Journal of Criminal Justice and Law (JCJL)
Why Are We Here?

Welcome to the first issue of the *Journal of Criminal Justice and Law*! It is my pleasure to welcome you to the pages of this new journal. I was invited by the Editor, Dr. Kevin Buckler, of the University of Houston-Downtown, to contribute a guest editor’s introduction to this issue. You might ask why, as I currently serve as the editor of the *Criminal Law Bulletin*, a journal that may be seen as a competitor for the types of manuscripts this journal is most interested in publishing. Well, the two journals are competitors, but only in the sense that both want to publish the best law and courts-related articles in the discipline of criminal justice. I believe this is a healthy competition, and the two journals share a common goal: to increase the amount of high-quality research related to legal issues in criminal justice. So I am happy to do what I can to promote the development of this journal.

But why me writing this editorial? Well, I confess it was I who came up with the idea for the journal, only to jump ship before the first issue came to be. I was interested in creating a journal with a court and law focus because I felt (and feel) there is a significant shortfall in the number of criminal justice journals that are willing to publish courts and law-related research. This is surprising, given the primacy of law in the criminal justice system. After all, without laws, there would be no crime, and no need for a criminal justice system to enforce those laws. Law is such an integral part of the criminal justice system, and yet it receives short shrift compared to other aspects of the system, such as policing and corrections.

While there have been few studies on the amount of legal research being published in criminal justice journals (Rowe, McCann, & Hemmens, forthcoming), my own review of the leading journals tells me that there has been a steady increase in the number of articles dealing with legal issues in criminal justice. Many criminal justice journals do not look kindly upon legal research, however. I have personally been told by the editor of more than one journal that legal manuscripts are not welcome. Criminal justice scholars can publish their research in non-criminal justice journals of course, but some departments look askance at this practice, as it means the research is not increasing the visibility of the department within the discipline. And the most common academic publication outlet for legal research, law reviews, are (with rare exceptions) not peer-reviewed and thus many departments do not count law review publications towards promotion and tenure requirements.

Thus, I believe there is a need for more journals that are focused on courts and law. I tried for several years to get an established journal publisher to support my proposed journal, to no avail. One publisher commissioned a market survey and found a great deal of interest in a new courts and law-related journal, but with the recession and the widespread budget cuts in higher education, publishers were understandably wary of expending resources (financial and otherwise) on a new, unproven journal. I also tried to convince the Executive Board of the Academy of Criminal Justice Sciences (ACJS) to add the journal to their existing lineup, but my proposal fell on deaf ears. So I said let’s do it ourselves!

I decided to run the journal through my home institution, Washington State University. I then invited well-regarded law and courts scholars to join the Editorial Board, and sent out word to the academy that a new journal would soon be accepting manuscripts. Before I got any farther, however, the opportunity to assume the editorship of the *Criminal Law Bulletin* was presented to me. I decided to take on that role, as the *Criminal Law Bulletin* is one of my favorite journals, and I did not feel I could pass up the honor of serving as its editor. That meant I had to find someone to take over the reins of the *Journal of Criminal Justice and Law* just as it was getting under way. The fine folks at the University of Houston-Downtown, with whom I had already been in contact about assisting with the journal, stepped up and offered to assume the editorship. The University of Houston-Downtown graciously agreed to provide some support for the journal, and that is how we got here.

About the Journal of Criminal Justice and Law

The journal is intended as an outlet for high-quality writing (both original research and essays) dealing with legal issues in criminal justice. This is a very broad category, obviously, but that is intentional. The goal is to be as inclusive as possible—so the journal welcomes traditional doctrinal style legal analysis, empirical research on the law, research on courts-related aspects of the criminal justice system (such as sentencing), and essays on law and justice. There is a paucity of academic criminal justice journals that have a law and courts focus; this journal is an effort to fill a part of this gap.
Those who might think there is no need for such a journal probably are not reading this introduction, and I am speaking to the choir. That said, I do think a strong case can be made for the need for more courts and law-related journals. I have made the argument in the past (Hemmens 2015), so I will only briefly point out that as the amount of research on criminal justice topics increases generally, there is an increase in the amount of scholarship in criminal justice that has a law and/or courts focus. With this additional research comes the need for additional outlets for that research.

JCJL will be available online only (at first), and is available at no charge, accessed through a link on the University of Houston-Downtown’s website. The journal will be published two times per year initially, and will move to more frequent publication when the number of quality submissions necessitates it. While the journal welcomes multiple formats, it does utilize a standard social science blind peer review process. Thus, manuscripts published in JCJL should count towards promotion and tenure requirements in criminal justice departments.

Obviously a new journal requires a qualified, experienced, committed editor to get the journal up and running. I believe that in Kevin Buckler and their department chair Barbara Belbot, JCJL has hit the jackpot. These are well-regarded courts and law scholars with impressive CVs who have a passion for the subject matter. They are assisted by an editorial board that includes a number of recognized scholars from across the country. JCJL is also fortunate to have a very supportive host institution in the University of Houston-Downtown.

I think now is a great time to start this journal. There is a need for another outlet, there are authors ready willing and able to submit, and there are multiple fascinating issues to discuss. Let’s do this.

In this Issue

In this inaugural issue of the Journal of Criminal Justice and Law we have two articles, two essays, and a book review. Each manuscript focuses on a timely, important legal issue in criminal justice, and adds to our knowledge base in unique and creative ways.

The article “An analysis of state statutes on capital juror disqualification and A proposal for an exploratory statute,” is authored by Alexander H. Updegrove and Professor Rolando V. del Carmen, both of the College of Criminal Justice at Sam Houston State University. It examines statutes regulating the process by which capital juries are purged of jurors categorically opposed to the death penalty. Their analysis of capital juror disqualification criteria reveals a heavy emphasis on disqualifying prospective jurors who oppose the death penalty, but devote scarce attention to addressing procedures for disqualifying prospective jurors with pro-prosecution and pro-death biases. This article concludes by proposing an exploratory statute designed to increase fairness in current capital juror disqualification practices.

The article “Pre- and post-conviction DNA laws in the United States: An analysis of proposed model statutes,” is authored by Dr. Xiaochen Hu of the Department of Criminal Justice at Fayetteville State University, Dr. Mai E. Naito of the Department of Criminology and Criminal Justice at the University of West Georgia, and Professor Rolando V. del Carmen of the College of Criminal Justice at Sam Houston State University. It examines the existing laws regulating the collection of DNA from arrestees and those convicted of a crime, including when DNA may be collected, where it is stored, and who has access to the information. Currently, all 50 states have post-conviction DNA collection laws, but only 30 states have enacted pre-conviction DNA collection laws. The authors analyze the statutes to identify strengths and weaknesses and they propose a model statute to standardize DNA collection laws nationwide.

The invited essay, “Discourses on death: The influence of language on capital jurors’ decisions,” is written by Dr. Robin Conley Riner, of the Department of Sociology and Anthropology at Marshall University. Professor Riner explores the role that language plays in capital jurors’ sentencing decisions. Her research is based on post-verdict interviews with members of capital juries. Using a comparative linguistic analysis, she explores how jurors negotiated the moral difficulty of sentencing another human being to death. The analysis reveals that jurors used language modeled for them in trial as a resource to deny empathy with defendants, thereby justifying sentencing them to death. The paper also illustrates that jurors used particular linguistic constructions to deny their own responsibility for defendants’ sentences, placing the onus elsewhere, such as on the judge or the “law.” The paper concludes with a summary of recommendations to defense attorneys for ways to incorporate the findings into death penalty practice.

The essay “Murder most human: A case for a categorical ban of life-without-parole sentences for all juvenile offenders with guidelines for release decisions for former juvenile life-without-parole cases” is written by Dr. Robert Johnson, of the Department of Justice, Law, and Criminology, at American University. Professor Johnson
discusses the recent Supreme Court case of *Miller v. Alabama*, which imposed a categorical ban on mandatory life-without-parole sentences for juveniles, but which left open the possibility of juveniles convicted of murder being sentenced to life without parole when the sentence is meted out on an individual basis, with due consideration given to the offender and the unique circumstances surrounding the offense. Professor Johnson argues the better approach would be to impose a categorical ban on all life-without-parole for juvenile offenders, and suggests the need for a more fluid assessment of murder dynamics, juvenile development, and crime desistance suggest sentence length parameters to guide release decisions for juveniles serving life terms.

**References**


Acknowledgements

The development and planning of anything new is never an easy task. Much of the work was already established by Craig Hemmens and was simply handed off to the Department of Criminal Justice and Social Work at the University of Houston–Downtown. There were, however, a host of items that the faculty in the department and staff of the college assisted with, so their time and attention is acknowledged here. Michael Cavanaugh and I initially served as co-editors of the journal before Michael stepped away to pursue other service endeavors. He deserves substantial credit for this first issue. His work to secure reviewers for submitted manuscripts, and particularly to invite committed individuals to review for a brand new journal, was essential.

Barbara Belbot, an Editorial Board Member, and Leigh Van Horn, the Dean of the College, provided much needed assistance toward the smooth transition of the journal from Washington State University to the University of Houston–Downtown. They handled much “red tape” that surfaced and guided Michael and I in navigating the waters of university bureaucracy. We were reminded countless times that the university had never before hosted a journal. On each occasion, under their guidance and direction, we plowed ahead. Shannon Fowler lent an ear and offered advice on many occasion on the design and structure of how the journal pages look. Paulina Gamino designed the journal cover and made the end product look really good. Lastly, Larry Karson, Rebecca Pfeffer, and Jace Valcore listened and offered input on the branding for the journal. While only the name of the guest editor, editorial board, and the editor appear on the front cover, this was a team effort.

Kevin Buckler, Editor
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Abstract
Despite increasing unease with the death penalty in the United States, many states continue to conduct capital trials purged of jurors categorically opposed to the death penalty. Death-qualified juries are of great concern because they are more likely to convict and sentence a defendant to death. An analysis of capital juror disqualification criteria in state statutes reveals states heavily emphasize disqualifying prospective jurors who oppose the death penalty, but devote scarce attention to addressing procedures for disqualifying prospective jurors with pro-prosecution and pro-death biases. Roughly half of the states where capital punishment remains legal do not have statutes specifically addressing capital jurors’ disqualification criteria; the half that do have statutes with provisions that are woefully inadequate. This article concludes by proposing an exploratory statute designed to increase fairness in current capital juror disqualification practices.

Keywords
depth penalty, capital punishment, death qualification, juror
Ewell’s failure to secure the hills of Gettysburg on the first day as the pivotal moment in the most important battle waged during the five year conflict. Although the fate of the Confederate States of America likely never rested on Ewell to the degree some historians allege, the principle still stands that battles are won or lost by controlling important terrain.

In the context of the United States’ continued historical jurisprudence with death penalty cases, the same holds true: those who occupy a stronger position at the outset of the conflict are more likely to prevail. The United States’ reliance on an adversarial legal system sets the stage for the prosecution to wage war against the defense, with the life of the capital defendant hanging in the balance. As one legal scholar notes, “most trials are won or lost in jury selection.” Death-qualification—the practice of questioning prospective capital jurors during voir dire to determine who is sufficiently biased for or against the death penalty to warrant removal from the jury—has long been acknowledged as giving the prosecution an unfair advantage. Stated bluntly, “the fighting over death qualification is related to the pink elephant in the room, which is that death qualification helps the prosecution win the case.” Other scholars refer to this prosecutorial advantage as “a clear slant,” “a serious problem of tyranny,” and “one of the finest tools of the prosecutor.” Regardless of intent, death-qualification gives voice to prospective jurors willing to uphold the status quo of the death penalty within a state while silencing objectors. The effect is to require the defense to labor uphill throughout the trial until finally they must storm the prosecution-controlled terrain much like Pickett’s charge. In comparison to the 498 men killed from Picket’s division, 1,442 capital defendants have been executed since 1976 partially as a consequence of the prosecution controlling the jury.

Although the U.S. Supreme Court appears to have largely moved on from refining capital juror disqualification procedures—the current criteria for disqualification were established in 1985—

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2 See John H. Blume, Sheri Lynn Johnson, & A. Brian Threlkeld, Probing "Life Qualification" through Expanded Voir Dire, 29 Hof. L. Rev. 1209, 1209 (1996).
4 Symposium, Open Discussion: Capital Jury, 80:1 Ind. Law J. 60, 64 (2005).
6 Id. at 53.
7 Open Discussion: Capital Jury, supra note 4.
9 See Robert C. Cheeks, Nothing But Glory Gained – Account of Picket’s Charge at Gettysburg, America’s Civil War, Sept. 1990, at 32. On the final day at Gettysburg, Lee ordered Picket to have his division march uphill over a long distance in the open while taking heavy artillery fire. Id. Although the Confederates suffered heavy casualties, a few soldiers crossed the enemy’s position but were ultimately unable to hold it. Id.
10 See Earl J. Hess, Pickett’s Charge -- The Last Attack at Gettysburg 333 (1st ed. 2010).
the issue of death-qualification is hotly contested today, in large part because of the great
disconnect between findings from social science on the prejudicial nature of capital-qualification
and the practices currently being employed. In an age marked by ever-growing skepticism
concerning the ability of the state to impose the death penalty in a fair manner, the debate over
death-qualification can hardly be considered "an open-and-shut case." According to some
researchers' estimations, the temperature of state cultures toward capital punishment has never
been more conducive for introducing desperately needed reforms on a variety of issues. Similarly,
the Supreme Court has carved out protections for particularly vulnerable populations within the
past decade and a half, electing to exempt them from society's harshest punishment. The Court
has traditionally ruled that evidence on the biasing effects of death-qualification is too flawed to
establish a Sixth Amendment violation. Some believe, however, that the Court has been growing
more receptive over time. Thus, it may be only a matter of time until the Court takes on a new
case with capital juror qualification practices at its center. If the Court does elect to revisit jury
qualification practices, however, there is no guarantee it will overturn previously established
precedents. Indeed, given the wide latitude afforded to trial judges in making final decisions for
juror exclusion, cautious optimism should be tempered with the knowledge that, historically, the
Court has shown great deference to trial judges.

II. Supreme Court Cases Addressing Capital Disqualification Procedures

Death-qualification arose out of concerns that abolitionists would highjack trial proceedings
as a form of protesting the possibility of death. The argument at the time was abolitionist jurors in
the pre-\textit{Gregg v. Georgia}\footnote{\textit{Gregg v. Georgia}}, 428 U.S. 153 (1976). era would nullify the jury by refusing to convict the defendant, despite
being convinced beyond a reasonable doubt of the defendant's guilt. This was possible because
the bifurcated trial design instituted by the Court in \textit{Gregg} had not yet been established, and
therefore a conviction was more closely associated with a death sentence. While the Court was
concerned about rogue jurors imposing their will on the jury and making a mockery of court

\begin{itemize}
\item \textbf{15} See Charles S. Lanier & James R. Acker, \textit{Capital Punishment, the Moratorium Movement, and Empirical Questions: Looking Beyond Innocence, Race, and Bad Lawyerin in Death Penalty Cases}. 10 \textit{PSYCHOL., PUB. POL., \\& L.} 577, 603 (2004) ("The country—or at least many parts of it—stands poised at the threshold of potentially dramatic changes in its death penalty policies and practices.").
\item \textbf{16} \textit{Atkins v. Virginia}, 536 U.S. 304 (2002), exempted intellectually disabled defendants from being sentenced to death or executed, and \textit{Roper v. Simmons}, 543 U.S. 551 (2005), excluded juveniles from being sentenced to death or executed.
\item \textbf{19} \textit{Lockhart v. McCree}, 476 U.S. 162 (1986).
\item \textbf{21} See Clark, \textit{supra} note 5, at 8.
\end{itemize}
proceedings, the Court had ruled previously that after all efforts have been taken to prevent jury nullification, there is ultimately not much that can be done to prevent it. As long as a juror appears to be acting in good faith without having been informed of the practice by another party, jury nullification is legal, though discouraged. 22

Table 1 presents an overview of important Court cases pertaining to death-qualification. In Witherspoon v. Illinois, 23 Witherspoon's attorney objected to the exclusion of prospective jurors unwilling to impose the death penalty, arguing the remaining jurors were more likely to both convict and sentence the defendant to death. The Court disagreed, citing a lack of rigorous empirical research demonstrating death-qualified jurors were more likely to convict a defendant. Thus, the practice was declared constitutional. Prospective jurors who raised "general objections to the death penalty or expressed conscientious or religious scruples against its infliction," however, could not be disqualified. 24 Witherspoon established two pathways to disqualification. The first disqualified any juror who would universally refuse to support a death sentence; the second disqualified any juror with personal convictions regarding the death penalty which would keep them from assessing the defendant's guilt based solely on the facts presented at trial. 25 One year later, the Court addressed the case of a prospective juror struck from the jury because of a "fixed opinion against" the death penalty. 26 Although the justices deemed the issue outside of their control for other reasons, they hinted they would have affirmed Witherspoon as only disqualifying jurors who could not properly follow the law as a consequence of their personal convictions. In sum, any juror who could decide the case based on its own merits rather than on personal convictions was considered qualified regardless of whether the juror totally opposed the death penalty.

Almost a decade later, after the Court's institution of the bifurcated capital trial procedure in Gregg, 27 the Court reiterated that Witherspoon 28 required the disqualification of prospective jurors if they conceded that knowing the defendant could be sentenced to death would interfere with their decision to assess the defendant's guilt. 29 A second important finding was that it was unconstitutional for states to restrict the number or type of mitigating factors jurors could consider when determining if the defendant deserved a sentence less than death. In Adam v. Texas the Court ruled that it was unconstitutional to disqualify jurors who would be "affected" by their death penalty views. 30 The Court reasoned it is fine for jurors to be influenced by their personal convictions; it is only when these convictions preclude them from performing their duties as impartial judges of the facts or giving at least a minimum level of consideration to mitigating or aggravating factors that a defendant's Sixth Amendment right is violated.

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22 Sparf v. United States, 156 U.S. 51 (1895).
24 Id. at 522.
25 Id. at 522 n.21.
28 See Witherspoon, 91 U.S. at 510.
Wainwright v. Witt expanded the criteria for disqualification based on an interpretation of Witherspoon cited in Adams. This new standard allowed for disqualification when a juror's death penalty convictions threatened to "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." The Court also found the burden of proof is on higher courts to establish the trial judge made a discernible error when disqualifying a prospective juror before they can overturn a death sentence. Following closely after this decision was Lockhart v. McCree, in which the Court again considered the matter of whether the death-

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**TABLE 1:** Leading U.S. Supreme Court Cases on Death-Qualification Standards

<table>
<thead>
<tr>
<th>Case</th>
<th>Issue</th>
<th>Court Ruling</th>
<th>Reason for Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Witherspoon v. Illinois 231 U.S. 510 (1968)</td>
<td>Does excluding jurors ideologically opposed to the DP violate defendant right to &quot;impartial jury&quot; under the 6th and 14th Amendments?</td>
<td>Yes</td>
<td>No evidence excluding jurors universally opposed to DP leads to death biased jury. Excluding ideologically opposed jurors to DP does create death-biased jury.</td>
</tr>
<tr>
<td>Lockett v. Ohio 438 U.S. 586 (1978)</td>
<td>Can jurors be excluded if they indicate they would have a hard time finding a defendant guilty?</td>
<td>Yes</td>
<td>Jurors who are unable to follow the law should be excluded.</td>
</tr>
<tr>
<td>Adams v. Texas 448 U.S. 38 (1980)</td>
<td>Can jurors be excluded if they admit they would be &quot;affected&quot; during a series of mandatory questions that if &quot;yes&quot; is answered DP will result?</td>
<td>No</td>
<td>Jurors who give at least minimal consideration to both aggravating and mitigating factors cannot be excluded.</td>
</tr>
<tr>
<td>Wainwright v. Witt 470 U.S. 1039 (1985)</td>
<td>Can jurors not universally opposed but strongly limited in ability to be objective be excluded?</td>
<td>Yes</td>
<td>Jurors &quot;substantially impaired&quot; in ability to follow the law should be excluded.</td>
</tr>
<tr>
<td>Lockhart v. McCree 476 U.S. 162 (1986)</td>
<td>Does exclusion of jurors strongly limited in ability to be objective violate defendant right to impartial jury under the 6th and 14th Amendments?</td>
<td>No</td>
<td>Method used in social science research which the death qualification procedures lead to death biased juries is too flawed.</td>
</tr>
<tr>
<td>Morgan v. Illinois 504 U.S. 719 (1992)</td>
<td>Can jurors universally opposed to a punishment other than the DP be excluded?</td>
<td>Yes</td>
<td>Voir dire questioning needs to be thorough enough to identify jurors universally in support of DP. Jurors must follow the law personally.</td>
</tr>
<tr>
<td>Ultecht v. Brown 531 U.S. 1 (2007)</td>
<td>Are appellate courts, in absence of evidence of evading, required to operate on assumption that the trial judges were right to dismiss jurors?</td>
<td>Yes</td>
<td>Trial judges have access to information not contained within court documents because they are physically present at trial.</td>
</tr>
</tbody>
</table>

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32 See Witherspoon, 91 U.S. at 510.
33 See Wainwright, 469 U.S. at 420 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).
34 See Wainwright, 469 U.S. at 431.
qualification process produced biased jurors and violated a defendant's right to trial by impartial jury. Here, as before in *Witherspoon*, the Court justified upholding the constitutionality of the practice by citing an absence of sufficiently rigorous studies.

In *Ross v. Oklahoma*, the petitioner alleged his right to trial by impartial jury was violated by the judge's refusal to disqualify a prospective juror who intended to automatically vote for a death sentence if the defendant was convicted. The Court found a constitutional violation would have occurred if the juror had remained seated, but decided against the petitioner because his attorney had used a peremptory strike to remove the juror in question prior to the start of the guilt phase.

The Court ruled a few years later in *Morgan v. Illinois* that prospective jurors need to be life-qualified as well—that is, jurors "who will automatically vote for the death penalty in every case," thereby "fail[ing] in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require" should be disqualified. According to some scholars, this case also decided that jurors who characterize a "particular mitigating factor" as never deserving of attention should be disqualified. Regardless of which interpretation is correct, this case demonstrates the term death-qualification is misleading. Because jurors must be willing to consider a death or life sentence in order to sit on a capital jury, this process can be more accurately described as capital juror disqualification. Finally, among other things, the Court confirmed in *Uttecht v. Brown* that it intends to abide by the criteria they outlined in *Witt* for juror disqualification, and the burden of proof rests on higher courts to demonstrate the trial judge erred in disqualifying a prospective juror. Furthermore, in making determinations regarding the exclusion of a prospective juror, the trial judge could consider "the demeanor of the juror" in addition to their voir dire responses.

### III. Review and Analysis

#### A. A Case for State Statutes Over Case Law

This research examines state statutes. Although case laws exist which help determine capital juror disqualification processes in various states, the number of states which retain the death penalty in at least name is too great to make a search of all state court cases related to capital juror disqualification practical. A second reason is that fundamental differences exist between state statutes and case law. For example, state statutes are enacted by legislators elected to represent...
the people, and therefore are symbolic of a public commitment to certain values. In contrast, judge-made laws are generally a product of judicial interpretation of existing law.

One scholar defines case law as "an evolving process that never settles on any immutable rule ... [but rather] incorporates all different judicial points of view, each tending to smooth out the rough edges of another." The imagery evoked is like a rock being tumbled in the ocean slowly over time until finally it emerges smooth and polished. Although statutes are less flexible than case law, case law is less immediate in effect than state statutes. What case law gains in flexibility it loses in immediacy, since courts can only set a precedent if they first hear a case on the statute in question. Additionally, courts are charged with interpreting the laws which exist, and cannot create new laws to address aspects of capital juror disqualification that were never touched on in the original statute. This is significant because, while many states have addressed inadequacies of their original statute through case law, few researchers would argue that these changes have sufficiently addressed all deficiencies in capital juror disqualification criteria. Despite the validity of statutes being modified through case law, one scholar labels the current disqualification process "woefully ineffective." When inadequate statutes are in place, case law addresses and corrects those inadequacies even if the people do not wish to act. If, however, these changes to a state statute are never implemented into the legislation, they may be eroded over time by judges who have decided those precedents should no longer be binding, or are less compelling than other precedents which demand a different interpretation of the law.

As others before have recognized, states need not wait for court precedents before correcting injustices associated with the current capital juror disqualification process. Instead, they should set an example for the courts to follow. This is particularly notable because the United States Supreme Court has a tradition of using the number of states which engage in a particular practice as a gauge for determining if that practice is cruel or unusual. State statutes, therefore, are preferable. They can be viewed as symbolic of the people's commitment to particular values. Statutes can be enacted more quickly, are generally more permanent, and appropriately place the burden of lawmaking on legislators as representatives of the people rather than on the courts. This allows states to influence the likelihood of future practices being interpreted as cruel and unusual by the Supreme Court.

B. Direct and Indirect Criteria for Disqualification

Thirty-one states still have a law permitting the use of the death penalty. Of these, fifteen states have temporarily halted executions. Among states with the death penalty, sixteen have a statute that directly defines the criteria necessary for disqualification of a prospective juror in a capital trial (see infra, Table 2).

Of the other fifteen states, twelve have statutes that are not specific to capital trials, but nonetheless have some bearing on capital juror disqualification. Only Kentucky, Oregon, and Pennsylvania lack statutes that either directly or indirectly spell out the circumstances under which

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46 See Bloom, Johnson, & Threlkeld, supra note 2, at 1211.
capital jurors can be disqualified. In these three instances, it is likely case law governs the details of capital juror disqualification. It is interesting to note that Oregon is the only state among these three to list specific challenges for cause, but not include a challenge that could be considered to even broadly address capital juror disqualification criteria.

A lot of variance exists between states which directly address capital juror disqualification and those that only address it through challenges for cause, which are also applicable to non-capital trials. For example, "[w]hen the offense is punishable with death," Arkansas permits disqualification if a prospective juror appears to be "entertaining ... such conscious opinions as would preclude him from finding the defendant guilty." In contrast, Virginia, which does not specifically address the issue of capital juror disqualification, allows a prospective juror who "has any interest in the case, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein" to be disqualified "if it shall appear to the court that the juror does not stand indifferent in the cause." Washington, another state which neglects directly addressing capital juror disqualification, allows prospective jurors to be excluded "[f]or the existence of a state of mind ... in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." Among the twelve states that have statutes aimed at challenges for cause not specific to capital trials (indirect capital juror disqualification criteria), North Carolina is concerned with jurors who cannot follow the law when delivering a verdict as a consequence of "matter of conscience." New Hampshire, South Carolina, and Virginia all use slightly different terminology to address a juror who is "prejudiced to any degree." Missouri allows for the disqualification of a juror whose "opinions or beliefs" prevent them from performing their duty as a juror according to the law. Kansas, South Dakota, Tennessee, and Washington all reference a juror who possesses a "state of mind" that would inhibit their ability to judge impartially. Arizona and Nevada allude to both a juror's opinions or beliefs and their state of mind. As previously discussed, Oregon does not provide any criteria for disqualification applicable to jurors' death penalty views in capital trials.

51 WASH. REV. CODE § 4.44.170(2) (2015).
56 16 A.R.S. Rules of Civil Procedure, Rule 47(c)(4-5); NEV. REV. STAT. § 16.050(1)(g) (2010).
C. Witherspoon and Witt Standards for Disqualification

Under the Witt criteria, the Supreme Court broadened capital juror disqualification criteria—which previously only dismissed prospective jurors who would "unambiguously" and "automatically" refuse to impose a death sentence as ruled in Witherspoon—to also exclude jurors whose personal convictions regarding the death penalty would "prevent or substantially\(^{57}\)"


### TABLE 2: Death-Qualification Provisions in States with the Death Penalty

<table>
<thead>
<tr>
<th>State</th>
<th>Directly Defines Death-Qualification?</th>
<th>Lists Challenges for Cause?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Directly</td>
<td>Yes</td>
</tr>
<tr>
<td>Arizona</td>
<td>Indirectly</td>
<td>Yes</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Directly</td>
<td>Yes</td>
</tr>
<tr>
<td>California</td>
<td>Directly</td>
<td>Yes</td>
</tr>
<tr>
<td>Colorado</td>
<td>Directly</td>
<td>Yes</td>
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<td>Georgia</td>
<td>Directly</td>
<td>Yes</td>
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<tr>
<td>Wyoming</td>
<td>Directly</td>
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NOTE: Delaware recently abolished the death penalty. Nebraska has recently reinstated capital punishment as a potential sanction.
impair” they from determining the case according to the law. Of the sixteen states that directly address capital juror disqualification, only Louisiana, Utah, and Wyoming use Watt terminology in their statutes (see infra, Table 3).

Wyoming copies the Watt standard almost word for word, while both Louisiana and Utah include the key phrase "prevent or substantially impair." In addition to the Watt standard, Louisiana's statute allows for disqualification in cases where the juror "would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him [the juror]" or possesses an "attitude toward the death penalty [that] would prevent him from making an impartial decision as to the defendant's guilt."

The remaining thirteen states have statutes that utilize language more consistent with Witherspoon disqualification criteria. For example, Alabama allows the disqualification of any capital juror who "would refuse to impose the death penalty regardless of the evidence produced." Such a statute fails to address prospective jurors who may only be "substantially impaired" in their ability to adhere to the law and set aside their personal conviction. Similarly, prospective jurors in Colorado can be disqualified if they "state that they would not be able to consider and impose the death penalty under any circumstances because of religious, ethical, or moral scruples against the death penalty."

D. Life-Qualification

Although nothing about Witherspoon or Watt suggests they were only meant to address disqualification criteria for jurors opposed to the death penalty, the Court ruled in Morgan that any juror "who will automatically vote for the death penalty in every case" should be disqualified. Over two decades after the Court's decision, no state has yet to adopt the protections against death granted in Morgan by explicitly stating capital jurors who will always support a death sentence should be disqualified. Even worse, fourteen of the sixteen states use language which makes it clear the disqualification criteria applies solely to jurors opposed to capital punishment. Only Utah and Wyoming employ neutral language that does not specify which direction a prospective juror's bias must lie in before they are eligible for disqualification. As a comparison, Utah's statute addresses "juror's views on capital punishment," whereas Oklahoma's statute references jurors who are "entertaining of such conscientious opinions as would preclude his finding the defendant guilty." Most damning, however, is the complete lack of any state statute explicitly stating prospective jurors who favor the use of the death penalty in a way that merely

63 See Witt, 469 U.S. at 412 (quoting Adams, 448 U.S. at 45).
66 Utah R. Crim. P. 18(e)(10).
"substantially impair[s]" rather than outright "prevent[s]" them from following the law should be disqualified.

Although some of the fourteen states likely applied Morgan’s protections through case law rather than amending the statutes themselves, they have made a point of specifically addressing only pro-defense biases in their written code. This suggests states are more committed to suppressing the voice of jurors who wish to protest the state’s use of capital punishment than they are to protecting the accused’s right to trial by impartial jury. The effectiveness of this strategy can be seen in the social science literature, which has firmly established death-qualified jurors as both more likely to convict the defendant and to return a death sentence.69 Such jurors also score higher

### TABLE 3: Criteria Used for Juror Disqualification in States with Death-Qualification Provisions

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**NOTE:** Delaware recently abolished the death penalty.

on a whole host of secondary measures known to increase the likelihood of condemning a defendant to death,\textsuperscript{70} and are more likely to consider aggravating circumstances to have been present and mitigating factors inconsequential.\textsuperscript{71} Even if case law eventually evolved to protect rights guaranteed by the Supreme Court, states were clearly not concerned about what might happen to defendants tried in the intermediate period after Morgan but before case law evolved.

IV. Other Issues Related to Disqualification

A. Disqualifying Witt-Includables

At least two of the sixteen states which directly address capital juror disqualification criteria endorse standards that would exclude jurors who would be considered death-qualified under the Court’s Witt standard (see infra, Table 4).

Georgia requires prospective jurors to answer the question: "Are you conscientiously opposed to capital punishment?" If the juror answers this question in the negative, he shall be held to be a competent juror."\textsuperscript{72} Similarly, Texas allows for the disqualification of a juror who "has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case."\textsuperscript{73} Both states make no reference to a prospective juror’s ability to follow the law despite their personal convictions. The Court in Witt specifically stated a juror can only be disqualified if their personal convictions regarding the death penalty "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."\textsuperscript{74} Because neither the Georgia nor Texas statute allows for the possibility of a juror who is ardently opposed to capital punishment in all circumstances but still intends to faithfully carry out their duties as a juror to the best of their ability, these statutes give the impression that simply expressing categorical opposition to the death penalty is adequate grounds for disqualification. This is certainly not the case, however, as the Court notes "jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial"\textsuperscript{75} should be retained. In contrast to Georgia and Texas, Ohio stands out as the only state to clarify "a prospective juror’s conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause."\textsuperscript{76}

\textsuperscript{71} See Butler & Moran, supra note 3, at 175.
\textsuperscript{72} GA. CODE ANN. § 15-12-164(a)(4) (2015).
\textsuperscript{73} TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(1) (West 2013).
\textsuperscript{74} See Wainwright v. Witt, 469 U.S. 412 (1985).
\textsuperscript{75} See id. at 421.
\textsuperscript{76} OHIO REV. CODE ANN. § 2945.25(C) (West 2015).
TABLE 4: Other Dimensions of Juror Disqualification in States with Death Qualification Provisions

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</table>

NOTE: Delaware recently abolished the death penalty.

B. Mandatory Voir Dire Questions

At the center of the inadequacies in the current capital juror disqualification criteria is the reality that two prospective jurors who give virtually identical answers during voir dire questioning may or may not be treated similarly regarding disqualification. This holds true regardless of whether both jurors are part of the same trial, from the same jurisdiction, or from separate jurisdictions within the same state. Such occurred in *Davis v. Ayala*, where the defense alleged prospective jurors were disqualified for expressing similar views held by jurors who remained seated. One potential way to ensure prospective jurors with similar views are treated uniformly is to require all jurors to answer a "minimum mandatory" threshold of questions aimed at vetting jurors to the same degree. While the Court has been clear that "[t]he Constitution ... does not dictate a catechism for voir dire," the practice is not inherently forbidden, and promises to provide better opportunities to accurately probe prospective jurors’ death penalty views. In other

words, the Court exists to establish the minimum level of rights a state must honor regarding the treatment of its people, but this minimum should by no means serve as the measure for determining whether capital juror disqualification criteria are sufficient.

Toward this end, the sixteen states which specifically address capital juror disqualification criteria were analyzed to determine the presence of mandatory questions during voir dire. Only Delaware and Georgia possess statutes that include mandatory questions. Georgia requires jurors to answer if they are "conscientiously opposed to capital punishment." Juries who answer 'yes' are disqualified, while jurors who answer 'no' are allowed to remain seated. Delaware employs a more rigorous questioning procedure, and has jurors first indicate if they have,

[F]ormed or expressed any opinion in regard to the guilt or innocence of the prisoner at the bar. If the answer is in the negative, the juror shall be sworn as a juror in the case, unless the juror has conscientious scruples against finding a verdict of guilty in a case where the punishment is death, even if the evidence should so warrant.... If the juror's answer to the question be in the affirmative, to the satisfaction of the court, that the juror feels able, notwithstanding such an opinion, to render an impartial verdict upon the law and the evidence, in which event the juror shall be a competent juror, if not otherwise disqualified, challenged or excused.81

C. Oral vs. Written Presentation of Questions

Regarding the method of presenting capital juror disqualification questions—whether in written or oral form—one scholar recommends using written questionnaires administered "outside the courtroom" in order to avoid imposing on the court's limited time.82 Alternatively, some scholars call for a "far more detailed and probative-inquiry" during voir dire, which would appear better suited for oral delivery. Possibly because of this disagreement over which methods are most desirable, or out of recognition that some built in flexibility is preferable, none of the sixteen states with capital-specific juror disqualification criteria address the form questions should be presented in.

D. Guilt or Sentence Phase Bias

In Witt, the Court determined "the tests with respect to sentencing and guilt, originally in two prongs, have been merged."84 Previously in Witherspoon,85 before the bifurcated trial procedure had been established,86 a prospective juror could be disqualified for being biased either when assessing the defendant’s guilt, or when determining the magnitude of the punishment deserved. Currently, the Court employs a more holistic approach where trial judges must determine whether, overall, a prospective juror’s views toward capital punishment will "prevent or substantially

80 GA. CODE ANN. § 15-12-164(a)(4)
81 DEL. CODE. ANN. tit. 11, § 3301 (2015).
83 See Blume, Johnson, & Thelkeld, supra note 2, at 1258.
impair"\textsuperscript{87} their ability to follow the law despite strong personal convictions regarding the state's use of the death penalty (either for or against the practice).

Among the sixteen states with specific capital juror disqualification criteria, five (Alabama, Colorado, Indiana, Ohio, and Texas) specify prospective jurors' death penalty views are grounds for disqualification if they will prevent the juror from following the law when determining the proper sentence. Another seven (Arkansas, Colorado, Delaware, Florida, Idaho, Montana, and Oklahoma) are concerned with death penalty biases that might influence whether a prospective juror can follow the law when assessing the defendant's innocence or guilt. Three more (Georgia, Utah, and Wyoming) fail to identify a particular stage of trial when capital punishments biases are problematic. The final state's (Louisiana) statute is exemplary in this regard because it most closely resembles the Court's ruling in \textit{Witt}—that death penalty biases are grounds for disqualification if a prospective juror cannot or will not follow the law during \textit{either} the guilt or sentencing phase of a capital trial.

Indiana's statute allows for the disqualification of any "person [who] entertains such conscientious opinions as would preclude the person from recommending that the death penalty be imposed."\textsuperscript{88} Idaho, on the other hand, lists grounds for disqualification as "the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror."\textsuperscript{89} Prospective capital jurors in Louisiana can be disqualified if they "would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before [them]" or their "attitude toward the death penalty would prevent [them] from making an impartial decision as to the defendant's guilt."\textsuperscript{90}

\section*{V. Proposed Solutions}

\textbf{A. Abolition of Capital Qualified Juries}

Several scholars have called for the outright abolition of capital juror disqualification practices and a return to the inclusion of jurors biased in favor of and against the death penalty.\textsuperscript{91} A particularly compelling argument for abolition is the systematic exclusion of certain categories of individuals from capital juries,\textsuperscript{92} which may violate the fair cross-section requirement of the Sixth Amendment. At least one scholar labels capital trials "ideal settings for contemporary racism to

\begin{thebibliography}{99}
\bibitem{footnote1} \textit{See Witt}, 469 U.S. 424.
\bibitem{footnote2} \textsc{Ind. Code} § 35-37-1-5(a)(1) (2015).
\bibitem{footnote3} \textsc{Idaho Code} § 19-2020(9) (2005).
\bibitem{footnote4} \textit{See Witherspoon}, 391 U.S. at 522 n.21.
\bibitem{footnote5} \textit{See Butler & Moran, supra note 17; see also Clark, supra note 5; Jane Tucker, An Alternative to Death-Qualification: The Nonunanimous Penalty Jury (2012) (unpublished Yale Law School Legal Scholarship), http://digitalcommons.law.yale.edu/student_papers/118.}
\bibitem{footnote6} \textit{See Alicia Summers, R. David Hayward, & Monica K. Miller, Death Qualification as Systematic Exclusion of Jurors with Certain Religious and Other Characteristics, 40 J. Appl. Soc. Psy. 3218 (2010); see also Brooke Butler, The Role of Death Qualification in Capital Trials Involving Juvenile Defendants, 37 J. Appl. Soc. Psy. 549 (2007); UTAH R. CRIM. P. 18(e)(10).}
\end{thebibliography}
flourish.”93 The Court, however, upheld the constitutionality of death-qualification in the face of this very contention in Lockhart.94 Other scholars support abolishing capital juror qualification because the process itself has been identified as encouraging prospective jurors to support a conviction and subsequent death sentence.95 While the Court “reject[s] the argument that the very process of questioning prospective jurors at voir dire about their views of the death penalty violates the Constitution,”96 it is still possible for states to revise their statutes by changing the content of capital juror disqualification questions and the manner in which they are asked. As scholars have recognized, states “have a legitimate interest”97 in providing defendants a trial by impartial jury, and it is “apparent”98 capital juror disqualification is the best process for screening out substantially biased jurors. Calls to abandon capital juror disqualification, therefore, are misguided. A more reasonable solution for correcting biases inherent in the disqualification process itself is to pay careful attention to the order in which questions are asked and the balance between the number of questions addressing pro-life versus pro-death biases. It is also important to restructure the wording of questions to include neutral language.99

A third reason some scholars support doing away with capital juror disqualification is a concern that judges restrict the amount of time spent on voir dire questioning in order to avoid overburdening the court’s time and money.100 The problem with this heightened concentration on efficiency is that “very few protections for the rights of the accused are calculated to expedite criminal proceedings.”101 One scholar identified a specific subtype of death-biased juror—one willing to consider a sentence other than death, but only for offenses ineligible for death in the first place—who can only be discovered through lengthy oral interrogation by the defense.102 For this reason, some scholars consider it important for the defense and prosecution, rather than the judge, to explore prospective jurors’ death penalty views at leisure. Such a process would likely consume more of the court’s resources, but this concern is overshadowed by the need to secure the defendant a trial by impartial jury.103

**B. Modifying Disqualifying Procedures**

Scholars who do not advocate complete abolition are split over how best to improve capital juror disqualification procedures. Some recommend using separate juries for the guilt and

94 See Butler & Moran, supra note 18.
95 See Blume, Johnson, & Threlkeld, supra note 2, at 1231; see also Craig Haney, On the Selection of Capital Juries, 8 LAW & HUMAN BEHAV. 121 (1984).
96 See Butler & Moran, supra note 18, at 170 n.7.
97 See Butler & Moran, supra note 3, at 183.
99 See Blume, Johnson, & Threlkeld, supra note 2, at 1250–1251.
100 See Johnson, supra note 82, at 564.
101 See Blume, Johnson, & Threlkeld, supra note 2, at 1239.
103 See Johnson, supra note 82, at 565–566.
sentencing phases,\textsuperscript{104} while others want to continue employing a single jury and capital-qualifying jurors during voir dire, but wait until the start of the sentencing phase to reveal the results and disqualify the appropriate jurors from participating in the sentencing phase.\textsuperscript{105} Both fall short as solutions, however, as the Court has "upheld against constitutional attack the Georgia capital sentencing plan which provided that the same jury must sit in both phases of a bifurcated capital murder trial."\textsuperscript{106} It is possible, of course, that the Court could reverse their decision on this issue. Some may even interpret the recent Court ruling striking down Florida's capital punishment system, prohibiting judges from overruling juries' recommendations, as supporting this view.\textsuperscript{107} The difference between this ruling and Georgia's post-\textit{Furman} capital punishment system, however, is that Florida's system was an abnormality relative to others states' systems, whereas all death penalty states currently employ a single jury for both phases of a capital punishment trial. Similarly, the second proposal fails to address the issue of death-qualified jurors sentencing defendants to death more often than disqualified jurors.\textsuperscript{108} The second approach also ignores the original reason death-qualification was conceived: to prevent abolitionists from refusing to find a defendant guilty in cases where death is a possible outcome.\textsuperscript{109}

At least one scholar has called for using implicit association tests to identify biases rather than the current \textit{Witt} disqualification criteria.\textsuperscript{110} In order to screen out prospective jurors whose support for the death penalty would severely interfere with their ability to perform their duties as juror, yet another scholar suggested the defense ask jurors biased toward the prosecution if they would devote time and thought to the relevance of specific mitigating factors in determining the appropriate sentence.\textsuperscript{111} Finally, as previously discussed, some scholars believe a "minimum mandatory" threshold of questions asked of every prospective juror would uncover damning biases not brought to light by inadequate questioning.\textsuperscript{112} This additional questioning should be headed by the defense and prosecution, because they have the best chance of eliciting meaningful answers from jurors.\textsuperscript{113}

VI. The Need for an Exploratory Statute

A. Justification

Taken together, research suggests the need for a statute which should: (1) contain a minimum threshold of predetermined questions to be asked of all prospective jurors in order to provide


\textsuperscript{105} See Salgado, \textit{supra} note 98, at 519.

\textsuperscript{106} See Butler & Moran, \textit{supra} note 18, at 180.

\textsuperscript{107} Hurst v. Florida, 136 S. Ct. 616 (2016).

\textsuperscript{108} See Butler, \textit{supra} note 69; Filkins, Smith, & Tindale, \textit{supra} note 69.


\textsuperscript{111} See Blume, Johnson, & Threlkeld, \textit{supra} note 2, at 1259; see also Susan D. Rozelle, \textit{The Utility of Witt: Understanding the Language of Death Qualification}, 54 BAYLOR L. REV. 677, 688 (2002).

\textsuperscript{112} See Nason, \textit{supra} note 75.

\textsuperscript{113} See Johnson, \textit{supra} note 82 at 565.
standardization; (2) contain questions utilizing a two-step process to first determine if a prospective juror holds strong death penalty views, then assess whether these pro-death or pro-life convictions would greatly diminish their ability to follow the law; (3) have questions using neutral language and require them to be presented in a non-biasing sequence; (4) structure questions to elicit yes or no answers to ensure clarity; (5) allow the defense and prosecution to follow up with oral questions until each prospective juror’s answers can be properly classified as affirmative or negative; (6) require all prospective jurors to answer questions specific to both death penalty support and capital punishment opposition biases; and (7) allow the minimum threshold questions to be presented in either oral or written form.

This article proposes an exploratory statute with mandatory minimum questions built into state law. In proposing such a statute, it should be clear what the article is and is not proposing. Social policies should always be empirically driven, and doubly so when individuals’ lives hang in the balance. Thus, we are proposing an exploratory statute for the scholarly community to test according to the scientific method—a statute which, if demonstrated effective at producing capital juries more representative of the community at large rather than just the pro-death community, states could benefit from implementing. Until and unless sufficient empirical evidence has been amassed to suggest the statute’s effectiveness, however, we strongly discourage states from blindly implementing this or any other policy without a proper understanding of the associated consequences. In creating the proposed mandatory questions, special attention was given to the Colorado method for voir dire and the questions’ readability. As far as possible, we tried to limit the mandatory questions to an eighth grade reading level.

If a question was perceived to have a socially desirable answer, it was asked in a manner designed to require jurors to actively deny a socially undesirable response rather than passively affirm a socially desirable response. Social desirability was also controlled for by adding a disclaimer designed to solicit honesty and openness prior to asking the questions, per the Colorado method.

This exploratory statute continues to allow capital defense attorneys the freedom to conduct business as usual. Although the research demonstrates states require updated death qualification statutes, this updated statute should not disrupt operating procedures defense attorneys have spent a lifetime developing and honing. Instead, an updated statute is necessary because state statutes in their current form heavily favor the prosecution and are known to bias juries toward both conviction and death sentences. This updated statute, then, should rectify the codified imbalance favoring the prosecution while simultaneously preserving defense attorneys' ability to

114 See Nason, supra note 78.
115 See Sandys & Trahan, supra note 102.
116 See Blume, Johnson, & Threlkeld, supra note 2, at 1250–1251.
118 See Blume, Johnson, & Threlkeld, supra note 83; Sandys & Trahan, supra note 102.
119 See Nason, supra note 78.
120 See Blume, Johnson, & Threlkeld, supra note 2, at 1254; Johnson, supra note 82, at 564.
121 See Matthew Rubenstein, Overview of the Colorado Method of Voir Dire, Champion, Nov. 2010, at 18.
122 Id.
123 See Open Discussion: Capital Jury, supra note 4.
practice current voir dire strategies. As one anonymous writer\textsuperscript{124} points out, no simplistic statute can possibly address all of the complexities associated with death qualification. It is possible, however, to craft a statute which takes into account voir dire practices such as the Colorado method\textsuperscript{125} which ensure all prospective jurors are vetted to the same minimum degree. This minimum threshold should never supplant a more thorough, one-on-one, private approach to voir dire questioning by defense attorneys, but appears necessary given the number of capital defendants who receive inadequate legal representation.\textsuperscript{126} An eventual model statute should recognize the importance of voir dire for obtaining a favorable trial outcome and require states to provide a minimum level of vetting to all prospective jurors in order to avoid penalizing capital defendants for incompetent legal representation. This solution is less than ideal, but offers capital defendants greater protections than they are currently afforded under existing state statutes.

\textbf{TABLE 5: Readability Scores for Exploratory Statute}

<table>
<thead>
<tr>
<th>Question #</th>
<th>Flesch Reading Ease</th>
<th>Flesch-Kincaid Grade Level</th>
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</thead>
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<tr>
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<tr>
<td>1A</td>
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<tr>
<td>1B</td>
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<td>1E</td>
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</table>

\textsuperscript{124} We are indebted to both anonymous reviewers who provided comments on an earlier draft and whose insightful comments have helped shape this article into its current form.

\textsuperscript{125} See Rubenstein, supra note 121.

\textsuperscript{126} See Justice Backs Death Penalty Freeze, CBS NEWS (Apr. 10, 2001), http://www.cbsnews.com/news/justice-backs-death-penalty-freeze/ (quoting Justice Ginsburg saying, "I have 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.... People who are well represented at trial do not get the death penalty").
B. An Exploratory Statute

In a capital trial, all prospective jurors are required to answer the following questions in the order presented below before serving as a juror. These questions may be presented and answered as a written survey in the presence of other prospective jurors, or asked verbally of each individual juror during a private, sequestered meeting where only a single prospective juror, the trial judge, the defense attorney, and the prosecutor are present. Before the questions are presented, jurors must be presented with the following disclaimer:

You are going to be asked a few questions. There are no 'right' or 'wrong' answers. People in our community have different opinions on many topics, and jurors also have different opinions. Having different opinions is a healthy part of democracy, and important for solving challenges our country faces. The court asks you answer as honestly and clearly as possible.

**Question 1A**: If you found someone guilty of murder, would your first thought be to give them the death penalty?

**Question 1B**: Would your first thought be to give them the death penalty if you could have them spend the rest of their life in prison with no way out?

**Question 1C**: If you found someone guilty of murder, would you feel like you owe it to the victim or their loved ones to give them the death penalty?

**Question 1D**: Would you ever have someone spend the rest of their life in prison with no way out for murder if you could give them the death penalty?

**Question 1E**: If you found someone guilty of murder, would you try to find reasons not to give them the death penalty?

**Question 1F**: If you had to pick between doing what you think is right and what the law says is right, would you choose to do what you think is right?

**Question 1G**: If you thought the law told you not to give the death penalty, but your heart told you to give the death penalty, would you follow your heart?

Prospective jurors who answer question 1D or 1E in the negative, or 1C, 1F or 1G in the affirmative, are to be disqualified from jury service for the present capital trial. All prospective jurors who were not disqualified from jury service based on their answers to questions 1C, 1D, 1E, 1F, or 1G are also to answer the following questions:

**Question 2A**: If you found someone guilty of murder, would your first thought be to stop them from getting the death penalty?

**Question 2B**: Would you ever think about giving someone the death penalty if you could have them spend the rest of their life in prison with no way out?

**Question 2C**: If you thought the law told you not to give the death penalty, but your heart told you to not give the death penalty, would you follow your heart?

Prospective jurors who answer question 2B in the negative or 2C in the affirmative are to be disqualified from jury service for the present capital trial. Prospective jurors who are not disqualified based on their responses to question 1C, 1D, 1E, 1F, 1G, 2B, or 2C may be asked additional, juror-specific, sequestered questions by the trial judge, prosecutor, or defense
attorney. It is recommended these additional questions be open-ended to allow jurors ample opportunity to respond without the restrictions imposed by the mandatory minimum questions. If for any reason confusion exists regarding the classification of a prospective juror’s answer as negative or affirmative for one of the mandatory questions, the defense, prosecution, and judge may all follow up with as many additional, open-ended, oral questions aimed at clarifying the matter as necessary to establish with reasonable confidence whether the juror’s answer is best understood as negative or affirmative. All follow up questions must be conducted in private with only the juror in question, the trial judge, the defense attorney, and the prosecutor present.

Prospective jurors are to be dismissed for cause and disqualified from jury service for the present capital trial if they hold views about the death penalty which would prevent or substantially impair their ability to:

1. Follow the law regarding a determination of the capital defendant's innocence or guilt;
2. Adequately consider mitigating circumstances during the sentencing phase according to the law;
3. Recommend a sentence less than death; or
4. Recommend a death sentence.

VII. Conclusion

This research analyzed death-qualification statutes in the thirty-one U.S. states which still retain the death penalty. Findings revealed only half of those states directly address death-qualification, while three states lack statutes regulating death-qualification in any capacity. Over 75% of states which directly address death-qualification incorporate language associated with a now outdated Supreme Court decision, and fail to specify that jurors who are substantially impaired in their ability to follow the law should be disqualified. No statute explicitly states prospective jurors should be disqualified if they would always support a death sentence, and over 75% have death-qualification statutes which apply solely to jurors biased against the death penalty. Georgia and Texas have statutes which would disqualify jurors the Supreme Court has said cannot be excluded. State statutes vary over whether death penalty biases are grounds for disqualification if they would influence the guilt phase, sentencing phase, or both. Overall, greater clarity is needed to create state statutes which reflect the most recent Court decisions and leave no doubt over which jurors can and cannot be disqualified.

Despite evidence demonstrating current death-qualification standards result in juries more likely to convict and sentence defendants to death,127 many states retain statutes inadequately regulating capital disqualification practices. At least two states have statutes that appear not to conform to Court decisions. Many more have codified language explicitly singling out jurors who oppose capital punishment for disqualification while remaining silent about jurors who unequivocally support death. Given the current shifting attitudes about capital punishment, states need to be more proactive in the interest of justice in death penalty cases based on Court decisions. The path states choose has important implications for constitutional law in the United States and beyond.

127 See Butler, supra note 69.
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Pre- and Post-Conviction DNA Collection Laws in the United States: An Analysis of Proposed Model Statutes

Xiaochen Hu, Mai E. Naito, Rolando V. del Carmen

Abstract
DNA is one of the most powerful molecular tools being widely used in criminal investigations today. Pre- and post-conviction DNA collection laws govern when DNA must be collected, where it is stored, and who has access to the information. Currently, all fifty states have post-conviction DNA collection laws, but only thirty states have enacted pre-conviction DNA collection laws. Details of the procedures and requirements in state statutes vary by state. This study analyzes the current statutes to identify strengths and weaknesses and propose a model statute to standardize DNA collection laws nationwide. By using Herbert Packer’s two models for criminal justice processes as a theoretical framework, the proposed pre-conviction and post-conviction DNA laws offer a foundation for states that may consider revising or adopting DNA collection laws.

Keywords
DNA, statutes, pre- and post-conviction

I. Introduction and Background
Alonzo Jay King was arrested by Maryland police in 2009 and charged with first- and second-degree assault. While in custody at the Wicomico County Central Booking facility, a DNA sample was


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taken from King during the booking procedure under the Maryland DNA Collection Act. After being added to the Maryland DNA database, King’s DNA matched a record of an unsolved rape case from 2003. King was then also charged and convicted with first-degree rape. He appealed and argued that taking his DNA while being arrested violated his Fourth Amendment right against unreasonable search and seizure. The U.S. Supreme Court ruled in 2013 that taking DNA sample from persons who are arrested but not convicted is constitutional. This is the first time the Court has addressed the issue of whether taking DNA sample from an arrestee is constitutional.

The opinion in *Maryland v. King* was written by Justice Kennedy who was joined by Chief Justice Roberts and Justices Thomas, Breyer, and Alito. The majority opined that taking a DNA sample from an arrestee who is not convicted is constitutional. Three major reasons were discussed: First, it is believed that DNA testing will be accepted similar to the use of fingerprints. Second, the Maryland DNA Collection Act has strict rules on how law enforcement are authorized to collect, store, and analyze DNA samples. According to the majority’s perspective, the rules adequately protect individuals’ privacy, including innocent individuals. Third, as an identification tool, DNA identification technology can rapidly achieve two important goals of identification in the criminal justice procedure—identifying an individual and retrieving his or her criminal history.

The dissenting opinion by Justice Scalia was joined by Justices Ginsburg, Sotomayor, and Kagan. The main concern from the dissent argued that identifying individuals does not equate to solving cold cases. If law enforcement agencies are using DNA information collected from an arrestee to link to an unsolved case, they are conducting a suspicion-less search, which is forbidden by the Fourth Amendment. Justice Scalia also pointed out that current DNA statutes do not provide enough rules for collecting and analyzing DNA samples. An innocent individual may have his or her DNA sample added into a database due to an arrest, even if it is an unlawful arrest.

The use of DNA is one of the most powerful forms of forensic identification that has significantly altered police investigations and the law must be equipped with how such information can be used without violating privacy. The recent Supreme Court decision in *King* set precedent that has opened the doors for DNA to be collected prior to conviction and such information may be used against national databases without specific requirements on reducing errors.

To bring the issue on how the government can protect DNA evidence from being fraudulently accessed or abused, the current research analyzed pre- and post-conviction DNA collection laws.

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1. *Id.* at 1962.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 1966.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
While all 50 states have post-conviction DNA collection laws that generally require individuals to surrender DNA after conviction, only thirty states have pre-conviction DNA collection laws as of May 2015. The King case decided that collecting DNA before an individual is convicted is constitutionally permissible; however, not all states have pre-conviction DNA collection laws. This suggests that reservations exist in some states about collecting DNA samples. Some state laws are well-written with details on the procedure to be followed, but other statutes can benefit from better provisions. Also, this study applies Herbert Packer’s two models to discuss how proposed DNA collection laws can be implemented to achieve a balance between the crime control and due process models. In sum, this paper identifies and analyzes existing state statutes and proposes model statutes for both pre- and post-conviction DNA collection laws to promote standardization in how DNA is collected, stored, and analyzed across the states.

A. DNA and DNA Identification Technology

DNA technology has played a significant role in numerous cases in criminal investigations. DNA has also resulted in over 300 exonerations. Cronan gives two reasons why there is a “universal adoration of DNA in forensic science.” The first is that genetic instruction encoded in DNA is unique to all living organisms and capable of being used for identification. The second reason is that DNA molecules are highly stable. Unlike fingerprints, which could be easily tainted before collection at the crime scene, DNA evidence is more reliable and precise.

The deoxyribonucleic acid (DNA) molecule can be found in all living cells such as blood cells, hair roots cells, and sperm. While it is commonly believed that DNA can provide accurate identification, misidentification is possible if one is not knowledgeable about the types of DNA. The variations, which determine a person’s DNA to be unique, are located in “a multitude of genomic sites.” Polymorphic genes account for these variations, which allow scientists to create an individual-specific DNA profile. There are two types of DNA—Nuclear DNA (nDNA) and Mitochondrial DNA (mtDNA). Nuclear DNA, found in the nucleus of a cell, is unique to each person because it is inherited from both parents. Mitochondrial DNA, found in the mitochondria, is less powerful than the nDNA because it is inherited only from the mother, which may result in multiple hits if an individual has siblings from the same mother. While nDNA is more reliable, mtDNA is more stable and can be found in multiple locations within a cell. This distinction is important because DNA analysis is different depending on the type of DNA.

19 Cronan, supra note 17, at 124.
20 Id.
21 Id.
22 Id. at 121.
23 Id.
24 Id.
25 Id.
27 Id.
28 Id.
Forensic DNA testing is different from complete individual-specific DNA profiling. In forensic DNA testing, scientists focus on repeated DNA sequences known as short tandem repeats (STRs). STRs resemble an accordion and contain repetitive sections of the DNA sequence that can be processed quickly. Alleles are variants of a gene that contain minor differences of the same basic genetic information. Thirteen locations of STR alleles are used to compare and identify a person. In DNA databases, only the thirteen locations of STR alleles known as “fragment or DNA” are stored in the DNA profile. Most state and federal crime laboratories also store the whole DNA sample. Both the DNA profile and sample contain personal information that are under the control of the government. The challenge is how to secure such personal information without infringing on an individual’s rights.

B. Theoretical Framework: Packer’s Crime Control and Due Process Models

In 1964, Herbert Packer proposed two models of the criminal process: crime control model and due process model. His primary purpose of creating the two models was to examine how laws were implemented in the criminal process. In his paper, Packer also stated that the two models should not be labelled as good or bad; instead, the two models were merely used to explain the operation of criminal process. This philosophy applies to the current study because the purpose is to propose possible statutes that could balance both models in the process of collecting a DNA sample.

The crime control model emphasizes the repression of criminal behavior and treats it as the most important function of the criminal process. To successfully operate the crime control model, the criminal justice system must have a high rate of apprehension and conviction. In this study, that would mean the criminal justice system must obtain as many DNA samples as possible. These DNA samples are collected from the arrestees and the convicted to maximize the probability of solving criminal cases. Without further limitation, it is imaginable that in the future, the crime control model requires everyone in society to provide his or her DNA sample in order to prepare for a potential or forthcoming criminal behavior.

The due process model emphasizes the reliability of the fact-finding process. According to Packer, the due process model did not ignore the importance of repressing criminal behavior, but it rejected the informal fact-finding process. The purpose of due process model is to maximize fairness in the criminal process. Although the DNA profile only has thirteen locations of STR alleles stored, the DNA database has been criticized about the ease of having an individual’s DNA information saved, but difficult to get it expunged. To prevent the abuse of DNA samples and

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30 Id.
32 Id. at 5.
33 Id. at 6.
34 Id. at 9.
35 Id. at 10.
36 Id. at 14.
37 Id.
38 See King, 133 S. Ct. 1958 (2013) at majority.
profiles at its root, collecting DNA samples appears to be the gatekeeper. It may be suitable to only collect DNA samples from arrestees of serious crimes, but they must be guaranteed the right to expunge if they are innocent.

To achieve a balance between the crime control and due process models in relation to DNA collection laws, it is imperative for the procedures to be consistent on how it is collected, stored, and analyzed. While it is important for law enforcement to use DNA to solve cases, it is also important to respect an individual’s rights on whether the government should have such sensitive information at its disposal. These two models will be used throughout the analysis of DNA collection laws.

C. DNA Collection Laws

Prior to 2000, scholars disagreed on the purpose for obtaining DNA or the need for various forensic technology. They were unsure about DNA collection and worried about Fourth Amendment violations. In 2000, Congress passed the DNA Analysis Backlog Elimination Act also known as the DNA Act. It requires law enforcement officers to obtain a DNA sample from a person “in [the] custody of the Bureau of Prisons who is, or has been, convicted of a qualifying federal offense,” as well as a person who is “on release, parole, or probation.”

Anticipating constitutional challenges, Congress embedded provisions in the DNA Act to protect individual’s rights. For example, the Act has limitations on who has access to the DNA database, and how DNA samples are used. The Combined DNA Index System (CODIS) is a computer software program operated by the FBI to run DNA databases. The National DNA Index System (NDIS) is part of CODIS on a national level that contains DNA profiles from participating federal, state, and local forensic laboratories. The DNA Act has procedures on expunging DNA samples from CODIS; however, it does not truly protect individuals from further constitutional attacks. Some scholars argue that once a person’s DNA sample is entered into CODIS, there is no way to know whether the actual DNA sample can be expunged because “there is no process or provision to compel its destruction,” even if the individual is found wrongfully convicted.

Moreover, financial considerations make DNA collection and analysis more problematic. Athens and Rower analyzed Alaska’s DNA collection statutes, and argued that “the collection, processing, and storage of DNA is a costly business.” DNA collection and analysis costs more than fingerprinting. The Innocence Project indicated that the average cost of DNA collection and analysis

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42 Id.
43 Id.
44 Pownall, supra note 40, at 765.
47 Pownall, supra note 40, at 765.
48 Beaugh, supra note 39, at 158.
analysis is $1,000 per test.50 Some states have ruled that the DNA provider must pay for the costs of DNA collection and analysis.51

State legislatures are cautious about passing pre-conviction as opposed to post-conviction DNA statutes. Currently, only thirty states have pre-conviction DNA collection statutes, which allow law enforcement officers to obtain a DNA sample from an arrestee rather than from an individual who has been convicted. Pre-conviction DNA collection statutes have generated more attention because an arrestee has not been adjudicated, and some arrestees may not have met with an attorney or appeared before a judge before they must relinquish their DNA. Using the arrestee’s DNA sample as an identification tool for the crime in which he or she was arrested does not make sense because probable cause must have been established for the individual to be arrested to begin with. Moreover, linking an arrestee to other unsolved cases violates the due process model. The Due Process Model suggests that a person should be innocent until found guilty.52 Justice Scalia warned in his dissenting opinion in King that identifying an individual that is not the crime for which he or she was originally arrested for is considered a suspicion-less search, which is forbidden by the Fourth Amendment.53

The Court’s decision in King did not end the debate over collecting DNA samples before conviction. In State v. Emerson,54 the Supreme Court of Ohio ruled that no person has a reasonable expectation of privacy in his or her DNA profile.55 Heil argued that the Supreme Court of Ohio’s decision “opens the door for potentially unlimited uses of DNA sampling.”56 Some scholars argue that DNA collection should be judged based on two tests which are: “totality of the circumstances” and “special needs.”57 The totality of the circumstances test applies to determine whether an offender has a lower expectation of privacy.58 The special needs doctrine test is used to determine whether the warrant or probable cause is impractical.59 However, even under these tests, courts have reached different outcomes.60 In United States v. Mitchell,61 the Third Circuit Court of Appeals held that the federal pre-conviction DNA statutes are constitutional.62 In contrast, the California Courts of Appeal held in People v. Buza63 that California’s pre-conviction DNA statute violated the Fourth Amendment when there was no judicial probable cause on the arrestee; however this

51 OR. REV. STAT. § 137.076 (2014); OKLA. STAT. tit. 74 § 150.27a (2016); NEB. REV. STAT. § 29-4106 (2012); IDAHO CODE § 19-5506 (2014).
52 Packer, supra note 31.
55 Id.
57 Id. at 4. See also Ashley Eiler, Arrested Development: Reforming the Federal All-Arrestee DNA Collection Statutes to comply with the Fourth Amendment, 79 GEO. WASH. L. REV. 1201, 1205 (2011).
58 Heil, supra note 56, at 539.
59 Id. at 533.
60 Id.
62 Id.
decision was abrogated. Some states’ pre-conviction DNA collection statutes rule that there should be probable cause for law enforcement officers to collect DNA samples from an arrestee, otherwise, the arrestee can refuse to provide his or her DNA sample.

Researchers have predictably criticized the Supreme Court’s decision in King. Noronha argued that the Court sacrifices “the Fourth Amendment to build up the DNA database” and concludes that the Court’s decision “leaves room for government abuse.” Moreover, Joh stated that the majority opinion in King is insufficient and the Court’s decision has reduced our genetic privacy. Other scholars maintain that certain limitations and requirements should be established before collecting DNA samples from arrestees. Lapp and Radice stated that probable cause established by a neutral third-party can balance the interests of the government and individual privacy, thus, reducing the chance for abuse. Some researchers, however, support expanding the DNA database because having such information could help lower the crime rate.

D. Federal Laws on Pre- and Post- Conviction DNA Collection

This study analyzes the current state statutes and proposes model statutes to standardize DNA laws across the states. Background knowledge of federal laws on pre- and post-conviction DNA collection is necessary to help understand state legislation. The DNA Identification Act of 1994 passed by Congress authorized the FBI to establish CODIS, and the DNA Backlog Elimination Act of 2000 allowed the Federal DNA Database Unit to collect DNA samples from federal convicted offenders. In 2006, Congress passed the DNA Fingerprint Act of 2005, which required federal arrestees to provide their DNA samples. The federal DNA law contains copious details; however, very few states have used them. The controversy surrounding the constitutionality of both pre-conviction and post-conviction DNA collection statutes requires that collecting DNA samples must be well-designed, even under the state DNA collection statutes. It is the goal of this paper to attempt a balance between crime control and due process models in both pre- and post-conviction DNA collection laws. The following section analyzes current pre-conviction DNA laws in thirty states.

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64 Id.
65 VA. CODE ANN. § 19.2-310.2:1; VT. STAT. ANN. tit. 20 § 1933 (2016); N.M. STAT. ANN. § 29-3-10 (2011); MINN. STAT. § 299C.105 (2006).
67 Stephanie B. Noronha, Comment, Maryland v. King: Sacrificing the Fourth Amendment to Build Up the DNA Database, 73 Md. L. Rev. 667 (2014).
72 Id.
73 42 U.S.C. § 14132 (1994); § 14135(a); § 14137.
74 Packer, supra note 31.
II. State Pre-Conviction DNA Collection Statutes

As of May 2015, only thirty states had pre-conviction DNA collection laws. Table 1 summarizes the variables that have been analyzed in the current paper. These variables, which are summarized from state statutes, particularly reflect Justice Scalia’s concerns in *King* such as crime type, DNA collection and storage, and expungement process.\(^75\)

### A. Crime Type Required for DNA Sample

State statutes limit the collection of DNA samples to persons who have committed certain crimes. Among the thirty states that have pre-conviction DNA collection statutes, twenty-nine states have the same crime types in both pre-conviction and post-conviction statutes. Only in Maryland are the pre-conviction DNA collection statute and the post-conviction DNA collection statutes different.\(^76\) In Maryland, arrestees who are charged with a violent crime or burglary must

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provide DNA samples. Most state statutes include felonies, but specifically mention sex offenses, adjudicated delinquent, burglary, and kidnapping. Rather than looking at the offense, the statute in South Carolina decided that an offense that is punishable by a prison sentence of five years or more must provide a DNA sample. Since DNA collection and analysis is expensive and many crime laboratories are overburdened with cases, it is suggested to limit DNA evidence collection to serious crimes.

B. When to Provide DNA Sample
Most states (twenty-one out of thirty) require that after a person has been arrested, his or her DNA sample must be collected. Other statutes (such as New Mexico and Vermont) provide that the presence of probable cause suffices to collect DNA. Although law enforcement must have probable cause when making an arrest, it is also an important component in pre-conviction DNA collection laws because probable cause alone does not always lead to an arrest. Instead, it can result in a person being “summoned to appear before a magistrate for the commission of a felony.” Some states require that probable cause must be confirmed by “a magistrate or a grand jury” before an arrestee’s DNA is collected. Other states (such as Colorado, Florida, Missouri, New Mexico, North Dakota, South Dakota, and Utah) require that DNA must be collected during the booking procedure, sometimes together with fingerprinting. Texas’s pre-conviction DNA statute requires law enforcement to collect a DNA sample from an arrestee “immediately after fingerprinting the defendant and at the same location as the fingerprinting occurs.”

78 Id.
80 MO. PUB. SAFETY CODE ANN. § 2-504; MO. REV. STAT. § 650.055.
84 N.M. STAT. ANN. § 29-3-10 (2011); VT. STAT. ANN. tit. 20 § 1933 (2016).
90 TEX. GOV’T CODE ANN § 411.1471 (2015).
C. DNA Collection in Juvenile Cases

Although many statutes (nineteen out of thirty) do not explicitly contain provisions on whether pre-conviction DNA collection statutes apply to juveniles, some states (11 out of 30) rule that juvenile arrestees should also have their DNA samples collected. States such as Alaska and Missouri require the suspect to be at least sixteen-, 91 seventeen-, 92 or eighteen-years-old.93 New Jersey’s statute states that juveniles “arrested for an act which, if committed by an adult, would constitute an offense” must provide a DNA sample.94 Other statutes allow pre-conviction DNA collection to be applied to both adults and juveniles. Wisconsin requires that a person must provide DNA sample if he or she “was arrested, or the juvenile was taken into custody, under a warrant.”95 Among states with pre-conviction DNA collection laws for juveniles, there is no difference between adults and juveniles’ provisions on crime types.96

D. Where DNA Samples are Stored and Expungement Process

Usually, both pre- and post-conviction DNA samples are stored at the same location. If a statewide crime laboratory is in charge of convicted offenders’ DNA analysis and storage, it is also responsible for arrestees’ DNA. In some states, however, pre-conviction DNA samples are stored in the same jurisdiction where it was collected, such as in its local crime laboratory.97 The rationale for this storage in the local crime laboratory is that it is more difficult to expunge DNA samples and profiles if they are entered into a state or national database.98

The expungement process in pre-conviction DNA collection laws is usually more detailed because arrestees have not been adjudicated. Among the thirty states with pre-conviction DNA laws, seventeen states have a clear section on the expungement process. Some states (such as Alabama, Alaska, Colorado, Maryland, Nevada, New Jersey, Tennessee, and Texas) indicate that the DNA sample must be destroyed only if the charge is dismissed or the person has been acquitted.

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91 ALASKA STAT. § 44.41.035 (West 2010).
95 WIS. STAT. § 165.84 (2016).
98 Beaugh, supra note 39. Beaugh argued that it is hard to know whether the actual DNA sample is expunged if it enters into CODIS. Id.
of the charge. Other states (such as Arizona, Pennsylvania, Florida, Illinois, and Kansas) require both DNA sample and profile in the database to be expunged.  

E. Other Provisions Worth Noting in Pre-Conviction DNA Laws  

Alabama’s pre-conviction DNA collection statute states that “any person...shall consent in writing freely and voluntarily to provide a DNA sample” and that the individual has “the right to refuse to provide a sample without penalty” and “refusal may not be used as evidence against the person in any proceeding.” To achieve balance with the due process model, allowing arrestees to provide DNA sample voluntarily is reasonable because the DNA sample is only used for identification purposes. If a law enforcement agency has the person in custody, photographs and fingerprints suffice for identification. However, if the arrestee is accused of a serious crime (e.g., homicide and/or a sexual crime) and there are no other evidence for identification, use of reasonable force to obtain a DNA sample collection may be an option.

North Carolina’s pre-conviction DNA collection statute states that “if the person is arrested without a warrant, the DNA sample must not be taken until a probable cause determination has been made.” This is a notable aspect of this statute because some scholars are skeptical about the expungement process. Texas’s pre-conviction DNA collection statute treats arrestees differently based on the crime committed. Individuals arrested for a serious offense must give their DNA sample immediately after arrest, while others can provide their DNA sample voluntarily at any time. This indicates that collecting DNA for serious crimes is a priority in that jurisdiction. There are differences among statutes as to what can be done when arrestees refuse to cooperate if asked to submit DNA. Some states mandate that law enforcement use reasonable force to collect DNA samples, while others require a court order.

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102 N.C. Gen. Stat. § 15A-266.3A.

103 Beaugh, supra note 39, at 158.


105 Id.

106 Id.

107 E.g., Haskell v. Harris, 745 F.3d 1269 (2014).


III. State Post-Conviction DNA Collection Statutes

All fifty states have detailed statutes on post-conviction DNA collection. Table 2 identifies the variables that are analyzed in this paper.

### TABLE 2: Variables Analyzed in Post-Conviction DNA Collection Laws

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*Specific crime types include sexual offense, adjudicated delinquent, attempt to commit felony, child-related crime, etc.

*Not mentioned in the statutes

**NOTE:** This table is condensed due to space restrictions. To see a complete table, please contact the first author.

### A. Crime Type Required for DNA Sample

State statutes require offenders to provide a DNA sample if they are convicted of violent crimes, such as murder and/or rape. In property crimes, first-degree burglary is usually included as a crime type. Many states require sex offenders to provide samples. Missouri requires persons who are registered as sex offenders to provide a DNA sample before release. Some states do not have clear statements on crime types in their DNA collection statutes. Instead, they refer to other state statutes to define crime types (e.g., an individual is found guilty of a felony or

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110 **Alaska Stat.** § 44.41.035 (West 2010).  
112 *Id.*
any offense under their state code). Some DNA collection statutes include crime types that require obtaining a DNA sample. Utah has a detailed crime type list, and identifies crimes such as “sale or use of body parts” and “failure to stop at an accident that resulted in death.” Among the fifty states, New Jersey is the only state that lists different types of sex offenses, such as aggravated sexual assault and aggravated criminal sexual contact.

TABLE 2: Variables Analyzed in Post-Conviction DNA Collection Laws
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*Specific crime types include sexual offense, adjudicated delinquent, attempt to commit felony, child-related crime, etc.
*Not mentioned in the statutes

NOTE: This table is condensed due to space restrictions. To see a complete table, please contact the first author.

For juveniles, some states, such as Arizona, use the term “adjudicated delinquency” to identify offenses committed by juveniles that are a felony if committed by an adult. Juveniles who commit these crimes are required to provide a DNA sample. Many states (thirty-six out of fifty) do

113 Id.
114 UTAH CODE ANN. § 53-10-403 (West 2015).
not have a clear section for juvenile offenders. However, Hawaii explicitly states that no juvenile is required to provide a DNA sample even if the act is considered a felony if committed by an adult.\footnote{HAW. REV. STAT. § 844d-31 (West 2006).}

In sum, the post-conviction DNA laws for both adults and juveniles are similar.

**B. When to Provide DNA Sample**

Every state has post-conviction DNA laws where an offender must relinquish DNA upon conviction. However, some statutes require offenders to provide DNA after pleading guilty.\footnote{CAL. PENAL CODE § 296.1 (2004); HAW. REV. STAT. § 844d-31; IDAHO CODE § 19-5506 (2014); LA. STAT. ANN. 15:609 (2010); MO. REV. STAT. § 650.055 (2012); OHIO REV. CODE ANN. 2901.07 (West 2012); S.D. CODIFIED LAWS § 23-5A-1 (2016).} Other states prescribe that even if an offender is found “not guilty by reason of insanity” or “guilty but mentally ill,”\footnote{DELCARMEN, supra note 85, at 56.} a DNA sample is still obtained.\footnote{ARK. CODE ANN. § 12-12-1109 (2003); HAW. REV. STAT. § 844d-31.} An issue with when to submit DNA sample after conviction is whether it applies retroactively. Some statutes (twenty-four out of fifty) are retroactive in effect and specify a start date when the new law takes effect. For example, Alabama requires offenders convicted after May 6, 1994 to provide DNA samples,\footnote{ALA. CODE § 36-18-24 (2016).} while Rhode Island requires persons who were convicted after June 29, 1998.\footnote{12 R.I. GEN. LAWS § 12-1.5-8 (2015).} Most dates vary by state. For instance, offenders in Indiana have to provide DNA sample if they committed offenses against the person or burglary after June 30, 1996,\footnote{IND. CODE ANN. § 10-13-6-10 (West 2006).} but all other crimes takes effect after June 30, 1998.\footnote{Id.} Some statutes (thirteen out of fifty) also have sections about requiring persons on parole, probation, or any other forms of release to provide DNA samples as a part of the conditions on release.\footnote{Id.}

**C. Where DNA Samples Are Stored**

All DNA databases are index systems containing both the DNA sample and profile. DNA samples need a physical place, while DNA profiles are generally stored electronically. Some DNA databases are operated by private laboratories,\footnote{MD. PUB. SAFETY CODE ANN. § 2-504 (West 2009); N.H. REV. STAT. ANN. 651-C:2 (2010); N.Y. EXEC. LAW § 995-c (Consol. 2012); N.C. GEN. STAT. § 15A-266.4 (2011); 44 PA. CON. STAT. §2316 (2005); 12 R.I. GEN. LAWS §12-1.5-8; TENN. CODE ANN. § 40-35-321 (2012); WIS. STAT. § 973.047 (2015); CAL. PENAL CODE § 296.1 (2004); VT. STAT. ANN. tit. 20 § 1933 (2016).} and some are run by local governmental agencies such as the department of public safety or department of justice.\footnote{ALASKA STAT. § 44.41.035 (West 2010); ARIZ. REV. STAT. § 13-610; IND. CODE ANN. § 10-13-6-10; MISS. CODE ANN. § 47-5-183 (2003); OHIO REV. CODE ANN. § 137.076.} Other states store DNA samples in a different department that is not directly affiliated with law enforcement. For
example, Rhode Island stores DNA samples in the Department of the Health.\textsuperscript{128} Texas analyzes DNA samples in any laboratory approved by the director.\textsuperscript{129}

Some states (eleven out of fifty) have statutes discussing whether DNA profiles on the state level will automatically be submitted and compared to profiles in CODIS. Some statutes mention CODIS; however, the statutes do not specify whether a DNA profile will automatically be entered into CODIS. It has been suggested that it is ideal for DNA profiles to be entered into a national database to expand the scope of searching for a suspect’s DNA. For example, Delaware requires its DNA database system to be “compatible with the procedures set forth in a national DNA identification index to ensure data exchange on a national level.”\textsuperscript{130} Similar to fingerprint identification technology, DNA identification technology relies on a large database to make it meaningful when running comparisons, and CODIS satisfies this need. However, DNA is expensive to analyze,\textsuperscript{131} thus many states need federal funding to build a DNA database.\textsuperscript{132}

\textbf{D. Other Provisions Worth Noting in Post-Conviction DNA Collection Laws}

Two features are worth noting in the post-conviction DNA collection statutes. First, only a few states have a section on expunging a DNA sample and DNA profile in the database. Although expunging a DNA sample and DNA profile is common in pre-conviction DNA collection statutes, it is difficult to find expungement processes in the post-conviction DNA collection statutes. So far, only Arizona’s statute clearly describes an expungement process if a person’s appeal or post-conviction relief succeeds.\textsuperscript{133}

Second, some states have provisions on when and how these DNA samples can be used. Since every physical characteristic of a person can be derived from DNA, the release and usage of DNA requires caution. Alabama’s DNA collection statute states that DNA samples and profiles can only be released for three purposes: (1) law enforcement identification,\textsuperscript{134} (2) criminal defense and appeal,\textsuperscript{135} and (3) forensic validation studies.\textsuperscript{136} If researchers want to use DNA samples and profiles, the statute states that personal identification information must be removed.\textsuperscript{137} Michigan’s statute allows DNA samples to be analyzed for research purposes.\textsuperscript{138} However, in Delaware and Florida, DNA collection statutes indicate that DNA profiles and DNA samples can only be used for law enforcement purposes.\textsuperscript{139}

\textsuperscript{128} R.I. GEN. LAWS § 12-1.5-8 (2015).
\textsuperscript{129} TEX. GOV’T CODE ANN. § 411.1471 (2015).
\textsuperscript{130} DEL. CODE ANN. tit. 29 § 4713 (2016).
\textsuperscript{131} Athens & Rower, \textit{supra} note 49, at 390.
\textsuperscript{132} \textit{Id.} at 391.
\textsuperscript{133} ARIZ. REV. STAT. § 13-610 (LexisNexis 2016).
\textsuperscript{134} ALA. CODE § 36-18-25 (2016).
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} MICH. COMP. LAWS SERV. § 750.520m (LexisNexis 2015).
\textsuperscript{139} DEL. CODE ANN. tit. 29 § 4713 (2016); FLA. STAT. § 943.325 (2016).
IV. Proposed Model Statutes

Some states have merged pre- and post-conviction DNA collection laws together into one statute;\textsuperscript{140} while other states have different statutes with some overlaps.\textsuperscript{141} It is best to have separate statutes for pre- and post-conviction DNA collections because arrestees must be guaranteed their presumption of innocence. DNA contains significant genetic information that justifies the need for caution in collecting, storing, and analyzing such information; therefore, balancing crime control and due process in the DNA collection statutes is imperative. Below are suggestions towards model statutes based on the gaps that were identified under the current statutes for both pre- and post-conviction DNA laws.

A. Model Statute for Pre-Conviction DNA Collection

Appendix A contains the proposed model statute for pre-conviction DNA collection. Pre-conviction DNA statutes emphasize the due process model over crime control because arrestees benefit from the presumption of innocence until adjudicated guilty. The pre-conviction DNA statutes must contain the following basic contents: First, the crime type that needs a DNA sample from an arrestee should be clear in the statute. Compared to post-conviction DNA collection laws, the scope of crime type in pre-conviction DNA collection laws needs to be narrowed down to improve efficiency and ensure some degree of privacy to balance the crime control and due process models. For example, only suspects arrested for serious crimes (e.g., violent crimes and sex crimes) should be required to provide a DNA sample immediately after arrest. Those arrested for minor crimes should have the option to provide a DNA sample voluntarily. This also removes system overload and unnecessary expenses in local crime laboratories.

There must be a clear procedure in the statute for when law enforcement officers are authorized to collect DNA sample from an arrestee to ensure the fundamental fairness. Obtaining a search warrant is the best practice. For warrantless arrest cases, probable cause must be established and approved by a magistrate. Collecting DNA is not time sensitive. For example, blood alcohol level in drunk driving cases is time sensitive because such information dissipates after several hours, while DNA will remain the same. There is always enough time to obtain a search warrant or detect probable cause.

Each state must differentiate between adults and juveniles and if DNA should be collected. Juveniles who have been taken into custody should not be required to submit DNA. Also, the statute must indicate where DNA samples go and when they are used for analysis, as was the issue in King.\textsuperscript{142} To balance crime control and due process models, DNA samples collected from arrestees must be stored and analyzed in local crime laboratories to make it easier to opt for an expungement because once DNA samples and profiles go to a federal DNA database, it becomes harder to expunge them. The statute must have sections that explain the purpose for collecting DNA sample from arrestees. It must be clear that the only purpose for collecting DNA is identification—linking the arrestee to the crime in the present case, rather than unsolved cases.

\textsuperscript{140} E.g., ALASKA STAT. § 44.41.035 (West 2010); COLO. REV. STAT. §16-23-103 (2010); FLA. STAT. § 943.325; 730 ILL. COMP. STAT. ANN. 5/5-4-3 (West 2014); KAN. STAT. ANN. § 21-2511 (2014); LA. STAT. ANN. § 15:609 (2010); MO. REV. STAT. § 650.055 (2012).

\textsuperscript{141} E.g., ARK. CODE ANN. § 12-12-1006, 1105, 1109; N.J. STAT. § 53:1-20.20, 20.25 (2013).

\textsuperscript{142} Maryland v. King, 133 S. Ct. 1958 (2013).
This is to prevent suspicion-less searches, which are forbidden by the Fourth Amendment. Moreover, the statute must contain provisions on the procedure for expungement if the arrestee has been found not guilty or the case is dismissed.

B. Model Statute for Post-Conviction DNA Collection

A model statute for post-conviction DNA collection proposes standardization among the state statutes. This can be found in Appendix B. The post-conviction DNA collection statute emphasizes crime control model over due process. It must include the following basic contents: First, crime types that need a DNA sample from an arrestee should be well defined. Since DNA testing is expensive, there is no need for minor crime offenders to provide a DNA sample such as those convicted of theft under a specified amount. Second, every statute must indicate whether the law applies retroactively and identify a starting date. This allowed for better tracking of high-profile offenders. Also, the statute must be clear on whether DNA collection also applies to those who plead guilty, go on probation or parole, or other forms of release. Unlike pre-conviction DNA collection laws, post-conviction DNA collection laws should rule that juveniles must only provide DNA samples after they are adjudicated of serious crimes.

However, emphasizing the crime control model does not mean the due process model should be ignored. The statute must indicate where DNA samples will be stored, who can access it, and for what purpose to minimize possible abuse of DNA profiles and samples. Although the public does not have access to the DNA database, individuals who have such access should be known to the public. For example, law enforcement, the judiciary, and institutional research may need access to the DNA database. Giving the public such information will reduce the risk of the information being misused.

In addition, similar to the proposed pre-conviction DNA statute, the post-conviction DNA statute should also contain detailed information on the expungement process of DNA samples and profiles. Based on the crime control model, convicted offenders must provide DNA samples incident to future recidivism. However, although these offenders have been convicted, they have the right to appeal. If the appeal succeeds, the DNA information must be expunged to fulfill goals of the due process model. The government might be reluctant to erase DNA profiles and samples since DNA testing has become a powerful tool in exonerations in wrongful conviction cases. Post-conviction DNA collection statutes need sections on destroying DNA profiles and samples in the DNA database. In addition, the statute should indicate whether state DNA profiles will go to the federal DNA database such as CODIS or if it will only be used to check for matches against the federal DNA database. There are three justifications: First, DNA profiles that are entered into the federal databases are harder to control. Second, if CODIS already has the DNA profile of an offender, the state will not need to run DNA analysis again. Third, it is better to limit how and when these DNA samples and profiles in the database can be used. Unlike identification before conviction, post-conviction DNA collection can be used to link the defendant to other unsolved crimes, which is a goal in the crime control model. To sum, a perfect balance between crime control and due process models in DNA collection is not possible; but these model statutes propose

\[143\] Id.

\[144\] Athens & Rower, supra note 49, at 390.
V. Conclusion

DNA collection understandably draws both respect and criticism. This study analyzed both pre- and post-conviction DNA collection laws, focusing on important variables that are in the current pre- and post-conviction DNA collection statutes. All fifty states have statutes on post-conviction DNA collection whereas only thirty states have pre-conviction DNA collection statutes. Some statutes are specific and comprehensive, while others are brief and generic. This study suggests that each variable analyzed should be included and addressed in every state’s pre- and post-conviction DNA collection statutes. It recommends that more safeguards be included in state statutes to limit pre-conviction DNA collection and analysis. For the states that do not have pre-conviction DNA collection statutes, it is recommended that the model statute be used to initiate state legislation.

The model statutes seek a balance between the crime control and due process models. The collection of such personal genetic information by the government must be protected to reduce abuse. DNA evidence is a powerful tool in the criminal justice system that can incarcerate the guilty, but also exonerate the innocent. It is a major and effective tool for law enforcement that a democratic society must use cautiously and wisely. DNA laws are crucial for all states to adopt to administer justice while maintaining individual privacy.

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Appendix A: Proposed Model Statute for Pre-Conviction DNA Collection

1. Any person who is 16-year-old or older arrested of a crime listed in section 2 on or after 90 days of the statute enacted must have DNA sample collected by law enforcement during the booking process. A search warrant and/or probable cause are needed to justify DNA collection.

2. Applicable offenses are listed as follows: murder in the first or second degree; felony murder; manslaughter; aggravated assault; attempted aggravated assault; gross sexual assault; rape; sexual abuse of a minor; unlawful sexual contact; sexual offenses against a child under 14 years of age; kidnapping; criminal restraint; burglary; arson; aggravated criminal mischief; or causing a catastrophe.

145 Packer, supra note 31.
146 Based on crime types listed in 25 M.R.S. § 1574.
3. Any person who is arrested for a crime not listed in section 2 can submit DNA with consent during booking process. The person has the right to refuse providing a DNA sample and this refusal cannot be used as evidence against the person.

4. All DNA samples and profiles must be stored in the local crime laboratories and analyzed for identification purpose only by law enforcement. Both DNA sample and profile collected and created during the booking process must not be submitted to statewide or federal databases such as the Federal Bureau of Investigation’s Combined DNA Index System (CODIS) until the person is adjudicated guilty. DNA profiles in the local crime laboratories can be compared to profiles in the stateside and federal databases if necessary, but for identification purposes only.

5. If a person is found not guilty or the case is dismissed, both DNA sample and profile of the person in the local crime laboratory must be expunged immediately and a letter must be sent to the court verifying the expungement is completed.

Appendix B: Proposed Model Statute for Post-Conviction DNA Collection

1. A person convicted on or after 90 days of the statute enacted of a crime listed in section 2 shall submit a DNA sample at the time of adjudication of guilt. If a person convicted submitted DNA at arrest, he or she does not have to submit DNA at adjudication.

2. Applicable offenses are listed as follows: murder in the first or second degree; felony murder; manslaughter; aggravated assault; attempted aggravated assault; gross sexual assault; rape; sexual abuse of a minor; unlawful sexual contact; sexual offenses against a child under 14 years of age; kidnapping; criminal restraint; burglary; arson; aggravated criminal mischief; or causing a catastrophe.

3. A juvenile adjudicated delinquent of a crime on or after 90 days of the statute enacted listed in section 2 shall be taken a DNA sample.

4. All DNA samples of persons convicted must be stored and analyzed in statewide crime laboratories run by state government. DNA profiles of persons convicted are automatically submitted to the Federal Bureau of Investigation’s Combined DNA Index System (CODIS) to allow exchange of DNA records submitted by federal, state, and local crime laboratories. DNA from adjudicated delinquents must only be stored and analyzed in statewide crime laboratories run by state government.

5. All DNA samples and profiles must only be disclosed to the following entities: (A) to a law enforcement agency for identification purpose only; (B) in a judicial proceeding; (C) to a defendant or his or her attorney if the DNA sample is related to the defendant; or (D) for academic research. If DNA samples and profiles are used for academic research purposes, names must be removed.

6. If the conviction or adjudication of a person is overturned on appeal or post-conviction relief, both DNA sample and profile must be expunged. A certified copy of the court order must show proof that conviction has been reversed. The DNA sample in the state crime laboratory must be destroyed. The DNA profiles in both state and federal DNA

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147 Based on crime types listed in 25 M.R.S. § 1574.
149 Based on A.R.S. § 13-610.
databases must be deleted. A certified copy of these expungement motions must be delivered to the court and the defendant.

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Discourses of Death: The Influence of Language on Capital Jurors’ Decisions

Robin Conley Riner

Abstract
This paper explores the role that language plays in capital jurors’ sentencing decisions. The research is based on ethnographic fieldwork in Texas death penalty trials, which included post-verdict interviews with jurors who served on those trials. A comparative linguistic analysis was conducted in which the language used in trial, including attorneys’ and judges’ talk in court and jurors’ written instructions, was compared with the language of jurors’ post-verdict interview responses. The paper explores how jurors negotiated the moral difficulty of sentencing another human being to death. The analysis reveals that jurors used language modeled for them in trial as a resource to deny empathy with defendants, thereby justifying sentencing them to death. The paper also illustrates that jurors used particular linguistic constructions to deny their own responsibility for defendants’ sentences, placing the onus elsewhere, such as on the judge or the “law.” The paper concludes with a summary of recommendations to defense attorneys for ways to incorporate the findings into death penalty practice.

Keywords
Death penalty, juries, language

Language is the stuff of law. This is not a new concept; legal scholars and practitioners continually reveal the linguistic makeup of law. Lawyers quibble over the precise verbiage to use in contracts, jury instructions, and closing arguments. Legal theorists recognize that a trial is constructed of multiple, fragmented narratives, none of them adding up to a singular truth. Critical legal scholarship attributes law’s violence – its power over people – to the binding force behind its words.

What draws researchers to this topic and what, I argue, has been simultaneously (and ironically) under-examined is this latter point: the power behind legal words. We see in law and
language studies the potential (read, perhaps, theoretical) implications of language forms for the lives of those entangled in the legal system. What we don’t often see is the actual effect of those words on those lives. This essay attempts to uncover the connection between language and consequence in the context of criminal trials. I examine the language used in Texas capital trials and, by hearing from the jurors who served on those trials, investigate the effect of that language on their decisions for life or death.

My research shows that jurors struggle, often emotionally, with the conflict between literally facing defendants during trial and then having to distort, diminish, or negate these interactions in order to sentence those same defendants to death. This essay explores how jurors use language as a significant resource for negotiating such moral conflicts and thus for facilitating death sentences. Specifically, jurors must walk a fine line between the purported objectivity the law requires of them and the emotional, subjective nature of their decision-making experiences. They anchor themselves to particular forms of objective language to deny empathic and emotional connections with defendants during trial in order to be able to sentence them to death. Overall, the language of death penalty trials entails a variety of communicative distancing practices that ultimately ease jurors into the difficult act of sentencing someone to death.

Research Design
The data presented in this paper are drawn from my dissertation research, which involved 12 months of ethnographic fieldwork conducted from 2009 to 2010 in diverse counties across Texas.¹ This project was driven by my desire to try to understand how capital jurors make decisions about sentencing defendants to death. This seemed to me to be – and, I found out later, was for jurors themselves – an incredibly difficult thing to do. Jurors look for direction, for “lifelines,” one said, when grappling with such a difficult decision. Such direction often comes in the form of legal language.

The project sought specifically to investigate how the language used during death penalty trials – both spoken language used by attorneys, judges, and witnesses and written language in the form of instructions – affects jurors’ sentencing decisions. Given the statutory prohibition against recording or observing jury deliberations in criminal cases (Recording, Listening to, or Observing Proceedings of Grand or Petit Juries While Deliberating or Voting, 2000), the project used a triangulated approach to provide the clearest window into jury decision making. I first observed and audio-recorded (when possible²) four capital trials in four different Texas counties. One of these trials resulted in a life verdict, the other three in death sentences. All four of the defendants were male, three were white (including the one who received a life sentence), and one was African American. The African American’s trial was the only one that involved a non-White victim – an African American female.

Second, I conducted post-verdict interviews with jurors who served on the four trials I observed. These interviews often occurred only days or weeks after the trials had concluded. I also interviewed additional jurors who had served on prior capital cases. In total, I interviewed 21 jurors from nine capital cases. In the first parts of the interviews, I asked open-ended questions about

¹ A complete write-up of the findings of this project can be found in Conley (2016).
² I was permitted to audio-record one of the trials. I took notes during the others and obtained an official transcript of each from the court.
the jurors’ experiences serving on capital trials in order to allow the jurors to “construct their responses in their own ways” (Fleury-Steiner, 2002, p. 555). The point of this open-ended question design was to avoid relying on a priori categories and instead to explore what experiences had meaning for the jurors in their own terms (Hollan, 2001, p. 48). The second part of the interviews involved more pointed questions, which focused on the jurors’ understanding of their instructions. 

I then conducted a comparative linguistic analysis of trial transcripts and transcripts of jurors’ post-verdict interviews. The analysis focused on the specific linguistic forms that attorneys, jurors, and witnesses used to refer to defendants, as well as the language jurors and others used to talk about sentencing decisions and about the death penalty in general. This analysis allowed me to identify language forms that jurors used when talking about their decisions and to link those forms with language used in trial.

The Texas Death Penalty Sentencing Scheme

The Supreme Court issued a nationwide moratorium against the death penalty in its 1972 decision in Furman v. Georgia, which held that capital punishment had been implemented so arbitrarily that it violated the Eighth Amendment’s prohibition against cruel and unusual punishment. After a 4-year suspension, the death penalty was reinstated in 1976, with conditions. In an attempt to rectify the arbitrary implementation of the death penalty, Gregg v. Georgia (1976) and related decisions required that states develop capital sentencing formulas that included “objective” guidelines for jurors.

The unique response of Texas to this “guided discretion” requirement was its “special issue” question framework for sentencing. This sentencing scheme differs widely from most states’ frameworks, which ask jurors to weigh aggravating versus mitigating evidence. At the time of my research, Texas jurors had to answer two special issue questions during their sentencing phase deliberations that would lead them to a sentence of life without parole or of death. The first, or “future danger question,” reads as follows:

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

If the jurors answer no to this question, the defendant receives a sentence of life without parole. If they answer yes to the first question, they then proceed to the second, or “mitigation,” question:

Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

If the jurors answer no to question 2, the defendant receives a death sentence. Texas jurors are thus never explicitly asked to sentence a defendant either to death or to life without parole. As

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3 Post-Furman statutes were evaluated by Gregg and its related cases, Woodson v. North Carolina (1976), Jurek v. Texas (1976), and Lockett v. Ohio (1978).

4 The original 1976 special issue questions included the current future danger question plus another that addressed the defendant’s intent to kill. The mitigation, or current second question, was added later (Penry v. Lynaugh, 1989 and Penry v. Johnson, 2001).
will be argued below, the indirect structure of the Texas special issue questions allows jurors to mitigate their own responsibility for sentencing capital defendants.

In post-*Furman* capital cases, states are also required to use a bifurcated trial structure, in which the same jury hears essentially two separate trials – one to determine the defendant’s culpability and the other to determine his or her sentence. The sentencing phase allows a broader range of evidence, including that which speaks to the defendant’s character and background, and uses a jury charge different from the one used in the culpability phase. This bifurcation proved significant in my research. The decisions jurors are required to make in each phase are qualitatively different (Bowers, Fleury-Steiner, & Antonio, 2003). In the first phase, they are instructed, as is any fact-finding jury, to follow the evidence and to be objective. In the penalty phase, however, jurors must make individual, moral decisions (*Caldwell v. Mississippi*, 1985; *Penry v. Lynaugh*, 1989) about the character of the defendant. Many of the jurors I spoke with conflated their fact-finding duties in the culpability phase with the moral nature of their sentencing decisions, often to the detriment of the defendant. Importantly, as will be elaborated in the following section, jurors considered these distinct types of instructions to be mutually exclusive. “Objective” decision making, for which Texas jurors strove, meant forsaking the moral and often emotional aspects of their judgment when deciding on a sentence. The challenge for legal practitioners is to clarify to jurors that a moral decision, based on emotion and personal experience, can indeed be evidence-based and thus still follow the law.

**Emotion, Jury Decision Making, and “Death Is Different”**

A prevalent theme in my discussions with capital jurors was emotion. More specifically, jurors often struggled with what they perceived to be a conflict between their duty to exclude emotion from their decisions and the often unavoidable emotional potency of the trials they were a part of. Jurors felt pressured to be “objective” by their instructions, things that attorneys and judges told them in the courtroom, and widespread legal ideologies holding that emotion has no legitimate place in the law (e.g., Bandes, 1996, 1999; Madeira, 2012, pp. 136-138; Nussbaum, 2004). Although jurors recognized the degree to which “emotion pervades the law” (Bandes, 1999, p. 1), they asserted that the law tells them to eschew emotional considerations when making their decisions. The jurors I interviewed often used authoritative legal language, centered around talk of “evidence,” to counter the subjective, emotional moments they experienced during trial. This (mistaken) denial of emotion is a critical means by which jurors may suppress the moral aspects of their decisions and find a way to sentence defendants to death.

There is an ambiguity within death penalty law and practice that complicates jurors’ understanding of emotion. Capital jurors are presented with two models of decision making that they simultaneously find contradictory and difficult to disassociate. The first model is based on their duties during the culpability phase, in which capital jurors are urged, as they would be in any trial, to remain unbiased and objective. This recommendation is reinforced indirectly in their sentencing charge, as evidenced by the following two excerpts from Texas capital sentencing instructions:

> You are to deliberate only on the evidence that is properly before you in this trial and to give this case individual deliberation based on only the evidence admitted before you.
You are ... not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all of the evidence before you.

The latter of these, the so-called “no-sympathy clause,” was especially influential in that it convinced many jurors that they were not to consider any emotional responses they or others experienced during trial. Although this clause was often included at the request of defense attorneys to protect against undue sympathy for the victims, most jurors who spoke of it used it as a justification for not sympathizing with the defendants and their families.

In addition to being explicated in jury instructions, this first model of decision making was echoed by judges and attorneys at other points during the trial. One judge addressed the jury panel before individual voir dire questioning began, emphasizing the need for objective decision making:

Judge: The first thing we know is juries in the state of Texas do not go out and deliberate and subjectively determine, we'll give this defendant life in this case. We'll give that defendant death in that case. Instead, what we do is we have juries make objective findings as to what the evidence is.

Attorneys’ questioning of individual venire persons during voir dire reiterated the privileging of fact over emotion in jurors’ decisions. As one prosecutor said to a potential juror during his individual questioning:

Prosecutor: We're not telling people they can't have emotion, but you make your call based on the facts.

Juror: Whatever the law dictates.

The cumulative effect of these messages is that jurors were convinced that their decision-making process could not include their own emotional reactions to testimony and evidence. Jurors were led to believe that “following the law” required them to eschew the experiential, often affective components of a capital trial when making their sentencing decisions.

The second model of decision making presented to capital jurors is based on the notion that death is different. During the sentencing phase of capital trials, jurors are told that they must make individual, moral decisions when deciding whether to sentence a defendant to life or death. In an order on a motion in limine addressing the appropriateness of the reasonable doubt standard in capital sentencing, a federal trial judge stated that “the sentencing decision in a capital case is, in its most important respects, fundamentally different than any other task that a jury is called upon to perform” (U.S. v. Sampson, 2016). A capital jury’s sentencing decision is, the judge concluded, “not something that is capable of proof in the traditional sense” (U.S. v. Sampson, 2016). In a recent Supreme Court decision (quoted in Sampson), Justice Scalia asserted in the majority opinion that “the ultimate question whether mitigating circumstance outweigh aggravating circumstances is mostly a question of mercy. ... It would mean nothing ... to tell the jury that the defendants must deserve mercy beyond a reasonable doubt” (Kansas v. Carr, 2016). Scalia clarified that it is permissible to instruct jurors that the facts by which they establish sufficient mitigating circumstances must be proved according to a particular standard of proof, but that mercy is, in the end, a question of what an individual juror deems “appropriate.”

5 In this post-trial opinion, Judge Wolf was essentially disagreeing with his own trial decision to instruct jurors that they must use the reasonable doubt standard when weighing aggravating and mitigating evidence in the sentencing phase.
A district judge’s reading of the Federal Death Penalty Act of 1994 (FDPA) echoes this notion that death is different:

[T]he weighing process of the FDPA governs a unique role of any jury: determining whether a defendant should be sentenced to death. This is not a matter that is either true or not true. Rather, each juror must make a moral judgment about whether a defendant should be executed. To require the Government to prove the defendant should be sentenced to death beyond a reasonable doubt is illogical and conflates truth-seeking with balancing moral values. (*U.S. v. Wilson*, 2013)

Although Texas jurors do not balance aggravating against mitigating evidence in their sentencing decisions, this same argument applies, arguably with more force, in Texas. Jurors are instructed in the sentencing phase that they may consider “evidence that a juror might regard as reducing the defendant’s moral blameworthiness,” and the second special issue question asks them to consider the “personal moral culpability of the defendant” in determining his or her sentence. They also may be instructed explicitly that they can consider mercy in their decisions.

My jury interviews revealed that even though death is different, and despite the instructions to consider mercy and to render a moral judgment, jurors largely understood their duty – during both phases of trial – as one of objective fact finding, in which subjective considerations should play no part. In the following example from a juror’s interview, a foreman explained to me his conviction that a defendant’s father’s emotional plea for his son’s life could not factor into the jury’s sentencing decision:

Juror: As you can imagine, any case like this deals a lot with emotion. In other words, I am fairly unemotional, but it is very difficult to sit there and listen to someone’s gray-haired old daddy beg you not to kill their boy. And try to take blame for the way he turned out and you know he may be right. However, the charge specific – that we as jurors, every one of us, swore to, on the oath – on the day of our oath, the charge said that we only let evidence guide us. We would not let supposition, emotion, prejudice, I forget the other term but something like that, okay. So, you you must try to put your emotion aside as much as you can and only go on what is presented as evidence. Either from the stand or physical evidence.

This juror’s recollection of mitigating testimony in the sentencing phase reveals the trouble jurors have with making a personal, moral judgment in the context of a trial. Despite the fact that the defendant’s father’s emotional plea was in itself evidence, this juror believed that his instructions required him to deny such a plea in making his sentencing decision because of its emotional character.

Another juror’s ruminations reveal his belief that the law asks jurors to keep emotional considerations out of their decisions:

Juror: Some of the feelings that people had on both sides were strictly emotional type feelings. Because when you’d be questioned on it, they’d realize well, I don’t really have a reason. I mean there’s not anything in the evidence that I can point to that says, here’s the reason I believe this. This is just kind of a feeling I have. They start looking back through the evidence and they realize that, well, maybe this is just an emotional feeling and I really don’t have anything to base
And judging by the evidence, because you read the charge, it said you can’t use sympathy or compassion, intuition, or any of these other things. Well, we’re all made of all that stuff. You’re gonna use it. You can’t not use it. And it’s hard to get that analytical about a man’s life. This juror’s discussion about how those on his jury sorted through evidence and other considerations in making their decision exposes an underlying belief – an ideology of law – that the law desires analytic decision making and privileges reason over emotion. The qualifier “just” used in the clauses about emotion highlights the juror’s stance that emotion is an irrelevant consideration in the context of the law. In the end, however, this juror understood that it is impossible to eliminate emotion entirely from deciding about life and death.

It is clear that the jurors with whom I spoke were using generalized language about “evidence,” as well as specific parts of their instructions, such as the no-sympathy clause, to make a case that emotion should not factor into their decision making. Capital jurors need to be reminded again and again that the character of their decision during the sentencing phase is qualitatively different from that of the decision they make during the culpability phase. The question is whether the notion of a decision that is both moral and legally permissible can penetrate the pervasive ideology – expressed by many of the jurors I interviewed – that there is no place for emotion or subjectivity in law. Post-Furman decisions have ruled that capital sentences should be individual, moral decisions, and therefore jurors must engage in both objective fact finding and personal, subjective, and moral deliberation. It is the duty of defense lawyers to explain and reinforce this paradoxical legal obligation.

**Linguistic Proximity and Dehumanization**

In accordance with their ideas of what legal reasoning should look like, jurors seek “objectivity” by using legal language to maintain emotional distance between themselves and defendants. Psychologist Craig Haney (2004) found that capital jurors work to establish an “empathic divide” between themselves and defendants; doing so provides the moral leeway necessary to commit another person to death (Garvey, 2000). According to this logic, empathy and distance are inversely related. In any act of killing, the closer you are physically to your potential victim, the more capacity for empathy and, thus, the harder it is to kill (Grossman, 2009; Kelman, 1973; Lifton, 1986).

Just as physical distance can influence empathic experiences between people (e.g., Milgram, 1974), the subtle process of managing linguistic distance can also play a role in creating or diminishing empathy. The term *deixis* refers to the use of language to denote a speaker’s spatial proximity to things or people being talked about. Deictic terms such as *this* or *that* and *here* or *there* place an object closer to or farther away from the participants in a conversation. Linguists have expanded the category of deictic relationships from simple spatial proximity to include other dimensions, such as social, affective, emotional, and empathetic distance (Duranti, 1984; Lakoff, 1974; Lyons, 1977; Ostman, 1995). Calling someone “that man,” for instance, can display a lack of empathy or a negative affect toward the person being referred to (cf. Duranti, 1984).

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6 Emphasis (text in bold) was added by the author to highlight areas of interest in the example. The same approach is taken at other points in the manuscript.
While analyzing the language of capital trials, I realized that defendants were constantly being referred to as “this/that guy” or “this/that defendant,” a reference pattern that was widespread in trials as well as in jurors’ interviews. These demonstrative reference forms (this/that plus generic noun – a particular kind of deictic) deny a defendant’s identity as a unique, identifiable person, thereby dehumanizing him or her and helping to disable the speaker’s capacity for empathy. These forms were most commonly used by jurors, attorneys, and witnesses in contexts of apparent dehumanization, in which the speakers placed social distance between themselves and a defendant by minimizing the latter’s status as a particular human being. Jurors often used these forms in the specific context of attempting to justify imposing a death sentence. At the other end of the spectrum, using a defendant’s name (especially his or her first name) invites empathy and intimacy. The Supreme Court has required capital jurors to consider the individuality of each defendant in their sentencing decisions, but the use of distancing reference forms such as these demonstrative forms can make it hard for jurors to carry out this task. When judges and lawyers use distancing reference forms, jurors may be dissuaded from empathizing with an individual defendant; when jurors themselves do so, it becomes easier for them to ignore a defendant’s humanity.

Attorneys’ talk during trial can serve as an authoritative model for jurors’ perception of defendants. As might be expected, prosecutors’ language reflects an effort to dehumanize defendants in order to promote the death sentence. The following texts are drawn from one prosecutor’s sentencing phase closing argument. In this case, the defendant murdered almost an entire family; one female child was the only survivor.

Prosecutor:
- The person that did this scares the hell out of her.
- The person that killed like this is extremely dangerous.
- That kind of person would be capable of doing all of this again.
- She’s [the child] still traumatized by what that defendant did to her.

Rather than employing a personalized reference form, such as a name, which would denote affinity with the defendant, each reference form in these examples characterizes the defendant as a token of a type, according to the crime he committed and his status as a defendant. The last example, “that defendant,” comes the closest to identifying the defendant individually, but the use of the demonstrative pronoun that creates a relationship of distance, hindering any sense of intimacy or empathy with the defendant. In addition to using the heightened distancing form that, the descriptor defendant, in contrast to person or guy, further severs the link between the defendant and his individualized human identity.

Jurors also used these distancing forms when talking about defendants. In the following interview excerpt, I had asked a juror when she first considered a death sentence for the defendant.

Juror: The girl was pregnant. And uh, to me he didn’t care. Cause the first thing he did he shot her in the stomach. And then we did the, that he was guilty, the – this guy doesn't have a heart. So, that’s when I thought because he killed an in-an infant in somebody’s [body].

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7 This word is within brackets because it is closest to what I think the juror said. I could not hear the word exactly on the recording.
This juror changed her initial form of reference to the defendant – *he* – to the demonstrative form *this guy* at the very point at which she literally dehumanized him: “this guy doesn’t have a heart.” Using the demonstrative reference form dissociated the juror from the defendant, whom she depicted as nonhuman and distinguished from other, normal persons. This may be a moral dissociation, in that she did not want to associate herself with such a being, or it may be a cognitive dissociation, in that she could not comprehend a person committing such an act. In either case, it probably becomes easier to sentence that defendant to death.

Another juror demonstrated a similar use of a demonstrative reference when questioning the defendant’s humanity:

Juror: I mean *he* just looked like, like a *normal* ol’ guy to me. You know. In the back of your mind you keep thinking, *this guy’s* just killed six people. You know?

This juror explained the evolution of her thinking about the defendant during trial. Her initial impression was that he looked like a “normal ol’ guy,” but as she contemplated the crime he committed, she questioned his classification as a normal person. It is in this moment that she switched to the demonstrative form, *this guy*, to refer to him.

Demonstrative reference forms can contribute to linguistic acts of dehumanization, facilitating jurors’ decisions to end a defendant’s life. The following juror’s proclamation exemplifies this logic:

Juror: You think, well *that person*, you know, they just need to be eliminated.

This juror used the more distant of the demonstrative pronouns – *that* – when claiming that another human being needed to be eliminated. These examples illustrate that particular linguistic choices, by allowing speakers to manage their social or affective proximity to defendants, can aid in dehumanizing defendants, stymying empathy with them and helping to justify death sentences. Reference forms, in that they always convey something about a speaker’s stance toward the person being referred to, reveal much about how jurors and attorneys linguistically – and actually – determine the course of defendants’ lives.

**Agency and Distance**

This last analytic section addresses the degree to which jurors recognize and admit that they are directly involved in a process in which a person may die. My research reveals that many jurors do not take individual responsibility for sentencing defendants to death and that they are guided to this stance by language used in court – both what they hear from attorneys and judges and what is written in their instructions.

Linguistic constructions of agency in particular contribute to jurors’ eschewal of responsibility for their sentencing decisions. In linguistics, a grammatical agent is an entity that carries out the action of a verb (e.g., Dixon, 1994). Where an agent is placed in a sentence can highlight or reduce a person or entity’s responsibility for an action. Take, for instance, the following sentences:

1. The judge sentenced the defendant.
2. The defendant was sentenced by the judge.

By placing the agent, or the doer of the action (the judge) at the end of the sentence, sentence 2 downgrades the judge’s role in sentencing the defendant. Certain constructions, such as “The defendant was sentenced,” delete the agent entirely, thus allowing an event caused by a human actor to be framed as if it were not.

The Supreme Court has found that it is unconstitutional for capital jurors to believe that the responsibility for a defendant’s death rests anywhere other than within themselves (*Caldwell v.*
Mississippi, 1985). The language of the Texas special issue questions sets up a framework that minimizes jurors’ role in their sentencing decisions, thus arguably violating the principle of Caldwell. Again, the second special issue question asks:

Do you find ... that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

In this excerpt, circumstances are positioned as the agent of warranting a death sentence, with the juror unmentioned at that critical point. The passive voice is also used (“a death sentence be imposed”), which is a strategy in English that allows an action to be described without any identified agent (Ehrlich, 2001, pp. 39–40; Henley, Miller, and Beazly, 1995; LaFrance and Hahn, 1994). The overall depiction of agency in this example, then, is that circumstances warrant a sentence and that the sentence is ultimately imposed by no human being in particular.

Jurors’ instructions beyond the special issue questions reinforce this perspective that jurors are not the responsible sentencing agents. In the following excerpt from a sentencing charge in one of the cases I observed, jurors were instructed as follows:

You have found the Defendant guilty of the offense of capital murder. As a result of that finding of guilt, and in order for the Court to assess a proper punishment, it is now necessary for you to determine ... the answers to certain questions.

Here, the Court is placed as the agent of assessing the punishment, while the jurors are relegated to answering certain questions. The causal chain depicted here is that jurors find guilt and answer questions, after which the judge determines a sentence.

This model of sentencing that minimizes juror responsibility was reiterated during voir dire. In the following example, a prosecutor was individually questioning a venire person. He explained,

You feel a little more comfortable after the judge explained these issues and the process you go through. It’s not just a yes or no where you decide. What you’re doing is you’re basically answering the question.

The prosecutor assured this potential juror that he would not have to state directly whether he sentenced the defendant to death or life, but merely answer the special issue questions.

In his individual questioning of a venire person, a defense attorney in the same case presented a contradictory picture of sentencing:

Defense attorney: You know that if you answer that question no, there is no mitigation, the defendant is going to get the death penalty from the judge.

Juror: That’s right.

Defense attorney: Just as sure as you signed death on the line.

Juror: That’s right.

This attorney presented juror responsibility in a way that is more consistent with Caldwell, making the potential juror aware that a defendant’s life or death is in his own hands. Allowing jurors to dodge this responsibility calls into question the legitimacy of the sentences they impose, given that many of them may be issuing death sentences only because they feel the ultimate responsibility for a defendant’s death is in the hands of someone or something else. The trouble with confronting them with this reality is that venire persons often respond that they could not in any circumstance render a death sentence and are therefore disqualified. The dilemma, if we wish jurors to remain aware of their responsibility for defendants’ deaths, is how to ask them to face this responsibility without leading them to disqualify themselves.
Jurors’ interview responses revealed that they indeed placed the onus of sentencing the defendant elsewhere. One juror identified the state as ultimately responsible for his decision. 

Juror: I determined going into this that I was going to do exactly what the state asked me to do. At the end of the day that would be the only way I would feel good about it … whatever the state asks, I’m going to rigidly abide by it. 

This juror endowed the state, a nonhuman, institutional manifestation of the laws of Texas, with the responsibility for his decision. Another juror thought, more specifically, that the judge had ultimate authority over the sentencing decision. 

Juror: Whether we’re the final authority or not, I think the judge can overrule sentence guide – excuse me, sentencing, at some point, but I think the jury decides guilt or innocence, and then at least makes the recommendation for penalty. 

What is astonishing about this comment is that Texas judges have no authority to override jurors’ sentencing decisions in capital cases. What, then, led this juror to his assumption that all he was doing was making a recommendation for sentencing? I argue that it is the language of jurors’ instructions, including the special issue questions, in conjunction with how attorneys and judges talk about jurors’ sentencing decisions in trial, that leads jurors to deny their personal responsibility for sentencing defendants. In particular, the constructions of agency that are used – by judges, lawyers, and ultimately jurors themselves – in characterizing sentencing decisions provide jurors with an “emotional shield” (Haney, Sontag, & Costanzo, 1994) against the consequences of their decisions, thereby potentially enabling death sentences.

Implications and Recommendations
The forms of communicative distancing previously outlined – between jurors and defendants and between jurors and their own decisions for death – render the death penalty a “kind of violence … which can be approved of and rationally dispensed” (Sarat, 1995, p. 41). It is worth interrogating the legitimacy of a process that encourages those who administer it to distance themselves from its nature and consequences. By providing a framework for the dehumanization of defendants, the language of capital trials becomes itself a form of violence. In that the Supreme Court has emphasized the need for jurors to consider seriously both the individual humanity of each defendant and their responsibility for the death that may result from their decisions, it is crucial to examine the language that enables jurors to avoid such considerations.

Linguistic research such as that presented here confirms the centrality of language to our conceptualizations of persons and the degree of humanity we are willing to allow them. Those working on capital trials should thus be aware of the effect seemingly minute linguistic formulations can have on jurors’ ability to render just decisions. Specifically, attorneys need to clarify for jurors their different duties in the culpability and punishment phases of a trial. Jurors need to be aware that the decision they make when determining the defendant’s sentence is qualitatively different from the one they made when determining his or her guilt. Jurors should also be informed that factoring emotion and other subjective considerations into their decisions does not mean that they are not following the law. In fact, the Supreme Court holds that jurors should make individually informed, moral decisions. It is important to repeat this message

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8 The judge can override capital sentencing decisions in only three states: Alabama, Florida, and Delaware.
throughout voir dire and the remainder of a trial in order to overcome the prominence of certain language in jurors’ instructions, such as the no-sympathy clause and the repetition of the words evidence and objective.

Attorneys should also be careful and strategic about how they refer to a defendant during trial. The repetition of dehumanizing reference forms can make it harder for jurors to humanize and thus empathize with defendants. Lastly, attorneys should reiterate the fact that individual jurors are indeed responsible for the result of their sentencing decisions, whether it be life without parole or death. Jurors are confronted repeatedly throughout trial with the details and reality of the violence perpetrated by the defendant. They should be made equally aware of the reality of the result of a sentence of death – an execution. Especially given the language used in jury sentencing charges, it is crucial to inform jurors that they, and they alone, determine the fate of the defendant.

Declaration of Conflicting Interests
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Recording, Listening To, or Observing Proceedings of Grand or Petit Juries While Deliberating or Voting, 18 U.S.C. § 1508 (2000).

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Author Biography

Robin Conley Riner is an assistant professor of anthropology at Marshall University. She has conducted ethnographic research on death penalty trials across Texas. This research explores how the use of language shapes jurors’ experiences during trials and influences their life-and-death decisions. Her ongoing research also addresses the topics of killing in the context of war and higher education in Appalachia. She serves as her department’s director of undergraduate studies and teaches in the areas of ethnographic methods and theory, language and social life, law, culture and society, and gender and sexuality.
Murder Most Human: A Case for a Categorical Ban of Life-Without-Parole Sentences for All Juvenile Offenders with Guidelines for Release Decisions for Former Juvenile Life-Without-Parole Cases

Robert Johnson

The Supreme Court has made clear that there is a categorical ban of mandatory life without parole sentences for all juveniles. This ban of mandatory sentences necessarily includes juveniles convicted of the most heinous murders. However, juveniles convicted of murder can be sentenced to life without parole when the sentence is meted out on an individual basis, with due consideration given to the individuality of the offender and the unique circumstances surrounding the offense. As enunciated in Miller v. Alabama, “[a]lthough we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”

Why no categorical ban of life without parole for all juveniles offenders? One impediment to a categorical ban of life without parole sentences for all juveniles, including juveniles convicted of murder, may be found in the Court’s understanding of the crime of murder and the character of offenders convicted of murder, which I will argue is misguided. An assessment of the interplay among murder dynamics, juvenile development, and crime desistance allows us to establish sentence length parameters that can be used to guide release decisions for juveniles serving life terms.

Murder is described in Graham as a uniquely serious offense that differs from all other crimes “in a moral sense,” inflicting a profound and irrevocable loss on the victim. It is telling that the


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Court in *Graham* used murder as a marker of moral depravity: “in terms of moral depravity,” the Court stated that even the most serious non-homicide crimes “cannot be compared to murder.” The implication is that some juveniles convicted of murder are depraved—corrupt or evil—and hence may be irredeemable. The research on homicide dynamics does not support this view.

Moral considerations pertaining to murder aside, research on homicide suggests that this crime is the result of fluid social transactions that unfold in emotionally laden encounters. Murder generally, and particularly murder by juveniles, is not the outcome of warped moral characters acting out pre-formed and unvarying malevolent intent, as is presumed, for example, in media depictions of homicide and implied in Graham. An extensive body of research on homicide by Miethe and Regoecci lead them to state: “Our primary conclusion is that a more complete understanding of homicide involves conjunctive thinking and attention to the interaction between offenders and victims within particular situational contexts.” Their analysis of statistics on homicide patterns, together with their review of crime reports, highlights the interpersonal and cultural dynamics of homicides. Motivations for homicide are shaped by contextual forces that play on personal susceptibilities and cultural understandings, notable among which is the common view in high crime environments that one’s worth as a person is connected to one’s ability to use violence in daily life. The inner city is a case in point. Research by Anderson and others has been read to confirm that “all inner city adolescents, especially males, become versed in the ways of the street, including the need to defend oneself through displays of toughness or violence. Manners of handling interpersonal disputes are learned early in life and reinforced by the pervasiveness of violence and conflict in these communities. It is within this context that violence becomes a mechanism for acquiring respect.”

A considerable body of evidence suggests that “the harsh conditions of life in urban ghettos may provide a context in which aggression and violence are fundamental to one’s survival,” particularly in light of the fact that there is a “profound lack of faith in the police and the judicial system, and in others who would champion one’s personal security.” That you are on your own, isolated from the larger society and responsible to protect yourself and maintain order in your world are violence-promoting lessons that are reinforced in juvenile confinement facilities, sometimes referred to as Gladiator Schools, a telling appellation, capturing the lessons in violence conveyed in such institutions. These institutions hold a disproportionate number of inner city

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3 Id.
6 Miethe & Regoecci, supra note 4, at xviii.
7 Id. at 182-84.
8 Id. at 189.
9 Id. at 189.
10 Id. at 225.
11 Id. at 184.
12 Youth in the California Youth Authority institutions, for example, routinely refer to these institutions as gladiator schools because they must live by violence while confined and, upon release, come out more violent
youths. A substantial proportion of people serving life sentences for crimes committed as children come from impoverished, inner city areas of the country. A stint in juvenile confinement has “an enduring criminogenic effect” and is significantly associated with the commission of homicide later in the offender’s life.

Mean streets, damaged and damaging families, devastating economic hardships, and cold institutions may promote terrible violence, but the agents of that violence are human beings managing hard lives, not evil or depraved creatures beyond reason or redemption. In fact, research on persons convicted of murder indicates that they are not, as a class, among the most obdurate and unregenerate offenders. Over the last several decades, large numbers of offenders convicted of capital murder, mostly adults but some juveniles as well, have been released from death row and placed in prisons, and some have earned release from prison and returned to society. These persons were mainly non-violent inmates; remarkably, lifers commit few prison rule violations of any kind, and are often described as a force for stability in the prison population. Those few who


13 “Although minority youth account for about one-third of the U.S. juvenile population, they comprise two-thirds of the juvenile detention/corrections population. Disproportionate minority confinement (DMC) has far-reaching consequences not only for these young offenders but for society as a whole.” Heidi M. Hsia et al., Off. of Juv. Just. and Delinq. Prevention, Disproportionate Minority Confinement 2002 Update, at iii (2004), http://www.ncjrs.gov/pdffiles1/ojjdp/201240.pdf.


16 As a general matter, research reveals that “juvenile confinement exerts unique, deleterious effects on youths’ subsequent offending, on youths’ perceptions of successfully reintegrating to society, on youths’ mental and physical health, education attainments, family and peer relations, and [relations with] others.” Id. at 209.

17 Over the years, a sizeable number of capital offenders have been commuted or had their sentences overturned. Thorsten Sellin, The Penalty of Death 103–04 (1980); see James W. Marquart & Jonathan R. Sorensen, Institutional and Postrelease Behavior of Furman-Commuted Inmates in Texas, 26 CRIMINOLOGY 677, 679 (1988); see also Joan M. Cheever, Back From the Dead: One Woman’s Search for the Men Who Walked Off America’s Death Row 2-4 (2006).

18 A sizeable body of research supports the assertion that murderers with no hope for parole adjust to prison with few rule violations or acts of violence. See Jonathan R. Sorensen, Robert Wrinkle & April Gutierrez, Patterns of Rule-Violating Behaviors and Adjustment to Incarceration Among Murderers, 78 THE PRISON J. 222, 230 (1998); Jonathan R. Sorensen & Rocky L. Pilgrim, An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1256 (2000); Mark D. Cunningham & Jonathan R. Sorensen, Nothing to Lose? A Comparative Examination of Prison Misconduct Rates Among Life-Without-Parole and Other Long-Term High-Security Inmates, 33 CRIM. JUST. AND BEHAV. 683, 684 (2006); Robert G. Morris et al., Institutional Misconduct and Differential Parole Eligibility Among Capital Inmates, 37 CRIM. JUST. AND BEHAV. 417, 425-27 (2010). The early years of confinement, when prisoners are beginning to settle into routines, may be marked by higher rates of infractions but, with rare exceptions, infraction rates drop over time. This is true for offenders sentenced as adults or juveniles. For adults, see note 17; for juveniles, see Eric Schab et al., Miller Resentencing Project Report: Florida Juveniles Sentenced to Mandatory Life Without Parole
are released, after years of confinement, typically desist from crime. In a recent study, fully 75% desisted from crime over the five-year study period, with only 7% (less than one in ten) committing acts of violence. John Irwin’s in-depth ethnographic research on lifers in California prisons clearly affirms the capacity for positive change among lifers eligible for parole – both while in prison and upon release into the free world, for the few prisoners that are ultimately paroled. The crime of murder is uniquely serious, but the empirical fact, reflected in the research on murderers in prison and upon release, is that persons convicted of murder can and do change, can mature and come to see the tragic error of their ways, and can, when given the chance, live decently in civil society, many coming over time to develop remorse for their crimes. In Margaret Leigey’s study of older male inmates serving life without parole, almost all of those convicted of murder expressed guilt, shame, and contrition for taking another’s life and sympathy for the victim’s loved ones. Thus, a conviction for the crime of murder, in and of itself, is not a valid marker of moral depravity as the Court in Graham purports, and hence should not disqualify juveniles from the special consideration they are accorded for all other crimes as a result of their inherently immature, unformed characters.

**Felony Murder No Exception**

Even felony murders – murders committed in the course of a felony, among the most legally serious forms of homicide – are often much less cold-blooded than they appear at first blush. Most felony murders occur in complex situations that unfold rapidly and sometimes unpredictably, such as when a robbery or burglary goes bad and results in an unplanned homicide. At times, those convicted of felony murder were not active or even knowing participants in the crime at all, such as when they were acting as a driver of a getaway car and were unaware that a felony, much
less a homicide, was about to occur. Analysis of crime report narratives reveals that felony murders typically are “chaotic and disorderly” and “haphazard,” the fruits of inept rather than methodical and planned undertakings. Juveniles have a limited capacity for planning and foresight, which makes it more likely they will fail to consider the consequences of the original offense, including the deadly sequence of events the original offense may put in motion. They are simply not thinking beyond the robbery or the burglary, or even, in many cases, beyond what it means to tag along with others who themselves may engage in risky or criminal behaviors.

Impulse control problems common to juveniles are compounded when they engage in criminal activity with their peers, since juveniles are notoriously susceptible to peer pressure. Much of juvenile crime, including homicide, occurs in a group context and involves “elements of honor contests, masculine competitiveness, or issues of respect.” In many peer group situations, volatile emotions give rise to unplanned actions that escalate quickly, with little or no chance for individuals to retreat or disengage; normal adolescent impulsivity makes it difficult for juveniles to interpret these complex and often emotionally charged interactions. Juveniles are thus more likely than adults to react with unplanned violence under the extreme duress of a crime that goes awry – to fight rather than flee and lose face with their peers. As reported in one crime case file, relating to a robbery-homicide in which the offender could easily have retreated in the face of insults but did not, “[t]he suspect said he hated for people to think he was a joke.”

The popular image of a felony murder is that of a coolly calculated crime in which the killing is undertaken with malice and premeditation to achieve a rational objective. For younger offenders, and especially juveniles, the evidence overwhelmingly indicates that it would be more accurate to see the vast majority of these crimes as situations that have gotten beyond their control and even full comprehension, as is evident in the following crime narrative rendered in the words of the offender:

26 MIETHE & REGOECCI, supra note 4, at 185.
27 Id. at 186.
29 See Roper, 543 U.S. at 569–71.
30 See Roper, 543 U.S. at 569. Many murders “took place in contexts in which powerful peer pressure was operating or strong emotions flared.” Irwin, supra note 21, at 42. Scott & Steinberg, supra note 28.
31 MIETHE & REGOECCI, supra note 4, at 179.
32 Id. at 182.
33 Most murders are committed by young men, 24 and under. Irwin, supra note 21, at 44. The situational, emotional, and peer-related pressures discussed as factors in these homicides apply with particular force to juveniles. Juveniles are, by virtue of their inherent immaturity, impulsivity, and short-sightedness, especially susceptible to the situational, emotional and often peer-related pressures that drive the typical murder, and particularly the typical felony murder. Roper, 543 U.S. at 569.
34 MIETHE & REGOECCI, supra note 4, at 186.
35 IRWIN, supra note 21, at 42–3.
Robert Johnson

I killed him. There’s no question about that. But I didn’t intentionally kill him. I didn’t go in there with murder on my mind... It was a robbery that went astray. Somebody walked in... I wind up shooting him and to this day I don’t know how it all happened. It happened. This kind of thing, at least for me, it happened in a haze, you know. One minute he is standing up. I’m saying, you know how it goes, stuff happens too quick, so fast, you’re on automation. The next thing you know, the man is shot.36

As a general matter, as I have noted, felony homicides are particularly “chaotic and disorderly” and “haphazard,” which makes these events both complicated and confusing for adults as well as juveniles.37 I argue that juveniles convicted of felony murder are, as a result of their susceptibility to peer pressure, impulsivity, and limited foresight, much less culpable than adults convicted of the same crime. These deficits were apparent to the Court in Miller as distinctive features of adolescent violence in general, and Kuntrell Jackson’s and Evan Miller’s adolescent violence, in particular; in both cases, the fluid and evolving situational dynamics of violence, embedded in lives suffused with damage wrought by violence in their formative years, were clearly in evidence.38 It is, then, not cold-blooded depravity but rather impulsive immaturity that drives juveniles to commit such crimes.

Conclusion

In thinking of homicide as a potential marker of depravity for at least some juveniles convicted of murder, the Court may have been indirectly influenced by the media, which regularly casts violent teens as heartless predators,39 or by the work of some social scientists, now widely discredited, who made unsubstantiated claims like “today’s bad boys are far worse than yesterday’s and tomorrow’s will be even worse than today’s.”40 Allegedly rooted in “moral poverty,” perhaps the social science equivalent of depravity as understood by the Court, some social scientists warned of a generation marked by character deficits that gave rise to wild and extraordinarily violent offenders. These offenders were said to comprise the “thickening ranks of juvenile ‘super-predators’ – radically impulsive, brutally remorseless youngsters, including even more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders.”41 These offenders, moreover, were

36 Id. at 55.
37 MIETHE & REGOECZI, supra note 4, at 185-186.
38 Miller, 132 S. Ct. at 2468-69.
39 A classic example of this is the Youth Crime issue of Time Magazine, which featured predatory-looking juveniles poised to attack. See The Youth Crime Plague, TIME MAG. (July 11, 1977), http://www.time.com/time/magazine/article/0,9171,919043-9,00.html. The subject of teen crime was also dramatized in Richard Lacayo & Sally B. Donnell, Teen Crime, TIME MAG. (July 21, 1997), http://www.time.com/time/magazine/article/0,9171,986709,00.html.
40 See MIETHE & REGOECZI, supra note 4, at 177. It is possible that the Court simply decided to address the narrow question raised in these cases. The legal question in both Graham and Miller pertained to mandatory sentences. Within the framework of mandatory sentences, the Court struck down the practice and left to the states the task of narrowly figuring out when the LWOP sentence is appropriate for a juvenile offender. That said, the Court is not immune to media-driven images of crime and punishment in general or in the case of juveniles.
41 Id.
presumed to be beyond the reach of punishment: “They do not fear the stigma of arrest, the pains of imprisonment or the pangs of conscience.”

One might well imagine that such offenders, a kind of army of junior psychopaths in training, must be confined until death, since they are simply too dangerous to be at large in society. Arguably, a lonely and degrading death in a prison cell would seem a suitable if premature end to their depraved lives. However, as we have indicated, research simply does not support the existence of such super-predators. Rather, research tells us that juvenile homicide, like much of juvenile crime, is rooted in group pressures, impulsiveness, and short-sightedness—defining elements of adolescence—that give rise to misguided efforts to save face and establish respect.

The Court in Graham spared non-homicide juvenile offenders from life without parole, our other death penalty, but at least some juveniles convicted of murder are still eligible for this harsh sanction. Life without parole entails a permanent loss of hope and a grim, lonely, and degrading death. It is a cruel sanction for any young person and is used with juveniles virtually nowhere else in the world. In principle, a maximum sentence of life with the possibility of parole – and hence the hope of one day rejoining society – is punishment enough for any juvenile, even one convicted of the terrible crime of murder. The Court expressed concern about “the rare juvenile offender whose crime reflects irreparable corruption.” Should such offenders exist, there would be no way to identify them while they are still developing adolescents since there is no way to reliably determine which attributes of their personalities are transitory and which are enduring elements of character. As adults, cumulative evidence of “irreparable corruption” may emerge in rare cases, at which point these offenders can be identified, monitored over time, and offered intensive rehabilitative services. These offenders would presumably be denied release unless and until they show evidence of profound character change.

In practice, lesser terms than life with parole for juveniles convicted of murder are possible and advisable. When these offenders reach the age range 35-39, for example, their risk of

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42 Id.
43 This characterization of psychopaths, juvenile or otherwise, reflects popular misconceptions and is used here for effect. In fact, “most psychopaths are not violent, and most violent people are not psychopaths.” Moreover, though hard to treat, psychopathic offenders are treatable, as are their criminal tendencies. See Scott O. Lilienfeld & Hal Arkowitz, What “Psychopath” Means, SCIENTIFIC AMERICAN (Dec. 1, 2007), http://www.scientificamerican.com/article.cfm?id=what-psychopath-means.
44 MIETHE & REGOECZI, supra note 4, at 182.
recidivism drops substantially: using national figures for arrests as a measure of recidivism, the drop ranges from a quarter to a half; using re-imprisonment as a measure, the drop is from a third to a half. These figures are illustrative of the fact that these prisoners, no longer young, are now at lower risk for recidivism; the lengthy prison terms they will have served by the time they reach the 35-39 age range are also associated with a low risk of recidivism.

By age 35-39, moreover, individual prisoners will have had sufficient time to establish that they have evolved and matured, and hence are no longer the impulsive juveniles who committed the heinous crimes that landed them behind bars. Thus, I contend that prisoners sentenced to life terms as juveniles should be entitled to hearings to determine their eligibility for release at some point during this age interval. These hearings would be used to determine recidivism risk in individual cases. Significantly, the primary factor that underlies successful (that is, recidivism-free) reentry for lifers is “a change in the self” in the direction of self-efficacy. Self-efficacy is the product of maturation and development, which can be assessed in the review of individual cases at release or re-sentencing hearings.

By age 50, recidivism is negligible; arrests are down by half or more (by one accounting, dropping by a robust 80%), re-imprisonment for a new crime drops by well over half, in some states (e.g., Virginia) dropping by over 90%. These figures are illustrative of “the criminological consensus” that age 50 is the point at which “recidivism in all crime categories

49 “In general, studies point to a young age at the time of release and a previous criminal record as the main predictors for recidivism.” Marieke Liem, Homicide offender recidivism: A review of the literature, 18 AGGRESSION AND VIOLENT BEHAVIOR 19, 23 (2013). Moreover, “when the length of imprisonment exceeds eight to 10 years, it decreases recidivism.” Id. By the time juveniles sentenced to life terms reach the 35-39 age category, they are no longer young (and thus cannot be counted as young and with a criminal record), and have served well over eight to ten years in prison.
51 “[T]he process of staying out for lifers is not the result of coming-of-age societal forces (e.g., parenthood, marriage, employment) ... but rather a change in the self, or a transformation of identity. Interviews with these lifers show that the group who was able to stay out reflected a strong sense of self-efficacy, while those who were re-incarcerated lacked this sense of voluntary action.” Marieke Liem and Jennifer Garcin, Post-Release Success among Paroled Lifers, 3 LAWS 798, 817 (2014).
54 AM. CIVIL LIBERTIES UNION, supra note 47, at 24 (Figure 20).
plummets.” Given the reduced culpability of juveniles for their original crimes, the normal progression of maturity over the course of their imprisonment, and the dramatically reduced risk of returning to crime after age 50, life sentences for juvenile offenders should include a presumption of release at age 50. Absent unambiguous evidence of a continuing disposition to violence, offenders at age 50 should be released and permitted to reenter society.

In sum, it is my contention that eligibility for release starting at age 35, together with a presumption of release by age 50, would seem entirely appropriate for the vast majority of juvenile offenders whose life without parole sentences were overturned following \textit{Miller} and are now up for reconsideration in many jurisdictions. To date, it would appear that only a handful of states have explicitly incorporated the factors articulated in the Miller decision into the language of parole statutes. Three states that do are California, Connecticut, and West Virginia, each of which requires parole boards to “consider factors such as age at the time of the offense, potential for rehabilitation, and increased maturity.” The framework proposed here would be of immediate value in the deliberations within these jurisdictions, giving benchmarks to guide release decisions.

Most jurisdictions, it would appear, have simply made juvenile offenders “eligible for release under existing and long-standing parole procedures,” which do not require parole boards to consider, or give guidance to how such boards might consider, the key Miller-related factors of age at the time of the offense in relation to reduced culpability, potential for rehabilitation, and increased maturity over the course of one’s confinement. The framework provided here may serve to encourage these jurisdictions to explicitly take into account the factors we have reviewed here when revisiting juvenile life-without-parole sentences—age and culpability at the time of the offense, prison adjustment and personal maturation over the course of the person’s confinement as a measure of rehabilitation, and an age-based assessment of recidivism risk at the time of release hearings.

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\textit{Id.} at 48; see generally \textit{Nat’l Research Council, The Growth of Incarceration in the United States} (Jeremy Travis, Bruce Western, & Steve Redburn eds., 2014).


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Barbara Belbot

Michael D. White and Henry F. Fradella have written a fascinating book about stop-and-frisk jurisprudence and practice, with a primary focus on its use over the past several decades by the New York City Police Department. Their book Stop and Frisk: The Use and Abuse of a Controversial Policing Tactic is an interesting read for lawyers, judges, law and criminal justice professors, and police administrators. It’s accessible, discussing the controversy surrounding stop-and-frisk in a way that appeals to a variety of different audiences, which is one of the book’s most important contributions.

The authors make a compelling case that stop-and-frisk has an important place in 21st Century policing while also acknowledging the inherent problems created by the reasonable suspicion standard that guides officers’ discretion when executing a stop-and-frisk. Early in their book they posit that stop-and-frisk as a police tactic to reduce crime has been overused and abused. In too many instances its use has violated individuals’ rights under the Fourth and Fourteenth Amendments, which has strained community/police relationships, and resulted in significant harm emotionally, psychologically, and physically to individuals and communities. Although most of their discussion involves the NYPD’s use of stop-and-frisk, they highlight specific problems faced by several other cities whose stop-and-frisk practices have been challenged, including Newark, Chicago, and Philadelphia. They characterize the current use of stop-and-frisk in some jurisdictions as “a story of abused police discretion” and that the unjust and unconstitutional use of stop-and-frisk is another in a series of failures by police to guide and control the use of discretion. They lament that there is a blurred line between the sound use of discretion and racial profiling. Their central theme is the disconnect between current perceptions of stop-and-frisk as a form of racial discrimination and its historical, legal, and discretionary foundations. This is a discussion, according

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How do White and Fradella make a case for stop-and-frisk in 21st Century policing after lamenting its misuse and abuse? What makes their case compelling is they take the long road to their conclusion by first describing the significant barriers to cross along the way. They begin by explaining the historical and legal context for stop-and-frisk. Historically, it’s a tactic that has deep roots in English common law. Before the Supreme Court’s decision in Terry v. Ohio in 1968, states had adopted stop-and-frisk-type statutes, many of which were adaptations of the model Uniform Arrest Act of 1939. In 1968, the Supreme Court authored landmark decisions that grounded stop-and-frisk practices in the Fourth Amendment. The Court held in Terry that stops are a special category of seizures that do not require probable cause or a warrant and are constitutional when an officer has reasonable suspicion that a crime has or is about to occur. Frisks are pat down searches of outer clothing limited to looking for weapons. Unfortunately, according to the authors, the reasonable suspicion standard too often invites an officer’s unconscious racial biases to impact his or her decisions about who to stop and when to frisk. Termed the “suspicion heuristic” by researchers L. Song Richardson and Phillip Atiba Goff, these biases explain common errors in perception and decision-making that individuals make when judging whether someone is and will be engaged in crime based on ambiguous acts and behaviors. These biases act below conscious awareness and often associate young, Black men with danger. The Terry holding defers to police officer experience when evaluating whether there was sufficient reasonable suspicion to establish a constitutional basis for a stop-and-frisk. In a series of opinions subsequent to 1968, the Supreme Court, using the totality of circumstances test, sanctioned more expansive uses of police discretion to justify stops. By the early 1990s, stops and frisks were upheld with increasingly lower levels of evidence. White and Fradella conclude that these decisions failed to consider whether police experience was informed by the suspicion heuristic, ignoring how a lower standard of proof invites racial stereotypes to enter into the decision-making process.

NYPD stop-and-frisk practices over the last two decades were the perfect storm that illustrates the problems created by the lower level reasonable suspicion standard. White and Fradella explain how the increase in crime in the city led the NYPD to engage in aggressive policing strategies that included widespread and often unjustified use of stop-and-frisk. Based on the broken windows theory of zero tolerance with regard to social disorder misdemeanors, policies and practices were designed to serve what became known as order-maintenance policing. Aggressive policing was aimed at low level social disorder offenses under the theory that disorder in a community, although it can involve relatively minor infractions, opens the door for more serious offenses. Stop-and-frisk was viewed as a way to “clean up” disorderly neighborhoods. Aggressive stop-and-frisk practices were also initiated by NYPD to target gun violence under the theory that guns would be confiscated during frisks and that the risk of being stopped on a minor infraction would deter people from carrying guns. The NYPD combined order-maintenance policing with a massive program to remove illegal guns off the streets.

Aggressive stop-and-frisk practices focused on high crime neighborhoods, hot spots known as impact zones, with large minority populations. The costs of the stop-and-frisk strategy has been enormous. According to the authors, these include a significant increase in racial and ethnic tension between police and the people living in the areas designated as impact zones. The costs undermined the legitimacy of the police department because the stop-and-frisk program...
disproportionately targeted minority neighborhoods. The number of stop-and-frisks quadrupled from 2003 to 2011, the peak of the practice, to 685,724.

Proponents of aggressive stop-and-frisk argue that the policy contributed in large part to New York’s major decline in crime beginning in the early 1990s, when the strategy was initiated. Many scholars, however, question the program’s effectiveness. White and Fradella review the research on both sides, examining crime statistics as well as the number of guns seized over different time periods, and conclude that the stop-and-frisk policy was not as effective as its proponents claim and the high costs incurred more than offset any benefits.

In their final two chapters, White and Fradella explain why stop-and-frisk should be a part of 21st Century policing. They argue that although there is compelling evidence that some police exercise discretion to stop people based on race and ethnicity, there are effective ways to control officers’ discretion. They posit that effective, just, fair, and constitutional stop-and-frisk programs are possible with better background screening at the hiring stage, better training (including helping officers understand their unconscious biases), strong administrative polices, and meaningful external oversight.

Once they establish that fair and constitutional stop programs are possible, White and Fradella explain why they believe stop-and-frisk has an important place in 21st Century policing in a way that does not contribute to racial injustice. Their position is that stop-and-frisk should be a central part of problem-oriented and community-oriented policing, as opposed to the role it played in New York City where it was a part of zero-tolerance policing. Analyzing the information gathered through stop-and-frisks should become part of conversations with the community members about how to solve problems. Stops should be a part of police problem-solving. Stops and frisks should be closely monitored and assessed for their effectiveness and unintended consequences, with the understanding that an overly aggressive stop-and-frisk program will negatively impact police/community relationships. The authors stress that, in their view, zero tolerance strategies have no place in 21st Century policing and stop-and-frisk is only viable if used in conjunction with community-policing and problem-solving policing. Procedural justice should play the major role in stop-and-frisk, with police treating people with fairness, neutrality, dignity, respect, and giving the people they encounter the opportunity to state their case. Procedural justice demonstrates that officers have trustworthy intentions and leads to police legitimacy. Although they express grave concerns about particular opinions in which the Supreme Court made it easier for officers to establish reasonable suspicion, White and Fradella do not challenge the constitutionality of stop-and-frisk. They seem to assume that stop-and-frisk will remain constitutional, argue that there are ways to control officer discretion, and turn next to recommend how stop-and-frisk can best become part of 21st Century policing. They do not address the position advocated by some scholars that Terry v. Ohio was a mistake, in line with Justice Douglas’s warning in his dissent that the decision granted excessive power to the police.

The decision in the Floyd v. City of New York lawsuit decided by U.S. District Court Judge Shira Scheindlin in August 2013 is the backdrop for White and Fradella’s book. The expert testimony that was the foundation of the Judge’s findings is key to understanding the nature and extent of the NYPD policy. Her 198-page decision (with a separate opinion that outlines the remedial orders) is an important document for anyone connected to the study or practice of constitutional police practices. The authors weave their analysis of stop-and-frisk law and practice around and through the facts of that case and the court’s opinion without making their book strictly about Floyd v. City
of New York. Their analysis is relevant for police departments throughout the country. It is grounded in current research as well as current legal trends. White and Fradella do an excellent job at combining the legal analysis of a police practice with the social science research that examines the impact of that practice, making their book relevant to different audiences. They present sound recommendations for the future of policing with a foundation in justice, fairness, and respect for the dignity of community residents. It is a timely treatment of an extremely important topic, not just for the future of policing, but also for building more procedurally just, respectful, and fair criminal justice institutions – policing, corrections, and the courts.
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