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Fighting for Justice on Death Row

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EDITORIAL REFLECTIONS

By Jeffrey Fagan*

It has been the Journal's practice over the past few years to publish both thematic issues and issues of general interest and concern in the law and administration of capital punishment around the world. Our most recent volume examined the origins and aftermath of the *Furman* opinion and moratorium in the US in the 1970s and its legacies in modern practice. We return now to contributions of general interest and contemporary crises in the administration of the death penalty in changing legal and political landscape both in the US and internationally.

This is a propitious moment to examine the quickly evolving state of death sentencing and executions worldwide. As we write, Governor Kate Brown of Oregon has commuted the death sentences of those remaining on its death row, after years of a moratorium on executions. In 2021, Virginia became the first Southern US state to abolish the death penalty. Three American states continue their moratoriums on executions, as has the federal government, as support for the death penalty has reached a modern low. Yet, events across the globe show the sharp divisions between nations. Iran has executed protestors in the ongoing popular uprising across the country. Israel has threatened to establish capital punishment for persons accused of acts of terrorism. In contrast, a supermajority of member states of the United Nations adopted a resolution calling for a global moratorium on the use of the death penalty with a view towards its ultimate abolition. Two nations in Africa, Zambia and the Central African Republic, abolished executions in the past year. Several nations in Southeast Asia have scaled back the practice of mandatory death sentences while retaining capital punishment for drug crimes as well as murders.

Despite the retreat of capital punishment in the US, Editorial Board members Russell Stetler and Alexis Hoag-Fordjour discuss the recent Supreme Court decision in *Shinn v. Ramirez and Jones*, which confirms the intractability of support for capital punishment among the nation's highest court, even as popular support wanes. This opinion imposes new obstacles to challenging ineffective trial representation when cases reach federal court on habeas corpus - even when there is compelling evidence of innocence. In *Shinn*, defendants now have to retain appellate lawyers who can fulfill an investigative obligation, expanding the role of appellate lawyers to double as investigators when trial counsel either fails or is incompetent to do so.

The article reminds us of the wall of unmovable support for the death penalty in the highest court in the US, part of an authoritarian and punitive response to the momentum in the states toward narrowing its practice. Beyond the effects of this decision on lawyering for defendants facing execution, this decision signals the dark prospect that a punitive and authoritarian majority may entertain cases reversing other critical decisions that until now have narrowed the scope of the death penalty, including the right to present mitigating evidence, the exemption of minors from execution, the right to challenge racial bias in jury selection and the right to counsel during police interrogations.

One of those precedents that is also under assault from the US Supreme Court is the prohibition on the execution of those with intellectual disability. While the Court in *Atkins v. Virginia* set that bar in 2002, Mer-

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edith Rountree discusses the line that the Supreme Court has drawn separating severe mental illness from intellectual disability. The Court has failed to extend *Atkins*'s doctrine of diminished moral culpability for those with intellectual disability deficits to those who are diagnosed as insane. The proportionality calculus that informed the *Atkins* (intellectual disability) and *Roper* (minors) exemptions from capital punishment has not been applied to persons with severe mental illness. Rountree shows that many of the components of intellectual disability that compromise culpability also are present among those with severe mental illness, yet those with diagnoses of mental illness have no such protection from capital punishment.

Rountree traces developments in eleven states that aim to reverse this contradiction in the calculus of proportionality and blameworthiness. These efforts attempt to reignite the movement created by the adoption of the American Bar Association resolution fifteen years ago regarding mental illness and capital punishment. However, the complexity of severe mental illness as a diagnosis is not as easily translated into statute and precedent, owing to the difference between the objective factors cited in *Atkins* and the factors or deficits that define severe mental illness. Just as *Atkins* faced a long road of state-by-state advocacy by coalitions of mental health and developmental advocates from the 1989 *Penry v. Lynaugh*[1] ruling on intellectual disability, so, too, do these advocates, clinicians and scholars face a similar road of state-by-state advocacy. Rountree ends with cautious optimism that the intellectual disability advocacy strategies from the 1990s can translate to modern statutes on capital eligibility for defendants diagnosed with severe mental illness.

In the past year, botched executions and recurring problems in obtaining execution drugs led to moratoriums on executions in several states, including some states that were among the most aggressive in pursuing executions in the past decade.[2] South Carolina stopped two scheduled executions, lacking a supply of execution drugs. Alabama Governor Kay Ivey halted executions, after the state corrections agency botched three consecutive executions. Overall, there were seven botched executions in three states in 2022 and a total of sixty since executions resumed in the US in the 1980s, following the 1976 *Gregg* ruling.[3] A recent case in Texas challenges the proposed use of expired and unsafe drugs to carry out executions, raising the specter of yet further botched executions.[4]

Tennessee is one of the states that halted executions in 2022. Governor Bill Lee pulled the breaks in May and ordered an "independent review" of the state's execution protocol, following litigation identifying dangerous flaws in the protocol and failures in procedures to establish accountability for failing to follow even the flawed protocol. In this issue, Anighuya Crocker, Jeremy Gunn, Ashley Robinson Li and Micael Tackeff provide an autopsy of the accumulation of errors and failures of Tennessee's execution protocols, focusing on the "numerous troubling aspects" of the state's use of lethal injection chemicals. Their article details the evidence of the systemic and perhaps incurable flaws in Tennessee's lethal protocols. The flaws range from unqualified staffing and inadequate training of the execution team, to flaws in chain-of-custody safeguards of the chemicals, to errors in the medical procedures to administer the drugs. These errors compounded in the brutal, botched execution of Oscar Smith in 2022. While the Governor's moratorium order and administrative review are in place, Crocker and colleagues report continued errors in filings by prosecutors in their opposition to the moratorium. This account of compounding errors raises profound questions as to the administrability of lethal injections and its future in capital punishment

in Tennessee, Alabama and other southern death penalty states. At the present time, Tennessee recently released the findings from a Governor-ordered independent investigation into Tennessee's lethal injection protocol, finding that the state repeatedly failed to follow its own protocols.

We next turn to a new analytic frame in the ongoing debate on innocence and the death penalty: the role of police institutions in the production of exonerations. Dozens of studies on forensics, false confessions, flawed eyewitness identification and botched lab procedures have been shown to produce wrongful convictions in capital cases and other cases where severe punishments were at stake.[5] Laurie Roberts, a State Policy Advocate at the Innocence Project, has analyzed recently posted data on police officer misconduct to assess the complaint histories - both of official misconduct and civilian complaints - of New York City police officers who were implicated in exonerations.[6] While the push by advocates for release of misconduct records had begun several years ago, the legislative repeal of the statute protecting the officers' identity in New York[7] - known as *50-a* - followed the protests in the city over the George Floyd killing in May 2020 and persistent advocacy by public interest and defense lawyers in the state. The database has generated a surge of research on the components and patterns of police officer misconduct and the discipline they may or may not have received for each incident. Roberts expands the analysis of those data by harmonizing it with data from the Innocence Project's databases on exonerations in New York State.

Roberts was able to identify the officers whose misconduct led to an exoneration following an arrest and conviction and compare their misconduct histories to other officers who were not so involved in exonerations. She reports startling results: Officers involved in exonerations had nearly five times the number of complaints. Those officers had fifteen or more allegations of misconduct compared to other officers and were more likely to be cited for use of force or abuse of authority. Roberts concludes that the burdens to victims of these wrongful convictions and the everyday misconduct of those officers are substantial. From the National Registry of Exonerations, Roberts also draws evidence showing that the New York data, though troubling, are replicated in several jurisdictions across the US, including in sixty-five overturned capital sentences. At a time of nationwide debate over police misconduct, police accountability and police violence toward civilians, this work shows the urgency of reform advocacy and policies, as matters of justice and human life.

The current issue includes several reviews of new works in film, biography and literature on capital punishment. Joyce Claudia Choo reviews the film *Free Chol Soo Lee*, a documentary on the life and incarceration and aftermath of Lee's incarceration. Film makers Julie Ha and Eugene Yi document the recurring miscarriages of justice that East Asians faced in California during the 1960s, focusing on the case of Chol Soo Lee. The film (and an accompanying memoir) dissects Lee's wrongful incarceration and the challenges he struggled with in building his life after release. The film - and Choo's review - is rich in historical detail on Asian immigration and the challenges facing Asian immigrants through a century of White resistance to immigration. The review also highlights the political and racial forces that drove Lee's prosecution. Ha and Li show the parallels of Lee's experiences with those experiencing harsh but wrongful punishment, but also those that are unique to his case. Perhaps most critical and universal to this film is the controlling and unrelenting intrusions of the criminal justice institutions in Lee's life, from his early life to his arrest, incarceration, release and his return.

Derecka Purnell is part of the vanguard of abolitionists whose work over the past decade has shaped and legitimized a burgeoning movement among scholars, advocates and organizers. In her review of Purnell's autobiography, *Becoming Abolitionists,* Eliza Harris guides the reader over Purnell's journey (including a travelogue) to embracing abolitionism and refining its meaning. The review summarizes Purnell's intensely personal account and her remarkable linguistic framing of the abolition discourse, but also the solid structure of Purnell's thoughts on abolition. Harris describes Purnell's analysis and response to the mainstream challenges to abolition and she welds those thoughts with searing accounts of the recurring injustices, wrought by the institutions that she would replace, to mostly Black and Brown defendants over decades. Harris' review sets out the granular conceptual and empirical frames that Purnell constructs to create a compelling logic for her vision.

Sam Magee's review of *Death by Prison*, a new book by Christopher Seeds, discusses the spread of Life Without Parole (LWOP), or death-in-prison sentencing in the US. Magee shows in his review how this practice is hardly unique to the US, though still relatively infrequent in the rest of the world. The book ranges from historical analysis, to modern jurisprudence of LWOP sentences, to the moral challenges of what is a form of state killing. Magee describes the dilemma facing abolitionists, both on the moral calculus and the watering down of cruelty by spreading terrible incarceration conditions over what might be decades - a debate that he accuses Seeds of sidestepping. There are several issues in the spread of LWOP in the US that demand attention in the review and in the book, including its use with minors and young adults and its use with non-murder sentences - both practices sanctioned by the US Supreme Court. Seeds avoids a detailed analysis of the gap in lawyering - including appellate representation - available to those facing death in prison. While common law nations including Canada, the United Kingdom and Australia have either abandoned or refused to adopt the practice, it is a common sentence in other common law nations including Kenya. Others, such as Jamaica, reject LWOP but can impose lengthy sentences of six decades that are *de facto* death -in-prison sentences. Their imposition on young offenders compounds the cruelty of these sentences by lengthening the duration of their time in prison. In discussing the Seeds book, Magee issues what I read as a challenge to Seeds to not sidestep the moral arguments for LWOP sentences (including those of abolitionists) and demand of abolitionists that they justify what amounts to prolonged punishment that can border on torture.

Imani John-Clare and Josie Lunnon each review a season of *Murderville*, a podcast produced and hosted by Liliana Segura and Jordan Smith. Each season provides detailed analytic reporting on a specific capital murder trial. Each goes beyond the details of the alleged murders to describe the social and political context of a case, the competing accounts of the crime itself and the investigations leading to the convictions of the defendants. Each identifies the failures of the legal institutions that, in season one produced a wrongful conviction and, in season two, should have produced an acquittal if not a post-conviction exoneration. Each season autopsies the components of the convictions, from forensic evidence to witness statements and recantations to allegations of wrongdoing by investigating law enforcement agencies, including *Brady* violations of withheld exculpatory evidence, to failures by attorneys and investigators to present critical mitigating evidence. The victim profiles in each system and the crimes themselves, couldn't be more different: Even though race is everywhere in the crime and prosecution in season one, it is presented in a more complex way in

season two. These differences show listeners the recurring themes in capital murder prosecutions and how context shapes the production of a capital sentence. Both Lunnon and Imani-Clare show the humanity of the defendants and their families. They also show how the indifference of prosecutors to the facts in each setting distorts their creation of narratives leading to convictions.

The review of cultural contributions concludes with a compilation by Trevor Grant of articles focusing on capital punishment in the Middle East region and across the world of LGBTQIA+ individuals. He begins with attention to the preparations for the 2022 World Cup in Qatar, where efforts to focus attention on the prosecution of LGBTQ people and the efforts of several international sides to show their support for LGBTQ rights and safety were thwarted by both the international governing body of football and the Qatari government.[8] Trevor's review also reminds us of the new urgency to this topic in the US, while also focusing our attention internationally.[9] Grant discusses recent scholarly articles, books, films, television programming, podcasts and documentaries, as well as reports from the field and government. The individual reviews and contributions are too numerous to mention here, but their breadth and diversity of media and topics on capital punishment should inform and inspire both scholarship and activism in the coming years.

One last contribution in this issue is an essay from Tommy Seagull, an Amicus volunteer who worked on a death penalty case in Florida. He reminds us how emotionally difficult it is to work on death cases, the complexity and range of trial and constitutional issues in representing defendants facing death and the contrasts between UK and American law and procedure where death is at stake. Seagull reports that this experience can be a lasting one. He says he will "always be a Floridian at heart," but some of us may want to have a talk with him about that!

One final note. Our friend and editorial board colleague, Mark George KC, passed away shortly before this volume was going to print. Mark was a tireless and brilliant advocate, a scholar when he could squeeze in the time between cases to write and an inspiration to everyone who was in his orbit. He will be deeply missed.

Endnotes

[1] 492 U.S. 302 (1999) (rejecting the claim that the Eighth Amendment does not allow death sentences for defendants who are intellectually disabled).

[2] *The Death Penalty in 2022: Year-End Report,* Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report. *See*, Marian J. Borg and Michael L. Radelet, *On Botched Executions*, Capital Punishment: Strategies for Abolition (Peter Hodgkinson and William Schabas, eds., 2004).

[3] *See, Botched Executions*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/botched-executions.

[4] Juan A. Lozano, *Inmates Challenge Texas Plans to Use Unsafe Execution Drugs*, Washington Post (Jan. 3, 2023), https://www.washingtonpost.com/national/inmates-allege-texas-to-use-unsafe-drugs-for-executions/2023/01/03/59707744-8bb4-11ed-b86a-2e3a77336b8e_story.html.

[5] *See, e.g.,* Catherine L. Bonventre, *Wrongful convictions and forensic science,* 3 Wiley Interdisciplinary Reviews: Forensic Science (2021). *See also,* Hong Lu and Bin Liang, *Introduction: Wrongful Convictions and Exonerations in Asia*, 17 Asian Journal of Criminology 1-7 1 (2022).

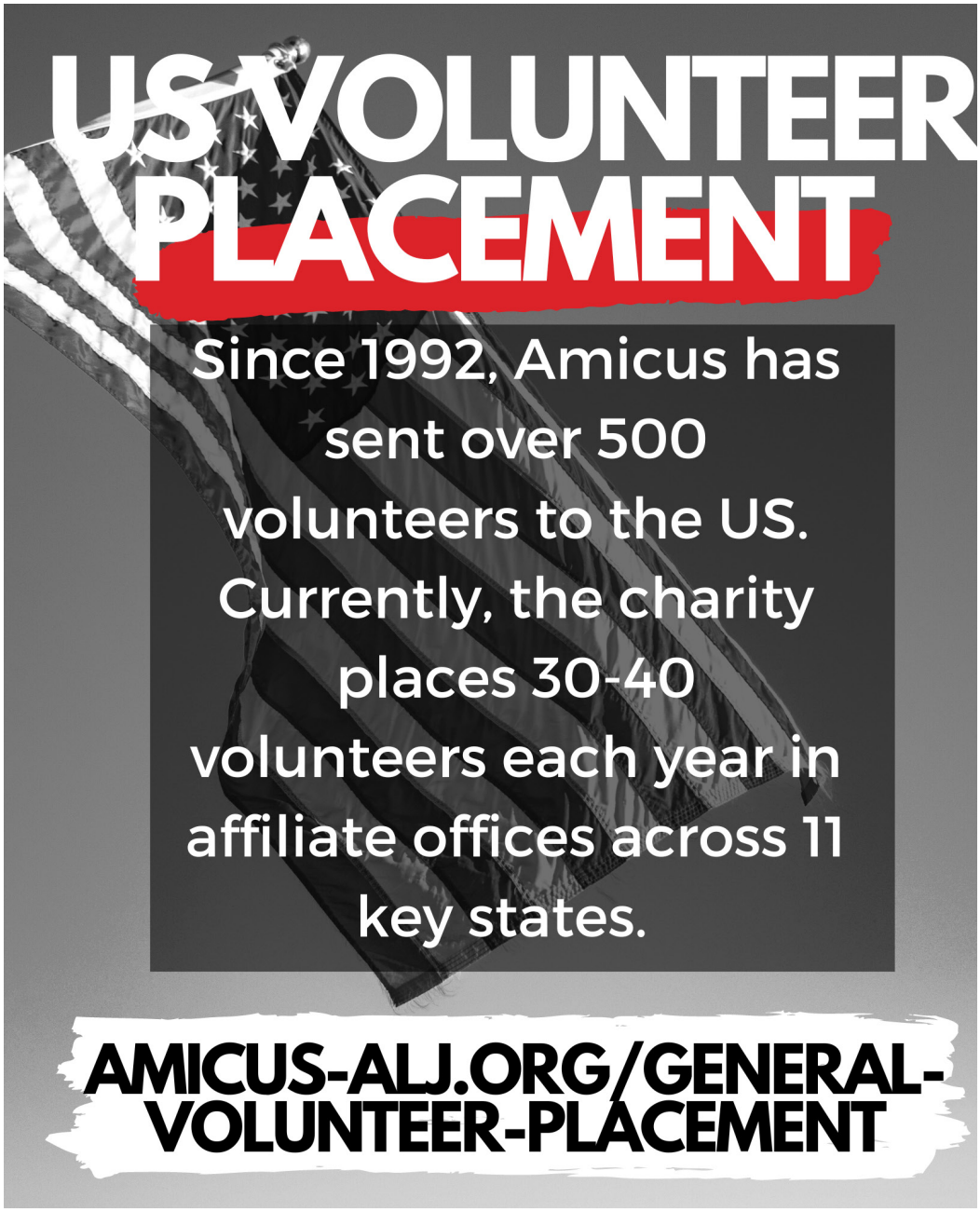
[6] *NYPD Misconduct Complaint Database*, New York Civil Liberties Union,

https://www.nyclu.org/en/campaigns/nypd-misconduct-database.

[7] New York Consolidated Laws, Civil Rights Law - CVR § 50-a

8 James Olley, *Why Did FIFA Ban The LBGTQ OneLove Armband at the World Cup?*, ESPN.COM (Nov. 21, 2022), https://www.espn.com/soccer/fifa-world-cup/story/4808986/why-fifa-banned-lgbtq-onelove-armband-at-world-cup-in-qatar.

[9] *See,* Jessica Sutton, John Mills, Jennifer Merrigan & Kristin Swain, *Death by Dehumanization: Prosecutorial Narratives of Death-Sentenced Women and LGBTQ Prisoners*, 95 St. John's L. Rev. 1053 (2021).



NOTES FOR CONTRIBUTORS

We welcome articles concerning legal issues relating to the death penalty in all jurisdictions around the world. The occasional Critical Approaches to the Death Penalty section also provides contributors with the opportunity to scrutinise death penalty issues theoretically and from the standpoint of disciplines other than law. Accordingly, we welcome submissions engaging in the disciplines of philosophy, sociology, psychology, economics, politics, religion, feminism, anthropology, and literature.

We also welcome case reports, volunteer reports from death penalty offices, reviews of books which concern the death penalty (both academic and literature), and opinion pieces on specific aspects of capital punishment. We encourage contributors to engage in a dialogue with all aspects of the death penalty, and also to comment on the Amicus Journal and our Amicus charity. Furthermore, we welcome short entrants for our Worldwide Overview and contributors are welcome to submit jurisdictional developments to be included as well.

Please refer to the articles published in the Journal for our house style. All points of law and fact are to be supported through endnote citation to authorities. Citations are to comply with the Blue Book citations. The title is to appear in normal case bold and the chapter headings are to appear in normal case bold. Sub-headings should appear in bold italics. The author's name should appear in regular type with an asterisk (*) footnote symbol, detailing professional position or affiliation.

Main Articles
Between 5,000-8,000 words.

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Between 2,000-3,000 words.

Book Reviews
Up to 1,000 words per book.

Editorials
Up to 1,000 words.

Letters to the Editor
Up to 800 words.

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Up to 100 words.

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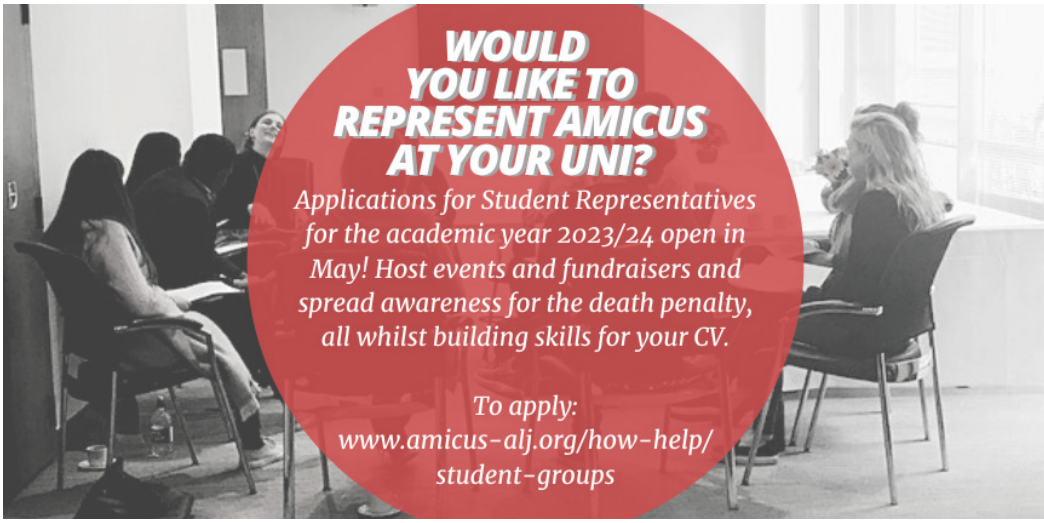

BLAMING THE POOR FOR THE LAWYERS THEY WERE GIVEN: SHINN V. RAMIREZ GUTS THE RIGHT TO EFFECTIVE CAPITAL DEFENSE COUNSEL

By Russell Stetler* and Alexis Hoag-Fordjour†

Emeritus Professor Anthony G. Amsterdam warned in the previous issue of this journal, that a "two-thirds majority of the [current Supreme] Court... stands as a rock-solid wall against federal constitutional invalidation of capital punishment. These are not people persuadable by law or reason. They are ideologues whose keen intelligence is devoted exclusively to vindicating their instinctively authoritarian and punitive predispositions."[1] Shortly afterward, the Court confirmed Amsterdam's fears with its decisions in *Shinn v. Ramirez and Jones*,[2] overturning not only its own precedent,[3] but also the considered opinions of five different members of the US Court of Appeals for the Ninth Circuit.[4]

At stake in *Shinn* was whether a state could properly put a person to death without allowing that person a fair trial, including the constitutional right to effective counsel. Both David Ramirez and Barry Jones had been represented by incompetent counsel throughout their state court proceedings. Mr. Ramirez's lawyer failed to present compelling evidence that his client was intellectually disabled and thus ineligible for the death penalty. Mr. Jones's lawyer failed to investigate his client's credible claim of actual innocence, which could have prevented a jury from convicting Mr. Jones and sentencing him to death. When the Court ruled against Mr. Jones and Mr. Ramirez, it cast law and reason out the door, opting to prioritize finality over the Respondents' compelling claims of ineffective assistance of counsel.

"Bedrock Principle"?

In 2012, the Supreme Court referred to the effective assistance of trial counsel as a "bedrock principle in this Nation's justice system."[5] Nonetheless, the Court did not recognize the right to counsel for people too poor to hire a lawyer in death penalty cases until 1932,[6] and in all cases until 1963.[7] The right to an *effective* lawyer in death penalty cases came decades later. In the meantime, the lower federal courts applied a variety of tests to determine whether defense counsel provided constitutionally effective counsel. The various tests for determining counsel's effectiveness ranged from methods that placed a heavy burden on defendants, to others that required *the state* to prove that trial counsel's conduct did not impact the outcome of the case.[8] However, the lack of a uniform standard proved untenable, particularly because which test a court applied could dictate whether a defendant prevailed on an ineffectiveness claim, not the merit of the defendant's claim.

In 1984, the Supreme Court finally identified a uniform standard to determine constitutionally effective representation in *Strickland v. Washington*.[9] Justice Sandra Day O'Connor, the Court's newest and youngest member, wrote the opinion. The only prior opinion that she cited was *Michel v. Louisiana*,[10] a Jim-Crow-era case involving an indigent Black defendant, appointed counsel who failed to timely challenge the state's exclusion of Black people from the grand jury, and an interracial rape conviction re-

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sulting in a death sentence.[11] There, the Court excused the performance of a lawyer in his late seventies, who had been bedridden for several months when he failed to file the critical motion to quash the grand jury – leaving a docket with no entries between his appointment and his motion to withdraw a year later.[12] The Court mused that counsel's failure may have been "sound trial strategy."[13] In *Strickland*, Justice O'Connor similarly excused the performance of a lawyer who had conducted no investigation of David Washington's life, suggesting, as in *Michel*, that doing nothing might have been sound trial strategy.[14] Like Mr. Michel, Mr. Washington was soon executed.[15] The two other defendants, whose case the Court consolidated with Mr. Michel's case, eventually pleaded guilty to lesser charges; the state of Louisiana released the two men after they spent twenty years incarcerated, including fourteen years on death row.[16]

The resulting legal standard requires a defendant to show (1) that his trial lawyers' conduct fell below an objective standard of reasonableness, and (2) a reasonable likelihood that but for counsel's poor performance, the result of the proceeding would have been different.[17] Then, based on *Michel* – a case riddled with anti-Black racism – the standard also requires the reviewing court to assume that trial counsel acted reasonably and that counsel's actions and/or inactions may have been based on sound trial strategy.[18]

For the following sixteen years, the Supreme Court found no one with a bar card ineffective in a capital case. However, beginning at the dawn of the twenty-first century, the Court established counsel's duty to conduct thorough mitigation investigation as a core element of effective representation in five cases.[19] Indeed, it was Justice O'Connor, authoring for the majority in *Wiggins v. Smith*, who spelled out most clearly what this responsibility entails: a thorough family and social history investigation before trial that identifies mitigating evidence to present to the jury if the case proceeds to trial.[20] If such an investigation does not happen prior to trial and the defendant is sentenced to death, it is incumbent upon post-conviction counsel to carry out the type of thorough investigation that trial counsel could have and should have conducted. Thus, to win relief on appeal, people on death row need post-conviction lawyers who can fulfill this investigative obligation. In other words, in appeal, defendants need the factual evidence that demonstrates a reasonable probability of a different outcome in either phase, evidence that would have persuaded at least one juror to vote against conviction or the death penalty.[21]

As a practical matter, poor people charged with a capital offense need to be fortunate enough to have good lawyers at some stage of litigation. Death penalty lawyer Stephen Bright lamented that capital punishment was reserved not for the worst crimes, but for indigent people represented by the worst lawyers.[22] However, even adequate lawyers need sufficient funding to undertake the investigation necessary to meet the constitutional demands of effective assistance.

The nine stages of litigation are shown in Figure 1. The top row indicates the points where a discretionary appeal to the Supreme Court of the United States is possible: After denial of an automatic appeal to the highest state court, denial of a state post-conviction petition affirmed by that court, and denial of federal habeas corpus relief.[23] The middle row shows the opportunities for review of purely legal issues: the appeal of trial court rulings to the state's highest court (after trial or after a denial of a state post-conviction petition) or the discretionary review of the denial of a federal habeas corpus petition. The bottom row is where funding matters most because it is here that good lawyers have the opportu-

Figure 1. The nine stages of capital litigation

United States Supreme Ct. (discretionary)	United States Supreme Ct. (discretionary)	United States Supreme Ct. (discretionary)
Highest state court: automatic appeal	Highest state court (appeal of post-conviction denial)	U.S. Circuit Court (appeal of district court habeas corpus denial)
State trial court	State post-conviction (usually filed in trial court)	United States District Ct. (federal habeas corpus)

nity to discover and present new factual evidence bearing on conviction or sentence. Wrongful convictions and wrongful death sentences can only be overturned by well-funded investigations in that bottom row.

The patchwork systems of indigent defense in the twenty-seven states that retain capital punishment mean that the odds of having good lawyers and adequate funding for investigation vary widely around the country.[24] The federal defender services program attempts to provide more uniform representation and funding once cases reach federal habeas corpus.[25] However, by the time the Supreme Court announced its clarifying decisions about what effective representation requires in capital trials, Congress had already enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which severely limits access to federal review of death penalty cases on habeas corpus through a variety of procedural bars.[26] The decision in *Martinez v. Ryan* in 2012 created a limited opportunity to avoid some of those bars, although it is unclear how many cases actually obtained relief based on *Martinez* in the decade before *Shinn* took away its promise. Many cases undoubtedly benefited by obtaining time, resources and evidentiary hearings in front of judges who were less vulnerable to electoral pressures than their state court counterparts.[27] The number of petitioners whose habeas writs federal courts granted is probably small and, in many instances, habeas litigation is ongoing.

Other Recent Supreme Court Cases

Shinn was of course not the only death penalty case in which the new supermajority on the Court showed its eagerness to ignore its own precedent. In *Andrus v. Texas*,[28] it denied certiorari even though the Texas Court of Criminal Appeals had defied vertical *stare decisis* and denied the law of the case established by the Supreme Court on the deficient-performance prong of *Strickland*. In its *per curiam* opinion in 2020,[29] the Supreme Court held that trial counsel in *Andrus* had been woefully deficient under the Sixth Amendment standard requiring thorough mitigation investigation, but remanded the case to the Texas Court of Criminal Appeals to decide the prejudice prong of *Strickland*.

Prior to *Shinn*, the Court also overruled the First Circuit Court of Appeals, which had overturned the death sentence of Dzhokhar Tsarnaev.[30] One ground for appeal was the exclusion of statutory mitigating evidence showing that Dzhokhar's older brother had a dominating influence over him. In an ominous footnote, the Court seemed to be inviting a challenge to the whole concept of mitigating evidence as established in the unbroken line of Eighth Amendment cases beginning with *Lockett v. Ohio*[31] and *Eddings v. Oklahoma*[32]:

> Some have argued that these cases and their progeny do not reflect the original meaning of the Eighth Amendment, whose prohibition "relates to the character of the punishment, and not the process by which it is imposed." *Gardner v. Florida*, 430 U. S. 349, 371 (1977) (Rehnquist, J., dissenting); see also, e.g., *Miller v. Alabama*, 567 U. S. 460, 505–506, and n. 3 (2012) (THOMAS, J., dissenting). Neither party here asks us to revisit that question and we decline to do so.[33]

Given these signals, the Court's decision in *Shinn* was unsurprising. Just as Amsterdam predicted, the conservative majority advanced its ideological and punitive agenda at the expense of the basic constitutional guarantees of people convicted of crimes. Justice Sotomayor, who has consistently served as the Court's moral compass, reminded her colleagues "that no matter how heinous the crime, any conviction must be secured respecting all constitutional protections."[34]

Possible Pathways

So, following *Shinn*, what pathway to relief is possible for an aggrieved defendant who received ineffective assistance of counsel and lacked an opportunity to vindicate that right until federal habeas? The pathway looks narrow and treacherous. Following *Shinn*, the Court in *Shoop v. Twyford* held that there was no reason to transport a death-sentenced client to an outside hospital for a brain scan because such evidence would be inadmissible in federal habeas corpus proceedings.[35] However, given the recency of the decision, most of the action is occurring in lower federal courts. A handful of federal courts of appeal and district courts have considered *Shinn*'s impact on pending habeas petitions. Depending on the procedural posture of the petition, there have been few bright spots.

After *Shinn*, some federal appellate courts have already overturned grants of relief. The Third Circuit has historically been a friendlier forum for many federal habeas petitioners. However, in a nonprecedential opinion, that court overturned a Middle District of Pennsylvania district court grant of relief in *Gelsinger v. Superintendent*.[36] The appellate court said it was constrained to vacate and remand to the district court to reevaluate the petition solely on the basis of evidence presented in the state court.[37] The Fifth Circuit, which has historically been aligned with the current Supreme Court supermajority, granted a Certificate of Appealability in *Mullis v. Lumpkin*.[38] It would be surprising if that court failed to follow *Shinn*.

Nonetheless, in some districts and circuits, courts have taken a different course. In *Barbour v. Hamm*,[39] a court in the Middle District of Alabama found that *Shinn* and *Shoop* did not affect the court's prior order and allowed further discovery on the petitioner's claim of actual innocence. In the Western District of Washington, in *Mothershead v. Wofford*,[40] the court held that *Shinn* does not preclude the evidentiary hearing that it had ordered prior to the decision. The Sixth Circuit, in *Rogers v. Mays*,[41] granted habeas relief with respect to petitioner's penalty phase, which vitiates the need for the district court to consider whether *Shinn* applies.

Multiple federal courts have also elected to permit habeas petitioners simply to return to state court, granting motions to stay and

abbey proceedings so that all the relevant evidence can be presented in state court.[42]

Conclusion

We are writing as the Supreme Court begins another term, and it is too early to predict what lies ahead. One set of Court watchers fears that the Court may overturn, or at least chip away at, the Sixth and Eighth Amendment precedents that have defined the modern era of death penalty litigation. Others see a less dramatic term ahead, with no good news from the Court: hostility to method-of-execution claims and end-stage litigation, stricter enforcement of AEDPA's procedural bars, and simply a return to the pre-*Martinez* litigation environment. We quoted Emeritus Professor Amsterdam's bleakly realistic assessment of the Court at the beginning of this article without acknowledging his enduring strategic optimism. We are at a time when litigation in the state courts, especially in the trial courts, assumes greatest importance. We are also witnessing a time when local state prosecutors are exercising their discretion not to seek the death penalty in states where capital punishment remains lawful.[43] If we have lost the legal battle in the Supreme Court, we are winning the narrative battle.[44] We are succeeding in telling mitigating, humanizing stories about capital clients not just in court, but in the arena of public opinion. The Supreme Court foreshadowed its *Shinn* decision in its rush to expedite the federal execution spree in the final months of Donald Trump's presidency – recklessly overturning or simply ignoring what was happening in the lower federal courts.[45] The Supreme Court is unlikely to have an opportunity for such wholesale disregard for those courts and the injustices that capital defenders seek to remedy, one client at a time.

Endnotes

[1] Anthony G. Amsterdam, *The Ghost of* Furman *Past, and the Specter of* Furman *Future*, 43 Amicus Journal 11 (2022).

[2] 142 S.Ct. 1718 (2022) (federal habeas court may not consider new evidence of trial counsel's and state post-conviction counsel's ineffectiveness that petitioner failed to develop in state post-conviction proceedings). In addition, evidence of innocence must now meet a standard of "clear and convincing" evidence.

[3] Martinez v. Ryan, 566 U.S. 1 (2012) (excusing procedural default of ineffective assistance of trial counsel claim when state post-conviction counsel also failed to develop the claim effectively); Trevino v. Thayer, 569 U.S. 413 (2013) (confirming that *Martinez* applies in Texas). The seven-member majority in *Martinez* included Chief Justice John Roberts and Justice Samuel Alito. Justice Kennedy wrote the majority opinion. Only Justices Scalia and Thomas dissented. Of course, the Court had already displayed its brazen disregard for *stare decisis* in overturning *Roe v. Wade*, 410 U.S. 113 (1973), in June, a precedent that had been upheld for nearly half a century. Professor Eric Freedman has characterized *Dobbs. v. Jackson Women's Health Organization*, 597 U.S. ___, 2022 WL 2276808 (2022), as "the gravest self-inflicted wound in the Supreme Court's history" and "a reckless assault on the very institution of judicial review." Eric M. Freedman, *Hari-Kari on First Street*, posted in Reproductive Law (28 June 2022). Who knows which precedent may be next on the chopping block?

[4] Ramirez v. Ryan, 937 F.3d. 1230 (9th Cir. 2019); Jones v. Ryan, 943 F.3d 1211) (9th Cir. 2019). Judge Richard Clifton, appointed by President George W. Bush, was on the three-judge panels in both cases. The Jones panel also included two ex-prosecutors, Johnnie B. Rawlinson, a former assistant district attorney in Las Vegas, and Paul J. Watford, a former federal prosecutor in the Central District of California. The Ramirez panel included Chief Judge Sidney R. Thomas, a former commercial litigator and bankruptcy specialist from Montana, and Marsha Berzon, whose private practice

specialized in Supreme Court litigation and who also held academic positions at Berkeley and Cornell. Every judge concurred in the outcomes, and Judge Berzon dissented in part only because she would have gone farther in granting a certificate of appealability on an additional issue.

[5] Martinez v. Ryan, *supra* note 3, at 12.

[6] Powell v. Alabama, 287 U.S. 45 (1932) (indigent right to counsel in capital cases under Sixth and Fourteenth Amendments, reversing convictions of nine Black teenagers accused of raping White woman). The accused were known as the Scottsboro boys. *See* James Goodman, Stories of Scottsboro (1994).

[7] Gideon v Wainwright, 372 U.S. 335 (1963) (holding indigent right to counsel essential to fair trials and due process of law in all cases). This case was followed by the passing of the Criminal Justice Act in 1964 and the creation of public defender offices in multiple state and federal jurisdictions. Nonetheless, provision of indigent defense services, even in capital cases, remains a patchwork system even today, with statewide offices in some jurisdictions and purely county-wide services in others delivering the services through public defender offices, assigned counsel (court-appointed) systems, and low-bid contracts. *See* George Ebo Brown & Kevin M. Scott, PhD., National Survey of Indigent Defense Systems (NSIDS)(Bureau of Justice Statistics 2013).

[8] *See, e.g.*, David Cole, Gideon v. Wainwright *and* Strickland v. Washington: *Broken Promises* in Criminal Procedure Stories 111-16 (Carol Steiker ed., 2006).

[9] 466 U.S. 688 (1984) (establishing two-prong test requiring deficient performance and prejudicial effect).

[10] 350 U.S. 91 (1955).

[11] *Id.*

[12] *See* Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 42 Hofstra L. Rev. 635, 653-655 (2013) and Alexis Hoag-Fordjour, *White is Right: The Racial Construction of Effective Assistance of Counsel*, 98 N.Y.U. L. Rev. __ (*forthcoming* 2023).

[13] 350 U.S. at 101.

[14] 466 U.S. at 646-650.

[15] John Michel was executed on 31 May 1957, two years after the Supreme Court ruling. *See* Stetler & Wendel, *supra* note 12, at n.114. David Washington, however, was executed just two months after the *Strickland* decision, on 13 July 1984. Fla. Dept. of Corr., Execution List, 1976 – Present, *available at*: http://www.dc.state.fl.us/ci/execlist.html (last visited 14 June 2022).

[16] Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966) (reversing conviction based on systemic exclusion of Black people and wage earners from jury system in violation of Fourteenth Amendment's due process and equal protection clauses), *cert. denied*, 87 S.Ct. 1303 (1967). *See also Death Row Ordeal of 14 Years Ends*, Miami Herald, Jan. 1, 1970, at 113.

[17] 466 U.S. 668.

[18] *Id.* at 689 (citing *Michel*, 350 U.S. at 101); *see also* Hoag-Fordjour, *supra* note 12.

[19] *See* Williams v. Taylor, 529 U.S. 362, 367, 395-96 (2000) (ineffective assistance where capital trial counsel in Virginia in 1986 did not fulfill their obligation to conduct a thorough investigation of the defendant's background); Wiggins v. Smith, 539 U.S. 510, 514, 524 (2003) (finding counsel ineffective in a 1989 Maryland trial because they "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"; Rompilla v. Beard, 545 U.S. 374, 387 (2005) (duty to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence); Porter v. McCollum, 558 U.S. 30, 39 (2009) (per curiam) (under prevailing norms, counsel had "unquestioned" "obligation to conduct a thorough investigation of the defendant's background."; Sears v. Upton, 561 U.S. 945, 953 (2010) (per curiam) (reasonable mitigation theory in the abstract does not excuse failure to conduct adequate investigation before arriving at theory).

[20] *See Wiggins*, *supra* note 19, at 524-

525 (discussing importance of "medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences" and lawyer's "substantial and important role... in raising mitigating factors both to the prosecutor initially and to the court at sentencing").

[21] *See, e.g., Wiggins*, 529 U.S. at 394 (acknowledging that a reasonable probability of a different outcome means mitigating evidence that would have moved "at least one juror… to spare Petitioner's life had he heard" it).

[22] Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 Yale L. J. 1835 (1994).

[23] "Of the 7,000 to 8,000 cert. petitions filed each Term, the court grants cert. and hears oral argument in only about 80." *See Supreme Court Procedure - Petition for Certiorari,* SCOTUSblog, *available at*: https://www.scotusblog.com/supreme-court-procedure/ (last visited November 23, 2022). Of the roughly eighty cases that are reviewed, only a small number are criminal cases, and capital cases represent an even smaller fraction.

[24] *See, e.g.,* Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 L. & Contemporary Problems 31 (1995) (describing various indigent defense delivery models throughout the United States).

[25] Twenty-three of the eighty-one federal public defender offices now host capital habeas units in all of the nine federal circuits where there are states that retain the death penalty. *See* 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act 194 (§ 9.2.3), *available at*: https://cjastudy.fd.org/sites/default/files/publicresources/Ad%20Hoc%20Report%20June%202018.pdf; *see also*: *John Baker Appointed New Federal Public Defender for the Western District of North Carolina*, United States Courts of the Fourth Circuit , available at: https://www.ca4.uscourts.gov/docs/pdfs/fpd-ncwd-johnbaker-03282022.pdf?sfvrsn=eb97b409_0 (discussing creation of Fourth Circuit Capital Habeas Unit in 2022).

[26] Pub. L. No. 104-132, 110 Stat. 1214 (bipartisan law passed in the wake of the first World Trade Center bombing in 1993 and the Oklahoma City bombing in 1995; signed into law by President Bill Clinton) to modify federal habeas corpus. AEDPA prevented federal judges from overturning prior state court rulings unless the adjudication was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S. Code § 2254(d).

[27] *See, e.g.*, Dickens v. Ryan, 740 F.3d 1302 (9th Cir. 2014) (en banc) (remanding case to district court for further proceedings on a procedurally defaulted ineffective assistance of trial counsel claim in light of *Martinez v. Ryan*).

[28] 142 S.Ct. 1866 (2022) (denying certiotari after Texas Court of Criminal Appeals denied IAC claim).

[29] 140 S.Ct. 1875 (2020) (finding deficient performance but remanding to Texas Court of Criminal Appeals to consider prejudice).

[30] 142 S.Ct. 1024 (2022).

[31] 438 U.S. 586 (1978).

[32] 455 U.S. 104 (1982).

[33] United States v. Tsarnaev, *supra* note 30 at 1051 n.2.

[34] *Shinn*, *supra* note 2, at 1740-41 (2022) (Sotomayor, J., dissenting).

[35] 142 S.Ct. 2037 (2002).

[36] No. 21-2844 (25 Aug. 2022), slip. op.

[37] *Id.* at 1.

[38] 2022 WL 3700045 (5th Cir. Aug. 26, 2022) (granting COA to determine whether petitioner received IAC during state habeas and whether district court can decide as much in light of *Shinn*).

[39] 2022 WL 3570327 (M.D. Ala. Aug. 18, 2022).

[40] 2022 WL 2275423; Case No. C21-5186 MJP (W.D. Wash. June 23, 2022).

[41] 2022 WL 3081318 (6th Cir. Aug. 3, 2022).

[42] *See, e.g.* Albarati v. Schiebner, No. 22-CV-10139, 2022 WL 2161020 (E.D. Mich. June 15, 2022); Ali v. Oliver, 2022 U.S. Dist. Lexis 119534, No. 19-4339 (E.D. Pa. July 7, 2022); Ambrose v. Cain, No. 1:21-CV-302-KHJ (S.D. Miss. Aug. 27, 2022); Bush v. McGinley, No. CV 21-2106, 2022 WL 2442731 (E.D. Pa. June 17, 2022), report and recommendation adopted, No. CV 21-2106, 2022 WL 2440762 (E.D. Pa. July 5, 2022); Chamberlin v. Cain, No. 2:11-cv-00072-CWR (S.D. Miss. June 1, 2022); Cowan v. Cates, No. 1:19-cv-00745-DAD (E.D. Cal. July 13, 2022); Derrick v. Secretary, No. 8:08-cv-01335 (M.D. Fla. Aug. 19, 2022); Elledge v. Huss, No. 21-CV-11122, 2022 WL 2308383 (E.D. Mich. June 27, 2022); Gran v. Gastelo, No. 118-CV-01745-DADSABHC, 2022 WL 2256422 (E.D. Cal. June 23, 2022); Hairston v. Sorber, No. 2:22-cv-00234 (W.D. Pa. Sept. 14, 2022); Hearne v. May, No. CV 22-630 (MN), 2022 WL 2064969 (Del. June 8, 2022); Hunter v. Baca, No. 3:13-cv-00166 (Nev. July 12, 2022); Hunter v. Jenkins, No. 1:15-cv-00209 (S.D. Ohio July 16, 2022); Moncada v. Perry, US. Dist. Lexis 150906 (Nev. Aug. 23, 2022); Ortiz v. Cain, No. 212-cv-02310-JTM-KWR (E.D. La. Jul. 7, 2022); Pickens v. Shoop, No. 1:19-cv-588 (S.D. Ohio July 18, 2022); Pontifies v. Baker, No. 3:20-cv-00652-ART-CSD, 2022 WL 4448259 (Nev. Sept. 23, 2022); Ruoff v. Covello, No. 22-CV-01207-JST, 2022 WL 2132216 (N.D. Cal. June 14, 2022); Stein v. Secretary of Florida Dept. of Corr., No. 3:09-CV-1162-MMH-PDB, 2022 WL 2452622 (MSep.D. Fla. July 6, 2022); Walker v. Lumpkin, No. CV H-20-3501, 2022 WL 2239851 (S.D. Tex. June 22, 2022); Wright v. Brown, No. 2:21-CV-10688, 2022 WL 2440746 (E.D. Mich. July 5, 2022). The authors gratefully acknowledge the practitioners who advised the habeas community of these early post-*Shinn* orders through a listserv posting by Talia MacMath of the Mwalimu Center for Justice, formerly known as the Capital Post-Conviction Project of Louisiana, on 13 July 2022 and updated through 30 Sept. 2022. Ms. MacMath has also tracked denials of these motions as well as litigation on evidentiary hearings.

[43] *See, e.g.,* Katie Lauer, *Rosen Announces the End of the Death Penalty in Santa Clara County,* San Jose Spotlight, 22 July, 2020, *available at*: https://sanjosespotlight.com/rosen-announces-the-end-of-the-death-penalty-in-santa-clara-county/ (last visited 05 Sept. 2022).

[44] *See, e.g.*, *New Poll Finds Bipartisan Opposition to Use of the Death Penalty as It is Actually Administered*, Death Penalty Information Center (01 Mar. 2022), *available at*: https://deathpenaltyinfo.org/news/new-poll-finds-bipartisan-opposition-to-use-of-the-death-penalty-as-it-is-actually-administered (last visited 05 Sept. 2022).

[45] *See* David Cole, *A Rush to Execute*, N.Y. Rev. (25 Feb. 2021) (multiple separate stays issued by many different federal courts overturned, enabling executions while appeals were pending or despite rulings that the execution protocol or process was unconstitutional); Lee Kovarsky, *The Trump Executions*, 42 Amicus J. 37 (2021) (discussing how Court normalized "shadow docket" practice of allowing executions without resolving important issues of law in multiple areas, including lethal injection challenges, other Federal Death Penalty Act litigation, 25 Savings Clause litigation, and Covid-19 litigation).

TAKING IT TO THE STATES: THE LONG ROAD TO EXCLUDING PEOPLE WITH SEVERE MENTAL ILLNESS FROM THE DEATH PENALTY

By Meredith Martin Rountree*

Should people with severe mental illness be excluded from the death penalty? A lot of people think they already are. In fact, they generally are not, but thanks to the American Bar Association and advocates across the country, some people with severe mental illness are being saved from the death penalty, and, one hopes, more will be in the future. In addition, these advocates are spreading the word about how existing law fails to protect people with severe mental illness.

The Supreme Court has decided that for some people, the death penalty is unconstitutional because it is a disproportionate punishment. People who commit crimes other than murder cannot be subjected to the death penalty, for example.[1] It is also disproportionate punishment to execute people with intellectual disability because, among other reasons, they are not as morally culpable as the "average murderer."[2] Intellectual disability (ID) is not the same as mental illness, however.

Intellectual disability is a developmental disability, a permanent condition, usually apparent at a young age, that implicates intellectual functioning (measured through IQ tests) and adaptive functioning, i.e., the skills necessary for independent living.[3] By contrast, people with severe mental illness (SMI) live with conditions such as schizophrenia or bipolar disorder that can disrupt their understanding of reality.[4] Unlike intellectual disability, these conditions commonly emerge in young adulthood and can be episodic.[5]

Several criminal law doctrines take mental illness into account, by, e.g., forbidding the trial of someone who is presently mentally incompetent and permitting legal defenses such as insanity or diminished capacity at the time of the crime. In death penalty trials, defendants can present evidence of their experiences of mental disturbance. Experience makes clear that these doctrines are inadequate. Most people are deeply skeptical of the insanity defense, but people who serve on capital juries are particularly hostile to these claims.[6] Misconceptions of defendants faking mental illness are common and the fact that insanity at the time is, generally, a total defense – if found insane, the defendant is not guilty – may also create pressure on jurors to convict even the most floridly ill defendant. The opportunity to present evidence of mental illness at a capital sentencing hearing may also be inadequate, particularly given hostility to and suspicion of claims of mental illness and misperceptions regarding mental illness and dangerousness.[7]

When the Supreme Court in *Atkins v. Virginia* found the execution of people with ID to be disproportionate punishment,[8] the American Bar Association (ABA) recognized an opportunity to extend the promise of *Atkins* to people with severe mental illness and shore up deficiencies in the existing law. In *Atkins*, the Court held people with ID are less morally culpable because ID:

> [D]iminish[es affected individuals'] capacities to understand and process in-

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> formation, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.[9]

Further, this disability can lead them to make false confessions, interfere with their ability to assist defense counsel and to be strong witnesses on their own behalf, and indeed, the fact of their impairment can be a "two-edged sword" to jurors, who conclude the impairment makes the individual more dangerous.[10]

One could describe the plight of the defendant with severe mental illness the same way. As the ABA explained, the ABA "does not take a position supporting or opposing the death penalty generally," but "the execution of people with severe mental illness is inconsistent with our existing legal prohibitions on executing people with intellectual disabilities[.]"[11]

> Executing defendants belonging to one of these two groups [i.e., those who were under eighteen years old at the time of the crime and those with ID] has been held unconstitutional as our society considers both groups less morally culpable than the "worst of the worst" murderers for whom the death penalty is intended, less able to appreciate the consequences of their actions, less able to participate fully in their own defense, and more likely to be wrongfully convicted – characteristics that apply to certain individuals with severe mental illness, too.[12]

The Individual Rights and Responsibilities Section of the American Bar Association (now the Civil Rights and Social Justice Section) therefore proposed it was "timely… to consider the extent, if any, to which other types of impaired mental conditions ought to lead to exemption from the death penalty."[13] It then organized a group of lawyers and mental health professionals into a Task Force on Mental Disability and the Death Penalty to articulate "*which* mentally ill people should not be executed and *under what circumstances*."[14] From the Task Force's work emerged a proposed resolution excluding people with certain mental conditions from the death penalty, which the ABA's House of Delegates adopted as ABA Resolution 122-A in 2006.[15]

The resolution had three parts. The first addressed implementing *Atkins* and extending it to people with dementia and traumatic brain injury, impairments comparable to intellectual disability, but not acquired in childhood; the second discussed psychiatric illnesses that profoundly disrupted the defendant's perception of reality and/or ability to understand his actions at the time of the crime; the third covered legal issues involving defendants already sentenced to death.[16] Shortly after the ABA's action, the American Psychiatric Association, the American Psychological Association and the National Alliance on Mental Illness each adopted comparable resolutions.[17] While a remarkable organizational convergence,[18] these resolutions could not by themselves create the necessary legal change. Change would require engaging with the Supreme Court's legal standard for so-called "categorical exclusions" from the death penalty.

Atkins is part of the Supreme Court's proportionality jurisprudence emerging from the "cruel and unusual punishment" clause of the Eighth Amendment.[19] The Court interprets the Eighth Amendment in conjunction with "evolving standards of decency that mark the progress of a maturing society."[20] These standards of decency are assessed based on "objective factors,"[21] such as state legislation.[22] While *Atkins*' description of the import of mental impairments in a capital trial certainly appeared to support an exclusion for people with mental illness, the objective factors so central to the proportionality analysis did not. In *Atkins*, the Supreme Court surveyed state legislative prohibitions on execution of those with ID and noted that, even where it was permit-

ted, such executions were "uncommon."[23] By contrast, at the time *Atkins* was decided, no state barred the execution of people with severe mental illness.[24]

The ABA Resolution was an essential first step, as it provided model language for state legislators. The ABA recognized, however, that reform required a more concerted effort. In 2016, the American Bar Association's Death Penalty Due Process Review Project convened advocates, lawyers, faith leaders and mental and behavioral health experts for a National Summit on Severe Mental Illness and the Death Penalty. The National Summit focused on bringing people with diverse perspectives together to discuss strategies to explain to policy makers the need to protect those with severe mental illness from the death penalty. The ABA simultaneously published a paper entitled "Severe Mental Illness and the Death Penalty" ("ABA White Paper").[25] The paper methodically identified "severe mental illness" as a narrow subsection of mental disorders, explained how existing legal protections for people with severe mental illness are inadequate to prevent these individuals from being sentenced to death and outlined the significant constitutional and policy problems with death sentencing this group of people.

Since the Summit, advocates, mental health professionals and other advocates for people with mental illness at the forefront, have worked tirelessly to advance bills to exclude people with serious mental illness from the death penalty, often in some of the most committed death penalty states. Bills have been proposed in Arkansas, Indiana, Missouri, North Carolina, Ohio, South Dakota, Tennessee, Texas and Virginia.[26] Ohio's bill gained legions of powerful supporters, including both Democratic and Republican Ohio governors, attorneys general, Supreme Court Justices and current and former legislators. Since the Ohio law was enacted, three people have been removed from death row and dozens more have petitioned for relief under the statute.[27]

The legislative proposals illustrate some of the complexities of SMI exclusion. The phrase "mental illness" encompasses a broader range of disorders than "intellectual disability." Further, and unlike intellectual disability, symptoms of mental illness can fluctuate. To address the latter concern, and consistent with the ABA's Resolution, bills impose a temporal requirement:

> **At the time of the alleged aggravated murder** with which the person is charged, the **[serious mental illness]** with which the person has been diagnosed… **significantly impaired the person's capacity to exercise rational judgment in relation to the person's conduct** with respect to either of the following: (i) Conforming the person's conduct to the requirements of law; (ii) Appreciating the nature, consequences, or wrongfulness of the person's conduct.[28]

With respect to what constitutes "severe mental illness," one can imagine at least two possible approaches. The first focuses on symptoms of mental disorder. The advantage of this approach is that it is more concerned with the nature of the defendant's impairment than with how the impairment fits certain diagnostic criteria, a question that invites a battle of the prosecution and defense experts. Further, many people who commit extreme violence may also have complex and interacting mental disorders that are not easily reducible to a particular psychiatric diagnosis. Some bills have taken this tack: "The term 'serious mental illness' means any mental diagnosis, disability, or defect that significantly impairs a person's capacity to" obey the law.[29] This is substantially the same language as the relevant part of the ABA Resolution.

The ABA White Paper turned to mental health professionals to elaborate a definition of "severe mental illness," concluding that phrase includes "certain diagnoses,

such as schizophrenia, bipolar disorder, and major depression, that are relatively persistent (e.g., lasting at least a year) and that result in comparatively severe impairment in major areas of functioning."[30] The ABA White Paper emphasized that this list was not comprehensive and proposed PTSD and traumatic brain injury should also be bases for the SMI exclusion.[31]

Most proposed bills and the two bills enacted into law in Ohio and Kentucky have largely adopted the ABA White Paper's more specific approach and identify the specific disorders included within the SMI exclusion.[32] Both Kentucky and Ohio laws define "serious mental illness" as schizophrenia, schizoaffective disorder, bipolar disorder and delusional disorder.[33] The Kentucky and Ohio statutes, however, also differ from each other in important ways. While they define "serious mental illness" the same way, the Kentucky statute is more restrictive, as it requires a "documented history, including a diagnosis" of the SMI to qualify for the death penalty exclusion. This requirement undermines the value of the statutory protection as many people, especially poor people, have a hard time accessing the kind of mental health services required to obtain this documentation and diagnosis. In addition, as serious mental illness often emerges in young adults, the individual who commits a homicide during a first psychotic break, for example, would not come within the protection of the statute.[34]

The ABA Resolution is now more than fifteen years old. Advocates in Ohio spent ten years seeking reform before they could celebrate the fruits of their labor. In that time, we have seen profound changes in the United States Supreme Court. The ABA spearheaded the state strategy to demonstrate that evolving standards of decency prohibit execution people with severe mental illness, but many advocates have become pessimistic about the Court's current interest in expanding the categories of people excluded from the death penalty. This only underscores the importance of pursuing state-based strategies to educate lawmakers and voters and press for legislative reform. What had been a means to an end has become the end in itself.

Endnotes

1 Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that punishing the rape of an adult woman with the death penalty violates the Eight Amendment's proportionality requirement); Kennedy v. Louisiana, 554 U.S. 407, 418 (2008) (holding the same for child rape where the crime did not result, and was not intended to result, in the death of the child).

2 Atkins v. Virginia, 536 U.S. 304, 319 (2002).

3 Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations,* 54 Cath. U. L. Rev. 1133, 1134-35 (2005).

4 *See, e.g.,* American Psychiatric Association defines a "mental disorder" as "a syndrome characterized by clinically significant disturbance in an individuals' cognition, emotion regulation, or behavior the reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning." Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) at 20; *see generally* American Bar Association Death Penalty Due Process Review Project, *Severe Mental Illness and the Death Penalty* (2016) at 9-14 (collecting scholarship and describing symptoms of severe mental illness) (hereafter "ABA White Paper").

5 Slobogin, *supra* note 3, at 1142; Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 Cath. U. L. Rev. 1123, 1124 (2005).

6 Prospective jurors in capital cases undergo extensive pretrial questioning to see whether they can follow a judge's in-

structions and sentence someone to death. This process, called "death qualification", does more than weed out people who oppose the death penalty. It also yields a group of jurors who are more punitive, more likely to convict, and more skeptical of insanity defenses. *See generally* Logan A. Yelderman, Monica K. Miller, and Clayton D. Peoples, *Capital-izing Jurors: How Death Qualification Relates to Jury Composition, Jurors' Perceptions, and Trial Outcomes*, in Advances in Psychology and Law (Brian H. Bornstein & Monica K. Miller, eds., 2016). As two other scholars noted, "capital defendants who plead [not guilty by reason of insanity] face a particularly difficult challenge: attempting to prove their innocence to a jury [biased] toward conviction and in favor of the death sentence before their trial even begins." Brooke Butler & Adina W. Wasserman, *The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense*, 36 J. Applied Soc. Psychology 1744 (2006) (citations omitted.) These researchers conducted an empirical study of three hundred venirepersons from the Twelfth Judicial Circuit in Florida and found that death-qualified venirepersons, when compared to excludables, were more likely to endorse certain insanity myths, find the defendant guilty, and sentence the defendant to death. *Id.* at 1744.

[7] *See, e.g.*, ABA White Paper, *supra* note 4, at 15-25; Bruce J. Winick, *Determining When Severe Mental Illness Should Disqualify a Defendant from Capital Punishment*, in Mental Disorder and Criminal Law: Responsibility, Punishment and Competence (Robert F. Schopp, Richard L. Wiener, Brian H. Bornstein & Steven L. Willborn eds., 2009) at 49-50, 53; Tabak, *supra* note 5, at 1128-29; Slobogin, *supra* note 3, at 1146, 1150-51 (2005).

[8] *Atkins*, *supra* note 2, at 321.

[9] *Id.* at 318.

[10] *Id.* at 320-21.

[11] ABA White Paper, *supra* note 4, at 6.

[12] ABA Death Penalty Due Process Review Project website on its Severe Mental Illness Initiative (https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/severe-mental-illness-initiative/).

[13] ABA White Paper, *supra* note 4, at 7.

[14] Tabak, *supra* note 5, at 1124 (emphasis in original).

[15] The first two parts of the Resolution reads as follows:

> RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to implement the following policies and procedures:
>
> 1. Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from [intellectual disability], dementia, or a traumatic brain injury.
>
> 2. Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity
>
> (a) to appreciate the nature, consequences or wrongfulness of their conduct,
>
> (b) to exercise rational judgment in relation to conduct, or
>
> (c) to conform their conduct to the requirements of the law.
>
> A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

[16] Slobogin, *supra* note 3 at 1133-36, 1139-45.

[17] Tabak, *supra* note 5, at 1125.

[18] ABA White Paper, *supra* note 4, at 8; Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier,* 50 B.C. L. Rev. 785, 789 (2009); Tabak, *supra* note 5, at 1125-26.

[19] *See, e.g.*, Weems v. U.S., 217 U.S. 349, 367 (1910) ("it is a precept of justice

that punishment for crime should be graduated and proportioned to offense"); Solem v. Helm, 463 U.S. 277, 285 (1983) (Framers "adopted … principle of proportionality" in sentencing).

[20] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[21] Atkins, *supra* note 2, at 312.

[22] *Id.*

[23] *Id.* at 313-15, 316 (listing states that prohibited the execution of the intellectually disabled and also noting "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.").

[24] Tabak, *supra* note 5 at 1124 (attributing paucity of legislative protection for people with SMI (as compared to protection for people with ID) to variations in types and effects of mental illness).

[25] For more information about the ABA's Severe Mental Illness Initiative, visit https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/severe-mental-illness-initiative/ and its link to relevant resources: https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/severe-mental-illness-initiative/resources/

[26] *See* Resources on Severe Mental Illness and Death Penalty, American Bar Association, https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/severe-mental-illness-initiative/resources/.

[27] Conversation with Kevin Warner Policy Director, Ohio Justice & Policy Center (29 Aug. 2022).

[28] Ohio Rev. Code Sec. 2929.025(A)(1)(b)-(b)(ii).

[29] Florida House Bill 1251 (2022); North Carolina Senate Bill 668 (2019-2020); Virginia Senate Bill 116 (2020); Links to these bills are available at https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity

[30] ABA White Paper, *supra* note 4, at 9.

[31] ABA White Paper, *supra* note 4, at 10, 13, 14.

[32] Missouri House Bill No. 278 (2021) defined "serious mental illness" more broadly than other states, with the category including schizophrenia; schizoaffective disorder, bipolar disorder, with psychotic features, major depressive disorder, with psychotic features, delusional disorders, traumatic brain injury, and posttraumatic stress disorder (PTSD). *Compare with* South Dakota Senate Bill 159 (2022) ("serious mental illness" defined as schizophrenia with psychotic symptoms, major depression with psychotic features, bipolar disorder with psychotic features, posttraumatic stress disorder with psychotic features, or schizoaffective disorder with psychotic features) *and* Tennessee House Bill 2809/Senate Bill 2310 (2022) (defined as schizophrenia, schizoaffective disorder, bipolar disorder, delusional disorder, or post-traumatic stress disorder). Texas's House Bill 140 (2021) proposed the narrowest definition for a "person with severe mental illness," i.e., someone with schizophrenia, schizoaffective disorder, or bipolar disorder, with "active psychotic symptoms" impairing the person's ability to follow the law. Some states combined approaches by listing the illnesses considered to be "serious mental illness" and further specified the "active symptoms" of the mental illness the individual must have at the time of the offense. See Arizona Senate B 1192 (2019); Arkansas House Bill 1494 (2019); Indiana Senate Bill 155 (2017). Other states managed this question by linking the illness with a substantial impairment in the individual's ability to follow the law at the time of the crime.

[33] Ohio Rev. Code Sec. 2929.025(A)(1)(a)(i)-(iv); KRS 532.130(3)(a).

[34] Kentucky, unlike Ohio, also extends the law's protection only to those not yet convicted. Prisoners currently sentenced to death cannot seek relief under the Kentucky statute. KRS 532.140(3)(b).

TENNESSEE SUSPENDS EXECUTIONS AND AUTHORIZES INDEPENDENT INVESTIGATION OF LETHAL INJECTION PROTOCOL

By Anighya Crocker*, Jeremy Gunn†, Ashley Robinson Li§ and Michael Tackeff¶

Earlier this year, Governor Bill Lee ordered an indefinite suspension of all executions in the State of Tennessee while an independent investigator examines problems with the state's protocol for use of lethal injection chemicals. In the months leading up to the Governor's decision, lawyers from Bass, Berry & Sims, PLC worked *pro bono* with federal public defender offices representing Terry King, a death-sentenced Tennessee man, in federal court litigation challenging the constitutionality of Tennessee's lethal injection protocol as being cruel and unusual punishment under the Eighth Amendment. The protocol calls for the use of midazolam, vecuronium bromide and potassium chloride to execute prisoners.

Through the discovery process in our lawsuit, we identified and made the court aware of numerous troubling aspects of Tennessee's use of lethal injection chemicals. These deficiencies were not limited to written policies and procedures. They were borne out of the practices the Tennessee Department of Correction ("TDOC") used to execute people condemned to die. This article summarizes the evidence presented to the court in the lawsuit and the circumstances that led to the Governor's decision to halt executions and order the independent investigation. Our experience confirms the impact that can be achieved when the resources of a private law firm working *pro bono* are combined with the dedication and expertise of full-time public interest lawyers who represent people on death row.

Tennessee Failed to Properly Implement the Lethal Injection Protocol

Oversight Failures

The expressed aim of Tennessee's lethal injection protocol is to provide a set of guidelines and procedures to carry out lethal injection executions in a humane and constitutional manner. Evidence uncovered in discovery, however, reveals that TDOC fell short of its aim by failing to implement sufficient safeguards to protect prisoners from botched executions and by failing to hold employees accountable for deviating from the protocol.

It became evident during discovery, even before identifying the flaws in the protocol, that TDOC secretly drafted the protocol without consulting proper experts. TDOC's general counsel drafted the protocol but admitted she had no personal knowledge of its substance. She did not consult pharmacists, physicians or other departments of correction while drafting the protocol. She testified that the TDOC commissioner and the state's drug procurer simply provided her information, which she inserted into the protocol. While the commissioner claimed he spoke with medical professionals and other state departments of corrections concerning their protocols, he noted that the individuals he spoke with did not help draft Tennessee's protocol. TDOC's general counsel did not recall holding any meetings while drafting the 104-page protocol nor receiving any notes from the commissioner or drug procurer. In discov-

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ery, TDOC largely hid behind state secrecy laws to prevent the full disclosure of how it drafted the protocol.

The Execution Team Was Not Qualified to Carry Out Executions

Members of the execution team deviated from the protocol and lacked sufficient training to carry out executions. Charged with overseeing all aspects of executions, the warden, for instance, testified that he failed to inventory lethal injection chemicals on a semi-annual basis as required by the protocol. Even when someone from TDOC conducted an inventory, the warden and other execution team members sometimes failed to dispose of expired lethal injection chemicals.

Among the other duties and obligations required by the protocol, the warden also conducts a "consciousness check" to determine whether the person is unresponsive and insensate to pain after receiving midazolam and before receiving the two other lethal injection chemicals. Setting aside that medical experts dispute whether midazolam can render a person insensate to pain and whether consciousness checks detect consciousness, the warden openly admitted that even if the person showed signs of responsiveness after midazolam was administered, such as yelling "help" or opening his eyes, the warden would likely still proceed with the execution.

On top of these troubling admissions, TDOC records show that other members of the execution team were inadequately trained to participate in carrying out executions. There is no evidence, for example, that the executioner was qualified to administer lethal injection chemicals despite participating in thirteen prior executions. While the executioner purportedly received "IV therapy training" twenty years ago at a medical college, he relied on his experience preparing vaccines for farm animals as qualifying him to administer lethal injection chemicals to people condemned to die.

The executioner's testimony also revealed that he was unaware of basic standard-of-practice techniques. The executioner admitted to using the same size syringe for all three lethal injection chemicals in contravention of TDOC's pharmacy instructions. He also admitted to cleaning syringe needles with alcohol wipes after removing them from their packages in violation of common pharmacy guidelines and aseptic techniques. Moreover, he was unaware that the lethal injection chemicals could fall out of the solution and was unconcerned about a change in the color of compounded drugs despite pharmacy guidelines requiring that a visual inspection take place.

Perhaps most concerning, however, was evidence of the executioner mixing lethal injection chemicals before executions. The executioner reconstituted vecuronium bromide by mixing the powder form with bacteriostatic water. The executioner professed that he did not remember how he learned to reconstitute vecuronium bromide and that he may have learned from written instructions or he may have figured it out through "common sense." He also stated that no pharmacist supervised him while this process was taking place, nor did he remember ever speaking with a pharmacist about how to properly reconstitute the drug.

TDOC Failed to Properly Transport and Store Lethal Injection Chemicals

Discovery also revealed that TDOC failed to adhere to the execution protocol in testing, transporting, and storing the lethal injection chemicals. Throughout discovery, TDOC produced evidence of state officials failing to employ basic safeguards to keep a stockpile of unexpired lethal injection chemicals.

Contrary to the protocol, TDOC records demonstrate that staff drove, at least once,

to a pharmacy located outside of Tennessee to personally transport commercially manufactured lethal injection chemicals back to the prison. Officials failed to record temperature data during both the transportation of the drugs and upon their delivery to the prison. Rather than confirming the drugs were frozen during transportation, an explicit requirement from the drug manufacturer, the transporting official merely assumed that the lethal injection chemicals arrived frozen because they were shipped on dry ice. Even more alarming, the official charged with receiving the drugs at the prison checked whether the chemicals were frozen by looking to see if the liquid in the vial moved around.

The protocol requires that the compounded chemicals be "placed in an unmovable heavy gauge steel container with security grade locks," but the directions from the pharmacy require that the compounded midazolam be placed into the freezer. State officials admitted to consciously deviating from the protocol in this respect and to storing the lethal injections chemicals in a freezer. But the freezer contained no mechanism for recording internal temperature fluctuations. Thus, when the vials were periodically checked, there was no way for officials to know whether the chemicals had remained at the required temperature for safe storage. Some logs showed temperature fluctuations outside of the safe temperature ranges and other entries simply did not record the temperature. Disturbingly, no one at TDOC was aware of the temperature range required by the protocol. One official recalled that someone told him to keep the freezer "a little freezing" and believed that the refrigerated temperature range for lethal injection chemicals is "forty degrees — forty-something degrees."

TDOC Records Showed Errors in Carrying Out Executions

Just as TDOC deviated from the protocol in practice sessions, court records show that TDOC botched the only two executions in which the lethal injection protocol was used. During Donnie Johnson's 2019 execution, TDOC pharmacy records show that the midazolam expired more than two weeks before TDOC used it to execute Mr. Johnson. Similarly, the vecuronium bromide and potassium chloride, both considered an "immediate-use compounded sterile product," were not administered within one hour of being drawn up as required by pharmacy regulations.[1] The effect of these errors may have resulted in Mr. Johnson experiencing excruciating pain. Media representative recounted Mr. Johnson's "mouth opened wide" and him making "a gurgling snore sound for about three minutes, ending with a sharper, high-pitched gasp."[2] Medical experts believe Mr. Johnson's reaction suggests that he was sensate and attempting to breathe while feeling the onset of paralysis, suffocation and drowning as his lungs filled with fluid.

TDOC records also show that during the 2018 execution of Bill Ray Irick, the execution team failed to timely administer vecuronium bromide and potassium chloride. Media representatives recalled that after the vecuronium bromide was administered, Mr. Irick physically "jolted and produced what sounded like a cough or choking noise. He moved his head slightly and appeared to briefly strain his forearms against the restraints."[3] Medical experts who reviewed the execution records concluded that Mr. Irick's reaction resembled someone attempting to breathe with an obstructed airway.

The Botched, Attempted Execution of Oscar Smith

Oscar Smith was convicted and sentenced to death in 1990 for the murders of his estranged wife and her two children.[4] The evidence leading to his conviction was entirely circumstantial,[5] and he has maintained his innocence since conviction. Recent scientific testing discovered unknown DNA on

the handle of the murder weapon.[6] The Tennessee Supreme Court set Mr. Smith's execution for April 21, 2022, after granting all death row inmates several reprieves due to the Covid-19 pandemic.[7] Governor Bill Lee denied Smith's clemency petition, and, on Monday, 18 April 2022, Smith was moved to "death watch," a cell next to Tennessee's execution chamber where condemned men stay three days prior to execution.[8]

As of the morning on 21 April 2022, Smith had no reason to believe that his execution by lethal injection would not proceed. His execution was set for 7:00 p.m. that evening.[9] But late that afternoon, the execution was halted and Smith was returned to his regular cell. The only official word came from Governor Lee in a tweet at 5:51 p.m. on 21 April: "Due to an oversight in preparation for lethal injection, the scheduled execution of Oscar Smith will not move forward tonight. I am granting a temporary reprieve while we address Tennessee Department of Correction protocol. Further details will be released when available."[10]

The next week, details began trickling out of Tennessee's public bureaucracy. TDOC had failed to correctly test the chemicals that it was slated to inject into Mr. Smith's arm to end his life (midazolam, vecuronium bromide and potassium chloride)[11] in accordance with the lethal injection protocol.[12] Staff had tested for potency and sterility, but not for endotoxins. Smith's attorneys noted that the presence of endotoxins could raise the risk Smith would experience pain during the execution.[13] Documents released in response to public records requests after the aborted execution confirmed that TDOC failed to perform endotoxin testing, despite the protocol requiring testing.[14] The Governor then commissioned an independent investigation into the State's lethal injection protocol practices, but declined to release documents relating to the execution.[15]

Fallout from the Attempted Execution of Oscar Smith

The Governor Orders an Independent Review of the Lethal Injection Protocol

The attempted execution of Oscar Smith confirmed what our lawsuit uncovered during discovery: Tennessee's execution protocol is not followed and is fundamentally flawed. Tennessee was aware of problems with its protocol, including its consistent failure to follow its own procedures, and yet willingly chose to move forward until Governor Bill Lee intervened at the eleventh hour. Once the governor learned that the drugs the state planned to use in Smith's execution were not tested for endotoxins, which Lee referred to as a "technical oversight," he halted the execution and directed former US Attorney Ed Stanton to conduct an independent, third-party investigation into TDOC's operations.[16] Mr. Stanton, who was appointed by President Barack Obama, formerly served as the top federal prosecutor for the Western District of Tennessee from 2010 to 2017.[17] Following his tenure as US Attorney, Mr. Stanton transitioned to private practice at Butler Snow, LLP.

Governor Lee describes Mr. Stanton's role as conducting an independent review of the following areas: (1) "circumstances that led to testing the lethal injection chemicals for only potency and sterility but not endotoxins" in preparing for Smith's execution, (2) "clarity of the lethal injection process manual that was last updated in 2018, and adherence to testing policies since the

update," and (3) "TDOC staffing considerations."[18] Governor Lee indicated that the review would lead to "corrective action to be put in place."[19] Yet, many circumstances surrounding the Smith execution have yet to be illuminated, as Governor Lee has refused to release records leading to his decision to abruptly halt Mr. Smith's execution or address questions from reporters.[20] The timeline for this review is presently unknown, although Tennessee will pay Mr. Stanton's firm, Butler Snow, a fee of up to $425 per attorney per hour for the time spent on the review.[21]

Tennessee Issues a Moratorium on Executions

The state has ceased conducting executions through at least the end of 2022.[22] How long this remains the status quo is yet to be determined as Mr. Stanton conducts his review of the lethal injection protocol. However, our understanding is that Tennessee will not conduct another execution until Mr. Stanton completes his investigation, issues his report and recommendations and the state implements changes to the protocol and TDOC staffing.

The Terry King *Case is Administratively Closed Pending the Independent Review*

Four days after Governor Lee halted Mr. Smith's execution, prosecutors for the state informed US District Court Judge William L. Campbell, Jr., who is presiding over the *Terry King* lawsuit, "that they have learned there may be factual inaccuracies or misstatements in some of [the state's] filings."[23] The prosecutors promised to "correct any inaccuracies and misstatements once the truth has been ascertained."[24] Prosecutors asked the court to stay all proceedings in the case pending the completion of the investigation, as it is "clearly contemplated that the independent investigation will result in changes to the ways in which [the state] conducts lethal injection procedures, the ways in which those procedures are staffed, and the personnel responsible for implementing those procedures."[25] The court granted the request to stay the case and administratively closed it pending the independent review. The state agreed not to set Mr. King's execution date (and the execution date for a prisoner in a related lawsuit, Donnie Middlebrooks) until the lawsuits come to a final judgment in the US Sixth Circuit Court of Appeals following the anticipated trial.

Future Considerations

It bears mentioning that the scope of Mr. Stanton's investigation does not address many of the core issues in the Terry King case, for instance, whether midazolam will prevent an inmate from experiencing excruciating pain when TDOC administers the other two drugs in the protocol and whether there are alternative methods of execution that pose a substantially lower risk of pain and suffering.[26] For now, those issues have been deferred to another day. Mr. King's anticipated trial will address whether the problems with Tennessee's lethal injection protocol pertain not only to the administration of the protocol and the staffing of the execution team, but also encompass the method of execution itself. That question remains outstanding.

Endnotes

1 *See* USP/NF 2021 Issue 2, Chapter 797, 7.

2 Adam Tamburin & Katherine Burgess, *'No More Dying There': Death Row Inmate Don Johnson Sang Hymns as Lethal Drugs Took Effect*, Commercial Appeal (17 May 2019), https://www.commercialappeal.com/story/news/2019/05/17/donnie-edward-johnson-tennessee-execution-lethal-injection/3685417002/.

3 Steven Hale, *The Execution of Billy Ray Irick*, Nashville Scene, 10 Aug 2018, https://www.nashvillescene.com/news/pithinthewind/the-execution-of-billy-

ray-irick/article_ef6c718d-bc1c-550f-926c-e68eb7fd9891.html/.

[4] *See generally* Smith v. State, No. M202200455CCAR3PD, 2022 WL 1115034, at *1 (Tenn. Crim. App. Apr. 14, 2022) (discussing case history).

[5] State v. Smith, 868 S.W.2d 561, 566 (Tenn. 1993) ("All of the evidence connecting the Defendant to the killings of his estranged wife and step children was circumstantial.").

[6] Application for Permission to Appeal, at 6, State of Tennessee v. Oscar Smith, No. M2022-00455-SC-R11-PD, https://www.tncourts.gov/sites/default/files/docs/initiating_document_-_trap_11_permission_to_appeal.pdf.

[7] Per Curiam Order, State of Tennessee v. Oscar Smith, No. M2016-01869-SC-R11-PD, https://www.tncourts.gov/sites/default/files/docs/order_setting_execution_date_for_oscar_franklin_smith.pdf.

[8] *Oscar Franklin Smith chooses last meal ahead of Thursday's execution in Tennessee*, Yahoo News (21 Apr. 2022), https://www.yahoo.com/news/oscar-franklin-smith-chooses-last-184134829.html.

[9] *Tennessee yet to release details on 'technical oversight' delaying Oscar Franklin Smith execution*, Tennessean (25 Apr. 2022), https://www.tennessean.com/story/news/crime/2022/04/26/oscar-franklin-smith-execution-tennessee-officials-release-no-details/7438692001/.

[10] *Tennessee governor Bill Lee calls off execution of Oscar Smith, state's oldest death row inmate*, CBS News (22 Apr. 2022), https://www.cbsnews.com/news/oscar-smith-tennessee-death-row-execution-halted/.

[11] *Id.*

[12] *Tennessee's governor has halted executions for an independent review into lethal injections following an inmate's last-minute reprieve*, CNN (2 May 2022), https://edition.cnn.com/2022/05/02/us/tennessee-executions-review-oscar-smith/index.html.

[13] *Id.*

[14] *New documents shed light on delayed Oscar Smith execution*, News Channel 5 Nashville (13 May 2022), https://www.newschannel5.com/news/new-documents-shed-light-on-delayed-oscar-smith-execution.

[15] *Citing 'deliberative process privilege', Tennessee governor won't release records on execution error,* Local Memphis ABC 24 (3 May 2022), https://www.localmemphis.com/article/news/state/tennessee-governor-wont-release-records-execution-error-oscar-smith/522-bd9932d9-316d-4223-9adb-d0428a044cf0.

[16] *See Tennessee yet to release details on 'technical oversight' delaying Oscar Franklin Smith execution*, Tennessean (25 Apr. 2022), https://www.tennessean.com/story/news/crime/2022/04/26/oscar-franklin-smith-execution-tennessee-officials-release-no-details/7438692001/; *Gov. Lee Calls for Independent Review Following Smith Reprieve*, TN Office of the Governor (May 2, 2022), https://www.tn.gov/governor/news/2022/5/2/gov--lee-calls-for-independent-review-following-smith-reprieve.html.

[17] *Who is Ed Stanton III, chosen by Gov. Bill Lee to review death penalty procedures?*, Commercial Appeal (3 May 2022), https://www.commercialappeal.com/story/news/2022/05/04/who-ed-stanton-tennessee-death-penalty-investigation-leader/9628193002/. Stanton now practices as a commercial litigator. Edward L. Stanton III, Butler Snow, (accessed on 30 Aug. 2022), https://www.butlersnow.com/attorney/ed-stanton/.

[18] *Gov. Lee Calls for Independent Review Following Smith Reprieve*, TN Office of the Governor 2 (2 May 2022), https://www.tn.gov/governor/news/2022/5/2/gov--lee-calls-for-independent-review-following-smith-reprieve.html.

[19] *Id.*

[20] *Tennessee Governor Won't Release Records on Execution Error*, U.S. News (3 May 2022), https://www.usnews.com/news/politics/articles/2022-05-03/

tennessee-governor-wont-release-records-on-execution-error.

[21] *Tennessee executed two inmates by lethal injection since 2018. It didn't follow its own rules in either one*, TENNESSEAN (25 May 2022), https://www.tennessean.com/story/news/investigations/2022/05/26/tennessee-death-row-lethal-injection-protocol-problems-independent-review-gov-bill-lee/9806784002/.

[22] *Tennessee Gov. Bill Lee suspends all 2022 executions for independent review of lethal injections*, USA TODAY (2 May 2022), https://www.usatoday.com/story/news/nation/2022/05/02/tennessee-governor-pauses-executions-lethal-injection/9613148002/.

[23] *Fallout From Aborted Tennessee Execution: Prosecutors Misrepresented Facts in Federal Lawsuit, 2 Members of Execution Team Knew Drugs Had Not Been Tested*, DEATH PENALTY INFORMATION CENTER (17 May 2022), https://deathpenaltyinfo.org/news/fallout-from-aborted-tennessee-execution-prosecutors-misrepresented-facts-in-federal-lawsuit-2-members-of-execution-team-knew-drugs-had-not-been-tested.

[24] *Id*.

[25] *Id.*

[26] And those considerations only scratch the surface of the problems with the death penalty considering constitutional defects such as "serious unreliability," "arbitrariness in application," and "unconscionably long delays that undermine the death penalty's penological purpose." Glossip v. Gross, 576 U.S. 863, 909 (2015) (Breyer and Ginsburg, JJ. dissenting; *see also, e.g.*, Moore v. Parker, 425 F.3d 250, 268 (6th Cir. 2005) (Martin, J., dissenting) ("After all these years, however, only one conclusion is possible: the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair... But lest there be any doubt, the idea that the death penalty is fairly and rationally imposed in this country is a farce").

"WHERE WERE YOU WHEN THE LIGHTS WENT OUT IN NEW YORK CITY?"
POLICE DISCIPLINARY HISTORIES AND WRONGFUL CONVICTIONS IN THE BIG APPLE

By Laurie Roberts*

Introduction

In the summer of 2020, as protesters around the United States demanded justice for the murder of George Floyd, the New York State Legislature repealed a section of the Labor Code known colloquially as "50-a."[1] This little-known statute had, for decades, blocked all access to disciplinary records of law enforcement without express permission of the officer whose records were requested. In practice, information about police misconduct – and how that misconduct was addressed by command staff – was for decades kept under lock and key from the public, from criminal defendants, even from prosecutors and juries.

Unchecked police misconduct negatively impacts the criminal legal system in myriad ways, from undermining community cooperation with law enforcement[2] to dramatically increasing the risk of wrongful conviction.[3] Lack of transparency perpetuates a culture of secrecy that systematically and pervasively shields police officers who abuse their authority. At the Innocence Project,[4] our casework demonstrates the clear link between police misconduct and false conviction; further, it often takes years, even after exoneration, for civil litigation to reveal that wrongdoing. Often, the only meaningful redress for victims is a monetary settlement, with little accountability for the officers at fault.

After the 50-a repeal, the New York Civil Liberties Union (NYCLU) acted swiftly to request all disciplinary files from the Civilian Complaint Review Board (CCRB), the independent agency charged with investigating NYPD misconduct.[5] NYCLU posted those records online in a searchable database.[6] The result: nearly 280,000 unique complaint records involving over 100,000 incidents and nearly 50,000 active or former NYPD officers spanning decades.

The release of this trove of data allows lawyers, researchers, and advocates to see, for the first time, whether New York City police officers with histories of undisclosed misconduct participated in the production of false convictions that relied, in part, on their credibility as law enforcement officers. To that end, we analyzed police misconduct and exoneration data to answer two novel questions: How much are undisclosed histories of officers involved in misconduct leading to wrongful convictions in New York City, and what do those records tell us about transparency and accountability measures to detect and prevent injustice?

Background and Method

The CCRB was established in 1993 to investigate complaints from the public involving excessive force, abuse of authority, discourtesy and offensive language: collectively known as "FADO". In 2020, the Board also began investigating complaints of untruthfulness. Anyone who witnesses or experiences police misconduct can file

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a complaint in one of several ways: online, by calling the CCRB's hotline, via 311[7], or in person at the CCRB office. CCRB investigators review each complaint, and, if it is "substantiated" - meaning there is sufficient evidence that an officer violated policy - the Board recommends discipline. Discipline can range from retraining of the officer to their dismissal from the Department. Each complaint is assigned its own identifying number. The CCRB tracks demographic data of the complainant and officer, including name, rank and precinct (both currently and at the time of the incident) and the ultimate disposition of the complaint.

The National Registry of Exonerations (NRE) tracks information about every known exoneration in the United States since 1989. They compile data on "cases in which a person was wrongfully convicted of a crime and later cleared of all the charges based on new evidence of innocence."[8] The NRE lists 223 exonerations across the five boroughs of New York City since 1989, 70 percent of all New York State cases. It became clear during this research that unless an officer connected to a wrongful conviction was named in civil proceedings after exoneration, accurately identifying all the individuals involved in a given case is nearly impossible. Therefore, we limited our analysis to exonerations involving official misconduct, as coded by the NRE. Official misconduct is defined as actions that produce unreliable, misleading or false evidence of guilt, or that conceals, distorts or undercuts true evidence of innocence.[9] These cases are far more likely to result in civil litigation that names relevant law enforcement actors, whose names we could check against the NYCLU database. Of the 223 New York City exonerations beginning in 1989, 156 involved official misconduct at the time this research was conducted.

Using the NRE database, PACER, LexisNexis, city payroll information and Google, we reviewed each of the 156 cases for the names of any NYPD officers involved in the initial investigation or conviction. To ensure as broad a sample as possible, we included any full or last name listed in any document related to the case, including news articles. We excluded high ranking officials sued in their supervisory capacity, such as the Police Commissioner, whenever they did not actively participate in the investigation or conviction. We also excluded any cases exclusively involving misconduct by non-NYPD actors, such as corrections officers or prosecutors. Ultimately, we found the name of at least one officer in ninety-nine cases across all five boroughs, 44 percent of all New York City exonerations. Table 1 shows the distribution of those ninety-nine cases by New York City borough (county).

Accurately matching a named officer to their misconduct history in the NYCLU database was challenging. Because the NYPD does not publicize unique identifiers for its officers[10], we often had to rely on context clues to determine whether an Officer John Doe

Table 1. NYC Wrongful Convictions involving Official Misconduct by Police officers by City Borough

	Number of Cases	% of Exonerations
All Cases	99	100%
Bronx	22	22%
Kings	35	35%
New York	21	21%
Queens	18	18%
Richmond	3	3%

a. Sample includes cases where one or more NYPD officer was identified

named in a lawsuit was the same Officer John Doe listed in the database. We considered rank, length of service and precinct location to match names to histories. Thus, there is an inherent potential for some human error and misidentification in this analysis; avenues of future work could include submitting public information requests to NYPD to confirm disciplinary histories of specific officers more accurately.

It is not uncommon for a single incident to generate multiple complaints against the same officer or against multiple officers.[11] When the CCRB reports data on "complaints," it is referring to a group of sub-complaints (what the CCRB calls "allegations") that occurred within the same incident. For clarity and accuracy's sake, "complaints" and "allegations" are counted and discussed separately, and the terms are not used interchangeably.

To be sure, this analysis has some inherent weaknesses. Most importantly, the CCRB data represents an incomplete picture of officers' disciplinary histories: Internal Affairs investigations are not available because they fall outside CCRB jurisdiction, nor is perjury or other adverse credibility findings. Further, NYPD internal procedure permits expungement of some records over time; just because an officer is not named in the NYCLU database does not mean they don't have a history of misconduct.[12] For example, infamous Brooklyn homicide detective Louis Scarcella[13] has no complaint history in the database, even though at least eighteen people have had their convictions overturned because of his wrongdoing.[14]

Accordingly, our analysis is limited to those exonerations where official misconduct is alleged, because those are often the only cases where discovering the full names of involved officers is possible (usually through post-exoneration civil rights litigation). Because of this, our sample contains selection bias; that is, our sample is not a randomized sample of all officers involved with wrongful convictions.

Findings

The simple fact that a police officer has an allegation of misconduct on their disciplinary record is not scandalous. Cops pick up civilian complaints by virtue of interacting with the public on a regular basis and false allegations do happen. According to CCRB annual reports going back to 2015, the proportion of active service members with at least one complaint is around 60 percent, while the percentage of substantiated allegations remains in the single digits.[15] Some may point to the low rate of substantiation (see Table 3 below) as proof that NYPD officials behave properly most of the time, but numerous reports have found how the Department successfully stymies investigations and prevents fair adjudications, including overruling the Board on whether and what punishment is meted out.[16] This analysis considers officers' records holistically, regardless of disposition, in order to observe patterns and consider officers whose records may be outliers.

The results were eye-popping from the be-

Table 2. Officer and Case Characteristics

Case Characteristic	N of Cases	% of Cases
Cases involving Officer w/ 6+ Complaints	**42**	**42%**
Cases involving Officer w/ 10+ Allegations	**51**	**52%**
N of Complaints per Officer		
1	149	50%
2 or more	126	42%
3 or more	102	34%
4 or more	75	25%
5 or more	52	17%
6 or more	41	14%
10 or more	15	5%
N of Allegations per Officer		
1	149	50%
2 or more	132	44%
5 or more	88	29%
10 or more	44	15%
15 or more	26	9%
20 or more	12	4%

a. 298 Officers identified in complaints

ginning. Table 2 shows officer complaints histories. Of the ninety-nine cases where we could identify an officer, *more than 40 percent* of these cases involved at least one officer with *six or more civilian complaints*. *More than half* involved at least one officer with *ten or more discrete allegations of misconduct,* despite such officers comprising around just 15 percent of our sample (and less than 3 percent of active-duty cops). In other words, officers accused of more misconduct than their peers more often worked cases later that were found to have resulted in a wrongful conviction in which official misconduct was alleged.

How does this compare to NYPD officials generally? Around 40 percent of the 298 officers we could connect with an exoneration had two or more complaints against them, but only 20 percent of officers named in the NYCLU database have more than one.[17] Three percent of all cops in the NYCLU database have fifteen or more allegations against them, but 8 percent of officers in our "wrongful conviction" sample had the same – and according to CCRB data, less than 1 percent of active NYPD have racked up fifteen or more allegations over their careers.[18]

In contrast to all officers in the NYCLU database or active-duty officers, Table 2 shows that cops involved with wrongful convictions in this sample have more allegations and more substantiated charges in their files. Officers in our sample who appear in the NYCLU database have an average of eight allegations each, but fewer than 7 percent of active-duty officers have eight or more accusations against them.[19] Twelve percent of officers in our sample (thirty-seven officers) had at least one sustained complaint with an average of eight allegations in their histories, compared to 9 percent of other active-duty officers.[20]

Both allegations and wrongful convictions were concentrated among a small subset of officers. Over 25 percent of the 1,323 allegations were filed against just seventeen officers assigned to seven command posts: the 43rd detective squad in the Bronx, the 67th and 68th detective squads in Brooklyn, South Brooklyn Patrol, the Queens robbery squad, the criminal intel section of the intelligence bureau and the FBI's joint terrorism taskforce.[21] Table 3 shows the type and disposition of the allegations in this sample.

Wrongful Convictions and Victim Burden

The twelve NYPD officers who together produced thirteen wrongful convictions had more than twenty allegations in their histories. Their victims spent a total of nearly two hundred years behind bars for crimes they didn't commit.

These data provide new context to wrongful conviction cases involving known misconduct and show how this information could have been used to prove innocence

Table 3. Allegations and Dispositions

Disposition of Complaint	N	Percent
Complainant unavailable/uncooperative/complaint withdrawn	323	24%
Officer exonerated	227	17%
Miscellaneous dispositions[a]	11	0.9%
Substantiated	108	8%
Unfounded	105	8%
Unsubstantiated	548	41%
Type of Misconduct Alleged	**N**	**%**
Force	497	38%
Abuse of Authority	528	40%
Discourtesy	248	19%
Offensive Language	50	4%

Note: Sample includes 1,323 allegations

a. Including officer resignations or retirement

– or at least question an officer's credibility at trial. For example, Charles Bunge was wrongfully convicted in 2007 of attempted robbery and sentenced to six years, largely due to the testimony of Officer Lucy Rosa[22], who first stopped Bunge in connection with the robbery.[23] After Bunge was exonerated (and the real assailant identified), the New York Court of Claims specifically noted that Rosa was "not credible," "evasive and contradictory" and that her testimony did not match up with the evidence.[24] Ultimately, the Court found that Rosa's testimony "was tailored to bolster the arrest" and awarded Bunge $1.4 million in compensation.[25] He had spent nearly three years in prison.

Before Bunge's arrest in 2006, Officer Rosa had already racked up nineteen allegations from ten different complaints. Accusations ranged from aggressive use of physical force, including allegedly threatening an eleven-year-old Black child, to the use of ethnic slurs and abuse of authority; through 2009, four more allegations were filed against Rosa. Only one was substantiated. She remained on the force until 2016.

Wayne Martin was convicted and sentenced to life in prison in 2010 for murder. The investigation was led by Detectives Kevin Gasser[26] and Michael Braithwaite[27]. Martin was exonerated in cooperation with the Kings County District Attorney's Conviction Review Unit (CRU) after eight years of incarceration. A civil suit filed later alleges egregious misconduct by police and prosecutors, including manufacturing false evidence, perjury during Grand Jury testimony and suppressing favorable exculpatory materials. By the time of Martin's trial, Det. Gasser already had collected forty-three allegations of misconduct in his disciplinary file, including four substantiated claims of abuse of authority and discourtesy; he retired in 2014. Det. Braithwaite's file lists ten allegations, of which the CCRB substantiated two. Det. Braithwaite is still on the force.

The case of Kadafi Ala is particularly interesting for illustrating a potential relationship between officers who engage in misconduct as part of a wrongful conviction and a subsequent increase in the rate of civilian complaints they receive. Ala was convicted of attempted assault for shooting at several officers shortly after midnight on New Year's Eve in 2000. Nine cops ultimately helped build the case, and seven testified about the evidence against Ala, including the locations of spent bullets, analysis of the firearm, Ala's supposedly inculpatory statements during his arrest and their own claims of seeing him with a gun at the scene. Sergeant Charles Broughton[28], one of the targeted officers, was especially crucial to the prosecution, because his testimony provided the motive for the attack: that Ala "hated the cops [and] how he wished he had killed [them]."[29] Ala spent two decades in prison before he was exonerated after a reinvestigation by the Kings County CRU, which found that all of the officers had testified falsely at trial. The CRU report called their testimony "implausible" and noted that the likelihood of events playing out as described by Broughton and others was "so remote as to be virtually impossible" and that the case should not have proceeded without the prosecution fully evaluating the evidence provided by NYPD.[30]

Eight of the nine involved officers involved in the Ala case have 188 separate accusations of misconduct across three decades in their files, with over 50 percent alleging abuse of authority. 70 percent were filed against the two highest ranking officers at the scene - Sergeants Broughton and David Cheesewright[31]. Interestingly, Broughton had only accumulated eight allegations before that New Year's Day, but, after providing false witness testimony against Ala, his misconduct record exploded. Indeed, more than 80 percent of the allegations against him were filed *after* the shooting and the rate increased as Broughton was promoted to Sergeant and then to Lieu-

tenant. Just one complaint, relating to discourtesy, was substantiated by the CCRB. Cheesewright's record lists an astonishing seventy-eight allegations – the most of any officer in our sample - all of which occurred after he participated in the faulty investigation of Ala. Sixteen allegations were substantiated by the CCRB before he retired in 2020.

It is well established in the policing literature that first-line supervisor–sergeants play a "critical role in directing and controlling the behavior of officers in police-citizen interactions."[32] Ala's case suggests an avenue for future research into whether engaging in particularly egregious malfeasance as a supervisor that brings about a wrongful conviction emboldens those officers to more regularly commit the kinds of "everyday misconduct" that is reported to the CCRB.

The value of these records in proving innocence is not just hypothetical. Since the repeal of 50-a, at least one conviction in New York City has been overturned based in part on the contents of disciplinary files that weren't turned over to the defense. Jason Serrano was exonerated in Staten Island three years after his drug possession arrest, when newly discovered body camera footage of the search appeared to show officers Kyle Erickson[33] and Elmer Pastran[34] planting marijuana in the vehicle. Serrano's lawyers discovered Erickson and Pastran's long disciplinary files, with Erickson having been penalized fifteen vacation days for an improper vehicle pursuit and cited by the Staten Island District Attorney for failing to keep records or properly invoice controlled substances and Pastran accumulating sixteen allegations of misconduct in just two years. The judge noted in her order vacating the conviction that "the body-worn camera footage, taken with the officers' disciplinary files, demonstrate that the defendant may have been searched and seized in violation of his constitutional rights."[35]

Our findings bolster NRE research that demonstrates an intimate connection between official misconduct and false conviction: 35 percent of exonerations nationwide involved some form of police misconduct.[36] Like other contributing factors to wrongful convictions, misconduct may be heightened in capital cases due to the seriousness of the crimes and the increased pressure on law enforcement to solve them. This impulse is borne out by NRE data, which found that "misconduct is generally more common the more extreme the violence, ranging from 38 percent and 39 percent for robbery and sexual assault cases, to 72 percent for exonerations from death sentences."[37] Two-thirds of the exonerees in our sample were convicted of murder or attempted murder, highlighting the connection between investigations of serious crimes and police misconduct.

None of the exonerees in our sample were sentenced to death, but the Registry lists sixty-five capital exonerations nationwide involving police officer misconduct since 1989. Law enforcement committed acts ranging from perjury (a common enough phenomenon that the term "testi-lying" was coined to describe it),[38] witness tampering or intimidation, fabricating or withholding evidence and other coercive behavior. In many of these cases, the exoneration was explicitly connected to previously unknown misconduct histories of involved officers.

For example, Debra Milke's 1990 murder conviction and death sentence in Arizona was overturned by the Ninth Circuit because the prosecution did not turn over evidence of the lead officer's "egregious misconduct."[39] His history included "a five-day suspension for taking 'liberties' with a female motorist and then lying about it to his supervisors" and judicial findings of misconduct in eight separate cases.[40] Because police disciplinary files were not public information in Arizona at the time of the original trial, the lead officer's history was only

discovered after attorneys spent almost 7,000 hours reviewing nearly a decade of criminal records on microfiche.[41]

Policy Reform Implications

The revelations hidden inside police misconduct records have enormous potential to detect and, ideally, prevent wrongful convictions – particularly in capital cases where law enforcement legitimacy is most critical. Beyond innocence issues, disciplinary files bolster other reforms by allowing oversight bodies and the public to see what's working and what isn't.[42] But while transparency is a prerequisite to true accountability, it is insufficient as a policy reform by itself. Instead, states should take a holistic reform approach that incorporates best practices known to curb abuse and increase public participation in law enforcement oversight.

First, the public must have full access to all completed police disciplinary investigation files, not just substantiated findings. Research shows that departments that reduce problematic officer behavior enjoy greater trust among citizens[43] and, conversely, that lack of legitimacy inhibits cooperation from the community, necessary to address crime.[44] Public access to records will permit the public to accurately evaluate police conduct based on fact-gathering, versus suspicion and distrust.[45] As Sunita Patel, Associate Professor at UCLA and researcher of social movement theory, police misconduct and civil rights explained, "when police processes are perceived as procedurally just, communities are more likely to cooperate with police and policing, in turn, is more effective."[46]

Differentiating access by complaint disposition creates a perverse incentive for agency investigators to substantiate even fewer complaints to avoid disclosure.[47] It's impossible for attorneys, researchers or advocates to know if an "unsubstantiated" finding is accurate if no one can review the underlying investigation.[48] We know unsubstantiated allegations can still undermine officer credibility in a courtroom: Only two of the twenty-five complaints against the officers who arrested Jason Serrano were sustained, but, taken with other evidence, the full disciplinary file persuaded that judge to vacate the conviction.

There is no uniform national standard for disclosure of police misconduct records or citizen complaints. States vary greatly on the extent of public access: In some states, the information is completely off-limits except to police internal affairs units. Others limit access to sustained complaints or complaints regarding certain types of misconduct. Some, like New York, are opening access to all information in these files. According to an Innocence Project review of national public records law, at least thirteen states provide complete public access to all completed investigation records for all complaints.[49]

Beyond removing barriers to public access, states should proactively collect and post all complaint records online in a searchable database. For example, in 2020, Oregon established a database on the Department of Public Safety Standards & Training website; it is limited to only some complaints dating back to January 2020 and does not include unsustained or unfounded charges, but the names and report details of over 600 public employees are already available.[50] In lieu of state-sponsored databases, nonprofits and newsrooms are taking up the mantle and establishing independent efforts, including the California Reporting Project and Chicago's Invisible Institute.

The value of these records depends on the efficacy of the underlying investigation, so independent oversight agencies are crucial to providing useful data for researchers and the public. Around 150 civilian review boards affiliated with large police departments exist nationwide.[51] The key to the success of these boards is unbiased re-

views of cases that can only happen independently of law enforcement. The Office of Police Complaints in Washington, DC is a strong model that has successfully enforced greater police accountability citywide.[52] But oversight bodies should also go beyond FADO and consider other forms of misconduct that cause wrongful convictions, like perjury, witness tampering or fabricating evidence.[53] The CCRB began investigating untruthful statements in 2020, but, thus far, that category makes up less than 1 percent of allegations received.[54] In contrast, one study of over 500 NYPD officers found that 77 percent of officers would lie under oath in some circumstances.[55] Clearly, current CCRB jurisdiction does not capture the more serious types of misconduct that happen during interrogations and in courtrooms.

So-called "wandering cops" are law enforcement officers who resign or leave a police agency under a cloud of misconduct or officers who are fired and who then find work at a new department.[56] It is vitally important that when an officer commits misconduct, their record follows them throughout their career, even if they move to a different agency, as research shows these officers may pose serious risks to the public.[57] Requiring licenses and certifications for law enforcement and tying each officer to a unique identifier will help identify problematic actors, assist with database accessibility and give the public a clearer picture of whether local police forces are effectively disciplining their staff. The federal government maintains a national database of decertified officers, but we have learned that many states do not decertify officers either at all or with any frequency and that those that do often fail to transmit information up the chain. Not only should states require the transmittal of this data, they should also expand the database to include serious misconduct that does not result in decertification.

California's SB2 arguably represents the strongest comprehensive reforms enacted since the murder of George Floyd. The new law requires agencies to investigate all complaints, regardless of whether the subject officer is still employed at the department; those investigation reports must be forwarded to the Commission on Peace Officer Standards & Training (POST) for tracking. SB2 expands the list of circumstances that will disqualify a person from employment in law enforcement and creates a process for POST to revoke certifications, so that bad actors can't hold a badge anywhere in the state. The Peace Officer Standards Accountability Division within POST will make final determinations on revocations and, importantly, the Board has strong community representation to ensure public participation in police oversight, which is often missing from other accountability methods.[58] These mechanisms work in concert to promote transparency, oversight and accountability. While the new law has yet to be implemented and it is too early to see if the framework translates into meaningful reform, other states should adopt the bones of the California effort and then measure its impact over time.

Finally, prosecutors play a critical role in revealing — or concealing — police misconduct. *Brady* rules require district attorneys to turn over to the defense any information that could impeach the state's witnesses, including police officers. Prosecutors often keep "*Brady* lists" of officers who they will not put on the stand due to adverse credibility or moral turpitude findings; they should proactively make these lists public, so that communities, judges and juries are aware of officers who are too untrustworthy to testify in court, following the example of offices from Manhattan[59] to Jacksonville, FL.[60] Conviction Integrity Units (CIU) within district attorneys' offices that reinvestigate past cases are also critical to uncovering police misconduct in wrongful convictions. CIUs exonerated sixty-three people in 2021

and more than 75 percent of those cases involved the kinds of official misconduct described in this article.[61]

Future Research

There are several avenues of research to explore further. CCRB data include the date of the incident, both the most recent rank and rank at the time of the incident, the number of days the officer was on the force when the incident occurred and their employment status. We intend to conduct a temporal analysis of our sample's misconduct history over their entire careers. Location data also allow for spatial and network analyses to examine hot spots across the city, compared to NYPD as a whole. We plan to add settlement data from any lawsuits in which sample officers are named; this will add to research quantifying the monetary cost of unchecked police misconduct.[62] It would also likely be edifying to cross-reference law enforcement overtime with the frequency of misconduct complaints.

There are several other robust municipal databases in cities with sufficient exonerations to ensure an acceptable sample size. The Invisible Institute's Citizens Police Data Project (CPDP) contains nearly 250,000 complaints against the Chicago Police Department between 1988 and 2018. CPDP provides the most complete picture of disciplinary files in the country because it includes Internal Affairs and self-reported use of force reports in addition to civilian complaints and calculates whether those variables are relatively high or low compared with the rest of the force. The NRE lists 370 Cook County exonerations involving official misconduct, two-thirds of which were connected to three cops: Jon Burge, Ronald Watts and Reynaldo Guevara. Future research should compare rates and types of misconduct across jurisdictions, like New York City and Chicago.

CCRB records provide a rich dataset from which to analyze not just police officers accused of misconduct by regular civilians, but those also known to have participated in the worst miscarriage of justice of the criminal legal system – a wrongful conviction. As more states expand access to police records, create public databases that include unique identifiers and establish broader oversight mechanisms, advocates and litigators should incorporate the misconduct we discover into the stories we tell the public about innocence and the death penalty. Ideally, these efforts will help build momentum to increase transparency in jurisdictions where the public is kept in the dark about the officers patrolling their communities and in turn, shine a light on those victims of police misconduct still languishing behind bars.

Endnotes

1 New York Consolidated Laws, Civil Rights Law - CVR § 50-a.

2 Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?,* 6 Ohio St. J. Crim. L. 231 (2008).

3 Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 Wash U. L. Rev. 1133 (2013).

4 The Innocence Project, available at: www.innocenceproject.org.

5 Ben Schaefer, *NYCLU Launches Statewide Police Misconduct Transparency Campaign*, New York Civil Liberties Union, (Sept. 15, 2020), available at: https://www.nyclu.org/en/press-releases/nyclu-launches-statewide-police-misconduct-transparency-campaign.

6 NYPD Misconduct Complaint Database, New York Civil Liberties Union, available at: https://www.nyclu.org/en/campaigns/nypd-misconduct-database (last visited Sep. 9, 2022).

7 Police Officer Complaint Report Portal, The Official Website of the City of New York, available at: https://

portal.311.nyc.gov/article/?kanumber=KA-02420.

[8] Glossary, National Registry of Exonerations, available at: https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited Sep. 9, 2022).

[9] Samuel R. Gross, et al., *Government Misconduct and Convicting the Innocent, The Role of Prosecutors, Police and Other Law Enforcement*, U of Michigan Public Law Research Paper 21-003 (2020).

[10] For NYPD officers, the only stable and unique identifier of police officers is "Tax ID", which is not consistently available from all sources of misconduct records. Badges/shield numbers, precincts and officer names are subject to change and cannot be considered reliable identifiers alone.

[11] For example, a complaint of excessive force could include allegations of "chokehold" and "gun pointed," each of which is assigned a unique Allegation ID by the CCRB.

[12] Section on New York City, NY, Nix the Six, available at: https://nixthe6.org/newyork/newyorkcity (last visited Sep. 9, 2022).

[13] Larry McShane, *Notorious NYPD detective no stranger to overturned convictions over the past decade*, New York Daily News, (Jun. 15, 2022), available at: https://www.nydailynews.com/new-york/nyc-crime/ny-scarcella-convictions-tossed-20220615-z45r4fgo6bfzzek24smcfr6hc4-story.html.

[14] National Registry of Exonerations, available at: https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7bfaf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7%7d&FilterField1=ST&FilterValue1=NY&SortField=Exonerated&SortDir=Desc (last visited Sep. 9, 2022).

[15] Annual & Bi-Annual Reports, New York City Civilian Complaint Review Board, available at: https://www1.nyc.gov/site/ccrb/policy/annual-bi-annual-reports.page (last visited Sep. 9, 2022).

[16] *See, e.g.,* Ethan Geringer-Sameth, *Oversight Board Stymied by NYPD Denial of Body Camera Footage Requests*, Gotham Gazette, (Nov. 17, 2019), available at: https://www.gothamgazette.com/city/8928-reasons-nypd-wont-provide-body-cam-era-video-to-oversight-board-ccrb.

[17] By definition, all of the officers included in the NYCLU database have at least one complaint on their records. Officers who have never received a complaint, or whose records were not included in the materials provided by the CCRB, are not named in the database. Officers with other misconduct or lawsuits but no complaints with the CCRB are not currently listed.

[18] Data Transparency Initiative: Current NYPD Members of Service, *How many current NYPD officers have ever received a CCRB complaint?*, New York City Civilian Complaint Review Board, available at: https://www1.nyc.gov/site/ccrb/policy/data-transparency-initiative-mos.page#complaints (last visited Sep. 9, 2022).

[19] *Id.*

[20] 2021 Annual Report, New York City Civilian Complaint Review Board, 23, available at: https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2021_Annual.pdf.

[21] For a description of the JTTF model, *see* Joint Terrorism Task Force, Wikipedia, available at: https://en.wikipedia.org/wiki/Joint_Terrorism_Task_Force.

[22] Lucy R. Rosa, 50-A, available at: https://www.50-a.org/officer/15409.

[23] People v. Bunge, 70 A.D.3d 710, 894 N.Y.S.2d 97 (2010).

[24] *Id.* Claim 120933, June 12, 2013.

[25] *Id.*

[26] Kevin M. Gasser, 50-A, available at: https://www.50-a.org/officer/14812.

[27] Michael D. Braithwaite, 50-A, available at: https://www.50-a.org/officer/14799.

[28] Charles Broughton, 50-A, available at: https://www.50-a.org/officer/39781.

[29] Kadafi Ala, National Registry of Exoneration, available at: https://www.

law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5992 (last visited Sep. 9, 2022).

[30] *Id.*

[31] David Cheesewright, 50-A, available at: https://www.50-a.org/officer/48065.

[32] Samuel Walker, *Police accountability: Current issues and research needs*, National Institute of Justice (NIJ) policing research workshop: Planning for the future, Washington, DC. 2006, 12.

[33] Kyle S. Erickson, 50-A, available at: https://www.50-a.org/officer/29863.

[34] Elmer H. Pastran, 50-A, available at: https://www.50-a.org/officer/30145.

[35] Frank Donnelly, *Judge vacates guilty plea in controversial S.I. arrest*, (Nov. 1, 2021), SI Live.com, available at: https://www.silive.com/crime-safety/2021/11/judge-vacates-guilty-plea-in-controversial-si-arrest-involving-allegations-of-police-misconduct.html (last visited Sep. 9, 2022).

[36] Samuel R. Gross, et al., *Government Misconduct and Convicting the Innocent, The Role of Prosecutors, Police and Other Law Enforcement*, U of Michigan Public Law Research Paper 21-003 (2020).

[37] *Id.*, pg 15

[38] *See generally* I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835 (2008).

[39] Debra Milke, National Registry of Exoneration, available at: https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4660 (last visited Sep. 9, 2022).

[40] *Id.*

[41] *See,* Milke v. Ryan, 711 F.3d 998, 1017 (9th Cir. 2013, Kozinski, J.) ("Milke was able to discover the court documents detailing [the detective's] misconduct only after a team of approximately ten researchers in post-conviction proceedings spent nearly 7000 hours sifting through court records. Milke's post-conviction attorney sent this team to the clerk of court's offices to search for [the detective's name in every criminal case file from 1982 to 1990. The team worked eight hours a day for three and a half months, turning up 100 cases involving [the detective]. Another researcher then spent a month reading motions and transcripts from those cases to find examples of [the detective's]" misconduct.").

[42] C. H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct information from the Public*, 22 CUNY L.Rev. 148, 3-4 (2019).

[43] D. Bayley, *Law Enforcement and the Rule of Law*, 2 Criminology and Public Policy 133-154 (2002).

[44] Michael S. Scott, *Problem-Oriented Policing: Reflections on the First Twenty Years*. Washington, D.C.: U.S. Department of Justice, Office of Community Oriented Policing Services (2000).

[45] *Id.*

[46] C. H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct information from the Public*, 22 CUNY L.Rev. 148, 3-4 (2019).

[47] J.R. Machet, *Should Police Misconduct Files by Public Record? Why internal Affairs investigations and Citizens Complaints Should be Open to Public Scrutiny*, 45 No.6 Crim. Law Bulletin Art 5, 6 (2009).

[48] *Id.*

[49] AZ (A.R.S. § 38-1109); CT (Conn. Gen Stat. § 1-200 et seq.; Conn. State Police Union v. Rovella, 494 F. Supp. 3d 210 (2020)); FL (Fla. Stat. Ann. §119 et seq; Art I, s. 24(a), Fla. Con.; Ch. 119, F.S.; ss. 112.532-534, F.S.); GA (GA Code § 50-18-72(a)(8)); IL (5 ILCS 140/1.2); KY (KRS § 61.878(1)(a)); LA (La. RS 44:1; City of Baton Rouge v. Capital City Press, 4 So.3d 807); MA (ALM GL ch. 66, § 10; G.L. c. 4, section 7, Clause Twenty-Sixth (c) as amended by St. 2020, chapter 253, section 2); MN (MN Statute § 13.43.); NY (NY Pub Off § 86); ND (ND Century Code § 44-04-18); OH (O.R.C. § 149.43); WA (RCW § 42.56; RCW § 43.101.010).

[50] Oregon DPSST Professional Stan-

dards/Economic Sanctions Database, available at: https://www.oregon.gov/dpsst/CJ/Pages/Cases.aspx (last visited Sep. 9, 2022).

[51] Olugbenga Ajilore, *How civilian review boards can further police accountability and improve community relations*, Scholars Strategy Network (retrieved Jan. 12, 2018).

[52] *Id.*

[53] Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 Wash. U. L. Rev. 1133 (2013).

[54] *Data Transparency Initiative: Allegations, What is the disposition of fully investigated allegations?*, New York City Civilian Complaint Review Board, available at: https://www1.nyc.gov/site/ccrb/policy/data-transparency-initiative-allegations.page#disposition (last visited Sep. 9, 2022).

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[56] Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 Yale Law Journal 1676-1782 (2020).

[57] *Id.*

[58] Victor E. Kappeler, Richard D. Sluder and Geoffrey P. Alpert, *Forces of deviance: Understanding the dark side of policing*, Waveland Press (1998).

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FILM REVIEW: "FREE CHOL SOO LEE"

By Julie Ha, Eugene Yi
Reviewed by Joyce Claudia Choo*

The story of Chol Soo Lee is not a new one, but it is poignant in documenting the often overlooked miscarriages of justice that the East Asian community faced in California throughout the 1960s and 1970s. Julie Ha and Eugene Yi present a powerful documentary, exposing the racial prejudice against this community and the injustice that resulted from it. Suffered at the hands of a mistrusting, predominantly White community, Chol's story exposes deeply rooted systems of oppression. More than that, however, the clear-sightedness of the film sheds a sobering light on the reality of life after incarceration and how damning the prospects of reintegrating into society are, especially for someone leaving death row.

Free Chol Soo Lee and its accompanying memoir *Freedom without Justice*[1] (a painstakingly handwritten, 600-page account written by Chol himself) is the captivating and powerful story of one man's wrongful incarceration for murder and his attempts to rebuild his life after release, following a successful retrial. Chol Soo Lee, a twenty-year-old Korean immigrant, was wrongfully convicted of the murder of a local gang leader. Chol then went to prison at a time when gang wars raged, and he received a death sentence when he killed someone in self-defense in a prison yard confrontation. His conviction united the social justice movement, and Chol, unwittingly, became the poster child for the fight against systemic racism that existed in the 1970s.

The unique impact on Chol's life of poverty and the lack of support following his migration cannot be overstated: His conviction occurred against the backdrop of great historical transition in the Asian American communities following the passage of the 1965 Immigration Act. The Act, colloquially known as the 'Hart-Celler Act' was ground-breaking in repealing national-origins quotas and admissions policies, giving rise to large-scale immigration of Asian people. Like many newcomers, Chol had an impoverished socio-economic background. Born as a likely product of rape in the South Joella Province in 1952, Chol stayed with relatives before moving to San Francisco in 1964 to live with his mother, a military bride. Without any real transitional support in place for immigrant children, Chol struggled with the English language. His inability to communicate left him isolated from the mostly mostly Chinese Asian immigrant communities in San Francisco. He slipped through the cracks, and he was housed in public mental hospitals for misdiagnosed schizophrenia and then later sent to juvenile halls on release.

Ha and Yi highlight how a backdrop of poverty and systemic failure puts Chol's crimes and life into perspective. His impoverished and isolated status led him to turn to crime to make ends meet, which ultimately put him in the wrong place at the wrong time and caused him to be implicated for the murder of a local Chinese gang leader, Yip Yee Tak. His trial was mishandled to devastating proportions due to the prosecutor and police's inability to recognize that Chol was ethnically Korean and not, in fact, Chinese, as White witnesses had indicated the perpetrator to be. The injustices Chol continued to face during his trial clearly highlight the reality of race and class discrimination in the United States which remains prevalent to this day. In that way, the film serves as a powerful reminder that minorities are still facing the same issues and finds common ground between Asian Americans and

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African Americans in the fight for equality in a skewed criminal justice system. Chol's story reminds us that this inequality is an inherent part of the American criminal justice system, one that does not care for a particular cultural, ethnic or nationalistic understanding of identity.

Throughout the film, Yi and Ha make a conscious effort to amplify Chol's voice and experience, by having Sabastian Yoon read sections of his memoir. Until now, the full story (as told from Chol's point of view) has not yet been heard on screen and Yi and Ha's decision to insert parts of his manuscript into the narration of the film allows the viewer to wholly get immersed in his life - from being a victim of the failure of the public education system and racially prejudicial systems, through his wrongful incarceration and his experiences in prison in a time when there were very few Asian American (and even fewer Korean American) inmates.[2] Hearing Chol's own words enriches our historical understanding of the experiences he has lived through and allows us to appreciate the complexities and nuances of his choices.

The film, compellingly, does not shy away from portraying Chol's story as one that does not end once he is released from prison. Instead, the filmmakers deliberately choose to highlight to the audience just how much he continued to fumble his way through society once released, after having spent years in a strikingly different environment. The film shows how morally complex and insidious the prison system can be, defined by a hypermasculine prison code that relies on the readiness of its inmates to use unrestrained violence against fellow prisoners when required in self-defense. The film portrays how dehumanizing this aspect of prison is, showing the audience how the penal system is a crucible for brutality, generating a constant production of inhumanity. Chol's case presents a realistically accurate, yet searingly disturbing picture of how the American carceral system is structured. Designed almost exclusively with punishment and retributive justice in mind, this system disallows for any practical chance at rehabilitation. Chol's manuscript complements the film this way: viewers will remember how he describes life after prison as “a razor’s edge between life and death,”[3] the post-traumatic stress disorder and trauma he went through in prison continuing to affect his life long after release. After being incarcerated for so long, for Chol, freedom meant relearning, “like a baby,”[4] how to behave in society. Unfortunately, Chol failed to resume normal societal relationships or responsibilities and soon fell back into the prison system.

In this way, the film does not allow the viewer to forget that, although there was unprecedented success in the Free Chol Soo Lee movement, his life after prison was a constant struggle, continuously marred by great adjustment. Upon his release in 1983, there were no reentry programs waiting for him. Like many before him, released after decades-long sentences, prison fundamentally traumatized Chol. He ultimately failed to fully re-adjust to society, after “living almost like a caged animal”[5] for so long. The injustices he faced went well beyond his years in prison: they were perpetuated throughout his life, carrying forward from his childhood to his adulthood.

The film builds on an interview that Chol conducted with journalist K.W. Lee,[6] in which Chol recounted many of his memories from death row. This, as well as his manuscript, attests to his incredible ability to recall minute details about places and events throughout his life. Sources indicate that Chol was incredibly intelligent and those that knew him spoke greatly about his potential. It is, in fact, this that makes this story such a moving and compelling one: Viewers wonder how Chol's life would have turned out, had he been born in a better position in life or had he not been at the wrong

place at the wrong time. Chol's story is a complicated and grippingly human one and convincingly shows how institutionalized racial violence is: It continuously manifests itself through poverty, lack of education, police brutality and discriminatory and arbitrary punishment, which are all factors appearing in nearly all death penalty cases.[7] Chol Soo Lee's life shows just how much work there is to be done to rectify these fundamental injustices and how important this work is.

Endnotes

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[2] *See* Chol Soo Lee, *Editor's Note, in* Freedom Without Justice: The Prison Memoirs of Chol Soo Lee (Richard S. Kim, Russell Leong and David K. Yoo ed., 2017).

[3] Chol Soo Lee, *Postscript, in* Freedom Without Justice: The Prison Memoirs of Chol Soo Lee 319-320 (2017).

[4] *Id.*

[5] Chol Soo Lee, *San Francisco, in* Freedom Without Justice: The Prison Memoirs of Chol Soo Lee 8-10 (2017).

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BOOK REVIEW: "BECOMING ABOLITIONISTS"

By Derecka Purnell
Reviewed by Eliza Harris*

I had never come across the idea of police abolition before. I marched on the US Embassy for George Floyd but, even then, I thought possible solutions involved more training and funding for the police, willing them to change. I didn't realise that the racism and White supremacy running so deeply through the US social, judicial and policing system had arguably become part of its subconscious. This book is a must-read for everyone, but particularly for those who have been fortunate enough to never be afraid of calling the police, like me.

Derecka Purnell, a human rights lawyer, organiser and abolitionist, takes us on a journey through Black history. From Harriet Tubman to Barack Obama, she explains the deep-rootedness of police brutality, built against the backdrop of slavery, concluding that the "terrain upon which policing exists is treacherous."[1] Perhaps most powerful is how she shows us Black history through her own journey from St. Louis, Missouri to Cambridge, Massachusetts, from calling 911 for almost everything,[2] to actively avoiding it,[3] trying to eliminate the need for the police in society.

Purnell's writing is accessible. Her voyage towards abolitionism, which has taken her from America to the Netherlands, South Africa and Puerto Rico, encourages us: At the start, she did not entirely understand it, making the reader feel like it is okay if they do not either.[4] By using her upbringing, family history and own life experiences as a lens through which to explore police brutality, as well as the countless murders of Black people by police and the troubled social landscape of the US, she welcomes the reader into this learning curve with open arms. In suggesting that we do not need to rely on these broken systems anymore, Derecka Purnell's *Becoming Abolitionists* is a breath of fresh air.

Becoming Abolitionists inevitably raises controversial ideas. A strength of the book is the fact that it embraces these ideas – as Purnell embraced those who challenged her – and answers them head on. If you are reading this wondering "What about the murderers?"[5] or "What if my house gets burgled? Surely, I need to call the police?" then read this book. To its merit, it won't tell you you're wrong. In response to your "good-faith enquiry"[6] it will simply seek to educate you. That's what makes it a must-read. Some might call it social responsibility.

The fight for justice on death row feels intrinsically linked to Purnell's discussion of police abolitionism and the quest for alternative systems of public safety. Capital cases can feel like microcosmic examples of the racism and double standards that permeate the wider justice and penal systems. It's as simple as looking at how the defendants are framed. Purnell's book encourages us to challenge why White supremacist mass shooters are labelled 'lone wolves', or have their actions attributed to mental illness,[7] whilst Black defendants often have recanted testimonies and flawed evidence used against them, even when no weapon ties them to the crime.[8] This double standard permeates our newspapers, televisions, judicial system, policing system and the beliefs of millions. In the hands of the police, it is fatal. Police abolition could provide a tangible way out.

Perhaps the most powerful analysis of the relationship between the police and Black people comes through the lens of mental

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health. Arnaldo Rios Soto was a patient resident with the mental capacity of a four-year-old. Police officer Jonathan Aledda attempted to shoot Arnaldo, who was calmly playing with his fire truck. He missed, killing Arnaldo's unarmed behavioural therapist. Following an initial hung jury, Aledda was acquitted of two charges and found guilty of negligence on another.[9] This story left me speechless. I had to read it twice. Had the police not been called to this incident, Arnaldo's therapist, Charles Kinsey, may have lived. The same can be said for innumerable victims. If that isn't an indictment for the de-funding - and, eventually, phasing out - of the police, then I don't know what is.

Although the book acknowledges that change cannot happen overnight, it can sometimes feel overly optimistic in its suggestions for police abolition. Quality drug access, decriminalising drug offences[10] and lowering penalties for handgun possession with a view to complete decriminalisation[11] are solid suggestions for ultimately reducing the need for the police. However, they come with their problems. Purnell suggests that we don't need the police to keep people safe,[12] and, whilst I agree that there are other, better, ways of preventing harm, I would like to learn more about the public systems of safeguarding in housing, health care and employment, that would replace the police system.[13]

For example, Portugal (which decriminalised cannabis in 2001) has seen a rise in the number of hospitalisations due to cannabis-induced psychotic disorders.[14] Between 2000 and 2015, there has been a thirtyfold increase in hospitalisations due to psychosis or schizophrenia associated with cannabis use.[15] Whilst I don't think the police will ever be the right body of people to protect the vulnerable in our society, there must be solid systems of safeguarding in place before we consider police abolition.

Ultimately, though, Purnell's words are indescribably powerful. This sentence sums up the book better than I ever could: "[T]he same systems responsible for our oppression cannot be the same systems responsible for our justice."[16] *Becoming Abolitionists* identifies the problem, explains its history and presence in the social psyche and offers a solution. Whether you agree with police abolition or not, it costs nothing to learn about and consider the prospect. Starting the conversation, re-directing police funding to housing, health care, employment and education, is a great place to begin.

Endnotes

1 Derecka Purnell, Becoming Abolitionists 55, 2021.

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3 *Id.* at 125.

4 *Id.* at 92.

5 *Id.* at 155.

6 *Id.* at 168.

7 *Id.* at 158.

8 *Id.* at 35.

9 *Id.* at 211.

10 *Id.* at 155.

11 *Id.* at 145.

12 *Id.* at 126.

13 *Id.*

14 Manuel Gonçalves-Pinho, Miguel Bragança & Alberto Freitas, *Psychotic disorders hospitalizations associated with cannabis abuse or dependence: A nationwide big data analysis*, 29 Int J Methods Psychiatr Res., (March 2020), available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7051837.

15 Men with a diagnosis of schizophrenia are about five times more likely to commit a violent crime and about seven times more likely to be the victim of a violent crime than the general population. *See* Wallace, C., et al., *Criminal offending in schizophrenia over a 25-year period marked by deinstitutionalization and increasing prevalence of comorbid substance use disorders*, American Journal of Psychiatry (2004).

16 Purnell, *supra* note 1 at 36.

BOOK REVIEW: "DEATH BY PRISON"

By Christopher Seeds
Reviewed by Sam Magee*

When discussing criminal justice in the United States, it is almost impossible to avoid talking about the death penalty. It is the most conspicuous characteristic of the US criminal legal system. For centuries, it has existed not only as a tool of state punishment, but as a symbol of law and order. It is an incredibly controversial topic. Cases often make national news. It is also heavily regulated. Alongside its own line of complex and evolving jurisprudence is an abolitionist movement as old as the system itself. The reason for its high-profile nature, many argue, is that it is an inhumane practice that shows little regard for human dignity. To those aligned with this way of thinking, what Christopher Seeds reveals in his book *Death by Prison* is sobering. While debate has raged around the death penalty, another punishment, similarly (if not equally) as harsh, has spread virtually unchecked throughout the US to the point where it is now routine. Perpetual confinement, or more specifically Life Without Parole (LWOP), has become embedded within the US criminal legal system and, in contrast to the death penalty, has done so with an extraordinary lack of scrutiny. The question that Seeds attempts to explore is how and why this has happened. His answers make for uncomfortable reading, especially for death penalty abolitionists.

The essential argument of *Death By Prison* is that perpetual confinement is a practice which deserves as much legal and moral attention as the death penalty. LWOP has not only increased exponentially since the 1970s; it has changed. Historically, a sentence of LWOP used to provide prisoners with a possibility of release. The "well-oiled" system of clemency was an important mechanism of prison regulation, among other things. In the twenty-first century, however, the chances of release are virtually non-existent. The sentence of LWOP itself has now become a death sentence of sorts. These developments are a result of many factors, but there are two central themes: firstly, an increasingly hardened attitude to punishment across the US and, secondly, disregard from judges, lawmakers, law enforcement and even anti-death penalty activists.

Seeds begins the book with a striking illustration of how unique the US is compared to other jurisdictions when it comes to LWOP. Citing a 2016 study, Seeds highlights how the US has over 50,000 inmates serving whole life sentences. The jurisdiction with the second highest amount, Kenya, has less than 4,000. What becomes clear to the reader very quickly is that the landscape of criminal law in the US has undergone a significant change, yet hardly anyone seems to have noticed. The rest of the book is then divided into three sections. The first looks at the historical trajectory of LWOP. It highlights how, even in the writings of eighteenth century legal philosophers, the concept of perpetual confinement was one of a fringe, last resort practice. When contrasting that with today (where LWOP is a routine part of sentencing), the reader is served with a stark reminder that societal progress is not always linear. The second part of the book analyses key changes in the US legal arena. The abolition of the death penalty, the abandonment of the rehabilitative approach to punishment and the erosion of the clemency system were all sufficiently disruptive to the status quo to provide a fertile environment for LWOP to bloom. The third part of the book offers the most insightful analysis. It looks at how the development of LWOP avoided potential obstacles from the US Supreme Court,

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legal reformists and prison overcrowding. So far, the US Supreme Court has refused to view LWOP as being of sufficient constitutional importance (unless in the context of youth offenders). Death penalty abolitionists, stretching back to the 1960s, have demonstrated such a preoccupation with the cause that any alternative punishment is considered an improvement. LWOP was initially treated with ambivalence (at least publicly), before being openly embraced by the movement in the 1990s - this is despite its arguable cruelty. Moreover, as issues regarding space and overcrowding in prisons arise, the natural reaction by many states is to simply build more prisons, which marks a radical change from the clemency system of previous eras. The theme of disregard is fully crystallised across these chapters.

One of the more remarkable aspects of the book is that it rarely gets drawn into the ethics of perpetual confinement itself. Seeds resists the temptation to make any philosophical arguments about the morality behind it. The book is a matter-of-fact, forensic analysis of how a phenomenon came to be – but this is not a flaw. As the reader progresses through the chapters, the indignity of the punishment becomes clear without the need for it to be explicitly stated. One example, found in the later chapters, is the widespread concern many had about LWOP potentially causing riots if prisoners were stripped of any hope of release. There is an inherent dehumanisation about the fact that the immediate concern was a fear of riots, as opposed to the psychological anguish imposed upon the inmates. At many points in the book such as this, the brutality of the practice speaks for itself.

The most hard-hitting aspect of *Death By Prison* will undoubtedly be felt by anti-death penalty activists and reformers. Seeds revitalises long-held doubts around the assumption that the alternative to the death penalty is a significant moral improvement. This demands serious introspection. The book includes a quote from Jacques Barzun: “[Abolitionists] speak to the sanctity of life, but have no concern with its quality.” Many oppose the death penalty on the basis of strong moral intuitions. If the alternative is abject and cruel, as the book implies, then the anti-death penalty movement may be facing an identity crisis at worst. At best, it may require a fundamental rethink of its legal and political strategy. Ultimately, Seeds argues that a fundamental systemic change may be needed; as a society, the US should look to abandon its instinct to permanently banish prisoners, whether by prison or execution. In practical terms, however, this is still disorientating. Abolitionists will have an impossible job if they are unable to utilise a viable alternative. Seeds does not address this point. He simply describes how it is a dilemma that abolitionists have long wrestled with. As it stands, the only way it appears possible to rationalise Seeds’ argument is to adopt the same view as some abolitionists in the 1990s. LWOP may be abject and cruel, but it is marginally less abject and cruel than execution. While this may preserve the moral justification of anti-death penalty efforts, it is still deeply unsettling.

Death By Prison is a powerful book which shines light on a largely unnoticed phenomenon across the US criminal legal system. Perpetual confinement, a punishment with severe moral and legal implications, has exponentially spread throughout the US. Seeds points out that it has done so with very little critical reflection. While conventional wisdom seeks to explain this by pointing to singular proximate causes such as the abolition of the death penalty in the 1970s, Seeds shows how, in reality, it evolved because of a complex array of legal, political and cultural forces. Increased punitiveness and disregard proved fertile ground for it to grow. For too long, many have ignored the cruelty of the punishment, and, now more than ever, critical scrutiny is needed. *Death By Prison* is important and illuminating. It is also an uncomfortable read – especially for death penalty abolitionists.

PODCAST REVIEW: "MURDERVILLE"

Murderville is a podcast series, created by the Intercept and hosted by Lilliana Segura and Jordan Smith. Currently, two seasons have been released: The first is set in Adel, Georgia and the second in Houston, Texas. Each season focuses on an individual case and comprehensively analyses the structural failures that lead to miscarriages of justice and wrongful convictions.[1]

Murderville, GA
By Josie Lunnon

In the first episode of *Murderville*, the hosts outline the podcast's aim and what they ask of their listeners: "The state may not care, but we hope you will". It is hard not to satisfy this imploration by the end of the season. The podcast fits its role as a true crime podcast, with narration sometimes couched in cliché, or simply stating the obvious with saccharine sentimentality in a manner only a true crime podcast can: "Murder is always shocking." But buttressing the moments of sensationalism and storytelling are some unignorable facts that unequivocally demonstrate the network of incompetence and systematic neglect in the American justice system.

The first season follows the case of Devonia Inman, who was sentenced to life for the 1998 murder of Donna Brown at a Taco Bell. It examines small town Adel, whose legacy and contemporaneous present was polluted and, perhaps, defined, by racism in the years before and after the crime (there "for a long time, cotton was king"). In 2021, Inman was finally exonerated and released after twenty-three years of incarceration - eight years after the exculpatory DNA evidence was first put before a court.

The podcast presents two stark exempla of the system's failures in Adel (which operates neatly as a foil for Georgia): the wrongful incarceration of an innocent man on the basis of what one might be generous to describe as "evidence" and the three tragic murders that the true culprit went on to commit. The podcast outlines two causes of this miscarriage of justice: failure of investigation and failure of the legal system.

Inman was failed first by the police and the Georgia Bureau of Investigation (GBI). The investigation ignored crucial information, some of which led to the real culprit, Hercules Brown. Brown had worked at the Taco Bell, and witness statements indicated that he had previously expressed his intention to rob it. Brown's alibi (provided by his mother) was left unexamined. Conversely, the evidence against Inman was scant and dubious. He had an alibi and the key witnesses against him included a woman with a deeply implausible story (which emerged a few weeks after the incident, shortly after the publication of a $5,000 reward for information, which she later received) and a jailhouse snitch hoping for a resentence. Other witnesses later recanted their stories, stating that they were coerced and fed information by the GBI. The investigators targeted Inman stubbornly, relentlessly and at the cost of justice.

The second substantial failure of Inman was by the legal system. The prosecution failed to disclose that Brown had been stopped by police during a robbery with a face mask very similar to the one found in Donna's car. As the judge markedly joked during the trial: "It seems like everyone forgot they went to law school, including me." *Murderville* discusses how difficult it is to prove one's innocence after being found guilty and exemplifies this clearly with Inman's case.

A former prosecutor, when asked (following the DNA revelation) if he was glad that Inman had not received the death penalty,

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merely said he felt "neutral." Clearly, "the state [does] not care," but, despite the podcast's stylistic flaws, the reality of Inman's situation and the horror of the miscarriage of justice will leave any listener incensed.

Murderville, TX

By Imani John-Clare

On first glance, the featured case in season two is strikingly different to the first instalment of Murderville. For a start, the setting of Houston, Texas is a far cry from the small town of Adel, Georgia. The murder of Edna Franklin was investigated by two detectives from Houston's prolific 1992 homicide department, who, early on in episode two, boast a clearance rate of over 90 percent; a concerningly high statistic that acts as a presage to the misconduct discovered later on in the season. Looking at the facts of Edna's case, it's a stark contrast to the murder-robbery of Donna Brown in the car park of Adel's Taco Bell. We learn that Edna Franklin was a somewhat isolated seventy-two-year-old woman, murdered in her own home. Moreover, the racial overtones in the conviction of Devonia Inman in *Murderville's* first season do not apply in this case. Although Charles Raby has traced his ancestry to the Choctaw Nation and identifies as a White Indian,[2] at the time of Edna's murder, he was not subject to the racial stereotypes that plagued Devonia's story.

That being said, our hosts uncover issues that are all too familiar to listeners of season one. The alleged wrongful conviction of Charles Raby was precipitated by the usual suspects of a tunnel-vision homicide investigation, bungled DNA evidence, questionable attorney work and an inhospitable justice system. As succinctly put by Charles's childhood caseworker, "everything was a foregone conclusion."

The overriding theme is a distinct lack of evidence tying Charles to the murder of Edna Franklin. The entirety of the prosecution case turns on a confession made by Charles during an unrecorded interview: a confession that's unreliable at best, coerced and drip-fed at worst. The listener can't help but be shocked by the weight that such a choregraphed and factually inconsistent statement held in the proceedings. At every peak in the defence's investigation, be it the analysis of exculpatory DNA evidence or discovery of a disingenuous pathology report, Charles's attorneys were confronted by the same rebuttal: Who confesses to a crime they didn't commit?

Subject matter aside, a major pitfall of the podcast was the manner in which certain witnesses' stories were portrayed. Intentional or not, domestic violence became one of the show's leitmotifs, both at the hands of Charles as well as other men associated with the story. Whilst recognising the importance of discussing all elements of a case and assessing the strengths of evidence, describing a complainant as "not an expert" in abuse seemed distasteful. The investigative complexion of the show felt jarring at times, brusquely overlooking issues that are incredibly sensitive and ought to have been treated with more care.

In spite of this, the podcast shone brightly in other areas, including the considerable involvement of Edna's daughter, Linda McLain. It's rare to hear so much from the victim's family in shows such as this and the discussions with Linda and her son demonstrated the agonizing human impact a murder has on those left in its wake.

Endnotes

[1] Risa Sarachan, '*Murderville' Podcast Explores What Happens When A Killer Goes Free*, Forbes, 10 January 2019, available at: shorturl.at/oxIJZ.

[2] Charles Raby, *Life on Polunsky in detail*, Save Charles D Raby, available at: shorturl.at/apRY5.

* Casework Volunteer, Amicus ALJ.

By Trevor Grant*

As the world now reflects upon the events from the 2022 World Cup in Qatar, many human rights organisations have used the opportunity to re-highlight issues relating to LGBT communities in the Middle East and the wider world. In Qatar itself, the 2004 Penal Code continues to outlaw consensual acts between same-sex partners through imprisonment[1] and retains the death penalty for homosexual acts and extramarital affairs for those practicing the Islamic faith.[2]

In Iran, Ms. Sedighi-Hamadani and Ms. Choubdar, two LGBT rights activists, currently face the death penalty for trafficking at-risk persons out of the country into Iraq. In late September 2022, United Nations Human Rights Council experts demanded the stay of their execution, an annulment of their sentences and for the death penalty to be repealed following the announcement of the judgment by the Islamic Revolution Court of Urumieh.[3]

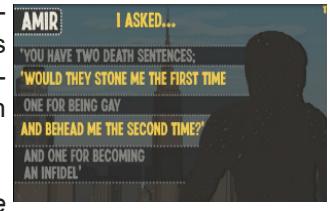
Further, in Missouri, Amber McLaughlin, who was convicted of first-degree murder, was executed on 3 January 2023, making her the first openly transgender woman to be executed in the United States.[4] Critics have expressed concern that McLaughlin's mental health evidence had been largely overlooked and that, despite a hung jury, the trial judge imposed a sentence of death.[5]

Through filmography, literature, reporting and culture, individuals from all around the world continue to reinforce their voices for the abolition of the death penalty and for the equal treatment in sentencing for those of different sexualities, gender and orientations. By sharing these stories, we can eliminate preconceived beliefs, facilitate healthy discussion and continue working towards possible solutions around this topic.

Film, TV, Documentaries

Risking death to tell the truth: Saudi Arabia's LGBT+ community (2021)[6]

In this short informational documentary provided by Tifo Football, stories of individuals fleeing persecution for their LGBT status are explored. The story of Amir tells us that he was called by "people claiming to be from the Saudi Government, saying he had two death sentences: one for being gay and one for becoming an infidel." The documentary additionally explored the relationship between the business of football and the continuing issues of the suppression of human rights.



Birds of the Borderlands (2019)[7]

In this documentary film, activist Jordan Byron records the struggles of individuals in Amman fleeing violence and criminalisation, allowing them refuge in his home. This raw, objective piece of footage was widely praised, as it allows the audience cultural insight into a world that often remains unseen.

The Execution of Wanda Jean (2002)[8]

Wanda Jean Allen was executed in 2001 by the State of Oklahoma for the murder of her long-term partner, Gloria Jean Leathers. Whilst the documentary was released in 2002, the final interview with Allen was recently uploaded to Youtube in 2022,[9] reigniting a lot of discussion relating to the use of 'queer archetypes' in order to seek the death penalty. In both the documentary and recently uploaded interview, Allen reflects on the unfair trial and representation that she received, as well as dis-

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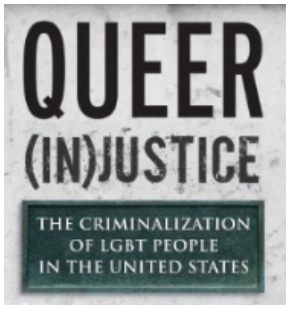
covery that was not produced at the time.

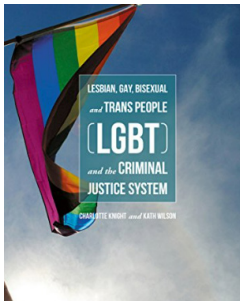
Books

Queer (In)justice: The Criminalization of LGBT People in the United States (2011)[10]
Commenting on Wanda Jean's case in 2011, among others, the writers reflected: "In capital cases, a prosecutor must complete the ethically complex task of convincing a jury… to kill another human being. [...] To succeed, the prosecution must demonize, dehumanize and 'other' the defendant.

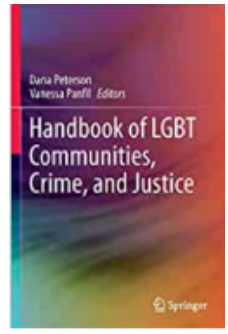


The dehumanization required to obtain a death sentence is easier when the defendant is of a different sexual orientation than the jury. Prosecutors' use of queer criminal archetypes alone or in combination with others rooted in race and class often has deadly consequences."

Lesbian, Gay, Bisexual and Trans People (LGBT) and the Criminal Justice System (2016)[11]
The writers follow LGBT offenders in Britain and their journey seeking equal treatment. When reviewing cases in the United States, there is also consideration of the presence of homophobia as having an influence on sentencing. It also explores possibile explanations as to why lesbian people are overrepresented on death row.



Handbook of LGBT Communities, Crime, and Justice (2014)[12]
This book shows critical research on LGBT communities across the US' - as well as global - criminal legal justice systems. It also analyses punitive measures in prisons, as well as potential biases and practical proposals for possible reform in this often underreported legal area.



Reports, Statements & Briefings

LGBT+ rights and issues in the Middle East (2022)[13]
The UK House of Commons library features a report published on 9 February 2022, highlighting that five of eleven UN member states that prescribe the death penalty for consenual same-sex relations are based in the Middle East. The report further examines the restrictions on humanitarian groups operating within these regions. Specifically, it reflects on the arrest of a Lebanese man for the promotion of homosexuality on social media who was facing the death penalty in 2016 in the United Arab Emirates.

State-Sponsored Homophobia (2020)[14]
The ILGA (The International Lesbian, Gay, Bisexual, Trans and Intersex Association) provides an overview of global legislation on the enforcement of illegality of same-sex relations. Their 'Special Dossier' section covers each country's use of the death penalty as a punishment in these instances. There is also exploration of the conflict between the International Covenant on Civil and Political Rights and domestic laws within different nations.

In the Killing Fields of the State: Why Abolition of The Death Penalty Is A Queer Issue[15]
The American Friends Service Committee's report analyses the use of homophobia and gender stereotypes to sway juries in a number of cases, such as Calvin Burdine and Kerry Max Cook. Their report contains

many links to other programmes and resources in the fight against state-imposed violence.

Articles

Jessica Sutton, John Mills, Jennifer Merrigan & Kristin Swain, *Death by Dehumanization: Prosecutorial Narratives of Death-Sentenced Women and LGBTQ Prisoners*, 95 St. John's L. Rev. 1053 (2022)[16]
This article explores prosecutors' and investigators' attitudes towards homosexual defendants, such as using their sexual orientation to develop the motive for their crime, as well as applying stereotypical headlines to degrade LGBT defendants. Instances of misconduct by the State are scrutinized, as well as failings of defendants' legal representatives and the courts' avoidance of finding legal errors arising from such unprofessional conduct. These case studies evidence a need to stop the use of stereotyping and propose a dignity-centered approach to prosecutorial scrutiny.

Jax Miller, *How A Gay Man's Execution Forced An Examination Of Anti-LGBTQ Bias Among Juries*, Yahoo! Finance (2022)[17]
In 2019, the US Supreme Court declined to review the case of Charles Rhines in South Dakota, despite "significant anti-gay bias presented by the jury" in sentencing. Rhines was denied psychological examinations whilst behind bars. His sentencing hearing continues to be deemed as unfair by many LGBT activist groups.

Iran: UN experts demand stay of execution for two women, including LGBT activist, United Nations (2022)[18]
The detention, prosecution and discrimination of Sedighi-Hamedani and Choubdar in Iran is currently ongoing. The situation continues to be closely monitored as the defendants have been given notice of the death penalty for the offences of 'corruption on earth' and 'trafficking.'

From marriage to death penalty: where are LGBT rights around the world, NDTV (2022)[19]
This article explored the criminalisation of homosexuality across nations and the progress that has been made over time. The main focus is on the decriminalization of same-sex relations in Singapore and the progression of equal rights from the 1990s to now.

Podcasts

Beyond the Rainbow: True Crimes of the LGBT (2022)[20]
Now on the tenth season, podcast host C.J. continues to review criminal cases involving the LGBT community, by looking at crimes both committed by and against members of it. The host has been given widespread praise for covering miscellaneous LGBT cases appropriately and with respect. The show often looks at the psychological drive of how violence tends to arise and analyses the reporting of criminal cases across the United States in consumable half-hourly segments.

World Wide Wave (2022)[21]
This podcast provides short, weekly updates on LGBT issues around the world. An associated report was also produced by Human Rights Watch Activists. which explores violence committed against LGBT individuals by militant groups.

Endnotes

[1] Article 296 Penal Code (Law 11/2004) (Qatar).

[2] Lauren Moss, *World Cup 2022: 'I*

am very afraid', says Qatari transgender woman, BBC News London, 2 Dec. 2022, https://www.bbc.co.uk/news/uk-63783327.

[3] United Nations Office of the High Commissioner, *Iran: UN experts demand stay of execution for two women, including LGBT activist*, Special Procedures Committee Press Releases, Geneva, 28 Sept. 2022, https://www.ohchr.org/en/press-releases/2022/09/iran-un-experts-demand-stay-execution-two-women-including-lgbt-activist.

[4] Doha Madani, *Amber McLaughlin, the first openly transgender person to be executed in the U.S., dies by lethal injection*, NBC News, 4 Jan. 2023, https://www.nbcnews.com/nbc-out/out-news/amber-mclaughlin-first-openly-transgender-person-executed-us-dies-leth-rcna64071.

[5] Missourians To Abolish The Death Penalty, *Missourians Ask Governor Parson to Stop the Execution of Amber McLaughlin*, MADP, Rotunda, 26 Dec. 2022, https://www.madpmo.org/post/missourians-ask-governor-parson-to-stop-the-execution-of-amber-mclaughlin.

[6] Joe Devine, *Risking death to tell the truth: Saudi Arabia's LGBT+ community*, Tifo Football, 3 Nov. 2021, https://www.youtube.com/watch?v=dQ_ZvtHoWsg.

[7] Jordan Byron, *Birds of the Borderlands*, Queerscreen, 13 Feb. 2019.

[8] Liz Garbus, *The Execution of Wanda Jean*, HBO, 2002.

[9] *Wanda Jean last interview before execution*, 4 Jun. 2022, https://www.youtube.com/watch?v=h5n7r2C2ivs.

[10] Joey L. Mogul, Andrea J. Ritchie and Kay Whitlock, Queer (In)Justice: The Criminalization of LGBT people in the United States (2011).

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[12] Dana Peterson and Vanessa R. Panfil, Handbook of LGBT Communities, Crime, and Justice (2014)

[13] John Curtis, Anna Dickinson, Philip Loft, Claire Mills & Reshma Rajendralal, *Commons Library Research Briefing: LGBT+ rights and issues in the Middle East*, House of Commons Library, 9 Feb. 2022.

[14] Lucas Ramon Mendos, Kellyn Botha, Rafael Carrano Lelis, Enrique López de la Peña, Ilia Savelev & Daron Tan, *State-Sponsored Homophobia: Global Legislation Review Update*, ILGA Geneva, Dec. 2020.

[15] The American Friends Service Committee, *In the Killing Fields of the State: Why Abolition of The Death Penalty Is A Queer Issue*, AFSC Community Relations Unit, Philadelphia, https://www.prisonpolicy.org/scans/death-penalty-brief.pdf.

[16] Jessica Sutton, John R. Mills, Jennifer Merrigan & Kristin Swain, *Death by Dehumanization: Prosecutorial Narratives of Death-Sentenced Women and LGBTQ Prisoners*, St John's Law Review, 16 Feb. 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032681.

[17] Jax Miller, *How A Gay Man's Execution Forced An Examination Of Anti-LGBTQ Bias Among Juries,* Oxygen: True Crime, 25 Jun. 2022, https://www.oxygen.com/crime-news/charles-rhines-executed-jury-alleged-anti-lgbtq-bias?amp.

[18] United Nations Office of the High Commissioner, *supra* note 3.

[19] *From Marriage To Death Penalty: LGBT Rights Across The World,* Agence France-Presse, 22 Aug. 2022, https://www.ndtv.com/world-news/from-marriage-to-death-penalty-lgbt-rights-across-the-world-3274208.

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[21] World Wide Wave (Joy Podcasts, 2022), https://podcasts.apple.com/gb/podcast/world-wide-wave/id473165502 (last visited 26 Jan. 2023).

IN MEMORIAM: PETER PRINGLE

By Margot Ravenscroft*

Peter Pringle died, aged eighty-four. He was a staunch supporter of Amicus, after meeting his wife - and fellow death row survivor - Sunny Jacobs. Pringle was one of the last people to be sentenced to death in Ireland before abolition in 1990.

His death sentence and that of two other men, Colm O'Shea and Patrick McCann, were commuted to forty years' penal servitude in 1981, weeks before their execution date.

All three had been convicted of the murder of two gardaí, John Morley and Henry Byrne, during a bank robbery in Co Roscommon, in July 1980. However, Pringle was released in May 1995, after his conviction was deemed unsafe and quashed. By then he had served fourteen years and ten months in prison and had become his own "jailhouse lawyer" to prove his innocence.

Born in Portobello, Dublin, in November 1938, Pringle was one of three children. After leaving school at fourteen, he had a variety of jobs over the years, working in a bakery, in a pub and in construction.

In 1957, when the IRA began its border campaign over British occupation of the North, Pringle was arrested while on a training exercise with thirty-seven other volunteers in Co Wicklow. It was the first of several jail terms for his activity. When the organisation split, he joined the Official IRA rather than the Provisional IRA, who he regarded as right-wing.

After his death sentence was commuted, Pringle found methods of coping: He practised yoga and meditation in prison, studied law and was taught how to paint by artist Brian Maguire. His love of art and yoga practice continued throughout his life.

He met Sunny Jacobs when she travelled to Ireland for a speaking tour hosted by Amnesty International in 1998. She was also a death row survivor: Jacobs had been sentenced in 1976 in Florida for the murder of two police officers and served seventeen years before she was exonerated.

Pringle was moved to tears on hearing Jacobs's story. He recalled being struck by the tragedy of her story and the empathy he felt, in hearing from someone who had experienced the same injustice as himself. Jacobs saw Pringle's open emotion. After they spoke, neither wanted to stop the conversation and Pringle, borrowing a car from a friend, offered to take her to her next talk in Cork. They discovered that their philosophy of forgiveness and path to healing were as one; a dip in the sea sealed their bond.

Six months later, Jacobs moved to Connemara to live with Pringle and their "two dogs, two cats, two hens, two ducks and eight goats," while also teaching yoga and growing vegetables. They officially married in 2011 in New York, surrounded by A-list actors who had participated in the play "The Exonerated", which features Jacobs's story.

While campaigning against the death penalty, they had resolved to live a life free of bitterness and they set up a centre to work with people who had been exonerated in Connemara. They also worked with arts groups and NGOs which opposed the death penalty, such as Amicus, Reprieve, the Community of Sant'Egidio in Italy and Seeds of Hope in the North.

Pringle had a long-standing relationship with Amicus; he inspired many law students and lawyers and was always open

* Director, Amicus ALJ.

to debate and discussions. He and Jacobs travelled to England to speak at the bi-annual training run by Amicus for over twenty years and made many friends along the way.

They set up the Sunny Center to support exonerated people from around the world, by hosting those in need at their own home, as well as setting up a community in the US. Having personally gone through the struggles of returning to society after a long incarceration, as well as their philosophy of kindness and support, meant that they were well placed to provide people with the help they needed.

Pringle's interest in politics was continued by his son, Thomas, who was elected as Independent representative "TD" for Donegal South West in 2011 and who returned to represent the Donegal constituency in 2016.

Pringle pursued a number of civil actions against the State. Last May, the Court of Appeal ruled that he could continue his claim for damages against the State. The action is on-going.

"We loved simply and beautifully and we never had an argument, as we resolved to allow each other to be who we were," Jacobs said of her late partner. "There were so many lives that Peter touched and changed."

Peter Pringle is survived by his wife Sunny, daughter Anna and sons Thomas and John, along with twelve grandchildren.

IN MEMORIAM: MARK GEORGE KC

By Margot Ravenscroft*

Mark George KC was an Amicus Trustee and Journal Board member, a death penalty abolition advocate and a social justice warrior with a career spanning over forty years, representing Hillsborough families and striking miners. And a life-long Chelsea football club supporter.

Mark George KC was at the heart of Amicus, the fair trials charity he supported, setting up and running training for lawyers undertaking work in capital defence offices in the USA. He lead the bi-annual death penalty training and sat on their trustee board as well as the Amicus Journal editorial board.

He was admired throughout the legal community for his many seminal cases, one of the most high-profile being the representation of families in the Hillsborough inquiry. He described this as the “longest continuous employment of my life" and remained in contact with many of his Hillsborough clients throughout his life. “This is vindication of an extraordinary struggle by some extraordinary people who simply would not give up their fight for justice,” he declared after the verdict. “The ramifications of this momentous day will take some time to resolve but let there be no doubt, this was victory at its sweetest. Pity it took twenty-seven years to be achieved”.

Born in Hammersmith, London to solicitor John George and nurse Dorothea (née McHallam), Mark McHallam George was the eldest of three and is survived by his siblings Chris, an actor, and Tina, retired. Having attended a Catholic school as a teenager, he contemplated joining the priesthood, but - as his son Tom George reflected - “became a Marxist instead.” His lifelong fascination with standing stones and ancient history started with studying Anglo-Saxon, Norse and Celtic studies at Jesus College, Cambridge. He took many “magical history tours” to view the standing stones across the country in his spare time. He enjoyed the unique interest, joking that he “doubt[ed] [...] there are any other members of the Bar who have [that degree].”

George was called to the Bar in 1976, joining (what was then) a radical set in London. He then went on to Manchester as one of the founding members at Garden Court North, of which he later became the Head of Chambers. George had started his career working on cases involving people who were arrested while protesting against the National Front in Lewisham, south London, in 1977. “Doing a series of trials for threatening behaviour, obstructing and assaulting police officers was the best advocacy training a new barrister could ask for,” he said, adding on another occasion: “It taught me that I wanted to defend, not prosecute. [...] Winning cases meant that people didn’t go to prison”.

George took silk in 2009, earning his affectionate nickname from the many young barristers he inspired and mentored: “Marky-G-QC”, a name that signified his life of delightful contradictions. George was an immensely popular figure at the Bar, well-loved by all who knew him regardless of differing opinions: Judges, opponents and colleagues all held him in the highest regard. He remained approachable and always had time to encourage the new generation of barristers and social justice warriors. He embraced social media with a large Twitter following, which he enjoyed reminding his sons outnumbered their own.

His early marriage to Anita (née Cave) was dissolved and he is survived by their two sons, Tom, a television and film director, and

* Director, Amicus ALJ.

Kieran, who works in recruitment. In 1987 he met Sue Price, who worked in his chambers. “I lived happily in sin for thirty-five years,” she said. She also survives him with their son, Joe, a theatre lighting designer.

Mark George KC significantly impacted everyone he met. He will be missed by all.

There will be a memorial in Manchester on 20 April 2023, arranged by Garden Court North Chambers and Manchester University. Amicus will be honouring Mark George KC at their annual awards in November 2023.





"In the six years I was lucky enough to know Mark George KC, he was nothing but an inspiration. Forever my number one cheerleader, guidance counsellor, pupillage application checker, respected colleague and treasured friend. I am eternally grateful for his support and all that he has taught me. I can only hope to continue his legacy with as much passion and tireless effort as he did. I, and the entire Amicus Family, will miss him greatly."

Maddie Steele
Amicus Alumni, Barrister at Unity Chambers

“The loss of Mark is so painful because we had it so good. Mark was our favourite lawyer: advocating with dignity, delivering the message with practical perfection and always with a humility that made him our favourite human also. I was lucky to have him mentor me in an official capacity as I worked to obtain my higher rights but he was really a life mentor. Everyone who met Mark knew what it was like to have someone champion them, for he was a champion of the people. Now, we will honour him by doing for others what he did for us: We rise by lifting others.”

Hannah Gorman
Amicus Trustee, US and UK qualified solicitor-advocate

“Mark introduced me to Amicus when I was an undergraduate student seven years ago. His enthusiasm and dedication for the cause was infectious - evidenced in the fact that I’m still working with Amicus today. He was exceedingly knowledgeable, selfless, courageous and funny, it was truly a privilege to know him and be able to learn from him. I will carry those lessons with me throughout my career.”

Anna Draper
Training & Casework Coordinator, Amicus ALJ

VOLUNTEER VOICES

By Tommy Seagull*

'We the jury unanimously find…'

The words that follow – rendering the verdict of the jury on two counts of first-degree murder – are etched into my memory. For nearly a month, a carefully curated (note: not randomly selected) panel of ordinary members of the public listened diligently and painstakingly to the evidence. They listened as the state and defence attorneys skilfully teased out and tested the evidence put before them. Being able to watch the attorneys do that and to assist them in their preparation in the weeks leading up to the start of the death penalty trial was an immense privilege. More than anything, the privilege was to be privy to frank conversations amongst the defence team about trial strategy and decisions.

I worked at a public defender's office in Florida for three months. The work that I was exposed to and the responsibility that I was entrusted with will stay with me forever.

The most rewarding part of my stint was the time that I spent with our client in jail. I spent as much time as I could visiting him, often spending hours at a time with him, in conversation. The sheer volume of time I spent in jail – sat directly opposite him in the tiniest of rooms – allowed me to cultivate a genuine and meaningful relationship with him. The trust and mutual respect allowed us to discuss a wide range of issues: sensitive mitigation evidence, intimate details about his life, his feeling and, of course, the incident from the day in question. Nothing was off the table. Those honest – and sometimes difficult - conversations allowed me to put together a detailed case summary for the attorneys. The case summary was intended to act as a 'one-stop shop' providing the attorneys with an overview as a starting point for trial preparation. It included a summary of all the key witnesses based on a review of material disclosed by the State Attorney's Office and from conversations with the client and his family. I continued to communicate with family members even after returning to the UK. That has been a particular privilege and a responsibility I took very seriously.

At times, I found exposure to this kind of work emotionally tough. Thoughts, images and words would linger in my head long after the working day had finished. The autopsy photographs. The bodycam footage. The graphic CCTV. It can impact you in ways that you might not initially anticipate. I found it helpful – as a general rule – to not end the working day by reviewing anything particularly traumatic (for example, visual images of any evidence). It is much better to end the day with a bit of admin (eurgh!) so that you are less likely to leave work thinking about something upsetting. That the attorneys I worked with deal intimately with such traumatic events for prolonged periods of time – often without even an acknowledgement of the personal toll such work takes on them psychologically - speaks volumes about their dedication, skill and professionalism.

It was fascinating to note the many differences in the trial process compared to England and Wales. The TV crews filming closing speeches. The defendant sat at the attorney's table alongside counsel (that is, not in a dock). The probing questions put to hundreds of potential jurors in open court on their feelings about the death penalty before empanelling a jury (a process known as 'voir dire'). During trial preparation, I acted as a prospective juror so that the team

* Pupil Barrister, Garden Court Chambers.

could practise their line of questioning. They were remarkably adept at teasing out the answers they wanted (whether that was to find grounds for striking a 'pro-death' juror or to insulate a 'lifer'). In contrast, I was remarkably inept at being an actor adopting the different personas of prospective jurors. I won't quit the day job.

The attorneys at the office supported me and guided me through my time there in the best possible way. They were compassionate, kind and fiercely brilliant lawyers. Outside of work, they were incredibly generous with their time: They took me to all the best spots (including beaches) in town. I even spent a day on a colleague's boat taking in the sights of the city from the water. Arriving at a water-front restaurant by boat was particularly cool (cars are so last year…).

I am incredibly grateful to Amicus for supporting me in the most unique experience of my life, to the Kalisher Trust for their scholarship – without which this would not have been possible – and most importantly, to the wonderful American attorneys who took me under their wing. They have made me a better lawyer. And, of course, I'll always be a Floridian at heart.

THANK YOU TO OUR GENEROUS SPONSOR

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