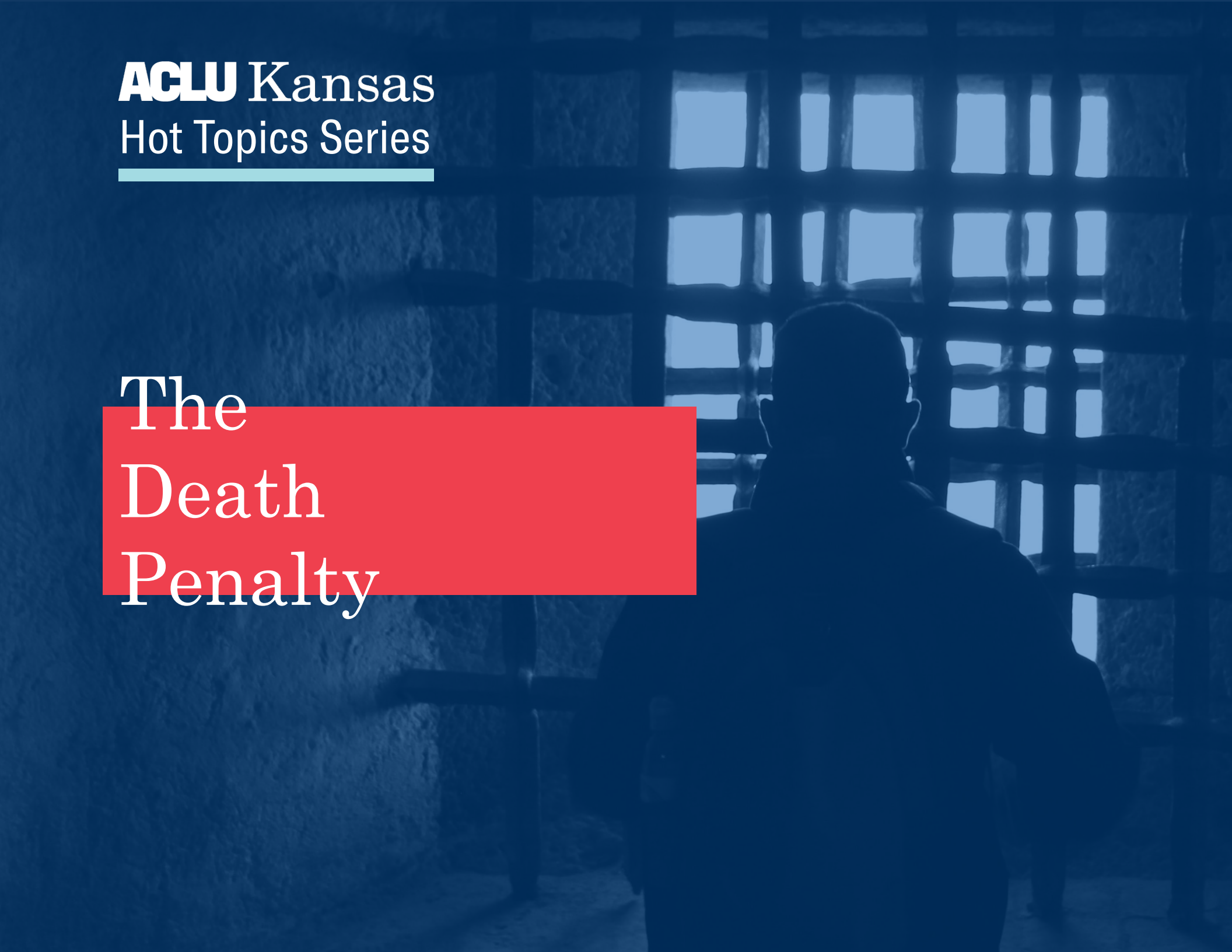


ACLU Kansas
Hot Topics Series

The
Death
Penalty



The Death Penalty

Kansas has an interesting history with the death penalty—one that has created a particular culture of ambivalence toward the practice of capital punishment in the state.

Kansas’s last execution took place in 1965. In the 1972 landmark decision *Furman v. Georgia*, the Supreme Court of the United States held “the imposition and carrying out of the death penalty in cases where it is inflicted discriminatorily upon members of racial minorities constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution,” thus invalidating and suspending the death penalty nationwide.¹ In 1976, when the Supreme Court’s decision in *Gregg v. Georgia* allowed states to reinstate the death penalty, Kansas was the last to do so.² In 1994, after 48 death penalty bills were introduced and defeated, Kansas reinstated its death penalty when Governor Finney allowed the death penalty statute to be signed into law without her signature.

Kansas is one of 27 states that maintains the death penalty. In recent years, several states—including Virginia, a leading death penalty state with a legacy of racial terror and lynchings—have abolished the death penalty. Efforts to remove Kansas’s death penalty are not new. As recently as 2021, 34 Kansas legislators came together to support a bipartisan bill to end capital punishment in the state. Legislators cited multiples reasons for their push, including the exorbitant cost of maintaining and administering the death penalty in Kansas, personal religious beliefs regarding the sanctity of life, and social justice reform.

These efforts, combined with evolving standards and awareness of the cruelty of death at the hands of the State, have rekindled an ever-present conversation about whether Kansas legally can, or morally should, continue to keep the death penalty around.

When Does the Death Penalty Apply in Kansas?

Kansas’s current statute³ governing capital murder can be applied in seven specific circumstances surrounding an intentional and premeditated murder: (1) killing a kidnapping or aggravated kidnapping victim held for ransom; (2) killing of a kidnapping or

aggravated kidnapping victim under 14 held for a sex crime; (3) killing of a victim of rape, criminal sodomy and aggravated criminal sodomy or those attempted crimes; (4) murder for hire or participation in a murder-for-hire scheme; (5) killing of any person by an inmate or prisoner held in a state correctional facility, community correctional institution

or jail; (6) killing a law enforcement officer; and (7) two or more killings at once or killings “connected together or constituting parts of a common scheme.”⁴ According to the Kansas Department of Corrections, Kansas does not have a separate “death row,” but there are currently nine men sentenced to death in Kansas who are awaiting execution.

¹ *Furman v. Georgia*, 408 US 238, 239-40 (1972).

² *Gregg v. Georgia*, 428 US 153 (1976)

³ K.S.A. § 21-5401

⁴ Amy Renee Leiker, Questions about Kansas’ death penalty answered, The Wichita Eagle (Mar. 31, 2022), <https://www.kansas.com/news/local/crime/article259911010.html>.

What Are Some Primary Concerns Associated with The Death Penalty?

The death penalty in Kansas, like much of the country, is deeply flawed. The continued threat of punishment by death fails to protect the most vulnerable, does not serve as a deterrent to crime, is costly, and can lead to the taking of innocent lives at the hands of the State.

The Death Penalty Disproportionately Punishes the Most Vulnerable

The death penalty has been exposed as a system with a long history of targeting, and punishing, the most vulnerable people in our society. The ultimate punishment disproportionately affects people of color (specifically, Black men); people with severe mental illnesses, intellectual disabilities, brain injuries, histories of serious childhood trauma and abuse; the impoverished; and young people.⁵

The death penalty has a long and storied history of racial bias and terror. Anti-death penalty advocates have found “the death penalty is a direct descendant of racial terror lynching.”⁶ In 2020, the Death Penalty Information Center released a report that “provides an in-depth look at the historical role that race has played in the death penalty and details the pervasive role racial discrimination continues to play in the administration of capital punishment today.”⁷ This report furnishes compelling evidence supporting the existence of racial bias in the modern death penalty and found that cases with white victims are more likely to be investigated and capitally charged, systemic exclusion of jurors of color in capital trials, and disproportionate sentencing of defendants of color.⁸ The findings of this report re-center the concerns brought forth in another landmark death penalty case, *McClesky v. Kemp*.

In 1987, death row prisoner Warren McClesky presented to the Supreme

Court an exhaustive study of Georgia’s death penalty by Professor David Baldus, which showed that defendants accused of killing a white person were 4.3 times more likely to receive death than those with Black victims.⁹ In a 5-4 decision, the majority—comprised of Justices William Rehnquist, Byron White, Lewis Powell, Sandra Day O’Connor, and Antonin Scalia—ruled that statistics alone could not prove a constitutional violation.¹⁰ The Court instead found racial disparities are “an inevitable part of our criminal justice system.”¹¹ A more recent look into Professor Baldus’ findings produced a new study published by the Harvard Civil Rights-Civil Liberties Law Review focusing on execution trends, rather than previously studied sentencing trends. This reinvigorated study found “the overall execution rate is a staggering seventeen times greater for defendants convicted of killing a white victim” than those involved in crimes with Black victims.¹² In the 15 cases that have resulted in a death sentence in Kansas, over 85% of the victims have been white.¹³

⁵ Death Penalty, Equal Justice Initiative, <https://eji.org/issues/death-penalty/>.

⁶ *Id.*

⁷ DNgozi Ndulue, *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty*. (2020).

⁸ *Id.*

⁹ David C. Baldus, Charles Pulaski, George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 *J. Crim. L. & Criminology* 661 (1983).

¹⁰ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

¹¹ *Id.* at 312.

¹² Scott Phillips & Justin Marceau, *Whom the State Kills*, *Harvard Civil Rights – Civil Liberties Law Review* (forthcoming 2020).

¹³ See <https://ksabolition.org/wp-content/uploads/2022-Racial-Disparity-.pdf>.

The death penalty is also ableist. In 2002, the Supreme Court ruled in *Atkins v. Virginia* that sentencing people with intellectual disabilities to death would be cruel and unusual punishment, a violation of the Eighth Amendment.¹⁴ The Court reasoned that the primary justifications supporting the application of the death penalty likely did not apply to intellectually disabled offenders because “[m]entally retarded¹⁵ persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others’ reactions.”¹⁶ This creates a higher risk of wrongful convictions and death sentences for people with intellectual disabilities as they may be more likely to falsely confess to a crime because they want to please the authorities and less able to communicate effectively with their legal team to help prepare their

defense.¹⁷ Ableism and social prejudice against people with disabilities are ever-present within the criminal legal system at large. Ending Kansas’s death penalty will play a large role in protecting the extremely vulnerable from execution and cruel and unusual punishment.

The Death Penalty is Ineffective as a Deterrent and Costly

The death penalty does not only disproportionately impact and punish the most vulnerable in our society, but it is also ineffective and costly. Given the time it takes for defendants to be sentenced, with a high likelihood of defendant’s pursuing post-conviction appeals, capital punishment simply cannot meet the conditions to be consistently and promptly employed. Further, those who commit murder oftentimes do not premeditate their crimes, therefore the threat of the ultimate punishment is not a considerable factor being weighed by those in advance of committing their

crimes.¹⁸ More than three decades of research has shown there is “no reliable evidence that the death penalty deters murder or that it protects police.”¹⁹

The death penalty is also incredibly expensive. When taking into account all the costs, from pre-trial to jury selection to incarceration and appeals, the taxpayer is paying far more to maintain the ultimate punishment than utilize life-without-parole sentences.²⁰ In Kansas, death penalty costs have been examined by the State three times. The result? Costs for death penalty cases are higher than non-death penalty cases. The 2003 Legislative Post Audit found that capital cases ending in a death sentence cost over their lifetime 70% more (\$1.2 million v. \$740,000) than similar cases in which the death penalty was not sought.²¹ The 2014 study conducted by the Kansas Judicial Council found that defense and district court costs are 3-4 times higher for trials where the death penalty is sought than for trials in similar cases where it is not sought.²² Further, from the years 2004-2011 a death penalty trial

¹⁴ Intellectual Disability and the Death Penalty, American Civil Liberties Union, <https://www.aclu.org/other/intellectual-disability-and-death-penalty>.

¹⁵ The term “mentally retarded” is frequently used in earlier judicial decisions but is now outdated. The capital community has recently pushed for the utilization of “intellectual disability” in its place.

¹⁶ Why People with Intellectual Disability are Exempt from the Death Penalty, Death Penalty Information Center, <https://deathpenaltyinfo.org/policy-issues/intellectual-disability/why-people-with-intellectual-disability-are-exempt-from-the-death-penalty>.

¹⁷ Intellectual Disability and the Death Penalty, American Civil Liberties Union, <https://www.aclu.org/other/intellectual-disability-and-death-penalty>.

¹⁸ *Id.*

¹⁹ Death Penalty, Equal Justice Initiative, <https://eji.org/issues/death-penalty/>.

²⁰ Policy Issues: Costs, Death Penalty Information Center, <https://deathpenaltyinfo.org/policy-issues/costs>.

²¹ See <https://www.ksabolition.org/wp-content/uploads/2017/02/Overview-of-Costs.pdf>.

²² *Id.*

cost the state on average \$395,762 per case versus a non-death penalty case averaging \$98,963.²³ The issue of cost is a bipartisan one, leading Republicans in some of the most conservative states in the country to condemn the death penalty as an “expensive government program that is ineffective in deterring crime.”²⁴

The ACLU has previously highlighted similar fundamental concerns to support the organization’s opposition to capital punishment: “[t]he death penalty is a waste of taxpayer funds and has no public safety benefit. The vast majority of law enforcement professionals surveyed agree that capital punishment does not deter violent crime; a survey of police chiefs nationwide found they rank the death penalty lowest among ways to reduce violent crime. They ranked increasing the number of police officers, reducing drug abuse, and creating a better economy with more jobs higher than the death penalty as the best ways to

reduce violence. The FBI has found the states with the death penalty have the highest murder rates.”²⁵

The Death Penalty Is Inaccurate and Leads to Execution of Innocent People

As if the aforementioned justifications for abolition were not enough, the death penalty has been proven to be inaccurate—leading innocent people to be wrongfully convicted and executed. Bryan Stevenson—lawyer, social justice advocate, and founder of the Equal Justice Initiative—has stated that “our death penalty treats you better if you’re rich and guilty than if you’re poor and innocent.”²⁶ Three important statistics support this statement: (1) 185 people have been exonerated and released from death row since 1973, (2) 1,532 people have been executed in the U.S. since 1973, and (3) for every nine people executed, one person on death row has been exonerated.²⁷

According to the Equal Justice Initiative, a nonprofit organization that challenges the death penalty and excessive punishment across the country, “a record 111 exonerations in 2018 involved witnesses who lied on the stand or falsely accused the defendant” and “misconduct by police or prosecutors (or both) was involved in 79% of homicide exonerations in 2018.”²⁸ These issues unsurprisingly disproportionately impact Black people with data showing “87% of Black exonerees who were sentenced to death were victims of official misconduct, compared to 67% of white death row exonerees.”²⁹ So long as the death penalty continues to exist, so too does the risk of executing an innocent person. There have been 14 wrongful convictions in the state of Kansas.³⁰ The only way to ensure an innocent Kansan is never executed is to abolish the death penalty.

²³ Death Penalty in Kansas, Kansas Legislative Research Department (Jan. 27, 2021), http://www.kslegresearch.org/KLRD-web/Publications/JudiciaryCorrectionsJuvJustice/memo_genl_deboer_death_penalty.pdf

²⁴ Death Penalty, Equal Justice Initiative, <https://eji.org/issues/death-penalty/>.

²⁵ The Case Against the Death Penalty, American Civil Liberties Union (2012), <https://www.aclu.org/other/case-against-death-penalty>.

²⁶ Bryan Stevenson, We need to talk about an injustice, TED Talks (2012), https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice/up-next?language=en.

²⁷ Death Penalty, Equal Justice Initiative, <https://eji.org/issues/death-penalty/>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See <https://ksabolition.org/wp-content/uploads/KCADP-2022-Innocence-flyer-final.pdf>