U.S. SUPREME COURT USE OF SOCIAL SCIENCE RESEARCH TO INFORM CONSTITUTIONAL CRIMINAL LAW AND PROCEDURE OPINIONS THROUGHOUT THE 2001 – 2015 TERMS

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The call for policies supported by evidence based research have increased over the past few decades. The United States Supreme Court is one of the entities that influence criminal procedure/civil liberties through their constitutional criminal procedure opinions. In 1990, Acker published a series of articles that assessed the Court's reliance on social science research in criminal cases. This study updates that research to assess how the Court has increased (or not increased) its reliance on/use of empirical research in decision-making on constitutional criminal procedure cases from the 2001 October term through the 2015 October term. It finds that the Court has increased its use of social science research but remains slightly tepid in its reliance.

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CHAPTER 1

INTRODUCTION

The United States Supreme Court is a prominent force in shaping the criminal justice policies of the United States (Stolz, 2002; Mancini & Mears, 2013).[1] The Court's opinions touch on an expansive range of criminal procedure and civil liberties issues, ranging from police-civilian interactions to cases on sentencing policy and jury decision-making (Kalven & Zeisel, 1966; Stolz, 2002; Hartley & Tillyer, 2012). Each year, as the Court issues its published judicial opinions, it creates, clarifies, and changes legal precedent. This, in turn, shapes how criminal justice is practiced on a daily basis. For example, in 2012, in *Miller v. Alabama*, the Court ruled that "the Eighth Amendment forbids a sentencing scheme that mandates a sentence of life in prison without the possibility of parole for juvenile offenders," regardless of the crime of which they are convicted. With the issuance of this opinion, dozens of states were forced to alter the manner in which they sentence select juvenile offenders.

Owing to the effect the Court's decisions can have on public policies, social scientists have long-championed the use of social science research and empirical data, to inform constitutional decision-making (Karst, 1960; Rosen, 1972; Acker, 1987; Acker; 1990b; Meares & Harcourt, 2000). These advocates have stressed the importance of evidence-based policies (or decisions), arguing that "empirical data are available and knowable – perhaps not perfectly – but reasonably reliably" and the Court should utilize the data and research when it is available (Meares &

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[1] This paper will refer to the United States Supreme Court as "the Court" hereinafter.

Harcourt, 2000, p. 743). These arguments regarding availability of social science research are fortified by a review of the availability of empirical research on criminal justice issues. For example, scholars have studied the effectiveness of *Miranda* warnings derived from the Court's decision in *Miranda v. Arizona* (1966) (Scherr & Madon, 2013; Oberlander, Goldstein, & Goldstein, 2003; Roger, Gillard, Wooley, & Fiduccia, 2011), jury decision-making, (Bowers, 2001; Lafree, 1989) the death penalty, (Daniels, 1979; Dezhbakhsh, Rubin, & Shepard, 2003) and sentencing (Wooldredge, Frank, Goulette, & Travis, 2015; Helland & Tabarrok, 2007), all of which have been labeled vital components of the criminal justice system.[2] It has been suggested that the extent to which the Court utilizes social science research in these and others areas "depends on the breadth of the rule it wishes to craft" and what motivates the Court to utilize the research (Rubin, 2011, p.185; Faigman, 2004).

This study explores whether, as the call for evidence-based policies continues to grow, the Court has made effective use of social science research in its opinions. Specifically, this dissertation looks at the frequency in which the Court cited social science research in its constitutional criminal procedure opinions in each of the terms from 2001 to 2015.

The remainder of this Introduction provides background on the rise of the use of social science research in the Court. Chapter 2 reviews the prior literature on the Court's use of social science research in rendering its opinions. Chapter 3 outlines the data and methodology used to analyze the Court's use in this study. A discussion of this study's findings and what these results

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[2] These are only a sampling of criminal procedure/ civil liberties topics that scholars have used empirical research to examine.

tell us about the future use of social science research in the Court is examined in Chapter 4. Finally, conclusions and takeaways from this study are discussed in Chapter 5.

Background

The rise of legal realism in the 1920s, a theory/paradigm that considers the social and policy implications of the law, is credited with furthering the role of social science in legal decision-making (Elliott, 1985; Pound, 1960). Legal realists encouraged the law to change as society changed and argued that the law should reflect the dynamics of human behavior (Pound, 1960). This new way of thinking further opened the doors to social scientists to provide their knowledge and findings to the courts. As Rosen (1972, p. 227) noted, "[t]he value of the Constitution depends in the final analysis on whether or not it actually provides effective and meaningful legal guidelines for a society constantly confronted by new problems and needs."

Legal realism also paved the way for the Court's seminal decision in *Brown v. Board of Education* (1954), where the Court relied on social science findings to rule that schools should no longer be racially segregated. In footnote eleven of *Brown* (1954, p. 494), the Court relied on seven social science studies to support the contention that separating children because of their race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way likely ever to be undone." The use of science to support this contention was somewhat novel at the time and drew several critics (Cook & Potter, 1964) but it also was "heralded as the beginnings of the modern era of the Court's use of social science material" (Acker, 1990b, p. 2).

The use of social science research in reaching a judicial decision with broad societal implications dovetailed with the then emerging push for evidence-based policies (outside of the

judicial context) with regard to criminal justice issues. As early as the 1920s, Ernest Burgess was building evidence to inform policy on parole decisions and recidivism (Tonry, 2012). However, the push for the use of social science research to influence policy has intensified over the last several decades (Clear, 2010; Tonry, 2012; Blumstein & Piquero, 2007; Mears, 2007; Sherman, 2013; Welsh & Farrington, 2012). This may be in large part due to the advancement of scholars in their respective disciplines (Bushway & Phiehl, 2007; Dorf, 1998; Posner, 1998; Clear, 2010) and "because the pool of contemporary knowledge has grown and changed fundamentally in the more than two centuries since the Constitution was ratified" (Faigman, 2004, p. 5). It is also due to the advancement in statistics, applied sciences, and technology generally.[3] As other have noted, social science and empirical research has been used to show the need for change, the lack of need for change, and the consequences of implementing (or not) implementing policies (Lochner, 1973; Rein, 1976; Daniels, 1979).

The Court is the body with the power, and some say the responsibility, for aligning the Constitution with a changing society.[4] Thus far, the push for the inclusion of social science research has only been moderately successful at the highest level of the judiciary (Rosen, 1972; Meares & Harcourt, 2000). This is despite the Court's 1972 sentiment in *Furman* v. *Georgia* that empirical evidence is legitimate and important (Haney & Logan, 1994).[5] This may be due in some

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[3] Examples include reproductive technology, statistical computer programs for data analysis, and industrial advances (semi-automatic weapons; smart phones) (Rustad & Koenig, 1993).

[4] For the Court's acknowledgement of this, see *Riley v. California* (2014), where a unanimous Court acknowledged the significant difference between the reasonable expectation of privacy in (1) the search of a cell phone and (2) that of the search of a traditional billfold, during a search incident to arrest.

[5] In *Furman* (1972), both the petitioner and the respondent cited empirical evidence in support of their arguments.

part to the fact that the Constitution was written and signed in 1787, prior to the age of science (Faigman, 2004) and some justices' do not view the Constitution as a "living" document (e.g. former Justice Scalia).

It may also be due to the fact that the desire to set precedent and honor precedent, a concept known as "stare decisis", means the justices' will not depart from prior rulings unless there is strong evidence as to why they should (e.g. in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992, p. 854)) the Court stated that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." One success that scholars often point to is the decision in *Ballew v. Georgia* (1978) which utilized twenty-five empirical studies on group deliberation size to find five person juries in Georgia to be unconstitutional (Bernard & Scarrow, 1980; Rustad & Koenig, 1993). In *Ballew* (1978, p. 232), Justice Blackmun wrote that "empirical data suggests that progressively smaller juries are less likely to foster effective group deliberation . . . at some point, this decline leads to inaccurate fact finding and incorrect application of the common sense of the community to the facts."[6]

The Court has not always utilized social science research accurately or appropriately. For example, in *Watkins v. Sowders* (1981), the Court ruled that eye-witness testimony was not meaningfully different than other types of testimony despite contrary evidence in the literature at

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[6] Elizabeth Tanke, a social scientist, and Tony Tanke, a lawyer, contacted the attorneys in the case and offered to gather and provide research on jury size and deliberations for them to use in their briefs and oral arguments before the Court and the attorney for the government (but not the petitioner) agreed to that assistance (Acker, 1990b).

the time that found that eye-witness testimony is often significantly flawed (Wells, 1978; Wells & Leippe, 1981; Lindsay & Wells, 1980; Tanford, 1990; Garrett, 2008; Thompson, 2009).[7]

The Court's view in *Watkins* (1981) and cases like it may be explainable. Per tradition and the Court's practice, the Court typically relies on the parties (and amicus briefs) to supply it with the relevant scientific evidence (Daniels, 1979; Rosen, 1972). The Court's power is further hampered by the fact that the parties before it are engaged in an adversarial system – which by definition, is often at odds with the goals of social science research (Frank, 1949; Rosen, 1972; Tanford, 1990; Erickson & Simon, 1998). The adversarial system encourages legal actors to use the research that supports their decision and ignore the parts that do not – which can distort the research's evidentiary value (Lindman, 1989).

In addition, social science and law tend to approach the world differently. Social science is based on data that is open to further study and interpretation. Law is based on precedent and hierarchy (Waldron, 2012). "In contrast to adversarial procedures, scientific inquiry is designed to answer questions such as whether capital punishment generally deters the commission of murder" (Acker, 1987, p.2) not whether it is appropriate constitutionally. Among other differences, social science research tends to be a continuous process and seeks to be objective and revisable, where the law traditionally seeks a decision and travels from a place of deduction vs. induction (MacHovec, 1987; Erickson & Simon, 1998). As Erickson and Simon (1998, p. 11)

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[7] Unlike in *Watkins v. Sowders* (1981) where the Court ignored science on eye-witness identification, in *Perry v. New Hampshire* (2012) the Court cited it in several places. Both the majority and the dissent in the case cited research on the likelihood of misidentification (e.g., Wells, 1998; Douglass & Steblay, 2006; Lindsay & Wells, 1980; Brewer, Keast, & Rishworth, 2002).

note, "the adversarial structure of the court, procedures, time limits, prohibitions against double jeopardy, and safeguards against procedural abuses prevent full disclosure of all relevant data and preclude or otherwise restrict the revision of decisions." Some even argue that law school may discourage future lawyers from the study and use of social science (Rosen, 1972; Mason, 1964). This conflict may explain some of the Court's hesitation in using social science research (for further discussion on this conflict, see Rosen, 1972; Driessen, 1983; Tanford, 1990; Faigman, 2004). All of this may help explain the sporadic, inconsistent use of social science by the Court.

While there has been a fair amount of research on the Court's use of social science (e.g., Faigman, 2004; Rosen, 1972; Erickson & Simon, 1998; Davis, 1986; Rustad & Koenig; 1993; Calvert, Bunker, & Bissell, 2012; Hafemesiter & Melton, 1987), little research (but see Acker, 1990a; Acker, 1990b; Meares & Harcourt, 2000; Mancini & Mears, 2013) has been performed on how common it is for the Court to use and rely on social science research in cases more generally involving criminal procedure. This is despite the reality that the Court's criminal procedure decisions have significant real-world impact on American lives (Johnson & Cannon, 1984; Acker, 1987).

Assessing the frequency and depth of utilizing social science research is important because it has been largely agreed, by social scientists, that relying on social science evidence will make a policy or judicial decision more sound and effective (Mears, 2007; Mears, 2010; Clear, 2010; Tonry, 2010; Uggen & Inderbitzin, 2010; Welsh & Farrington, 2012). Use of social science research may "improve the commonsense judgements about human behavior" directly on an issue or indirectly via background (Meares & Harcourt, 2000, p. 749). To illuminate this point, Meares and Harcourt (2000) note that the sociological research on the relationship between low income

minorities and police officers may be an indirect reason for a minority's waiver of their Miranda rights.

The inclusion of social science research in Court opinions may also improve the quality of the Court's judgments, provide transparency, and hold the Court to a greater degree of accountability (Karst, 1960; Kalven, 1968; Rosenblum 1971; Haney, 1980; Faigman, 1989; Meares & Harcourt, 2000; Faigman, 2004). It may also aid the Court in asking if the policy is needed in the first place; if current practice is being implemented the way it was intended, and whether the policy is effecting criminal justice rights in the way it was designed, all important elements in evaluating policy (Mears, 2007). According to Rosen (1972, p. xii) "[t]here are many critical and troublesome areas of constitutional law badly in need of the kind of factual illumination that be provided by science findings in the hands of a willing court."

CHAPTER 2

REVIEW OF PRIOR RESEARCH

The Court's use of social science and empirical data in constitutional decision-making is by no means novel. In 1908, the Court utilized social science research in *Muller v. Oregon* (1908), a case involving the numbers of hours in a day that a woman would be allowed to legally work. In that case, an Oregon owner of a laundry establishment was charged and convicted of violating a state statute that prohibited the employment of females in a laundry facility for more than ten hours a day. In reaching its decision, the Court considered an extensive brief submitted by Louis Brandeis, the attorney representing the state of Oregon (Brandeis would go on to be a justice himself). Within the brief, Brandeis citied several studies regarding a woman's purported limited ability to work long hours, and relied on expert opinions of American and foreign doctors to support the position that "excessive hours of labor generally endanger the health, safety and morals of women" (Craven, 1975; Rosen, 1972, p. 81). Relying, in part, on the Brandeis brief, the Court upheld Oregon's statute. Since the *Muller* decision in 1908, the Court has continued to sporadically rely on social science research in Constitutional opinions.

The first empirical study examining the Court's usage of social science research in decision-making was conducted in 1978 for the National Science Foundation. The author reviewed cases in the Court's 1954, 1959, 1964, 1969, and 1974 terms (Rosenblum, 1978; Acker, 1987). Of the total cases (n=606) reviewed, 10.4% (n=63) cited social science materials with political science being the most cited discipline, followed by economics, psychology, history, and anthropology (Rosenblum, 1978; Acker, 1987). Cases with a constitutional issue at stake were more likely to utilize social science research, criminal procedure cases being one of the two most

likely categories. Other studies have been written on social science research and the Court's use of that research on specific issues such as the death penalty or criminal law generally (Horowitz, 1977; Daniels, 1979; Haney, 1980; Levine, 1984; Bersoff, 1987; Ellsworth, 1998; Monahan & Walker, 2011; Calvert, et al., 2012; Mancini & Mears, 2013; Acker, 1990a; Acker, 1990b).

In addition, several books have been written on the subject, although the majority of them are now decades old (Rosen, 1972; Davis, 1973; Lempert & Sanders, 1986; Chesler, Sanders, & Kalmuss, 1988; Faigman, 2004).[8] As Acker (1990b, p. 2) wrote, "[r]emarkably, notwithstanding the volume of discourse (on social science research and the courts) there is almost a complete void in systematic description of even the most fundamental aspects of the Court's use of social science information."

To rectify this, Acker (1990b) used a more systematic review of criminal justice cases. Specifically, Acker examined 200 randomly selected criminal cases decided by the Court between 1958 and 1987 and found that approximately 14% of the Court's opinions cited social science research. That same study found that the Court cited social science research with generally greater frequency as each year passed – between the 1969 and 1987 terms (although there were some years where the percentages went down). It also noted that the justices directly cited briefs in 50% of the reviewed cases – most of the citations were provided by private interest groups or discovered by the Court on their own (Acker, 1990b). Furthermore, organizations with scientific expertise, such as the American Psychiatric Association or the American Medical Association, rarely participated as amicus curie. In fact, only three of the 114 amicus briefs writers were "likely to

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[8] These books have generally lacked empirical studies.

possess or have direct access to special scientific expertise" (Acker, 1990a, p. 34). This can lead to the Court relying erroneously on social science research (Saks, 1974; Mancini & Mears, 2013).

Approximately ten years later, in 2000, the *Journal of Criminal Law and Criminology* published an article that analyzed the Court's reliance on social science research to support judicial opinions. In that study, Meares and Harcourt (2000, p.736) noted that "theoretical principles cannot properly resolve difficult criminal procedure cases without the assistance of empirical evidence." This and other studies over the past twenty years have highlighted the fact that the Court relies on social science evidence (and sometimes asks for it directly or indirectly[9]) in only a small number of cases but that the trend may be increasing (Meares & Harcourt, 2000). Schauer and Wise (1997) observed a similar trend by finding an increase in empirical (non-legal) citations from 1950 to 1995. By strictly counting the citations, the authors found that there was generally no significant increase in the Court's citation of non-legal sources from 1950 to 1990 but there was generally an uptick from 1991-1995 (Schauer & Wise, 1997).

An example of an instance where the Court sought out, but did not find, empirical evidence was in 2000 when the Court decided *Illinois v. Wardlow.* In *Wardlow* (2000), the Court was grappling with whether a fleeing suspect would automatically create reasonable suspicion (Rehnquist, majority, p. 676). The Court stated that "no available empirical studies dealing with inferences drawn from suspicion behavior" existed for the Court to consider (p. 676). Therefore, they needed to rely on "commonsense judgements about human behavior" (p. 676).

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[9] See for example *Chandler v. Florida* (1981); *Haley v. Ohio* (1948); *Miranda* (1966). See also *Ferguson v. Moore-McCormick Lines* (1957, p. 547) noting that "the types of cases now calling for decision to a considerable extent require investigation of voluminous literature far beyond the law reports and other legal writings."

In a more recent study, Mancini and Mears (2013) reviewed Court decisions between 1991 and 2011 that focused on sex offenders or sexual assault crimes to ascertain whether or not the Court referenced scholarly research in its opinions on those topics. Of the seven cases pertinent to the study, all but one utilized social science research. In fact, the Court cited twenty-three scholarly works that touched on the prevalence of sex crimes, sex crimes involving children, sex offender treatment, recidivism, and victimization (Mancini & Mears, 2013).

Case Examples

The use of social science research in the Court's opinions varies with respect to the prominence placed on the research. In many cases, empirical research is simply cited on a single occasion with minimal comment or is ignored altogether. On other occasions, however, social science research plays a primary role in the Court's ultimate decision. Three cases provide illustrative examples: *Witherspoon v. Illinois* (1968), *Lockhart v. McCree* (1986), and *Untied States v. Leon* (1984).

In *Witherspoon v. Illinois* (1968), the Court affirmed the use of questioning prospective jurors during voir dire about their moral or religious objections to the death penalty and excusing those who held such objections from both the guilt and sentencing phase. In reaching its decision, the Court reviewed and rejected three social science studies that suggested that pro-death penalty jurors tended to favor the prosecution (Goldberg, 1970; Wilson, 1964; Zeisel, 1957). The Court found that the research was "too tentative and fragmentary" (p. 520). Social scientists interpreted the Court's language to suggest that further and more robust research on the topic could influence the Court in future decisions on the topic.

In 1986, the Court took up the issue of voir dire and the death penalty again in *Lockhart v. McCree*, an Arkansas case where the defendant had argued that the exclusion of anti-death penalty jurors was a violation of his constitutional rights. In the briefing before its decision, the Court was presented with an additional twenty years of research that had been conducted on the pro-prosecution leaning of "death qualified" jurors since the *Witherspoon* decision. With the aid of five social psychologists, the American Psychological Association (APA) filed an amicus curiae brief in *Lockhart* in support of defendant McCree, arguing that the exclusion of jurors who objected to the death penalty was unconstitutional. The Court was also presented with an amicus brief by twenty-six states that supported the position of the state and argued that the social science evidence was "soft" and "ambiguous" (Petitioners Brief, 1985, p. 22). The Court was unpersuaded by studies that did not utilize actual jurors noting that the study participants were not sworn in and did not look at a real case with a real defendant facing an actual death sentence. The Court stated: "[w]e have serious doubts about the value of these studies in predicting the behavior of actual jurors" (p. 171). The Court once again rejected the social science research and sided with the state.

Alternatively, in *United States v. Leon* (1984), the Court relied on empirical research in reaching it decision. *Leon* involved the application of the exclusionary rule and whether the Court should create an exception to the rule when the officer(s) had acted in "good faith." At central issue was whether the rule's underlying purpose of deterring misconduct by police officers was met when the officer had made a mistake while acting in good faith. Both the majority and the dissenting opinions relied on studies showing the effect of the exclusionary rule on deterrence – citing the studies that supported their position. The empirical evidence suggested there were so

few cases the rule would effect, that a good faith exception was not going to significantly undermine the spirit of the rule (Nardulli, 1983; Davies, 1983; Feeney, Dill, & Weir, 1983).

The goal of this study is to supplement and update the research on the Court's use of social science research in reaching its decisions. There has been only one empirical study on criminal cases for almost twenty-five years and it dealt only with sexual offenders cases (Mancini & Mears, 2013). This study also seeks to determine whether there has been an increase over time in the Court's usage of social science research in rendering its decisions.

In doing so, the scope of this study seeks to analyze and document the frequency of use of social science research in the Court's criminal procedure opinions.[10] More precisely, this study reviews every decision issued by the Court, starting with the 2001 term and continuing through the 2015 term that directly addresses constitutional criminal justice issues. As such, it analyzes and identifies those cases that deal with the interpretation and application of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments in the criminal context. The text of the Amendments to the United States Constitution that are relevant for this study are listed below.

Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land

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[10] It has been noted by scholars that judges in criminal cases are particularly likely to utilize social science research (Bernstein, 1968; Rosenblum, 1978; Haney, 1980).

or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Eighth Amendment: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding

Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The universe of these identified cases amounts to approximately 168 opinions issued by the Court.[11]

[11] Federal statute reviews, habeas cases, and opinions without arguments are excluded.

CHAPTER 3

DATA AND METHODS

The Court influences criminal procedure/civil liberties through their constitutional criminal procedure opinions. In fact, according to Mitchell & Klein (2016), the Court believes its primary function is to create law and policy.[12] Researchers suggest that the Court, like other policy makers, should rely on social science research to inform and support their opinions (Acker, 1990a; Meares & Harcourt, 2000; Rublin, 2011).

In reviewing every decision issued by the Court from the 2001 term through the 2015 term that directly speaks to constitutional criminal justice matters[13] this study furthers the research conducted several decades ago by Acker (1990b) and Rosenblum (1978). The time period of the 2001-2015 terms was chosen because it provides 15 years of cases, and provided a significant amount of cases to review. It also allows for substantial time to have passed since the studies published by Acker in 1990.

Acker (1990b, p.4) defined the occurrence of social science research evidence to include a citation by the Court "that encompassed the study of behavioral events relevant to individuals or social relations." He included the disciplines of criminal justice, economics, political science, psychology, psychiatry, social psychology, and sociology. A recorded use of social science research for Acker (1990b, p.3) was "a citation of a qualifying written reference (or expert testimony)" within a brief or a Court opinion. A similar definition was used by Erickson and Simon in their text: *The Use of Social Science Research in Supreme Court Decisions* (1998). It

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12 The authors make this assertion based on public statements several justices have made.

13 Court opinions focusing on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

was also used by Mancini and Mears (2013) and in Acker's (1990b) article on social science in Supreme Court cases. The current study uses the definition of research on social (sociology, criminal justice, political science, and economics), social psychological, and psychological issues. It is not without challenges to determine which social sciences are relevant to the creation or modification of laws, but this definition is the one scholars have generally utilized (Davis, 1973; Marvell, 1978). Historical references,[14] legal treatises, strictly medical references,[15] religious references, and philosophical references were omitted, just as they have been in previous studies on the topic (Rosenblum, 1978; Acker, 1990a; Acker, 1990b). Thus, utilizing this definition – research on social (sociology, criminal justice, political science, and economics), social psychological, and psychological issues – in the current study is in line with guidelines for quality qualitative analysis (Merriam, 2009; Berg & Lune, 2012; Strauss & Corbin, 1998).

To identify the cases relevant to this study, every case decided by the Court during the 15 Court terms of interest (n=1,153 cases) were reviewed and analyzed to determine if it was a case that dealt primary with the Fourth, Fifth, Sixth, Eighth, or the Fourteenth Amendment. Justia US Supreme Court Center online was utilized to review each case.[16] Once cases that met this study's definition of a constitutional criminal justice case were identified, each of the opinions (majority,

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[14] For an example, see *Johnson v. United States* (2015). *Johnson* cited to Gamer (1965) to support that "Justice Brewer was widely recognized as 'a leading spokesman for "substantized" due process,'... though he did not identify the constitutional source of judicial authority to nullify vague laws." This was considered a purely historical reference and not social science research.

[15] For an example, see the majority opinion in *Birchfield v. North Dakota* (2016) and its citation to Hall (2015).

[16] Cases were reviewed using https://supreme.justia.com/cases/federal/us/ and a list of the cases that met the definition of a constitutional criminal procedure case are provided in the Appendix.

concurring, and dissenting) in those 168 cases were read, reviewed, and analyzed by the instant author.[17] Specifically, each opinion was analyzed to determine whether the author of that specific opinion cited any social science research in the opinion itself. This specifically and explicitly included any citation to a law review article, peer reviewed article, government document, or book. In addition, any "other" citation that appeared to represent social science research was noted. After the citations were noted, a deeper review of the citation was conducted. Each of the cited publications were reviewed to determine if the specific citation met this study's definition of social science research.

Once identified, this study detailed which justice cited the social science research and whether they did so in a majority, concurring, or dissenting opinion. Noting the type of opinion (majority, concurring, or dissenting) in which the research is cited was considered a potentially telling factor regarding the Court's reliance and use of social science research. As such, it is hypothesized that dissenting opinions tend to utilize social science research more readily because the opinion writer is trying to justify their decision to forgo aligning with the majority position. This study also differentiates among the criminal procedure Amendments to determine if the Court utilizes research more often in evaluating certain Amendments over others (e.g., Fifth Amendment vs. Eighth Amendment cases).

This study focuses solely on those citations referenced in the Court's opinions, as opposed to those in the briefs submitted by the parties or others. Although citations do not always indicate that the reference influenced the writer (Rosenblum, 1978; Acker, 1990b; Mancini & Mears,

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[17] In over 60 of the cases reviewed, there were multiple concurring and/or dissenting opinions filed.

2013), an examination of a citation is one of the best ways to understand the reasoning behind a justice's decision (Merryman, 1954; Hafemeister & Melton, 1987; Acker 1990b). The presence of social science research in amicus and the parties' briefs is certainly important, however, this research focuses on a citation in an opinion as evidence that the court relied on it for rendering its decision.

All social science citations are noted, however, the citations are placed in five different categories of publications: (1) law review articles, (2) peer-reviewed articles, (3) government reports, (4) books, and (5) other. The category of "other" includes policy and foundation studies as well as other social science research that meets the definition but does not fall squarely into one of the other four categories. Law reviews are included for two primary reasons. One is for purposes of consistency, they are included in prior research, and two, they can contribute social facts to the Court through both descriptive and empirical studies.

The first of two examples of law review contribution was observed in *Miller El v. Dretke*, (2005) where Justice Breyer cited an empirical article from the *University of Pennsylvania Journal of Constitutional Law* on preemptory challenges and capital trials[18] to recognize that "despite *Batson*, the discriminatory use of peremptory challenges remains a problem" (Breyer, concurrence, p. 261).[19] Another example is within the dissent in *Castle Rock v. Gonzales* (2005) when the

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[18] Breyer (concurrence, 2005) cites Baldus, Woodworth, Zuckerman, Weiner, & Broffitt (2001).

[19] Preemptory challenges are utilized by attorneys in jury selection to eliminate jurors they do not want seated on the jury panel. The number available to each side is typically set by the judge and with a few exceptions (gender and race), they can be used for any reason the attorneys choose.

Court, in evaluating mandatory arrest statutes for domestic violence, cited an empirical *Pace Law Review* article to demonstrate the number of mandatory arrests in New York City for the time period that was of interest to the Court (Walsh, 1995).

The Court's negative evaluation of cited studies are also discussed in the results below. In addition, whether the Court was made aware of the citation from an amicus brief is noted.

This study seeks to supplement and update prior research on the Court's use of social science research in their written opinions. It also examines whether there has been an increase in the use of social science research by the Court over the study period. The current study makes note of any social science research that touches on social (sociology, criminal justice, political science, and economics), social psychological, and psychological issues. It is hypothesized that cases focused on particular criminal procedure Amendments, particularly the Eighth Amendment, where the Court has traditionally relied on social science and where the Court is deeply divided, will utilize more social science research to support the opinion.

In *Batson v. Kentucky* (1986), the Court ruled that the prosecution cannot use their preemptory challenges to eliminate jurors on the basis of race alone. To do so, the Court found, is a violation of a defendants rights under the Sixth and Fourteenth Amendments.

CHAPTER 4

RESULTS

This study focuses primarily on criminal procedure cases decided by the Court where Fourth, Fifth, Sixth, Eighth, or Fourteenth Amendment issues were decided. The review starts with the October 2001 term and continues through the October 2015 term (15 years). A total of 168 cases fell under this research criteria. During this time, the justices cited social science research in 67 (39.9%) of the 168 cases reviewed (Table 1).

Table 1. Summary of Cases that Cite to Social Science Research: 2001–2015 Terms

Court Term	Cases That Cite SS Research	Cases That Do Not Cite SS Research	Total Number Of Cases	Percentage of Cases That Cited SS Research
2015	3	9	12	*25%*
2014	3	5	8	*37.5%*
2013	4	4	8	*50%*
2012	3	5	8	*37.5%*
2011	8	5	13	*61.5%*
2010	6	2	8	*75%*
2009	6	9	15	*40%*
2008	4	6	10	*40%*
2007	5	1	6	*83.3%*
2006	3	10	13	*23%*
2005	6	9	15	*40%*
2004	5	10	15	*33.3%*
2003	3	10	13	*23%*
2002	2	9	11	*18%*
2001	6	7	13	*46.2%*
Total:	**67**	**101**	**168**	***39.9%***

No pattern was apparent to the Court's use of social science research (Table 1), with regards to this specific time frame. The 2007 term saw the highest use with 5 of the 6 cases citing social

science research (83.3%) followed by the 2011 term where 8 of the 13 (61.5%) cases utilized social science citations. The 2002 term had the least number of citations with the justices citing social science research in only 2 of the 11 cases relevant to this study (18%).

These findings demonstrate a higher percentage of use among the Court than was utilized in the past. Acker found in his study (1990b) that 13.8% of the criminal cases he reviewed cited social research. Rosenblum (1978) found 10.4% utilized social science citations. An important differentiation between this study and those of Acker and Rosenblum is that their studies looked at criminal cases both randomly and more generally. In comparison, this study looked exclusively at the population of 15 terms of constitutional criminal justice opinions, which generally (but not always) have a larger impact and effect on society than criminal cases that focus on habeas or invalidation of federal statutes (Faigman, 2004). In addition, it is important to note that according to scholars, constitutional criminal justice opinions tend to have a greater number of social science citations (Bernstein, 1968; Daniels, 1983; Rosenblum, 1978; Hafemesiter & Melton, 1987; Acker 1990b). Table 1 provides a summary of the general findings in this study and highlights the number of reviewed cases that cited social science research each October term. The years with the highest percentage of citations are 2007 (83.3%), 2011 (61.5%), 2013 (50%), and 2001 (46.2%).

Opinion Type

In addition to reviewing the number of cases that cited social science research, this study examined how many citations were included in the various types of opinions: majority, concurring and dissenting. This information found in Table 2 may illuminate when the Court finds it necessary to support its opinions with research findings. The results show that majority and

dissenting opinions contain the most citations. Majority and dissenting opinions are often (but not always) longer in length than concurring opinions.

Table 2 shows majority opinions produced citations in 46 of the total 67 cases [20] (68.66%) that cited social science research. Dissents cited social science research in 38 of the 55 cases in which one or more dissents were filed (69.1%). These findings indicate that the Court utilized social science research in the majority and dissenting opinions with relatively the same frequency. Social science research was cited in 17 of the 43 concurring opinions filed (39.53 %). These findings are relatively similar to Acker's findings (1990b). Table 2 illustrates the number of opinions that cited social science research as well as the total number of citations within them.

Table 2. Type of U.S. Supreme Court Opinion That Cited Social Science Research and Number of Citations within the Opinions

Opinion Type	**Cases That Cite SS Research**	**Percentage of Cases**	**Number Of Cites**	**Percentage of Cites**
Majority	46 of 67	*68.66%*	218	*40.37%*
Concurring	17 of 43	*39.53%*	100	*18.52%*
Dissenting	38 of 55	*69.1%*	222	*41.11%*

[20] For purposes of this study, one per curium citation is counted as a majority opinion citation. A per curium opinion is written in the name of the Court. The name of the individual judge who wrote the opinion is not provided. Per curium opinions are issued numerous times each term (Robbins, 2012).

Justices' Citations

Each of the justices on the Court during the 2001–2015 terms cited social science research to some degree. Due to the fact that not all justices were on the Court for the entire duration of the years reviewed, the focus is on the percentage of the opinions they each wrote in which they cited social science research. The justices' use of citations will be discussed in alphabetical order.

Justice Samuel A. Alito, Jr., a President George W. Bush appointee, joined the Court on January 31, 2006. As of this writing, Justice Alito remains on the Court. He wrote 46 of the opinions reviewed (including majority, concurring and dissenting opinions) and cited social science research in 11 of those opinions (23.91%).

Justice Stephen G. Breyer, a President William Clinton appointee, joined the Court in August of 1994 and continues to hold his seat on the Court as of this writing. Justice Breyer wrote 53 of the opinions reviewed and cited social science research in 24 of those opinions (45.28%). Justice Breyer has the highest percentage of opinions in which social science citations appeared by over 10%. Plausible reasons for this will be discussed below.

Justice Ruth Bader Ginsburg, also a President Clinton appointee, joined the Court in August of 1993. Justice Ginsburg wrote 40 of the reviewed opinions and cited social science research in eight of those opinions (20%). Her percentage was eighth largest in the group of thirteen.

Justice Elena Kagan, a President Barack Obama appointee, joined the Court in August 2010. Justice Kagan wrote 10 of the reviewed opinions and cited social science research in three of them (30%). Justice Kagan is fifth in number of citations with a slightly higher percentage than Ginsburg.

Justice Anthony M. Kennedy, a President Ronald Reagan appointee, joined the Court in February 1988. He is currently the longest serving justice on the present-day Court. Justice Kennedy wrote 44 of the reviewed opinions and cited social science research in 14 of them (31.82%). Similar to Justice Ginsburg and Justice Kagan, Justice Kennedy is in the middle of the relative-pack. He had the fourth highest percentage of citations.

Former Justice Sandra Day O'Connor, the first woman to ever serve on the Court, was appointed by President Ronald Reagan and served on the Court from September 1981 through January 31, 2006. Justice O'Connor wrote 13 of the opinions and cited social science research in 3 of them (23.10%). This was on the lower end of the group, falling seventh in line in percentage of citations.

Former Chief Justice William H. Rehnquist, a President Ronald Reagan appointee, served on the Court from September 1986 until September 2005. Justice Rehnquist wrote 11 of the opinions and cited social science research in one of them (9.10%). This was the lowest percentage of cases that cited social science research. Potential explanations for this result will be discussed below.

Current Chief Justice John Roberts, a President George W. Bush appointee, joined the Court in September 2005, and continues to serve as the Chief Justice. Chief Justice Roberts wrote 18 of the opinions and cited social science research in six of them (33.33%). His percentage is the third largest.

Former Justice Antonin Scalia, a President Ronald Reagan appointee, joined the Court in September 1986, and served on the Court until he passed away on February 23, 2016. Justice Scalia wrote 66 of the opinions (the most of any of the justices) and cited social science research

in 13 of them (19.70%). This percentage was on the lower end of spectrum. It was the ninth highest percentage.

Justice Sonia Sotomayor, a President Barack Obama appointee, joined the Court in August 2009, and continues to serve on the Court as of this writing. Justice Sotomayor wrote 26 of the opinions and cited social science research in nine of them (34.62%). Subsequent to Justice Breyer, she had the second highest percentage of opinions with social science citations.

Former Justice David A. Souter, a President George H.W. Bush appointee, joined the Court in October 1990 and served on the Court until retiring in June 2009. Justice Souter wrote 19 of the opinions and cited social science research in three of them (15.79%). He had the tenth highest percentage.

Former Justice John Paul Stevens, a President Gerald Ford appointee, joined the Court in December 1975 and remained on the Court until he retired in June 2010. Justice Stevens wrote 41 of the opinions and cited social science research in five of them (12.2%). This was the second lowest percentage of opinions with social science citations.

Lastly, Justice Clarence Thomas, a President George H.W. Bush appointee, joined the Court in October 1991 and remains on the Court as of this writing. Justice Thomas wrote 65 of the opinions reviewed and cited social science research in 10 of them (15.38%). This represents the third lowest percentage of opinions with social science citations.

There are plausible explanations for the percentage of cases in which each justice or former justice cited social science research. Although Rosenblum (1978) did not find that liberal justices (typically but not always registered with the Democratic Party) cited social science to a higher degree, Acker (1990b) did find that justices who were more liberal tended to cite social science

with a greater frequency. Some scholars have suggested that liberal justices are more likely to cite social science research because they tend to be more activist in nature and are less concerned with judicial restraint.[21] According to Rosen (1972, p. 212), liberal justices tend to "believe all knowledge is relevant to law" and thus are more likely to look outside the legal discipline for answers to questions that affect the individual. It has been suggested that liberal justices tend to side more often with the individual than with the government (Haney, 1980). To support the idea that some justices are more liberal and tend to side with the individual over the government, a study by Mitchell and Klein (2016) is worth a brief discussion.

Mitchell and Klein (2016) reviewed criminal procedure cases decided by the Court beginning with the 2010 term – and continuing through the 2012 term. [22] The authors found that Justice Alito, traditionally considered a more conservative justice, sided with the prosecution/government in 85% of the cases. Similarly, other conservative justices like Justice Thomas, sided with the government in 73% of the criminal cases and Justice Scalia sided with the government in cases 62% of the time. Justice Kennedy, who is traditionally considered a moderate justice, sided with the prosecution in 56% of the cases. On the other hand, the authors found that more liberal justices like Justice Breyer sided with the government in only 49% of the cases reviewed, while Justice Kagan sided with the government only 34% of the time. Justice Sotomayor

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[21] "A judicial activist . . . is a judge who engages in making constitutional law that cannot be firmly tied to clear constitutional language or to the intent of the Framers" whereas one who practices judicial restraint "interprets the Constitution by appealing to [its] original intent" (Luban, 1987, p. 9).

[22] The Mitchell and Klein (2016) review examined all criminal procedure cases during those three terms, it did not limit it to constitutional criminal procedure cases as this study does and the purpose of their review was different than that in this study.

ruled in favor of the government in only 33% of the cases and Justice Ginsburg ruled in line with the prosecution only 29% of the time (Mitchell & Klein, 2016). Table 3 includes a summary of the percentage of opinions in which each justice cited social science research.

Table 3. U.S. Supreme Court Justices Use of Social Science Research Citations: 2001 – 2015 Terms

Justice	Years on the Court	Party Affiliation	Opinions	Cited in	Percentage
Alito	2006-Present	Republican	46	11	23.91%
Breyer	1994-Present	Democratic	53	24	45.28%
Ginsburg	1993-Present	Democratic	40	8	20.00%
Kagan	2010-Present	Democratic	10	3	30.00%
Kennedy	1988-Present	Republican	44	14	31.82%
O'Connor	1981-2006	Republican	13	3	23.10%
Rehnquist	1986-2005	Republican	11	1	9.10%
Roberts	2005-Present	Republican	18	6	33.33%
Scalia	1986-2016	Republican	66	13	19.70%
Sotomayor	2009-Present	Democratic	26	9	34.62%
Souter	1990-2009	Republican	19	3	15.79%
Stevens	1975-2010	Republican	41	5	12.20%
Thomas	1991-Present	Republican	65	10	15.38%

Type of Publication Cited

The current study also focused on an examination of the type of social science publication that the Court cited. The reader will recall that the type of publication was assigned into one of five categories – law review articles, peer-reviewed articles, government reports, books, and other.

Law review articles were the most prevalent scholarship on which the justices relied.[23] This supports conventional wisdom and scholarship that suggests legal periodicals are more likely to be understood by trained lawyers and are assumed to have more direct relevance to the case and the justices (Grofman & Scarrow, 1980; Hafemesiter & Melton, 1987). In the instant study, there were over 200 citations to law review articles. They accounted for approximately 37% of the total citations over the time period of this study.[24] Notably, Acker (1990b) had found 22.2% in his study.

Peer reviewed articles were the second most prevalent scholarship relied upon by the justices in their written opinions. A total of 128 citations were counted which made up 23.70% of the total relevant citations. Acker (1990b) had found 15.6%. Government reports were next in prevalence with 94 citations (17%). Acker (1990b) had found 23.4 %. Books accounted for 73 of the citations (13.50%). Acker (1990b) had found 19.2%. Finally 44 "other" citations accounted for 8%. Examples of "other citations" included reports by foundations and councils.[25] It is possible that the trend of including empirical findings or discussions on social science type studies

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[23] There are several law and social science "hybrid" journals (e.g., *Law and Human Behavior*). If a source was a peer-reviewed journal it was placed in that category and if it was not, it was placed in the law review category.

[24] This is despite a comment in 2007 by Chief Justice Roberts that law review articles are not "particularly helpful for practitioners and judges" in reaching judicial decisions (Newton, 2012, p. 399).

[25] Included here for example are: National Council of Juvenile and Family Court Judges, Civil Protection Orders: A Guide for Improving Practice (2010), cited in Justice Ginsburg's Dissent in *Fernandez v. California* (2014); AAA Foundation for Traffic Safety, Measuring Cognitive Distraction in the Automobile 28 (June 2013) cited in Justice Scalia's dissent in *Navarette v. California* (2014); and Poythress, Bonnie, Monahan, Otto, & Hoge (2002) cited in *Indiana v. Edwards* (2008).

in law reviews has led to the increase of the Court's reliance and acceptance of social science research in other scholarly periodicals as well, such as peer-reviewed journals (Table 4). In addition, in the past few decades the use of technology and the accessibility of research has changed dramatically which also may account for the increase.

Table 4. Type of Research Publication Cited for the Total 540 Citations

Law Review	Gov't Report	Peer Reviewed Journal	Book	Other
201	94	128	73	44
37.0%	17.0%	23.7%	13.5%	8.0%

Constitutional Amendments

This study also sought to determine if cases involving particular Amendments were more likely to utilize social science research. Table 5 illustrates that cases with Eighth Amendment issues (such as the death penalty) were the most prevalent in citing social science research, with 214 of the 540 cites (39.63%).[26] Cases involving the Sixth Amendment (such as confrontation clause issues and ineffective assistance of counsel) had the second highest with 127 citations (23.52%).[27] Next, cases dealing with the Fourth Amendment (search and seizure issues)

[26] For example, in the case of *Glossip v. Gross* (2015), the Court decided that the use of a lethal injection drug did not violate the Eighth Amendment protection against cruel and unusual punishment.

[27] For example, in *Ohio v. Clark* (2015), the Court decided that a child's out of court statements about abuse were not subject to the confrontation clause under the Sixth Amendment because they were not considered testimonial.

comprised 83 citations (15.37%).[28] Cases involving the Fourteenth Amendment (particularly due process matters) included 78 citations (14.44%).[29] Cases focusing on the Fifth Amendment, such as controversies involving the Miranda warning had the least number of citations – 38 (7.04%).[30]

Table 5. U.S. Supreme Court Cases by Constitutional Amendment that Cite to Social Science Research: 2001–2015 Terms

Constitutional Amendment	Do Cite SS Research	Number Of Cites	Percentage
Fourth	18	83	*15.37%*
Fifth	7	38	*7.04%*
Sixth	25	127	*23.52%*
Eighth	12	214	*39.63%*
Fourteenth	5	78	*14.44%*
Total	**67**	**540**	

Criticisms of Social Science Research in the Court's Opinions

[28] For example, in *United States v. Jones* (2012), the Court decided that placing a GPS tracking device on a suspect's automobile without a warrant violated an individual's Fourth Amendment protections against unreasonable searches and seizures.

[29] For example, in *Perry v. New Hampshire* (2012), the Court ruled that the Fourteenth Amendment due process clause does not entitle a defendant to review the reliability of an out-of-court eyewitness identification.

[30] For example, in *J.D.B. v. North Carolina* (2011), the Court ruled that age should be taken into account when making a determination about whether an individual is "in custody" for purposes of a required Miranda warning.

There were two cases (five citations) where justices criticized social science research, both of which were Eighth Amendment death penalty cases. This accounted for only .01% of the total citations. The first case is *Glossip v. Gross,* (2015). In Justice Thomas' concurrence, he challenged a study cited in a dissent filed by Justice Breyer. The study, known as the Donahue study (Donahue et al., 2014) "measured the "egregiousness" (or "deathworthiness") of murders by asking lawyers to identify the legal grounds for aggravation in each case, and by asking law students to evaluate written summaries of the murders and assign "egregiousness" scores based on a rubric designed to capture and standardize their moral judgments" (Justice Thomas concurrence, *Glossip v. Gross*). Justice Thomas argued that, while the study tries to approximate the role of jurors, it was flawed in that "the results of these studies are inherently unreliable because they purport to control for egregiousness by quantifying moral depravity in a process that is itself arbitrary, not to mention dehumanizing" (Justice Thomas concurrence, *Glossip v. Gross*).

The second case was in Justice Scalia's concurrence in *Kansas v. Marsh,* (2006). In *Marsh*, Justice Scalia wrote the following:

> One study (by Lanier and Acker) is quoted by the dissent as claiming that "'more than 110' death row prisoners have been released since 1973 upon findings that they were innocent of the crimes charged, and 'hundreds of additional wrongful convictions in potentially capital cases have been documented over the past century.'" Post, at 8 (opinion of Souter, J.). For the first point, Lanier and Acker cite the work of the Death Penalty Information Center (more about that below) and an article in a law review jointly authored by Radelet, Lofquist, and Bedau (two professors of

> sociology and a professor of philosophy). For the second point, they cite only a 1987 article by Bedau and Radelet. See Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21. In the very same paragraph which the dissent quotes, Lanier and Acker also refer to that 1987 article as "hav[ing] identified 23 individuals who, in their judgment, were convicted and executed in this country during the 20th century notwithstanding their innocence." Lanier & Acker, Capital Punishment, the Moratorium Movement, and Empirical Questions, 10 Psychology, Public Policy & Law 577, 593 (2004). This 1987 article has been highly influential in the abolitionist world. Hundreds of academic articles, including those relied on by today's dissent, have cited it. It also makes its appearance in judicial decisions—cited recently in a six-judge dissent in *House v. Bell*, 386 F. 3d 668, 708 (CA6 2004) (en banc) (Merritt, J., dissenting), for the proposition that "the system is allowing some innocent defendants to be executed." The article therefore warrants some further observations.

Justice Scalia, clearly skeptical of the study the dissent had cited, goes on to call the research useless (with its failure to comment on the current system of justice), unverified, and completely lacking in credibility.[31] Social scientists in turn have not always been kind to the Court. They have criticized the Court on its inability to understand and interpret the findings before them (e.g.

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[31] The study cites to three post World War II executions (Bedau & Radelet, 1987).

Zeisel & Diamond, 1974). However, both the Court and social scientists want to seek decisions that reflect the reality of the social world (Davis, 1986; Meares & Harcourt, 2000; Faigman, 2004).

Citations Directly Cited From Amicus Briefs

Nine cases utilized amicus briefs citations in the opinions accounting for a total of 101 citations (18.70% of the 540 citations in the study). In some cases, the Court may receive as many as 50 amicus briefs.[32] One case that utilized amicus briefs and the studies it provided was *Graham v. Florida* (2010). Over half of the citations in the opinions in *Graham* were those provided by amici curie. The case dealt with the constitutionality of a life without parole sentence for a juvenile convicted of a non-homicidal offense. The Court utilized research on the juvenile's ability to participate in their own defense (Henning, 2005) as well as several studies provided by the American Medical Association and the American Psychological Association.

The instant study only evaluated amicus briefs if the Court cited to those briefs. Other studies have more generally looked at the contributions of amicus briefs to the Court's understanding of social science research (Rosenblum, 1978; Acker, 1987; Acker, 1990a; O'Connor & Epstein, 1981; Bradley & Gardner, 1985; Songer & Sheehan, 1993). Some of the findings of these studies included an analysis of the volume (or lack thereof) of amicus briefs filed in criminal cases (Morris, 1987).

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[32] See for example *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992).

CHAPTER 5

DISCUSSION AND SUGGESTIONS FOR FUTURE RESEARCH

Rosen (1972, p.116) noted that "the Court's cautious approach to the temple of social science, and the underlying tension between law and social science, are understandable in terms of the distinct and fundamental physiological styles . . . of the two disciplines . . . law is a particular art, while social science is ultimately a theoretical pursuit." It should not be surprising that the Court has been cautious in its use of social science to interpret constitutional criminal procedure cases when much of that research is tentative (Fahr, 1961).

Previous literature observed and suggested an increase by the Court in use of social science research over the years. It is important to note that research did not deal specifically with constitutional criminal procedure opinions. However, a percentage of those studies examined criminal law and procedure generally, or focused on specific areas of criminal procedure such as sex offender related cases. This study saw more use generally than previous research but there was no direct linear increase over time in this study. The percentage ranged from 46% one year to 18% the next to 23% the next (Table 1). There are several explanations for this. One is the identification of the author of the opinion, as it was observed that some justices tend to utilize social science research more than others (Table 3). It may also be explainable by the diversity of type and number of cases on each Amendment heard each term as cases with particular Amendments saw a higher percentage of use (Table 5).

Another plausible explanation is the fact that some constitutional criminal law cases would not be aided from the support or illumination provided by social science research. Two examples illustrate this point. *Evans v. Michigan* (2013), (a case heard during the 2012 term) asked the

Court to consider whether it is a Fifth Amendment double jeopardy violation for an individual to be retried when the judge erroneously dismisses a case at the close of the government's presentation of evidence. In *Evans*, the Court concluded 8-1 that it was a Fifth Amendment violation and double jeopardy attached, meaning a defendant could not be retried. Besides providing data to the Court on how often an erroneously dismissal happens, there may be little to no need to provide or rely on additional research in this case.

Another example of when the social science research may not be particularly helpful to the Court's decision-making was reflected in the case of *Brendlin v. California* (2007). *Brendlin* dealt with the Fourth Amendment and asked the Court to decide whether a passenger in a stopped car has standing to challenge a traffic stop of the vehicle by law enforcement.[33] The Court ruled that the passenger did have such standing. Social science may not be particularly useful to answer the specific question at issue in *Brendlin*.

There are cases where the Court did not cite research but relevant social science research existed and was ignored. For example, in *Smith v. Cain* (2012) a Fourteenth Amendment case on eye-witness identification, the court did not utilize research to support the opinion that when the incriminating evidence against an offender is a single eyewitness, it is a *Brady* violation for the prosecution to withhold identification statements that contradict the incriminating statement. The Court could have discussed the research on the fragility of eye-witness testimony.[34]

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[33] Standing refers to an individual's right to bring a cause of action on their behalf.

[34] See for example Garrett (2008); Gross, Jacoby, Matheson, & Montgomery (2005); Thompson (2009).

The Justices' View on Social Science Research

In 2004, Daniel Faigman wrote a book about the Court's 200 plus year struggle to integrate social science and the law. In doing so, he asked each of the justices serving on the Court at the time if they would give their perspective on the dynamic. Three of the justices, Justice Breyer, Justice O'Connor, and Justice Stevens agreed to speak with Faigman. Their perspectives are an important component to understanding the use of social science by the Court.

In these conversations, Justice Breyer suggested that scientific research comes to the Court's attention mostly through the amicus briefs filed on the case which he called "a particularly rich source of data" (Faigman, 2004, p. 359). Notably, in this study, only 18.70% of the citations were attributed to amicus briefs.[35] According to Faigman (2004), Justice O'Connor and Justice Stevens were not as supportive of amicus briefs because the information cited in them in many cases has not been through "the adversarial process" (Faigman, 2004, p. 359).

Faigman also asked the justices if appointing a special master or court appointed expert at the high court level would be helpful to them in some cases. They responded that they had used something along those lines in a recent internet obscenity case. In that case, they went to the Court's law library and were shown a demonstration on the different software available to protect children from accessing pornography on a computer.[36] However, despite that somewhat unique

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[35] Just because the amicus briefs were not cited to directly does not mean they did not have an impact on the opinion writer (Merryman, 1954; Hafemeister & Melton, 1987; Acker 1990b).

[36] Neither Fagiman nor the justices mentioned which case they were referring to, but upon a search of the cases around the time of the interviews, it was likely *United States v. American Library Association* (2003), which challenged the constitutionality of Congress's Child Internet Protection Act. This act required that libraries install pornography filtering software on all internet terminals in order to receive federal funding.

occasion, the justices did not appear to be seeking out independent assistance on a regular basis, telling Faigman that it would be an unusual practice (2004).

Justice Breyer, the justice who cited more social science than others in this current study, interestingly stated that "it is very rare that general sociological facts will give you a specific answer to a legal problem" (p. 361). When Faigman asked him about the *Brown* (1954, p. 361) case, where scholars champion the Court's use of empirical studies on race and feelings of inferiority of the child, Breyer stated "[it] did not take sociological evidence to tell this Court that racial segregation was deleterious to black school children" (p. 361). Justice Breyer appears to suggest that while not dispositive, social science research may simply provide support for a given decision. It appears the Court uses social science when it is believes it would be helpful to substantiate their reasoning and conclusions and it chooses to disregard it (or not go looking for it) when the Court or individual justice perceives it will not.

Citations Relevance

Interestingly the citations do not always seem relevant to the ultimate decision. For example in *Utah v. Strieff* (2016), a Fourth Amendment case, the Court decided that evidence discovered as a search incident to a lawful arrest on an outstanding warrant should not be suppressed despite the fact that the warrant search was conducted as a result of an illegal *Terry* stop (1968). In her dissent, Justice Sotomayor cited research that found individuals with an arrest record face difficulties in employment and housing.[37] This is important because it highlights the

[37] Justice Sotomayor cited scholarship by Chin (2012); Jacobs (2015); and Young & Petersilia (2016) to support the notion that an arrest record may have detrimental effects on an individual arrestee's future.

effect of an unconstitutional stop/seizure that ends in an arrest but it is not dispositive of the specific constitutional issue before the Court. However, what is unclear is how much weight the studies had in forming Justice Sotomayor's dissenting opinion or why she decided to cite the studies she did. It is plausible the Court utilizes some form of their own test of scientific evidence articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993).

Federal courts routinely allow expert testimony on a variety of topics, as long as the proposed testimony, among other things, meets the requirements that were set forth in the seminal case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993). The case, formally shifted power from juries to judges, in terms of expert testimony (Saks & Faigman, 2005). *Daubert* analogized the role of judges to that of a gatekeeper (Monahan & Walker, 2011). As gatekeeper, the judge must find that the methods utilized by the proposed expert are reliable, based on scientific knowledge, and applicable to the issue in the case at hand. The proposed testimony must assist the trier of fact – meaning, among other things, that the proposed technique relied upon by the expert has been subjected to peer review or is otherwise reliable. Notably and tellingly, when the Court decided *Daubert*, it relied on, and cited to numerous scientific articles.

In this way, following *Daubert*, judges and courts are already primed to evaluate social science experts and research and determine its/their reliability. In fact, federal trial judges perform this exact exercise in most trials that they oversee. However, not all judges think this is an appropriate role for judges to play. In his dissent to the *Daubert* opinion, former Chief Justice Rehnquist opined that the *Daubert* majority ruling placed too much responsibility on judges and forced them to become "junior social scientists," a role that he was uncomfortable in assuming

(1993). However, *Daubert* may shed some light on how the justice's weigh the evidence they cite in their opinions.

The Various Channels to Reach the Court

The Court has conduits between itself and social scientists. However, questions remain on whether they are being used effectively (Davis, 1986). Acker (1987, p. 699) notes that "a major impediment to the judicial use of social science research is the lack of systematic procedures to bring it to the attention of the Court." Faigman (2004) echoes this sentiment in arguing that the Court learns of social science research in an arbitrary way. The main channels are the parties' briefs, amicus briefs, Brandeis briefs,[38] and the individual justice's own research (and that of their clerks).

Several other avenues have been suggested including re-briefs by the parties on the social science facts relevant to the issue before the Court – which Acker (1987) noted would be somewhat adversarial and subject to cherry picking of studies.[39] Other scholars have suggested that the Court should utilize a research service, just as Congress does (Davis, 1986).[40] This suggestion is not new and according to the fact that it has not been acted upon and Faigman's (2004) conversations with the three justices, it does not appear likely to occur anytime soon. For the time being, when materials are not presented to them in the briefs, justices utilize their own research skills or that of

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[38] Brandeis briefs contain "policy-oriented extra-legal arguments" (Rustad & Koenig, 1993, p. 20). According to scholars, these are not filed frequently (Davis, 1986).

[39] A re-brief would entail the Court asking the parties to submit a new brief on the particular issue the Court is grappling with at the time.

[40] Congress utilizes the Congressional Research Service (CRS). Its goal is to provide neutral and non-partisan policy research and analysis to aid Congress in its functions (https://www.loc.gov/crsinfo/).

their clerks (Bernstein, 1968; Marvell, 1978; Acker, 1990b; Faigman, 2004; Mancini & Mears, 2013).

CHAPTER 6

CONCLUSION

Law is based on human behavior and cases have come to the Court (and will continue to do so) that call for social science to inform and support judicial decision-making (Rosen, 1972). The results of this study are a modern update on studies conducted in the late 1970s (Rosenblum, 1978) and the early 1990s (Acker, 1990a; Acker 1990b).

One goal of this study is to encourage social scientists to find avenues to provide the best, most supported evidence to the Court to aid in decisions that might benefit from it. Rosen (1972, p. 201) notes that if "the Court does not use social science findings to define problematic fact situations, then constitutional principles will probably be interpreted in the context of facts that are derived from sources far less reliable than social science." Another goal of this study is to remind social scientists of the importance of conducting value free research on social issues and remind them of the impact their work can have on policy created at the highest levels of our criminal justice system. The integrity and reliability of that research cannot be overstated. The expectation is that this paper will also promote further research on the Court's use of social science research in constitutional criminal procedure cases and how social scientists can effectively contribute to the Court's decision-making.

Like any social science study, there are some weaknesses of this study that need to be acknowledged. This study focuses on constitutional criminal procedure opinions which makes it difficult to compare directly to previous studies where criminal cases were looked at more generally. This limits the generalizability of the findings. The study period saw several shifts in

the make-up of the Court. In addition, the issues before the Court are not always predictable with some years seeing more types of a particular case.

Admittedly, there is some interpretation that must be made by the researcher in this study to determine if a citation falls into the definition of social science research used both in this and previous studies. In an ideal world, multiple trained researchers should be employed to review the cases to ensure the study's internal validity.

For the Court to continue use of social science research, social scientists need to ensure that they provide the best-available, accurate, evidence-based research to the Court through current or new avenues. Social science can provide observed and recorded descriptions of societal behavior. "It can explain the etiology of social behavior, the effects of law on social behavior, the probable consequences of legal decisions, and how values or goals can best be realized" (Rosen, p. 225). One way to bring more social science into the law is to train law students on how it may be used to aid and support law and policy for "reliance on evidence about the real world in very real world criminal justice cases will make these decisions better" (Meares & Harcourt, 2000, p. 746).[41]

This research was conducted with the understanding that not every constitutional criminal case requires social science research and not every case that does require social science research will have that social science research available. Future research should consider also including all

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[41] There is a course at UCLA Law School titled "Social Science and the Constitution." A brief description of the course includes the following: "Social science lurks in the background of many court decisions – especially in major cases involving broad social and regulatory questions – but doctrinal courses rarely have the leisure to delve into the making and interpretation of this research." (See https://curriculum.law.ucla.edu/Guide/InstructorCourse/1190?i=160, visited 2/20/2017).

criminal law opinions instead of focusing just on the Constitutional criminal procedure Amendments included in this study. It may also want to consider the role that criminological theory may play in advancing social science research in the Courts. Future research should also consider addressing additional questions that remain such as: (1) when the Court should utilize social science research; (2) what issues would benefit from it; (3) at what point is social science research ready to render support in a decision; and (4) how research should be evaluated before the Court relies on it. It is worthwhile for future research to both ask these questions and try to answer them.

APPENDIX

CASES REVIEWED

Case Name	Citation	Term
Utah v. Strieff	579 U.S. ___ (2016)	2015-2016
Birchfield v. North Dakota	579 U.S. ___ (2016)	2015-2016
U.S. v. Bryant	579 U.S. ___ (2016)	2015-2016
Puerto Rico v. Sanchez Valle	579 U.S. ___ (2016)	2015-2016
Hurst v. Florida	577 U.S. ___ (2016)	2015-2016
Luis v. U.S	578 U.S. ___ (2016)	2015-2016
Betterman v. Montana	578 U.S. ___ (2016)	2015-2016
Foster v. Chatman	578 U.S. ___ (2016)	2015-2016
Kansas v. Carr	577 U.S. ___ (2016)	2015-2016
Montgomery v. Louisiana	577 U.S. ___ (2016)	2015-2016
Musacchio v. United States	577 U.S. ___ (2016)	2015-2016
Welch v. United States	578 U.S. ___ (2016)	2015-2016
Williams v. Pennsylvania	579 U.S. ___ (2016)	2015-2016
City of Los Angeles v. Patel	576 U.S. ___ (2015)	2014-2015
Ohio v. Clark	576 U.S. ___ (2015)	2014-2015
Glossip v. Gross	576 U.S. ___ (2015)	2014-2015
Heien v. North Carolina	574 U.S. ___ (2014)	2014-2015
Rodriguez v. United States	575 U.S. ___ (2015)	2014-2015
City of San Francisco v. Sheehan	575 U.S. ___ (2015)	2014-2015
Kerry v. Din	576 U.S. ___ (2015)	2014-2015
Kingsley v. Henderson	576 U.S. ___ (2015)	2014-2015
Johnson v. United States	576 U.S. ___ (2015)	2014-2015

Fernandez v. California	571 U.S. ___ (2014)	2013-2014
Navarette v. California	572 U.S. ___ (2014)	2013-2014
Riley v, California	573 U.S. ___ (2014)	2013-2014
Hall v. Florida	572 U.S. ___ (2014)	2013-2014
Plumhoff v. Rickard	569 U.S. ___ (2013)	2013-2014
Kansas v. Cheever	571 U.S. ___ (2013)	2013-2014
Burt v. Titlow	571 U.S. ___ (2013)	2013-2014
Hinton v. Alabama	571 U.S. ___ (2014)	2013-2014
Missouri v. McNeely	569 U.S. ___ (2013)	2012-2013
Salinas v. Texas	570 U.S. ___ (2013)	2012-2013
Chaidez v. U.S.	568 U.S. ___ (2013)	2012-2013
Bailey v. U.S	568 U.S. ___ (2013)	2012-2013
Florida v. Harris	568 U.S. ___ (2013)	2012-2013
Florida v. Jardines	569 U.S. ___ (2013)	2012-2013
Maryland v. King	569 U.S. ___ (2013)	2012-2013
Evans v. Michigan	568 U.S. ___ (2013)	2012-2013
Alleyne v. U.S	570 U.S. ___ (2013)	2012-2013
Jones v. United States	565 U.S. ___ (2012)	2011-2012
Messerschmidt v. Milender	565 U.S. ___ (2012)	2011-2012
Florence v. Bd. of Free…	566 U.S. ___ (2012)	2011-2012
Missouri v. Frye	566 U.S. ___ (2012)	2011-2012
Lafler v. Cooper	566 U.S. ___ (2012)	2011-2012
Williams v. Illinois	566 U.S. ___ (2012)	2011-2012
Miller v. Alabama	567 U.S. ___ (2012)	2011-2012
Perry v. New Hampshire	565 U.S. ___ (2012)	2011-2012
Howes (Warden) v. Fields	565 U.S. ___ (2012)	2011-2012
Blueford v. Arkansas	566 U.S. ___ (2012)	2011-2012

Southern Un. Co. v. United States	567 U.S. ___ (2012)	2011-2012
Minneci v. Pollard	565 U.S. ___ (2012)	2011-2012
Smith v. Cain	565 U.S. ___ (2012)	2011-2012
Davis v. United States	564 U.S. ___ (2011)	2010-2011
J.D.B. v. North Carolina	564 U.S. 261 (2011)	2010-2011
Michigan v. Bryant	562 U.S. 344 (2011)	2010-2011
Bullcoming v. New Mexico	564 U.S. 647 (2011)	2010-2011
Brown v. Plata	563 U.S. 493 (2011)	2010-2011
Kentucky v. King	563 U.S. 452 (2011)	2010-2011
Ashcroft v. Al-Kidd	563 U.S. 731 (2011)	2010-2011
Maryland v. Shatzer	559 U.S. 98 (2010)	2009-2010
Berghuis v. Thompkins	560 U.S. 370 (2010)	2009-2010
Padilla v. Kentucky	559 U.S. 356 (2010)	2009-2010
Porter v. McCollum	558 U.S. 30 (2009)	2009-2010
Berghuis v. Smith	559 U.S. 314 (2010)	2009-2010
Graham v. Florida	560 U.S. 48 (2010)	2009-2010
Michigan v. Fisher	558 U.S. 45 (2009)	2009-2010
City of Ontario v. Quon	560 U.S. 746 (2010)	2009-2010
Florida v. Powell	559 U.S. 50 (2010)	2009-2010
Bobby v. Van Hook	558 U.S. 4 (2009)	2009-2010
Wong v. Belmontes	558 U.S. 15 (2009)	2009-2010
Jefferson v. Upton	560 U.S. 284 (2010)	2009-2010
Presley v. Georgia	558 U.S. 209 (2010)	2009-2010
Skilling v United States	561 U.S. 358 (2010)	2009-2010
Smith v. Spisak	558 U.S. 139 (2010)	2009-2010
Herring v. United States	555 U.S. 135 (2009)	2008-2009
Arizona v. Gant	556 U.S. 332 (2009)	2008-2009

Kansas v. Ventris	556 U.S. 586 (2009)	2008-2009
Melendez-Diaz v. Mass.	557 U.S. 305 (2009)	2008-2009
Arizona v. Johnson	555 U.S. 323 (2009)	2008-2009
Safford Sch. Dist. v. Redding	557 U.S. 364 (2009)	2008-2009
Montejo v. Louisiana	556 U.S. 778 (2009)	2008-2009
Vermont v. Brillon	556 U.S. 81 (2009)	2008-2009
Knowles v. Mirzayance	556 U.S. ___ (2009)	2008-2009
Oregon v. Ice	555 U.S. 160 (2009)	2008-2009
Giles v. California	554 U.S. 353 (2008)	2007-2008
Virginia v. Moore	553 U.S. 164 (2008)	2007-2008
Indiana v. Edwards	554 U.S. 164 (2008)	2007-2008
Baze v. Rees	553 U.S. 35 (2008)	2007-2008
Kennedy v. Louisiana	554 U.S. 407 (2008)	2007-2008
Snyder v. Louisiana	552 U.S. 472 (2008)	2007-2008
Cunningham v. California	549 U.S. 270 (2007)	2006-2007
Schriro v. Landrigan	550 U.S. 465 (2007)	2006-2007
Gonzales v. Carhardt	550 U.S. 124 (2007)	2006-2007
Wallace v. Kato	549 U.S. 384 (2007)	2006-2007
Scott v. Harris	550 U.S. 372 (2007)	2006-2007
Los Angeles County v. Rettele	550 U.S. 609 (2007)	2006-2007
Brendlin v. California	551 U.S. 249 (2007)	2006-2007
Wilkie v. Robbins	551 U.S. 537 (2007)	2006-2007
Whorton v. Bockting	549 U.S. 406 (2007)	2006-2007
Ayers v. Belmontes	549 U.S. 7 (2006)	2006-2007
Uttecht v. Brown	551 U.S. 1 (2007)	2006-2007
Panetti v. Quarterman	551 U.S. 930 (2007)	2006-2007
Erickson v. Pardu	551 U.S. 89 (2007)	2006-2007

Georgia v. Randolph	547 U.S. 103 (2006)	2005-2006
Hudson v. Michigan	547 U.S. 586 (2006)	2005-2006
Samson v. California	547 U.S. 843 (2006)	2005-2006
Clark v. Arizona	548 U.S. 735 (2006)	2005-2006
Brown v. Sanders	546 U.S. 212 (2006)	2005-2006
Kansas v. Marsh	548 U.S. 163 (2006)	2005-2006
Davis v. Washington	547 U.S. 813 (2006)	2005-2006
Holmes v. South Carolina	547 U.S. 319 (2006)	2005-2006
Brigham City v. Stuart	547 U.S. 398 (2006)	2005-2006
United States v. Grubbs	547 U.S. 90 (2006)	2005-2006
Washington v. Recuenco	548 U.S. 212 (2006)	2005-2006
United States v. Gonzalez-Lopez	548 U.S. 140 (2006)	2005-2006
Dixon v. United States	548 U.S. 1 (2006)	2005-2006
Oregon v. Guzek	546 U.S. 517(2006)	2005-2006
Day v. McDonough	547 U.S. 198 (2006)	2005-2006
Florida v. Nixon	543 U.S. 175 (2004)	2004-2005
Roper v. Simmons	543 U.S. 551 (2005)	2004-2005
Miller-El v. Dretke	545 U.S. 231 (2005)	2004-2005
Deck v. Missouri	544 U.S. 622 (2005)	2004-2005
Castle Rock v. Gonzales	545 U.S. 748 (2005)	2004-2005
Illinois v. Caballes	543 U.S. 405 (2005)	2004-2005
Devenpeck v. Alford	543 U.S. 146 (2004)	2004-2005
Muehler v. Mena	544 U.S. 93 (2005)	2004-2005
Brosseau v. Haugen	543 U.S. 194 (2004)	2004-2005
Johnson v. California	543 U.S. 499 (2005)	2004-2005
Bradshaw v. Stumpf	545 U.S. 175 (2005)	2004-2005
Rompilla v. Beard	545 U.S. 374 (2005)	2004-2005

Smith v. Massachusetts	543 U.S. 462 (2005)	2004-2005
Johnson v. California	543 U.S. 499 (2005)	2004-2005
Halbert v. Michigan	545 U.S. 605 (2005)	2004-2005
Blakely v. Washington	542 U.S. 296 (2004)	2003-2004
Crawford v. Washington	541 U.S. 36 (2004)	2003-2004
Missouri v. Seibert	542 U.S. 600 (2004)	2003-2004
Illinois v. Lidster	540 U.S. 419 (2004)	2003-2004
Maryland v. Pringle	540 U.S. 366 (2003)	2003-2004
Thornton v. United States	541 U.S. 615 (2004)	2003-2004
Hibel v. 6th D. Court of Nevada	542 U.S. 177 (2004)	2003-2004
United States v. Banks	540 U.S. 31 (2003)	2003-2004
Groh v. Ramirez	540 U.S. 551 (2004)	2003-2004
United States v. Flores-Montano	541 U.S. 149 (2004)	2003-2004
Fellers v. United States	540 U.S. 519 (2004)	2003-2004
United States v. Patane	542 U.S. 630 (2004)	2003-2004
Iowa v. Tovar	541 U.S. 77 (2004)	2003-2004
Ewing v. California	538 U.S. 11 (2003)	2002-2003
Lawrence v. Texas	539 U.S. 558 (2003)	2002-2003
Kaupp v. Texas	538 U.S. 626 (2003)	2002-2003
Chavez v. Martinez	538 U.S. 760 (2003)	2002-2003
Conn. Dept. of Public Safety v. Doe	538 U.S. 1 (2003)	2002-2003
Lockyer v. Andrade	538 U.S. 63 (2003)	2002-2003
Woodford v. Visciotti	537 U.S. 19 (2002)	2002-2003
Early v. Packer	537 U.S. 3 (2002)	2002-2003
Price v. Vincent	538 U.S. 634 (2003)	2002-2003
Sattazahn v. Pennsylvania	537 U.S. 101 (2003)	2002-2003
Wiggins v. Smith	539 U.S. 510 (2003)	2002-2003

United States v. Drayton	536 U.S. 194 (2002)	2001-2002
United States v. Knights	534 U.S. 112 (2001)	2001-2002
Harris v. United States	536 U.S. 545 (2002)	2001-2002
United States v. Ruiz	536 U.S. 622 (2002)	2001-2002
Mickens v. Taylord States	535 U.S. 162 (2002)	2001-2002
Kirk v. Louisiana	536 U.S. 635 (2002)	2001-2002
Alabama v. Shelton	535 U.S. 654 (2002)	2001-2002
Bd of Ed. Pott. Cty. v. Earls	536 U.S. 822 (2002)	2001-2002
McKune v. Lile	536 U.S. 24 (2002)	2001-2002
Atkins v. Virginia	536 U.S. 304 (2002)	2001-2002
Ring v. Arizona	536 U.S. 584 (2002)	2001-2002
Bell v. Cone	535 U.S. 685 (2002)	2001-2002

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BIOGRAPHICAL SKETCH

Michele Bisaccia Meitl was born in Brooklyn, NY. After completing her schoolwork at Monte Vista High School in Danville, CA in 1998, Michele attended The University of California, Santa Barbara. She received a Bachelor of Arts in Law and Society in 2002. During the following three years, she attended and graduated from law school in Washington, D.C. Michele worked as an attorney for seven years. She received her Master's in Criminal Justice from ASU in 2012. In August 2013, she entered Graduate School at The University of Texas at Dallas.

CURRICULUM VITAE

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ACADEMIC POSITIONS

THE UNIVERSITY OF TEXAS AT DALLAS, School of Economic, Political and Policy Sciences

August 2014 – Present

Course Instructor for the Following Courses:

Courts and Criminal Prosecution (Fall 2014, Fall 2015)

Crime and Civil Liberties (Spring 2015, Spring 2016, Spring 2017)

Criminal Law (Fall 2016)

Served as Graduate Teaching Assistant for the Following Courses:

Criminal Justice (Fall 2013, Spring 2014)

Criminal Procedure (Fall 2013, Summer 2014)

SOUTHERN METHODIST UNIVERSITY, Meadows School of the Arts

June 2013 – Present

Adjunct Lecturer for the Following Course:

Free Speech and the First Amendment (Summer 2013, Summer 2014, Summer 2015, Summer 2016)

ARIZONA STATE UNIVERSITY, School of Criminology and Criminal Justice

January 2013 – Present

Faculty Associate Online for the Following Courses:

Crime Control Policies (Spring 2015, Spring 2016, Fall 2016)

Advanced Criminological Theory (Spring 2016)

Corrections (Spring 2013, Fall 2013)

Criminology (Spring 2013, Spring 2014, Fall 2014, Fall 2015, Fall 2016)

Law and Social Control (Fall 2013)

Criminal Justice (Spring 2014, Fall 2014)

Served as Graduate Teaching Assistant for the Following Courses:

Discretionary Justice (Fall 2012)

Corrections (Fall 2012)
Domestic Terrorism (Summer 2012)
Sex Crimes (Summer 2012)
Procedural Criminal Law (Spring 2012)

KENTUCKY WESLEYAN COLLEGE, ONLINE PROGRAM

June 2016

Adjunct Instructor for the Following Course:

Criminal Procedure (Summer 2016)

EDUCATION

THE UNIVERSITY OF TEXAS AT DALLAS, School of Economic, Political, and Policy Sciences, Criminology Program

Ph.D. Candidate (ABD), Criminology, August 2013- Present (May 2017 expected graduation)

ARIZONA STATE UNIVERSITY, School of Criminology and Criminal Justice

MA, Criminal Justice, December 2012

THE CATHOLIC UNIVERSITY OF AMERICA, Columbus School of Law

JD, May 2005

Activities: Journal of Contemporary Health Law and Policy, Production Editor

UNIVERSITY OF CALIFORNIA AT SANTA BARBARA

BA, Law and Society, June 2002

Honors: Law and Society Honors Program

PROFESSIONAL EXPERIENCE

DC BAR PRO BONO PROGRAM

***Staff Attorney and Training Manager*, July 2008-March 2012**

- Recruited, mentored, and facilitated the work of other pro bono attorneys in the District of Columbia.
- Directly advised and assisted clients in need of pro bono legal assistance on a variety of topics, including landlord-tenant, bankruptcy, domestic and family disputes, veteran's affairs, and other issues.

- Managed and implemented training programs.
- Assisted with the design of service delivery models to address unmet legal needs in the indigent population.
- Supervised and assisted in administration of a variety of legal clinics, including the Advocacy & Justice Clinic, Advice & Referral Clinic, and other community-based and court-based clinics.
- Represented indigent clients in D.C. Family Court.
- Assisted in drafting and revision of form pro se court filings.

AMERICAN BAR ASSOCIATION DEATH PENALTY REPRESENTATION PROJECT

***Staff Attorney*, November 2006-July 2008**

- Recruited and trained attorneys for capital cases provided ongoing support during the life of the case.
- Assisted with implementation of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.
- Managed the death penalty practice area of www.probono.net/deathpenalty.
- Coordinated death penalty programs, including recruitment meetings and facilitate ABA co-sponsorship of capital training programs.

THE HONORABLE WENDELL P. GARDNER, JR., SUPERIOR COURT

***Law Clerk,* August 2005-August 2006**

- Served as the sole law clerk for Judge assigned Felony I calendar (homicides) in D.C. Superior Court.
- Conducted legal research for the Judge on trial and sentencing issues.
- Advised and consulted Judge on evidentiary matters.
- Drafted and revised jury instructions, findings of fact and conclusions of law, responses to motions.

PUBLIC DEFENDERS SERVICE, MENTAL HEALTH DIVISION WASHINGTON, DC
***Student Law Clerk and Investigator,* Fall 2003**

- Interviewed clients facing probable cause and commission hearings; advised clients of their legal rights.
- Drafted memoranda for supervising attorneys; conducted research on criminal law and mental illness.

PEER REVIEWED PUBLICATIONS

- **Meitl, Michele Bisaccia**, Piquero, Nicole Leeper, and Piquero, Alex R. "Predicting the Length of Jury Deliberations." Forthcoming in *Journal of Crime and Justice*.
- Powell, Zachary, **Meitl, Michele Bisaccia**, Worrall, John. "Police Consent Decrees and Section 1983 Civil Rights Litigation." Forthcoming in *Criminology and Public Policy*.
- Piquero, Nicole Leeper, **Meitl, Michele Bisaccia**, Brank, Eve. M., Woolard, Jennifer, L., Lanza-Kaduce, Lonn, and Piquero, Alex. R. "Exploring Lawyer Misconduct: An Examination of the Self-Regulation Process." *Deviant Behavior*.
- **Meitl, Michele Bisaccia.** "The Not Guilty By Reason Of Insanity Defense and the Factors That Influence Its Success." *Criminal Law Bulletin.*
- Holcomb Jefferson E., Williams Marian R., Hicks William D., Kovandzic, Tomislav V and **Meitl, Michele Bisaccia**. "The Relationship between Civil Forfeiture Laws and Police Forfeiture Activity." (under review)
- **Meitl, Michele Bisaccia** (Encyclopedia Contributing Author). *Crimes of the Centuries: Notorious Crimes, Criminals, and Criminal Trials in American History*, published by ABC-CLIO.

PROFESSIONAL CONFERENCE PRESENTATIONS

- Powell, Zachary, **Meitl, Michele Bisaccia**, Worrall, John. "Police Consent Decrees and Section 1983 Civil Rights Litigation." Presented at the American Society of Criminology annual meeting in November 2015.
- **Meitl, Michele Bisaccia**, Piquero, Nicole Leeper and Piquero, Alex. R. "Predicting the Length of Jury Deliberations." Presented at the Academy of Criminal Justice Sciences annual meeting in March 2015.
- Connell, Nadine, **Meitl, Michele Bisaccia** and Barbieri, Nina. "Teen Court Operations: How Does the Process Really Work?" Presented at the Academy of Criminal Justice Sciences annual meeting in March 2015.
- Williams, Marian, Holcomb, Jefferson, Kovandzic, Tomislav and **Meitl, Michele Bisaccia**. "Equitable Sharing and Asset Forfeiture by the Police" Presented at the Academy of Criminal Justice Sciences annual meeting in March 2015.
- **Meitl, Michele Bisaccia**, Piquero, Nicole Leeper, Brank, Eve. M., Woolard, Jennifer, L., Lanza-Kaduce, Lonn and Piquero, Alex. R. "Exploring Lawyer Misconduct: An Examination of the Self-Regulation Process." Presented at the American Society of Criminology annual meeting in November 2014.
- **Meitl, Michele Bisaccia** and Morris, Robert. G. "Recidivism Among Bond Eligible Offenders Who Remain Jailed Pretrial." Presented at the Southwestern Association of Criminal Justice annual meeting in October 2014.

- **Meitl, Michele Bisaccia**. "The Not Guilty By Reason Of Insanity Defense and the Factors That Influence Its Success." Presented at the Academy of Criminal Justice Sciences annual meeting in March 2014.

MEMBERSHIPS AND BOARDS

- Academy of Criminal Justice Sciences (Teaching , Learning, and Scholarship Section)
- The American Society of Criminology
- Southwestern Academy of Criminal Justice
- Criminology Graduate Student Association, UT Dallas
- Dean's Student Advisory Committee Member, UT Dallas (Fall 2014-Spring 2015)
- FBI Citizens Academy Alumni
- Board of Directors, Clariden School, Southlake, TX (Fall 2015-Present)
- District of Columbia Bar Association (Active)
- Maryland Bar Association (Inactive)
- Board of Directors, Washington Council of Lawyers (Winter 2011-Fall 2012)
- Manuscript Reviewer for *Police Quarterly*

AWARDS AND HONORS

- Keith Lankford Taylor Graduate Fellowship (2015-2016 academic year and 2016-2017 academic year)
- Vibhooti Shukla Graduate Fellowship Recipient (2014-2015 academic year)
- ACJS Doctoral Student Summit representative for the University of Texas at Dallas, Criminology Program (March 2015)
- School of Economic, Political and Policy Sciences Outstanding Teaching Award (2014-2015 school year)

RESEARCH AND TEACHING INTERESTS

- Courts and Sentencing
- Criminal Law
- Criminal Procedure
- Judicial and Legal Systems
- Crime and Delinquency
- U.S. Supreme Court
- Violence and Gun Control

- Crime and Justice Policy
- Corrections
- Civil Liberties
- Law and Society
- Mental Health and the Criminal Justice System