After All?" Criminology 42(1) February 2004: 27-54.

"Youths' Involvement with Guns: Motivation vs. Availability" Archives of Pediatrics & Adolescent Medicine July, 2004: 705.

PJ Cook and J Ludwig "Principles for Effective Gun Policy" Fordham Law Review 73(2), November, 2004: 589-613.

PJ Cook, J Ludwig, and A Braga "Criminal Records of Homicide Offenders" Journal of the American Medical Association 294(5), August 3, 2005: 598-601.

GJ Wintemute, PJ Cook, and M Wright "Risk Factors among Handgun Retailers for Frequent and Disproportionate Sales of Guns Used in Violent and Firearm-Related Crimes" Injury Prevention December, 2005: 357-363.

PJ Cook and J Ludwig "The Social Costs of Gun Ownership" Journal of Public Economics 90(1-2), January 2006: 379-391.

PJ Cook and SB Sorenson "The Gender Gap Among Teen Survey Respondents: Why are Boys more Likely to Report a Gun in the Home than Girls?" Journal of Quantitative Criminology 22(1) March, 2006: 61-76.

PJ Cook and J Ludwig "Aiming for evidence-based gun policy" Journal of Policy Analysis and Management 25(3), Summer 2006: 691-735.

"Use and Control of Firearms" Encyclopedia of Law & Society, Sage Publications, Inc., 2007.

PJ Cook, J Ludwig, SA Venkatesh, and AA Braga "Underground Gun Markets" The Economic Journal, 117 (524) November, 2007: 588-618.

SB Sorenson and PJ Cook “‘We’ve Got a Gun?’: Comparing Reports of Adolescents and their Parents about Household Firearms” Journal of Community Psychology 36(1), January 2008: 1-19.

PJ Cook and J Ludwig “Firearms Violence” in Michael Tonry (ed.) Oxford Handbook on Crime and Public Policy Oxford University Press, 2009.

“Robbery” in Michael Tonry (ed.) Oxford Handbook on Crime and Public Policy Oxford University Press, 2009.

PJ Cook, J Ludwig, and AM Samaha “Gun Control After *Heller*: Threats and Sideshows from a Social Welfare Perspective” UCLA Law Review 56(5), June 2009: 1041-1093.

PJ Cook, W Cukier, and K Krause “The Illicit Firearms Trade in North America” Criminology and Criminal Justice 9(3) 2009: 265-286.

PJ Cook, J Ludwig, and AM Samaha “Gun Control After *Heller*: Litigating against Regulation” in Daniel Kessler, ed., Regulation versus Litigation Chicago: University of Chicago Press, 103-135.

PJ Cook, A Braga, and MH Moore “Gun Control” Crime and Public Policy New York: Oxford University Press, 2010: 257-292.

“Post-*Heller* Strategies to Reduce Gun Violence” Journal of Catholic Social Thought 8(1) Winter, 2011: 93-110.

Q&A on Firearms Availability, Carrying, and Misuse, Government, Law and Policy Journal, vol. 14 no. 1 (Summer, 2012), pp. 77-81, New York State Bar Association

The Great American Gun War: Notes from Four Decades in the Trenches. Crime and Justice: A Review of Research Vol. 42, 2013: pp. 19-73.

PJ Cook and J Ludwig. The Limited Impact of the Brady Act: Evaluation and Implications. In DW Webster, JS Vernick & M Bloomberg (eds.) Reducing Gun Violence in America Johns Hopkins University Press, 2013.

PJ Cook, RJ Harris, J Ludwig, and HA Pollack. “Some sources of crime guns in Chicago: Dirty dealers, straw purchasers, and traffickers” Journal of Criminal Law & Criminology 104(4) Fall 2014: pp. 717-760.

PJ Cook and J Ludwig. “Elusive Facts about Gun Violence: Where Good Surveys Go Bad” in MD Maltz and SK Rice (eds.) Envisioning Criminology: Researchers on Research as a Process of Discovery 2015. New York: Springer.

PJ Cook, S Parker, and HA Pollack. Sources of guns to dangerous people: What we learn by asking them. Preventive Medicine 79: 2015, pp. 28-36.

Braga, AA and PJ Cook. "The criminal records of gun offenders" The Georgetown Journal of Law and Public Policy 14(1): 2016. Reprinted in A Debate on the Second Amendment , Georgetown Law School, Washington DC 2020.

Webster, DW, M Cerdá, GJ Wintemute, PJ Cook, "Epidemiologic Evidence to Guide the Understanding and Prevention of Gun Violence" Epidemiological Reviews 2016 doi: 10.1093/epirev/mxv018

PJ Cook, A Rivera, M Cerda, GJ Wintemute, "Constant Lethality of Gunshot Injuries from Firearm Assault, US 2003-2012." American Journal of Public Health Aug;107(8):1324-1328. doi: 10.2105/AJPH.2017.303837. Epub 2017 Jun 22, 2017.

PJ Cook and HA Pollack, "Reducing access to guns by violent offenders" RSF: The Russell Sage Foundation Journal of the Social Sciences 3(5) 2017: 2-36.

P.J. Cook and J.J. Donohue. Policy Forum: Gun-Violence Research: Saving lives by regulating guns: Evidence for policy. Science 358(6368), Dec. 2017, p. 8.

"The Challenge of Firearms Control in a Free Society" Criminology & Public Policy 17(2), 2018: 1-15.

"Gun Markets" Annual Review of Criminology 1, 2018: 359-77.
<http://www.annualreviews.org/eprint/2SEFDMA6paatqqs2bjmT/full/10.1146/annurev-criminol-032317-092149>

PJ Cook and J Ludwig, "The Social Costs of Gun Ownership: A Reply to Hayo, Neumeier and Westphal" Empirical Economics, 56(1), 13-22 2019.

S Smucker, R Kerber and PJ Cook "Suicide and Additional Homicides Associated with Intimate Partner Homicide: North Carolina 2004-2013" Journal of Urban Health 95(3) 2018: 337-343.

"Gun Theft and Crime" Journal of Urban Health 95(3), 2018: 305-312.

AA Braga and PJ Cook "The Association of Firearm Caliber With Likelihood of Death From Gunshot Injury in Criminal Assaults" JAMA Network Open, (released July 27, 2018).

PJ Cook, AA Braga, BS Turchan, LM Barao. Why Do Gun Murders Have A Higher Clearance Rate than Gunshot Assaults? Criminology & Public Policy August 1, 2019.

PJ Cook and J Ludwig. Understanding Gun Violence: Public health vs. public policy. Journal of Policy Analysis and Management 38(3), Summer 2019: 788-795.
<https://doi.org/10.1002/pam.22141>

PJ Cook and J Ludwig. Response to Counterpoint: Violence itself is a root cause of violence. Journal of Policy Analysis and Management 38(3), Summer 2019: 802-804. <https://doi.org/10.1002/pam.22142>

PJ Cook, HA Pollack, and K White. The Last Link: From gun acquisition to criminal use Journal of Urban Health on line publication May 29, 2019: <https://link.springer.com/article/10.1007/s11524-019-00358-0>

Thinking about gun violence. Criminology & Public Policy, 2020;1–23. <https://doi.org/10.1111/1745-9133.12519>.

AA Braga, R Brunson, PJ Cook, B Turchan, B Wade. Underground gun markets and the flow of illegal guns into the Bronx and Brooklyn: A mixed methods analysis" Journal of Urban Health Sept. 4, 2020: <https://doi.org/10.1007/s11524-020-00477-z>.

K White, PJ Cook, HA Pollack. Gunshot-victim cooperation with police investigations: Results from the Chicago Inmate Survey. Preventive Medicine, Dec. 29, 2020.

L Barao, AA Braga, B Turchan, PJ Cook. Clearing gang- and drug-involved nonfatal shootings. Policing: An International Journal. 2021.

P.J. Cook, A. Berglund. "More and better video evidence for police investigations of shootings: Chicago's area technology centers. Policing: An International Journal. 2021

3. Commentaries

"Making Handguns Harder to Hide, The Christian Science Monitor, May 29, 1981.

PJ Cook and J Ludwig "Has the Brady Act Been Successful?" The Charlotte Observer August 15, 2000.

PJ Cook and J Ludwig "Toward Smarter Gun Laws" The Christian Science Monitor Feb. 6, 2001.

PJ Cook and J Ludwig "Protecting the Public in Presidential Style" News & Observer June 10, 2001.

PJ Cook and J Ludwig "What did the sniper case teach us? Lessons in Gun Control" News & Observer Nov. 3, 2002, 25A.

PJ Cook and J Ludwig "Will wider availability of guns improve public safety? No" CQ Researcher Oct. 31, 2008.

P.J. Cook and J. Ludwig, *Five myths about gun control*, Washington Post (June 13, 2010)

- P.J. Cook and J. Ludwig, *How to cut gun death toll*, CNN.com (January 12, 2011)
- P.J. Cook, *Gun Point*, Times of India - Education Times (December 24, 2012)
- P.J. Cook, *Craig Whitney's Living With Guns*, New York Times (December 26, 2012)
- P.J. Cook, *How we can reduce gun violence*, Chronicle of Higher Education (January 8, 2013)
- P.J. Cook *How dangerous people get their guns*, The Conversation (Posted January 5, 2016) <http://theconversation.com/how-dangerous-people-get-their-guns-52345>
- P.J. Cook “At last, a good estimate of the magnitude of the private-sale loophole for firearms” (editorial) Annals of Internal Medicine Jan. 3, 2017.
- P.J. Cook Ariadne E. Rivera-Aguirre Magdalena Cerdá Garen Wintemute
Letter to the editor RE: “The Hidden Epidemic of Firearm Injury: Increasing Firearm Injury Rates During 2001–2013” American Journal of Epidemiology, 186(7) 1 October 2017, 896.
- P.J. Cook, How to reduce school shootings (arming teachers won’t help) News & Observer March 8, 2018.
<https://www.newsobserver.com/opinion/op-ed/article204013154.html>
- P.J. Cook, “Expanding the Scope of the Public Health Approach to Gun Violence Prevention” (editorial) Annals of Internal Medicine Oct. 30, 2018.
- AA Braga and PJ Cook “Guns do Kill People” Penn Regulatory Review. Nov. 5, 2018
<https://www.theregreview.org/2018/11/05/braga-cook-guns-do-kill-people/>
- P.J. Cook and J. Ludwig Nov. 6, 2018: “Policing Guns” SSRC Items
<https://items.ssrc.org/policing-guns-why-gun-violence-is-not-just-a-public-health-problem/>
- P.J. Cook and J. Ludwig Nov. 13, 2018: “The Economic Approach to Evaluating Gun Control Policies” Penn Regulatory Review
<https://www.theregreview.org/2018/11/13/cook-ludwig-economic-approach-evaluating-gun-control-policies/>
- P.J. Cook. “Gun Policy Research: Personal Reflections on Public Questions” in J. Carlson, K.A. Goss and H. Shapira (eds.) Gun Studies: Interdisciplinary Approaches to politics, Policy, and Practice New York: Routledge, 2019.

E. Income Distribution

1. Book

RH Frank and PJ Cook The Winner-Take-All Society (New York: The Free Press, 1995). Named a "Notable Book of the Year, 1995" by the *New York Times Book Review*; named one of the ten Best Business Books of 1995 by *Business Week*; given The Critics' Choice Award 1995-96 by the *San Francisco Review of Books*. Paperback edition (Penguin Books, 1996). Named "One of Ten best books of the year, 1996" by *The China Times*. Portuguese, Korean, Chinese, Japanese and Polish editions.

RH Frank and PJ Cook "Preface to the new edition" The Winner-Take-All Society (London: Virgin Books, Random House, 2010).

2. Article

PJ Cook and RH Frank "The Growing Concentration of Top Students at Elite Schools" in Charles T. Clotfelter and Michael Rothschild, eds., Studies of Supply and Demand in Higher Education (Chicago: University of Chicago Press, 1993).

PJ Cook and RH Frank "The Economic Payoff of Attending an Ivy-League Institution" in Richard Delgado and Jean Stefancic, eds., Critical White Studies: Looking Behind the Mirror Temple University Press, 1997.

RH Frank and PJ Cook "The winner-take-all society" in William Darity, ed., The International Encyclopedia of the Social Sciences, 2nd ed. Gale, 2007.

RH Frank and PJ Cook "Winner-Take-All Markets" Studies in Microeconomics 1(2), 2013: 131-154.

3. OpEd and Magazine Articles (with Robert Frank)

USA Today, October 9, 1995, p. 13A

Washington Post, November 12, 1995

Washington Monthly, December 1995

Chronicle of Higher Education, January 5, 1996

F. Education and Other topics

"A 'One Line' Proof of the Slutsky Equation" The American Economic Review, March 1972, 139.

PJ Cook and Robert H. Frank "The Effect of Unemployment Dispersion on the Rate of Wage Inflation" Journal of Monetary Economics 1, 1975, 241-249.

PJ Cook and JW Vaupel "What Policy Analysts Do: Three Research Styles" Journal of Policy Analysis and Management, 4 (3) Spring, 1985, 427-8.

PJ Cook and Jens Ludwig "Weighing the Burden of 'Acting White'; Are there Race Differences in Attitudes Towards Education?" Journal of Policy Analysis and Management 16(2), Spring 1997, 256-278. (Winner of the Vernon Prize for best paper in Volume 16)

PJ Cook and Jens Ludwig "The Burden of 'Acting White:' Do Black Adolescents Disparage Academic Achievement?" in Christopher Jencks and Meredith Phillips (eds.) The Black-White Test Score Gap Brookings Institution Press, Washington DC, 1998: 375-400. Reprinted in Minority status, Oppositional Culture and Academic Engagement John U. Ogbu, Ed. New York: RoutledgeFarmer, forthcoming.

PJ Cook, Robert MacCoun, Clara Muschkin, and Jacob Vigdor "The Negative Impacts of Starting Middle School in Sixth Grade" Journal of Policy Analysis and Management Winter 2008, 104-121. (winner of the Raymond Vernon Memorial Prize, 2008)

"Acting White" in William Darity, ed. International Encyclopedia of the Social Sciences, 2nd ed. Gale, 2007.

Robert MacCoun, PJ Cook, Clara Muschkin, and Jacob Vigdor "Distinguishing Spurious and Real Peer Effects: Evidence from Artificial Societies, Small-Group Experiments, and Real Schoolyards" Review of Law and Economics 4(3), 2008: 695-714.

Erin H-W Kim and PJ Cook, The continuing importance of children in relieving elder poverty: evidence from Korea Ageing & Society 31(06) August 2011, pp 953-976.

Sorensen, Lucy C., PJ Cook, and Kenneth A. Dodge. "From Parents to Peers: Trajectories in Sources of Academic Influence Grades 4 to 8." Educational Evaluation and Policy Analysis 39(4) Dec. 2017: 697-711.

PJ Cook, Elizabeth J Gifford, Kenneth A Dodge, Amy B Schulting. 2017. A new program to prevent primary school absenteeism: Results of a pilot study in five schools. Child and Youth Services Review 82: 262-270.

PJ Cook and Songman Kang. 2020. Girls to the front: How redshirting and test-score gaps are affected by a change in the school-entry cut date. Economics of Education Review. On-line, February. Vol. 76, June.

OpEds, Blogs, Magazine articles.

Phyllis W. Jordan and PJ Cook. 2017. A simple way to confront chronic school absences. Charlotte Observer Oct. 19th.

Book reviews

Of Jack P. Gibbs, Crime, Punishment, and Deterrence in Contemporary Psychology 21:5, 1976.

Of Kenneth Dolbeare (ed.) Public Policy Evaluation in Policy Analysis, Fall 1977, 604-606.

Of David T. Stanley, Prisoners Among Us in Policy Analysis, Winter 1978, 139-141.

Of John Heineke, Economic Models of Criminal Behavior in Southern Economic Journal, April 1980, 1255-1257 (with Anne Witte).

Of Laurence Ross, Deterring the Drinking Driver in Journal of Health Politics, Policy, and Law, Winter 1983, 958-961; and in Popular Government, Winter 1983, 37-38.

Of Robert H. Frank, Choosing the Right Pond: Human Behavior and the Quest for Status in Journal of Policy Analysis and Management, Fall 1986.

Of Michael D. Laurence, John R. Snortum, and Franklin Zimring. eds., Social Control of the Drinking Driver, in Science, July 29, 1988.

Of Michael Tonry and Norval Morris, eds., Drugs and Crime in Journal of Policy Analysis and Management 10(3), Summer 1991.

Of Mark A.R. Kleiman, Against Excess: Drug Policy for Results; and Franklin E. Zimring and Gordon Hawkins, The Search for Rational Drug Control Policy in Journal of Policy Analysis and Management 11(4), Fall 1992.

Of H. Laurence Ross, Confronting Drunk Driving: Social Policy for Saving Lives in Journal of Health Politics, Policy and Law 18(1) Spring 1993, 235-237.

Of Willard Manning et al, The Costs of Poor Health Habits in Policy Currents 2(4), Nov. 1992.

Of Gary Kleck, Point Blank: Guns and Violence in America in New England Journal of Medicine February 3, 1994.

Of Robert L. Rabin and Stephen D. Sugarman, eds., Smoking Policy: Law Politics and Culture in Science 262, December 10, 1993.

Of Trudy Ann Karlson and Stephen W. Hargarten, Reducing Firearm Injury and Death: A public health sourcebook on guns in New England Journal of Medicine, February 5, 1998.

Of Tyler Cowen, What Price Fame? in Journal of Economic Literature September 2001, 933-935.

Of Felix Gutzwiller and Thomas Steffen, Cost-Benefit Analysis of Heroin Maintenance Treatment in Addiction 2001, v. 96, 1071-2.

Of Robert J. MacCoun and Peter Reuter Drug War Heresies in Journal of Policy Analysis and Management v. 21(2), Spring 2002, 303-306.

Of James B. Jacobs Can Gun Control Work? in Journal of Policy Analysis and Management 23(1), Winter 2004, 198-201.

Of S. Selvanathan and E.A. Selvanathan The Demand for Alcohol, Tobacco, and Marijuana: International Evidence in Addiction 102, 2007: 830.

Of Harold Winter The Economics of Crime: An introduction to rational crime analysis in Journal of Economic Literature v. 47: Sept. 2009.

Of Craig Whitney Living with Guns in New York Times Dec. 25, 2012.

Of Franklin E. Zimring When Police Kill in Science 355(6326) Feb. 17, 2017

Unpublished monographs

"The Effect of Legitimate Opportunities on the Probability of Parolee Recidivism," Institute of Policy Sciences and Public Affairs, Duke University, 1973.

"Citizen Cooperation with the Criminal Justice System," Institute of Policy Sciences and Public Affairs, Duke University, 1976.

"A Summary of State Legal Codes Governing Juvenile Delinquency Proceedings" (with Joseph Austin and Richard Levi), Institute of Policy Sciences and Public Affairs, Duke University, 1977.

"Life, Liberty, and the Pursuit of Self Hazardous Behavior" (with James Vaupel), Institute of Policy Sciences and Public Affairs, Duke University, 1978.

"Regulating Handgun Transfers: Current State and Federal Procedures, and an Assessment of the Feasibility and Cost of the Proposed Procedures in the Handgun Crime Control Act of 1979" (with James Blöse), Institute of Policy Sciences and Public Affairs, Duke University, 1980.

Public and Invited Lectures

PJ Cook, San Francisco: MacArthur Foundation Group on Juvenile Justice, 28 February 2003.

PJ Cook, University of Virginia Law School, 11 March 2003.

PJ Cook, University of Virginia Medical Center, 12 March 2003.

PJ Cook, University of Pennsylvania Symposium on Gun Policy, 24 April 2003.

P.J. Cook, Washington, DC: National Institute of Justice, 28 July 2003.

PJ Cook, Washington DC: Robert Wood Johnson Foundation Investigator Award Conference, 9 October 2003.

PJ Cook, UNC-CH Public Health School, 20 October 2003.

P.J.Cook, University of Delaware, 23 October 2003.

The Social Costs of Gun Ownership, Cambridge, MA, March 26, 2004.

Effective gun policy, Fordham Law School, April 13, 2004.

Effective gun policy, Columbia University Law School, April 14, 2004.

The Homicide Epidemic, Emory University Sociology Department, October 28, 2004.

Hochbaum Lecture, UNC School of Public Health, Chapel Hill, April 10, 2006.

European Economic Assn, Vienna, Austria, August 25, 2006.

Symposium honoring Thomas Schelling, University of Maryland, College Park, September 29, 2006.

Robert Wood Johnson Foundation Investigators Award, San Diego, October 6, 2006.

Davis Lectureship, University of Chicago Center for Health Administration Studies, December 6, 2006.

2007 Crime & Population Dynamics Summer Workshop, Aspen Wye River Center, June 04, 2007.

Paying the Tab: The case for higher alcohol taxes, Johns Hopkins University Institute for Policy Studies, February 14, 2008.

Alcohol and Tobacco Taxes as Public Health Measures, Washington DC: American Medical Assn President's Forum, March 31, 2008.

Paying the Tab: The case for raising the alcohol excise tax, Rutgers University School of Social Work, April 23, 2008.

Cost-Benefit Analysis of Crime, Washington DC, June 25, 2008.

The New Second Amendment, Virginia Tech Department of Economics, October 13, 2008.

Paying the Tab: The case for higher alcohol taxes, Bloomberg School of Public Health, Johns Hopkins University, December 03, 2008.

Sussmilch Lecture: Estimating the effects of alcohol taxation on mortality, Max Planck Institute for Demographic Research, Rostock, Germany, December 16, 2008.

Paying the Tab, University of Maryland, February 13, 2009.

Lessons from Alcohol Control Research, San Diego, California, February 20, 2009.

Paying the Tab, University of Maryland Baltimore County, March 04, 2009.

Benefits of Crime Reduction, National Academy of Sciences, March 05, 2009.

School Crime, University of Maryland, March 09, 2009.

Post-Heller Strategies to Reduce Gun Violence, Villanova University, March 24, 2009.

Gun control after Heller, Emory University Department of Economics, December 04, 2009.

Private inputs into crime control, Economics Department, University of Virginia, February 04, 2010.

Private inputs into public safety, Royal Economic Society Annual Conference, Surrey, March 30, 2010.

The case for and against preserving a minimum drinking age of 21, Duke University, May 19, 2010.

The Scientific and Intuitive Case for Higher Alcohol Taxes, Helsinki, Finland, September 22, 2010.

Public safety through private action, Bonn, Germany, October 09, 2010.

Public safety through private action, Harvard Law and Economics Workshop, February 08, 2011.

Public safety through private action, University of Oregon Department of Economics, March 05, 2011.

Crime and the Business Cycle, Andrew Young School of Policy Studies, Georgia State University, March 10, 2011.

Public safety through private action, Vanderbilt Law and Economics Program, April 25, 2011.

Alcohol and Violence, Washington DC, April 28, 2011.

Lessons from an (un)controlled experiment, Jerry Lee Symposium on Criminology and Public Policy, May 03, 2011.

Economical Crime Control, National Institute of Justice *Research for the Real World Seminar series* December 06, 2011

The Virtuous Tax, Santiago, Chile *Latin American and Caribbean Economics Association annual meeting* November 11, 2011

Perspectives on Gun Violence, University of Minnesota Law School *Robina Institute Annual Conference, "Crime and Justice in America, 1975-2025"* April 26, 2012

Calibrating effect sizes, University of Maryland 12th Annual Jerry Lee Crime Prevention Symposium April 24, 2012

Public safety through private action, Southern Illinois University, Vandever Chair Public Lecture in Economics April 12, 2012

Private prevention, John Jay College, New York Guggenheim Symposium on Crime February 06, 2012

Cost of the Death Penalty in North Carolina, University of Maryland September 27, 2012

The Virtuous Tax, Cornell University, Department of Policy Analysis and Management October 10, 2012

The great American gun war, Georgetown Institute of Public Policy, Dec. 3, 2012

Private action to prevent crime, Vera Institute of Justice, Washington DC, Jan 24, 2013

Birthdays, schooling and crime, UNC Charlotte Economics Department, Feb 1, 2013

Reducing public costs of crime via private action: BIDs, AAAS Annual Meeting, Boston, Feb. 16, 2013

The case for using cost-benefit analysis in criminal justice evaluations, Israeli Prison Service, Ramla, Israel, May 20, 2013

Private action for crime prevention, Hebrew University Institute of Criminology, May 21, 2013

The economics of illegal gun markets, Chicago, IL AAAS Annual Meeting – Panel February 16, 2014

The Gun Debate, The Cooper Union for the Advancement of Science and Art May 08, 2014

Birthdays, schooling and crime, Columbia Center for Study of Wealth and Inequality October 09, 2014

Evaluation of an employment-oriented program for released prisoners, Columbia Population Research Center, October 16, 2014

Birthdays, schooling and crime, Stanford Law School, Law and Economics, October 23, 2014

The Underground Gun Market Rutgers University Institute for Health, Health Care Policy and Aging Research, November 13, 2014

Birthdays, Schooling and Crime, Rutgers Department of Economics, March 27, 2015.

The Underground Gun Market University of Pennsylvania Injury Science Center, April 13, 2015.

Paying the Tab. World Bank Group Conference “Winning the Tax Wars.” Washington, DC May 24, 2016.

Reducing access to guns by violent offenders. Yale CHESS Workshop, October 28, 2016.

Keeping guns away from dangerous people. Rockefeller College, SUNY Albany, April 26, 2017.

Preventing Alcohol-Related Driving Fatalities by Raising Alcohol Taxes. Invited presentation, National Academy of Sciences Committee on Accelerating Progress to Reduce Alcohol-Impaired Driving Fatalities, May 9, 2017.

Keeping guns away from dangerous people. Invited talk, University of Michigan Department of Economics, December 8, 2017.

Testing Instrumentality. Invited talk, University of Pennsylvania Department of Criminology, January 17, 2018.

The Underground Gun Market. Invited talk, HF Guggenheim Symposium, John Jay College. February 16, 2018.

Policing Gun Violence. Samuel Levin Memorial Lecture, Wayne State University Department of Economics. March 29, 2019.

Medical Costs of Gun Violence. Conference on Small Arms and Light Weapons. French Ministry of Armed Forces, Paris. May 15, 2019.

Police investigations of shooting assaults and homicides. NISS Forum on Gun Violence, Alexandria VA. June 26, 2019.

Preventing Gun Violence: Public Health and Public Policy Approaches. American University, October 2, 2019.

3 Pillars of Gun Policy. University of Iowa, Symposium on Public Policy and Gun Violence, October 23, 2019.

Selected Research grants

Principal investigator, "Evaluating Policy Options to Increase Citizen Cooperation in Urban Law Enforcement," A Durham Observatory Project, 1975.

Principal investigator, "The Processing of Gun Crimes in D.C. District Court," Institute of Law and Social Research, 1977.

Principal investigator, "Empirical Studies of Robbery and Handgun Control," U.S. Department of Justice.

Principal investigator, "Evaluating Alternative Policy Strategies for Controlling the Distribution of Handguns" (with Mark Moore), Ford Foundation, 1977-79.

Principal investigator, "A Review of the Major Gun Regulation Proposals," Center for the Study and Prevention of Handgun Violence, 1979-80.

Principal investigator, "A Review of Robbery Literature," National Institute of Justice, 1981.

Principal investigator, "Robbery Violence," National Institute of Justice, 1983-85.

Principal investigator, "Vice," The Chicago Resource Center, 1987

Principal investigator, "Costs of the Death Penalty in North Carolina," NC Administrative Office of the Courts, 1991-93.

Principal investigator, "Causes and Effects of Youthful Drinking," National Institute on Alcohol Abuse and Alcoholism, 1992-1994.

Principal investigator, "Markets for Stolen Guns," Harry Frank Guggenheim Foundation, 1993-4.

Principal investigator, "The Costs of Gunshot Wounds," The Joyce Foundation, 1997-99.

Principal investigator, "Community Gun Prevalence and Crime," The Joyce Foundation, 2000-2003.

Investigator Award In Health Policy Research, Robert Wood Johnson Foundation, 2003-4.

Principal Investigator, "evaluations of two programs in Milwaukee designed to reduce serious criminal violence" Joyce Foundation, 2007-2008.

Principal Investigator, "Fiscal Costs of Capital Punishment in NC" Z. Smith Reynolds Foundation, 2007-2008.

Principal Investigator, "An Experimental Evaluation of the Milwaukee Prisoner Re-entry Program" Smith Richardson Foundation, 2008-2011.

Co-Investigator, "Preventing truancy in urban schools through provision of social services by truancy officers: A Goal 3 randomized efficacy trial" US Department of Education/IES: 2010 – 2014.

Principal Investigator, "Truancy Prevention Project" US Department of Education/IES: 2012-2015.

Principal Investigator, "Clearance Rates" National Consortium on Gun Violence Prevention (Arnold Foundation/RAND), 2020-2022.

Service and Administrative Activities at Duke University

Director of Undergraduate Studies, Institute of Policy Sciences and Public Affairs, 1974-75, 1992.

Director of Graduate Studies, Institute of Policy Sciences and Public Affairs, 1977-79, 1984, and 1994-95.

Chairman, Graduate Curriculum Committee, Institute of Policy Sciences and Public Affairs, 1977-79.

Member, Undergraduate Faculty Council of Arts and Sciences, 1977-78, 1991-93.

Author of an evaluation of undergraduate admission policy, commissioned by the Undergraduate Faculty Council, 1978.

Member, Academic Council, Duke University, 1978-79, 1982-84, 1993-95, 1998-2000
Elected to the Executive Committee of the Academic Council, 1982-83.

Associate Director, Institute of Policy Sciences and Public Affairs, 1979-1985, 2005-.

Pre-Major Advisor, 1981-85.

Member, UFCAS Committee on Admissions, 1984-86.

Member, University Committee on Undergraduate Admissions and Financial Aid, 1986 - 87.

Author of a special report on predicting yields from undergraduate admissions, 1987.

Member, Dean White's Ad Hoc Committee on Undergraduate Internships, 1987.

Member, President's Administrative Oversight Committee, 1987-90.

Chairman, Public Policy Studies Committee on Appointments and Promotion, 1990-93.

Chair, Provost's committee to review Dean Earl Dowell for reappointment, 1992.

Member, Arts and Sciences Committee on Planning and Priorities, 1993-95. Chair, 1994-95.

Member, Dean Search Committee, Fuqua School of Business, 1994.

Chair, PPS Diversity Committee, 1994-95.

Member, Executive Committee of the Graduate School, 1995-96

Member, steering committee, Child and Family Policy initiative, 1999

Member, Dean's Search Committee, Duke Law School, 1999

Member, Planning Committee, Institute for Genome Sciences and Policy, 1999

Chair, Arts & Sciences Council Task Force on the Budget, 2001-2

Public and Professional Service

Chairman, Weapons and Violent Crime Workshop, NILECJ, LEAA, U.S. Department of Justice, February 1978.

Presenter, N.C. Governor's Crime Commission, June and September, 1979.

Panel member, National Research Council Study of Alternative Policies Affecting the Prevention of Alcohol Abuse and Alcoholism, 1978-1981.

Member, N.C. Governor's Task Force on Drunken Driving, 1982.

Member, Ad Hoc Workshop on the Future of Criminal Justice Research, U.S. Department of Justice and National Research Council, March 1982.

Testified on alternative gun-control policies before the U.S. Senate Criminal Law Subcommittee, March 4, 1982.

Testified on alcohol tax policy before the Social Security Advisory Council, May 25, 1982.

Participant, Sixty-Sixth American Assembly (Public Policy on Alcohol Problems), Harriman, NY, April 26-29, 1984.

Member, Executive Session on the Juvenile Justice System, Harvard University, 1984-85.

Member, Policy Council of the American Society of Criminology, 1985-86, and 1990-91.

Invited participant, Conference on the Cigarette Excise Tax sponsored by the Harvard Institute for the Study of Smoking Behavior, Washington, DC, April 17, 1985.

Member, "Crime and Violence" working group of the NAS Committee on Basic Research, 1985.

Member, Research Advisory Committee of the U.S. Sentencing Commission, 1986-91 (Chair, 1986).

Associate, Canadian Institute of Advanced Research, 1986.

Member, Board of Advisors, Public Policy Program, College of William & Mary, 1987-1992.

Member, National Academy of Sciences Committee on Law and Justice, 1987-1993.

Treasurer, Association of Public Policy Analysis and Management, 1987-1994.

Testified on the use of alcohol taxation as a public-health measure before the U.S. Senate Committee on Governmental Affairs, September 27, 1988.

Member, Workshop on Health Economics, National Institute of Alcohol Abuse and Alcoholism, September 1988.

Member, National Research Council's Panel on the Understanding and Control of Violent Behavior, 1988-91.

Member, Advisory Board to the Injury Prevention Research Center, University of North Carolina, 1990-.

Witness, "Problems and Prospects for a N.C. Lottery" North Carolina Economic Future Commission, December 5, 1990.

Invited participant, CDC's Forum on Youth Violence in Minority Communities, Atlanta, December 10-12, 1990.

Member, President's Advisory Board of the H. John Heinz III School of Public Policy and Management, Carnegie Mellon University, 1992-96 and subsequently (including 2007).

Consultant, Tax Advisory Program, US Department of Treasury, 1994-95.

Steering Committee, National Consortium on Violence Research, 1995-1997.

Member, Center for Gun Policy Research, Johns Hopkins University, 1995-.

Invited participant, White House Leadership Conference on Youth, Drug Use, and Violence, March 7, 1996.

Invited speaker, U.S. Senate Democratic Policy Council, Wilmington, DE, April 26, 1996.

Member, National Academy of Sciences (IOM) Committee on Injury Prevention and Control, 1997-8.

Member, Advisory Committee to the Harvard Injury Control Research Center, 1998-.

Consultant, US Department of Treasury, Enforcement Division, 1999-2000.

Member, National Academy of Sciences (NRC) Case Studies of School Violence Committee, 2001-2002.

Member, Division Committee for the Behavioral and Social Sciences and Education, National Research Council, 2001-2004.

Member, "Committee to Develop a Strategy to Prevent and Reduce Underage Drinking", Institute of Medicine 2002-3.

Member, Panel on Assessing the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database, The National Academies 2004-5.

Member, *Crime and Justice* editorial board, 2007-2010.

Member, National Research Council Workshop on Understanding Crime Trends, 2007-8

Co-Director, NBER Economics of Crime Working Group, 2007-

Vice Chair, National Research Council Committee on Law and Justice, 2006-2010.

Vice President, Association of Public Policy and Management, 2008-2009 (two years).

Panel member, International Benchmarking Review of UK Sociology: 2009-2010.
http://www.esrcsocietytoday.ac.uk/ESRCInfoCentre/Support/Evaluation/ibr/IBR_Sociology.aspx

Member, International Scientific Advisory Board, Netherlands Institute for the Study of Crime and Law Enforcement (NSCR), 2010-.

Member, National Research Council Committee on Deterrence and the Death Penalty, August 2010 – November 2011.

Member, National Research Council Committee on The Illicit Tobacco Market: Collection and Analysis of The International Experience, 2013-15.

Member, National Research Council Committee on Proactive Policing, 2015-2017.

Refereeing

Associate editor, Law and Contemporary Problems, 1974-78.

Editorial consultant, Journal of Criminal Law and Criminology, 1982-.

Member, Editorial Board, Journal of Policy Analysis and Management, 1986- 2002.

Associate Editor, Criminology, 1987-91.

Editorial board, Criminology & Public Policy 2010-

Editorial board, Journal of Quantitative Criminology 2015-

Occasional refereeing: American Economic Review, Journal of Political Economy, Journal of Public Economics, Economic Inquiry, Journal of Legal Studies, Journal of Law and Economics, New England Journal of Medicine, Journal of the American Medical Association, Criminology and other professional journals.

APPENDIX B

FRANK R. BAUMGARTNER

Richard J. Richardson Distinguished Professor of Political Science
The University of North Carolina at Chapel Hill
313 Hamilton Hall • Chapel Hill, NC 27599-3265
Phone 919 962 3041 • Fax 919 962 0432
Frankb@unc.edu • <http://fbaum.unc.edu/>

EDUCATION

- Ph.D., 1986, The University of Michigan. (Fields: Comparative, American, methods.)
Dissertation: “Strategies of Policy Making: Education Policy in France, 1983–1984.”
Doctoral fieldwork conducted in Paris, France, 1983–84.
- M.A., 1983, The University of Michigan. *Thesis*: “Models of Incumbent Spending in U.S. House Races.”
- B.A., 1980, The University of Michigan. Honors in Political Science, honors in French, high distinction, Phi Beta Kappa, junior year at Université de Provence, Aix-en-Provence, France, 1978–79.
- Diploma, 1976, Cass Technical High School, Detroit, Michigan. Class rank: 3 of 914.
- Languages: American (native); French (fluent).

PROFESSIONAL EXPERIENCE

Full-Time Academic Appointments

- 2009– Richard J. Richardson Distinguished Professor of Political Science, UNC Chapel Hill (also Adjunct Professor of Public Policy, 2019–)
- 1998–09 The Pennsylvania State University (Professor 1998–2005; Interim Head, 1999–2000; Head, 2000–04; Distinguished Professor, 2005–2007; Bruce R. Miller and Dean D. LaVigne Professor, 2007–09)
- 1998–99 California Institute of Technology, Visiting Professor
- 1987–98 Texas A&M University (Assistant Professor 1987–92; Associate Professor 1992–97; Professor 1997–98)
- 1986–87 The University of Iowa, Visiting Assistant Professor

Temporary and other Appointments

- 2019 Visiting Professor, University of St. Gallen, Switzerland, May–June
- 2016 Fellow, Institute for Advanced Studies in the Humanities, University of Edinburgh, May–June
- 2011–12 Visiting Professor, University of Barcelona, May–June 2011, January–June 2012
- 2006–10 Chercheur associé, Center for European Studies / Cevipof / Sciences Po, Paris; also Professeur invité, Sciences Po (graduate courses in public policy). May–June, 2006–10.
- 2000–10 Professor (honorary appointment), University of Aberdeen
- 2007 Fellow, The Camargo Foundation, Cassis, France, January–May
- 2005 Visiting Professor, Cevipof / Sciences Po, Paris, March–August
- 2004–05 Visiting Fellow, European University Institute, Department of Political and Social Sciences, Florence, September–February
- 1997 Visiting Scholar, The University of Washington, Seattle, Summer

- 1996, 90, 87 Visiting Scholar, The University of Michigan, Ann Arbor, Summers
 1988 Visiting Scholar, Institut de Management Public, Paris, Summer
 1983–84 Visiting Scholar, Institut de Management Public, Paris, September–July
 1981–86 Teaching Assistant, then Instructor, then Lecturer, The University of Michigan
 1981–86 Research Assistant, then Research Associate, The University of Michigan.
 Institute for Public Policy Studies; National Election Studies; Center for Political
 Studies; Inter-university Consortium for Political and Social Research
 1981 Summer intern and interpreter, *Conseil Régional du Nord – Pas-de-Calais*,
 France, M. Pierre Mauroy, President of the Region and Prime Minister of France

Teaching and Research Fields

Public policy, policy process, punctuated equilibrium, agenda-setting, framing, interest groups, lobbying, social movements, budgeting, capital punishment, American politics, comparative politics, race and ethnic politics, racial disparities in criminal justice, traffic stops, and policing.

CURRENT RESEARCH

Comparative Agendas Project (see <http://www.comparativeagendas.net>). Bryan Jones and I started the US Policy Agendas Project in 1994, making available data on the activities of the US government since 1947. It has now expanded internationally to become the Comparative Agendas Project (CAP), with affiliated projects in over 25 countries and political systems.

Capital Punishment Research (see <http://fbaum.unc.edu/Innocence/Innocence.htm> and <http://fbaum.unc.edu/books/DeadlyJustice/index.html>) Following on the research I conducted for books published in 2008 and 2018, I continue to be involved in analyses of the death penalty in the US and in North Carolina.

Traffic Stops and “Driving While Black” (see <http://fbaum.unc.edu/traffic.htm> and <http://fbaum.unc.edu/books/SuspectCitizens/index.html>). After publishing a comprehensive analysis of over 20 million traffic stops in North Carolina since 2000, I have remained active in studying the “driving while black” phenomenon in a series of articles.

Racial Disparities in Criminal Justice Outcomes. With a team of graduate students and other collaborators, I am involved in various studies of jury formation, patterns of arrest, and differences in judicial outcomes for different racial and gender groups in the North Carolina criminal justice system, based on large administrative databases.

Research Under Review or Near Completion:

- Being revised for submission

A Deadly Symbol: Race and Capital Punishment in North Carolina. Under contract, University of North Carolina Press; target for submission: Fall 2022. (Frank R. Baumgartner, Seth Kotch, and Isaac Unah)

Criminal Justice Contact and Outcomes in North Carolina: Race, Poverty, and Inequality. A book-length analysis of arrest records, using comprehensive data from the North Carolina courts with millions of observations from 2013 through 2019. (Frank R. Baumgartner, Christian Caron, Marty A. Davidson, and Kaneesha R. Johnson)

- The Importance of Faculty Diversity for Political Science. Target for submission: Spring 2022. (with Chris Clark and Ray Block, Jr.)
- Geography or Personal Choice: Prosecutor Decisions about the Death Penalty in the 30 Most Active Death Penalty Counties in the US. Target for submission: Summer 2022 (Sally Stanley and Frank R. Baumgartner)
- A Probabilistic Method for Matching Identity in Administrative Records with Application to Criminal Justice. Target for submission: Summer 2022. (Ted Enamorado and Frank R. Baumgartner)
- Physical Characteristics and Severity of Punishments in Prison. Target for submission: Summer 2022 (Kaneesha Johnson and Frank R. Baumgartner)
- A Critique of the Veil of Darkness Method of Assessing Racial Disparities in Traffic Stops. Target for submission: Spring 2022. (with Anthony Lindsey)
- Punctuations and Trends and Super-Trends in Budgetary Change. Target for submission: Spring 2022. (Ehud Segal and Frank R. Baumgartner)
- Purchasing Privilege? Driver Identity, Status Cues, and Unwarranted Police Suspicion. Target for resubmission: Spring 2022. (Frank R. Baumgartner, Colin Case, and Will Spillman)
- Under review
- Racial Resentment and the Death Penalty. Submitted, *British Journal of Political Science*, December, 2021. (Frank R. Baumgartner, Christian Caron, and Scott Duxbury)
- Public Health Critical Race Praxis at the Intersection of Traffic Stops and Injury. Submitted, *Injury Epidemiology*, Commentary Section, December, 2021 (Mike Fliss, Frank R. Baumgartner, Paul Delamater, Steve Marshall, Charles Poole, and Whitney Robinson)
- Innocence and the Death Penalty. In Todd Peppers and Jamie Almellen, eds. *The Death Penalty: A Postmortem*. Edited volume submitted for review September, 2021, New York University Press.

PUBLICATIONS

Authored Books

- The Dynamics of Public Opinion*. New York: Cambridge University Press, Elements Series, 2021. (Mary Layton Atkinson, K. Elizabeth Coggins, James A. Stimson, and Frank R. Baumgartner)
- Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race*. New York: Cambridge University Press, 2018. (Frank R. Baumgartner, Derek A. Epp and Kelsey Shoub).
- Winner of the C. Herman Pritchett Award for the best book published in 2018 from the APSA Section on Law and Courts, 2019.
- Deadly Justice: A Statistical Portrait of the Death Penalty*. New York: Oxford University Press, 2018. (Frank R. Baumgartner, Marty Davidson, Kaneesha R. Johnson, Arvind Krishnamurthy, and Colin P. Wilson).
- Agenda Dynamics in Spain*. London: Palgrave Macmillan, 2015. (Laura Chaqués Bonafont, Anna M. Palau, and Frank R. Baumgartner).
- The Politics of Information: Problem Definition and the Course of Public Policy in America*. Chicago: University of Chicago Press, 2015. (Frank R. Baumgartner and Bryan D. Jones)
- Winner of the Louis Brownlow Award for the best book in public administration, National Academy of Public Administration, 2016.

- Winner of the best book award from the International Public Policy Association, recognizing the best book published in the English language in 2015 on any topic of public policy, 2017.

Lobbying and Policy Change: Who Wins, Who Loses, and Why. Chicago: University of Chicago Press, 2009. (Frank R. Baumgartner, Jeffrey M. Berry, Marie Hojnacki, Beth L. Leech, and David C. Kimball).

- Winner of the Leon D. Epstein Outstanding Book Award, APSA Section on Political Organizations and Parties, 2010.
- Simplified Chinese translation, Nanjing University Press, forthcoming.

Agendas and Instability in American Politics, 2nd ed. Chicago: University of Chicago Press, 2009. (Frank R. Baumgartner and Bryan D. Jones).

The Decline of the Death Penalty and the Discovery of Innocence. New York: Cambridge University Press, 2008. (Frank R. Baumgartner, Suzanna L. De Boef and Amber E. Boydston).

- Winner of the Gladys M. Kammerer Award for the best publication in the field of US national policy, American Political Science Association, 2008.

The Politics of Attention: How Government Prioritizes Problems. Chicago: University of Chicago Press, 2005. (Frank R. Baumgartner and Bryan D. Jones)

Basic Interests: The Importance of Groups in Politics and in Political Science. Princeton: Princeton University Press, 1998. (Frank R. Baumgartner and Beth L. Leech)

Agendas and Instability in American Politics. Chicago: University of Chicago Press, 1993. (Frank R. Baumgartner and Bryan D. Jones)

- Chapter 6, The Dynamics of Media Attention, reprinted in *Mediare la Realtà: Mass Media, Systema Politico, e Opinione Pubblica* (ed. Sara Bentivegna. Milano: Franco Angeli, 1994).
- Winner of the Aaron Wildavsky Award for a work of lasting impact on the field of public policy, APSA Organized Section on Public Policy, 2001.
- Featured in *Oxford Handbook of the Classics of Public Policy and Administration* (Steven Balla, Martin Lodge, and Edward Page, eds., Oxford University Press, 2015)
- Chinese translation, Peking University Press, 2011.

Conflict and Rhetoric in French Policymaking. Pittsburgh: University of Pittsburgh Press, 1989.

Edited Books and Special Issues of Journals

Comparative Policy Agendas: Theory, Tools, Data. New York: Oxford University Press, 2019. (Frank R. Baumgartner, Christian Breunig, and Emiliano Grossman, eds.)

The Dynamics of Policy Change in Comparative Perspective, special issue of *Comparative Political Studies* vol. 44, no. 8, August 2011. (Frank R. Baumgartner, Bryan D. Jones, Sylvain Brouard, Christoffer Green-Pedersen, and Stefaan Walgrave, eds.)

Comparative Studies of Policy Agendas. New York: Routledge, 2008. (Frank R. Baumgartner, Christoffer Green-Pedersen, and Bryan D. Jones, eds.)

- Previously published as a special issue of the *Journal of European Public Policy*, vol. 13, no. 7, September 2006.

Policy Dynamics. Chicago: University of Chicago Press, 2002. (Frank R. Baumgartner and Bryan D. Jones, eds.)

Other Editorial Work

Theoretical Models of the Policy Process, virtual special issue of *Journal of European Public Policy*, 2014. Frank R. Baumgartner and Petya Alexandrova, guest editors. (This is our selection of 11 influential articles from previous issues of *JEPP*, with a short introduction.) <http://explore.tandfonline.com/page/pgas/rjpp-policy-process>

Articles in Peer-Reviewed Journals

- Throwing away the Key: The Unintended Consequences of “Tough-on-Crime” Laws. *Perspectives on Politics* Online version 2021. (Frank R. Baumgartner, Tamira Daniely, Kalley Huang, Sydney Johnson, Alexander Love, Lyle May, Patrice McGloin, Allison Swagert, Niharika Vattikonda, and Kamryn Washington) doi: 10.1017/S153759272100164X.
- Better for Everyone: Black Descriptive Representation and Police Traffic Stops. *Politics, Groups, and Identities*, Online version 2021. (Leah Christiani, Kelsey Shoub, Frank R. Baumgartner, Derek A. Epp, and Kevin Roach) doi: 10.1080/21565503.2021.1892782.
- Fines, Fees, and Disparities: The Link between Municipal Reliance on Fines and Racial Disparities in Policing. *Policy Studies Journal* 49, 3 (2021): 835–859. (Kelsey Shoub, Leah Christiani, Frank R. Baumgartner, Derek A. Epp, and Kevin Roach) doi: 10.1111/psj.12412.
- Intersectional Encounters: Representative Bureaucracy and the Routine Traffic Stop. *Policy Studies Journal* 49, 3 (2021): 860–886. (Frank R. Baumgartner, Kate Bell, Luke Beyer, Tara Boldrin, Libby Doyle, Lindsey Govan, Jack Halpert, Jackson Hicks, Katherine Kyriakoudes, Cat Lee, Mackenzie Leger, Sarah McAdon, Sarah Michalak, Caroline Murphy, Eyan Neal, Olivia O’Malley, Emily Payne, Audrey Sapirstein, Sally Stanley, Kathryn Thacker) doi: 10.1111/PSJ.12382.
- Included in the *PSJ* Virtual Special Issue on Racial Justice, ed. Jamila Michener, July 15, 2020
- At the Intersection: Race, Gender, and Discretion in Police Traffic Stop Outcomes. *Journal of Race, Ethnicity, and Politics*, Online version 2020. (Kevin Roach, Frank R. Baumgartner, Leah Christiani, Derek A. Epp, Kelsey Shoub) doi: 10.1017/rep.2020.35.
- Agenda Dynamics in Latin America: Theoretical and Empirical Challenges. *Revista de Administração Pública (Brazilian Journal of Public Administration)* 54, 6 (2020): 1513–1525. (Frank R. Baumgartner, Bryan D. Jones, and Laura Chaqués Bonafont)
- Learning to Kill: Why a Small Handful of Counties Generates the Bulk of US Death Sentences. *PLoS-ONE*, 15, 10 (2020): e0240401. (Frank R. Baumgartner, Janet M. Box-Steffensmeier, Benjamin W. Campbell, Christian Caron, and Hailey Sherman)
- Race, Place, and Context: The Persistence of Race Effects in Traffic Stop Outcomes. *Journal of Race, Ethnicity, and Politics* 5, 3 (2020): 481–508. (Kelsey Shoub, Derek A. Epp, Frank R. Baumgartner, Leah Christiani, and Kevin Roach) doi: 10.1017/rep.2020.8.
- Re-Prioritizing Traffic Stops to Reduce Motor Vehicle Crash Outcomes and Racial Disparities. *Injury Epidemiology* 7, 3 (2020). (Mike Fliss, Frank R. Baumgartner, Paul Delamater, Steve Marshall, Charles Poole, and Whitney Robinson) doi: 10.1186/s40621-019-0227-6.
- Democracy, Authoritarianism, and Policy Punctuations. *International Review of Public Policy* 1, 1 (2019): 7–26. (Bryan D. Jones, Derek A. Epp, and Frank R. Baumgartner)
- Event Dependence in U.S. Executions. *PLoS-ONE* 13, 1 (2018): e0190244. (Frank R. Baumgartner, Janet M. Box-Steffensmeier, and Benjamin W. Campbell)

- Budgetary Change in Authoritarian and Democratic Regimes. *Journal of European Public Policy* 24, 6 (2017): 792–808. (Frank R. Baumgartner, Marcello Carammia, Derek A. Epp, Ben Noble, Beatriz Rey, and Tefvik Murat Yildirim)
- Complexity, Capacity, and Budget Punctuations. *Policy Studies Journal* 45, 2 (2017): 247–64. (Derek A. Epp and Frank R. Baumgartner)
- Included in the *PSJ* Virtual Special Issue on COVID-19 Crisis, ed. Michael D. Jones, May 26, 2020
- Endogenous Disjoint Change. *Cognitive Systems Research* 44 (2017): 69–73.
- Creating an Infrastructure for Comparative Policy Analysis. *Governance* 30, 1 (2017): 59–65.
- Targeting Young Men of Color for Search and Arrest during Traffic Stops: Evidence from North Carolina, 2002-2013. *Politics, Groups, and Identities* 5, 1 (2017): 107–31. (Frank R. Baumgartner, Derek A. Epp, Kelsey Shoub, and Bayard Love)
- Included in the #BlackLivesMatter *PGI* Micro-Syllabus
- Do the Media Set the Parliamentary Agenda? A Comparative Study in Seven Countries. *European Journal of Political Research* 55 (2016): 283–301. (Rens Vliegthart, Stefaan Walgrave, Frank R. Baumgartner, Shaun Bevan, Christian Breunig, Sylvain Brouard, Laura Chaqués Bonafont, Emiliano Grossman, Will Jennings, Peter B. Mortensen, Anna M. Palau, Pascal Sciarini, and Anke Tresch)
- Assessing Business Advantage in Washington Lobbying. *Interest Groups and Advocacy* 4 (2015): 205–24. (Marie Hojnacki, Kathleen M. Marchetti, Frank R. Baumgartner, Jeffrey M. Berry, David C. Kimball, and Beth L. Leech)
- Images of an Unbiased Interest System. *Journal of European Public Policy* 22, 8 (2015): 1212–31 (David Lowery, Frank R. Baumgartner, Joost Berkhout, Jeffrey M. Berry, Darren Halpin, Marie Hojnacki, Heike Klüver, Beate Kohler-Koch, Jeremy Richardson, and Kay Lehman Schlozman)
- #BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions, 1977-2013. *Politics, Groups, and Identities* 3, 2 (2015): 209–21. (Frank R. Baumgartner, Amanda Grigg, and Alisa Mastro)
- Included in the #BlackLivesMatter *PGI* Micro-Syllabus
- All News is Bad News: Newspaper Coverage of Politics in Spain. *Political Communication* 32, 2 (2015): 268–91. (Frank R. Baumgartner and Laura Chaqués Bonafont).
- Partners in Advocacy: Lobbyists and Government Officials in the Policy Process. *Journal of Politics* 77, 1 (2015): 202–15. (Christine Mahoney and Frank R. Baumgartner)
- Popular Presidents Can Influence Congressional Attention, for a Little While. *Policy Studies Journal* 43, 1 (2015): 22-43. (John Lovett, Shaun Bevan, and Frank R. Baumgartner)
- Included in the *PSJ* Virtual Special Issue on COVID-19 Crisis, ed. Michael D. Jones, May 26, 2020
- Partisan Priorities and Public Budgeting. *Political Research Quarterly* 67, 4 (2014): 864–78. (Derek A. Epp, John Lovett, and Frank R. Baumgartner)
- The Two Worlds of Lobbying: Washington Lobbyists in the Core and on the Periphery. *Interest Groups and Advocacy* 3, 3 (2014): 219–45. (Timothy M. LaPira, Herschel F. Thomas III, and Frank R. Baumgartner).
- The State of the Discipline: Authorship, Research Designs, and Citation Patterns in Studies of EU Interest Groups and Lobbying. *Journal of European Public Policy* 21, 10 (2014): 1412–34. (Adriana Bunea and Frank R. Baumgartner)

- Money, Priorities, and Stalemate: How Lobbying Affects Public Policy. *Election Law Journal* 13, 1 (2014): 194–209. (Frank R. Baumgartner, Jeffrey M. Berry, Marie Hojnacki, David C. Kimball, and Beth L. Leech)
- Divided Government, Legislative Productivity, and Policy Change in the US and France. *Governance* 27, 3 (2014): 423–447. (Frank R. Baumgartner, Sylvain Brouard, Emiliano Grossman, Sebastien G. Lazardeux, and Jon Moody)
- Measuring the Media Agenda. *Political Communication* 31, 2 (2014): 355–80. (Mary Layton Atkinson, John Lovett, and Frank R. Baumgartner)
- Ideas, Paradigms, and Confusions. *Journal of European Public Policy* 21, 3 (2014): 475–80.
- Understanding Time-Lags and Measurement Validity in Secondary Data: The *Encyclopedia of Associations Database*. *Social Science Research* 42 (2013): 1750–64. (Shaun Bevan, Frank R. Baumgartner, Erik W. Johnson, and John McCarthy)
- Ideas and Policy Change. *Governance* 26, 2 (2013): 239–58.
- A Failure to Communicate: Agenda Setting in Media and Policy Studies. *Political Communication* 30, 2 (2013): 175–192. (Michelle Wolfe, Bryan D. Jones, and Frank R. Baumgartner)
- Newspaper Attention and Policy Activities in Spain. *Journal of Public Policy* 13, 1 (2013): 1–24. (Laura Chaqués Bonafont and Frank R. Baumgartner)
- Framing the Poor: Media Coverage and US Poverty Policy, 1960–2008. *Policy Studies Journal* 41, 1 (2013): 22–53. (Max Rose and Frank R. Baumgartner)
- Public Budgeting in the EU Commission: A Test of the Punctuated Equilibrium Thesis. *Politique Européenne* 38 (2012): 70–99. (Frank R. Baumgartner, Martial Foucault and Abel François)
- Who Cares About the Lobbying Agenda? *Interest Groups and Advocacy* 1, 1 (2012): 1–21. (David C. Kimball, Frank R. Baumgartner, Jeffrey M. Berry, Marie Hojnacki, Beth L. Leech, and Bryce Summary)
- From There to Here: Punctuated Equilibrium to the General Punctuation Thesis to a Theory of Government Information Processing. *Policy Studies Journal* 40, 1 (2012): 1–19. (Bryan D. Jones and Frank R. Baumgartner)
- Introduction to special issue on punctuated equilibrium studies of public policy, one of four special issues on the major theoretical approaches to the study of public policy.
- Studying Organizational Advocacy and Influence: Reexamining Interest Group Research. *Annual Review of Political Science* 15 (2012): 379–99. (Marie Hojnacki, David C. Kimball, Frank R. Baumgartner, Jeffrey M. Berry, and Beth L. Leech).
- Comparative Studies of Policy Dynamics. *Comparative Political Studies* 44, 8 (August 2011): 947–72. (Frank R. Baumgartner, Bryan D. Jones and John Wilkerson)
- Policy Attention in State and Nation: Is Anyone Listening to the Laboratories of Democracy? *Publius* 41, 2 (2011): 286–310. (David Lowery, Virginia Gray and Frank R. Baumgartner)
- Replacing Members with Managers? Mutualism Among Membership and Non-Membership Advocacy Organizations in the U.S. *American Journal of Sociology* 116, 4 (January 2011): 1284–1337. (Edward T. Walker, John D. McCarthy, and Frank R. Baumgartner)
- Congressional and Presidential Effects on the Demand for Lobbying. *Political Research Quarterly* 64, 1 (March 2011): 3–16. (Frank R. Baumgartner, Heather A. Larsen, Beth L. Leech, and Paul Rutledge)

- Measuring the Size and Scope of the EU Interest Group Population. *European Union Politics* 11, 3 (September 2010): 463–76. (Arndt Wonka, Frank R. Baumgartner, Christine Mahoney, and Joost Berkhout)
- A General Empirical Law for Public Budgets: A Comparative Analysis. *American Journal of Political Science* 53, 4 (October 2009): 855–73. (Bryan D. Jones, Frank R. Baumgartner, Christian Breunig, Christopher Wlezien, Stuart Soroka, Martial Foucault, Abel François, Christoffer Green-Pedersen, Peter John, Chris Koski, Peter B. Mortensen, Frédéric Varone, and Stefaan Walgrave)
- Punctuated Equilibrium in Comparative Perspective. *American Journal of Political Science*, 53, 3, (July 2009): 602–19. (Frank R. Baumgartner, Christian Breunig, Christoffer Green-Pedersen, Bryan D. Jones, Peter B. Mortensen, Michiel Neytemans, and Stefaan Walgrave)
- Agenda-setting Dynamics in France: Revisiting the “Partisan Hypothesis.” *French Politics*, 7, 2 (2009): 57–95. (Frank R. Baumgartner, Emiliano Grossman and Sylvain Brouard)
- Federal Policy Activity and the Mobilization of State Lobbying Organizations. *Political Research Quarterly* 62, 3 (September 2009): 552–67. (Frank R. Baumgartner, Virginia Gray and David Lowery)
- Public Budgeting in the French Fifth Republic: The End of *La République des partis*? *West European Politics* 32, 2 (2009): 401–19. (Frank R. Baumgartner, Martial Foucault and Abel François)
- Le Projet Agendas Comparés : Objectifs et Contenus. *Revue Internationale de Politique Comparée*, 16, 3 (2009): 365–79. (John Wilkerson, Frank R. Baumgartner, Sylvain Brouard, Laura Chaqués Bonafont, Christopher Green-Pedersen, Emiliano Grossman, Bryan D. Jones, Arco Timmermans, and Stefaan Walgrave)
- Comparer les Productions Législatives : Enjeux et Méthodes. *Revue Internationale de Politique Comparée* 16, 3 (2009): 381–404. (Sylvain Brouard, John Wilkerson, Frank R. Baumgartner, Arco Timmermans, Shaun Bevan, Gerard Breeman, Christian Breunig, Laura Chaqués Bonafont, Christopher Green-Pedersen, Will Jennings, Peter John, Bryan D. Jones, and David Lowery)
- Converging Perspectives on Interest-Group Research in Europe and America. *West European Politics*, 31, 6 (2008): 1251–71. (Christine Mahoney and Frank R. Baumgartner)
- Reprinted in Jan Beyers, Rainer Eising, and William A. Maloney, eds. 2013. *Interest Group Politics in Europe: Lessons from EU Studies and Comparative Politics* (London and New York: Routledge).
- The Two Faces of Framing: Individual-Level Framing and Collective Issue-Definition in the EU. *European Union Politics* 9, 3 (2008): 435–49. (Frank R. Baumgartner and Christine Mahoney)
- Media Framing of Capital Punishment and Its Impact on Individuals’ Cognitive Responses. *Mass Communication and Society* 11, 2 (2008): 115–40. (Frank R. Baumgartner, Suzanna De Boef, Amber E. Boydston, Frank E. Dardis, and Fuyuan Shen)
- EU Lobbying: A View from the US. *Journal of European Public Policy* 14, 3 (March 2007): 482–88.
- Comparative Studies of Policy Agendas. *Journal of European Public Policy* 13, 7 (September 2006): 955–70. (Frank R. Baumgartner, Christoffer Green-Pedersen and Bryan D. Jones)
- Reprinted in Peter Hupe and Michael Hill, eds. 2012. *Public Policy*. London: Sage.

- Punctuated Equilibrium in French Budgeting Processes. *Journal of European Public Policy* 13, 7 (September 2006): 1082–99. (Frank R. Baumgartner, Martial Foucault and Abel François)
- Measuring Association Populations Using the *Encyclopedia of Associations*: Evidence from the Field of Labor Unions. *Social Science Research* 35 (2006): 771–78. (Andrew W. Martin, Frank R. Baumgartner, and John McCarthy)
- A Model of Choice for Public Policy. *Journal of Public Administration Research and Theory* 15, 3 (July 2005): 325–51. (Bryan D. Jones and Frank R. Baumgartner)
- Selected for inclusion in special issue reprinting the most outstanding articles for the 20th anniversary issue of *JPART*, 2010.
- Drawing Lobbyists to Washington: Government Activity and Interest-Group Mobilization. *Political Research Quarterly* 58, 1 (March 2005): 19–30. (Beth L. Leech, Frank R. Baumgartner, Timothy La Pira, and Nicholas A. Semanko)
- Representation and Agenda-Setting. *Policy Studies Journal* 32, 1 (January 2004): 1–24. (Bryan D. Jones and Frank R. Baumgartner)
- Issue Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics. *Journal of Politics* 63, 4 (November 2001): 1191–1213. (Frank R. Baumgartner and Beth L. Leech)
- Reprinted in Phil Harris, ed., *Public Affairs Management* (London: Sage Publications, 2013)
- The Evolution of Legislative Jurisdictions. *Journal of Politics* 62, 2 (May 2000): 321–49. (Frank R. Baumgartner, Bryan D. Jones and Michael C. MacLeod)
- Policy Punctuations: US Budget Authority, 1947–95. *Journal of Politics* 60, 1 (February 1998): 1–33. (Bryan D. Jones, Frank R. Baumgartner, and James L. True)
- Does Incrementalism Stem from Political Consensus or Institutional Gridlock? *American Journal of Political Science* 41, 4 (October 1997): 1319–39. (Bryan D. Jones, James L. True, and Frank R. Baumgartner)
- The Multiple Ambiguities of “Counteractive Lobbying.” *American Journal of Political Science* 40, 2 (May 1996): 521–42. (Frank R. Baumgartner and Beth L. Leech)
- This article led to a rebuttal and response as follows:
- Theory and Evidence for Counteractive Lobbying *American Journal of Political Science* 40, 2: 543–64. (David Austen-Smith and Jack R. Wright)
 - Good Theories Deserve Good Data. *American Journal of Political Science* 40, 2: 565–9. (Frank R. Baumgartner and Beth L. Leech)
- Public Interest Groups in France and the United States. *Governance* 9 (1996): 1–22.
- From Setting a National Agenda on Health Care to Making Decisions in Congress. *Journal of Health Politics, Policy and Law* 20 (1995): 437–45. (Frank R. Baumgartner and Jeffery C. Talbert)
- Nonlegislative Hearings and Policy Change in Congress. *American Journal of Political Science* 39, 2 (May 1995): 383–406. (Jeffery C. Talbert, Bryan D. Jones, and Frank R. Baumgartner)
- Reprinted in Steven S. Smith, Jason M. Roberts, and Ryan J. Vander Wielen, eds. *The American Congress Reader Pack*, various editions (New York: Cambridge University Press, 2011 and previous years)
- The Politics of Protest and Mass Mobilization in France. *French Politics and Society* 12 (1994): 84–96.

- The Destruction of Issue Monopolies in Congress. *American Political Science Review* 87, 3 (September 1993): 673–87. (Bryan D. Jones, Frank R. Baumgartner, and Jeffery C. Talbert)
- Agenda Dynamics and Policy Subsystems. *Journal of Politics* 53, 4 (November 1991): 1044–74. (Frank R. Baumgartner and Bryan D. Jones)
- Measurement Validity and the Continuity of Results in Survey Research. *American Journal of Political Science* 34, 3 (August 1990): 662–70. (Frank R. Baumgartner and Jack L. Walker)
(In response to: Trends in Voluntary Group Membership: Comments on Baumgartner and Walker, by Tom W. Smith. *American Journal of Political Science* 34, 3 (August 1990): 646–61.)
- Independent and Politicized Policy Communities: Education and Nuclear Energy in France and the United States. *Governance* 2 (1989): 42–66.
- Afterword on Policy Communities: A Framework for Comparative Research. *Governance* 2 (1989): 86–94. (John Creighton Campbell, with Mark A. Baskin, Frank R. Baumgartner, and Nina P. Halpern)
- Educational Policy Making and the Interest Group Structure in France and the United States. *Comparative Politics* 21, 3 (April 1989): 273–88. (Frank R. Baumgartner and Jack L. Walker)
- Survey Research and Membership in Voluntary Associations. *American Journal of Political Science* 32, 4 (November 1988): 908–28. (Frank R. Baumgartner and Jack L. Walker)
- Parliament’s Capacity to Expand Political Controversy in France. *Legislative Studies Quarterly* 12 (1987): 33–54.
– Reprinted in: *The International Library of Politics and Comparative Government: France*. Ed. David Bell. Hampshire, U.K.: Dartmouth Publishing, 1994.
- Preemptive and Reactive Spending in U.S. House Races. *Political Behavior* 8 (1986): 3–20. (Edie N. Goldenberg, Michael W. Traugott and Frank R. Baumgartner)

Articles Published in Law Reviews

- Race and Gender Disparities in Capitally-Charged Louisiana Homicide Cases, 1976-2014. Forthcoming, 2022. *Southern University Law Review* (Tim Lyman, Frank R. Baumgartner, and Glenn L. Pierce)
- The Mayhem of Wrongful Liberty: Documenting the Crimes of True Perpetrators in Cases of Wrongful Incarceration. *Albany Law Review*, 81, 4 (2018): 1263–1288. (Frank R. Baumgartner, Amanda Grigg, Rachelle Ramirez, and J. Sawyer Lucy).
- Racial Disparities in Traffic Stop Outcomes. *Duke Forum for Law and Social Change* 9 (2017): 21–53. (Frank R. Baumgartner, Leah Christiani, Derek A. Epp, Kevin Roach, and Kelsey Shoub)
- These Lives Matter, Those Ones Don’t: Comparing Execution Rates by the Race and Gender of the Victim in the US and in the Top Death Penalty States. *Albany Law Review* 79, 3 (2016): 797–860. (Frank R. Baumgartner, Emma Johnson, Colin Wilson, and Clarke Whitehead)
- The Geographic Distribution of US Executions. *Duke Journal of Constitutional Law and Public Policy* 11, 1&2 (2016): 1–33. (Frank R. Baumgartner, Woody Gram, Kaneesha R. Johnson, Arvind Krishnamurthy, and Colin P. Wilson)
- Louisiana Death-Sentenced Cases and their Reversals, 1976-2015. *Journal of Race, Gender, and Poverty* 7 (2016): 58–75. (Frank R. Baumgartner and Tim Lyman)

Race-Of-Victim Discrepancies in Homicides and Executions, Louisiana 1976-2015. *Loyola University of New Orleans Journal of Public Interest Law* 17 (2015): 128-44. (Frank R. Baumgartner and Tim Lyman)

Book Chapters

The Code and Craft of Punctuated Equilibrium. In Christopher M. Weible and Samuel Workman, eds., *Methods of the Policy Process*. Abingdon, UK: Routledge, forthcoming 2021. (Samuel Workman, Frank R. Baumgartner, and Bryan D. Jones)

In *Comparative Policy Agendas: Theory, Tools, Data*, 2019, Oxford University Press. (Frank R. Baumgartner, Christian Breunig, and Emiliano Grossman, eds.)

- The Comparative Agendas Project: Intellectual Roots and Current Developments (Frank R. Baumgartner, Christian Breunig, and Emiliano Grossman), pp. 3–16.
- Advancing the Study of Comparative Public Policy (Frank R. Baumgartner, Christian Breunig, and Emiliano Grossman), pp. 391–398.

Punctuated Equilibrium Theory: Explaining Stability and Change in Public Policy. In Christopher M. Weible and Paul A. Sabatier, eds., *Theories of the Policy Process* 4th ed. Abingdon, UK: Routledge, 2018, pp. 55–101. (Frank R. Baumgartner, Bryan D. Jones, and Peter B. Mortensen)

Politics in France: Participation versus Control. In Paulette Kurzer, eds., *Comparative Governance*. New York: McGraw-Hill, 2017. (Previously published as “France: The Fifth Republic at Fifty” in 2012 and 2008 and as “Politics in France: Democracy and Efficiency” in 2005, 2000, 1997, 1995.) (2017 edition co-authored with Sebastien G. Lazardeux)

John Kingdon and the Evolutionary Approach to Public Policy and Agenda-Setting. In Nikolaos Zahariadis, ed. *Handbook of Public Policy Agenda-Setting*. Cheltenham, UK: Edward Elgar, 2016, pp. 53–68.

Agendas: Political. 2015. In: James D. Wright (editor-in-chief), *International Encyclopedia of the Social & Behavioral Sciences*, 2nd edition, Vol 1. Oxford: Elsevier. pp. 362–366.

Population Dynamics and Representation. In David Lowery, Virginia Gray, and Darren Halpin, eds., *The Organization Ecology of Interest Communities: Assessment and Agenda*. London: Palgrave Macmillan, 2015, pp 203–24. (Frank R. Baumgartner and Kelsey Shoub)

Punctuated Equilibrium Theory: Explaining Stability and Change in Public Policy. In Christopher M. Weible and Paul A. Sabatier, eds., *Theories of the Policy Process* 3rd ed. Boulder: Westview Press, 2014, pp. 59–103. (Frank R. Baumgartner, Bryan D. Jones, and Peter B. Mortensen)

Public Policy Responses to Wrongful Convictions. In Allison D. Relich, James R Acker, Robert J. Norris, and Catherin L. Bonventre, eds., *Examining Wrongful Convictions: Stepping Back, Moving Forward*. Durham, NC: Carolina Academic Publishing, 2014, pp. 251–66. (Frank R. Baumgartner, Sandra D. Westervelt, and Kimberly J. Cook)

Lessons from the “Lobbying and Policy Change” Project. In Layna Mosley, ed., *Interview Research in Political Science*. Ithaca, NY: Cornell University Press, 2013, pp. 209–24. (Beth L. Leech, Frank R. Baumgartner, Jeffrey M. Berry, Marie Hojnacki, and David C. Kimball)

Tracking Interest-Group Populations in the US and UK. In Darren Halpin and Grant Jordan, eds., *The Scale of Interest Organization in Democratic Politics*. London: Palgrave Macmillan,

- 2012, pp. 141–60. (Grant Jordan, Frank R. Baumgartner, John McCarthy, Shaun Bevan, and Jamie Greenan)
- Incrémentalisme et les punctuations budgétaires en France. In Philippe Bezes et Alexandre Siné, eds., *Gouverner (par) les finances publiques*. Paris: Presses de Sciences Po, 2011, pp. 299–322. (Frank R. Baumgartner, Martial Foucault, and Abel François)
- Interest Groups and Agendas. In L. Sandy Maisel and Jeffrey M. Berry, eds., *Oxford Handbook of American Political Parties and Interest Groups*. New York: Oxford University Press, 2010, pp. 519–33.
- The Decline of the Death Penalty: How Media Framing Changed Capital Punishment in America. In Brian F. Schaffner and Patrick J. Sellers, eds. *Winning with Words: The Origins and Impact of Framing*. New York: Routledge, 2010, pp. 159–84. (Frank R. Baumgartner, Suzanna Linn and Amber E. Boydston)
- Patterns of Public Budgeting in the French Fifth Republic: From Hierarchical Control to Multi-Level Governance. In Sylvain Brouard, Andrew Appleton and Amy Mazur, eds., *The Fifth Republic at Fifty: Beyond Stereotypes*. London: Palgrave Macmillan, 2008, pp. 174–90. (Frank R. Baumgartner, Martial Foucault and Abel François)
- Punctuated Equilibrium Theory: Explaining Stability and Change in American Policymaking. In Paul Sabatier, ed., *Theories of the Policy Process* 2nd ed. Boulder: Westview Press, 2007, pp. 155–188. (James L. True, Bryan D. Jones, and Frank R. Baumgartner)
- Friction, Resistance, and Breakthroughs. In Liesbet Heyse, Sandra Resodihardjo, Tineke Lantink, and Berber Lettinga, eds. *Reform in Europe: Breaking the Barriers in Government*. Hampshire (UK): Ashgate, 2006, pp. 193–200.
- Punctuated Equilibrium Theory and Environmental Policy. In Robert Repetto, ed., *Punctuated Equilibrium and the Dynamics of U.S. Environmental Policy*. New Haven: Yale University Press, 2006, pp. 24–46.
- Social Movements, the Rise of New Issues, and the Public Agenda. In David S. Meyer, Valerie Jenness, and Helen Ingram, eds., *Routing the Opposition: Social Movements, Public Policy, and Democracy*. Minneapolis: University of Minnesota Press, 2005, pp. 65–86. (Frank R. Baumgartner and Christine Mahoney)
- The following chapters in Clive S. Thomas, ed., *Research Guide to US and International Interest Groups*. Westport, CT: Praeger Press, 2004:
- The Origins, Organization, Maintenance, and Mortality of Interest Groups (with Beth L. Leech), pp. 95–111.
 - Criminal Justice Interest Groups (with Michael C. MacLeod), pp. 248–49.
 - Education Interest Groups (with Michael C. MacLeod), pp. 221–23.
 - Health-Care Interest Groups (with Jeffery C. Talbert), pp. 257–59.
- The following chapters in Frank R. Baumgartner and Bryan D. Jones, eds., *Policy Dynamics*. Chicago: University of Chicago Press, 2002:
- Introduction: Positive and Negative Feedback in Politics (Frank R. Baumgartner and Bryan D. Jones)
 - Studying Policy Dynamics (Frank R. Baumgartner, Bryan D. Jones, and John Wilkerson)
 - The Changing Agendas of Congress and the Supreme Court (Frank R. Baumgartner and Jamie Gold)
 - Conclusion (Frank R. Baumgartner and Bryan D. Jones)
- Organized Interests and Issue Definition in Policy Debates. In Allan J. Cigler and Burdett A.

- Loomis, eds., *Interest Group Politics*, 6th ed. Washington, D.C.: Congressional Quarterly, 2002, pp. 275–92. (Frank R. Baumgartner, Jeffrey M. Berry, Marie Hojnacki, Beth L. Leech, and David C. Kimball)
- Political Agendas. In Niel J. Smelser and Paul B. Baltes, eds. *International Encyclopedia of Social and Behavioral Sciences: Political Science*. New York: Elsevier Science and Oxford: Pergamon, 2001, pp. 288–90.
- Interest Groups. In Paul Barry Clarke and Joe Foweraker, eds., *Encyclopedia of Democratic Thought*. London and New York: Routledge, 2001, pp. 371–74.
- Punctuated Equilibrium Theory: Explaining Stability and Change in American Policymaking. In Paul Sabatier, ed., *Theories of the Policy Process*. Boulder: Westview Press, 1999, pp. 97–115. (Bryan D. Jones, James L. True, and Frank R. Baumgartner)
- Lobbying Friends and Foes in Washington. In Allan J. Cigler and Burdett A. Loomis, eds., *Interest Group Politics*, 5th ed. Washington, D.C.: Congressional Quarterly, 1998, pp. 217–33. (Frank R. Baumgartner and Beth L. Leech)
- Media Attention and Congressional Agendas. In Shanto Iyengar and Richard Reeves, eds. *Do The Media Govern? Politicians, Voters, and Reporters in America*. Thousand Oaks, Calif.: Sage, 1997, pp. 355–69. (Frank R. Baumgartner, Bryan D. Jones and Beth L. Leech)
- The Many Styles of Policymaking in France. In John T.S. Keeler and Martin A. Schain, eds. *Chirac's Challenge: Liberalization, Europeanization and Malaise in France*. New York: St. Martin's and London: Macmillan, 1996, pp. 85–101.
- Interest Groups and Political Change. In Bryan D. Jones, ed., *The New American Politics*. Boulder: Westview Press, 1995, pp. 93–108. (Frank R. Baumgartner and Jeffery C. Talbert)
- Attention, Boundary Effects, and Large-Scale Policy Change in Air Transportation Policy. In David A. Rochefort and Roger W. Cobb, eds., *The Politics of Problem Definition*. Lawrence: University Press of Kansas, 1994, pp. 50–66. (Frank R. Baumgartner and Bryan D. Jones)
- France: Science within the State. In Etel Solingen, ed. *Between Power and Ethos: Scientists and the State in Comparative Perspective*. Ann Arbor: University of Michigan Press, 1994, pp. 63–91. (with David Wilsford)
- Preface and Epilogue: The Unfinished Research Agenda. In Jack L. Walker, Jr. *Mobilizing Interest Groups in America*. Ann Arbor: University of Michigan Press, 1991. (with Joel D. Aberbach, et al.)
- Strategies of Political Leadership in Diverse Settings. In Bryan D. Jones, ed., *Leadership and Politics: New Perspectives from Political Science*. Lawrence: University Press of Kansas, 1989, pp. 114–34

Invited Essays and Other Publications

Mobilizing Interest Groups in America: Patrons, Professions, and Social Movements: A Retrospective. *Interest Groups and Advocacy* 10, 1 (2021): 72–77. (Joel D. Aberbach, Frank R. Baumgartner, and Mark A. Peterson) doi: 10.1057/s41309-021-00114-3.

- Part of a symposium recognizing the 30th anniversary of the publication of Jack L. Walker Jr.'s book of that title. Other contributors include Andrew S. McFarland, Kathleen Marchetti, and Jesse M. Crosson, Alexander, C. Furnas, and Geoffrey M. Lorenz.

Forward: Political Actors and the Media. In Peter Van Aelst and Stefaan Walgrave, eds. *How*

- Political Actors Use the Media*. London: Palgrave Macmillan, 2017, pp. v–viii.
 Analyzing Patterns of Government Attention and What Drives Them: The Comparative Agendas Project. Introductory essay to a symposium on the Comparative Agendas Project.
Perspectives on Europe 42, 2 (2012): 7-13. (Arco Timmermans and Frank R. Baumgartner)
- What We Can All Learn from Lin Ostrom. 2010. *Perspectives on Politics* 8, 2: 575–77. Invited essay as part of a symposium on the work of Nobel Prize winner Elinor Ostrom – Reprinted in *Elinor Ostrom and the Bloomington School of Political Economy: A Compendium of Key Statements, Collaborations, and Reactions, Volume 1: Polycentricity and the Bloomington School* (Daniel Cole and Michael McGinnis, eds., Lexington Books, 2015)
- “3. Jack L. Walker Jr. 1969. The Diffusion of Innovation Among the American States. *American Political Science Review* 63 (September): 880–99. Cited 482 times.” 2006. *American Political Science Review* 100, 4 (November): 672. Invited commentary as part of a review of “The APSR Citation Classics.”
- The Growth and Diversity of US Associations, 1956–2004: Analyzing Trends using the *Encyclopedia of Associations*. Working paper on my web site. March 29, 2005.
- Studying Interest Groups Using Lobby Disclosure Reports. *VOX POP* (Newsletter of the Political Organizations and Parties Section of the APSA) Vol. 18, No. 1 (Fall 1999), pp. 1–3. (with Beth L. Leech)
- The Policy Agendas Project: A Public Resource for the Systematic Study of Public Policy. *Policy Currents* (Newsletter of the Public Policy Section of the APSA) Vol. 9, No. 2 (June, 1999): 12–14. (with Bryan D. Jones) (Also published in *PS: Political Science and Politics*, 1999; and at the APSA web site: www.apsanet.org/PS/announcements/)
- Lessons from the Trenches: Ensuring Quality, Reliability, and Usability in the Creation of a New Data Source. *The Political Methodologist* (Newsletter of the Political Methodology Section of the APSA) Vol. 8, No. 2 (Spring 1998), pp. 1–10. (Frank R. Baumgartner, Bryan D. Jones, and Michael C. MacLeod)
- L’aide de l’état aux groupes d’intérêt en France: Le cas de l’éducation. *Problèmes politiques et sociaux* No. 511 (Paris: La Documentation Française), 1985.

Legal / Criminal Justice / Legislative Testimony / Reports

- A Statistical Overview of the Kentucky Death Penalty System, forthcoming 2022.
- Affidavit in support of Mr. Bruce Johnson regarding jury selection in Johnston County, NC, November 9, 2021.
- Affidavit in support of Mr. Nathan Holden regarding capital jury selection in Wake County, NC, June 10, 2021.
- Affidavit in support of Mr. Kendrick Gregory regarding capital jury selection in Wake County, NC, June 10, 2021.
- Expert Report on the cases of *Cox v. Commonwealth of Pennsylvania* and *Marinelli v. Commonwealth of Pennsylvania*, 102 EM 2018. May 4, 2021.
- Oral presentation to the Nevada Legislature regarding AB 379, a bill to remove expiration date stickers from NV automobile license plates as a means to reduce racial disparities, April 1, 2021.
- Aging in Place in the Big House: A Demographic Analysis of the North Carolina Prison Population. (Frank R. Baumgartner and Sydney Johnson) October 11, 2020.

- Expert Report on North Carolina's Disenfranchisement of Individuals on Probation and Post-Release Supervision. Submitted May 8, 2020 in the case of *Community Success Initiative v. Moore*, No. 19-cv-15941 (N.C. Super.). Court testimony before a three-judge panel in Raleigh, NC, August 18, 2021.
- Declining Use of the Death Penalty for Offenders 18, 19 and 20 Years of Age. Submitted, August 1, 2019 as part of the capital appeal of *State v. Guzek*, Marion County OR, No. 17CV08248. Court testimony in Salem OR, October 10, 2019.
- Capital and Non-Capital Murder Prosecutions in East Baton Rouge Parish, Louisiana, 2000–2016. Submitted, March 25, 2019 as part of the capital appeal of *Holliday v. State*. No. 2017-KA-1921.
- Amicus brief to the Supreme Court of Pennsylvania, Eastern District regarding racial bias in the application of the state's death penalty system. Related case is *Cox v. Commonwealth of Pennsylvania*, and *Marinelli v. Commonwealth of Pennsylvania*, 102 EM 2018; brief filed February 2019. (co-signed with Catherine M. Grosso and Jules Epstein as lead signatories and 21 other social scientists)
- Amicus brief to the Supreme Court of the State of Washington regarding racial bias in application of the state's death penalty system. Related case is *State v. Gregory* (no. 88086-7); brief filed January 22, 2018. (co-signed with Catherine Grosso and Jeffrey Fagan as lead signatories and nine other social scientists). In October, 2018, the Supreme Court of Washington ruled the death penalty unconstitutional based on racial and geographic bias, consistent with our brief.
- Analyzing Racial Disparities in Traffic Stops Statistics from the Texas Department of Public Safety. Report to the Texas House of Representatives, Committee on County Affairs, September 20, 2016. (Frank R. Baumgartner, Leah Christiani, and Kevin Roach)
- Amicus brief to the US Supreme Court regarding constitutional defects in the application of the death penalty. Related case is *Tucker v. Louisiana* (15-946); brief filed February 29, 2016. (lead author, with 20 signatories)
- The Impact of Race, Gender, and Geography on Florida Executions. 2016.
- The Impact of Race, Gender, and Geography on Ohio Executions. 2016.
- The Impact of Race, Gender, and Geography on Missouri Executions. 2015.
- Racial Disparities in Texas Department of Public Safety Traffic Stops, 2002-2014. Report to the Texas House of Representatives, Committee on County Affairs, November 18, 2015. (Frank R. Baumgartner, Bryan D. Jones, Julio Zaconet, Colin Wilson, Arvind Krishnamurthy)
- Analysis of Trespass Stops in Grand Rapids Michigan, 2011-2013. Report for the ACLU of Michigan as part of legal action alleging racial bias by the Grand Rapids Police Department. March 5, 2014.
- Affidavit in support of litigants seeking relief under the NC Racial Justice Act to be tried in Forsyth County, NC August 8, 2012.
- Amicus brief to the US Supreme Court regarding mandatory life without parole sentences for juveniles, January 17, 2012; related Supreme Court Decision is *Miller v. Alabama* No. 10–9646, Decided June 25, 2012. (co-signed with Jeffrey Fagan lead author and 44 others)
- Member, Task Force on Racial and Ethnic Bias in the Criminal Justice System, North Carolina Advocates for Justice, 2010-2012. Our report (see below) led the Attorney General to create The North Carolina Commission on Racial Disparities in the Criminal Justice

System in September 2012. I am not a member of this commission but have consulted with it.

North Carolina Traffic Stop Statistics Analysis. Report to the North Carolina Advocates for Justice, 1 February 2012. (with Derek A. Epp) These technical reports were based on official statistics provided by the NC Department of Justice and relate to possible racial bias associated with each traffic stop in the state from January 1, 2000 through June 2011. The report was submitted to the Governor, Attorney General, and leaders of both parties in both chambers of the NC legislature in April 2012. In June 2012, it was leaked to the press.

Opinion Pieces / Op Eds

Thousands of prisoners have died of covid-19. Because of the “tough on crime” era, there’s worse to come. *WashingtonPost.com* Monkey Cage, August 26, 2021 (Frank R. Baumgartner, Tamira Daniely, Kalley Huang, Sydney Johnson, Alexander Love, Lyle May, Patrice McGloin, Allison Swagert, Niharika Vattikonda, and Kamryn Washington).

If Biden abolishes the federal death penalty, he’ll have more support than you think. *WashingtonPost.com* Monkey Cage, August 3, 2021.

Why traffic stops can be deadly for people of color. *Los Angeles Times*. April 16, 2021. (Frank R. Baumgartner, Derek Epp and Kelsey Shoub)

Virginia may abolish the death penalty. There’s a racist history behind why a few jurisdictions use it most. *WashingtonPost.com* Monkey Cage, February 4, 2021. (Frank R. Baumgartner and Christian Caron)

Ten Years of Study and the Protesters are Right. What traffic stops tell us about racial bias in policing. *Medium.com/3streams*, June 25, 2020 (Frank R. Baumgartner, Leah Christiani, Derek A. Epp, Kelsey Shoub, and Kevin Roach)

The fears of Driving While Black in NC are true. The data prove it. *Raleigh News and Observer*, July 27, 2018 (Frank R. Baumgartner, Derek A. Epp and Kelsey Shoub)

What 20 Million Traffic Stops Reveal about Policing and Race in America. *SSN Key Findings*, June 2018 (Frank R. Baumgartner and Derek A. Epp)

An American Epidemic: Crimes of Wrongful Liberty. *InjusticeWatch.org*, April 3, 2018. (Jennifer E. Thompson and Frank R. Baumgartner)

America’s Failed Efforts to Reform the Death Penalty. *SSN Key Findings*, February 2018. (Frank R. Baumgartner, Marty Davidson, Kaneesha Johnson, Arvind Krishnamurthy, and Colin Wilson)

A few counties are responsible for the vast majority of executions. This explains why. *WashingtonPost.com* Monkey Cage, February 1, 2018 (Frank R. Baumgartner, Janet M. Box-Steffensmeier, and Benjamin W. Campbell)

There’s been a big change in how the news media covers sexual assault. *WashingtonPost.com* Monkey Cage, May 11, 2017. (Frank R. Baumgartner and Sarah McAdon)

Arkansas plans to execute 7 men in 11 days. They’re likely to botch one. *WashingtonPost.com* Monkey Cage, April 14, 2017 (Frank R. Baumgartner and Kaneesha Johnson)

Does the death penalty target people who are mentally ill? We checked. *WashingtonPost.com* Monkey Cage, April 3, 2017 (Frank R. Baumgartner and Betsy Neill)

U.S. executions and death sentences dropped dramatically in 2016 — except in a few hotspots. *WashingtonPost.com* Monkey Cage, January 27, 2017. (Frank R. Baumgartner, Arvind Krishnamurthy and Emily Williams)

- Is Congress working as it should? Depends on who you are, by Frank R. Baumgartner and Lee Drutman, *Vox.com*, September 15, 2016.
- Forty Years of Experience with the “New and Improved” Death Penalty, 1976–2016, *The American Prospect*, July 5, 2016.
- Study shows racial bias in death penalties in Florida, *The Florida Times Union* (Jacksonville), February 5, 2016
- Racial bias plagues Florida’s death penalty, *The Gainesville (FL) Sun*, January 26, 2016 (online), January 31 (print).
- Americans are turning against the death penalty. Are politicians far behind?
WashingtonPost.com Monkey Cage December 7, 2015 (Frank R. Baumgartner, Emily Williams and Kaneesha Johnson)
- Racial bias plagues state’s death penalty, *Shreveport Times*, September 24, 2015.
- The death penalty is about to go on trial in California. Here’s why it might lose.
WashingtonPost.com Monkey Cage, August 5, 2015.
- Missouri should abandon death penalty, *St. Louis American*, July 22, 2015
- The number of lethal injections is declining. That’s what history would predict.
WashingtonPost.com Monkey Cage, June 29, 2015.
- Differential Policing by Neighborhood, June 11, 2015. *TheUrbanNews.com*
- The Death Penalty: A Symbol of Which Lives Matter, and Which Lives Don’t, April 24, 2015.
90MillionStrong.org
- Most death penalty sentences are overturned. Here’s why that matters. *WashingtonPost.com* Monkey Cage Blog, March 17, 2015. (Frank R. Baumgartner and Anna W. Dietrich)
- North Carolina’s rickety, unreliable death penalty, *Raleigh News and Observer*, February 14, 2015
- NC’s death penalty: Going, going, good riddance. *North Carolina Policy Watch*, November 18, 2013. Reprinted in *Durham Herald-Sun*, December 2, 2013 and in the *Chapel Hill News* under the title of “Death penalty still failed policy.”
- A Half Century after the March on Washington, Little Attention to the Struggles of the Poor.
SSN Key Findings, October 2013. (Frank R. Baumgartner and Max Rose)
- Governor must veto RJA repeal, *Winston Salem Journal*, December 8, 2011
- Detecting bias essential in death penalty cases, *The Burlington Times-News*, November 26, 2011
- On the decline: murders and death sentences, *Raleigh News and Observer*, October 31, 2010.
- Death Penalty Moratorium is Not Enough, *Chapel Hill News*, October 10, 2010.
- Time to Commute N.C.’s Death Sentences. *Carrboro Citizen*, September 20, 2010.
- N.C. Should Commute Death Sentences, *Herald-Sun*, September 16, 2010.
- The Death of the Death Penalty at Hand? *Asheville Citizen-Times*, September 16, 2010.
- In N.C., only 20 percent of condemned are executed. *Charlotte Observer*, March 5, 2010.
- Death penalty’s vanishing point? *Raleigh News and Observer*, January 24, 2010.

Book Reviews

- Strach, Patricia. *Hiding Politics in Plain Sight: Cause Marketing, Corporate Influence, and Breast Cancer Marketing*. (New York: Oxford University Press, 2016). *Perspectives on Politics* 16, 1 (2018): 228–229.
- Agenda Setting in Comparative Perspective. Review of: Christoffer Green-Pedersen and Stefaan Walgrave Agenda Setting, eds. *Policies, and Political Systems: A Comparative Approach*. (Chicago: University of Chicago Press, 2014). *Perspectives on Politics* 14, 2 (2016): 456–60.

- The Gatekeepers of International Human Rights; review of “*Lost*” *Causes: Agenda Vetting in Global Issue Networks and the Shaping of Human Security*, by Charli Carpenter (Ithaca: Cornell University Press, 2014). *International Studies Review* 17, 4 (2015): 711–13.
- Westervelt, Sandra D., and Kimberly J. Cook. *Life After Death Row: Exonerates’ Search for Community and Identity*. (New Brunswick, NJ: Rutgers University Press, 2012).
- Sociation Today* (North Carolina Sociological Association), 11, 1 (Spring/Summer 2013).
- Jacques Gerstlé, *La Communication politique*, 2nd ed. (Paris, Armand Colin, 2008), *International Journal of Public Opinion Research*, 2011.
- David Hanley, *Party, Society, Government: Republican Democracy in France* (Berghahn Books, 2002). *French Politics, Society, and Culture* 23, 2 (Summer 2005): 150–53.
- Stuart N. Soroka, *Agenda-Setting Dynamics in Canada* (University of British Columbia, 2002). *Canadian Journal of Political Science* 37, 2 (2004): 444.
- Christine Musselin, *La longue marche des universités françaises* (PUF, 2001). *French Politics, Society, and Culture* 21, 2 (Summer 2003): 154–56.
- Michael S. Lewis-Beck, ed., *How France Votes* (Chatham House, 2000), *French Politics, Society, and Culture* 18, 2 (Summer 2000): 130–32.
- Richard L. Hall, *Participation in Congress* (Yale, 1996), *The Annals of the American Academy of Political and Social Science* 566 (1999): 177–78.
- Graham K. Wilson, *Only in America? The Politics of the United States in Comparative Perspective* (Chatham House, 1998) and John W. Kingdon, *America the Unusual* (St. Martin’s, 1998) *Governance* 12 (1999): 495–506.
- Vivien A. Schmidt, *From State to Market? The Transformation of French Business and Government*. (Cambridge, 1996) *American Political Science Review* 93 (1999): 229–30.
- Hans Keman, ed., *The Politics of Problem-Solving in Postwar Democracies*. (St. Martin’s, 1997) *Journal of Politics* 60 (1998): 1249–51.
- Thomas A. Birkland, *After Disaster: Agenda-Setting, Public Policy, and Focusing Events* (Georgetown, 1997), *Political Science Quarterly* 113 (1998): 516–17.
- Edith Archambault, *The Nonprofit Sector in France* (Manchester, 1997) *French Politics and Society* 16 (1998): 49–51.
- Olivier Wieviorka, *Nous entrerons dans la carrière: De la Résistance à l’exercice du pouvoir* (Seuil, 1994) *Contemporary French Civilization* 19 (1995): 340–42.
- William H. Riker, ed., *Agenda Formation* (Michigan, 1993) *Journal of Politics* 57 (1995): 564–66.
- Martin J. Smith, *Pressure, Power and Policy: State Autonomy and Policy Networks in Britain and the United States* (Pittsburgh 1994) *Governance* 7 (1994): 315–6.
- David M. Ricci, *The Transformation of American Politics: The New Washington and the Rise of Think Tanks* (Yale, 1993) *The Annals of the American Academy of Political and Social Science* 534 (1994): 195–96.
- Jack Hayward, ed., *De Gaulle to Mitterrand: Presidential Power in France* (Hurst, 1993) *Political Studies* 41 (1993): 703.
- Michael R. Reich, *Toxic Politics: Responding to Chemical Disasters* (Cornell, 1991) *Comparative Political Studies* 25 (1992): 420–23.
- David Wilsford, *Doctors and the State: The Politics of Health Care in France and the United States* (Duke, 1991) *Journal of Politics* 54 (1992): 930–33.
- David Knoke, *Organizing for Collective Action: The Political Economies of Associations* (Aldine de Gruyter, 1990) *Journal of Politics* 53 (1991): 884–86.

Andrew McPherson and Charles D. Raab, *Governing Education: A Sociology of Policy Since 1945* (Edinburgh University Press, 1988) *Governance* 4 (1991): 223–24.

John L. Campbell, *Collapse of an Industry: Nuclear Power and the Contradictions of U.S. Policy* (Cornell, 1988) and Spencer R. Weart, *Nuclear Fear: A History of Images* (Harvard, 1988) *Journal of Politics* 52 (1990): 1021–25.

John T.S. Keeler, *The Politics of Neocorporatism in France* (Oxford, 1987) and Frank L. Wilson, *Interest-Group Politics in France* (Cambridge, 1988) *American Political Science Review* 83 (1989): 325–26.

Edward A. Kolodziej, *Making and Marketing Arms* (Princeton, 1987) *Journal of Politics* 51 (1989): 786–88.

Annual Meetings, APSA 1983. *Politiques et Management Public* 1, 4 (Automne 1983): 164–71.

REVIEWS OF MY BOOKS

Comparative Policy Agendas: Theory, Tools, Data.

- Comparative policy agendas: a review essay, by Jonathan Drew, *Australian Journal of Political Science* 55, 2 (2020): 228–237.

Suspect Citizens: What 20 Million Traffic Stops Tell Us about Policing and Race

- *Journal of Race, Ethnicity, and Politics* 6, 1 (March 2021): 258–261, by Michael Leo Owens
- *American Journal of Sociology* 125, 6 (May 2020): 1672–1674, by Albert J. Meehan
- *Perspectives on Politics* 17, 3 (2019): 892–893, by Doris Marie Provine
- *Choice*, 56, 5 (January 2019), by D.R. Kavish
- Do You Know Why You Pulled Me Over? by Charles Epp, *Washington Monthly*, September/October 2018.

Deadly Justice: A Statistical Portrait of the Death Penalty

- Conklin, Michael. 2019. Painting a Deceptive Portrait: A Critical Review of *Deadly Justice*. *New Criminal Law Review* 22 (2): 223–231.
- Jochnowitz, Leona Deborah. 2018. The (Uncertain) ‘Withering Away’ of the Death Penalty Due to Decreasing Popularity and Super-Regulatory Costs. SSRN.com (December 19). Available at: <https://ssrn.com/abstract=3304003>
- *The Champion* (National Association of Criminal Defense Lawyers), August 2018, p. 54, by Robert Sanger
- Hoyle, Carolyn. 2018. The American death penalty: A flawed institution. *Political Quarterly* 89, 3: 517–519.
- *Criminal Justice Policy Review* 30, 5 (2019): 811-813, by Brandon C. Dulisse
- *Choice* 55, 9 (May 2018), by J. S. Taylor
- *Criminal Law and Criminal Justice Books*, March 2018, by Mary Welek Atwell

Agenda Dynamics in Spain

- *Revista Española de Investigaciones Sociológicas* 159 (2017): 174-178, by Jesus M. de Miguel (review in Spanish)
- *Perspectives on Politics* 14, 2 (2016): 540-541, by Thomas Jeffrey Miley
- *West European Politics* 39, 6 (2016): 1347-49, by Luis Bouza García

- *European Political Science* (2016), by Tevfik Murat Yildirim (Joint review of *Politics of Information and Agenda Dynamics in Spain*)

The Politics of Information

- *Political Studies Review* 15, 1 (2017): 157-158, by Tevfik Murat Yildirim
- *European Political Science* (2016), by Tevfik Murat Yildirim (Joint review of *Politics of Information and Agenda Dynamics in Spain*)
- *Governance* 29, 4 (2016): 581-83, by Jacob S. Hacker
- Review Symposium in *Perspectives on Politics* 14, 2 (2016): 498-506, with commentaries by Kuhika Gupta, Kathleen Knight, Eric Patashnik, and Scott E. Robinson
- *Congress & the Presidency* (2016), by Gisela Sin
- *Public Administration* 94, 4 (2016): 1155–57, by Peter Mortensen
- Symposium in *Interest Groups and Advocacy* 4, 3 (2015): 297-310, with reviews by Edward T. Walker, Matt Grossman, and Anne S. Binderkrantz
- *Cognitive Systems Research* 40 (2016): 114–115, by George Kampis
- *Analyses of Social Issues and Public Policy* 15, 1 (2015): 447–449, by Phyllis Wentworth
- Low-Information Lawmakers: Why today’s Congress can no longer cope with complex problems. *Washington Monthly* by Lee Drutman, June/July/August 2015
- *Choice* 52, 12 (August 2015), by L. T. Grover

Lobbying and Policy Change

- Fraussen, Bert. Interest Group Politics: Change and Continuity. *Journal of European Integration* 34, 5 (2012): 523-529
- *Gouvernement et Action Publique* 2 (2012): 189-192, by H el ene Michel (review in French)
- *Perspectives on Politics* 9, 1 (2011): 178-80, by McGee Young
- *Government Information Quarterly* 28, 2 (2011): 291–292, by Julia Proctor
- Saurugger, Sabine. 2010. Influence et d emocratie: Nouvelles  tudes sur les groupes d’inter et. *Revue Fran aise de Science Politique* 60, 6: 1182–1185 (review in French)
- *Journal of Politics* 72, 4 (2010): 1252-67, by Thomas T. Holyoke
- *Political Science Quarterly* 125, 1 (2010), by Susan Webb Yackee
- *Journal of Legislative Studies* 16, 2 (2010): 270–271, by Christine DeGregorio
- *Public Administration* 88, 3 (2010): 895-898, by Caelesta Braun-Poppelaars
- *Journal of Health Politics, Policy, and Law* 35, 3 (2010): 433-438, by David Randall
- *Regulation* (Fall 2010), pp. 48-49, by John Samples
- *APSA Legislative Studies Section Newsletter* Jan 2010, by Caitlyn O’Grady
- *Choice* (March 2010), by S. L. Harrison

The Decline of the Death Penalty and the Discovery of Innocence

- *Public Administration* 89, 2 (2011): 698–717, by David A. Rochefort.
- Review Symposium in *Perspectives on Politics* 7, 4 (2009): 921-30. Reviews by James A. Morone; Robert Y. Shapiro; Marie Gottschalk; and Austin Sarat
- *The International Journal of Press/Politics* 14 (2009): 134-140, by James N. Druckman
- *Journal of Politics* 71 (2009): 1604-1606, by Rosalee A. Clawson

- *International Journal of Public Opinion Research* 21, 4 (2009): 547-550, by Robert M. Bohm
- *Criminal Justice Policy Review* 20, 4 (2009): 507-508, by Tiffany Bergin
- *Theoretical Criminology* 13, 2 (2009): 259-62 by Alexander J. Blenkinsopp
- *Law and Politics Book Review* 17, 8 (2008), by Priscilla H. M. Zotti
- *Choice* (August 2008), by M. A. Foley.
- *Research Penn State*, 2008, by Vicki Fong
- *Contemporary Sociology* 37, 5 (2008): 495, Take Note short reviews.

Politics of Attention

- *ThinkProgress.org*, February 28, 2011, by Matthew Yglesias
- *Acta Politica* 43 (2008): 504-507, by Joost Berkhout
- *Political Communication* 25 (2008) 330-331, by Kathleen Knight
- *Konan Law Review* 47, 3 (2007): 125-166, by Nishiyama Takayuki (in Japanese)
- *Perspectives on Politics* 4, 3 (2006): 598-9, by Paul E. Johnson
- *Political Science Quarterly* 121, 3 (2006) 515-516, by Scott E. Robinson
- *Social Forces* 85, 3 (2006) 1042-43, by John C. Scott
- *Choice* (March 2006), by M. C. Price
- *Significance* 37 (2006): 139, by Ya-Hui Kuo

Basic Interests

- *American Political Science Review* 93, 4 (1999): 967-968, by Richard Smith
- *Journal of Politics* 61, 3 (1999): 844-848, by Anthony Nownes
- *Canadian Journal of Political Science* 32, 3 (1999): 596-597, by Harold Walker
- *Political Science Quarterly* 114, 1 (1999): 177-178, by Ken Kollman
- *Australian Journal of Political Science* 34, 2 (1999): 285, by Clive Beauchamp
- *The Public Opinion Quarterly* 63, 1 (1999): 151-154, by John R. Wright
- *Choice*, October 1998, by M. E. Ethridge

Agendas and Instability

- Bossy, Thibault. 2010. La mise sur l'agenda des problèmes publics saisie par ses niveaux d'analyse : des espaces discrets aux équilibres ponctués *Revue Française de Science Politique* 60, 6: 1178-1181 (review in French)
- Graham, Hugh Davis. 1996. Policy History Without Historians. *Journal of Policy History* 8, 2: 273-278
- *Journalism and Mass Communication Quarterly* 72, 1 (Spring 1995): 233, by Donald L. Shaw
- *American Political Science Review* 88, 3 (1994): 752-753, by Chris Bosso
- *Journal of Politics* 56, 4 (1994): 1164-1166, by Jeffrey Cohen
- *Choice*, September 1993, by D. R. Imig

Conflict and Rhetoric in French Policymaking

- *NYU Journal of International Law and Politics* 26 (1993): 150-152, by Alex P. Darrow.
- *International Review of Administrative Sciences* 49 (1993): 336-338, by Marie Widemanova

- *Journal of Politics* 53, 2 (1991): 583–586, by David Wilsford
- *NYU Journal of International Law and Politics* 23 (1990): 329–330.
- *American Political Science Review* 84, 4 (1990): 1416–1417, by John Keeler
- *Social Science Quarterly* 71, 4 (1990): 879, by Jurg Steiner
- *Choice* 1990, by M. G. Roskin
- *The Public Historian* 12, 3 (1990): 155-156, by David Mock
- *Politiques et Management Public* 8, 1 (1990): 157–159, by Luc Rouban (review in French)
- *Perspectives on Political Science* 19, 4: (1990): 233–234, by Vincent E. McHale

SUPREME COURT DECISIONS REFERRING TO MY RESEARCH

Oregon Supreme Court, 365 Or 695 (S066119) *State v. Arreola-Botello*, November 15, 2019, stating that a police officer may not conduct a search following a traffic stop if that search is unrelated to the purpose of the original stop. The Court noted our research on the racial disparities in such searches.

Arizona Supreme Court, CR-11-0107-AP, August 16, 2018, Justice Winthrop concurring in part and dissenting in part in *Arizona v. Bush*, on the issue of geographic concentration of death sentences by county.

United States Supreme Court, 14-7153 and 17-7245, June 28, 2018, Justice Breyer in his dissents to the denial of cert in *Jordan v. Mississippi* and *Evans v. Mississippi*, on three separate issues: increasing delays on death row before execution, high proportions of homicides that are death-eligible, and the increasing geographic concentration of executions in just a few counties.

Iowa Supreme Court, No. 16-0735, June 28, 2018, *Iowa v. Ingram*, on the use of traffic stops as an “unregulated tool in crime control”.

United States Supreme Court, 14-7955, June 29, 2015, Justice Breyer in his dissent in *Glossip v. Gross*, on the rate at which death sentences are overturned.

CONFERENCE PRESENTATIONS

Driving while Black (and Male, and Young, and...): Evidence of Disparities at the Margin and the Intersection. Paper presented at the annual meetings of the American Political Science Association, Boston, MA, August 30–September 2, 2018. (Frank R. Baumgartner, Leah Christiani, Derek Epp, Santiago Olivella, Kevin Roach, and Kelsey Shoub)

Policing the Powerless: How Black Political Power Reduces Racial Disparities in Traffic Stops Outcomes. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago IL, April 5–8, 2018. (Frank R. Baumgartner, Leah Christiani, Derek Epp, Kevin Roach, and Kelsey Shoub)

Why Congressional Capacity Is Not Enough. Paper presented at the State of Congressional Capacity Conference, New America Foundation, Washington, DC, March 1–2, 2018. (Frank R. Baumgartner and Bryan D. Jones)

Author meets critics panel on *Deadly Justice: A Statistical Portrait of the Death Penalty*. Annual meeting of the American Society of Criminology, Philadelphia, November 15–18, 2017.

Stasis and Punctuation in State Tax Policy. Paper presented at the Annual Meeting of the American Political Science Association, San Francisco, August 31-September 3, 2017. (Herschel F. Thomas, Frank R. Baumgartner, and Derek A. Epp)

- Emotional Responses to Racially Disparate Policing. Paper presented at the Annual Meeting of the American Political Science Association, August 31-September 3, 2017. (D'Andra Orey, Frank R. Baumgartner, and Stuart Soroka)
- Assessing Racial Disparities in Traffic Stops. Paper presented at the Annual Meeting of the American Political Science Association, August 31-September 3, 2017. (Frank R. Baumgartner, Derek A. Epp, Leah Christiani, Kevin Roach, and Kelsey Shoub)
- Stasis and Punctuation in State Tax Policy. Paper presented at the Annual Meeting of the Comparative Agendas Project, Edinburgh, June 15-17, 2017. (Herschel F. Thomas, Frank R. Baumgartner, and Derek A. Epp)
- Policing the Powerless: How Black Political Power Reduces Racial Disparities in Traffic Stop Outcomes. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, IL, April 6–8, 2017. (Kelsey Shoub, Frank R. Baumgartner, and Derek A. Epp)
- Author Meets Critics Panel on *The Politics of Information*. Annual meeting of the Public Management Research Association, Aarhus, Denmark, 23 June 2016.
- Geographic Disparities in US Capital Punishment. Paper presented at the *Duke Journal of Constitutional Law and Public Policy* Spring 2016 Symposium: Death Penalty in America Post-Glossip, Durham, NC, February 19, 2016. (Frank R. Baumgartner, Woody Gram, Kaneesha Johnson, Arvind Krishnamurthy, and Colin Wilson)
- Budgeting in Authoritarian and Democratic Regimes. Paper presented at the Political Budgeting across Europe conference, Texas A&M University, December 2015 (Frank R. Baumgartner, Marcello Carammia, Derek A. Epp, Ben Noble, Beatriz Rey, and Tevfik Murat Yildirim)
- Images of an Unbiased Interest System. Paper presented at the annual meetings of the American Political Science Association, San Francisco, CA, September 2–6, 2015. (David Lowery, Frank R. Baumgartner, Joost Berkhout, Jeffrey M. Berry, Darren Halpin, Marie Hojnacki, Heike Klüver, Beate Kohler-Koch, Jeremy Richardson, and Kay Lehman Schlozman)
- Budgeting in Authoritarian and Democratic Regimes. Paper presented at the annual meetings of the Comparative Agendas Project, Lisbon, June 2015. (Frank R. Baumgartner, Petra Bishtawi, Marcello Carammia, Derek A. Epp, Ben Noble, Beatriz Rey, and Tevfik Murat Yildirim)
- Punctuated Equilibrium in Public Budgeting in Authoritarian and Democratic Brazil. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, IL, April 16–19, 2015. (Beatriz Rey, Derek A. Epp, and Frank R. Baumgartner)
- Policy Competition and Friction. Paper presented at the workshop on The Politics of Non-Proportionate Policy Response, ECPR Joint Workshops, Warsaw Poland, 29 March – 2 April 2015.
- The Mayhem of Wrongful Liberty: Documenting the Crimes of True Perpetrators in Cases of Wrongful Incarceration. Paper presented at the Innocence Network Conference, Portland OR, April 11-12 2014. (Frank R. Baumgartner, Amanda Grigg, Rachele Ramirez, Kenneth J. Rose, and J. Sawyer Lucy)
- How Robust are Distributional Findings of Punctuated Equilibrium in Public Budgets? Paper presented at the annual meetings of the Midwest Political Science Association, Chicago IL, April 2–6, 2014. (Derek A. Epp and Frank R. Baumgartner)

- The Diversity of Internet Media: Utopia or Dystopia? Paper presented at the annual meetings of the Midwest Political Science Association, Chicago IL, April 2–6, 2014. (Bryan J. Dworak, John Lovett, and Frank R. Baumgartner)
- The Hierarchy of Victims in Death Penalty Processing. Paper presented at the annual meeting of the National Conference of Black Political Scientists, Wilmington DE, March 13–15, 2014. (Frank R. Baumgartner, Seth Kotch, and Isaac Unah)
- The Two Worlds of Lobbying: Washington Lobbyists in the Core and on the Periphery. Paper presented at the annual meetings of the American Political Science Association, Chicago, August 29–September 1, 2013. (Tim LaPira, Trey Thomas, and Frank R. Baumgartner).
- Finding the Limits of Partisan Budgeting. Paper presented at the annual meetings of the Association Française de Science Politique, Paris, July 9–11, 2013. (Derek A. Epp, John Lovett, and Frank R. Baumgartner)
- Explaining Punctuations. Paper presented at the annual meetings of the Comparative Agendas Project, Antwerp, Belgium, June 27–29, 2013. (Frank R. Baumgartner and Derek A. Epp)
- All News is Bad News: Newspaper Coverage of Politics in Spain. Paper presented at the annual meetings of the Council for European Studies, Amsterdam, June 24–26, 2013. (Frank R. Baumgartner and Laura Chaqués Bonafont).
- Contraverting Expectations: New Empirical Evidence on Congressional Lobbying and Public Policy. Paper presented at the SUNY Albany Law School Conference, Under the Influence? Interest Groups, Lobbying, and Campaign Finance, March 8–9, 2013.
- When Is There a Single Media Agenda? Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 12–14, 2012. (John Lovett and Frank R. Baumgartner)
- Searching for Election Effects in US Policymaking and Spending. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 12–14, 2012. (Derek A. Epp, John Lovett, and Frank R. Baumgartner)
- Who Cares About the Lobbying Agenda? Paper presented at the Annual Meeting of the American Political Science Association, Seattle, WA, August 30–September 3, 2011. (David C. Kimball, Frank R. Baumgartner, Jeffrey M. Berry, Marie Hojnacki, Beth L. Leech, and Bryce Summary)
- Developing Policy-Specific Conceptions of Mood: The United States. Paper presented at the Annual Meetings of the Comparative Agendas Project, Catania, Italy, June 23–25, 2011. (Mary Layton Atkinson, Frank R. Baumgartner, K. Elizabeth Coggins, and James A. Stimson)
- Legislative Productivity and Divided Government in the US and France. Paper presented at the Council of European Studies, Barcelona, June 20, 2011. (Frank R. Baumgartner, Sylvain Brouard, Emiliano Grossman, Sebastien G. Lazardoux, and Jon Moody)
- Mood and Agendas: Developing Policy-Specific Conceptions of Mood. Paper presented at the annual meeting of the Midwest Political Science Association, Chicago, March 30–April 3, 2011. (Mary Layton Atkinson, Frank R. Baumgartner, Elizabeth Coggins, and James A. Stimson)
- Explaining the Surprising Decline of Capital Punishment in North Carolina. Paper presented at the annual meetings of the National Conference of Black Political Scientists, March 18, 2011, Raleigh, NC. (Frank R. Baumgartner and Isaac Unah)
- Ideas and Policy Change. Paper presented at the *Governance* Symposium on Policy Paradigms and Social Learning Suffolk University, February 11, 2011, Boston.

- Retrospective on 20 years after the publication of Jack L. Walker, Jr.'s *Mobilizing Interest Groups in America*, annual meetings of the Southern Political Science Association, New Orleans, LA, January 8–11, 2011.
- The Decline of Capital Punishment in North Carolina. Paper presented at the annual meetings of the American Society of Criminology, San Francisco, CA, November 17–20, 2010. (Frank R. Baumgartner and Isaac Unah)
- Advocates and Interest Representation in Policy Debates. Paper presented at the Annual Meeting of the American Political Science Association, Washington, DC, September 1–4, 2010. (Marie Hojnacki, Kathleen Marchetti, Frank R. Baumgartner, Jeffrey M. Berry, David C. Kimball, and Beth L. Leech)
- Author meets critics panel on *Lobbying and Policy Change*, annual meetings of the Southern Political Science Association, Atlanta, GA, January 7–10, 2010.
- Taking Advantage of “Crisis.” Paper presented at the workshop on Politics in Times of Crisis, University of Heidelberg, Germany, December 4–5, 2009.
- Dynamic Threshold Modeling of Budget Changes. Paper presented at the annual meeting of the Association for the Advancement of Artificial Intelligence, Washington, DC, November 5–7, 2009. (Bryan D. Jones, László Zalányi, Frank R. Baumgartner, and Péter Érdi)
- Measuring the Size and Scope of the EU Interest Group Population. Paper prepared for the 5th ECPR General Conference, Potsdam, Germany, September 10–12, 2009. (Arndt Wonka, Frank R. Baumgartner, Christine Mahoney, Joost Berkhout)
- The Structure and Stability of Lobbying Networks in Washington. Paper presented at the annual meeting of the Midwest Political Science Association, Chicago, April 2–5, 2009. (with Timothy M. LaPira and Herschel F. Thomas III)
- Comparing the Topics of Front-Page and Full-Paper Stories in the New York Times. Paper presented at the annual meeting of the Midwest Political Science Association, Chicago, April 2–5, 2009. (with Michelle Wolfe, Amber E. Boydstun)
- Author meets critics panel on *The Decline of the Death Penalty*, annual meetings of the Academy for Criminal Justice Sciences, Boston, March 13, 2009.
- Partisanship and Political Attention in France: Agenda Dynamics and Electoral Incentives. Paper presented at the Annual Meeting of the American Political Science Association, Boston, MA, August 28–31, 2008. (with Sylvain Brouard and Emiliano Grossman)
- Tracing Interest-Group Populations in the US and UK. Paper presented at the Annual Meeting of the American Political Science Association, Boston, MA, August 28–31, 2008. (with Grant Jordan, John McCarthy, Shaun Bevan, and Jamie Greenan)
- Advocacy Behavior and Conflict Expansion in Policy Debates. Paper presented at the Annual Meeting of the American Political Science Association, Boston, MA, August 28–31, 2008. (with Marie Hojnacki, Jeffrey M. Berry, David C. Kimball, and Beth L. Leech)
- Policy Attention in State and Nation: Is Anyone Listening to the Laboratories of Democracy? Paper presented at the Annual Meeting of the American Political Science Association, Boston, MA, August 28–31, 2008. (with David Lowery and Virginia Gray)
- Legislative Productivity in Comparative Perspective: An Introduction to the Comparative Agendas Project. Paper presented at the ECPR Joint Sessions, Rennes, April 11–16, 2008. (Sylvain Brouard, Frank Baumgartner, John Wilkerson, Gerard Breeman, Christian Breunig, Laura Chaqués Bonafont, Christopher Green-Pedersen, Will Jennings, Peter John, Bryan Jones, David Lowery, Arco Timmermans, and Shaun Bevan)

- The Structure of Washington Lobbying Networks: Mapping the Ties that Bind. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago IL, April 3–6, 2008. (With Timothy M. La Pira and Herschel F. Thomas III)
- The Discovery of Innocence: Americans and the Death Penalty. Paper presented at the annual meetings of the National Conference of Black Political Scientists, Chicago, March 21, 2008.
- Patterns of Public Budgeting in the French Fifth Republic: From Hierarchical Control to Multi-Level Governance. Paper presented at the annual meetings of the American Political Science Association, Chicago IL, August 30–September 2, 2007. (with Martial Foucault and Abel François)
- Washington: The Real No-Spin Zone. Paper presented at the annual meetings of the American Political Science Association, Chicago IL, August 30–September 2, 2007. (with Jeff Berry, Marie Hojnacki, Beth Leech, and David Kimball)
- Federal Policy Activity and the Mobilization of State Lobbying Organizations. Paper presented at the annual meetings of the American Political Science Association, Chicago IL, August 30–September 2, 2007. (with Virginia Gray and David Lowery)
- The Discovery of Innocence and the Decline of the Death Penalty. Paper presented at the research conference on issue framing, American University, Washington DC, June 21, 2007. (with Suzanna De Boef, and Amber E. Boydston)
- Public Budgeting in EU Commission: A Test of the Punctuated Equilibrium Thesis. Paper presented at the annual meetings of the European Union Studies Association, Montreal, Canada, May, 2007. (with Martial Foucault and Abel François)
- Does Money Buy Power? Interest Group Resources and Policy Outcomes. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 12–15, 2007. (with Jeff Berry, Marie Hojnacki, Beth Leech, and David Kimball)
- Congressional Influence on State lobbying Activity. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 12–15, 2007. (with Virginia Gray and David Lowery)
- Goals, Salience, and the Nature of Advocacy. Paper presented at the annual meetings of the American Political Science Association, Philadelphia, August 31–September 3, 2006. (with Jeff Berry, Marie Hojnacki, Beth Leech, and David Kimball)
- Essays on Policy Dynamics. Paper presented at the European Consortium for Political Research, Nicosia, Cyprus, April 25–30, 2006. (with Bryan D. Jones, Heather Larsen-Price, James L. True, and John Wilkerson)
- Punctuated Equilibrium in French Budgeting Processes. Paper presented at the European Consortium for Political Research, Nicosia, Cyprus, April 25–30, 2006. (with Martial Foucault and Abel François)
- The Structure of Policy Conflict. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 20–23, 2006. (with Jeff Berry, Marie Hojnacki, Beth Leech, and David Kimball)
- Framing Capital Punishment: Morality, Constitutionality, and Innocence, 1960–2004. Paper presented in a plenary address by Baumgartner to the annual meeting of the National Coalition to Abolish the Death Penalty, Austin Texas, October 27–30, 2005. (with Suzanna De Boef, Amber E. Boydston, Frank E. Dardis, and Fuyuan Shen)
- A Model of Choice for Public Policy. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 7–10, 2005. (with Bryan D. Jones)

- The Determinants and Effects of Interest-Group Coalitions. Paper presented at the annual meetings of the American Political Science Association, Chicago, September 2–5, 2004. (with Christine Mahoney)
- An Evolutionary Factor Analysis Approach to the Study of Issue-Definition. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 15–18, 2004. (with Suzanna De Boef and Amber E. Boydston)
- Representation and Agenda-Setting. Paper presented at the annual meetings of the American Political Science Association, August 28–31, 2003. (with Bryan D. Jones) (Nominated, best paper, Public Policy Section.)
- The Co-evolution of Groups and Government. Paper presented at the annual meetings of the American Political Science Association, August 28–31, 2003. (with Beth L. Leech and Christine Mahoney)
- Symbols and Advocacy. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 3–6, 2003. (with Marie Hojnacki)
- Gaining Government Allies: Groups, Officials, and Alliance Behavior. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 25–28, 2002. (with Christine Mahoney)
- The Demand Side of Lobbying: Government Attention and the Mobilization of Organized Interests. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 25–28, 2002. (with Beth L. Leech, Timothy La Pira, and Nicholas A. Semanko)
- Policy Macro-Punctuations: How the US Government Budget Evolved. Paper presented at the conference on Budgetary Policy Change: Measures and Models, Nuffield College, Oxford, March 8–9, 2002. (with Bryan D. Jones and James L. True)
- Patterns and Punctuations in the US Budget. Paper presented at the conference on Budgetary Policy Change: Measures and Models, Nuffield College, Oxford, March 8–9, 2002. (with Bryan D. Jones and James L. True)
- Social Movements and the Rise of New Issues. Paper presented at the Conference on Social Movements, Public Policy, and Democracy at the University of California, Irvine, January 11–13, 2002.
- Issue Advocacy and Interest-Group Influence. Paper presented at the First General Conference, European Consortium for Political Research (ECPR 2001), University of Kent at Canterbury, England, September 6–8, 2001. (with Jeffrey M. Berry, Marie Hojnacki, Beth L. Leech, and David C. Kimball)
- Policy Dynamics. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 18–21, 2001. (with Bryan D. Jones)
- Where is the Public in Public Policy? Paper presented at the conference on Political Participation: Building a Research Agenda, Princeton University, October 12–14, 2000. (with Beth L. Leech)
- Advocacy and Policy Argumentation. Paper presented at the annual meetings of the American Political Science Association, Washington, DC, August 30–September 3, 2000. (with Jeffrey M. Berry, Marie Hojnacki, Beth L. Leech, and David C. Kimball)
- Lobbying Alone or in a Crowd: The Distribution of Lobbying in a Sample of Issues. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 27–29, 2000. (with Beth L. Leech)
- The Evolution of American Government, 1947–1999. Paper presented at the annual meetings of

- the American Political Science Association, Atlanta, GA, September 2–5, 1999. (with Bryan D. Jones)
- Business Advantage in the Washington Lobbying Community: Evidence from the 1996 Lobby Disclosure Reports. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 15–17, 1999. (with Beth L. Leech)
- Trends in the Production of Legislation, 1949–1994. Paper presented at the annual meetings of the American Political Science Association, Washington, DC, August 28–31, 1997. (with Bryan D. Jones, Glen S. Krutz, and Michael C. Rosenstiehl)
- Lobbying with Governmental Allies. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 10–12, 1997. (with Beth L. Leech)
- New Issues and Old Committees: Jurisdictional Change in Congress, 1947–93. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 10–12, 1997. (with Bryan D. Jones and Michael C. Rosenstiehl)
- Normative Perspectives on Interest Groups and Lobbying. Paper presented at the annual meetings of the Southern Political Science Association, Atlanta, GA, November 6–8, 1996. (with Nicole Canzoneri)
- Problems in the Study of Lobbying. Paper presented at the annual meetings of the American Political Science Association, San Francisco, CA, August 29–September 1, 1996. (with Beth L. Leech)
- Shepsle Meets Schattschneider: Conflict Expansion in Congress. Paper presented at the annual meetings of the American Political Science Association, San Francisco, CA, August 29–September 1, 1996. (with Bryan D. Jones and Michael C. Rosenstiehl)
- Tractability and Triviality in Interest-Group Studies. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 18–20, 1996. (with Beth L. Leech)
- The Shape of Change: Incrementalism and Shifts in Federal Budgeting, 1946–1994. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 18–20, 1996. (with Bryan D. Jones and James L. True)
- Producing Legislation in Congress. Paper presented at the annual meetings of the American Political Science Association, Chicago, August 31–September 3, 1995. (with Bryan D. Jones, Jeffery C. Talbert, and Glen Krutz)
- Policy Agendas in the United States since 1945. Poster presented at the annual meetings of the Midwest Political Science Association, Chicago, April 6–8, 1995. (with Bryan D. Jones, Jeffery C. Talbert, Beth L. Leech, Michael C. Rosenstiehl, and James L. True)
- Committee Jurisdictions in Congress, 1980–1991. Paper presented at the annual meetings of the American Political Science Association, New York, NY, September 1–4, 1994. (with Bryan D. Jones, Michael C. Rosenstiehl, and Ronald Lorenzo)
- Public Interest Lobbies in France and the United States. Paper presented at the meetings of the International Political Science Association, Berlin, Germany, August 21–25, 1994.
- The Legislative Importance of Non-Legislative Hearings. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 14–16, 1994 (with Bryan D. Jones and Jeffery C. Talbert)
- Agendas and Instability in American Politics. Paper presented at the annual meetings of the American Political Science Association, Chicago, September 3–6, 1992. (with Bryan D. Jones)
- Congressional Committees and Jurisdictional Dynamics. Paper presented at the annual meetings

- of the Midwest Political Science Association, Chicago, April 8–11, 1992. (with Bryan D. Jones and Jeffery C. Talbert)
- The Dynamics of Bias. Paper presented at the annual meetings of the American Political Science Association, Washington, DC, August 29–September 1, 1991. (with Bryan D. Jones)
- Attention and Valence in Agenda-Setting. Paper presented at the annual meetings of the Southern Political Science Association, Atlanta, GA, November, 1990. (with Jeffery C. Talbert and Bryan D. Jones)
- Towards the Quantitative Study of Agenda-Setting. Paper presented at the annual meetings of the American Political Science Association, San Francisco, CA, August 30–September 2, 1990. (with Bryan D. Jones)
- Interest Groups and Agenda-Setting in America. Paper presented at the Conference on Organized Interests and Democracy, Vith Feltrinelli International Colloquium, Cortona, Italy, May, 1990. (with Bryan D. Jones)
- Keeping Nuclear Power Off the Political Agenda in France. Paper presented at the Workshop on the Comparative Political Economy of Science: Scientists and the State, sponsored by the UCLA Center for International Studies and Overseas Programs, Los Angeles, CA, January 12–14, 1990.
- Explaining Variation in Policy Styles in France. Paper presented at the annual meetings of the American Political Science Association, Atlanta, GA, September 1–3, 1989.
- Shifting Images and Venues of a Public Issue: Explaining the Demise of Nuclear Power in the United States. Paper presented at the annual meetings of the American Political Science Association, Atlanta, GA, September 1–3, 1989. (with Bryan D. Jones)
- Image and Agenda in Urban Politics. Paper presented at the Second annual Conference on Public Policy, Department of Public Administration and Policy, State University of New York at Albany, Albany, NY, April, 1989. (with Bryan D. Jones)
- Changing Image and Venue as a Political Strategy. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 14–15, 1989. (with Bryan D. Jones)
- Changing Images and Venues of Nuclear Power in the United States. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 14–15, 1989. (with Bryan D. Jones)
- Creating and Maintaining Consensus over Nuclear Power in France: A Preliminary Report. Paper presented at the annual meetings of the American Political Science Association, Washington, DC, September 1–4, 1988.
- Policy Communities in France: The Strategic Implications of Conflict and Consensus. Paper presented at the annual meetings of the American Political Science Association, Chicago, September 3–6, 1987.
- Survey Research and Membership in Voluntary Associations. Paper presented at the National Election Studies Conference on Groups and American Politics, Center for Advanced Study in the Behavioral Sciences, Stanford, CA, January 16–17, 1987. (with Jack L. Walker)
- Education Policy Making and the Interest Group Structure in France and the United States: A Commentary on Pluralism and Corporatism. Paper presented at the annual meetings of the American Political Science Association, Washington, DC, August 28–31, 1986. (with Jack L. Walker)
- A New Question on Group Affiliations in the 1986 NES Pilot Study. Report to the Board of

- Overseers of the National Election Study, May 20, 1986. (with Jack L. Walker)
- Politicians and Technicians in the Policy Process: Education Policy in France, 1983–1984. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 10–12, 1986.
- French Interest Groups and the Pluralism-Corporatism Debate. Paper presented at the annual meetings of the American Political Science Association, New Orleans, LA, August 29–September 1, 1985.
- Preemptive and Reactive Spending in U.S. House Races. Paper presented at the annual meetings of the Midwest Political Science Association, Chicago, April 20–23, 1983. (with Edie N. Goldenberg and Michael W. Traugott)
- Chair, discussant, or paper presenter at the following meetings, American Political Science Association, 1985–2019; Midwest Political Science Association, 1983, 1986–87, 1989–2019; European Consortium for Political Research, 2001, 2006, 2008, 2009, 2015; Southern Political Science Association, 1996–97, 2010, 2011; Council on European Studies, 2010, 2011, 2013; International Political Science Association, 1994; Western Political Science Association, 1988, 1999; Southwestern Social Science Association, 1990; Association for the Advancement of Artificial Intelligence, 2009; National Conference of Black Political Scientists, 2008, 2011, 2014, 2018; American Society of Criminology 2010, 2017; Comparative Agendas Project annual meetings 2006 (Aarhus), 2007 (Paris), 2008 (Barcelona), 2009 (The Hague), 2010 (Seattle), 2011 (Catania), 2012 (Reims), 2013 (Antwerp), 2014 (Konstanz), 2015 (Lisbon), 2016 (Geneva), 2017 (Edinburgh), 2018 (Amsterdam), 2019 (Budapest).

EXTERNAL GRANTS AND AWARDS

Grants Submitted / Pending

- Proposal for Study of Jury Pool Formation and Jury Selection. Submitted to the Governor's Task Force on Racial Equity in the Criminal Justice System, January 2021. (Frank R. Baumgartner, Marty Davidson, and Emily Coward)

Grants Funded / Awarded

- National Science Foundation, Developing Policy-Specific Measures of Public Opinion, award number SES 1024291. \$157,989 for the period of July 1, 2010 to August 31, 2013. Jim Stimson, PI; Frank R. Baumgartner, Co-PI.
- National Science Foundation, Framing Policy Debates in the European Union, proposal 1102978. \$300,000 awarded for the period of August 15, 2011 to July 31, 2013. Christine Mahoney (University of Virginia), PI; Frank R. Baumgartner, Co-PI; Heike Kluever, consultant.
- Visiting International Scholar, Catalonia Ministry of Education and Research, funding for eight month visit to the University of Barcelona, December 2011–July 2012 (with Laura Chaqués Bonafont, University of Barcelona)
- Center for Advanced Study in the Behavioral Sciences (CASBS), Stanford University. Expenses for a dozen scholars from the social sciences, computer science, government, and industry to travel to Stanford and attend a one-week workshop: *Tracking, Transcribing, and Tagging Government: Building Digital Records for Computational Social Science*, June 21–25, 2010. Frank R. Baumgartner and James T. Hamilton (Duke University), PIs

- Agence nationale de la recherche (ANR) (France), Les médias, les partis et les agendas politiques de la 5^e République. Emiliano Grossman, Frank Baumgartner, Sylvain Brouard, Manlio Cinalli, Abel François, Martial Foucault, Pierre Lascoumes, Nicolas Sauger. Project funded in October 2008.
- European Science Foundation (European Union), “The Politics of Attention: West European Politics in Times of Change.” Proposal with subprojects in Denmark, Netherlands, United Kingdom, Italy, Switzerland, Belgium, and Spain, with Christoffer Green-Pedersen and others. Submitted April 2007. Projects have been funded starting in 2008 for Denmark, Spain, United Kingdom, Switzerland, the Netherlands, and Belgium.
- National Science Foundation, “New Computer Science Applications in Automated Text Identification and Classification for the Social Sciences.” Grant # SES 0719703, \$55,722, September 1, 2007 to August 31, 2008. Principal investigator, with John McCarthy.
- Camargo Foundation Residential Fellowship for Spring 2007. This covers the period of January to May 2007. The Foundation maintains a residence for scholars in Cassis, France.
- National Science Foundation, “Nanotechnology and Science Federalism.” Grant # NER 0608986, \$85,000, August 1, 2006 to July 31, 2007. Co-PI. Paul Hallacher (Penn State) is PI. Additional Co-PI’s are Roger Geiger, Henry Foley, and Creso Sa.
- National Science Foundation dissertation award for Amber Boydston, “Doctoral Dissertation Research in Political Science: Agenda Setting and Issue Framing Dynamics on Front Page News.” Grant # SES 0617492, \$10,907, July 1, 2006 to June 30, 2007.
- Pennsylvania Policy Agendas Database. State of Pennsylvania appropriation to Temple University for \$480,000 over three years, 2005–08. Penn State subcontract for \$77,888 awarded March 2006. Additional funds of \$26,600 awarded September 2007; \$5,500 in 2008; \$22,500 in 2009. Joe McLaughlin, Temple University, principal investigator.
- National Science Foundation, “Collaborative Research: Database Development for the Study of Public Policy.” Grant # SBR 0111611, \$690,719, January 1, 2002 to December 31, 2007. Co-Principal Investigator, with Bryan D. Jones.
- Policy Agendas Project focus of NSF press release, January 2005; see http://www.nsf.gov/discoveries/disc_summ.jsp?cntn_id=100599&org=NSF.
- National Science Foundation, REU supplemental award for award 0111611, \$15,000, awarded October 12, 2005.
- National Science Foundation, “Lobbying and Issue-Definition.” Grant # SBR 0111224, \$235,930, July 1, 2001 to June 30, 2004. Principal Investigator. Co-Investigators are: Jeff Berry, Marie Hojnacki, Beth Leech, and David Kimball.
- Pew Charitable Trusts / University of Wisconsin, “Lobbying and Television Advocacy,” \$36,503, June 1 to December 31, 2002. With Marie Hojnacki and Ken Goldstein.
- National Science Foundation, “Collaborative Research on Lobbying.” Grant # SBR 9905195, \$80,569, August 1, 1999 to December 31, 2000. Principal Investigator. Co-Investigators are: Jeff Berry, Marie Hojnacki, Beth Leech, and David Kimball.
- Norwegian Science Foundation (Norges forskningsråd), “Agenda Setting and Public Policy” to support teaching a graduate seminar at the University of Bergen, in fall 1998. (69,300 Norwegian Krone, with Richard L. Matland.) Awarded December 1997.
- National Science Foundation dissertation award for Beth L. Leech, “Lobbying Strategies of American Interest Groups,” # SBR 9631232, \$8,476, July 15, 1996 to July 14, 1997
- National Science Foundation, “Policy Agendas in the United States since 1945.” Grant # SBR 9320922, \$245,000, March 15, 1994 to February 28, 1998. (with Bryan D. Jones)

National Science Foundation, Research Opportunities for Undergraduates, supplements to the Policy Agendas grant, \$12,500 per year, 1994, 1995. (with Bryan D. Jones)

French Government Travel Grant (\$1,000), 1988.

Bourse Chateaubriand, French Government Dissertation Grant, 1983–84.

Awards

C. Herman Pritchett Best Book Award from the Law and Courts Section of the American Political Science Association, 2019 (for *Suspect Citizens*)

Lijphart / Przeworski / Verba Dataset Award, APSA Section on Comparative Politics, 2019 (for the Comparative Agendas Project)

Best reviewer award, *Journal of European Public Policy*, 2018

Member, American Academy of Arts & Sciences, inducted 2017

International Public Policy Association, 2017 award for the best book published in 2015 in English on the topic of public policy (for *The Politics of Information*).

Louis Brownlow Book Award, National Academy of Public Administration, 2016 (for *The Politics of Information*).

Samuel J. Eldersveld Career Achievement Award, APSA Section on Political Organizations and Parties, 2011.

Hometown Hero Award, News Talk 1360 WCHL Chapel Hill NC, concerning career achievement award listed above, July 2011.

Leon D. Epstein Outstanding Book Award, APSA Section on Political Organizations and Parties, 2010 (for *Lobbying and Policy Change*).

Article selected for inclusion in special issue reprinting the most outstanding articles for the 20th anniversary issue of *JPART*, 2010, for “A Model of Choice for Public Policy.”

Gladys M. Kammerer Award, American Political Science Association, for the best publication in the field of US national policy, 2008 (for *The Decline of the Death Penalty*).

Best Instructional Political Science Web Site, for www.policyagendas.org, from the Information Technology and Politics Section of the American Political Science Association, 2007.

Mentoring Award from the Public Policy Section of the American Political Science Association, 2005. For mentoring younger members of the profession.

Winner, vote by the members of the Public Policy Section of the American Political Science Association for *Agendas and Instability in American Politics*; top vote-getter in an election where members of the section were asked to identify the top five policy-related books or articles written in the past ten years. See *Policy Currents* 11 (2), Summer 2001, p. 14.

Aaron Wildavsky Award from the Public Policy Section of the American Political Science Association, 2001, for *Agendas and Instability in American Politics*. The Wildavsky Award recognizes work of lasting impact on the field of public policy.

Phi Beta Kappa, The University of Michigan, 1980.

INTERNAL GRANTS, AWARDS, AND SCHOLARSHIPS

Senior Faculty Research and Scholarly Leave, UNC-CH, 2020–21.

Faculty Fellowship, Institute of African American Research, UNC-CH, Fall 2015.

Charles Robson Award for Excellence in Graduate Instruction, UNC-CH, Department of Political Science, 2013.

Welch Alumni Relations Award, Pennsylvania State University, College of the Liberal Arts,

2008.
 Best Graduate Student Advisor, Pennsylvania State University, Department of Political Science, Spring 2005. Based on a vote by current graduate students.
 Faculty Scholar Medal in Social Sciences, Pennsylvania State University, 2005.
 Distinction in the Social Sciences Award, Pennsylvania State University, College of the Liberal Arts, 2003.
 “Legislative Lobbying,” \$5,000 grant from the Program in American Politics, Texas A&M University (with Beth L. Leech), 1998.
 “Lobbying Congress,” \$7,500 grant from the Texas A&M Office of Associate Provost for Research, Program to Enhance Scholarly and Creative Activities (with Beth L. Leech), 1997.
 “Interest Groups and Lobbying in American Politics,” \$3,000 grant from the Program in American Politics, Texas A&M University (with Beth L. Leech), 1996.
 Jordan Faculty Fellow, Center for Presidential Studies, Texas A&M University, 1994, 1995.
 “Policy Agendas in Congress Since 1945,” \$7,500 grant from the Texas A&M Office of Associate Provost for Research, Program to Enhance Scholarly and Creative Activities (with Bryan D. Jones), 1993.
 International Curriculum Development Grant (\$1,100, with Richard Golsan), 1993.
 Honors Program Curriculum Development Grant (\$6,000, with Bryan D. Jones, Nehemia Geva, and Alex Mintz), 1993.
 Center for Presidential Studies Grant (\$1,000, with Bryan D. Jones), 1993.
 Center for Energy and Mineral Resources Grant, Texas A&M University (\$12,500, with Bryan D. Jones) 1989.
 College of Liberal Arts Summer Research Award (\$7,000), 1988.
 International Enhancement Grant, Texas A&M University (\$1,200), 1988.
 Center for Energy and Mineral Resources Grant, Texas A&M University (\$3,000) 1988.
 Nominee, Gabriel Almond Prize for best dissertation in comparative politics, 1986.
 Rackham Pre-Doctoral Fellowship, The University of Michigan, 1985–86.
 Rackham Dissertation Grant, The University of Michigan, 1983–84.
 Teaching Fellow, The University of Michigan, 1981–83.
 Rackham First Year Fellowship, The University of Michigan, 1980–81.

DOCTORAL STUDENTS ADVISED AND ACADEMIC / POLICY PLACEMENTS

Kelly Tzoumis** (Texas A&M, 1992; DePaul University, tenured)
 Jeffery C. Talbert** (Texas A&M, 1994; University of Kentucky School of Medicine, tenured)
 Shalini Vallabhan* (Texas A&M, 1995; VP for Government Relations, American Cancer Society Cancer Action Network)
 Rachel Gibson** (Texas A&M, 1995; University of Manchester, England, tenured)
 Billy Ray Hall** (Texas A&M, 1995; Baylor, now an attorney in private practice)
 Beth L. Leech* (Texas A&M, 1998; Rutgers, tenured)
 Michael C. MacLeod* (Texas A&M, 1998; Hewitt Associates)
 James L. True* (Texas A&M, 1998; Lamar, tenured, retired)
 Doris McGonagle* (Texas A&M, 1998; Blinn College, tenured)
 Glen Krutz*** (Texas A&M, 1999; Oklahoma State University, Dean of Arts and Sciences)
 Nicole Canzoneri** (Texas A&M, 1999; Alexandria, VA schools)
 Xingsheng Liu** (Texas A&M, 1999; Texas A&M)

Valery Hunt*** (University of Washington, 2002)
Jens Feeley*** (University of Washington, 2002; NASA)
Matthieu Dalle** (Penn State, French, 2002; University of Louisville)
Suzanne Robbins** (SUNY, Stony Brook, 2003; George Mason University)
Chad Lavin** (Penn State, 2003; SUNY Buffalo (English), tenured)
Andrew Martin** (Penn State, Sociology, 2004; Ohio State University, tenured)
Maria Inclan** (Penn State, 2005; CIDE, Mexico City, tenured)
Christine Mahoney*** (Penn State, 2006; University of Virginia, tenured)
Amber Boydston* (Penn State, 2008; University of California, Davis, tenured)
Tim LaPira** (Rutgers University, 2008; James Madison University, tenured)
Manuele Citi** (European University Institute, Florence, 2009; Copenhagen Business School)
Sam Workman** (University of Washington, Seattle, 2009; University of Oklahoma, tenured)
Caelesta Poppelaars** (Leiden University, Netherlands, 2009; Leiden)
Erika Martin** (Yale, 2009; SUNY Albany, Public Health)
Paul Rutledge** (West Virginia University, 2009; University of West Georgia, tenured)
Julianna Sandel Pacheco** (Penn State 2010; University of Iowa, tenured)
Stéphanie Yates** (Université de Laval, Quebec City, Canada, 2010; University of Ottawa)
Joost Berkhout** (Leiden University, Netherlands, 2010; University of Amsterdam)
Chris Faricy** (UNC 2010; Syracuse University, tenured)
Shaun Bevan* (Penn State, 2011; University of Edinburgh, tenured)
Jiso Yoon* (Penn State, 2011; University of Kansas, tenured)
Isabelle Guinaudeau** (Sciences Po Bordeaux, 2011; CNRS / Sciences Po Bordeaux)
Cecilia Cannon** (Graduate Institute of International and Development Studies, Geneva, 2012)
Jon Moody* (Penn State 2013; Pew Charitable Trusts)
Mary Layton Atkinson* (UNC 2013; UNC-Charlotte, tenured)
C. Elizabeth Coggins** (UNC 2013; Colorado College, tenured)
Roy Gava** (PhD 2014, University of Geneva; University of St. Gallen)
Petya Alexandrova** (PhD 2014, Leiden University; EU Asylum Support Office, Malta)
Tinette Schnatterer** (PhD 2014, Sciences Po Bordeaux; CNRS Sciences Po Bordeaux)
Trey Thomas** (PhD 2015, University of Texas at Austin; University of West Virginia)
Tyler Hughes** (PhD 2015, University of Oklahoma; Cal State Northridge)
Derek Epp* (PhD 2015, UNC; University of Texas at Austin)
Nick Howard** (PhD 2015, UNC; Auburn University at Montgomery)
Greg Wolf** (PhD 2015, UNC; Drake University)
Stephen Weir** (PhD 2015, Trinity University, Dublin)
John Lovett* (PhD 2016, UNC; Wake Forest)
Ehud Segal** (PhD 2017, Hebrew University, Israel; Haifa University, post-doc)
Carmen Huerta* (PhD 2017, UNC Sociology; UNC Office of Student Affairs)
John Wachen** (PhD 2018, UNC Education Policy; Chicago Ill. education consultant)
Zoila Ponce de Leon** (PhD 2018, UNC; Washington and Lee)
Annelise Russell** (PhD 2018, University of Texas; University of Kentucky)
Andrew Tyner** (PhD 2018, UNC; Center for Open Science)
Emily Carty** (PhD 2018 UNC; University of Salamanca, Spain)
Kelsey Shoub* (PhD 2018, UNC; University of South Carolina)
Milad Minooie** (PhD 2018, UNC Mass Communications)
Mike Fliss** (PhD 2019 UNC Epidemiology; post-doc, UNC-Chapel Hill Public Health)

Amy Sentementes** (PhD 2019 UNC; Penn State)
 Serge Severenchuk** (PhD 2019 UNC; post-doc, Dartmouth)
 Leah Christiani* (PhD 2020 UNC; University of Tennessee)
 Emily Wager* (PhD 2020 UNC; Washington DC polling firm)
 Marc Faulkner** (PhD 2020, Université de Montréal; Quebec provincial government)
 Thomas Kristensen** (PhD 2020, Aarhus University, Denmark; City of Aarhus)
 Stefany Ramos* (PhD 2021, UNC Public Policy; RTI International)
 Austin Bussing** (PhD 2021, UNC; Sam Houston State University)
 Beatriz Rey** (PhD 2021, Syracuse University; post-doc, Johns Hopkins and APSA
 Congressional Fellow)
 Kevin Roach* (PhD 2021, UNC)
 Christian Caron* (PhD expected 2022, UNC, current student)
 Bettina Stauffer** (University of Bern, Switzerland, current student)
 Kaneesha Johnson** (Harvard, current student)
 Arvind Krishnamurthy** (Duke, current student)
 Marty Davidson** (Michigan, current student)
 Philip Warncke** (UNC, current student)
 Jonathan Schlosser** (UNC, School of Journalism, current student)
 Colin Case** (UNC, current student)
 Alex Love** (UNC, current student)

* indicates committee chair or co-chair

** indicates committee member

*** indicates another student from the Policy Agendas Project or the Advocacy and Public Policy Project with whom I have worked closely

SENIOR HONORS THESES ADVISED AT UNC

Jasmine Orsini, in progress for 2022
 Alessandra Quattrochi, in progress for 2022
 Rebecca Weisberger, in progress for 2022
 Lucas Cain, in progress for 2022
 Emily Payne, Race, Age, Gender, Attorney Type, and Income on Violent and Non-Violent Felonies in North Carolina, 2021
 Tate Rosenblatt, Sentenced to Die? A Comparison of Factors Leading to Death Sentences and Executions, 2021
 Sally Stanley, on the effect of District Attorneys on capital punishment, 2020
 Sydney Johnson, on the cost implications of LWOP prison sentences, 2020
 Sarah McAdon, on the outcomes of traffic tickets in North Carolina, 2019
 Olivia O'Malley, on the legal treatment of sex trafficking crimes in North Carolina, 2019
 Luke Beyer, on the outcomes of high-level felonies in North Carolina, 2019
 Libby Doyle, on the geographical distribution of racial inequities in North Carolina, 2019
 Betsy Neill, on mental illness and the death penalty, 2017*
 Wallace Gram, on the geographic distribution of executions in the US, 2015
 Anna W. Dietrich, on the conditional probability of execution given a death sentence, 2014*
 BJ Dworak, comparing traditional news media with social media, 2013*
 Alex Loyal, on trends in state legislation concerning the death penalty, 2013

Lindsey Stephens, on the impact of the creation of a statewide Indigent Defense Services office on the use of capital punishment in North Carolina, 2012

Max Rose, on changing media frames associated with poverty, 2012

Alissa Ellis, on North Carolina's use of the death penalty with inmates suffering from mental illness, 2011

(* = Winner of the departmental award for the best senior thesis that year)

COAUTHOR RELATIONSHIPS

- **Faculty mentors:** Jack L. Walker, Jr., Edie N. Goldenberg, Michael W. Traugott, Joel D. Aberbach, John Creighton Campbell
- **Graduate student colleagues:** Mark A. Baskin, Nina P. Halpern
- **Faculty colleagues:** Bryan D. Jones, James A. Stimson, Jeffrey M. Berry, Marie Hojnacki, David C. Kimball, Suzanna De Boef / Linn, Frank E. Dardis, Fuyuan Shen, Martial Foucault, Abel François, John Wilkerson, Virginia Gray, David Lowery, Arco Timmermans, Sylvain Brouard, Gerard Breeman, Laura Chaqués Bonafont, Christopher Green-Pedersen, Will Jennings, Peter John, Grant Jordan, John McCarthy, Emiliano Grossman, Arndt Wonka, Péter Erdi, László Zalányi, Isaac Unah, Seth Kotch, Ben Noble, Marcello Carammia, Darren Halpin, Beate Kohler-Koch, Jeremy Richardson, Kay Lehman Schlozman, D'Andra Orey, Stuart Soroka, Santiago Olivella, Lee Drutman, Janet M. Box-Steffensmeier, David Wilsford, Sandra D. Westervelt, Kimberly J. Cook, Peter B. Mortensen, Michiel Neytemans, Stefaan Walgrave, Frédéric Varone, Christopher Wlezien, Rens Vliegthart, Anna M. Palau, Pascal Sciarini, Anke Tresch, Paul Delamater, Steve Marshall, Charles Poole, Whitney Robinson, Glenn L. Pierce, Ted Enamorado, Scott Duxbury
- **Graduate students:** Jeffery C. Talbert, Beth L. Leech, Michael C. Rosenstiehl / MacLeod, James L. True, Glen S. Krutz, Nicole Canzoneri, Timothy M. La Pira, Herschel F. Thomas III, Christine Mahoney, Amber E. Boydston, Heather A. Larsen-Price, Shaun Bevan, Christian Breunig, Jamie Greenan, Michelle Wolfe, Joost Berkhout, Kathleen Marchetti, Mary Layton Atkinson, K. Elizabeth Coggins, Sebastien G. Lazardoux, Jon Moody, Bryce Summary, Derek A. Epp, John Lovett, Amanda Grigg, Rachelle Ramirez, J. Sawyer Lucy, Beatriz Rey, Petra Bishtawi, Tefvik Murat Yildirim, Heike Klüver, Kelsey Shoub, Leah Christiani, Kevin Roach, Benjamin W. Campbell, Jamie Gold, Andrew W. Martin, Chris Koski, Paul Rutledge, Edward T. Walker, Adriana Bunea, Bayard Love, Petya Alexandrova, Mike Fliss, Alexander Love, Colin Case, Ehud Segal, Oliver Huwyler, Sam Workman, Alex Love, Christian Caron, Anthony Lindsey
- **Undergraduate students:** Ronald Lorenzo, Nicholas A. Semanko, Bryan J. Dworak, Woody Gram, Kaneesha R. Johnson, Arvind Krishnamurthy, Colin P. Wilson, Max Rose, Anna W. Dietrich, Emily Williams, Betsy Neill, Sarah McAdon, Marty Davidson, Julio Zaconet, Emma Johnson, Clarke Whitehead, Alisa Mastro, Kate Bell, Luke Beyer, Tara Boldrin, Libby Doyle, Lindsey Govan, Jack Halpert, Jackson Hicks, Katherine Kyriakoudes, Cat Lee, Mackenzie Leger, Sarah McAdon, Sarah Michalak, Caroline Murphy, Eyan Neal, Olivia O'Malley, Emily Payne, Audrey Sapirstein, Sally Stanley, Kathryn Thacker, Alex Bennett, Tamira Daniely, Kalley Huang, Sydney Johnson, Patrice McGloin, Allison Swagert, Niharika Vattikonda, Kamryn Washington, Will Spillman
- **Non-academics:** Kenneth J. Rose, Jennifer E. Thompson, Tim Lyman, Lyle May

INVITED ACADEMIC TALKS AND CONFERENCES

Manchester University (UK), November 10, 2021*
 John Jay College, Center on Media, Crime, and Justice, November 3, 2021*
 UNC-Charlotte, November 2, 2021*
 UNC Chapel Hill, 27th Annual MURAP Academic Conference, July 23, 2021*
 Kings College (London), Ken Young Annual Lecture in Public Policy, May 18, 2021*
 University of Georgia, George S. Parthemos Lectures, April 5–7, 2021*
 MIT Media Lab, Poetic Justice Group, March 30, 2021*
 Georgetown Law / Howard University / The Lab@DC workshop on Reimagining Police Stops,
 October 16, 2020*
 Dartmouth University, October 7, 2020*
 University of Michigan, ICPSR Summer Program, Blalock Lecture, July 9, 2020*
 Arizona State University, Pi Sigma Alpha lecture, February 22, 2020
 Notre Dame University, November 8, 2019
 University of Tennessee, book workshop, September 20, 2019
 University of Texas at Austin, September 13, 2019
 International Conference on Public Policy, Montreal, Keynote Speaker, June 27, 2019
 University of Stuttgart (Germany), June 3, 2019
 University of Konstanz (Germany), May 27, 2019
 University of St Gallen (Switzerland), May 21, 2019
 UNC-Chapel Hill, Odum Institute 95th Anniversary Speakers Series, April 22, 2019
 UNC-Greensboro, February 7, 2019
 Reed College, book workshop, December 12, 2018
 Johns Hopkins University, conference on policing and race, May 17–18, 2018
 Wayne State University School of Law, conference on congressional oversight, March 23, 2018
 New America Foundation, conference on congressional capacity, Washington DC, March 1–2,
 2018
 University of Michigan, January 19, 2018
 Harvard University, November 6, 2017
 Wake Forest University School of Law, November 3, 2017
 University of Arizona, October 26, 2017
 Hungarian Academy of Sciences, Budapest, September 27, 2017
 Leiden University, The Hague Campus, Netherlands, September 21, 2017
 Aarhus University, Denmark, September 19, 2017
 University of Antwerp, Belgium, September 14, 2017
 ESADE Business School, Madrid, Spain, January 12, 2017
 National Academy of Public Administration, Washington DC, November 17, 2016
 NC State University, Raleigh, graduate seminar on public policy, October 10, 2016
 Columbia University, “Politics at Work” book workshop, August 15, 2016
 University of Edinburgh, Scotland, May 19, May 26, June 16, 2016
 Centro de Investigación y Docencia Económicas (CIDE), Mexico City, May 4, 2016
 Distinguished Lecturer in the Social, Behavioral, and Economic Sciences, National Science
 Foundation, October 14, 2015
 UNC-Chapel Hill School of Journalism, September 11, 2015
 UNC-Chapel Hill Institute of African-American Research, September 9, 2015
 University of Glasgow, Scotland, June 12, 2015

Duke University, Ralph Bunche Summer Institute, June 4, 2015
University of Michigan, May 8, 2015
University of Texas, May 6, 2015
University of Oklahoma, April 30, 2015
University of Houston, February 6, 2015
Princeton University, November 10, 2014
University of Minnesota, November 6, 2014
Center for the Study of the American South, UNC-CH, October 28, 2014
University of California, Irvine, January 30, 2014
University of Geneva, January 27, 2014
University of Michigan, September 13, 2013
University of Malta, May 21, 2013
University of Pennsylvania, March 21, 2013
SUNY at Buffalo, March 8-9, 2013
University of South Carolina, March 1, 2013
University Institute of Lisbon, Portugal, February 6, 2013
University of Maryland, November 30, 2012
Appalachian State University, November 6, 2012
University of Geneva, September 5, 2012
UNC-Chapel Hill Conference on Policy Change in Complex Urban Systems, Keynote, March 31, 2012
Georgetown University, March 26, 2012
Oxford University, All Souls College, March 8, 2012
Aarhus University, Denmark, January 26, 2012
Sciences Po Bordeaux, December 1, 2011
UNC-Charlotte, November 10, 2011
Santa Fe Institute, August 2011
University of Florida, July 14, 2011
SUNY Albany, April 24, 2011
University of Michigan, 100th anniversary of the political science department, April 7, 2011
UCLA, February 27, 2011
Washington State University, February 25, 2011
Suffolk University School of Law, Symposium on Peter Hall, February 11, 2011
Trinity College, Dublin, December 13, 2010
Johns Hopkins University, November 4, 2010
National Press Club, Washington DC, debate on *Lobbying and Policy Change*, September 16, 2010
Hewlett Foundation, San Francisco, symposium on public advocacy, July 2, 2010
Stanford University, CASBS workshop on digital government records, June 21–25, 2010
Sciences Po, Paris, May 19, 2010
University of Milan, Italy, May 12, 2010
Institut National de l'Audiovisuel, Paris France, May 3, 2010
University of Laval, Quebec, April 16, 2010
Northwestern University conference on "Text as Data," March 11–12, 2010
Kalamazoo College workshop on complexity in the social sciences, March 5, 2010
University of North Carolina, Charlotte, February 18, 2010

University of Heidleberg, conference on “Politics in Times of Crisis,” December 3–4, 2009
Witness to Innocence (Death penalty advocacy group), Philadelphia, PA, October 23–24, 2009
University of North Carolina, Department of Public Policy, October 2, 2009
University of Leiden, Den Haag campus, June 16, 2009
University of Mannheim, Germany, MZES, June 8, 2009
University of Lausanne, Switzerland, May 18, 2009
University of Geneva, Switzerland, May 18, 2009
University of Manchester, England, May 15, 2009
University of Leiden, Netherlands, May 8, 2009
Northwestern University, NICO (complexity series), April 1, 2009
University of Michigan, RWJ Health Policy Scholars Program, March 3, 2009
University of Southern California, February 18, 2009
National Coalition to Abolish the Death Penalty, Harrisburg PA, January 23–24, 2009
Sciences Po, Paris, Roundtable on US Elections, January 19, 2009
Sciences Po, Paris, Social Movement Effects on Public Policy, January 5, 2009
Hebrew University of Jerusalem and IDC, Herzliya, Israel, December 14–21, 2008
SPIRIT / Sciences Po, Bordeaux, France, November 28, 2008
University of Nebraska, Lincoln, November 7, 2008
University of Antwerp, October 29, 2008
Wageningen University, NL, keynote speaker, Agriculture in Transition, October 28, 2008
University of Antwerp, workshop on US-EU lobbying, October 23–24, 2008
University of Washington, Seattle, American Politics series, October 10, 2008
Cevipof / Sciences Po, Paris, France, Groupe Argent et Politique, June 23, 2008
SPIRIT / Sciences Po, Bordeaux, France, June 9, 2008
Cevipof / Sciences Po, Paris, France, “Pôle Action Publique” series, May 14, 2008
Syracuse University workshop on US-EU lobbying studies, April 24–25, 2008
Yale University, April 15, 2008
Wayne State University, Detroit, March 20, 2008
CONNEX workshop on lobbying, University of Mannheim, Germany, March 6–8, 2008
University of North Carolina, February 15, 2008
University of Washington, Seattle, November 2, 2007
Harvard University, Graduate School of Education, Askwith Education Forum, October 4, 2007
University of Antwerp, September 20–21, 2007
University of Aberdeen, July 1, 2007
University of Barcelona, June 14, 2007
University of Aarhus, Denmark, June 8, 2007
Netherlands Institute of Government, The Hague, keynote speech, May 23, 2007
University of Geneva, May 7, 2007
Oxford University, March 6, 2007
World Congress Against the Death Penalty, Paris France, February 1–3, 2007
University of Newcastle, January 25–26, 2007
Université de Montréal, November 18, 2006
Public Policy Institute of California, San Francisco, October 27, 2006
University of Newcastle, England, May 3–4, 2006
UCLA Law School, Conference on Capital Punishment, April 8, 2006
University of Manchester, England, March 17, 2006

Mount St. Mary's University, Maryland, February 23, 2006
University of Wisconsin, Madison, February 10, 2006
Indiana University, January 27, 2006
University College, London, England, School of Public Policy, Distinguished Visiting Speaker,
January 16–20, 2006
National Coalition to Abolish the Death Penalty, Austin Texas, October 28, 2005
Yale University, Aspen Conference on Climate Change, October 6–8, 2005
University of Aarhus, Denmark, Workshop on Comparative Agenda-Setting, July 1–2, 2005
University of Aberdeen, Scotland, June 15, 2005
University of Manchester, England, June 14, 2005
Centre de Sociologie des Organisations (CSO–CNRS), Paris, France, June 10, 2005
University of Leiden, Netherlands, Workshop on Reform Miracles, May 27–28, 2005
University of Exeter, England, May 18, 2005
Cevipof / Sciences Po, Paris, France, “Pôle Action Publique” series, May 11, 2005
University of Leiden, Netherlands, Workshop on Interest Groups in the EU, April 14–16, 2005
University of Utrecht, School of Governance, Netherlands, March 17, 2005
University of Antwerp, Belgium, March 15, 2005
University of Mannheim, Germany, Center for European Social Research, January 24, 2005
University of Aarhus, Denmark, January 21, 2005
University of Trento, Italy, January 19, 2005
European University Institute, Florence, Italy, November 22, 2004
University of Aberdeen, Scotland, November 19, 2004
University of Leiden, Netherlands, June 10–12, 2004
University of Aberdeen, Scotland, May 24–June 4, 2004
University of North Carolina, American Politics Research Group, April 2, 2004
University of Pennsylvania, Wharton School, Conference on Management Strategy and the
Business Environment, March 26–27, 2004
Harvard University, Conference on The Transformation of American Politics: Policies,
Institutions, and Participation, March 5–6, 2004
University of Kentucky, Martin School of Public Policy, January 23, 2004
University of Aberdeen, Scotland, December 15–19, 2003
Rutgers University, November 21, 2003
University of Arizona, Conference on Research Policy as an Agent of Change, October 10–11,
2003
Pennsylvania State University, College of Communications, September 26, 2003
University of British Columbia, Vancouver, Canada, August 18–19, 2003
NAACP Legal Defense and Educational Fund, Inc., 24th Annual Capital Punishment Training
Conference, Airlie Conference Center, Warrenton, VA, July 17–20, 2003
Yale University, School of Forestry, Conference on Punctuated Equilibrium Models of
Environmental Policymaking, June 30, 2003
The Justice Project, Washington DC, May 15, 2003
University of Michigan, Robert Wood Johnson Health Policy Fellows Program, April 10, 2003
Pennsylvania State University, Hazelton Campus, November 7, 2002
University of Michigan, Conference on Social Movements and Organizations, May 10–11, 2002
West Virginia University, April 19, 2002
Nuffield College, Oxford University, England, Conference on Budgetary Policy Change:

Measures and Models, March 8–9, 2002
 University of California, Irvine, Conference on Social Movements, Public Policy, and
 Democracy, January 11–13, 2002
 University of Chicago, May 21, 2001
 University of Kentucky, April 13, 2001
 Temple University, March 14, 2001
 Columbia University, January 26, 2001
 Harvard University, November 3, 2000
 Princeton University, Conference on Political Participation: Building a Research Agenda,
 October 13–14, 2000
 University of Aberdeen, Scotland, May 15–19, 2000
 University of Pittsburgh and Carnegie Mellon University, April 10, 2000
 Pennsylvania State University, Department of French, February 28, 2000
 Western Michigan University, Sam Clark Lecturer, March 15–16, 1999
 University of California, Santa Barbara, February 12, 1999
 University of Aberdeen, Scotland, October 1998
 University of Bergen, Norway, October 1998
 University of Texas School of Public Health, October 2, 1997
 Harvard University Conference on Civic Engagement, September 26–28, 1997
 University of Michigan, 5th Annual Jack L. Walker Memorial Conference of Political Affairs:
 The Politics (or Un-Politics) of the Underclass and Unemployed, March 20, 1992
 UCLA Workshop on Comparative Political Economy of Science, January 1990
 Feltrinelli Foundation Conference on Organized Interests and Democracy, Cortona, Italy, 1990

LEGAL EDUCATION TRAININGS PRESENTED

National Law Enforcement Liaison Program, panel discussion on traffic safety enforcement,
 sponsored by the National Highway Traffic Safety Administration and the Governors
 Highway Safety Association, August 12, 2021*
 Guilford County, NC Judicial Conference (Judges, DA's, Court Administrators, Public
 Defenders), October 30, 2020*
 North Carolina Conference of District Court Judges, October 7, 2020*
 North Carolina Conference of Superior Court Judges, August 14, 2020*
 Fair and Just Prosecution, DA workshop on capital punishment, Durham NC, December 6, 2019
 National Police Accountability Project, Durham NC, October 17, 2019
 NC NAACP, Raleigh NC, December 7, 2018
 American Bar Association, Chicago, IL, August 3, 2018
 NC Committee on Racial and Ethnic Disparities in the Criminal Justice System (NC-CRED),
 Wake Forest University School of Law, November 3, 2017
 NC Association of District Court Judges, Asheville NC, October 5, 2016
 UNC School of Government, training for judges, April 6, 2016
 UNC School of Government, Racial Equity Network (public defenders), July 24, 2015
 North Carolina Public Defenders and Investigators, Greensboro NC, May 15, 2015

COMMUNITY PRESENTATIONS ON CRIMINAL JUSTICE

Panelist, Scholars and Local Policymakers: An Essential Collaboration for Change. Scholars
 Strategy Network, Chapel Hill NC, November 16, 2021*

Panelist, Race and the Death Penalty virtual seminar, Quaker Southeast Yearly Meeting, Tampa FL, September 10, 2021*

Hillsborough NC, City Council, Mayor, Police Chief, March 11, 2021*

Arlington County VA, Policing Oversight Group, November 16, 2020*

UNC / Chapel Hill Community Dialogue on Race, November 10, 2020*

Suffolk County, NY, Policing Oversight Group, November 3, 2020*

Chapel Hill Rotary Club, October 30, 2020*

UNC Honors Carolina, Structures of Inequality speakers series, September 23, 2020*

UNC Highway Safety Research Center, September 2, 2020*

Lexis-Nexis, Raleigh NC, July 16, 2020*

City of Berkeley (CA) Fair and Impartial Policing Working Group, July 1, 2020*

NC-CRED, Policing and Racial Justice seminar, June 29, 2020*

UNC General Alumni Association, roundtable on racial justice June 18, 2020*

Greensboro Bound (Greensboro NC), panel discussion on the death penalty, June 11, 2020*

North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System (NC-CRED), Raleigh, NC, August 24, 2018

Chapel Hill, NC, Public Library, August 13, 2018

UNC-Chapel Hill THINKposium, August 17, 2016

*Presentation made by remote video technology

PROFESSIONAL SERVICE AND MEMBERSHIP

University / College / Department service at UNC-Chapel Hill:

University

Faculty Co-Chair, Campus Safety Commission, 2019–21

Faculty Council (elected position), 2012–19

Carolina Summer Reading Program Selection Committee, 2013–14; Chair, 2014–15

Member, review team, Institute for African American Research, Spring 2016

Faculty Affiliate, Institute of African American Research, 2014–

Office of Undergraduate Research, Summer Undergraduate Research Fellowship (SURF) selection committee, 2018

College of Arts and Science

Chair, Search Committee for Distinguished Professor and Director of the Center for the Study of the American South (CSAS), 2021–22

Member, Advisory Board, Center for the Study of the American South (CSAS), 2016–

Member, Advisory Committee, Department of Public Policy, 2019–2022

Adjunct Professor of Public Policy, 2019–

Member, Dean’s Faculty Diversity Advisory Group, 2016–2021

Chair, Student Learning Outcomes for General Education Courses Committee, 2017–18

Co-Chair, Diversity Task Force, 2015–16

Member, Interdisciplinary Grants Awards Committee, 2013

Member, Dean’s Task Force on Faculty Diversity, 2010–11

Department of Political Science

Director of PhD Placement, 2014–17, 2018–; interim Placement Director, Fall 2012

Member, post-tenure review committees, 2010–13, 2014–17; Chair 2012–13, 2019–20

Member, Committee on Faculty Mentoring (2016–18)

Diversity Liaison, 2011–17
 Chair, Diversity Affairs and Recruitment, 2010–17 (Member, 2009–10)
 Chair, American Politics Talent Search Committee, 2015–16
 Chair, Dawson Chair Search Committee, 2016–17
 Member, Strategic Planning (SWOT) Committee, 2016–17
 Director of Graduate Admissions, 2013–14
 Member, Salary Review Committee, 2011–12, 2014–15
 Member or chair, ad hoc faculty recruitment committees, 2009–15, 2016–17, 2021–22
 Member, internal evaluation (promotion) committees, 2013–14, 2016–17
 Member, best MA thesis committee, 2013, 2020; best graduate student publication award committee, 2015

Editorial boards

Policy Studies Journal, 2003 –
Journal of European Public Policy, 2004 –
Public Administration, 2008 –
Journal of Public Policy, 2010 –
Gouvernement et Action Publique, 2010 –
Interest Groups and Advocacy, 2011–
Governance, 2012 –
French Politics, Society, and Culture, 2013 –
West European Politics, 2015–
Politics, Groups, and Identities, 2017–
Interdisciplinary Political Studies, 2017–
International Review of Public Policy, 2018–
Korean Journal of Policy Studies, 2021–
Political Research Quarterly, 2006–14
American Journal of Political Science, 2006–09
Journal of Information Technology and Politics, 2006–10
Journal of Politics, 1993–2001

Series editor, Palgrave Macmillan series on Comparative Studies of Political Agendas, with Laura Chaqués Bonafont, Christoffer Green Pedersen, Frédéric Varone, and Arco Timmermans. Publications began in 2012, as listed below:

- Peter Bjerre Mortensen, Matt W. Loftis, and Henrik Bech Seeberg, 2022. *Explaining Local Policy Agendas: Institutions, Problems, Elections and Actors*.
- Miklós Sebök and Zsolt Boda, eds. 2021. *Policy Agendas in Autocracy, and Hybrid Regimes: The Case of Hungary*.
- Alper T. Bulut and Tevfik Murat Yildirim. 2020. *Political Stability, Democracy and Agenda Dynamics in Turkey*
- Eva-Maria Euchner. 2019. *Morality Politics in a Secular Age: Strategic Parties and Divided Governments in Europe*.
- Laura Chaqués Bonafont, Anna M. Palau, and Frank R. Baumgartner. 2015. *Agenda Dynamics in Spain*.
- Peter John, Anthony Bertelli, Will Jennings, and Shaun Bevan. 2013. *Policy Agendas in British Politics*.
- Isabelle Engeli, Christoffer Green-Pedersen and Lars Thorup Larsen, eds. 2012. *Morality*

Politics in Western Europe: Parties, Agendas and Policy Choices.

Book review board, *French Politics, Society, and Culture* (formerly *French Politics and Society*), 1997 – 2012

Tenure and promotion reviews for the following colleges and universities: Aberdeen (Scotland), Alabama-Birmingham, Arizona, Arizona State, Australian National, Barcelona (Spain), Brandeis, British Columbia (Canada), California at Berkeley, California at Los Angeles, California at Riverside, California at San Diego, Chicago, Colorado at Denver, Colorado at Boulder, Columbia, Cornell, Dartmouth, Denver, Duke, East Carolina, Edinbourg (Scotland), Georgia, Georgia State, Georgetown, Harvard, Hebrew University of Jerusalem (Israel), Johns Hopkins, Indiana, Iowa State, Kansas, Kentucky, Lamar, London School of Economics (UK), Malta (Malta), Marquette, Maryland, Massachusetts, Memphis, Miami, Michigan, Michigan State, Minnesota, Missouri, Montana State, New School for Social Research, Ohio, Ohio State, Oklahoma, Pennsylvania, Potsdam (Germany), Pittsburgh, Princeton, Purdue, Reed, Roosevelt, Rutgers, SciencesPo Paris (France), Southampton (UK), SUNY-Albany, SUNY-Buffalo, St. John Fisher College, Syracuse, Tel Aviv (Israel), Temple, Texas at Austin, Texas at Dallas, Villanova, Virginia, Washington, Wellesley, West Virginia, Wisconsin, Yale

Manuscript reviewer, proposal reviewer, or consultant for:

Journals: *American Political Science Review; Perspectives on Politics; PS; American Journal of Political Science; Journal of Politics; Polity; Political Research Quarterly; American Politics Quarterly; Journal of Theoretical Politics; Public Choice; Social Science Quarterly; Social Forces; Social Problems; Legislative Studies Quarterly; Journal of Legislative Studies; Congress and the Presidency; Interest Groups and Advocacy; Presidential Studies Quarterly; Political Behavior; Party Politics; Journal of Information Technology and Politics; Journal of Health Politics, Policy and Law; State Politics and Policy Quarterly; State and Local Government Review; Local Government Studies; Electoral Studies; Political Communication; World Politics; Comparative Politics; Comparative Political Studies; European Union Politics; Comparative European Politics; Journal of Common Market Studies; Canadian Journal of Political Science; Scandinavian Political Studies; Public Administration Review; Policy and Politics; Public Administration; Administration and Society; Governance; Politics and Governance; Regulation and Governance; Journal of Public Administration Research and Theory; Urban Affairs Review; Government and Policy; Economics and Politics; Journal of Policy History; Human Welfare; Journal of Public Policy; Journal of European Public Policy; West European Politics; Journal of European Politics; Acta Politica; Policy Studies Journal; Journal of Comparative Policy Analysis; Policy Studies Review; Review of Policy Research; Political Science Research and Methods; Harvard International Journal of Press/Politics; Southeastern Political Review; Politics and Policy; Australian Journal of Political Science; Research and Politics; Applied Behavioral Science Review; International Review of Administrative Sciences; Wetlands; Environmental Politics; Global Environmental Politics; Journal of Environmental Policy and Planning; International Planning Studies; Socio-Economic Planning Sciences; Journal of Contingencies and Crisis Management; Women and Politics; Milbank Quarterly; Journal of International Business Studies; Business and Politics; International Migration Review; Education Evaluation and Policy Analysis;*

Computational and Mathematical Organization Theory; Politics; The Social Science Journal; Social Science Research; Cambridge Review of International Affairs; Review of International Political Economy; Journal of Criminal Law and Criminology; Criminology; American Journal of Criminal Justice; International Journal of Applied Criminal Justice; Journal of Experimental Criminology; International Journal of Police Science and Management; Police Quarterly; Journal of Global Governance; KOME; Big Data and Society; Gouvernement et Action Publique; American Sociological Review; Science; Science Advances; Sociological Imagination; Journal of the Center for Policy Analysis and Research; Social Work in Public Health; Stanford Law Review

University Presses: Princeton, Chicago, Harvard, Cambridge, Oxford, Cornell, California, Michigan, Pittsburgh, Kansas, State University of New York, New York University, Ohio State, Georgetown, Manchester (UK), Brookings Institution

Commercial and other Publishers: HarperCollins, Westview, Longman, Routledge, St. Martin's, Allyn & Bacon, Congressional Quarterly, Haworth Press, Resources for the Future Press, Palgrave Macmillan

Funding Agencies: National Science Foundation (US), Social Science Research Council (UK), British Academy, European Social Research Council, European Research Council, European Science Foundation, Social Science and Humanities Research Council (Canada), Irish Research Council for Humanities and Social Sciences, Irish Academy of Science, National Science Foundation (Switzerland), Research Grants Council (Hong Kong), Hungarian Scientific Research Fund, Israeli Science Foundation, Council for the Earth and Life Sciences (Netherlands), Research Foundation – Flanders (Belgium), Danish Council for Independent Research, University of Milan (Italy), Australian Research Council, Agence Nationale de la Recherche (France), Japan Society for the Promotion of Science (Japan), Agency for Management of University and Research Grants (AGAUR) (Catalonia), Hungarian Academy of Sciences, Millennium Science Initiative (Government of Chile), Austrian Science Fund, Royal Society of New Zealand, MacArthur Foundation, Spencer Foundation, Earhart Foundation, Pew Charitable Trusts

Camargo Foundation, selection review board, 2009–14

West European Politics Smith-Wright best article award committee (chair), 2021

Other: Educational Testing Service, Decision Insights, Inc., Handbook of Decision-Making

National Science Foundation, 2000-2021:

Committee of Visitors, Member or Chair, Social Behavioral Sciences, Political Science Panelist, Building and Broadening, Interdisciplinary Behavioral and Social Science Research, Cyber-Enabled Discovery and Innovation, Interdisciplinary Graduate Education, Research and Training

Distinguished Lecturer, SBE Division, 2015

Workshop on Cyberinfrastructure Needs in the Social Sciences, October 22, 2004

Outside evaluations:

University of Glasgow, Policy Scotland external advisory board, 2013–2018

Political Science Department, Purdue University, October 2015

Political Science Department, University of California, Santa Cruz, January 2008

Political Science Department, Graduate Programs, Western Michigan University,
December 2005

Political Science Department, Syracuse University, October 2005

Political Science Department, University of British Columbia, Canada, September 2005

Political Science Department, Michigan State University, Spring 2004

M.A. in Public Policy Program, SUNY-Stony Brook, October 1999

Professional Service and Association Work

American Political Science Association:

Association-wide assignments

Member, Presidential Task Force on the Association's Reponse to the Coronavirus, 2020–
Special Projects Fund Selection Committee, 2018

Vice-President, 2015–16

Member, *APSR* editor selection committee, 2014–15

Member, Lasswell Award Committee, 2012 (for best dissertation in public policy)

Member, Nominating Committee, 2004

Chair, Nominating Committee, 2003

Chair, EE Schattschneider Award Committee, 2002 (for best dissertation in American
politics)

Section on Public Policy

Best paper on comparative public policy committee, 2012, 2013

Short Course on the Comparative Policy Agendas Project, annual meetings, August 30,
2011. (with Bryan D. Jones and others)

President, 2008–09

President-elect (section organizer), 2007–08 (29 panels)

Short Course on Teaching Public Policy, workshop on comparative approaches, annual
meetings, August 27, 2008. (with Kent Weaver)

Member, selection committee for editor, *Policy Studies Journal*, 2008

Short Course on the Comparative Policy Agendas Project, annual meetings, August 30,
2006. (with Bryan D. Jones, John Wilkerson, and others)

Member, Aaron Wildavsky Award selection committee, 2005–06

Short Course on the Policy Agendas Project, annual meetings, August 31, 2005. (with
Bryan D. Jones, John Wilkerson, and others)

Short Course on the Policy Agendas Project, annual meetings, August 27, 2003. (with
Bryan D. Jones, John Wilkerson, and others)

Member, Executive Council, 1997–2000

Member, Nominating Committee, 2000

Short Course on Using the Policy Agendas Project in Your Research, annual meetings,
August 30, 2000 (with Bryan D. Jones)

Chair, Aaron Wildavsky Award selection committee, 1997–98

Section on Political Organizations and Parties

Chair, Samuel Eldersveld Career Achievement Award Committee, 2019

Member, Leon Epstein Award committee for best book, 2011

Member, Selection committee for special issue of *Party Politics*, 2010

Chair, Samuel Eldersveld Career Achievement Award Committee, 2008

Chair, 2003–05
Member, Emerging Scholar Selection Committee, 2002
Member, Nominating Committee, 1999–2000

Division on Politics and Society in Western Europe

Program Chair, annual meetings, 1998 (18 panels)

Conference Group on French Politics and Society

Program organizer, 1993–97 (2 to 4 panels per year)

Member, Stanley Hoffman Award for the best article on French politics, 2009

Midwest Political Science Association:

Member, Best Poster Award Committee, 2010
Member, Patrick J. Fett Award Committee, 2008
Member, Selection Committee for Editorship of the *AJPS*, 2004
Member, Committee on the Annual Program, 1996–97
Program co-chair, annual meetings, 1995 (approx. 300 panels and 2,000 participants)

Southern Political Science Association:

Member, Joseph L. Bernd Best *Journal of Politics* Paper Award Committee, 2018
Member, Malcolm Jewell Award Committee for best paper by a graduate student presented at the 2010 meetings
Chair, Section on Interest Groups, annual meetings, 2002 (8 panels)
Chair, Section on Interest Groups, annual meetings, 1996 (5 panels)

Association Française de Science Politique:

Comité de direction, groupe argent et politique (2005–10)

Other:

Chair, Charles Levine memorial book prize selection committee, International Political Science Association, committee on Structures and Organization of Government, to recognize a distinguished book in the field of comparative public administration, 2005–06
Member, Nominating Committee, Midwest Public Administration Caucus, 2005
Member, National Election Studies 1997 Pilot Study Planning Committee

Member of: American Political Science Association; Midwest Political Science Association; Conference Group on French Politics and Society, APSA Organized Sections on Public Policy, Race and Ethnic Politics, and Political Organizations and Parties

Community Service:

Member, Data Team, NC Task Force for Racial Equity in Criminal Justice, 2020–
Pro-bono consulting for various civil rights, death penalty, and other legal and advocacy causes, 2010–
Member, Board of Directors, Healing Justice Project, Washington DC, 2015–2019

References available on request

APPENDIX C

I, Olivia Ensign, declare and state the following:

1. I made this declaration based upon my personal knowledge, as a former Staff Attorney for the American Civil Liberties Union's Capital Punishment Project.
2. On December 3, 2019, Board of Indigent Defense Services Death Penalty Defense Unit (DPDU) attorney Peter Conley sent a KORA request to the Sedgwick County District Attorney's office requesting homicide data. The Sedgwick County District Attorney's Office provided a response on February 21, 2020. On April 2, 2020, Mr. Conley sent an additional request to the Sedgwick County District Attorney requesting data related to decisions to seek the death penalty, training materials for prosecutors, and costs associated with prosecuting capital cases.
3. On February 5, 2020, Mr. Conley sent KORA requests to the other 104 counties in Kansas. These requests went out to County and District Attorney offices. These requests asked for data on capital and non-capital homicide prosecutions between July 1, 1994 to the present. The requested data included charging materials, training materials, and cost and staffing data.
4. Mr. Conley also filed a KORA request with the Kansas Department of Corrections for the data related to the added cost of housing death row prisoners on August 26, 2020, and received data on September 3, 2020.
5. On April 2, 2020, counsel filed a KORA request with the Kansas Judicial Council for the data collected during the January 29, 2004, December 4, 2009, and February 13, 2014 reports by the Death Penalty Advisory Committee. On August 13, 2020 counsel was granted access to these files.
6. Also on April 2, 2020, counsel filed a KORA request to the Kansas Legislative Division of Post Audit for the December 2003 Performance Audit Report on Costs Incurred for Death Penalty Cases. On that day, the Kansas Legislative Division of Post Audit responded that they had destroyed all records.
7. On June 22, 2020, at the request of counsel, Mr. Conley provided the Kansas State Board of Indigent Defense (BIDS) budgets by fiscal year for the years 2014-2021. On February 16, 2021, counsel sent an additional request to BIDS for trial expenses, direct appeal expenses and habeas expenses for the Counties that had a capital trial prosecution between 2012 and 2019 to ensure the years with an active capital case, 2014 to 2018 were covered. BIDS provided costs for the homicides the agency handled since 2012, pulling from vouchers, for attorney costs, expert costs, and transcript costs in June 2021.
8. On October 20, 2021, counsel sent a KORA request to the Kansas Supreme Court. This request was forwarded to the Office of Judicial Administration and denied in part on October 21, 2021. On November 1, 2021, November 4, 2021, and November 5, 2021, the Office provided documents regarding judicial salary information and annual budgets from 2012-present.
9. On August 30, 2021, counsel sent a KORA request to the Kansas Attorney General's Office. On September 9, 2021, counsel received a response stating the Office had received the request. On September 27, 2021, October 6, 2021, November 2, 2021, and November 8, 2021, counsel

attempted follow up communications via phone and email but received no reply. On December 13, 2021, counsel sent the Office a courtesy copy of a complaint set to be filed in Kansas district court due to this lack of response. On December 15, 2021, counsel conferred with the Attorney General's Office via a phone conference. Following this conference, on December 30, 2021, counsel received a letter denying the request in part and noting that the Attorney General's Office would continue to collect certain documents. On February 8, 2022, the Office provided a list of criminal homicide cases handled by the Office from 2012-2020 and noting that the Office would continue to collect certain documents. On February 22, 2022, the Office sent a request for clarification which counsel responded to on February 23, 2022.

10. On August 26, 2021, counsel sent a KORA request to the Kansas Bureau of Investigation (KBI). On September 1, 2021, counsel received a list of questions regarding the request from KBI and responded on September 14, 2021. On September 24, 2021, counsel received a letter from KBI stating that the KBI website contained a register of all KBI's publicly available digital information. On October 15, 2021, KBI sent a letter stating the request did not contain sufficient information for the relevant documents to be located. On October 27, 2021, and November 1, 2021, counsel sent emails intended to clarify the request for KBI. On November 1, 2021, KBI again stated the request did not contain sufficient information for the relevant documents to be located. On November 15, 2021, counsel again provided an updated request with a focus on documents from a single county. On November 18, 2021, KBI again stated the request did not contain sufficient information for the relevant documents to be located. On January 3, 2022, counsel again provided an updated request. On January 6, 2022, KBI again stated the request did not contain sufficient information for the relevant documents to be located. On January 19, 2022, counsel again provided an updated request. On January 25, 2022, KBI replied stating that they would need until February 21, 2022, to provide an update. On February 21, 2022, KBI sent a letter describing the data available for one investigation and requesting additional clarification. Counsel responded to this letter on February 24, 2022.
11. On January 12, 2022, counsel sent a KORA request to the Kansas Court of Appeals. On January 14, 2022, this request was forwarded to the Office of Judicial Administration. It was denied on January 20, 2022.
12. Beginning in January 2021 extensive follow up efforts were initiated to gather all outstanding data from county officials in counties that had one of more active death penalty cases between 2014 and 2018. These included Barton, Chautauqua, Franklin, Geary, Harvey, Johnson, Labette, Pratt, Riley, Saline, Sedgwick, Shawnee, and Wyandotte counties.
13. Barton: In February 2020, the Barton County attorney issued its initial response to counsel's February 2020 request. On February 24, 2020, they issued a partial response to the KORA request sending itemized budgets from 1998 to 2020, detailing wages, travel, and witness fees, but not providing a breakdown by case. On January 12, 2021, counsel reached out to confirm that, when public health guidelines allowed, that a team member would be able to review physical files for charging documents and individual costs in files. On January 14, 2022 counsel reached out to confirm a time to review and, in the alternative, requested a "filings by statute report" search. On January 20, 2022, the county attorney's office provided a list of capital and first-degree homicide cases from 2012-2020.

14. On August 26, 2021, counsel submitted a KORA request to the Barton County Sheriff's Department. On September 29, 2021, the Barton County Sheriff's Department provided relevant budget documents and reported that they handled no relevant cases between January 1, 2012, to January 1, 2020 and therefore had no relevant cost documents.
15. On August 27, 2021, counsel submitted a KORA request to the Clerk of the Barton County District Court. This was forwarded to the Office of Judicial Administration. On January 5, 2022, counsel submitted an updated request to the Clerk of the Barton County District Court for all complaint(s); the notice of intent to seek the death penalty; the journal entry of judgement; the notice of intent to seek a separate sentencing proceeding; the withdrawal of notice of intent to seek the death penalty; all financial affidavits; all orders appointing counsel; the notice of filing of charge(s), amended charge(s), or additional charge(s); and any documents that appear to be related to expenses/costs for all capital and non-capital homicide cases handled by the court between January 1, 2012 to January 1, 2020 (hereinafter, the "documents requested from the District Courts"). On January 6, 2022, the District Court provided some of these documents.
16. Chautauqua: On March 19 2020, the Chautauqua County Attorney issued a partial response to counsel's February 2020 request. The only information the County Attorney could provide was an estimation of approximately \$300 in witness fees for homicide cases prosecuted since January 2017. The County Attorney also confirmed that she did not maintain time-keeping records. She also referred counsel to the Clerk of District Court for any lists of capital and non-capital homicide prosecutions, the County Clerk of the Court for any annual budgets, and the Office of the Attorney General for any documentation of capital prosecutions originating from the County. A renewed KORA request was sent to the Chautauqua County Attorney's Office in January 2021, but no additional information was provided.
17. On August 26, 2021, counsel submitted a KORA request to the Chautauqua County Sheriff's Office. On October 8, 2021, the Chautauqua County Sheriff's Office provided relevant budget documents, documentation for personnel who would have assisted or investigated non-capital homicides between January 1, 2012, to January 1, 2020, and reported that they handled no relevant capital homicide cases between January 1, 2012, to January 1, 2020 and therefore had no relevant cost documents for capital homicide cases.
18. On August 26, 2021, counsel submitted a KORA request to the Clerk of the Chautauqua County District Court. This was forwarded to the Office of Judicial Administration. On January 6, 2022, counsel submitted an updated request to the Clerk of the Chautauqua County District Court for the documents requested from the District Courts. On January 7, 2022, the District Court provided some of these documents.
19. On August 27, 2021, counsel submitted a KORA request to the Chautauqua County Clerk's Office. On September 27, 2021, the Chautauqua County Clerk's Office provided relevant budget documents and accounts payable, including transcript and jury fees.
20. Franklin: In February 2020, the Franklin County Attorney provided a partial response to counsel's February 2020 request with a list of capital and non-capital homicide cases prosecuted since 1994 and associated charging documents as well as non-itemized annual budgets. In January 2021, counsel submitted a renewed KORA request to the County Attorney and did not

receive any additional information. In their response to this renewed KORA request, the County Attorney noted that prior to his taking over the office in November 2018, the record keeping “was not good” and that no additional responsive information was available.

21. On August 26, 2021, counsel submitted a KORA request to the Franklin County Sheriff’s Office. On October 15, 2021, the Franklin County Sheriff’s Office provided relevant budget documents.
22. On August 26, 2021, counsel submitted a KORA request to the Clerk of the Franklin County District Court. This was forwarded to the Office of Judicial Administration. On December 13, 2021, counsel submitted an updated request to the Clerk of the Franklin County District Court for the documents requested from the District Courts. On December 13, 2021, the District Court provided some of these documents.
23. On August 26, 2021, counsel sent a KORA request to the Franklin County Accounting Department. The County Treasurer forwarded this request to the County Clerk who, on August 30, 2021, provided the relevant budget documents for the Franklin County Attorney from January 1, 2012 to January 1, 2020. Additionally, the Franklin County Clerk provided trial funds from 2013-2017 that contain expenses for the only capital homicide as well as county staff hours and salary for time attributed to that case.
24. Geary: On February 10, 2020, the Geary County Attorney requested additional time to respond to counsel’s February 5, 2020, KORA request. In January 2021, counsel submitted a renewed KORA request. In February 2021, the County Attorney responded to this renewed request and advised that it would take “no less than six months” to produce responsive records. On August 26, 2021, counsel submitted a KORA request to the Geary County Accounting Department and on August 27, 2021, counsel submitted a KORA request to the Geary County Clerk’s Office. The County Treasurer and the County Clerk forwarded this request to the Geary County Attorney’s Office who on September 14, 2021 provided the relevant budget documents for the Geary County Attorney for the years 2014, 2016, 2017, 2018, 2019, and 2020; attorney salaries for 2021; and a list of capital and non-capital homicides from 2012-2020. On September 21, 2021, the County Attorney’s Office provided relevant budget documents for the remaining years of 2012, 2013, and 2015. On October 5, 2021, the County Attorney’s Office provided vouchers associated with the list of capital and non-capital homicide cases.
25. On August 26, 2021, counsel submitted a KORA request to the Geary County Sheriff’s Office. On August 30, 2021, the Geary County Sheriff’s Office provided relevant budget documents. On September 21, 2021, the Geary County Sheriff’s Office provided caseloads and salaries for employees involved in a case that would classify as capital murder.
26. On August 27, 2021, counsel submitted a KORA request to the Clerk of the Geary County District Court. This was forwarded to the Office of Judicial Administration. On December 16, 2021, counsel submitted an updated request to the Clerk of the Geary County District Court for the documents requested from the District Courts. On December 22, 2021, the District Court provided a portion of these documents. On February 16, 2022, counsel received complete paper documents.

27. Harvey: Counsel submitted a KORA request to the Harvey County Attorney on February 5, 2020 and a renewed request on January 27, 2021 to the newly elected Harvey County Attorney. Counsel did not receive a response to either request. As a result, on February 16, 2021, counsel notified Harvey County Attorney Jason Lane that they would be pursuing enforcement actions in the District Court and attached a draft courtesy copy of the related complaint. Lane responded the next day, citing system issues and transition as the reason behind the lack of response. Lane requested additional time to process the request and renewed this request in March 2021. On April 6, 2021, Lane provided lists, but not charging documents, for capital and non-capital homicide cases in the requested time period and lists of decision makers. Lane referred counsel to the Harvey County Office of Administration for annual budgetary information and noted that the “Harvey County Attorney’s Office does not segregate costs and time-keeping specific to the prosecution of capital homicide cases from general prosecution.”
28. On August 26, 2021, counsel submitted a KORA request to the Harvey County Sheriff’s Office and the Harvey County Accounting Department. The County Treasurer and Sheriff forwarded this request to the County Counselor who provided the relevant budget documents for the Harvey County Attorney’s Office and the Harvey County Sheriff’s Office for the years 2013, 2016, and 2017 on October 11, 2021. On October 22, 2021, the County Counselor provided relevant budget documents for both offices for the years 2012, 2014, 2015, 2018, 2019, and 2020.
29. On August 27, 2021, counsel submitted a KORA request to the Clerk of the Harvey County District Court and the Harvey County Clerk’s Office. This was forwarded to the Office of Judicial Administration who provided suggestions. On December 16, 2021, counsel submitted an updated request to the Clerk of the Harvey County District Court for the documents requested from the District Courts. On December 17, 2021, the District Court provided some of these documents.
30. Johnson: On July 31, 2020, the Johnson County District Attorney acknowledged receipt of the July 31, 2020, KORA request. In December 2020, the District Attorney stated that review was still in progress. In March 2021, the District Attorney provided an update that the review would be finalized soon. In May 2021 the District Attorney’s office responded, directing counsel to the Johnson County Budget and Financial Planning Department for any historical budget data and employee salary information, and noting that there were no responsive cost documents because the “Johnson County District Attorney’s Office does not track billable hours or keep timesheets related to specific cases.”
31. On August 26, 2021, counsel submitted a KORA request to the Johnson County Sheriff’s Office. On October 14, 2021, the Johnson County Sheriff’s Office provided relevant documents.
32. On August 27, 2021, counsel submitted a KORA request to the Clerk of the Johnson County District Court. This was forwarded to the Office of Judicial Administration. On December 20, 2021, counsel submitted an updated request to the Clerk of the Johnson County District Court for the documents requested from the District Courts. On February 8, 2022, the District Court provided some of these documents.
33. Labette: On February 13, 2020, the Labette County Attorney acknowledged receipt of the February 5, 2020 request. Later that month, the County Attorney's office requested additional

time to process the request. On January 27, 2021, counsel submitted a renewed KORA request. On March 2, 2021 the Labette County Attorney supplied only budget information for 2013 to 2021. On March 8, 2021 counsel replied, requesting cost estimates for searching individual files for cost information. This estimate was not forthcoming despite follow up by counsel in July and August. On August 25, 2021 the County Attorney requested a phone call, which took place on August 26, 2021. The next day the County Attorney provided in writing a confirmation of the information provided on the call including that the Labette County Attorney's Office did not keep time keeping records and that there were no expert costs expended by the office on homicide cases between 2012 and 2019. The County Attorney also referred counsel to the Attorney General's Office for information about the capital case charged in that period.

34. On August 26, 2021, counsel submitted a KORA request to the Labette County Sheriff's Office and the Labette County Clerk's Office. On September 10, 2021, the Labette County Clerk's Office provided relevant budget documents for the Labette County Sheriff's Office.
35. On August 26, 2021, counsel submitted a KORA request to the Clerk of the Labette County District Court. This was forwarded to the Office of Judicial Administration who provided suggestions. On January 5, 2022, counsel submitted an updated request to the Clerk of the Labette County District Court for the documents requested from the District Courts. On January 6, 2022, the District Court provided some of these documents.
36. Pratt: On February 5, 2020, counsel submitted a KORA request to the Pratt County Attorney. On February 17, 2020, the Pratt County Attorney provided a list of charged homicide cases, all of which were referred to and prosecuted by the State Attorney General's Office. On costs, the County Attorney provided its annual budget and expert witness consulting costs for a single case.
37. On August 26, 2021, counsel submitted a KORA request to the Pratt County Sheriff's Office. On September 7, 2021, the Pratt County Sheriff's Office provided relevant budget documents and reported that they handled no relevant cases between January 1, 2012, to January 1, 2020 and therefore had no relevant cost documents.
38. On August 27, 2021, counsel submitted a KORA request to the Pratt Police Department. On August 31, 2021, the Pratt Police Department directed the inquiry to the Pratt Finance Director. On September 17, 2021, the Pratt Finance Director provided annual certified budget sheets from 2012-2020 and budgets for 2012-2020.
39. On August 26, 2021, counsel submitted a KORA request to the Clerk of the Pratt County District Court. This was forwarded to the Office of Judicial Administration. On December 17, 2021, counsel submitted an updated request to the Clerk of the Pratt County District Court for documents requested from the District Courts. On December 17, 2021, the District Court provided some of these documents.
40. On August 26, 2021, counsel submitted a KORA request to the Pratt County Freedom of Information Officer. On August 27, 2021, this request was forwarded to the Pratt County District Court Clerk and the Pratt County Attorney. On September 17, 2021, and October 13, 2021, the Pratt County Attorney provided relevant cost-related documents for two homicide cases

prosecuted in the county between January 1, 2012, and January 1, 2020, as well as county budget documents.

41. Riley: On February 10, 2020, the Riley County Attorney responded to counsel's February 5, 2020, KORA request. They produced cost information included budgets going back to 2018, but referred counsel to the Riley County Clerk's Office for historical budget information prior to that date. The County Attorney also provided a cost estimate for additional research into cost information. On May 20, 2021 counsel flagged outstanding documents to the County Attorney. On September 9, 2021 the County Attorney's Office provided additional information on costs, however noting that the office did not track hours spent on each case or the "number of hours spent preparing and or responding to motions and preparing for trial." The County Attorney did provide "documented fees" by case, totaling \$34,308.26.
42. On January 12, 2021, counsel sent a KORA request to the Riley County Clerk. The County Clerk forwarded this request to the Deputy Riley County Counselor who provided the budget information for the Riley County Attorney from January 1, 2012 to January 1, 2020.
43. On August 26, 2021, counsel sent a KORA request to the Riley County Police Department. On November 22, 2021, the Riley County Police Department provided budget information from 2012-2020 and the number of hours spent and costs associated with investigating 22 non-capital homicides from 2012-2020.
44. On August 27, 2021, counsel sent a KORA request to the Riley County District Court. Following discussions with the Office of Judicial Administration, counsel sent an updated request on December 13, 2021, to the Clerk of the Riley County District Court for documents requested from the District Courts. The Riley County District Court provided some of these documents on December 22, 2021 and January 28, 2022.
45. Saline: On February 5, 2020, counsel sent a KORA request to the Saline County Attorney. On February 11, 2020, the County Attorney responded by email and provided the annual budget for the County Attorney from 2001 to 2020. The County Attorney also responded that "no such documents exist" relating to prosecuting capital cases and non-capital homicide cases, but did provide an "unofficial...tab of expenses for homicide cases" by year, that did not include time keeping records and included "mostly costs of photographs, exhibits, witness expenses." Counsel submitted an updated KORA request January 12, 2021, identifying a capital case charged in 2017 and requesting associated costs as well as requesting the underlying documentation for the unofficial tab provided in February 2020. An additional request was made by counsel March 17, 2021, identifying another capital case charged in the requested time period. No additional information was provided by the County Attorney who replied "I don't know the numbers for costs or hours handling capital cases" and referred counsel to the Saline County Administrator's Office and the Clerk of the Court.
46. On August 26, 2021, counsel sent a KORA request to the Salina City Police Department. On November 17, 2021, and November 19, 2021, the Police Department provided 2012-2020 budgets, overtime hours submitted by police officers and some civilian support staff, salaries, and benefits of identified officers and support staff broken down by homicide.

47. On August 26, 2021, counsel sent a KORA request to the Saline County Sheriff's Office. The Office provided budget information on August 30, 2021.
48. On August 26, 2021, counsel sent a KORA request to the Saline County District Court. This was forwarded to the Office of Judicial Administration. On December 12, 2021, counsel submitted an updated request to the Clerk of the Saline County District Court for the documents requested from the District Courts. The Saline County District Court provided some of these documents on January 3, 2022, January 7, 2022, January 26, 2022, and January 27, 2022.
49. On August 26, 2021, counsel sent a KORA request to the Saline County Clerk. On August 27, 2021, this request was forwarded to the Saline County Attorney who responded that none of the requested documents were available on October 6, 2021.
50. On August 26, 2021, counsel sent a KORA request to the Saline Accounting Department. On September 9, 2021, the Department provided payroll information for all employees in the County Attorney's Office.
51. Sedgwick: On April 2, 2020, counsel sent a request to the Sedgwick District Attorney requesting data related to decisions to seek the death penalty, training materials for prosecutors, and costs associated with prosecuting capital cases. On June 5, 2020 the Office of the District Attorney provided a response to the KORA request and on June 19, 2020, the Office of the District Attorney provided cost estimates for providing annual budgets and expenses related to criminal cases. The District Attorney also stated that they did not maintain records regarding staff time spent working on homicide cases and did not have compensation data to determine the salaries of staff during the time they worked on specific cases. For the latter they referred counsel to the Sedgwick County Division of Finance. On March 30, 2021, the District Attorney provided counsel with their budget for years 1994 through 2002 as well as case related payments for 813 cases where one or more deaths occurred between the dates of July 1, 1994 and August 2, 2020.
52. On August 30, 2021, counsel sent a KORA request to the Wichita Police Department. On October 13, 2021, the Department provided annual budget information.
53. On August 30, 2021, counsel sent a KORA request to the Sedgwick Sheriff's Office. On September 10, 2021, and October 28, 2021, the Sheriff's Office provided the following information: annual budgets from 2007-2021; annual benefit rates from 2012-2020; excel spreadsheet representing all officers who worked on a homicide case from 2012-2020; and excel spreadsheet including a list of names and dates corresponding to each officer who worked on homicide cases from 2012-2020.
54. On August 30, 2021, counsel sent a KORA request to the Wichita State University Police Department. On December 10, 2021, Wichita State University General Counsel's Office provided records of the Department's involvement in one investigation and annual budget information.
55. On August 30, 2021, counsel sent a KORA request to the Sedgwick County District Court. This was forwarded to the Office of Judicial Administration. On January 25, 2022, counsel submitted an updated request to the Clerk of the Sedgwick County District Court for the documents requested from the District Courts. The Sedgwick County District Court provided some of these

documents on February 9, 2022, February 10, 2022, February 11, 2022, February 16, 2022, February 22, 2022, February 25, 2022, and February 28, 2022.

56. Shawnee: On February 5, 2020, counsel submitted a KORA request to the Shawnee District Attorney. On January 13, 2021, counsel submitted a renewed KORA request to the District Attorney requesting all documents on the costs of investigating, charging, or prosecuting of capital and non-capital homicides between January 1, 2012 and January 1, 2020. On January 15, 2021, the District Attorney responded noting that they were unable to provide expert fees or time keeping records and referring counsel to the Clerk of the District Court for witness fees. On January 26, 2021, the District Attorney submitted an additional response noting that it was not possible to determine staff time on a particular case, but offered to provide information on the special fund created by the County Commission authorized by the District Attorney's Office for any special costs related to prosecuting capital cases. Upon submission of payment, the Shawnee District Attorney's Office provided cost documentation including information on budget line items and totals for the Special Account for Capital Murder, fiscal year 2014-15, trial expenses for fiscal year 2015-18, and information on employee salaries and benefits.
57. On August 26, 2021, counsel submitted a KORA request to the Topeka Police Department. On September 1, 2021, the Department provided annual budget information for fiscal years 2012-2020.
58. On August 26, 2021, counsel submitted a KORA request to the Shawnee County Sheriff's Office. On September 9, 2021, and November 18, 2021, the Office provided the following information: budgets from 2012-2020; a table of case numbers and types; and a table of hours worked during each pay period by the officers assigned to the case while the case was active, along with their wages at the time of the respective case and any overtime.
59. On August 26, 2021, counsel submitted a KORA request to the Shawnee County District Court. This was forwarded to the Office of Judicial Administration. On December 13, 2021, counsel submitted an updated request to the Clerk of the Shawnee County District Court for the documents requested from the District Courts. The Shawnee County District Court provided some of these documents on January 11-14, 2022, and February 4, 2022.
60. On January 13, 2021, counsel submitted a KORA to the Shawnee County Clerk requesting the annual budget of the District Attorney's Office and costs related to the adjudication of capital and non-capital homicide costs. The Shawnee County clerk referred this request to the Deputy District Attorney who on January 20, 2021, provided the annual budgets for their office for 2012-2019. On August 26, 2021, counsel submitted another KORA request to the Shawnee County Clerk's Office and Accounting Department. On August 27, 2021, this request was forwarded to the Shawnee County District Attorney's Office. On September 17, 2021, the District Attorney reported that they had provided all information in their possession.
61. Wyandotte: On February 5, 2020, counsel submitted a KORA request to the Wyandotte County District Attorney. On February 7, 2020, counsel received an email response requiring that a request be made through a specific portal; the request was resubmitted through this platform on July 31, 2020. On July 31, 2020, Wyandotte County acknowledged receipt of the Request and assigned it reference number 20-1541. Wyandotte County did not respond again to Mr. Conley's

request until September 25, 2020. On this date Wyandotte County's Public Records division sent Mr. Conley an unsigned email stating they had reviewed the request and determined none of these records exist in their office. The email stated that "[t]he District Court may have records." On January 22, 2021, counsel sent the District Attorney's office a draft courtesy copy of a complaint seeking additional information. On January 25, 2021, the District Attorney's Office responded referring counsel to the District Court for criminal case records and Unified Government Accounting for records regarding costs. On this same date the District Attorney's Office provided three case names. On February 3, 2021, counsel submitted KORA requests to the District Attorney's Office and Accounting Department. On February 26, 2021, the Accounting Department provided amended and actual budgets of the District Attorney between 2011 and 2020 as well as expenditures, not broken down by case, but including, among other items, witness fees and travel costs. On May 12, 2021 the District Attorney's Office provided a list of homicide cases between 2012 and 2020.

62. On August 26, 2021, counsel sent a KORA request to the Kansas City Police Department. On September 27, 2021, the Department provided their annual budgets from 2012-2020.
63. On August 26, 2021, counsel sent a KORA request to the Wyandotte County Sheriff's Office. On September 21, 2021, the Office provided their annual budget documents.
64. On August 26, 2021, counsel sent a KORA request to the Wyandotte County District Court. This was forwarded to the Office of Judicial Administration. On December 16, 2021, counsel submitted an updated request to the Clerk of the Shawnee County District Court for the documents requested from the District Courts. The Wyandotte County District Court provided certain of these documents on February 11, 2022. On February 16, 2022, counsel followed up for additional documents. The Wyandotte County District Court provided certain of these documents on February 17, 2022.

I declare under the penalty of perjury of perjury under the laws of North Carolina that the foregoing is true and correct and was executed this 4th day of March in Durham, North Carolina.

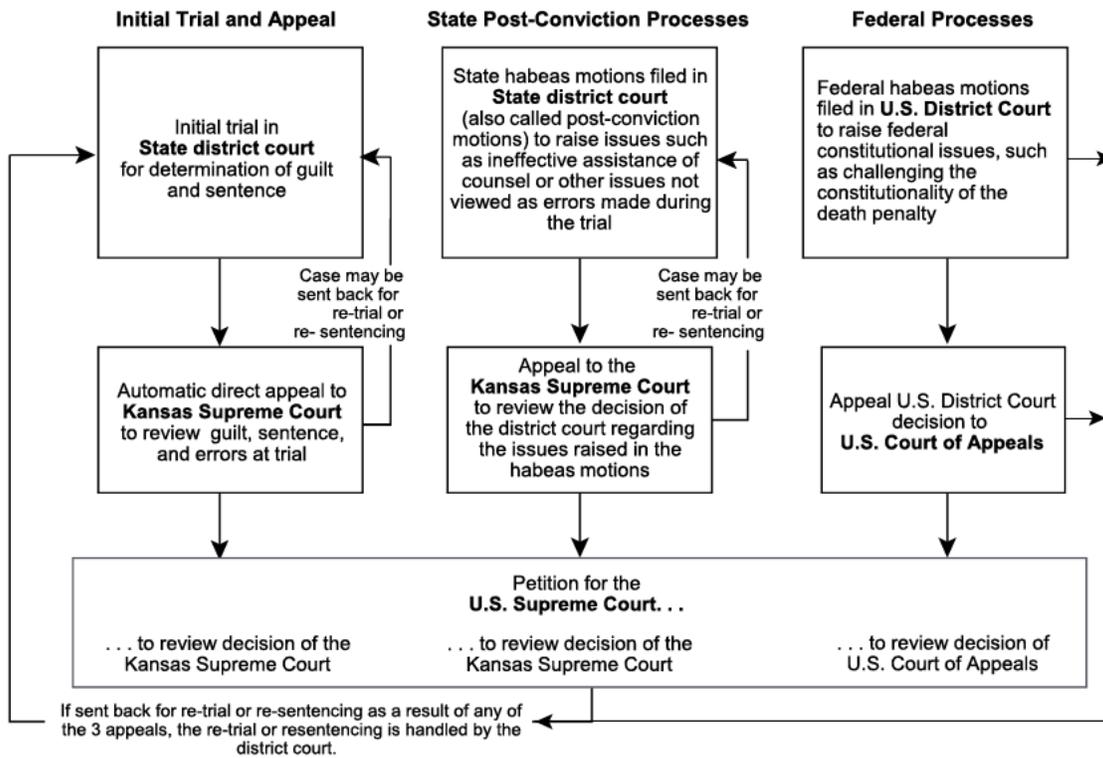


Olivia Ensign

APPENDIX D

Death Penalty Cases Have Several Levels of Review

U.S. Supreme Court rulings have given defendants in death penalty cases access to various levels of review, as shown below.



As a general rule, the levels of appeal are sequential: the defendant must appeal to the Kansas Supreme Court and the U.S. Supreme Court before filing post-conviction motions in district court, and State appeals must be exhausted before filing any appeals with the U.S. District Court.

Exhibit N

Expert Report of Carol Steiker

March 4, 2022

Expert Qualifications

1. A complete description of my education and experience and a list of my representative publications relating to capital punishment for the last 15+ years is set forth in my C.V., attached as Appendix 1. I am currently the Henry J. Friendly Professor of Law at Harvard Law School. I teach, research, and write in the broad field of criminal justice, with an emphasis on the legal regulation of capital punishment. I teach a course on Capital Punishment in America, and I am the faculty director of Harvard's Capital Punishment Clinic.¹ I am the author or editor of two books on capital punishment: *COMPARATIVE CAPITAL PUNISHMENT* (Edward Elgar 2019) (with Jordan Steiker, ed.), and *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (The Belknap Press of Harvard University Press 2016) (with Jordan Steiker). I am also the author of several book chapters on capital punishment, including *Judicial Abolition of the American Death Penalty under the Eighth Amendment: The Most Likely Path*, in *THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT* (Ryan & Berry, eds., Cambridge University Press 2020) (with Jordan Steiker); *Aggravating and Mitigating Evidence in Capital Cases*, in *ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT* (Bohm and Lee, eds. Routledge 2018) (with Jordan Steiker); *The Death Penalty and Deontology*, in *THE OXFORD HANDBOOK OF CRIMINAL LAW* (Deigh & Dolinko, eds., Oxford University Press 2011); *The Beginning of the End?*, in *THE ROAD TO ABOLITION?: THE FUTURE OF CAPITAL PUNISHMENT IN THE UNITED STATES* (Ogletree & Sarat, eds., New York University Press 2009) (with Jordan Steiker), and *Furman v. Georgia: Not an End, But a Beginning*, in *DEATH PENALTY STORIES* (Blume & Steiker,

¹ In my capacity as faculty director of Harvard's Capital Punishment Clinic, I am responsible for Matthew Besman's externship placement with the ACLU Capital Punishment Project, which is assisting in the representation of Mr. McNeal. All of the students in the clinic are placed in externships with capital defense offices around the country. Matt (Harvard Law School class of 2023) has been working on the McNeal case as part of his externship since January 2022 and will continue through the end of the spring semester in April 2022. Matt has not contributed to my report in any way, nor have I edited any of his work for the ACLU. I make this disclosure solely for the purpose of ensuring transparency about my connections to this litigation.

eds., Foundation Press 2009). I have also authored numerous law review articles on the death penalty, as listed in my C.V.

2. I am currently a member of the American Law Institute (ALI), and I produced a report for the ALI that led it to withdraw the death penalty provisions of the Model Penal Code in 2009. I have previously served on the American Bar Association's Death Penalty Due Process Review Project and on the governing board of the Massachusetts Committee for Public Counsel Services, the statewide public defender. I have been a speaker at the Federal Judicial Center, where I have given presentations on capital punishment and constitutional law. I have testified as an expert witness on the constitutionality of the federal death penalty in a federal capital trial, *United States v. Fell*, No. 201-CR-1201 (D. Vt. 2016). I have also testified as an expert witness on capital punishment before state legislatures in Massachusetts and Montana, and I have served as an expert consultant on reforming or abolishing the California death penalty for the California Committee on Revision of the Penal Code. I have consulted on capital cases at all stages of litigation and have served as counsel in two capital appeals, *Smith v. Texas*, 550 U.S. 297 (2007) (counsel of record for the defendant) and *State v. Addison*, 87 A.3d 1 (N.H. 2013) (amicus counsel). I have served as an expert consultant to the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions and the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. I have given presentations around the world to academics, lawyers, and public officials on the American death penalty and its relationship to the practice of capital punishment in other countries.

Summary Of Anticipated Testimony

I have been asked by counsel for Cornell McNeal to testify regarding the history and application of the death penalty in the United States and in Kansas, and to specifically address my 2008 study for the ALI and developments since the study.

I. The History and Context of My Report to the ALI and the ALI's Decision to Withdraw the Death Penalty Provisions of the Model Penal Code

3. In 1962, the ALI promulgated the Model Penal Code (MPC), which provided influential guidance for state criminal law reform, including model death penalty provisions in § 210.6. In 2009, the ALI formally withdrew its model death penalty provisions “in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”² That decision and the specific language used by the ALI were recommended by a 2008 Report that I prepared for the ALI, along with my brother and fellow law professor and death penalty scholar, Jordan Steiker, at the request of the Director of the ALI at the time, Lance Liebman.³ The Report and accompanying background materials from the ALI are attached as Appendix 2.

4. The ALI's Model Penal Code project arose from the ALI's general mission as an independent, non-profit, non-partisan, expert organization to “produc[e] scholarly work to clarify, modernize, and otherwise improve the law.”⁴ The ALI is perhaps best known for its “Restatement” projects, in which the ALI has sought to address uncertainty in the law through restatements of basic legal subjects that serve as authoritative sources for judges and lawyers.⁵ When the ALI turned its hand to a project on American criminal law, however, “it judged existing law too chaotic and irrational to merit ‘restatement.’”⁶ Instead, the ALI decided to draft a model penal code that could serve as a template for state legislative reform. The ALI's enormously influential Model Penal Code project—“far and away the most successful attempt to codify American criminal law”⁷—was launched in 1951, and the MPC was finally adopted by the ALI in 1962. While the MPC was under preparation, the Advisory Committee to the MPC Project,

²AM. LAW INST., MODEL PENAL CODE (quoting language adopted by the ALI Council after a vote of the ALI's membership at the 2009 Annual Meeting), <https://www.ali.org/publications/show/model-penal-code/>.

³ See Steiker & Steiker, *ALI Report*, at 1 (Attached as Appendix 2).

⁴AM. LAW INST., *ALI Overview*, <http://www.ali.org/index.cfm?fuseaction=about.overview>.

⁵ See *id.*

⁶ Paul H. Robinson & Markus Dirk Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323 (2007).

⁷ *Id.* at 320.

which was headed by Professor Herbert Wechsler of Columbia Law School as Chief Reporter, voted 18-2 to recommend the abolition of capital punishment.⁸ But the ALI's Council held the view "that the Institute could not be influential" on the issue of abolition or retention of the death penalty and thus should not take a position either way.⁹ The body of the ALI agreed with the Council, and thus the MPC took no position on the issue, but rather promulgated model procedures for administering capital punishment for adoption by states that retained the death penalty.¹⁰

5. The death penalty procedures promulgated by § 210.6 of the MPC in 1962 differed from then-prevailing capital statutes in several key provisions. First, the MPC allowed the death penalty only for the crime of murder, not for crimes such as kidnapping, treason, and rape (among others) as many state statutes permitted at the time.¹¹ Second, the MPC categorically exempted juveniles from the death penalty and gave the trial judge discretion to exempt defendants if "the defendant's physical or mental condition calls for leniency."¹² Moreover, the MPC precluded a sentence of death in cases in which "the evidence suffices to sustain the verdict [but] does not foreclose all doubt respecting the defendant's guilt."¹³ As for which murders should be punished with death, the MPC did not confine capital punishment to "first-degree" murder (generally defined by state statutes as either premeditated and deliberate murder or felony murder); rather, the MPC made eligibility for the death penalty for any murder turn on the finding, in a separate penalty phase, of one of eight "aggravating circumstances" which ranged from the more objective and clear-cut ("The murder was committed by a convict under sentence of imprisonment"¹⁴) to the more subjective and qualitative ("The murder was especially

⁸ MODEL PENAL CODE (hereinafter MPC) § 210.6, Comment at 111 (1980) (section repealed 2009).

⁹ *Id.*

¹⁰ *Id.*

¹¹ MPC § 210.6.

¹² *Id.* at § 210.6(1)(e).

¹³ *Id.* at § 210.6(1)(f).

¹⁴ *Id.* at § 210.6(3)(a).

heinous, atrocious or cruel, manifesting exceptional depravity”¹⁵). The MPC’s innovation was not only the list of aggravating circumstances, but also the requirement of a bifurcated procedure, in which the determination of guilt and the determination of the appropriate penalty were considered in two separate proceedings. The MPC required the finding of at least one aggravating circumstance at the penalty phase for a defendant to be eligible for the death penalty. In addition, the MPC required the consideration of all “mitigating circumstances” and authorized the imposition of the death penalty only when “there are no mitigating circumstances sufficiently substantial to call for leniency.”¹⁶ Mitigation consisted of eight statutorily defined mitigating circumstances (such as “The defendant has no significant history of prior criminal activity”¹⁷ and “The youth of the defendant at the time of the crime”¹⁸), but the sentencer was also instructed to consider other evidence “including but not limited to the nature and circumstances of the crime [and] the defendant’s character, background, history, mental and physical condition.”¹⁹ The MPC’s structuring of the penalty phase, with its lists of aggravating and mitigating circumstances, was a significant departure from prevailing practice, which gave sentencing juries essentially unfettered discretion in capital trials to impose life or death (and for a much wider range of crimes than simply murder), without any statutory standards or guidance.

6. For a decade after their adoption, the MPC death penalty provisions had virtually no impact on state procedures.²⁰ But after the Supreme Court constitutionally invalidated prevailing death penalty statutes in 1972 in *Furman v. Georgia*,²¹ a large majority of states sought to draft new capital statutes

¹⁵ *Id.* at § 210.6(3)(h).

¹⁶ *Id.* at § 210.6(2).

¹⁷ *Id.* at § 210.6(4)(a).

¹⁸ *Id.* at § 210.6(4)(h).

¹⁹ *Id.* at § 210.6(2).

²⁰ While “[p]rior to 1972, no American jurisdiction had followed the Model Code in adopting statutory criteria for the discretionary imposition of the death penalty . . . the only discernible effect of the Model Code proposal was introduction of a bifurcated capital trial procedure in six states.” MPC § 210.6, Comment at 167-68 (1980) (citing Comment, *Jury Discretion and Unitary Trial Procedure in Capital Cases*, 26 ARK. L. REV. 33, 39. n. 9 (1972) (listing states)).

²¹ 408 U.S. 238 (1972).

that would meet the *Furman* Court’s apparent concern with standardless sentencing discretion. Although a significant minority of states sought to address the problem of standardless discretion through the enactment of mandatory capital statutes, a substantial number of states modeled their new statutory endeavors on the MPC.²² In 1976, the Supreme Court struck down mandatory capital statutes as unconstitutional under the Eighth Amendment,²³ but upheld the “guided discretion” statutes enacted by Georgia, Florida, and Texas.²⁴ In doing so, the Court made a point of referencing the ALI’s efforts to guide capital sentencing discretion through the Model Penal Code and noted the similarity, either textual or functional, of each of the state statutes that it approved to the MPC’s death penalty provisions.²⁵

7. Two years after the 1976 cases reinstating the death penalty, the Supreme Court invalidated Ohio’s capital statute on the ground that its narrowly drawn list of mitigating circumstances unconstitutionally constrained the sentencer’s consideration of mitigating evidence that might call for a sentence less than death.²⁶ In doing so, the Court adopted as a constitutional requirement an approach virtually identical to the MPC provision that capital sentencers must consider “the nature and circumstances of the crime [and] the defendant’s character, background, history, mental and physical condition.”²⁷ As the ALI itself recognized, the Court’s cases from 1976 to 1978 outlining the constitutional preconditions for a valid capital punishment scheme “confirm what the 1976 plurality several times implied—that Section 210.6 of the Model Code is a model for constitutional adjudication

²² See *id.* at 169 (“Each of the 19 new statutes examined when this comment was prepared resembles the Model Code provision and provides for bifurcation and consideration of specified aggravating circumstances.”).

²³ *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

²⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

²⁵ See *Gregg*, 428 U.S. at 193 (citing the MPC to reject the claim that standards to guide a capital jury’s sentencing deliberations are impossible to formulate; *Proffitt*, 428 U.S. at 247-48 (noting approvingly that the Florida statute in question was patterned after the MPC); *Jurek*, 428 U.S. at 270 (recognizing that Texas’s statutory narrowing of the categories of capital murder serves essentially the same purpose as the list of aggravating circumstances expounded by the MPC).

²⁶ *Lockett v. Ohio*, 438 U.S. 586 (1978).

²⁷ MPC § 210.6(2).

as well as for state legislation.”²⁸

8. Shortly after the new generation of MPC-inspired, guided discretion statutes were approved by the Court in 1976, executions resumed in the United States, after a decade-long hiatus. Over the next quarter century, the national execution rate soared, reaching levels that the country had not seen since the early 1950’s.²⁹ Many observers, myself among them, lamented that the new generation of capital statutes failed to fulfill their promise of rationalizing the administration of capital punishment and ameliorating the problems that the ALI and the Supreme Court had sought to address.³⁰ Observers within the ALI were especially concerned about the shortcomings of the new capital statutes in light of the role that the ALI’s reform efforts and institutional prestige had played in the constitutional reinstatement of capital punishment. Thus, when the ALI approved the undertaking of law reform project that would reconsider the provisions of the MPC relating to criminal sentencing in general, internal critics of the administration of capital punishment viewed the new project as an opportunity to reconsider the ALI’s contribution to the new status quo. In particular, law professor Frank Zimring, an Adviser to the new ALI Sentencing Project, called upon the Project to address (and call for the abolition of) capital punishment.³¹ When the ALI set aside the question of capital punishment as beyond the scope of the Project, Professor Zimring resigned in protest as an Adviser and later published an article criticizing the ALI’s failure to address capital punishment.³²

9. Zimring’s call for abolition within the ALI was taken up by members Roger Clark and Ellen

²⁸ MPC § 210.6, Comment at 167 (1980).

²⁹ See Death Penalty Information Center, *Death Penalty Fact Sheet* (tallying executions yearly from 1976-2010), available at <http://deathpenaltyinfo.org/documents/FactSheet.pdf>, and *Executions in the U.S. 1608-2002: The Espy File*, available at <http://www.deathpenaltyinfo.org/documents/ESPYyear.pdf>.

³⁰ See generally Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

³¹ See AM. LAW. INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY, Annex C at 15 (2009), https://www.ali.org/media/filer_public/3f/ae/3fae71f1-0b2b-4591-ae5c-5870ce5975c6/capital_punishment_web.pdf.

³² See *id.*, Annex C at 15, n. 6 (citing Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396 (2005)).

Podgor, also both law professors, who moved at the ALI's annual meeting in 2007 "That the Institute is opposed to capital punishment."³³ The President of the ALI responded by assigning the Institute's Program Committee the task of deciding whether the ALI should study and make recommendations about the death penalty.³⁴ The President also appointed an Ad Hoc Committee on the Death Penalty to advise the Program Committee, the Council, and the Director "about alternative ways in which the Institute might respond to the concerns underlying the motion."³⁵ The Director of the ALI, Lance Liebman, engaged me, along with my brother and frequent co-author Jordan Steiker, to write a report in which we would "review the literature, the case law, and reliable data concerning the most important contemporary issues posed by the ultimate question of retention or abolition of the death penalty and, if retained, what limitations should be placed on its use and what procedures should be required before that sentence is imposed. Another way of asking the question is this: Is fair administration of a system of capital punishment possible?"³⁶ The report that we produced reviewed the history and then-current state of the administration of capital punishment in the United States and recommended that the ALI withdraw § 210.6 with the following statement: "In light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option."³⁷

10. The Council of the ALI, its chief governing board, submitted a report to the body in advance of the ALI's annual meeting of 2009. The Council adopted our recommendation that the Institute withdraw the death penalty provisions of the MPC and not undertake any further project to revise or replace those provisions.³⁸ Although the Council's report acknowledged "reasons for concern about

³³ *Id.*, Annex C at 11.

³⁴ *See id.*

³⁵ *Id.*

³⁶ *Id.*, Annex C at 46.

³⁷ *Id.*, Annex B at 1.

³⁸ *Id.*, Council's Report at 1.

whether death-penalty systems in the United States can be made fair,”³⁹ it did not endorse the statement that we proposed in the paper and instead recommended that the body take no position to either endorse or oppose the abolition of capital punishment.⁴⁰ At the ALI’s 2009 annual meeting, the body voted as the Council had recommended on the withdrawal of the MPC’s death penalty provisions and the decision not to undertake further reform efforts regarding capital punishment, but it also added, after several hours of vigorous discussion, the following statement: “For reasons stated in Part V of the Council’s report to the membership, the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”⁴¹

11. In essence, the body split the baby in half: it adopted the Council’s report and thus rejected an explicit call for the abolition of capital punishment, but it also adopted the language from our report recognizing “current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.” As Adam Liptak, who reported the ALI’s decision for the *New York Times*, translated: “What the Institute was saying is that the capital justice system in the United States is irretrievably broken.”⁴² The body’s resolution went back to the Council, which must approve any action of the body before it becomes official policy of the ALI. In October 2009, the Council approved of the body’s vote and statement, and the ALI’s withdrawal of the death penalty provisions, and its statement of reasons for that withdrawal, became official. The withdrawal of the death penalty provisions of the MPC in 2009 constituted the first change that the ALI had made to the MPC since the Code was promulgated in 1962.

II. Summary of My Report to the ALI

³⁹ *Id.*, Council’s Report at 5.

⁴⁰ *Id.*, Council’s Report at 6.

⁴¹ AM. LAW INST., MODEL PENAL CODE, <https://www.ali.org/publications/show/model-penal-code/>.

⁴² Adam Liptak, *Shapers of Death Penalty Give Up on Their Work*, N.Y. TIMES, Jan. 5. 2010, at A11.

12. Our 2008 report to the ALI was organized to explain and support our recommendation that the ALI withdraw Section 210.6 of the MPC in light of “current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.” In the introductory section of the report, we described the then-current state of the death penalty in the United States as one of new ambivalence toward the practice. Substantial majorities still registered support for capital punishment in public opinion polls, but the use of the death penalty had begun to decline in terms of both executions and new death sentences after the year 2000. Moreover, we observed that the use of the death penalty seemed to be increasingly concentrated in a small number of states. In this introductory section, we also directly addressed the frequently voiced question about why withdrawal of the death penalty as a penal option was advisable when many of the same problems that we documented in the capital justice process also existed in the ordinary criminal justice process. We explained that the death penalty, unlike incarceration, is not an essential part of a functioning criminal justice system; that some of the problems with the death penalty are more pronounced because of special pressures in capital cases; that the death penalty is uniquely irrevocable; and that problems in the administration of capital punishment present special challenges to the legitimacy of the criminal justice system. The rest of our report was organized into eight subparts that examined “the intractable institutional and structural obstacles” to the fair administration of capital punishment in the United States.

13. The first subpart of our report addressed “The Inadequacies of Constitutional Regulation.” Although the Supreme Court has developed a complex Eighth Amendment jurisprudence addressing capital punishment, the Court’s constitutional regulation of the death penalty has failed to adequately address the problems of arbitrariness, discrimination, and error that the Court identified in its foundational cases in the 1970s. By failing to require legislatures to narrow the number and breadth of aggravating factors that make offenders eligible for the death penalty, while at the same time insisting

that the capital sentencing process be unstructured with regard to mitigating factors, the Court's Eighth Amendment jurisprudence has essentially reproduced the same pathology of wide death-eligibility and standardless sentencing discretion that characterized the pre-*Furman* regime. In addition to the overarching ineffectiveness and incoherence of its Eighth Amendment jurisprudence, the Court's specific constitutional doctrines addressing race discrimination, innocence, and standards for capital defense counsel have failed to set standards or provide remedies for these intractable and continuing problems. We concluded this section of our report by noting that numerous justices from the left, right, and center of the Court have criticized and explicitly rejected numerous aspects (and sometimes the entirety) of the Court's Eighth Amendment jurisprudence, reinforcing our characterization of the Court's effort at constitutional regulation as a failure on its own terms.

14. The second subpart of our report addressed "The Politicization of Capital Punishment." We described two types of "politicization" of capital punishment. The practice of capital punishment (like the rest of criminal justice in the United States) is politicized *institutionally*, in that some or all of the most important actors in the administration of capital punishment are elected, with the exception of lay jurors. Capital punishment is also politicized *symbolically*, in that it looms much larger than it should in public discourse because of its power as a focus for fears of violent crime and as political shorthand for support for "law and order" policies generally. On the institutional side, we described the political pressures that are faced by locally elected prosecutors and by state judges, who overwhelmingly stand for some form of election throughout the United States. We surveyed empirical studies that found that electoral cycles in the aggregate affect sentencing in general and capital sentencing in particular. On the symbolic side, we noted pressures faced by elected officials outside of the everyday criminal justice process, such as governors and legislators, due to the intensity of emotions and saturation of media attention that capital cases evoke. The willingness of governors to sign death warrants (or conversely, to grant clemency or impose moratoria) is subject to the high salience of capital punishment as a

political issue. The ability of legislators to shrink or even merely maintain the breadth of capital statutes is also limited by the politics of the death penalty. We concluded that both the integrity of individual capital cases and the prospects for reform of the capital justice system are threatened by the intense and emotional politicization of the issue throughout much of the country.

15. The third subpart of our report addressed “Race Discrimination” in the administration of capital punishment. We noted the long history of discriminatory application of the death penalty from the earliest days of American history. We traced the continuing influence of race on capital sentencing outcomes and executions, observing the surprising link between the geographic distribution of modern executions and the geographic distribution of racialized vigilante violence (e.g., lynching) more than a century ago. We surveyed empirical studies demonstrating a robust bias in favor of seeking the death penalty for the murder of white as opposed to black victims in many jurisdictions, even those outside of the South and without strong histories of racialized vigilante violence. We discussed the reluctance of legislatures to limit the broad discretion exercised by capital juries, or to pass racial justice legislation creating remedies for discriminatory patterns in capital sentencing. We concluded that the combined influences of unchecked prosecutorial and jury discretion, underrepresentation of racial minorities in prosecutors’ offices and on juries, historical death penalty practices, and conscious or unconscious bias, make it extraordinarily difficult to disentangle race from the administration of the American death penalty.

16. The fourth subpart of our report addressed “Jury Confusion” in capital cases. The post-*Furman* efforts to reform the death penalty have been focused on rationalizing the capital sentencing process through a combination of statutory precision and focused jury instructions. These provisions precisely enumerate relevant aggravating and mitigating factors and carefully explain burdens of proof, the role of mitigation, inappropriate bases for decision (such as “mere sympathy”), and the process for reaching a final decision. However, a large body of empirical research by the Capital Jury Project (CJP),

which conducted interviews with over a thousand capital jurors across 14 states, demonstrates that these efforts have been ineffective in guiding jurors, and even quixotic in potentially masking the irreducible moral responsibility of capital juries. CJP research has shown that jurors often profoundly misunderstand the fundamentals of capital sentencing in that they may mistakenly believe that a death sentence is required, fail to understand the meaning of “aggravation” and “mitigation,” fail to consider mitigating evidence as mitigating (or even consider it as aggravating), and decide the sentencing issue before the penalty phase even begins, among other misapprehensions of their role. The hope that statutory reform along the lines of the MPC template would produce reasoned moral decisions by capital sentencing juries, rather than impulsive, arbitrary, or discriminatory ones, has not been realized in large part because jurors either misunderstand or ignore what they are instructed to do pursuant to modern capital statutes.

17. The fifth subpart of our report addressed “The Inadequacy of Resources, Especial Defense Counsel Services, in Capital Cases.” We surveyed the studies conducted by many state governments of the costs of capital litigation, all of which revealed that capital murder prosecutions cost substantially more than non-capital murder prosecutions, even when the cost of lifetime incarceration is included in the latter. As is the case with indigent defense funding generally, states and localities are reluctant or unable to cover the costs of capital litigation so as to ensure fairness and due process in the capital justice process. We reported the findings of the American Bar Association’s (ABA’s) Death Penalty Moratorium Implementation Project, which performed in-depth studies of the capital justice process in eight states. As part of these studies, the ABA specifically investigated the extent to which the states were in compliance with the ABA’s 2003 *Guidelines* for the provision of capital defense counsel services. Not a single state was found to be fully in compliance with any aspect of the ABA *Guidelines* studied. The lack of adequate resources for capital defense services may vary in degree across jurisdictions, but even relatively wealthy jurisdictions that profess a strong commitment to due process for indigent

defendants fall short in the provision of resources necessary for the complex and protracted litigation that capital prosecutions entail.

18. The sixth subpart of our report addressed the “Erroneous Conviction of the Innocent.” We surveyed the empirical literature on the raw number, rate, and causes of wrongful convictions in capital cases. We documented the evidence suggesting that wrongful convictions may be more common in capital than non-capital cases, notwithstanding the more elaborate procedures required in capital cases. Moreover, despite the horror and sympathy evoked by miscarriages of justice in capital cases, those who have been wrongfully convicted have often faced significant obstacles to relief, even after DNA testing exonerated them. In addition, many jurisdictions have failed to comply with ABA standards regarding preservation of and access to biological evidence. More generally, many jurisdictions have failed to adopt reforms aimed at preventing some of the most common causes of wrongful conviction, such as videotaping police interrogations to prevent false confessions, changing photo identification procedures to avoid misidentification, subjecting jailhouse informant testimony to greater pretrial scrutiny, and performing external independent audits of crime labs. This lack of political will seems to be driven by resistance by some in the law enforcement community and by the potential financial costs of adopting and implementing such reforms.

19. The seventh subpart of our report addressed the “Inadequate Enforcement of Federal Rights.” This section surveyed the many impediments to accessing a federal forum for litigation of federal constitutional claims. The Supreme Court’s strict restriction of the federal habeas forum when defense lawyers have procedurally defaulted constitutional claims in state courts has had the effect of denying defendants adjudication of their claims in *any* forum because of the errors of their counsel. Similarly, the Court’s retroactivity doctrine has limited the types of constitutional claims that may be brought in the federal habeas forum, creating a one-way ratchet by which the government, but not habeas petitioners, may seek the benefit of “new” law. Finally, and most broadly, the Antiterrorism and

Effective Death Penalty Act of 1996 (AEDPA) erected numerous barriers to federal habeas relief, with the express intent of facilitating capital prosecutions and speeding executions. AEDPA imposed a strict statute of limitations for filing in federal court, stringent limitations on successive petitions, restrictions on the availability of evidentiary hearings to develop facts relating to an inmate's underlying claims, and, most significantly, a deferential standard of review of state-court adjudication of federal claims. The procedural maze created by the overlapping Court-made and statutory obstacles to federal habeas relief yields a system of habeas review in which even meritorious constitutional claims are rarely adjudicated and, if adjudicated, are rarely vindicated.

20. The eighth and final subpart of our report addressed "The Death Penalty's Effect on the Administration of Justice." Although capital cases represent only a very small part of the overall criminal justice system, the death penalty generates negative spillover effects to the broader system. First, the Court's "death is different" doctrine can work to normalize extremely punitive non-capital sanctions and to insulate them from constitutional scrutiny. Second, capital litigation has sometimes driven broader criminal policy, as illustrated by the passage of AEDPA, which restructured the entire system of federal habeas review for all claimants, capital and non-capital alike. The high political salience of the death penalty can produce a peculiar dynamic by which a small subset of American prisoners frames the debate over the appropriate operation of larger institutional frameworks. Third, the death penalty extracts a disproportionately large share of financial resources at every stage of the proceedings, including investigation, trial, appeal, post-conviction review, and incarceration. Fourth, in addition to these financial costs, the death penalty places enormous burdens on state and federal judicial resources. Finally, as discussed in the introductory section of our report, miscarriages of justice in capital cases pose a special threat to the legitimacy of the entire criminal justice system in the eyes of the public and of the world.

III. Evidence of Structural and Institutional Obstacles to a Minimally Adequate Death Penalty System Has Continued to Mount Since 2008

21. Although we drafted our report for the ALI nearly 15 years ago, our overall conclusions remain as strong or stronger today, as evidence continues to mount that the system for administering capital punishment in the United States is irretrievably broken. Although there have been modest reforms in some places,⁴³ the overall picture is one of similar or even greater dysfunction in the American capital punishment system, whether one considers the protection of procedural rights, the reliability of capital verdicts, or the prevention of arbitrary and discriminatory sentencing.

22. The strongest evidence of the continuing problems in the American capital punishment system is the extent to which the death penalty has been abandoned in many parts of the country, either through formal abolition, gubernatorial moratorium, or the decisions of prosecutors or juries to decline to seek or impose it. In the introductory section of our ALI report, we noted a new ambivalence toward the practice of capital punishment in 2008, reflected in the diminishing numbers of executions and death sentences nationwide and in the increasing concentration of the death penalty in a small number of states. That ambivalence has grown into a dramatic and unprecedented decline in the use of the death penalty along every possible dimension. When we wrote our 2008 report, 36 states authorized the death penalty. Today, only 27 states do, with nine states having rejected their capital statutes in the interim either through legislative repeal or judicial invalidation. Three additional states (California, Oregon, and Pennsylvania) currently have gubernatorial moratoria in place. Legislative repeals, judicial invalidations, and gubernatorial moratoria all have been accompanied by detailed accounts of the many problems in the administration of capital punishment.

23. Even among jurisdictions that formally retain the death penalty, there has been a substantial decline in its use. More than two-thirds of the states in the country have not carried out an

⁴³ For example, both Florida and Alabama no longer permit judges to override jury life verdicts in favor of death sentences; Louisiana no longer permits non-unanimous verdicts in criminal cases (after the U.S. Supreme Court outlawed the practice in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)); and Oregon recently replaced its capital statute with a significantly narrower one.

execution in the past decade.⁴⁴ In 2008, the average number of executions conducted in the prior three years was 43; today, that average is 17. Even if one discounts the COVID years and averages the three years prior to 2020, the average is still only 23—nearly a 50% decline. The decline in death sentencing is even more pronounced. In 2008, the three-year average was 121; today it is 23. Even discounting the COVID years, the average is still only 29—more than a 75% decline.⁴⁵ Moreover, the concentration of the use of the death penalty in a few geographical regions has increased significantly. We noted in our 2008 report that the death penalty was concentrated in only a few states. Research since then has demonstrated the death penalty is growing even more concentrated geographically and in smaller geographic units, notably counties within states. A 2013 study revealed that the majority of death sentences in the United States are produced by only 2% of the nation’s counties.⁴⁶ These indicia, taken together, reflect a stunning diminishment of capital punishment in the United States that appears likely to continue for the foreseeable future, given that death sentences (which show the strongest decline) are the leading indicator of the scope of the future of the American death penalty.

24. The Supreme Court’s constitutional regulation of capital punishment has not changed in its fundamentals. The central tension between the conflicting constitutional commands of guided discretion and open-ended individualized sentencing continues unabated, and the Court’s doctrines addressing race discrimination, innocence, and standards for defense counsel offer no greater (and in some ways less) protection today than they did in 2008. Not a single claimant has prevailed on a federal constitutional claim based on patterns of racial discrimination in capital sentencing, nor has any

⁴⁴ See Death Penalty Information Center, *Number of Executions by State and Region Since 1976*, <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976>.

⁴⁵ The yearly count of executions and death sentences nationwide is available at Death Penalty Information Center, *Fact Sheet*, <https://deathpenaltyinfo.org/facts-and-research/fact-sheet>.

⁴⁶ See RICHARD C. DIETER, *THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL* (Oct. 2013), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/the-2-death-penalty-how-a-minority-of-counties-produce-most-death-cases-at-enormous-costs-to-all>.

claimant prevailed on a federal constitutional claim based on actual innocence—despite ample reason to believe that discrimination and error continue to plague the administration of capital punishment, as discussed further below in paragraphs 28-30 and 36-37.

25. The Supreme Court’s Sixth Amendment jurisprudence regarding ineffective assistance of counsel in capital cases has actually scaled back its protections since 2008. In three cases that were decided shortly before our 2008 report, the Court seemed willing to subject capital sentencing presentations by the defense to more demanding scrutiny. The Court granted relief to three capital defendants whose lawyers had done insufficient investigation into mitigating evidence, finding that state court denials of relief in those cases were not just wrong, but unreasonably so even under the deferential standard of review required by AEDPA.⁴⁷ In each of the three cases, the Court cited approvingly to the *ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases*, which offer comprehensive guidance for the conduct of counsel in capital cases. However, the Court has since backtracked on this greater degree of scrutiny in two ways. First, the Court has declined to use the ABA Guidelines to assess the effectiveness of capital defense counsel in the absence of findings that the Guidelines were both prevailing norms of practice at the time of defense counsel’s performance and not so detailed as to interfere with counsel’s independence—findings that the Court has thus far declined to make.⁴⁸ Second, the Court has frequently granted certiorari in recent years to reverse lower federal courts’ grants of relief on claims of ineffective assistance of counsel in capital cases, holding that the lower courts showed insufficient deference to the decisions of state courts under AEDPA. As the Court explained the required deference in a 2011 case,

⁴⁷ See *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Rompilla v. Beard*, 545 U.S. 374 (2005).

⁴⁸ See *Bobby v. Van Hook*, 558 U.S. 4, 8 n. 1 (2009) (explaining that for use of the ABA Guidelines to evaluate defense representation to be proper, “the Guidelines must reflect ‘[p]revailing norms of practice’ and ‘standard practice’ and must not be so detailed that they would ‘interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions’”) (internal citations omitted).

“[A] state prisoner must show that the state court’s ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law *beyond any possibility for fairminded disagreement*.”⁴⁹ The Court observed, “It bears repeating that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable. If this standard is difficult to meet, that is because it was meant to be.”⁵⁰ Applying this demanding standard, the Court recently reversed a grant of habeas relief in a capital case, noting that AEDPA grants state courts “even more latitude” in resolving claims of ineffective assistance of counsel because the Sixth Amendment framework involves “more general” rules and standards.⁵¹ The Court further explained that deference by federal habeas courts includes not only identifying and rebutting every ground undergirding the state court decision, but also determining “what arguments or theories . . . could have supported” the state court’s holding, even if the state court did not articulate them.⁵²

26. The politicization of capital punishment is a continued feature, given that it is woven into the fabric of our country’s democratic structure through the election of most prosecutors and judges. In the past two decades, a period of mostly falling murder rates, one might have expected to see capital punishment sharply decline in political salience in light of the waning “law and order” politics that dominated many electoral contests in the last decades of the twentieth century. However, the death penalty has remained a focal point of some political contests even in these times. For example, Florida Governor Rick Scott issued an executive order in 2017 removing State Attorney Aramis Ayala from the prosecution of a case involving the murder of a police officer after she announced that she would not seek the death penalty in any cases that came before her office. He subsequently stripped her of

⁴⁹ *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (emphasis added).

⁵⁰ *Id.* at 102.

⁵¹ *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020).

⁵² *Id.* at 524.

approximately 30 additional murder cases.⁵³ Scott’s successor, Governor Ron DeSantis, removed Ayala from another high-profile murder case in 2020, again citing her objections to the death penalty.⁵⁴ The battle between these governors and a locally elected prosecutor received statewide and national attention due to the high salience of the issue of capital punishment. On the federal level, President Trump made a concerted effort to carry out as many federal executions as possible in the months leading up to the 2020 election and the period prior to President Biden’s inauguration, despite not having made executions a priority earlier in his presidential term, a decision that one observer argued “can only be explained by the pursuit of political advantage.”⁵⁵

27. Scholars and judges alike continue to document the political pressures on institutional actors around the issue of the death penalty. A 2014 study on judicial elections and the death penalty noted the continued salience of crime, even in times of declining murder rates. It found that “64% of advertisements [in judicial election campaigns] paid for by state parties in 2010 focused on the issue of crime[,] and various studies have highlighted judges’ incentives to avoid being labeled ‘soft on crime.’ The death penalty, in particular, has repeatedly been a flashpoint of campaigns, emerging in states from Ohio to Florida to California, among others.”⁵⁶ The same study found that “state supreme court decisions are considerably more likely to gain front page coverage in local newspapers if they involve the death penalty, holding other case characteristics constant.”⁵⁷ Judge William Fletcher of the Ninth Circuit Court of Appeals wrote an article detailing the effects that the politicization of the death penalty has

⁵³ See WKMG, *Gov. Rick Scott wins legal battle against State Attorney Aramis Ayala*, 10 Tampa Bay (Aug. 31, 2017), <https://www.wtsp.com/article/news/local/gov-rick-scott-wins-legal-battle-against-state-attorney-aramis-ayala/67-469841835>.

⁵⁴ See News Service of Florida, *Aramis Ayala Yanked from Case by Second GOP Governor, This Time DeSantis*, TAMPA BAY TIMES (Jan. 31, 2020), <https://www.tampabay.com/florida-politics/buzz/2020/01/31/aramis-ayala-yanked-from-case-by-second-gop-governor-this-time-desantis/>.

⁵⁵ David Allen Green, *Killing and the Campaign Trail: How Trump Scheduled Executions for Political Advantage*, PROSPECT MAGAZINE (Jan. 26, 2021), <https://www.prospectmagazine.co.uk/magazine/donald-trump-united-states-capital-punishment-death-penalty>.

⁵⁶ See Brandice Canes-Wrone, Tom S. Clark & Jason P. Kelly, *Judicial Selection and Death Penalty Decisions*, 108 AM. POLITICAL SCI. REV. 23, 25 (2014) (citations omitted).

⁵⁷ *Id.*

had in California. He noted that after three justices of the California Supreme Court were recalled by the voters in 1986 because of their pro-defendant rulings in death penalty cases, the rate of reversal in capital cases dropped from 40% (prior to the recall) to a mere 3.8% (after the recall).⁵⁸ Fletcher further argued that politicization of death penalty cases results in false convictions. Two key ingredients are that “[t]he police are under heavy pressure to solve a high-profile crime” and prosecutors have a combination of wide discretion and “absolute immunity from damage suits for activities undertaken in connection with litigation.”⁵⁹

28. Race discrimination continues to be an ineradicable feature of capital punishment and the broader criminal justice system. A comprehensive report on race and the death penalty in the United States released in 2020 collected voluminous data on the continuing influence of race on the administration of capital punishment. The study reported evidence of bias based on the race of both victims and defendants, with the murders of white victims being more likely to be investigated and capitally charged, and defendants of color being more likely to be sentenced to death. The study also reported evidence of systemic exclusion of jurors of color from service in death penalty cases. Among the evidence referenced by the report was a 2015 meta-analysis of 30 studies showing that people accused of killing white victims were more likely than people accused of killing Black victims to face a capital prosecution; data showing that since executions resumed in 1977, 295 Black defendants have been executed for interracial murders of white victims, while only 21 white defendants have executed for interracial murders of Black victims; and data showing that the wrongful convictions of Black exonerees were 22% more likely to be linked to police misconduct.⁶⁰

29. Since 2008, there have been numerous studies of race and the death penalty in individual

⁵⁸ William A. Fletcher, *Our Broken Death Penalty*, 89 N.Y.U L. REV. 805, 821 (2014).

⁵⁹ *Id.* at 818.

⁶⁰ See NGOZI NDULUE, ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY, Death Penalty Information Center (Sept. 15, 2020), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/enduring-injustice-the-persistence-of-racial-discrimination-in-the-u-s-death-penalty>.

states finding disparities based on the race of the victim, the race of the defendant, or both. For example, researchers updated the famous Baldus study from Georgia that we referenced in our ALLI report and that formed the basis for the narrowly unsuccessful constitutional challenge considered by the Supreme Court in *McCleskey v. Kemp*.⁶¹ The researchers added information about who among those sentenced to death in Georgia were actually executed. The study concluded that the disparities that Baldus had found in the sentencing phase were considerably exacerbated at the execution stage.⁶² Other researchers have studied the effects of race on the capital punishment systems of North Carolina (2011),⁶³ Delaware (2012),⁶⁴ and Colorado (2015).⁶⁵ Each of these studies found strong race effects, consistent with virtually all earlier studies in these states and elsewhere.

30. Two of the most influential state studies of race and the death penalty played key roles in the abolition of the death penalty in those states. Connecticut legislatively repealed its death penalty in 2012. At the legislative hearings, Professor John Donohue presented his research regarding racial disparities in the administration of the death penalty in Connecticut. During their debates, a number of the bill's supporters "expressed that Donohue's research was an important factor in their decision to vote to abolish the death penalty."⁶⁶ The legislative repeal was prospective only, and three years later, the Connecticut Supreme Court found that the death penalty violated the Connecticut constitution and

⁶¹ 481 U.S. 279 (1987). The original Baldus study analyzed more than 2,000 murder cases in the state of Georgia in the 1970s. The study found that defendants accused of killing white victims were 4.3 times more likely to receive the death penalty than defendants accused of killing Black victims. It also showed that Black defendants were more likely than white defendants to receive the death penalty.

⁶² See Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 602, 615 (2020) ("We have documented how sentencing and execution contribute independently, and jointly, to racial disparities in capital punishment.").

⁶³ See Glenn L. Pierce and Michael L. Radelet, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119 (2011).

⁶⁴ See Sheri Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925 (2012).

⁶⁵ See Meg Beardsley et al., *Disquieting Discretion: Race, Geography, and the Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DENV. U. L. REV. 431 (2015).

⁶⁶ *State v. Santiago*, 318 A.3d 1, 158 (Conn. 2015) (Norcott and McDonald, JJ., concurring) (citing the remarks of Senator Donald E. Williams, Senator Edwin A. Gomes, Representative Bruce V. Morris, and Representative Charlie L. Stallworth).

applied that ruling retroactively to clear the state’s death row.⁶⁷ In doing so, the Court relied on studies demonstrating racial bias to bolster broader arguments regarding “caprice and bias” (i.e., arbitrariness) and the possibility of error. The Court emphasized that the use of empirical studies when determining legal questions is appropriate, stating that “appellate courts tasked with determining the content of law and policy may take notice of constitutional and legislative facts, such as historical sources and scientific and sociological studies.”⁶⁸ Three years later, in 2018, the Washington Supreme Court also held that its state’s death penalty violated its state constitution.⁶⁹ The Court relied on research by Professor Kathryn Beckett from the University of Washington that demonstrated that “capital cases involving Black defendants were between 3.5 and 4.6 times as likely to result in a death sentence as proceedings involving non-Black defendants.”⁷⁰ The Court explained that “[t]he most important consideration is whether the evidence shows that race has a meaningful impact on imposition of the death penalty”—and concluded that it did. Unlike the Connecticut Supreme Court, which relied on a broader range of concerns about the administration of the death penalty, the Washington Supreme Court rested its constitutional decision squarely on the evidence of racial discrimination.

31. Racial discrimination is not the only form of arbitrariness and bias that continues to affect the administration of the death penalty. Bias on the basis of gender, local geography, and availability of resources is also frequently documented along with racial bias.⁷¹ Yet another concerning bias in the administration of capital punishment that gets less attention is the higher likelihood that the death penalty will be sought, imposed, or carried out against people who suffer from diagnosed mental illness. In 2009, the ACLU published a report documenting the “significant gaps in the legal protection accorded

⁶⁷ *State v. Santiago*, 318 A.3d 1 (Conn. 2015).

⁶⁸ *Id.* at 78.

⁶⁹ *State v. Gregory*, 427 P.3d 621 (Wash. 2018).

⁷⁰ *Id.* at 633 (internal quotation marks omitted).

⁷¹ See *Glossip v. Gross*, 576 U.S. 863, 920 (2015) (Breyer, J., dissenting) (documenting bias on the basis of “race, gender, local geography, and resources”).

severely mentally ill defendants charged with or convicted of a capital crime.”⁷² In 2016, the ABA published a white paper on the topic noting the “inadequacy of existing legal mechanisms to address severe mental illness in capital cases,” despite our society’s improved understanding of mental illness.⁷³ Mental Health America (MHA), a nonprofit dedicated to addressing the needs of those living with mental illness, has issued a policy statement on the death penalty and people with mental illnesses that documents how “[p]eople with serious mental illnesses are at a substantial disadvantage in defending themselves when they face criminal charges, and those difficulties are compounded when the charges are so serious that the death penalty is sought.”⁷⁴ The policy statement went on to observe that “[s]tigma and fear are significant factors in jury verdicts in such cases.”⁷⁵ Although a substantial majority of Americans say they oppose the death penalty for the mentally ill,⁷⁶ only one state (Ohio) has a statute forbidding the capital prosecution of those with serious mental illness, and that statute was passed only in 2021.⁷⁷ Statistical analysis demonstrates a strong tilt toward executing those who have received a diagnosis of mental illness at some point in their life: only 18% of the public have received such a diagnosis, as compared with 43% of those executed between 2000 and 2015.⁷⁸

32. Evidence of jury confusion in capital cases also continues to mount. Although the data from the Capital Jury Project cited in our ALI study remains the best and most comprehensive window into

⁷² ACLU, MENTAL ILLNESS AND THE DEATH PENALTY 1 (May 5, 2009), <https://www.aclu.org/report/report-mental-illness-and-death-penalty>.

⁷³ ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 1-2 (Dec. 2016) (capitalization omitted), https://www.prisonpolicy.org/scans/aba/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf.

⁷⁴ MENTAL HEALTH AMERICA, POSITION STATEMENT 54: DEATH PENALTY AND PEOPLE WITH MENTAL ILLNESS, <https://mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses>.

⁷⁵ *Id.*

⁷⁶ Death Penalty Information Center, *POLL: Americans Oppose Death Penalty for Mentally Ill by 2-1* (Dec. 1, 2014), <https://deathpenaltyinfo.org/news/poll-americans-oppose-death-penalty-for-mentally-ill-by-2-1>.

⁷⁷ Death Penalty Information Center, *Ohio Bars Death Penalty for People with Severe Mental Illness* (Jan. 11, 2021), <https://deathpenaltyinfo.org/news/ohio-passes-bill-to-bar-death-penalty-for-people-with-severe-mental-illness>.

⁷⁸ Frank Baumgarten & Betsy Neill, *Does the Death Penalty Target People Who Are Mentally Ill? We Checked.*, WASH. POST (Apr. 3, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked/>.

the comprehension of actual capital sentencing jurors, researchers since 2008 have conducted further studies primarily involving mock capital jurors. One such recent study used a real murder trial transcript to evaluate whether simplified jury instructions would improve jurors' understanding of key concepts. The study found that mock jurors do not understand aggravating and mitigating factors and the behaviors or circumstances that contribute to each, and that simplified instructions resulted in somewhat better but "still poor" understanding.⁷⁹ This study is just the most recent of many since 2008 that continue to demonstrate misunderstanding of key concepts by capital sentencing jurors, misconceptions that do not substantially improve with either simplified instructions or jury deliberation.⁸⁰

33. Despite regular pleas for improvement, indigent defense services remain underfunded. 2013 was the 50th anniversary of the Supreme Court's decision in *Gideon v. Wainwright*,⁸¹ and it produced a tremendous outpouring of conferences, symposia, and speeches on the ongoing crisis in the provision of indigent defense services.⁸² The state of indigent defense in capital cases is no better and sometimes worse, given the greater complexity of capital cases, which demand greater expertise by

⁷⁹ Shana L. Maier, et al., *Mock Jurors' Comprehension of Aggravating and Mitigating Factors: The Impact of Timing and Type of Sentencing Phase Instructions*, 16 APPLIED PSYCH. IN CRIM. JUST. 65, 65 (2021).

⁸⁰ See, e.g., Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 L. & HUM. BEHAV. 481, 481 (2009) (finding that jury deliberation "failed to improve characteristically poor instructional comprehension"); Amy E. Smith & Craig Haney, *Getting to the Point: Attempting to Improve Juror Comprehension of Capital Penalty Phase Instructions*, 35 L. & HUM. BEHAV. 339, 339 (2011) (finding that "significant comprehension problems" remained even after the implementation of simplified jury instructions); Marc. W. Patry & Steven D. Penrod, *Death Penalty Decisions: Instruction Comprehension, Attitudes, and Decision Mediators*, 13 J. FORENSIC PSYCH. PRAC. 204, 204 (2013) (reporting findings consistent with previous research showing "low comprehension of capital penalty instructions").

⁸¹ 372 U.S. 335 (1963).

⁸² For just a few examples, see *The Invention of Courts*, 143 DAEDALUS Issue 3 (2014) (special issue marking the anniversary of *Gideon v. Wainwright*); *Gideon at 50: How Far We've Come, How Far to Go* (Sept. 20, 2013) (Symposium hosted by the Charleston School of Law and the South Carolina Commission on Indigent Defense); *Answering Gideon's Call Outside the Courtroom: Integrated Policy Reform Strategies to Protect the Sixth Amendment Right to Counsel* (March 18, 2013) (one-day convening hosted by the Justice Programs Office of the School of Public Affairs at American University, in partnership with the National Legal Aid & Defender Association, the American Council of Chief Defenders, and the Washington College of Law at American University); *The Gideon Effect: Rights, Justice, and Lawyers Fifty Years After Gideon v. Wainwright*, 122 YALE L. J. Number 8 (2013) (special symposium by the Yale Law Journal).

counsel and greater resources at every stage. Studies conducted after 2008 continue to confirm that death penalty cases are vastly more expensive than non-capital ones. Upon reviewing fifteen state studies across the country between 2000 and 2016, researchers concluded that, on average, capital prosecutions impose \$700,000 more in costs than non-capital prosecutions.⁸³ They added: “It is a simple fact that seeking the death penalty is more expensive. *There is not one credible study, to our knowledge, that presents evidence to the contrary.*”⁸⁴

34. The cost of capital punishment has continued to rise even further because of the vastly increased cost of carrying out executions. As drug manufacturers increasingly have refused to permit the use of their drugs in executions, corrections departments have turned instead to compounding pharmacies to buy drugs for use in lethal injection.⁸⁵ The costs of these drugs have skyrocketed over the past decade.⁸⁶ For example, in 2014, it cost Virginia \$250 to receive drugs directly from pharmaceutical manufacturers. In 2016, the state spent \$66,000 to obtain the drugs necessary for the next two executions—assuming “legal appeals [didn’t] continue beyond the drugs’ early-2017 expiration dates.”⁸⁷ Tennessee paid \$190,000 to acquire midazolam, vecuronium bromide, and potassium chloride between 2017 and 2020—a period during which only two executions took place. Missouri spent over

⁸³ Peter A. Collins, Matthew J. Hickman & Robert C. Boruchowitz, *Proportionality, Cost, and Accuracy of Capital Punishment in Oklahoma*, in REPORT OF THE OKLAHOMA DEATH PENALTY COMMISSION app. 1B, at 228 (2017).

⁸⁴ *Id.* at 227 (emphasis in original). See also *Testimony Submitted to the Kentucky Senate: Hearings on the Costs of the Death Penalty Before the Standing Comm. on Judiciary* (2012) (statement of Richard Dieter, Executive Director, Death Penalty Information Center), 4–5 (“[A]ll of the studies conclude that the death penalty system is far more expensive than an alternative system in which the maximum sentence is life in prison”).

⁸⁵ See *Execution Costs Spike in Virginia; State Pays Pharmacy \$66k*, CBS NEWS (Dec. 12, 2016), <https://www.cbsnews.com/news/execution-costs-spike-in-virginia-state-pays-pharmacy-66k/>; Sheila Burke, *Tennessee Supreme Court Upholds Lethal Injection Method*, ASSOCIATED PRESS (Mar. 26, 2017), <https://apnews.com/article/20c6abc124f2421eb3a56bcb651340b3>; *Arizona Finds Pharmacist to Prepare Lethal Injections*, ASSOCIATED PRESS (Oct. 27, 2020), <https://apnews.com/article/arizona-doug-ducey-phoenix-df8203ee5c11d43ca84ce79c77616fdd>.

⁸⁶ Lethal injection drugs are exponentially more difficult to acquire than they were in 2009. This is in large part due to the 2011 export ban by the European Union, which severed U.S. prisons from the last large-scale manufacturers of sodium thiopental.

⁸⁷ Ed Pilkington, *Revealed: Republican-led States Secretly Spending Huge Sums on Execution Drugs*, THE GUARDIAN (Apr. 9, 2021), <https://www.theguardian.com/world/2021/apr/09/revealed-republican-led-states-secretly-spending-huge-sums-on-execution-drugs>.

\$160,000 on lethal injections between 2015 and 2020, a time period in which it executed ten inmates.⁸⁸ In 2020, Arizona paid \$1.5 million for one thousand one-gram vials of pentobarbital sodium salt, to be shipped in “unmarked jars and boxes.”⁸⁹ All three of these latter states acquired their drugs through compounding pharmacies. Because of the difficulty of obtaining drugs for lethal injections, some states are now turning to alternative methods of execution, which generates the additional costs of litigation challenges.⁹⁰

35. In our ALI report, we reviewed the detailed assessments conducted by the ABA of the provision of capital defense services in eight states, none of which were found to be in full compliance with any of the metrics that the ABA had set for effective capital representation. Since 2008, the ABA has conducted four more such state studies—of Kentucky, Missouri, Texas, and Virginia (although Virginia has since repealed its death penalty, and its assessment has been removed from the ABA’s website).⁹¹ The second set of assessments, published between 2011 and 2013—confirm the prior pattern of deficiencies in capital representation. In particular and most concerning, they note the excessive caseloads of public defenders⁹² and the prevalence of unqualified counsel at all stages of capital proceedings.⁹³

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Joseph Ax & Nate Raymond, *U.S. States Considering Alternative Execution Methods Face Legal Hurdles*, REUTERS (April 19, 2017), <https://www.reuters.com/article/us-usa-execution-idUSKBN17L142>.

⁹¹ See generally American Bar Association, *Evaluating Fairness and Accuracy in Death Penalty Systems: The Kentucky Death Penalty Assessment Report—An Analysis of Kentucky’s Death Penalty Laws, Procedures, and Practices* (2011); American Bar Association, *Evaluating Fairness and Accuracy in Death Penalty Systems: The Missouri Death Penalty Assessment Report—An Analysis of Missouri’s Death Penalty Laws, Procedures, and Practices* (2011); and American Bar Association, *Evaluating Fairness and Accuracy in Death Penalty Systems: The Texas Death Penalty Assessment Report—An Analysis of Texas’s Death Penalty Laws, Procedures, and Practices* (2013). All of the assessments are available at https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments/.

⁹² *Missouri Report* at xxii; *Kentucky Report* at xxiv; *Texas Report* at 238.

⁹³ The *Kentucky Report* recounts the case of Gregory Wilson, in which the trial court hung a sign on the courtroom door that said, “PLEASE HELP. DESPERATE. THIS CASE CANNOT BE CONTINUED AGAIN.” One of the two attorneys who agreed to represent him had never tried a felony, and the other was “semi-retired,” with “no office, no staff, no copy machine and no law books.” *Kentucky Report* at xxiv.

36. Evidence also continues to mount regarding the wrongful conviction of the innocent. In our report to the ALI in 2008, we noted that the Death Penalty Information Center had recorded 129 exonerations in capital cases, using a strict definition of “exoneration.”⁹⁴ Today that number is 186, nearly 50% higher.⁹⁵ Now, “one person wrongfully convicted and condemned to die has been exonerated for every 8.3 prisoners who have been executed.”⁹⁶ In our ALI report, we wrote that “reasonable estimates [of the rate of error in capital cases] range from 2.3% to 5%.”⁹⁷ Today, the most authoritative estimate, published in the *Proceedings of the National Academy of Sciences* in 2014, “present[ed] a conservative” calculation that 4.1% of capital verdicts between 1973 and 2004 were erroneous.⁹⁸ That study explained that the current exoneration rate is an inapt proxy for the false conviction rate because courts convert most death sentences into life sentences; life-sentenced defendants, in turn, do not receive the searching review provided to those on death row. “With an error rate at trial over 4%,” the study concluded, “it is all but certain that several of the [then] 1,320 defendants executed since 1977 were innocent.”⁹⁹

37. There is also strong evidence that wrongful conviction and racial bias are intertwined. A recent study found that “African Americans are only 13% of the American population but a majority of innocent defendants wrongfully convicted of crimes and later exonerated.”¹⁰⁰ This skewing is particularly pronounced in murder cases, as exonerations reveal that “innocent black people are about

⁹⁴ See ALI Report at 38 & n.149.

⁹⁵ See Death Penalty Information Center, *Innocence Database*, <https://deathpenaltyinfo.org/policy-issues/innocence-database>.

⁹⁶ Death Penalty Information Center, *The Death Penalty in 2021: Year-End Report* 16 (2021), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2021-year-end-report>.

⁹⁷ ALI Report at 38.

⁹⁸ Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, 7230, 7234 (2014).

⁹⁹ *Id.* at 7235.

¹⁰⁰ SAMUEL R. GROSS, ET AL., RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES ii, National Registry of Exonerations, NewKirk Center for Science and Society, University of California, Irvine (Mar. 7, 2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

seven times more likely to be convicted of murder than innocent white people.”¹⁰¹ Moreover, as noted above, empirical data show that the wrongful convictions of Black exonerees were 22% more likely to be linked to police misconduct.¹⁰²

38. The enforcement of federal constitutional rights on federal habeas review continues to be inadequate, with some obstacles to relief even increasing since 2008. As noted above, the Supreme Court has been more vigorously policing federal courts’ deference under AEDPA to state court denials of relief for claims of ineffective assistance of counsel in capital cases.¹⁰³ In addition, the Court interpreted AEDPA in 2011 to deny evidentiary hearings in federal court in *all* cases in which there was a state court decision on the merits, precluding even the rare exceptions noted in the statute.¹⁰⁴ The Court has also tightened its non-retroactivity doctrine, eliminating last year one of the two exceptions to non-retroactivity on federal habeas review that had been announced in 1989.¹⁰⁵ And the law of procedural default continues to be, in the words of Justice Antonin Scalia, the “*principal escape route* from federal habeas.”¹⁰⁶ A federal judge whose Circuit (and whose own opinions) have been repeatedly reversed by the Supreme Court for too generously opening the federal court doors to issue habeas relief in capital cases, published a dire account of the state of federal habeas corpus in 2015, detailing the “unfortunate consequences” of “the Court’s ever increasing limitations on the development and enforcement of constitutional rights.”¹⁰⁷

39. Finally, the death penalty continues to have the same two primary negative effects on the

¹⁰¹ *Id.*

¹⁰² See *supra* ¶128.

¹⁰³ See *supra* ¶125.

¹⁰⁴ See *Pinholster v. Cullen*, 562 U.S. 86 (2011) (holding that §2254(e)(2) of AEDPA precludes an evidentiary hearing whenever the federal claim was adjudicated on the merits in state court proceedings).

¹⁰⁵ See *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (overruling the exception to non-retroactivity for “watershed” rules of criminal procedure announced in *Teague v. Lane*, 489 U.S. 288, 311 (1989)).

¹⁰⁶ *Martinez v. Ryan*, 566 U.S. 1, 22 (2012) (Scalia, J., dissenting) (emphasis in original).

¹⁰⁷ See Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1219 (2015) (capitalization omitted).

broader administration of criminal justice that we detailed in our 2008 ALI report. First, our report noted that the death penalty helps to normalize and entrench other extreme punishments, especially life sentences, with or without possibility of parole. Even though the Supreme Court has now limited the use of life without parole sentences for juvenile offenders,¹⁰⁸ the use of life sentences continues to grow, such that one in seven people in U.S. prisons is now serving some kind of a life sentence.¹⁰⁹ This growth has continued in recent years: 29 states had more people serving life sentences in 2020 than just four years earlier.¹¹⁰ Second, our report described the disproportionate share of resources required by the administration of capital punishment, which draws needed resources away from the broader criminal justice system. This disproportion has been exacerbated by the rising cost of lethal injection drugs and the cost of litigation around alternative methods of execution, described above.¹¹¹

IV. The Kansas Death Penalty Statute Faces the Same Intractable Problems as the MPC

40. The Kansas death penalty statute (Kan. Stat. Ann. §21-6617 et seq.), like the vast majority of statutes passed in response to the Supreme Court's decisions in *Furman* and *Gregg*, was explicitly modeled on the MPC. As in the MPC, the Kansas law bifurcates the guilt and sentencing determinations. As the MPC prescribes, the Kansas statute requires sentencing juries to unanimously find beyond a reasonable doubt that one or more statutory aggravating circumstances exists, and then to consider a list of statutory mitigating circumstances as well as all relevant non-statutory mitigating evidence. The Kansas lists of aggravating and mitigating circumstances mirror the lists in the MPC. While there are some minor variances from the precise language of the MPC, the Kansas law is clearly patterned closely on the model statute, sharing the MPC's evident faith that carefully worded guidance to capital

¹⁰⁸ See *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012).

¹⁰⁹ See Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, THE SENTENCING PROJECT (Feb. 17, 2021), <https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/>.

¹¹⁰ *Id.*

¹¹¹ See *supra* ¶134.

sentencers would be able to address the problems of arbitrariness and discrimination that plagued the pre-*Furman* administration of capital punishment. As our 2008 report to the ALI demonstrated, and as the previous section of this report to the court updates to present, that hope has not been realized.

41. Like more than two-thirds of states in the U.S., Kansas has not performed an execution in the past decade. But Kansas has a rather unique historical relationship to the death penalty, and its ambivalence about the death penalty runs deeper than that of most other retentionist states. Kansas has not conducted an execution in more than 50 years and has only 9 people currently under sentence of death—fewer, for example, than the less populous neighboring state of Nebraska, which legislatively repealed its capital statute in 2015 but saw it reinstated by referendum in 2016. Of all 27 states that currently permit capital punishment, Kansas was the last to reauthorize the death penalty after the Supreme Court’s invalidation of all prevailing statutes in 1972, not enacting its revised statute until 1994. In 2010, the Kansas Senate came within one vote of repealing the death penalty for aggravated murder and replacing it with life without possibility of parole.¹¹²

42. Kansas’s experience with the death penalty has also revealed the inadequacy of post-conviction proceedings and federal constitutional regulation to reform and rationalize the administration of capital punishment. The U.S. Supreme Court has twice reversed decisions of the Kansas Supreme Court on the grounds that the Kansas Court had interpreted the federal Eighth Amendment to extend too much protection to capital defendants. In *Kansas v. Marsh*,¹¹³ the Kansas Supreme Court struck down Kansas’s death penalty scheme on the basis that Kansas’s statute violated the Eighth and Fourteenth Amendment because it established a presumption in favor of death by directing imposition of the death penalty when aggravating and mitigating circumstances are in equipoise. The U.S. Supreme Court reversed, and Kansas’s death penalty was reinstated. In *Kansas v.*

¹¹² See generally Death Penalty Information Center, *State and Federal Info: Kansas*, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/kansas>.

¹¹³ 548 U.S. 163 (2006).

Carr,¹¹⁴ the U.S. Supreme Court reversed the Kansas Court's holding that the Eighth Amendment required a severance of the proceedings against the co-defendants who had been tried jointly, as well as the Kansas Court's separate holding that the Eighth Amendment requires capital sentencing juries to be instructed that mitigating circumstances need only be proved to the satisfaction of the individual juror and not beyond a reasonable doubt.

43. This is an illustrative reminder that the problems of juror misunderstanding in capital cases are endemic and difficult to eradicate, even in a state like Kansas with a vigilant judiciary. Kansas journalists covering capital cases have written repeatedly about the difficulty that courts face in explaining the complex and sometimes counter-intuitive capital system to lay jurors. For example, in the capital prosecution of Cornelius Oliver, potential confusion arose even before the sentencing phase. At the guilt phase, the jury had to evaluate Oliver's responsibility for capital murder in a case involving multiple murder victims and multiple possible killers when the statute elevated premeditated murder to capital murder if it involved the "killing of more than one person as part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct."¹¹⁵ The jury had to "sort through a list of crimes that sound similar yet carry different weight in the legal system," explained the *Wichita Eagle*. "The state's theory is that [one victim] died first. So when [three others] died, the crime became capital." However, "if jurors choose instead to find Oliver guilty on four counts of [simple] premeditated murder, there is no penalty phase." And, "[i]f that's not complicated enough," continued the *Eagle*, "Oliver wasn't the only one in the Erie house who could have committed murder."¹¹⁶ Coverage of the later capital prosecution of John Robinson emphasized the confusion that could arise in determining a capital defendant's responsibility for a

¹¹⁴ 577 U.S. 108 (2016).

¹¹⁵ Kan. Stat. Ann. §21-5401(6).

¹¹⁶ Ron Sylvester, *Oliver Jury Faces Array of Decisions*, WICHITA EAGLE (Dec. 29, 2001), at 1A.

murder “pursuant to a contract or agreement to kill”¹¹⁷ when the defendant hired someone else to do the killing and was guilty of capital murder only as an accomplice. “Prosecutors say aiding and abetting—which makes someone who helps plan a murder as guilty as the person who does the killing—can be difficult for jurors to comprehend, especially in cases where the death penalty is at stake.”¹¹⁸

44. Kansas is also no stranger to the politicization of the death penalty. The gruesome horror of what has come to be known as the Wichita Massacre gave rise to a flood of media attention. The capital sentences of the Wichita defendants Jonathan and Reginald Carr were first (briefly) invalidated when the Kansas Supreme Court struck down the state’s death sentencing provisions in *Marsh*.¹¹⁹ After the U.S. Supreme Court reversed that ruling, the Kansas Supreme Court directly overturned the Carr brothers’ death sentences on appeal, a ruling that was also reversed by the U.S. Supreme Court. The Kansas ruling in the *Carr* case led the Governor to renew calls for a state constitutional amendment to change the way justices are selected for the Kansas Supreme Court.¹²⁰ The *Carr* case and the death penalty more generally motivated at least one appointment to the Court, as the Governor himself acknowledged.¹²¹ And they also became the focal point of the next gubernatorial contest, dominating the debates between Sam Brownback and Paul Davis.¹²² Paradoxically, the infrequency of capital cases in Kansas heightens their sensitivity. “With death penalty cases so rare in Kansas,” said the *Wichita Eagle*, “the resulting court cases have attracted strong public attention.”¹²³ And, importantly, the pressures of high-profile capital cases are felt not only by public officials, but also by jurors. In the *Carr*

¹¹⁷ Kan. Stat. Ann. §21-5401(2).

¹¹⁸ Ron Sylvester, *Prosecutors Explain Aiding, Abetting to Jury*, WICHITA EAGLE (Sept. 28, 2008), at 3A.

¹¹⁹ See *supra* ¶42.

¹²⁰ See Staff, *In Carr Brothers Case, Supreme Court Says Kansas Wrongly Overturned Death Sentences*, WICHITA EAGLE (Jan. 20, 2016), at 1A.

¹²¹ Bryan Lowry, *Caleb Stegall to Take Seat on Kansas Supreme Court in December*, WICHITA EAGLE (Sept. 12, 2014), <https://www.kansas.com/news/politics-government/election/article3204377.html> (noting that Governor Brownback maintained that “Stegall, a former prosecutor, would bring a needed perspective to the court on death penalty cases”).

¹²² Dion Lefler, *Carr Brothers’ Case Highlights Bitter Debate Between Sam Brownback and Paul Davis*, WICHITA EAGLE (Oct. 22, 2014), <https://www.kansas.com/news/politics-government/election/article3204377.html#storylink=cpy>.

¹²³ Ron Sylvester, *Oliver Seeks to Be Tried Elsewhere*, WICHITA EAGLE (Nov. 22, 2001), at 1B.

case, for example, the community's influence was so powerful that one woman "said she'd find it difficult to vote for acquittal even if the state didn't prove its case, because of community pressure."¹²⁴

45. There are demonstrated and acknowledged racial disparities in the Kansas criminal justice system in general, and in its administration of the death penalty in particular. Analysis completed by the Wichita Bar Association in June 2021 concluded that Sedgwick County jury panels "tend to lack the racial and ethnic diversity of our community."¹²⁵ Moreover, research and analysis by other experts in this case demonstrate additional forms of disparity and discrimination in the administration of capital punishment in Kansas. For example, a new report by Professor Frank Baumgartner shows that racial disparities exist in death penalty charging and sentencing for capital-eligible crimes in Kansas. New research, including a community survey conducted in Sedgwick County by Professor Mona Lynch shows that the death qualification process in Kansas is likely to exclude people of color and women from jury service in capital cases. The report of *Batson* decision making in Kansas cases by Professor Elisabeth Semel shows that "prosecutors across Kansas use peremptory strikes to disproportionately remove African-American and Latinx citizens" from capital juries in the state, and that *Batson* offers inadequate protection from racial discrimination in the jury selection process. More generally, research by Professor Shawn Leigh Alexander describes the history of racial bias in the Kansas criminal justice system.

46. Disparities based on race are not the only kind of concerning disparity that affect the administration of capital punishment in Kansas. As noted above, the research of Professor Mona Lynch demonstrates that the process of death qualification in capital cases works to exclude women as well as people of color. In addition, a 2004 Report of the Kansas Judicial Council Death Penalty Advisory

¹²⁴ Ron Sylvester, *Six Inch Closer to Serving on Carr Jury*, WICHITA EAGLE (Sept. 24, 2002), at 3B.

¹²⁵ WICHITA BAR ASSOCIATION, EQUAL JUSTICE UNDER LAW: REPORT OF THE RACIAL JUSTICE TASK FORCE TO THE BOARD OF GOVERNORS OF THE WICHITA BAR ASSOCIATION 5 (June 4, 2021), https://cdn.ymaws.com/www.wichitabar.org/resource/resmgr/files/wba_racial_justice_report_06.pdf.

Committee noted that there are significant geographic disparities in whether capital charges are brought to trial or result in death sentences, with capital defendants in Sedgwick County being “much more likely” to be taken to trial and sentenced to death.¹²⁶ Finally, Kansas’ extremely narrow formulation of the insanity defense, recently upheld against constitutional challenge by the U.S. Supreme Court in *Kahler v. Kansas*,¹²⁷ suggests that the under-protection of capital defendants with severe mental illness, described more generally above,¹²⁸ is particularly likely in Kansas.

47. As is the case in virtually every jurisdiction, the provision of indigent defense services faces substantial resource challenges in Kansas. A 2020 Report by the Board of Indigents’ Defense Services described “dangerously high caseloads, . . . long suppressed compensation, and historic lack of resources”¹²⁹—challenges that have been greatly exacerbated by the state budget crisis precipitated by the COVID 19 pandemic. The need for resources is even greater in capital cases, as research has shown that in Kansas, as elsewhere, capital cases are substantially more expensive than non-capital prosecution of the same or similar matters. A 2014 report by the Judicial Council Death Penalty Advisory Committee found that both the Board of Indigents’ Defense Services and the district courts “incur costs in trial cases that are 3 to 4 times higher in cases where the death penalty is sought than in cases where it is not.”¹³⁰ The Kansas report concluded that its findings were consistent with the findings from other jurisdictions that the costs of death cases are “significantly higher” than non-death cases.¹³¹ Professor Philip Cook another expert in this case, and Frank Baumgartner have completed a study that shows that,

¹²⁶ KANSAS JUDICIAL COUNCIL, REPORT THE KANSAS JUDICIAL COUNCIL DEATH PENALTY ADVISORY COMMITTEE ON CERTAIN ISSUES RELATED TO THE DEATH PENALTY 10 (Nov. 12, 2004), https://kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/Previous%20Judicial%20Council%20Studies/PDF/Death_Penalty_Adv_Comm_Nov04.pdf.

¹²⁷ 140 S. Ct. 1021 (2020).

¹²⁸ See *supra* ¶31.

¹²⁹ THE BOARD INDIGENTS’ DEFENSE SERVICES, A REPORT ON THE STATUS OF PUBLIC DEFENSE IN KANSAS 5 (Sept. 2020), <http://www.sbids.org/forms/Report%209-30-2020.pdf>.

¹³⁰ KANSAS JUDICIAL COUNCIL, REPORT OF THE JUDICIAL COUNCIL DEATH PENALTY ADVISORY COMMITTEE 15 (Feb. 13, 2014), <https://kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/2015%20Reports/death%20penalty%20cost%20report%20final.pdf>.

¹³¹ *Id.*

since the 2014 Judicial Council report, the cost of capital cases in Kansas remains dramatically higher than the cost on non-capital cases.

48. The issue of the wrongful conviction of the innocent has also been a problem in Kansas, as in the rest of the United States. Wrongful convictions in non-capital cases in Kansas have occurred in many counties and have occurred across the gamut of crimes. Some were robberies.¹³² Others were rapes.¹³³ Many were murders.¹³⁴ And these wrongful convictions occurred across numerous Kansas counties: Clay,¹³⁵ Douglas,¹³⁶ Jefferson,¹³⁷ Johnson,¹³⁸ Riley,¹³⁹ Sedgwick,¹⁴⁰ Seward,¹⁴¹ Shawnee,¹⁴² and Wyandotte.¹⁴³ Kansas' wrongful convictions, however, do not tell the whole story. The State has also

¹³² See, e.g., Joe Robertson, *17 Years Later, She Laments About Mistakes That Led to the Wrong Man Getting Imprisoned*, WICHITA EAGLE (June 13, 2017), <https://www.kansas.com/news/nation-world/national/article155939579.html> ("Tamara Scherer . . . says she told investigators and prosecutors this all along — 'I didn't get a good look at his face.'").

¹³³ See, e.g., Hurts Laviana, *Settlement Reached in Wrongful Conviction*, WICHITA EAGLE (Feb. 7, 2010), at 1A; Melissa Hellmann, Associated Press, *Kansas Weighing Rules for Handling Eyewitnesses to Crimes*, WICHITA EAGLE (Mar. 28, 2016), <https://www.kansas.com/news/local/crime/article68588002.html>.

¹³⁴ See e.g., Associated Press, *Court Rejects Liberal Man's Murder Conviction Over Lie by Witness*, WICHITA EAGLE (Jul. 5, 2004), at 3B; Luke Nozicka & Katie Bernard, *Family of Late Kansas Exoneree Says Jailhouse Informant Bill Could Have Saved His Life*, WICHITA EAGLE (Mar. 17, 2021), <https://www.kansas.com/news/state/article249951764.html>.

¹³⁵ See Roxana Hegeman, *Kansas Has Paid 2 of 5 Claims for Wrongful Conviction*, ASSOCIATED PRESS (May 26, 2019), <https://apnews.com/article/fee472c2f95747b9a41437866008eef4>; see also <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={b8342ae7-6520-4a32-8a06-4b326208baf8}&SortField=State&SortDir=Asc&FilterField1=State&FilterValue1=Kansas>.

¹³⁶ Shaun Hittle, *Man Tries to Rebuild Life After Serving Time for Crime He Says He Didn't Commit*, LAWRENCE JOURNAL-WORLD (Oct. 16, 2011), <https://www2.ljworld.com/news/2011/oct/16/man-tries-rebuild-life-after-serving-time-crime-he/>.

¹³⁷ See Roy Wenzl & Travis Heying, *Wrongly Imprisoned Man Learns to Forgive*, WICHITA EAGLE (Mar. 13, 2016).

¹³⁸ Joe Robertson, *17 Years Later, She Laments About Mistakes That Led to the Wrong Man Getting Imprisoned*, WICHITA EAGLE (June 13, 2017), <https://www.kansas.com/news/nation-world/national/article155939579.html>.

¹³⁹ See Hurts Laviana, *Settlement Reached in Wrongful Conviction*, WICHITA EAGLE (Feb. 7, 2010), at 1A; Jim Suhr, Associated Press, *Freed Inmate Faces Compensation Challenge*, WICHITA EAGLE (Dec. 14, 2014).

¹⁴⁰ AG Derek Schmidt: *Fourth Mistaken-Conviction Lawsuit Concluded* (Apr. 14, 2020), <https://ag.ks.gov/media-center/news-releases/2020/04/14/ag-derek-schmidt-fourth-mistaken-conviction-lawsuit-concluded>.

¹⁴¹ Associated Press, *Court Rejects Liberal Man's Murder Conviction Over Lie by Witness*, WICHITA EAGLE (July 5, 2004), at 3B.

¹⁴² See Melissa Hellmann, Associated Press, *Kansas Weighing Rules for Handling Eyewitnesses to Crimes*, WICHITA EAGLE (Mar. 28, 2016), <https://www.kansas.com/news/local/crime/article68588002.html>.

¹⁴³ See Luke Nozicka & Katie Bernard, *Family of Late Kansas Exoneree Says Jailhouse Informant Bill Could Have Saved His Life*, WICHITA EAGLE (Mar. 17, 2021), <https://www.kansas.com/news/state/article249951764.html>; *Settlement Approved With Wrongfully Convicted Kansas Man*, ASSOCIATED PRESS (June 25, 2021), <https://apnews.com/article/ks-state-wire-kansas-a775050e5a4069b6eb1dfc434d88c689>; Roxana Hegeman, *Kansas Fights Claim of Man Wrongly Imprisoned for 23 Years*, ASSOCIATED PRESS (Aug. 21, 2019).

brought mistaken *charges* in capital cases. For example, prosecutors erred in originally seeking Gentry Bolton's death. When two slayings occurred at convenience stores in the span of a few days, fears mounted across the State, and a manhunt ensued.¹⁴⁴ Prosecutors charged Bolton for both killings.¹⁴⁵ For one murder, they sought the death penalty.¹⁴⁶ But it turned out that Bolton was innocent in that case. Instead, "authorities conceded they had the wrong man and later charged" another.¹⁴⁷

49. Other expert reports elaborate further on the problem of wrongful conviction of innocent people in Kansas. Tricia Bushnell, Executive Director of the Midwest Innocence Project, submitted evidence on the prevalence and devastating impact of wrongful convictions generally and specifically with regard to Kansas. Kansas exoneree, Floyd Bledsoe, who spent 16 years in prison for a crime he did not commit, has prepared a report showcasing the destructive impact of wrongful convictions on exonerees' mental, physical, and financial health.

50. Finally, the Kansas death penalty has deleterious effects on the broader administration of justice in the same two primary ways addressed above and discussed in our ALI report.¹⁴⁸ First, the death penalty tends to normalize and legitimize other serious punishments. When death is the punishment for the most serious murders, it creates a vacuum that generates an upward pressure on sentences for lesser murders and other forms of homicide. One can see such escalation in recent Kansas law: in 2014, the Kansas legislature passed HB 2490, which included amendments to the sentencing provisions for premeditated first-degree murder, attempted capital murder, and felony murder. The bill increased the default sentence for premeditated first-degree murder committed on or after July 1, 2014 from a "Hard 25" to a "Hard 50" sentence, meaning that defendants sentenced under the new bill now

¹⁴⁴ See *Killer Has Convenience Store Clerks on Edge*, SALINA JOURNAL (Jan. 4, 1998), at A3.

¹⁴⁵ See *Man Sought in Two Killings at KCK Convenience Stores*, WICHITA EAGLE (Jan. 2, 1998), at 10A.

¹⁴⁶ Associated Press, *Death Penalty Sought Against Slaying Suspect*, SALINA JOURNAL (Jan. 14, 1998), at A5.

¹⁴⁷ *Man Convicted in Killing of Convenience Store Clerk*, WICHITA EAGLE (Dec. 13, 1998), at 23A.

¹⁴⁸ See *supra* ¶139.

become eligible for parole on a life sentence after 50 years, rather than after 25 years.¹⁴⁹ The bill also imposed the “Hard 25” sentence for attempted capital murder (previously a severity level 1 felony) and felony murder (previously a “Hard 20” sentence).¹⁵⁰ Second, the high cost of capital trials, appeals, post-conviction review, and executions diverts precious resources away from an already-strained criminal justice system. The substantially higher resources required by capital prosecutions in Kansas,¹⁵¹ combined with the spiraling cost of lethal injection drugs and the economic pressures of the COVID 19 pandemic, only exacerbate this resource drain.

A handwritten signature in cursive script that reads "Carol Steiker". The signature is written in black ink on a white background.

Carol Steiker

¹⁴⁹ See KANSAS LEGISLATIVE RESEARCH DEPARTMENT, KANSAS LEGISLATOR BRIEFING BOOK 5 (2019), http://www.kslegresearch.org/KLRD-web/Publications/BriefingBook/2019_briefing_book.pdf. However, the sentencing judge may still impose a “Hard 25” sentence for premeditated first-degree murder if the judge, after reviewing mitigating factors, finds “substantial and compelling reasons” to impose the lesser sentence. *Id.*

¹⁵⁰ See *id.*

¹⁵¹ See *supra* ¶147.

Appendix 1

CAROL S. STEIKER

HARVARD LAW SCHOOL • GRISWOLD 409 • CAMBRIDGE, MA 02138 • PHONE: 617.496.5457
EMAIL: STEIKER@LAW.HARVARD.EDU

CURRENT POSITION

1992 TO PRESENT

HARVARD LAW SCHOOL FACULTY

- *Henry J. Friendly Professor of Law*
- *Dean's Special Advisor on Public Service*

I teach, research, and write in the broad field of criminal justice, with an emphasis on the legal regulation of capital punishment. During the 1996-97 year, I was a Fellow with Harvard University's Program in Ethics and the Professions, and I remain a faculty affiliate of that Program (now the Edmond J. Safra Center for Ethics). From 2015-2020, I co-directed the Harvard Criminal Justice Policy Program.

EDUCATION

LEGAL

Harvard Law School, Cambridge, MA

J.D. *magna cum laude*, 1986; President, *Harvard Law Review*, Volume 99 (the second woman to hold the position of President in the *Law Review's* then 99-year history)

POST-GRADUATE

Fulbright Grant, 1982-83

I was a teaching assistant in a French *lycée* and a student at the University of Languages and Letters in Grenoble, France.

COLLEGE

Harvard-Radcliffe Colleges, Cambridge, MA

A.B. *summa cum laude*, *Phi Beta Kappa* in History and Literature, 1982

PRIOR EMPLOYMENT

1988-1992

Staff Attorney, Public Defender Service for the District of Columbia

I have represented indigent defendants at all stages of the criminal process—from arrest through trial, appeal, and application for post-conviction relief.

1987 Term

Law Clerk, Justice Thurgood Marshall, United States Supreme Court

1986 Term

Law Clerk, Judge J. Skelly Wright, Federal Court of Appeals for the District of Columbia Circuit

BAR ADMISSIONS

2006

U.S. Supreme Court Bar

1988

District of Columbia Bar

1987

New York State Bar

PROFESSIONAL ACTIVITIES & PUBLIC EDUCATION

Ongoing

2020 to present	Faculty Affiliate, Program in Criminal Justice Policy and Management, Harvard Kennedy School of Government
2018 to present	Co-Chair, Real Colegio Complutense Study Group, “Studies on Life and Human Dignity”
2014 to present	Fellow, American Bar Foundation
2014 to present	Member, American Law Institute
2011 to present	Adviser, American Law Institute Model Penal Code Project (Sexual Assault and Related Offenses)
2009 to present	Advisory Board, Racing Horse Productions (documentary film company that makes films on social issues relating to criminal justice)
2006 to present	Advisory Board, Legal Scholarship Network: Corrections and Sentencing Law and Policy Series
2002 to present	Board of Editors, <i>Ohio State Journal of Criminal Law</i>
1999 to present	Editor, Legal Scholarship Network: Harvard Public Law and Legal Theory Paper Series
1997 to present	Faculty Associate, Harvard University's Program in Ethics and the Professions
1995 to present	Board of Trustees, <i>Harvard Law Review</i>

Completed

2021	Expert Consultant, California Committee on Revision of the Penal Code, presentation on reforming or abolishing the California death penalty
2021	Discussant, “An Examination of the Death Penalty in America,” WilmerHale podcast, <i>In the Public Interest</i> (with Seth Waxman)
2021	Discussant, “Death Penalty Debate,” University of Virginia Federalist Society (with former federal prosecutor William Otis)
2013-2021	Member, Board of Syndics, Harvard University Press
2015-2020	Faculty Co-Director, Criminal Justice Policy Program at Harvard Law School
2010-2020	Advisory Board, American Constitution Society, Boston Chapter

2015-2018 Member, American Bar Association Death Penalty Due Process Review Project

2016 Expert Witness, *U.S. v. Donald Fell*, on the constitutionality of the federal death penalty

2011-2015 Board Member, Committee for Public Counsel Services for the Commonwealth of Massachusetts (appointed by the Massachusetts Supreme Judicial Court to the 15-member Board that oversees the appointment and supervision of counsel for indigent clients)

2012 Expert Consultant, Meeting of U.N. Special Rapporteur on extrajudicial summary or arbitrary executions and U.N. Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment

2012 Speaker, Inaugural Women in Public Service Project, Wellesley College

2011-2013 Judge and participant, Harvard/Stanford International Junior Faculty Forum

2011 Expert Witness, Montana State Legislature, (hearing on Senate Bill 185 to abolish the death penalty)

2010, 2014, 2016 Speaker, Federal Judicial Center (presentations on capital punishment and constitutional law)

2010-2013 Advisory Board, “Preventive Justice” research project, U.K. grant to researchers Andrew Ashworth and Lucia Zedner, Oxford University

2009 Speaker, Aspen Ideas Festival, Aspen Institute, summer 2009 (Justice and Society track, presentation on capital punishment in America)

2009 *Amicus Curiae*, *Addison v. New Hampshire*, No. 2008-0495 (*amicus* on behalf of first death-sentenced inmate in New Hampshire in 70 years) (with retired Justice Deborah Poritz of the New Jersey Supreme Court)

2008 Consultant, American Law Institute (wrote report on the death penalty that led the ALI to withdraw the death penalty provisions of the Model Penal Code) (with Jordan Steiker)

2008 Participant, American Bar Association Roundtable on “Second Look” Sentencing Reforms, December 2008

2007 Co-Counsel, *Smith v. Texas*, 127 S. Ct. 1686 (2007) (pro-bono representation of Texas death row inmate; death sentence vacated by Supreme Court) (with Jordan Steiker)

2007 Faculty, United States District Court for the District of Puerto Rico, “Capital Punishment in the United States” (with Jordan Steiker), October 5, 2007

- 2007 Expert Witness, Massachusetts Joint Committee on Criminal Justice, re: "An Act Reinstating the Death Penalty in the Commonwealth," May 9, 1997; July 14, 2005; and October 23, 2007
- 2004 Counsel for *Amicus Curiae*, *U.S. v. Dansby* (D. Mass.) and *U.S. v. Gudiel-Lopez* (D.R.I) (challenging constitutionality of the "Feeney Amendment" to the PROTECT Act; both challenges denied in 2004)
- 2002 Board of Editors, Encyclopedia of Crime and Justice (Macmillan 2nd edition, 2002)
- 2001 Faculty, Flaschner Judicial Institute, "Judicial Involvement in Plea Negotiations," May 24, 2001
- 1997, 1999 Faculty, National Practice Institute, Continuing Professional Education, "Current Issues in Criminal Justice," March, 1997; March, 1999
- 1995-1997 Consultant to the American Academy of Arts and Sciences' Committee on Juvenile Justice
- 1996 Faculty, Massachusetts Trial Court, Judicial Institute, "Approaching the Bench: The Art and Skill of Judging for the Newer Judge," May 1996
- 1995-1996 Participant, Harvard University's Mind/Brain/Behavior Working Group on Drugs and Addiction
- 1995-1996 Board of Directors, Cambridge and Somerville Legal Services Corporation (CASLS)
- 1995 Expert Witness, U.S. Senate Judiciary Committee Hearing, "The Jury and the Search for Truth," March 7, 1995

AWARDS, GRANTS, AND FELLOWSHIPS

- 2018 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence, Harvard Law School
- 2017 Robert W. Hamilton Book Award for *Courting Death*, University of Texas
- 2017 Dean's Writing Prize for Exceptional Scholarship, Harvard Law School
- 2014 Rita E. Hauser Fellowship at the Radcliffe Institute for Advanced Study at Harvard University
- 2011 Endowed Chair, the Henry J. Friendly Professorship of Law, Harvard University

- 2011 Radcliffe Institute “Exploratory Seminar” Grant for seminar, “Comparative Perspectives on the Death Penalty” (with Moshik Temkin, Harvard Kennedy School of Government)
- 2008 Hugo Adam Bedau Award for influential scholarship, Massachusetts Citizens Against the Death Penalty
- 2007 Endowed Chair, the Howard J. and Katherine W. Aibel Professorship of Law, Harvard University
- 2006 Dean’s Writing Prize for Exceptional Scholarship, Harvard Law School
- 1996 Faculty Fellowship with the Harvard University Program on Ethics and the Professions (now the Safra Center for Ethics)

LAW SCHOOL AND UNIVERSITY SERVICE

Law School: In addition to serving as the Dean’s Special Advisor on Public Service since 2003, and as Associate Dean for Academic Affairs from 1998-2001, I have served on the Admissions Committee, the Clinical Education Committee, the Entry-Level Appointments Committee, the Public Interest Committee, and the Strategic Planning Committee. I chaired the 2009-10 Public Service Initiative Task Force that developed the law school’s Public Service Venture Fund, which distributes \$1 million yearly in public service grants to HLS graduates, beginning in 2013.

University: I have served on the Law School Dean Search Committee (2008 and 2017), the University-wide Public Service Committee, the Committee on Presidential Public Service Fellows, the Honorary Degrees Committee, the Mahindra Humanities Center Post-Doctoral Fellows Committee, the Board of Syndics of Harvard University Press, and the Committee to Visit Harvard College.

REPRESENTATIVE PUBLICATIONS (SINCE 2005)

Books

- 2022 *A Very Short Introduction to Capital Punishment* (forthcoming Oxford University Press 2022) (with Jordan Steiker)
- 2019 *Comparative Capital Punishment* (Edward Elgar 2019) (with Jordan Steiker, ed.)
- 2016 *Courting Death: The Supreme Court and Capital Punishment* (the Belknap Press of Harvard University Press 2016) (with Jordan Steiker)
- 2012 *The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz* (Cambridge University Press 2012) (with Michael Klarman and David Skeel, eds.)
- 2007 *Criminal Law and Its Processes: Cases and Materials*, (Aspen 8th and 9th eds. 2007 and 2012) (with Sanford Kadish, Stephen Schulhofer, and Rachel Barkow)

- 2006 *Criminal Procedure Stories* (ed., Foundation Press 2006)
- Book Chapters**
- 2020 *Judicial Abolition of the American Death Penalty under the Eighth Amendment: The Most Likely Path*, in *The Eighth Amendment and Its Future in a New Age of Punishment* (Meghan J. Ryan & William W. Berry III, eds., Cambridge University Press 2020) (with Jordan Steiker)
- 2019 *Capital Punishment in the Supreme Court 2018 Term*, in *Supreme Court Review* (Steven D. Schwinn, ed., American Constitution Society 2019) (with Jordan Steiker)
- 2018 *Constitutional Regulation of Contested Social Issues: Lessons from the U.S. Supreme Court's "Experiment" with Capital Punishment*, in *Nouveaux regards sur des modèles classiques de démocratie constitutionnelle: États Unis, Europe* (Eleonora Bottini, Bernard Harcourt, Pasquale Pasquino, Otto Pfersmann, eds., 2018)
- 2018 *Aggravating and Mitigating Evidence in Capital Cases*, in *Routledge Handbook on Capital Punishment* (Robert M. Bohm and Gavin Lee, eds., Routledge 2018) (with Jordan Steiker)
- 2017 *Capital Punishment*, in *Reforming Criminal Justice* (Erik Luna, ed., The Academy for Justice 2017) (with Jordan Steiker)
- 2015 *Criminal Procedure*, in *The Oxford Handbook of the U.S. Constitution* (Mark Tushnet, Mark A. Graber, and Sanford Levinson, eds., Oxford University Press 2015)
- 2014 *"To See a World in a Grain of Sand": Dignity and Indignity in American Criminal Justice*, in *The Punitive Imagination: Law, Justice, and Responsibility* (Austin Sarat, ed., University of Alabama Press 2014)
- 2013 *Proportionality as a Limit on Preventive Justice: Promises and Pitfalls*, in *Prevention and the Limits of the Criminal Law* (Andrew Ashworth, Lucia Zedner, and Patrick Tomlin, eds., Oxford University Press 2013)
- 2012 *The Mercy Seat*, in *The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz* (Michael Klarman, David Skeel, and Carol Steiker, eds., Cambridge University Press 2012)
- 2011 *The Death Penalty and Deontology*, in *The Oxford Handbook of Criminal Law* (John Deigh & David Dolinko, eds., Oxford University Press 2011)
- 2010 *Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration*, in *The Boundaries of the Criminal Law* (R.A. Duff, et al., eds., Oxford University Press 2010)

- 2009 *The Beginning of the End?*, in *The Road to Abolition?: The Future of Capital Punishment in the United States* (Charles J. Ogletree, Jr., and Austin Sarat, eds., New York University Press 2009) (with Jordan Steiker)
- 2009 *Furman v. Georgia: Not an End, But a Beginning* in *Death Penalty Stories* (John H. Blume and Jordan Steiker, eds., Foundation Press 2009)
- 2008 *Darrow's Defense of Leopold and Loeb: The Seminal Sentencing of the Century*, in *Trial Stories* (Michael E. Tigar and Angela J. Davis, eds., Foundation Press 2008)
- 2007 *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, in *Forgiveness, Mercy, and Clemency* (Austin Sarat and Nasser Hussain, eds., Stanford University Press 2007)
- 2005 *Capital Punishment and American Exceptionalism* in *American Exceptionalism and Human Rights* (Michael Ignatieff, ed., Princeton University Press 2005)

Articles

- 2022 *Little Furmans Everywhere: State Constitutional Intervention and the Decline of the American Death Penalty*, forthcoming *Cornell Law Review*, 2022 (with Jordan Steiker)
- 2021 Book Review, *Let the Lord Sort Them: The Rise and Fall of the Death Penalty*, by Maurice Chammah, *Rutgers Criminal Law and Criminal Justice Book Reviews*, <https://clcjbooks.rutgers.edu/>
- 2020 *The Rise, Fall, and Afterlife of the Death Penalty in the United States*, 3 *Ann. Rev. Criminology* 299 (2020) (with Jordan Steiker)
- 2019 *The American Death Penalty: Alternative Model for Ordinary Criminal Justice or Exception that Justifies the Rule?*, 22 *New Crim. L. Rev.* 359 (2019) (with Jordan Steiker)
- 2018 Book Review, *End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice*, by Brandon L. Garrett, *Rutgers Criminal Law and Criminal Justice Book Reviews*, <https://clcjbooks.rutgers.edu/>
- 2017 The Tabor Lectures: *Abolishing the American Death Penalty: The Court of Public Opinion versus the U.S. Supreme Court*, 51 *Valparaiso L. Rev.* 579 (2017) (with Jordan Steiker)
- 2017 *Two Cheers for Miranda*, 97 *Boston U. L. Rev.* 1197 (2017)
- 2016 *A Thematic Approach to Teaching Criminal Adjudication*, 60 *St. Louis U. L. Rev.* 463 (2016) (with Adriaan Lanni)
- 2015 *Can/Should We Purge Evil through Capital Punishment?* 9 *Crim. L. and Philos.* 367 (2015) (responding to Matthew H. Kramer, *The Ethics of*

- Capital Punishment: A Philosophical Investigation of Evil and its Consequences, Oxford University Press 2011)
- 2015 *Choosing Our Heroes: Skelly Wright and Atticus Finch*, 61 Loyola L. Rev. 125 (2015)
- 2014 Keynote: *Justice vs. Mercy in the Law of Homicide*, 47 Texas Tech L. Rev. 1 (2014)
- 2014 *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. Cal. L. Rev. 733 (2014) (with Jordan Steiker)
- 2014 *The Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 Am. J. Crim. L. 189 (2014) (with Jordan Steiker)
- 2014 *Gideon's Problematic Promises*, 143 Daedalus 51 (2014)
- 2013 *Gideon at Fifty: A Problem of Political Will*, 122 Yale L. J. 2694 (2013)
- 2013 *Miller v. Alabama: Is Death (Still) Different?*, 11 Ohio St. J. Crim. L. 37 (2013) (with Jordan Steiker)
- 2012 *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 Law & Inequality, 211 (2012) (with Jordan Steiker).
- 2010 *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 Tex. L. Rev. 353 (2010) (with Jordan Steiker)
- 2010 *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. Chi. Legal F. 117 (2010) (with Jordan Steiker)
- 2010 *Capital Punishment: A Century of Discontinuous Debate*, 100 J. Crim. L. & Criminology 643 (2010) (with Jordan Steiker)
- 2009 *Brandeis in Olmstead: "Our Government is the Potent, the Omnipresent Teacher,"* 79 Miss. L. J. 149 (2009)
- 2009 *The Marshall Hypothesis Revisited*, 52 How. L. J. 525 (2009)
- 2008 *Promoting Criminal Justice Reform through Legal Scholarship: Toward a Taxonomy*, 12 Berkeley J. Crim. L. 161 (2008)
- 2008 *Opening a Window a Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. Pa. J. Const. L. 155 (2008) (with Jordan Steiker)
- 2006 *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 Tex. L. Rev. 1869 (2006) (with Jordan Steiker)

- 2006 *The Shadow of Death: The Effect of Capital Punishment on American Criminal Law and Policy*, 89 *Judicature* 250 (2006) (with Jordan Steiker)
- 2005 *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 *J. Crim. L. & Criminology* 587 (2005) (with Jordan Steiker)
- 2005 *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 *Stan. L. Rev.* 751 (2005)

Opinion Pieces

“The Pope Changed the Catholic Church’s Position on the Death Penalty. Will the Supreme Court Follow?” (with Jordan Steiker), *Time Magazine*, Aug. 7, 2018

“Justice Kennedy: He swung left on the death penalty but declined to swing for the fences” (with Jordan Steiker), *SCOTUSblog*, July 2, 2018, <http://www.scotusblog.com/2018/07/justice-kennedy-he-swung-left-on-the-death-penalty-but-declined-to-swing-for-the-fences/>

“Rein in Texas on Executing the Intellectually Disabled” (with Jordan Steiker), *Washington Post*, Nov. 28, 2016

“The More We Confront the Death Penalty, the Less We Like It” (with Jordan Steiker), *L.A. Times*, Nov. 23, 2016

“Why Death Penalty Opponents Are Closer to Their Goal Than They Realize” (with Jordan Steiker), *New Republic*, Sept. 27, 2011

“Don’t Blame Perry for Texas’s Execution Addiction. He Doesn’t Have Much to Do With It” (with Jordan Steiker), *New Republic*, Sept. 2, 2011

“Kagan and the Legacy of Marshall,” *National Law Journal*, July 26, 2010

“Passing the Buck on Mercy,” *Washington Post*, Sept. 8, 2008

REPRESENTATIVE PRESENTATIONS (SINCE 2015)

“The Juridical Regulation of Capital Punishment in the US: Promises and Pitfalls of a Failed Experiment,” *Columbia Law School Conference on Torture, Death Penalty, Imprisonment: Beccaria and His Legacies*, New York, NY (by Zoom), October 16, 2021

“The Derek Chauvin Verdict,” Panel Discussion at Harvard Law School, Cambridge, MA (by Zoom), April 21, 2021

“Comparative Capital Punishment,” University of Texas School of Law book panel, Austin, TX (by Zoom), October 25, 2020 (with Jordan Steiker)

“Global Abolition of the Death Penalty: Contributors, Challenges, and Conundrums,” Taubenschlag Lecture, The Buchman Faculty of Law, University of Tel Aviv, Tel Aviv, ISRAEL, May 23, 2019

“The American Death Penalty: Alternative Model for Ordinary Criminal Justice or Exception that Justifies the Rule?,” Multi-door Criminal Justice Symposium, Bar-Ilan University Faculty of Law and University of Haifa School of Criminology, Ramat Gan and Haifa, ISRAEL, May 27-29, 2019 (with Jordan Steiker)

“The Criminalization of Poverty and the work of Harvard’s Criminal Justice Policy Program,” Annual Retreat of Federal Judges, District of Massachusetts, Chatham, MA, November 9, 2018

“Constitutional Regulation of Capital Punishment in the United States and Japan,” Ryukoku University, Kyoto, JAPAN, June 16, 2018 (also presentations at Congress House, Tokyo; the Japan Federation of Bar Association Lawyers, Tokyo; and the Osaka Bar Association, Osaka) (with Jordan Steiker)

“Mitigation and Capital Punishment,” University of Texas School of Law, Austin, TX, April 6, 2018

“The Future of the American Death Penalty,” The American University of Paris, Paris, FRANCE, March 15, 2018

“Controversies about the Past, Present, and Future of the American Death Penalty,” U.C.L.A. School of Law, Los Angeles, CA, March 9, 2018

“End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice,” University of Virginia School of Law (discussion of book by Professor Brandon L. Garrett), Charlottesville, VA, February 22, 2018

“Courting Death: Authors Meet Readers” panel, American Society of Criminology Annual Meeting, Philadelphia, PA, November 15, 2017 (with Jordan Steiker)

“The Death Penalty in America,” League of Women Voters Justice Forum, Franklin Institute, Philadelphia, PA, November 17, 2017 (with Jordan Steiker)

“Cruel and Unusual: The Seminal Legacy of Michael Meltsner’s Work to Capital Punishment Advocacy and Scholarship,” Northeastern University School of Law, Boston, MA, October 27, 2017

“Courting Death: Authors Meet Readers” panel, Law and Society Annual Meeting, Mexico City, MEXICO, June 20, 2017 (with Jordan Steiker)

“Courting Death,” Searchlight Speaker Series at Eastern State Penitentiary, Philadelphia, PA, June 6, 2017 (with Jordan Steiker)

“The Future of the Death Penalty Worldwide,” Conference: Comparative Capital Punishment Law, University of Texas Capital Punishment Center, Austin, TX, April 7, 2017

“Challenging the Criminalization of Poverty,” University of Ottawa Lecture Series on Research in Law, Ottawa, CANADA, March 28, 2017

“Justice and Mercy in the Judeo-Christian Tradition and American Criminal Justice,” Renaissance Weekend, Santa Fe, NM, February 18, 2017

“Courting Death,” University of Texas School of Law book panel, Austin, TX, February 10, 2017 (with Jordan Steiker)

“The Death Penalty in America,” National Constitution Center Bill of Rights Day Festival, National Constitution Center, Philadelphia, PA, December 15, 2016 (with Jordan Steiker)

“Courting Death,” Criminal Justice Policy Program Conference, Harvard Law School, Cambridge, MA, November 17, 2016 (with Jordan Steiker)

“The Death Penalty: Historical and Doctrinal Perspectives,” Conference: The Death Penalty’s Numbered Days?, Journal of Criminal Law and Criminology, Northwestern Pritzker School of Law, Chicago, IL, November 11, 2016 (with Jordan Steiker)

“Courting Death,” Mahindra Humanities Center Book Talk and Panel, Harvard University, Cambridge, MA, October 27, 2016 (with Jordan Steiker)

“Respecting Human Dignity: Social Inequality and Mass Incarceration in the United States,” Distinguished Visiting Professorship lecture, Zhejiang University, Hangzhou, CHINA, June 25, 2016

“The Rise of Mass Incarceration in the United States: Causes, Critiques, and Current Changes,” Renmin University, Beijing, CHINA, June 30, 2016

“Abolishing the American Death Penalty,” The Tabor Lectures, Valparaiso University School of Law, Valparaiso, IN, April 21, 2016 (with Jordan Steiker)

“The Future of the American Death Penalty,” Hugo Adam Bedau Memorial Lecture, Tufts University, Medford, MA, March 11, 2016

Keynote, “The Future of the Death Penalty,” Symposium: At a Crossroads: The Future of the Death Penalty, Michigan Journal of Law Reform, University of Michigan Law School, Ann Arbor, MI, February 6, 2016 (with Jordan Steiker)

“Conviction and Punishment,” Guest Lecturer, Criminal Cases: Reading Law with Literature (course by Professor Peter Gay), Princeton University, Princeton, NJ, December 9, 2015

“Reviewing the 2014 Term,” Guest Lecturer on Criminal Justice, Seminar with Justice Elena Kagan, Harvard Law School, Cambridge, MA, September 10, 2015

“Unpremeditated: The Supreme Court and Capital Punishment,” Public Lecture, Radcliffe Institute for Advanced Study, Harvard University, Cambridge, MA, April 22, 2015

“Racial and Ethnic Bias in Capital Punishment Law,” Conference: Latinos and the Death Penalty, Capital Punishment Center, University of Texas School of Law, Austin TX, April 10, 2015

“Michael Brown, Ferguson, and What Is To Be Done,” Panel Discussion, Harvard Law School, March 11, 2015

Appendix 2

Part II: Report to the ALI Concerning Capital Punishment*

Prepared at the Request of ALI Director Lance Liebman by Professors Carol S. Steiker (Harvard Law School) & Jordan M. Steiker (University of Texas)

Introduction and Overview

We have been asked by Director Lance Liebman to write a paper for the Institute to help it assess the appropriate course of action with regard to Model Penal Code § 210.6 (adopted in 1962 to prescribe procedures for the imposition of capital punishment). This request stems from two recent developments. First, the Institute has already undertaken a project revisiting the MPC sentencing provisions, but that project has not included any consideration of capital punishment. Second, at the Institute's Annual Meeting in May of 2007, Roger Clark and Ellen Podgor moved "That the Institute is opposed to capital punishment." In response to the motion, an Ad Hoc Committee on the Death Penalty was convened, and in light of that committee's deliberations, Director Liebman gave us the following charge: "to review the literature, the case law, and reliable data concerning the most important contemporary issues posed by the ultimate question of retention or abolition of the death penalty and, if retained, what limitations should be placed on its use and what procedures should be required before that sentence is imposed. Another way of asking the question is this: Is fair administration of a system of capital punishment possible?" (Program Committee Recommendation Regarding the Death Penalty, Dec. 3, 2007).

The possible approaches that the Institute might take with regard to § 210.6 at the present time were identified in Dan Meltzer's memorandum on behalf of the Ad Hoc Committee on the Death Penalty (Report on ALI Consideration of Issues Relating to the Death Penalty, Oct. 2, 2007): 1) revise § 210.6, 2) call for abolition, or 3) withdraw § 210.6. Although each of these options obviously allows for various permutations, we agree that these three options mark the Institute's primary choices of action. In light of the difficulties, elaborated below, that would be raised by either the Institute's attempt to revise § 210.6 or the Institute's embrace of an unadorned call for abolition, we believe that the soundest course of action for the Institute would be withdrawal of § 210.6 with an accompanying statement to the effect that, in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for

* This Report is reproduced in its entirety and has not been altered from its original content as submitted to the ALI

administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option.

This choice comes at a time of widespread reflection about American capital punishment. On the one hand, popular political support for the death penalty appears to remain relatively high, with opinion polls reporting stable majorities (about 70%) embracing the death penalty on a question that asks “Are you in favor of the death penalty for a person convicted of murder?” Thirty-six states presently authorize the death penalty (as well as the federal government), twenty-four of those states have at least ten inmates on death row, and nineteen of those states have conducted at least ten executions over the past forty years. At the same time, however, use of the death penalty (in terms of executions and especially death sentences) has declined significantly in recent years. Nationwide executions reached a modern-era (post-1976) high of 98 in 1998; the past three years have seen significantly lower totals – 53 (2006), 42 (2007), and 34 (2008 – as of Nov. 20). Nationwide death sentences have dropped even more precipitously, from modern-era highs of around 300 in the mid-1990s (315 (1994), 326 (1995), 323 (1996)), to modern-era lows in each of the past four years (140 (2004), 138 (2005), 115 (2006), 110 (2007)). In addition, executions during the modern era have been heavily concentrated in a small number of states, with five states (Texas (422), Virginia (102), Oklahoma (88), Florida (66) and Missouri (66)) accounting for about two-thirds of the executions nationwide (744/1133). Several states, including California and Pennsylvania, have large death-row populations (CA = 667, PA = 228) but very few executions in the modern era (CA = 13, PA = 3). This snapshot captures both the continuing political support for the death penalty as an available punishment but also significant ambivalence about its use in practice. Although different in its particulars, this snapshot shares some similarities to the state of the American death penalty almost a half century ago when the Institute last addressed capital punishment.

The Institute’s initial involvement in American capital punishment resulted in its promulgation of § 210.6 of the Model Penal Code in 1962. As the Meltzer memorandum recounts, the drafters of the MPC considered the problems plaguing the then-prevailing death penalty practices. The provision sought to ameliorate concerns about the arbitrary administration of the punishment and the absence of meaningful guidance in state capital statutes. The MPC provision was essentially ignored until the Supreme Court invalidated all existing capital statutes in *Furman v. Georgia*¹ in 1972. *Furman* raised concerns about the arbitrary and discriminatory administration of the death penalty. These concerns stemmed from the interplay of extremely broad death eligibility in state schemes, the fact of its rare imposition, and the absence of any standards guiding charging or

1 408 U S 238 (1972)

sentencer discretion. After *Furman*, states sought to resuscitate their capital statutes by revising them to address the concerns raised in *Furman*; many of the states turned to § 210.6 as a template for their revised statutes, hoping in part that the prestige of the Institute would help to validate these new efforts. In the 1976 cases addressing five of the revised statutes, state advocates drew particular attention to the fact that many of their provisions were modeled on § 210.6. The Court in turn relied on the expertise of the Institute – particularly its view that guided discretion could improve capital decisionmaking – when it upheld the Georgia, Florida, and Texas statutes.² Those statutes, and the decisions upholding them, provided the blueprint for the modern American death penalty.

The stance that the Court took in 1976 was provisional; it then adopted a role of continuing constitutional oversight of the administration of capital punishment. Each year the Court has granted review in a substantial number of capital cases, and the Court has continually adjusted its regulatory approach to prevailing capital practices. It is clear that the Court’s attempt to regulate capital punishment – largely on the model provided by the MPC – has been unsuccessful on its own terms. The guided discretion experiment has not solved the problems of arbitrariness and discrimination that figured so prominently in *Furman*; nor has the Court’s regulation proven able to ensure the reliability of verdicts or the protection of fundamental due process in capital cases. An abundant literature, reviewed below, reveals the continuing influence of arbitrary factors (such as geography and quality of representation) and invidious factors (most prominently race) on the distribution of capital verdicts. Most disturbing is the evidence of numerous wrongful convictions of the innocent, many of whom were only fortuitously exonerated before execution, and the continuing concern about the likelihood of similar miscarriages of justice in the future. These failures of constitutional regulation are due in part to the inherent difficulty and complexity of the task of rationalizing the death penalty decision, given the competing demands of even-handed administration and individualized consideration. Moreover, such a difficult task is compounded by deeply

2 *Gregg v Georgia*, 428 U S 153, 193 (1976) (opinion of Stewart, Powell, and Stevens, JJ) (“While some have suggested that standards to guide a capital jury’s sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded ‘that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case’) (emphasis in original) (quoting ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959)) (footnote omitted) (the citation to “§ 201.6” rather than to “§ 210.6” reflects the change in numbering from the 1959 draft to the 1962 Code); *Proffitt v Florida*, 428 U S 242, 247–48 (1976) (opinion of Stewart, Powell, and Stevens, JJ) (describing Florida statute as “patterned in large part on the Model Penal Code”); *Jurek v Texas*, 428 U S 262, 270 (1976) (opinion of Stewart, Powell, and Stevens, JJ) (citing Model Penal Code to support its conclusion that the narrowing of capital murder in the Texas statute serves much the same purpose as the use of aggravating factors in Florida and Georgia)

rooted institutional and structural obstacles to an adequate capital justice process. Such obstacles include the intense politicization of the capital justice process, the inadequacy of resources for capital defense services, and the lack of meaningful independent federal review of capital convictions.

In many legal contexts, the identification of problems in the administration of justice and obstacles to reform would counsel in favor of the Institute's undertaking a reform project in order to promote needed improvement. The administration of capital punishment, however, presents a context highly unfavorable for a successful law reform project, for several related reasons.

First, numerous other organizations have already undertaken to study the administration of capital punishment, both at the state and the national level. These studies have generated an enormous amount of raw data and a large body of proposed reforms (about which there is a substantial degree of agreement from a variety of sources). A large number of diverse states have undertaken systematic self-studies of the administration of their systems of capital punishment in the recent past. For example, in 2001, Governor George Ryan of Illinois appointed a blue-ribbon, bi-partisan commission to conduct a comprehensive study his state's administration of capital punishment after 13 exonerations from Illinois' death row.³ In 2004, a task force of the New Mexico State Bar undertook a comprehensive study of capital punishment in that state.⁴ The legislatures of a number of other states have also undertaken systematic studies of their death penalty systems, including Connecticut in 2001,⁵ North Carolina in 2005,⁶ New Jersey in 2006,⁷ Tennessee in 2007,⁸ and Maryland in 2008.⁹ In addition to these comprehensive studies, virtually every death penalty state has undertaken one or more smaller investigations into various aspects of their capital justice system (such as cost, racial disparities, forensic evidence processing, etc.).

3 See <http://www.idoc.state.il.us/ccp/index.html> for a copy of the Executive Order, a list of Commission Members, and the Commission's final report. Two years later, Governor Mitt Romney of Massachusetts (an abolitionist state) took a similar step in appointing a blue ribbon commission; the Massachusetts Commission was charged with determining how to create a "fool proof" death penalty statute that would avoid the erroneous conviction and execution of murderers. See http://www.cjpc.org/dp_govs_commission.htm

4 See <http://www.nmbar.org/Attorneys/lawpubs/TskfrDthPnltyrpt.pdf> for a copy of the Task Force's final report

5 See http://www.ct.gov/.../commission_on_the_death_penalty_final_report_2003.pdf for a copy of the Connecticut Commission's final report

6 See <http://www.deathpenaltyinfo.org/node/1557> (20 members of the North Carolina House of Representatives appointed to undertake study the administration of the death penalty)

7 See http://www.njleg.state.nj.us/committees/njdeath_penalty.asp New Jersey abolished the death penalty in 2007

8 See http://www.thejusticeproject.org/press/tn_death_penalty_study_bill_passed/ (16 member expert committee appointed in Tennessee)

9 See <http://www.deathpenaltyinfo.org/node/2336> (commission appointed to study racial, socio economic, and geographical disparities, the execution of the innocent, and cost issues relating to the death penalty in Maryland)

The most wide-ranging studies to date are those conducted by the American Bar Association in conjunction with its call for a nationwide moratorium on capital punishment in 1997. In the wake of the adoption of its moratorium resolution, the ABA developed a publication entitled *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, which was intended to serve as "Protocols" for jurisdictions undertaking reviews of death penalty-related laws and processes. The ABA, as part of its Death Penalty Moratorium Implementation Project, has recently completed a three-year study of eight states to determine the extent to which their capital punishment systems achieve fairness and provide due process.¹⁰ A review of the ABA's research and the state self-studies together strongly suggests that the death penalty is not an area in which the Institute can measurably contribute by conducting new research or compiling or explicating existing research.

Second, there is also reason to be skeptical that the Institute will be able to promote needed death penalty reform by adding its voice, with the expertise and prestige that is associated with it, to influence political actors. Capital punishment has remained an issue strongly resistant to reform through the political process in most jurisdictions. Consider first the reforms contained in § 210.6 itself. Although adopted by the Institute in 1962, § 210.6 was ignored in the political realm for a decade, until the Supreme Court constitutionally invalidated capital punishment in 1972, at which point § 210.6 was pressed into service by state legislatures in order to revive the moribund penalty. The ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, originally adopted in 1989 and revised in 2003, have likewise failed to succeed in the political realm; indeed, the ABA's Death Penalty Moratorium Implementation Project found in 2007 that not a single one of the eight states that it studied were fully in compliance with any aspect of the ABA *Guidelines* studied. (See discussion in section on "Inadequacy of Resources, *infra*.) Perhaps most telling is the view of Professor Joseph Hoffman, someone who has devoted enormous time and energy to death penalty reform, spearheading death penalty reform efforts in both Illinois and Indiana and serving as Co-Chair and Reporter for the Massachusetts Governor's Council on Capital Punishment. Hoffman served as a member of an advisory group to discuss an earlier draft of this paper, and he strongly expressed the view that seeking reform of capital punishment in the political realm is futile. This is a striking position to take by one who is not morally opposed to the death penalty and who has worked on numerous reform projects. But Hoffman cited as grounds for his change of heart the example of Illinois, in which there were confirmed wrongful convictions in capital cases, a sympathetic Governor, and a bi-partisan reform commission, but still strong resistance in the state

¹⁰ See <http://www.abanet.org/moratorium/> for the full reports of the ABA Moratorium Implementation Project

legislature to reforms specifically targeted at capital punishment. In short, serious concerns about efficacy in the political realm militate against the undertaking of a new reform effort by the Institute.

Moreover, some of the structural problems in the administration of capital punishment are not the sort of problems that the Institute can address with its legal expertise. While standards for defense counsel, for example, might be considered within the purview of the Institute's expertise, the problem of the intense politicization of the capital process – arising from the decentralization of criminal justice authority within states, the political accountability of many of the key actors in the capital justice system, and the sensationalism of death cases in the media – is a problem largely beyond the reach of legal reform.

Finally, were the Institute to take on a death penalty reform project despite the likelihood of ineffectiveness in the political realm and the fact that some of the underlying problems are not amenable to legal reform, it would run the risk not merely of failing to improve the death penalty, but also of helping to entrench or legitimate it. The undertaking of a reform project, despite its impetus in the flaws of current practice, might be understood as an indication that “the fundamentals” of the capital justice process are sound, or at least remediable. If the Institute upon reflection concludes, as this report suggests, that the administration of capital punishment is beset by problems that cannot be remedied by even an ambitious reform project, the Institute should say so, rather than invest its own time and resources and the hopes of reformers, in a project that will not succeed but may delay the recognition of failure.

We also recommend against the Institute's adoption of the Clark-Podgor motion declaring “[t]hat the Institute is opposed to capital punishment.” As this report reflects, our study of capital punishment focuses on its contemporary administration in the United States and the prevailing obstacles to institutional reform. We did not understand our charge from the Institute to encompass review of moral and political arguments supporting or opposing the death penalty as a legitimate form of punishment. Obviously there is deep disagreement along these dimensions regarding the basic justice of the death penalty. Some supporters view the death penalty as retributively justified (or indeed required). Other supporters maintain that the death penalty deters violent offenses and should be embraced on utilitarian grounds, especially in light of some recent empirical work purporting to establish its deterrent value.¹¹ Opponents generally reject the retributive argument and insist that capital punishment violates human dignity or vests an intolerable power in the State over the individual. Some opponents reject the empirical claims of deterrence and advance contrary claims of a

¹¹ See generally Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 Ann Rev L & Soc Sci 151 (2005) (reviewing recent empirical studies and their critics)

“brutalization effect” in which executions actually reduce inhibitions toward violent crime.

Resolution of these competing claims falls outside the expertise of the Institute. The Institute is well-positioned to evaluate the contemporary administration and legal regulation of the death penalty. Moreover, the Institute is well-suited to evaluate the success, or lack thereof, of the MPC death penalty provisions in light of their subsequent adoption (in whole or part) by many jurisdictions. If, in its review of the prevailing system and of the prospects for securing a minimally adequate capital process, the Institute were to conclude that the death penalty should not be a penal option, the Institute should frame its conclusion to reflect the basis for its judgment. Endorsement of the Clark-Podgor motion might well be understood to reflect a moral or philosophical judgment rather than a judgment about the inadequacy of prevailing or prospective institutional arrangements to satisfy basic requirements of fairness and accuracy. That perception of the Institute’s position would be inconsistent with the focus of this report (and the questions propounded by the Program Committee Recommendation Regarding the Death Penalty) and could possibly undermine the authority of the Institute’s voice on this issue.

The remaining question for the Institute is whether to withdraw § 210.6, and if so, whether to include an accompanying statement regarding the withdrawal. The case for withdrawal is compelling and reflects a consensus among the Institute’s members who have spoken to the issue thus far. At the outset, it should be noted that several provisions in § 210.6 have been rendered unconstitutional by rulings of the U.S. Supreme Court in the years since 1962. For example, section 210.6’s failure to require a jury determination of death eligibility conflicts with the Supreme Court’s recognition of a Sixth Amendment right to such a determination;¹² one of § 210.6’s aggravating factors (“the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity”) has been deemed to be impermissibly vague;¹³ and section 210.6’s failure to identify mental retardation as a basis for exemption from capital punishment violates the Court’s recent Eighth Amendment proportionality jurisprudence.¹⁴ These specific defects could be corrected, but more fundamentally § 210.6 is simply inadequate to address the endemic flaws of the current system. Section 210.6, which in many respects provided the template for contemporary state capital schemes, represents a failed attempt to rationalize the administration of the death penalty and, for the reasons we discuss in greater detail below, its adoption rested on the false assumption that carefully-worded guidance to capital sentencers would meaningfully limit arbitrariness and discrimination in the administration of the American death penalty.

12 Ring v Arizona, 536 U S 584 (2002)

13 Godfrey v Georgia, 446 U S 420 (1980)

14 Atkins v Virginia, 536 U S 304 (2002)

Given the prevailing problems in the administration of the death penalty and the discouraging prospects for successful reform, we recommend that the Institute issue a statement accompanying the withdrawal of § 210.6 calling for the rejection of capital punishment as a penal option under current circumstances (“In light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option.”). Such a statement would reflect the view that the death penalty should not be imposed unless its administration can satisfy a reasonable threshold of fairness and reliability.

Mere withdrawal of § 210.6, without such an accompanying statement, would pose two problems. First, the absence of any explanation might suggest that the Institute is simply acknowledging specific defects in the section, or that the Institute believes that the problems afflicting the administration of the death penalty are discrete and amenable to adequate amelioration. Second, and more importantly, the Institute’s role is to speak directly and forthrightly on policy questions within its expertise. If the Institute is persuaded that the death penalty cannot be fairly and reliably administered in the current structural and institutional setting, it should say so.

Of course, many of the problems in the capital justice system exist to some degree in the broader criminal justice system as well. Why should these problems call for the rejection of the death penalty as a penal option if such problems could not justify elimination of criminal punishment altogether? Four considerations suggest the distinctiveness of the capital context. First, unlike incarceration, capital punishment is not an essential part of a functioning criminal justice system (as reflected by its absence in many localities, states and, indeed, many countries). While many of the same problems that afflict the prevailing capital system are also present in the non-capital system, the deficiencies of the non-capital system must be tolerated because the social purposes served by incarceration cannot otherwise be achieved. Second, many of the problems undermining the fair and accurate administration of criminal punishment are more pronounced in capital cases. For example, the distorting pressures of politicization exist in both capital and non-capital cases, but the high visibility and symbolic salience of the death penalty heightens these pressures in capital litigation. The inadequacy of resources and the absence of meaningful supervision of counsel are also prevalent throughout the criminal justice system, but these problems appear with greater regularity and severity on the capital side as a consequence the special training, experience, and funding necessary to ensure even minimally competent capital representation. Third, the irrevocability of the death penalty counsels against accepting a system with a demonstrably significant rate of error. Evidence suggests a higher rate of erroneous convictions in capital versus non-capital cases, and there is little reason to believe that the problem of wrongful convictions and executions

will be solved in the foreseeable future. Fourth, deficiencies within the capital system impose significant and disproportionate costs on the broader legitimacy of the criminal justice system. In light of the high visibility and high political salience of capital cases, the arbitrary or inaccurate imposition of the death penalty undermines public confidence in our institutions and generates a distinctive and more damaging type of disrepute than similar problems in non-capital cases.

What follows below is a more thorough account of the existing problems in capital practice, the various efforts to address those problems, and the prospects for meaningful reform. Part I evaluates the course of constitutional regulation over the past three decades. The remaining sections examine the underlying problems and structural barriers that have undermined regulatory efforts (Part II: The Politicization of Capital Punishment; Part III: Race Discrimination; Part IV: Juror Confusion; Part V: The Inadequacy of Resources, Especially Defense Counsel Services, in Capital Cases; Part VI: Erroneous Conviction of the Innocent; Part VII: Inadequate Enforcement of Federal Rights; Part VIII: The Death Penalty's Effect on the Administration of Criminal Justice). Of course, it is possible to improve discrete aspects of the capital justice process through incremental reform. But achieving the degree of improvement that would be necessary to secure a minimally adequate system for administering capital punishment in the United States today faces insurmountable institutional and structural obstacles. Those obstacles counsel against the Institute's undertaking a reform project and in favor of the Institute's recognition of the inappropriateness of retaining capital punishment as a penal option.

I. The Inadequacies of Constitutional Regulation

The Supreme Court's constitutional regulation of capital punishment, which commenced in earnest with the Court's temporary invalidation of capital punishment in *Furman v. Georgia* in 1972¹⁵ and its reauthorization of capital punishment in *Gregg v. Georgia* in 1976,¹⁶ has produced some significant advances, both substantively and procedurally, in the administration of the death penalty. Indeed, most of these advances track the requirements of § 210.6, which served as a template for many states in reforming their capital schemes to avoid constitutional invalidation. For example, like the MPC, most states try to guide capital sentencing discretion through consideration of "aggravating" and "mitigating" factors in response to the *Furman* Court's rejection of "standardless" capital sentencing discretion and the *Gregg* Court's approval of "guided discretion." Such guidance seeks to avoid the arbitrariness that was guaranteed by the pre-

¹⁵ 408 U.S. 238

¹⁶ 428 U.S. 153. See also *Gregg's* four accompanying cases: *Proffitt*, 428 U.S. 242; *Jurek*, 428 U.S. 262; *Woodson v. North Carolina*, 428 U.S. 280 (1976); and *Roberts v. Louisiana*, 428 U.S. 325 (1976).

Furman practice of instructing juries merely that the sentencing decision was to be made according to their conscience, or in their sole discretion, without any further elaboration. By invalidating the death penalty for rape in 1977¹⁷ and extending that invalidation to the crime of child rape this past Term,¹⁸ the Supreme Court, again like the MPC, has limited capital punishment to the crime of murder,¹⁹ in comparison to the pre-*Furman* world in which death sentences for rape, armed robbery, burglary and kidnapping were authorized and more than occasionally imposed. The Court recently has categorically excluded juveniles and offenders with mental retardation from the ambit of the death penalty.²⁰ Although the Court has never held that bifurcated proceedings (separate guilt and sentencing phases) are constitutionally required,²¹ post-*Furman* statutes have made bifurcation the norm, and it would likely be held to be a constitutional essential today, should the issue ever arise.

Despite these genuine improvements to the administration of capital punishment, constitutional regulation has proven inadequate to address the concerns about arbitrariness, discrimination, and error in the capital justice process that led to the Court's intervention in the first place. At its worst, constitutional regulation is part of the problem. When the Court requires irreconcilable procedures, its own conflicting doctrines doom its efforts to failure. Such conflicts have led several Justices to reject the Court's regulatory efforts as unsustainable. In many more instances, the Court's doctrine, though it may recognize serious threats to fairness in the process or recognize important rights, fails to provide adequate mechanisms to address the threats or vindicate the rights. Some of these inadequacies have led additional Justices to defect in various ways from the Court's death penalty doctrine. Finally, the existence of an extensive web of constitutional regulation with minimal regulatory effect stands in the way of *non*-constitutional legislative reform of the administration of capital punishment – not only because such reform is generally extremely unpopular politically, but also because political actors and the general public assume that constitutional oversight by the federal courts is the proper locus for ensuring the fairness in capital sentencing and that the lengthy appeals process in capital cases demonstrates that the courts are doing their job (indeed, maybe even *over*-doing their job, considering how long cases take to get through the

17 *Coker v Georgia*, 433 U S 584 (1977)

18 *Kennedy v Louisiana*, 128 S Ct 2651 (2008)

19 The Court limited its holding to crimes against persons, and put to one side crimes against the state such as treason or terrorism. *See id.* at 2659

20 *Atkins v Virginia*, 536 U S 304 (2002) (offenders with mental retardation); *Roper v Simmons*, 543 U S 551 (2005) (juvenile offenders). The MPC categorically excludes juvenile offenders, and addresses mental retardation by requiring a life sentence when the court is satisfied that “the defendant’s physical or mental condition calls for leniency.” § 211 6(1)(e)

21 *McGautha v California*, 402 U S 183 (1971). The MPC requires bifurcated proceedings § 210 6(2)

entire review process). What follows is a discussion of the four most serious inadequacies in the constitutional regulation of capital punishment and their implications for reform efforts.

1. *The central tension between guided discretion and individualized sentencing.*—The two central pillars of the Court’s Eighth Amendment regulation of capital punishment are the twin requirements that capital sentencers be afforded sufficient guidance in the exercise of their discretion and that sentencers at the same time not be restricted in any way in their consideration of potentially mitigating evidence. The first requirement led the Court to reject aggravating factors that rendered capital defendants death eligible but failed to furnish sufficient guidance to sentencers – most notably, factors similar to MPC § 210.6(3)(h): “The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.” The Court rejected such vague factors as insufficient either to narrow the class of those eligible for capital punishment or to channel the exercise of sentencing discretion.²² The second requirement led the Court to reject statutory schemes that limited sentencers’ consideration of any potentially mitigating evidence, either by restricting mitigating circumstances to a statutory list,²³ or by excluding full consideration of some potentially relevant mitigating evidence.²⁴

From the start, the tension between the demands of consistency and individualization were apparent. As early as a year prior to *Furman*, the lawyers who litigated *Furman* and *Gregg* argued that unregulated mercy was essentially equivalent to unregulated selection: “‘Kill him if you want’ and ‘Kill him, but you may spare him if you want’ mean the same thing in any man’s language.”²⁵ After more than a decade of attempting to administer both requirements, several members of the Court with widely divergent perspectives came to see the incoherence of the foundations of their Eighth Amendment doctrine. In 1990, Justice Scalia argued that the second doctrine – or “counterdoctrine” – of individualized sentencing “exploded whatever coherence the notion of ‘guided discretion’ once had.”²⁶ Justice Scalia rejected the view that the two doctrines were merely in tension rather than flatly contradictory: “To acknowledge that ‘there perhaps is an inherent tension’ [between the two doctrines] is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing ‘twin objectives’ is rather like referring to the twin objectives of good and evil. They cannot be

22 See, e.g., *Godfrey v Georgia*, 446 U S 420 (1980); *Maynard v Cartwright*, 486 U S 356 (1988)

23 See *Lockett v Ohio*, 438 U S 586 (1978)

24 See *Penry v Lynaugh*, 492 U S 303 (1989)

25 See Brief Amici Curiae of the NAACP Legal Defense and Education Fund, Inc., and the National Office for the Rights of the Indigent at 69, *McGautha v California*, 402 U S 183 (1971) (No. 71 203)

26 *Walton v Arizona*, 497 U S 639, 661 (1990) (Scalia, J., concurring)

reconciled.”²⁷ As a result, Justice Scalia (later joined by Justice Thomas), has chosen between the two commands and rejected the requirement of individualized sentencing as without constitutional pedigree: “Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer’s discretion has been unlawfully restricted.”²⁸

Four years later, Justice Blackmun came to same recognition of the essential conflict between the doctrines, but reached a different conclusion. Justice Blackmun found himself at a loss to imagine any sort of reform that could mediate between the two conflicting commands: “Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer’s discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would ‘thro[w] open the back door to arbitrary and irrational sentencing.’”²⁹ Unlike Justices Scalia and Thomas, however, Justice Blackmun did not resolve to jettison either constitutional command – not merely because of the demands of *stare decisis*, but “because there is a heightened need for both in the administration of death.”³⁰ Consequently, Justice Blackmun concluded that “the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.”³¹

One Justice’s response to the conflict between the need for guidance and the need for individualization was to call for limiting eligibility for capital punishment to a very small group of the worst of the worst – “the tip of the pyramid” of all murderers, in the words of Justice Stevens.³² If unguided mercy reprieves some from this group, there will still be arbitrariness in choosing among the death eligible, but it will operate on a much smaller scale, and with greater assurance that those who make it to the “tip” belong in the group of the death eligible. However, even if it were agreed that limiting arbitrariness to a smaller arena is sufficient to mediate the conflict between guidance and discretion, this solution is neither constitutionally prescribed nor politically feasible. The Court’s “narrowing” requirement is formal rather than quantitative; there is no requirement that

27 *Id.* at 664 (citations omitted)

28 *Id.* at 673

29 *Callins v Collins*, 510 U S 1141, 1155 (1994) (Blackmun, J, dissenting from denial of certiorari) (citation omitted)

30 *Id.*

31 *Id.* at 1157

32 *See Walton*, 497 U S at 716 18 (Stevens, J, dissenting)

any state restrict the ambit of the death penalty to a group of any particular size or with any particular aggravating attributes. And in the absence of a constitutional command, the scope of most capital statutes remains extraordinarily broad. One study, for example, of the Georgia statute upheld in *Gregg* as a model of guided discretion, found that 86% of all persons convicted of murder in Georgia over a five-year period after the adoption of Georgia's new statute were death-eligible under that scheme,³³ and that over 90% of persons sentenced to death before *Furman* would also be deemed death-eligible under the post-*Furman* Georgia statute.³⁴ The widespread authorization of the death penalty for felony murder, murder for pecuniary gain, and murders that could be described as "cold-blooded," "pitiless," and the like³⁵ have ensured a wide scope of death eligibility, and capital statutes have tended to grow rather than shrink over time, for reasons that we discuss in greater detail below. (See section on "Politicization.")

The conflict between guidance and individualization thus has been resolved by the Court not by Justice Stevens' suggestion of strict narrowing, but rather by reducing the requirement of guidance to a mere formality. States must craft statutes that narrow the class of the death eligible to some subset – however large and however defined – of the entire class of those convicted of the crime of murder. In contrast, the Court has enforced the requirement of individualization with greater zeal and demandingness. Consequently, the structure of capital sentencing today is surprisingly similar to the pre-*Furman* structure (bifurcation aside). The sentencer must determine whether the defendant is death eligible – today not merely by conviction of a capital offense but also by the additional finding of an aggravating factor. These factors can be numerous, broad in scope, and still quite vague; indeed, the Court has held that the aggravator can duplicate an element of the offense of capital murder (in which case the aggravator adds nothing to the conviction).³⁶ After this fairly undemanding finding, the inquiry opens up into pre-*Furman* sentencing according to conscience: the sentencer is asked whether any mitigating circumstances of any type, statutory or non-statutory, call for a sentence less than death. This sentencing structure, which dominates the post-*Furman* world, is not accidental, nor is it the product of deliberate undermining of constitutional norms by states; rather, it is the *product* of constitutional regulation and thus fairly impervious to all but constitutional reform.

33 David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 268 n.31 (1990)

34 *Id.* at 102

35 Although the Court initially invalidated vague aggravators like "heinous, atrocious or cruel," it later permitted judicially imposed "narrowing constructions" of such aggravators to save them from unconstitutionality. For example, in *Arave v. Creech*, 507 U.S. 463 (1993), the Court upheld Idaho's aggravator of "utter disregard for human life" by a narrowing construction that asked sentencers whether the defendant acted as a "cold-blooded, pitiless slayer."

36 See *Lowenfield v. Phelps*, 484 U.S. 231 (1988)

We share Justice Blackmun's skepticism about the possibility of adequate constitutional mediation of the needs for heightened guidance and individualization in the capital context. As for Justice Steven's suggestion of the possibility of sharply narrowing the scope of capital punishment, Justice Harlan said it best in 1971, in explaining the Court's rejection of challenges to standardless capital sentencing under the Due Process clause:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need.³⁷

As for Justice Scalia's suggestion of abandoning the individualization requirement as a constitutional essential, we think the 1976 *Woodson* plurality explanation for why individualization is required remains compelling:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.³⁸

In the absence of a constitutional solution, states (and Congress) will continue to operate capital sentencing schemes that fail to adequately address the concerns about arbitrariness and discrimination that led to constitutional intervention in the first instance.

2. *Racial disparities and constitutional remedies.*—The failure of constitutionally mandated guided discretion to offer much in the way of guidance might be less worrisome if there were other constitutional avenues to address discriminatory outcomes. After all, the challenge to standardless capital sentencing that led to the constitutional requirement of guided discretion was premised in large part on the concern that the absence of guidance gave too much play to racial discrimination. The NAACP Legal Defense Fund, the organization that spearheaded the constitutional litigation

37 *McGautha*, 402 U.S. at 204, 208

38 428 U.S., 304 (plurality opinion of Stewart, Stevens, and Powell, JJ)

challenging the death penalty that culminated in *Furman* and *Gregg*, was also involved in litigation under the Equal Protection clause directly challenging racial disparities in the distribution of death sentences. For the first few decades of constitutional regulation of capital punishment, however, the Court avoided this issue, deciding cases that raised it on entirely non-racial grounds.³⁹ Finally, in 1987, the Court took up the issue directly in *McCleskey v. Kemp*.⁴⁰

McCleskey involved a constitutional challenge to the imposition of the death penalty based on an empirical study conducted by Professor David Baldus and his associates (the Baldus study) using multiple regression statistical analysis to study the effect of the race of defendants and the race of victims in capital sentencing proceedings in Georgia. The study examined over 2,000 murder cases that occurred in Georgia during the 1970's. The researchers used a number of different models that took account of numerous variables that could have explained the apparent racial disparities on nonracial grounds. The study found a very strong race-of-the-victim effect and a weaker race-of-the-defendant effect: after controlling for the nonracial variables, the study concluded that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks, and that black defendants who killed white victims had the greatest likelihood of receiving the death penalty.

The Court rejected McCleskey's challenge to his death sentence on both Equal Protection and Eighth Amendment grounds. The Court assumed for the sake of argument the validity of the Baldus study's statistical findings, but held that proof of racial disparities in the distribution of capital sentencing outcomes in a geographic area in the past was insufficient to prove racial discrimination in a later case. Proof of unconstitutional discrimination, held the Court, requires proof of discriminatory *purpose* on the part of the decisionmakers in a particular case. Moreover, in light of the importance of discretion in the administration of criminal justice, proof of such purpose must be "exceptionally clear."⁴¹ In light of this heavy burden, the Court found the Baldus study's results "clearly insufficient" to prove discriminatory purpose under the Equal Protection clause.⁴² As for the Eighth Amendment challenge, the Court held that the "discrepancy indicated by the Baldus study is a far cry from the major systemic defects identified in *Furman*."⁴³ The Court concluded that the "risk of racial bias" demonstrated by the Baldus study was not "constitutionally significant."⁴⁴

39 See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977); *Maxwell v. Bishop*, 398 U.S. 362 (1970)

40 481 U.S. 279 (1987)

41 *Id.* at 297

42 *Id.*

43 *Id.* at 313

44 *Id.*

In part, the Court's rejection of McCleskey's claim was informed by its concern that there might be no plausible constitutional remedy short of abolition: "McCleskey's claim . . . would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black."⁴⁵ (We discuss further the difficult problem of remedies for racial discrimination below in the section on "Race Discrimination.") But the Court's requirement of exceptionally clear proof of discriminatory purpose on the part of a particular sentencer makes constitutional challenges to intentional discrimination essentially impossible to mount. Not surprisingly, there have been no successful constitutional challenges to racial disparities in capital sentencing in the more than two decades since *McCleskey*, despite continued findings by many researchers in many different jurisdictions of strong racial effects. By rendering racial disparities in sentencing outcomes constitutionally irrelevant in the absence of more direct proof of discrimination, the Court has dispatched the problem of racial discrimination in capital sentencing from the constitutional sphere to the legislative one, where it has not fared well. (See "Race Discrimination," below.) Notably, Justice Powell, the author of the 5-4 majority opinion in *McCleskey*, repudiated his own vote only a few years later, when a biographer asked him upon his retirement if there were any votes that he would change, and he replied, "Yes, *McCleskey v. Kemp*."⁴⁶

In rejecting McCleskey's Eighth Amendment claim that the Baldus study demonstrated an unacceptable "risk" of discrimination, the Court relied in part on other "safeguards designed to minimize racial bias in the process."⁴⁷ Primary among these safeguards is the Court's *Batson* doctrine. In *Batson v. Kentucky*⁴⁸ – decided just one year prior to *McCleskey* – the Court eased the requirement for proving intentional discrimination in the exercise of peremptory strikes by shifting the burden to the prosecution to provide race neutral explanations for strikes when the nature or pattern of strikes in an individual case gave rise to a *prima facie* inference of discriminatory intent. *Batson* did in fact permit the litigation of many more claims of discrimination in the use of peremptory strikes than the earlier, more demanding *Swain* doctrine,⁴⁹ and the Court has been more vigorous in overseeing the enforcement of the *Batson* right in capital cases in recent years.⁵⁰

45 *Id.* at 293

46 David Von Drehle, *Retired Justice Changes Stand on Death Penalty: Powell Is Said to Favor Ending Executions*, Wash Post, June 10, 1994 (based on interview with John C. Jeffries, Jr., Justice Powell's official biographer)

47 *McCleskey*, 481 U.S. at 313

48 476 U.S. 79 (1986)

49 See *Swain v. Alabama*, 380 U.S. 202 (1965)

50 See *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008); *Miller El v. Dretke*, 545 U.S. 231 (2005); *Miller El v. Cockrell*, 534 U.S. 1122 (2002)

But the Court's reliance on *Batson* as a means of preventing racial discrimination in capital jury selection is profoundly misplaced. Studies of the effectiveness of *Batson* in reducing the race-based use of peremptory strikes have demonstrated only an extremely modest effect.⁵¹ This is not surprising in light of the incentives that exist to base peremptory strikes at least in part upon the race of prospective jurors and the ease with which "race neutral" explanations for strikes can be offered.

If the race-based use of peremptory strikes depended on racial hatred or the belief in the intrinsic inferiority of minority jurors, then there would undoubtedly be much less race-based use of peremptories than is evident today. However, there is clearly a great deal of what economists call "rational discrimination" in jury selection. Counsel on both sides make decisions about the desirability of jurors from particular demographic groups based on generalizations about attitudes that the group as a whole tends to hold. There is good reason, based on polling data, to believe that blacks as a group are more sympathetic to criminal defendants and less trusting of law enforcement than whites, and that blacks as a group are less supportive of capital punishment than whites. Moreover, in cases involving black defendants, there is reason to believe that black jurors may be more personally sympathetic to the defendant than white jurors and more likely to perceive "remorse" on the part of the defendant, a perception crucial to obtaining life verdicts in capital sentencings.⁵² Under such circumstances, capital prosecutors who harbor no personal racial animosity may well see strong reasons to use race as a proxy for viewpoint in using peremptory challenges, especially when they often have little other information to go on.

In implementing *Batson*, the Court has held that a prosecutor's race neutral explanation need not be "persuasive, or even plausible" – it must simply be sincerely non-racial.⁵³ It can be perilous for a prosecutor to offer as an explanation some aspect of a struck minority juror that is also true of white jurors whom the prosecutor failed to strike.⁵⁴ But one sort of explanation remains a virtually guaranteed race neutral explanation – an objection to a prospective juror's demeanor (e.g., the juror appeared hostile, nervous, bored, made poor eye contact, made too much eye contact, smiled or laughed inappropriately, frowned). Because no lawyer or judge can simultaneously monitor all of the prospective jurors' demeanors throughout all of voir dire, and because perceptions about the meaning of demeanor can vary, there is no way to disprove a prosecutor's claim that a particular juror

51 See, e.g., William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U Pa J Const L 171 (2001)

52 See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 Colum L Rev 1538 (1998)

53 *Purkett v Elem*, 514 U S 765, 768 (1995) (accepting the prosecutor's professed objection to the struck jurors' hairstyle and facial hair as an acceptable non racial reason)

54 These sorts of comparisons formed the basis for the reversals in *Miller El v. Dretke* and *Snyder*, *supra* note 50.

appeared more “hostile” to him than the others. To reject such an explanation, a trial judge would have to make a credibility determination against a prosecutor – something judges are not prone to do lightly and in the absence of any hard evidence. Moreover, prosecutors may offer such explanations not only from a calculated attempt to preserve a dubious strike, but also in some cases from an honest perception built on the foundations of “rational discrimination.” Starting from a belief that black jurors are more hostile to law enforcement or less supportive of the death penalty, a prosecutor in a capital case may genuinely believe that he or she is perceiving hostility from prospective minority jurors.

In short, there is little reason to put much faith in *Batson* as a strong protection against the racial skewing of capital juries. This skewing should concern us not merely because it inevitably affects perceptions about the fairness of the capital justice system, but because there is strong reason to believe that the race of capital jurors affects the outcomes of capital trials (just as there is reason to believe that the race of victims and defendants does).⁵⁵

3. *Innocence*.—Just as *McCleskey* effectively precludes challenges to racial discrimination in capital sentencing (at least challenges based on patterns of outcomes over time), the Court’s doctrine also makes virtually no place for constitutional consideration of claims of innocence. In *Herrera v. Collins*,⁵⁶ the Court rejected petitioner’s claim of actual innocence as a cognizable constitutional claim in federal habeas review. The Court held that while claims of actual innocence may in some circumstances open federal habeas review to other constitutional claims that would otherwise be barred from consideration, the innocence claims themselves are not generally cognizable on habeas. The Court assumed – without deciding – that a “truly persuasive” showing of innocence would constitute a constitutional claim and warrant habeas relief *if* no state forum were available to process such a claim.⁵⁷ But, the Court found that Herrera’s claim failed to meet this standard. More recently, the Court has suggested just how high a threshold its (still hypothetical) requirement of a “truly persuasive” showing of innocence would prove to be. In *House v. Bell*,⁵⁸ the petitioner sought federal review with substantial new evidence challenging the accuracy of his murder conviction, including DNA evidence conclusively establishing that semen recovered from the victim’s body that had been portrayed at trial as “consistent” with the defendant actually came from the victim’s husband, as well as evidence of a confession to the murder by the husband and evidence of a history of spousal abuse. The Court held that this strong showing of

55 See Bowers, et al., *Death Sentencing in Black and White*, supra note 51

56 506 U.S. 390 (1993)

57 *Id.* at 417

58 547 U.S. 518 (2006)

actual innocence was the rare case sufficient to obtain federal habeas review for petitioner's *other* constitutional claims that would otherwise have been barred, because no reasonable juror viewing the record as a whole would lack reasonable doubt. But even this high showing was inadequate, concluded the Court, to meet the "extraordinarily high" standard of proof hypothetically posited in *Herrera*.⁵⁹

This daunting standard of proof suggests that even if the Court does eventually hold that some innocence claims may be cognizable on habeas, such review will be extraordinarily rare. Thus, the problem of dealing with the possibility of wrongful convictions in the capital context (like the problem of dealing with patterns of racial disparity) has been placed in the legislative rather than the constitutional arena. The reliance on the political realm to deal with the issue of wrongful convictions is less troubling than such reliance on the issue of racial disparities, because there is far more public outcry about the former rather than the latter issue. But the problem of wrongful convictions in the capital context has proven to be larger and more intractable than might have been predicted. The large numbers of exonerations in capital cases may be due in part to the fact that many of the systemic failures that lead to wrongful convictions are likely to be more common in capital than other cases. Moreover, courts have been resistant both to providing convicted defendants with plausible claims of innocence the resources (including access to DNA evidence) necessary to make out their innocence claims, and to granting relief even when strong cases have been made. Finally, larger-scale reforms that might eliminate or ameliorate the problem of wrongful convictions are often politically unpopular, expensive, or of uncertain efficacy. (See section on "Erroneous Conviction of the Innocent," below.)

4. *Counsel*.—Unlike innocence, the problem of inadequate counsel has been squarely held to undermine the constitutional validity of a conviction. Despite the fact that "effective assistance of counsel" is a recognized constitutional right, the scope of the right and the nature of the remedy have precluded the courts from being able to ensure the adequacy of representation in capital cases. Perhaps in response to repeated accounts of extraordinarily poor lawyering in capital cases,⁶⁰ the Court recently has granted review and ordered relief in a series of capital cases raising ineffectiveness of counsel claims regarding defense attorneys' failure to investigate and present mitigating evidence with sufficient thoroughness⁶¹ – a development that

59 *Id.* at 555 (quoting *Herrera*)

60 *See, e.g.*, James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2103 (2000); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835 (1994); Marcia Coyle, et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, Nat'l L. J., June 11, 1990, at 30

61 *See Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005)

might be viewed as raising the constitutional bar for attorney performance, at least in the sentencing phase of capital trials.⁶² Nonetheless, constitutional review and reversal remain an inadequate means of ensuring adequate representation, both because the constitutional standard for ineffectiveness remains too difficult to establish in most cases, and because the remedy of reversal is too limited to induce the systemic changes that are necessary to raise the level of defense services.

One of the hurdles to regulating attorney competence through constitutional review is the legal standard for ineffective assistance of counsel. In crafting the governing standard in *Strickland v. Washington*,⁶³ the Court maintained that “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system.”⁶⁴ In light of the Sixth Amendment’s more modest goal of ensuring that the outcome of a particular legal proceeding crosses the constitutional threshold of reliability, the Court established a strong presumption in favor of finding attorney conduct reasonable under the Sixth Amendment, in order to prevent a flood of frivolous litigation, to protect against the distorting effects of hindsight, and to preserve the defense bar’s creativity and autonomy. This general deference was amplified for “strategic choices,” which the *Strickland* Court described as “virtually unchallengeable.”⁶⁵ Moreover, the Court declined to enumerate in any but the most general way the duties of defense counsel, instead deferring to general professional norms. Finally, the requirement that a defendant also prove “prejudice” from attorney error (a reasonable probability that the outcome of the trial would be different) necessarily immunizes many incompetent legal performances from reversal, if the guilt of the defendant is sufficiently clear.

The difficulty of meeting the legal standard, even in cases of manifestly incompetent counsel, is amplified by the procedural context in which such claims are made. Although there is often no legal bar to raising claims of ineffective assistance on direct appeal (when indigent defendants still have a constitutional right to appointed counsel), appellate review is appropriate only for record claims, where the basis for asserting ineffective assistance is a trial error evident from the transcript (such as failure to object to the

62 Compare the outcomes and analysis in *Williams*, *Wiggins*, and *Rompilla* to the Court’s earlier rejections of claims of ineffective representation in capital sentencing proceedings in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Burger v. Kemp*, 483 U.S. 776 (1987).

63 466 U.S. 668.

64 *Id.* at 689.

65 *Id.* at 690. Note that often the primary source of information in ineffective assistance litigation is trial counsel him or herself, who will often have obvious reasons to resist the implication of ineffectiveness and testify accordingly. Hence, the enormous deference to “strategic choices” allows attorneys who wish to justify their decisions at a later date an obvious means to do so, though the Court did qualify its deference by noting that “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* at 690-91.

introduction of prejudicial evidence by the state). Claims of ineffective assistance, however, routinely involve the presentation of factual evidence beyond the record – e.g., evidence about information that the defense attorney failed to discover or to introduce, evidence about the likely answers to questions that the defense attorney failed to pursue at trial, or evidence about the defense attorney’s interaction with the defendant. Such evidence must be developed in collateral proceedings, where the constitutional right to counsel runs out.⁶⁶ Although almost all states formally provide for counsel for indigent defendants in capital post-conviction proceedings,⁶⁷ there is virtually no monitoring of the performance of such counsel.⁶⁸ Moreover, should post-conviction counsel fail to perform adequately, *their* ineffectiveness does not preserve the claims that they are seeking to raise from state procedural bars, because there is no constitutional right to counsel in such proceedings.⁶⁹ The inadequacy of postconviction representation is compounded by the deferential review of state court decisions under the 1996 habeas statute (AEDPA), which seeks to ensure that state post-conviction proceedings are the primary venue for the litigation of non-record claims. The decline in the number of federal habeas grants of relief in the post-AEDPA era demonstrates the impact that AEDPA has had – an impact necessarily greatest on claims, like those of ineffective counsel, that will rarely see direct review.⁷⁰

The constitutional review and reversal of individual capital convictions is by its nature an inadequate tool for achieving the institutional changes that are necessary in the provision of indigent defense services in capital cases. On the same day that the Court announced the constitutional standard in *Strickland*, it decided a companion case, *United States v. Cronin*,⁷¹ which rejected a claim of ineffectiveness based on the circumstances faced by the

66 See *Murray v. Giarratano*, 492 U.S. 1 (1989) (rejecting constitutional right to representation for indigent prisoners seeking postconviction relief in capital cases)

67 Alabama is a notable exception

68 See Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wis. L. Rev. 31, 66 (although some states have informal means of monitoring the performance of postconviction counsel, only Florida requires such monitoring)

69 In *Coleman v. Thompson*, 501 U.S. 722 (1991), post conviction counsel’s failure to file a timely appeal from the denial of post conviction relief barred federal habeas review of petitioner’s claim regarding the ineffectiveness of his trial counsel. The Court did, however, note without deciding the question whether “there must be an exception [to *Giarratano*] in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction.” *Id.* at 755. The Court avoided the question by noting that the default in *Coleman*’s case happened on appeal from a merits denial of post conviction relief, and thus he had been afforded a forum for litigating his ineffectiveness claim.

70 Compare James Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-95* (2000), available at <http://www2.law.columbia.edu/instructionalservices/liebman/> (40% federal habeas reversal rate in capital cases during pre AEDPA period), with Nancy King, et al., *Habeas Litigation in U.S. District Courts* (2007) (12.5% federal habeas reversal rate in capital cases during post AEDPA period)

71 466 U.S. 648 (1984)

defense attorney in litigating the case (lack of time to prepare, inexperience, seriousness of the charges, etc.). The Court insisted that a defendant must identify particular prejudicial errors made by counsel, rather than merely identify circumstances that suggest that errors would likely be made. *Cronic* has widely been held by courts to preclude Sixth Amendment challenges to the institutional arrangements (fee structures, caseloads, availability of investigative or expert services, lack of training and experience, etc.) that lead to incompetent representation, except in the most extraordinary of circumstances.⁷² Without any ability to directly control fees, caseloads, resources, or training, courts conducting Sixth Amendment review of convictions can only reverse individual convictions based on individual errors. And even an extended period of substantial numbers of reversals on ineffectiveness grounds has failed to produce substantial reform in the provision of capital defense services. Despite the fact that “egregiously incompetent defense lawyering” was the most common reversible error in capital cases (39%) in a more than two-decade period (1973-1995) with an overall reversible error rate of 68%,⁷³ there is no reason to believe that these reversals promoted systemic reform. Indeed, the absence of systemic assurance of adequate counsel in capital cases formed a cornerstone of the American Bar Association’s call for a moratorium on executions in 1997, two years after the end of the studied period.⁷⁴

* * * * *

The best evidence of the inadequacies of constitutional regulation of capital punishment is the sheer number of Justices who have either abandoned the enterprise, in whole or in part, or raised serious questions about its feasibility. The attempt to regulate the capital justice process through constitutional supervision is not in its infancy; the Court has had nearly four decades of experience in implementing it. Notably, two of the four Justices who dissented in *Furman* in 1972 eventually came full circle and repudiated the constitutional permissibility of the death penalty. Justice Blackmun did so in a long and carefully reasoned dissent from denial of certiorari, concluding twenty-two years after *Furman*, that “the death penalty experiment has failed.”⁷⁵ Justice Powell did so in reviewing his career in an interview with his official biographer after his retirement. Justice Stevens, one of the three-Justice plurality that reinstated the death penalty in the 1976 cases, this past Term has concluded that the death penalty should be ruled unconstitutional, though he has committed himself to *stare decisis* in

⁷² See Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 Md L Rev 1433 (1999)

⁷³ Liebman, et al, *A Broken System*, *supra* note 70

⁷⁴ The text of the ABA moratorium and a copy of the supporting report are available at <http://www.abanet.org/moratorium/resolution.html>

⁷⁵ *Callins*, 510 U S, at 1145 (1994) (Blackmun, J, dissenting from denial of certiorari)

applying the Court's precedents.⁷⁶ In explaining his own change in constitutional judgment, Justice Stevens offers a long list of concerns about the administration of the death penalty and notes that the Court's 1976 decisions relied heavily on the now untenable belief "that adequate procedures were in place that would avoid the [dangers noted in *Furman*] of discriminatory application . . . arbitrary application . . . and excessiveness."⁷⁷ Justices Scalia and Thomas have repudiated the Court's Eighth Amendment jurisprudence as hopelessly contradictory and unable to promote guided discretion. Justices Kennedy, Souter, and Breyer each have authored opinions raising a variety of serious concerns about the administration of capital punishment and the ability of constitutional regulation to prevent injustice.⁷⁸ Finally, Justices Sandra Day O'Connor and Ruth Bader Ginsburg have both given speeches questioning the soundness of the capital justice process on the ground of inadequate provision of capital defense services.⁷⁹ We can think of no other constitutional doctrine that has been so seriously questioned both by its initial supporters and later generations of Justices who have tried in good faith to implement it. Such reservations strongly suggest that the constitutional regulation of capital punishment has not succeeded on its own terms.

The question remains whether the Institute should undertake a new law reform project to ameliorate the consequences of the Supreme Court's unsuccessful regime of constitutional regulation of capital punishment, given that the Institute's prior law reform project in this area (MPC § 210.6) played a role in initiating and shaping the Court's current approach. Militating against such a course of action is the fact that the problems currently afflicting the capital justice process are not addressable in the absence of larger scale political or institutional changes that are either impossible or

⁷⁶ See *Baze v Rees*, 128 S Ct 1520, 1552 (2008) (Stevens, J, concurring)

⁷⁷ *Id.* at 1550

⁷⁸ See *Kennedy v Louisiana*, 128 S Ct 2641, 2661 (2008) (emphasizing "the imprecision [in the definition of capital murder] and the tension between evaluating the individual circumstances and consistency of treatment" that plague the administration of the death penalty as a reason for not extending the penalty to cases in which the victim does not die) (majority opinion joined by Stevens, Souter, Ginsburg, and Breyer); *Kansas v Marsh*, 548 U S 163, 207 11 (2006) (emphasizing the risk of erroneous conviction in the current capital justice process as a reason to reject a capital scheme that required a death sentence when aggravating and mitigating evidence were in equipoise) (Souter dissent, joined by Stevens, Ginsburg, and Breyer); *Ring v Arizona*, 536 U S 584, 616 (2002) (emphasizing the continued division of opinion as to whether capital punishment is in all circumstances "cruel and unusual punishment" as currently administered as grounds for requiring jury sentencing in all capital cases) (Breyer concurrence for himself alone)

⁷⁹ In 2001, Justice O'Connor criticized the administration of capital punishment on the grounds of wrongful conviction and inadequate provision of defense services. See Associated Press, *O'Connor Questions Death Penalty*, NY Times, July 4, 2001. The same year, Justice Ginsburg told a public audience that she supported a state moratorium on the death penalty, noting that she had "yet to see a death case among the dozens coming to the Supreme Court on eve of execution stay applications in which the defendant was well represented at trial." Associated Press, *Ginsburg Backs Ending Death Penalty*, Apr 9, 2001, available at <http://www.truthinjustice.org/ginsburg.htm>

beyond the scope of an ALI-style law reform project. The scope of these problems – which we survey below – demonstrates that a more appropriate response by the Institute would be the withdrawal of § 210.6 with a statement calling for the rejection of capital punishment as a penal option.

II. The Politicization of Capital Punishment

Perhaps the most important feature of the landscape of capital punishment administration that imperils the success of any discrete law reform project is the intense politicization of the death penalty. Capital punishment (like the rest of criminal justice in the United States) is politicized *institutionally*, in that some or all of the most important actors in the administration of capital punishment are elected (with the exception of lay jurors). At the same time, capital punishment is politicized *symbolically*, in that it looms much larger than it plausibly should in public discourse because of its power as a focus for fears of violent crime and as political shorthand for support for “law and order” policies generally. These two aspects of politicization ensure that the institutional actors responsible for the administration of the capital justice process are routinely subject to intense pressures, which in turn contribute to the array of problems that we review below – e.g., inadequate representation, wrongful convictions, and disparate racial impact. There is little hope of successfully addressing these problems in the absence of profound change on the politicization front.

The vast majority of death penalty jurisdictions within the United States have elected rather than appointed prosecutors, and these prosecutors are usually autonomous decisionmakers in their own small locales (counties). Rarely is there any state or regional review of local decisionmaking or coordination of capital prosecutions. These simple facts of institutional organization generate enormous geographic disparities within most death penalty jurisdictions. In Texas, for example, Dallas County (Dallas) and Harris County (Houston), two counties with similar demographics and crime rates, have had very different death sentencing rates, with Dallas County returning 11 death verdicts per thousand homicides, while Harris County returns 19. One sees an even greater disjunction in Pennsylvania between Allegheny County (Pittsburgh) and Philadelphia County (Philadelphia), which have death verdict rates of 12 and 27 per thousand homicides, respectively. In Georgia, another significant death penalty state, the death sentencing rate ranges from 4 death verdicts per thousand homicides in Fulton County (Atlanta) to 33 in rural Muscogee County – a difference of more than 700%. Large geographic variations exist within many other states that are similarly uncorrelated with differences in homicide rates.⁸⁰ These

⁸⁰ See generally James S. Liebman, et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), available at <http://www2.law.columbia.edu/brokensystem2/index2.html>

geographic disparities are troubling in themselves because they suggest that state death penalty legislation is unable to standardize the considerations that are brought to bear in capital prosecutions so as to limit major fluctuations in its application across the state. But these geographic disparities are also troubling because they may be one of the sources of the persistent racial disparities in the administration of capital punishment in many states. (See section on “Race Discrimination” below.)

In addition, the symbolic politics of capital punishment is very much at play in the election of local prosecutors. Candidates for local district attorney and state attorney general in a wide variety of jurisdictions have run campaigns touting their capital conviction records, even going so far as listing individual defendants sentenced to death.⁸¹ As a practical matter, an elected prosecutor’s capital conviction record should be a relatively small part of any prosecutor’s portfolio, given the limited number of capital cases that any prosecutorial office will handle – a small fraction of all homicide cases, and an even smaller fraction of all serious crimes. (Remember that even Harris County, Texas, has a death verdict rate of only 1.9% of all homicides). Clearly, many prosecutorial candidates perceive that the voting public has a special interest in capital cases, both because of the fear generated by the underlying crimes that give rise to capital prosecution and because a prosecutor’s support for capital punishment represents in powerful shorthand a prosecutor’s “toughness” on crime. These general incentives are troubling in themselves, because they suggest that political incentives may exist to bring capital charges and to win death verdicts, quite apart from the underlying merits of the cases.⁸² Even more troubling is the incentives that may exist to favor those in a position to provide campaign contributions or votes. The racial disparities in capital charging decisions favoring cases with white victims mirror the racial disparities in political influence in the vast majority of communities.⁸³

81 See John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S Cal L Rev 465, 474-75 (1999); 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 (1994)

82 The federal system presents a different picture with regard to the problem of political pressures on prosecutors, because federal prosecutors are appointed rather than elected. Moreover, unlike most local district attorneys, federal prosecutors must subject their decisions to seek the death penalty to centralized review by Main Justice. While federal cases may be different in important respects from state cases (in degree of politicization, among other things), the MPC was designed as a state penal code. Thus, any such differences are not relevant to the question of how the Institute should address the capacity of § 210.6 to address the problems common to most state death penalty systems.

83 The Baldus study on racial disparities in capital sentencing, see *supra* note 33, also found evidence that charging decisions were strongly correlated with the race of murder victims. These statistical findings parallel anecdotal evidence from lawyers in the field. Stephen Bright, Director of the Southern Center for Human Rights in Atlanta, Georgia, describes an incident in a Georgia county: “In a case involving the murder of the daughter of a prominent white contractor, the prosecutor contacted the contractor and asked him if he wanted to seek the death penalty. When the

Judges as well as prosecutors must face the intense politicization that surrounds the administration of capital punishment. Almost 90% of state judges face some kind of popular election.⁸⁴ Politicization of capital punishment in judicial elections has famously ousted Chief Justice Rose Bird and colleagues Cruz Reynoso and Joseph Grodin from the California Supreme Court,⁸⁵ as well as Justice Penny White from the Tennessee Supreme Court.⁸⁶ These high-profile examples are only the tip of the iceberg of political pressure, as no judge facing election could be unaware of the high salience of capital punishment in the minds of voters, especially in times of rising crime rates or especially high-profile murders. The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, after an official visit to the United States, reported that many of those with whom he spoke in Alabama and Texas, which both have partisan judicial elections, suggested that “judges in both states consider themselves to be under popular pressure to impose and uphold death sentences whenever possible and that decisions to the contrary would lead to electoral defeat.”⁸⁷

Of course, there is every hope and reason to expect that most judges will conscientiously endeavor to resist such pressures and decide cases without regard to political influences. Despite the fact that there is good reason to have confidence in the personal integrity of the individual men and women who comprise the elected judiciary, several statistical studies suggest that, in the aggregate, judicial behavior in criminal cases generally and capital cases in particular appears to be influenced by election cycles.⁸⁸ Moreover, in

contractor replied in the affirmative, the prosecutor said that was all he needed to know. He obtained the death penalty at trial. He was rewarded with a contribution of \$5,000 from the contractor when he successfully ran for judge in the next election. The contribution was the largest received by the District Attorney.” Stephen B. Bright, *Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 453-54 (1995). This case was part of a larger pattern of prosecutors meeting the families of white murder victims to discuss the bringing of capital charges, but not with the families of black murder victims. See *id.*

84 Matthew Streb, *Running for Judge: The Rising Political, Financial and Legal Stakes of Judicial Elections* 7 (2007).

85 See Joseph R. Grodin, *Judicial Elections: The California Experience*, 70 *Judicature* 365, 367 (1987) (describing television spot that encouraged voters to vote “three times for the death penalty; vote no on Bird, Reynoso, Grodin”).

86 Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* 72 *N.Y.U. L. Rev.* 308, 314 (1997) (describing opposing party’s political ad “Vote for Capital Punishment by Voting NO on August 1 for Supreme Court Justice Penny White”).

87 Press Statement, Professor Philip Alston, United Nations Human Rights Council Special Rapporteur on extrajudicial, summary or arbitrary executions, June 30, 2008. A recent political advertisement by a Texas trial court judge reflects the influence of public pressure to return death verdicts. Judge Elizabeth Coker’s advertisement offers as the first reason to re-elect her the fact that she “cleared the way for the jury to issue a death sentence” in John Paul Penry’s capital murder trial after it had been reversed by the U.S. Supreme Court for a second time. (A copy of the advertisement is on file with the authors.)

88 See Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?* 48 *Am. J. Pol. Sci.* 247 (2004) (finding that trial judges standing for re-election tend to impose harsher sentences as elections approach); Melinda Gann Hall, *Electoral*

many jurisdictions, judges not only preside over and review capital trials, they also appoint lawyers, approve legal fees, and approve funding for mitigation and other expert services. These decisions, which are crucial to the capital justice process, are less visible but no less likely to be subject to political pressures.⁸⁹ Finally, in a few capital jurisdictions, elected judges actually impose sentences in capital cases through their power to override jury verdicts, and a comparison among these states strongly suggests that the degree of electoral accountability influences the direction of such overrides.⁹⁰ One potential avenue for mitigating the effect of political pressure on elected judges was foreclosed when the Supreme Court struck down, on First Amendment grounds, a state law barring a judicial candidate from announcing his or her views on disputed legal or political issues.⁹¹ The Court's decision invalidated laws in nine states, and it has been interpreted broadly by lower courts, who have struck down other limitations on judicial candidates, including those on both fundraising and campaign promises, that were part of the law in many more states.⁹²

Governors, too, are influenced by the intense politicization of capital punishment. Like prosecutors and judges, Governors have often campaigned on their support for the death penalty, emphasizing their willingness to sign

Politics and Strategic Voting in State Supreme Courts, 54 J Pol 427 (1992) (finding that district based elections influence justices in state supreme courts to join conservative majorities in death penalty cases in Texas, North Carolina, Louisiana, and Kentucky); Paul Brace & Brent D Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am J Pol Sci 360 (2008) (finding that judicial behavior in affirming death sentences is correlated with public opinion about the death penalty only in states where judges face election and not in states where judges are appointed); *but cf.* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S Cal L Rev 465 (1999) (finding no system wide evidence of the effect of state judicial election methods on capital case outcomes, but finding other evidence confirming the politically charged character of the death penalty in state courts)

89 For example, defense lawyers in the pool of those seeking appointments to capital cases contributed money to the election and re election campaigns of judges in Harris County, Texas the county responsible for the largest number of executions in the United States See Amnesty International, *One County, 100 Executions: Harris County and Texas A Lethal Combination* 10 (2007), available at <http://www.amnesty.org/en/library/info/AMR51/125/2007>

90 Elected judges in Alabama and Florida have been far more likely to use their power to override jury verdicts to impose death when the jury has sentenced the convicted person to life in prison than to replace a jury verdict of death with one of life In contrast, judges in Delaware, who do not stand for election, are far less likely to override in favor of death than to override in favor of life See 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, 793 94 (1995) Moreover, in Alabama, overrides in favor of death have appeared to be more frequent in election years See Ronald J Tabak, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 Fordham Urb L J 239, 255 56 (1994)

91 *Republican Party of Minnesota v White*, 536 U S 765 (2002)

92 See Roy A Schotland, *New Challenges to States' Judicial Selection*, 95 Geo L J 1077, 1095 96 (2007)

death warrants.⁹³ While Governors are less implicated in the day-to-day workings of the capital justice process than prosecutors and judges, they play a crucial role in the exercise of clemency powers, which the Supreme Court has recognized as an important defense against conviction and execution of the innocent.⁹⁴ Some Governors, like George Ryan of Illinois, have not been afraid to use the clemency power to respond to concerns about wrongful conviction. However, the trend in the use of the clemency power in capital cases has been sharply downward in the decades since the reinstatement of capital punishment in 1976, at the same time that the trend in death sentencing and executions has been sharply upward.⁹⁵ The persistent high political salience of capital punishment, as reflected by its prominence at all levels of political discourse,⁹⁶ has no doubt affected the willingness of Governors to set aside death sentences.⁹⁷

Finally, the politicization of the issue of capital punishment in the legislative sphere limits the capacity of legislatures to promote and maintain statutory reform. The kind of statutory reform that many regard as the most promising for ameliorating arbitrariness and discrimination in the application of the death penalty is strict narrowing of the category of those eligible for capital crimes. Justice Stevens argued that unfettered discretion to grant mercy based on open-ended consideration of mitigating evidence (which is commanded by the constitution) is not fundamentally inconsistent with guided discretion (which is also commanded by the constitution), provided that the category of the death eligible is truly limited to the “tip of the pyramid.”⁹⁸ And the Baldus study reported that racial disparities were not evident in the distribution of death sentences for the category of the most aggravated murders, because death sentences were so common in this category.⁹⁹ A few states, like New York, have managed to maintain a

93 See Carol S. Steiker, *Capital Punishment and American Exceptionalism*, in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* 71 (2005) (noting examples of John K. Van de Kamp in California, Jim Mattox in Texas, and Bob Martinez in Florida)

94 See the discussion of *Herrera v. Collins*, 506 U.S. 390 (1993), in the “Constitutional Regulation” section, *supra* notes 55–59 and accompanying text

95 See Elizabeth Rapaport, *Straight is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M.L. Rev. 349 (2003)

96 Even presidential politics is profoundly marked by capital punishment, though the federal government in general, and the President in particular, plays a very small role in the administration of capital punishment, other than through the appointment of Justices to the Supreme Court

97 One dramatic example of the political costs of clemency is the 1994 Pennsylvania gubernatorial race between Republican Tom Ridge and Democrat Mark Singel. Singel had been chairman of the state’s Board of Pardons, which had released an inmate who was arrested on murder charges a month before the election. Overnight, Singel went from leading Ridge by 4 points to trailing him by 12: Singel’s commutation recommendation lost him the election. See Tina Rosenberg, *The Deadliest D.A.*, N.Y. Times, July 16, 1995

98 See the discussion of Stevens’ opinion in *Walton v. Arizona*, 497 U.S. 639 (1990), in the “Constitutional Regulation” section, *supra* notes 32–36 and accompanying text

99 See the discussion of the Baldus study in the section on “Race Discrimination,” *infra* at 27–28

relatively narrow death penalty.¹⁰⁰ However, most states have been unwilling to restrict the scope of the death penalty, and the continued inclusion of broad aggravators like felony murder, pecuniary gain, future dangerousness, and heinousness (or its equivalent) preclude the strict narrowing approach in most jurisdictions.

Moreover, even if a jurisdiction were able to pass a truly narrow death penalty (something more likely in an abolitionist jurisdiction reinstating the death penalty than in a retentionist jurisdiction sharply curtailing a current statute), the political pressure to expand the ambit of the death penalty over time will likely prove politically irresistible. The tendency of existing statutes, even already broad ones, to expand over time through the addition of new aggravating factors has been well documented.¹⁰¹ When former Governor Mitt Romney introduced legislation drafted by a blue-ribbon commission to reinstitute capital punishment in Massachusetts, supporters of the draft emphasized the very narrow ambit of proposed statute. However, a symposium of experts organized to discuss the proposed statute noted the problem of what one of them called “aggravator creep” (an analogy to “mission creep” referred to in military contexts), in which “[a] statute is passed with a list of aggravating factors, and then structural impulses often push that list to become longer and longer as new aggravators are added.”¹⁰² The most eloquent case for the inevitability of “aggravator creep” has been made by lawyer and novelist Scott Turow. Turow, a former federal prosecutor who supported the death penalty for most of his life, wrote a (nonfiction) book describing how his later pro bono work on the capital appeal of a wrongfully convicted man and his service on the Illinois Governor’s Commission to reform the death penalty convinced him to vote as a Commission member for abolition rather than reform. As a moral matter, Turow remains persuaded that a narrow death penalty is both morally permissible and desirable. But he has come to see that expansion is inevitable, with the arbitrariness and potential for error that expansive capital statutes necessarily entail:

The furious heat of grief and rage the worst cases inspire will inevitably short-circuit our judgment and always be a snare for the innocent. And the fundamental equality of each survivor’s loss, and

100 Indeed, New York even refused to re authorize the penalty after its highest court invalidated the state’s death penalty statute on easily remediable state constitutional grounds. But states like New York and New Jersey (the only state to legislatively abolish capital punishment since its reinstatement in 1976) are outliers. They did not participate significantly in the practice of capital punishment in the modern era even while formally retaining the death penalty.

101 Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in Austin Sarat, ed., *The Killing State: Capital Punishment in Law, Politics, and Culture* (1999); Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 *Pepperdine L. Rev.* 1 (2006).

102 See *Symposium: Toward a Model Death Penalty Code: The Massachusetts Governor’s Council Report. Panel One – The Capital Crime*, 80 *Ind. L.J.* 35, 35 (2005) (statement of Edwin Colfax).

the manner in which the wayward imaginations of criminals continue to surprise us, will inevitably cause the categories for death eligibility to expand, a slippery slope of what-about-hims.¹⁰³

The foregoing suggests that politicization of the death penalty, both within the capital justice process and more broadly in the realm of public policy and discourse, threatens both the integrity of individual cases and the prospects for reform. This politicization is the most far-reaching, important, and intractable reason to be dubious of the prospects for success of an ALI reform project in this area.

III. Race Discrimination

Race discrimination has cast a long shadow over the history of the American death penalty. During the antebellum period, race discrimination was not merely a matter of practice but a matter of law, as many Southern jurisdictions made the availability of the death penalty turn on the race of the defendant or victim.¹⁰⁴ After the Civil War, the discriminatory Black Codes were largely abandoned, but discrimination in the administration of capital punishment persisted. Discrimination permeated both the selection of those to die as well as the selection of those who could participate in the criminal justice process. African Americans were more frequently executed for non-homicidal crimes, were more likely to be executed without appeals, and were more likely to be executed at young ages.¹⁰⁵ Discrimination was most pronounced in Southern jurisdictions. The most obvious discrimination occurred in capital rape prosecutions, as such prosecutions almost uniformly targeted minority offenders alleged to have assaulted white victims, and the numerous executions for rape post-1930 (455) were entirely confined to Southern jurisdictions, border states, and the District of Columbia.¹⁰⁶ Until the early 1960s, the differential treatment of both African-American offenders and African-American victims was attributable in part to the exclusion of African-Americans from jury service, again largely (although not exclusively) concentrated in Southern and border-state jurisdictions.

When the Supreme Court first signaled its interest in constitutionally regulating capital punishment in the early 1960s, several Justices issued a dissent from denial of certiorari indicating their willingness to address whether the death penalty is disproportionate for the crime of rape.¹⁰⁷

¹⁰³ Scott Turow, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty* 114 (2003)

¹⁰⁴ Stuart Banner, *The Death Penalty: An American History* (2002)

¹⁰⁵ William J. Bowers, *Legal Homicide: Death as Punishment in America, 1864-1982*, 67 *87* (1984)

¹⁰⁶ Marvin E. Wolfgang, *Race Discrimination in the Death Sentence for Rape*, in William J. Bowers, *Executions in America* 113 (1974)

¹⁰⁷ *Rudolph v. Alabama*, 375 U.S. 889, 889-91 (1963) (Goldberg, J., joined by Douglas and Brennan, JJ., dissenting from denial of certiorari)

Although these Justices did not mention race in their brief statement, they were undoubtedly aware of the racially-skewed use of the death penalty to punish rape. The NAACP Legal Defense Fund thereafter sought to document empirically race discrimination in capital race prosecutions with an eye toward challenging such discrimination in particular cases. The first significant study, produced by Professor Marvin Wolfgang and others at the University of Pennsylvania, found both race-of-the-defendant and race-of-the-victim discrimination in the administration of the death penalty for rape (after controlling for non-racial variables); African-American defendants convicted of raping white females faced a greater than one-third chance of receiving a death sentence whereas all other racial combinations yielded death sentences in about two percent of cases.¹⁰⁸

The Wolfgang study did not ultimately lead to success in litigation, and the Eighth Circuit's rejection of the study as a basis for constitutional relief, authored by then-Judge Blackmun – foreshadowed the Supreme Court's subsequent denial of relief in *McCleskey*, discussed above.¹⁰⁹ In particular, the judicial response to the statistical demonstration of discrimination was to insist on a showing by the defendant of improper racial motivation in *his* case, a requirement that insulates widespread discriminatory practices from meaningful judicial intervention. But the Wolfgang study did contribute to the accurate perception that the prevailing administration of the death penalty was both arbitrary and discriminatory, and thus contributed to *Furman*'s invalidation of existing statutes and the “unguided” discretion they entailed.

The central question today is whether efforts to guide sentencer discretion – such as the one embodied in the MPC death-sentencing provision – successfully combat the sort of discrimination reflected in the Wolfgang study. The current empirical assessment is “no” – that race discrimination still plagues the administration of the death penalty, though the evidence suggests that race-of-the-victim discrimination is of a much greater magnitude than race-of-the-defendant discrimination. The more difficult question is whether the persistent role of race in capital decisionmaking can be significantly reduced or eradicated, whether through statutory efforts to narrow the reach of the death penalty or other means.

The Baldus study, described above, found that defendants charged in white-victim cases, on average, faced odds of receiving a death sentence that were 4.3 times higher than the odds faced by similarly situated defendants in black-victim cases.¹¹⁰ Other studies have similarly pointed to a robust relationship between the race of the victim and the decision to seek death and to obtain death sentences (also controlling for non-racial variables). Leigh Bienen produced a study of the New Jersey death penalty that reflected

108 Wolfgang, *supra* note 106, at 117 (Table 4 2)

109 Maxwell v Bishop, 398 F 2d 138 (8th Cir 1968)

110 See Part I, *supra*, at p 13 14

greater prosecutorial willingness to seek death in white victim cases.¹¹¹ Baldus, et al, studied capital sentences in Philadelphia and found both race-of-the-victim and race-of-the-defendant discrimination.¹¹² Given the remarkably different histories and demographics of Philadelphia and Georgia, it is surprising that the Philadelphia study found a magnitude of race-of-the-victim effects quite similar to the magnitude found in the Georgia study addressed in *McCleskey*. A federal report issued in 1990, which summarized the then-available empirical work on the effects of race in capital sentencing (28 studies), likewise found consistent race-of-the-victim effects (in 82% of the studies reviewed), particularly in prosecutorial charging decisions.¹¹³

Apart from these statistical studies, a broad scholarly literature often highlights American racial discord as an important explanatory variable of American exceptionalism with respect to capital punishment – the fact that the United States is alone among Western democracies in retaining and actively implementing the death penalty.¹¹⁴ Such works point to the fact that executions are overwhelmingly confined to the South (and states bordering the South), the very same jurisdictions that were last to abandon slavery and segregation, and that were most resistant to the federal enforcement of civil rights norms.

Professor Frank Zimring, in his recent broad assessment of the American death penalty, argued that the regional persistence of “vigilante values” strongly contributes to American retention of capital punishment.¹¹⁵ Many scholars have speculated that contemporary state-imposed executions might serve a role similar to extralegal executions of a previous era, and Zimring observes that “the substantive core of the support for death as a penalty seems to be an ideology of capital punishment as community justice that appears most intensely today in these areas where extreme forms of vigilante justice thrived in earlier times.”¹¹⁶ A recent article in the *American Sociological Review* presents empirical data supporting the claim that current death sentences might be linked to such vigilante values.¹¹⁷ The authors report a positive relationship between death sentences, “current racial threat” (reflected in the size of a jurisdiction’s African-American population), and

111 Leigh Bienen et al, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 Rutgers L Rev 27 (1988)

112 David Baldus, et al, *Race Discrimination and the Death Penalty in the Post Furman Era: An Empirical and Legal Overview, with Recent Finding from Philadelphia*, 83 Cornell L Rev 1638 (1998)

113 U S General Accounting Office, *Death Penalty Sentencing* (Feb 1990)

114 Carol S Steiker, *Capital Punishment and American Exceptionalism*, in *American Exceptionalism and Human Rights*, ed Michael Ignatieff (2005)

115 Franklin E Zimring, *The Contradictions of American Capital Punishment* (2003)

116 *Id.* at 136

117 David Jacobs, et al, *Vigilantism, Current Racial Threat, and Death Sentences*, 70 Amer Soc Rev 656 (2005)

“past vigilantism” (reflected in past lynching activity). The authors conclude that: “our repeated findings that this relationship is present support claims that a prior tradition of lethal vigilantism enhances recent attempts to use the death penalty as long as the threat posed by current black populations is sufficient to trigger this legal but lethal control mechanism.”¹¹⁸

Supporters of the death penalty would certainly resist the claim that the death penalty remains in place *because of* underlying conscious or unconscious racial prejudice. Moreover, the high level of executions in Southern jurisdictions correlates not only with racial factors (such as past race discrimination and contemporary racial tensions) but also with other potential explanatory factors such as high rates of violent crime and the prevalence of fundamentalist religious beliefs. Some empirical literature, though, modestly supports the claim that racially discriminatory attitudes may account for some of the contemporary support for the death penalty.¹¹⁹

The most significant efforts to reduce the effect of race in capital proceedings have focused on narrowing the class of death eligible offenses and guiding sentencer discretion at the punishment phase of capital trials. The first solution – restricting the death penalty to the most aggravated cases – appears promising, because the Baldus study found that race effects essentially disappear in such cases given the very high frequency of death sentences in that range (in the eighth category of cases within the study, with the most aggravation, jurors imposed the death penalty 88% of the time¹²⁰). Indeed, the MPC death sentencing provision could be viewed as one such effort to narrow the death penalty because it requires a finding of an aggravated factor (beyond conviction for murder) to support the imposition of death.

The problem, though, played out over the past thirty years, is that no state has successfully confined the death penalty to a narrow band of the most aggravated cases. Death eligibility in prevailing statutes remains breathtakingly broad, as aggravating factors or their functional equivalent often cover the spectrum of many if not most murders. The MPC provision is representative in this regard, allowing the imposition of death based on any of eight aggravating factors, including murders in the course of several enumerated felonies,¹²¹ and any murder deemed “especially heinous,

118 *Id.* at 672

119 Several empirical studies have explored the subtle role of race discrimination in death penalty attitudes. See, e.g., Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 *J. of Research in Crime & Delinquency* 202 (1994) (reporting empirical study in which two indexes of racial prejudice were significantly linked to greater support for the death penalty among whites, even after controlling for relevant demographic and attitudinal variables); Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 *Social Psychology Quarterly* 67 (1991) (empirical analysis finding that racial prejudice significantly predicts both support for the death penalty and tougher crime control policies)

120 *McCleskey*, 481 U.S. at 325 n.2 (Brennan, J., dissenting)

121 § 210.6(3)(e)

atrocious or cruel, manifesting exceptional depravity.”¹²² One reading of the MPC provision is that it excludes only those murders of “ordinary” heinousness, atrociousness, cruelty, or depravity, and prosecutors and especially jurors might be reluctant to deem any intentional deprivation of human life as “ordinary” along those dimensions.

The failure to achieve genuine narrowing is partly a matter of political will in light of the constant political pressure to expand rather than restrict death eligibility in response to high-profile offenses (consider the expansion of the death penalty for the crime of the rape of a child). But the failure also stems from the deeper problem identified by Justice Harlan (discussed above), that it remains an elusive task to specify the “worst of the worst” murders in advance. Any rule-like approach to narrowing death eligibility will require jettisoning factors such as MPC’s “especially heinous” provision; but those factors often capture prevailing moral commitments – some offenses are appropriately regarded as among the very worst by virtue of their atrociousness, cruelty, or exceptional depravity. At the same time, many objective factors taken in isolation seem appropriately narrow (such as MPC § 210.6(3)(c), the commission of an additional murder at the time of the offense), but collectively these factors establish a broad net of death eligibility. The breadth of death eligibility in turn invites and requires substantial discretion, particularly in prosecutorial charging decisions, which permits racial considerations to infect the process.

The prospect of a meaningful legislative remedy to address race discrimination seems quite remote. After *McCleskey*, legislative energies were directed toward fashioning a response to the discrimination reflected in the Baldus study. At the federal level, the Racial Justice Act, which would have permitted courts to consider statistical data as evidence in support of a claim of race discrimination within a particular jurisdiction, repeatedly failed to find support in the U.S. Senate. Many state legislatures have considered similar legislation (including Georgia, Illinois, and North Carolina), but to date only Kentucky has enacted such a provision. The Kentucky provision, like the failed federal bill, allows a defendant to use statistical data to establish racial bias in the decision to seek death, though the question remains whether racial bias likely contributed to the decision to seek death *in the defendant’s case*.¹²³ To date, no death-sentenced inmate in Kentucky or elsewhere has had his death sentence reversed on such grounds.

Apart from its lack of political appeal, racial justice legislation seems inadequately suited to address the problems reflected in the empirical data.

122 § 210.6(3)(h)

123 The Kentucky provision states: “No person shall be subject to or given a sentence of death that was sought on the basis of race A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought.” Ky Rev Stat Ann § 252.3 (2001)

On a practical level, the numerous variables involved in particular cases make it difficult to demonstrate racial motivation or bias at the individual level, even if such discrimination is evident in the jurisdiction as a whole. Introducing evidence of system-wide bias might cause a court to look more closely at the facts surrounding a particular prosecution (especially with a burden-shifting provision), but the sheer “thickness” of the facts in a particular prosecution will likely permit courts to find inadequate proof of bias in case after case. Indeed, racial justice legislation risks legitimating capital systems that are demonstrably discriminatory by ostensibly providing a remedy when in fact none is forthcoming. More broadly, the litigation focus of racial justice acts fails to address the underlying problems. Many of the most troublesome cases in which race influenced prosecutorial or jury decisionmaking are those in which no death sentence was sought or obtained because of the minority status of the victim. Courts are (appropriately) powerless to compel decisionmakers to produce death sentences in such cases, and the troubling differential treatment is irremediable. Notwithstanding their increased political participation generally, minorities remain significantly underrepresented in the two roles that might make a difference: as capital jurors¹²⁴ and as elected district attorneys.¹²⁵ The combined influences of discretion, underrepresentation, historical practice, and conscious or unconscious bias, make it extraordinarily difficult to disentangle race from the administration of the American death penalty.

IV. Jury Confusion

Another significant post-*Furman* effort to solve the problem of arbitrariness and discrimination has been to impose structure and order on the ultimate life-death decision. The universal adoption of bifurcated proceedings – with a punishment phase focused solely on whether the defendant deserves to die – was embraced in hopes of producing reasoned moral decisions rather than impulsive, arbitrary, or discriminatory ones. In this respect, the post-*Furman* experiment has been focused on rationalizing the death sentencing process through a combination of statutory precision and focused jury instructions. Such provisions would precisely enumerate relevant aggravating and mitigating factors and carefully explain burdens of proof, the role of mitigation, inappropriate bases for decision (e.g., “mere sympathy”), and the process for reaching a final decision.

124 Empirical research has found a strong association between life verdicts and the presence of at least one African American male on the jury in capital cases involving African American defendants and white victims. William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U Pa J Const L 171, 192 Table 1 (2001) (asserting “black male presence effects”).

125 See Jeffrey Pokorak, *Probing the Capital Prosecutor's Perspective: Race and Gender of the Discretionary Actors*, 83 Cornell L Rev 1811 (1998) (discussing significance of underrepresentation of racial minorities as District Attorneys).

As noted above, the *constitutional* requirements respecting states' efforts to channel sentencer discretion are quite minimal. Indeed, once states have ostensibly "narrowed" the class of death-eligible defendants via aggravating circumstances, states need not provide any additional guidance to sentencers as they make their life-or-death decision.¹²⁶ The central question as a matter of policy and practice is whether the post-*Furman* experiment with guided discretion has resulted in improved and more principled decisionmaking. The available empirical evidence – largely developed by the Capital Jury Project (CJP) – is discouraging along these lines.

Over the past eighteen years, the CJP has collected data from over a thousand jurors who served in capital cases with the goal of understanding the decision-making process in capital cases. CJP interviewers spent hours with individual jurors exploring the factors contributing to their decisions and their comprehension of the capital instructions in their cases. The CJP designed its questions to determine whether the intricate state capital schemes adopted post-*Furman* actually reduce arbitrariness in capital sentencing by controlling sentence discretion. Dozens of scholarly articles have been published based on the CJP data, and much of the research has documented the failure of jurors to understand the guidance embodied in the sentencing instructions and verdict forms they receive.¹²⁷ By collecting data from numerous jurisdictions (fourteen states), the CJP project has been able to identify not only idiosyncratic defects in particular state statutes but endemic flaws in jury decisionmaking, such as the propensity of jurors to decide punishment during the guilt-innocence phase of the trial,¹²⁸ their frequent misapprehension of the standards governing their consideration of mitigating evidence,¹²⁹ and their general moral disengagement from the death penalty decision.¹³⁰ Jurors tend to misunderstand the consequences of a life-without-possibility-of-parole verdict, and, in jurisdictions that permit the alternative of a life-with-parole verdict, jurors consistently underestimate the

126 See, e.g., *Zant v Stephens*, 462 U.S. 862 (1983).

127 See, e.g., Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming: Aggravation Requires Death; and Mitigation is No Excuse*, 66 Brooklyn L. Rev. 1011 (2001); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999); William J. Bowers, Marla Sandys, & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993).

128 See, e.g., William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1089-90 (1995).

129 See, e.g., Bentele & Bowers, *supra* note 127, at 1041 (suggesting that mitigating evidence plays a "disturbingly minor role" in jurors' deliberations in capital cases across jurisdictions).

130 See, e.g., Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 Stan. L. Rev. 1447 (1997) (describing how prevailing capital sentencing practices assist jurors in overcoming their resistance to imposing the death penalty in part by diminishing their sense of responsibility for their verdict).

length of time a defendant will remain in prison if not sentenced to death.¹³¹ A significant number of jurors serve in capital cases notwithstanding their unwillingness to consider a life verdict,¹³² and many jurors who have served on capital trials simply are unable to grasp the concept of mitigating evidence.¹³³ Other findings of the CJP point to the skewing of capital juries through death-qualification,¹³⁴ the significance of the racial composition of the jury in capital decisionmaking,¹³⁵ and the particular problems posed in jurisdictions (such as Florida and Alabama) where juries and judges share responsibility for capital verdicts.¹³⁶

The empirical findings of the CJP are disheartening because they reflect widespread, fundamental misunderstanding on the part of capital jurors. Perhaps some of the findings can be discounted by the fact that the jurors' explanations of their role and the governing law were offered well after their actual jury service (and perhaps the jurors' understanding of their sentencing instructions at the time of interviews did not correspond perfectly to their understanding of the instructions at the time of their deliberations). But even a superficial review of instructions given in capital cases today reveals the unnecessary technical complexity of prevailing practice.¹³⁷ Jurors are told about the role of aggravating factors, their ability (in many jurisdictions) to consider non-statutory aggravators, the role of mitigation, and so on. They are then asked to weigh or balance aggravation against mitigation or to decide whether mitigating factors are sufficiently substantial to call for a sentence less than death.

131 John H Blume, et al, *Lessons from the Capital Jury Project*, in *Beyond Repair? America's Death Penalty* 167 (Stephen Garvey, ed 2003); see also Theodore Eisenberg, et al, *The Deadly Paradox of Capital Jurors*, 74 S Cal L Rev 371 (2001) (discussing jurors' misperceptions about the meaning of life sentences)

132 Blume, et al., *supra* note 131, at 174

133 Craig Haney, *Taking Capital Jurors Seriously*, 70 Ind L J 1223, 1229 (1995) (reporting that "less than one half of our subjects could provide even a partially correct definition of the term 'mitigation,' almost one third provided definitions that bordered on being uninterpretable or incoherent, and slightly more than one subject in 10 was still so mystified by the concept that he or she was unable to venture a guess about its meaning") (citing Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 Law & Hum Behav 411, 420 21 (1994))

134 See, e.g., Marla Sandys and Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in *America's Experiment with Capital Punishment*, James Acker, et al, ed (2nd ed 2003)

135 Bowers, et al, *supra* note 124

136 Wanda D Foglia and William J Bowers, *Shared Sentencing Responsibility: How Hybrid Statutes Exacerbate the Shortcomings of Capital Jury Decision Making*, 42 Crim L Bulletin 663 (2006)

137 In Alabama, for example, the allocation of burden regarding proof of mitigating circumstances is explained as follows: "[w]hen the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence " Ala Code § 13A 5 45(g)

These sorts of efforts to tame the death penalty decision do not necessarily ensure more principled or less arbitrary decisionmaking. Casting the decision in terms of “aggravation” and “mitigation” and requiring jurors to “balance” or “weigh” these considerations might falsely convey to the jurors that their decision is a mechanical or mathematical one, rather than one requiring moral judgment. As one commentator lamented, “giv[ing] a ‘little’ guidance to a death penalty jury” poses the risk that “jurors [will] mistakenly conclude[] that they are getting a ‘lot’ of guidance” thus diminishing “their personal moral responsibility for the sentencing decision.”¹³⁸

More fundamentally, the problem identified by Justice Harlan in *McGautha* casts a shadow over any effort to rationalize the decision whether to impose death. In many jurisdictions, jurors are permitted to consider both statutory and non-statutory aggravating factors (including victim impact evidence), making the grounds for their ultimate decision virtually limitless. At the same time, every jurisdiction – responding to the Supreme Court’s direction – currently permits unbridled consideration of mitigating factors, which likewise undercuts any effort to structure the death penalty decision. In the thirty-five or so years of constitutional regulation since *Furman*, states have reproduced the open-ended discretion of the pre-*Furman* era, but have packaged it in the guise of structure and guidance. In the absence of *substantive* limits on sentencer discretion, the complicated and confusing *procedural* means of implementing that discretion cannot reduce arbitrary or discriminatory decisionmaking. It can only obscure the jury’s current responsibility for deciding, essentially on any criteria, whether a defendant should live or die. In this respect, reform of contemporary capital statutes should focus on reducing complexity and communicating clearly the sentencer’s awesome obligation to make an irreducible moral judgment about the defendant’s fate. The states’ failure to make such reforms is largely attributable to their misguided belief that the complicated overlay of instructions is somehow constitutionally compelled. It is also partly attributable to the fact that such reform efforts – and the return to the pre-*Furman* world that they would represent – would amount to a concession that Justice Harlan was right: that statutory efforts (like the MPC death-sentencing provision) are likely unable to reduce the arbitrary imposition of the death penalty.

V. The Inadequacy of Resources, Especially Defense Counsel Services, in Capital Cases

Capital prosecutions are expensive. A number of studies have tried to ascertain the relative expense of capital prosecutions vis-a-vis non-capital

138 Joseph L. Hoffman, *Where’s the Buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137, 1159 (1995)

prosecutions, using a variety of methodologies.¹³⁹ What emerges from these studies is a consensus that capital prosecutions generate higher costs at every stage of the proceedings, and that the total costs of processing capital cases are considerably greater than those of processing non-capital cases that result in sentences of life imprisonment (or other lengthy prison terms), even when the costs of incarceration are included. Although the data are often incomplete or difficult to disaggregate, it appears that the lion's share of additional expenses occur during the trial phase of capital litigation, as a result of a longer pre-trial period, a longer and more intensive voir dire process, longer trials, more time spent by more attorneys preparing cases, more investigative and expert services, and an expensive penalty phase trial that does not occur at all in non-death penalty cases. Appellate and especially post-conviction costs are also considerably greater than in non-capital cases, though they tend to make up a smaller share of the total expense of capital litigation.

Despite the very large costs that are currently incurred in the administration of capital punishment, there is also good reason to believe that the capital process remains substantially under-funded, especially in the area of defense counsel services. The best reference point for what constitutes minimally adequate defense counsel services in capital cases has been provided by the American Bar Association. The ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, originally adopted in 1989 and revised in 2003, offer specific guidance on such matters as the number and qualifications of counsel necessary in capital cases, the nature of investigative and mitigation services necessary to the defense team, and the performance standards to which the defense team should be held. The *Guidelines* also instruct about the need for a "responsible agency" (such as a Public Defender organization or its equivalent) to recruit, certify, train and monitor capital defense counsel. In addition, there are separate Guidelines regarding the appropriate training for capital counsel, the need to control capital defense caseloads, and the need to ensure compensation at a level "commensurate with the provision of high quality legal representation."¹⁴⁰ The Supreme Court has repeatedly endorsed the ABA's performance standards for capital defense counsel as a key

139 See, e.g., 2008 study of "The Cost of the Death Penalty in Maryland" by the Urban Institute; 2008 study of "The Hidden Death Tax: The Secret Costs of Seeking Execution in California," by the ACLU of Northern California; 2006 study by the Death Penalty Subcommittee of the Committee on Public Defense of the Washington State Bar Association (no title); 2004 study of "Tennessee's Death Penalty: Costs and Consequences," by Comptroller of the Treasury; 2003 Study of "Costs Incurred for Death Penalty Cases: A K GOAL Audit of the Department of Corrections" by the Legislative Division of Post Audit, State of Kansas; 2003 "Study of the Imposition of the Death Penalty in Connecticut" by the Connecticut Commission on the Death Penalty; 2002 study of "The Application of Indiana's Capital Sentencing Law," by the Indiana Criminal Law Study Commission; 2001 "Case Study on State and County Costs Associated with Capital Adjudication in Arizona" by the Williams Institute

140 Guideline 9 1B

benchmark for assessing the reasonableness of attorney performance in a series of recent cases addressing claims of ineffective assistance of counsel in capital cases.¹⁴¹

Nonetheless, it is obvious that the vast majority of states do not comply with the ABA *Guidelines*, and many do not come even close. In response to concerns about the lack of fairness and accuracy in the capital justice process, the ABA called in 1997 for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. In 2001, the ABA created the Death Penalty Moratorium Implementation Project, which in 2003 decided to examine several states' death penalty systems to determine the extent to which they achieve fairness and provide due process. Among other things, the Project specifically investigated the extent to which the states were in compliance with the ABA *Guidelines* for capital defense counsel services. The first set of assessments were published near the end of 2007, and the record of compliance with the ABA *Guidelines* was extremely low: of the 8 states studied,¹⁴² not a single state was found to be fully "in compliance" with any aspect of the ABA *Guidelines* studied. For the 5 guidelines that were studied over the 8 states, there were 15 findings of complete noncompliance and 23 findings of only partial compliance (in 2 cases, there was insufficient information to make an assessment).

For example, the assessment described Alabama's indigent defense system as "failing" due to the lack of a statewide indigent defense commission, the minimal qualifications and lack of training of capital defense counsel, the failure to ensure the staffing required by the Guidelines (2 lawyers, an investigator, and a mitigation specialist), the failure to provide death-sentenced inmates with appointed counsel in state post-conviction proceedings, and the very low caps on compensation for defense services.¹⁴³ While Alabama had the worst record of compliance among the states studied, Indiana had the best record. Nonetheless, the Project found that Indiana, too, "falls far short of the requirements set out in the ABA *Guidelines*." In particular, the report pointed to inadequate attorney qualification and monitoring procedures, unacceptable workloads, insufficient case staffing, and lack of an independent appointing authority (such as a Public Defender office). Indiana is not alone in this latter failing, as fewer than 1/3 of the 36

141 See *Williams*, 529 U.S. at 396 (citing ABA Standards for Criminal Justice); *Wiggins*, 539 U.S. 510 (citing 1989 ABA death penalty Guidelines); *Rompilla*, 545 U.S. 374 (citing 1989 and 2003 death penalty Guidelines)

142 The 8 states assessed by the ABA Moratorium Implementation Project were Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee. The reports are available at <http://www.abanet.org/moratorium/>

143 The caps for capital defense services in Alabama are \$2,000 for direct appeal, and \$1,000 for state post conviction proceedings

states that currently retain the death penalty have statewide capital defense systems as called for by the ABA.¹⁴⁴

The 2003 revisions to the ABA *Guidelines* insist that the Guidelines are not “aspirational” but rather are the minimum necessary conditions for the operation of the capital justice process in a fashion that adequately guarantees fairness and due process. Unfortunately, the record of compliance with the Guidelines even among the states most committed to providing adequate defense services remains poor. New York, which provided for generous levels of capital defense funding when it reinstated capital punishment in 1995, slashed that allocation by almost a third three years later, and then maintained funding at the reduced rate until its capital statute was judicially invalidated in 2004.¹⁴⁵ When the New York State Assembly held hearings that year on whether to again reinstate the death penalty, experts warned that the invalidated statute failed to comply with the ABA *Guidelines* for the appointment of counsel in postconviction proceedings.¹⁴⁶ The record of state compliance with the *Guidelines* overall suggests that the states agree with the ABA that the *Guidelines* are not aspirational – not because the states believe that they are required, but rather because they simply do not aspire to meet them.

Failure to meet (or even to aspire to meet) the ABA *Guidelines* should not necessarily be written off as simple intransigence. The costs involved in providing the resources necessary for a minimally fair capital justice process can be staggering. Instructive in this regard is the Brian Nichols prosecution in Atlanta. Nichols was charged in a 54-count indictment for an infamous courthouse shooting and escape that killed a judge, a court reporter, a sheriff’s deputy, and a federal agent. In the investigative stage of the case, Nichols’ appointed counsel quickly generated costs totaling \$1.2 million, wiping out Georgia’s entire indigent defense budget and requiring the postponement of the trial.¹⁴⁷ Note that this price tag covered only the early investigative costs and did not include the costs of Nichols’ trial or the years of appellate and post-conviction costs that will follow if a death sentence is imposed (note: Nichols has been convicted and the sentencing phase is ongoing as of this writing, Nov. 20, 2008). The provision of the resources necessary for fair capital trials and appeals may simply not be possible, or at least not possible without substantial diversion of public funds from other sources – something state legislatures have shown themselves again and again unwilling to do in the context of providing indigent defense services. Moreover, when excellent defense services are provided to capital defendants

144 See Shaila Dewan, *Executions Resume, as Do Questions of Fairness*, N Y Times, May 7, 2008

145 James R. Acker, *Be Careful What You Ask For: Lessons from New York’s Recent Experience with Capital Punishment*, 32 Vermont L. Rev. 683, 752 (2008)

146 *Id.*

147 See Shaila Dewan & Brenda Goodman, *Capital Cases Stalling as Costs Grow Daunting*, N Y Times, Nov. 4, 2007

at every stage of the criminal process, the process may become endlessly protracted. As Frank Zimring has most aptly observed, “A nation can have full and fair criminal procedures, or it can have [a] regularly functioning process of executing prisoners; but the evidence suggests it cannot have both.”¹⁴⁸

The ABA’s Moratorium Implementation Project should sound two significant cautionary notes for the ALI. First, the ABA has already done the important work of promulgating norms and standards for the capital justice process. After a great deal of study, reflection, and consultation with experts, the ABA has made comprehensive and sensible recommendations for the reform of capital sentencing proceedings, and there seems little that an ALI study could usefully add. Second, even if the ALI came up with different or additional reform proposals, the lack of resources or the political will to generate the necessary resources stands in the way of any substantial reform of the capital justice process. The widespread failures to adequately fund defense counsel services, which are foundational for the implementation of most other reforms, should make the ALI dubious of the prospects for success of a large-scale law reform project in this area.

VI. Erroneous Conviction of the Innocent

Although there is debate about what constitutes a full “exoneration,” it is beyond question that public confidence in the death penalty has been shaken in recent years by the number of people who have been released from death row with evidence of their innocence. The Death Penalty Information Center, an anti-death penalty organization, keeps a list of exonerated capital defendants that now totals 129 for the years since 1973.¹⁴⁹ While it is difficult to extrapolate from the number of known exonerations to the “real” rate of wrongful convictions in capital cases (for the same reason that it is difficult to extrapolate from the number of professional athletes who test positive for steroids to the rate of steroid use among athletes), reasonable estimates range from 2.3% to 5%.¹⁵⁰

Because exonerations of death-sentenced prisoners are such dramatic events, they have generated extensive study of the causes of wrongful convictions, in capital cases and more generally. There is widespread

148 Franklin E. Zimring, *Postscript: The Peculiar Present of American Capital Punishment*, in Stephen P. Garvey, ed., *Beyond Repair? America’s Death Penalty* 228 (2003).

149 For inclusion on DPIC’s innocence list, a defendant must have been convicted and sentenced to death, and subsequently either: a) their conviction was overturned AND i) they were acquitted at retrial or ii) all charges were dropped; or b) they were given an absolute pardon by the governor based on new evidence of innocence. See <http://deathpenaltyinfo.org/node/70>

150 See Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases* (forthcoming 2008 *J. Empirical Legal Stud.*); Samuel R. Gross, *Convicting the Innocent* (forthcoming 2008 *Ann. Rev. L. & Soc. Sci.*); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate* 97 *J. Crim. L. & Criminology* 761 (2007).

consensus about the primary contributors to wrongful convictions: eyewitness misidentification; false confessions; perjured testimony by jailhouse informants; unreliable scientific evidence; suppression of exculpatory evidence; and inadequate lawyering by the defense.¹⁵¹ Professor Samuel Gross of Michigan has studied wrongful convictions in both capital and non-capital cases, and he has made a convincing case that erroneous convictions occur disproportionately in capital cases because of special circumstances that affect the investigation and prosecution of capital murder. These circumstances include pressure on the police to clear homicides, the absence of live witnesses in homicide cases, greater incentives for the real killers and others to offer perjured testimony, greater use of coercive or manipulative interrogation techniques, greater publicity and public outrage around capital trials, the “death qualification” of capital juries which makes such juries more likely to convict, greater willingness by defense counsel to compromise the guilt phase to avoid death during the sentencing phase, and the lessening of the perceived burden of proof because of the heinousness of the offense.¹⁵²

In light of the well-known causes of wrongful convictions and the great public concern that exonerations generate, especially in capital cases, one might expect that this would be an area in which remedies should be relatively easy to formulate and achieve without much resistance in the judicial or legislative arenas. In fact, remedies have proven remarkably elusive, despite the clarity of the issues and degree of public sympathy. First, it did not prove easy for those who were eventually exonerated by DNA to get access to DNA evidence or to get relief even *after* the DNA evidence excluded them as the perpetrators of the crimes for which they were convicted. A recent study of the first 200 people exonerated by post-conviction DNA testing revealed that approximately half of them were refused access to DNA testing by law enforcement, often necessitating a court order. After being exonerated by DNA evidence, 41 of the 200 required a pardon, usually because they lacked any judicial forum for relief, and at least 12 who made it into a judicial forum were denied relief from the courts despite their favorable DNA evidence.¹⁵³

Second, these early difficulties cannot be written off as preliminary kinks that have been worked out of the system. While the vast majority of states have now passed legislation requiring greater preservation of and access to DNA evidence, the ABA Moratorium Implementation Project’s recent assessment of 8 death penalty states included an assessment of how well these states were complying with the ABA’s recommendations

151 The Innocence Project at Cardozo Law School tracks the causes of wrongful conviction in cases of DNA exonerations. See <http://www.innocenceproject.org/understand/>

152 See Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 Buff L Rev 469 (1996)

153 See Brandon L. Garrett, *Judging Innocence*, 108 Colum L Rev 55 (2008)

regarding preservation of and access to biological evidence, and the provision of written procedures, training and disciplinary procedures for investigative personnel. As in the context of the provision of defense counsel services, findings of complete non-compliance or only partial compliance with the ABA's recommendations were commonplace, while full compliance was rare. Similar resistance can be found to implementing reforms aimed at preventing some of the most common causes of wrongful conviction, such as videotaping police interrogations to prevent false confessions, changing photo identification procedures to avoid misidentification, subjecting jailhouse snitch testimony to greater pretrial scrutiny, and performing external independent audits of crime labs. Resistance to providing adequate funding for capital defense services has already been documented above,¹⁵⁴ and the failure of defense lawyers to challenge misidentifications, false confessions, and unreliable scientific evidence has been an important element in the generation of wrongful convictions.

This resistance has a variety of causes. Some law enforcement groups resist changes in investigative procedures with which they have been comfortable, such as interrogations and identification procedures. Moreover, they may oppose proposals for greater monitoring and disciplining of investigative personnel because they fear that misunderstandings may lead to misuse of such procedures. Some reforms are expensive, such as investing in the infrastructure for reliable preservation of biological material, while others promise to be too open-ended in the resources that they might require, such as improving defense counsel services.

Once again, as in the provision of adequate defense counsel services, there is not very much question about the general types of improvements that would be helpful in reducing wrongful convictions; rather, there appears to be an absence of political will to implement them (or to do so in an expeditious fashion). Moreover, a number of the factors catalogued by Samuel Gross that render capital prosecutions more prone to error are simply inherent in the nature of capital crimes and not obviously subject to amelioration by changing the capital justice process. These circumstances militate against the undertaking of a reform project by the ALI and support the suggestion that the ALI instead call for the rejection of capital punishment as a penal option.

VII. Inadequate Enforcement of Federal Rights

The preceding sections discuss the limits of constitutional regulation of the death penalty to counter many of the institutional and structural challenges of the American death penalty. Some of the challenges are simply beyond the reach of courts and "law," such as the difficulties described above in guiding sentencer discretion and combating the influence of race in

154 See discussion in "Resources" section, *supra* at 34-37

discretionary decisionmaking; other institutional problems, such as the inadequate level of resources at capital trials and the failure to safeguard against wrongful convictions, require the involvement and leadership of political branches. The constitutional edifice that remains secures only limited benefits, and, regrettably, those limited benefits are frequently undermined by inadequate enforcement mechanisms, particularly the stringent limitations on the availability of federal habeas review of state capital convictions.

Over the past three decades, coinciding with the Court's inauguration of constitutional regulation of the death penalty, the availability of federal habeas review has been sharply curtailed. The initial limitations were Court-crafted, but they were followed by the most significant statutory revision of federal habeas in American history, the adoption of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The net effect of these judicial and statutory refinements has been to dilute the limited constitutional protections that the Court has developed.

The case for strong federal habeas review of state criminal convictions is rooted in experience. During the early part of the 20th century, state trial courts, especially in the South, often made little pretense of ensuring basic fairness, and state appellate courts appeared more than willing to ratify those truncated proceedings. After the infamous denial of habeas relief to Leo Frank,¹⁵⁵ whose mob-dominated murder trial led to his death sentence despite his likely innocence, the Court granted habeas relief to five African Americans who had been convicted of murder and sentenced to death following a race riot in Arkansas.¹⁵⁶ The Arkansas case illustrated the potential for state hostility to federal rights: the five defendants were represented by a single lawyer who never consulted with them, and the forty-five minute trial before an all-white jury, in front of an angry white mob, included no defense motions, witnesses, or defendant testimony.¹⁵⁷ As the Court extended most of the constitutional criminal protections in the Bill of Rights to state criminal defendants in the 1950s and 1960s, the Court adjusted the scope of federal habeas as well. Perceived state court hostility to federal constitutional protections, especially those rights newly-recognized and extended to state proceedings, led the Court to expand the federal habeas forum and to relax procedural barriers to federal review of federal claims.

Beginning in the 1970s, though, the availability of federal habeas review was significantly limited. Most importantly, the Court tightened the federal enforcement of defaults imposed in state court, so that the failure of state inmates to preserve federal claims within state court forecloses later consideration of those claims in federal court as well – with extremely

155 Frank v Mangum, 237 U S 309 (1915)

156 Moore v Dempsey, 261 U S 86 (1923)

157 Larry W Yackle, *Capital Punishment, Federal Courts, and the Writ of Habeas Corpus*, in *Beyond Repair? America's Death Penalty* 65 (Stephen Garvey, ed 2003)

narrow exceptions.¹⁵⁸ Strict enforcement of state procedural default rules has significantly limited the effectiveness of the federal forum. Indeed, some courts have even applied stringent default rules against fundamental claims of excessive punishment – including the prohibition against executing persons with mental retardation.¹⁵⁹ The enforcement of procedural defaults in this context means, as a practical matter, that the execution of all persons with mental retardation is not constitutionally prohibited; the prohibition extends only to those persons with mental retardation who have successfully navigated state procedural rules and preserved their claim for state or federal review. In this respect, limitations on the availability of federal habeas review promote misconceptions about prevailing capital practices; the public is likely to believe that the Court’s decisions announcing absolute prohibitions – such as the *Atkins* exemption – effectively end the challenged executions, whereas the reality is more qualified and complicated.

The near blanket prohibition against litigating claims defaulted in state proceedings encourages state courts to resolve claims on procedural grounds, and state courts have occasionally imposed defaults opportunistically to deny enforcement of the federal right. Moreover, strict enforcement of defaults in federal courts is particularly troublesome in cases involving claims defaulted on state postconviction review (typically claims alleging ineffective assistance of counsel at trial or prosecutorial misconduct). As noted above, because state inmates have no constitutional right to counsel on state habeas, they have no right to *effective* assistance of counsel in that forum. Ordinarily, in cases involving attorney error at trial, the one avenue for reviving a procedural defaulted claim is for the inmate to demonstrate that he had been denied constitutionally adequate representation; but if the attorney error occurs on state habeas, the inmate is held to his attorney’s mistakes and cannot seek relief under the Sixth Amendment. Given the inadequate resources and monitoring of state postconviction counsel, it is not uncommon for death-sentenced inmates to forfeit substantial claims on state habeas, and the current regime of federal habeas review permanently forecloses consideration of such claims. The strict enforcement of procedural defaults ensures that many death-sentenced inmates will be executed notwithstanding constitutional error in their cases.

The Court has also crafted limitations on the ability of inmates to benefit from “new” law on federal habeas. The Court’s nonretroactivity doctrine, set forth in *Teague v. Lane*,¹⁶⁰ is ostensibly designed to prevent excessive dislocation whenever the Court identifies a new constitutional rule; its roots are traceable to the Warren Court era, when the Court’s vast expansion of constitutional criminal procedure threatened to throw open the

158 See *Murray v. Carrier*, 477 U.S. 478 (1986); *Wainwright v. Sykes*, 433 U.S. 72 (1977)

159 See, e.g., *Hedrick v. True*, 443 F.3d 342 (4th Cir. 2006) (defaulting defendant’s claim of ineligibility for the death penalty based on mental retardation)

160 489 U.S. 288 (1989)

jailhouse doors. But in its more recent incarnation, the nonretroactivity doctrine has blocked retroactive application of many decisions far less dramatic or path-breaking than the Warren Court rulings which had given rise to the doctrine. The Supreme Court, as well as lower federal courts, have rejected as impermissibly “novel” claims that are barely distinguishable from previously decided cases.¹⁶¹ Apart from generating extraordinary time-consuming and complex litigation, *Teague* has thwarted the development and evolution of constitutional principles surrounding the administration of capital punishment. Federal habeas courts are discouraged from modestly extending or refining established precedents, so all constitutional realignment must come from the Supreme Court itself (on direct review of state criminal convictions). This institutional arrangement is a built-in headwind against adaptation to changing circumstances, and given the Eighth Amendment’s focus on “evolving standards of decency,” the *Teague* doctrine is at cross-purposes with the underlying substantive law of the death penalty.

The most significant reform of federal habeas is embodied in AEDPA’s unprecedented limitations on the availability and scope of federal review. AEDPA imposes a strict statute of limitations for filing in federal court,¹⁶² stringent limitations on successive petitions,¹⁶³ and restrictions on the availability of evidentiary hearings to develop facts relating to an inmate’s underlying claims.¹⁶⁴ These procedural barriers have proven formidable, and many inmates have lost their opportunity for federal review of their federal claims on these grounds. The most far-reaching of AEDPA’s provisions, though, has been the elimination of *de novo* review for federal claims addressed on their merits in state court. In its place, AEDPA requires, as a condition for relief, that the state court adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”¹⁶⁵ This statutory revision essentially requires federal courts to defer to wrong but “reasonable” decisions by state courts. It insulates from review all decisions but those that demonstrably flout established rules. In many areas of constitutional doctrine, this “reasonableness” standard of review amounts to “double deference” on federal habeas. Numerous constitutional doctrines, including the Court’s standards for reviewing the effectiveness of counsel or a prosecutor’s alleged discriminatory use of peremptory challenges, already require deferential review of the underlying conduct; state courts are not expected to grant relief unless trial counsel’s performance

161 *See, e.g.*, *Butler v McKellar*, 494 U S 407 (1990) (holding that the rule prohibiting police initiated interrogation concerning a separate offense in the absence of counsel, *Arizona v Roberson*, 486 U S 675 (1988), was novel notwithstanding an earlier decision that had addressed a virtually identical Fifth Amendment violation, *Edwards v Arizona*, 451 U S 477 (1981))

162 28 U S C § 2244(d)(1)

163 28 U S C § 2244(b)

164 28 U S C § 2254(e)(2)

165 28 U S C § 2254(d)(1)

wildly departed from established norms or a prosecutor's race-neutral explanation defies belief. When these cases get to federal habeas, AEDPA imposes an *additional* level of deference. For Sixth Amendment claims concerning the right to effective counsel, the question is not whether trial counsel's performance was unreasonably deficient – it is whether the state court's determination of reasonableness was *itself* unreasonable. This relaxation of federal review of state decisionmaking essentially insulates all but the most egregious denials of rights in state court.

AEDPA's significance in curtailing federal enforcement of federal rights is reflected in the substantial decline in habeas relief since AEDPA's enactment.¹⁶⁶ It is also reflected in numerous federal habeas decisions that explicitly recognize that relief might be required under de novo review. For example, the Fifth Circuit Court of Appeals recently reversed a District Court grant of relief on a claim of impermissible judicial bias.¹⁶⁷ The state court judge, at petitioner's capital trial, had indicated in open court that he was "doing God's work to see that [Petitioner] gets executed;" the judge also taped a postcard to the bench depicting the infamous "hanging judge" Roy Bean, altering it to include his own name and self-bestowed moniker, "The Law West of the Pedernales;" and the judge engaged in extensive ex parte contacts with the prosecution, threatened to remove petitioner's attorneys, and laughed out loud during the defense presentation of mitigating evidence at the punishment phase. The panel opinion recognized that such conduct might require relief under de novo review, but reversed the District Court because it could not find the state court's rejection of the bias claim unreasonable.¹⁶⁸ AEDPA's mandated deference, which ratifies unconstitutionally obtained death-sentences absent gross negligence on the part of the state court, removes the strongest incentive for state courts to toe the constitutional mark and allows executions to go forward despite acknowledged constitutional error.

Unlike several of the institutional and structural obstacles to the fair and accurate implementation of the death penalty described above, the scope of federal habeas is subject to legislative and judicial revision. But it seems unlikely that meaningful reform or restoration of federal habeas will be forthcoming. The politicization of criminal justice issues makes it extraordinarily difficult to expand review, and all of the pressures run in the other direction. In the absence of reform, though, the Court's minimalist constitutional regulation becomes virtually irrelevant; though enormous resources are expended in federal habeas, and the litigation results in delayed executions, most of the energies are directed toward overcoming procedural

166 See *supra*, note 70

167 *Buntion v Quarterman*, 524 F 3d 664 (5th Cir 2008)

168 *Id.* at 67 ("Although we might decide this case differently if considering it on direct appeal, given our limited scope of review under AEDPA, we are limited to determining whether the state court's decision was objectively unreasonable.")

barriers rather than enforcing the underlying substantive rights of death-sentenced inmates.¹⁶⁹ Despite the articulation of many constitutional protections, the enforcement is relegated to state courts, and at least some of those courts, particularly in active executing states, are notably unsympathetic to the Court's regulatory efforts. Indeed, in a Texas case recently twice reversed by the Court, Texas judges repeatedly voiced their prerogative to disagree with the Court's constitutional conclusion.¹⁷⁰

The inadequacy of federal habeas review to enforce federal rights is lamentable in itself; but it also generates the same legitimation problem described above. Despite the Court's seeming regulation of the American death penalty via its declaration of substantive rights, the procedural mechanisms currently in place under-enforce those protections. Casual observers of the death penalty will likely regard the death sentences and executions that emerge from the current process to be the product of careful, extensive review by many courts. The reality, though, is much different. States have essentially the first and last opportunity to focus on the constitutional merits of inmates' claims. After that review, the many years of legal wrangling is primarily spent navigating the procedural maze and deferential forum that federal habeas has become. Thus, even if increased constitutional regulation of the death penalty could solve many of the deficiencies of the prevailing system, which appears unlikely, the inadequate mechanisms for enforcing that regulation would in any case undermine the effort.

VIII. The Death Penalty's Effect on the Administration of Criminal Justice

The preceding sections highlight the constitutional, institutional, and structural obstacles to the fair and accurate administration of the death penalty. But the problems with the American death penalty are not confined to the capital system. The current battles over the scope of the death penalty may have consequences for the broader American criminal justice scheme. In particular, the presence of the death penalty may tend to normalize and stabilize the extremely punitive sanctions prevailing on the non-capital side; the constitutional regulation of the death penalty – with its explicit death-is-

169 Jordan Steiker, *Restructuring Post Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U Chi L Forum 315

170 Ex parte Smith, 132 S W 3d 407, 427 (Tex Crim App 2004) (Hervey, J, concurring) (“[H]aving decided that no federal constitutional error occurred in this case, we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable ‘nullification’ instruction such as the one in this case”) (summarily reversed in *Smith v Texas*, 543 U S 37 (2004)); Ex parte Smith, 185 S W 3d 455, 474 (Tex Crim App 2006) (Hervey, J, concurring) (“[W]e are not bound by the view expressed in *Penry II* that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable ‘nullification’ instruction such as the one in this case”) (on remand from summary reversal) (reversed in *Smith v Texas*, 127 S Ct 1686 (2007))

different caveat – has further insulated non-capital practices from significant scrutiny; concerns about inefficiencies in the capital system – particularly delays between trial and sentence – have led to significant restrictions on the habeas rights of non-capital inmates; and the demands of the capital system drain resources from the non-capital defense system and the state and federal judiciaries more generally. A decision about the Institute's stance on capital punishment must take account of these spillover costs imposed by the current capital regime.

Capital punishment constitutes only a tiny part of the criminal justice system. Fewer than 50 people were executed and slightly over 100 people were sentenced to death nationwide in 2007, while considerably over two million people remain incarcerated in the non-capital criminal justice system. The death penalty does not even constitute a substantial part of our system for punishing *homicide*. In a country that has experienced between 15,000 and 20,000 homicides per year nationwide over the past decade, the number of capital sentences and executions last year looks particularly trivial. The relative paucity of death sentences and executions does not disappear if we focus on the high-water marks for death-sentencing and executions in the modern era, with highs for death sentences in the 300s (per year, nationwide) and executions hovering close to 100 (per year, nationwide).

At the same time, the non-capital system has experienced extraordinary growth. Over the past three decades, the country has embarked on an unprecedented experiment with mass incarceration. The jail and prison population of the United States has grown eight-fold over the past 35 years. In addition to imprisoning the most inmates in absolute terms worldwide, the United States also has an incarceration rate that is five to eight times higher than other Western industrialized nations; the United States has recently achieved the dubious distinction of imprisoning more than one out of every hundred of its adults. Much of the expansion of the prison population is attributable to more punitive sentencing regimes, especially for non-violent offenders. National spending on incarceration has reached unprecedented levels, with estimates that states and the federal government spend over \$65 billion annually to house the more than 2.3 million inmates held nationwide. Moreover, the rate of incarceration in minority populations is particularly high, with one in nine black males between the ages of 20 and 34 behind bars.

Despite the enormous social and political costs of our mass incarceration policies, reform efforts have been unable to reverse the remarkable trends. The presence of the death penalty, especially the recent focus on the possibility of executing innocents, might well undermine the prospects for non-capital reform. First, the very existence of the death penalty blunts arguments about the excessive punitiveness of non-capital sanctions. Indeed, death penalty opponents approvingly argue in *favor* of harsh incarceration sanctions (including life without parole) as a way of undermining support for the death penalty. In this respect, the death penalty

deflects arguments about the ways in which lengthy incarceration (and the absence of alternative sanctions) imposes substantial costs and undermines human dignity: lengthy incarceration is viewed as a “lesser” evil instead of as an evil in itself. Second, the innocence focus wrought by the death penalty and projected on to the rest of the criminal justice system tends to emphasize the *selection* of those to be incarcerated rather than on the normative underpinnings of our incarceration policy. Tinkering with the investigation and prosecution of crime will leave untouched the prevailing punitive framework. The one important link between wrongful convictions and excessive punitiveness is frequently missed in public and professional debate: the presence of extremely harsh sanctions encourages plea-bargaining, and when the plea-bargain discount is sufficiently high, excessive punishments encourage false confessions. But few advocates of reform have sought to attack the problem of wrongful convictions by reducing the harshness of our current sanctions. The focus on innocence in contemporary death penalty discourse also tends to legitimate and entrench the justice of harshly punishing the guilty. The more precariously-held values of fairness, non-discrimination, adequate representation, and procedural regularity are endangered by equating injustice with inaccuracy.

The death penalty’s deflection of policy-based criticisms of our extraordinarily punitive non-capital system is exacerbated by the Court’s highly-visible constitutional regulation of the death penalty. Over the past decade, the Court has issued three landmark decisions limiting the reach of the death penalty. Two of the decisions, *Atkins v. Virginia*¹⁷¹ and *Roper v. Simmons*,¹⁷² held that the death penalty was disproportionate as applied to particular offenders – juveniles and persons with mental retardation. The third decision, *Kennedy v Louisiana*,¹⁷³ held that the death penalty was constitutionally disproportionate as applied to a particular offense – the rape of a child – though the Court’s reasoning was considerably broader, indicating that the death penalty is disproportionate as applied to any non-homicidal ordinary crime (distinguishing offenses against the State such as espionage and treason). Together, these decisions reflect a considerable broadening of the criteria available to discern evolving standards of decency, including evidence of elite, professional, and world opinion. Two of the cases – *Atkins* and *Simmons* – overruled relatively recent decisions, and, along with *Kennedy*, the decisions signal an unprecedented willingness of the Court to rein in capital practices deemed excessive.

But at the same time the Court has demonstrated a willingness to protect against disproportionate punishment on the capital side, it has wholly deferred to states in their imposition of harsh terms of incarceration. In between its pronouncements in *Atkins* and *Simmons*, the Court upheld the

171 536 U S 304 (2002)

172 543 U S 551 (2005)

173 128 S Ct 2641 (2008)

operation of California's "three-strikes-you're-out" law that resulted in a 25-years-to-life sentence for a repeat offender convicted of attempting to steal three golf clubs from a golf course pro shop.¹⁷⁴ In a choice of quotation that reveals just how difficult the non-capital proportionality test is meant to be, the Court reached back to repeat its observation from an earlier case that the proportionality principle might "come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment."¹⁷⁵

There may be strong institutional and practical reasons for providing robust proportionality review in capital cases while deferring to extremely punitive and rare non-capital sentences. But the death-is-different principle might contribute to a false sense of judicial oversight, especially in light of the enormous visibility and salience of the death penalty both within the United States as a symbol of crime policy and in the broader world as a symbol of American punitiveness. In this respect, the Court's capital jurisprudence offers a means to legitimate American penal policy by ameliorating some of its harshest aspects and portraying the Court as a counter-majoritarian scrutinizer of state penal policy, while leaving the fundamental pillars of America's true penal exceptionalism intact. The United States' status as the world's leading incarcerator remains untouched by the constitutional regulation of capital punishment, yet such regulation gets a disproportionate degree of attention because of the power of the death penalty as a symbol in numerous different arenas. As a result, constitutional regulation of capital punishment both obscures and normalizes the excesses of American penal policy. The problems of mass incarceration, racial disparities in punishment, and the endless war on drugs are obscured because they inevitably fall into the shadows when the spotlight of national and world attention are focused by the Court on highly dramatic issues regarding American death penalty practices. Moreover, extremely lengthy sentences are normalized by capital litigation: successful capital litigants, after all, are almost always "rewarded" with sentences of life without possibility of parole. Even the lengthiest sentences lose their horror when they are so avidly sought and so victoriously celebrated by the (rarely) successful capital litigant. In these ways, the narrow successes of capital litigants under the Eighth Amendment offer little comfort to and indeed likely limit the chances of successful challenges by the vastly larger group of non-capital litigants. Of course, a proponent of our severe non-capital policies would not find worrisome any reinforcement of such policies. But the many critics of our current trend toward mass incarceration should pay attention to the ways in

174 *Ewing v. California*, 538 U.S. 11 (2003).

175 *Id.* at 21 (internal quotation marks omitted) (quoting *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding a life sentence with possibility of parole for a repeat offender convicted of obtaining \$120.75 by false pretenses)).

which the retention of capital punishment may entrench and legitimate that trend.

As noted above, concerns about the administration of the death penalty – particularly the length of time between the imposition of death sentences and executions – led to stringent procedural and substantive limits on the availability of federal habeas for state prisoners. Although the title of the legislation – the Antiterrorism and Effective Death Penalty Act – suggests a purpose unrelated to the status of non-capital inmates, the restrictions were made to apply globally. In addition, many of the restrictions imposed by AEDPA – its one-year statute of limitations, its absolute ban on same-claim successive petitions, its higher bar for filing new-claim successive petitions, its onerous exhaustion provisions, and its restrictions on the availability of federal evidentiary hearings – actually impose special hardships on non-capital inmates; unlike those sentenced to death, indigent non-capital inmates have no statutory right to counsel in state or federal habeas proceedings. As difficult as it is for death-sentenced inmates to navigate AEDPA's procedural maze, the burdens on non-capital inmates are virtually insurmountable. The already low-rate of relief for non-capital inmates pre-AEDPA (1 in 100) has apparently dropped considerably post-AEDPA (1 in 341) according to a recent study.¹⁷⁶ Thus, concerns about the skewed incentives on the capital side – in which inmates have every reason to delay seeking relief in federal court – have generated restrictions for the vastly larger group of non-capital inmates whose incentives are quite different. More generally, this example illustrates the risk of capital litigation driving broader criminal justice policy, and the peculiar dynamic of a small subset of American prisoners framing the debate over the appropriate operation of larger institutional frameworks.

Although death penalty inmates are a small fraction of the overall prison population, the death penalty extracts a disproportionately large share of resources at every stage of the proceedings. As discussed above, capital trials are enormously more expensive than their non-capital counterparts, and the decision to pursue a capital sentence often has significant financial consequences for the local jurisdiction. Indigent defense is notoriously underfunded in both capital and non-capital cases, and the resources devoted to the capital side often come directly at the expense of the rest of the indigent defense budget. In this respect, death penalty prosecutions threaten to compromise an already over-burdened and under-funded indigent defense bar, in addition to imposing daunting costs on local prosecutors and their county budgets. The political pressures and high emotions in capital cases can sometimes overwhelm sober assessments. The famous Texas litigation involving John Paul Penry reflects this dynamic, as his three capital trials

¹⁷⁶ See Nancy J King, Fred L Cheesman II, & Brian J Ostrom, *Habeas Litigation in U.S. District Courts: An empirical study of habeas corpus cases filed by state prisoners under the Antiterrorism and Effective Death Penalty Act of 1996*, National Center for State Courts, Aug 21, 2007, at p 9

generated millions in county expenses before he pled to a life sentence (after three reversals of his death sentences). Following the Supreme Court's invalidation of his first sentence, the local District Attorney declared to the press, "if I have to bankrupt this county, we're going to bow up and see that justice is served."¹⁷⁷ More recently, the Chair of the Florida Assessment Team for the ABA Death Penalty Moratorium Implementation Project reported that "all members of the Assessment Team, including those representing the state, were deeply worried that the expenditure of resources on capital cases significantly detracts from Florida's ability to render justice in *non-capital* cases."¹⁷⁸

In addition to these financial costs, the death penalty places enormous burdens on state and federal judicial resources. In some states, such as California, the burdens imposed by capital cases on appellate courts compromise the ability of those courts to manage their competing commitments on the civil and non-capital side. The burdens imposed are not merely a function of the sheer time required for capital litigation; the frenetic, last-minute litigation in active executing states exacts its own toll on judges and court personnel and likely negatively affects the courts' fulfillment of their non-capital obligations. The possibility of even greater disruption along these lines looms with the increased likelihood that AEDPA's "opt-in" provisions¹⁷⁹ will become operative. Those provisions give fast-track status to death-sentenced inmates from states that create a system for the appointment and compensation of competent counsel in state postconviction. Under the opt-in provisions, once a state has satisfied the opt-in requirements, the state receives the benefit of a shorter statute of limitations for death-sentenced inmates filing in federal habeas (six months instead of one year) and the federal courts are under strict deadlines for ruling on claims, including the congressionally-imposed requirement that capital cases take priority over the rest of the federal docket. A literal reading of the opt-in provisions would require federal courts to halt on-going proceedings (trials, hearings, etc.) until capital habeas petitions are resolved ("The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters."¹⁸⁰). In this respect, the death penalty makes extraordinary demands on the American courts and threatens the quality of justice for all litigants, including those outside the capital process.

¹⁷⁷ Steve Brewer, *Penry likely to face retrial, officials say*, The Huntsville Item, Jul 1, 1989, p 3A

¹⁷⁸ Christopher Slobogin, *The Death Penalty in Florida*, Vanderbilt University Law School Public Law and Legal Theory Working Paper 08 51 (November, 2008)

¹⁷⁹ 28 U S C § 2261

¹⁸⁰ 28 U S C § 2266(a)

Conclusion

The foregoing review of the unsuccessful efforts to constitutionally regulate the death penalty, the difficulties that continue to undermine its administration, and the structural and institutional obstacles to curing those ills forms the basis of our recommendation to the Institute. The longstanding recognition of these underlying defects in the capital justice process, the inability of extensive constitutional regulation to redress those defects, and the immense structural barriers to meaningful improvement all counsel strongly against the Institute's undertaking a law reform project on capital punishment, either in the form of a new draft of § 210.6 or a more extensive set of proposals. Rather, these conditions strongly suggest that the Institute recognize that the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved.