

A Statistical Portrait of the Death Penalty

Frank R. Baumgartner (Corresponding author: Frankb@unc.edu),
Marty Davidson, Kaneesha Johnson, Arvind Krishnamurthy, Colin Wilson

Proposal to Oxford University Press
May 10, 2016

The US Supreme Court ruled on July 2, 1976 in *Gregg v. Georgia* that the death penalty was constitutional if it complied with certain specific provisions designed to ensure that it was reserved for the “worst of the worst.” The same court had rejected the death penalty just four years before in the *Furman* decision (1972) because it found the punishment to be applied in a capricious and arbitrary manner. The 1976 decision ushered in the “modern” period of the US death penalty, setting the country on a course to execute over 1,400 inmates in the ensuing years, with over 8,000 individuals sentenced to die. On the eve of the 40th anniversary of the modern death penalty, we assess the empirical record.

Our book consists of xx short chapters, each of which assesses a precise empirical question and provides evidence, not opinion, about whether how the modern death penalty has functioned. Chapters are designed to answer a number of the questions posed by Justice Breyer in his 2015 dissent in *Glossip v. Gross*. Breyer called for a full briefing on the constitutionality of the death penalty. We seek to provide much of the empirical evidence to assess whether the nation’s now 40 years of experience with the modern death penalty shows that it has met the aspirations of *Gregg* or continues to suffer from the flaws that caused its rejection in *Furman*.

On the following pages we give short descriptions of each chapter. Before going into this detail, we describe the nature of the book and its audience, the status and timing of the manuscript production, and our goals in finding a publisher.

Three audiences:

The book stems from a large course that Baumgartner has taught at UNC-Chapel Hill for the past several years: Race, Innocence, and the End of the Death Penalty. The course has grown from 30 students in 2010 to 265 in 2016. This book is designed to be an on-going text in the course going forward. As such, the first audience is undergraduate students with no particular previous knowledge or exposure to the US death penalty. However, unlike most books on the topic, our focus is not theoretical, abstract, or moral. Rather, it is factual. As Justice Thurgood Marshall famously noted in his 1972 *Furman* dissent, many who support the death penalty in fact know very little about how it actually works. The facts are so compelling, and in fact so surprising to most who become aware of them, that we focus solely on these factual, empirical, and statistical questions. We provide a *Statistical Portrait of the Death Penalty*.

A second audience for the book are students and scholars already familiar with the legal and other arguments about the death penalty, but for whom we provide in one place a treasure-trove of empirical data. Much of what we present is similar in concept to what is available at the Death Penalty Information Center (<http://deathpenaltyinfo.org/>), a group with which

Baumgartner has long collaborated. Similar to their mission, we seek simply to bring together into a single place a wide range of factual information, presented in simple tabular and graphical form, about the nation's practice with capital punishment. We believe this second audience will include members of the legal profession, advocates for and against the death penalty, students in criminal justice, law, political science, sociology, public health, and other fields.

A third audience is Justice Breyer and his colleagues on the court, as well as advocates seeking to influence the Court in anticipation of a future ruling on the matter. Geographic concentration, time spent on death row, equality in application of the death sentence across different jurisdictions, exonerations and reversals, the impact of mental illness, public opinion support, racial and gender disparities by inmate or victim, and evolving standards of decency have all been raised and will certainly be brought up to the Court in the near future. Justice Breyer cited Baumgartner's work on rates of reversal in his *Glossip* dissent. (Over 65 percent of all solemnly declared death sentences, in fact, are later overturned on appeal; fewer than 15 percent of all death sentences are later carried out. This is the kind of empirical fact that few know, but which we highlight in each chapter of the book.) So we know that empirical questions about the actual functioning of the modern death penalty system will be of interest. We therefore count the Court and its followers as an important audience for the book.

Status and timing:

We include with this outline several chapters in close to final form. We have completed drafts of all the chapters and plan to revise them into a form similar to those included here over the summer of 2016. We plan to have the entire manuscript ready for final review before September 1, 2016. If comments from reviewers are available before then, we will incorporate our response and revisions based on those comments before submitting the final manuscript. In any case, we expect to have it available before the beginning of fall, 2016.

The publisher we want:

Our goal is to have the book made available to the widest possible audience, at the lowest price to the purchaser. We want the royalties to be directed to the UNC Arts and Science Foundation to be held in an account to supplement the Richard J. Richardson Distinguished Professorship (Baumgartner's endowed chair), to be used for expenses associated with his class, in particular the evening speakers series. Thus, the book will be used to enhance the teaching mission of the university. Baumgartner's co-authors on the book are all currently (as of spring 2016) undergraduate students at UNC, and several of the individual chapters are co-authored with other students who have taken the class in the recent past. Thus, the book is a collective product of the class, and we expect to use it in the class in the future. In contrast to other books Baumgartner has done, in addition to reporting the results of important research, this book has both a broad teaching audience as well as a significant policy community audience. Therefore marketing to course adopters and beyond is a concern for us.

Technical details:

Each chapter is approximately 15-20 pages in manuscript (double-spaced), and most contain several figures (300 dpi, png format), tables, or maps as appropriate. See the sample chapters for examples. Each chapter also contains suggested reading for further information. Detailed information including all the data used in the book, as well as supplemental materials associated with each individual chapter, will be made available on a web site to be hosted at Baumgartner's university web site. Expected length: Approximately xx,xxx words, xxx figures, xxx tables.

Suggested reviewers:

Michael Radelet (University of Colorado, Sociology; michael.radelet@colorado.edu)

Samuel Gross (University of Michigan, Law; srgross@umich.edu)

Jeffrey Fagan (Columbia University, Law; jeffrey.fagan@columbia.edu)

Robert Dunham (Death Penalty Information Center, DPIC; rdunham@deathpenaltyinfo.org)

Richard Dieter (DPIC, emeritus; rdieter@rdietercommunications.com)

Rob Smith (UNC Law / Eighth Amendment Project; rsmith@8thamendment.org)

Brandon Garrett (Virginia Law School; bgarrett@virginia.edu)

Lee Kovarsky (Maryland Law School; lkovarsky@law.umaryland.edu)

Chapter Outlines

Chapter 1. *Furman, Gregg, and the Creation of the Modern Death Penalty*

This chapter reviews the Court decisions in 1972 and 1976, which eliminated and reinstated the death penalty respectively. In addition, it examines the constitutional “sweet spot” that the Court effectively created: *Furman* rejected the death penalty based on its arbitrary and capricious application, and *Gregg* affirmed it largely based on procedural safeguards designed to ensure its limited application only to a narrow category of “worst of the worst” offenders. The chapter reviews these issues as well as the rapid legislative response to *Furman* during which 37 states revised their existing capital laws to come into compliance with the Court’s new standards. Finally, the chapter reviews the growth in use of the death penalty, showing trends in death sentences and executions nationally from 1976 through 2015.

Chapter 2. The Capital Punishment Process.

This chapter reviews the procedural ways in which “death is different.” It reviews the procedural steps in a capital trial from the decision to proceed capitally through conviction, the penalty phase, direct appeals through the state and federal system, and the *habeas* system. It introduces the reader to the language and terminology of capital punishment, with a focus on procedure and appellate review.

Chapter 3. Homicide in America

We start our empirical section with a review of homicide statistics. All capital cases have at their core a homicide, so we start with a review of how many such crimes there are; how the U.S. compares to other countries; who commits homicide; who are the victims; how these offender-victim categories interact; and where the homicides occur. The chapter uses official US Department of Justice statistics to make clear how violent our country is compared to others, how homicides are typically committed by young men, how the victims and perpetrators are typically of the same race, and how different regions of the country show dramatically different homicide rates per population. This chapter forms a baseline from which we can compare cases which lead to execution, as these are far from a random sample whether based on race, gender, or geography.

Chapter 4. Comparing Homicides with Execution Cases

Following a similar format to the previous chapter, we focus here on the 1,422 cases since 1976 where an execution has occurred. Which types of offender-victim combinations were most common, compared to homicides overall? We show rates of execution per homicide by the race and gender of the offender and the victim. Our findings clearly point to the overwhelming impact of the race and gender of the victim, regardless of the offender. Crimes against White females are much more likely to lead to execution, though even within that category this represents less than two percent of all homicides. Crimes against Black males, the group we showed in the previous chapter to be the most common victims of homicide, are punished by death only in infinitesimal proportions. We also note the extreme rarity of executions, with just 1,422 cases, but over 700,000 homicides in the 40 years since *Gregg*.

Chapter 5. Which Crimes Are Capital Eligible, and is Death Reserved for the Worst Offenders?

This chapter reviews the state laws on which crimes are deemed eligible for capital punishment. It documents the wide variety of laws and some of the idiosyncratic elements of many of them. It clearly distinguishes between those states with relatively narrowly defined classes of capital crimes and those with broad definitions leaving considerable discretion to the prosecutor (e.g., “especially heinous,” “felony murder” [e.g., a homicide committed during the commission of another felony, such as a robbery], or “lying in wait” statutes which make large percentages of all homicides death-eligible.

We also review the evidence as to whether the death penalty is reserved for the “worst-of-the-worst” by looking at particular cases where notable or heinous crimes were not followed by a death sentence. The killer of Martin Luther King, Jr., for example, was not sentenced to death. Neither was the Unabomber, nor was James Holmes, the Aurora, Colorado mass killer. We also review various Baldus-type studies that rated various homicides by degree of heinousness to see if death was reserved for those with the most heinous crimes. Most notably on that score, the recent Donohue study of Connecticut comprehensively assessed the heinousness of every death-eligible homicide in that state, allowing an assessment of whether death is strongly associated with heinousness.

Chapter 6. Which Jurisdictions Execute and Which Ones Don't?

We compare the states as well as the counties by the frequency with which they execute. We compare this to homicides as well. We demonstrate that the extremely high concentration of executions in just a few states and even in a few counties within the executing states cannot statistically be associated with homicides and that it is the result of a self-reinforcing process whereby the counties have self-separated into a large group which never executes (indeed, only 15 percent of all U.S. counties have had even a single execution in the 40 years since *Gregg*), and a few which have come to execute dozens of times, or, in the case of Houston Texas, more than any other U.S. state.

Chapter 7. How Long Does It Take?

Based on a comprehensive analysis of every execution, we compare the date of the crime to those of the death sentence and the execution. We show dramatic and consistent increases over time in the delays before execution and show that this is not due to the time between the crime and the death sentence; rather, it is exclusively due to time after the death sentence. We show some important differences across states here as well, foreshadowing differences in rates of reversal which differ dramatically by state, the focus on the next chapter.

Chapter 8. How Often Are Death Sentences Overturned?

Based on comprehensive U.S. BJS data on the outcomes of all death sentences since 1973, we show the surprisingly high rate at which they are reversed. Further, we compare the 50 states on their rates of reversal.

Chapter 9. How Often Are People Exonerated From Death Row?

We review the impact of innocence on the death penalty by focusing on the 156 cases where death row inmates have been exonerated. The previous chapter allows us to note the outcomes of all death sentences, and here we focus on that subset of inmates who are completely exonerated.

Chapter 10. How Are The Executions Carried Out?

We review the changing methods of execution, showing how each method has grown out of favor over time and how innovators have developed ever-more-promising methods with the hope of developing a “more humane” method of death. We review how often cases have been botched, ranging from the first electrocution to the most recent controversies surrounding lethal injection drugs and their availability.

Chapter 11. How Often Are Scheduled Executions Delayed or Cancelled?

We focus here on stays of execution. Some states, such as Pennsylvania, routinely issue death warrants in spite of the fact that they rarely carry out an execution. Increasingly, even Texas sees delays or dates of execution which are cancelled, sometimes at the last minute. Troy Davis, executed by the state of Georgia in 2011, faced three execution dates before his execution was carried out, and that execution was in doubt up to the last minute, as attorneys sought relief at the U.S. Supreme Court. We present statistics on delays and cancellations as well as illustrative cases studies about the uncertainty of many executions and discuss the torture element of such uncertainty.

Chapter 12. Mental Illness and Death Row

Inmates sentenced to death or executed are much more likely than the general public to have severe mental illness at the time of their trial, and further numbers develop illnesses as a result of the trauma of a death sentence or years on death row. We review these numbers here based on new research on the prevalence of mental illness among all those inmates executed since 2000. As an important element of mental illness is suicidal ideation or attempts at suicide, we also pay attention to that segment of the executed population which “volunteered” for execution, about ten percent of the total. Finally, we document how many executed inmates have been veterans of the U.S. armed forces and the possible role of post-traumatic stress in these cases. The U.S. Supreme Court ruled in *Atkins* (2002) that the execution of those with intellectual disabilities is unconstitutional. Many forms of mental illness are theoretically supposed to be mitigating factors in the penalty phase of a trial. However, some elements, such as “future dangerousness” may in fact be interpreted as aggravators. In this chapter, we document the very high incidence of mental illness among those executed.

Chapter 13. How Deep Is Public Support for the Death Penalty?

We develop new indicators of aggregate public opinion over time, based on those earlier developed in Baumgartner et al.’s 2008 book which explored this in detail. Based on over 450 national surveys, we show the rise, then the decline in national support for the death penalty, and show the surprisingly high correlation between opinion and death sentences; is the death penalty supposed to be related to the heinousness of the crime, or the state of public opinion? Finally, we pay special attention to the geographic distribution of opinion. Making use of a new database of 25 Gallup Polls since the 1990s, we develop new estimates of state-by-state opinion on the death penalty, and show that there is virtually no relation between opinion and executions. We explore this in more detail by looking at variation within the state of Texas, using a series of Texas Polls conducted by the University of Houston; these show that public opinion in Houston is actually less supportive of the death penalty than in other areas of Texas.

Chapter 14. Why Does The Death Penalty Cost So Much?

We review cost studies and summarize previous estimates on the cost of death penalty cases compared to non-capital cases, showing the existing estimates by case, by year, or for entire state systems. We also summarize findings from the literature regarding the stages in the process that lead to these high costs. We link these surprising results to the inefficiency of the system in terms of cases never carried out, but tried capitally or even involving a death sentence, later overturned, documented in earlier chapters.

Chapter 15. Is the Death Penalty Dying?

We show trends over time and the decreasing number of jurisdictions carrying out executions. We evaluate these trends with regards to the concept of “evolving standards of decency.”

Chapter 17. Does the Modern Death Penalty Meet the Goals of *Gregg*?

We began the book with a discussion of the “sweet spot” established in the *Furman* and the *Gregg* decisions. This poses the question of whether the “modern” death penalty, with which we now have 40 years of experience, would pass the test that the historical system failed in *Furman*. We use the Espy file, which provides data on historical cases of judicial executions, to compare the modern system to the historical one, focusing on geography, race, and gender. The numbers indicate that the system, in fact, has become more isolated geographically and that there is no indication that proportionality review or the other safeguards mandated in *Gregg* have generated a system significantly more equitable than that which the Court rejected in *Furman*.

References

Web Site: Data and resources.

We will have a web site associated with the book that includes all of the data associated with the book, including supplemental studies or state-by-state comparisons that cannot be included in the book for reasons of space.