Approved: January 28, 2010
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Tim Owens at 9:30 a.m. on January 19, 2010, in Room 548-S of the Capitol.

All members were present except:
Senator Terry Bruce- excused

Committee staff present:
Doug Taylor, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the Committee:
Jeffrey Jackson, Kansas Judicial Council Death Penalty Advisory Committee
Jordan Steiker, Judge Parker Chair in Law & Co-director, Capital Punishment Center, University of Texas School of Law
Most Reverend Michael O. Jackels, Roman Catholic Bishop of Wichita
Michael Radelet, Professor, University of Colorado, Boulder

Others attending:
See attached list.

The Chairman opened the hearing on **SB 208 - Abolishing the death penalty and SB 375 - Abolishing the death penalty; creating the crime of aggravated murder.**

Jason Thompson, staff revisor, reviewed the technical aspects of both bills (Attachment 1).

Jeffrey Jackson provided the committee with a review of the *Report of the Judicial Council Death Penalty Advisory Committee* by the Kansas Judicial Council. The report is in response to a request by the Senate Judiciary Committee for the Council to review **SB 208** which would abolish the death penalty. (Attachment 2)

Jordan Steiker testified as a proponent providing testimony regarding the American Law Institute's (ALI) withdrawal of capital punishment provision from the Model Penal Code. The ALI is an independent organization devoted to "clarifying, modernizing, and otherwise improving" the law. The ALI adopted the Model Penal Code (MPC) in 1962 and since that time has been extraordinarily influential in states' efforts to codify and revise their criminal statutes. The MPC death penalty provision was critical to the reinstatement of the death penalty in 1976. In October 2009, the ALI withdrew the capital sentencing provisions in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment. Mr. Steiker identified several factors as the basis of this decision including:

- lack of reconciliation between equal treatment of offenders and adequate consideration of aspects of an offender's character, backgrounds, and circumstance of the offense,
- administration of the death penalty had been undermined by the intense politicization of the capital process,
- the persistence of race discrimination,
- the inadequacy of resources for capital prosecutions, and
- concerns about wrongly convicting and executing the innocent.

Withdrawal of the capital sentencing provision constitutes recognition that the provision has not and cannot satisfactorily solve the problems undermining the past and present system of capital punishment. The Institute did not endeavor to consider whether the death penalty is justified retributively or serves as a deterrent or violates basic human rights. Mr. Steiker provided the Committee with copies of the *Report of the Council to the Membership of the American law Institute on the Matter of the Death Penalty* dated April 15, 2009. (Attachment 3)

Bishop Michael Jackels spoke in support stating that in modern industrialized societies capital punishment is not necessary. "We have the technological means to ensure that those who would do us harm are

incarcerated for life." Abolishment of the death penalty in no way diminishes the condemnation of the evil deeds that brutally victimize innocent people but recourse can and should be made to bloodless means to protect public order and the safety of people. (Attachment 4)

Michael Radelet appeared as a proponent focusing his remarks on deterrence. Mr. Radelet stated the question is not whether the death penalty is a deterrent to crime but does the death penalty have a stronger deterrent effect that other available punishments. One of the important aspects of the deterrent effect of a punishment is severity, after awhile, increases in the severity of a punishment no longer add to its deterrent effect. The more important component of deterrence is the certainty of apprehension. Increased in the certainty of punishment has far more deterrent value than increasing the severity of punishment. (Attachment 5)

Written testimony is support of **SB 375** was submitted by:
Donna Schnewis, Amnesty International & Kansas Coalition Against the Death Penalty (Attachment 6)
Bill Lucero, Kansas Coordinator, Murder Victims' Families for Reconciliation (Attachment 7)
The Western District, Mennonite Church USA (Attachment 8)

The hearing on **SB 208** and **SB 375** will be continued at the next Committee meeting.

The next meeting is scheduled for January 20, 2010.

The meeting was adjourned at 10:31 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-19-2010

NAME	REPRESENTING
[signature]	MVFR KS
Carolyn Zimmerman	MVFR KS
Margaret A. Mailloux	SCLA
Larry Dixon	Southern Hills Mennonite Church, Topeka
John Daryl Currie	St. Joseph Church, Shawnee
BEATRICE SWOOPES	KS CATHOLIC CONFERENCE
Michael Schuttloffel	KS Catholic Conference
[signature]	Budget
Kevin Carr	KTEC
PATRICIA A. SCALIA	Bd of Indigent Defense Assoc, Inc
[signature]	Sisters of Charity of Leavenworth
Joanne Bodner	Sr. of Charity Associate - PVKS 66208
GENE MEYER	KANSASREPORTER.ORG
Barbara Hollingsworth	Capital-Journal
Sister M. Corita Condon	Sisters of Charity of Leavenworth
Sister Jeanne McKinney	Sisters of St Joseph - Concordia
Sister Christina Meyer	Sisters of St. Joseph - Concordia
Sister Esther Pineda	Sisters of St Joseph - Concordia

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-19-2010

NAME	REPRESENTING
Christina Cook	KCADP
Sarah Ellen Johnson	Capital Appellate Defender Office
Jordan Steiker	Univ. of Texas School of Law
Rebecca Woodman	Capital Appellate Defender Office
Michael L. Radelet	University of Colorado - Boulder
Dan Gibb	KSAG
Kris Ailslieger	KSAG
Sean Miller	Capitol Strategies
Richard Samaniego	Kenney & Assoc.
Lynn Walsh	Judicial Branch
Joseph Molina	KS Bar Assn.
Jeremy S Barclay	KS Dept Of Corr
Barbara Gibson	Episcopal Diocese of KS

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MEMORANDUM

To: Chairman Owens and Members of the Senate Judiciary Committee

From: Jason Thompson, Assistant Revisor (JT)

Date: January 19, 2010

Subject: Death Penalty Bills - SB 208 and SB 375

Below is a brief refresher on SB 208, which this committee heard in 2009, and a brief explanation of SB 375, which was drafted with the assistance of the Judicial Council Death Penalty Advisory Committee.

SB 208

- Section 1: no person shall be sentenced to death after July 1 (would need updated to 2010) and any person who has been sentenced to death before July 1 may be put to death.
- Section 5: attempts to implement life in prison without the possibility of parole for certain acts currently codified as capital murder.
- Remainder: attempts to clean up references to capital murder, but often fails to replace the reference with a reference to the new crimes.

SB 375

- Section 1: no person shall be sentenced to death for a crime committed on or after July 1 and any person who is sentenced to death for a crime committed prior to July 1 may be put to death.
- Section 2: creates the new crime of aggravated murder using the language from current K.S.A. 21-3439 (capital murder); also addresses the Kansas Supreme Court's Scott decision in subsection (c) – allows defendant to be prosecuted for crimes combined to charge aggravated murder, not just aggravated murder.

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- Section 3: creates the rules for "imprisonment for life without the possibility of parole" using the language from current K.S.A. 21-4624(g) and 21-4638.
- Section 4: amends Alexa's Law to include capital murder, prior to its repeal, and aggravated murder.
- Section 5: amends the expungement statute to maintain no expungement of convictions for capital murder, prior to its repeal, and aggravated murder.
- Section 6: amends K.S.A. 21-4622 to preserve the current law that juveniles cannot be sentenced to life without parole.
- Section 7: amends K.S.A. 21-4634 to preserve the current law that the mentally retarded cannot be sentenced to life without parole.
- Section 8: amends K.S.A. 21-4635 to cross-reference section 3, life without parole for aggravated murder.
- Section 9: technical amendment to clarify which statutes apply to the defendant's crime, depending on the date of the crime.
- Section 10: amends the special sentencing statute to clarify that aggravated murder is an off-grid crime with a mandatory sentence of imprisonment for life without the possibility of parole.
- Section 11: maintains the current policy of requiring a defendant to be present at all parts of trial for crimes punishable by death by adding life without parole.
- Section 12: addresses the governor's power to commute sentences in criminal cases, preserving current rules and adding a rule for life without parole.
- Section 13: amends the parole statute by adding a clear statement that life without the possibility of parole means no eligibility for parole.
- Section 14: amends K.S.A. 22-4210 to include a person under sentence of life without parole, continuing current policy that mentally ill and egregious offenders cannot go out of state as witnesses.
- Sections 15 through 23: technical cleanup, making references to capital murder prior to its repeal and adding references to aggravated murder.
- Repealer: the bill also repeals K.S.A. 21-3439 (capital murder) and its related sentencing statutes (K.S.A. 21-4623 through 21-4631).

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MEMORANDUM

TO: **Senate Judiciary Committee**

FROM: **Kansas Judicial Council – Professor Jeffrey Jackson**

DATE: **January 19, 2010**

RE: **Testimony on 2009 SB 208 and 2010 SB 375**

The Judicial Council's Death Penalty Advisory Committee drafted the attached report at the request of Senator Tim Owens. The Judicial Council approved the report on December 4, 2009. While the Council takes no position on whether the death penalty should be repealed, if the legislature decides that is the appropriate public policy, the Council recommends 2010 SB 375 as an effective vehicle to accomplish the repeal.

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Attachment 2

REPORT OF THE JUDICIAL COUNCIL
DEATH PENALTY ADVISORY COMMITTEE

Approved by the Judicial Council December 4, 2009

BACKGROUND

On May 4, 2009, Senator Tim Owens requested that the Kansas Judicial Council review 2009 Senate Bill 208, which would abolish the death penalty in Kansas. Senator Owens asked that the Council draft a workable bill to address the technical problems that were apparent when the bill was debated by the Senate earlier in 2009. In addition, Senator Owens asked the Council to review questions of cost, constitutionality and the effect of repeal. At its June 2009 meeting, the Judicial Council agreed to undertake the study and assigned the study to its Death Penalty Advisory Committee.

COMMITTEE MEMBERSHIP

The following persons served on the Judicial Council Death Penalty Advisory Committee during the study:

Hon. Donald R. Noland, Chair, Girard, District Court Judge in 11th Judicial District.
Ron Evans, Topeka, Chief Defender, Kansas Death Penalty Defense Unit.
Jeffrey D. Jackson, Lawrence, Professor at Washburn University School of Law and former consultant on death penalty issues to the Kansas Supreme Court.
Michael Kaye, Topeka, Professor at Washburn University School of Law.
Stephen Morris, Hugoton, State Senator from the 39th District and Senate President.
Steven Obermeier, Olathe, Assistant District Attorney in Johnson County.
Thomas (Tim) Owens, Overland Park, State Senator from the 8th District, Chair of the Senate Judiciary Committee and member of the Judicial Council.

Kim T. Parker, Wichita, Deputy District Attorney in Sedgwick County.
Patricia Scalia, Topeka, Executive Director of Kansas Board of Indigents' Defense Services.
Jason Thompson, Topeka, Assistant Revisor of Statutes.
Ron Wurtz, Topeka, Deputy Federal Public Defender and former Chief Defender, Kansas Death Penalty Defense Unit.

SUMMARY

The Death Penalty Advisory Committee's primary assignment was to review and make recommendations on 2009 SB 208. The Committee agreed that SB 208 presented a number of technical problems which could not be resolved simply by amending the bill. Instead, the Committee drafted a new bill, 2010 SB 375. A discussion of the issues identified and resolved in the redraft of the bill is contained in Section I of this report.

In addition to reviewing SB 208, Senator Owens asked the Advisory Committee to review any constitutional questions relating to those currently awaiting execution versus those convicted of the same offense after abolition of the death penalty. The Committee concluded that prospective repeal of the death penalty would not violate equal protection or the prohibition against ex post facto laws. These issues are addressed in Section II and Appendix B of this report.

Finally, Senator Owens asked the Advisory Committee to review the cost of a death sentence compared to the cost of life in prison without parole. Costs are discussed in Section III of this report.

I. Review and Redraft of SB 208

In reviewing 2009 SB 208, the Advisory Committee acknowledged that its role was not to make a policy recommendation about whether the death penalty should be repealed. Rather, the Committee's role was to draft a workable bill that would effectively repeal the death penalty if the legislature decides that is the appropriate policy.

The Committee first reviewed 2009 SB 208, its fiscal note, and written testimony from both proponents and opponents that was submitted during

legislative hearings on the bill, including testimony offered by the Attorney General. The Committee also reviewed correspondence from Senator Derek Schmidt setting out his concerns about the bill. A copy of Senator Schmidt's letter and the Committee's specific responses to questions and issues he raised are attached as Appendix A.

The Committee identified a number of technical problems with SB 208 which it attempted to address by drafting a new bill, 2010 SB 375. What follows is a discussion of how those technical problems were resolved in the new bill and a description of those issues which present a policy choice for the legislature.

Effective Date of Repeal: 2010 SB 375, New Section 1.

The Committee believes that, as originally drafted, Section 1 of 2009 SB 208 is problematic because it would make the effective date of the death penalty repeal dependent on the date of sentencing rather than the date the offense was committed. In other words, if a person has been convicted of capital murder but not yet sentenced before the bill's effective date, that person could not be sentenced to death. Under this framework, a judge would have a great deal of discretion to determine whether a case was death penalty eligible, simply by setting the date of the sentencing hearing. Also, there would inevitably be legal maneuvering by both the prosecution and defense about setting that date.

For these reasons, in 2010 SB 375, the Committee changed Section 1 to make the date of the offense the controlling date. This is consistent with the historical practice of making new sentencing laws applicable only to crimes committed on or after their effective date. Under this approach, defendants who are already under a death sentence will remain under a death sentence. In addition, any defendant who is charged with capital murder occurring before July 1, 2010, will still be eligible to receive a death sentence.

New crime of "aggravated murder": 2010 SB 375, New Section 2.

The primary concern expressed in Senator Schmidt's letter was that SB 208 repeals the capital murder statute but fails to clearly define when a defendant may be sentenced to life imprisonment without the possibility of parole. The Committee's redraft of the bill solves this problem by defining

the new crime of "aggravated murder" for which the penalty is imprisonment for life without the possibility of parole. The definition of aggravated murder in Section 2 is identical to the current definition of capital murder found in K.S.A. 21-3439. This means that any crime which was eligible for the death penalty prior to July 1, 2010, would carry a penalty of life imprisonment without the possibility of parole if committed after July 1, 2010.

Multiplicity and *State v. Scott*: 2010 SB 375, New Section 2.

In drafting Section 2, the Committee included language which is intended to directly address the Kansas Supreme Court's decision in *State v. Scott*, 286 Kan. 54, 183 P.3d 801 (2008). In that case, the court held that two convictions arising out of a double homicide, one for capital murder for the intentional and premeditated killing of more than one person, and the other for premeditated first-degree murder, were improperly multiplicitous. In other words, a defendant could not be convicted of capital murder on the basis of multiple victims and also convicted of first-degree murder for one or more of those multiple victims.

The *Scott* court based its holding on the lack of declared legislative intent to authorize cumulative punishment for multiple victim murders. *Scott*, 286 Kan. at 65-68. If the legislature does intend to authorize cumulative punishment in such a case, the Committee's recommended language will make that clear. The language is found in Section 2, subsection (c) and reads as follows, "Notwithstanding subsections (2)(a) or (b) of K.S.A. 21-3107, and amendments thereto, when the same conduct of a defendant may establish the commission of aggravated murder and the commission of another crime under the laws of this state, the defendant may be prosecuted and sentenced for each of such crimes."

This amendment makes clear that the legislature intends cumulative punishment under Section 2. For example, if a defendant commits an intentional and premeditated double homicide, the defendant may be charged with and sentenced for both aggravated murder under Section 2(a)(6) (intentional and premeditated killing of more than one person) and first degree murder. As another example, if a defendant commits an intentional and premeditated murder in the course of a kidnapping for ransom, the defendant may be charged with and sentenced for both aggravated murder under Section 2(a)(1) (intentional and premeditated

killing in commission of kidnapping for ransom) and the underlying kidnapping.

On the other hand, if the legislature agrees with the outcome of the *Scott* decision and does not wish to authorize cumulative punishment as described above, subsection (c) of Section 2 should be deleted.

Definition of Life Without Parole: 2010 SB 375, New Section 3.

As originally drafted, 2009 SB 208 would repeal the current definition of life without parole. The Committee believes that the definition of life without parole should be retained, and it appears in 2010 SB 375 at Section 3. The language is based on current K.S.A. 21-4624(g) and 21-4638.

Governor's Commutation Powers: 2010 SB 375, Section 12 amending K.S.A. 22-3705.

2010 SB 375 amends K.S.A. 22-3705 to clarify the governor's commutation powers where the original sentence is death, life without the possibility of parole, or some other term of imprisonment. The amendments do not significantly change current law, but assume that the governor's power to commute a sentence of life without the possibility of parole should be limited in the same way as the power to commute a sentence of death is limited.

Under the amendments, the governor has the power to commute a death sentence to life imprisonment without parole or any other term of imprisonment not less than 10 years. The governor may commute a sentence of life imprisonment without parole to a sentence of life or any other term of imprisonment not less than 10 years.

The Committee noted that life imprisonment means something different now than it did when K.S.A. 22-3705 was enacted in 1970. Then, life imprisonment meant parole eligibility after 15 years. K.S.A. 22-3717(b)(3). Now, life imprisonment means parole eligibility after 25 years. K.S.A. 22-3717(b)(1). In addition there is now the possibility of a Hard 40 or Hard 50 sentence. K.S.A. 21-4635.

Conforming Amendments: 2010 SB 375, Sections 4 through 11 and 13 through 23

The majority of the amendments contained in 2010 SB 375 are conforming amendments which strike references to capital murder or the death penalty, change some of those references to "capital murder before its repeal," and add new references to "aggravated murder." The effect of these changes is to ensure that the new crime of aggravated murder will be treated in the same manner as capital murder before its repeal. For example, under current law a defendant convicted of capital murder cannot have the conviction of capital murder expunged, is subject to Alexa's Law, and must register under the Offender Registration Act. Under the redraft, a defendant convicted of aggravated murder is subject to exactly the same requirements and limitations. These changes resolve issues 1 through 4 listed on pages 1-2 of Senator Schmidt's letter.

II. Constitutionality of Repeal

As part of its review of 2009 SB 208, Senator Owens asked the Advisory Committee to review any constitutional questions relating to those currently awaiting execution versus those convicted of the same offense after abolition of the death penalty. The Committee concluded there are no constitutional obstacles to a prospective repeal of the death penalty.

The Committee concluded that prospective repeal of the death penalty does not constitute an arbitrary classification or deny a criminal defendant equal protection of the law. The Committee also concluded that prospective repeal of the death penalty does not violate the prohibition against ex post facto laws, because the Ex Post Facto Clause is implicated only where a law alters the definition of criminal conduct or increases the penalty retroactively. A more detailed discussion of these issues is included in the memorandum attached as Appendix B.

III. Costs of the Death Penalty

Senator Owens asked the Advisory Committee to review the cost of a death sentence compared to the cost of life in prison without parole. First,

some background on why death penalty cases are so costly may be helpful.

General Background on Death Penalty Costs

Death penalty cases are more expensive that non-death prosecutions for many reasons, including higher trial costs, higher appeal costs, potential retrial costs, and lost opportunity costs. The capital case consumes more trial court time and attorney time than the non-capital case beginning with pre-trial preparation. A capital case often takes a full year to come to trial. Even before the prosecutor has given notice that he or she will seek the death penalty, experienced defense counsel have begun preparing the defense. Both prosecution and defense must prepare for two separate trials: a trial to determine guilt and a trial to determine the appropriate penalty.

At the earliest stages of the capital case, competent defense counsel must engage the costly services of investigators, psychological evaluators, and a mitigation specialist. The mitigation specialist is a forensic researcher who will develop an exhaustive "social history" of the defendant. This history will be useful to the defense in both the trial phase and the penalty phase. The United States Supreme Court has ruled that compiling a social history is a requirement of competent representation in death penalty mitigation proceedings, and that a capital defense lawyer who does not have such a report prepared must show that the report would not have aided in the case or the case may be reversed and a new trial on penalty ordered. *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003). Furthermore, a defendant has an absolute right to present mitigation evidence relevant to leniency in sentencing during the penalty hearing. See *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954 (1978).

The capital case requires more lawyers on both the prosecution and defense teams, more experts on both sides, more pre-trial motions, longer jury selection time, and a longer trial. Researchers at Duke University found that a capital murder case takes more than three times longer to try than a non-capital murder case. See P. Cook, "The Costs of Prosecuting Murder Cases in North Carolina," Duke University, Terry Sanford Institute of Public Policy (May 1993). Some consider the capital trial the single most costly element of the capital punishment legal process that extends from arrest through trial to sentencing and possible execution.

The post-conviction process is a long process even with changes in federal law intended to streamline it. The process after trial includes direct appeal to the state supreme court and petition for review to the U.S. Supreme Court. Following denial of Supreme Court review, the inmate may seek state habeas corpus relief. The inmate can then appeal a denial of state habeas relief to the state Supreme Court and to the U.S. Supreme Court. After state proceedings are completed, the inmate may then seek federal habeas corpus relief, and appeal the federal trial court decision to the U.S. Circuit Court of Appeals and the U.S. Supreme Court. If evidentiary hearings are required to decide the issues in the case, the case can be litigated for years.

After an inmate is denied federal habeas corpus relief in the U.S. Supreme Court, and upon issuance of a state death warrant, the inmate may again initiate state or federal court proceedings to avoid execution. The courts may delay an execution to evaluate the new claims. The inmate may also seek clemency or commutation of the death sentence from the governor.

The post-conviction process involves difficult and time-consuming legal and factual issues. There is a nationwide reversal rate of more than two out of three capital judgments due to serious error. See J. Leibman, *et al.*, "Capital Attrition: Error Rates in Capital Cases 1973-1995," 78 Texas Law Review 1839 (2000). The Leibman study also found that when the cases were retried, over 80% of the defendants received a sentence less than death.

Death penalty costs also impact the courts. State criminal justice systems are run economically. Salaries of those working in the criminal justice system are often modest. Jurors are paid a token sum for their service. Court facilities are usually not elaborate. The cost of the death penalty can weigh heavily on this system and weaken it. Courts at the trial and appellate level may become so busy with capital litigation matters that other court business suffers potential neglect due to lack of time and personnel.

The death penalty process combines high costs of trial, investigation, and appeals. Yet a death penalty proceeding may, and often does, result in a sentence of life in prison rather than the death sentence, either because the judge or jury imposes a sentence less than death or because

the death sentence is not carried out. When this happens, taxpayers pay for not only a more costly criminal trial and appeals process, they also pay for years of incarceration in maximum security.

It may take ten to twelve years from conviction for an execution. Kansas has yet to execute a capital defendant since the death penalty was reinstituted in 1994.

The more reliable the procedures are that are used by the state to seek and to impose the death penalty, the higher the costs incurred. Higher legal standards for death penalty defense at trial, on appeal, and in post-conviction proceedings, higher pay for lawyers, more time spent by prosecutors to respond to the defense case, and more thorough review by the appellate courts add to the cost. However, these higher legal standards are necessary to insure that an innocent person is not put to death. If they are ignored, the result is likely to be a reversal on appeal and a costly retrial.

The ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, revised edition (February 2003), are recommended national standards of practice developed to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence in any jurisdiction. The United States Supreme Court reaffirmed in *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003), that its standard of effective assistance of counsel under the 6th Amendment in death penalty cases is influenced by local community standards and the ABA Guidelines. State lawmakers must be aware of Supreme Court case law and the ABA standards when they enact capital legislation.

The standards contained in the ABA Guidelines apply once a person is taken into custody and extend to all stages of every case in which the state or federal government may seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings, and any connected litigation. In February 2003, these standards were revised upward. They now require membership on the defense team of "at least one mitigation specialist."

The Guidelines also require "high quality representation" in defense of death penalty cases. This is a more demanding standard than the

former Guideline standard: "effective assistance." The same standards apply whether the capital defense counsel is appointed or retained. The Guidelines seek to apply at "the moment the client is taken in to custody" in a death eligible case, and funding should begin at this time. At the outset of representation a team of two attorneys, and an investigator, and a mitigation specialist should be assembled. One member of the team should be qualified to screen for mental retardation and mental illness. If counsel is retained and lacks funds to hire such assistants, funds should be supplied by the court. All members of the team, including the non-lawyers, must receive death penalty specific training at least every other year.

So that clients get the necessary quality of representation, the Guidelines recommend that attorneys and other team members should receive "full" funding. Public defenders must receive comparable salaries to the prosecutors' salaries. For private practitioners, the hourly rate should be the market rate for retained lawyers doing similar work. The commentary to the Guidelines points out that in the criminal justice system, "you get what you pay for" and, therefore, discourages flat fees, caps, and other cost saving methods that could hinder quality representation. The commentary to the Guidelines encourages periodic payment to lawyers rather than requiring counsel to wait until the case is concluded.

Death Penalty Costs in Kansas

In considering the question of death penalty costs, the Advisory Committee reviewed its own previous January 2004 report on costs as well as Post Audit's December 2003 Performance Audit Report, "Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections." In its 2004 report, the Advisory Committee concluded that the best information relating to what the death penalty costs in Kansas could be obtained from the Post Audit Report.

The Advisory Committee did not have the time or resources to conduct a complete update of either report; however, the Committee was able to obtain some figures that are more current. The 2003 Post Audit report projected costs in three kinds of cases: seven cases where the death penalty was sought and imposed; seven cases where the death penalty was sought but not imposed; and eight first degree murder cases where the death penalty was not sought. At the time of the Post Audit report, actual cost figures did not exist. However, there are now some

estimated figures available as to defense costs that have been actually incurred so far.

Committee member Patricia Scalia, Executive Director of the Board of Indigents' Defense Services, provided information about estimated defense costs incurred in the seven cases where the death penalty was sought but not imposed and the eight cases where the death penalty was not sought. See the chart attached as Appendix C. (The cases listed on the chart are the same ones used in the 2003 Post Audit report.) The chart demonstrates that death penalty cases in Kansas have proven more expensive to defend at trial and on appeal than non-death cases.

The figures in the chart at Appendix C were based on the 2003 Post Audit estimates and then adjusted up or down to reflect defense costs incurred between 2003 and October 8, 2009. Defense costs include defense investigators' and attorney' hourly pay, based upon their estimates of the hours they worked on each death case. Defense costs do not include administrative costs. Two of the defendants in death cases, Marsh and Elms, have entered into plea agreements and received life sentences; thus, those cases are completed and no additional costs other than incarceration are likely to be incurred. The other five cases, however, are ongoing and costs will continue to accrue.

Incarceration Costs

The Committee invited Secretary of Corrections Roger Werholtz to attend a meeting to discuss the difference in cost between incarcerating an inmate for life versus putting that inmate to death. A copy of Secretary Werholtz' memorandum regarding operating cost information is attached as Appendix D.

Secretary Werholtz explained that one can calculate the cost of incarcerating an inmate either by looking at the average annual cost per inmate (which includes DOC operating costs) or the marginal cost per inmate. The average annual per capita cost to house an inmate is approximately $25,000. However, the marginal cost to house one additional inmate is $2,400 per year. He suggested the latter cost figure is the most realistic one.

Inmates who are under a sentence of death are housed in administrative segregation; there is no separate "death row." Because it is more labor intensive, housing an inmate in administrative segregation costs approximately $1,000 more per year than housing that inmate in the general population. If an inmate is sentenced to life without parole, even if that inmate was previously sentenced to death, the inmate would be housed in the general population unless the DOC determined that a security concern required the inmate to be housed in administrative segregation.

Post Audit's projected incarceration/execution costs were based in part on the DOC's average annual per capita cost to house an inmate. Secretary Werholtz stated that, while those numbers are not inaccurate, they do not represent the true difference between incarcerating an inmate for life versus putting that inmate to death.

Given the small number of Kansas inmates currently sentenced to death, housing those inmates makes little or no difference to the Department of Corrections' budget. Only if the inmate population increased by a significant amount would the DOC reach a "tipping point" where construction of new bed space would be required.

Conclusion re Costs

If the death penalty were repealed in Kansas pursuant to the bill drafted by the Advisory Committee, it is expected that the state would realize cost savings. However, the Committee recognizes that cost savings alone are not the only consideration in determining whether to repeal the death penalty, and the Committee expresses no opinion regarding whether the death penalty should be repealed.

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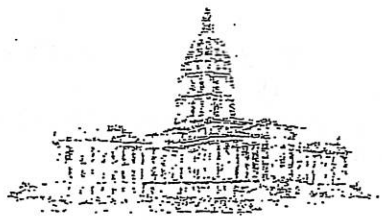

Senator Derek Schmidt
Majority Leader

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July 6, 2009

Honorable Tim Owens
Chairman, Senate Judiciary Committee
7804 W 100th Street
Overland Park, KS 66212

Re: Concerns with Senate Bill 208- repeal of the death penalty

Dear Mr. Chairman:

During the 2009 legislative session, you requested that I commit to paper concerns I expressed during floor debate regarding the drafting and content of Senate Bill 208. I regret this delay in completing that task and admit that a few detailed concerns then fresh may now be more difficult to recreate. I have, however, reviewed my notes from that debate and hope these thoughts are helpful to you and the Judicial Council in evaluating the language of the bill during this interim period.

As a general statement, I am concerned that the overall framework the bill employs in its attempt to implement a policy of repealing the death penalty in Kansas is flawed. Frankly, it appears to me that this particular bill draft may have been assembled by borrowing parts of various other bills drafted over the years to implement the policy of repealing the death penalty without properly integrating the diverse language from those bills. Senate Bill 208 repeals the capital murder statute, which encompasses both the death penalty and the life without parole law, but it is unclear to me what the bill is attempting to do in terms of re-implementing a possible penalty of life without parole for certain crimes. Whatever the intent of how to preserve a life without parole option, I do not believe it is accomplished by the bill as drafted.

This basic drafting point is important to resolving other concerns with the bill. If the intent of the bill is to rewrite the first degree murder statute to incorporate the possibility of a sentence of life without the possibility of parole, then doing that more coherently would resolve the following concerns. However, if the intent is to create some new homicide crime for which the penalty is life without the possibility of parole, then at numerous points in the bill the deletion of references to the capital murder statute and the failure to substitute a new reference to a new crime for which the penalty is life without the possibility of parole would lead to peculiar outcomes. For example:

1. Murderers in this new category of crime would be able to work at an adult care home (Section 18) or a home health agency (Section 19).
2. Murderers in this new category of crime would no longer have their murder conviction considered in custody decisions (page 30), to be declared an unfit parent (page 32), or in a CINC proceeding (page 36).

3. Murderers in this new category of crime would no longer have to register under the Offender Registration Act (Section 13).
4. Murderers in this new category of crime who kill a pregnant woman and her fetus would no longer be subject to Alexa's Law.

In addition, in no particular order, I share the following concerns and questions about the bill:

1 • New Section 1 is the heart of the bill insofar as it contains the language purported to stop the death penalty in Kansas after a date certain while grandfathering in those already under sentence of death. Among concerns about this section:

1. If a person who is under sentence of death prior to the deadline is subsequently resentenced after the deadline, does this section eliminate the possibility of that person being sentenced to death? Is that the intended policy?
2. What equal protections concerns are implicated as a result of grandfathering those already under sentence of death?
3. If this bill is enacted, does the governor retain the authority to commute the sentences of persons already under sentence of death?

2 • Insofar as the bill repeals K.S.A. 21-4627, which sets forth the process for death penalty appeals, are persons currently under sentence of death and grandfathered by the bill still entitled to an automatic appeal and the same appeals process?

3 • Insofar as Section 11 of the bill repeals authority to pay BIDS attorneys for death penalty work, what is the process by which the persons currently under sentence of death and grandfathered by the bill obtain representation for a direct appeal? Or for a habeas corpus or K.S.A. 60-1507 motion?

4 • What is the rationale for repealing the severability clause that is part of the capital murder statute in current law (K.S.A. 21-4630)? Does this mean that, to the extent the capital murder statute applies to the persons currently under sentence of death and grandfathered by the bill, the capital murder statute is now to be considered by courts as non-severable?

5 • If this bill is enacted, how will the concept of life without the possibility of parole interact with the language of Section 8 (K.S.A. 22-3705)? This problem may be remedied by tightening the definition of life without the possibility of parole.

6 • If this bill is enacted, what aggravating circumstances can result in a sentence of life without the possibility of parole? Are they the Hard 40/50 aggravators? Or the capital murder aggravators?

7 • If this bill is enacted, can a sentence of life without parole be given to a juvenile? Current law precludes that possibility in K.S.A. 21-4622, but that section of law is repealed by the bill.

8 • If this bill is enacted, what will be the definition of a sentence of life without the possibility of parole (LWOP)? Current law defines LWOP in K.S.A. 21-4624(g), but that provision of law is repealed by the bill.

9 • If this bill is enacted, is the governor granted authority to commute a sentence of life without the possibility of parole? The express prohibition against that in current law is repealed by the bill.

10 • If this bill is enacted, would it then become possible to expunge a LWOP conviction of an adult (Section 3) or a juvenile (Section 16)?

11 • If this bill is enacted, the amendments to current law included in Section 11 of the bill appear to allow persons under sentence of death but grandfathered by the bill to be sent out of state as witnesses in out-of-state trials under the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act. Is this policy change intended?

12 • What is the reason for striking lines 10 and 11 on page 11 of the bill but retaining lines 6 to 10 on that same page? It is not clear to me whether these retained words have meaning absent a connection to a death sentence.

Mr. Chairman, these are the concerns I have gleaned from the notes I assembled for Senate floor debate on this bill earlier this year. I hope reducing them to paper in this manner is helpful to you and to the Judicial Council in working through the drafting choices made in this legislation.

If I may be of further assistance, please let me know.

Sincerely,

Derek Schmidt
Kansas State Senator

cc: Randy Hearrell, Kansas Judicial Council

The Committee reviewed and responded to each of the bullet points listed in Senator Schmidt's letter as follows (bullets are numbered for ease of reference and paraphrased):

Bullet 1 – Listing several concerns about 2009 SB 208, Section 1, relating to retroactivity, equal protection, and governor's commutation powers.

Bullet 1, question 1 - If a person under sentence of death is resentenced after the effective date of 2009 SB 208, can that person be resentenced to death?

Under 2009 SB 208 as originally drafted, it appears that a defendant could not be resentenced to death after the repeal of the death penalty, even if that defendant had originally been sentenced to death while the death penalty was still in effect. As discussed in Section I of the report, the Committee recommends making the repeal of the death penalty dependent on the date of the offense rather than the date of sentencing. Under 2010 SB 375, a defendant who had been sentenced to death before the repeal could be resentenced to death after the repeal, so long as the offense was committed while the death penalty was in effect.

Bullet 1, question 2 - What equal protection concerns are implicated as a result of grandfathering in defendants already sentenced to death?

The prospective repeal of the death penalty does not constitute an arbitrary classification or deny equal protection of the law to a prisoner who has already been sentenced to death. This issue is addressed in more detail in Section II of this report.

Bullet 1, question 3 - Under 2009 SB 208, does the governor retain the authority to commute existing death sentences?

Under both 2009 SB 208 as originally drafted and 2010 SB 375, the governor retains the power to commute existing death sentences. See SB 208, Sec. 8; SB 375, Section 12. Under current law, the governor may commute a death sentence to "imprisonment for life or for any term not less than ten years." K.S.A. 22-3705(a). The redraft does not significantly change current law but clarifies that the governor may commute a death sentence to "imprisonment for life without the possibility of parole or any lesser sentence, but not to any term less than ten years."

Bullet 2 – Under 2009 SB 208, are persons currently sentenced to death still entitled to an automatic appeal and the same appeals process?

Yes. In both 2009 SB 208 and 2010 SB 375, K.S.A. 21-4627 is repealed prospectively only; therefore, the statute would still apply to defendants who committed capital crimes when the statute was in effect.

Bullet 3 – Under the bill, how will persons currently sentenced to death obtain representation for a direct appeal or habeas motion?

The Committee determined that stricken language in 2009 SB 208, Sections 11 and 12, relating to BIDS representation of capital defendants needed to be replaced, as persons already sentenced to death will continue to need those services. The Committee recommends no changes to the BIDS statutes (K.S.A. 22-4505 and 22-4506) in SB 375.

Bullet 4 – What is the effect of repealing the severability clause which is part of the capital murder statutes?

No effect. If an offense was committed while the death penalty was still in effect, one would look to the version of the statutes in effect at the time of the capital crime, including the severability clause.

Bullet 5 - How does the section on the governor's commutation powers relate to a sentence of life without parole?

The redraft contains amendments that specifically address the governor's power to commute a sentence of life without parole. See 2010 SB 375, Section 12. Under the redraft, the governor would have the same power to commute a sentence of life without parole as he currently has to commute a death sentence.

Bullet 6 - What aggravating factors must be found to impose a sentence of life without parole?

The redraft defines a new crime of "aggravated murder" for which the penalty is life without parole. 2010 SB 375, New Section 2. There are no hard 40/50 aggravating or mitigating factors to be considered.

Bullet 7 - Under the bill, can a sentence of life without parole be imposed upon a juvenile?

While 2009 SB 208 as originally drafted would repeal K.S.A. 21-4622, the Committee agreed that statute should be amended rather than repealed. Under 2010 SB 375, a

juvenile cannot be sentenced to life imprisonment without parole.

Bullet 8 – How will life without parole be defined?

2009 SB 208 as originally drafted would repeal the current definition of life without parole as contained in K.S.A. 21-4624(g). The Committee agreed that the definition of life without parole should be retained and it appears in 2010 SB 375 in Section 3. The language is based on current K.S.A. 21-4624(g) and 21-4638.

Bullet 9 - Does the governor have the authority to commute a sentence of life without parole? The express prohibition against that is repealed by 2009 SB 208.

Yes, the governor does have such authority. Section 12 of 2010 SB 375 addresses the governor's commutation powers.

The Committee was not aware of any express prohibition against the governor commuting a sentence of life without parole. The Committee reviewed K.S.A. 21-4624(g), which may have been the basis of Senator Schmidt's concern. That statute provides a defendant who is sentenced to imprisonment for life without the possibility of parole is not eligible for "suspension, modification or reduction of sentence." However, the Committee believes this language refers to suspension, modification or reduction of sentence by the court, not by the governor. K.S.A. 21-4624(g) does not reference the governor's commutation power.

Bullet 10 - Can a conviction for a crime carrying a sentence of life without parole be expunged?

No. Senate bill 375 addresses this issue by inserting a reference to aggravated murder in the expungement statute, and in any other statute which currently refers to capital murder. See 2010 SB 375, Section 5 amending K.S.A. 2009 Supp. 21-4619.

Bullet 11 - Under 2009 SB 208, persons under a sentence of death will be allowed to be sent out of state as witnesses in out-of-state trials. Is this change intended?

The Committee believes this change was not intended. Under the redraft, persons under a sentence of death or a sentence of life without parole will not be allowed to be sent out of state as witnesses in out-of-state trials. See 2010 SB 375, Section 14 amending K.S.A. 22-4210.

Bullet 12 - On page 11 of 2009 SB 208, why are lines 10-11 stricken but not the preceding lines that are part of the same sentence?

The Committee believes this was an oversight. In the redraft, the entire sentence from line 6 to line 11 is stricken. See 2010 SB 375, Section 8 amending K.S.A. 21-4635.

MEMORANDUM

TO: Kansas Judicial Council Death Penalty Advisory Committee
FROM: Michael Kaye, Jeffrey Jackson, Ronald Evans, and Jeffrey Dazey
DATE: November 18, 2009
RE: Constitutional Questions Raised by Senate Bill 208

ISSUES PRESENTED

1. Whether passage of Senate Bill 208, prospectively repealing capital punishment, violates the Equal Protection Clause of the Fourteenth Amendment and § 1 of the Kansas Constitution Bill of Rights.
2. Whether passage of Senate Bill 208, prospectively repealing capital punishment, violates the Ex Post Facto Clause of Article 1 of the United States Constitution and the Kansas Constitution.

BRIEF ANSWERS

1. *Equal Protection Challenge* - A Kansas prisoner currently under sentence of death will probably not raise a successful equal protection challenge following passage of Senate Bill 208. Although the Equal Protection Clause does protect arguably indistinguishable persons from unequal treatment by a local, state or federal governments, the courts and legal scholars who have addressed this issue agree that legislatures may chose an effective date for a statute reducing the penalty for a crime and not run afoul of the Equal Protection Clause. Courts will always begin their analysis by presuming that a statute is constitutional. Moreover, even if a court were to address the issue it is unlikely that a Kansas prisoner currently under sentence of death would prevail on a claim of unequal treatment. A court addressing the issue would be likely to apply the most deferential standard of review, because a prisoner forfeits a fundamental right to liberty following a

lawful conviction. Finally, even if a court chose to apply a less deferential standard of review, it is unlikely that any prisoner would successfully overcome the legislature's articulated interests in repealing capital punishment because these interests are legitimate.

2. *Ex Post Facto Challenge* – The Ex Post Facto Clause prohibits a legislature from passing laws that punish a person for then legal conduct committed before passage of the law, or from increasing the punishment for a crime committed before passage of the increased punishment. Senate Bill 208 proposes to eliminate the death penalty for all capital murders committed on or after the bill's July 1, 2010, effective date. Because Senate Bill 208 both reduces a criminal sanction and operates only against future crimes, the Ex Post Facto Clause would not be offended by passage of Senate Bill 208.

BACKGROUND

The Kansas Judicial Council has been convened to review and make recommendations on Senate Bill 208 (SB 208), an act concerning abolition of the death penalty. As drafted, with September 11, 2009, revisions in italics, SB 208 § 1(a) provides that "[n]o person shall be sentenced to death *for any crime committed* on or after July 1, 2010." § 1(b) addresses the issue of retroactivity: "[a]ny person who has been sentenced to death before July 1, 2009, may be put to death pursuant to the provisions of article 4 of chapter 22 of the Kansas Statutes Annotated, and amendments thereto." Together, these initial provisions express a clear legislative intention that SB 208 abolishes the death penalty prospectively and that SB 208 should not be given retroactive effect for the inmates presently on Kansas' death row.

Kansas is not alone in considering bills to prospectively abolish the death penalty. As recently as March 18, 2009, Gov. Bill Richardson of New Mexico signed legislation prospectively repealing New Mexico's death penalty. *See* Shari Allison, Cathy Ansheles, and

Angelyn Frazer, *Taking Death of the Table in the Land of Enchantment*, 33 Jun Champ. 42 (2009). Two men, Robert Fry and Timothy Allen, remain on New Mexico's death row. *Id.* Victoria Wilson, the New Mexico Assistant Attorney General tasked with defending Fry and Allen's convictions and sentences, confirmed that neither defendant has raised a constitutional challenge to the prospective repeal of Capital Punishment by the New Mexico legislature. Both defendants are procedurally at the State post-conviction review stage of their appellate proceedings.

Constitutional concerns over a prospective repeal of capital punishment have been brought to the attention of the Senate Judiciary Committee. In a letter dated July 6, 2009, from Senator Derek Schmidt to Senator Tim Owens, Senator Schmidt shared several concerns with SB208. Ltr. from Sen. Derek Schmidt, Majority Leader of the Kansas Senate, to Sen. Tim Owens, Chairman, Senate Judiciary Committee, *Re: Concerns with Senate Bill 208 – repeal of the death penalty* 2 (July 6, 2009) (copy provided to Kansas Judicial Council Death Penalty Advisory Committee). Among Senator Schmidt's written concerns, was the issue of "[w]hat equal protections (sic) concerns are implicated as a result of grandfathering those already under sentence of death?" *Id.* These concerns, in part, prompted the Kansas Judicial Council Death Penalty Advisory Committee to request a review of SB 208 focusing on three issues:

- (1) The cost of a death sentence versus the cost of life in prison without parole;
- (2) The sentencing aspect for a person convicted of a crime when the offense occurred while the death penalty was still in effect; and
- (3) Any constitutional questions relating to those currently awaiting execution versus those convicted of the same offense after abolition of the death penalty.

Ltr. from Christy R. Molzen, Staff Attorney, Kansas Judicial Council, to the Members of the Kansas Judicial Council Death Penalty Advisory Committee, 2 (Aug. 7, 2009) (copy provided to Kansas Judicial Council Death Penalty Advisory Committee). The following memorandum has

been drafted to address Senator Schmidt's Equal Protection concern and issue number (3) set forth above.

During the initial meeting of the Kansas Judicial Council Death Penalty Advisory Committee, held on Wednesday, August 19, 2009, the Committee established a subcommittee consisting of Profs. Michael Kaye and Jeffrey Jackson, both of Washburn University School of Law, and Ronald Evans, of the Kansas Death Penalty Defender's Unit. From these conversations, the Committee agreed that the "Constitutional Issues" subcommittee would review two particular constitutional concerns:

- (1) Whether passage of Senate Bill 208, prospectively repealing capital punishment, violates the Equal Protection Clause of the Fourteenth Amendment.
- (2) Whether passage of Senate Bill 208, prospectively repealing capital punishment, violates the Ex Post Facto Clause of Article 1.

The legal memorandum below represents the Advisory Committee's legal conclusions following a review by the "Constitutional Issues" subcommittee.

DISCUSSION

(I) EQUAL PROTECTION CHALLENGE: The prospective repeal of capital punishment by passage of SB 208 does not constitute an arbitrary classification or deny those currently under sentence of death equal protection of the law

This section will address whether prospective repeal of capital punishment raises equal protection concerns by distinguishing between persons sentenced to death for murders committed before July 1, 2010, and those sentenced to life without parole for murders committed on or after July 1, 2010. First, this portion of the memo will discuss Kansas equal protection jurisprudence, focusing on the analysis used by Kansas courts, the presumption that legislation is constitutionally valid and the situations implicating equal protection concerns. Next, this memo will discuss the prevailing view among courts and legal commentators that prospectively

reducing a criminal punishment by legislative action does not constitute an arbitrary classification or deny the prisoner equal protection of the law. Last, this portion of the memo will discuss why a prospective repeal of capital punishment would survive an equal protection analysis, if the Kansas court rejected the prevailing viewpoint set forth above.

a. KANSAS EQUAL PROTECTION JURISPRUDENCE: Analysis, Presumption of Validity and Circumstances Implicating Equal Protection Challenges

In Kansas, Equal Protection challenges derive from the Fourteenth Amendment to the United States Constitution and § 1 of the Kansas Constitution's Bill of Rights. An Equal Protection challenge "emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Chiles v. State*, 254 Kan. 888, 891, 869 P.2d 707, 711 (1994) (citing *Ross v. Moffitt*, 417 U.S. 600, 609 (1974)). Resolving the constitutionality of a particular statutory classification depends on the relationship between the challenged classification and the "objective sought by its creation." *Id.*

Recently, the Kansas Supreme Court described the steps of analysis used to assess the constitutionality of a statute challenged on the basis of the equal protection clause. *See State v. Salas*, 289 Kan. 245, 210 P.3d 635, 638-39 (2009). The first step is to determine the nature of the legislative classification, and whether it results in arguably indistinguishable classes of individuals being treated differently. *Id.* at 638. "*Only if there is differing treatment of similarly situated individuals is the Equal Protection Clause implicated.*" *Id.* (emphasis added.)

If the Equal Protection Clause is implicated, the Kansas Supreme Court will examine which rights are affected by the classification, and using this examination as a guide, select the level of scrutiny applied to the legislative classification. *See id.* The final step of this

constitutional analysis requires the court to determine whether the relationship between the classifications and the legislative goal withstands the applicable level of scrutiny. *See id.* These steps will be addressed below using the order supplied by the Kansas Supreme Court.

i. Presumption of Validity

Before conducting an Equal Protection analysis, Kansas courts emphasize the presumption of constitutionality favoring the legislature's enactments. *See State v. Denney*, 278 Kan. 643, 651-52, 101 P.3d 1257, 1264 (2004). The Kansas Supreme Court has "often" held that "[a] statute is presumed constitutional, and all doubts must be resolved in favor of validity." *See id.* 278 Kan. at 651, 101 P.3d at 1263 (citing *Mudd v. Neosho Memorial Regional Med. Center*, 275 Kan. 187, 197, 62 P.3d 236, 244 (2003)). Moreover, the Kansas Supreme Court has observed that, under an equal protection analysis, the courts have a "duty" to "construe a statute in such a manner that it is constitutional if this can be done within the apparent intent of the legislature in passing the statute." *Salas*, 210 P.3d at 638.

Where the intent of the legislature can be ascertained, and the statute is plain and unambiguous, Kansas courts apply the "fundamental rule," and hold all other rules subordinate, that the legislature's intent governs. *See Denney*, 278 Kan. at 650, 101 P.3d at 1263. Here, the legislature's intent to prospectively repeal capital punishment is clearly expressed by the language of SB 208 §1(b), reading, "[a]ny person who has been sentenced to death before July 1, 2010, may be put to death."

ii. Circumstances Implicating Equal Protection Challenges

After setting forth the "fundamental rule," and presumption of constitutionality, a Kansas court will determine whether the legislative enactment implicates the equal protection clause by creating two arguably indistinguishable classes. *See Denney*, 278 Kan. 651-52, 101 P.3d at

1263-64. During this step of an equal protection analysis, a Kansas court will examine "the nature of the legislative classification and whether the classifications result in arguably indistinguishable classes of individuals being treated differently." *Salas*, 210 P.3d at 638. Here, the Equal Protection Clause is only invoked if there is differing treatment of similarly situated individuals. *See id.* (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)). The question is whether the distinction between the penalty for the same crime based on the date of offense implicates the Equal Protection Clause. Every jurisdiction to examine this question has held that it does not.

b. Prospectively Reducing a Criminal Punishment by Legislative Action does not Constitute an Arbitrary Classification or Deny the Prisoner Equal Protection of the Law

Courts and commentators reaching this issue unanimously conclude that there is no merit to a claim that the denial of a retroactive application to a newly created statutory right is a denial of equal protection of the laws. *See e.g. Bowen v. Recorder's Court Judge*, 179 N.W.2d 377, 378 (Mich. 1970), *Carter v. State*, 512 N.E.2d 158, 170 (Ind. 1987), Arthur W. Campbell, *Law of Sentencing* § 8:6 (3d ed., West 2004). In a recent, representative example, the Alabama Court of Criminal Appeals affirmed the sentence of defendant Zimmerman against an equal protection challenge. *Zimmerman v. State*, 838 So.2d 404 (Ala. Crim. App. 2001), *aff'd*, *Zimmerman v. State*, 838 So.2d 408 (Ala. 2002). Zimmerman argued that his 1991 sentence, as a habitual felony offender, of life without parole, violated his right to equal protection because the Alabama legislature amended the statute under which he was sentenced to give trial courts discretion to chose between imprisonment for life or imprisonment for life without parole. 838 So.2d at 805. Under the equal protection clause, Zimmerman asserted that:

> the amendatory act results in a date-based classification, conferring the possibility of a more lenient sentencing on the class of persons whose sentences were not final . . . as of the effective date of the Act, while excluding from that leniency those whose sentences, although imposed on convictions for offenses of the same nature or seriousness, were final before the effective date of the act.

Id. at 806. The Alabama Court of Criminal Appeals rejected Zimmerman's constitutional claim under the "well recognized rule" that "[a] reduction of sentences only prospectively from the date of a new sentencing statute takes effect is not a denial of equal protection." *Id.* (citing 16B C.J.S. *Constitutional Law* § 777 (1985)).

The *Zimmerman* court also cited to the "general law," found in 24 C.J.S. *Criminal Law* § 1462 (1989), that

> a criminal offender must be sentenced pursuant to the statute in effect at the time of the commission of the offense, at least in the absence of an expression of intent by the legislature to make the new statute applicable to previously committed crimes. An increase in the penalty for previously committed crimes violates the prohibition against ex post facto legislation.
>
> *A legislature may, however, prospectively reduce the maximum penalty for a crime even though those sentenced to the maximum penalty before the effective date of the act would serve a longer term of imprisonment than one sentenced to the maximum term thereunder.*

838 So.2d at 406 n. 1 (emphasis added). The California Supreme Court also addressed this issue recently, noting that the "[d]efendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense." *People v. Floyd*, 72 P.3d 820, 825 (Cal. 2003). The California Supreme Court also observed that "[n]umerous courts, however, have rejected such a claim." *Id.* (citing *Baker v. Superior Court*, 677 P.2d 219 (Cal. 1984) (holding that refusal to apply a statute retroactively does not violate the Fourteenth Amendment)).

Moreover, the courts reviewing similar equal protection challenges agree that the selection of an effective date is not an arbitrary action taken by a state legislature. *See Fleming*

v. Zant, 386 S.E.2d 339, 341 (Ga. 1989) (holding that a legislative distinction between cases that have been tried and those that have not is neither arbitrary nor discriminatory because the legislature had to choose some effective date). Further, the United States Supreme Court has held that "the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time." *Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502, 505 (1911).

Thus, although the Kansas Supreme Court has not addressed this exact equal protection issue, if the Kansas Supreme Court follows the precedents set above, the court will conclude that the legislature can prospectively reduce a criminal penalty without creating an arbitrary classification or denying the prisoners presently under sentence of death equal protection under the law. *See Jackson v. Alabama*, 530 F.2d 1231, 1237-38 (5th Cir. 1976).

c. PROSPECTIVE REPEAL WOULD SURVIVE EQUAL PROTECTION SCRUTINY: Even if a Kansas Court were to Scrutinize a Prospective Repeal of Capital Punishment, SB 208 would Survive Equal Protection Scrutiny because the State's Legitimate Interests Justify the Repeal

Further, even if a Kansas court were to agree that prospectively repealing capital punishment creates two arguably indistinct classes of offenders (those sentenced to death for capital murder before repeal and those sentenced to life without parole for aggravated murder after repeal) and treats these classes differently, it is unlikely that such a classification would be rejected as unconstitutional under the equal protection clause. The Kansas Supreme Court has repeatedly acknowledged that such a distinction need not be perfect. *See Chiles*, 254 Kan. at 900, 869 P.2d at 716 (citing *Marshall v. United States*, 414 U.S. 417, 428-30 (1974)); *see also e.g., Aves v. Shah*, 258 Kan. 506, 525, 906 P.2d 642, 655 (1995) (holding state legislature presumed

to act within constitutional power, even if statute results in some inequality). Thus, even if a statute implicates equal protection by distinguishing between arguably indistinguishable classes of individuals and treats them differently, this statutory distinction by itself will not render the statute unconstitutional. *See Aves*, 258 Kan. at 525, 906 P.2d at 655. Instead, at this point in a Kansas court's analysis, the court would decide which level of scrutiny to apply to the statutory distinction. *See Salas*, 210 P.3d at 638.

ii. RATIONAL BASIS: Kansas Court Would Probably Use a "Rational Basis" Test to Resolve an Equal Protection Challenge Brought by a Kansas Prisoner Under Sentence of Death Following Prospective Repeal of Capital Punishment

To resolve what level of scrutiny to apply to an equal protection challenge, the Kansas Supreme Court examines the rights which are affected by the classifications, because the "nature of the rights dictates the level of scrutiny." *See id.* The Kansas Supreme Court has articulated at least three different standards which may be used in determining if a statute violates the equal protection clause of the Kansas and federal constitution: rational basis scrutiny, heightened (intermediate) scrutiny, and strict scrutiny. *See Farley v. Engelken*, 241 Kan. 663, 669, 740 P.2d 1058, 1062-63 (1987). Where a suspect classification such as race or gender, or a fundamental right is involved, the courts would apply a stricter form of scrutiny. *See Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1016-17, 850 P.2d 773, 778-79 (1993). But, where the right involves a sentencing question or aspect of criminal process, the Kansas courts generally apply a more deferential, "rational basis" test. *See Chiles*, 254 Kan. at 899-900, 869 P.2d at 716 (citing *Marshall v. United States*, 414 U.S. 417 (1974) (concluding no suspect classification and no

fundamental right to rehabilitation from narcotic addiction)), *see also Denney*, 278 Kan. at 654, 101 P.3d at 1265 (applying rational basis scrutiny to right to postconviction DNA testing).

The Kansas Supreme Court's decision to apply rational basis scrutiny to questions of sentencing or criminal rights is also in accord with courts that have rejected equal protection challenges based upon the prospective repeal or reduction of criminal sentences. *See State ex rel. Stewart v. McWherter*, 857 S.W.2d 875, 876 (Tenn. Crim. App. 1993). A prisoner challenging their sentence on equal protection grounds has lost the "relevant portion of his fundamental right to personal liberty by virtue of his lawful conviction." *Burch v. Tennessee Dept. of Correction*, 994 S.W.2d 137, 139 (Tenn. App. 1999).

The United States Supreme Court follows this tradition, holding that it has "never" subjected the criminal process to a truncated and stricter form of scrutiny because "a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual." *See Chapman v. U.S.*, 500 U.S. 453, 465 (1991) (emphasis in original) (applied in due process context but noting that an argument based on equal protection essentially duplicates an argument based on due process); *see also e.g. Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, ___ U.S. ___, 129 S. Ct. 2308, 2320 (2009) (rejecting a due process right to DNA testing by noting that a criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man). Further, the United States District Court for the District of Kansas has recently refused to apply a form of strict scrutiny to a substantive due process challenge to a sentence of death. *See U.S. v. Tisdale*, 2008 WL 5156426 (D. Kan. Dec. 8, 2008).

Here, the State of Kansas is likely to prevail, arguing that a form of scrutiny stricter than rational basis would not be appropriate because the Kansas inmates currently under sentence of

death forfeited their fundamental right to personal liberty by virtue of their lawful convictions. *See Kansas v. Marsh*, 548 U.S. 163 (2006) (upholding Kansas death penalty scheme as constitutional under the Eighth Amendment to the United States Constitution), *see also Stewart*, 857 S.W.2d at 876 (applying rational basis to equal protection challenge brought by prisoner citing forfeiture of fundamental right to personal liberty by lawful conviction). These arguments were persuasive to the Kansas Supreme Court in *Chiles*, 254 Kan. at 899-900, 869 P.2d at 715, and the United States Supreme Court in *Chapman*, 500 U.S. at 465, and *Osborne*, 129 S. Ct. at 2320. Accordingly, because the classification of inmates currently under sentence of death in Kansas does not involve a suspect category, such as race or gender, and because their fundamental right to personal liberty was forfeited by lawful convictions, it is likely that a reviewing court would apply a rational basis test to an equal protection challenge brought by a Kansas prisoner under sentence of death. *See Stewart*, 857 S.W.2d at 876.

Even if the inmate under sentence of death for whom the equal protection challenge is brought belongs to a suspect classification, according to the United States Supreme Court, such an inmate must prove that the "Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect." *See McCleskey v. Kemp*, 481 U.S. 279, 298 (1987).

ii. LEGITIMATE STATE INTERESTS: Kansas Courts will Likely Conclude that a Prospective Repeal of Capital Punishment Passes Constitutional Muster Because the Means Chosen by the Legislature bear a Rational Relationship to the State's Legitimate Goals.

For a Kansas Court conducting a rational basis review, relevance is the only relationship required between the classification and the objective. *See Chiles*, 254 Kan. at 895, 869 P.2d at

712-13. The constitutional safeguard of equal protection is offended "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* Under rational basis scrutiny, the legislature's purpose in creating the classification need not actually be established, rather, "a statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it." *Id.* 254 Kan. at 895, 869 P.2d at 714. However, while the rational basis test is highly deferential, this test does contain two substantive limitations on legislative choices:

> (1) legislative enactments must implicate legitimate goals, and
> (2) the means chosen by the legislature must bear a rational relationship to those goals.

Id. Thus, the party asserting a statute's unconstitutionality bears a "weighty" burden, and, according to the Kansas Supreme Court, "[t]his is just as it should be, for the enacted statute is adopted through the legislative process ultimately expressing the will of the electorate in a democratic society." *See Mudd v. Neosho Memorial Regional Med. Center*, 275 Kan. 187, 198, 62 P.3d 236, 244 (2003).

The courts cited above denying equal protection challenges to prospective repeals or reductions of criminal sentences, rejected these challenges, in part, because the states articulated legitimate goals for the prospective repeal or reduction. *See e.g. Zimmerman*, 838 So.2d at 407. In *Jackson*, the Fifth Circuit rejected the "seeming inequity in fixing a cut-off date," by asserting that the "factors of reliance and burden on the administration of justice" outweigh these inequities. 530 F.2d at 1238 (citing *Stovall v. Denno*, 388 U.S. 293 (1967)). In addition, other courts examining this issue have recognized that a legislature may give prospective operation to statutes reducing or repealing a punishment for a particular offense to assure that penal laws will maintain their desired deterrent effect by carrying on the original punishment. *See In re Moreno*,

58 Cal.App.3d 740, 743 (1976); *Burch*, 994 S.W.2d at 139. Moreover, the United States Supreme Court has recognized deterrence as serving an especially important purpose within the context of capital punishment. *See Gregg v. Georgia*, 428 U.S. 153, 185-87 (1976).

Additionally, courts have recognized that a compelling state interest exists in preserving the finality of criminal litigation within an equal protection challenge to prospective reduction in punishment. *See Stewart*, 857 S.W.2d at 877. Still other courts have recognized the legitimate state interest of avoiding remands for additional sentencing hearings as supplying a reasonable basis for a prospective only repeal, *see People v. Grant*, 377 N.E.2d 4, 9 (Ill. 1978), as well as a legitimate state interest in not "reopening" a "virtual Pandora's box" of resentencing. *See Burch*, 994 S.W.2d at 139. The *Stewart* court even held that the interests of finality and avoiding resentencing were enough to allow the prospective repeal or reduction of a punishment to pass the "strict scrutiny test." 857 S.W.2d at 876-77.

Here, the preamble to Senate Bill 208 lists the following motivations behind its proposal to abolish the death penalty: "[i]nmates in Kansas are currently under sentence of death; and . . . Kansas has not carried out an execution since 1965; and . . . The estimated median cost of a case in which the death sentence was given was approximately 70% more than the median cost of a non-death penalty murder case." While "cutting costs" alone is not a legitimate State interest sufficient to survive rational basis scrutiny, *see Aves*, 258 Kan. at 526-27, 906 P.2d at 656, *citing Stephenson v. Sugar Creek Packing*, 250 Kan. 768, 780-81, 830 P.2d 41, 49-50 (1992), the Kansas Supreme Court has also clearly held that "a statutory discrimination will not be set aside *if any state of facts reasonably may be conceived* to justify it." *Denney*, 278 Kan. at 651-52, 101 P.3d at 1265 (emphasis added).

Other legitimate goals for prospective repeal may be found in the testimony of SB 208 proponents, including the issue of innocence, *see Testimony Before the Senate Judiciary Committee Regarding SB 208* by Richard Dieter on Feb. 16, 2009, the ambiguous data concerning the deterrent effect of capital punishment, and the psychological toll on murder victims families, *see* Sue Norton's letter dated February 26, 2009, to the Senate Judiciary Committee, dated February 26, 2009.

Given the deferential nature of a rational basis review, and the legislature's power to enact any statute and apply it prospectively, a court is likely to conclude that the rationales elicited during testimony in support of SB 208, in addition to cost, finality, preservation of the deterrent effect of penal laws, and avoiding burdening the administration of justice with remands and resentencing, together serve as legitimate goals for the Kansas legislature to pursue by prospectively repealing capital punishment. Accordingly, it is likely that the prospective repeal of capital punishment by passage of SB 208 would survive an equal protection challenge brought by inmates currently under sentence of death in Kansas.

(II) *EX POST FACTO / RETROACTIVITY ISSUES*: Kansas Courts Will Probably Conclude that the Prospective Repeal of Capital Punishment does not Raise any Constitutional *Ex Post Facto* Concerns Because Changing a Sentencing Statute is a Substantive Change that Kansas Courts would only Apply Prospectively

The *Chiles* court also analyzed the Kansas Sentencing Guidelines Act for retroactivity concerns. 254 Kan. at 895-97, 869 P.2d at 714-15. When conducting a retroactivity analysis, to determine whether a statute violates the constitutional prohibition against *ex post facto* laws, the court must first determine the legislature's intent. *See State v. Sutherland*, 248 Kan. 96, 106, 804 P.2d 970, 977 (1991) (citing *State v. Dubish*, 236 Kan. 848, 853, 696 P.2d 969, 974-75 (1985)).

To determine whether the legislature intended a statute to act prospectively or retrospectively, the Kansas Supreme Court's "general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates the legislature intended that it operate retrospectively." *Chiles*, 254 Kan. at 897, 869 P.2d at 714, *also State v. Hutchinson*, 228 Kan. 279, 287-88, 615 P.2d 138, 145-46 (1980). Here, SB 208 exhibits clear language that its operation should be prospective only. *See* SB 208 § 1(b) ("Any person who has been sentenced to death before July 1, 2010, may be put to death"). The Kansas Supreme Court will only conduct a retroactivity analysis if the court determines that the legislature intended the statute to apply retroactively. *See Sutherland*, 248 Kan. at 106, 805 P.2d at 977. Thus, SB 208 would not violate the constitution's *ex post facto* prohibition because the bill clearly expresses an intent to act prospectively.

Death Penalty Costs Estimate of 2003 Plus Defense Cost to October 8, 2009

Defendant's Name	Investigation and Trial Costs	Direct Appeal	Re-Trials	Additional Appeals	State Habeas	Federal Habeas
Robinson, John	$1,331,617	$313,220				
Kleypas, Gary	$836,001	$787,786	$413,492			$5,196
Carr, Reginald	$469,520	$143,848				
Carr, Jonathan	$324,625	$350,270				
*Marsh, Michael	$312,537	$435,016	$0	$90,726	$0	$0
*Elms, Stanely	$195,102	$356,459	$0	$0	$0	$0
Scott, Gavin	$356,682	$317,635	$35,446	$34,640	$40,311	

*These cases are completed based upon agreements for a life sentence.

Death Penalty-Not sought-Costs Estimate of 2003 Plus Defense Cost to October 8, 2009

Defendant's Name	Investigation and Trial Costs	Direct Appeal	Re-Trials	Additional Appeals	State Habeas	Federal Habeas
Donesay, Sakone	$189,000	$111,562	$0	$0	$0	$0
Barnes, Gordon	$138,932	$17,759	$0	$0	$0	$0
Wakefield, Jason	$87,801	$9,829	$0	$0	$0	$0
Jamison, Chester	$75,239	$22,541	$0	$0	$1,050	$0
Douglas, Romaine	$83,925	$24,487	$0	$0	$1,072	$0
Juliano, Ramon	$43,118	$8,263	$0	$0	$0	$0
Henry, Rodney	$207,633	$18,363	$0	$0	$0	$0
James, Tyron	$52,540	$16,335	$0	$0	$4,679	$0

KANSAS
DEPARTMENT OF CORRECTIONS

Mark Parkinson, Governor
Roger Werholtz, Secretary

www.doc.ks.gov

MEMORANDUM

TO: Christy R. Molzen
Staff Attorney, Kansas Judicial Council

FROM: Roger Werholtz
Secretary of Corrections

DATE: November 10, 2009

SUBJECT: Operating Cost Information

Attached are two tables summarizing operating cost information for the Kansas Department of Corrections. This information will be discussed during my appearance before the Death Penalty Advisory Committee on November 18th.

In determining the difference in cost between incarcerating an inmate for life versus putting that inmate to death, it is our recommendation that the marginal cost figure of $2,400 or no cost figure be used.

If you have any questions, please contact me at 296-3310 or e-mail me at RogerW@doc.ks.us

KDOC PER CAPITA OPERATING COSTS
FISCAL YEAR 2009

Facility	ADP	Actual Expenditures FY 2009	Annual Per Capita	Daily Per Capita
Lansing Correctional Facility	2,351	$35,866,683	$15,256	$41.80
Hutchinson Correctional Facility	1,711	27,440,776	16,038	43.94
El Dorado Correctional Facility	1,318	23,376,677	17,736	48.59
Topeka Correctional Facility	567	12,462,743	21,980	60.22
Norton Correctional Facility	734	13,298,625	18,118	49.64
Ellsworth Correctional Facility	814	11,833,359	14,537	39.83
Winfield Correctional Facility	652	11,565,930	17,739	48.60
Larned Correctional Mental Health Facility	326	9,013,716	27,649	75.75
Subtotal	**8,473**	**$144,858,509**	**$17,096**	**$46.84**
Inmate Medical and Mental Health Care	8,473	45,560,805	5,377	14.73
Inmate Programs	8,473	6,423,006	758	2.08
Food Service	8,473	13,329,056	1,573	4.31
Total Expenditures	**8,473**	**$210,171,376**	**$24,804**	**$67.96**

Note: The systemwide annual per capita operating cost was computed by dividing the authorized expenditures for facilities operations, health care, inmate programs, and food service by the systemwide average daily population (ADP) housed in KDOC facilities. The daily per capita operating cost was computed by dividing the annual cost by 365 days. The per capita costs do not include costs associated with central office administration, correctional industries, debt service, and capital improvements.

OPERATING COST INFORMATION – KANSAS DEPARTMENT OF CORRECTIONS

Systemwide Per Capita Operating Cost - FY 2009	$24,804
Systemwide Per Capita Operating Cost - FY 2009 (Excluding Programs)	$24,046
El Dorado Correctional Facility (EDCF) Per Capita Operating Cost - FY 2009	$25,444
EDCF Per Capita Operating Cost - FY 2009 (Excluding Programs)	$24,686
Per Capita Operating Cost for Administrative Segregation Cellhouse at EDCF (Excluding Programs) - FY 2010	$25,710
Per Bed Cost for Construction of a Cellhouse at EDCF	$75,000
Marginal Cost	$2,400

AVERAGE ANNUAL COST/MARGINAL COST PER INMATE

The average annual cost per inmate, which for the FY 2009 was approximately $25,000, is one indicator of correctional system costs, but caution should be exercised in how this indicator is used. The average annual cost per ADP is a derivative number (operating costs divided by ADP); it is not used as the basis for determining budgetary requirement or adjustments. The budget for the Kansas Department of Corrections (KDOC) is built through a detailed process of estimating expenditure requirements, by object code, for each budgetary program. The projected inmate population level is certainly an important factor in the budget development and approval process, but it is by no means the only one.

The $25,000 figure is the result of a calculation that divides system wide expenditures for facility operations, health care, food service, and inmate programs by the system wide average daily population housed in KDOC facilities. The average cost cannot be used for budgetary adjustments, because it includes expenditure categories, such as salaries and wages, that are not adjusted in response to incremental changes in population that are accommodated within existing capacity and staffing levels. If adjustments are made, they are made to specific object codes, not on the basis of the average cost per inmate, but on the basis of the marginal cost per inmate. Our current estimate of marginal costs – i.e. those expenditure levels directly affected by the addition (or reduction) of a single inmate – is approximately $2,400 per inmate for facility operations and food service. In addition, changes in medical contract costs may result, depending on the

magnitude of increase or decrease. Medical contract payments are affected when a facility's population varies from the contract capacity by increments of 10%. The amount of the adjustment varies by facility.

If the inmate population increases by 200, the department does not receive an additional $5 million in its operating budget (the amount of funding increase that would occur if the population increase were multiplied by the average cost). If the increased population is accommodated within existing capacity and staffing resources, and if the budget is adjusted (it isn't always), we would most likely receive an additional $480,000, which is based on the marginal cost amount of $2,400 per inmate. If additional capacity and staffing were required to accommodate in increase in the population, the amount of the operating budget increase would depend on the specifics of the capacity project, such as custody and physical configuration. Similar considerations would be taken into account in calculating savings that would result from a decrease in the inmate population.

Testimony Regarding American Law Institute's Withdrawal of Capital Punishment Provision from Model Penal Code and Accompanying Statement Regarding Prevailing Inadequacies of American Death Penalty System

Jordan M. Steiker (University of Texas)

I am here to share my perspective on the recent decision of the American Law Institute to withdraw the capital punishment provision (MPC § 210.6) from the Model Penal Code in light of what the ALI regards as "the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." First, a few brief words about the ALI. The ALI is an independent organization of lawyers, judges, and academics devoted to "clarifying, modernizing, and otherwise improving" the law. The organization, founded in 1923 by some of the most distinguished lawyers in the country, including Chief Justice (and former President) William Howard Taft and future Chief Justice Charles Evan Hughes, is the most prestigious law reform organization in the United States. Two of its early leaders were Judges Benjamin Cardozo and Learned Hand. It currently has an elected membership of about 3000 attorneys. The ALI's work comes in the form of its famous Restatements of Law (such as the Restatements of Contracts, Torts, Restitution, and Trusts), its collaboration on the Uniform Commercial Code, and its Model Statutory Formulations, including the Model Code of Evidence and the Model Penal Code. Under its bicameral structure, ALI projects become the official work of the Institute when approved by both the ALI membership and the ALI Council (a smaller group of about 60 elite members).

The ALI adopted the Model Penal Code in 1962. The Institute describes the MPC's purpose as follows: "to stimulate and assist legislatures in making a major effort to appraise the content of the penal law by a contemporary reasoned judgment – the prohibitions it lays down, the excuses it admits, the sanctions it employs, and the range of authority that it distributes and confers." Over the past (almost) half century, the MPC has been extraordinarily influential in states' efforts to codify and revise their criminal statutes.

In 2001, the Institute undertook a project to revise some of the criminal sentencing provisions of the MPC. At that time, the Director of the Institute, the Council, and the Reporter of the sentencing project decided not to revisit the capital sentencing provisions. When a tentative draft of the sentencing project came before the membership in 2007, a motion was made for the Institute to call for the abolition of the death penalty. The Institute did not act on the motion, but instead referred to the Program Committee and the Council the question "whether the ALI should study and make recommendations about the death penalty." An ad hoc committee of Council members was appointed to advise the Program Committee in the matter. That committee identified three possible courses of action: (a) call for abolition of the death penalty; (b) withdraw § 210.6 from

the Model Penal Code (the capital sentencing provision); and/or (c) undertake a project to revise § 210.6.

The Institute then chose to study the matter further, and engaged my sister, Carol Steiker (Professor at Harvard Law School), and I to prepare a substantial paper addressing these proposed courses of action. The Institute also assembled a diverse group of criminal justice experts, including judges, lawyers, and academics, to advise us on our report. After our report was completed, in the fall of 2008, the Council recommended to the membership that the Institute should withdraw the capital sentencing provisions from the Model Penal Code; that the Institute should not take a position on capital punishment itself; and that the Institute should not engage in a project on capital punishment (either to revise or replace § 210.6). In May, 2009, the membership of the ALI ultimately adopted a somewhat broader position that underscored the prevailing inadequacies of the prevailing American death penalty: "For reasons stated in Part V of the Council's report to the membership, the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." The Council approved the membership's position three months ago, in October, 2009, and that is now the official Institute position regarding capital punishment.

My comments today will explain the basis of the Institute's decision and its broader significance. I want to begin by pointing out the MPC death penalty provision was critical to the reinstatement of the death penalty in 1976. At the time the ALI adopted the MPC in 1962, state death penalty statutes provided essentially no guidance to capital sentencers. Typical state statutes simply allowed jurors to choose between life or death based on their "conscience" and their own "moral light." The drafters of the MPC viewed the absence of guidance as problematic because it seemed to ensure the arbitrary administration of the punishment. Section 210.6, by specifying relevant aggravating and mitigating factors, sought to ameliorate these concerns about the arbitrary administration of the punishment. The MPC provision was essentially ignored until the Supreme Court invalidated all existing capital statutes in *Furman v. Georgia* in 1972. *Furman* raised concerns about the arbitrary and discriminatory administration of the death penalty. These concerns stemmed from the interplay of extremely broad death eligibility in state schemes, the fact of its rare imposition, and the absence of any standards guiding charging or sentencer discretion. After *Furman*, states sought to resuscitate their capital statutes by revising them to address the concerns raised in *Furman*; many of the states turned to § 210.6 as a template for their revised statutes, hoping in part that the prestige of the Institute would help to validate these new efforts. In the 1976 cases addressing five of the revised statutes, state advocates drew particular attention to the fact that many of their provisions were modeled on § 210.6. The Court in turn relied on the expertise of the Institute – particularly its view that guided discretion could improve capital decisionmaking – when it upheld the Georgia, Florida, and Texas statutes. Those statutes, and the decisions upholding them, have provided the blueprint for the modern

American death penalty, and indeed, the current Kansas statute, though adopted years after the 1976 decisions, likewise borrows heavily from the MPC framework.

As our Report recounts, it is now clear that the Court's efforts over the past 35 or so years to regulate capital punishment – largely on the model provided by the MPC – has been unsuccessful on its own terms. The guided discretion experiment has not solved the problems of arbitrariness and discrimination that figured so prominently in *Furman*; nor has the Court's regulation proven able to ensure the reliability of verdicts or the protection of fundamental due process in capital cases. An abundant literature, reviewed in our Report, reveals the continuing influence of arbitrary factors (such as geography) and invidious factors (most prominently race) on the distribution of capital verdicts. Most disturbing is the evidence of numerous wrongful convictions of the innocent, many of whom were only fortuitously exonerated before execution, and the continuing concern about the likelihood of similar miscarriages of justice in the future. These failures of constitutional regulation are due in part to the inherent difficulty and complexity of the task of rationalizing the death penalty decision, given the competing demands of even-handed administration and individualized consideration. But such a difficult task is compounded by deeply rooted institutional and structural obstacles to an adequate capital justice process, such as the intense politicization of the capital justice process and the inadequacy of resources for capital defense services.

I will speak briefly about these conclusions.

First, on the effort to reconcile the competing concerns of "guidance and structure," on the one hand, to ensure equal treatment of offenders, and "individualization," on the other, to ensure adequate consideration of aspects of an offender's character, background, and circumstances of the offense. Despite serious efforts by states and the courts to mediate this tension, almost no one believes that our current system does this well, or is even capable of reconciling these competing interests. The best evidence of the inadequacies of constitutional regulation in this regard is the sheer number of Justices who have either abandoned the enterprise, in whole or in part, or raised serious questions about its feasibility. The attempt to regulate the capital justice process through constitutional supervision is not in its infancy; the Court has had nearly four decades of experience in implementing it. Notably, two of the four Justices who dissented in *Furman* in 1972 eventually came full circle and repudiated the constitutional permissibility of the death penalty. Justice Blackmun did so in a long and carefully reasoned dissent from denial of certiorari, concluding twenty-two years after *Furman*, that "the death penalty experiment has failed." Justice Powell did so in reviewing his career in an interview with his official biographer after his retirement. Justice Stevens, one of the three-Justice plurality that reinstituted the death penalty in the 1976 cases, recently concluded that the death penalty should be ruled unconstitutional, though he has committed himself to *stare decisis* in applying the Court's precedents. In explaining his own change in constitutional judgment, Justice Stevens offers a long list of concerns

about the administration of the death penalty and notes that the Court's 1976 decisions relied heavily on the now untenable belief "that adequate procedures were in place that would avoid the [dangers noted in *Furman*] of discriminatory application . . . arbitrary application . . . and excessiveness." Justices Scalia and Thomas have repudiated the Court's Eighth Amendment jurisprudence as hopelessly contradictory and unable to promote guided discretion. Justices Kennedy, Souter, and Breyer each have authored opinions raising a variety of serious concerns about the administration of capital punishment and the ability of constitutional regulation to prevent injustice. As we stated in our Report, we could think of no other constitutional doctrine that has been so seriously questioned both by its initial supporters and later generations of Justices who have tried in good faith to implement it. The most reasonable conclusion to draw is that the constitutional regulation of capital punishment – which in large part used the MPC as a template for constitutional sufficiency – has been and continues to be a failure.

Second, the fair and accurate administration of the death penalty has been undermined by the intense politicization of the capital process. Capital punishment is politicized *institutionally*, in that some or all of the most important actors in the administration of capital punishment are elected (with the exception of lay jurors). At the same time, capital punishment is politicized *symbolically*, in that it looms much larger than it plausibly should in public discourse because of its power as a focus for fears of violent crime and as political shorthand for support for "law and order" policies generally. These two aspects of politicization ensure that the institutional actors responsible for the administration of the capital justice process are routinely subject to intense pressures, which in turn contribute to the array of problems that plague the current system, including inadequate representation, wrongful convictions, and disparate racial impact. There is little hope of successfully addressing these problems in the absence of profound change on the politicization front.

The vast majority of death penalty jurisdictions within the United States have elected rather than appointed prosecutors, and these prosecutors are usually autonomous decisionmakers in their own small locales (counties). Rarely is there any state or regional review of local decisionmaking or coordination of capital prosecutions. These simple facts of institutional organization generate enormous geographic disparities within most death penalty jurisdictions. In addition, the symbolic politics of capital punishment is very much at play in the election of local prosecutors. Candidates for local district attorney and state attorney general in a wide variety of jurisdictions have run campaigns touting their capital conviction records, even going so far as listing individual defendants sentenced to death.

Judges as well as prosecutors must face the intense politicization that surrounds the administration of capital punishment. Almost 90% of state judges face some kind of popular election. Of course, there is every hope and reason to expect that most judges

will conscientiously endeavor to resist such pressures and decide cases without regard to political influences. Despite confidence in the personal integrity of the individual men and women who comprise the elected judiciary, several statistical studies suggest that, in the aggregate, judicial behavior in criminal cases generally and capital cases in particular appears to be influenced by election cycles. Moreover, in many jurisdictions, judges not only preside over and review capital trials, they also appoint lawyers, approve legal fees, and approve funding for mitigation and other expert services. These decisions, which are crucial to the capital justice process, are less visible but no less likely to be subject to political pressures. Governors, too, are influenced by the intense politicization of capital punishment. Like prosecutors and judges, Governors have often campaigned on their support for the death penalty, emphasizing their willingness to sign death warrants. While Governors are less implicated in the day-to-day workings of the capital justice process than prosecutors and judges, they play a crucial role in the exercise of clemency powers, which the Supreme Court has recognized as an important defense against conviction and execution of the innocent. The trend in the use of the clemency power in capital cases has been sharply downward in the decades since the reinstatement of capital punishment in 1976, at the same time that the trend in death sentencing and executions has been sharply upward. The persistent high political salience of capital punishment, as reflected by its prominence at all levels of political discourse, has no doubt affected the willingness of Governors to set aside death sentences in appropriate cases.

The foregoing suggests that politicization of the death penalty, both within the capital justice process and more broadly in the realm of public policy and discourse, threatens both the integrity of individual cases and the prospects for reform.

Third, the persistence of race discrimination. Race discrimination has cast a long shadow over the history of the American death penalty. The central question today is whether efforts to guide sentencer discretion – such as the one embodied in the MPC death-sentencing provision – successfully combat the sort of discrimination documented in earlier studies. The current empirical assessment is "no" – that race discrimination still plagues the administration of the death penalty, though the evidence suggests that race-of-the-victim discrimination is of a much greater magnitude than race-of-the defendant discrimination. The more difficult question is whether the persistent role of race in capital decisionmaking can be significantly reduced or eradicated, whether through statutory efforts to narrow the reach of the death penalty or other means.

The most significant efforts to reduce the effect of race in capital proceedings have focused on narrowing the class of death eligible offenses and guiding sentencer discretion at the punishment phase of capital trials. The first solution – restricting the death penalty to the most aggravated cases – appears promising, because studies have found that race effects essentially disappear in such cases given the very high frequency of death sentences in that range. Indeed, the MPC death sentencing provision could be

viewed as one such effort to narrow the death penalty because it requires a finding of an aggravated factor (beyond conviction for murder) to support the imposition of death.

The problem, though, played out over the past thirty years, is that no state has successfully confined the death penalty to a narrow band of the most aggravated cases. Death eligibility in prevailing statutes remains breathtakingly broad, as aggravating factors or their functional equivalent often cover the spectrum of many if not most murders. The MPC provision is representative in this regard, allowing the imposition of death based on any of eight aggravating factors, including murders in the course of several enumerated felonies, and any murder deemed "especially heinous, atrocious or cruel, manifesting exceptional depravity."

The failure to achieve genuine narrowing is partly a matter of political will in light of the constant political pressure to expand rather than restrict death eligibility in response to high-profile offenses (consider the expansion of the death penalty for the crime of the rape of a child). But the failure also stems from the deeper problem: that it remains an elusive task to specify the "worst of the worst" murders in advance. Any rule-like approach to narrowing death eligibility will require jettisoning factors such as MPC's "especially heinous" provision; but those factors often capture prevailing moral commitments – some offenses are appropriately regarded as among the very worst by virtue of their atrociousness, cruelty, or exceptional depravity.

Fourth, the inadequacy of resources. Capital prosecutions are expensive. A number of studies have tried to ascertain the relative expense of capital prosecutions vis-a-vis non-capital prosecutions, using a variety of methodologies. What emerges from these studies is a consensus that capital prosecutions generate higher costs at every stage of the proceedings, and that the total costs of processing capital cases are considerably greater than those of processing non-capital cases that result in sentences of life (even life-without-possibility-of-parole). Increased costs are attributable, among other things, to the relatively high costs of capital trials (bifurcated proceedings, investigation costs, voir dire costs, expert costs -- particularly for development of mitigation, etc.), the costs of mandatory appeals and multi-layered postconviction review, and the comparatively high costs of death-row incarceration. Along these lines, and to illustrate via an extreme case, it is worth noting that the current estimate for the cost of *each* of the thirteen executions secured in California (dividing total expenditures on capital cases over the past 35 years by the thirteen executions) is approximately one-quarter of a billion dollars.

Despite the very large costs that are currently incurred in the administration of capital punishment, there is also good reason to believe that the capital process remains substantially under-funded, especially in the area of defense counsel services. The best reference point for what constitutes minimally adequate defense counsel services in capital cases has been provided by the American Bar Association. The Supreme Court has repeatedly endorsed the ABA's performance standards for capital defense counsel as a

key benchmark for assessing the reasonableness of attorney performance in a series of recent cases addressing claims of ineffective assistance of counsel in capital cases.

Nonetheless, it is obvious that the vast majority of states do not comply with the ABA *Guidelines*, and many do not come even close.

The 2003 revisions to the ABA *Guidelines* insist that the Guidelines are not "aspirational" but rather are the minimum necessary conditions for the operation of the capital justice process in a fashion that adequately guarantees fairness and due process. Unfortunately, the record of compliance with the Guidelines even among the states most committed to providing adequate defense services remains poor. The record of state compliance with the *Guidelines* overall suggests that the states agree with the ABA that the *Guidelines* are not aspirational – not because the states believe that they are required, but rather because they simply do not aspire to meet them.

Failure to meet (or even to aspire to meet) the ABA *Guidelines* should not necessarily be written off as simple intransigence. The costs involved in providing the resources necessary for a minimally fair capital justice process can be staggering. The widespread failures to adequately fund defense counsel services, which are foundational for the implementation of most other reforms, made the ALI dubious of the prospects for success of a large-scale law reform project in this area.

Lastly, concerns about wrongly convicting and executing the innocent. Although there is debate about what constitutes a full "exoneration," it is beyond question that public confidence in the death penalty has been shaken in recent years by the number of people who have been released from death row with evidence of their innocence.

Because exonerations of death-sentenced prisoners are such dramatic events, they have generated extensive study of the causes of wrongful convictions, in capital cases and more generally. There is widespread consensus about the primary contributors to wrongful convictions: eyewitness misidentification; false confessions; perjured testimony by jailhouse informants; unreliable scientific evidence; suppression of exculpatory evidence; and inadequate lawyering by the defense.

In light of the well-known causes of wrongful convictions and the great public concern that exonerations generate, especially in capital cases, one might expect that this would be an area in which remedies should be relatively easy to formulate and achieve without much resistance in the judicial or legislative arenas. In fact, remedies have proven remarkably elusive, despite the clarity of the issues and degree of public sympathy. First, it did not prove easy for those who were eventually exonerated by DNA to get access to DNA evidence or to get relief even *after* the DNA evidence excluded them as the perpetrators of the crimes for which they were convicted.

Second, these early difficulties cannot be written off as preliminary kinks that have been worked out of the system. While the vast majority of states have now passed legislation requiring greater preservation of and access to DNA evidence, the ABA Moratorium Implementation Project's recent assessment of 8 death penalty states included an assessment of how well these states were complying with the ABA's recommendations regarding preservation of and access to biological evidence, and the provision of written procedures, training and disciplinary procedures for investigative personnel. As in the context of the provision of defense counsel services, findings of complete non-compliance or only partial compliance with the ABA's recommendations were commonplace, while full compliance was rare.

This resistance has a variety of causes. Some law enforcement groups resist changes in investigative procedures with which they have been comfortable, such as interrogations and identification procedures. Moreover, they may oppose proposals for greater monitoring and disciplining of investigative personnel because they fear that misunderstandings may lead to misuse of such procedures. Some reforms are expensive, such as investing in the infrastructure for reliable preservation of biological material, while others promise to be too open-ended in the resources that they might require, such as improving defense counsel services.

Once again, as in the provision of adequate defense counsel services, there is not very much question about the general types of improvements that would be helpful in reducing wrongful convictions; rather, there appears to be an absence of political will to implement them (or to do so in an expeditious fashion).

Overall, these considerations (and others I have not discussed for lack of time) prompted the ALI to adopt its three-fold position of withdrawing the capital sentencing provision, declining further study of the death penalty, and issuing its statement regarding the current intractable obstacles to a minimally adequate death penalty system. A brief word on each of these decisions.

Withdrawal of the capital sentencing provision constitutes recognition that the provision has not and cannot satisfactorily solve the problems of arbitrariness and fairness undermining the past and present system of capital punishment. The Institute wished to disassociate itself from the system of capital punishment that its provision had been crucial to sustaining.

The decision not to study the death penalty further was supported by the view that the problems of the prevailing system were not likely to be solved by new and better ideas; rather, some of those difficulties are likely ineradicable, whereas others, though curable, face insurmountable institutional structures that prevent well-known solutions from being adopted and appropriately implemented.

Finally, the decision to accompany the withdrawal of the MPC provision with a statement regarding the inadequacy of prevailing practices represented a judgment about the Institute's appropriate role. The Institute rejected issuing a call for outright abolition because it was rightly concerned that such a call would be read as a broad pronouncement regarding the morality of capital punishment rather than an appraisal of its administration within our society. The Institute did not endeavor to consider whether the death penalty is justified retributively or serves as a deterrent or violates basic human rights. Rather, it started with the assumption that states might believe the death penalty to serve important interests and then evaluated whether, given its present administration, it can reasonably be maintained. The language adopted by the Institute makes clear that the answer to that question is "no," and that the entrenched obstacles to the fair and accurate administration of the death penalty provide reason enough (wholly apart from broader moral considerations) to revisit whether capital statutes remain on books.

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CATHOLIC DIOCESE OF WICHITA

Office of the Bishop

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Wichita, Kansas 67202

The Catholic Church teaches that public authorities have the right and the duty to punish criminals in a way that matches the seriousness of their crime. They are morally justified in the most serious cases to impose even the death penalty. This is a self-defense based on the commandment to love oneself (cf. *Mark* 12:31). The guilt of an unjust aggressor and the need to protect society makes capital punishment morally different from the killing of an innocent child in elective abortion, which is never justified.

It is worth recalling, however, that Pope John Paul II of happy memory often made public appeals for public authorities to show clemency and to refrain from using the death penalty. In this same vein, Pope Benedict XVI recently commended the Philippine government for outlawing the use of the death penalty. These interventions were made because the Catholic Church also teaches that the death penalty should not be imposed if there are other ways to guarantee public order and the safety of citizens.

In light of the above, for a number of reasons preference should be given whenever possible to punishments other than the death penalty:

- When a person is falsely condemned and executed there is no possibility to correct the error, resulting in a supreme injustice;
- It does not offer the offender the possibility of reform or to pay his debt to society, both of which are principal aims of punishment;
- It can make people forget their own dignity as human persons or that of others, seen for example in the carnival atmosphere that sometimes occurs on the occasion of an execution;
- It is too often associated with attitudes and behavior that are opposed to Christian life, such as hatred of or vengeance against the criminal (cf. *Matthew* 5: 38-48);
- It is now possible, at least in our country, to guarantee the public order and the safety of citizens without recourse to capital punishment.

Support for the abolishment of the death penalty in no way diminishes the condemnation of the evil deeds that brutally victimize innocent people, or the profound sympathy towards people who have been made a victim or who grieve the murder of a family member or friend. This righteous anger and compassion notwithstanding, recourse can and should be made to bloodless means to protect public order and the safety of people, instead of making use of the death penalty.

+Michael O. Jackels

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Remarks before the Senate Judiciary Committee, Kansas Legislature
January 19, 2010

Michael L. Radelet
University of Colorado
<Radelet@Colorado.edu>

Mr. Chairman and members of the Committee, thank you. My name is Michael Radelet, and I am a Professor at the University of Colorado. Over the past thirty years I have published seven books and nearly 100 scholarly articles on various aspects of the death penalty. Until recently I was also on the Board of Directors of "Families of Homicide Victims and Missing Persons," a Colorado group of some 750 people who have had a loved one murdered and where the murder has not been solved. Over the past eight years my students have documented approximately 1,500 unsolved homicides in Colorado.

Today I will focus my remarks on the deterrence question. Up through the 1970s and into the early 1980s, the number one justification for the death penalty cited by death penalty proponents was the idea that we needed the death penalty to reduce the homicide rate.[1] Later, as deterrence fell from favor, retribution and specifically retribution in the name of families of homicide victims has surpassed deterrence as the leading justification for executions.

From the start, the question we face is not whether the death penalty *per se* is a deterrent to crime. If we executed people for overdue library books, we all know that we would have fewer overdue books. Instead, the question is the *marginal* deterrent effect: does the death

[1] A May 2006 Gallup Poll found that only 34 percent of Americans believed the death penalty had deterrent effects, down from over 60 percent in the mid-1980s.

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penalty have a stronger deterrent effect than other available punishments, in this case Life without Parole? I note that when deterrence was the leading justification for the death penalty in the 1970s, those convicted of capital crimes but not sentenced to death could expect to serve only 12-15 years before being released. In 2004, Kansas established Life without Parole sentences. And so the question before us has changed dramatically: Does the death penalty deter anyone who would not be deterred by LWOP? It is marginal deterrence that counts.

By that I mean that if the penalty for speeding is $300, increasing it to $350 will not add to its deterrent effect. If you want to deter people from sitting on your stove, medium heat works just as well as high heat. One of the important ingredients of the deterrent effect of a punishment is *severity*, but after awhile, increases in the severity of a punishment no longer add to its deterrent effect.[2]

The second, and more important component of deterrence, is the certainty of apprehension. If we want to deter students from cheating on exams, the best method is to hire several proctors, so the students know that if they cheat, regardless of the punishment, they will get caught. I must say that I have no idea how steep the fine is for speeding in Kansas, but the best way to make me drive the speed limit is to see a police officer in the rear view mirror.

Yet, while numerous states have spent millions of dollars in recent years on the death penalty, more and more killers are escaping justice. In 1960, over 90 percent of homicides in the U.S. were solved. This had dropped to 79 percent in the late 1970s, when many states began to reinstate the death penalty. By 2005, it was down to 62 percent.[3] In short, four out of ten killers today are not apprehended.

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[2] Given that 11 percent of those executed in the past 30 years dropped their appeals and asked to be executed, a plausible argument could be made that LWOP is even more retributive than death. See http://www.deathpenaltyinfo.org/executions. According to the most recent Gallup Poll that asked the question, more Americans support LWOP than support the death penalty. See http://www.gallup.com/poll/1606/Death-Penalty.aspx

[3] http://www.ojp.usdoj.gov/bjs/homicide/cleared.htm; http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf

. Senators, I am absolutely positive that if you asked a random sample of families of homicide victims in Kansas, you will find exactly what we found in Colorado: the vast majority would want you to use the money spent on the death penalty to instead fund cold case squads that can solve some of these unsolved murders. For victims' families, finding the killer is more important than taking a small handful of those who are already caught, convicted and imprisoned, and strapping them on a gurney. Anything we can do to increase the *certainty* of punishment has far more deterrent value than increasing the *severity* of punishment for a small number who will already die while behind bars.

There is widespread consensus among our country's leading criminologists that executing criminals does not add to the deterrent effects of long imprisonment. Six months ago a graduate student and I published results from a survey of 77 of the world's leading criminologists.[4] 90 percent agreed that the research on this subject has shown that the threat or use of the death penalty is not a stronger deterrent than long or life prison sentences. That is an extremely high rate of consensus, rarely found in the social sciences.

That is not to say that it is impossible to find research articles that do find small deterrent effects. A recent one found that if states execute like Texas, each execution might reduce ½ of a murder, although the results are so unstable that the data showed only murders between family members were affected, not felony murders that are the focus of death penalty trials. Virtually every study that has found a deterrent effect has been discredited.

Police Chiefs agree with the criminologists. In a 2009 survey of 500 police chiefs, 57 percent agreed that the death penalty did not act as a deterrent, and 69 percent said that politicians support the death penalty as a symbolic way to show they are tough on crime. When asked about various means to reduce violent crime, greater use of the death penalty ranked last

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[4] Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates? The Views of Leading Criminologists*, JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 99 (2009): 489-508.

on the list.[5] Research has shown that the threat of the death penalty has no impact on homicides against police officers or prison guards.[6]

New York courts abolished the death penalty in 2004, and in 2009, for the second time in three years, New York City set a record for the fewest homicides since record keeping began some five decades ago.[7] New Jersey abolished the death penalty in December 2007, and in 2009 homicides decreased by 9.2 percent.[8] When Gov. George Ryan emptied the Illinois death row in 2003, the homicide rate in that state dropped precipitously.[9] New Mexico abolished the death penalty in 2009, and I have yet to see a case where a Colorado murderer traveled to New Mexico to do his crime to avoid Colorado's still-active gurney.

In the fifteen years between 1994 and 2008, there were 2002 homicides in Kansas, an average of 133.5 per year.[10] With ten people on death row, 1/200 homicides result in a death sentence. The death penalty pours enormous resources into this small fraction of killers, not on the 40 percent who are never apprehended and still on the streets. If the Kansas legislature wants to do something that really might reduce homicide rates, it would abolish the death penalty and channel funds to help solve the homicides that are going unpunished.

Thank you.

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[5] Death Penalty Information Center, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis* (Oct. 2009), available on line at http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf.
[6] Wolfson, Wendy, *The Deterrent Effect of the Death Penalty Upon Prison Murder*, pp. 159 73 Bedau, Hugo Adam (ed.). THE DEATH PENALTY IN AMERICA, 3d Edition (1982); Bailey, William C., *Capital Punishment and Lethal Assaults Against Police*, CRIMINOLOGY 19 (1982): 608-25; Bailey, William C. & Ruth D. Peterson, *Police Killings and Capital Punishment: The Post*-Furman *Period*, CRIMINOLOGY 25 (1987): 1-25.
[7] Al Baker, *New York on Track for Fewest Homicides on Record*, NEW YORK TIMES, Dec. 29, 2009, available on-line at http://www.nytimes.com/2009/12/29/nyregion/29murder.html?pagewanted=print.
[8] *Armed with Statistics, Milgram Readies for Departure*, NEWARK STAR-LEDGER, Dec. 30, 2009, available on-line at http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-15/1262139306228080.xml&coll=1.
[9] For Illinois crime statistics, *see* http://www.disastercenter.com/crime/ilcrime.htm.
[10] http://www.disastercenter.com/crime/kncrime.htm

U.S. Department of Justice Office of Justice Programs
Bureau of Justice Statistics

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Contents of *Homicide trends in the U.S.*

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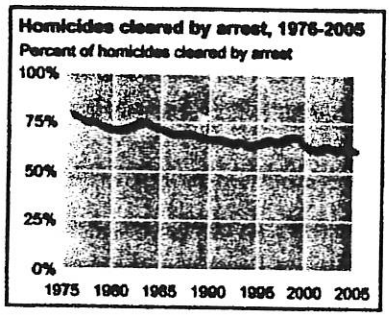
Homicide trends in the U.S.
Clearances

The percentage of homicides cleared by arrest has been declining

- In 2005, 62% of all homicides were cleared compared to 79% in 1976.
- Homicide has the highest clearance rate of all serious crimes.

To view data, click on the chart.

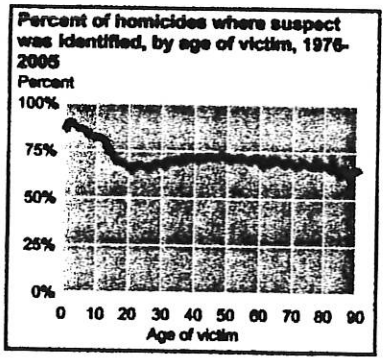


[D]

Note: Law enforcement agencies clear or solve an offense when at least one person is arrested, charged with the commission of the offense, and turned over to the court for prosecution. Law enforcement agencies may also clear a crime by exceptional means such as when an identified offender is killed during apprehension or commits suicide.

Police are more likely to identify a suspect if the victim is a child

To view data, click on the chart.



[D]

Source: FBI, Supplementary Homicide Reports, 1976-2005.
See also Additional information about the data.

Note: The victims of the 9/11/01 terrorist attacks are not included in this analysis.

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Written Testimony SB 375

Senate Judiciary Committee

January 19-20, 2010

Chairman Owens and Members of the Committee, I submit this written testimony on behalf of Amnesty International, a worldwide human rights organization. Our mandate is based on the Universal Declaration of Human Rights and other international human rights treaties. Amnesty International supports the abolition of the death penalty. We believe capital punishment violates the Universal Declaration of Human Rights.

Even if you do not support abolition from a human rights framework, I ask you to consider this: In 1994, the Senators and Representatives took the information they had, and made a choice to enact a capital punishment statute. At that juncture, the Kansas death penalty was a concept.

Now, over 15 years later, it is no longer a concept. It has a record of multiple types of errors: prosecutorial misconduct (Kleypas-Crawford County), judicial error (Marsh-Sedgwick County), jury misconduct (Scott-Sedgwick County), withheld evidence (Fox-Seward County). The State has now stipulated that there was inadequate representation in the penalty phase in Cheatham in Shawnee County. The Judicial Council Death Penalty Advisory Committee report of January 12, 2005, notes the disparity of application between Sedgwick and Wyandotte Counties. The cost implications are becoming ever more clear as you look at the Post Audit data and the latest Judicial Council report.

Donna Schneweis, State Death Penalty Abolition Coordinator
2044 SW Stone, Topeka, KS 66604 785-271-1688 dms2@mindspring.com

Amnesty International is a worldwide grassroots movement that promotes and defends hun

What you see in Kansas is a microcosm of the national reality. The death penalty system is broken. When an organization like the American Law Institute drops the death penalty from its model penal code, then it is clear that the problems in Kansas are not isolated. Rather they are indicative of a fatal flaw.

Amnesty urges you to break free of the premise that the death penalty is justice. The death penalty process intensely focuses the state's response on the person charged with the murder. This process ignores the very real needs of the family to a large part, and it also disregards communal needs for healing. We believe it would be far better to end the use of the death penalty and instead to put society's time and resources into crime prevention and to victim services for families and communities who are dealing with homicide.

So given all this evidence of the fatal flaws of the death penalty system, as well as the human rights and faith perspectives we urge you to abolish the Kansas death penalty now. It is a failure, plain and simple.

Murder Victims' Families for Reconciliation
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Senate Judiciary Committee
Written Testimony in Support of S 375
19 January 2010

Mr. Chairman and Members of the Committee:

This session marks the 33rd consecutive year that I have actively lobbied for abolition of capital punishment at the Legislature. You all are familiar with me and my concern that continued application of the death penalty in Kansas will only prolong the suffering of murder victims' families by re-traumatizing them each time they publically have to re-visit their grief when the case is brought up in the media.

Once again "financial cost" seems to be a driving force behind the abolition effort this session. But I hope you also will consider the emotional cost involved with the death penalty to murder victims' families, regardless if they favor or oppose capital punishment. The endless years of appeals of capital cases only add stress to families and provide no opportunity for healing.

You have occasionally asked me, "Bill I see you up here, but are there truly other murder victim families that feel the same way you do?" Last year, you had the opportunity to hear Sue Norton of Arkansas City offer compelling testimony regarding her tragic loss of her parents. Tomorrow you will have the opportunity tomorrow to hear Bud Welch speak about the anguish he suffered following the Oklahoma City bombing in 1994 when he lost his daughter.

Today, I wanted to share with you comments from Kansans who have lost loved ones to murder and have found that the death penalty inadequate and inappropriate as retribution. If you have questions of any of these folks, please feel free to call me and I will provide you with their respective contact information. Since this document is public record, I would ask the press members reading it to speak with me first before contacting these individuals as a few of them prefer to have their privacy respected.

In 2004, I testified in favor of Life Without Parole for persons convicted of capital murder. With that bill's passage, Kansas is adequately protected by that alternative sentence. More importantly, murder victims' families now have the reassurance that those defendants convicted of killing their loved ones will never be back on the street again. I once again ask that you pass S 375 as a means of best providing for the safety and welfare of all Kansans.

Bill Lucero

Bill Lucero
Kansas Coordinator
Murder Victims' Families for Reconciliation

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Murder Victims' Families for Reconciliation
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Kansas Murder Victims' Families for Reconciliation Speak Out

When my 28 yr old daughter Amy was murdered by the father of her 22 month old son, I had to rethink my belief in capital punishment. Some day his son will ask about his birth dad, and I would have to explain everything to him. How could I explain his father was killed because he killed Amy? If I couldn't explain the logic of the death penalty to a child, then it is wrong. I realized I had always looked at the death penalty as one dimensional and not how many persons it affects: the families and communities of both the murdered and murderer, and all of society.

-Carol Samuelson
Topeka KS

Our family has experienced murder on a personal level twice. Our niece Melissa Rains was murdered by Greg Braun in Garden City, and one of our son's best friends was murdered by the Carr brothers in Wichita. I oppose the Death Penalty as I would much prefer those guilty live out their lives in prison being fully aware of what they did and the horrendous sorrow and emptiness their act(s) caused.

-Linda Hessman
Dodge City KS

In October 1991, my 12 year old daughter was kidnapped, raped and murdered. The man who killed our daughter was sentenced to at least 40 years in prison. Ultimately I faced the hard reality that his crime was so heinous, so depraved, there was no way he could pay for what he did to Brenda, our family and the community. I am convinced that the only way for healing to begin, is for me to give up the urge to make him suffer, and to begin taking steps toward forgiveness: To choose little by little, through the pain, and the hurt, the grief, to release the bitterness, and release the rage, and to put the killer into the hands of God. I'm not saying this is easy. Nor am I saying that I have this "forgiveness" business all wired. But I am convinced that it is essential to healing.

-Bob Keller
Dover KS

Because my brother was murdered in 1982, I am often asked if I want his perpetrator to be punished with the death penalty. My unequivocal answer is NO. My faith confirms my belief that the person who took my brother's life will pay for his crime in the here after. The punishment the Lord has in mind is much harsher than anything our legal system could inflict on earth. However, I truly believe that death by imprisonment is the best alternative. And the incarceration should take place in an isolated institution that allows the guilty person one-hour recreation outdoors and 23 hours inside and all alone. Besides, arriving at a Pro-life political position included life at its beginning and its ending.

-Candy Ruff
Leavenworth KS

I don't believe in taking someone else's life, period. Despite that I worshipped the ground my father walked on, life sentences for the men who killed him was appropriate and well deserved.

- Kristi Smith
Kechi KS

My son David is dead. Nothing can change that. Spending energy on punishment without working toward rehabilitation guarantees continued defeat.

- Wilma Loganbill
Newton KS

I have only so much energy- constant feelings of unresolved anger would only rob me of that energy and would not be fair to me, my family and my murdered son, Paul. . . Capital punishment causes us to lose our care and compassion for our fellow human beings as it further devalues human life.

- Alma Weber
Topeka KS

Four years before he was executed, we began to correspond with Gregg Braun who killed our daughter, Mary. At first, he was belligerent with us; but later he began to release his bitterness, eventually expressing regret and apologized for killing her. We didn't find forgiveness just by saying, 'We forgive' and moving on. We found we needed to start each day with a prayer of forgiveness for Gregg. Pleasure comes to us now from watching our children and our grandchildren as they learn to follow us on the journey of forgiveness. For if we are to believe we can be forgiven, we must be able to forgive.

-Bob and Ruth Hessman
Dodge City KS

The murder of my father sadly kept him from knowing the joys that come with age. But the death penalty for those who killed him only perpetuates disregard for human life; it cheapens and brutalizes the society that inflicts it, only reinforcing violence. And those are the very things that underlie the terrible crime committed against my father.

- Carolyn Zimmerman
Topeka KS

My father Julian Magin Olivas was killed on November 11, 1980 in Santa Cruz, New Mexico. His killer has never served time in jail. I am opposed to the death penalty. For me, killing is wrong. My spiritual belief comes from the Bible. In the New Testament in John 8:7 it says, "Let him who is without sin among you be the first to threw a stone at her".

-Jose Olivas
Ulysses KS

We do not have the right to kill someone because they take a life. It would not bring my brother back if someone else was killed for shooting him. I do not trust the "Big Folks", but I trust THE BOOK that tells us "Do unto others as you would have them do unto you".

-Wilma Hubbard
Topeka Ks

Senator Tim Owens, Chairman
Senate Judiciary Committee
300 SW 10th Ave.
Topeka, KS 66612-1504

Written Testimony to End the Death Penalty in Kansas, SB 375
January 18, 2010

End Death Penalty Task Force, Western District Conference, Mennonite Church USA

(representing 70 congregations, 40 in Kansas with 9000 members)

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Summary

We believe that government has a responsibility to guard and protect the sacredness of all human life, even the criminal who remains a person before God capable of repentance and transformation. Though historically Christians have not agreed on whether all killing is wrong, we do have common ground in believing that there is a presumption for the preservation of life and against killing. To cross the line and kill a human being intentionally is a momentous act that can only be justified for compelling reasons.

There are NOT compelling reasons FOR capital punishment that could justify state sanctioned killing. In addition to our theological and biblical convictions, we recognize that there are powerful pragmatic arguments against the death penalty. The argument that the death penalty protects public safety by deterring criminals from committing violent crime is not supported by scientific evidence. The death penalty, intended to be an instrument of justice, has been applied unfairly and unjustly to minorities. Innocent persons have been executed, because the criminal justice process is not perfect. In a time of economic recession when governments are unable to meet budget commitments, the financial costs of death penalty litigation should be taken into account. The death penalty is unnecessary to protect the public, and it is very expensive to administer.

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Statement on the Death Penalty

Approved by Delegates to the Mennonite Western District Conference, August 8, 2009

From our Anabaptist origins in the sixteenth century, Mennonites have believed that God is love, that God was incarnate in Jesus Christ, and that Jesus' teaching and example witnessed against the killing of human life. Our spiritual ancestors in Europe as well as in America were persecuted for their opposition to killing.

We seek to be followers of Jesus. The teaching of our church has consistently opposed the death penalty. The Western District Conference adopted resolutions against the death penalty in 1961, 1976, and 1991.

Today, at a time when the death penalty is being reconsidered in our state legislatures, we renew our opposition to capital punishment.

We believe that God created the world in love and peace. Humanity chose ways of unrighteousness and violence, yet the original vision of peace and justice remained alive in the developing drama of salvation. God's prophets and other messengers called the people of Israel to trust in God rather than in weapons and military force.

We are committed to follow Jesus. Jesus specifically taught against the retribution of "an eye for an eye and a tooth for a tooth." (Matt. 5: 38) Faced with the exercise of the death penalty against a woman caught in adultery, Jesus released the woman from imminent death. (John 8) The Apostle Paul taught against retaliation: "Beloved, never avenge yourselves, but leave it to the wrath of God." (Romans 12: 19)

We accept the authority of the Bible. We recognize that the Old Testament calls for the death penalty for offenses that our own society would not consider to be capital crimes—such as breaking Sabbath rules (Ex. 31: 14), cursing or striking a parent (Ex. 21:15, 17; Lev. 20:9; Deut. 21:18-21), or having sex during a woman's menstrual period (Ex. 22:19; Deut. 22:21, 24, 25; Lev. 20: 10-14; 21:18). But the trajectory of Scripture moves toward limiting excessive punishment in ways that make the death penalty increasingly rare. The Bible is morally serious about disobedience and injustice, but it is committed to human life and to mercy. The commitment to mercy came to flower in the New Testament and was fully manifested in the life and teachings of Jesus, who himself became a victim of the death penalty.

We believe that all human life is sacred, even the criminal who remains a person before God capable of repentance and transformation. Though historically Christians have not agreed on whether all killing is wrong, we do have common ground in believing that there is a presumption for the preservation of life and against killing. To cross the line and kill a human being intentionally is a momentous act that can only be justified for compelling reasons.

There are no compelling reasons for capital punishment that could justify state-sanctioned killing. In addition to our theological and biblical convictions, we recognize that there are powerful pragmatic arguments against the death penalty. The argument that the death penalty protects public safety by deterring criminals from committing violent crime is not supported by scientific evidence. The death penalty, intended to be an instrument of justice, has been applied unfairly and unjustly to minorities. Innocent persons have been executed, because the criminal justice process is not perfect. In a time of economic recession when governments are unable to meet budget commitments, the financial costs of death penalty litigation should be taken into account. The death penalty is unnecessary to protect the public, and it is very expensive to administer.

We call upon the congregations of the Western District Conference to support efforts to change public policy toward the elimination of the death penalty.

Statement on Capital Punishment
Written Testimony on Senate Bill 375
End Death Penalty Task Force
January 18, 2010

1. Participants of our task force are members of Mennonite Churches in the Central Kansas area who belong to the Western District Conference of Mennonite Church U.S.A.

2. We support Senate Bill 375 that abolishes the death penalty in Kansas.

3. In these difficult economic times, when the Kansas Legislature is forced to trim the budgets of essential services like public education, it is critical that the legislature fund only those programs that are proven to be absolutely necessary to protect and preserve the common good. The death penalty is unnecessary to protect the public, and it is very expensive to administer.[i] Kansas does not need the death penalty either as a form of punishment or to protect public safety.

4. An essential component of a well-ordered society is public safety, the prevention of crime and the protection of our communities from those who have no respect for the sacredness of human life. Society must have laws to protect itself against dangerous criminals who endanger the lives of others. Public safety can be achieved in Kansas with a maximum sentence of life without the possibility of parole. Public support for the death penalty declines significantly when the alternative of a life sentence without parole is available to assure the public that their safety is secure.

5. Some argue that the death penalty protects public safety by deterring criminals from committing violent crime. However, there is little, if any, scientific evidence that capital punishment has a deterrent effect. Careful and well designed scientific studies and policy analyses raise serious doubts that executions deter criminals from violent crime.[ii] Because the variables are so complex, public policy based on the claim the death penalty has a deterrent effect is unwarranted.

6. A life sentence without parole is at the same time a very severe punishment that fits the gravity of the crime. Public policy must take injustice seriously and address the anger that people feel about the victims of murder. An execution, necessarily delayed for many years because of the appeals process and to guard against mistakes, continues to focus on the criminal who committed the wrong. A life sentence without parole is a swifter justice. It is more likely to provide the context for victims to focus on their own healing rather than on the criminal who committed the crime.[iii]

7. An execution also creates another set of victims, namely the family members and close associates of the one who committed the crime. The cycle of violence is not broken, but it continues through state sanctioned killing. Killing of another human being forever closes off the possibility of repentance and healing.

8. Innocent persons have been executed, because the criminal justice process is not perfect. To avoid a gross miscarriage of justice, on January 31, 2000, following the exonerations of 13 death row inmates found innocent of the capital crimes for which they were convicted, Governor George H. Ryan announced a moratorium on executions in Illinois until a review of the administration of the death penalty in the state could be conducted. It is also difficult to apply fairly which defendants will face capital punishment. Richard Ney, an experienced capital litigator in Wichita disputes Attorney General Six's claim that there is not "unlimited discretion" operative in Kansas. He cites the case of a defendant in Salina allowed to plead guilty for a life sentence though he had killed three people, one of them a child, while his office rejected a plea to life by Justin Thurber who committed a single homicide. Nye says: "This clearly is the height of arbitrariness."

9. An abolition of the death penalty would enable us to allocate the scarce resources of our state more wisely. A 2003 Legislative Post Audit estimated the median cost for death penalty cases was $1.26 million through execution, compared with $740,000 for non-death penalty cases through the end of incarceration. The audit obtained the data from the agencies involved, including the Attorney General's Office. Numerous studies of the costs in other states consistently show that death penalty cases are very expensive. See in the Appendix a 2002 article from the Wall Street Journal. Conclusion: significant savings could be achieved by abolishing the death penalty and redirecting these resources to programs that prevent crime.

10. In the last several years the steep rise in the prison population in Kansas has been significantly reduced. This has been accomplished by an intensive effort by the Department of Corrections to manage parolees and successfully re-integrate offenders into society. The state's budget woes have already reduced inmate programs in drug rehabilitation and education and the number of parole officers. The prevention of crime and the promotion of public safety would be much better served by using scarce state resources for programs that prevent crime rather than wasting scarce resources in a few high publicity death penalty cases which neither deter crime nor protect the public safety.

11. We testify before this committee both as citizens of Kansas and as Christians who believe that government has a responsibility to guard and protect the sacredness of all human life. We believe that all human life is sacred, even the criminal who remains a person before God capable of repentance and transformation. Though historically Christians have not agreed on whether all killing is wrong, we do have common ground in believing that there is a presumption for the preservation of life and against killing.[iv] To cross the line and kill a human being intentionally, which some faith traditions choose not to cross, is a momentous act that can only be justified for compelling reasons.[v] The desire for vengeance or to abide by the maxim, "a life for a life," are not compelling reasons to override the presumption against killing.

12. To summarize, there are NOT compelling reasons FOR capital punishment that could justify state sanctioned killing. Capital punishment does not adequately protect against human fallibility, despite the long appeal process. Mistakes have been made in executing persons who are innocent. Capital punishment has been disproportionately applied to the poor and minorities, violating fundamental principles of justice. The death penalty is not necessary to protect the public safety. The evidence that it is a deterrent is not substantiated by careful scientific studies. Life without parole is a severe punishment that addresses the needs of victims better than the death penalty. The death penalty is expensive. It diverts scarce resources away from programs that can better prevent crime and protect public safety.

For all these reasons, most major Christian denominations, both Protestant and Catholic, have taken official positions against capital punishment.[vi] We join these other groups in urging the Kansas legislature to support Senate Bill 375 by abolishing the death penalty.

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i. Kansas is not alone. Efforts to repeal the death penalty for economic reasons have been successful or have been considered in New Mexico, Colorado, Nebraska, Montana, New Hampshire, and Maryland.

ii. One of the best statistical studies available was done by Brian Forst, "The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's" Minnesota Law Review 61, no. 5 (May 1977). Glen H. Stassen, Lewis Smedes Professor of Christian Ethics at Fuller Theological Seminary, Pasadena, CA, summarizes this study. "Forst uses the method of multiple regression, which can measure the impact of numerous likely influences on the homicide rate. . . . Forst includes comparisons across the states as well as over time, and comparisons of how much each variable has changed rather than simply *whether* it has increased or decreased. He focuses on the crucial 1960s, when the use of the death penalty was changing in different ways in different states, and when the homicide rate began increasing dramatically starting in 1963. (See the collection of essays on the pros and cons of capital punishment, Capital Punishment: A Reader, edited by Glen Stassen, Pilgrim Press, 1998, p. 2) Forst's conclusion: "I doubt that the presence or absence of a deterrent effect of the death penalty is likely to be demonstrable by statistical means." (p.

55). For a more recent analysis of studies on whether capital punishment has a deterrent effect, see the website, http://www.deathpenaltyinfo.org/FaganTestimony.pdf, "Deterrence and the Death Penalty: A Critical Review of New Evidence," Testimony to the New York State Assembly Standing Committee on Codes, Assembly Standing Committee on Judiciary and Assembly Standing Committee on Correction Hearings on the Future of Capital Punishment in the State of New York, Jeffrey Fagan, Columbia Law School, January 21, 2005.

iii. Bill Lucero of Topeka who lost his father to homicide says "The emotional cost of the death penalty is tremendously higher because the victim's family is re-traumatized every time they have to deal with the subject of an execution that so far has yet to occur."

iv. On the complex issues surrounding the Bible and capital punishment, and for those who are interested in these issues, we recommend an article published in Review and Expositor: A Quarterly Baptist Theological Journal, Vol. 93, No. 4, Fall 1996. The conclusion is: "In sum, the Bible affirms two profound principles. One is profound moral seriousness about obeying God's will. Disobedience may not be taken lightly. The other is profound seriousness about the sacredness of human life. Killing people to punish them must be avoided if there is another morally serious way to punish crime. Therefore, in practice, the death penalty becomes increasingly rare. One almost never hears of it in the Prophets and the Writings, and every mention of it in the New Testament concerns an unjust death penalty. Other penalties develop, and the death penalty is avoided. Mercy becomes central. Vengeance is ruled out: "Beloved, never avenge yourselves, but leave it to the wrath of God; for it is written, 'Vengeance is mine, I will repay,' says the Lord" (Romans 12:19; Lev. 19:18 Deut. 32:35; Hebrews 10:30). And the Bible again and again emphasizes justice for the poor, the powerless, the oppressed, and the innocent. Furthermore, it rejects whatever blocks the possibility of repentance and redemption." All twelve of the most recent Presidents of the Society of Christian Ethics have signed the statement. The Society of Christian Ethics is the professional society of over 1000 teachers of Christian Ethics in theological schools, colleges, and universities in the United States and Canada.

v. See the website, http://www.usccb.org/sdwp/national/penaltyofdeath.pdf, for a carefully reasoned argument against the death penalty by the U.S. Catholic Bishops.

vi. See the Appendix for a list of the many religious organizations - Protestant, Catholic, Jewish - who oppose the death penalty. There is a growing consensus among widely diverse faith traditions that there are not compelling reasons in the case of the death penalty to override the presumption against killing.

Appendix

Death Penalty in America, Legal Studies 485, Spring 2003
Counties Struggle With High Cost
Of Prosecuting Death-Penalty Cases
The Wall Street Journal, January 9, 2002

By RUSSELL GOLD

When a Utah police chief was shot to death in July after responding to a call about a domestic dispute, tiny Uintah County's decision to seek the death penalty was easy. "It was a law-enforcement officer in the line of duty," says county attorney JoAnn Stringham.

Now comes the hard part: paying for the trial. So far, the county hopes to avoid raising taxes on its 25,959 citizens by spreading the as-yet undetermined costs over three fiscal years.

Other counties haven't been as lucky. Jasper County, Texas, ran up a huge bill seeking a capital-murder conviction of three men accused of killing James Byrd Jr., who was dragged to death in a 1998 case that attracted national attention. (Two were sentenced to death; the third got life in prison.) The cost -- $1.02 million to date, with other expenses expected -- has strained the county's $10 million annual budget, forcing a 6.7% increase in property taxes over two years to pay for the trial. County auditor Jonetta Nash says only a massive flood that wiped out roads and bridges in the late 1970s came close to the fiscal impact of the trial.

As a growing number of local governments are discovering, there is often a new twist on an old saying: Nothing is certain except the death penalty and higher taxes.

Just prosecuting a capital crime can cost an average of $200,000 to $300,000, according to a conservative estimate by the Texas Office of Court Administration. Add indigent-defense lawyers, an almost-automatic appeal and a trial transcript, and death-penalty cases can easily cost many times that amount.

The cost, county officials say, can be an unexpected and severe budgetary shock -- much like a natural disaster, but without any federal relief to ease the strain. To pay up, counties must raise taxes, cut services, or both.

In research published last summer, Dartmouth College economist Katherine Baicker found that counties that bring a death-penalty case had a tax rate 1.6% higher than those that didn't. Her statistical examination of 14 years of budget data from all 3,043 U.S. counties showed those with a death penalty also spent 3.3% less on law enforcement and highways. Ms. Baicker's analysis found that the same pattern of raised taxes and spending cuts hits all death-penalty counties regardless of size.

In Texas, Dallas County is struggling to pay for concurrent cases against six prison escapees accused of killing a suburban policeman last year. Gov. Rick Perry gave the county $250,000 from discretionary funds to help.

The fiscal fallout can linger for years. In Mississippi, Quitman County raised taxes three times in the 1990s and took out a $150,000 loan to pay for the 1990 capital-murder trials of two men that went on for years. Now, the county is having trouble attracting a new tenant to a vacant warehouse because it has higher property taxes than any nearby county. A death-penalty case "is almost like lightning striking," says county administrator Butch Scipper. "It is catastrophic to a small rural county."

The issue has become more pressing as death-penalty case costs have pushed higher, says Jay Kimbrough, criminal-justice director for Gov. Perry. Among the causes: DNA tests and appellate-court decisions that require longer jury selection and more expensive defense attorneys.

Now local officials are pressing state governments for relief. In Texas, Jasper County's experience helped persuade lawmakers last year to expand a program to help counties pay for the "extraordinary costs" of prosecuting capital-murder cases. (The discretionary funds given Dallas County last April were not part of this program.) State Rep. Bob Turner, who sponsored the legislation, says he was worried that smaller counties were "downgrading cases" -- pursuing lesser charges rather than the death penalty -- "to preclude the tremendous drain on the county budget." While Mr. Turner says he knows of no specific examples, he says he often heard about the cost pressures during meetings with officials from the 17 mostly rural counties he represents.

A Trial 's Tally

Jasper County, Texas, spent more than $1.02 million bringing death penalty cases against three men for the 1998 murder of James Byrd Jr. A breakdown of expenses:
Court-appointed defense attorneys 28.3%
Telephone, travel and misc 20.6
Salary for extra prosecutors 17.3
Jury, courthouse security, court reporter 15.5
Investigation 15.4
Psychiatric evaluation 2.9

Costs notwithstanding, county officials say they pursue the death penalty when the crime warrants it. "It is very expensive and it is very burdensome on communities, so that gives people pause," says Arthur Eads, who was the district attorney in Killeen, Texas, for 24 years. But, he says, "I never felt the heat to do it or not to do it because of the money."

Polk County, in east Texas, was the most recent county to receive state help. In June, the U.S. Supreme Court overturned the sentence of Johnny Paul Penry, convicted of fatally stabbing a woman in 1979, and sent the case back to Polk County for a third trial. County officials toted up the likely costs: $250 to $350 per hour for the forensic psychiatrist to review and testify about Mr. Penry's medical records; $700 to copy his 1,500-page prison record; $20,000 to pay for hotels, meals and mileage for prosecutors, investigators and support staff when the trial is moved to a different county, as expected.

Total estimated cost: at least $200,000. In December, Polk received $100,000 from the state to help pay the bill.

Other states have begun to set up what amount to death-penalty risk pools, allowing counties to pay in annually and receive funds in the event of a death-penalty case. Utah created one of the first such pools in 1997 after "the legislature got tired of bailing out counties," says Mark Nash, director of the Utah Prosecution Council.

Uintah was one of six Utah counties that didn't participate in that state's risk pool. The county, in the northeast corner of the state, had never had a death-penalty case until Roosevelt City police chief Cecil Gurr was shot and killed in July, just a few feet inside the county line.

Now, as the county struggles to pay for prosecuting the case, local officials are convinced the insurance is a good idea. In August, Uintah paid $21,500 to join the state risk pool -- for the next death-penalty case.

Religious organizations Against the Death Penalty

Kansas

Evangelical Lutheran Church in America, Central States Synod
Mennonite Church USA, Western District
United Church of Christ, Kansas Oklahoma Conference
United Methodist Church-Kansas
Kansas Ecumenical Ministries
Adorers of the Blood of Christ, Wichita Center
Benedictine Sisters
Dominican Sisters of Great Bend
Pax Christi Kansas
Sisters of Charity of Leavenworth
Sisters of St. Joseph of Concordia
Sisters of St. Joseph of Wichita
Ursuline Sisters Leadership Team

National denominations who oppose the death penalty

American Baptist Churches in the U.S.A.
American Friends Service Committee (Quakers)
American Jewish Committee
Bruderhof Communities
Buddhist Peace Fellowship
Central Conference of American Rabbis
Christian Church (Disciples of Christ)
Church of the Brethren
Community of Christ
The Episcopal Church
Evangelical Lutheran Church in America
Friends United Meeting
Mennonite Church USA
The Moravian Church in America
National Council of Churches of Christ in the U.S.A.
National Council of Synagogues
Orthodox Church in America
Presbyterian Church (U.S.A.)
The Rabbinical Assembly
Reformed Church in America
Union of American Hebrew Congregations
Unitarian Universalist Association
United Church of Christ (Congregationalists)
United Methodist Church
United States Catholic Conference