THE UNIVERSITY of NORTH CAROLINA at CHAPEL HILL

A Statistical Portrait of the Death Penalty

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Chapters

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Death Penalty Constitutionality

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The 1960s marked the beginning of multiple challenges brought against the constitutionality of capital punishment in the United States. Previously, the fifth, eighth, and fourteenth amendments have been interpreted as the death penalty being a form of valid constitutional punishment. In *Trop v Dulles* (1958) the Supreme Court questioned the extent to which the state can punish a person based on his or her crimes. The Court held that stripping someone of his or her citizenship was a punishment that outweighed the crime of desertion, and was so was considered "cruel and unusual". Chief Justice Earl Warren, in his majority opinion, stated, "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (Trop v. Dulles (1958) 356 U.S. 86). It was not long before these themes emerged in the debate of the death penalty.

In the late 1960s the court began to modify the nature in which the death penalty was administered. The first of the two cases that arose surrounding the procedural constitutionality of the death penalty was *U.S. v. Jackson* (390 U.S. 570), where the Supreme Court heard the arguments for the provision of the death penalty from a federal kidnapping statute only from the recommendation of a jury. The court found this unconstitutional due to encouragement of the

defendants to waive their right to a jury trial to ensure that they would not receive a death sentence[1].

The second case was *Witherspoon v. Illinois* (391 U.S. 510), which concerned an Illinois statute that provides grounds for dismissal for any juror with "conscientious scruples" against capital punishment. The Court held that a jurors "conscientious scruples" against capital punishment was in violation of the Sixth Amendment's guarantee of an "impartial jury" and the Fourteenth Amendments guarantee of due process.

Furman v. Georgia (1972)

The issue of the arbitrary and capricious use of the death penalty was presented to the court four years later in the landmark decision of *Furman v. Georgia* (1972 408 U.S. 238). Furman was burglarizing a home when a family member discovered him. In an attempt to flee, Furman tripped and fell, during which the gun he was carrying discarded and killed a resident of the home. He was convicted of murder and sentenced to death. **(describe why he was appealing)** The court held, in a 5-4 decision in favor of Furman, that the Georgia death penalty statute, which gave jury's complete discretion of imposing the death penalty, was "cruel and unusual" and therefore in violation of the Eighth Amendment. The decisions put forth by Supreme Court Justices in *Furman* are mostly directed to the procedural elements of capital punishment.

The decision in *Furman* ruled that all existing forms of the death penalty were unconstitutional, thus placing a temporary hold on all death sentences across the United States. The *Furman* decision also established safeguards for states to follow in order to have a death

[1] http://deathpenaltycurriculum.org/student/c/about/history/history-5.htm

penalty. Following this decision, 35 states changed the procedures of capital punishment to be in line with those safeguards, some of who imposed mandatory death sentences for eligible crimes (see *Woodson v. North Carolina* and *Roberts v. Louisiana*).

In over two hundred pages of concurrence and dissents, the Justices highlighted their views on the controversial subject. The major themes in the opinions given by the justices centered around the unconstitutionality of the death penalty due to capriciousness, inhuman nature, arbitrariness, lack of deterrence, the rejection of retribution by American society, and the excessive costs of capital punishment. Only Justice Thurgood Marshall and Justice William Brennan believed that the death penalty should be unconstitutional in all instances, which is further highlighted in the later decision of *Gregg v. Georgia* (1976). The main themes that the justices highlighted in their concerns of the constitutionality of the death penalty fall under five main themes; capriciousness, the inhumane nature, lack of deterrence, the question of retribution, and the biased nature of sentencing.

Arbitrary and Capriciousness

Perhaps the most important issues highlighted in *Furman* is the capricious and arbitrary nature in which the death penalty was being imposed. All five Justices voting in support of Furman found the death penalty to be capricious in its current form. Justice Douglass, in his concurrence, highlighted that the death penalty as unusual because it "discriminates against him by reason of his race, religion, wealth, social position, [and] class, [and] if it imposed under a procedure that gives room for the play of such prejudices" (Furman v. Georgia, 242).

The death penalty is arbitrary for many reasons. One reason highlighted by Justice Brennan is its application not determined by the extremity of the offence, but thee is a strong probability that it is inflicted arbitrarily (*Furman v. Georgia* 295, 305)

Inhumane Nature

Another major concern in the *Furman* majority opinion was the inhumane nature in which the death penalty was imposed. In his opinion, Brennan established a four-pronged test for whether or not a case is constitutional (what is this test?). The principles are to determine whether or not a punishment, "comports with human dignity" (305). Further, Justice Brennan highlighted that "if a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes" (282)

Deterrence

The three Justices, who voiced opinions against the deterrent effect of capital punishment, including White, Marshall, and Brennan, found that there "is no reason to believe the assumption that the current way the death penalty is administered is a superior or more effective deterrent to long-term imprisonment" (Furman v. Georgia 302,303).

There have since been numerous studies on the deterrent effect of the death penalty on murder rates in the United States. In 2012, the National Research Council of the National Academies published a study that reviewed over three decades of research and concluded that those studies that claimed a deterrent effect were fundamentally flawed (Nagin and Pepper,

2012). The committee further recommended that those studies should not be used to inform the deliberations in the judgment of the effects of the death penalty.

Retribution

Retribution, the idea that punishment should be inflicted on someone as vengeance for a criminal act, was also considered in the *Furman* case. Three of the concurring Justices found that retribution should not be used for support of capital punishment. In his opinion, Justice Brennan highlighted, "Society rejects the death penalty to the point that it serves no purpose. An examination of history of the American practice of punishing criminals by death is almost total rejected by contemporary society" (Furman v. Georgia, 305).

Figure 1.1 Summaries of Majority Justices Reasons for Deeming Capital Punishment Unconstitutional

	Brennan	**Stewart**	**White**	**Marshall**	**Douglas**
Capriciousness					
Racial Bias					
No Deterrence					
Cruel/inhumane					
Retribution					

Gregg v. Georgia (1972)

Four years following the decision in *Furman v. Georgia*, the courts were faced with a case that could reinstate the death penalty. *Gregg v. Georgia* held that capital punishment did not violate the eighth and fourteenth amendment, provided that there are sufficient safe guards put into place to ensure that the sentencing authority had adequate information and guidance in reaching its decision.

Following the decision set forth in *Furman*, the main concerns from the justices was that the current form of the death penalty was arbitrary and capricious in its application. The Georgia legislature revised their death penalty statute so that no person could be found guilty and sentenced to death without the discovery of certain aggravating factors; this narrowed the class of murderers that the death penalty could be given to. These new procedures put in place by the state of Georgia, in the eyes of the court, prevented the death penalty to be administered in an arbitrary and capricious manner (Gregg v. Georgia 162).

In establishing the necessary safeguards to prevent arbitrary punishment, the U.S. Supreme Court outlined two meanings of excessiveness, (1) the punishment must not involve the unnecessary and wanton infliction of pain, and (2) the punishment must not be grossly out of proportion to the severity of the crime (Gregg v. Georgia 173). They then moved on to create safeguards in capital punishment procedures to ensure fair application of the punishment.

One of those safeguards established by the court in Gregg was a bifurcated system, in which there are two phases of a capital trial, the guilt phase, in which guilt or innocence is determined, and the sentencing phase, where the jury will receive additional information and decide whether to give a sentence of death. The bifurcated system is intended to work as a system of checks and balances, through separating the trial into two phases; jurors are able to still find the defendant guilty, while not necessarily sentencing him or her to death. The trial and appeals process of the death penalty will be further outlined in the following chapter.

In addition to the bifurcated trial system, the jury is also required to specify aggravating circumstances to justify their application of the death penalty, to avoid the freakish death penalty application found pre-Furman (Gregg v. Georgia 207). This safeguard was established to ensure fair and consistent sentencing. Furthermore, the jury is not required to impose the death penalty

when one or more aggravating circumstances have been identified, they are merely authorized to do so (Gregg v. Georgia 211). Aggravators and an outline of death-eligible sentences will be discussed in a later chapter.

A further safeguard is the automatic appeals process guaranteed to any person who received a death sentence, the court held that;

> "the State Supreme Court must review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstances, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" (Gregg v. Georgia 205)

Only two justices, Brennan and Marshall, found that capital punishment should be unconstitutional in all circumstances. In their dissents, the main themes that emerged that highlighted the unconstitutional nature of capital punishment were; evolving standards of decency, an uninformed citizenry, and capital punishments excessiveness, in its lack of both deterrence and retribution.

Justice Marshall highlights that the 35 states (supplemental material) that enacted new statutes authorizing the death penalty cannot be viewed as conclusive, given the publics lack of knowledge of the nature of capital punishment

Constitutional Considerations Beyond *Furman* and *Gregg*

There have been several cases passed since *Furman* and *Gregg* that have questioned the constitutionality of the death penalty. These cases address questions pertaining to its use in cases involving juveniles, persons exhibiting mental illness and retardation, race, innocence, and

public support of the punishment. In these recent cases the Justices are concerned with and most often cite the evolving standard of decency argument.

In June 2002 the Supreme Court found that the execution of mentally retarded persons is considered a cruel and unusual punishment in the landmark case *Atkins v. Virginia*[2]. The court highlighted that due to their lessened culpability, the rationale that would usually be given in support of the punishment is not applicable for mentally retarded criminals. The Justices also touched upon the fact that society has evolved pass the point of allowing the state to take the life of a mentally retarded offender.

On March 1, 2005, the Supreme Court held in *Roper v. Simmons* that it was unconstitutional to execute offenders under the age of 18[3]. Again, the court cited that evolving standard of decency deem it cruel and unusual for the state to kill a minor, calling it a disproportional punishment.

The constitutional question of inequalities from racial bias did not end at the *Furman* decision. There have since been multiple cases that directly address the constitutionality of racial discrepancies in the practice of capital punishment in the United States. Despite the earlier concerns regarding racial bias in death sentencing, the current court do not hold consensus on the matter. In *McCleskey v. Kemp (1987)* Justice Antonin Scalia stated, "I do not share the view, implicit in the opinion, that an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal"[4].

[2] Atkins v. Virginia 536 U.S. 304 (2002)

[3] Roper v. Simmons 543 U.S. 551 (2005)

[4] McCleskey v. Kemp, 481 U.S. 279 (1987)

More recently, the court has been faced with the questions of the excessive wait times on death row. In 2014 Justice Kennedy has raised extensive concerns over the waiting time on death row, as well as the issue of solitary confinement[56]. Justice Breyer has recently raise concerns over the constitutionality of the death penalty. Justice Breyer has noted that the unlikelihood of an execution actually being carried out, the consideration of the international disapproval of the death penalty, and the excessive times spent on death row by those who have been condemned to death.

What are the Constitutional Thresholds?

When assessing the constitutional considerations outlined above, we are able to draw a rough line of where the Supreme Court considers the death penalty to cross over a threshold to unconstitutional use. What types of errors would cause the Supreme Court to doubt the constitutionality of the punishment?

A major component of the punishment is the possibility for its arbitrariness or capriciousness nature and application. The 1972 *Furman* decision made very clear that this was one their main concerns in the application of the death penalty. A very compelling argument that could be made for the death penalty as an arbitrary and capricious punishment is that the most barbaric or heinous crimes are not the ones that receive the punishment. This concept will be explored in chapter four.

Another consideration is the inhumane or cruel quality of the punishment. Capital punishment was commonplace when other barbaric practices, such as slavery, lynching, and branding, were conventional. However, as those practices have died out, and the American

[5] Hall v. Florida, 2014 WL 2178332 (U.S. Mar. 3, 2014)
[6] Davis v. Ayala, No. 131428 (Mar. 3, 2015)

people embraced the elimination of those punishments in the name of evolving standards of decency, capital punishment remained on the books. While there have been advances in ways in which the death penalty has been imposed, if it can be proved that there is systematic application of a cruel or torturous punishment then the Supreme Court will likely find the practice to have transitioned to the realm of an unconstitutional punishment.

Racial bias may also play a factor in deeming the punishment unconstitutional. However, cases such as *McCleskey v. Kemp* and the passage and consequent strike down of the Racial Justice Act may hint that this may not be too easy to prove. Both of these cases denied statewide statistical evidence of racial bias to be a factor in proving relief of those placed on death row. In order for the Supreme Court to accept the argument of racial bias, the evidence must heavily point to specifics in the defendant's case.

The evolving standard of decency and public understanding and support is a compelling argument when considering its constitutional viability. Chapter 14 will discuss how public opinion has evolved, and the significant role it plays for policy implementation and change. Chapter 16 will discuss the declining use of the death penalty, and whether the downward trends suggest that we have outgrown our thought that it is a suitable punishment.

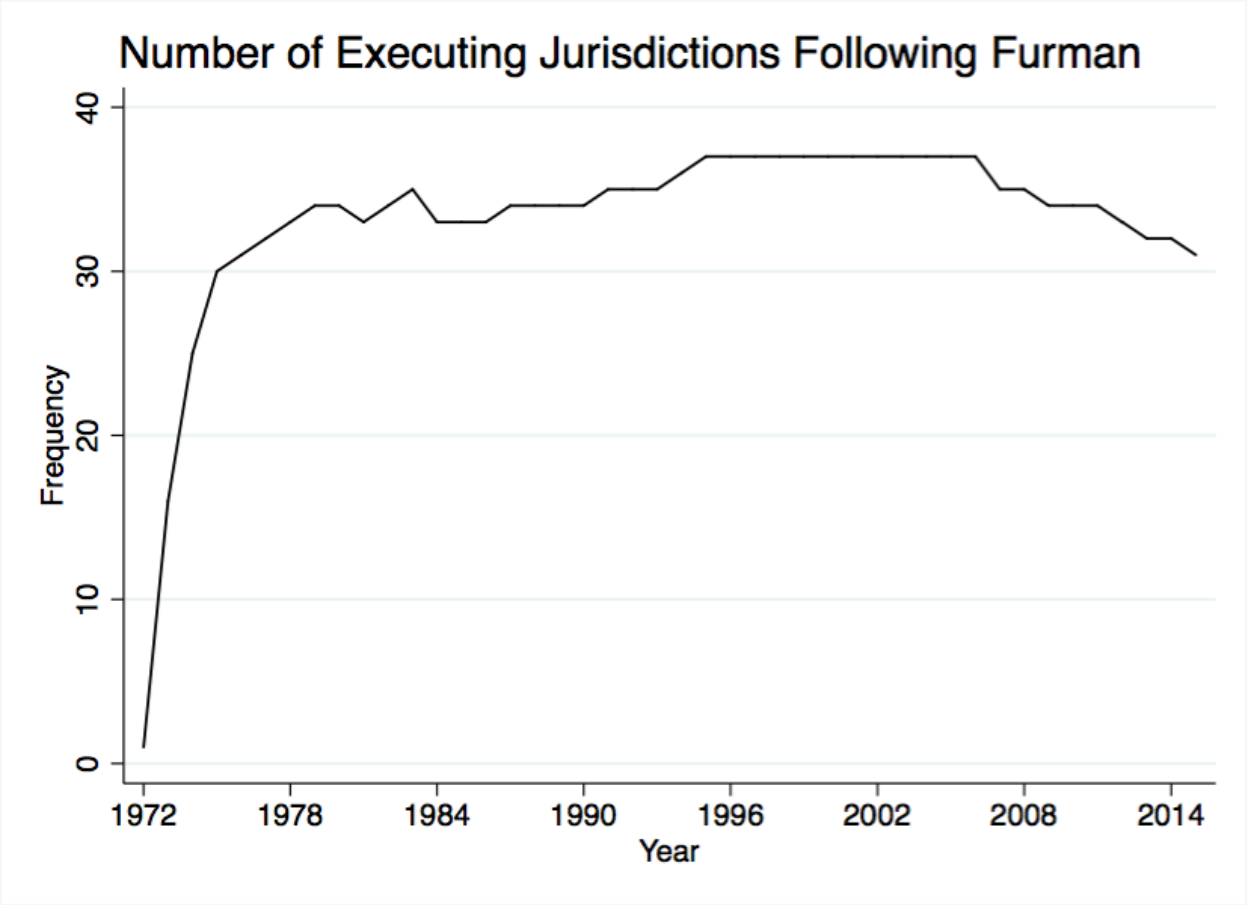
Throughout this book we will be addressing the constitutional question and attempting to determine whether we have surpassed the constitutional thresholds of the death penalty, or if we are still secure within its borders.

United States Aggressive Response to *Furman*

The United States is unique in its the aggressive response to the 1972 Supreme Courts decision. Following the *Furman* ruling, within three years 30 states had passed new statutes that allowed the death penalty to be reinstated. The first state that reinstituted capital punishment statutes was

Florida on December 7th 1972, just five months after the *Furman* decision. Figure 1.2 shows the number of executing jurisdictions following *Furman*.

Figure 1.2 Executing Jurisdictions



The rapid increase in death penalty statutes began to level in the early 1980s. During the period from 1995-2006 there were 37 states with active capital punishment statutes. Since 2006, there has been an increase in the number of states abolishing their use of use of execution by the state.

The Southern Experience

Another important element to consider in the *Furman* response is the Southern experience. The South had experienced multiple blows to their traditional values and practices,

including the abolition of slavery, the civil rights movement, and recent laws banning abortion. With the abolition of the death penalty, the South saw it as an act of attacking southern values, an "illegitimate attack on the region's cultural traditions by outside elites" (Garland, 248). Capital punishment thus became a major front in a cultural war (Sarat 1999).

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2

The Capital Process

Emily Vaughn and Kaneesha Johnson

Condemning a citizen to death is the most harsh and final punishment that can be imposed by the state, and as such it calls for a unique process to avoid errors and disproportional punishments. Following the *Gregg* decision, the Supreme Court mandated measures in both the trial and appeals process that limited the opportunity for arbitrary application of the death penalty. Given the unique characteristics of the capital appeals process, it is necessary to provide a framework for understanding the complex punishment. This chapter lays out the pre-trial, trial, and appeals process an inmate facing execution will likely complete, and will regularly be referred to through out the book.

Pretrial

Beginning immediately after the arrest of the capital defendant, the pretrial phase, like in any criminal case, is comprised of several critical steps, yet the severity of the punishment in these cases makes for a unique and oftentimes long process, lasting anywhere from several months to over a year. The pretrial phase has several key components, including appointment of counsel, indictment, arraignment and notice of intent, discovery, and several pretrial motions, estimated to be between two and four times more than in non-capital cases (Johnson & Hooper, 2004).

Appointing Capital Counsel

Under the Constitution, capital defendants have the right to promptly appointed (18 U.S.C. § 3005) “effective assistance of council [at] trial” in both the guilt and penalty phases (White,

2006). However, the vast majority of capital defendants cannot afford a lawyer, especially when factoring in the extent of the time, work, and resources required to try a capital case; as such, these defendants rely on state provided indigent defense services to appoint an attorney. Unfortunately for these indigent defendants, court appointed capital defenders are often lacking in the resources and experience needed to properly represent their client and the quality of their counsel can dramatically impact the outcome of trials. When assigning representation, courts attempt to ensure some level of quality of counsel by implementing minimum standards, most stringently applied to the first chair attorney, and providing for at least two attorneys. In the state of New Mexico, which abolished capital punishment in 2009, minimum standards included being a member of good standing of the state Bar, a minimum of five years of active criminal litigation, and completion of capital defense training provided by the state (NMSA §5-704). Additionally, the Supreme Court established the Strickland Test in 1984 to determine quality of counsel and when applied defendants must show representation "fell below an objective standard of reasonableness" and such performance prejudiced the defendant. However, this test was created with the caveat that the guarantee of effective assistance will "improve the quality of legal representation" and ensure that the trial is fair, "with a fair trial being defined as one 'whose result is reliable'" but not perfect (White, 2006).

Notice of Intent, Discovery & Preparing for Trial

Once the prosecution have filed the charges, with sufficient evidence to support the accusation of first degree murder, either through a Grand Jury Hearing or a Bill of Information and probable cause is found, the trial moves forward and it is the job of the court to notify the defendant that they intend to seek death, along with the aggravating factors that led to the charges. Though there is no set timeframe within which notification must occur, the prosecution must notify the

defendant within a "reasonable time before trial" so as to initiate the bifurcated trial proceedings, allow for the hiring or provision of additional council, and sufficient time to prepare for both stages of the trial through discovery (Johnson & Hooper, 2004).

Due to the serious nature of the charges, the discovery period in capital cases is a long one and relies heavily upon experts to build effective cases on both sides. It is considered to be the responsibility of the court to ensure indigent defendants obtain the services needed to develop not only an effective defense for the guilt phase, but for the potential sentence phase as well, at which point mitigating circumstances found in the discovery period could determine a death sentence or lowered charges. Additionally, the prosecution is expected to disclose any potential mitigating factors found in their discovery to the defense prior to trial. Mitigation specialists, psychologists, investigators, jury consultants, and other experts comprise the pre-trial team that develops a picture of the defendant, good or bad depending on whose side their on, in hopes of finding the circumstances, both for guilt and justice, that can determine the fate of the individual on trial.

Trial

Jury Selection

Launching the trial stage, jury selection is a critical step in the capital process, with special guidelines put in place by the courts. This jury is particularly important because they will not only determine the guilt or innocence of the defendant, but in many capital schemes, the sentence that they will face should they move to the second stage of the trial. Before each side can make their juror selections and strikes, it must be determined if the juror in question is "death qualified." A death qualified juror is one who, should the defendant be convicted, be capable of sentencing them to death; this isn't to say that they're death preferable, so much as willing to

vote for the sentence should the sentencing phase show that to be the fair choice. When selecting jurors in any case, both the defense and the prosecution are given a certain number of peremptory challenges, typically six, that allow them to dismiss a potential juror without providing cause; in capital cases, this number is raised to twelve. Once the selection process ends, jurors are instructed in the unique nature of capital trials, including the bifurcated structure, aggravating and mitigating factors, and the stricter rules on communication, media exposure, and more. Now the guilt phase of the trial is ready to begin.

The Bifurcated Trial

The two part capital trial begins with the guilt phase, a trial period that runs relatively similar t that of an average violent or major crime trial. The trial begins with opening statements from both the prosecution and the defense, each giving a preview of the case to set the tone for the type of arguments they'll be making over a trial that could run several weeks. At this stage in the capital process, the burden of proof is not on the defendant but instead the courts, and so the prosecution presents their case first, providing the evidence they found in discovery from the pretrial stage to convince the jury that the defendant committed the crime beyond a reasonable doubt. Following the conclusion of the prosecution's presentation, the defendant responds, presenting their evidence from discovery as well as attempting to weaken the prosecutor's case, all in an effort to establish the innocence they allegedly still have. At the conclusion of the guilt stage of the trial, the jury is given specific instructions that outline the aggravating circumstances needed for a capital conviction, the lower charges that have been included in addition to the murder charge, and what constitutes reasonable doubt. Following jury deliberation, four

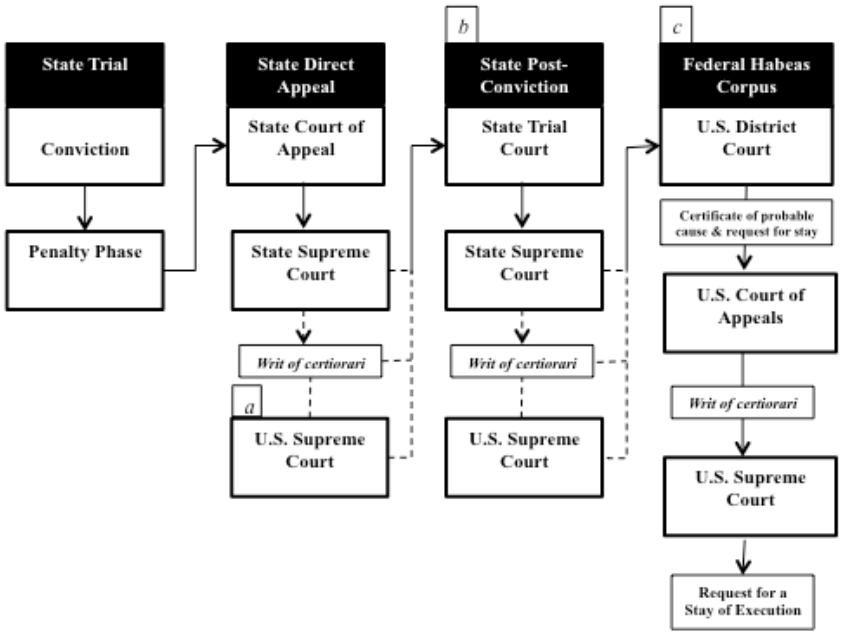
outcomes are possible: (1) a guilty verdict, convicting the defendant of First Degree Murder, (2) A guilty verdict for a lesser offense, (3) A Acquittal, or (4) A mistrial.

Appeals Process

When a defendant has completed the bifurcated initial trial, which includes the guilt phase and penalty phase, and has been found guilty and a death sentence is given, an automatic appeal process ensues. Once a person has been found guilty, all presumption of innocence is removed, and the defendant is faced with proving that there was a mistake during the trial and sentencing phase of the trial.

Figure 2.1 shows the death penalty appeals process, while the process differs slightly across states, it shows the usual course of action a defendant will take to exhaust an entire capital punishment appeals process. The dotted lines indicate that the inmate has a choice of courses of action at that stage.

Figure 2.1 The Appeals Process



a: If the decision runs against the defendant in the direct appeal, then a defendant may seek certiorari in the United States Supreme Court. Although they are routinely denied, occasionally it may be accepted. Certiorari is usually seen as the final stage in the criminal case.
b: Also known as State Habeas Procedure, this begins once the direct appeal ends. In order to progress to seek federal habeas corpus of a constitutional claim, the defendant must have exhausted at least one full round of state appeals.
c: Once the state habeas corpus is completed, the prisoner may file a petition for federal habeas corpus, which has a one-year time limit

The first stage is the direct appeal, which is automatically given to everyone that has received a sentence of death and is typically made to the state's highest court. While many states make this appeal mandatory for every person given the death penalty, other states allow this to be left to the discretion of the inmate. The direct appeal is limited to those instances where the defendant will seek appeal from a conviction and death sentence. The losing side may then issue a petition for a *writ of certiorari* with the U.S. Supreme Court, which orders the lower court to deliver its record in a case so that the higher court may review any constitutional issues.

The second stage of the appeals process concerns issues that were outside of the record in the conviction and sentencing phase, such as ineffective assistance of counsel, juror misconduct, new evidence or Brady violations. Petitions are first filed with the original trial judge, and may

then continue through state Supreme and Appellate courts. Once the defendant has exhausted the State appeals, they may petition to the U.S. Supreme Court for a *writ of certiorari*. During this stage of the appeals process, there are strict time limits that must be adhered to. Failure to comply with those limits could result in the termination of a defendant's appeals.

The final stage of the appeals process is Federal *habeas corpus*, and is limited to federal constitutional issues raised on appeal in the state courts. The defendant, referred to as the petitioner, has one year from the date the post-conviction decision was given to file the petition for habeas relief. If the petitioner is unsuccessful throughout the Federal Habeas Corpus stage, then an execution date will be set.

Waiving the right to trial

Because the direct appeal is available for all inmates, regardless of them claiming innocence or pleading of guilt, there are inmates who attempt to waive their right to appeal. Many of those instances are for inmates that regard the death penalty as a punishment that matched the crime they were convicted of. In order for a waiver of appeals to be granted, the court must first find that the inmate in competent in their decision to do so. The first time the court was faced with the challenge to determine competency to waive appeals was in *Rees v. Payton*. In some cases, the inmate's desire to forfeit their right to appeal conflicts with the state's interest in preservation of life (Blank 2006), causing major conflict when an inmate seeks to abandon appeals. The notion of competency will be further explored in Chapter 12.

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3

Characteristics of those Executed

Clarke Whitehead, Emma Johnson, and Elizabeth Grady

The question of who gets executed is a complex one, as individuals are more than just the sum of listed attributes. However, through a demographic analysis of these attributes, statistical patterns in *who* gets executed emerge. This chapter will focus on age, gender and race of the executed.

In order to understand how these characteristics affect an individual's chances of receiving the death penalty, each characteristic will be shown for the larger population of general homicide offenders. This will serve as a comparison to the information provided on the individuals executed, and allow for a relative proportionality test.

Age of the Executed

The age of the executed refers to both the age at which an inmate was executed and the age at which they allegedly committed the crime they were sentenced to die for.

Table 3.1: Number of Executions and Homicides by Age of Offender, 1976-2013

	Executions		Homicides	
Offender Age	N	%	N	%
Under 18	34	2.5%	81623	10.8%
18-24	542	40%	265375	35.1%
25-34	555	41%	2133077	28.2%
35-49	237	17.4%	135510	17.9%
50+	26	1.9%	59555	7.9%
Total	1355	100.0	755500	100

Note: Data used in this table was collected from BJS "Trends in Homicide.[7]*"*

This table shows several commonalities between these two populations. The two subsets with the fewest number of homicides and executions are at either extreme; the UNDER 17 and 50+ demographics commit the fewest homicides, and receive the fewest number of executions. Similarly, the 35-49 age range commits 18% of all homicides, while the same demographic constitutes 17% of all executions. The final two subsets, the 18-24 and the 25-34 sets, make up the bulk of executions and homicides. It is interesting to note, however, that in the executions column, the 18-24 age range has fewer executions than the 25-34 age range. In the homicide column, 18-24 year olds are responsible for more homicides than the 25-34 year old age range.

The above figures show what percentage each age group constitutes of the whole population of both executions and homicides. The bottom three categories in each case are the UNDER 17 age group, the 50+ age group and the 35-49 age group. In Figure 3.1, these three groups make up a little over a quarter of the entire population; in Figure 3.2, they make up approximately a fifth of the population. The 35-49 age group is roughly the same size, with one percentage point separating the Homicide proportion from the Execution proportion. The Under 17 category for Executions is 9% less than the same category for Homicides. It is worth noting that the 2005 Supreme Court case *Roper v Simmons* established the execution of those who committed their crimes under the age of 18 as unconstitutional, which certainly accounts for some of this difference. The 50+ age group has a 6% different, which could be explained by the

[7] "Homicide Trends in the U.S." Accessed October 10, 2015. http://www.bjs.gov/content/pub/pdf/htius.pdf.

lengthy appeals process accompanying the death penalty. This topic will be explored in a later chapter.

The top two categories, 18-24 and 25-34, make up well over half of the entire population for both Executions and Homicides. The 18-24 set is roughly similar, with the percentage of Executed being 4% higher than that of the Homicide. The 25-34 age range has a high variance from the Executions to the Homicides. The number of 25-34 year-olds being executed is 12% higher than the number in the corresponding section of all homicides.

Gender of the Executed

Table 3.2: Number of Execution and Homicides by Gender of Offender, 1976-2013

	Executions		Homicides	
Gender	N	%	N	%
Male	1345	98.9%	667267	88.3%
Female	15	1.1%	83131	11%
Unknown	0	0%	34296	4.5%
Total	1360	100.0%	75550	100.0%

Note: Data used in these figures was collected from BJS "Trends in Homicide" and the FBI's "Offenses Known to Law Enforcement: Expanded Homicide[8]*"*
database.

Table 3.2 shows that men make up a significantly larger percentage of both the Homicides and Executions numbers.

Table 3.2 show that there is a great difference between the percent of female homicide offenders and the percent of females executed. Women make up 11% of all homicide offenses,

[8] FBI. July 2, 2012. Accessed November 18, 2015. https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/offenses-known-to-law-enforcement/offenses-known-to-law-enforcement.

yet only account for 1% of all Executions. 99% of people executed are male even thought men commit 89 percent of all homicide offences. From these statistics, it is evident that there is great discrepancy in punishment between males and females.

Characteristics of Female Offenders

Women who commit homicide are handled differently than men who commit the same crime. Though women account for 11% of murder arrests, they account for only 2% of death sentences issued at the trial level, almost 2% of the people currently on death row, and about 1% of those executed.

As of December 2012, 178 women had received death sentences, but only 12 had been executed. Now, the total has reached 15. Though the number of women that commit homicides are far less than men, the factors determining execution remain the victim's profile and state where the crime took place.

In 2005, a study was conducted about women on death row. One quarter of them had killed their husband, boyfriend, or significant other. Another quarter had killed their child(ren). In addition, there were women whose husband and children were both victims. During this study, over half of the women on death row claimed to have been victims of abuse.

Five states (North Carolina, Florida, California, Ohio, and Texas) account for over half of all death sentences issued to women in the modern era. Of the 15 women that have been executed in the modern death penalty era (post 1976), nine were executed for the murder of a husband, child, or significant other (Table 3.3).

Men who have killed women have a higher chance of being sentenced to death and executed than those who have killed men. In contrast, of the 15 women executed, 12 had male

victims (Table 3.3). It is interesting to note that the system seemingly places more emphasis on offenders whose victims were of the opposite sex.

Twelve out of 15 women executed had white victims. The three women executed with black victims all had close relations with their victims: a significant other, children, a husband, and the son of a girlfriend. From this, it is interesting to note that women were executed for killing white strangers, but not black ones. In addition, all of the women executed for black victims had very close relationships to their victims. Much like men's executions, people who commit homicides and murder whites are far more likely to be executed than those who murder people of other races.

In summary, women who murder a acquaintance, child, or significant other are more likely to be executed than those who murder their parents or extended family members. In addition, Table 3.3 shows that white victim deaths have been punished far harder than black victim deaths.

It is interesting to note that the majority of women executed were responsible for killing males, while males are far more likely to be arrested for killing a woman instead of a man.

Table 3.3: Executed Women

Date of Execution	Name	Race	State	Victim(s)	Relation to Victim(s)	Race of Victims
11/2/84	Velma Barfield	W	NC	Stuart Taylor	boyfriend	W
2/3/98	Karla Faye Tucker	W	TX	Jerry Dean and Deborah Thornton	stranger	W
3/30/98	Judy Buenoano	W	FL	James Goodyear	husband	W
2/24/00	Betty Lou Beets	W	TX	Jimmy Don Beets	husband	W
5/2/00	Christina Riggs	W	AR	Justin Thomas and Shelby Riggs	children	W
1/11/01	Wanda Jean Allen	B	OK	Gloria Leathers	significant other	B
5/1/01	Marilyn Plantz	W	OK	James Plantz	husband	W
12/2/01	Lois Nadean Smith	W	OK	Cindy Baillie	son's ex-girlfriend	W
5/10/02	Lynda Lyon Bloc	W	AL	Sgt. Roger Motley Jr.	stranger (police officer)	W
10/9/02	Aileen Wuornos	W	FL	**7 men** listed below	stranger	W
9/14/05	Frances Newton	B	TX	Adrian, Alton, and Farrah Newton	children and husband	B
9/23/10	Teresa Lewis	W	VA	Julian and CJ Lewis	husband and stepson	W
6/26/13	Kimberly McCarthy	B	TX	Dorothy Booth	neighbor	W
2/5/14	Suzanne Basso	W	TX	Louis "Buddy" Musso	boyfriend	W
9/17/14	Lisa Coleman	B	TX	Davontae Williams	girlfriend's son	B
				** Richard Mallory, Dick Humphreys, Charles Carskaddon, Troy Burress, Peter Siems, Walter Jeno Antonio, David Spears		

When compared to men who have been executed from 2000-2013, it is evident that we execute those we fear. Stereotypes such as a crazy wife or deranged man in the alleyway are the types of people that the United States is executing. The majority of women who have been executed killed a significant other, while the majority of men executed had no known relationship with their victims. There is a rather dynamic conflict presented by this statistic: the fact that men and women are held to different standards in the justice system. The majority of homicide offenses committed by men kill an acquaintance*, whereas men are most likely to be executed for killing someone with no known relationship. Women do not have nearly as high of a chance of being executed for killing an acquaintance as men do, but are most likely to be executed for killing a significant other.

Race of the Executed

The race category has been broken down into three sections: white, black, and other. For executions, the groups (in order of largest to smallest) are: white, black, and other; whereas in homicides, the groups are black, white, unknown, and other. For executions, the unknown category could not be found, and was therefore left blank, and for homicides the other category was not found and was therefore left blank.

The data collected for Table 3.4, Table 3.5, and Figure 3.1 is not complete. Information for the years 1983-1986 and 1988-1997 was inaccessible, and therefore unavailable for collection and analysis. However, homicide trends across the years rarely fluctuate more than a few percent, remaining fairly consistent. Because of this, the data collection is still reliable, as trends over decades reinforces the data collected, showing the addition of the missing information from 1983-1986 and 1988-1997 would not drastically skew the currently compiled data.

Table 3.4: Number and Percent of Execution and Homicide by Race of Offender, 1981-2013

	Executions		Homicides	
Race	N	%	N	%
White	762	56.2%	86978	27.2%
Black	465	34.3%	83991	26.3%
Other	128	9.4%	N/A	N/A
Unknown	N/A	N/A	150152	47.0%
Total	1355	100.0	319192	100.0%

Note: Data used in these figures was collected from the National Archive of Criminal Justice Data[9]

[9] "Uniform Crime Reporting Program Data [United States]: 1975-1997 (ICPSR 9028)." Uniform Crime Reporting Program Data [United States]: 1975-1997. Accessed October 22, 2015. http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/9028.

Table 3.4 demonstrates the disparity between execution rates and homicide rates by the offender's race. While white offenders are responsible for 27.2% of homicides, they make up 56.2% of those executed. In contrast, black offenders are similarly responsible for 26.3% of homicides, but are only 34.3% of those executed. The unknown category in homicides accounts for almost 50% of offenders, demonstrating the lack of complete information on homicides offenders.

Table 3.5: Homicide Offender Race/Gender, Victim Race/Gender

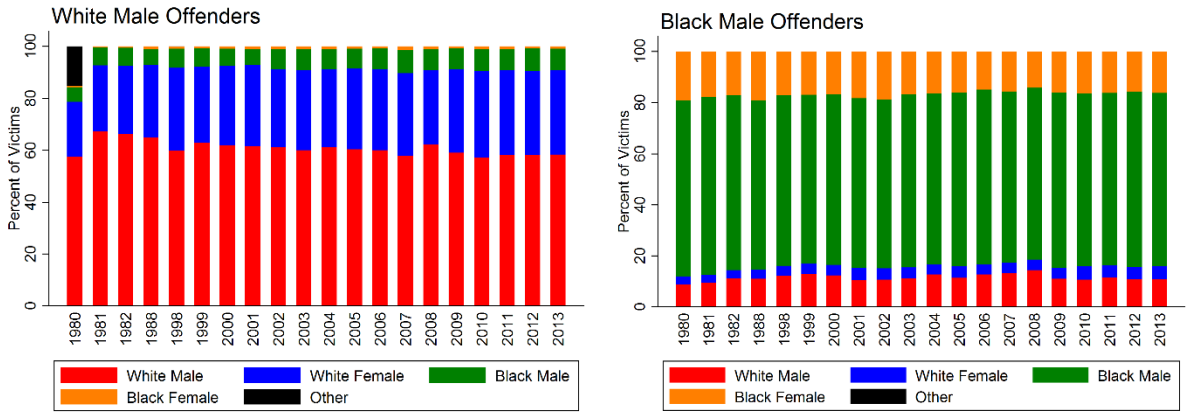
	Victim Race/Gender											
Perpetrator	White Female		White Male		Black Female		Black Male		Other		Total	
Race/Gender	N	%	N	%	N	%	N	%	N	%	N	%
White Female	1,605	25.7	4,220	67.7	79	1.3	333	5.3	0	-	6,237	100.00
White Male	16,751	31.1	32,300	60.0	527	1.0	4,209	7.8	2	-	53,789	100.00
Black Female	107	1.98	289	5.34	1,187	21.9	3,834	70.8	0	-	5,417	100.00
Black Male	2,287	4.3	6,275	11.9	8,653	16.4	35,450	67.3	0	-	52,665	100.00
Total	31,747	13.4	83,896	35.4	17,568	7.4	94,654	39.9	9,435	4.0	237,300	100.00

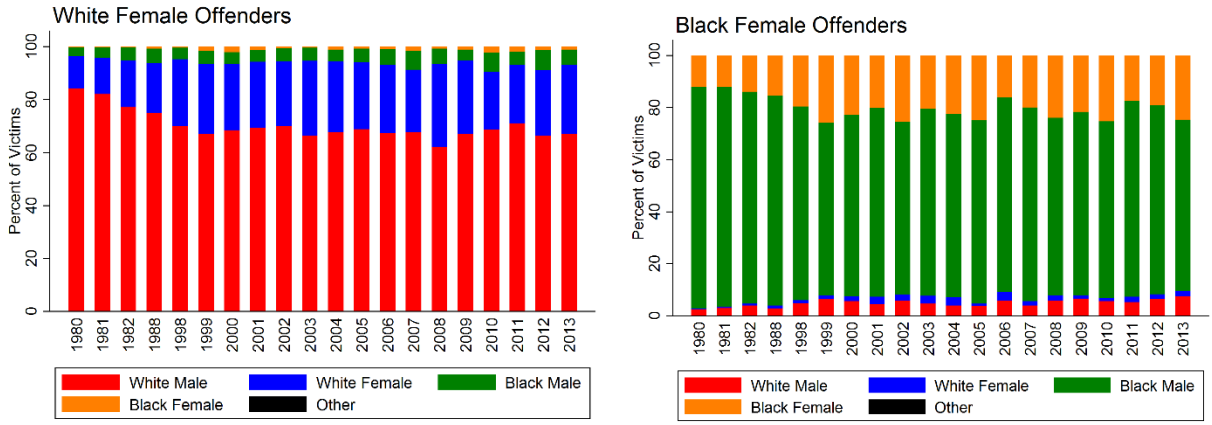
Note: Data used in these graphs was collected from the National Archive of Criminal Justice Data

Table 3.5 demonstrates the relationship between interracial homicides and intraracial homicides. The large majority of homicides are kept within race. 60% of white male offenders have white male victims, 67.3% of black male offenders have black male victims. Only 11.9% of black male offenders have white male victims, and 7.8% of white male offenders have black male victims. This clearly demonstrates the close relationship of homicide within race. Interracial homicide is rare, especially outside of race and gender lines. Comparing Table 3.5 to Table 3.4 it is clear there is a disparity between black homicide offenders and black executed

offenders. Black males' homicide rate is comparable to white males' homicide rate. Keeping within intraracial lines, black male offenders kill black males more than any other group. As a result, their execution rate should be equal to that of white males. However, as shown in Table 3.4, their execution rate is drastically lower, despite the similar homicide rate. The relationship between offender and victims' race and gender will be explored in Chapter Three.

Figure 3.1: Homicide Offenders and Victims (retitle)





Note: Data used in these graphs was collected from the National Archive of Criminal Justice Data

Figure 3.1 further supports the data shown in Tables 3.4 and 3.5. Figure 3.1 demonstrates the continuity of homicides rates, and intraracial homicides in particular. The graphs demonstrate minimal fluctuation between homicide rates over the years. Each group, white males, white females, black males and black females, maintain fairly steady race and gender victim percentages. It is very clear from the graphs that black offenders consistently have black victims, and white offenders consistently have white victims. These trends stay relatively consistent across the decades, reinforcing the idea that a large majority of homicides are intraracial. However, as previously mentioned, the execution rates for white offenders are substantially higher than black offenders, despite the fact that they have very similar homicide rates. This trend is related to their victim type, as the race of the *victim* is the single biggest factor in determining whether an execution occurs or not. This trend will be further explored in Chapter Four.

4

Characteristics of the Victims

Emily Williams and Colin Wilson

Whether or not a defendant will be executed is largely dependent on the race of the victim. The victim of the crime has a definitive relationship with the perpetrator and what penalty the perpetrator is likely to receive—whether that is the death penalty or a lesser sentence[10]. Though some of the relationships described in this chapter may seem intuitive, others may surprise the reader in their articulation. A study conducted by Donohue in 2014 concluded that death sentences were not reserved for the most heinous crimes, but instead were largely dependent on geography and victim race (Donohue). The heinousness of crimes eligible for death will be elaborated in more detail in a later chapter; however, the important claim we are making here is the victim is the largest determinant in a defendant receiving the death penalty. **Further, In every study of racial bias in capital prosecution, prosecutors were more likely to charge killers of Whites with capital crimes than they were killers of Blacks[11]. (Baumgartner exact wording)**

The courts have resisted the evidence showing racial bias in the application of the death penalty under the declaration that if they cannot prove racial bias on part of the decision makers (jury, prosecutors, judge, etc.), then there is no way to deem the punishment unconstitutional.

[10] (E.g., David Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 Cornell L. Rev. 1638, 1658 & n.61, 1659, 1660–61 & n.69, 1662, 1742–45 (1998) (collecting studies); U.S. Gen. Acct. Off., Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities 1–6 (1990).

[11] **(Thirty studies examined race-of-victim bias in prosecutor's decisions to charge defendants capitally. In addition, the literature covered 16 current and past death penalty states including states in the geographic West, South, and Northeast as well as cases prosecuted within the judicial branch of the US Armed Forces. Studies covered a period of over 30 years with periods studied ranging from 1976 to 2007.)**

This problem is referred to as the "prejudice problematic"—a problem that occurs when trying to label a single decision maker as the result of something that may just be a structural bias (Scheidegger (2011, 2012). Eduardo Bonilla-Silva (1997). This chapter will summarize the highly racial and gendered disparities in the implementation of the death penalty on a national scale, as well as on a state-by-state basis.

Table 4.1 represents an overview of both executions and homicides in the United States as they relate to the race and gender of the victims. This chapter will break down this table and what this means in terms of the effects of victims characteristics on the perpetrator's punishment, whether that be the death penalty or not.

Table 4.1. United States Executions and Homicides by Race and Gender of Victims.

	Homicides		Executions		
Victim Characteristic	Number	Percent	Number	Percent	Executions per 10,000 Homicides
Whites	252,366	50.77	1,652	75.81	65
Blacks	229,801	46.23	311	15.19	14
Others	10,690	2.15	196	8.99	183
Unknown	4,173	0.84	-	-	-
Total	497,030	100.00	2,179	100.00	44
Males	379,164	73.14	1,116	51.22	29
Females	117,234	26.84	1,063	48.78	91
Unknown	632	0.11	-	-	-
Total	497,030	100.00	2,179	100.00	44
White Female	68,576	13.80	841	38.60	123
White Male	183,756	36.97	811	37.22	44
Black Female	44,779	9.01	157	7.21	35
Black Male	185,003	37.22	174	7.99	9
Other	10,690	2.15	196	8.99	183
Unknown	4,226	0.85	-	-	-
Total	497,030	100.00	2,179	100.00	44

*Note Homicide Data ranges from 1975-2005 and Execution Data ranges from 1977 to 2014.

As we can see in Table 4.1, the victims of executed death row inmates are most commonly White females—38 percent. Almost as common are the executions of inmates who murdered White males—37 percent. Only 15 percent of victims of executed defendants have been Black, while Black victims constitute nearly half of U.S. homicide victims.

Murders of White women specifically are executed at a much higher rate, surpassing the expected rates of most criminals executed for the murders of black and white men. The death penalty lacks proportionality to the total population of race and gender of total homicides in the U.S. Instead there is a paring down of cases based on race and gender, showing disparate results.

Effects of Race and Gender of Victims on Executions

There is evidently a victim hierarchy in determining who receives the death penalty and who does not. This is both racial and gendered. The hierarchy is as follows: White female, Black female, White male, and then Black male; however, it is important to note that 80 percent of victims are male (Baldus et al.) Among murders that occur in the United States as a whole, the majority of murder victims are males, nearing 77.6 percent. Among these males, 50% of them are Black and 46% of them were White. One might expect a winnowing down of these cases from a murder case to a capital case to show similar statistical characteristics of victims. Rather, various victim groups are over and under represented in death row cases.

A person is statistically most likely to be placed on death row if they murder a White female, and least likely to be executed for murdering a Black male. Race and gender of victim heavily skew the population of death row beyond what would be proportionate based on who the predominant majority of the victims are. In this section we elaborate on the characteristics of race and gender, as they pertain to the victim, and what this means for representation on death row.

Race of the Victims

According to a 1990 report on racial bias in capital punishment, the Government Accounting Office found that 82% of research studies concluded that those who murdered whites were more likely to be sentenced to death than those who murdered blacks (GAO, 1990).

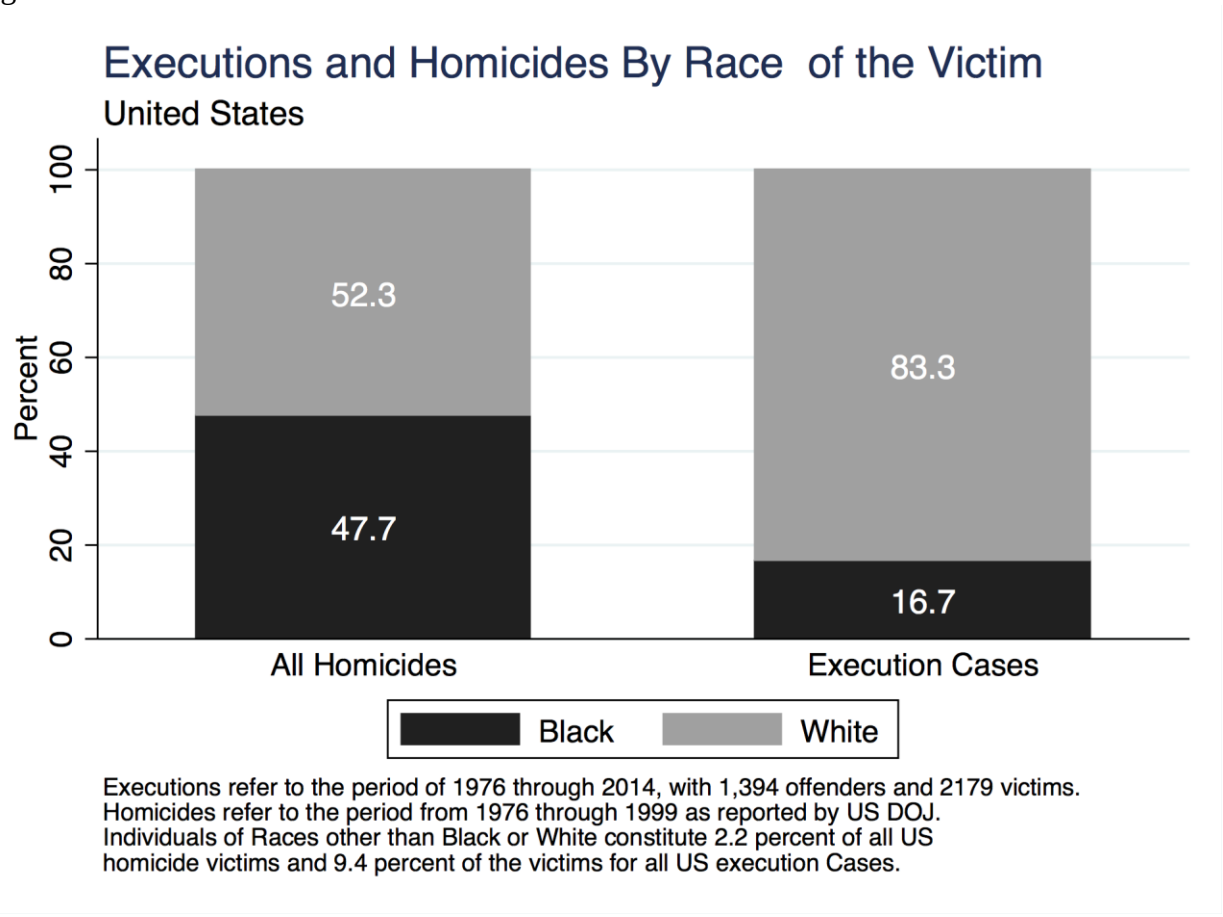
One statistic is particularly stark: since the reinstatement of capital punishment in 1976 through the end of 2013, 1359 inmates were executed. Among the 534 White inmates executed for killing a single victim, just nine had a Black male victim (Baumgartner exact wording)

This information is not new, scholars for years have been evaluating the relationship between victim and defendant prison sentences. Further, it has been proven to date back to the 1600's in Louisiana. Michael Radelet's 1989 study of nearly 16,000 executions dating back to the 1600's found that there had only been 30 cases where a White was executed for the murder of a Black (Radelet, 1989). More recently, Donahue (2014), reviewed over 4,600 Connecticut murders and found that Black defendants were three times more likely to receive the death penalty compared to Whites when the victim was White.

Expanding on Donahue's work, a comprehensive study regarding victim effects found that those accused of killing White victims were four times as likely to be sentenced to death as those accused of killing Black victims (Baldus, Pulaski, & Woodworth, 1983) This particular study evidencing racial bias was used in the *McCleskey v. Kemp* 1987 Supreme Court decision. The plaintiff alleged racial discrimination in the application of the death penalty in Georgia, and, using the evidence by Baldus, the Supreme Court declared that even statistical evidence of racial bias does not make the death penalty unconstitutional. It is necessary to determine racial bias in a specific case, rather than evaluating its potentially structural nature (McCleskey vs. Kemp).

Discussion surrounding the impact of victim race on criminal punishment have led scholars to this unfortunate conclusion: the judicial system places more value on the lives of Whites, resulting in disproportionately harsh treatment of Black criminals who have White victims (ACLU 2007; Baldus, Pulaski, and Woodworth 1983; NAACP 2013). This argument is clear in Figure 4.2, where victim of homicides are compared to victims of homicides leading to executions, categorized racially by Black and White.

Figure 4.2



*Note: Figure 4.2 does not include victims of races other than white or black. For analysis purposes, uses totals that only include homicides and executions involving white and black victims.

As Figure 4.2 shows, Whites are overrepresented among victims of those executed as compared to homicides in general. On the contrary, perpetrators with Black victims are underrepresented on death row in relation to the amount of homicides they commit.

Gender of the Victims

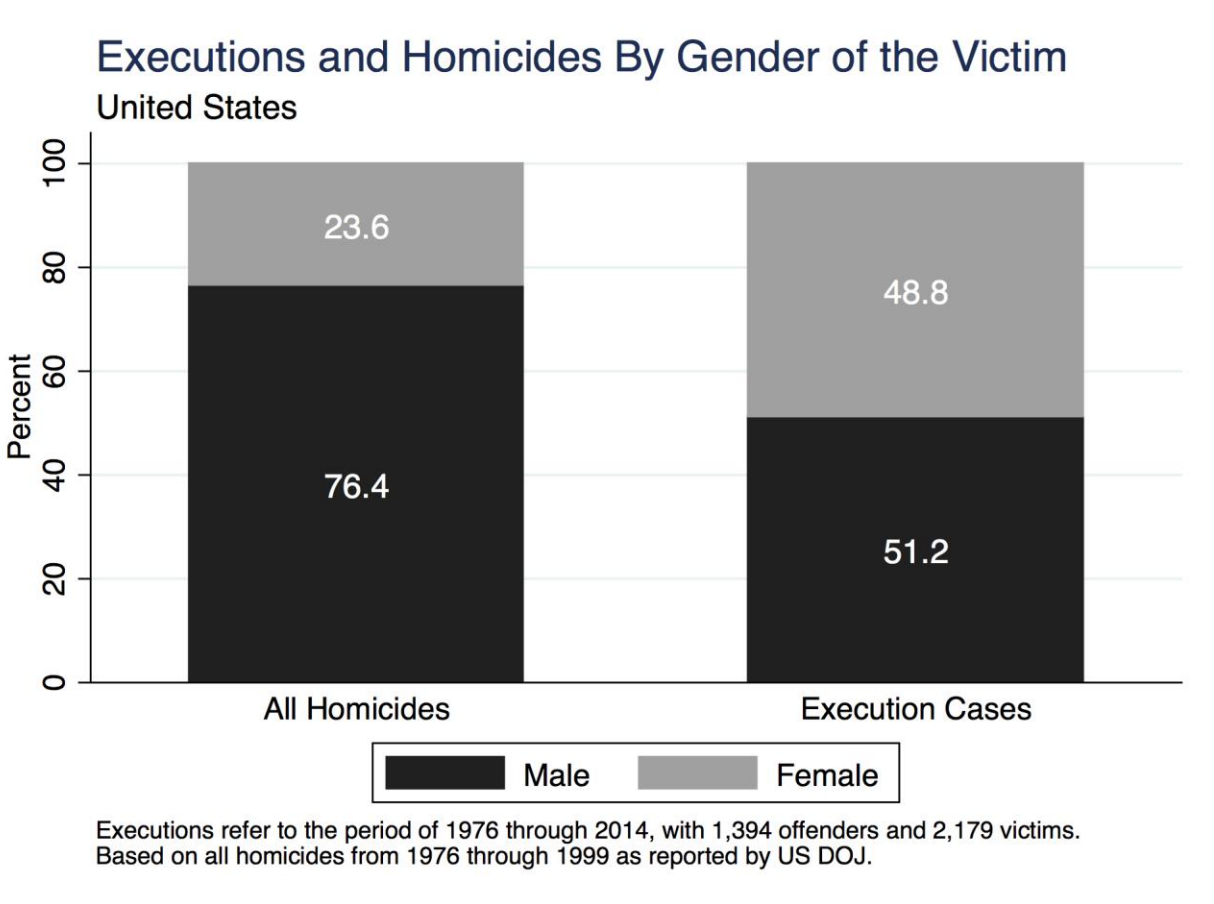
As outlined before, the victim effects are not only racialized, but highly gendered as well. Collected research suggests that murderers with female victims face a higher likelihood of being charged with a capital crime as well as a higher likelihood of being convicted and sentenced with the death penalty (Royer, Hritz, Eisenberg, Wells 2014).

In one study on the victim death penalty effects in Georgia, the odds of receiving a death sentence for killing a White female were 14.5 times higher than the odds for killing a Black male. The odds of receiving a death sentence were also significantly higher for killing a White female than the odds for killing either a Black female or a White male. Researchers found that victim gender was a main effect on whether or not the defendant would receive the death penalty, with the odds of a death sentence 3.43 times higher when the victim was female[12].

Overall, female victims of executed inmates are disproportionate to the rate of female victims in all U.S. homicide cases. Less than a quarter of all homicide victims are female, while nearly half of the victims of executed inmates are female. Figure 4.3 illustrates victim of homicides compared to victims of homicides leading to executions, categorized by gender: male or female.

[12] Georgia stats come (Williams et al)

Figure 4.3



Female victims are overrepresented on death row, accounting for a nearly equal percentage of executions to their male counterparts, but only 24 percent of total homicides.

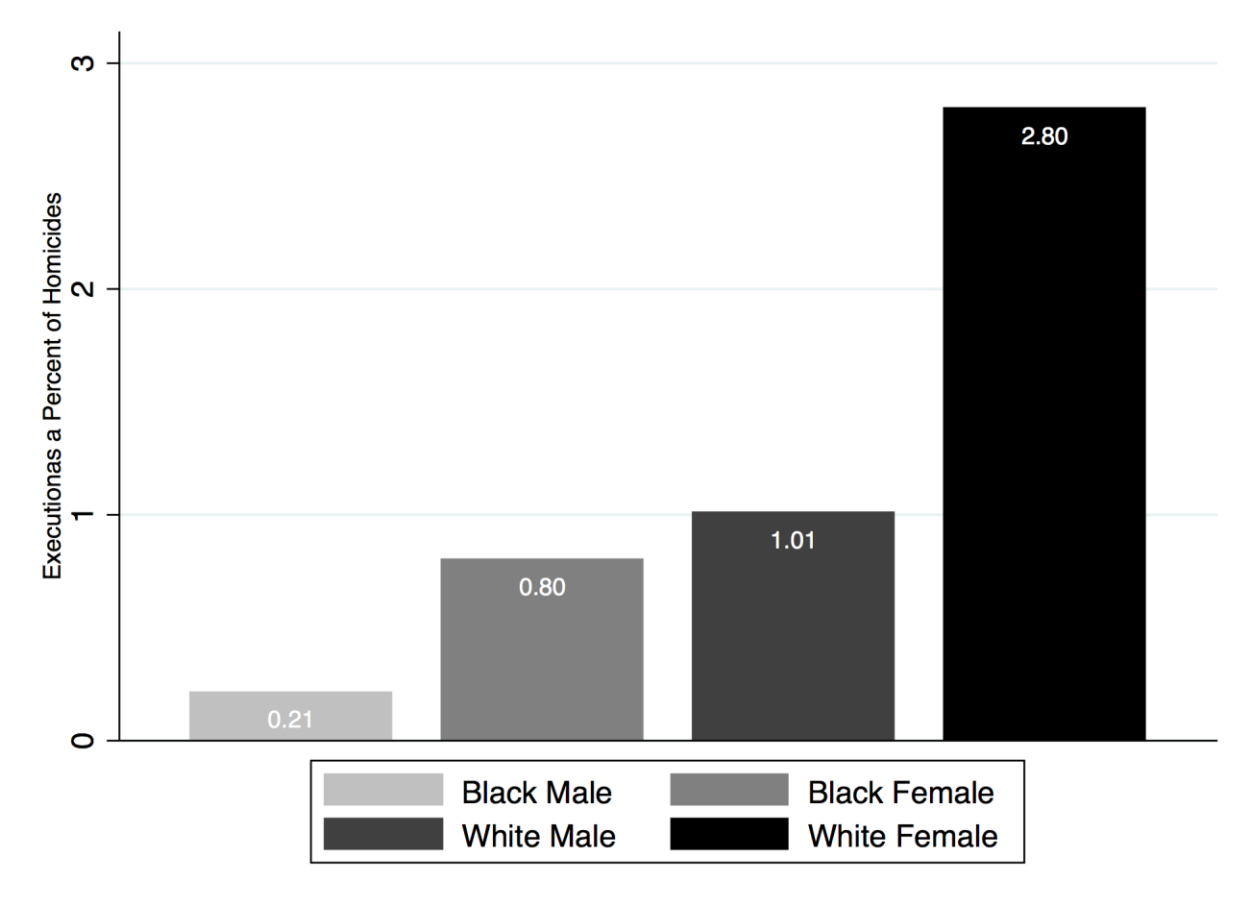
Race and Gender of the Victims

To understand whom the victims of those executed are, it is not sufficient to just look at the variables of race and gender individually. Looking at these characteristics individually, while helpful, cannot give a complete representation of their makeup. Understanding which perpetrators will eventually be executed can be understood by studying this combination of their victims, both race and gender.

Through the years of 1976 until 2015 the United States has seen 1,421 executions, an interesting number if you consider an average of 10,000 homicides per year (DPIC)[13]. Even more interesting is the break down of who the victims of these crimes are and the probability of an execution depending on the victim's combined race and gender. Figure 4.5 shows what the percent likelihood of a homicide leading to an execution will be based on the race and gender of the victim, compared to other victim characteristics. The number of homicides leading to executions is generally very low: sitting at .4 percent. This figure allows a comparison between the general .4 percent, and how that changes depending on the variables of race and gender.

Figure 4.5

Percent of Homicide Victims Leading to Inmate Executions- By Race and Gender



[13] Most of our data comes from 2014 so this number is slightly higher.

With 185,003 homicides with a Black Male victim, only .21 percent of those perpetrators are eventually executed. While the number of those executed is generally minimal across all homicides in general, it goes up a noticeable amount when looking at White Females. With 68,576 homicides of White females over the period of time from 1976 until 2014, less than half the number of homicides involving Black males, 826 of their perpetrators were executed—nearly three percent.

Looking at homicides, White women represent about 14 percent of all homicide victims; however, they are over represented when it comes to executions, reaching 42 percent. On the other hand, Black males fall victim to 38 percent of all homicides; however, their representation on death row is only a fraction, resting at only nine percent. Black male victims, for reasons explored further later on, are severely underrepresented on death row.

Race and Gender of Victims by State

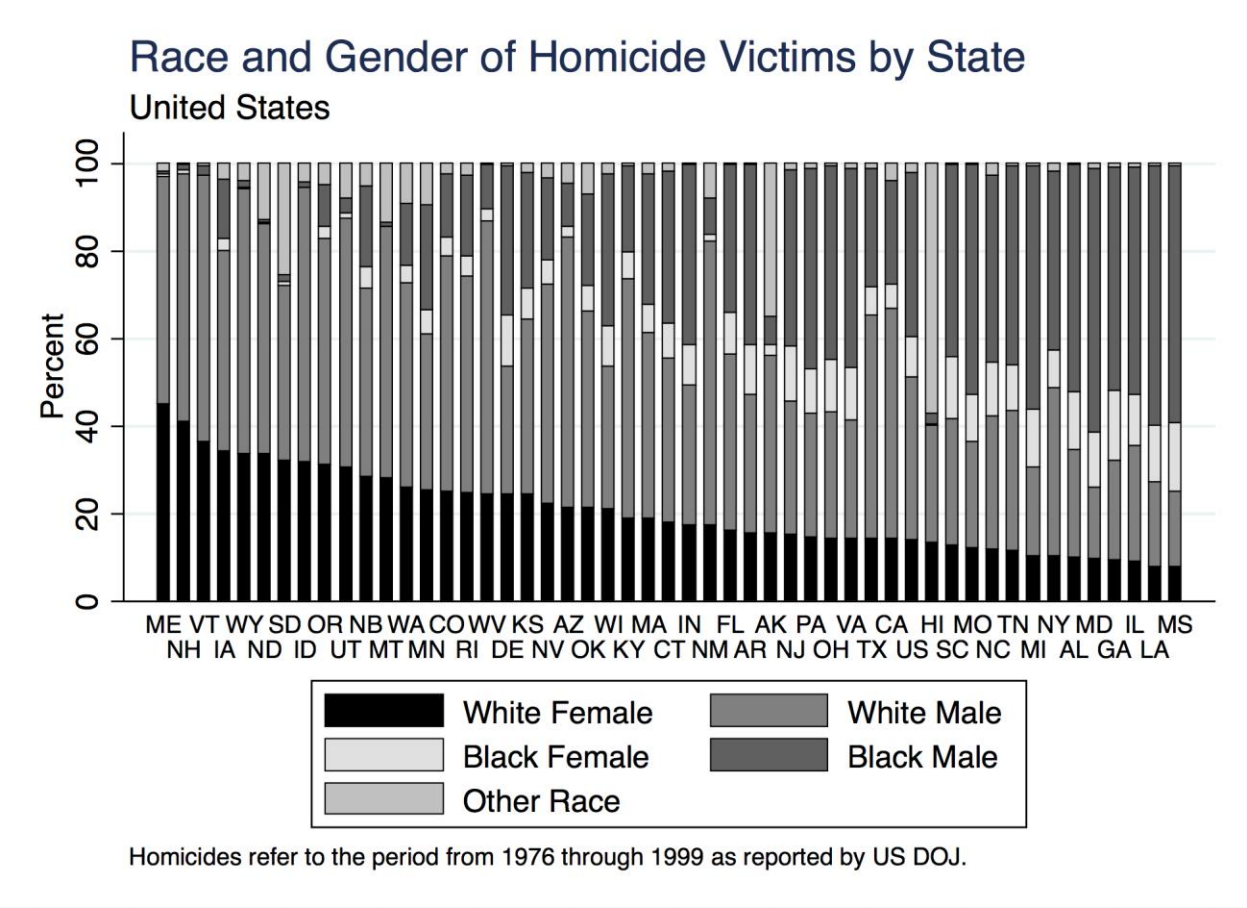
Up to this point, this chapter has focused on the analysis of homicide victims and the victims of those executed at a national level. While it is important to recognize trends of victim characteristics between those who have been killed and those whose killers are executed at an aggregate level, it is also important to break down exactly which areas of the country are the major contributors to this trend. The United States is a particularly interesting case in regards to its application of capital punishment given the nature of the Federalist system. This system allows individual states to formulate their own policies regarding the existence and administration of capital punishment independent from federal control. As a result of this system, the policies of different states on Capital punishment and its administration vary greatly. With this in mind, it is important to consider the trends regarding different characteristics of murder

victims and how these characteristics affect the likelihood that the perpetrator will be executed in terms of whether or not these trends are noticed on the state level.

In evaluating the victim characteristics of each state, it is possible to get an idea of where these trends are most salient and in which areas certain victim characteristics play a major role and others perhaps do not. For instance, the data for one state may show that very few murderers of black females are executed in comparison to white females. While this data may contribute to the recognized disparity on a national scale, the unbalance in this state may be largely due to the very low number of black female homicide victims in that state. This section will asses the race and gender of homicide victims on a state by state basis, the race and gender of victims whose killers were executed per state, and the rates of execution by rage and gender of victims in States with a large number of executions.

Figure 4.8 shows the differences in race and gender of victims across the United States, broken down by state.

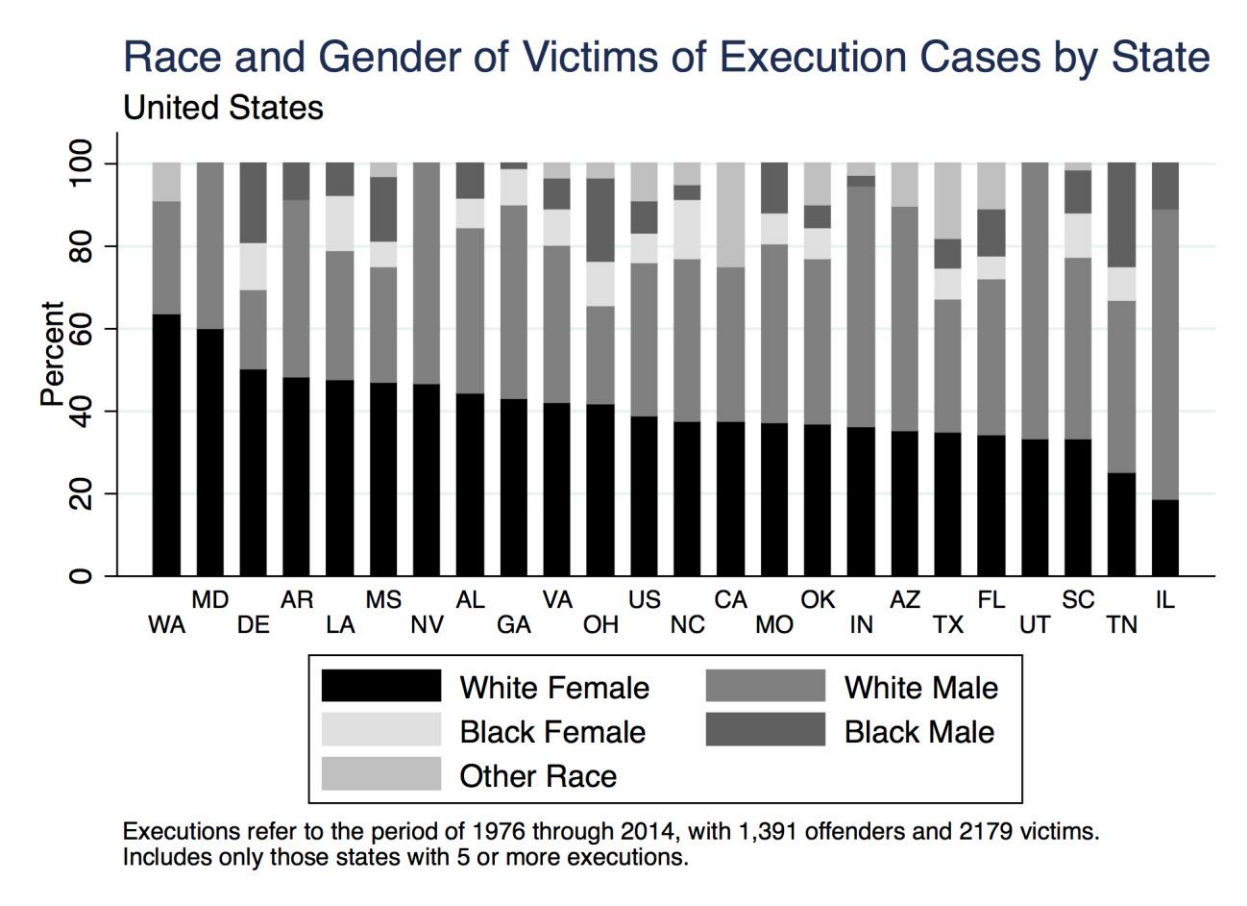
Figure 4.8



For example, while nearly 50% of homicide cases in Missouri involve a Black male, Figure 4.9 shows us that they only account for less than 20% of the executions. If we look at White female homicide victims, accounting for less than 20% of homicides, we can see they are represented in Missouri at nearly 40% of executions.

Figure 4.9, mentioned above, shows the victim characteristics of executions by state, only including states with five or more executions.

Figure 4.9



David Baldus, Charles Pulaski and George Woodworth contributed one of the most influential works in relation to victim effects. They focused on Georgia, where they analyzed over 2,000 murders. They found that a defendant who had a White victim was four times more likely to be sentenced to death as those who had a Black victim (Baldus, Pulaski, & Woodworth, 1983). This is evident in the above figure. In Georgia, the likelihood of an execution case being carried through where the victim is Black is minimal—about two percent. On the flipside, we can see that White Females and White Males account for over 80 percent of execution cases in Georgia. This is true for a number of other states. Geographically based studies have come to similar conclusions. Texas has been studied on three accounts and found to use the death penalty

at a higher rate in cases with White victims, and this holds true for the states of North Carolina and Florida. (Bowers, 1984, Ekland-Olson, 1988; Unah, 2011; Zeisel, 1981)

Table 2 shows the rate at which victims characterized by race and gender see their killers executed. Importantly, this table also shows the ratio of black males to white females. This column provides a striking comparison on a state-by-state basis of how much more likely an individual is to be executed for killing a white female than for killing a black male. The table makes the distinction between black and white victims, but does not include victims of other races. We can see from this table that the majority of homicide victims on a state-by-state basis are male, but the majority of male homicide victims shift between Whites and Blacks in certain states. Table 2 includes only those states with a high number of executions. Any state with fewer than 5 executions was left out of this table.

Table 4.2 Characteristics of Homicide Victims and Victims of those Executed by State

	Homicides					Executions						
State	Total	%Black Male	%Black Female	%White Male	%White Female	Total Executions	Total Victims	%Black Male	%Black Female	%White Male	%White Female	Ratio Black Males to White Females
GA	16,873	51	16	22	9	55	79	0.12	3	10	21	184
LA	15,514	59	13	19	8	28	38	0.33	2	4	15	45
NC	14,611	43	12	30	12	43	56	0.32	4	5	12	38
IN	9,212	41	9	32	17	20	36	0.27	-	7	8	30
AL	10,635	51	13	24	10	56	70	1	4	11	30	27
MS	7,406	58	16	17	8	21	32	1	2	7	26	23
VA	11,292	45	12	27	14	110	145	2	10	18	38	18
AR	5,109	41	11	32	16	27	58	2	-	15	35	15
MO	11,140	52	11	24	12	80	108	2	7	17	30	13
SC	7,985	44	14	29	13	43	66	2	6	13	22	11
IL	27,055	52	12	26	9	12	27	0.21	-	3	2	9
TX	47,857	27	7	51	14	518	691	4	16	9	35	9
FL	20,325	34	9	40	16	89	143	2	4	7	15	6
OK	6,072	21	6	45	21	111	160	7	33	23	46	6
OH	15,734	44	12	29	14	53	84	2	5	4	15	6
TN	11,185	45	10	32	11	6	12	1	1	1	2	4
DE	757	34	11	29	24	16	26	19	35	23	71	4
AZ	6,975	10	2	62	21	37	57	-	-	7	13	-
CA	72,147	23	5	52	14	13	32	-	-	0.32	1	-
MD	11,172	60	13	16	10	5	5	-	-	1	3	-
NV	3,171	19	5	50	22	12	15	-	-	5	10	-
UT	1,295	4	1	56	30	7	15	-	-	14	13	-
WA	5,333	14	4	47	26	5	11	-	-	1	5	-

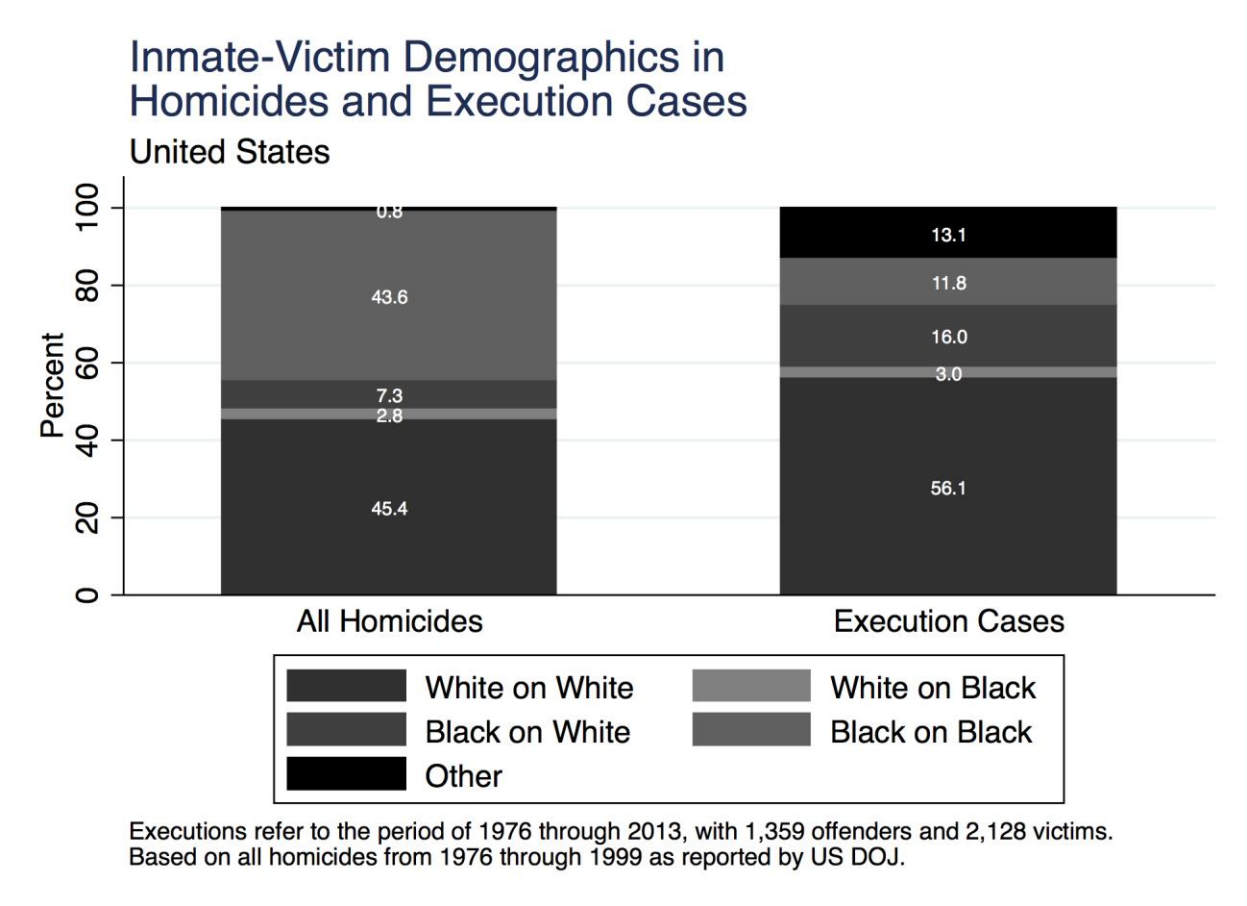
*Note: Table 4.2 excludes states that have outlawed capital punishment as well as those states with fewer than five executions. States with fewer than five executions are excluded due to complications that arise when calculating the ratio of executions between White females and Black males

Relationships Between Victim and Perpetrator

Homicides are primarily intra-racial activities, accounting for 89 percent of all cases and 72 percent of cases that led to executions. Overall, black/white killer/victim combinatorial relationships contribute to about 99 percent of all cases. Homicides in which 'Other' races are killers, victims, or both are comparatively extremely rare, and are overrepresented among cases that lead to executions. Since the vast majority of homicides concern black or white killers or victims, in any combination, we will focus on those demographics in further analysis.

Figure 4.6 shows different combinations of inmate/victim characteristics and their representation in homicides as well as executions. Here we can see the stark difference between White on White crimes and Black on Black crimes. White on White crime accounts for about 45 percent of all homicides; however, that number jumps to 56 percent of executions. Black-on-Black crimes, accounting for nearly 44 percent of homicides, are represented in only 12 percent of executions.

Figure 4.6



While most homicides are interracial, in cases that have led to executions, Black on Black murders are drastically underrepresented on death row, appearing at 1/4 the proportion that they occur in all homicide cases. Compared to other demographic relationships, Black on Black murders are punished at 1/4 the rate of white on black murders, 1/5 the rate of white on white murders, and 1/8 the rate of black on white murders. In stark contrast, Black on White murders are overrepresented in death row, appearing at twice the proportion that they occur in all homicides. A study conducted in Philadelphia between 1983 and 1993 found that, after controlling for the defendant's criminal background and the gravity of the crime committed, Black defendant's were sentenced at a rate of 38 percent more than other defendants. Further, they found that the death penalty was more likely to be given in cases where black defendants

have non-black victims, and least likely in the case where a non-black defendant has a nonblack victim (Baldus et al. 1998). The finding of racial disparities in different studies makes it appear as if Blacks are overrepresented on death row; however, this is not the case. Figure 4.6 highlights this stark disproportion in the death penalty's considerations of Black victims. This trend of Black on Black underrepresentation and Black on White overrepresentation has persisted over time. As a baseline, White on White murders delineates an almost consistent 1:1 ratio of cases that led to executions versus all homicides in general. In comparison, there is a persistent bias towards executing Black murderers of White victims and against executing White murderers of Black victims. Additionally, there have been substantial lengths of time during which no White murderers were executed for killing Black victims. Given the numbers and trends, the disparity in the death penalty's treatment of different victims appears to be chronic. Placing more value on the lives of Whites has resulted in the harsher treatment of Blacks in the judicial system, and consequently, on death row (ACLU, 2007; NAACP, 2013; Baldus, Pulaski, & Woodworth, 1983).

Table 4.3 Race and Gender Comparisons Between Execution Victims and Perpetrators

	Victim Race/Gender											
Perpetrator	White Female		White Male		Black Female		Black Male		Other		Total	
Race/Gender	N	%	N	%	N	%	N	%	N	%	N	%
White Female	1	10.0	9	90.0	0	-	0	-	0	-	10	100.0
White Male	317	41.33	401	52.3	9	1.2	11	1.4	29	3.8	767	100.0
Black Female	1	25.0	0	-	0	-	3	75.0	0	-	4	100.0
Black Male	121	25.3	162	33.9	64	13.4	99	20.7	6	6.7	478	100.0
Other	28	20.7	39	28.9	2	1.48	3	2.2	63	46.7	135	100.0
Total	468	33.57	611	43.8	75	5.4	116	8.32	124	8.9	1,394	100.0

In the conclusion of the previous chapter, the relationship between homicide perpetrators and their victims was initially explored. Table 4.3 looks at this same relationship, but focuses instead on those cases that lead to execution. A number of trends represented in this table are particularly striking. First of which is the infrequency of executions that result from black male on black male homicide particularly when one considers the high number of black on black homicide cases. On the other hand, cases in which a black male murders a white female are much lower than those of black male on black male. This data suggests that black males are far more likely to be executed for the murder of a white female even though this constitutes a lower percentage of black male homicides in general. In addition to this, table 3 also clearly shows that murder of a white woman leads to the most instances of executions, a point that has been well covered earlier in the chapter. Importantly, however, is the distinction between the perpetrator in execution cases in which the victim was a white female. In the United States, Far more white males murder white females than do black males. However, Black males are far more likely to be executed for killing a white female than are white males. In other words, while murdering a white woman leads to a higher likelihood of being executed, this likelihood increases disproportionately when the perpetrator is a black male.

This distinction is crucial when considering the roles of both the homicide victims characteristics and the perpetrator characteristics. While this chapter has shown that the race and gender of the victim is highly indicative of likelihood of execution, the race of the perpetrator has a significant impact as well. While the previous chapter suggested that racial disparities were not particularly problematic in regards to who was committing crimes, this further analysis regarding the interaction between perpetrator and victim characteristics clearly shows a racial bias principally affecting black males. With this data in mind, one must consider the problematic

nature of a system that punishes certain individuals for the crimes that they commit against one race and gender, but not for the crimes that similar individuals commit against their own race and gender.

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5

What Crimes Are Eligible For Capital Punishment?

Arvind Krishnamurthy and Liz Schlemmer

Introduction

Much of this book leads a discussion regarding the application of the death penalty; however, law precedes application. Before furthering the discussion, it is important to understand what crimes are eligible for capital punishment across the United States. Following the decision of *Furman v. Georgia,* 37 states amended their death penalty laws to ensure that the application of capital punishment would not be capricious and arbitrary (Olasky). These changes served as an attempt to ensure that the individuals executed represented those that committed the most heinous crimes.

The 1976 Supreme Court case *Gregg v. Georgia* ended the de facto moratorium upon the death penalty that *Furman* created, approving new measures in the state code designed to limit arbitrary administration of death sentences. New state laws offered guided discretion for juries, providing specified lists of circumstances that would make an offense eligible for death. Justice White predicted in *Gregg* that if the pool of crimes eligible for death was restricted, that most eligible murders would result in death sentences: "As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries—even given discretion not to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined" (*Gregg v. Georgia* 222). As this chapter will show,

White's prediction has not held true. In the years following *Gregg v Georgia*, the range of offenses and aggravating circumstances eligible for the death sentence has expanded, while the number of defendants sentenced to death has dropped in recent decades.

In 2015, 31 states have death penalty statutes in their state code. This chapter aims to describe the underlying framework of state laws that define death penalty eligibility by providing categorized state-by-state data on the type of crimes that are eligible for capital punishment, as well as the aggravating and mitigating factors that weigh in death penalty sentencing.

Capital Eligible Crimes

The only crimes eligible for capital punishment in the United States are murder and crimes against the state. In its 2008 decision in the case of *Kennedy v. Louisiana,* the Supreme Court ruled against the application of the death penalty as a violation of the Eighth Amendment in the case of the brutal rape of a child. The ruling set a new standard for death penalty eligibility, furthering the precedent set in the 1977 Supreme Court Case *Coker v. Georgia.* As a result of the precedent set forth by *Kennedy v Louisiana*, capital punishment is now only permissible on the basis of on one of two conditions:

(1) The crime is committed against an individual or individuals and leads to the intentional death of a victim.

(2) The crime is committed against the state.

Beyond these two conditions, death penalty eligibility is determined by the states. The Supreme Court did not extend the proportionality standard to non-murder crimes against the state: "Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are

offenses against the State," wrote Justice Kennedy in his majority opinion (*Kennedy v. Louisiana* 26).

The argument furthered by the Supreme Court in *Kennedy v Louisiana* was based upon the principle of proportionality. The Court ruled that capital punishment is unjustifiable in cases where a life is not taken, placing murder in a special category for the purposes of capital punishment. Writing for the Court, Justice Anthony Kennedy stated, "The court concludes that there is a distinction between intentional first–degree murder, on the one hand, and non–homicide crimes against individuals, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but in terms of moral depravity and of the injury to the person and to the public, they cannot compare to murder in their severity and irrevocability." This distinction furthers the claim that capital punishment is to be reserved solely for crimes with the highest degree of severity and heinousness.

Death Penalty for Non-Murders

A number of states have statutes on the books that allow the pursuit of capital punishment for crimes not involving murder. Presumably, any of these crimes that do not fit the criteria established in *Kennedy v. Louisiana* could no longer be applied. Death sentences for non-homicides are historically rare. No one currently on death row has been sentenced for one of these charges. Table 5.1 lists all Non-Murder Capital Eligible Crimes

Table 5.1 Non-Murder Capital Eligible Crimes.

Crime	# of States With Statute	State(s)
Placing a bomb near a bus terminal	1	Missouri

Espionage	1	Missouri
Aggravated assault by incarcerated, persistent felons, or murderers	1	Montana
Treason	9	Arkansas, Calif., Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Washington
Aggravated Kidnapping	5	Colorado, Idaho, Illinois, Missouri, Montana
Drug Trafficking	2	Florida, Missouri
Aircraft Hijacking	2	Georgia, Missouri

Note: Data from DPIC Database

Capital Eligible Murder

Capital eligible murders are murders accompanied by particular characteristics or committed under defined circumstances known as aggravators. States label the crimes differently in state code, with terms such as “Capital Murder with Aggravating Circumstances” (Arkansas) or “First Degree Murder with Special Circumstances” (California); however, each state generally lays out conditions for considering a murder eligible for capital punishment.

In most states, there is no distinction made between a death penalty eligibility characteristic and an aggravating circumstance to be weighed against the defendant during sentencing. Capital trials are bifurcated – with a guilt phase followed by a sentencing phase. If a defendant is found guilty of murder accompanied by any of these eligibility characteristics during the guilt phase, the prosecution may seek a death sentence and juries will weigh these characteristics during the sentencing phase.

Tables 5.2 and 5.3 are an aggregated summary of statutes for eligibility characteristics found within individual state codes. For the purposes of presenting this data in a cohesive manner, multiple statutes are placed under a single category. For example, the field "Victim on Public Duty" encompasses such statutes as: the victim is a peace officer; the victim is a penal officer; the victim is a prosecutor; the victim is a state or federal official; the victim is a subpoenaed witness; the victim is a schoolteacher; the victim is a news reporter; etc. and acting in the line of duty at the time of the murder or that the murder was in response or retaliation to an action the victim made while on public duty. "Criminal Sexual Conduct" encompasses rape, sexual assault, sexual abuse of a minor, sodomy, oral copulation, and rape by instrument. "Victim Vulnerability" includes statutes concerning the victim's youth or old age, or that the victim is unborn, known to be pregnant, mentally or physically disabled, incarcerated, or had a protective order.

This classification serves to present the data in a comprehensible manner. Because each and every state has unique capital punishment statutes, semantic differences in language may exist though functionally the statutes may be identical. For example California's capital punishment statute has a murder carried out for "financial gain" as an aggravating factor, while Delaware's capital punishment statute has a murder carried out for "pecuniary gain" listed as an aggravating factor. These statutes are identically conceptually and functionally, but semantically differ. This table allows the two statutes to be classified together. As a result, this table aims to represent crimes by their conceptual themes to smooth out these differences in technical language. The totals for the number of states with any category of eligibility characteristics may be larger than the number of states that share any single statute in that category. For example, in the case of "Victim on Public Duty," 24 states have the statute "victim is a peace officer" (the

most common statute in this category) and 10 states have the statutes “victim is a subpoenaed witness” (the next most common) or “victim is a jail or prison official,” but combining all statutes related to a victim’s public service results in every state having at least one related statute in its code. A full list of statutes classified under a single category is listed in the appendix.

Table 5.2 Eligibility Characteristics Alabama to North Carolina

Characteristic	#	AL	AZ	AR	CA	CO	DE	FL	GA	ID	IN	KS	KY	LA	MS	MO	MT
Victim on Public Duty	31	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
*Defendant's Criminal History	28	X	X	X		X	X	X		X	X	X	X		X	X	X
Criminal Sexual Conduct	27	X	X	X	X		X	X		X	X	X	X	X	X	X	X
For Gain	26	X	X	X	X	X	X	X	X			X	X	X	X	X	
Kidnapping	26	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X
Robbery	24	X	X	X	X		X	X	X	X	X		X	X	X	X	
Burglary	24	X	X	X	X		X	X	X	X	X		X		X	X	
* Risk to Multiple Victims	24	X	X			X	X	X	X			X	X	X		X	X
Victim Vulnerability	24	X	X	X		X	X	X		X	X	X	X	X	X		

Escape or Avoiding Arrest	23			X		X	X	X	X	X		X		X		X	
Arson	22	X	X	X	X		X	X	X	X	X		X	X			
*Heinousness	18	X	X	X		X	X	X	X	X		X				X	
Directed Another	17			X		X	X		X		X	X			X	X	
Interfering with Justice	17	X			X		X	X	X	X	X	X		X			
Type of Weapon	16	X	X	X	X	X	X	X		X	X				X		
*Torture	15				X	X	X		X	X	X						X
Location of Weapon or Victim	10	X		X	X						X			X	X		
Piracy or Wrecking	10	X		X	X			X	X		X				X	X	
Drug-Related Charges	10			X							X			X		X	
Premeditated	9			X			X	X		X		X					
Terrorism	9		X	X						X				X			

Treason	7				X	X			X					X	X		
Gang Activity	6		X		X			X			X					X	
Poisoning	6				X		X			X							
Stalking Victim or *Lay in Wait	5				X	X				X							X
Hate Crime	4				X	X	X										
Relationship of Defendant to Victim	4							X									
Serial Killing	2					X											
*Defendant is Future Danger	2					X				X							
Interfering with Victim's Free Speech	1						X										

Table 5.3 Eligibility Characteristics – Ohio to Wyoming

Characteristic	NV	NH	NC	OH	OK	OR	PA	SC	SD	TN	TX	UT	VA	WA	WY
Victim on Public Duty	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Defendant's Criminal History	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Criminal Sexual Conduct	X	X	X	X	X		X	X		X	X	X	X	X	X
For Gain	X	X	X	X		X	X	X	X	X		X	X	X	X
Kidnapping	X	X	X	X	X			X		X	X	X		X	X
Robbery	X		X	X	X			X		X	X	X	X	X	X
Burglary	X	X	X	X	X			X		X	X	X	X	X	X
Risk to Multiple Victims	X	X	X	X	X	X		X	X	X	X	X	X	X	
Victim Vulnerability	X	X		X	X		X	X		X	X	X	X	X	X
Escape or	X	X	X	X	X	X		X	X	X	X	X	X	X	X

Avoiding Arrest															
Arson	X		X	X	X			X		X	X	X	X	X	X
Heinousness		X	X	X					X	X	X	X			X
Directed Another		X				X	X	X	X	X	X	X		X	X
Interfering with Justice			X	X		X				X		X	X	X	X
Type of Weapon			X	X	X	X	X		X			X			X
Torture	X				X	X	X	X		X		X	X		
Location of Weapon or Victim	X			X			X					X			
Piracy or Wrecking			X									X			
Drug-Related Charges		X			X		X	X	X				X		
Premeditated	X	X											X		X
Terrorism	X			X	X					X	X		X		

Treason							X					X			
Gang Activity														X	
Poisoning	X							X				X			
Stalking Victim or Lay in Wait	X														
Hate Crime	X														
Relationship of Defendant to Victim				X				X						X	
Serial Killing							X								
Defendant is Future Danger															X
Interfering with Victim's Free Speech															

Note: * Designates Eligibility Characteristics with a level of discretion

Patterns In Eligibility Characteristics

A few patterns stand out in tables 5.2 and 5.3. Five of the ten most frequent eligibility characteristics involve committing a felony during the course of the homicide, and the second most frequent eligibility characteristic is the defendant's criminal history. The only conceptual category to be present in the statutes of all 31 states was the victim serving on public duty. This places individuals serving in the line of public duty (police officers, firefighters, law enforcement officers) into a special category of individual. The vulnerability or risk of the victim is another recurrent theme across tables 5.2 and 5.3. Victim Vulnerability is an eligibility characteristic for 22 states, with the elderly, the young, the pregnant and the disabled being designated as protected groups in various states. This is of particular interest given the trends described in Chapter 2 (Victim Characteristics), which showed that the race of the victim is the single biggest factor in determining whether an individual is executed.

The similarities in capital eligibility characteristics across states is likely a reflection of states adopting the model penal code. According to Chelsea Creo Serrano of Harvard Law, "In their efforts to draft death penalty statutes that complied with Furman, most state legislatures adopted the Model Penal Code's guided discretion model, which specified eight aggravating factors and required the jury to find at least one such factor before a defendant could be death eligible." (Serrano 232). These eight aggravators are listed below in table 5.3.

Table 5.3 - Eight Aggravators Listed in Model Penal Code

#	Aggravator
1	The murder was committed by a convict under sentence of imprisonment.
2	The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

3	At the time the murder was committed the defendant also committed another murder
4	The defendant knowingly created a great risk of death to many persons.
5	The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
6	The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody
7	The murder was committed for pecuniary gain.
8	The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.'

Note: Courtesy of Model Penal Code § 210.6(3).

Mitigating Factors

During the sentencing phase of the bifurcated trial, after the defendant has been found guilty of capital eligible murder, the jury is asked to weigh mitigating factors against the aggravating factors or eligibility characteristics to determine whether a death sentence is appropriate. Mitigating circumstances serve as explanations of the defendant's behavior in ways that may be relevant to a sentencing decision (Haney 1995). Several states provide juries with little guidance, but allow for discretionary mitigators as the prosecutor and jury see fit. The existence of unlimited mitigating circumstances may lead to greater jury discretion, while the existence of subjective mitigators leaves room for arbitrariness in the same way that subjective aggravators do.

Table 5.5 Mitigators – Alaska to North Carolina

Mitigator	#	AL	AZ	AR	CA	CO	DE	FL	GA	ID	IN	KS	KY	LA	MS	MO	MT	NV	NH	NC

*Acted under duress or domination	25	X	X	X	X	X	X	X			X	X	X	X	X	X	X	X	X	X
* Mental Disturbance	24	X		X	X	X	X	X			X	X	X	X	X	X	X	X		X
Age	23	X	X	X	X	X	X	X			X	X	X	X	X	X	X	X		X
No Past Criminal History	22	X		X	X			X			X	X	X	X	X	X	X	X		X
*Capacity to Conform Conduct Compromised	21	X	X	X	X	X	X	X			X	X	X	X	X	X	X		X	
*Discretionary mitigators	21		X		X	X	X	X		X	X			X			X	X		X
*Minor Participation	21	X	X	X	X	X		X			X	X	X	X	X	X	X	X		X
Victim is Participant	15	X									X	X	X	X	X	X	X	X		X

*Defendant believed there was moral justification	4					X						X							
*Could not have foreseen death	3	X	X			X													
Aided in arrest of another	1																		X
*Defendant was acting in heat of passion	1															X			

Table 5.6 Mitigators – Ohio to Wyoming

	OH	OK	OR	PA	SC	SD	TN	TX	UT	VA	WA	WY
Acted under duress or domination	X		X	X	X		X			X	X	X

Mental Disturbance	X		X	X	X		X		X	X	X	X
Age	X		X	X	X					X	X	X
No Past Criminal History	X		X	X	X		X		X	X	X	X
Capacity to Conform Conduct Compromised	X			X	X					X	X	X
Discretionary mitigators	X	X		X		X	X	X	X	X		X
Minor Participation	X			X	X					X	X	X
Victim is Participant				X	X					X	X	X
Defendant believed there		X			X							

was moral justification												
Could not have foreseen death												
Aided in arrest of another												
Defendant was acting in heat of passion												

Note: * Designates Mitigators with a level of discretion

Subjectivity Amongst Eligibility Characteristics, Aggravators and Mitigators

Subjective Eligibility Characteristics or Aggravators

A number of the death penalty eligibility characteristics and aggravators involve a level of discretion or subjectivity from jurors and judges. These characteristics and aggravators are marked with an asterisk (*) in tables 5.2 and 5.3. Chief amongst these are statutes that label crimes that especially heinous an eligibility characteristic. Eligibility characteristics for capital punishment include crimes that are “heinous” in ten states, acts that show “extreme indifference

to human life" in five states, acts that are "inhuman" in three states and even, in South Dakota, acts that demonstrate "sadistic inclination". Each of these terms is provided without any criteria or definition to guide a juror in their decision making.

Scholars and Justices alike have pointed out these flaws on numerous occasions. Jeffrey Kirchmeier, of the City University of New York School of Law, writes of an inherent paradox in sentencing schemes that attempt to simultaneously create narrow eligibility requirements while also allowing for individualized sentencing with arbitrary aggravating factors and unlimited discretionary mitigating factors. Kirchmeier argues that while only mandatory sentencing schemes can be nonarbitrary, they have been historically considered unfair; thus, "no human system for selecting defendants for the ultimate punishment can be both fair and nonarbitrary." (Kirchmeier p. 345) Richard Rosen, a Law Professor at the University of North Carolina at Chapel Hill, argued that such aggravators are "too vague, too broad and too subjective to provide any real guidance to a sentencer or a court," in his critique of these categories titled *The "Especially Heinous" Aggravating Circumstance In Capital Cases -- The Standardless Standard* (Rosen 1986). In a death penalty appeal reaching the Arizona Supreme Court, Chief Justice Feldman stated that "If there is some "real science" to separating "especially" heinous, cruel, or depraved killers from "ordinary" heinous, cruel, or depraved killers, it escapes me. It also has escaped the court" (*State v. Salazar).*

Justice Souter, in the Supreme Court case *Kansas v Marsh* wrote that "within the category of capital crimes, the death penalty must be reserved for the worst of the worst." But because the "heinousness" statutes of most states are vague, lacking any definitions or guidance, the punishment has been imposed wantonly" (Pg. 4). JJ Donohue, a professor of Law at Stanford conducted an empirical evaluation of the death penalty in Connecticut in order to determine

whether capital punishment was actually being used for the "worst of the worst". Donohue analyzed all homicides in Connecticut from 1973 until 2007, and found 207 death penalty eligible homicides. Donohue and his team then developed a metric to rate the "egregiousness" of each of these 207 capital eligible homicides. He found that only one of the nine death sentences issued by the state was amongst the most egregious. In fact, Donohue found that the median number of equally or more egregious cases for eight of the nine death sentences in Connecticut is between 35 and 46 depending upon the measure of egregiousness used - a clear example of the discretion that "heinousness statutes" allow for (Donohue 2014).

Another particularly vague death penalty statute includes the capital eligibility criteria of "lay in wait". The term itself is broadly applied to any defendant who commits murder after deliberation and waits for an opportune moment to kill, but it lends itself to an arbitrary application. Five states contain "lay in wait" statutes, including Colorado. A study of the death penalty's application in Colorado found that the lying in wait aggravator applied in an "extremely large number of murder cases in Colorado," despite it being employed in a very small number of cases. In fact the very same study, conducted by Law Professors Justin Marceau, Sam Kamin and Wanda Foglia, found that in the state of Colorado 92% of all first degree murders were eligible for the death penalty while it was pursued all the way through sentencing in only one percent of those killings, and obtained in only 0.6 percent of all cases - an indicator that the ambiguous nature of capital punishment statutes leads to rampant subjectivity and arbitrariness in application (Marceau 2013). It is worth noting that Colorado's death penalty statute is nearly identical to the model penal code aggravating factors that most states based their statutes upon.

Torture is listed as an aggravator or eligible circumstance in 15 states, but only in Indiana do legislators explicitly define what constitutes torture. Most states do not define the actions that

would constitute torture, nor do they explain a level of severity, time or pain necessary. This leaves torture to become another discretionary aggravator or eligible circumstance. Similarly, 24 states list "risk to multiple victims" as an aggravator or eligible circumstance, and 2 states list "defendant is future danger" as the same. While some states, like Kentucky, specify what it means to pose a 'grave risk' by specifying the kinds of weapon used, and location of the murder 12 of the 24 states simply state that the victim posed a "grave or great risk to multiple persons". By failing to specify what type of weapon is needed, a location or any criterion for what constitutes a risk to multiple victims this is another category open to subjectivity and discretion.

Subjective Mitigators

The subjectivity and ambiguity in statutes is not simply reserved for eligibility characteristics and aggravators. In fact many mitigators are rife with ambiguity and subjectivity. 21 states include a statute that simply says "any other mitigators up to the discretion of the jury" - an obviously ambiguous, broad category. Mitigators like "acting in the heat of passion" , "sincere belief in moral justification" , and "inability to foresee death" are present in multiple states, and inherently subjective. Each of these mitigators calls for a juror to determine the mindset or emotional state of a defendant, making it a particularly prone to arbitrary or discretionary application.

Two of the five most common mitigators across all states were that the defendant "acted under duress or domination" and that the defendant had their "capacity to conform conduct compromised". While some states do define what constitutes an inability to conform their conduct, 10 of the 25 states that include this mitigator, simply state that an individual's capacity to conform their conduct was "compromised" without providing further details regarding what constitutes compromised capacity to conform conduct. Each and every state that includes the

mitigator "acted under duress or domination" fails to define what constitutes domination or duress. This leaves each of these statutes open to arbitrary and discretionary application.

The Idiosyncratic Eligibility Characteristics

Thirty-one states provide for capital punishment in their legal code. There is not one death penalty eligibility characteristic shared by all of the states that allow execution. The most common single aggravating circumstance to murder -- kidnapping – is eligible in 26 of 31 states. When disaggregated from the categories created in tables 5.2 and 5.3, the overwhelming majority of specific eligibility characteristics are shared by 10 states or fewer. Table 5.7 lists idiosyncratic eligibility characteristics found in only one or two states.

Table 5.7 Idiosyncratic Eligibility Characteristics

Eligibility Characteristic	# of States	
Defendant Is a Designated Sexual Predator	2	Florida, South Carolina
Perpetrated On Educational Property	2	Mississippi, Nevada
Victim In A Vehicle	2	Alabama, Arkansas
Victim Is Conservation Officer	2	New Hampshire, Mississippi
Victim Is Liquor Enforcement Inspector	2	Mississippi, Oregon
Defendant Had Familial Or Custodial Authority Of Victim	1	Florida
Interfering With Victim's First Amendment Right	1	Delaware
Murder To Increase Position In Hierarchical Organization	1	Washington
Perjury Causing Execution Of An Innocent Person	1	California

Possession Of The Weapon Was Felony	1	Colorado
Weapon Was A Remote Stun Gun	1	Arizona
Victim Is Civilian Employee Of State Crime Laboratory	1	Louisiana
Victim Is Family Member of Defendant	1	Washington
Victim Is Newsreporter	1	Washington
Victim Is Teacher Or School Employee	1	Arkansas

Felony Murder

Ten men have been executed under the death penalty for murders their jurors knew they did not commit (Death Penalty Information Center). They were an accomplice, lookout guard, or get-away driver, but not the one who pulled the trigger on the fatal shot. In three of those cases, the murderer received a lesser sentence. The crime is called felony murder: aiding in a situation that led to murder regardless of culpability for the murder itself. In six states it is certainly eligible for death. The past executions stand proof. In Oregon, it is not possible to receive a death sentence for felony murder, the only state with an explicit outcome for that crime. In some states, minor participation in the homicide is a mitigating factor to be weighed in a defendant's benefit during sentencing. In other states, potential outcomes are vague. According to Princeton Research Associates, two public opinion polls garnered 32% and 27% support for the application of the death penalty if the convicted person was only an accomplice to the person who actually did the killing (Further discussion in public opinion chapter).

States that Executed for Felony Murder: Texas (5), Florida, Indiana, Missouri, Oklahoma, Utah

States where Minor Participation in Crime is a Mitigator:Alabama, Arizona, Kentucky, Missouri, New Hampshire, North Carolina, Tennessee, Utah

Felony murder was reviewed by the U.S. Supreme Court in *Enmund v. Florida* in 1982 and again in *Tison v. Arizona* in 1987. In *Enmund v. Florida* the Court gave the opinion that in dealing with felony murder, the focus must be on the defendant's culpability, not on the culpability of accomplices who committed murder. If a defendant did not kill or intend to kill, it would be impermissible for the State to treat the defendant equally to an accomplice who committed or intended to commit murder. *Tison v. Arizona* clarified this standard to allow for capital punishment of defendants who were major participants in the underlying felony and who demonstrated reckless indifference to human life and intended or anticipated that lethal force might be used.

Four months after the Supreme Court gave its decision in *Tison v. Arizona,* Beauford White was executed for felony murder in Florida. White had participated in a robbery known as the Carol City Killings involving the theft of drugs and jewelry in which his two accomplices shot eight of the robbery witnesses in the back of the head, killing six (Bookman 2014). White's lawyers argued that the murders were part of a drug-dispute involving his accomplices John Ferguson and Marvin Francois, who had a prearranged contract to kill two of the victims. White testified that he had no knowledge that murder would occur. Witnesses testified that White appeared in shock over the killings and refused to dispose of the guns to conceal evidence, saying "I ain't getting rid of nothing." All 12 of Beauford White's jurors recommended life imprisonment over execution for his crime. In Florida between 1972 and 1974, a jury's vote in death sentencing was a recommendation only, and a judge had the final decision. Judge Richard S. Fuller overruled the jury's unanimous recommendation and sentenced White to death, a decision upheld by the Florida Supreme Court. Following the Supreme Court's decision in *Enmund v. Florida,* the Florida Supreme Court heard White's appeal again, but resisted a

reversal and found that *Enmund* did not prohibit the death penalty under the specific circumstances of White's case. White went to the electric chair in August, 1987, while the apparent ringleader of the Carol City Killings, who fired the bullets into the victims' heads, whose own jury unanimously recommended a death sentence, reached the end of his appeals process and was executed in August, 2013.

Other cases of executions include Gregory Resnover, executed in Indiana in 1994 for felony murder involving the death of an Indianapolis police sergeant during a police raid. An accomplice was convicted of firing the fatal shot. In appeals, Resnover's lawyers cited evidence that he fired no shots and only admitted to doing so to protect his younger brother from taking blame (Reuters 1994). Dennis Skillicorn was executed in 2009 for a murder committed by his accomplice who took the victim a quarter mile away from their parked car to fire the shot (Clark County (IN) Prosecutor). Steven Hatch was executed in 1996 for murders committed by his accomplice Glenn Ake; he and Ake invaded the home of a pastor's family and abused the family and raped the daughter, but Hatch left the house while Ake shot the four members of the family, killing both parents. Ake is serving a life sentence under the protection of double jeopardy after the Supreme Court sent his case back to lower courts because it was found he did not receive adequate counsel to plead an insanity defense (Marquand 1996). Though *Tison v. Arizona* laid out standards for felony murder death sentences that these cases arguably met, there is no standard that guarantees that a triggerman will receive a harsher sentence than an accomplice.

Conclusion

In 1975 *Gregg v Georgia* ended the de facto moratorium upon the death penalty, on the basis of the death penalty serving as a "an extreme sanction, suitable to the most extreme of crimes" (Pg 187). The court also set forth a broad guideline that the criteria for receiving the death penalty

must be objective - a response to the *Furman v Georgia* ruling that "where discretion is afforded [to] a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" (*Gregg v Georgia*, 189).

37 years later, the States have failed in these tasks. The capital eligible characteristics, aggravators and mitigators used to determine the sentencing and guilt of an individual are rife with vague, ambiguous language that lacks explicit definitions with clear boundaries. Criterion like "lay in wait", "heinousness", "sadistic inclination" and "capacity to conform conduct compromised" are used to determine whether an individual receives a death sentence, but are so inadequately defined that almost any murder can be slotted under these circumstances. This leaves the death penalty largely subject to discretion - whim and fancy rather than objective criteria. These inadequately defined criteria determine the life and death of individuals around us, and their lack of precision have contributed to the disparities and biases that currently exist in the application of the death penalty.

Appendix

Categories for Tables 5.2 & 5.3

1. Victim on Public Duty: law enforcement or peace officer; sheriff; firefighter; news reporter; teacher; employee of crime lab; penal officer, state federal or local public official; conservation officer, liquor enforcement inspector; judge, juror, prosecutor, witness, or nongovernmental informant.

2. Defendant's Criminal History: prior convictions, incarcerated, on probation, on unauthorized release, under life imprisonment, designated sexual predator.

C. Criminal Sexual Conduct: rape, sexual assault, sodomy, oral copulation, rape by instrument, sexual abuse of a minor.

3. For gain: for pecuniary gain, on contract, to increase position in hierarchical organization.

4. Kidnapping: also abduction; subjected victim to criminal confinement; using victim as shield, hostage or ransom.

5. Robbery

6. Burglary

7. Risk to Multiple Victims: also grave risk to another, great risk of death to many, two or more victims in one act.

8. Victim Vulnerability: victim under 17, over 60, elderly, unborn, known to be pregnant, mentally or physically disabled, incarcerated, or had protective order.

9. Escape or Avoiding Arrest

10. Arson

11. Heinousness: heinous, atrocious, cruel, depraved, sadistic inclination, extreme indifference to human life, wantonly vile, horrible or inhumane.

12. Directed another to murder

13. Interfering with justice: intent to conceal crime or perpetrator, attempt to conceal felony offense, disrupting government action.

14. Type of Weapon: discharge of firearm or crossbow with intent, use of explosives, remote stun gun, chemical biological or radiological weapons, weapons of mass destruction, or possession of the weapon was a felony

15. Torture: torture, dismembered victim, burned or mutilated victim alive, Class D or C Battery.

16. Location of Weapon or Victim: weapon outside dwelling and victim inside, victim in vehicle, using deadly weapon in a vehicle, firearm discharged from vehicle, perpetrated on school property.

17. Piracy or Trainwrecking: vehicular piracy, aircraft piracy, train wrecking, hijacking.

18. Drug-Related Charges: delivery of controlled substance, dealing narcotics

19.Premeditation: calculated, deliberate and premeditated, substantially premeditated

20. Terrorism

21. Treason

22. Gang activity

23. Poisoning

24. Lay in wait

25. Hate Crime

26. Relationship of Defendant to Victim: family member, defendant had custody of victim

27. Series of Intentional Killing

28. Defendant is Future Danger

29. Interfering with Victim's Free Speech

Note: see "DP Eligibility Characteristics from State Code.docx" for a copy of each state's eligibility code, use this for the web site.

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6

Is the Death Penalty Reserved for the "Worst-of-the-Worst"?

Sarah Tondreau

The United States Supreme Court has routinely and consistently upheld the decision that the death penalty is constitutional if it is reserved for the worst of the worst murders and murderers: "Since *Gregg*[14], our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes."[15] As was mandated in 2002 in the case of *Atkins v. Virginia*, capital punishment exists in order to "…ensure that only the most deserving of execution are put to death…"[16] Not only is the death penalty to be reserved for the worst of the worst crimes, but it also has been established that in order for a death sentence to be given it must be representative of the punishments that have been given to the majority of similar cases. This concept is known as proportionality review and was officially put into place in the 1976 case of *Gregg v. Georgia:*

> "The new sentencing procedures require that the State Supreme Court review every death sentence to determine… [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant"

Under this amendment, it is made clear that in order to remain constitutional, the death penalty must be used equally and proportionally amongst all murder cases, particularly those of the same nature and category. In the case of *Gregg v. Georgia*, the court came to the following decisions

[14] *Gregg v. Georgia*, 428 U.S. 153 (1976)
[15] *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)
[16] *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)

regarding the guidelines and requirements surrounding the implementation of proportionality review:

- "The Georgia court has held that if the death penalty is only rarely imposed for an act or its is substantially out of line with sentences imposed for other acts it will be set aside as excessive"
- "The court on another occasion stated that 'we view it to be our duty under the similarity standard to assume that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally…'"
- "If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death"

Although the principle of proportionality review has been presented in such a blatant and explicit way, many have challenged the actual implementation of this review in the capital punishment system. In a study done by David Baldus and colleagues, the use of proportionality review in death penalty cases throughout the state of Georgia was analyzed through a comparative review of all capitally sentenced cases. It was discovered that Georgia's rate of death sentencing does not represent that of a system focusing on adequate proportionality review, and that the majority of cases that receive death sentences do not mirror the decisions of the other similar cases. In 2011, Professor John J. Donahue III of the Stanford Law School released a study that looked at the use of proportionality review throughout death sentences in the state of Connecticut. He began by creating a method of scoring the level of egregiousness of a capital case and proceeded to use this scale to score and compare all of the cases that received death sentences to those that did not. His research resulted in similar findings as that of Baldus. He

began by looking at the 4868 murders that occurred in Connecticut between 1973 and 2007 and pulled out the 205 cases that both qualified as a capital felony and also received a homicide conviction. Of those 205 only 12 received the death penalty, 3 of the 12 had their sentences vacated on appeal, 8 stayed on death row until the death penalty was abolished in 2012, and only 1 was executed.

I also found six other literary references to include in this section but did not have the time to go through them all before turning this in on 12/5 since we met and decided to include more on 12/4. However I have included all of them in the bibliography and will provide the titles and authors here:

- "The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99"
  - Michael L. Radelet & Glenn L. Pierce
- "Race and Death Sentencing in North Carolina, 1980-2007"
  - Michael L. Radelet & Glenn L. Pierce
- "Arbitrariness and Discrimination under Post-*Furman* Capital Statutes"
  - William J. Bowers & Glenn L. Pierce
- "Race, Region, and Death Sentencing in Illinois, 1988-1997"
  - Michael L. Radelet & Glenn L. Pierce
- "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)."
  - David C. Baldus, George Woodworth, Catherine M. Grosso, & Aaron M. Christ
- "Assessing Capriciousness in Capital Cases: Comment"
  - Raymond Paternoster

Although many amendments have been made to the original federal statute of capital punishment, these challenges have not been accepted. The remainder of this chapter will present a selection of murder cases that have come to be widely known as some of the most gruesome, heinous, and egregious murders in the history of the United States, in which the evidence of guilt was proven to be factual, and representative of many other murder cases in which the death

penalty was given, yet the perpetrator did not receive a death sentence, or had their sentences overturned.[17]

Famous Cases: Successful or Attempted Assassinations of Officials

There have been multiple cases of both successful assassinations and attempted assassinations of United States officials throughout history. This section will focus on some of the most notorious assassinations and attempted assassinations in United States history, including Bobby Kennedy's assassin, Sirhan Sirhan, President John F. Kennedy's assassin, Lee Harvey Oswald, the man who attempted to assassinate President Reagan, John Hinckley Jr., and the man who assassinated Martin Luther King. Jr., James Earl Ray. However, regardless of evidence proving intent, premeditation, the identity of the assassin beyond a reasonable doubt, etc., the majority of these cases did not end with a capital conviction or death sentence, and none led to an actual execution. Even in cases where the defendant did receive a death sentence, nobody has ever been executed for murdering the President of the United States.

Sirhan Bishara Sirhan[18]

When- Murder	When- Apprehended	Where	Victims
June 5, 1968	June 5, 1968	Los Angeles, CA	One

What: Assassination of Senator Robert Francis "Bobby" Kennedy
Trial and sentencing: Following a trial that lasted roughly three months, Sirhan was convicted of first-degree murder on April 17, 1969 and was sentenced to death. However, in 1972 his sentence was commuted to life in prison due to the decision made in *California v. Anderson,* which resulted in the invalidation of all death sentences given in the state of California before

[17] Each case provides the most basic and crucial pieces of information. Please refer to the reference page for a list of sources that provide more depth and detail for each case.
[18] Sirhan Bishara Sirhan, Murderpedia.

1972. Sirhan is currently serving his sentence at the state penitentiary in Corcoran, California, and has been routinely denied parole since his sentence in 1972.

Lee Harvey Oswald[19]

When- Murder	When- Apprehended	Where	Victims
November 22, 1963	November 24, 1963	Dallas, TX	One

What: Assassination of President John F. Kennedy

Trial and sentencing: On November 24th, two days after being taken into custody, as Oswald was being transferred to the Dallas county jail, he was shot and killed by a man named Jack Ruby. This prevented him from ever being tried, convicted, and sentenced for Kennedy's assassination. Ruby was convicted for Oswald's murder and although he initially received a death sentence, he was never executed.[20]

Jack Ruby[21]

When- Murder	When- Apprehended	Where	Victims
November 24, 1963	November 24, 1963	Dallas, TX	One

What: Murder of Lee Harvey Oswald. At the time of the murder, Oswald was in custody for the assassination of President John F. Kennedy.

Trial and sentencing: Ruby was sentenced to death on March 14, 1964 by the district court of Dallas, Texas. However, prior to his trial, Ruby and his lawyers had requested a change of venue multiple times claiming that Ruby could not receive a fair trial in Dallas because of the high level of publicity that his case was receiving, but the requests were denied. In November 1966,

[19] Lee Harvey Oswald Biography, The Biography.com Website.
[20] See section on Jack Ruby for further information regarding his case.
[21] Jack Leon Ruby, Murderpedia.

Ruby's lawyers filed an appeal to the Texas Supreme Court based on this argument. The court agreed that he could not have received a fair trial in Dallas based on the level of publicity of the case, and his conviction and sentence were overturned. A new trial was scheduled for February 1967, but Ruby died from a heart condition before it could take place.

John Hinckley Jr.[22]

When- Murder	When- Apprehended	Where	Victims
March 30, 1981		Washington, D.C.	One

What: Attempted assassination of President Ronald Reagan

Trial and sentencing: Hinckley was tried in 1982 in D.C. and was found not guilty by reason of insanity. He was institutionalized at St. Elizabeths Hospital immediately following his trial. In 2014, White House Press Secretary James Brady died as a result of a gunshot wound inflicted by Hinckley during the attempted assassination, and although his death was ruled a homicide, Hinckley, who was still at St. Elizabeths at the time of Brady's death, was never charged with the murder.

James Earl Ray[23]

When- Murder	When- Apprehended	Where	Victims
April 4, 1968	July 19, 1968	Memphis, TN	One

What: Assassination of Martin Luther King Jr.

Trial and sentencing: At his trial, Ray pled guilty to the murder of King, however he did not receive the death penalty. Instead he was sentenced to 99 years in prison.

[22] John Hinckley Jr. Biography, The Biography.com Website.
[23] James Earl Ray Biography, The Biography.com Website.

Arthur Herman Bremer[24]

When- Murder	When- Apprehended	Where
May 15, 1972	August 4, 1972	Wheaton, MD

What: Attempted assassination of Alabama Governor George Wallace

Trial and sentencing: Bremer was convicted and sentenced to 63 years in prison. Following an appeal, his sentence was reduced to 53 years on September 28, 1972.

Famous Cases: Mass Group Killings or Serial Killers

A serial murder is defined as: "The unlawful killing of two or more victims by the same offender(s), in separate events."[25] Therefore a serial killer is someone who has murdered two or more people over the course of multiple separate incidents. Although the first case in this section does not fit under the category of serial killers, it is an important case to acknowledge in this section based on its heinous nature and lack of death sentence.

James Eagan Holmes[26]

When- Murder	When- Apprehended	Where	Victims
July 20, 2012	July 20, 2012	Aurora, CO	12 dead 70 injured

What: Mass shooting in Aurora Colorado movie theater.
Trial and sentencing: On July 30th, Holmes was charged with illegal possession of weapons, 116 counts of attempted murder, and 24 counts of first-degree murder. On June 4, 2013, Holmes was ruled not guilty by reason of insanity and was transferred to the Colorado Mental Health Institute in Pueblo, Colorado.

[24] Portrait of an Assassin: Arthur Bremer, Public Broadcasting Service (PBS).
[25] Johns, "Serial Murder."
[26] James Eagan Holmes, Murderpedia.

Whitey Bulger[27]

Who	When- Murders	When- Apprehended	Where	Victims
James Joseph Bulger Jr.	1971-1995	June 22, 2011	MA	19+

What: Gang-related murders during time as alleged leader of the Winter Hill Gang

Trial and sentencing: From 1975 to 1990 Bulger worked as an informant for the FBI. In 1994, an official investigation into Bulger's various operations was launched. Right before his indictment in 1995, Bulger fled the area. In 1999 he was placed on the FBI's "Ten Most Wanted Fugitives" list. In 2011, after 16 years on the run, Bulger was finally apprehended in Santa Monica, California. At age 81, Bulger was indicted under 33 counts of money laundering, drug dealing, racketeering, extortion, corruption, and participating in 19 different murders. On August 12, 2013, Bulger was found guilty on 31 of the 33 counts. He was convicted of extortion, conspiracy, racketeering, and 11 of the 19 murders, and on November 13, 2013, he was sentenced to two life sentences.

Theodore John Kaczynski[28]

Who	When- Bombing	When- Murders	When- Apprehended	Where	Victims
The Unabomber	1978-1995	1985, 1994, & 1995	April 3, 1996	CA, NJ	3 dead 23 injured

What: Mail-bombing spree

Trial and sentencing: In April of 1995, *The New York Times* received an anonymous letter from someone claiming to be the Unabomber and stating that they would stop the bombings if a

[27] White Bulger Biography, The Biography.com Website.
[28] Ray, 2015.

major news outlet would publish his manifesto. *The Washington Post* and *The New York Times* joined together and released the manifesto on September 19th. Upon reading the published manifesto, Kaczynski's brother David contacted authorities saying that he recognized the writing style of the manifesto and believed that it was his brother, Ted. David offered to help investigators locate Ted as long as they did not seek a death sentence once he was convicted. Kaczynski was arrested on April 3, 1996, and, on January 22, 1998, after pleading guilty to all of the charges brought against him, he received life in prison without the possibility of parole.

Jeffrey Dahmer[29][30]

When- Murders	When- Apprehended	Where	Victims
1978-1991	July 22, 1991	Milwaukee, WI	17

What: Rape, murder, dismemberment, and cannibalizing of seventeen boys and young men.

Trial and sentencing: At his trial on January 30, 1992, Dahmer pled not guilty by reason of insanity to 17 charges of murder. The prosecution argued that Dahmer did not fit the requirements for a plea of insanity because he was fully aware of the evil nature of his acts and still continued to commit them. On February 17th, Dahmer was found guilty of 15 of the 17 murder charges and was given 15 consecutive sentences of life in prison.

Gary Ridgway[31]

Who	When- Murders	When- Apprehended	Where	Victims
The Green River Killer	1982-2001	November 30, 2001	WA	49+

[29] Jeffrey Dahmer, 2015.
[30] Jeffrey Dahmer Biography, The Biography.com Website.
[31] Gary Ridgway, Murderpedia.

What: Convicted of the kidnapping, rape, and murder of 49 young girls and women throughout the state of Washington, but confessed to murdering almost twice as many as could be proven.

Trial and sentencing: In 2003 Ridgway was sentenced to 49 life sentences with no possibility of parole as part of a plea bargain that protected him from receiving a death sentence as long as he assisted authorities in locating the bodies of all 49 of his victims.

Charles Manson[32]

When- Murders	When- Apprehended	Where	Victims
July-August 1969	October 12, 1969	CA	10

What: Cult-related murders

Trial and sentencing: Although Manson was sentenced to death in 1971, his sentence was automatically commuted to life in prison with the possibility of parole in 1972 due to the decision made in the Supreme Court case of *Furman v. Georgia* which invalidated the statute under which he was sentenced, and he remains in prison to this day.

Less Well Known Cases

While the previous section presents evidence of the large percentage of brutally heinous crimes that did not result in a death sentence or execution through some of the country's most well known and publicized cases, there is an enormous amount of less well known cases that fall under this category as well. The following cases are a small portion of these.

David Berkowitz[33]

Who	When- Murders	When- Apprehended	Where	Victims

[32] Charles Miles Manson, Murderpedia.
[33] David Berkowitz, Muderpedia.

The Son of Sam The .44 Caliber Killer	July 1976- August 1977	August 10, 1977	New York City, NY	6

What: Serial Killing Spree

Trial and sentencing: Berkowitz confessed to the six murders in exchange for life imprisonment as opposed to facing the death penalty. He was sentenced to six life sentences on June 12, 1978.

Edmund Kemper[34]

Who	When- Murders	When- Apprehended	Where	Victims
The Co-Ed Killer The Co-ed Butcher	1970s	April 20, 1973	Santa Cruz, CA	10

What: In 1964, at age fifteen, Kemper shot and killed both of grandparents. Throughout the 70s, he picked up and killed six female hitchhikers. In 1973, he killed his mother and his mother's friend. At this time, Santa Cruz, California, was known as the murder capital of the world.

Trial and sentencing: His trial occurred in October of 1973. He was charged with and found guilty of eight counts of first-degree murder. He received eight consecutive life sentences.

Roy Norris[35]

When- Murders	When- Apprehended	Where	Victims
June- November 1979	November 23, 1979	CA	5

What: As part of a murdering duo with a man named Larry Bittaker, Lewis partook in a six month long spree of kidnapping, raping, and strangling young women to death.

[34] Edmund Kemper, Murderpedia.
[35] Roy Norris, Murderpedia.

Trial and sentencing: On March 18, 1080, he was sentenced to 45 years to life with the possibility of parole after thirty years. He was denied parole in 2009 and will be eligible again in 2019.

Dennis Rader[36]

Who	When- Murders	When- Apprehended	Where	Victims
BTK Killer (Bind, Torture, and Kill)	1970s-1990s	February 25, 2005	Wichita, KA	10

What: In 1974 Rader entered the home of the Otero family and proceeded to strangle and kill four of the family members. He continued his murders that year and also began writing letters and sending them to authorities in order to report his crimes in an attempt to seek fame for his actions. Rader committed his final murder in 1991 but was not apprehended until 2005.

Trial and sentencing: Rader was charged with ten counts of first-degree murder. He pled guilty to all ten charges and was sentenced to ten consecutive life sentences.

Arthur Shawcross[37]

Who	When- Murders	When- Apprehended	Where	Victims
The Genesee River Killer	1972-1990	January 5, 1990	NY	13

What: Shawcross was arrested in 1972 for the murder of two children. After being released on parole in 1987, he embarked on a three-year killing spree, ending in 1990 after murdering eleven more people and dumping many bodies in the Genesee River.

Trial and sentencing: Shawcross was arrested for the first time on October 3, 1972, and was sentenced to 25 years. He was released on parole in April of 1987. He was arrested again in

[36] Dennis Rader, Murderpedia.
[37] Arthur Shawcross, Murderpedia.

1990, and in November of that year he was charged with and found guilty of ten counts of second-degree murder. He was sentenced to twenty-five years for each count, a total of 250 years.

Kristen Gilbert[38]

When- Murders	When- Apprehended	Where	Victims
1995-1996	July 11, 1996	Northampton, MA	4+

What: Injecting patients with lethal doses of epinephrine while working as a nurse at the Veterans Affairs Medical Center. She was convicted of four deaths however a multitude of other staff members at the VA hospital believe that she was responsible for over eighty of her patient's deaths.

Trial and sentencing: Gilbert was convicted of three first-degree murder charges, one second-degree murder charge, and two attempted murders. Although she was eligible for a death sentence, in March of 2001 Gilbert was sentenced to serve four consecutive life sentences without the possibility of parole.

Dorothea Puente[39]

When- Murders	When- Apprehended	Where	Victims
1982-1988	November 17, 1988	Sacramento, CA	3+

What: Puente ran a boarding house for elderly people who were typically struggling with various addictions or other issues. She would go through her tenants' mail before passing it along to them and would take a large portion of their social security checks for herself. If any tenants

[38] Kristen Gilbert, Murderpedia.
[39] Dorothea Puente, Murderpedia.

spoke up or complained about this, she would kill them via lethal doses of poison and trick the other tenants into disposing of the bodies. Many bodies were buried in various locations at and around her apartment.

Trial and sentencing: Puente was charged with nine murders but only convicted of three. She was eligible for a death sentence, however after multiple days of deliberation the jury reported that their minds were made up and they were split 7 to 5. The judge declared a mistrial and Puente was sentenced to life in prison without the possibility of parole.

Patrick Wayne Kearney[40]

Who	When- Murders	When- Apprehended	Where	Victims
The Trash-Bag Killer The Freeway Killer	1975-1977	July 5, 1977	CA	32

What: Rape, dismemberment, and murder of young men, boys, and children throughout the state of California. Deemed the Trash-Bag Killer and The Freeway Killer because his victims' remains were typically found in trash bags on the side of the highway.

Trial and sentencing: After turning himself in to authorities, Kearney pled guilty to and was convicted of twenty-one counts of first-degree murder. In exchange for his confession and guilty-plea, Kearney was spared a death sentence and instead sentenced to twenty-one life terms. After his conviction, Kearney confessed to eleven more murders, although he was never prosecuted for them.

Altemio Sanchez[41]

[40] Patrick Wayne Kearney, Murderpedia.
[41] Altemio Sanchez, Murderpedia.

Who	When- Murders	When- Apprehended	Where	Victims
The Bike Path Rapist	1981-2006	January 15, 2007	Erie County, NY	3+

What: Rape of at least fourteen women and murder of at least three. He was deemed The Bike Path Rapist because he typically committed his crimes in the hidden areas of bike various paths.

Trial and sentencing: Sanchez was convicted of three murders and sentenced to seventy-five years in prison without the possibility of parole.

Kenneth Bianchi[42]

Who	When- Murders	When- Apprehended	Where	Victims
The Hillside Stranglers	1977-1979	January 13, 1979	CA, WA	12

What: As part of a duo with his cousin, Angelo Buono, Bianchi convicted of the kidnapping, rape, torture, and murder of young women via strangulation, lethal injection, electric shock, and carbon monoxide poisoning. The murders took place in the hills above Los Angelos, California, hence the name the "Hillside Stranglers."

Trial and sentencing: Bianchi's trial took place in California and although he was eligible for a death sentence he was sentenced to life in prison with the possibility of parole in exchange for testifying against Buono. He is serving his sentence at Washington State Penitentiary in Walla Walla, Washington. He was denied parole in 2010 and will be up for parole again in 2025.

Angelo Buono[43]

Who	When-	When-	Where	Victims

[42] Kenneth Bianchi, Murderpedia.
[43] Angelo Buono, Murderpedia.

	Murders	Apprehended		
The Hillside Stranglers	1977-1979	October 22, 1979	Los Angeles, CA	10

What: As part of a duo with his cousin, Kenneth Bianchi, Buono was convicted of the kidnapping, rape, torture, and murder of young women via strangulation, lethal injection, electric shock, and carbon monoxide poisoning. The murders took place in the hills above Los Angelos, California, hence the name the "Hillside Stranglers."

Trial and sentencing: Due to Bianchi's testimony against him, Buono was convicted of nine counts of murder and sentenced to life in prison.

Conclusion

These cases serve as evidence of the fact that there is no perfect implementation of proportionality review and that we are far from achieving one. Without proportionality we don't know what it is that makes one case death penalty eligible and another not. It is said that the death penalty is to be reserved or the "worst-of-the-worst" murders, yet without proper use of this review we cannot adequately distinguish what crimes fall under this category.

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7

Which Jurisdictions Execute and Which Don't?

Kelsey Britton

If a person closed their eyes and threw a dart at a map of the United States, they would have a 62% chance of hitting a state that has the death penalty on the books. If they did the same exercise with the goal of hitting a county that had ever executed a single criminal, however, they would have only a 15% chance. Thirty-one states have the death penalty as a sentencing option, but of those states only a small number use it to add inmates to their death rows. An even smaller number of states have counties that have ever used it to execute a single inmate. A criminal's chance of being sentenced to death and later being executed is largely determined by the location the crime took place; in one of the limited number of locations that issues death sentences, in addition to the infrastructure and willingness to carry out executions. Only a few counties routinely execute, but those which do are responsible for the majority of the executions that have occurred while the modern death penalty has been in use. In the past 45 years, including a period predating the Furman decision which temporarily made the death penalty unconstitutional, 85% of counties have not executed a single person (Dieter 2013). Various factors go into the existence of the death penalty in its current geographical form; decisions made at the county level by prosecutors, the overall size of the county budget, as well as an established county level capital punishment infrastructure in the locales of the most efficient executioners, are large contributors to which counties execute the most.

As the Furman decision in 1976 placed a moratorium on the death penalty largely due to its arbitrary and capricious nature, it is shocking that such disparities exist to this day and to such a severe degree. Arbitrary and capriciousness are terms that seem to epitomize the randomness of

executions as performed today as, “death is not and never has been the likely consequence for murder” (Baumgartner 2015). The death penalty as practiced is on the borderlands of constitutionality, something that will likely not escape the notice and review of the Supreme court for much longer.

Top Executing Counties and Trends

Table 1. Executions by County

	State	*County*	*Executions*	*National Total*	*Cumulative Total*
1	Texas	Harris	123	8.7%	8.7%
2	Texas	Dallas	53	3.7%	12.4%
3	Oklahoma	Oklahoma	39	2.8%	15.2%
4	Texas	Bexar	38	2.7%	17.8%
5	Texas	Tarrant	38	2.7%	20.5%
6	Missouri	St. Louis	23	1.6%	22.1%
7	Oklahoma	Tulsa	18	1.3%	23.4%
8	Texas	Jefferson	15	1.1%	24.5%
9	Texas	Nueces	14	1.0%	25.5%
10	Texas	Montgomery	13	0.9%	26.4%
11	Arizona	Pimas	13	0.9%	27.3%
12	Florida	Miami-Dade	12	0.8%	28.1%
13	Texas	Lubbock	12	0.8%	29.0%
14	Florida	Orange	11	0.8%	29.8%
15	Texas	Brazos	11	0.8%	30.5%
				Top 15 Total	30.5%

Figure 7.1
Note: Executions by County. This graph shows the top 15 executing counties and their total national percentage. Out of 3,143 counties, 15 make up almost 31% of executions; a fact which highlights the monumental regional disparities that have come about during the modern usage of the death penalty.

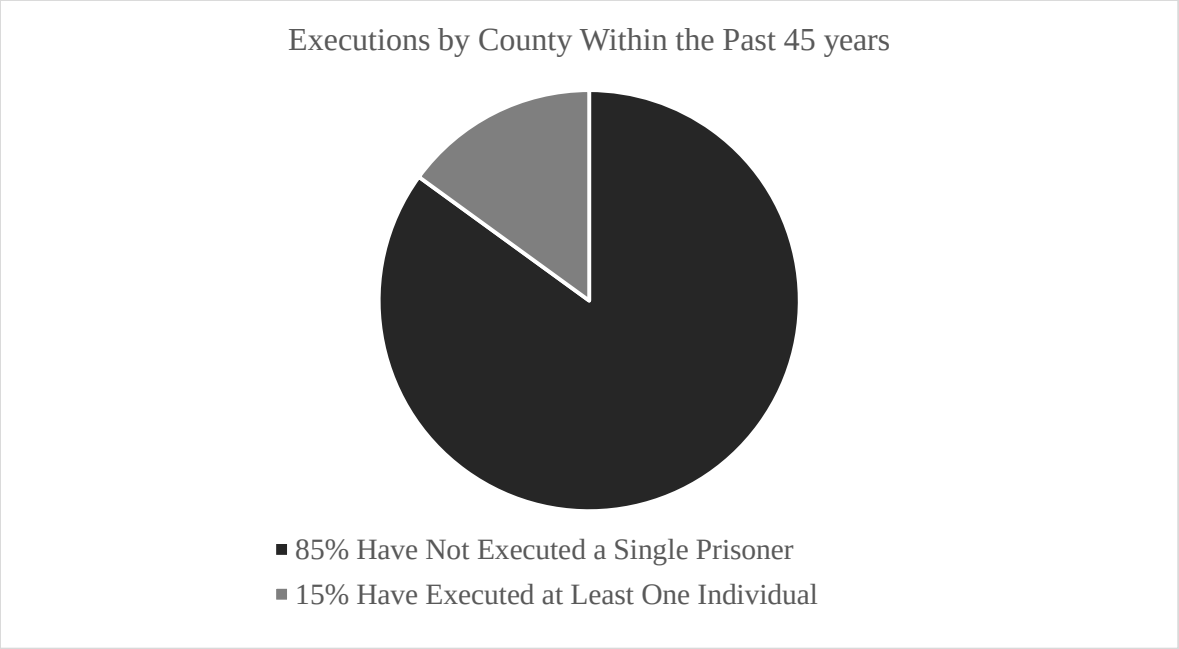


Figure 7.2
Note: This graph shows the sharp disparity between the counties which execute and the counties which do not (2% Report)

In Table 1 the counts and percentages of the top fifteen executing counties are listed. The top fifteen counties and states make up a very large percentage of the national total, which is surprising due to the sheer number of counties in the United States. One can see the domination of these fifteen counties in the execution statistics; they make up almost one third of all executions in the United States since 1976. While these counties execute with disturbing regularity, a difference in a few feet of ground where can be the difference between the possibility of a criminal receiving the death sentence, and having no chance of receiving the death sentence. Where a crime takes places is one of the leading determinants of a criminal's likelihood of later being executed for their crime. The dividing place between county lines can be the difference between life or death for a murderer.

If the death penalty were equally applied, such a small concentration of counties would not constitute such a large amount of executions. Based on the mere fact that thirty-one states

have death penalty on the books, this should not be the case. As stated in the above figure, there are a total of 3,143 counties in the United States. Out of those counties 15 make up almost 31 percent of total executions in the country (Baumgartner 2011). If the death penalty as a criminal punishment were equitably applied, such statistics would not exist. The fact that there is such a sharp disparity between states that have laws permitting the use of the death penalty and the counties usages within those states demonstrates a deep flaw in the death penalty system that goes beyond state and county legal autonomy. Life and death for an inmate should not depend on what side of a county line they committed their crime. The death penalty as practiced ventures into territory violative of the the 8th amendment's precept that a punishment must not be arbitrary and capricious.

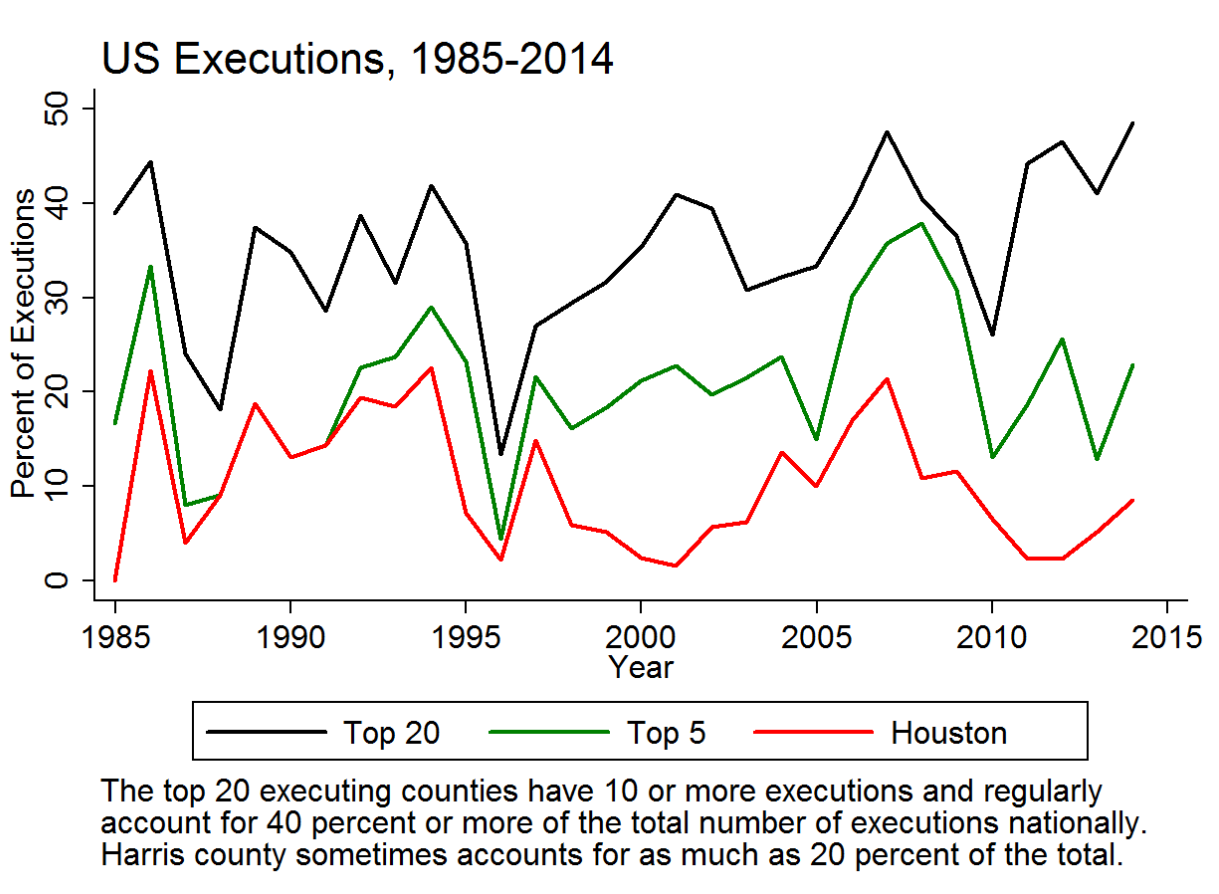


Figure 7.3

Note: This figure highlights the fact that a minority of counties are responsible for the bulk of executions, with the top twenty counties making more than 40% of the national total of executions during some parts of the 1980s and mid 2000s.

Prosecutorial Discretion

The decision of whether to pursue a capital case or not falls to the discretion of the county prosecutor. A prosecutor can be put in place either through an appointment or election, with those elected far more dependent on public opinion to attain and keep their position (Ellis 2012). Regrettably, in the United States, only three states have the prosecutor as an appointed position (Wright 2008). Due to the fact that there are so few elected prosecutors, it is difficult to make a statistical analysis based on whether or not the prosecutor is elected to determine whether there is an increase in death sentences carried down, as those who are appointed make up such a small population.

While the prosecutor is supposed to make sentencing decisions based on heinousness and other relevant factors of a crime, the influence of public opinion on the prosecutor as an elected official can make a prosecutor more avidly in support of the death penalty. This in part leads to a geographic disparity in the number of death sentences handed down in a particular county. Public support may vary from one county to the other, for reasons such as the perceived threat from crime in that area, longstanding political views, and persistent leanings of public opinion towards capital punishment as a preferred method of punishment for murder. As the death penalty is used as a punishment over time, this becomes precedent for a particular locality. New prosecutors may choose to continue or exceed their predecessor's level of capital case proceedings which leads to a continued uptick in the number of executions at an exponential rate. For example, if you are the prosecutor of Harris county, the county with the most executions in the country, and there is another terrible murder, what do you do? Well there have been executions for similar or less heinous crimes in that county in the past, and so it is automatic to

seek the death penalty. This leads to a perpetuation of the death penalty due to momentum at the prosecutorial level. Precedent is very important in the legal world, and what has happened in a county's past will largely determine its future. In addition, counties only draw upon their own histories when deciding to seek the death penalty. There is a danger in localism and drawing upon precedent due to the fact that when local histories are only compared to themselves there can be a divergence from national norms and trends. This divergence can vary to such a wide degree that counties such as Harris County will have a much higher number of executions than any other that carries out capital punishment. Counties like Harris county developed their patterns of prosecution in a vacuum divorced from the prevailing national trends on capital punishment.

As part of their duties, U.S. Attorneys must submit all death-eligible cases to the U.S. Attorney General for death authorizations. Out of the ninety-four federal judicial districts, only six account for one-third of death authorizations. More than half of all death-authorizations are requested from only fourteen federal judicial districts. Contrastingly, two thirds of the districts have not sentenced anyone to death. This wide variation would not exist if there was a consistent application of the death penalty of prosecutors nation-wide. There is obviously a wide disparity between county by county usage of prosecutorial resources and sentencing decisions that is unexplainable by crime rates, murder rates or the heinousness of crimes prosecuted capitally (Cohen and Smith 2010).

County Budget Size

Housing death row inmates for many years and then executing them is not a cheap proposition. Many counties are constrained in the number of death cases they can hand down (if any) due the fact that it is financially untenable for them to house death row inmates, create an infrastructure

to handle continuous appeals, and then later to execute them. Counties that have larger amounts of funding available are able to maintain the death penalty as a viable punishment and implement it more often than less populated counties with a smaller tax base. As only a few counties have large enough budgets to maintain a capital punishment system in their locales, very few counties are able to use the death penalty from a fiscal standpoint. The combination of financial constraints in combination will the overall low levels of use of the death penalty in most places lead to arbitrariness. Less heinous crimes in a high rate of execution county will be much more likely to receive the death penalty, but in places where the death penalty is not a tenable sentence a more heinous crime will get the punishment of life in prison. Even within the same state, there will be great variances in ability to use the death penalty based on financial constraints. Smaller, less populous counties will not have a large enough tax base, while large, heavily populated areas are capable of using the death penalty in an overly gratuitous manner (Gershowitz 2010).

Momentum

Though it is not specifically known why some counties have rose to statistical predominance as consistent executioners while others that have larger populations or homicide rates do not execute often or at all, it is thought that once many death sentences and executions occur it a state, policy momentum leads to the continuation of the death penalty in that county. Simply put systems, once established, will perpetuate themselves and grow. Once a county has set up a procedure to secure death penalties and execute criminals, various officials, from the prosecutors to the judges will continue to use the death sentence. The below power law demonstrates the effect of momentum on the number of executions by county. As has been mentioned previously, counties will typically look at crimes which have previously warranted executions, and make comparisons of heinousness within the bounds of their preexisting record. As such, there will be

a continuation of executions as the previous court decisions build on each other. With each consecutive execution, there is increased likelihood that another execution will occur, with each execution building on the next to create and perpetuate a system of death.

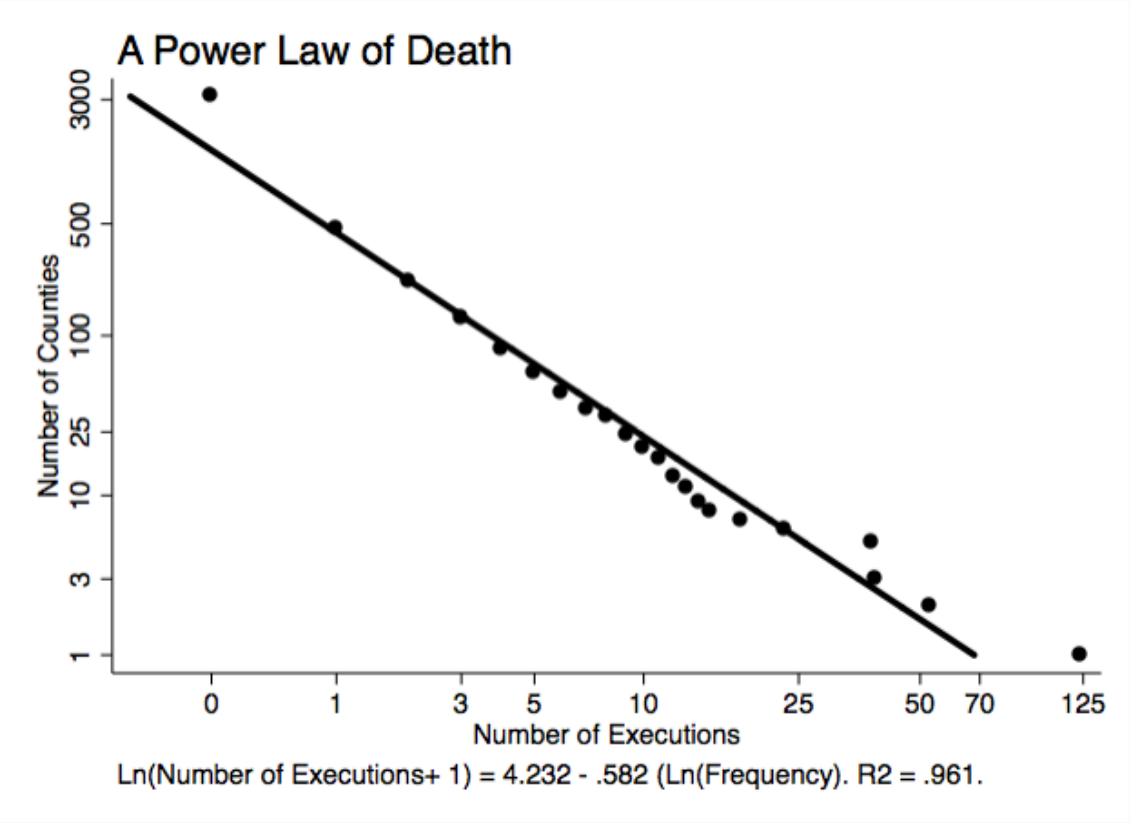


Figure 7.4
Note: A Power Law of Death. This is a power law which demonstrates the diminishing nature of death penalties in a logarithmic manner. That means that the scale goes up at a rate that each number increases by a power. This distribution of data has a right skew that goes more than 60 standard deviations form the mean.

If a data set is statistically normal it will tend fall within two standard deviations from the mean. In addition, the data will follow a bell curve shape and will be relatively evenly distributed. A power law relationship occurs when there are data points that fall beyond two standard deviations from the mean; a very unusual phenomenon statistically. The power law shown below has standard deviations more than sixty standard deviations from the mean; a

statistical aberration. It is the statistical version of a snowball effect; where there is an acceleration of executions once an initial execution occurs in a county. That initial execution can lead to more and more executions and cause a greater degree of deviation in the future. This does not happen in every county, but once a county has passed the initial threshold of their first execution, the executions are statistically more likely to occur with increased frequency with each execution. Though power laws may not be familiar to all readers, there is one power law that might already be familiar. The income distribution in the United States is one of the most common examples of a power law. As with executions, the majority of data points are at the low end of the distribution with a wide degree of deviance from the mean. Most people are middle-class to poor, with individuals who are very wealthy in possession of a disproportionate amount of wealth. Executions fall in a similar pattern, with most counties clustered at the low end of the data distribution with no executions or one or two. Then there are extremes which greatly deviate from the overall distribution, ie. Harris County, Dallas County, Oklahoma County. The current distribution of executions should be a statistical impossibility, and yet it exists.

County Versus State Trends

State notoriety for high numbers of executions is often driven by the large numbers of executions that take place in a handful of counties. For example, though the state of Texas is known for its high rate of executions, it is surprising that a very small percentage of counties in Texas consistently use capital punishment or have routine executions. The counties that do execute at a high rate of frequency are anomalies even in places like Texas that are known for their pro-death penalty slant. The below power law for the state of Texas represents this statistically anomalous

relationship.

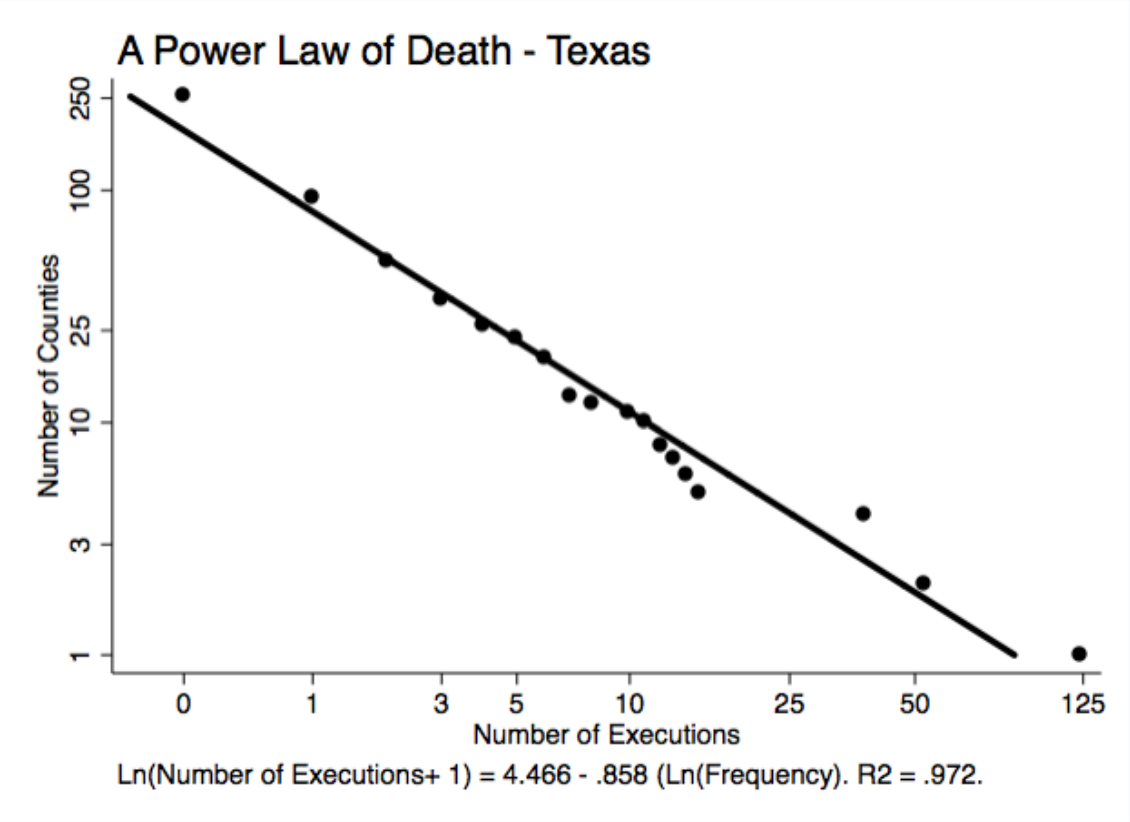


Figure 7.4
Note: A Power Law of Death-Texas. This power law shows a similar trend to the power law for national executions. Most counties have zero to one executions, but several counties have very high number of executions, with the most notable data point being Harris County Texas, which is not even on the fit line.

Locales which are pro-death penalty may not be able to use the death penalty due to its being outlawed or the lack of resources and knowhow to carry out the penalty. The previous Clark County prosecutor in the state of Indiana was infamously pro-death penalty and created a pro-death penalty website to explain and support its usage. Despite that fact, there has never been a single execution in Clark County. Only sixteen inmates have been executed in the state of Indiana since 1976, a period lasting over thirty years (Stewart 2008). There is very little difference between jurisdictions that execute and jurisdictions that don't in terms of support for

the death penalty, the real difference comes into play with the random existence of high rates of execution in some places and not in others. Even in states that are considered death penalty states, only a very few number of locales in the state lead to that label.

Texas as a Case Study

The state of Texas, and Harris County specifically, has executed the largest number of people in the modern usage of the death penalty. Though the reason for this is not completely understood, Harris county and Texas as a whole have streamlined their procedures to secure death penalties and have implemented the mechanisms necessary to later carry out executions. For example, in Texas appellate court judges are elected officials, which means they are subject to public opinion on the death penalty. In order to win reelection in a state where voters want an official who is "tough on crime", they will take a hardline when reviewing capital cases. Various questions have been raised with regards to the quality of these elected officials, as opposed to officials appointed to such a position in other states. There is a lack of transparency among these appellate court judges as well as general inconsistencies with regards to why they make the decision to grant or deny relief (Walpin 2014). As discussed previously, prosecutors are drivers of death sentences as well. They rely upon the records of their predecessors and often perpetuate existing patterns of capital prosecution.

In addition, there is no public defense system for indigent defendants, rather, there are court appointed lawyers who are under experienced and under-paid. Other states will have a devoted public defender's office that specializes in capital cases in addition to having a vested interest in supporting vulnerable defendants. In many cases the state wants to easily secure death penalties so they do not have a vested interest in setting a high bar for lawyering. There is not a very high standard upheld with regards to indigent defense, and in certain cases lawyers have

been intoxicated or otherwise failed to provide any defense for their client, and faced no repercussions for such poor lawyering. This is not a phenomenon strictly confined to Texas, but as a feature of the Texas death penalty system it is instrumental in the high numbers of death sentences that occur.

As well as that, many states allow the governor to grant clemency at the last minute when an execution is taking place. The independence of the governor when exercising clemency divorces the act from the legal system. In Texas there is a board called the Board of Pardons and Paroles which must recommend a commutation to the governor before he can even consider commuting a sentence to life in prison, without the possibility of parole (Silverman 1995). The panel systemizes the clemency power and helps maintain the penalty of death up to the point where the execution takes place. This limits the governor's power to commute a sentence, and diminishes his power in that capacity.

All of these features of Texas' death penalty system makes securing a death penalty case and a later execution much more likely than most locales, including the second most avid death state of Oklahoma. With this system in place, it is neither a mystery nor a surprise that Texas continues to execute inmates at a high rate. Texas dominates the list of executions, and seven Texas counties are on the top ten list of most inmates executed since 1976. Depending on one's perspective they are either doing something very right, or very wrong.

The Largest Death Row vs the Top Executioner: A Tale of Two Cities

Though the state of California is known for its sunshine and ocean breezes, it is also known for a far less pleasant feature; it is the home of the largest death row in the United States. With a total of 751 inmates on death row, it is by far the most active in securing death penalty sentences and filling cells in the capital penitentiary (Fins 2015). At the same time, California has one of the

most static death rows in the country, due to a moratorium placed on executions from 2006, which the entirety of its death row awaiting an execution date that will likely never come. Currently, the death penalty in California as practiced is essentially a death penalty by old age as individuals will be incarcerated until their natural demise (Walters 2014).

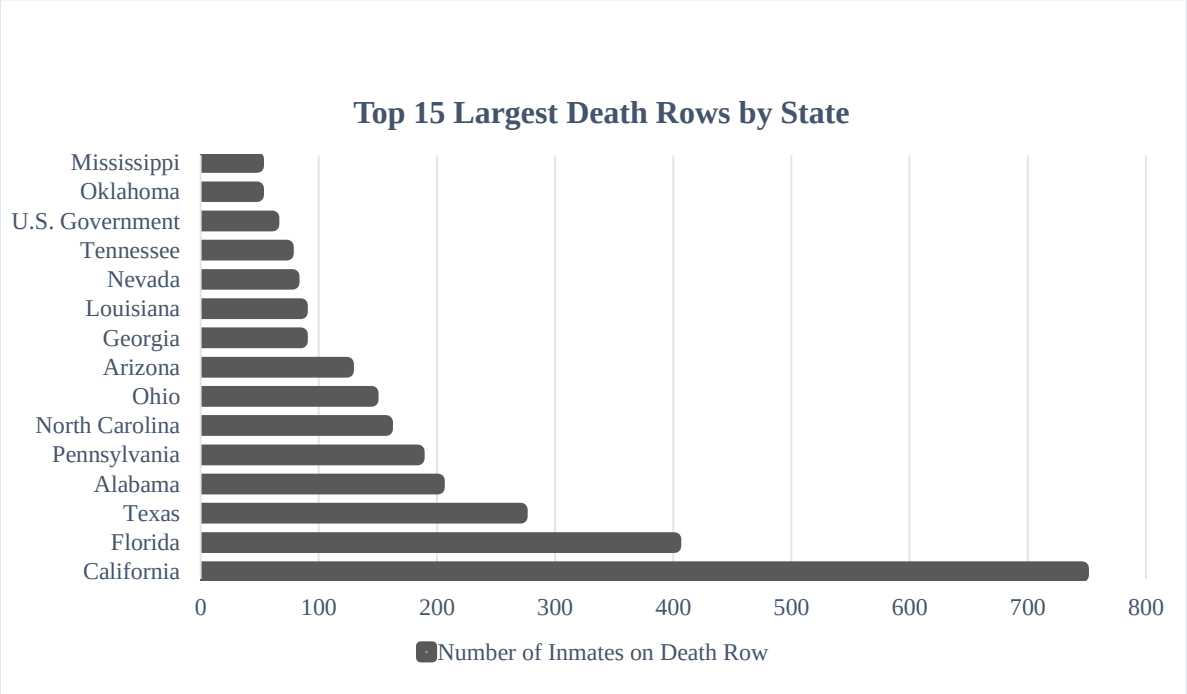


Figure 7.7
Note: This figure shows the size of the top 15 largest death rows in the United States, with the length of the grey bar indicating the number of inmates on each state's death row.

Contrastingly, Harris County Texas, in the Houston metropolitan area, is the most avid executioner in the country, though there has been a decline in the number of executions in recent years. Over the entirety of Harris County's modern usage of the death penalty, 123 inmates have been executed. Harris County is extremely active in sentencing and executions, with a system designed to secure death penalties and to ensure that those who are sentenced will have a high likelihood of being executed. Both Los Angeles County and Harris County are heavily populated areas. The city of Los Angeles and and the city of Houston are the second and third most populous cities in the country respectively. Both have relatively high homicide rates at 251

murders and 214 murders per 100,000 people per year respectively for the last year the data was available in 2013, but not beyond what would be expected for such heavily populated areas ("Crime Rates in Los Angeles; Houston" 2013). A logical assumption to make about the pattern of geographic locations where executions take place is that they would have a high crime rate or a high homicide rate. This is not the case, however, homicide rates and top execution counties do not statistically correlate as exampled by the rates for St. Louis City and St. Louis County later on in this chapter. While LA county with the largest death row and Harris county with the most executions both have large populations, the per capita murder rate is not unusual for cities of their size. If homicide rate and executions correlated, then it would follow that whichever county had the highest homicides would also have the most executions. There is an association between homicide rates and number of executions, but there is also an association between homicide rates and population size which could be responsible for a lot the former's association.

Homicide Rate and Death Penalty Use and Frequency

In terms of the usage of the death penalty, one would logically expect that geographic locations with the highest murder rates and those which have the most executions would correlate. Homicide frequency should lead to a greater or lesser use of the death penalty, as more cases of homicides should lead to more death sentences if the death penalty was applied fairly around the country. Almost every other type of crime and punishment has a similar parity, as murder rate rise so do life imprisonment rates, as burglaries rise so do imprisonment rates. Such is not the case with the death penalty; it is a statistical anomaly in a variety of ways explained in this chapter and others.

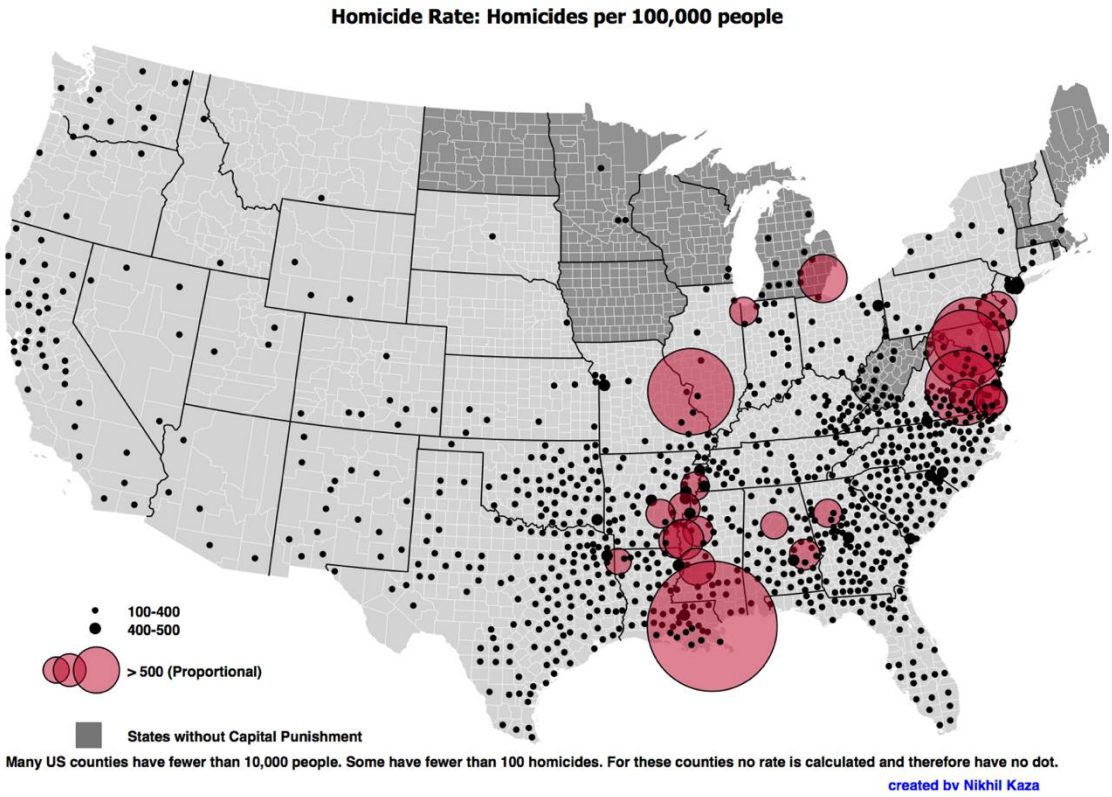
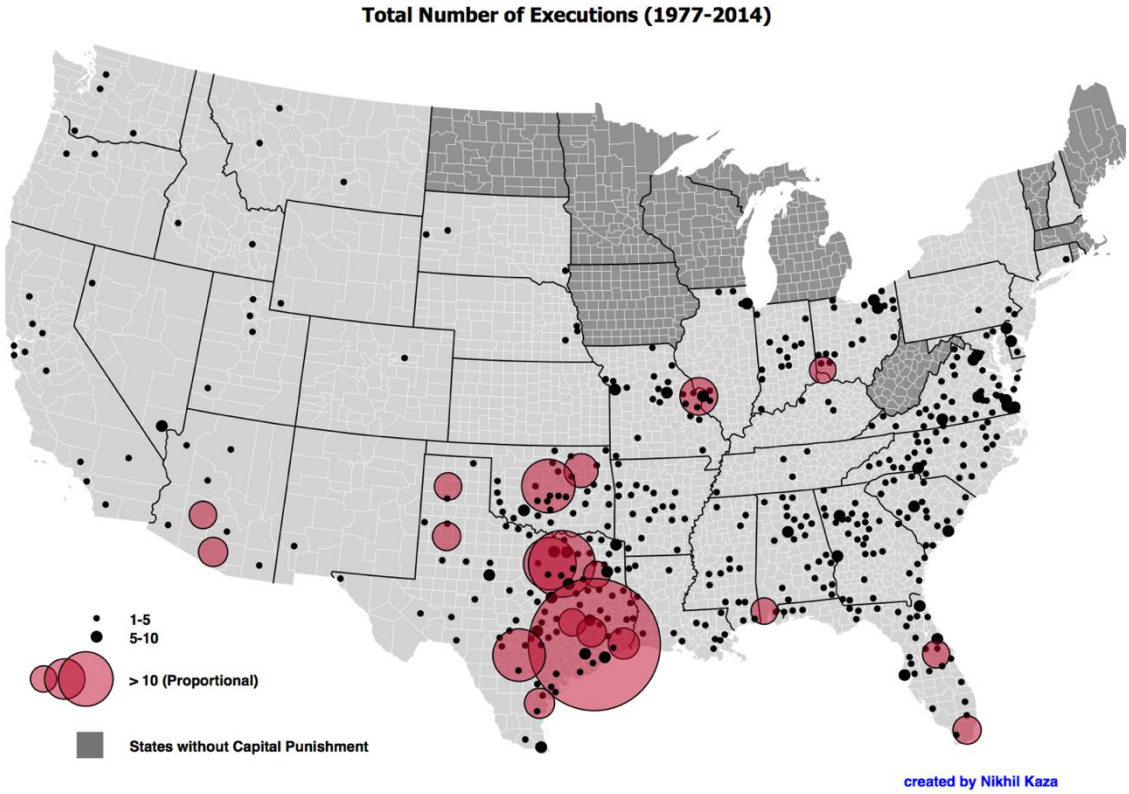


Figure 7.5 Above. Figure 7.6 Below.

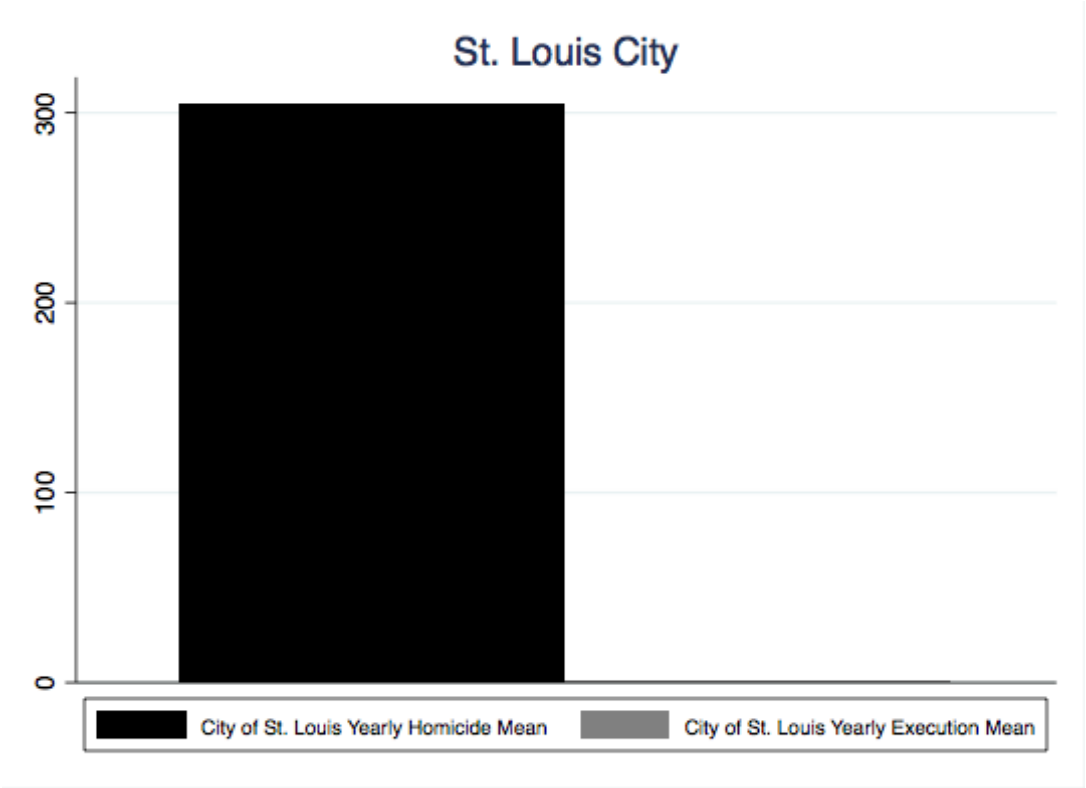


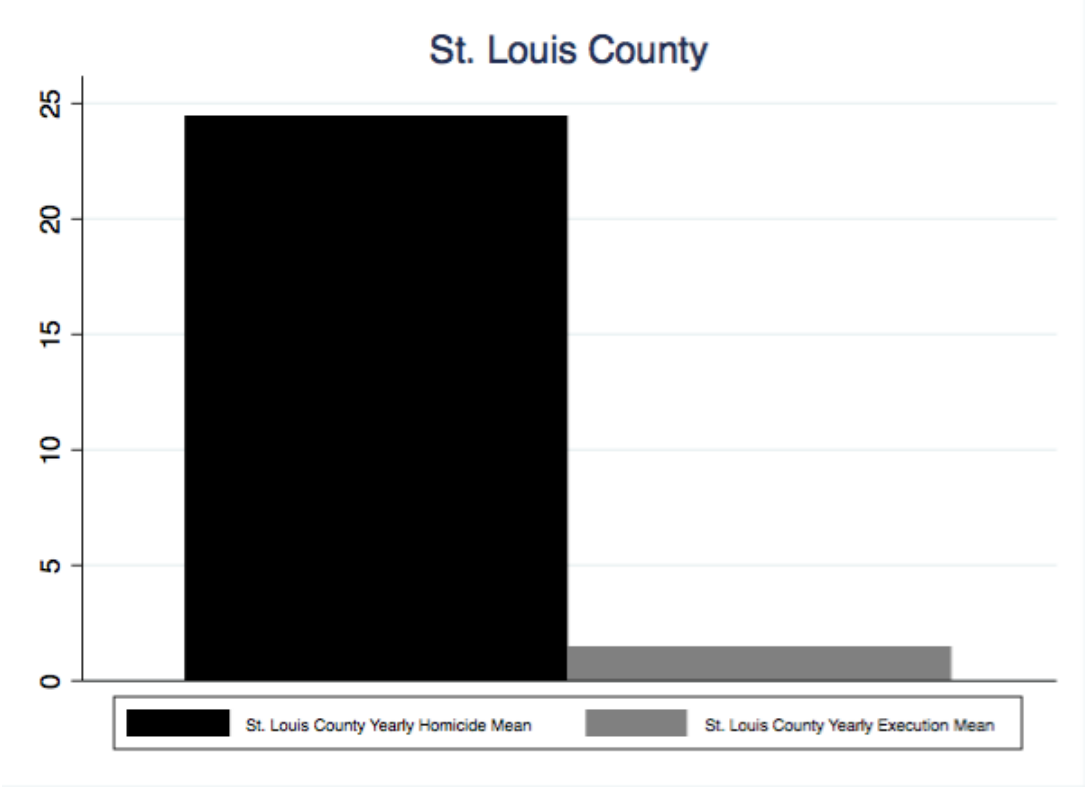
Note: Figure 7.5 shows the homicide rate per 100,000 people. With the largest red dots being the places with the highest homicide rates in the country.

Figure 7.6 shows the total number of executions in the modern era of the death penalty. If homicide rate correlated with execution rate, then figure 7.5 and figure 7.6 would have approximately the same geographic distribution.

St. Louis City and St. Louis County: The Rule Not the Exception

One of the most interesting cases of difference in execution levels and homicide rates is the case of St. Louis City and St. Louis county. St. Louis County has a relatively low number of homicides, but a high number of executions. By contrast, St. Louis City has one of the highest homicide rates in the country but a very low execution rate that has been mostly static during the period in which this data was collected. St. Louis City, Illinois has the highest homicide rate in the United States. If the death penalty was applied based on the number of homicides in a given area, then St. Louis City would have the most death sentences and executions in the country. Due to the fact that the death penalty has never been applied in a manner consistent with the number of homicides, however, this finding is not a surprise. This further highlights the arbitrariness of capital punishment in this country. The two figures below show the gross discrepancies between the two counties.





Note: Figures 7.7 and 7.8 show the total number of executions in St. Louis County and St. Louis City compared to homicide rate.

This pattern continues in many other localities. For example, Camden New Jersey, Gary Indiana, East Chicago Illinois and Compton Los Angeles, all have high homicide rates but a very low number of executions. This pattern is remarkably consistent around the United States in a way that is worrisome for those who advocate for a more just application of the death penalty. If the death penalty was applied in a way that accounted for the number of homicides in each locality, with the counties with the highest homicide rates acting as the most active executioners, that would make sense from a number of perspectives. The current pattern and distribution of high execution areas is essentially random and does not follow any common sense pattern.

What Next?

The death penalty is a scattered practice throughout the United States. It is dominated by a small number of counties. The title of this chapter is, "Which Jurisdictions Execute and Which Don't"; if that title was as a question, the answer would be, a few jurisdictions execute and most don't. Though one of the characteristics of the death penalty is its arbitrary nature, we can see that beyond the arbitrariness, there are systems implemented that are designed with the intent of continuing this practice. The practice of death is in place in such an irregular fashion that it calls into question the legality of matter. A punishment a serious and as permanent as death should not be the domain of a few random counties. It is an impossibly expensive and ludicrous notion to endow every county in the country with sufficient resources to make executions more evenly distributed. But it is extremely feasible to make the number of executions even in another way; by having none. As the Furman decision in 1976 placed a moratorium on the death penalty largely due to its arbitrary and capricious nature, it is shocking that such disparities exist to this day and to such a severe degree. The power laws presented in this chapter are some of the most stunning pieces of evidence with regards to the wide disparities in executions. The death penalty

as practiced in this country is statistically aberrant, and that feature among others will continue to lead to its decline and may warrant a re-review by the Supreme Court of the United States.

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8

How Long Does It Take?

Chris Armistead

The right to a speedy trial as guaranteed by the sixth amendment ends just there—at the trial. A new norm has emerged in regards to the death penalty such that lengthy delays from the time when a crime was committed and the time of the execution now exist. In fact, the average delay between crime and execution for those executed since 2010 is 16 years. It is no longer the case that we see executions carried out within 5 years of a crime much less even 10 with the exception of those who "volunteer" for execution by abandoning appeals. The issue of how long it can take to carry out an execution originally raised concerns of constitutionality in 1995 with the case of *Lackey v. Texas*. These questions of constitutionality have continued to be addressed in other more recent cases such as *Jones v. Chappell*.

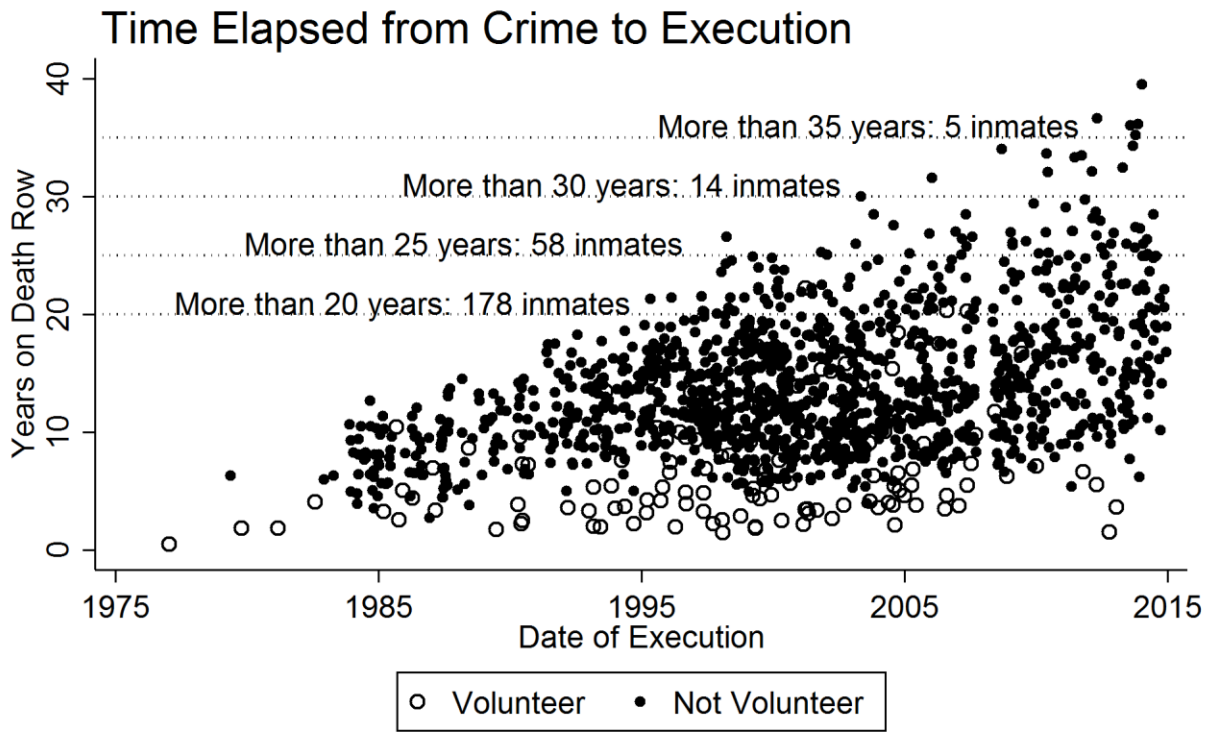
On April 18, 1978, Clarence Allen Lackey was sentenced to death by the state of Texas for the 1977 murder of Diane Kumph. In 1994 Lackey filed his first federal habeas petition in which he argued that executing him after such a lengthy delay of 16 years would be considered cruel and unusual and therefore a violation of the Eighth Amendment. In 1995, Lackey filed his second petition adding to his claim that it was necessary to consider who was to blame for such a lengthy period of incarceration. He brought up the fault in the fact that by exercising his legitimate right to review his case, a petitioner would be adding more of a delay, and that much of the delay time was caused by negligent or purposeful action of the state itself. Although his claim was denied, his case is largely relevant due to the fact that this was the first time that the issue of lengthy delays between sentencing and execution were brought up as being unconstitutional.

Ernest Dewayne Jones was sentenced to death by the state of California on April 7, 1995 however; 20 years later he still awaits his execution. Although this may seem like a rare case, it is actually the norm in the state of California. On average, those who exhaust the appeals process in California wait on death row for 25 years or more and of the 900 inmates currently on death row, 40% of them have been there longer than 19 years. In this particular case Mr. Jones raises the question of the constitutionality of the death penalty and the 8th amendment as his council claims that the death penalty is being "arbitrarily inflicted" which would constitute as both a cruel and more importantly unusual punishment.

From Crime to Execution

The vast majority of executions today span years of delay between the date of a crime and the date of an execution. Figure 8.1 illustrates this point. Since 1976, the US has executed 1,394 inmates. Using publicly available sources, the dates of their crimes, sentencing, and execution have been compiled for all but 15 of these cases. Figure 8.1 shows the correspondence between the year when an individual was executed and the time between the crime and the execution. Each dot in the figure represents an executed inmate, and they appear in rows according to the year of their execution. The vertical placement of each dot shows how many years elapsed from the crime to the execution. The figure compares the date of an execution with the time elapsed since the date of a crime.

Figure 8.1



For example, Gary Gilmore represents the dot seen at the bottom-left corner of the figure. He was first sentenced to death for a crime he committed in 1976. Gilmore was the first inmate to be executed after the reinstatement of the death penalty in 1977 thus ending the 10-year moratorium issued after the Furman v. Georgia decision. He waived his right to appeal his sentence and subsequently volunteered to be executed. After multiple stays of execution, Gary Gilmore was executed in 1977—only a year after his crime. Gilmore spent a total of 182 days on death row, making his time spent from crime to execution the shortest. No other inmate has been executed with such little time delay. Thomas Knight, on the other hand, represents the dot seen at the top-right corner of the graph. Knight was executed in early 2014 for crimes he committed as early as 1975 in the state of Florida. Even taking into account his brief escape of 100 days from prison, his time spent from crime to execution totaled 39 years, the longest time lag from crime

to execution in U.S. history. Moreover, Thomas Knight is among the numerous death row inmates who are still being executed to this day for crimes they committed nearly 40 years ago. What is even more astounding is that Gilmore and Knight committed their crimes around the same time. With only a little over a year's time difference between the crimes, the scope of the possible length in the amount of time elapsed from crime to execution is apparent.

The stories of Gilmore and Knight, however, are exceptions to the general delay in time from crime to execution. Another exception of this general trend of delay is also apparent in Figure 8.1. Throughout the graph there are numerous hollow dots. These dots refer to those who "volunteer" for execution. In other words, these individuals chose to abandon the appeals process thus ending the delay before the execution is carried out. In fact, 23 inmates experienced less than 3 years delay from crime to execution, all of whom being "volunteers". While these dots are found in various places throughout the graph, the majority is clustered in a line along the bottom of the graph under the 5-year mark for years on death row. However, inmates can still drop their appeals at any point during their time on death row, which explains the hollow dots seen at various years on death row. In order to get a more accurate idea of what the general trend in time delay looks like, data pertaining to the state of California as discussed in the *Jones v. Chappell* case serves as an example. As mentioned previously, the average time that an inmate in California spends on death row after receiving their sentence is about 25 years. The time that prisoners are waiting for their execution has grown so exponentially that of the 900 inmates sentenced to death from 1978 in California, only 13 of them have been executed. Additionally, it is safe to say that for every 1 inmate that is executed in the state of California, seven inmates have died awaiting their executions mainly from natural causes. The product of these inmates

dying on their own on death row is the product of an exemplified wait time from sentencing to execution in the state of California.

Not only do we see these substantial delays in years from crime to execution but also the delay is growing quite dramatically. The data in Figure 8.1 show an average increase of 124 days per year from crime to execution: about 1 increased year of delay every 3 years. They also show an increased spread in elapsed time. There is no significant increase in the *minimum* time served; volunteers can still drop their appeals, and regularly do so. On the other hand, the maximum time served, the average time served, and the spread between the minimum and the maximum have all increased substantially. It could be, and very well is the case that death row inmates continue to see increased delays in their executions as time progresses.

By breaking down the time elapsed between the date of a crime and the date of an execution into two sections: time elapsed from crime to sentencing and time elapsed from sentencing to execution, a clear distinction is made in terms of where the majority of time is spent.

From Crime to Sentencing

Capital murder trials are one of the most exhaustive and resource intensive legal proceedings, both in terms of the time it takes to efficiently administer due process of law and the monetary values attached to them.

The question then arises, where does most of the time get consumed along the way between when a capital murder is committed and the subsequent execution? From the data that follows, it is readily apparent that the period between a murder and sentencing is fairly expedient. The true consumption of time and resources occurs after the sentencing, when an inmate is often found addressing every avenue of appeal for relief from capital punishment.

Figure 8.2 shows the time elapsed from a murder to the completion of the bifurcated sentencing phase of a capital trial. As you can see, most of the observations are concentrated near the bottom of the graph, indicating an average of 1.68 years of wait time from the murder to the ultimate death sentence, and this trend does not seem to change from decade to decade. Those accused of, and subsequently convicted of, capital murder offenses appear to always have been entitled to and guaranteed a speedy and sometimes expedited trial by jury.

What follows the capital trial, on the other hand, extremely dissimilar, particularly in the waiting period by inmates to face the death penalty and how it becomes exponentially longer every decade since the reinstatement of capital punishment following the landmark Gregg v. Georgia Supreme Court decision.

Figure 8.2

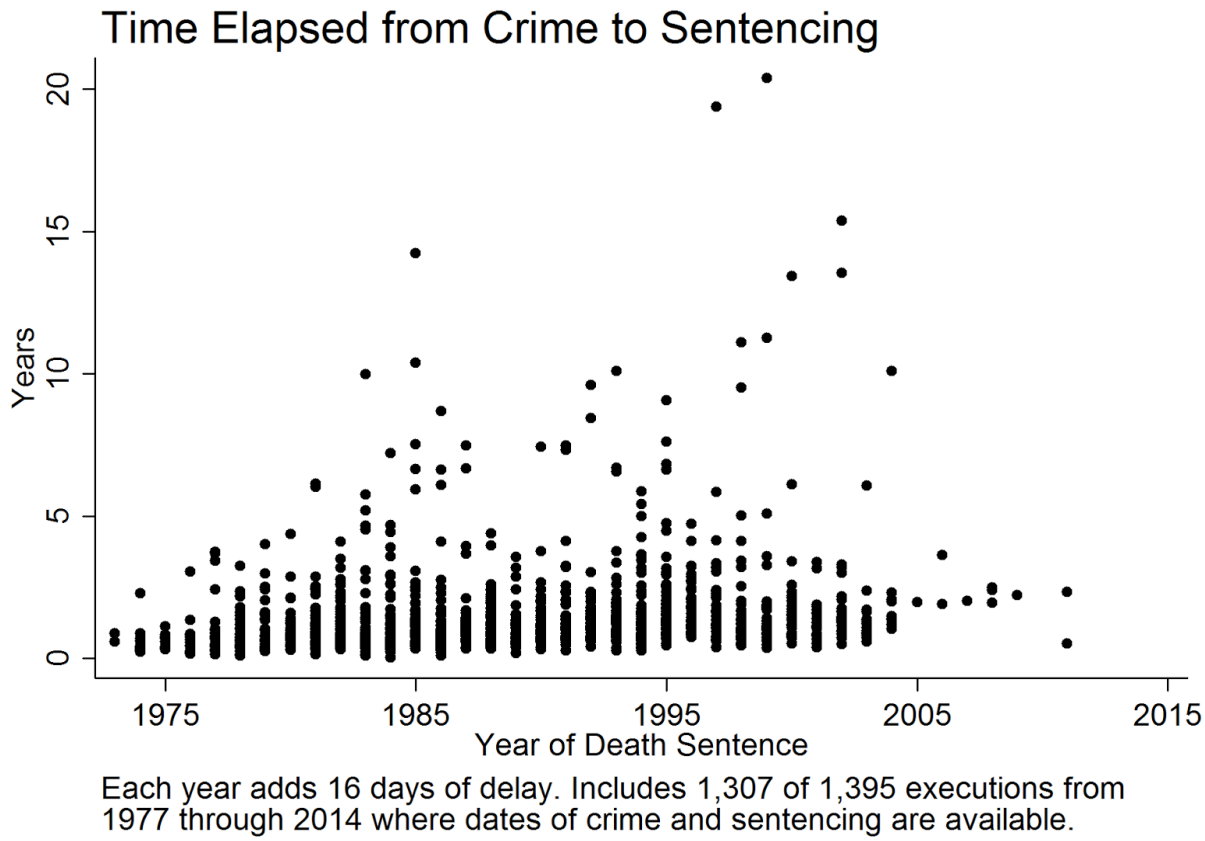
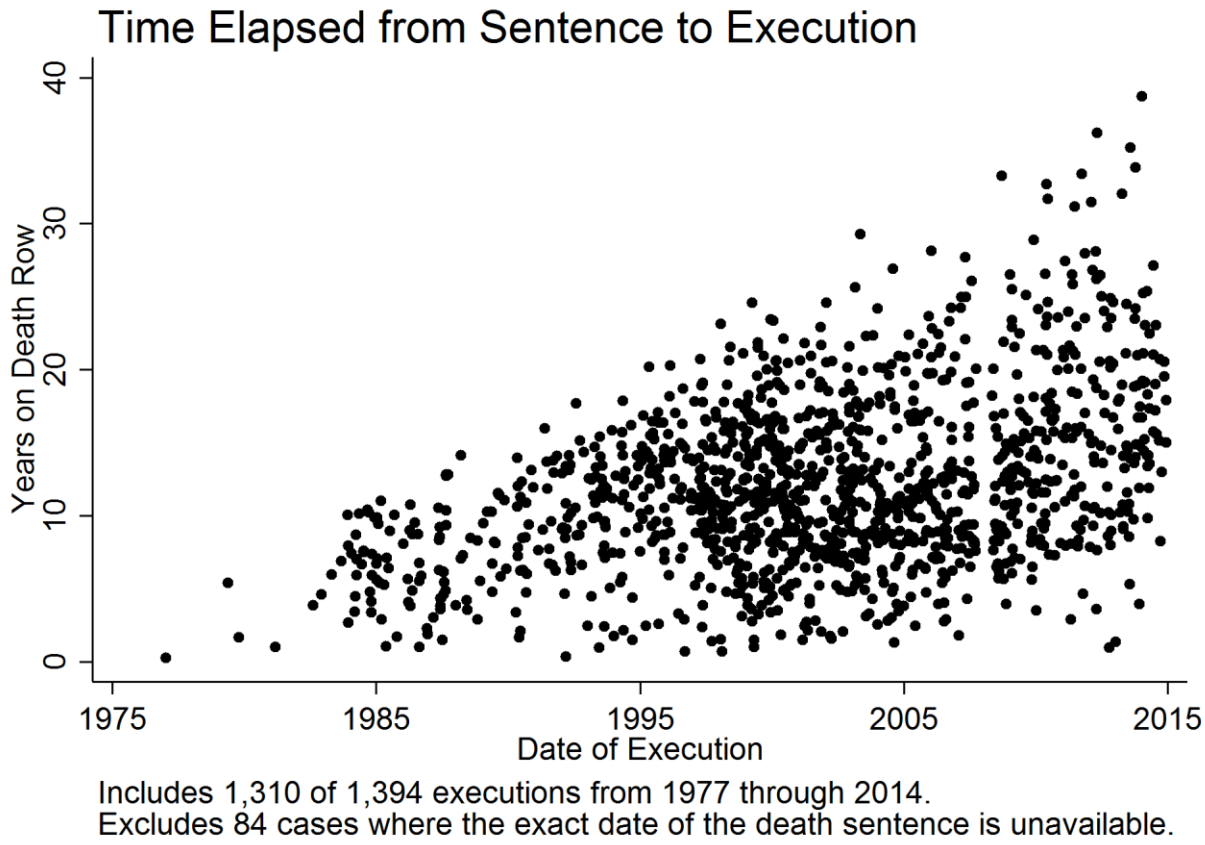


Figure 8.3



From Sentencing to Execution

Michael Selsor was first sentenced to death by the state of Oklahoma in 1976. His sentence was later reduced that same year when Oklahoma's death penalty was overturned. However, he was resentenced for the same crime in 1998. From his first conviction to his execution in 2012, he served approximately 36 years on death row. Selsor served the longest time between his sentencing and execution out of anyone on death row. Gary Gilmore, mentioned before as having the shortest time span from crime to execution, also has the shortest time span from sentencing to execution. Gilmore's first sentence was in early October of 1976 and was executed no more than four months later. These cases represent the two ends of the spectrum in terms of time elapsed from sentencing to execution.

In reality, the average time elapsed from sentencing to execution falls between the times served by Selsor and Gilmore from sentencing to execution. By examining data of the 1394 executions with the exception of 84 cases for which no sentencing date is available, the average time spent from sentencing to execution is 12.098 years. This starkly contrasts with the 1.68 years average wait from crime to sentencing. Clearly the expediency seen within the first phase of a case (crime to sentencing) vanishes once an inmate has been sentenced.

Breakdown by State

By analyzing data on a state-by-state basis, a similar trend of an increased spread in delays is apparent. Data was analyzed for the following 10 states, all of which had over 40 executions: Alabama, Florida, Georgia, Montana, North Carolina, Ohio, Oklahoma, Ohio, South Carolina, Texas, and Virginia.

Delays varied in these 10 states from a decrease of 9 days per year on average for Virginia to an increase of 213 days per year on average for Ohio. While these spreads do have considerable variance, the average delay from crime to execution for these 10 states of 122 days is very similar to the national trend of 124 days per year increase on average. Nine out of ten of these states showed in increase in the average number of days per year from crime to execution, with Virginia being the one exception.

Table 8.1 Change in days per year from crime to execution by state.

State	Number of executions	Change in days per year
Alabama	56	149.35
Florida	91	210.14
Georgia	58	170.80
Missouri	86	157.70
North Carolina	43	131.74
Ohio	53	213.88
Oklahoma	112	127.99
South Carolina	43	11.64
Texas	530	58.84
Virginia	111	-9.06
Total N	1183	

Note: Only includes states with a minimum of 40 executions.

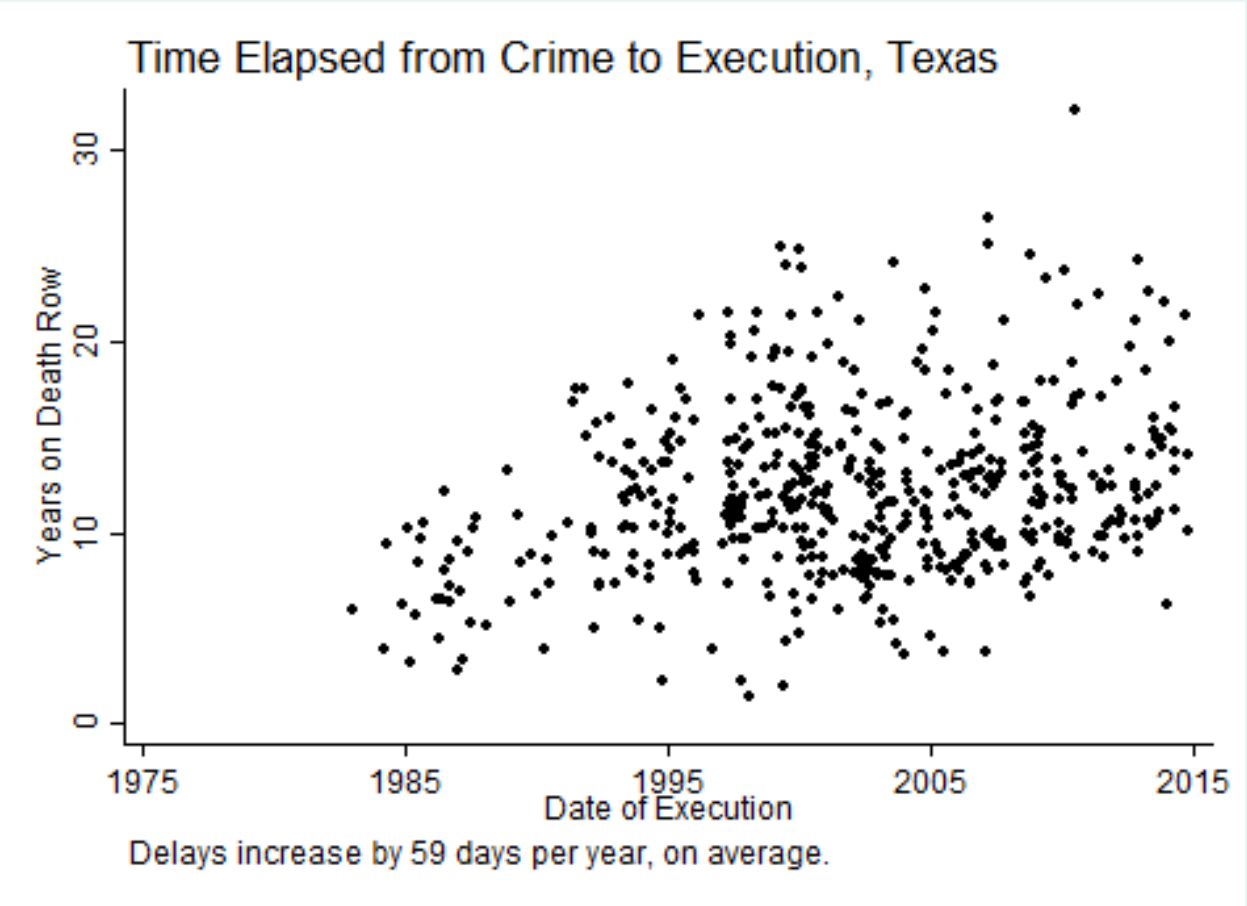
Clearly, the problem of increased delays is not getting any better. This furthers the question of constitutionality raised in cases such as *Lackey v. Texas* and *Jones v. Chappell*, not only are there lengthy delays between crime and execution, but these delays are increasing, and even worse little to nothing is being done to help solve this problem. Perhaps most interesting are the cases of Texas and Virginia.

Texas

Texas, by and large has the most executions in the United States. In fact, Texas accounts for 531 of all US executions. From this large sample of executions, however, a trend appears that is quite different from the national trend in terms of increases in delays from crime to execution.

The data in Figure 8.4 show an increase of 59 days per year from crime to execution for the state of Texas. This clearly differs from the national average of an increase of 124 days per year. While the delay in days from crime to execution is still increasing in the state of Texas it is doing so at a much lower rate than the national average.

Figure 8.4

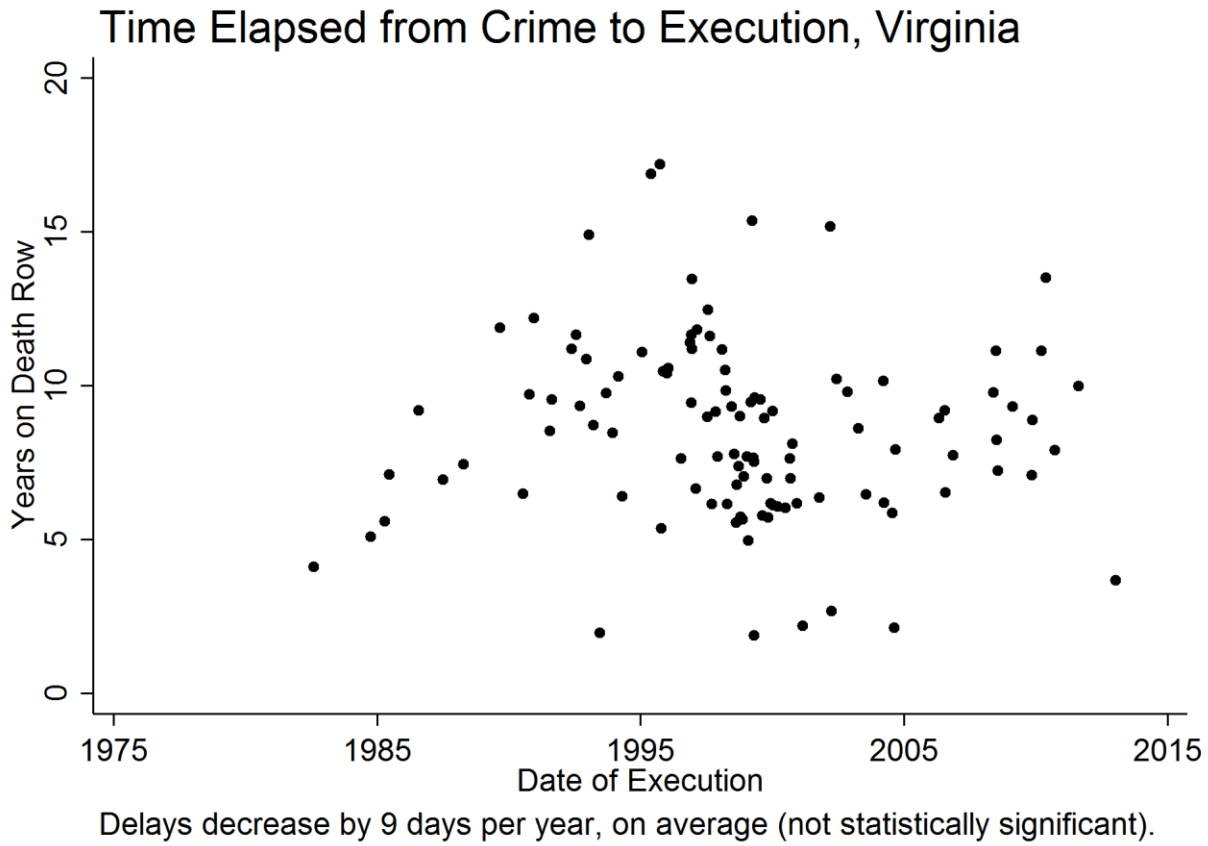


Virginia

Virginia ranks third in number of executions with a total of 111. Just as with the state of Texas, a clear trend is apparent that differs from the national trend in delays from crime to execution.

The data in Figure 8.5 show a decrease of 9 days per year for the state of Virginia. While this result is not statistically significant, it drastically differs from the national trend. Out of the 10 states with more than 40 executions, Virginia stood alone as the only state to show a decrease in delay from crime to execution. While Virginia does show a decrease in delays from crime to execution, this is not the norm. The increase of 124 days delay from crime to execution is a national problem, one that furthers the questions of constitutionality raised in cases such as *Lackey v. Texas* and *Jones v. Chappell*.

Figure 8.5



Question of Constitutionality

The cases of *Lackey v. Texas* and *Jones v. Chappell* illustrate the lengthy delays that inmates can experience in awaiting an execution after a death sentence has been given. While Lackey's appeal for a writ of certiorari was denied by the Supreme Court, Jones appeal momentarily changed the face of the death penalty in the state of California after a federal district court's decision declaring California's death penalty unconstitutional.

As previously mentioned, *Lackey v. Texas* was one of the first cases to question the constitutionality of having such lengthy delays between sentencing and execution. In this case, Lackey's request for a writ of certiorari, which would grant a review of the case by the Supreme

Court, was denied. Justice Stevens did, however, write a memorandum to the courts decision of denial in which he addressees these claims of constitutionality. Justice Stevens writes that the retribution sought from a death sentence has arguably already been fulfilled from the punishment of having such an extended time on death row. In regards to deterrence, Justice Stevens writes that the additional effect of deterrence from a death sentence in comparison to 17 years on death row followed by incarceration for life is minute. Justice Stevcns continues that this denial of a writ of certiorari will allow state and federal courts to serve as "laboratories" to further study the issue before it is brought before the Supreme Court.

On July 16, 2014 in the case of *Jones v. Chappell*, US District Court Judge Cormac Carney ruled that California's death penalty was unconstitutional due to the systematic delays inherent in its system. Judge Carney held that California's death penalty was unconstitutional under the 8th amendment. He further held that it neither offered any deterrent or retributive benefits. While a three-judge panel of the U.S. Court of Appeals for the 9th Circuit overturned this decision, Judge Carney's decision was monumental in its short-lived abolition of California's death penalty.

This issue is one that still exists. As the Supreme Court continues to neglect the issue of extended delays from crime to execution inmates spend more and more time on death row each year. If this issue is not addressed we will continue to hear stories of inmates such as Thomas Knight, who spend more than 30 years on death row awaiting an execution that may or may not occur.

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9

Death Sentence Reversals

Emily Vaughn and Kaneesha Johnson

Though the "finality and severity" of a capital sentence makes it "qualitatively different from other forms of punishment,"[44] in the modern era of the practice, an inmate is nearly three times as likely to be removed from death row as they are to be executed. Of the 8,466 cases in which a death sentence was given between 1973 and 2013, a total of 3,586 capital defendants had their sentences overturned or commuted at some stage in the appeals process, compared to the 1,359 inmates who were executed. As the disparity between sentences imposed and sentences carried out grows, so too does the question of the institution of capital punishment.

Capital Sentence Dispositions

It is often taken for granted that the majority of the death sentences administered in the United States are never carried out. Despite receiving a death sentence, most capital defendants will never face execution or even remain on death row, with 42 percent of those convicted ultimately removed via commutation or successful appeals resulting in overturned sentences. As shown in Table 9.1, between 1973 and 2013, 16.1 percent of individuals sentenced to death have been executed, a number significantly lower than both those removed and those individuals who remain on death row, a population accounting for 35.2 percent of those sentenced. The remaining 6.4 percent of inmates who received death sentences and who were not executed were either removed for other causes or died while incarcerated.

Table 9.1 Capital Sentence Dispositions, 1973-2013

[44] Coleman v. McCormick, 874 F. 2d 1280 - Court of Appeals, 9th Circuit (1989)

Disposition	Number of Sentences	Percentage of All Sentences
On Death Row	2,979	35.2
Executed	1,359	16.1
Penalty Overturned	1,781	21.0
Conviction Overturned	890	10.5
Statute Overturned	523	6.2
Commutation	392	4.6
Other Removal	33	0.4
Other Death	509	6.0
Total	8,466	100.00

Finalized Dispositions

A finalized sentence is one where the inmate has been removed from death row; this includes removal by means of execution, or an inmate that has been removed as a result of having a sentenced reversed. A perfect system would exhibit only finalized sentences, with no reversals due to errors made at the trial stage of the process. As of 2013, 5,487 of the 8,466 – or roughly 63 percent of sentences given in the modern death penalty era are considered finalized. However, due to the increasing wait time an inmate will wait on death row, typically due to the extremely lengthy appeal process, that number naturally decreases substantially over time, as shown in Figure 9.1.

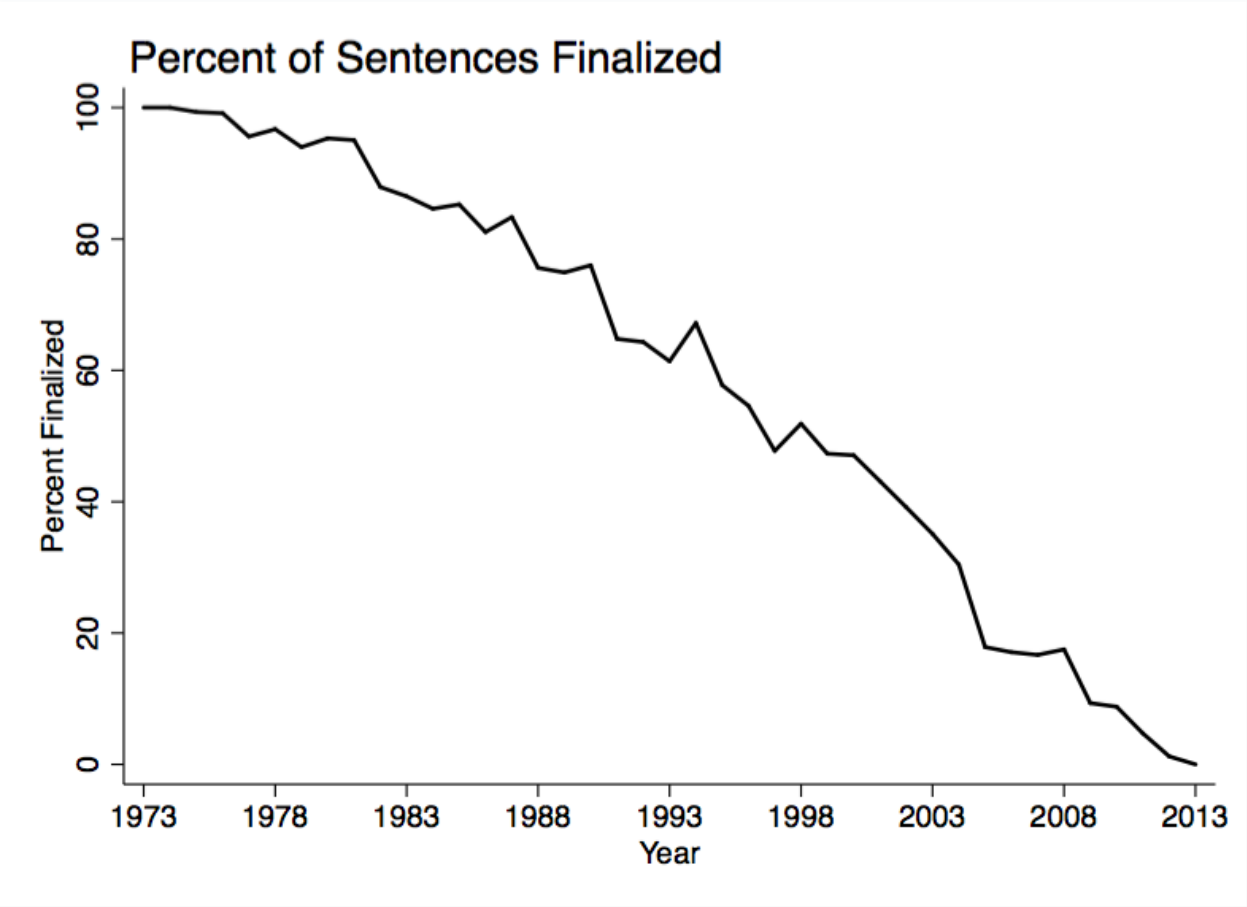
Unfinalized Dispositions

Large portions of death sentences are unfinalized, which refers to any inmate that remains on death row either waiting for execution or making their way through the appeals process. As of 2013, there were 2,979 inmates remaining on death row – roughly 35 percent of all inmates sentenced in the modern death penalty era.

Due to the inability to predict the number of sentences that will have a successful appeals, those sentences have been excluded from the analysis of general trends of reversals. This means that instead of looking at the total 8,466 sentences given in the modern death penalty era, we will

only include the 5,487 finalized sentences, omitting the 2,979 inmates that remained on death row as of 2013. Figure 9.1 shows the percent of finalized sentences given from 1973-2913

Figure 9.1 Finalized sentences 1973-2013



Another issue to take into consideration with regard to finalized sentences is the exceptionally low number of sentences that have been finalized in recent years. Due to a large number of sentences that have not been resolved, we have capped our analysis to only include the years where 40 percent of the sentences have been finalized, which omits years following 2001 when studying general trends over time.

Why are Sentences Overturned?

When a capital defendant successfully achieves an appeal and they are removed from death row, most often they have had their conviction, penalty, or statute overturned, or, in a rarer few cases, they have had their sentence commuted. Accounting for a collective 65 percent of all finalized

cases, a capital defendant is nearly three times as likely to find themselves in one of these scenarios than in the execution chamber.

Penalty Overturned

Across all capital cases tried in the modern era, the most common form of reversal is penalty overturn, in which the defendant's guilt is sustained but their death sentence is successfully challenged. During this forty-year span, 1,781 defendants, making up 50 percent of those who were granted reversals, had their conviction of guilt upheld but sentence of death overturned. A death sentence may be overturned for a variety of reasons, including discovery of potential errors made during the sentencing phase of the trial, as well as a successful proportionality review. A proportionality review seeks to determine if a death sentence was appropriate in a defendant's case, with appropriate defined as "[a sentence] which is not excessive or disproportionate to the penalty imposed in similar cases."[45] If a sentence is determined to be inappropriate or disproportionate on this ground, or if mitigating factors or other cause for appeal is found, the appeals court vacates the sentence and returns it to trial court for re-sentencing. The most common sentences following a reversal are life in prison without the possibility of parole or life in prison with the possibility of parole in 25 or 30 years.

Conviction Overturned

Between 1973 and 2013, 890 capital defendants had their conviction overturned by an appellate judge, accounting for 25 percent of all overturned sentences during the review period. As established by the Supreme Court in Gregg v Georgia, 428 U.S. 153 (1976), capital cases are subject to bifurcated proceedings in which there are separate trials for the guilt and penalty phases. It is potential errors in the initial guilt phase that can result in the reversal of a

[45] OHIO REV. CODE § 2929.05(A)

defendant's conviction, should they be able to prove that an error or errors occurred and that those errors significantly contributed to their conviction. However, it's important to note that conviction overturn is not the same as exoneration and that those who receive such verdicts most commonly return to court for a new trial, one that results in a reduced or alternative sentence.

Statute Overturned

Responsible for 523 reversals between 1973 and 2013, the overturn of a statute occurs when the court finds that the statute under which defendants were sentenced to death is unconstitutional. When such findings occur, all individuals sentenced to death under such statutes are removed to death row and their sentences are reduced to life without the possibility of parole, as the change in statute does not alter their guilt but the punishment for that guilt. For example, in 2005 the Supreme Court ruled in Roper v Simmons, 543 U.S. 551 (2005), that capital punishment may not be applied to minors. The court cited the declining public support for the practice, through individual states banning it, and the lack of maturity or developed character exhibited by minors as preventing them from being "reliably classified among the worst offenders"[46] as cause for sparing 72 death row inmates in 20 states.

Commutation

Though commutation of sentences is relatively rare, with only 392 granted between 1973 and 2013, they do occur through the appeals process. When a defendant is a granted a commutation, their guilt is sustained but their sentence is reduced his or her death to life imprisonment, either with or without parole eligibility. A form of executive clemency, commutations are granted by the governor, typically following an exhausted appeals process or at the recommendation from the state parole board, though at times governors have ignored recommendations.

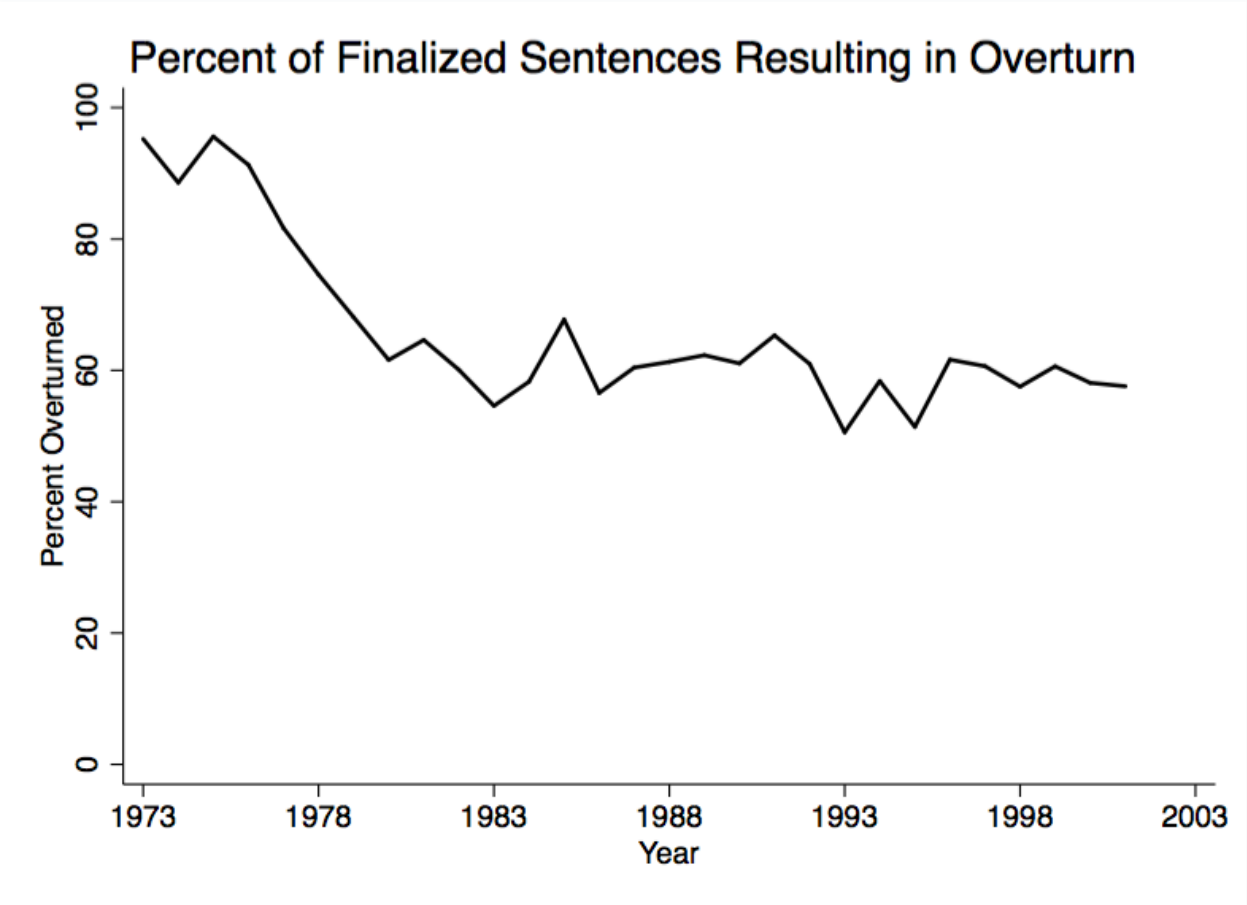
[46] Roper v Simmons, 543 U.S. 551 (2005)

Likelihood of Capital Sentence Reversal

General Trends

The most likely outcome of a death sentence given in the United States is for the sentence to be reversed. In the modern death penalty era 3,586 of the 5,487 finalized sentences, around 65 percent, or roughly 42 percent of total sentences, have resulted in some form of removal from death row. Figure 9.2 shows the percentage of death sentences that have resulted in an overturn from 1973-2001.

Figure 9.2 Percent of Finalized Sentences Resulting in Overturn 1973-2001



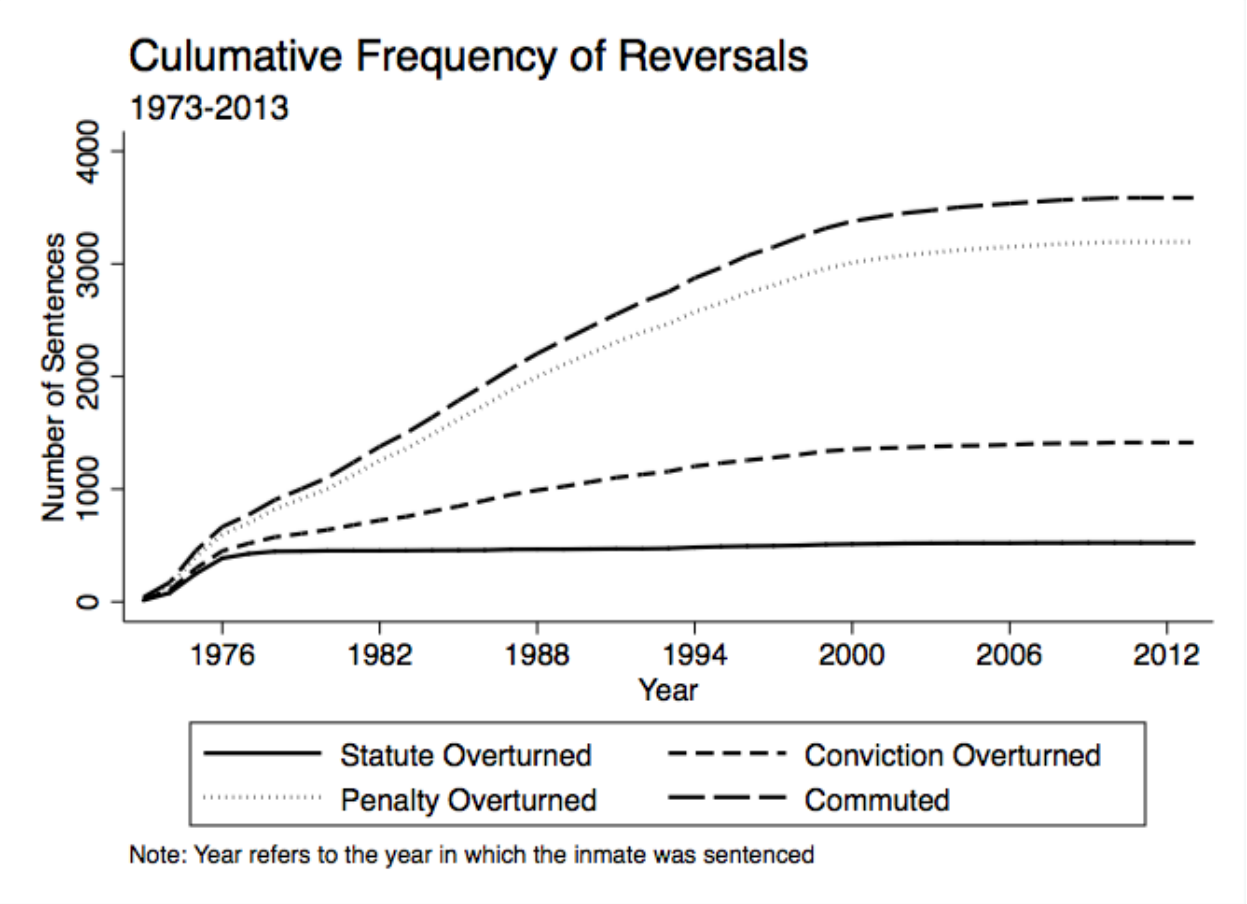
Sentences that were given during the beginning of the modern death penalty period were reversed at close to 100 percent. From the mid 1970s to the mid 1980s that rate at which people

were being removed from death row decreased to around 60 percent and then stabilized at that percentage until 2001.

Of those sentences that have been overturned, the majority is due to an inmate's penalty being overturned. As of 2013, there have been 1,781 penalty's overturned, translating to almost 33 percent of all finalized cases. Around half the number of inmates that have had their penalty overturned have had their conviction overturned. In the modern death penalty era, 890 inmates, approximately 16 percent of finalized sentences, have had their conviction overturned. Statute overturns comprise of 523, or 10 percent, of finalized sentences. Following the *Gregg v. Georgia* decision in 1972, many states abandoned their execution statutes. To date, there have been a total of 10 states that have cut death penalty statutes from their books in the modern death penalty period, the most recent being the state of Nebraska in 2015. When a state abolishes their capital punishment statutes, the inmates on death row are typically given sentences of life in prison without the possibility for parole.

Commutations are just below the number of statute overturns at 392, or 7 percent of modern finalized sentences. In 2003 Illinois Governor George Ryan commuted all 163 death row inmates calling the capital punishment system fundamentally flawed and unfair (Wilgoren 2003). This is the largest state commutation that the United States has ever seen in the modern period. Figure 9.3 shows the cumulative outcome of all death sentences given from 1973-2013.

Figure 9.3 Cumulative Frequencies of Death Penalty Reversals, 1973-2013



While there is no comprehensive data for the specific outcomes of a reversal regarding what sentence length the inmate will receive, certain states keep records of these figures. North Carolina, for example, has overturned roughly 58[47] percent of their death sentences. The Department of Public Safety has records of 256 inmates removed from death row (NCDPS), and provides extensive details on what has happened in each inmate's case. The category of those removed from death row includes inmates that that were initially given a death sentence but are no longer on death row due to execution, a change of sentence being served, death by other means, and those awaiting a new trial. Of those 256 inmates, 141 of them were given a life sentence, translating to 55 percent of death sentences in North Carolina being changed to serving

[47] BJSTable17-2013

life in prison. 12 of the inmates were given other sentences, ranging from 10 to 40 years. As of November 2015, 10 inmates are awaiting a new trial[48].

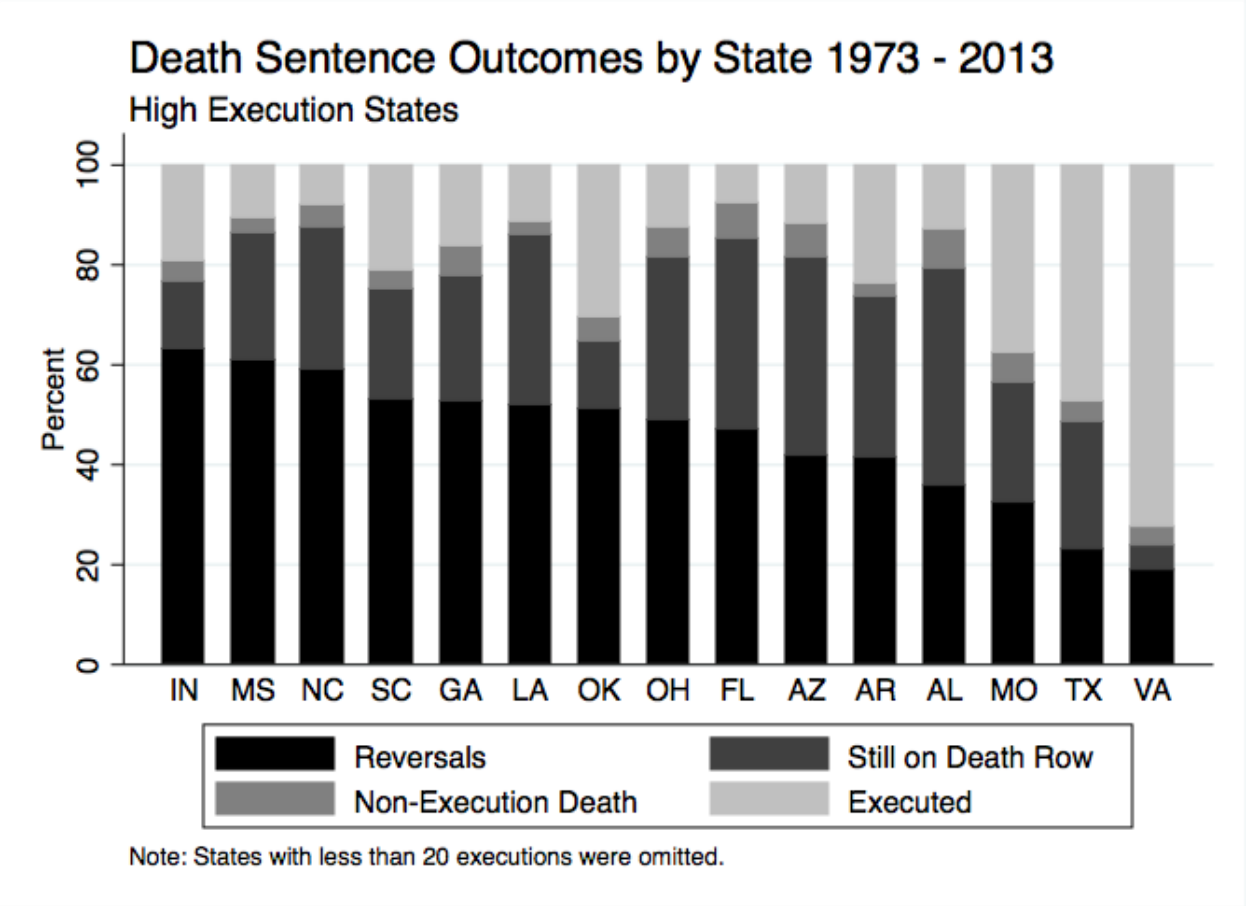
Comparison of Sentence Outcomes by State

Having already established the vast geographical discrepancies in execution in the United States, as discussed at length in chapter 7, there are also vast discrepancies in the rate of reversals across the United States. In order to examine the geographical trends of death sentence outcomes, we have divided states into two sections, the higher executing states and inefficient executing states, which are states that have larger death row populations, but low execution rates. We have also omitted any state that does not currently have death penalty statutes.

For purposes of this discussion, we have defined higher executing states as those with more than 20 executions. Figure 9.4 shows the outcomes of sentences in high executing states. The black portion of the bar indicates the percent of sentences that have resulted in a reversal, which includes penalty, statute, and conviction overturns, commutations and other forms of removal. These bars indicate that depending on the state in which an inmate was given the death penalty, there are vast differences in the likelihood of you being released from death row. We reintroduced unfinalized sentences to give a more comprehensive picture of the very low likelihood of execution in most U.S. states.

Figure 9.4 Sentencing outcomes by high execution states

[48] finalized-overturned.xlsx, sheet("NC")

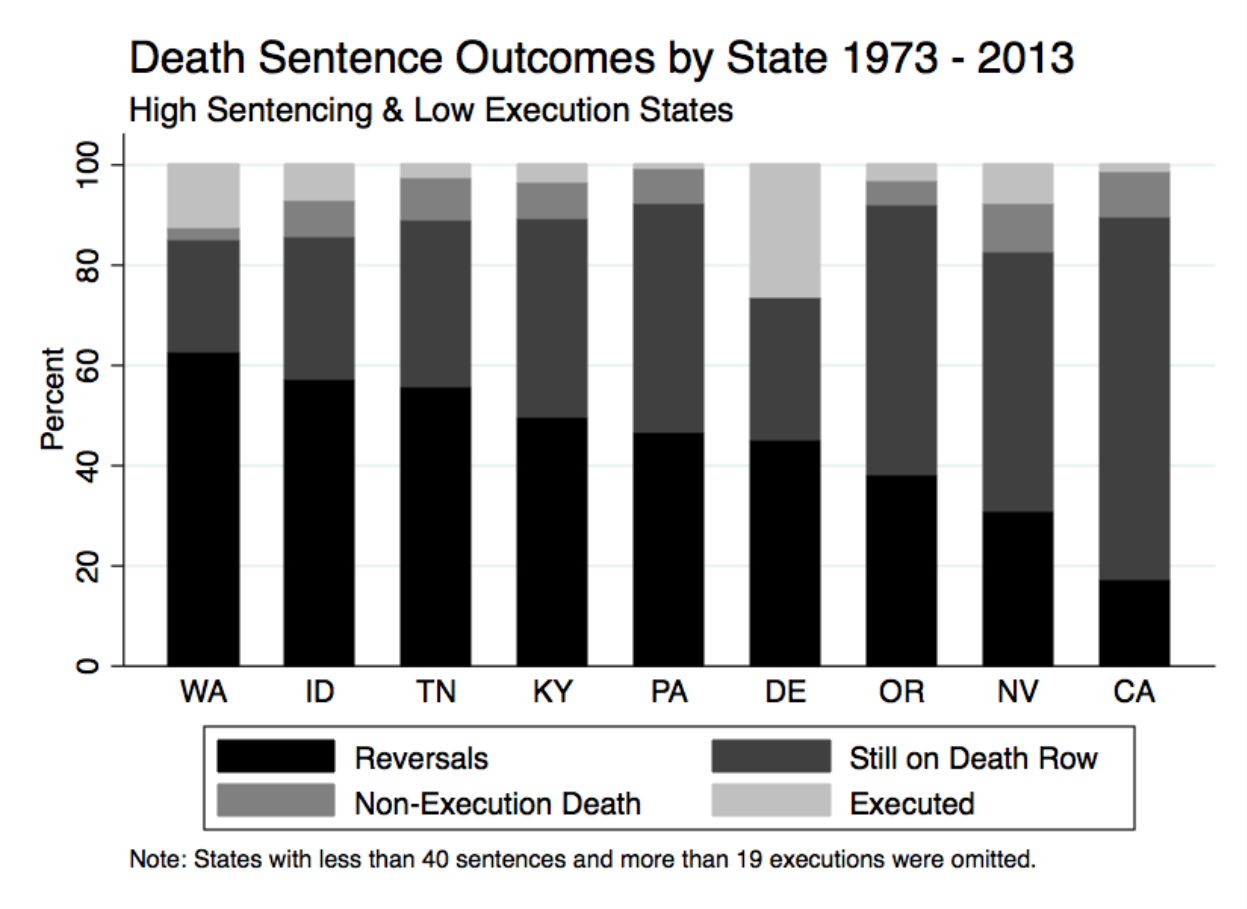


Of the highest executing states, Indiana has the highest percentage of death sentences resulting in reversals, at just over 60 percent, or 63 reversals of the 103 sentences from 1973-2013. Virginia is the least likely state to reverse a sentence, at a reversal rate of only 18 percent of their death sentences, or only 28 of the 153 sentences given. Not surprisingly, the majority of the high executing states are located in the south, which has a rich history of supporting and advocating capital punishment.

To exclude states that have fewer than 20 executions means that we have ruled out those states that have a low execution rate, but a high death row population. The states that are included in this category are states that have an inefficient death row system, which would be states with very high rates of reversals or inmates remaining on death row. California, for instance has the highest death row populations in the United States, with 735 inmates remaining

on death row as of 2013, and a total number of 1013 sentences given out from 1973-2013. Figure 9.5 shows the outcomes of those death penalty inefficient states.

Figure 9.5 Sentencing outcomes by inefficient death penalty states



Of the high sentencing, low execution states, Washington has the highest percentage of reversals, at just over 60 percent. California not only has the highest sitting death row population, they are also the least likely to either reverse a sentence or execute an inmate.

Those states that have been left out of each of the above analysis include; Colorado, Kansas, Montana, New Hampshire, South Dakota, Utah, and Wyoming. These states have very low sentencing and execution rates, and therefore, not much can be drawn from their trends of death penalty outcomes. Colorado has given out only 22 sentences and executed only one person. Kansas has given out 13 sentences and has not executed any inmate in the modern death penalty

period. Montana has handed out only 15 sentences and executed three people. South Dakota has also only executed three people out of the seven sentences they have given. Wyoming has executed only one person in the modern period, and handed out only 12 sentences. Of these low usage states, Utah has given out sentences and executed at the highest rate, with 27 and seven, respectively.

Conclusion

The persistence and extraordinary high rates of capital punishment reversals casts wide doubt on the institution of capital punishment. With 65 percent of finalized sentences resulting in some form of reversal, means that the state came to the conclusion that their decision was wrongfully imposed in 3,586 instances of condemning a person to death. While there is undoubtedly a margin of error in many government institutions, a 65 percent error rate in capital sentences passes the threshold of a reasonable number of mistakes, and enters into the realm of systematic issues.

The safeguards established by the Supreme Court in *Gregg v. Georgia* to prevent wrongful application of the death penalty in the original trial are failing at extraordinary rates, and are placing a huge burden on the appeals process to try to remedy those mistakes. Resulting in an astonishing number of inmates either waiting on death row for a substantial amount of time or being removed entirely.

The fact that the outcome of your sentence is highly determined by the geographical location of your conviction would suggest that those being executed are not those that are committing the most heinous crimes, rather, they are the unfortunate souls who find themselves in prison in a state that have more efficient capital punishment systems. Whereas those inmates that find themselves on death row in the inefficient states will likely only have a marginal

possibility of being executed, and are more likely to spend their life on death row awaiting an execution that will likely never arrive.

The high number of sentences that result in reversal also hints at the notion of evolving standards of decency. In 3,586 cases some authoritative body, be it a jury, judge, or public official, found that the sentence originally given to the inmate was excessive and far beyond what should be considered fitting for the crime. With many Supreme Court decisions in the modern death penalty period questioning whether the application of the death penalty has moved beyond what we would call a humane or decent punishment (see *Atkins v. Virginia*, *Roper v. Simmons*, and *Kennedy v. Louisiana* for examples), it may be time to question whether the majority percentage reversal of death sentences constitutes revisiting our standards of the application of the death penalty.

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10

How Often Are People Exonerated from Death Row?

Sarah Tondreau, Lanie Phillips, & Candice Holmquist

The University of Michigan Law School's National Registry of Exonerations, a source which this chapter draws from heavily, states that an exoneration occurs when a person who was convicted of a crime is either: "declared to be factually innocent by a government official or agency with the authority to make that declaration; or relieved of all consequences of the criminal conviction by a government official or body with the authority to take that action."[49] One can be exonerated through a complete pardon, an acquittal, or a dismissal of "all charges factually related to the crime for which the person was originally convicted." [50]

In the case of *Kansas v. Marsh*[51], Supreme Court Justice Antonin Scalia identified the criteria for exonerations created by the DPIC as the "best known catalogue of innocence in the death-penalty context."[52] However, it is important to note that there are issues and concerns that exist for this criterion as well. The main issue that gets brought up pertains to the title given by the Death Penalty Information Center for the list of names of people who have been exonerated from death row. This list is known as the "Innocence List," [53] and this presents an issue due to the fact that the list does not only consist of names of people who were exonerated due to actual

[49] Glossary, 2015.
[50] Glossary, 2015.
[51] In *Kansas v. Marsh*, upon the finding of three aggravating circumstances that were not counterbalanced by mitigating circumstances, Michael Lee Marsh was convicted of capital murder and sentenced to death by a Kansas jury. On direct appeal, Marsh argued that the state of Kansas unconstitutionally favors death through its statute by encouraging a death sentence when the aggravating and mitigating circumstances are evenly balanced. The Kansas Supreme Court agreed and called for a new trial based on the fact that Kansas' weighing equation was in violation of Fourteenth and Eighth Amendments.
[52] Campbell, 2008.
[53] Innocence: List of Those Freed from Death Row, 2015.

innocence, but also because of legal insufficiency. The following is the set of criteria required in order to be included on the Death Penalty Information Center Innocence List:

"Defendants must have been convicted, sentenced to death and subsequently either-

a. Their conviction was overturned AND
    i. They were acquitted at re-trial or
    ii. All charges were dropped
b. They were given an absolute pardon by the governor based on new evidence of innocence"[54]

As was expressed in the case of *Jackson v. Virginia* in 1979, the term legal sufficiency says that "[a]ctual innocence means factual innocence, not mere legal insufficiency."[55] The Innocence List not only includes people who are factually innocent, but also those who were exonerated because the state was not able to prove that they were guilty beyond reasonable doubt.[5657] This has led to concern regarding whether or not the majority of people who have been exonerated from death row actually deserve to be exonerated.

A recent study conducted by Samuel R. Gross and colleagues has proven this concern to be invalid. Through his study, Gross deduced that the proportion of erroneous convictions of defendants given the death penalty is 4.1%.[58] What this means is that if every person who received a death sentence were to remain on death row, more than 4.1% of these people would end up being exonerated. However, as Gross points out, an extremely important detail to keep in mind is that the large majority of defendants who are sentenced to death do not remain on death row. Their death sentences are overturned and they are retried and resentenced to life in prison. 392 death sentences were overturned and resentenced to life in prison between 1973 and 2013;

[54] Innocence: List of Those Freed From Death Row, 2015.
[55] *Jackson v. Virginia,* 443 U.S. 307 (1979).
[56] Campbell, 2008.
[57] For examples of cases that fit under the category of exonerated due to reasons other than actual innocence refer to Campbell's article: "Exoneration Inflation: Justice Scalia's Concurrence in *Kansas v. Marsh."*
[58] Gross, 2014.

got from overturns chapter, need source. This switch from death row to life in prison is what Gross refers to as a change in the "threat of execution," and he shows how this switch actually increases the chance that an innocent person will never be exonerated.[59] The threat of execution is the high level of threat that an inmate faces against his or her life while on death row. Gross discusses the fact that the level of intensity that is present in a case where one's life is at such high risk is significantly higher than it is for someone who is facing further time in prison as opposed to death. The intensity brought on by this threat of execution causes lawyers, judges, court systems, and others involved in capital cases, to put in a larger amount of effort and focus to proving that the defendant is either innocent or guilty. Therefore, when defendants are resentenced to life in prison, the intensity that was being brought to their case dramatically decreases and the focus and drive to prove their innocence disappears: "The net result is that the great majority of innocent defendants who are convicted of capital murder in the United States are neither executed nor exonerated. They are sentenced, or resentenced to prison for life, and then forgotten."[60] This lack of intensity in searching for errors that occurs once the threat of execution disappears implies that the proportion of inmates exonerated from death row is significantly smaller than the actual rate of false death penalty convictions because it does not take into account the wrongfully convicted inmates who were resentenced to life in prison. Therefore proving that although the Innocence List does contain the names of people who were not officially declared factually innocent, there is an extremely high likelihood that they are in fact innocent.

According to the National Registry of Exonerations, there have been 698 homicide exonerations since 1989, therefore, with 163 exonerees, death row exonerations account for more

[59] Gross, 2014, p. 7231.
[60] Gross, 2014, p. 7235.

than 23% of all capital punishment exonerations.[61] This lack of adequate legal defense that Gross highlights is only one factor that plays into the extremely high level of fail-ability within the system of capital punishment. Shockingly enough, mistakes are made and things do go wrong, and it occurs significantly more often and in a lot more ways than many people are aware of. Including Inadequate Legal Defense, there are seven main contributing factors that play a role in the occurrence of the majority of exonerations and explain a large portion of the mistakes and degree of error that is present in these cases. These factors are DNA, False Confession, False or Misleading Forensic Evidence, Inadequate Legal Defense, Mistaken Witness Identification, Official Misconduct, and Perjury or False Accusation.[62] The following list provides an explanation of each of the contributing factors as is presented by The National Registry of Exonerations:[63][64]

Perjury or False Accusation

Perjury or False Accusation is used to describe a situation where a person was convicted of a crime because of a false accusation given by another person. There is much documentation of plea bargains being given to other defendants or prisoners in exchange for information regarding the crime. This is a common contributing factor in two-criminal crimes where one of the prisoners flips and gives a false account of the story in exchange for a lesser sentence.

[61] The National Registry of Exonerations, 2015.
[62] In the majority of cases, several of these contributing factors tend to exist simultaneously. Exonerations based solely on one of these factors are very rare.
[63] Glossary, 2015.
[64] The list of contributing factors is presented by frequency from highest to lowest.

Official Misconduct

Official Misconduct occurs when officials such as law enforcement officers, prosecutors, and other government officials dramatically abuse the power of their positions in a way that is proven to influence the conviction.

Mistaken Witness Identification

Mistaken Witness Identification is used when at least one witness wrongfully identified the exoneree as the person who committed the crime. This factor can be intentional or unintentional, depending on the influence of other contributing factors.

Inadequate Legal Defense

Inadequate Legal Defense is used to describe situations where the exoneree's legal defense obviously and absolutely provided inadequate representation.

DNA

DNA is used to tag exonerations that occur because DNA evidence later proves that they were not the actual perpetrator and were therefore wrongfully convicted. It is one of the only factors with the power to either fully convict or exonerate someone accused of a crime.

False or Misleading Forensic Evidence

False or Misleading Forensic Evidence is used if any forensic evidence was used to convict a defendant during trial and then this same evidence was found to be false or misleading. There are four ways this can happen. First, the exoneree's conviction was based on forensic information that was caused by errors in forensic testing. Second, the conviction was based on unreliable or unproven methods, including testing methods that are later proven to be inadequate. Third, the

forensic evidence was presented to the judge or jury with exaggerated and misleading confidence. Fourth, the conviction was based on fraudulent forensic information.[65]

False Confession

False Confession occurs in any combination of the following three situations prior to being convicted. First, authorities treated a false statement made by the exoneree as a confession. Second, authorities claimed that the exoneree confessed, but the exoneree denied this same confession. Third, the authorities misinterpreted a statement made by the exoneree as an admission of guilt as a false confession.

Death Row Exoneration Cases

In total, the 125 men and women who have been exonerated from death row between 1989 and 2015 have collectively spent upwards of 1,136 years on death row, and upwards of 1,651 collective years in prison. The following are a handful of exoneration cases that provide real world examples of the events and situations that fall under the various categories of contributing factors, and exactly where and how these illegal occurrences and factors find their way into the system. The summaries of each case are entirely drawn from the information provided on their respective webpage created by the National Registry of Exonerations.

Paul G. House[66]

Age	Race	Gender	State	Year Convicted	Year Exonerated
23	White	Male	TN	1986	2009

Contributing Factors: False or Misleading Forensic Evidence and DNA.

[65] This final situation can also be considered Official Misconduct.
[66] Jackson, 2012.

Case: House was wrongfully accused of and convicted for the rape and murder of Carolyn Muncey. Not long after he was sentenced to death, DNA evidence linking Muncey's husband to the murder was discovered. Further forensic testing also proved that the DNA evidence used against House had been tampered with. House was exonerated after spending 22 years on death row.

Anthony Hinton[67]

Age	Race	Gender	State	Year Convicted	Year Exonerated
29	Black	Male	AL	1986	2015

Contributing Factors: Mistaken Witness Identification, False or Misleading Forensic Evidence, & Inadequate Legal Defense.

How: Anthony Hinton was convicted of and sentenced to death for the murders of John Davidson and Thomas Wayne Vason. He was convicted on the basis of multiple eyewitness accounts and the fact that the defense could not prove that the bullets found in the bodies of the deceased did not come from the gun belonging to Hinton. It was later discovered that Hinton's attorney had not obtained adequate testing of the bullets and gun, and upon further testing it was proven that the bullets in fact did not come from Hinton's gun. His charges were dismissed and he was released from prison.

Debra Milke[68]

Age	Race	Gender	State	Year Convicted	Year Exonerated
25	White	Female	AZ	1990	2015

[67] Possley: Anthony Hinton, 2015.
[68] Possley: Debra Milke, 2015.

Contributing Factors: False Confession, Perjury or False Accusation, & Official Misconduct.

How: Deborah Milke was convicted of and sentenced to death for the kidnapping and murder of her four-year-old son, Christopher. Her conviction was based primarily on a confession presented by Detective Armando Saldate. There was no actual physical evidence connecting Milke to the murder. Her charges were eventually dismissed when evidence was brought to the attention of the court that Saldate had exhibited extreme levels of misconduct throughout the entire case, particularly during his interrogation of Milke, and that the prosecution had withheld the evidence that proved this. It was also discovered that Saldate had known who the real perpetrators were but offered them lesser sentences in exchange for testifying against Milke.

Glenn Ford[69]

Age	Race	Gender	State	Year Convicted	Year Exonerated
34	Black	Male	LA	1984	2014

Contributing Factors: False or Misleading Forensic Evidence, Perjury or False Accusation, Official Misconduct, and Inadequate Legal Defense.

How: Glenn Ford was convicted of and sentenced to death for the murder of Isadore Rozeman. He was convicted based on various erroneous eyewitness accounts and forensic findings. It was also the first time either of his attorneys has ever handled a criminal case. The discrediting of forensic evidence, declaration of inadequacy by the attorneys, and discovery of withheld evidence that proved Ford's innocence, all led to the eventual dismissal of his charges, vacating of his conviction, and release from prison.

Ricky Jackson, Wiley Bridgeman, and Kwame Ajamu (Ronnie Bridgeman)[70]

[69] Possley: Glenn Ford, 2015.
[70] Possley: Ricky Jackson, 2015.

Who	Age	Race	Gender	State	Year Convicted	Year Exonerated
Ricky Jackson	18	Black	Male	OH	1975	2014
Wiley Bridgeman	20	Black	Male	OH	1975	2014
Kwame Ajamu	17	Black	Male	OH	1975	2014

Contributing Factors: Perjury or False Accusation & Official Misconduct.

How: Ronnie Jackson, Wiley Bridgeman, and Kwame Ajamu (at the time Ronnie Bridgeman), were all convicted of and sentenced to death for the murder of Harold Franks. Their convictions were based on the eyewitness accounts of two people who later confessed to having been intimidated by authorities into making up their stories and falsely testifying against the three young men. When these statements were proven to be true, Jackson, Bridgeman, and Ajamu were exonerated of all the charges brought against them.

Madison Hobley[71]

Age	Race	Gender	State	Year Convicted	Year Exonerated
26	Black	Male	IL	1990	2003

Contributing Factors: Mistaken Witness ID, False Confession, False or Misleading Forensic Evidence, Perjury or False Accusation, Official Misconduct.

How: Madison Hobley was convicted of and sentenced to death for the murder of 7 people including his wife and son by setting the apartment building where they all lived on fire. His conviction was based almost entirely on claims of a confession during a police interrogation, however there was no actual evidence of a confession, along with three eyewitness testimonies, and a statement from an arson expert declaring that the fire was started purposefully. Roughly five years after his conviction, it was discovered that police had withheld reports that proved that Hobley could not have started the fire, and also that the fire had in fact most likely been an

[71] "Madison Hobley," 2012.

accident. Hobley was granted a pardon by Governor George H. Ryan and was released from prison.

Damon Thibodeaux[72]

Age	Race	Gender	State	Year Convicted	Year Exonerated
21	White	Male	LA	1997	2012

Contributing Factors: Mistaken Witness ID, False Confession, Official Misconduct, and DNA.

How: Damon Thibodeaux was convicted and sentenced to death for the rape and murder of 14-year old Crystal Champagne. His conviction was based on a confession from Thibodeaux that was achieved after nine hours of police interrogation and the eyewitness accounts of two local women. After his conviction, DNA testing proved that Champagne had never been raped. It was also discovered that many of the details of Thibodeaux's confession did not add up with the physical evidence of the crime, and an expert on false confessions declared that Thibodeaux's confession had been coerced and that he only confessed to the crime due to police intimidation and severe exhaustion. His charges were dismissed and he was released from prison.

Ernest Ray Willis[73]

Age	Race	Gender	State	Year Convicted	Year Exonerated
39	White	Male	TX	1987	2004

Contributing Factors: False or Misleading Forensic Evidence, Official Misconduct, Inadequate Legal Defense.

How: Ernest Ray Willis was convicted and sentenced to death for the murder of Elizabeth Belue, Gail Allison, Cheryl Robinson and Michael Robinson, by setting fire to the house where they all

[72] Gross, "Damon Thibodeaux," 2012.
[73] Gross, "Ernest Ray Willis," 2012.

lived. At trial, arson specialists declared the fire had been intentional, and the prosecution convinced the jury to seek death by painting Willis as being a heartless monster, a claim that Willis seemed to back due to his extremely dazed and emotionless appearance. His case was reopened five years later and it was discovered that Willis had appeared this way because for months prior to the trial, the state of Texas had been mixing high doses of anti-psychotic drugs in with his regular medications without his knowledge. This along with inadequate defense provided by his attorney who failed to counter the majority of the prosecution's arguments or bring any witnesses to the stand, are what led to the dismissal of Willis' charges and release from prison in 2004.

Shareef Cousin[74]

Age	Race	Gender	State	Year Convicted	Year Exonerated
16	Black	Female	LA	1996	1999

Contributing Factors: Mistaken Witness ID, Official Misconduct.

How: Shareef Cousin was convicted of the murder of Michael Geradi and sentenced to death. Three years later, his conviction was reversed due to prosecutorial misconduct in witness questioning and the discovery of withholding of evidence by the prosecution. The murder charges were dropped and his conviction was dismissed.

Daniel Wade Moore[75]

Age	Race	Gender	State	Year Convicted	Year Exonerated
24	White	Male	AL	2002	2009

Contributing Factors: Official Misconduct.

[74] Oprea, "Shareef Cousin," 2012.
[75] Gross, "Daniel Wade Moore," 2012.

How: Daniel Wade Moore was convicted of the sexual assault and murder of Karen Tipton. Due to intentional withholding of evidence that proved Moore was not guilty of the murder, and an eyewitness statement that countered the prosecution's story, Moore was acquitted of the charges brought against him and released from prison.

Gussie Vann[76]

Age	Race	Gender	State	Year Convicted	Year Exonerated
42	Black	Male	TN	1994	2011

Contributing Factors: False or Misleading Forensic Evidence and Inadequate Legal Defense.

How: Gussie Vann was charged with multiple counts of incest and the murder of his daughter Necia. Due to a number of inaccurate forensic findings and the fact that Vann's legal defense failed to introduce multiple factors that would have aided in proving his innocence, his charges were dismissed and he was exonerated of the crime in 2011.

Joe D'Ambrosio[77]

Age	Race	Gender	State	Year Convicted	Year Exonerated
26	White	Male	OH	1989	2012

Contributing Factors: False or Misleading Forensic Evidence, Perjury or False Accusation, and Official Misconduct.

How: Along with two other men, D'Ambrosio was suspected of the murder of Estel Anthony Klann. He was convicted and sentenced to death in 1989 on the bases of multiple eyewitness accounts. However, 23 years later, the discovery of a multitude of withheld evidence discredited

[76] Possley: Gussie Vann, 2015.
[77] Possley: Joe D'Ambrosio, 2012.

these testimonies and proved D'Ambrosio's innocence. His charges and conviction were expunged and he was released from prison.

Robert Springsteen[78]

Age	Race	Gender	State	Year Convicted	Year Exonerated
17	White	Male	TX	2001	2009

Contributing Factors: False Confession, Perjury or False Accusation, and DNA.

How: Springsteen and four others were suspected of murdering and sexually assaulting four young girls. Springsteen was convicted and sentenced to death based on video of him confessing during a police interrogation, which he claimed he had been intimidated into giving. In 2007 DNA testing proved that Springsteen was not involved in the murders at all and revealed the true perpetrator. Two years later his charges were dismissed.

Frank Lee Smith[79]

Age	Race	Gender	State	Year Convicted	Year Exonerated
37	Black	Male	FL	1986	2000

Contributing Factors: Mistaken Witness ID, Perjury or False Accusation, Official Misconduct, and DNA.

How: Smith was accused of and convicted for the rape and murder of an 8-year-old girl. His conviction was based on three false eyewitness accounts. Smith passed away almost a year before DNA testing proved his innocence and he was exonerated of all the charges brought against him.

[78] Possley, "Robert Springsteen," 2012.
[79] Frank Lee Smith, 2012.

Ronald Kitchen[80]

Age	Race	Gender	State	Year Convicted	Year Exonerated
22	Black	Male	IL	1990	2009

Contributing Factors: False Confession, Perjury or False Accusation, and Official Misconduct.

How: Ronald kitchen was suspected of the murder of two women and three children after having discovered their bodies in the remains of a house that had burned down. He was sentenced to death based solely on the testimony from a witness falsely accusing him of confessing to the murders, and a forced confession that came from hours of physical abuse and intimidation during a police interrogation. Nearly ten years later Kitchen's case was reopened based on evidence of torture. His charges were dismissed and he was released from prison.

Post-Execution Innocence

It is important to note that once prisoners are executed, their case is no longer investigated to prove innocence. Two major examples of this are Cameron Todd Willingham and Carlos DeLuna.

On December 23, 1991, a fire burned down Cameron Todd Willingham's home, killing his three daughters. Throughout the trial, Willingham repeatedly asserted that he had been asleep when the fire started and was innocent. At his trial, the prosecution claimed that he intentionally set the fire. The prosecution used the testimony of an arson specialist and information from a jailhouse informant who claimed that Willingham had confessed to him. On October 29, 1992, he was sentenced to death. In early 2004, Willingham's attorneys sent the governor a report from Gerald Hurst, a nationally recognized arson expert, saying that his conviction was based on fault forensics. Unfortunately, the Board of Pardon and Parole did not act on the report and

[80] Ronald Kitchen, 2012.

Willingham was executed days later on February 17. Since his execution, the Innocence Project has gone on to launch full investigations regarding Willingham's innocence.

Carlos DeLuna was sentenced to death for killing a 24-year-old gas station attendant on February 4, 1983. The victim, Wanda Lopez, was stabbed multiple times and was on the phone with the police when she died. There were two eyewitnesses to the crime: Kevan Baker and George Aguirre. Baker had stopped for gas and claimed to have seen saw a man dragging Lopez's body to the back of the gas station. Aguirre had also stopped for gas, and he claimed to have seen a man standing outside the gas station, drinking a beer and playing with a knife. The man asked Aguirre for a ride, but he declined and drove away. When he looked back, he saw the man and Lopez struggling inside the store. Police found DeLuna 30-40 minutes after the crime hiding underneath a parked truck. Although the crime scene was very bloody, no blood was found on DeLuna. DeLuna was convicted entirely on the basis of the eyewitness accounts of Baker and Aguirre. He maintained his evidence throughout his trial and execution. His case is widely recognized by many scholars as a wrongful execution.

Data Analysis[81]

Although there is documentation of all 155 exonerations, full case overviews exist for only 119 of these cases[82]. The main characteristic that the remaining 37 cases have in common is that they occurred prior to 1989. This suggests that complete documentation of exonerations did not begin to take place until 1989.[83] Information regarding the race of the victims in each case was

[81] The spreadsheet containing the information regarding the 155 people who have been exonerated from death row draws heavily from The National Registry of Exonerations and The Death Penalty Information Center.
[82] The National Registry of Exonerations only accounts for the 125 that occurred after 1989.
[83] Ten of the remaining 37 cases occurred after 1989 however they were never fully analyzed and summarized.

extremely scarce as well.[84] Due to the lack of information prior to 1989 only cases that occurred after that year have been taken into consideration throughout this analysis.

Contributing Factors	All Exonerations	Death Row Exonerations
Perjury or False Accusation	56%	72%
Official Misconduct	47%	75%
Inadequate Legal Defense	23%	26%
Mistaken Witness I.D.	32%	22%
False Confession	13%	18%
DNA	24%	21%
False or Misleading Forensic Evidence	22%	29%

Post-Exoneration Compensation

There is a common belief that when people are released from jail after a conviction is overturned, they are automatically paid hundreds of thousands of dollars by the government to right the wrong and go on to live happy lives. Unfortunately, this is not an accurate statement. Released prisoners are not automatically awarded compensation. On average, about one-third of the people exonerated due to proof of innocence have not been compensated. There are statutes providing for some type of compensation in 30 states and Washington DC, but some of these statutes are insufficient and all are inconsistent. Of these states, 15 provide a monetary amount based on time served. Fourteen have a cap on the maximum amount of compensation, which ranged from $20,000 to $2,000,000. On average, exonerates spend around 14 years in jail before their conviction is overturned. As a result, inmates are released and left without money, housing, transportation and insurance, among other emotional and physical issues. Additionally, many prisoners are left with a lasting criminal record. Only four states (14.3%) even begin to address

[84] This is potentially due to respecting the privacy of the identity of the victim and privacy of the victim's family.

the issue of record expungement. Three provide immediate expungement and one requires a separate hearing to address the issue.

There are three main ways that exonerees receive compensation: private bills, litigation and compensation statutes. The first option requires the exoneree to obtain a private compensation bill from the state legislature. This method has only a 9% success rate. The second option is extremely difficult also. Lawsuits take large amounts of time and money due to the required burden of proof and the immunity clause written for police and prosecutors. Only 28% of Innocence Project exonerees have received compensation through this method and the average length of time the suit took was four years.

Unfortunately, this overall statistic is misleading. Thirteen of the 30 states with statues have requirements for the type of crime the exoneree had to have been convicted of in order to be eligible for compensation. Four states require a pardon for eligibility. Twenty statutes have at least one stated disqualification, the most common being "a situation in which the exoneree is serving a concurring sentence for a crime of which he or she is presumably guilty". Five states also disqualify exonerees from receiving compensation if they are convicted of a felony following their exoneration. An additional disqualification restricts exonerees who falsely confessed or initially pleaded guilty from receiving compensation. There are disqualifications incorporating statute of limitations, tax provisions, "upon death" provisions; the list goes on and on. These disqualifications only create additional battles for wrongfully convicted prisoners once they are released. Although having a system in place is better than none at all, the compensation system is definitely one that needs to be revamped.

Conclusion

In conclusion, there are a few consistent factors that contribute to an inmate being wrongfully convicted. This is a surprising fact when there have been many safeguards put in place to prevent this from happening. There have been 163 people who have been wrongfully convicted and in turn exonerated. In addition to this, there is no way of knowing of all the other wrongfully convicted inmates, such as Willingham and DeLuna, who may have been executed before their innocence could be proven. While 163 may seem like a small number, it becomes quite significant when the punishment is death.

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11

Methods of Execution

Emma Johnson, Elizabeth Grady, Clarke Whitehead, and Ty Tran

Introduction

As laws, and ideas of justice have evolved in our country, so too have the standards of decency and the accepted definitions of humane. Execution has been a standard in the American justice system since the colonies were founded in the 17th century and lawmakers have fought on both sides over the centuries in an effort to either protect it or abolish it. As the standards of decency have evolved in the nation, the justice system has struggled to maintain a method of execution that remains both constitutionally acceptable and protected, and efficient. The constitutional foundation in support of the death penalty has remained firm and relevant throughout the years as methods have changed and public support has wavered. The changing methods of execution have lead us to the present, in which lethal injection is the preferred medium for executioners, though it remains highly controversial and contested. In this chapter we will examine the constitutional foundations of the death penalty, the ever evolving methods of execution, how lethal injection became the primary method of execution and the various ways in which executions can be botched leading to unnecessary pain for the condemned.

Methods of Executions

America has been executing people since the early 1600's, when Captain George Kendall was hanged in the Jamestown colony in 1608, charged with being an informant for Spain.[85] Since then the United States has evolved right along with the evolving standard of decency for all people. The death penalty began on a colony by colony basis, with different laws being eligible for the death penalty in different colonies. In the New York Colony for instance, the death penalty could be enacted for "such offenses as striking one's parents or denying the 'true God.'"[86] Hanging and the firing squad were the first methods of execution used, evolving from there to electrocution, lethal gas and the current and controversial method of lethal injection.

Hanging was one of the first approved methods of execution, and was used regularly until the 1890's. Ideally, the noose tied around the inmate's neck will fracture the spinal cord and the prisoner will die instantaneously. However, the more common outcome is the prisoner's eventual asphyxiation. After the prisoner is dropped from a platform with the noose around their neck, more often than not they will asphyxiate, taking up to 45 minutes to die. There are several ways for this method of execution to go awry, including the size of the prisoner's neck muscles, their

[85] "History: Early World and American Death Penalty Laws." History: Early World and American Death Penalty Laws. Accessed October 17, 2015. http://deathpenaltycurriculum.org/node/23.

[86] "History: Early World and American Death Penalty Laws." History: Early World and American Death Penalty Laws. Accessed October 17, 2015. http://deathpenaltycurriculum.org/node/23.

weight and the position of the noose. Hanging is still legal in Delaware and Washington, though lethal injection remains as an alternate method.[87]

Firing squads were also used in the 17th century, and have recently been re-legalized in Utah by Governor Gary Herbert. Governor Herbert approved firing squads as the alternative method of execution if the drugs for a lethal injection cannot be obtained. For this method, an inmate is tied to a chair and their head is covered by a black hood. Sand bags surround the chair to absorb the any blood. A doctor will use a stethoscope to locate the heart and pin a white circular target over it. Five gunmen are given .30 caliber rifles and supplied with single round ammo. One of the gunmen is given blanks, and all shooters fire from behind a cloth screen between them and the inmate.[88] The inmate will die of blood loss if they do not sustain a direct hit to the heart or lungs. The most recent firing squad execution was used in Utah in 2010, by the request of inmate Ronnie Gardner.[89] "There are plenty of people employed by the state who can pull the trigger and have the training to aim true. The weapons and ammunition are bought by the state in massive quantities for law enforcement purposes, so it would be impossible to interdict the supply. And nobody can argue that the weapons are put to a purpose for which they were not intended: firearms have no purpose other than destroying their targets"[90]

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[87]"Descriptions of Execution Methods." Descriptions of Execution Methods. Accessed November 17, 2015. http://www.deathpenaltyinfo.org/descriptions-execution-methods?scid=8&did=479#hanging.

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[90] Wood V. Ryan. 2015.

Electrocution became the new and preferred method of execution following firing squads and public hangings. New York built its first electric chair in 1888 and electrocuted its first prisoner in 1890. The person is usually shaved and strapped to a chair with belts that cross his chest, groin, legs and arms."[91] They will then have a skull-shaped electrode strapped to their scalp. Between the electrode and the prisoners scalp sits a saline moistened sponge, essential for conducting electricity from the electrode to the prisoner. The sponge has to be wet enough that it can successfully conduct the electricity, and yet not wet enough to short circuit the electrode. Another electrode is covered with conductive jelly and attached to the prisoner's leg. The inmate will be blindfolded and once the execution team has moved to the observation room, the warden will signal the executioner, who will flip a switch. The pulling of this switch will send between 500-2,000 volts of electricity through the prisoner and this will last for up to 30 seconds. The doctors will wait until the body cools down to check the inmate for a pulse. If a pulse is found more electricity will be applied, and this cycle will continue until the inmate is dead. The prisoner may fracture their carpal bones from gripping the chair during the body spasm caused by the electricity. Body tissues will swell, the inmate will most likely defecate and their body may smoke following the execution, accompanied by a burning smell. The inmate may even catch fire. After the inmate is pronounced dead, the body is still too hot to touch so the autopsy is deferred until the internal organs cool down. As a deputy chief medical examiner once said, "The brain appears cooked in most cases." [92]

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[91] "Methods of Execution: Electrocution." Electrocution. Accessed November 19, 2015. http://deathpenaltycurriculum.org/node/36.

[92] "Methods of Execution: Electrocution." Electrocution. Accessed November 19, 2015. http://deathpenaltycurriculum.org/node/36.

In 1924 Nevada sought a more humane method of execution and decided lethal gas was the best possible method. Nevada officials first attempted to pump cyanide gas into the cell of an inmate as he was sleeping, but found this method ineffective because the gas leaked out of his cell. To remedy this, they built a gas chamber. For this method, an inmate is strapped to a chair in the aforementioned gas chamber. A pail of sulfuric acid is placed below the chair and a long stethoscope is attached to the prisoner so a doctor can pronounce death from outside the gas chamber. Once everyone is out of the airtight room, the warden signals an executioner who drops crystals of sodium cyanide in the pail of sulfuric acid. This releases hydrogen cyanide gas. The prisoner is told to breathe deeply to hasten the process, though some hold their breath or struggle against their bonds instead. According to a former California Warden, "at first there is evidence of extreme horror, pain and strangling. The eyes pop. The skin turns purple and the victim begins to drool."[93] One prisoner told reporters he would nod if he was in pain as he was executed. Witnesses reported that he nodded his head for several minutes.[94] According to a doctor from John Hopkins University School of Medicine, "the person is unquestionably experiencing pain and extreme anxiety… the sensation is similar to the pain felt by a person during a heart attack, where essentially the heart is being deprived of oxygen."[95] After the inmate's death from

[93] "Methods of Execution: Gas Chamber." Methods of Execution: Gas Chamber. Accessed November 15, 2015. http://deathpenaltycurriculum.org/student/c/about/methods/gaschamber.htm.

[94] "Methods of Execution: Gas Chamber." Methods of Execution: Gas Chamber. Accessed November 15, 2015. http://deathpenaltycurriculum.org/student/c/about/methods/gaschamber.htm.

[95] "Methods of Execution: Gas Chamber." Methods of Execution: Gas Chamber. Accessed November 15, 2015. http://deathpenaltycurriculum.org/student/c/about/methods/gaschamber.htm.

hypoxia, or oxygen loss to the brain, the gas chamber is removed of the hydrogen cyanide by an exhaust fan and the corpse is sprayed with ammonia to make it safe to handle and remove all traces of the gas. At least 30 minutes later orderlies are allowed into the room, with gas masks and rubber gloves. Their training manual says to ruffle the inmate's hair to release any possible trapped gas before removing the body.[96] In early 2015 Oklahoma Governor Mary Fallin signed legislation allowing the use of the gas chamber in the case that the drugs for lethal injections are unavailable. This legalization calls for nitrogen gas instead of hydrogen cyanide.

This brings us to lethal injection. While clearly preferable to the obscene sights and repercussions of the gas chambers and electrocution, lethal injection is still a questionable method of execution at best. Why then, have American lawmakers decided that this method is preferable to others? Most likely, this can be attributed to the fact that lethal injection simulates a medical procedure, making it appear more humane. The inmate will be tied to a gurney and connected to two heart monitors. Two needles, including a backup, are inserted into viable veins, usually in the arm. The first intravenous drip to enter the prisoners blood stream is a saline solution. Once the needles are in and the saline solution has begun, the warden will give a signal shifting the curtain around the execution chamber to allow those in attendance in the audience chamber to witness the execution. The next drug will then be administered to the inmate – sodium thiopental. Sodium thiopental is an anesthetic that will put the inmate to sleep. Next follows pancuronium bromide, a paralytic that also stops the inmate's respiration. Finally, potassium chloride will be administered to stop the inmate's heart. Death will be the result of

[96] "Methods of Execution: Gas Chamber." Methods of Execution: Gas Chamber. Accessed November 15, 2015. http://deathpenaltycurriculum.org/student/c/about/methods/gaschamber.htm.

anesthetic overdose and cardiac and respiratory arrest while the inmate is unconscious.[97] Current medical ethics do not allow doctors to participate in executions, though they can pronounce death, and this ruling often leads to inexperienced executioners. The execution team member may inject the drugs into a muscle instead of the arm or the needle can become clogged, all slowing the process and causing pain to the inmate. Since 1980, more than 7 percent of lethal injection executions have been botched.[98] "The rate of botched executions where lethal injection is the method used is considerably *higher* than it has been when other, supposedly less humane, methods have been employed."[99]

[97] "Descriptions of Execution Methods." Descriptions of Execution Methods. Accessed November 17, 2015. http://www.deathpenaltyinfo.org/descriptions-execution-methods?scid=8&did=479.

[98] Sarat, Austin. ""How Enviable a Quiet Death" Lethal Injection." In *Gruesome Spectacles: Botched Executions and America's Death Penalty*, 120. Stanford, California: Stanford University Press, 2014.

[99] Sarat, Austin. ""How Enviable a Quiet Death" Lethal Injection." In *Gruesome Spectacles: Botched Executions and America's Death Penalty*, 123. Stanford, California: Stanford University Press, 2014.

12

Lethal Injection and Its Complications

Emma Johnson, Elizabeth Grady, Clarke Whitehead, and Ty Tran

Why has lethal injection become the preferred method of execution?

Why has lethal injection become the preferred method when it is surrounded by potential pitfalls and botched executions? Generally this can be attributed its similarity to a medical procedure and the belief that it is more humane than other methods. The United States often functions on an evolving standard of decency as demonstrated in its laws and changing execution methods. Each type of execution can be seen as an evolution from the previous type, an attempt to decrease the pain involved with execution.

As a medical examiner, Jay Chapman witnessed the aftermath of electrocutions and decided there had to be a more painless way to execute death row inmates. His thoughts on executions were "we put animals to death more humanely that we do people."[100] Using his own medical knowledge and working with an anesthesiologist and toxicologist, Chapman and his colleagues took the protocol for anesthesia and "just carr[ied] it to extremes" [101] in order to create a more humane execution. Chapman claims, "If the drugs were administered appropriately, there was not a single chance that any of these inmates could be aware of what was happening" [102]

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[100] Sanburn, Josh. "Creator of Lethal Injection Method: 'I Don't See Anything That is more Humane'." Time. May 15, 2014. Accessed December 3, 2015. http://time.com/101143/lethal-injection-creator-jay-chapman-botched-executions/

[101] Sanburn, Josh. "Creator of Lethal Injection Method: 'I Don't See Anything That is more Humane'." Time. May 15, 2014. Accessed December 3, 2015. http://time.com/101143/lethal-injection-creator-jay-chapman-botched-executions/

[102] Sanburn, Josh. "Creator of Lethal Injection Method: 'I Don't See Anything That is more Humane'." Time. May 15, 2014. Accessed December 3, 2015. http://time.com/101143/lethal-injection-creator-jay-chapman-botched-executions/

making his intentions for a painless execution clear. However, the three drug cocktail was never tested before it was released for usage and written into laws and execution protocols.

Despite best intentions, Chapman's method does not work flawlessly. The errors in the process can be attributed to multiple aspects, including mismanagement of completion, and lack of available drugs. Chapman himself believes the problem with lethal injection is insufficient and/or improper training of those who administer it. [103] Regardless of intention and results, lethal injection has created a legacy of medicalization of the death penalty.

Of all the previous execution methods, lethal injection had the potential to appear the cleanest. There is no excessive blood like firing squads, no burning flesh like electrocutions, and no stigma carried with it like gas chambers. When lethal injections are performed in front of the public, inmate are strapped to a gurney and then a needle is inserted into the inmate's arm and bandaged down. The entire procedure appears medical and professional. The drugs and their effects also add to the medicalized atmosphere. The use of IVs and drugs themselves are directly associated with doctors and safe medical practices. Specific drugs themselves also add to the cosmetic appeal of lethal injection. Pancurium, a drug used in several lethal injection cocktails, "decrease[s]… involuntary movements as consistent with suffering on the part of the witnesses" (Test. Mark Dershwitz, Jackson v. Danberg, 06-cv-300 (D. Del) (9/10/07) making the execution appear less painful. However, despite the inmate's inability to move, the amount of pain felt is unclear. Lethal injection's professional appearance creates a cosmetic veneer over the process, making it more appealing because the level of pain felt by inmates is unclear. However, in many cases, finding a vein for injection takes over 20 minutes, and the death itself is not peaceful, with

[103] Sanburn, Josh. "Creator of Lethal Injection Method: 'I Don't See Anything That is more Humane'." Time. May 15, 2014. Accessed December 3, 2015. http://time.com/101143/lethal-injection-creator-jay-chapman-botched-executions/

inmates struggling and crying out.[104] Despite this, lethal injection still maintains a medicalized environment.

The use of drugs in lethal injection is not the only factor the attributes to the medical atmosphere. In order to administer the drugs, medical techniques are used, such as IVs, consciousness monitoring, and medicinal knowledge is required to accomplish these tasks. [105] The equipment provided and utilized requires basic medical training, and creates the perception that those involved with executions are medical professionals, regardless of their training level. As a result, the idea that lethal injection is a medical process is perpetuated with every execution.

Lethal injection was created with good intentions – decreasing the pain of execution in order to keep up with evolving standards of decency. But the ramifications are greater than could have been imagined. Lethal injection is now seen as inherently medical, creating a paradox between processes that are meant to heal and a punishment intended to kill.

What are the Problems Associated with Specific Execution Methods?

Botched Executions

The risk of botching an execution is one of the strongest arguments against the death penalty. While botched executions can take on many forms, some of the most common have occurred with electric chairs and lethal injections. When using the electric chair, it is essential that a wet sponge is properly placed on the convict's head. Because water conducts electricity

[104] Radelet, Michael. "Some Examples of Post-Furman Botched Executions." Some Examples of Post-Furman Botched Executions. July 14, 2014. Accessed December 4, 2015. http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions

[105] "So Long as They Die: Lethal Injections in the United States." So Long as They Die. April 1, 2006. Accessed November 3, 2015. https://www.hrw.org/reports/2006/us0406/index.htm.

well, the electrical current will make the electrical current move more efficiently, killing the prisoner faster. When the sponge is misplaced or absent, the electricity will disperse across the prisoner's body, causing immense pain.[106] An example of a botched execution due to a sponge issue happened to Jesse Tafero, who was convicted of first-degree murder, robbery, and rape. Instead of using a sea sponge, a member of the execution team used a synthetic sponge. It took three shocks to execute Tafero.[107]

In response to lethal injection, there are a number of things that can go wrong. The rate at which a dose is administered, the amount administered, and whether or not administers can find a suitable vein play a large role as to whether or not an execution will be botched. Despite being known as the most humane way to be executed, lethal injections have been botched at the highest rate (7 percent) than any other method used since the late 19th century.[108]

Often times, however, botched executions are not caused by the methods of execution, but by those who administer the punishment. The claim that the lethal injection is not cruel is supported by the administering of anesthesia, which renders the inmate unconscious, therefore unable to feel pain. Unfortunately, however, officials often times do not ensure the effective administration of anesthesia. While anesthesiologists monitor patients during surgery to ensure

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[106] Radelet, Michael. "Examples of Post-Furman Botched Executions." Death Penalty Information Center. July 24, 2014. Accessed November 5, 2015. http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions.

[107] Radelet, Michael. "Examples of Post-Furman Botched Executions." Death Penalty Information Center. July 24, 2014. Accessed November 5, 2015. http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions.

[108] Sarat, Austin, Robert Henry Weaver, and Heather Richard. "Lethal Injection Leads to the Most Botched Executions." The Daily Beast. April 30, 2014. Accessed November 8, 2015. http://www.thedailybeast.com/articles/2014/04/30/lethal-injection-leads-to-the-most-botched-executions.html.

the anesthesia is being administered properly, state agencies do not have these safeguards in place. State laws do not require anesthesia professionals to monitor the use of anesthesia, nor require that they ensure the patient's condition under it before proceeding with the lethal injection.[109]

Common procedure for execution is as follows:

-The prisoner enters the execution chamber and is strapped to a gurney.

-The catheter is hooked up to an IV, where the injection is administered. (Sometimes one-way mirrors will be present. In this case, the executioners see the prisoner, but the prisoner cannot see them.)

-The Warden will let the execution team know that the time has come

-The execution team will begin injecting the syringes into the IV lines. [110]

Because of the possible problems (malfunctioning equipment, wrong dosage of drugs, etc.) associated with the administration of anesthesia, the American Society of Anesthesiologists (ASA) has serious concerns for any factors or set of practices that would affect the safety of the drug or its administration. Because of this, the ASA believes that "anesthesiologist participation in all deep sedation is the best means to achieve the safest care."[111] Directly in contrast with this statute is the execution process. According to the ASA's policy statement on physician

[109] "So Long as They Die: Lethal Injections in the United States." So Long as They Die. April 1, 2006. Accessed November 3, 2015. https://www.hrw.org/reports/2006/us0406/index.htm.

[110] "So Long as They Die: Lethal Injections in the United States." So Long as They Die. April 1, 2006. Accessed November 3, 2015. https://www.hrw.org/reports/2006/us0406/index.htm.

[111] "Standards and Guidelines." American Society of Anesthesiologists. Accessed November 12, 2015. http://www.asahq.org/quality-and-practice-management/standards-and-guidelines.

nonparticipation in legally authorized executions, the ASA "strongly discourages participation by anesthesiologists in executions." [112]

According to the ASA, "there is no circumstance when it is considered acceptable or a person to experience emotional or psychological duress or untreated pain amenable to safe intervention while under a physician's care."[113] Ironically, this is precisely what occurs when executions are botched. Though the ASA focuses on the critical need for a checklist protocol while administering anesthesia, they fail to require that a licensed anesthesiologist be on site during the execution process. With so many things that can go wrong with the administration of anesthesia, many botched executions are results of anesthesia misadministration. According to a North Carolina warden, his execution teams do have a checklist protocol, but it is "not used or practiced. I don't know the last time [it] was actually used."[114]

Aside from protocol neglect and the absence of a present anesthesiologist, the design of death chambers is poor and can lead to botched executions. Lethal injection drugs are administered a few feet away from the offender from behind a screen. With all of the extension sets required because of the distance between the offender and the machine, there is a high risk for a leaking tube.[115]

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[112] "Standards and Guidelines." American Society of Anesthesiologists. Accessed November 12, 2015. http://www.asahq.org/quality-and-practice-management/standards-and-guidelines.

[113] "Standards and Guidelines." American Society of Anesthesiologists. Accessed November 12, 2015. http://www.asahq.org/quality-and-practice-management/standards-and-guidelines.

[114] "So Long as They Die: Lethal Injections in the United States." So Long as They Die. April 1, 2006. Accessed November 3, 2015. https://www.hrw.org/reports/2006/us0406/index.htm.

[115] "So Long as They Die: Lethal Injections in the United States." So Long as They Die. April 1, 2006. Accessed November 3, 2015. https://www.hrw.org/reports/2006/us0406/index.htm.

Qualification of Execution Teams

A key reason for the number of botched executions is the qualification of execution teams. From selection, to training, and protocols, each aspect plays a crucial role in the quality of an execution team. In North Carolina, execution team members are selected by the Warden of Central Prison. According to the Execution Procedure Manual for Single Drug Protocol, "each successful candidate must be a mature, seasoned professions, possess a sound mind, and exhibit sound judgment."[116] The problem with these categories is that they are all subjective and when selection is at full discretion of the warden, anyone could be said to have these qualities. As for training, the amount of time per session, number of sessions, and material learned at all sessions is left to the discretion of the warden. There are minimal requirements including: at least one annual briefing on responsibilities, expectations, and protocols, and a minimum of one simulation every other month.[117] The issue with simulations is that each human responds differently to the lethal drugs, so no simulation will authentically represent the human experience.

Currently, no state requires an anesthesiologist to be present while anesthesia is being administered to the offender. The majority of lethal injection protocols are extremely vague about what all is required of those who will serve on the execution team.[118]

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[116] "EXECUTION PROCEDURE MANUAL FOR SINGLE DRUG PROTOCOL (PENTOBARBITAL)." Accessed November 7, 2015. https://www.ncdps.gov/div/AC/Protocol.pdf.

[117] "EXECUTION PROCEDURE MANUAL FOR SINGLE DRUG PROTOCOL (PENTOBARBITAL)." Accessed November 7, 2015. https://www.ncdps.gov/div/AC/Protocol.pdf.

[118] "So Long as They Die: Lethal Injections in the United States." So Long as They Die. April 1, 2006. Accessed November 3, 2015. https://www.hrw.org/reports/2006/us0406/index.htm.

Refusal of Participation by Medical Professionals

Though they have specifically condemned the participation of medical professionals in executions, the American Medical Association does not sanction or punish medical professionals that do participate. "A physician… should not be a participant in a legally authorized execution."[119] According to the AMA, physician participation in executions can include, though is not limited to: prescribing medication that is part of the execution procedure; monitoring vital signs either remotely or on site; attending or observing an execution in an official capacity as a physician; and giving technical advice regarding an execution. Specific to lethal injection, the following definitions for participation have been added to the AMA opinion: choosing an injection site; starting IVs; supervising, prescribing, preparing or administering the lethal drugs; inspecting or testing the devices used for lethal injection; and consulting or advising supervising execution personnel.[120] The American Society of Anesthesiologists has also published an opinion on participation in the death penalty: "execution by lethal injection has resulted in the incorrect association of capital punishment with the practice of medicine, particularly anesthesiology," and

[119] "Opinion 2.06 - Capital Punishment." Opinion 2.06 - Capital Punishment. June 1, 1994. Accessed November 29, 2015. http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page?

[120] "Opinion 2.06 - Capital Punishment." Opinion 2.06 - Capital Punishment. June 1, 1994. Accessed November 29, 2015. http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page?

"although lethal injection mimics certain technical aspects of the practice of anesthesia, capital punishment in any form is not the practice of medicine."[121]

Lethal Drugs Used

Until 2009, lethal injections used a three- drug cocktail that was developed about 40 years ago. Almost all states used the traditional cocktail at some point in time, until the past few years, when multiple lethal injection protocols evolved. The three drugs that made up most lethal injections were: sodium thiopental, pancuronium bromide and potassium chloride.[122] Sodium thiopental is a short-acting barbiturate that was used in the early phases of general anesthesia. In cases where everything functions properly, the drug causes unconsciousness within 45 seconds. Pancuronium bromide was the second part of the cocktail that relaxed the muscles, while the final drug, potassium chloride, stopped the breathing and heart.[123]

With evolving medicines and drug shortages, many states have adopted new procedures for lethal injection.

ONE DRUG: An anesthetic (with a lethal dosage) has been used by eight states (Arizona, Georgia, Idaho, Missouri, Ohio, South Dakota, Texas and Washington).[124]

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[121] "ASAHQ - Board of Directors Annual Meeting Summary." American Society of Anesthesiologists. 2006. Accessed November 29, 2015. http://www.asahq.org/resources/publications/newsletter-articles/2006/october2006/board-of-directors-annual-meeting-summary.

[122] "So Long as They Die: Lethal Injections in the United States." So Long as They Die. April 1, 2006. Accessed November 3, 2015. https://www.hrw.org/reports/2006/us0406/index.htm.

[123] "So Long as They Die: Lethal Injections in the United States." So Long as They Die. April 1, 2006. Accessed November 3, 2015. https://www.hrw.org/reports/2006/us0406/index.htm.

[124] "State by State Lethal Injection." Death Penalty Information Center. Accessed November 11, 2015. http://www.deathpenaltyinfo.org/state-lethal-injection.

PENTOBARBITAL: In 2010, sodium thiopental was replaced by pentobarbital in 14 states (Alabama, Arizona, Delaware, Florida, Georgia, Idaho, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, Texas and Virginia). [125]

MIDAZOLAM:

(as part of a three-drug injection series) Florida and Oklahoma gave offenders midazolam as the first drug in the three-drug injection series. Clayton Lockett was a recipient of midazolam in Oklahoma. His injection was botched and Lockett died after the execution team terminated the procedure.

(as part of a two-drug injection series) Ohio and Arizona opted for midazolam, but both of their injections were botched after prolonged gasping from the offenders. [126]

COMPOUNDING PHARMACIES: These pharmacies prepare personalized medications for patients. These medications mix ingredients together to form precise strengths and dosages of the prescription. The FDA approval is required for manufacturers who make drugs in mass production, but not compounding pharmacies because compounded drugs are customized for each individual recipient (the government approves compound medicines for people who have a prescription for the ingredients in the drug). Currently, 5 states have used drugs from compounding pharmacies (South Dakota, Missouri, Texas,

[125] "State by State Lethal Injection." Death Penalty Information Center. Accessed November 11, 2015. http://www.deathpenaltyinfo.org/state-lethal-injection.

[126] "State by State Lethal Injection." Death Penalty Information Center. Accessed November 11, 2015. http://www.deathpenaltyinfo.org/state-lethal-injection.

Georgia, and Virginia), while 5 states have announced plans to use compound pharmacies in the future (Ohio, Mississippi, Louisiana, Pennsylvania, Colorado and Oklahoma) [127]

Despite intentions to kill offenders quickly, often times these drugs fail. When Oklahoma's execution team replaced sodium thiopental with pentobarbital for Michael Wilson, he screamed "I can feel my whole body burning."[128] In Ohio, Dennis McGuire was injected with midazolam as part of a two drug injection series. According to Alan Johnson, AP reporter who witnessed the execution, "McGuire struggled, made guttural noises, gasped for air and choked for about 10 minutes before succumbing to a new, two-drug execution method."[129] With poorly regulated compounding pharmacies, and using drugs for the first time in executions, it is highly likely that something will go wrong.

In addition to these procedures, there are alternate methods for execution. Utah, Tennessee, and Oklahoma have all passed laws that allow alternate execution methods if the drugs used for lethal injections become unavailable. [130]

UTAH- firing squad

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[127] "State by State Lethal Injection." Death Penalty Information Center. Accessed November 11, 2015. http://www.deathpenaltyinfo.org/state-lethal-injection.

[128] Alter, Charlotte. "Oklahoma Convict Who Felt "Body Burning" Executed With Controversial Drug." Time. January 10, 2014. Accessed November 12, 2015. http://nation.time.com/2014/01/10/oklahoma-convict-who-felt-body-burning-executed-with-controversial-drug/.

[129] Johnson, Alan. "Inmate's Death Called 'horrific' under New, 2-drug Execution." The Columbus Dispatch. January 17, 2014. Accessed November 4, 2015. http://www.dispatch.com/content/stories/local/2014/01/16/mcguire-execution.html.

[130] "State by State Lethal Injection." Death Penalty Information Center. Accessed November 11, 2015. http://www.deathpenaltyinfo.org/state-lethal-injection.

TENNESSEE- electric chair

OKLAHOMA- nitrogen gas asphyxiation

Since the introduction of lethal injection, states have altered minor aspects of their protocols for the death penalty including: the room setup, how offenders can respond to the media, visitation requirements, and the time of the execution. These factors are minor and extremely insignificant in ensuring a safe execution, but have been altered and manipulated, perhaps as to cover up the fact that the drugs aren't changing at the rate they should.[131]

Section 3: The Judicial Issues

Constitutional Foundation and Requisites for Challenges

The issues we have identified with lethal injection bring us to a constitutional discussion. Can it be argued that lethal injection is violative of the 8th Amendment? Given the judicial background, this task is difficult: The Supreme Court has almost consistently operated under the assumption that the death penalty is constitutional (see Ch. 1 of this book; Furman v. Georgia 1972). "From that assumption, it follows that there must be a constitutional means of carrying out a death sentence"[132]. The responsibilities of implementing these means, as well as the task of refining them to be more scientifically-grounded and humane, fall to legislatures. The role of the Court in this process is simply to assess their constitutionality. To this end, it is consistent with their disposition towards capital punishment that the Supreme Court "has never invalidated a

[131] "So Long as They Die: Lethal Injections in the United States." So Long as They Die. April 1, 2006. Accessed November 3, 2015. https://www.hrw.org/reports/2006/us0406/index.htm.

[132] Baze v. Rees, 553 U. S. 35 (2008)

State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment"[133].

A cruel method of punishment, to the Court, involves torturous or lingering deaths, the deliberate infliction of pain, something "more than the mere extinguishment of life."[134] And yet, because some pain is intrinsic to any execution method, even if only from the prospect of human error in carrying out the procedure, the Court asserts that the Constitution "does not demand the avoidance of all risk of pain."[135] Consequently: "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual."[136] To constitute cruel and unusual, then, an execution method must create a "substantial" or "objectively intolerable" risk of serious harm.[137]

These conditions create a high bar for 8th Amendment challenges against a particular execution method. The Court demands concrete evidence and studies to prove a method carries substantial risks. It also expects petitioners to proffer viable and immediately implementable alternative methods. In consideration of botched executions, then, these conditions can help explain why challenges indicting their risks have been unsuccessful: The nature of botches as a result of human or equipment error precludes arguments of deliberate infliction of pain. They are

[133] Baze v. Rees, 553 U. S. 35 (2008)

[134] In re Kemmler, 136 U. S. 436 (1890)

[135] Baze v. Rees, 553 U. S. 35 (2008)

[136] Baze v. Rees, 553 U. S. 35 (2008)

[137] Baze v. Rees, 553 U. S. 35 (2008)

infrequent, "isolated mishaps" in the Court's eyes that cannot prove the method systemically gives rise to substantial risks.[138] Pain that may arise as a consequence of botching does not invalidate a method because, while the Court concedes that accidents do occur, they assert that the avoidance of all risk of pain is unnecessary and that safeguards can be implemented to obviate risks. Consequently, the Court does not consider the risk of botching sufficient to invoke 8th Amendment challenges.

Given the realities of lethal injection's problems and the lofty requisites for 8th Amendment challenges, what arguments have been pursued by death row inmates and defense attorneys? How has the Supreme Court responded to these challenges?

Risk of Pain: Pancuronium Bromide and Potassium Chloride

The combination of pancuronium bromide and potassium chloride has been asserted, in no uncertain terms, to be capable of causing torturous deaths (Heath 2007). Because it is an integral part of the three-drug protocol adopted by most states, it can be argued that there is an intrinsic risk of pain inscribed within the methodology. Suppression of this risk is contingent on the successful delivery of the anesthetic, which may have issues associated with it as well. Additionally, petitioners challenging the use of pancuronium and KCl have suggested, as an alternative, the use of a one-drug protocol common in veterinarian practice.[139] This method uses a large dose of sedative to induce, in order, unconsciousness, coma, respiratory and cardiac depression, and eventually death. They argue that the exclusion of pancuronium and KCl

[138] Baze v. Rees, 553 U. S. 35 (2008)

[139] "Irreversible Error: Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment." *The Constitution Project*. (2014): 137-145. Retrieved from http://www.constitutionproject.org/wp-content/uploads/2014/06/Irreversible-Error_FINAL.pdf

significantly lowers the risk of pain and suffering. They also argue that this alternative is viable and readily implementable as veterinarians have long used the procedure to put down animals. Lethal injection, petitioners claim, is unconstitutional when it methodically incorporates drugs that are capable of causing excruciating suffering when demonstrably safer alternatives exist.

In response to intense exhortations against pancuronium and KCl, however, as of *Baze v. Rees*, the Supreme Court asserts it is satisfied with the safeguards implemented to prevent inmates from being conscious at the time these drugs are injected. To the Court, as long as anesthetic is administered prior to the injection of the latter drugs, it can obviate the risk of pain. Any risk informing the basis of the challenge, then, is contingent on the efficacy of the anesthetic, which to the Court is not up to debate, as discussed in the next section. The Court is also satisfied, as of *Glossip*, with the safeguards instituted by Oklahoma designed to prevent maladministration of the anesthetic: consciousness-monitoring equipment and warden presence, using two IV lines, and requiring EMTs and CMAs to possess one-year of experience are acceptable procedural precautions to ensure the inmate is unconscious at the time pancuronium and KCl is administered.

Approving the use of pancuronium and KCl, the Supreme Court is not concerned that some states have chosen to use the three-drug protocol over the one-drug method. To the Court, petitioners against the three-drug protocol have not sufficiently proven it capable of "substantial risks" to the extent that the one-drug method can be proven to be significantly safer. Without explicit, substantial differences, the Court is not interested in challenges that proffer "slightly or marginally safer alternatives."[140] Nitpicking over drugs in execution methods would, in the view

[140] Baze v. Rees, 553 U. S. 35 (2008)

of the Court, embroil them in scientific debates beyond their expertise and intrude in the role of legislature in implementing these procedures. Exercising their judicial restraint, the Court affirms the right of states to use procedures of their choosing. Consequently, the Court upholds the constitutionality of the three-drug protocol and rejects 8th Amendment challenges against the use of pancuronium and KCl.

Efficacy of Anesthesia

The Supreme Court has approved the use of pancuronium and KCl on the basis that the anesthetic should obviate risks of pain, but what issues have challenges raised about the anesthetic itself? In *Glossip*, concerning Oklahoma's use of midazolam, petitioners have argued that no studies have been conducted on the efficacy of the drug at the high dosage called for in executions. Support for the dosage, petitioners criticize, comes from experts who have extrapolated the effects from usage at lower, therapeutic levels. Consequently, petitioners argued that there is no scientific evidence that the dosage used in lethal injection conditions will be effective. Additionally, petitioners claimed that anesthetics can possess a "ceiling effect" at which higher doses do not increase anesthetic effectiveness. If this ceiling occurs before complete anesthesia can be achieved, the anesthetic may still expose an inmate to pain. Petitioners claim these issues concerning the anesthesia compromise a method's ability to provide protection from suffering. Consequently, they argued the execution method possesses a substantial risk of harm despite the anesthetic, supporting an 8th Amendment challenge.

The Supreme Court's latest affirmations of lethal injection in *Glossip* dismiss these concerns about the anesthesia, so what informs the Court's confidence in the efficacy of the anesthetic? The drugs used in executions, according to expert testimony, have been recognized by the medical community as capable of rendering patients unconscious and insensate to pain.

Lower doses of the drugs are used therapeutically, and the dosage used in executions may exceed these many times as to be able to induce coma or death. Endorsed by scientific evidence and medical experience, the drugs have been approved by democratically-elected legislatures and written into protocol. Given these qualifications, the Court asserts that petitioners are not able to cast doubt on the efficacy of the anesthetics utilized in execution methods.

Against this standard, petitioners bear the burden of proving the anesthetic called for is unsafe, not capable of delivering anesthesia with the dosage used or method applied, or in some manner creates an unacceptable risk of pain. In *Glossip*, the Court expected petitioners to cite studies proving midazolam was ineffective, or had a ceiling effect that rendered it such, when used in conditions comparable to those in executions. Of course, modern studies that emulate executions on human subjects would be difficult to procure for citation. The petitioner is consequently trapped in a catch-22, asked to find evidence that does not and cannot exist. On the other hand, when an expert employed by the state is defending a protocol's anesthetic dosing, the Court finds it "reasonable" that the expert extrapolates its effects because of course such high dosage has never been administered therapeutically and studied.[141] From these examples, the bar for challenges does appear disparately higher compared to the leeway afforded to the defense. However, the Court justifies this based on their conviction that the anesthetic has already surpassed strict scrutiny in order to be able to be written into state protocol. In challenges, then, the petitioner is expected to undermine the state's finding, provide scientific counter-evidence, and/or prove in some way the anesthetic creates substantial risks. The bar set by the Court has

[141] Glossip v. Gross 576 U.S. ___ (2015)

not been surmounted, and the Court affirms the efficacy of anesthetics adopted by states, and in extension, the constitutionality of the three-drug protocol.

The Judicial Paradox

The Supreme Court's rulings against constitutional challenges appear comprehensive. *Baze*'s substantial risks standard created significant hurdles for challenges that sought to establish 8th Amendment violations: interpretation of "substantial risks" fell to courts, which paid great deference to protocols instituted by states.[142] Additionally, as a result of *Baze*, Kentucky's debated protocols and safeguards were perceived to have been validated. States could therefore affirm their protocols were constitutional on basis of similarities to Kentucky's. Resultantly, *Baze* became a "safe harbor" for lethal injection defenses.[143]

Yet it is important to note that, down the line, the decision in *Glossip v. Gross* only narrowly passed 5 to 4. The current Court appears divided on the issue of lethal injection, and *Glossip*'s dissents reveal ambivalence about America's modern capital punishment system. Justice Breyer's opinion encourages a reevaluation of the constitutionality of the death penalty as a whole,[144] while Justice Sotomayor questions whether lethal injection, in its current state, can be applied without risks that render it comparable to burning at the stake.[145] Thus, it appears that the

[142] Gee, Harvey. "Eighth Amendment Challenges after Baze v Rees: Lethal Injection, Civil Rights Lawsuits, and the Death Penalty." *BC Third World LJ* 31 (2011): 217.

[143] Gee, Harvey. "Eighth Amendment Challenges after Baze v Rees: Lethal Injection, Civil Rights Lawsuits, and the Death Penalty." *BC Third World LJ* 31 (2011): 217.

[144] Glossip v. Gross 576 U.S. ___ (2015)

[145] Glossip v. Gross 576 U.S. ___ (2015

precariousness of lethal injection's application has not been alleviated despite *Glossip*'s determination.

If *Glossip* and *Baze* have achieved little in the way of reinforcing the acceptability of lethal injection, what has been their impact on the ongoing debate? For *Glossip*, its recency provides little grounds for conjecture. But Justice Scalia, a stout upholder of capital punishment's constitutionality, has remarked that it would not surprise him if the death penalty were to be ruled unconstitutional by the Court in the near future.[146] This comment may imply that *Glossip* has failed to inspire even Scalia about its ability to bulwark lethal injection against future constitutional challenges. For *Baze*, years of invocation and discussion in courts and academia have made it easier for scholars to analyze. Given that challenges against lethal injection are raging harder than ever, it appears that the effect *Baze* has had on assuaging lethal injection's procedural concerns have been minimal. True to Justice Steven's prophetic concurrence for *Baze*, the case has motivated debates rather than settled them.

The years between *Baze* and *Glossip* have seen waves of litigations against lethal injection. Between April 2008 and May 2013, approximately 333 cases cited *Baze* in their decisions.[147] These citations are applied to a variety of challenge angles such as protocol concerns, executioner qualifications, drug procurement, and drug choices.[148] Furthermore, they

[146] Bakst, Brian. "Scalia: 'Wouldn't Surprise Me' if Death Penalty Struck Down." *Associated Press*, Oct. 20, 2015. Retrieved from http://bigstory.ap.org/article/1466089081e34d4d849b11f8f831a756/scalia-wouldnt-surprise-me-if-death-penalty-struck-down.

[147] Denno, Deborah W. "Lethal injection chaos post-Baze." *Geo. LJ* 102 (2013): 1331.

[148] Denno, Deborah W. "Lethal injection chaos post-Baze." *Geo. LJ* 102 (2013): 1331.

regularly fall back on the assertion that the challengers failed to prove substantial risks or failed to provide tenable alternatives.[149]

From this pattern, it appears that rather than creating a lasting guidance for the implementation of lethal injection, *Baze* has instituted an ambiguous standard that invites attack on minute procedural details. That is, while its ambiguity makes it difficult for challenges to prevail, *Baze* does not, by means of failing to define a guideline, limit or disqualify arguments that can be brought against lethal injection. The consequence, as mentioned, is the large number litigations with arguments indicting diverse procedural aspects. As a result, capital punishment requires constant reassurances by the courts that a state's continuously altering lethal injection protocols are constitutionally acceptable. *Glossip* then appears to be the latest, high-profile, Supreme Court-level example of this pattern: an attack by death penalty opponents taking advantage of states' difficulties in procuring drugs by challenging a state's adoption of a new anesthetic. The Supreme Court's response also fits into this pattern, falling back on the recourse of asserting the challenge does not meet "substantial risks" standards. Thus, the result of *Baze* appears to be the endless embroilment of courts in lethal injection debates.

This outcome has created a judicial restraint paradox. The Supreme Court has declared that it does not want to be involved in implementing execution methods, in legislative and scientific debates. Yet as a result of *Baze*, persistent appeals, challenges, and litigations have deluged the judicial system. Some may have even float up to the Supreme Court, most to be denied consideration, of course. These appeals may have entailed petitions for courts to render

[149] Denno, Deborah W. "Lethal injection chaos post-Baze." *Geo. LJ* 102 (2013): 1331.

judgment on minute procedural details. The judicial system is effectively being requested to micromanage lethal injection.

Not only has the floodgates to litigations opened, the media has over time increasingly paid attention to lethal injection's troubles with the legal system. News stories will mention that an inmate is pursuing appeals, and may even specify what procedural aspect of lethal injection is being indicted. For example, 25 out of 50 execution cases from January 2014 to June 2015 had news coverage mentioning lethal injection challenges. These stories cited arguments such as pentobarbital use, midazolam use, secrecy of the protocols or drug procurement, and qualifications of the executioners. In comparison, one case out of 50 from January to June 2000 had news coverage with any mention of lethal injection appeal. The media is increasingly exposing how procedural details may cause problems for the implementation of lethal injection. It is popularly becoming understood that the capital punishment has become problematically complex.

The Medicalization Paradox

Why is lethal injection so complicated? As mentioned in the previous section, the deluge of litigations have largely focused on procedural concerns and difficulties in implementation. Consequently, states have been repeatedly forced to alter their protocols, which has led back to more litigations. But the constant patches states have adopted to sustain lethal injection have failed to remedy the chronic paradox of a *medicalized execution method*.

Lethal injection is medically involved. The drugs required are the same as those used for therapeutic purposes. This dependency creates an association between capital punishment and healthcare that pharmaceutical companies repudiate. The administration of those drugs require specialized skills such as IV access and consciousness monitoring. Yet medical associations

decry involvement of professionals such as physicians, nurses, and anesthesiologists, the people with the most relevant qualifications to oversee and conduct lethal injections. More generally, the creation and implementation of lethal injection may have benefited from the expertise of professionals and associations, beside the singular contribution of Jay Chapman. But the medical field has declined or abjured involvement, and the 3-drug protocol, now beset with complications and controversies, persists. Lethal injection has emulated a profession that rejects it.

The issues that arise out of capital punishment's medicalization and medical repudiation are myriad. Limited participation by medical professionals, whether because of individual moral inclination or organizational dissuasion, has compelled states to find workarounds that may fail to meet medical rigor. IV access and drug delivery are done by EMTs and paramedics rather than physicians or nurses who may be better qualified. Monitoring of consciousness is done by EKGs and the prison warden instead of anesthesiologists. Lethal drugs are obtained from compounding pharmacies under-regulated by the FDA. Borne out of these issues are medicalized procedural concerns such as improper IV access, maladministration of the anesthetic, uncertainty in the anesthesia, and improper monitoring of consciousness. These uniquely medical issues have contributed to the deluge of litigations discussed in the previous sections. Appeals and challenges single out procedural concerns such as drug choice, procurement, and executioner qualifications. *Baze* and *Glossip*, which together have addressed all of these issues (and failed to satisfactorily settle them), are the paradigmatic examples. States have responded by repeatedly revising and obscuring protocols. These constant procedural changes, the switch from drugs to untested drugs, from source to dubious source, have resulted in a capital punishment system that is controversial, amorphous, and highly opaque.

This is the current state of lethal injection. By any other name, the systematic application of untested, intentionally obscured procedures on inmates might evoke the description of human experimentation. This label was implied in *In re Ohio Execution Protocol Litigation*:[150]

> There is absolutely no question that Ohio's current [lethal injection] protocol presents an experiment in lethal injection processes. The science involved, the new mix of drugs employed at doses based on theory but understandably lacking actual application in studies, and the unpredictable nature of human response make today's inquiry at best a contest of probabilities. (p. 913)

The ultimate consequence of these aforementioned issues, debated by a deluge of litigation, made possible by lethal injection's uniquely medicalized aspects, is the possibility of an "excruciatingly painful death hidden behind a veneer of medication."[151]

[150] In re Ohio Execution Protocol Litig., 994 F.Supp.2d 913 (S.D. Ohio 2014).

[151] Glossip v. Gross 576 U.S. ___ (2015).

13

Stays of Execution

Danielle Buso, Chandler Mason, Emily Vaughn, Colin Wilson

It is not uncommon for a death row inmate to receive more than one execution date. These delays of execution, known as stays of execution are the result of a variety of reasons. This chapter serves to examine the general process in how an inmate receives an execution date as well as the instances in which inmates can be granted a stay. Moreover, vignettes on various inmates' cases and an extensive case study on stays of execution in Pennsylvania provide insight into the broader question of the potentially torturous experience of receiving multiple stays and execution dates.

Death Warrants

For a capital defendant, the execution process begins with the issuance of a death warrant by a designated judicial or executive official, determined by state protocols as shown in Table 13.1, with Trial Court Judges and State Supreme Courts being the most common. Though the timeline varies by state protocol, typically, once a death warrant has been issued, the Department of Corrections or the otherwise responsible office must set an execution date no less than 30 days but no more than 90 days after notification. For example, in the state Arizona the warrant requires an execution date to be set between "thirty-five and sixty days following the issuance of a warrant" (A.R.S. §7.1-13-759), while protocol in Oklahoma requires a minimum of sixty and maximum of ninety days between issuance of the warrant and the potential execution date (22 O.S. §22-1001).

Table 13.1 Power to Issue Death Warrant by Actor

Actor	States
Governor	Arkansas, Florida, Kentucky, New Hampshire, Pennsylvania
State Supreme Court	Alabama, Arizona, Indiana, Mississippi, Missouri, Ohio, South Carolina, Tennessee
Trial Court Judge	California, Colorado, Delaware, Georgia, Idaho, Kansas, Louisiana, Montana, Nevada, Oregon, South Dakota, Texas, Utah, Virginia, Washington, Wyoming
State Attorney General	North Carolina
State Court of Criminal Appeals	Oklahoma

Note: Death warrants in Federal capital cases are issues by trial court judges; the Secretary of the Army, following affirmation of the sentence by the President, issues death warrants in capital Military cases.

The issuance of a death warrant is determined by individual state protocols, but is generally signed following the conclusion of a defendants initial post conviction review proceedings or at the end of the time period in which the opportunity to file such a petition has expired. For example, in the state of Florida, the Governor can issue a death warrant once the state supreme court certifies that the defendant has completed their initial state appellate and federal habeas corpus proceedings or has "allowed the time permitted for filing habeas corpus petition in federal court to expire" (Fla. Stat. §922.052-2a). In many states, the issuance of a death warrant is largely determined by the appellate actions taken by the defendant within the time frame for collateral review set forth by the state; should the defendant not meet the deadlines to pursue continued post conviction relief, a warrant and subsequent execution date are likely to be issued. In the state of Oklahoma, a death warrant is to be issued within thirty days of six different instances in which a defendant fails to file necessary appeals in a timely fashion, including failing to file a writ of certiorari to the U.S. Supreme Court within ninety days of denial of state post conviction relief and failing to file an appeal to the U.S. 10th Circuit Court of Appeals within seventy days of denial of federal writ of habeas corpus (22 O.S. §22-1001.1). The Oklahoma statues effectively show that the issuance of a warrant and setting of an execution

date are not determined by factors such as heinousness of crime or length of time on death row, but instead the ability of a defendant to meet appeals deadlines. This ability is often beyond the defendants control and reliant upon factors such as quality of counsel and efficacy of the courts.

Despite setting an execution date and marking the completion of the appeals process, at least in some stage, death warrants are not always final and often prompt a new wave of emergency appeals and requests for executive clemency on behalf of the defendant. Should those appeals be successful, a defendant can be granted a stay of execution, a court order that temporarily halts execution proceedings. Stays of execution can be granted at both the state and federal levels and at any stage in the post conviction process, in some cases before a death warrant has even been issued and in others mere hours before an inmate is scheduled to die. While some stays are indefinite, others may expire within a few hours or days, at which point it is the responsibility of the state to issue another death warrant and execution date. However, should the stay dissolve before the expiration of the original warrant and execution date, the scheduled execution "shall be carried out as ordered prior to the issuance of such vacated stay of execution" (22 O.S. §22-1001.1-E).

Reasons for Stays

Stays of execution can be granted at both the state and federal level for a number of different reasons. Stays of execution often times result from the lengthy appeals process that is guaranteed to all death row inmates so long as they themselves do not choose to forgo their own appeals. Because appellate litigation is often conducted in dire circumstances, the adoption of a particular case regarding an inmate's appeal is often, though not always, accompanied by a stay of execution so as to allow ample time for the claim to be explored without regards to an impending execution date (Swallows, 1993). While stays of execution are far from uncommon, the process of attaining one is by no means simple. The claims of the appellant must meet a set of criteria if

they are to be considered for a stay. These criterion include, whether it is likely that the inmate will prevail in his or her petition, whether the prisoner will sustain some kind of irremediable harm if stay is denied, what the potential harm the stay could cause to third parties (i.e. the families of the victims, etc.), and whether or not granting the stay would offer a benefit to the public interest (Swallows, 1993). It is often the case that petitioners will receive multiple stays of execution during their time spent on death row. In the event that an inmate is petitioning for additional stays, there are additional burdens that he or she must meet before being granted a second or third delay including the presentation of new grounds for relief (Swallows, 1993).

While there are a number of potential claims that an inmate can make in regards to petitioning for a stay of execution, a limited set of specific reasons for stay have been identified for the purposes of this chapter based on the commonality of each main reason. The list of common reasons, found in table 13.1 include commutation of an inmate's sentence, review of new evidence, claims surrounding the Lethal injection protocol of a particular state, evaluations of the mental capacity of an inmate, and evaluation of claims regarding a flawed trial (i.e. evidence that there was jury bias, etc.). Other appellate-based claims are placed under the classification "other". This category can include rare issues of stay for case specific reasons as well as those stays granted for reasons unspecified.

Also included, as a broad category is that of State Moratorium. This category included those stays that are issued not as a result of the broader appeal process, but rather are granted in a blanket fashion when the governor of a state decides for one reason or another to halt all executions in the state for a given period of time. A number of states have recently instituted these moratoriums generally citing broad reviews of their capital punishment protocol. Other states have halted executions based on the greater moral scruples of state leadership regarding

the entire death penalty itself. In 2013, Governor John Hickenlooper of Colorado issued a stay for an inmate named Nathan Dunlap citing what he saw as a need for reconsideration of the death penalty entirely (DPIC). Because this indefinite stay was not made on the basis facts relating to Dunlap's case, it is likely that this moratorium will remain in place for all scheduled death row inmates while Hickenlooper remains in office (DPIC). Similarly, Governor Tom Wolf of Pennsylvania issued a reprieve for all inmates on death row in February of 2015 citing a need for a broad evaluation of the state's capital punishment system (DPIC). A Legislatively mandated study is currently being conducted, and the stays remain in place, however the Pennsylvania State Supreme Court is currently reviewing the power of the governor to issue indefinite stays for all death row inmates (DPIC).

The list of broad categories also includes those stays that are issued by the Supreme Court. While this is not a specific reason for a stay to be granted, it is important to identify these stays given that they often tend to be issued at the 11th hour before the scheduled execution and are generally more difficult to attain. In order to attain a writ of certiorari form the Supreme Court, a petitioner must show that there is a reasonable chance that at least four justices on the court would regard the underlying issues in question to be legitimate, that a legitimate probability of reversal of the lower court's decision is present, and again that there is a risk of irreparable harm if the case is not granted cert (Swallows,1993). The manner in which the Supreme Court decides cases contributes to how frequently they stays they issue are granted so soon before the scheduled execution of the inmate. While it only takes the vote of four justices to grant a writ of certiorari, it takes the votes of five justices to grant a stay (Swallows, 1993). It is not uncommon for a fifth justice to vote for a stay simply to allow more time for consideration of

the plaintiff's claim before their decision is rendered moot by the inmates execution (Swallows 1993).

Table 13.1 provides the frequency that each of these determined reasons have lead to successful attainment of stays between the years of 2010 and 2015. The goal of this table is to show the trends of execution stays in regards to the issues that frequently lead to execution delays. As the table shows, there are two substantial factors that lead to stays of execution more frequently than others. These include "Lethal Injection Protocol" and the category labeled as "Other". The reason behind the high number of cases classified as "other" is due largely to the broad scope this this particular category covers. When cases identified simply state "time for appeals" as the reason for stay, we include that case as "other". This is done in order to simplify the classification process given that most of the categories listed are granted in order to allow time for appeals, but in these cases we are provided with more information regarding the nature of the particular appeal. In the case of leathal injection protocol, however, we see evidence of a growing trend in stays that are granted. Particularly in recent years, stays granted to death row inmates have come about as a result of questions regarding the process of lethal injection.

Table 13.2- Reasons for Stays Granted From 2010-2015

Year	Supreme Court	Commutation	Evidence Review	Lethal Injection Protocol	Mental Capacity	Flawed Trial	State Moratorium	Other
2010	2	6	1	12	4	1	0	17
2011	6	3	4	14	1	0	1	14
2012	2	2	4	6	9	4	0	27
2013	0	1	4	5	4	1	0	18

2014	3	1	0	17	3	0	5	29
2015	2	0	4	11	2	2	7	26

*Note: The information in this table was generated and consolidated based on the list of stays granted between 2010 and 2015 as provided by the Death Penalty Information Center. The column for "Other" included those stays with a listed reason of "allowing time for appeals" as well as those reasons that do not fit into the chosen categories for the purposes of this chapter

Lethal Injection Protocol

As we can see in table 13.1 stays are often granted as a result of issues surrounding the execution method of lethal injection. There are a number of circumstances in which an inmate can have his or her execution stayed given misgivings surrounding the lethal injection process. Often times controversy surrounding lethal injection is based on claims regarding the specific drugs that are used in the process. A number of high profile cases have argued that a state's usage of particular drugs constitute cruel and unusual punishment given that they do not protect an inmate form the wanton infliction of pain. These cases are often brought to court following high profile instances of botched lethal injection procedures during executions, as are discussed elsewhere in the text, and later in the chapter in the case of Richard Glossip.

The 2008 United States Supreme Court case of *Baze v. Rees* (553 U.S 35) called into question the constitutionality of a four-drug lethal injection procedure under the Eighth Amendment ban on cruel and unusual punishment. Appealed from the Supreme Court of Kentucky, two inmates Ralph Baze and Thomas K. Bowling argued that the lethal injection procedure of Kentucky created an unnecessary risk of pain and suffering, thereby in violation of the Eighth Amendment. In agreeing to hear this case, the U.S. Supreme Court effectively created a de facto moratorium on executions across the United States. That is, no executions were to be carried out by any state pending the decision of *Baze v. Rees*. More specifically, the case

questioned if the Eighth Amendment prohibits carrying out a method of execution that creates an unnecessary risk of pain and suffering as opposed to the substantial risk of the wanton infliction of pain. Kentucky's four-drug cocktail at the time consisted of sodium thiopental, pancuronium, bromide, and potassium chloride. Therefore, the case also required a decision on if the use of these drugs, individually or together, violates the Eighth Amendment because lethal injections could be carried out using other chemicals associated with less risk of pain and suffering (Cornell University Law School). In a 7-2 decision, the justices held that Kentucky's lethal injection procedure did not violate the Eighth Amendment, thus ending the moratorium in 2008. The majority opinion cited that the inmates failed to prove that the incorrect administration of the drugs would amount to cruel and unusual punishment. Yet, it warned that a state may be in violation of the Eighth Amendment if it continues a particular procedure without "sufficient justification" as opposed to superior alternative procedures (Oyez).

When constitutional issues regarding the usage of particular drugs is not an issue, the mere attainment of the drugs can often pose a particular problem that will lead to delays of execution. Gaining access to these drugs is becoming increasingly difficult as public opinion on capital punishment, specifically lethal injection, begins to shift. While these drugs are not particularly difficult to produce, it is becoming increasingly rare to find drug companies who are willing to provide the drugs for fear that their company will be negatively impacted by the association with execution. Issues in attaining drugs the proper drugs can often times lead to statewide moratoriums on execution contributing significantly to the increasing number of stays being granted. For instance, the Ohio Governor John Kasich recently granted a reprieve to 11 death row inmates scheduled for execution delaying all executions in Ohio until at least 2017 due

to an inability to attain the proper drugs needed to conduct the procedures (Welsh-Huggins, 2015).

In some cases, issues with lethal injection protocol can come about even when issues surrounding the specific drugs used are not brought up. In North Carolina, for instance, the state lethal injection protocol required that a physician be present for the execution of any inmate in attempts to ensure the normal progression of the process. A de facto moratorium was instituted in North Carolina when, in 2007, the State Medical Board barred physicians from participating in executions asserting that it constituted a violation of their code of ethics (WRAL). While this policy was overturned by the North Carolina Supreme Court, executions have yet to resume in the state.

The near constant flow of controversy surrounding lethal injection has lead to countless stays in execution both on a statewide and individual basis. The frequency of these issues surrounding the principal execution method nationwide raises serious concerns regarding the arbitrary nature of executions in general. This persistent trend in execution delays as a result of various lethal injection concerns gives rise to the question of what it means to be given an execution date. If there is no reliable way to carry out the execution, what certainty can be had by the inmate that any execution will be carried out at all, and at what point does this start to become a serious constitutional issue regarding the unusually and arbitrary usage of capital?

Richard Glossip

A particularly troubling case, regarding extended stays on death row smattered with a number of different stay and renewed execution dates, is that of Oklahoma death row inmate Richard Glossip, sentenced to death for paying co-worker Justin Sneed to murder his boss, Barry Van Treese (Berman, 2015). To this day, Glossip has received four separate stays of execution (Connor , 2015[1]). Much of the controversy surrounding Glossip's numerous stays of execution

have been regarding lethal injection protocol. Glossip's first stay of execution was granted on October 13th of 2014 when the State Attorney General announced that the state lacked an adequate amount of drugs needed for the execution of Glossip and two other inmates (Lucero, 2015). This first delay of execution due to issues surrounding the Oklahoma lethal injection protocol foreshadowed the significant legal struggle that would bring the case of Richard Glossip to the forefront of national attention.

The case of *Glossip v. Gross* made national headlines when taken up by the Supreme Court. In this case, Glossip, joined by other death row inmates, argued that the usage of the sedative midazolam constituted a violation of the 8th amendment arguing that it failed to ensure that no pain would be felt by the inmate (SCOTUSblog). The impetus for this case arose after the botched execution of Clayton Lockett a year earlier (Ford, 2015). As a result of this case, Glossip was granted yet another stay on January 28th, 2015, one day prior to his scheduled execution as the Supreme Court evaluated the constitutionality of the Oklahoma lethal injection protocol (Lucero, 2015). In a 5-4 decision, the Court held the Oklahoma lethal injection protocol and the usage of midazolam to be constitutional (SCOTUSblog). Upon gaining this clearance, the state of Oklahoma moved to quickly set a new Execution date of September 16th, 2015 for Glossip (Berman, 2015).

This latest execution date, however, would be pushed back yet again when the Oklahoma Court of Criminal appeals granted Glossip yet another last minute stay, this time only eight hours prior to his scheduled 5 o'clock execution (Ford, 2015). This latest stay, unlike the previous two, was not related to lethal injection protocol, but rather dealt with a new challenge regarding Glossip's innocence. Questions surrounding the guilt of Glossip have gained a great deal of attention of late. Much of the controversy surrounding this issue is based in the potential

inaccuracy of Justin Sneed's testimony on which the case for Glossip's guilt hinges (Ford, 2015). In need of more time to evaluate Glossip's latest claims of innocence, the Appeals Court granted him a stay of two weeks, only to eventually rule against him (Lucero, 2015). Following this latest attempt at reprieve, Glossip was scheduled to be executed on September 30th, 2015 (Lucero, 2015).

Once again, however, Glossip's execution was stayed in the eleventh hour by Oklahoma governor Mary Fallin (Berman, 2015). Her unexpected stay came after the US Supreme Court denied Glossip's latest attempt to halt the execution in order to allow more time for the evaluation of new evidence regarding his potential innocence (Berman, 2015). Fallin claimed that her decision to stay the execution for over a month was a made in attempts to ensure that the drugs used in the execution complied with Oklahoma Execution protocol (Berman, 2015). According to Fallin's order, the drug meant to be used for stopping Glossip's heart was potassium acetate, but the drug allowed for by the Oklahoma execution protocol is potassium chloride (Berman, 2015). It is unclear as to why this was a last minute decision, however, given that officials in Oklahoma are to inform inmates of the drugs to be used in their execution ten days prior (Berman, 2015). Glossip was assigned a new execution date of Noverber 6th, 2015, although it is unclear said execution will take place given persistent issues with Oklahoma execution protocol and the growing doubt of Glossip's guilt.

Manuel Valle

The case of Manuel Valle again raises issues regarding the tortuous characteristics of capital punishment as it relates to stays granted at the last minute depriving an inmate of any real sense of certainty as to whether he will live or die until the drugs enter his system. Before Valle was eventually executed in 2011, his scheduled execution was delayed three times, the final stay being granted by the Supreme Court only three hours prior to his scheduled execution

(Pilkington, 2011). Again, the issues raised by Valle and his legal representatives were in relation to the drugs used in the Lethal injection protocol as proscribed by the State of Florida.

[152]During his stay on Florida's death row, Valle was given three execution dates and was granted three stays, though the last one only granted him a reprieve of three hours before the United States Supreme Court decided to allow the execution to finally proceed (Clark Prosecutor)[153].[154] Prior to his last minute execution stay in 2011, Valle was granted two separate stays of execution once by the Florida Supreme Court and another time by the 11th U. S. Circuit Court of Appeals delaying his original August execution date by a combined 8 weeks (Clark Prosecutor)[2,3]. The reason for which these stays were granted surrounded the controversial use of the drug pentobarbital, brand-named Nembutal, which replaced sodium thiopental as the anesthetic used in Florida's three drug lethal injection protocol (Clark Prosecutor 4). Controversy surrounding the use of pentobarbital was ignited following the botched execution of Roy Blankenship who, after being administered the drug, was said to have "lurched, grimaced and kept his eyes open even into death" (Pilkington, 2011). Controversy surrounding the usage of this drug intensified when Staffan Schuberg, head of the Danish drug company responsible for the manufacture and distribution of this drug, wrote to then Florida Governor Rick Scott discouraging him from allowing the drug to be used in executions citing the fact that is untested for such a purpose and could cause intense suffering on behalf of the prisoners (Pilkington, 2011). Despite the delays in execution granted to Valle, the courts eventually rejected his claims.

Valle's final stay of execution was granted by the Supreme Court only three hours before his scheduled execution time in order to allow the court the time to evaluate a last minute appeal

[152] Retrieved from Miami Herald, Patricia Mazzei, 9/28/2011
[153] Retrieved from Miami Herald, Patricia Mazzei, 9/28/2011
[154] Retrieved from Tampa Bay Online, September 28th 2011

filed by Valle's legal council on his behalf (Pilkington, 2011). Valle's Lawyers, in this last ditch attempt to save their client's life, appealed to the Supreme Court claiming that Valle was not allowed the proper opportunity to seek clemency prior to his execution and thus should be granted a stay. Creating a further source of controversy surrounding this case, the Miami Herald, mistakenly reported that Valle's execution had already taken place, while in reality, his fate remained in the hands of the United States Supreme Court (Pilkington, 2011). The case of Manuel Valle stands as a testament to the potentially tortuous nature of capital punishment. When the fate of an individual is in such flux that he is left wondering if he is going to be put to death as soon as three hours before his scheduled execution serious mental harm is likely inflected. In the case of Valle, however, his own uncertainty was only exacerbated by the false media claims that published reports of his death while he awaited the deliberation of the Supreme Court.

Troy Davis

The execution of Troy Davis is a testament to the surprising number of death warrants that fail to be carried out. In his 22 years on death row, Davis received four executions dates, with the fourth ultimately resulting in his execution in 2011. With each assigned date, Davis, his family, and the family of the victim prepared themselves for the execution and the end of this case. However, as each execution date approached, each party was met with the news that the execution was to not be carried out as scheduled.

On August 30, 1991, a jury sentenced Troy Anthony Davis to die for the 1989 murder of Officer Mark Allen MacPhail. In 1994, a judge signed the first order of execution, however another ten years would pass before a date was set. On June 25, 2007, Davis received his first execution date of July 17, 2007. One day prior to his scheduled execution, July 16th, The

Georgia State Board of Pardons and Paroles granted a ninety-day stay of execution to evaluate new evidence in Davis' trial, as well as strong claims of his innocence. On September 3, 2008, Davis' execution was rescheduled to take place on September 23rd (Clark Prosecutor[5]). Troy Davis prepared for the end of his life. The Georgia Supreme Court rejected the request for a stay of execution and the Georgia Board of Pardons and Paroles subsequently denied clemency. With two hours remaining until his execution time, Davis was strapped onto the gurney. However, in an eleventh-hour intervention by the United States Supreme Court, Davis receives a stay of execution, and is removed from the gurney within 90 minutes of his execution time (Khalek, 2013). The court again temporarily stayed his third execution date of October 28th, three days before it was to take place. Appeals continued throughout 2009 and 2010, with the U.S. Supreme Court ultimately rejecting his final appeal on March 28, 2011. On September 6th, 2011, a new execution order set Davis' execution to be carried out on September 21st (Clark Prosecutor[5]). Once again, Troy Davis prepared for his execution, receiving his last meal and saying his goodbyes to his family. Once again, Davis is strapped to the gurney and awaits his 7 P.M. execution. An hour after his scheduled execution time, The U.S. Supreme Court temporarily postpones Davis' execution to review his petition for a stay. The court deliberates for several hours, only to strap Davis back on the gurney four hours later and carry out the execution at 11:08 P.M (Clark Prosecutor[5]).

Three of Davis' executions dates were cancelled within three days of his execution, coming as close to the final hour. In the course of one day, he lay on the gurney twice, each time unsure of whether or not this was the final time. Unfortunately, Davis' mother died a few months before his execution. According to Davis' late sister Martina, their mother died of a broken heart due to the multiple execution dates and last minute stays. Constant preparation for an execution

only for it to be cancelled or delayed amounts to an element of psychological torture for the inmate, inmate's family, and the victim's family as well.

Warren Hill

Warren Lee Hill's experience on Georgia's death row raises important concerns surrounding not only mental illness and capital punishment, but also the torturous nature of an inmate facing the anticipation of death only to be spared at the last minute over three times. In fact, Hill faced the execution chamber three times in the course of one year prior to his execution in January 27, 2015.

Warren Hill was already serving a life sentence for the 1986 murder of his girlfriend when he beat a fellow inmate to death using a nail-studded board. Upon his conviction in 1991, he was sentenced to death. Hill endured a rigorous appeals process, with his lawyers asserting strong claims of mental disability. The case of *Atkins v. Georgia,* 536 U.S. 304 (2002), rendered the execution of the mentally retarded to be in violation of the Eighth Amendment and thereby unconstitutional. However, the definition of who is to be considered mentally retarded is left to the discretion of the states. Georgia possesses the strictest standard in granting claims of mental retardation in that it requires proof of intellectual disability beyond a reasonable doubt (NY Daily News). Ultimately, Hill's lawyers supposedly failed to meet this extreme burden of proof.

Warren Hill received two stays of execution within minutes of the scheduled times. Hill was first set to be executed in July of 2012. After eating his last meal and saying goodbye to his family, the execution was stayed ninety minutes before its scheduled time. He received a stay until February of 2013. Yet this time, Hill came within thirty minutes of execution. In fact, he was already strapped to the gurney and had received a sedative intravenously. His third execution date, in July of 2013, was stayed within four hours. While this should amount to a form of torture for any inmate, last-minute stays of execution is perhaps even crueler for

someone who possesses the mental cognition of a child (Khalek, 2013). An inmate with such a disability, like Warren Hill, has fewer preliminary skills to cope with the stress and anticipation of impending execution and to understand why, despite being told he is going to die time after time, he continues to live.

Warren Hill received enormous support for clemency, including support from the victim's family. Furthermore, former jurors expressed remorse, citing they were not given the option of life without parole during the sentencing phase (Gallman, 2015). Hill's execution was arguably unconstitutional. Brian Kammer, Hill's lawyer of 20 years, deemed this execution as a "grotesque miscarriage of justice" and one that will continue to live on as a "moral stain" on the state of Georgia and the court system (Connor, 2015[2]).

Charles Warner

The case of Charles Warner encompasses various problematic aspects of the application of the death penalty. Convicted in 2003 for the 1997 rape and murder of an 11-month-old infant girl, Warner was originally sentenced to die by lethal injection on April 29, 2014. Warner shared this execution date with fellow Oklahoma death row inmate Clayton D. Lockett. Lockett was to be executed first, followed immediately by Warner. Having received his last meal and final visitation, Warner awaited his escort to the execution chamber. However, his trip to the death chamber never occurred that night. Warner's execution was cancelled following the botched execution of Lockett in which the process took 43 minutes and resulted in Lockett dying of a heart attack (Connor, 2015[3]). The tremendous public outcry surrounding Lockett's execution resulted in a six-month stay of Warner's execution. On November 13, his execution was stayed to allow the state to obtain drugs and train staff on new protocol, with a new execution date set for January 15, 2015 (DPIC).

Despite challenges to the constitutionality of Oklahoma's drug cocktail, The U.S. Supreme Court rejected another stay of execution. The victim's mother pleaded for a life sentence rather than one of death for Warner. However, the prosecution ignored her wishes in pursuing Warner's conviction (Connor, 2015[3]). While stays of execution amount to torture for the inmate and inmate's family, it is also torturous for the family of the victim. For some, multiple execution dates and subsequent cancellations bars family members from feeling justice has been carried out. For this mother, she feared execution would bring back the severe depression and anxiety she suffered following the murder and therefore opposed the death penalty for Charles Warner. Regardless if the families of both the inmate and victim support or oppose capital punishment, stays of execution are tortuous to all as there is no element of finality in a case that has likely been emotionally traumatic to all parties involved for many years.

Warner was ultimately executed on the scheduled date of January 15, 2015, making him the first inmate executed by Oklahoma since the disastrous execution of Clayton Lockett. Warner's final words were "my body is on fire". An investigation into the autopsy report revealed that officials used potassium acetate to stop Warner's heart rather than potassium chloride (Peralta, 2015). The use of the wrong drug in an execution, especially following Lockett's execution, severely calls into question the ability of prisons to correctly carry out executions and the constitutionality under the 8th Amendment of such errors. Unfortunately for Warner, the U.S. Supreme Court effectively took up his case a little over a week after his execution in its issuance of stays of execution to three inmates, including Richard Glossip. The Court granted stays until a decision was to be made on the lethal injection challenge regarding midazolam (Richinick, 2015). This marks the first instance the Court has agreed to hear a challenge to the legality of lethal injection since its decision in Baze v. Rees in 2008.

John Balentine

John Balentine was sentenced to death on April 19, 1999 for murdering his ex-girlfriend's brother and two other white teenage boys as they slept. On September 30, 2009, the U.S. Court of Appeals for the Fifth Circuit granted Balentine a stay a day before he was scheduled to die. His execution date had been set on June 23, 2009. On June 15, 2011, the U.S. Supreme Court granted Balentine a stay within an hour of the scheduled execution. On August 22, 2012, the U.S. Supreme Court granted Balentine a stay about an hour before he was to be executed. The Court granted the stay to allow Ballantine time to bring claims that his court-appointed trial counsel had been ineffective for neglecting to present mitigating factors, such as emotional problems and a difficult childhood. This was Balentine's third last-minute stay (Texas Moratorium Network). John Balentine continues to await his impending execution.

Kelly Gissendaner

Kelly Gissendaner was convicted of malice murder on November 18, 1998 for recruiting her boyfriend to kill her husband. She was then sentenced to death. On February 9, 2015, the Gwinnett County Superior Court issued an order for the Georgia Department of Corrections to execute Gissendaner. On February 25, 2015, her execution was temporarily stayed due to inclement winter weather. On March 2, while waiting for a response from the U.S. Supreme Court, correctional officials postponed the 7 P.M. execution because the lethal injection drugs appeared cloud. Gissendaner had already been removed from her cell and was in a holding area near the prison's death chamber. The execution was stayed at 11 P.M. due to this issue, four hours later than it had been scheduled to occur. The following day, corrections officials announced that all executions would be put on hold until further drug analysis took place. The state called off the execution hours before it was to have happened (AJC). On September 29,

2015, Gissendaner's execution, scheduled for 7 P.M., was put on hold due to pending appeals. These appeals were denied, and Gissendaner was executed several hours later around 12:30 A.M. on September 30, 2015. She was the first woman executed in Georgia in 70 years, and the only person executed in Georgia who did not directly commit the killing since the death penalty was reinstated.

Pennsylvania Case Study

On February 13, 2015, Pennsylvania Governor Tom Wolf granted a temporary reprieve to Terrence Williams, a capital defendant who had been on death row for nearly three decades and who had received his third death warrant, and execution date, four weeks prior. The newly instated Governor Wolf not only granted Williams temporary relief, but also pledged to "grant a reprieve in each future instance in which an execution is scheduled, " effectively enacting a moratorium on executions until the state's Capital Punishment Task Force completes their review of the system and their recommendations are "sufficiently" put into effect (Wolf, 2015). For the 181 inmates still on death row, though the threat of death is temporarily at bay, for many, it is not the execution chamber that poses the greatest threat, but instead the deeply flawed, underfunded, and excessively restrictive Pennsylvania post-conviction review systems that may place them there.

Capital Punishment in Pennsylvania

Home to the fifth largest death row population in the country, Pennsylvania has imposed a sentence of death on 417 individuals since reinstating capital punishment nearly four decades ago in 1978. However, despite a large number of sentences, at 0.7 percent, Pennsylvania has the lowest rate of execution of any state that has executed at least one capital inmate in the modern era of the penalty, a rate nearly half that of California's, where in 2014 low execution rates and a

large death row population signified systemic, excessive delays, the discovery of which resulted in the state's death penalty system being ruled unconstitutional (Jones v. Chappell, No. 2:09-cv-02158 (C.D. Cal. July 16, 2014)) As shown in Table 12.3, Pennsylvania's sentence outcomes reflect a similar imbalance, with 188 individual's sentences overturned, 190 remaining on death row as they continue their appeals process, and only three executed, all of whom were volunteers.

Table 13.3 Pennsylvania Capital Sentence Dispositions, 1973-2013

Disposition	Number of Sentences	Percentage of All Sentences
On Death Row	190	45.6
Executed	3	0.7
Sentence Overturned	188	45.1
Commutation	6	1.4
Other Removal	0	0.0
Other Death	30	7.2
Total	417	100.00

*Note: Data retrieved form the Pennsylvania Department of Corrections database

Unfortunately, the sentence outcomes described above are largely symptomatic of a heavily flawed capital punishment system that has been growing consistently worse over time. While the system has cost an estimated $315 to $600 million in taxpayer money, key components of ensuring a functional system, for all parties involved, are not receiving the necessary financial and governmental support they so desperately need. For example, in Pennsylvania, Bar Association found that, of interviewed capital jurors, 98.6 percent indicated that they did not understand "at least some" jury instructions and 82.8 percent of interviewed jurors "did not believe that a 'life sentence really meant life in prison'" (ABA, 2007). The ABA's finding that the majority of interviewed jurors struggled to understand the bifurcated nature of the trial, with 83.3 percent discussing the "right punishment" before the sentencing stage, it is clear that the state is not devoting enough time to educating jurors on the specifics of

the capital trial process by not providing them with materials, personal instruction, and access to resources, including expert witnesses, all of which are ABA recommendations for capital jurors. In addition to jurors, Pennsylvania is not investing in their public defense systems, as it is the only state in the nation that provides no form of state funding for Public Defender services, instead leaving the full financial burden on individual counties (Stolinas, 2013). This imbalanced representation based on regional investment, paired with noncompliance with ABA norms such as guaranteed dual counsel and counsel at all stages, including clemency petitions, as well as lack of funding for investigators and expert witnesses, has culminated in a standard of capital counsel well below national standards.

Post-Conviction Procedure

After a capital defendant has been sentenced to death and both their sentence and conviction have been upheld in their automatic appeal, Pennsylvania law requires that they must file their initial or successive post-conviction petition within one year of the final ruling on their direct appeal. At this point in time, new counsel must be appointed for the collateral review, unless the defendant is waiving appeals, chooses to continue with their original lawyer, or are able to bring in outside legal assistance. However, the application of Pennsylvania Rule of Criminal Procedure 904 can prevent defendants in the collateral review stage from gaining access to court appointed counsel. Though Rule 904 states counsel is to be appointed in all cases in which a defendant files for post-conviction relief and without the ability to pay for or procure counsel, it limits this appointment on all petitions after the first, unless the judge determines an evidentiary hearing is required or if "justice requires it" (ABA, 2007 p. 157). This is the first conflict in the collateral review trial, in that access to legal counsel is made more difficult and at the judge's discretion, all while a defendant races against the clock to meet the tight one-year deadline. It is this one-

year deadline that leads to conflict number two, which is a combination of strict timelines and even stricter requirements for collateral petitions after the one-year window is closed.

Should a capital defendant seek post-conviction relief more than a year after their sentence has been finalized, they have only sixty days to do so and with a higher burden of proof, while still trying to secure legal counsel at the trial judge's discretion (ABA, 2007 p. 155). To begin this new round of collateral review, the state requires that a defendant prove that either (1) the claim was not raised earlier due to "interference by government officials, not including legal aid, (2) The factual basis of the claim could not have known to the defendant prior to this point, or (3) The right asserted is constitutional and recognized as such by the U.S. or Pennsylvania Supreme Court (ABA 2007, p. 155). Whether the defendant is filing their initial, secondary, or successive collateral petition, a capital defendant is expected to file a stay of execution with their petitions, as the automatic appeals attached to petitions in the automatic appeals stage has ended, and instead a "presumption of finality" have taken over. According to Pennsylvania law, a "stay of execution should be requested in the petition for post-conviction relief" and will only be granted if the petition is timely and pending, and if the petitioner shows a strong likelihood of success. These conflicts created by the nature of post conviction relief in Pennsylvania capital cases creates a few primary problems, conditions that can lead to multiple death warrants, execution dates, and stays, yet very few executions and nearly 200 individuals still on death row.

First, by only operating within short timeframes so as to expedite the process, defendants are being provided with potentially insufficient time to fully develop a quality collateral petition, defeating the purpose of the exercise. Second, strict bases for collateral petitions require a greater amount of work and attention to detail so as to meet these requirements. This is already a difficult task, but when paired with a short window of one-year for the first base and a

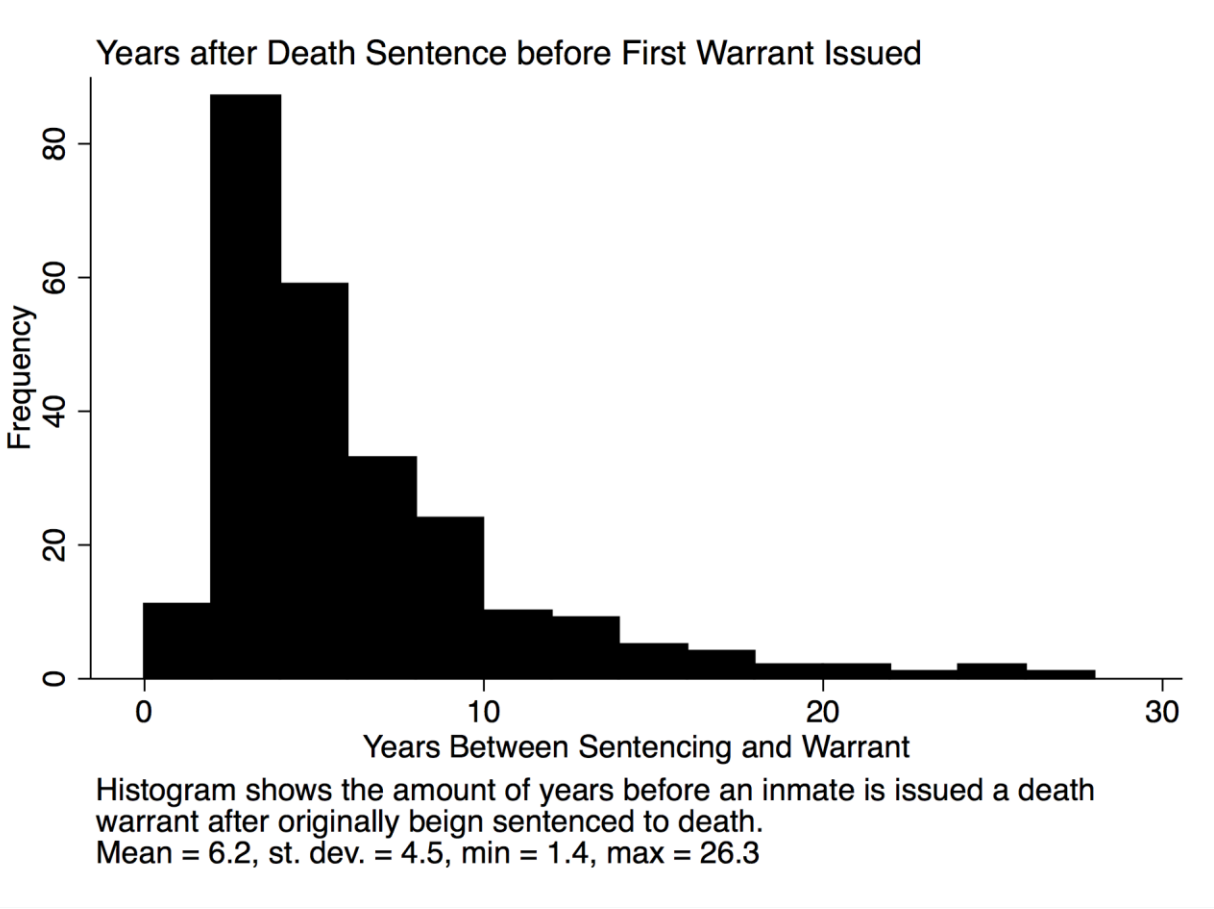
subsequent, immediate 60-days for the next, the timelines and guideline can derail an appeals process. It should also be noted that when these two conditions are paired with the trial court judge's ability to "severely limit the scope of review or discovery for petitioners, the ability to create an adequate defense grows even smaller (ABA, 2007). These first two issues largely account for the state laws "restrictions on adequate development" of collateral appeals, with the court's right two dispose of a petition without an evidentiary hearing, for reasons including untimely petitions and presence of previously litigated claims, reducing "judicial consideration" (ABA, 2007). This all culminates in one of the most critical components of the petition: the stay of execution. Stays of execution rely upon being both timely and, most importantly, making a "strong showing of likelihood" that the petition will be successful to be approved by the court (ABA, 2007); however, when a petitioner has insufficient time to address strict guidelines, their ability to show this likelihood of success decreases dramatically and places their life on the line. As a result, inadequate petitions will be submitted, appeals and stays will not be granted, warrants will be signed, and a stay of execution will allow the petitioner to re-enter the cycle once again. As Pennsylvania has chosen quick appeals and tight deadlines to improve efficiency over adequate development of petitions and thorough investigation, the "unending cycle of death warrants and appeals" that Governor Wolf called a moratorium for are likely to continue until systemic reform occurs (Wolf, 2015).

Stays of Execution: How Likely is an Execution?

Since August 1, 1985, Pennsylvania governors have signed 448 death warrants for 259 inmates, with several inmates being the recipient of more than one, and only 3 resulting in an execution. The remaining 445 death warrants could be classified as legally premature, meaning they were "directed at individuals who had not had an opportunity to obtain at least one level of judicial

review to which they were legally entitled" (Dunham, 2015). As a result, only .67 percent of all death warrants have resulted in executions, all of which were for inmates who volunteered, with the remaining windows for execution eventually expiring as an inmate continues their appeals process. This portion of the chapter looks at both the stays and the warrants, reviewing how long an individual waits for their first warrant, how close to death did some of the 256 individuals who outlived their execution window come, and what happened to those individuals following their stay of execution.

Figure 13.1 Years Between Sentencing and Issue of first Death Warrant for PA Inmates

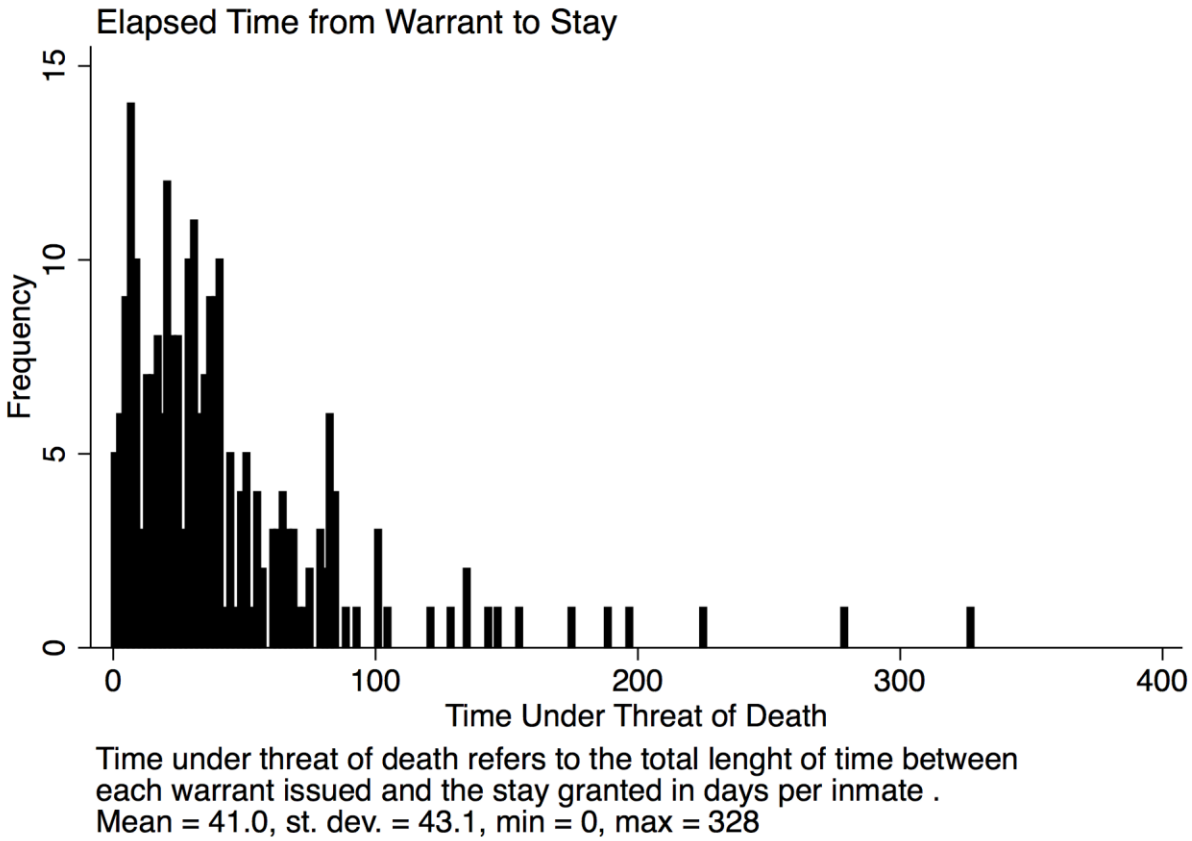


*Note: Data retrieved form the Pennsylvania Department of Corrections database

Figure 13.1 illustrates the first troubling trend regarding the sentencing of death row inmates in Pennsylvania. This histogram shows the number of years that inmates spend on death

row after being sentenced before ever being issued a death warrant. As can be seen in the figure, the average inmate spends just over six years on death row before he or she is issued a death warrant in the state of Pennsylvania. It is very rare that death warrants are issued within a year of an inmate's sentencing. This is likely due to the complex and logistically complicated process that must be carried out prior to setting an execution date. However, significantly longer delays between sentencing and the issuing of the first death warrant are not unheard of. The maximum amount of time between sentencing and first death warrant for any inmate in Pennsylvania was just over twenty-six years. Such a substantial delay between sentencing and the issuing of a death warrant raises questions regarding the nature of capital punishment itself. If an inmate is sentenced to die, it would logically follow that the sentence should be carried out in a timely manner. Such long delays almost constitute an additional, if not explicit, punishment as the inmate must languish on death row with no indication of when he or she can expect to be executed.

Figure 13.2. Total Time PA Inmates Spend Under Threat of Death

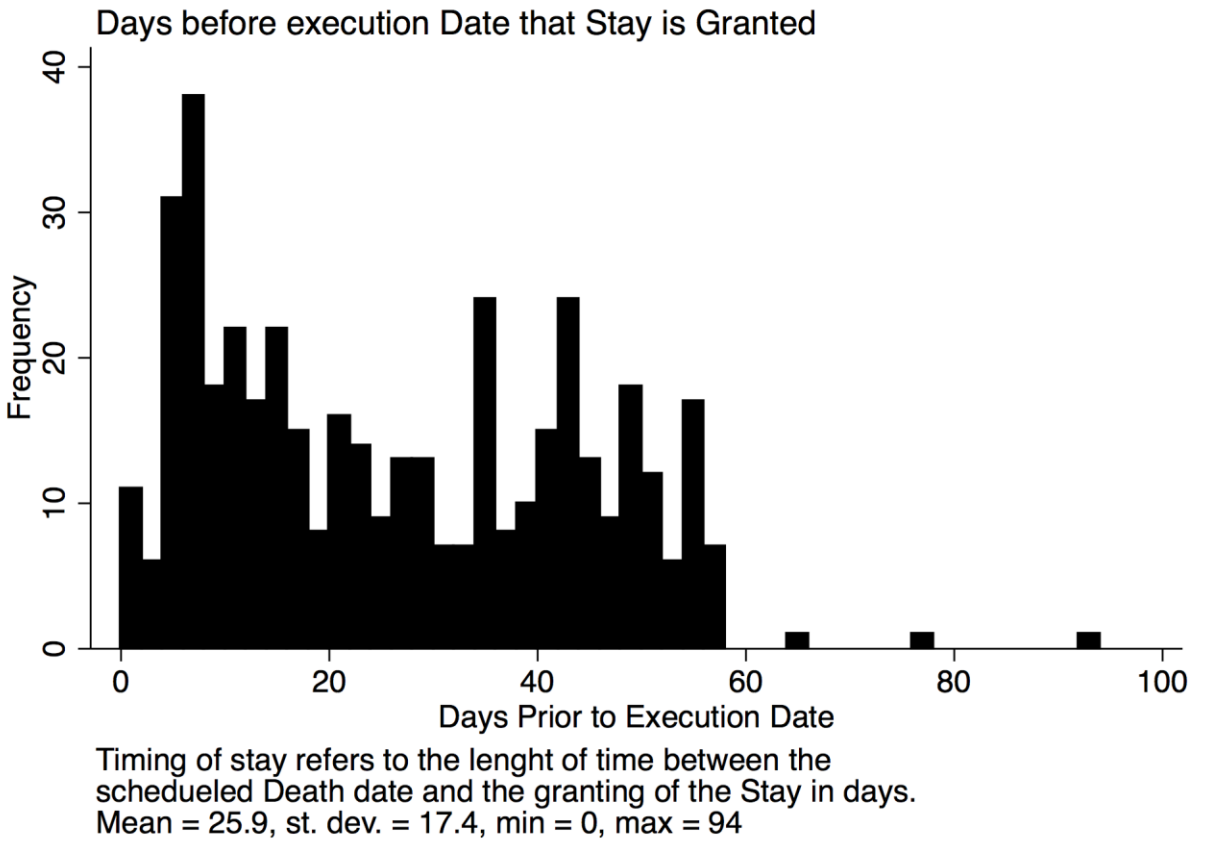


*Note: Data retrieved form the Pennsylvania Department of Corrections database

Figure 13.2 (depending on final distribution of chapters) illustrates the amount of time Pennsylvania death row inmates spend under threat of death. This concept refers to the amount of time each inmate spends on death row after being issued a death warrant. Once a Warrant is issued, a specific date for their execution has been set, and the inmate is simply waiting to be executed. The analysis above considers the total number of days spent under threat of death between the issuing of a death warrant and either the granting of a stay or the execution of the inmate, more often the former than the latter. As is shown in the figure, the average total time spent under threat of death, per inmate, is forty-one days, although it is not unheard of for

inmates to spend a significantly longer period of time under threat of death. One inmate, Hubert Michael, has spent just under a year total under the threat of death after being issued five separate death warrants and being granted a total of seven stays. Such considerable amounts of time spend awaiting death, only to see the date pushed back time and time again highlights the torturous aspects of capital punishment, as it currently exists. In the most extreme cases, as is shown by the above figure, inmates can spend expended periods of time awaiting execution while at the same time never truly knowing what his or her fate will eventually be. Given the moratorium that has since been enacted in the state of Pennsylvania, there are no inmates on Pennsylvania's death row that are currently under threat of death.

Figure 13.3. Timing of Stay Prior to Execution Date for PA Inmates



*Note: Data retrieved form the Pennsylvania Department of Corrections database

Figure 13.3 (again tentative) illustrates the timing of stays granted in regards to the scheduled execution date set with each death warrant issued by the Pennsylvania Governor. As is shown in the figure above, the average number of days prior to the execution date that a stay is granted is just under 26 days. While this, in itself, is not shocking, the significant number of stays granted at a much shorter notice is worth pointing out. A number of inmates in Pennsylvania have been granted stays within ten days of their scheduled execution date, with a fair among of inmates being granted stays at the very last minute, sometimes on the day of their scheduled execution. Given that Pennsylvania does not execute inmates on a regular basis, the issue of last minute stays is far less problematic than in certain other states. Accounting for this, stays granted at the

11th hour highlight yet another potentially torturous aspect of capital punishment. The concept of awaiting death for expended periods of time, only to have that date canceled or moved at the very last minute exacts a particularly concerning toll on the mental state of the inmate who, often times, can not be sure of his or her fate, even as he or she is being strapped down to the gurney.

Table 13.4 Total Number of Death Warrants Per Inmate

Number of Warrants	Number of Inmates	Percent of Inmates	Cumulative Percent
1	127	50.60	50.60
2	81	32.27	82.87
3	30	11.95	94.82
4	9	3.59	98.41
5	2	0.80	99.20
6	2	0.80	100.00
Total	251	100.00	-

Note: Table shows the total number of inmates who have received x number of death warrants while on Pennsylvania's Death Row. Data retrieved form the Pennsylvania Department of Corrections database

Table 13.4 offers a look at the number of death warrants that inmates generally receive on Pennsylvania's death row. As is shown in the table, the majority of inmates only receive death warrants once, but a great deal of them are likely to receive multiple death warrants though the course of their stay on death row. The issue of issuing multiple death warrants for inmates has to do with the arbitrary nature of the death penalty itself and the potentially torturous characteristics of its implementation. If an inmate is issued a death warrant and a specific execution date, he or she is fully expecting to be killed on that date. When a warrant is canceled, certainty regarding that inmate's fate is once again called into question. Those inmates receiving four, five, or even 6 different death warrants are denied any sense of certainty regarding their fate as it is made clear that the assignment of an execution date has little to do with whether or not the inmate will actually be executed. Furthermore, the repeated assignment of execution dates exacts a troubling

mental toll on inmates who must time and time again come to terms with the reality that they are to be executed, while at the same time having no real indication of what their fate will be.

Table 13.5 Total Number of Death Warrants issued to Inmates Later Removed from Death Row

Number of Warrants	Number of Inmates	Percent of Inmates	Cumulative Percent
1	32	39.51	39.51
2	39	48.15	87.65
3	6	7.41	95.06
4	4	4.94	100.00
Total	81	100.00	-

Note: Table shows the total number of inmates since removed from death row who have received x number of death warrants while on Pennsylvania's Death Row. Inmates dropped form this analysis include those who have been executed, committed suicide while in prison, died of natural causes while in prison, had their sentences commuted by the governor, died of unknown causes while in prison, have been removed from death row awaiting a new trial, and are still on death row. Note: Data retrieved form the Pennsylvania Department of Corrections database

Table 13.5 offers another look at death warrants issued to Pennsylvania inmates on death row. In this case, the table shows the number of warrants issued to inmates who have since been removed from death row. This data is particularly troubling given that these inmates were given a scheduled date to die, in some cases multiple times, before eventually being removed from death row after being re-sentenced to a less harsh punishment or removed form prison entirely. What is particularly problematic about this is that these inmates, who have since been shown not to deserve death at the hands of the state for one reason or another, each came dangerously close to being executed any, sometimes on multiple occasions. This raises a particularly troubling issue surrounding capital punishment, for it highlights the potential for states to execute inmates who are not deserving of such punishment under the laws of that state or the U.S. constitution.

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14

How Many Inmates Just Give Up?

Marty Davidson and Caroline Lim

When an individual receives the death sentence the next process are appeals; a both drawn out and lengthy ordeal exacerbated by lawyers' unwillingness to let a client be condemned and the modern safeguards instituted by Gregg v. Georgia. In the fray of this drawn out process, there are inmates, who after being sentenced to death, decide to waive all chances of appeal and allow the death sentence to be carried through. These individuals are defined as death row volunteers because they allow the state to enact death voluntarily

Volunteers on death row are relatively rare to find. Even though some of the individuals who volunteered to be sentenced to death are covered by a media circus – Gary Gilmore, Steven Judy, Andrew Chabrol, etc. – most individuals who volunteer die in obscurity. Out of the over 1400 individuals sentenced to death since 1976, little more than 10% were volunteers. In general, it is difficult to determine why anyone would want to reject having the chance of overturning a death sentence, especially when most individuals sentenced to death have their conviction overturned; however, for most volunteers, personal circumstances leading up to and during trial play a vital role in determining why one would choose to waive rights of appeal.

For this chapter, the ten volunteer inmates with the shortest wait time before waiving all appeal rights and the ten inmates with the longest wait time will be analyzed. This sample pool was chosen out of 137 volunteer inmates due to the high profile coverage of their court proceedings and the fact that they represent the extremes of a population that is already rare to find.

Incorporating quotes and testimonies from these twenty volunteer inmates on death row, press releases from county prosecutors and defense attorneys, and statements from family and witnesses, we explain possible reasons why an inmate might choose to be condemned by the state. Several general themes were developed from this sample population:

- "Death is a Better Option than Life Imprisonment"
- Conclusion Based on Self-Examination (Self-Retribution, Religious Motivation, and Remorse for Actions)
- Discernible Mental Instability
- Idiosyncratic Reasons or other

All of these themes help reveal, in part, reasons why an inmate on death row might choose to waive all appeal rights. Table 14.1details the common themes for volunteer inmates and the names of the inmates associated with each category.

Most of the inmates cross categories. In addition, with all of the defendants, there was a general sense of frustration with the legal process. The sampled inmate that best communicated this frustration was Jesse Bishop who was quoted as stating, "They want to force me to appeal, to wait just so the lawyers can play their games ... I feel that's cruel and unusual punishment" (Cannon 2013). In this chapter, the intention is to look beyond general frustration. First, we discuss in detail each of the four categories highlighted in Table 14.1. We use the inmates listed in the table to bring out characteristics that encompass the general category. Finally, we give two case examples of the volunteer with the shortest wait period, Gary Gilmore, and the volunteer with the longest wait period, Robert Lee Massie, and examine them in greater detail. Constrained by both their legal and personal circumstances, an inmate's decision to waive his rights of appeal is the product of a fractured death penalty legal structure.

Table 14.1. Common Themes for Volunteers

Reasoning	**Inmates**

"Death is a Better Option than Life Imprisonment"	*Steven Judy, Gary Gilmore, Eric Robert, Aaron Foust, Daryl Mack, Kevin Conner, Robert Lee Massie, Edward Lee Harper, Kevin Conner, David Dawson, Jesse Bishop*
Conclusion Based on Self-Examination (Self-Retribution, Religious Motivation, or Remorse for Actions)	*Gary Gilmore, Steven Renfro, Sean Flannagan, Eric Payne, James Clark Jr., Peter Miniel, Michael Ross, Jack Trawick, Robert Charles Comer*
Discernible Mental Instability	*Pernell Ford, Jack Trawick, Gary Gilmore, Steven Judy*
Idiosyncratic Reasons or other	*Andrew Chabrol, James Clark Jr.*

"Death is a Better Option Than Life Imprisonment"

Eric Payne killed Ruth Parham, 61, and Sally Fazio, 57, in the Richmond area in June 1997, six months after he finished a six-year term for drug possession (Associated Press, "2 Put to Death for Slaying in Texas, Virginia). One of Payne's attorney, who described Payne's upbringing as a continual experience of "extreme violence and institutionalization", stated to the media that Payne never received proper counseling while in prison; for Payne, the distress produced from interacting with the legal system on several occasions fueled his rage (Associated Press, Va. Man Executed for 1997 Slayings).

Payne's experience was not uncommon within the pool of volunteer inmates sampled; most had interacted with the legal system on several occasions and had spent a significant portion of their lives incarcerated. For these inmates, incarceration was a mark that they wanted to remove. Eric Payne volunteered to be sentenced to death because he did not want to spend the remainder of his life in prison. For Payne and for many of the volunteers in this category, death was a better alternative than life imprisonment.

Some of the inmates sampled had specific reasons for wanting to die. Aaron Foust, for example, expressed his grievance with spending the remainder of his life without the company of woman (Graczyk 1999). Eric Robert, who was already imprisoned with an 80-year sentence, murdered a prison guard while attempting to escape from prison (Kolpack 2012).

When asked why he wanted to be sentenced to death by a judge, Robert proclaimed that if her were not sentenced to death, there would be no guarantee he would not kill again or escape (Kolpack 2012).

Other volunteer inmates sampled expressed their tired will, which was already damaged from being imprisoned for so long. Robert Lee Massie justified his waiving of appeal rights by citing through a phone interview his tiredness of being on death row for such a long time (Halperin, Rick, "Robert Lee Massie, The Lamp of Hope." 2001). Similarly, David Dawson's attorney stated, after Dawson's death, that Dawson was tired of living a life of imprisonment; he had considered the situation carefully and wanted to go home in peace (Bohrer 2006).

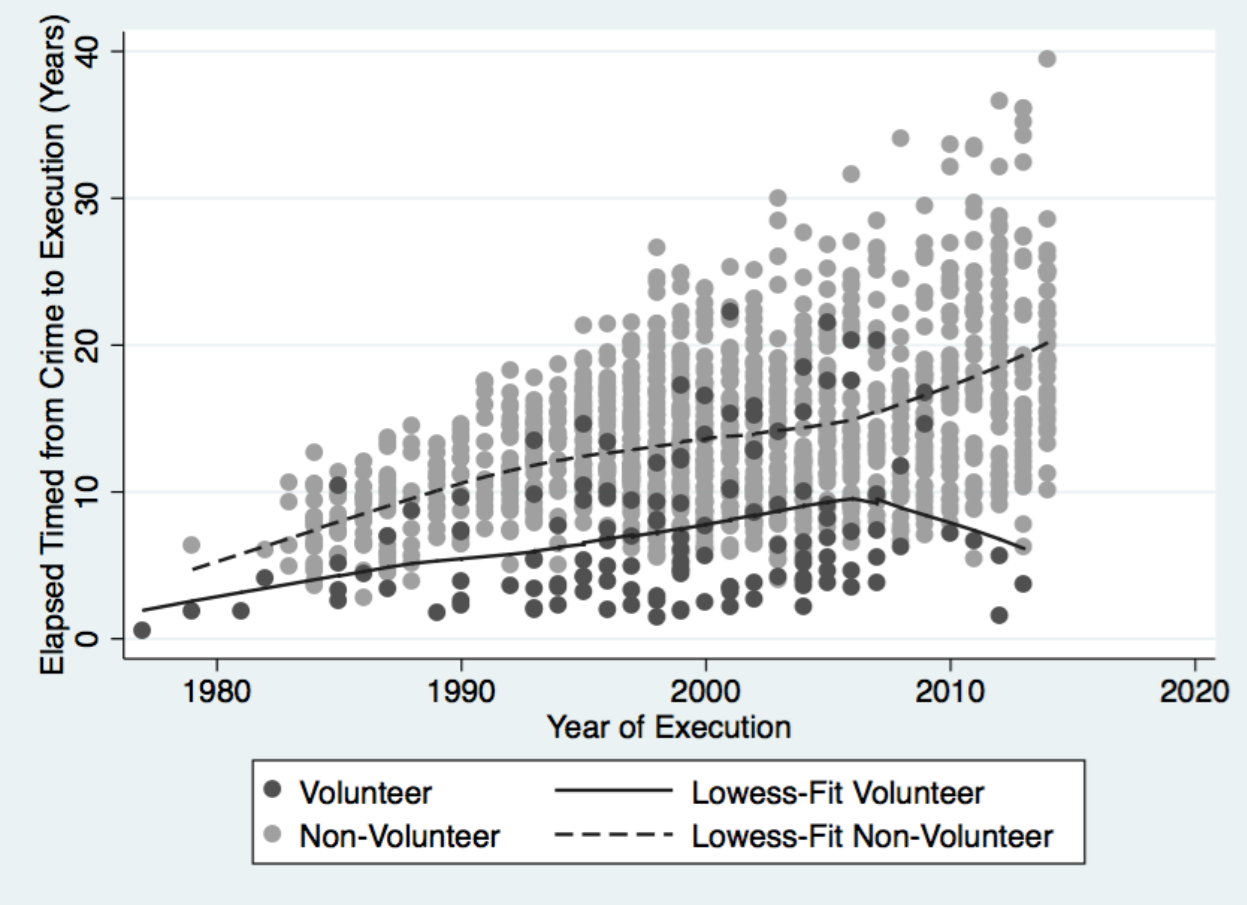
Many of the volunteers made vocal their dissatisfaction with being imprisoned for the remainder of their lives. What follows are a few excerpts of the statements and sentiments that some of the sampled volunteers expressed to either their juries or the media.

- Steven Judy had declared multiple times throughout his trial that he preferred to die than stay in prison for the rest of his life (New York Times, The. "Nevada Executes Man in Homosexual Killings").
- Gary Gilmore described life in prison as a form of 'cruel and unusual punishment' and preferred death to sitting in a prison cell (Time Magazine, "The Law: A Sudden Rush for Blood").
- Daryl Mack stated, "he'd rather be executed than spend the rest of his life locked up on death row." (Riley 2006).
- Kevin Conner claimed, "killing a person is far more honest and human than imposed repression under the guise of justice in the penal system" (Ryckaert, "Man executed for '88 murders" 2005).
- Edward Lee Harper proclaimed that "he preferred death to the slow torture of life in prison" ("Harper Executed by Lethal Injection," 1999)

For these volunteers, their worries over remaining imprisoned for a long period of time, even if on death row, were well grounded. Figure 14.1 shows the distribution of inmates

executed on a given year accompanied by their elapsed wait time from crime to execution. Volunteers are represented by a black dot whereas non-volunteers are represented by a gray dot.

Figure 14.1- Elapsed Time for Executed Inmates by Year of Execution



From this graph, it is evident that the average elapsed time on death row has increased over the decades for non-volunteer inmates. Had these volunteers decided to not waive their appeals rights, they would have lingered in a prison cell for years if not decades.

It is difficult to determine what would have been their outcome had they not volunteered. As was discussed in Chapter 8, most inmates end up having their death sentences overturned with a few that are fully exonerated; however, most overturned death sentences are converted to life in prison, and for the volunteers detailed above this would have been an unacceptable alternative.

It could be argued that a volunteer's choice to waive all appeals rights constitutes an act of suicide; the inmate's hopelessness surrounding life in prison, combined with the state's authority to kill, offers them an opportunity to escape an undesirable sanction. Some of the volunteers above, such as Gary Gilmore, actually attempted to commit suicide while on death row.

Table 14.2 Comparison of Inmates Who Committed Suicide versus Volunteering

Years	Suicides (A)	Volunteers (B)	Total (C)	Years	Suicides (A)	Volunteers (B)	Total (C)
2012	6	2	8	**1995**	6	7	13
2011	2	1	3	**1994**	2	4	6
2010	3	1	4	**1993**	3	7	10
2009	4	2	6	**1992**	3	1	4
2008	4	2	6	**1991**	2	0	2
2007	7	5	12	**1990**	1	7	8
2006	2	5	7	**1989**	1	2	3
2005	3	9	12	**1988**	5	1	6
2004	3	10	13	**1987**	4	2	6
2003	3	4	7	**1986**	3	1	4
2002	4	7	11	**1985**	1	4	5
2001	3	9	12	**1984**	4	0	4
2000	0	5	5	**1983**	3	0	3
1999	2	12	14	**1982**	1	1	2
1998	2	9	11	**1981**	1	1	2
1997	2	5	7	**1980**	2	0	2
1996	4	9	13	**Total**	**96**	**135**	**231**

Source: Bureau of Justice Statistics, Capital Punishment Series

Table 14.2 includes a yearly count of death row inmates who either volunteered to be executed or committed suicide between 1980 and 2013. Column A includes figures on inmates who committed suicide while awaiting their execution. Column B includes the number of volunteers who waived all rights of appeals within a given year. Column C includes combined figures of both volunteers and inmates who committed suicide. If the death sentence of inmates

who volunteered had been overturned and converted into life sentences, it is likely that many would have joined the ranks of prisoners who decided to take their own life with their own hands.

Conclusion Based on Self-Examination

Sean Flannagan struggled with his sexuality and when he murdered his victims it was due to his inability to cope with same-sex attractions (United Press International, "Nevada Governor Denies 11th Hour Plea to Halt Execution"). For Flannagan, killing 'homosexuals' was a good he could produce for society. His perverted sense of thinking extended to death row, where after giving his life to Jesus, Flannagan waived all rights of appeal in a good faith effort to make amends for his actions (Associated Press, "Nevada Executes Man in Homosexual Killings"). Flannagan's decision to waive all appeal rights was based on a personal notions of self-retribution. Flannagan's believed his execution would be "proper and just" and would produce a benefit for all of society (Associated Press, "Nevada Executes Man in Homosexual Killings").

Flannagan's decision to waive all appeal rights, undergirded by his religious mantra and notions of self-retribution, differs dramatically from the sampled volunteers inmates above. Flannagan's decision was based on an introspective assessment of self instead of an outward critique of his material legal environment. From an outsider perspective, the decision to waive all appeal rights may seem nonsensical and irrational; however, for the inmates in this current section, personal conceptions of justice, self-retribution, and religious forgiveness propelled their decisions to waive all appeal rights.

One common strand in this category was **religious conviction or motivation**. This was more often than not interpreted through the lens of other individuals and not the volunteer inmate himself. These other individuals witnessed or interpreted the volunteer inmate's decision as an

attempt to achieve a religious goal or to atone. For example, Harrison County prosecutor, Rick Berry, spoke about Renfro's understanding of dying by the state after Renfro was executed (Associated Press, "Man Who Killed Three Put To Death In Texas"). For Steven Renfro, being executed by the state was a way for him to be admitted to heaven. In a similar format, after his execution, Gary Gilmore's assigned chaplain spoke of Gilmore's desire to be executed as the product of an inner desire for repentance for his actions, which he described as sincere and logical (People's Magazine, "Firing Squad or Drug Overdose: Gary Gilmore Claims His Right to Die").

Another common strand in this category was **regret for past actions and expressed sympathy for the victims' relatives**. This was more often than not revealed after the inmate had waived his appeal rights and captured best during the final moments before the time of execution. For Jack Trawick, his decision to volunteer was partly due to feelings of remorse directed towards his victims; however, this sentiment was not shared until a few minutes before his execution when he stated, "I wish to apologize to the people whom I have hurt and I ask for their forgiveness. I don't deserve it but I do ask for it" (Gordon 2009). Although it is difficult to measure the level of sincerity of his apology, but he took the step of acknowledging his victims, which many of the other volunteers failed to do. Like Trawick, Peter Miniel's decision to be executed was prompted largely from feelings of remorse, especially his past actions (Carson, "Texas Execution Information Center"). Learning from his past mistakes, Miniel wanted his future "to be more peaceful in a better place" (Clark County Prosecutor, "Peter Miniel #932."). For Eric Payne, it was not until after his execution that we learned from his attorney about his feelings of remorse for his actions and expressed sorrow to his victims being sorry for his actions and apologized to his victims (Associated Press, Va. Man Executed for 1997 Slayings).

A final common strand in this category was **self-retribution and personal conceptions of justice**. Volunteers who outwardly expressed how their death would benefit society or their victims' relatives were included into this category. For Robert Charles Comer, proving to the court that he was competent enough to waive all of his appeals proved a difficult battle; however, once this right was granted, Comer expressed to the Court how his decision to be executed was promoted by the debt he had incurred by causing harm to his "victims, society, and himself" (Villa and Kiefer 2007).. Similarly, Michael Ross, who according to sources was morally opposed to the death penalty (Tuohy 2005), decided to waive all of his rights to appeals because he wanted to spare his family and the victims' families from the torment of never ending appeals (Reuters News 2005).

Discernible Mental Instability

Pernell Ford's decision to waive his appeal rights was a back in forth process; on some days he wanted to waive his appeal rights and on others he wanted to continue navigating the appeals process to have his death sentence overturned. Ford's teetering between death and life may have been exacerbated by his poor state of mental health and exhibited acts of delirium. For example, Ford, during Court proceedings, would sometimes wear a bed sheet over his head and would ask that the bodies of his victims be brought into the room so that God could resurrect them. In addition to this deranged behavior, Ford would claim that he was able to escape death row through "translation," which he claimed could allow him to visit heaven and other places throughout the world while imprisoned (Halperin, "USA (Alabama) Pernell Ford, Aged 34.").

For Ford and for some of the other volunteers sampled, mental instability seemed to have impaired their judgment with regards to waiving their appeal rights. In Ford's case, he would periodically "give up his appeals but then would resume them when his mental health stabilized"

(Halperin, "USA (Alabama) Pernell Ford, Aged 34."). Gary Gilmore under mental distress tried to commit suicide while on death row; when he failed, he shortly thereafter decided to waive his rights of appeal. Jack Trawick who, according to his attorney, had been plagued by mental illness for most of his life felt that his mental instability was a burden; he would on certain occasions proclaim to judges that if they did "not sentence him to death," but instead sentenced him "to time in the prison system, he would kill a prison system employee" (Gordon 2009).

Other volunteers had exhibited mental instability and sickness even before being sentenced to death. For example, Steven Judy was institutionalized at the age of thirteen due to a psychotic breakdown where he assaulted and stabbed a woman (Sheppard, Nathaniel. "Indiana Murderer Executed At Prison"). Sean Flannagan, struggling with his sexuality and under distress, killed two innocent individuals because of their sexual orientation.

More will be discussed about the mental instability of death row inmates; however, for these volunteer inmates, mental instability produced by stress and uncertainty only contributed to the long list of reasons for why they would choose to waive their appeal rights. Although it can be argued that every volunteer sampled in this chapter was plagued by some form of mental instability or sickness, the individuals highlighted in this section outwardly exhibited highly irrational behavior.

Idiosyncratic Reason or Other

According to Bill Brown, Andrew Chabrol's attorney, Andrew's decision to waive his appeal rights had been made up for a long time (Associated Press, "Va. Executed Former Naval Officer"). Chabrol's decision to waive all rights of appeal because neither he nor his legal team made further comments about Chabrol's choice. A once decorated military man, Andrew Chabrol was disgraced when he raped and murdered a woman that had filed a sexual assault case

against him (Associated Press, "Va. Executed Former Naval Officer"). On the surface, it appears that Chabrol's decision was nonsensical and whimsical; however, other reasons, hidden from the public, might have contributed to Chabrol's decision. For example, in addition to his tarnished military career, Chabrol also went through a separation with his wife and lost custody of his children. With almost every important portion of his life stripped away, for what other reasons did Chabrol had to live for while on death row.

While examining the sample pool, a non-negligible number of inmates sampled exposed minimal clear and discernible reasons as for why they decided to waive all rights of appeal. The inmates placed into this category in Table 14.1 were included because nothing in either their legal circumstances or personal lives revealed clear reasons for their decision to waive appeal rights. Once again, it can be argued that all of the inmates who volunteer have idiosyncratic reasons as for why they would want to waive all rights of appeal; however, the inmates in this category were included because no clear aspect of their inner thinking was revealed.

Gary Gilmore

"Let's do it," and it happened. Gary Gilmore's death sentence ushered in the era of the modern death penalty, as he was the first American citizen to be sentenced to death immediately following Gregg v. Georgia. Gilmore, who was sentenced to death for killing a gas station attendant and a motel employee, both Brigham Young University students, during a random spree of killing in 1975, furthered his infamy by waiving all legal appeal rights and volunteering to be condemned by the state (Time Magazine, "The Law: A Sudden Rush for Blood").

Up until this point, Gilmore had an army of legal lawyers willing to help with his appeals process; however, all of this support was disbanded when Gilmore decided to waive all rights to

his appeals. Gilmore wanted to die by Utah's firing squad instead of navigating through the appeals process (Time Magazine, "The Law: After Gilmore, Who's Next to Die?").

The personal circumstances surrounding Gilmore's case were often overshadowed by the media's legal coverage, which mainly scrutinized Gilmore's decision to waive all rights of appeal. During his trial, Gilmore was deemed to be "intelligent" by a certified Utah prison psychiatrist (Time Magazine. "The Law: After Gilmore, Who's Next to Die?"); however, it is false to assume that because Gilmore was declared intelligent that he was therefore mentally stable. As a young man, Gilmore was admitted twice to an Oregon psychiatric ward due to emotional disturbances (Time Magazine. "The Law: After Gilmore, Who's Next to Die?"). Since then, Gilmore had been in an out of the legal system for large portions of his life.

If Gilmore's death sentence had been overturned, it would have resulted in a life in prison sentence, which was an unappealing option for Gilmore. Gilmore described life in prison as a "cruel and unusual punishment" and his disdain for imprisonment prompted his failed suicide attempt during trial (Time Magazine. "The Law: A Sudden Rush for Blood").

For Gary Gilmore, death by the state was a way to escape the pattern of being institutionalized and incarcerated. By waiving all appeal rights and volunteering to be sentenced to death, Gilmore established a precedent for those willing to die by the state. Instead of waiting for his legal case to make it all the way through appeals, Gilmore intervened and committed an act of suicide by the state.

Robert Lee Massie

Robert Lee Massie waived all rights of appeals because he originally hoped for a "swift execution" (Department of Corrections, California). First sentenced to death in 1965 on three separate robberies and murders, Massie was diagnosed with a disorder "tantamount to an acute

schizophrenic reaction" by a prison psychiatrist (Department of Corrections, California; Kroll, Michael A. 2001). From this diagnosis, Massie lost his right to waive his appeals process. Immediately following Furman v. Georgia (1972) ruling of the death penalty as unconstitutional, Massie's sentence was commuted to life in prison (Department of Corrections, California).

After serving thirteen years in prison, Massie was paroled in 1978; a few months later, on January 3, 1979, he robbed a liquor store and murdered storeowner Boris G Naumoff (Clark's County Prosecutor. "Robert Lee Massie #703."). Massie pleaded guilty to this crime and was sentenced to death for a second time on May 25, 1979 (ProDeathPenalty.com. "Robert Lee Massie."), which was reversed by the California Supreme Court due to the fact that his lawyer never gained Massie's consent to plead guilty (Clark's County Prosecutor. "Robert Lee Massie #703."). Massie's case was then retried and, in 1989, a jury found him guilty of the crime and sentenced him to death, bringing the total amount of times being condemned to three.

From then on Massie was convinced that the justice system was corrupt and that the only way out of the adversaries he faced was to die, so he waived all of his appeals (Kroll, Michael A. 2001). In one last effort to save his life, oppositionists of the death penalty claimed that Massie had long suffered from depression and other mental illnesses so he was not competent to give up all of his appeals as had been seen in his previous time on death row; however, the judge for this case claimed that Massie was competent enough to waive the right to his appeals and that is exactly what he did (Halperin, "Robert Lee Massie, The Lamp of Hope." 2001).

According to Massie, "[he did] not consider [his decision of] forgoing the raptures of another decade behind bars to be an irrational" one. For Massie, the conditions on death row "were harsh and cruel" and he was hopeful that his death would eventually result in a challenge to California's death penalty system. After multiple legal delays and hurdles, Massie was

executed by lethal injection on January 27, 2001; his final words were “Forgiveness, Giving up all hope for a better past”(Clark’s County Prosecutor. “Robert Lee Massie #703.”)

Conclusion

Volunteers are the product of both a failed death penalty legal structure and a failed legal system in general. Constrained by their legal and personal circumstances, a volunteer will choose to commit an act of suicide by state execution rather than navigate through the appeals process. Caused by mental instability, feelings of remorse, self-retribution, religious motivation, and believing that death is a better alternative than life in prison, many inmates choose to volunteer because they fear the legal system more than they fear death.

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15

Mental Health

Betsy Neill, Chris Armistead, Caroline Lim, Lanie Phillips, Chandler Mason

Throughout history, mental illness and mental competency (previously referred to as mental retardation) have been full of stigmas. People are sometimes skeptical of mental illness or do not understand that a disorder can be just as debilitating as other medical illnesses. Mental illness can be biological or environmental, but it is almost always a combination of both. However, some mental illness can be more biological than others. Schizophrenia for example is accompanied by a long list of biological abnormalities. Post-traumatic stress disorder on the other hand can be more heavily attributed to environmental factors. This being said, Schizophrenia is also influenced by environmental factors and post-traumatic stress disorder is also influenced by biological factors. The disorders that are more heavily attributed to biological factors such as bipolar disorder, and psychotic disorders normally develop regardless of whether or not an inmate is imprisoned. The disorders more heavily attributed to environmental factors such as depression, substance abuse disorder, and suicidal behavior can develop before or as a result of experience in prison.

The way that the court decides whether or not someone meets these criterion for competency is determined by hearing the expert opinion based on a psychological assessment of the defendant. Both the defense attorney and the prosecutor can request a psychological assessment from a psychiatrist, psychologist, forensic psychologist, or other psychological expert. This assessment can test for a variety of things such as whether or not the defendant has a mental illness, whether or not the defendant is mentally retarded, whether or not the defendant is mentally capable of understanding the crimes he or she committed, whether or not the defendant

is a continued threat to society, any information about the childhood or past of the defendant, and any other psychological information that the defense or prosecution finds relevant to the case. This information is not required for a trial, but instead must be requested and presented as either mitigating or aggravating circumstances. A defendant cannot be denied any type of psychological assessment for the purpose of his or her defense. Once a defendant is sentenced to death, a psychological expert can still assess him or her while they are on death row.

In this chapter, we talk about mental health on death row. Our overall finding is that mental illness, abuse, and suicidal behavior are much more prevalent on death row than in the general population of the United States. This is not to say that mental illness is associated with violence because most individuals that are abused, suicidal, or mentally ill do not go on to live violent lives. Our data shows that at least 47.74% of inmates executed from 2000-2014 suffered from a mental illness. It seems as though these stigmas around mental illness have painted the picture of mental illness leading to an uncontrollable and dangerous individual that should not be allowed to live in society. This suggests that when mental illness is in theory a mitigating factor, it could in reality be an aggravating factor in the eyes of the jury.

Constitutionality

In 2002, Daryl Atkins challenged the constitutionality of executing someone who is not mentally competent. Atkins had an IQ of 59, eleven points below the criteria for mental retardation. In his case, the Supreme Court ruled 6-3 that executing someone that was mentally incompetent was cruel and unusual and was therefore a violation of the 8th amendment. The threshold for mental competency was set at an IQ score less than or equal to 70. This seemed like an easy, non-arbitrary way of defining mental competency, but the problem that arose was that

not everyone scores the exact same on every IQ test. If someone scores a 69 on one and a 71 on another, the jury must make the decision about which IQ is more accurate. This case has since changed the rule for all mental health issues in the context of the death penalty.

Atkins v. VA was not the first case where the concern of mental health was discussed. In 1986, Ford v. Wright ruled that executing someone that is incompetent to stand trial is cruel and unusual punishment, but the decision did not specify a constitutional definition of competency **during the trial so later courts had little direction of how to use this ruling**. In 1994, Barnard v. Collins also brought up a similar issue where the court ruled that mental illness could be different than awareness and competency. Barnard was diagnosed with a mental illness with psychotic elements and suffered from many hallucinations and delusions, but the court ruled that his awareness at the time of the trial was a separate factor than his mental illness and deemed him competent to stand trial based on his awareness at the time of the murder. This makes the line hazier between competent to stand trail and not competent to stand trial because it adds the element of deciding whether or not an illness effects awareness. All three of these cases speak to the subjectivity and arbitrariness of diagnosing someone with a mental illness or mental retardation and its effect on a person's competency to stand trial.

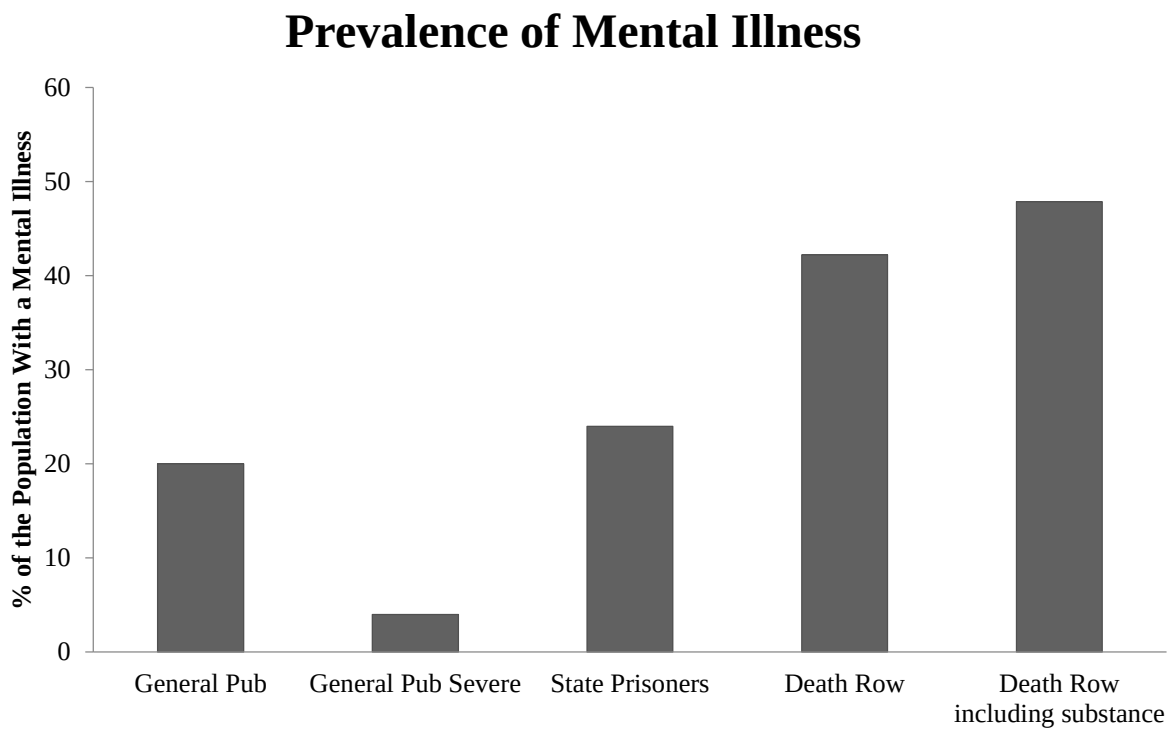
Another highly controversial topic is treatment with the intention of making someone competent to stand trial. In Perry v. LA (1990), the court ruled that it was unconstitutional due to being capricious and arbitrary to execute someone whose competency status was changed after they received mental health treatment. In the same year, Washington v. Harper (1990) ruled that medical officials can forcibly medicate someone for a mental illness with the intention of making him or her competent to stand trial if they are a danger to themselves or society. This decision was reinforced in Riggins v. NV (1992). This was a controversial ruling because Washington

claimed this violated the due process clause, equal protection, and freedom of speech. In Sell v. United States (2003), it was officially declared unconstitutional to forcibly medicate someone with a mental illness with the intent of changing his or her mental status from incompetent to competent as it violates the14th amendment. The decision held that forcibly medication someone to alter competency for a death sentence deprives the individual's liberty to deny medical treatment without due process of law.

Prevalence of Mental Illness

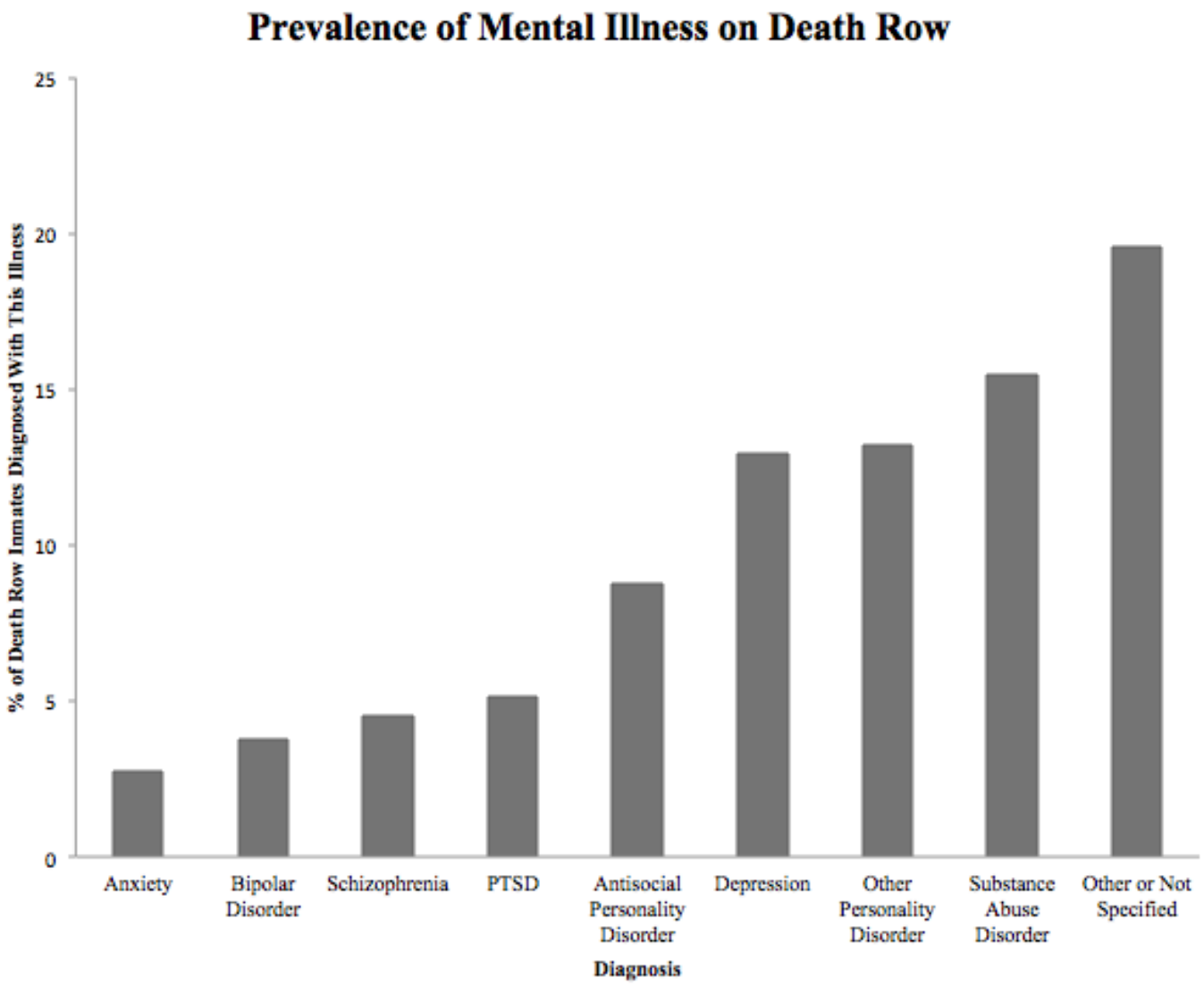
In the United States, 1 in 5 people suffer from a mental illness. Included in that are anxiety disorders which effect 18% of the United States. In our data, there are very few cases of anxiety disorders (3.14%) and a much higher rate of depressive, psychotic, and personality disorders. Therefore, the more accurate comparison is to the 1 in 20 people in the United States that suffer from severe mental illnesses. Executed death row inmates have a higher percentage of mental illness than in the general public of the United States, and than those in state prisons.

Figure 15.1



The chart below represents the prevalence of each mental illness from our data. The numbers may not match up completely because some inmates suffer from comorbidities. The category titled "Other" includes mental illness such as intermediate explosive disorder, schizoaffective disorder, organic brain syndrome, psychosis, dissociative disorders, fetal alcohol syndrome, dysthymia, thought or emotional disorders, sadism, pedophilia, obsessive compulsive disorder, paranoia, provisional sexual disorder, pathological liar, ego dystonic homosexuality disorder, depersonalization disorder, conversion disorder, adjustment disorder, psychosexual disorder, impulse control dysfunction, dementia, steroid rage syndrome, reactive disorder of later childhood, insomnia, oppositional defiant disorder, hyperactivity disorder, ganser syndrome, Tourette's syndrome, variations of these disorder, or if the psychologist diagnosed the inmate but did not list the specific illness.

Figure 15.2



Schizophrenia Case Example

Schizophrenia is relatively rare in the general United States population compared to some other mental illnesses such as anxiety disorders. Only about 1.1% of people in the United States suffer from schizophrenia; however, this number rises to 4.52% for executed inmates between 2000-2014. This is not to say that schizophrenia is a dangerous disorder because most people that have schizophrenia live a non-violent life. Psychotic disorders, such as schizophrenia, contribute to what makes the line of competency to stand trial very subjective because the court must decide

whether or not the psychotic symptoms were active at the time of the murder, and also if they impaired their understanding of the situation.

Schizophrenia, like all mental illnesses, is the result of an interaction between environmental and biological factors. There are many brain abnormalities associated with schizophrenia. Studies have shown using positron emission tomography (PET) scans that when there is no noise in a room, areas of the brain associated with auditory functions indicate brain activity on the scan at the same time that the individual reports hearing something indicating that the individual is actually having auditory hallucinations that others cannot hear (Silbersweig et al., 1995). Below is a picture that shows some of the brain differences of two identical twins, one with schizophrenia, and one without:

(we don't have the rights to this picture, but I think it would be a good visual to have something like this if we can get the rights to it. A lot of people don't believe in mental illnesses and it would be cool to show them physical evidence of it)

The process of diagnosing a mental illness is long. The individual must meet all of the criterion of the illness as defined in the latest Diagnostic Statistical Manual (DSM). Schizophrenia is defined in the DSM V as:

A. Two (or more) of the following, each present for a significant portion of time during a 1-month period (or less if successfully treated). At least one of these must be (1), (2), or (3):
    1. Delusions.
    2. Hallucinations.

3. Disorganized speech (e.g., frequent derailment or incoherence).
4. Grossly disorganized or catatonic behavior.
5. Negative symptoms (i.e., diminished emotional expression or avolition).

B. For a significant portion of the time since the onset of the disturbance, level of functioning in one or more major areas, such as work, interpersonal relations, or self-care, is markedly below the level achieved prior to the onset (or when the onset is in childhood or adolescence, there is failure to achieve expected level of interpersonal, academic, or occupational functioning).

C. Continuous signs of the disturbance persist for at least 6 months. This 6-month period must include at least 1 month of symptoms (or less if successfully treated) that meet Criterion A (i.e., active-phase symptoms) and may include periods of prodromal or residual symptoms. During these prodromal or residual periods, the signs of the disturbance may be manifested by only negative symptoms or by two or more symptoms listed in Criterion A present in an attenuated form (e.g., odd beliefs, unusual perceptual experiences).

D. Schizoaffective disorder and depressive or bipolar disorder with psychotic features have been ruled out because either 1) no major depressive or manic episodes have occurred concurrently with the active-phase symptoms, or 2) if mood episodes have occurred during active-phase symptoms, they have been present for a minority of the total duration of the active and residual periods of the illness

E. The disturbance is not attributable to the physiological effects of a substance (e.g., a drug of abuse, a medication) or another medical condition.

F. If there is a history of autism spectrum disorder or a communication disorder of child- hood onset, the additional diagnosis of schizophrenia is made only if prominent delusions or hallucinations, in addition to the other required symptoms of schizophrenia, are also present for at least 1 month (or less if successfully treated).

One example of an executed inmate that had schizophrenia was James Willie Brown. He was assessed for trail and was diagnosed with paranoid schizophrenia. Brown was born prematurely to a 15-year-old mother and grew up in an extremely abusive household. His alcoholic father regularly beat him with belts, boards, branches, chords, and his fists both at home and in public so that he would feel humiliated. His maternal uncle also regularly molested him. Around second grade he developed a stutter and was consistently picked on at school for it. His troubled childhood most likely was an environmental contribution to the development of his mental illness and his violent behavior.

Brown was arrested in 1968, but was deemed incompetent to stand trial due to hearing voices and noises, passing out, and having severe headaches. He was sent to a psychiatric

hospital instead of being incarcerated where he attempted suicide by cutting his own throat. He was prescribed antipsychotics and tranquilizers and was in and out of psychiatric hospitals. He started having delusions that he was Jesus Christ and even signed his name that way on documents. He believed that someone was trying to poison him with germs and regularly saw hallucinations of God and the Devil who advised his actions. He was diagnosed on 17 different occasions with schizophrenia. In 1981, he was found guilty of raping and suffocating Brenda Watson with her own underwear, and sentenced to death. His sentence was overturned in 1988 because he was deemed incompetent to stand trial due to his mental capacity. In 1989, he was retried and given the death sentence once again when an expert testified that he was not schizophrenic, but instead suffering from flashbacks when he abused LSD. Brown was deemed competent to stand trial and executed on November 4th, 2003.

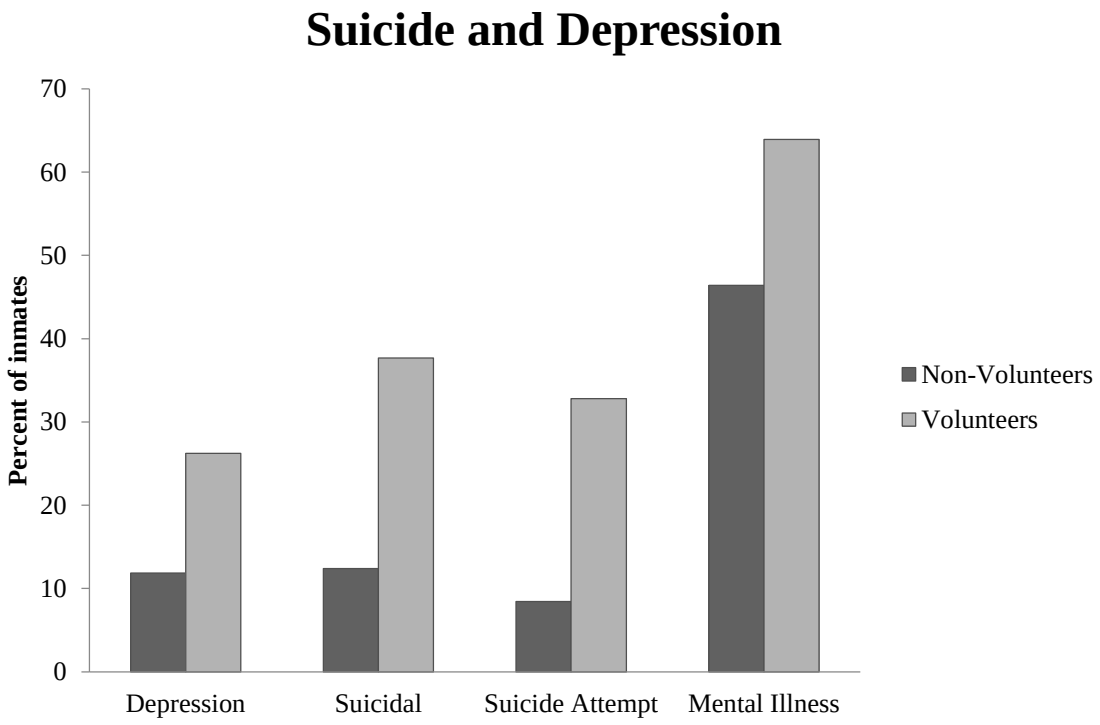
This is one of many examples where an executed inmate's psychological state and competency at the time of death is arbitrary and subjective. Despite getting the same diagnosis 17 times and previously being deemed incompetent to stand trial, Brown was ultimately determined to be competent based on the testimony of one expert that disagreed with the other seventeen.

Suicide and Depression

Of the inmates executed from 2000-2014, 10.30% of them have attempted suicide in their lifetime. Of the 796 of them, 14.32% exhibited suicidal thoughts or tendencies. This data comes from the entire lifetime of an inmate. The studies that calculate these percentages for the entire United States population do it over the course of a year. Therefore, we could not find a proper comparison to the U.S. population. However, a study done in 2013 found that 3.9% of American reported having suicidal thoughts in the past year and .6% had attempted suicide in the past year.

Because these are not lifetime statistics, it is possible that these numbers will go up. In the previous chapter we looked at volunteers on death row. In 2005, John H. Blume did a study of death row inmates that volunteered to skip the appeals process and be executed right away. He found that of the inmates that volunteered between 1976 and 2003, 88% had a mental illness or substance abuse disorder. We have also done this with our own data. Our numbers are slightly lower, but still result in similar findings–mental illness, suicidal behavior, suicidal attempts, and depression are much higher amongst those that volunteer to skip the appeal process and die right away than others on death row.

Figure 15.3



Timothy James McVeigh was executed after he bombed a building killing 168 people. He claimed that he did not kill himself during the bombing because he hoped he would get the death penalty and commit suicide by the government. He was diagnosed with depression and suicidal tendencies, but never made a suicide attempt prior to the bombing. He claimed that his bombing

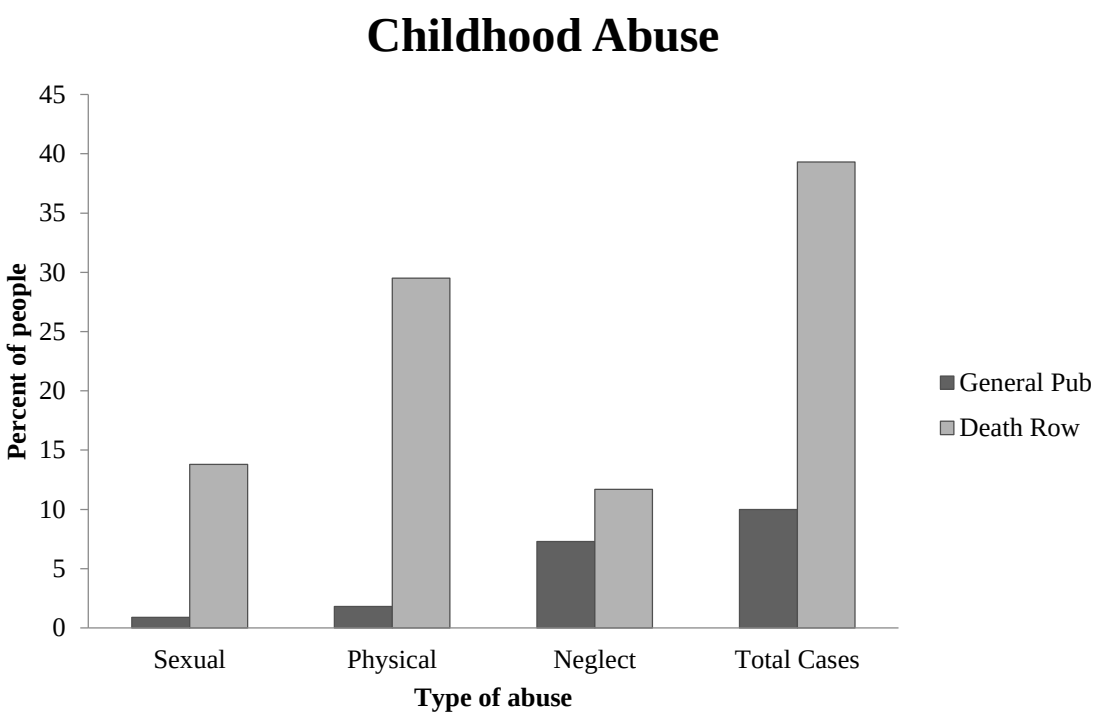
was a suicide attempt because he was committing state-assisted suicide. McVeigh is not the only one that has made this claim. Many attorneys that have depressed or mentally ill clients will argue that executing someone with a mental illness is state-assisted suicide. Our data suggests that there is some truth to this argument. If someone is suicidal or depressed and they receive the death penalty, they can volunteer to be legally killed. Our data suggests that most of those suicidal inmates are taking advantage of the state-assisted suicide.

Suicide is a very touchy subject on death row. In the case of Thomas Knight, three of the jurors were dismissed because they had prior information on the defendant. This information was that the defendant had attempted suicide in the past. Aside from this dismissal, Knight's suicide attempt was not brought up in the trial. Jurors can sometimes see suicide as a means of remorse, a mitigating factor. Larry Eugene Mann had a history of suicide attempts. He killed a 10-year old girl names Elisa Nelson, and then later that day cut his wrists with the intention of dying. His wife found him and he stated to her that he had "done something stupid and needed help." This is presented at trial to show the jury that he felt remorse and therefore is humanized in the eyes of the jury.

Abusive Upbringing

In the United States, 1 in 10 children are abused. Of those abused, 73% suffer from childhood neglect (7.3% of the US population), 18% suffer from physical abuse (1.8% of US population), and 9% suffer from sexual abuse (.9% of the US population). Of the executed inmates from 2000-2014, these numbers go up significantly: 39.32% experience some type of abuse, 13.81% of them were sexually abused, 29.52% were physically abused, 11.6% were neglected, and 4.52% provided evidence of abuse but did not specify which type of abuse.

Figure 15.4



Our statistics make up the abuse that is reported as mitigating circumstances at trial and some news articles included on the website. Many cases of abuse are not reported. There were also many mentions of statements such as a "traumatic childhood" or cases where the inmate claimed they were molested or beaten, but there was no way of proving these events happened because no one could testify as a witness. Therefore, the numbers about abuse should be viewed as the bear minimum of abuse cases with consideration of the cases that went unreported. Overall, death row inmates are grew up in abusive households much more often than the general population of the United States.

Mental illness is almost always a result of an interaction between biological and environmental factors. Being raised in an abusive environment most likely contributed both to the inmates' violent behavior and mental illness if they have one. This is not to say that all individuals that grow up in an abusive home go on to become mentally ill or criminals. However,

when the biological makeup is correct, the environmental factors can sometimes affect these biological factors. Alton Coleman is one example of an inmate that grew up in an abusive environment and later developed a mental illness. His mother was a prostitute who abused drugs and alcohol while she was pregnant with Coleman. When he was young, she threw him into a trashcan and he was saved when someone heard him crying and took him out. He was raised mostly by his grandmother who ran a brothel and gambling house. She practiced voodoo rituals where she forced Coleman to kill animals so that she could use the blood to make potions. In the brothel, he was repeatedly raped and physically abused by the customers. He also witnessed many group sex activities involving his mother and grandmother with men and other prostitutes. He was exposed to drugs, alcohol, sex, gambling and violence starting from a very young age.

Coleman was later diagnosed with pansexual propensities, a personality disorder, and brain dysfunction due to his mother's substance abuse while pregnant. The psychologist suggested that he possibly suffered from posttraumatic stress disorder, but did not present a formal diagnosis of it. A diagnosis of pansexual propensities means that he was willing to have sex with any person or object presented to him. He was arrested for multiple rape charges of adults and children and eventually received a death sentence for raping and brutally killing two women. It would be incorrect to say that Coleman's abusive upbringing caused him to lead a violent and sexually abusive life. However, it does seem likely that the violence, abuse, and exposure to so many different sexual encounters contributed to his mental illness and his violent behaviors.

Substance Abuse

Substance abuse was measured in three ways. Each inmate was coded for use, evidence presented that they abused drugs or alcohol, and dependency, addiction, or a substance abuse

disorder. We found that a higher percentage of executed inmates abused alcohol and drugs than in the general population of the United States. Overall, 15.5% of inmates suffered from a substance abuse disorder, dependency or addiction whereas in the United States, 6.31% of the U.S. population have a substance abuse disorder. The most commonly abused substances on death row were alcohol, marijuana, cocaine, methamphetamine, LSD, and PCP. _____ of the inmates were under the influence of a substance at the time of the murder.

Mental Competency

As mentioned before, in Atkins v. VA (2002), it was declared illegal to execute someone with an IQ of 70 or below. Like the case with James Willie Brown's competency, there is also a subjective element that factor into mental competency. Often times, someone scores differently each time they take an IQ test. Rickey Lynn Lewis is one of 22 inmates between 2003-2014 that scored a 70 or below on an IQ test, but was still executed. For most of these cases, the inmate was tested multiple times and sometimes tested below 70, and sometimes tested above 70. Lewis scored overall IQ scores of 59, 70, 75, and 79. Two of these scores deem him incompetent to stand trial according to Atkins v. VA, but the other two deem him competent to stand trial. The court weighed the higher scores more than the lower, and executed him on April 9th, 2013. Arbitrariness of number

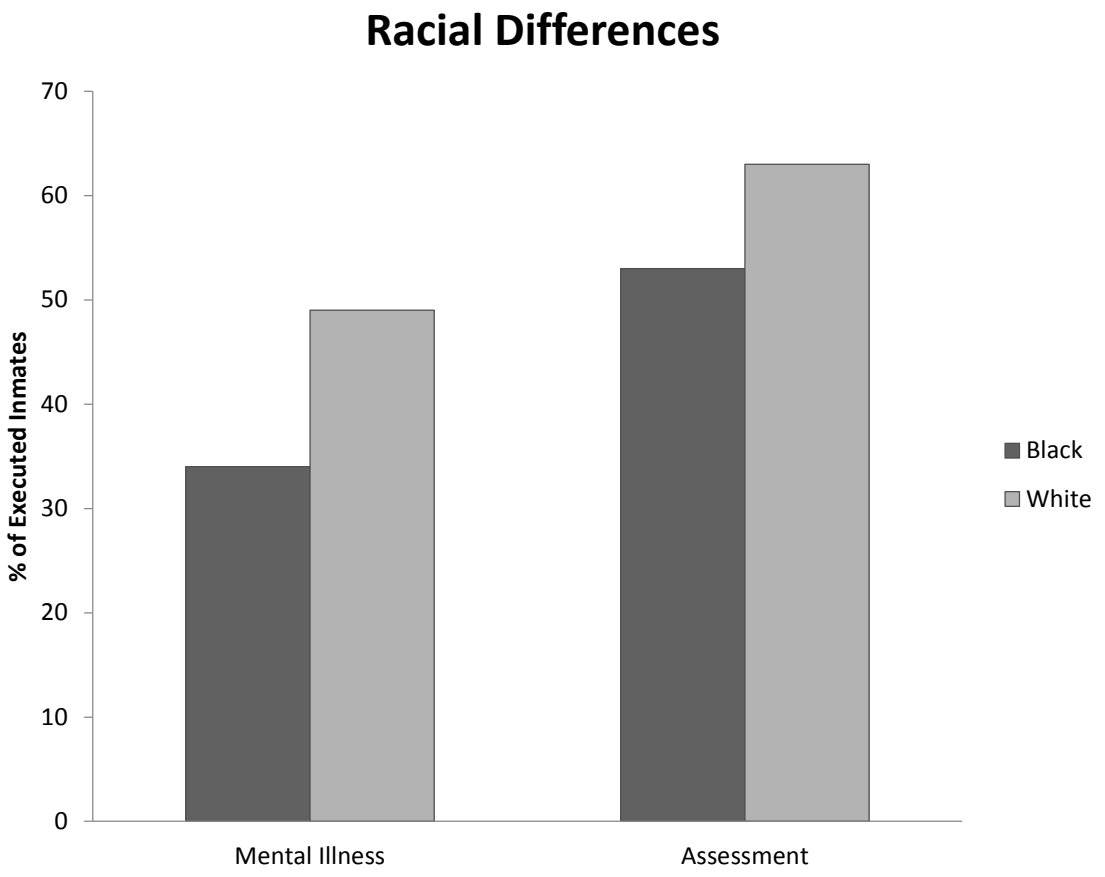
Mental competency is not only subjective in determining competency to stand trial, but it can also be detrimental to innocent inmates such as Henry McCollum. Henry McCollum was falsely convicted of the murder of Sabrina Buie on October 25th, 1984 in Robeson County, North Carolina. McCollum had an IQ that tested as low as 51 and was illiterate. During an hour-long investigation, the Red Springs Police Department fed McCollum information about the murder until he eventually signed a confession statement that he could not read. The police officers told

them that if he signed this paper, he could go home. Unknowingly, McCollum signed the confession slip with the hopes of leaving the police station. No physical evidence other than the confession linked McCollum, to the crime, yet he was given the death penalty regardless. McCollum's low IQ made him an easy target for the police department. With no attorney present, McCollum was tricked and intimidated into confessing to a crime that he did not commit. It was not until 30 years later on September 2nd, 2014 that McCollum was exonerated due to new DNA evidence linking another man to the crimes.

Racial Differences

Often time people make the general claim that white offenders are excused in the media and conversation for their crimes due to mental illness more often that black offenders are. We ran this with our data to see if there was any truth to these claims. On average, white executed inmates are more likely to be assessed for trial by a psychological expert and more likely to be diagnosed with mental illness by that expert than black executed inmates. Both of these mean differences are significant at the .001 level. This suggests that a lawyer is more likely to see a psychological expert necessary when they have a white client.

Figure 15.5


Racial Differences
% of Executed Inmates
70
60
50
40
30
20
10
0
Mental Illness
Assessment
Black
White

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We didn't know how to cite links. I will do this later if you give me a format:

http://www.deathpenaltyinfo.org/documents/122AReport.pdf

https://ncadd.org/about-addiction

http://www.policestateusa.com/2014/brown-and-mccollum-exonerated/

http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4492

http://www.innocenceproject.org/cases-false-imprisonment/henry-lee-mccollum

CLARK LINKS FOR CASE EXAMPLES:

James Willie Brown:
http://www.clarkprosecutor.org/html/death/US/brown879.htm

Timothy James McVeigh
http://www.clarkprosecutor.org/html/death/US/mcveigh717.htm

Thomas Knight
http://www.clarkprosecutor.org/html/death/US/knight1360.htm

Larry Eugene Mann
http://www.clarkprosecutor.org/html/death/US/mann1327.htm

Alton Coleman
http://www.clarkprosecutor.org/html/death/US/coleman771.htm

Rickey Lynn Lewis
http://www.clarkprosecutor.org/html/death/US/lewis1326.htm

16

Veterans on Death Row

Danielle Buso

The word "veteran" carries a positive connotation with which special respect and treatment is awarded. On the other hand, society views a death row inmate as the worst of offenders. This conflict materializes into a paradox when a veteran is convicted of murder and sentenced to death. Why does a sentence of death carry with it the subsequent dehumanization and a stripping of the honor once given to a veteran who has been convicted?

In a recent report published by the Death Penalty Information Center (2015), it is estimated that over 300 death row inmates are veterans, amounting to approximately ten percent of the current death row across the United States. In 2015, the first person executed was decorated Vietnam veteran Andrew Brannan, despite the fact he received full mental disability from the Veteran's association (DPIC 2015). This raises the crucial issue of the effects of combat on mental illness and diminished emotional capacity. A significant number of veterans who served in combat-intensive conflicts such as Vietnam, Operation Desert Storm, and Afghanistan and Iraq are reported to suffer from Post-Traumatic Stress Disorder (DPIC 2015). While convicted veterans have indeed committed horrific and tragic crimes, should they be capital eligible due to the severity of psychological trauma experienced for the purpose of keeping our country safe? An in-depth quantitative survey of veterans on North Carolina's death row and investigation into a few individuals assists in understanding how one individual transitions from honorable veteran to being judged as the "worst of the worst".

North Carolina Case Study

Table 1. Veterans on North Carolina's Death Row

	Veterans
Executed	6
Suicide	0
Natural Death	4
Sentence of Life	9
Sentence Less than Life	0
Found Not Guilty	1
Commuted By Governor	0
Racial Justice Act re-sentenced to LWOP	0
New trial or sentence ordered, outcome of trial not recorded	0
Currently on Death Row	24
Total N	44

Note: Survey from consolidated list of 401 inmates who have served on North Carolina's death row from 1976 through December 31, 2014. Categories reflect sentence outcomes. Veteran refers to inmate with prior service in any branch in the United States Military. Veteran status obtained through the use of court records and news articles.

Table x.1 provides counts of the number of veterans, categorized by sentence outcome, who are or have been inmates on North Carolina's death row between 1976 and through 2014. Out of 401 total inmates, 44 have served in the military. This is approximately 11% of the entire death row population of North Carolina, which is close to the aforementioned national estimate of 10%. The state of North Carolina has executed 43 inmates since 1976, six of which have been veterans. This constitutes about 14% of executions, which is small yet significant.

Kenneth Lee Boyd

On December 2, 2005, Kenneth Lee Boyd was the 1,000th inmate executed in the United States (Clark County Prosecutor). Described by members of his community, Boyd was a loving father, shy yet likeable, and a hardworking employee. With an IQ of only 77, he suffered a difficult childhood, growing up as an only child with a strict father and with several learning disabilities.

These disabilities prevented him from finishing high school despite his best efforts. As a result, Boyd joined the Army at the age of 18 in 1966 and was first stationed in Germany. Due to his status as an only child, the Army refused to deploy Boyd to Vietnam. Thus, he volunteered to serve in Vietnam, an act that demonstrated his love for and service to this country. In Vietnam, he witnessed many horrific acts in combat including the death of many friends and getting trapped in a minefield. As a result, he suffered from several blackouts and was thus honorably discharged in 1969 in addition to receiving a medal for gallantry. Despite no longer serving in the military, Kenneth Boyd remained forever changed and continued to experience blackouts and flashbacks. He married Julie Curry and had three sons for which he worked long hours as a truck driver to provide for his family.[1]

On March 1988, Boyd entered the home of Curry, his then estranged wife, and her father and shot and killed the two with a .357 Magnum pistol he had purchased just days prior. He had developed an alcohol addiction and was heavily intoxicated at the time of the murder (Clark County Prosecutor). After the murder he called 911 to report himself and subsequently surrendered to the police, not being able to recall the actions he had just carried out.[1]

Kenneth Boyd did not have a violent past of any kind. His hard work, reputation in his community, and service to his country exemplify that his commission of the murder was severely out of character. His marriage with Curry caused him a great deal of pain for which he lacked the adequate emotional coping capacity due to his PTSD. The murder was a culmination of various emotional traumas. In police questioning, Boyd described the crime as being "similar to being in Vietnam".[1] Over 800,000 Vietnam veterans were diagnosed with PTSD (DPIC 2015). These combat veterans experience a kind of severe trauma that most American would never experience,

which should be addressed in the broader discussion of severe mental illness and capital punishment. [155]

James Floyd Davis

Another Vietnam veteran, James Floyd Davis is a current inmate on North Carolina's death row. Sentenced for the murder of three workers at Union Butterfield Warehouse, is a severely mentally ill man subject to execution. Davis experienced a terrible childhood, growing up with a verbally and physically abusive father who would threaten to kill Davis, Davis' mother, and his siblings.[2] After 15 long years of abuse, Davis was seized by Child Welfare and placed into foster care until his graduation from high school. Thirteen days after his graduation, Davis enlisted in the military.[2]

James Davis served two tours in Vietnam, which consisted of eight campaigns of nearly continuous combat. During his first tour, Davis was stationed in one of the most dangerous regions for American soldiers and was severely injured by a piece of shrapnel during the Tet Offensive.[2] Following hospitalization, he served the remainder of the tour. Rather than returning to civilian life, Davis subjected himself to serve his country in a second tour in Vietnam. During this time, Davis was stationed in a province considered to be a "hotbed" of Viet Cong activity and witnessed the deaths of over 650 Americans, including 25 of his fellow artillerymen.[2] Like many other Vietnam veterans, Davis suffered severe psychological damage in accumulation with his traumatic childhood. Fellow veterans who served with Davis reported noting a devastating change in Davis' personality, citing the psychological toll of combat.[156]These effects returned home with Davis and ultimately culminated in the tragic murders.

[155] Kenneth Lee Boyd, "A Plea for Clemency"
[156]Rose, Ken and G. Engel. "Clemency Petition Presented on Behalf of James Floyd Davis, A Prisoner Under Sentence Of Death" *Center for Death Penalty Litigation.* 6 Nov. 2012.

Due to his war experiences, Davis faced anxiety, isolation, alienation, and anger upon his return to civilian life. When he returned from Vietnam in the 1970s, there was little medical knowledge of Post-Traumatic Stress Disorder and the Veteran's Administration did not offer adequate treatment. As a result, Davis continued to suffer, holding various jobs because he could no longer find peace of mind or place trust in people.[157]

The case of James Floyd Davis illustrates that a death sentence is excessive punishment for a "patriot who had given so much to his country and suffered so much in return."[3] In fact, The United States Army held a ceremony in 2009 at Central Prison in which Davis was awarded the Purple Heart, the Good Conduct Medal, the silver service star, and three bronze service stars for his service in Vietnam.[3] These belated awards are telling of a man who served his country honorably, but unfortunately fell victim to the psychological traumas of war and driven to commit a crime he may not have committed with adequate treatment.

Warren Gregory

Warren Gregory was sentenced to die by the State of North Carolina for two counts of first-degree murder in April of 1993 and currently resides on death row. Prior to his arrest, Gregory was a member of the United States Marine Corps, for which he was recruited immediately after high school in 1988. Upon his completion of basic training, Gregory exhibited behaviors characteristics of a positive, committed role model through his assistance in Marine Corps recruiting efforts.[158] Warren Gregory fought in the First Gulf War. The First Gulf War received much speculation regarding gas attacks. As a result, soldiers, including Gregory, were sent in a "climate of fear".[4] Throughout the tour, Gregory remained in a constant state of alert, due to the

[157] See Rose and Engel, note 2 above
[158] State of North Carolina v. Warren Robert Gregory. General Court of Justice Superior Court Division. 18 Mar. 2015. Print.

unpredictability of enemy attacks using fires and bombs. Often times, these oil fires provided no visibility, thus increasing fear.[4] After the end of his service, Warren Gregory was discharged with no disciplinary violations and received six decorations. The affidavits of fellow service members depict him as a model Marine with remarkable enthusiasm and performance.[159] However, they equally admitted to noticing differences in his appearance and mannerisms upon his return from Operation Desert Storm. Once a man of proud posture and crisp uniforms, Gregory appeared slumped and tense. Warren could no longer relax or stay in one place.[5]

After his return from overseas, members of Gregory's units were not screened for trauma symptoms and many exhibited difficulties in transitioning back to civilian life and increased alcohol use.[5] This lack of care exacerbated Gregory's flashbacks, nightmares, and anger. When he was initially imprisoned pending trial, physicians reported him as having hallucinations in which he heard shots and bombs as if he were in combat.[5] Far from the man he was prior to his deployment to the Gulf, Gregory testified at his initial trial, speaking manically and in such a way consistent of someone suffering a debilitating mental illness. [5]

Warren Gregory continues to await his execution on death row despite having a severe mental illness. A reported 175,000 Desert Storm veterans suffer from PTSD, yet few receive the treatment they desperately need (DPIC 2015).

Conclusion

As illustrated through the case studies, many death row inmates who are veterans suffer severe illness. It is questionable if the traumatic conditions of death row are considered cruel to these individuals who have already suffered severe trauma that the majority of citizens never experience. Additionally, the majority of inmates from this North Carolina study received

[159] See *State of North Carolina v. Warren Robert Gregory*, note 4 above

honorable discharges from the military and had no prior infractions. Yet, they proceeded to commit horrific crimes in which they were awarded the ultimate punishment. We can turn to possible explanations for why juries inflict capital punishment on those many would call heroes otherwise. The DPIC report suggests the possibilities of inadequate investigation into PTSD by defense attorneys, as well as the blatant dismissal of mental illness from war claims and the dismissal of evidence of mental trauma. Perhaps it's the lack of attention to and treatment of mental health in the military and consequential drug and alcohol abuse. If *Atkins v. Virginia* (2002) outlawed the execution of a mentally disabled individual, then why have veterans who exhibit debilitating mental illnesses been executed? As the death penalty continues to be more scrutinized in some areas such as lethal injection procedure, it is imperative to take a further look at mental illness and the need for reform.

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17

Public Opinion

Caroline Lim, Emily Williams

Throughout this book we have elaborated on different aspects of the death penalty and how it is implemented in practice. Following discussions of mental illness, botched executions, the importance of the victim, and more, it is necessary to step back and ask how the general public feels about these policies.

At this point it is important to understand the democratic element behind the death penalty. Public opinion in the United States has pull on whether or not policies are implemented, and if so, whether they stay implemented. Given recent research regarding the death penalty, and increasing standards of decency, the shift in public opinion over a long period of time is noticeable; however, if we look at trends, as we will in this chapter, we can see that public opinion towards the death penalty is relatively stable. This stability stems from a policy that is firmly engrained in individuals' moral and religious understandings, as well as a long history in supporting the punishment (Alvarez and Brehm 2002; Baumgartner and Jones 1993; Kingdon 1984; Pool and Rosenthal 1984). Throughout this chapter we will explore what this means and whether polling is an accurate evaluative method to determine public opinion.

Support for the death penalty is the majority, and we can see that it remains fairly stable over time. However, this is a surface level understanding of the complexity of public opinion polls. Questions regarding the death penalty that are used to generate an understanding of support versus opposition range dramatically. One question, the most general, will ask "Are you in favor of the death penalty for persons convicted of murder", and the next question may substitute murder for mugging. Other angles may be taken as well. For example, a question that

attempts to measure why people support the death penalty may ask: "it is a deterrent, that is fear of such punishment discourages potential murderers... is this among the best reason to support the death penalty, or not?" Therefore, support for the death penalty is the majority; however, this is in the abstract. When we factor in the mentally disabled, juveniles, and alternative options such as LWOP support decreases. So the answer to "Are you in favor of the death penalty for those convicted of murder" ends up being one of the harshest questions. (Bowers 1993 Cullen et al. 2000; Durham et a. 1996; Ellsworth and Gross 1994; Fox et al. 1991; Vidmar and Ellsworth 1974).

This chapter, in addition to offering an updated version of Baumgartner's aggregate public opinion index in book *The Decline of The Death Penalty and The Discovery of Innocence,* will offer a comprehensive analysis of question wording. Further, a state-by-state analysis will show that support for the death penalty does not dramatically change depending on region, even though certain geographical areas tend to sentence and execute more. A case study of Houston will show that despite Harris County's track record regarding sentencing and executions, the population does not favor the death penalty more dramatically than the national opinion.

To start, it is helpful to understand why people support the death penalty. We have no come to the conclusion that throughout history, more than 50 percent of the population has supported the death penalty at any given time. In 2003, Gallup survey organization posed the question "why do you favor the death penalty for persons convicted of murder?" was posed. The majority of respondents, 51 percent, answered that they support the death penalty for the reason of "an eye for an eye/they deserve it/fair punishment". The next largest response rate was for deterrence and cost associated with prison, 15 and 8 percent respectively. The last response, with a rate under five percent, includes biblical reasons.

The response regarding cost shows that the public is largely misinformed on the death penalty. This includes general facts about the death penalty including how often the death penalty is used, how a capital case proceeds, and available alternatives (Bohm et al. 1991; Sarat and Vidmar 1976; Vidmar and Ellsworth 1974). A previous chapter showed that the cost of life without parole is significantly less than the cost of a capital case that leads to execution. This evidence was presented through numerous studies that all arrived at a similar conclusion: Capital cases more expensive than non-capital cases for reasons of requirement of two attorneys, longer appeals processes, longer times spent in prison, etc.

Further, nine percent of people primarily support the death penalty for reasons of deterrence; however, a different question, posed in 2002, shows that 62% believed that it has a major deterrent effect. (FIND INFORMATION ABOUT DETTERENCE. I don't know if there is a story to tell here). In 1999, more than half of people claimed that they would still support the death penalty if it did not have a deterrent effect.

While public opinion is generally correlated with policy change, explored later in the chapter, there are exceptions. For example, we can look at the case of executing accomplices of murder. Since the death penalty was reinstated, 21 people have been executed for either a felony murder or a contract killing. In both cases they have been executed for involvement in the crime, not physically completing the crime (DPIC).

If we examine public support for the death penalty for accomplices, we can see that it doesn't match up with the 21 people who have been executed. Two survey questions, by the same organization (Princeton Survey Research Associates), have asked the questions about whether respondents support the death penalty for accomplices to murder. The specific question wording is as follows: "Please tell me whether you would generally favor or oppose the death

penalty for murder in each case of the following circumstances. If the convicted person was... only an accomplice to the person who actually did the killing... would you favor or oppose the death penalty?" This question was asked in 1995 and generated 32 percent support, and then again in 1997 where it generated 27 percent support. We can see that general public support for this crime, as death penalty eligible is not substantial; however, we have seen it occur. Felony murders, aiding in a situation that leads to murder, has resulted in 12 death sentences. Three of these involved the killer receiving a lesser sentence (DPIC). This is one example of how public opinion does not correspond to the usage of the death penalty.

Another example arises in the publics opinion of sentencing the mentally retarded to death. The chapter regarding mental health of inmates on death row had an overall finding that that mental illness, abuse, and suicidal behavior are much more prevalent on death row than in the general population. Data compiled shows that nearly 50 percent of inmates executed from 2000-2014 suffered from a mental illness, a substantially larger number that the general population. Recognizing this as a problem, a Supreme Court decision in 2002, *Atkins v. Virginia*, determined that executing someone a mentally retarded defendant was cruel and unusual, thus a violation of the 8th Amendment.

The public agrees with this determination. The question about whether respondents felt mentally retarded people should be executed for death-eligible crimes was first posed in 1989 and resulted in 71 percent in opposition. Through the years the responses stay fairly stable. The highest level of support for the death penalty in these cases, by a wide margin, was 29 percent—most were less.

This is another example of where public opinion is not echoed by practice. *Atkins v. Virginia* was a 2002 ruling, meaning the death penalty for the mentally ill was common for over

15 years before then. Survey questions assessing the public's feelings regarding this have always been negative, dating back to 1989.

This disconnect between policy and public opinion can call into question constitutionality of the practice. The U.S Supreme Court has explicitly stated that public opinion on the death penalty may serve as a relevant factor in determining the constitutionality of the practice (Baumgartner et al. 2008). A Supreme Court decision: *Weems v. United States* deliberated on the extent of the 8th amendment saying, "it is not fastened to the absolute but may acquire meaning as public opinion becomes enlightened by a humane justice" (Weems 1910) In *Furman*, when the death penalty was abolished in 1972, the court recognized public opinion as an indicator of "contemporary standards of decency". Public opinion, for this reason and more, is important in understanding the past and present versions of the death penalty, as well as understanding the principles guiding the future of the punishment.

Another reason we cannot neglect the importance of the death penalty is that citizens are inclined to vote for political candidates that align with their beliefs. Since the death penalty, unlike many policies, is a very firmly held belief (whether pro or anti) by the general public, politicians are likely to present their platform in a way that appeases the masses. This is why the death penalty has not sparked much debate as a partisan issue, but rather remains bi-partisan. In 1988 the question "How important is a candidate's position on the death penalty when you decide how to vote in an election for Governor or state legislator? Is it...one of the most important, very important, somewhat important, or not too important?"[160]. 84 percent of respondents felt is was *at least* somewhat important to obtaining their votes.

[160] Gallup Poll (1989)

Similarly, over 10 years later, in 2001, the question "In deciding how to vote in a state or national election, how important is it to you that a political candidate agrees with your position on the death penalty--very important, somewhat important, not too important, or not important at all?"[161]. Over 60 percent responded that is was at least somewhat important to their decision. While these numbers are indeed the majority, it is important to note that we do see a downward trend. We hope to trace this trend through other questions, and then through the national aggregate level of public opinion on the death penalty over time.

1997 was the highest support for public opinion on the death penalty since the death penalty was reinstated in 1976, and 2014 is generates the lowest approval percent since the death penalty was reinstated in *Gregg v Georgia*. 1997 has such high support levels because 50 percent of the questions asked that year were regarding support for the death penalty for Timothy McVeigh, the Boston bomber. In order to show a comprehensive sample of questions related to the death penalty in a given year, we chose a year that asked a variety of questions, 1995. Table 17.A1 shows different questions asked regarding the death penalty in 1995, and what the pro percent was for each question.

Table 17.1. Public Support for Death Penalty Based on Different Questions in 1995

% Support	Pro Option	Question

[161] ABC/Washington Post Poll (2001)

80	Favor	Do you favor or oppose the death penalty for persons convicted of murder?
71	Yes, Death penalty	In a recent case that received a lot of media attention, Susan Smith confessed to drowning her two young sons in her car. If found guilty of murder in this case, do you think Susan Smith should receive the death penalty, or not?
52	Favor	(Please tell me whether you would generally favor or oppose the death penalty for murder in each of the following circumstances.) If the convicted person was...a young teenager at the time of the crime, would you favor or oppose the death penalty?
32	Favor	Please tell me whether you would generally favor or oppose the death penalty for murder in each of the following circumstances. If the convicted person was...only an accomplice to the person who actually did the killing, would you favor or oppose the death penalty?
14	Yes, happened in the past 20 years	How often do you think a person has been sentenced to the death penalty who was, in fact, innocent of the crime he was charged with? Do you think this has ever happened in the past 20 years, or do you think it has never happened?[162]

This table, limited by its expression of data for a specific year, gives insight into how different questions on the death penalty generate vastly different answers. The questions regarding support for the death penalty for murder is the most commonly asked question on the subject by survey organizations. This question often ends up being the harshest in terms of percent support because it doesn't prompt any emotional understanding of the policy, and insinuates the "eye for an eye" message.

[162] Percent support for this question is percent of people who do not feel that an innocent person has been executed in the past 20 years.

If we are to ask a more specific question about the death penalty, we get different results. For example, as discussed before, over half of the questions in 1997 were regarding support for the death penalty for Timothy McVeigh, the Oklahoma bomber. These questions generate higher levels of support, averaging in the 60th percentile. Similarly, questions about Susan Smith in 1995 generated a high level of support, at 71 percent. These types of questions cause emotions and instill within respondents a desire to punish someone more so than the "average" murderer.

The question regarding whether or not the public believes that an innocent person has been executed in the last 20 years is rather incredulous. 86 percent of people agreed that an innocent person has been executed, leaving only 14 percent to believe that no innocent person has been executed. This is an indirect question because it does not directly test whether or not they approve of the death penalty. However, we assumed that those who felt an innocent person had been executed would also be opposed to the death penalty for reasons of a faulty system. This seems to present a contradiction, showing that a large percentage of people who support the death penalty also believe that an innocent person has been executed.

Overall, different questions generate dramatically different answers regarding opinion on the death penalty. Later, we use all of these responses and questions to generate a more dynamic and holistic understanding of the death penalty over time.

Table 17.2 shows support for the death penalty based on different question wordings over time, as opposed to concentrated in one year. Gallup was the predominantly used organization for this table; however, Gallup did not ask certain questions in certain years, and different organizations were used for those (outlined in the footnotes). Since some questions had been asked in the same year by different organizations, Gallup Organization was preferred, and then NORC, the General Social Survey. The first column represents our index, a dynamic measure of

public opinion based on all of the surveys we found that fit the criteria[163]. The index includes all of the questions previously mentioned and more. Recognizing that each question measures different variables regarding the public's general opinion on the death penalty, we feel that this is important in gaining a holistic understanding of the trends. For example, a question about the question about whether or not respondents support the death penalty for the mentally ill tests support for the death penalty, as well as understanding of mental conditions and how those should factor into death sentencing. Similarly, questions about specific people, such as Saddam Hussein, tap into the publics desire for the death penalty for terrorists, and the severity they place on the crime. In sum, the index represents a comprehensive level of support for the death penalty throughout the years, diminishing the margin of error that may arise in quantifying single survey questions. The index will be explained in further detail later on, but for the purposes of this table the index is representative of a comprehensive level of support for the death penalty in any given year.

[163] See appendix for criteria for survey questions.

Table 17.2. Support for the Death Penalty Depending on Different Question Wording

Year	Index	1	2	3	4	5	6	7	8
1976	59	72							42
1977	61	72	64						
1978	59	70							
1979	57	71							
1980	60	71							
1981	60	73							
1982	64	78							
1983	64	77							55
1984	63	74							
1985	64	78					62		67
1986	63	76	80				61		66
1987	63	74							
1988	64	83							
1989	64	83						21	
1990	66	80							66
1991	64	80					60		55
1992	63	80					58		
1993	65	77					67	27	
1994	64	83					61		
1995	64	86			32			9	
1996	66	80							
1997	67	76			27		68		
1998	64	73					54		
1999	62	76		73					
2000	60	71		71			54		
2001	60	71			70		55	19	47
2002	60	74		76	70	57	55	13	
2003	59	72		76	67		55	29	
2004	59	73		76	70	59	52		36
2005	60	72		79	74	64	59		
2006	60	70		78	76	61	50		35
2007	59	70			71	60	52		
2008	58	68		77	67	59	52		
2009	58	68		78	67	63	54		
2010	59	69		81	69	62	52		
2011	58	64		73	70		49		33
2012	56	66			63		49		
2013	55	63	66	52	67	57	53		
2014	56	66		57	69	55	53		

2015	55	62	62	66	47

Note: General question wording is as follows. Question wording may be different for certain years, depending on organization, but were filtered to make sure the same thing was being asked.

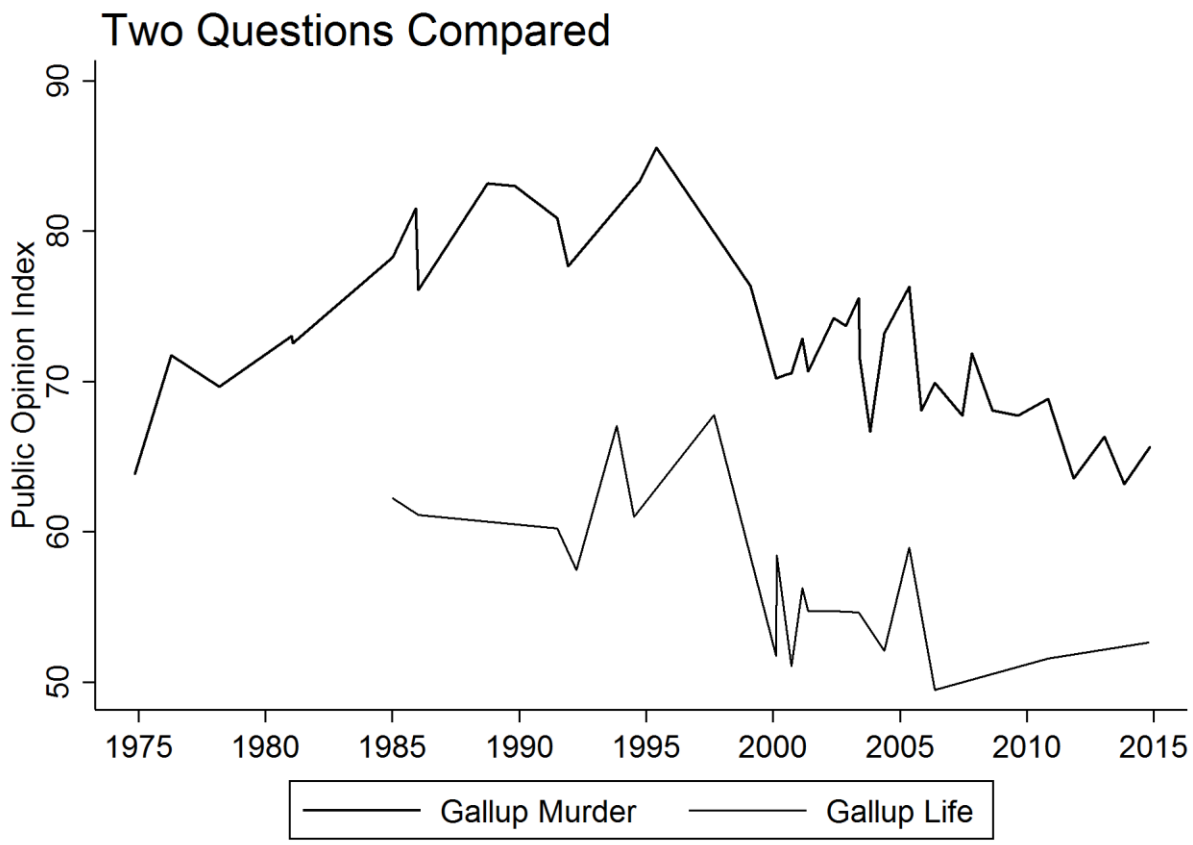
Question 1: Are you in favor of the death penalty for persons convicted of murder?[164]
Question 2: In general, do you think people convicted of murder during an act of terrorism should receive the death penalty or life in prison with no chance of parole?[165]
Question 3: In your opinion, is the death penalty imposed too often today or not often enough?[166]
Question 4: (Next, I'm going to read you a list of issues. Regardless of whether or not you think it should be legal, for each one, please tell me whether you personally believe that in general it is morally acceptable or morally wrong.) How about...the death penalty?[167]
Question 5: Generally speaking, do you believe the death penalty is applied fairly or unfairly in this country today?[168]
Question 6: If you could choose between the following two approaches, which do you think is the better penalty for murder -- the death penalty or life imprisonment, with absolutely no possibility of parole?[169]
Question 7: Do you favor or oppose the death penalty for...the mentally retarded?[170]
Question 8: Do you feel that the death penalty acts as a deterrent to the commitment of murder, that it lowers the murder rate, or not?[171]

[164] Gallup unless: 1977, 1979, 1980, 1982-1984, 1987, 1993, 1998 from National Opinion Research Center, 1992, 1996 from ABC/Washington Post, 1997 Pew Research Associates, 2015 CBS
[165] Quinnipiac University Polling Institute
[166] Gallup
[167] Gallup unless: 1995, 1997 Pew Research Associates
[168] Gallup
[169] Gallup unless: 1998 CBS, 2007 ISPOS, 2998 Death Penalty Information Center, 2009, 2015 Quinnipiac University Polling Institute, 2011 Opinion Research Corporation, 2012, 2013 Public Religion Research Institute
[170] 1989 Louis Harris & Associates [Some people think that persons convicted of murder who have a mental age of less than 18 (or the 'retarded') should not be executed. Other people think that 'retarded' persons should be subject to the death penalty like anyone else. Which is closer to the way you feel, that 'retarded' persons should not be executed, or that 'retarded' persons should be subject to the death penalty like anyone else?]1993 The Tarrance Group and Greenberg/Lake [Do you favor or oppose the death penalty for mentally retarded individuals convicted of serious crimes, such as murder?], 1995 Princeton Survey Research Associates [(Please tell me whether you would generally favor or oppose the death penalty for murder in each of the following circumstances.) If the convicted person was...mentally retarded, would you favor or oppose the death penalty?] , 2001 Opinion Dynamics [Do you favor or oppose the death penalty for a person convicted of premeditated murder, if that person is shown to be mentally retarded?], 2002 Gallup [Do you favor or oppose the death penalty for...the mentally retarded?], 2003 Quinnipiac University Polling Institute [In general do you agree or disagree with the decision that banned the death penalty for the mentally retarded?]
[171] Gallup unless:1976, 1983 Louis Harris & Associates, 1990, 2001 CBS

Table 17.2 shows how different questions have received different response rates over time. Generally, we see that there is a downward trend of rates of support. This does not hold true for the question regarding the death penalty for the mentally ill, which as discussed earlier has always produced very low support. Figure 17.1 assesses similar information. Comparing the questions of death penalty for murder, and then death penalty for murder when an alternative option is given, presents interesting results. From this, we can conclude that respondents don't realize that if they were to answer no to the general "Are you in favor of the death penalty for persons convicted of murder", the defendant would still be facing harsh penalties—specifically life in prison without parole, which appears to the safer and more cost effective option in the realm of criminal punishment. When this is spelled out for survey respondents, they recognize the appeal of the second option. This is part of the reason that the general "Are you in favor of the death penalty for persons convicted of murder" receives such high levels of support.

Figure 17.1

[Support for Death Penalty for Murder Compared to Support for Death Penalty for Murder when LWOP is an Option]



Specifically, Figure 17.1 shows the trajectory of two survey questions over time. The "Gallup Murder" question asks: "Are you in favor of the death penalty for persons convicted of murder" while the "Gallup Life" question asks "What do you think should be the penalty for murder--the death penalty or life imprisonment with absolutely no possibility of parole?"

The purpose of this figure is to identify what occurs when respondents are given alternatives to the death penalty. As we can see, respondents were much more likely to support the death penalty when that appeared to be the only penalty option When they were given another option, life imprisonment with absolutely no possibility of parole, support dramatically

decreases. This is important because when alternatives are offered, it no longer appears that support is substantially in the majority (Bowers 1993; Cullen et al. 2000, Durham et al. 1996; Fox et al. 1991; Vidmar and Ellsworth 1974) Rather, into 2000s support seems to average around 50 percent.

In 2005 the question "What do you think should be the penalty for persons convicted of murder--the death penalty, or life in prison with no chance of parole, or a long prison sentence with a chance of parole?" was asked by CBS News. This question had 46 percent support towards the death penalty when two other options were available. In 2005, "Gallup Murder" had 76 percent support, and "Gallup Life" had 59 percent support. We can see from this that the more alternatives a respondent is offered, the less likely they are to support the death penalty.

Response rates also decrease when the defendant's crime was something other than murder, the defendant is a juvenile, or the defendant is identified as mentally retarded. (Bowers 1993: Culen et al. 2000, Durham et al. 1996, Ellsworth and Gross 1994; Fox et al. 1991; Vidmar and Ellsworth 1974).

While this is effective to understand trends across the two questions, and how the public shifts when given alternatives, it is also worth noting that there were not survey questions that posed an alternative before 1985, making the analysis less complete.

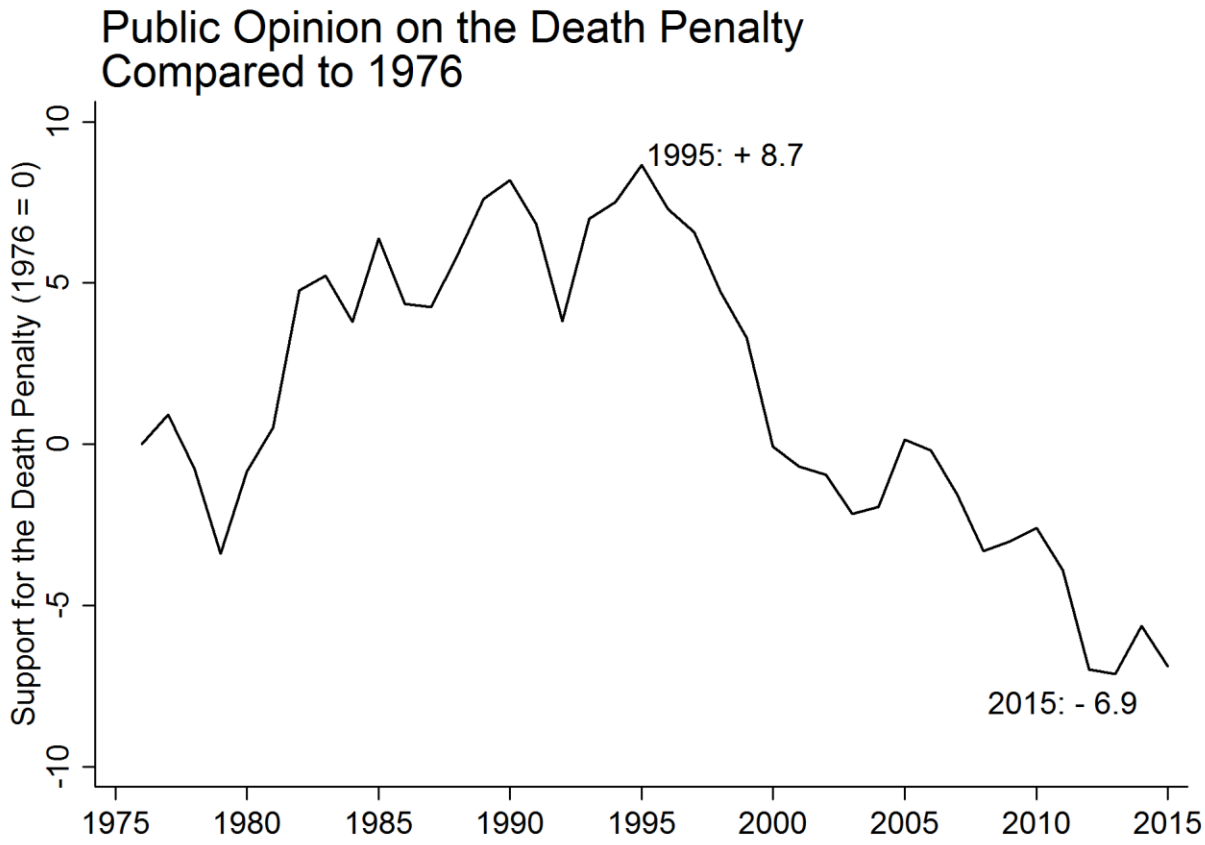
Figure 17.2 is our complete index on the death penalty into the modern era. We identified 488 national surveys with 66 distinct questions about various aspects of the death penalty, including direct and indirect questions (Baumgartner et al. 2008) For example, the most common question is a direct question stating: "Are you in favor of the death penalty for persons convicted of murder?" This question tends to align with the index very well. Indirect questions tend to fall beneath the index. For example, a question that asks whether or not the respondent

believes the death penalty acts as a deterrent would be an indirect question. (Bohm et al. 1991; Sarat and Vidmar 1976; Vidmar and Ellsworth 1974) we know that public is misinformed about the frequency of the death penalty in practice, procedural steps for deciding to pursue a capital case, and alternatives available. (Baumgartner et al. 2008)

Direct questions resulted in lower support levels depending on what was asked. For example, one of the direct questions asked whether one supported the death penalty for mugging. This generally generated very low levels of support. On the other hand, the direct questions were also those that rest above the index line. As discussed earlier, the question "Are you in favor of the death penalty for someone convicted of murder?" is one of the harshest questions. It generates an average of 58 percent support over time. This question has also been asked the most into the modern era.

The Stimson algorithm, now standard in the analysis of aggregate dynamics of public opinion, assesses the shared movement over time in survey responses to the same question at two or more time points. If the questions load on the same underlying factor, assessed by shared variance over time, then the overall index can be seen as an overall representation of the underlying public opinion on that topic. Our index on death penalty opinion explains 72.51 percent of the underlying variance.

Figure 17.2



Note: Complete data collection and methods provided in Appendix.

In looking at Figure 17.2 it is important to recognize that the numerical value is not of significant importance. Since the index is composed of multiple survey questions asked in any given year, it is difficult to interpret what a numerical value may represent. Rather, our index is important for evaluating changing in public opinion over time. Regardless of what the quantitative levels of support, we know that public opinion is the lowest it has ever been since the death penalty was reinstated in 1976. We also know that it reached its peak of support in 1995.

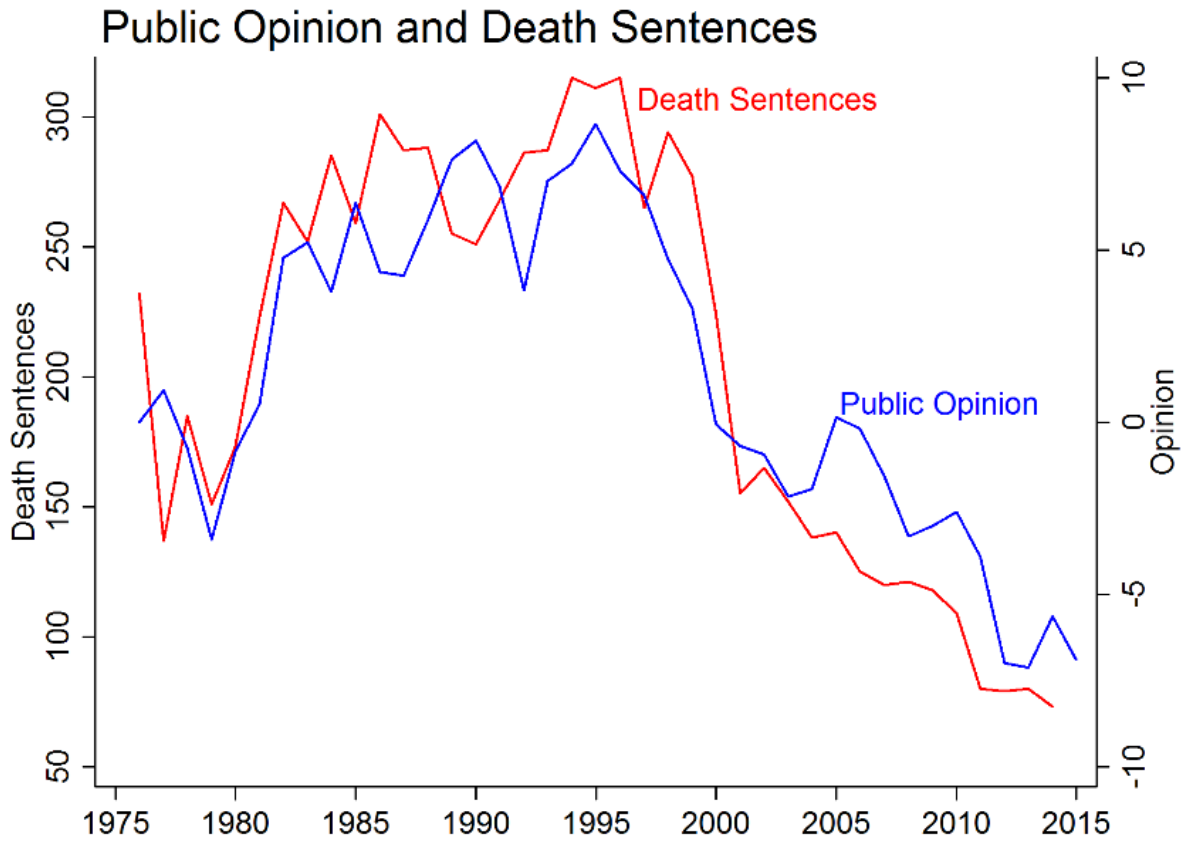
In 1972, *Furman vs. Georgia*, the Supreme Court determined the death penalty to be unconstitutional. Following reforms and new guidelines presented in Gregg vs. Georgia it was reinstated in 1976. Through the 1970s and 1980s we see a trend toward increase use and support of the death penalty, stemming from the encouragement of tougher punishments and more punitive policies.

Support for the death penalty was an all-time high in 1995, at +8.7, and has since fallen to the lowest it has been since the death penalty was reinstated in 1976, at -6.9 in 2016. Public opinion favoring the death penalty has been on a steady decline.

Peter Enns completed a similar process on the subject of crime more generally, using Stimson's algorithm as well. He was able to show an apparent relationship between public opinion on crime and policy response. He constructed a similar database using 33 survey questions from 1953 to 2012 on crime, and determined that when the public's mentality toward crime was more punitive, incarceration rates went up. When public opinion appeared to be less harsh, incarceration rates diminished (Enns 2014)

In our analysis, we present evidence that the decline of public opinion on the death penalty continues to show a decline in executions. Since 1996, death sentences have declined by over 60 percent. Figure 17.3 shows the relationship between death sentences and public opinion from 1976-2015. The trend is obvious, and shows that the impact of public opinion on policy is real.

Figure 17.3



There is a strong correlation (.92) between public opinion and death sentences. As the public becomes increasingly opposed over time, death sentences follow on a decline-- from 315 in 1996 to just 73 in 2014. This comprehensive index of public opinion on the death penalty is similar to what Enns did for criminal justice punitiveness. Enns' index explained 46.04 percent of the variance on crime, while our index explains 72 percent variance. Enns index on crime and our index on the death penalty more specifically align very well, showing similar trends over time (Enns 2014)

State- by- State Analysis of Public Opinion

Still waiting on info.
Other sources??

Jacobs and Carmichael 2002; Nice 1992; Stack 2000

From Pacheco:

For the death penalty, I measure the proportion who favored the death penalty for a person convicted of murder from 1957 to 2006 using the General Social Survey and polls from Gallup and CBS/NYT.10

For all issues, "don't know" or "no opinion" were excluded. See the supplemental text for more details on question wording.

The yearly estimates of state support for the death penalty correlate highly (r = .86) with opinion estimates measured by Shirley and Gelman (2014). In addition, Figure S11 in the supplemental text shows that changes in the estimates are also highly related.

12. All states are missing in the following years for the death penalty: 1968, 1970, 1973, 1979, and 1992.

"Scholars must overcome two problems, however, when using national surveys to estimate state public opinion: variation in state sample sizes and the potential for nonrepresentative estimates (http://spa.sagepub.com/content/early/2011/09/30/1532440011419287.full.pdf) "

Erikson, Wright, and McIver (1993) showed that if mass ideology and partisanship are assumed to be stable over time, reliable and unbiased measures of these variables can be obtained for each state by pooling multiple years of national-level data, such as the CBS/NYT polls, and then aggregating to the state level (http://spa.sagepub.com/content/early/2011/09/30/1532440011419287.full.pdf)

No death penalty:

Alaska, New Mexico, North Dakota, Iowa, Illiois, Wisconsin, Michigan, West Virginia, New York, Maine Vermont, Massachusetts,

High use of death penalty:

texas oklahoma virginia florida missouri Georgia

Low use of death penalty:

Create 3 regions; sum up percent respondents before calculating support.

"Are you in favor of the death penalty for persons convicted of murder?"

state data on this question using the MRP approach

Texas Public Opinion

Leading in both the number of executions and death sentences in the country, Texas accounts for around one-third of all executions since 1976. Harris County, the main county that covers the city of Houston, is deemed the "epicenter" of executions in the country and similarly leads in capital convictions nationwide. It accounts for over 8 percent of total executions. Moreover, it is worth noting that the African American population in the Houston area is the fifth largest in the country (At the Cross Source). The combination of these various factors plays into how supportive Texans are of the death penalty and also highlights the importance of why Texas provides an interesting case study for public opinion on the death penalty.

In many ways Texas, and specifically Harris County, is a major outlier when it comes to executions, which brings into question how public opinion stacks up in this particular state. Additionally, taking a look at Texas provides insight into what extent public opinion shapes the way in which the death penalty is used in the state and whether or not it truly is a measure of the evolving standards of decency. If public opinion were to be indicative of the nature in which capital punishment is used in Texas, then support would be high. In other words, does public opinion explain why the death penalty is used so frequently in Harris County and Texas in general as opposed to the rest of the United States?

In examining public support of the death penalty in both the Houston area and the state of Texas as a whole, Table 17.3 shows poll questions taken from various surveys regarding Texans' opinions on the death penalty in differing contexts, dating as early as 1986 and as recent as 2015. Table 17.3 also differentiates between questions covering exclusively Harris County and Texas in general. Additionally, the table shows the percentage of pro-death penalty responses questions

that were repeatedly asked over the years. The wording and type of questions, as well as possible responses varied among greatly, as did the percentage of support for the death penalty.

Table 17.3. Texas and Harris County Public Opinion on the Death Penalty

	Harris County				Texas
	Question Wording				
Year	1	2	3	4	5
1984				72	
1985					
1986				69	
1987					
1988				70	
1989					
1990				74	
1991		56			
1992					
1993			80		
1994					
1995					
1996					
1997					
1998					
1999			70		
2000	43				
2001		57	60		
2002					
2003		58	73		
2004	35				
2005		66	70		
2006	33				
2007		58	71		
2008	41				81
2009		63	63		
2010	40				81
2011		63	67		78
2012	32				77
2013		56	62		79
2014	29				74
2015					80

Note: Question wordings are as follows:

1. What do you think should generally be the penalty for persons convicted of first-degree murder: **the death penalty**, life imprisonment with no chance of parole, or live imprisonment with a chance of parole after 25 years
2. Are you for or **against** a true life sentence without the possibility of parole, as an alternative to the death penalty?
3. Are you **for** or against the death penalty for persons convicted of murder?
4. Are you **for** or against increased use of the death penalty?

5. Which of the following best characterizes your opinion on the death penalty for those convicted of violent crimes: **strongly support, somewhat support**, somewhat oppose, strongly oppose, don't know** duplicate years but different numbers- ask Baumgartner

Cell entries are the number giving the pro-death penalty response (listed in bold above) as a percentage giving any response (neutral / don't know / no response answers are excluded).

Xxx from FB: we need to go to this page: http://kinder.rice.edu/content.aspx?id=2147485824 and ensure that all available questions have been incorporated.

In examining Table 17.3, the percentage of pro-death penalty responses varies greatly throughout the years. Overall, these disparities point to how public opinion cannot be a major indicator of why the death penalty is used so often in one area and very rarely in another. The number of pro-death penalty responses varied based on question wording and the number of possible responses. For example question 5 has two possible pro-death penalty answers, but there is a disparity regarding the degree of support. Regardless, as both answers are considered pro-death penalty responses, the support for this particular question is skewed higher than if an "either or" question was posed, such as question 3. In other words, it does not provide an accurate measure as to why capital punishment in Texas is used so frequently, adding to the arbitrariness of the death penalty.

In looking at the general trends of the table, public opinion in Texas does not seem to be disproportionately high in the same way that it is in executions. More specifically, Houston's public support of the death penalty only hovers above the national average and as a result cannot explain why it has been deemed the "epicenter" of executions in the United States. In fact, Harris County's public support consistently measured below that of Texas as a whole. In 2002, the Houston Chronicle conducted a poll, which compared support of the death penalty between Harris County, Texas, and the United States. All questions were formatted similarly, with only three options given as a response: "Yes/Support," "No/Oppose," or "Not sure/No answer." In this poll, the U.S. continuously showed a lower percentage of pro-death penalty responses;

additionally, Harris County repeatedly showed a lower percentage of pro-death penalty responses in comparison to Texas even though it has a higher concentration of executions (Houston Chronicle Source). The general findings of the survey point to no significant explanation into Houston's high execution numbers. However, it is worth noting the decline in death penalty support and the subsequent implications for the state.

Looking back at Table 17.3, all questions show a steady decline in pro-death penalty responses as the years have progressed, aligning with the general decline of public support nationally. Support has reached an all time low, and at the same time, as of 2015 Texas has only given out 1 death sentence for the year. This is the lowest number of death sentences Texas has ever given since the death penalty's reinstatement following its reinstatement with the *Gregg v. Georgia* ruling. This is not to say that the cause of Texas' decreased use in the death penalty is the result the decline of public support; however, there seems to be some sort of correlation between the two.

Regardless, public opinion in Texas and additionally the Houston area overall does not seem to severely deviate from the rest of the country's public opinion as to provide a reason for why the state leads in executions in the country. The relationship between the disproportionately number of executions and above average public support of the death penalty seems to be arbitrary at best. In other words, disparities between pro-death penalty sentiments between Texas and the whole nation do not seem to fully dictate the extent to which this form of punishment is being used. Various factors play into public opinion measurements, which undermine the validity in using it as an indicator. In looking at Texas as a case study, it is apparent that public opinion cannot provide significant insight into how and why the death penalty is used so frequently in some areas and almost never in others.

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Appendix on Public Opinion

We constructed our index of death penalty opinion using the same methodology and Baumgartner et al. did in their 2008 book (see Chapter 6), as Enns did in his 2014 article and 2016 book on crime punitiveness, and as Stimson first developed in 1991. The methodology is conceptually simple even if the details may be complicated. The idea is to make use of all available questions on the same topic, even if the question wordings may differ. Stimson, for example, was concerned with public attitudes toward the size of government, often tapped by questions asking if the government is spending "too much, too little, or about the right amount" on various public services, such as education, health care, roads, or hospitals. As should be expected, when looking at the trends of any of these individual questions, they track up and down over time in parallel. If aggregate public opinion, assessed by the average response to a national sample of whether we are spending too little on education goes down over time, then chances are that opinion on spending on health care probably went down by a similar amount in that same time period. If the answers to the question tap into a general attitude on government spending, then the individual series will all reflect an underlying trend. Political scientists call such an underlying, unobserved, trend a "latent variable." Latent variables can affect any observed variable, such as responses to a question about spending on roads, education, or health care. Of course, whether a latent variable is causing changes to an observed variable is an empirical question. If the individual questions tap into different latent attitudes, they will not trend in parallel over time. If they do track together, then the questions may all be tapping into a generalized attitude toward some underlying issue. Any particular question will reflect some

part of the latent attitude, and some part the particular twist on it reflected in the particular question. For example, more people might support increased spending on health care than on welfare, more on roads than on international aid. But when looking over time, when one series goes up, the others may go up by a similar amount. If the question is revised so that it elicits an attitude on a different topic, then it will not correlate over time with the latent variable and this will be observable in the data.

In his recent work on Americans' attitudes toward punitive crime policies, Peter Enns (2014, see also 2016) used 33 different questions about crime and punishment, ranging from how adequately people feel protected by the police from being a victim of crime to how much confidence people have in the courts to convict and sentence criminals to jail time. Across the 1953 to 2012 time period, some of these questions were asked as many as 49 times, and others as few as three times. In all, the shared portion of the variance in the proportion of the respondents giving the "tough on crime" response to these many different questions was 56 percent. That is, of all the movement over time in these questions, 56 percent of the variance was shared; it could be considered to be a reflection of the public's underlying, latent, attitude toward being punitive with regards to crime. The remaining variability in response, 44 percent, reflected idiosyncratic movement with regards to the particular wording in the different questions used.

We did something similar for the death penalty. In fact, we assembled the largest collection of national surveys so far compiled. Our index runs from the beginning of the modern era of the death penalty in 1976 and through the date of our data collection in October 2015. We identified 488 national surveys with 66 distinct questions about various aspects of the death penalty (in a 2008 book, Baumgartner and colleagues used 292 surveys from 1937 to 2006 to develop a similar index). These questions were asked as many as 25 times (for the Gallup

Murder question), but all were asked at least twice. Our index on death penalty opinion explains 72.51 percent of the underlying variance. In sum, we have constructed the most comprehensive assessment of public opinion on the death penalty ever assembled. In contrast to any single survey, since ours is based on 488 national surveys, the sampling variation is reduced to a minimum.

The tables below present, first, the exact question text for all the question we used, as well as the Question ID; these are listed in alphabetical order by the Question ID. In the final table, technical details are presented for each of those Question IDs: how many times the question was asked, its statistical factor loading on the overall index, its mean value, and its standard deviation. The higher the loading on the first factor, the stronger the question contributes to the overall factor. (Loadings on the second factor are all zero.) Note that in the Stimson algorithm, the logic is simple. Neutral and no-answer responses are eliminated, and the percent of pro- death penalty responses is divided by the sum of the pro- and anti-death penalty responses. This single number, along with the sample size, the date of the survey, and the question ID go into the algorithm. Based on sample size and the degree of loading on the overall index, each observation then contributes proportionately more or less to the resulting score. Note that questions posed just once never enter the calculation, as the algorithm looks at movement over time for two or more occurrences of the exact same question wording, by the same survey firm or organization. Thus, it controls both for "house effects" as well as for "wording effects." Further, keep in mind that the first several questions listed in the last table below, the most well-known, frequently asked, and familiar questions from Gallup and NORC, generate the core of the index we use, with extremely high factor loadings. This means that the simple correlation

between any one of those series and the overall index are correspondingly high. A graph of two of them together would show parallel lines.

It is important to understand, but perhaps slightly counter-intuitive, that since the index reflects the combined results of many different question wordings, the numerical value of the index is difficult to interpret; rather *changes in the value over time* are of interest. That is, for example in the tables below it is clear that the Gallup Murder question, posed 25 times in our dataset, has an average value of 73% pro-death penalty. (This is higher than what would be in the raw survey responses because our calculation eliminates neutral and no-opinion responses, as described above.) The NORC question with the same question wording also has the same average value: 73.6. But the Gallup question allowing for the option of Life Without Parole has an average value of 57.5. (See the first three rows in Table 17.A2, below.) In fact, looking down Table 17.A2 below, it is clear that some questions have relatively low average scores. The virtue of the index is that it allows us to use the shared variance of diverse questions posed over time in order to generate a nuanced and highly accurate understanding of the *dynamics* of public opinion over time. But because it incorporates responses to so many different questions, and makes use of all questions that happen to have been posed in reputable national surveys made available through iPOLL (made available by the Roper Center for Public Opinion Research), the value of the index is completely determined by the mix of questions that were fed into it. We adjusted the value of the index to have a value of zero in 1976. Therefore, it can be interpreted as higher or lower than it was at that time.

Data retrieved from the iPOLL roper center from November 11, 1953 to May 19, 2015 using key words “death penalty” and “capital punishment”. 964 total survey questions were generated from this keyword search. These questions were compiled into a database (put in footnote?) and

were then filtered to fit certain criteria necessary for the creation of a public opinion index on the death penalty. A question was selected if it met the following two parameters:

1) Was asked of a National Adult sample, as opposed to a sample of only Catholics or minorities.
2) Able to be categorized in a pro or anti manner. If the question was an indirect question, meaning it didn't explicitly ask feelings towards the death penalty, it was considered for its ability to be manipulated in such a way that assessed pro vs. anti feelings.
3) Directly related to the debate of the death penalty

Using this method, 546 different survey questions from 45 different survey organizations were recorded. Using these questions we are able to thoroughly analyze the changing nature of public opinion on the death penalty through the form of an index, derived from Jim Stimson's WCALC program. We are also able to look at specific questions and understand discrepancies between public opinion depending on question wording and the time in which the survey question was asked.

Table 17.A1. Question Wordings.

Question ID	Question Text
ABC_18	Do you support or oppose the death penalty for people who are convicted of murder that they committed when they were juveniles--that is, when they were younger than age 18?
ABC_ACC	(For each item that I name, please tell me if you personally find it morally acceptable or unacceptable.)...The death penalty
ABC_APP	Regardless of your overall opinion on the death penalty, for each statement I read please tell me if you agree with it strongly, agree somewhat, disagree somewhat, or disagree strongly....The death penalty is unfair because it's applied differently from county to county and state to state.
ABC_BLK	(Regardless of your overall opinion on the death penalty, for each statement I read please tell me if you agree with it strongly, agree somewhat, disagree somewhat, or disagree strongly.)...The death penalty is unfair because it's applied unequally to blacks compared to whites.
ABC_COC	Do you think people convicted of selling cocaine should be given the death penalty, life imprisonment, a long jail term, a short jail term or what?
ABC_DETER	Do you feel that the death penalty acts as a deterrent to murder--that it lowers the murder rate--or not?
ABC_EVERIN	(Regardless of your overall opinion on the death penalty, for each statement I read please tell me if you agree with it strongly, agree somewhat, disagree somewhat, or disagree strongly.)...The death penalty is unfair because sometimes an innocent person is executed.
ABC_EYE	(Regardless of your overall opinion on the death penalty, for each statement I read please tell me if you agree with it strongly, agree somewhat, disagree somewhat, or disagree strongly.)...The death penalty is fair because it's an eye for an eye--the killer is killed.
ABC_HER	Convicted heroin dealers should get the death penalty?
ABC_LIFE	Which punishment do you prefer for people convicted of murder: the death penalty or life in prison with no chance of parole?
ABC_MUR	Do you support/favor or oppose the death penalty for persons convicted of murder
ABC_NIK	(As you may know, Terry Nichols was convicted recently of conspiracy and involuntary manslaughter in connection with the Oklahoma City bombing which killed 168 people in 1995. But the jury acquitted Nichols of first-degree murder and the use of a truck bomb in the case.) As you may have heard, the jury deadlocked on the question of whether Nichols should receive the death penalty which means he will not be sentenced to death. Do you think Nichols should or should not have received the death penalty?
ABC_OJ	If he's convicted of murder, do you think (O.J.) Simpson should or should not receive the death penalty?

ABC_SAD	Which punishment would you prefer for Saddam (Hussein) if he is convicted of war crimes--the death penalty, or life in prison with no chance of parole?
ABC_SPY	Suppose a U.S. citizen is convicted of spying for the Soviet Union. Should that person receive the death penalty, life imprisonment, or go to prison for a number of years?
ABC_TIM	As you may know, Timothy McVeigh has been sentenced to death for the Oklahoma City bombing in 1995. Do you support or oppose the death penalty for McVeigh?
AP_FAV	Do you favor, oppose or neither favor nor oppose the death penalty for people convicted of murder? Would you say you favor the death penalty for people convicted of murder strongly or just somewhat? Would you say you oppose the death penalty for people convicted of murder strongly or just somewhat?
AP_MUR	Do you favor or oppose the death penalty for persons convicted of murder?
AWP_DETER	Do you feel that the death penalty acts as a deterrent to murder--that it lowers the murder rate--or not?
AWP_LIFE	Which punishment do you prefer for people convicted of murder: the death penalty or life in prison with no chance of parole?
AWP_MUR	Do you favor or oppose the death penalty for persons convicted of murder?
AYRES_MUR	(Do you support or oppose each of the following?)...The death penalty for murder
BEL_MUR	(Do you support or oppose each of the following?)...The death penalty for persons convicted of murder...Do you support/oppose that strongly or somewhat?
CBS_18	What about people who commit murder when they are 16 or 17? Do you favor or oppose the death penalty for them?
CBS_DET	Do you think that capital punishment--the death penalty--is or is not a deterrent to murder?
CBS_LIF	What do you think should be the penalty for persons convicted of murder--the death penalty, life in prison with no chance of parole, or a long prison sentence with a chance of parole?
CBS_LIFE	What do you prefer for persons convicted of murder--the death penalty, or life imprisonment with absolutely no possibility of parole?
CBS_MUR	Do you favor or oppose the death penalty for persons convicted of murder?
CBS_PAR	What do you think should be the penalty for persons convicted of murder--the death penalty, life in prison with no chance of parole, or a long prison sentence with a chance of parole?
CBS_TIM	As you may know, Timothy McVeigh was found guilty of the 1995 bombing of the federal building in Oklahoma City, in which 168 people were killed, and was sentenced to death in 1997.... He is scheduled to be executed on Monday (June 11, 2001). Do you favor or oppose the death penalty for Timothy McVeigh?
CNY_ANY	Are there any circumstances under which you think the death penalty is justified?

CNY_DRGM	Do you favor or oppose the death penalty for people convicted of controlling large drug dealing operations?
CNY_MUR	Do you favor or oppose the death penalty for persons convicted of murder?
CPS_MUR	QN08 Do you favor or oppose the death penalty for persons convicted of murder?
CSRA_MUR	For criminals convicted of premeditated murder, which of the following do you think is the most appropriate sentence?... 25 years in prison, life in prison with the possibility of parole, life in prison without the possibility of parole, the death penalty
DPIC_GUIL	As you may know, in recent years many people who had been convicted of murder and sentenced to death have been released from death row after new evidence, such as DNA testing, shows they could not be guilty of the crime. They have been exonerated of all charges. For example, so many people on death row in Illinois were found to be not guilty that the state put a moratorium on carrying out the death penalty until the problem could be thoroughly investigated. Having heard that, which one of the following comes closest to describing your opinion about the death penalty?...I support the death penalty, but hearing this makes me feel less strongly in favor of it, hearing this does not affect my opinion of the death penalty, I oppose the death penalty, and hearing this makes me feel more strongly opposed to it
DPIC_LIFE	Which penalty do you prefer for people convicted of murder, the death penalty, or life in prison with no chance of parole?
DPIC_MOR	As you may know, in the court cases where the death penalty is one possible punishment, most courts require jurors to say they do not have a moral objection to imposing the death penalty if the evidence supports it, in order to qualify as a juror in a death penalty case. Someone who has a moral objection to the death penalty in all cases would be excluded from a jury in a death penalty case. Suppose you were in the jury pool for a death penalty case, would you qualify on those grounds, or would you be disqualified because you have a moral objection to the death penalty?
DPIC_MUR	Do you favor or oppose the death penalty for persons convicted of murder?
FOX_AND	As you may know, Andrea Yates is the woman on trial for killing her children. Prosecutors are seeking the death penalty, but Yates' attorneys say she is innocent by reason of insanity. If Yates is convicted, what do you think is the appropriate penalty?...Death penalty, life in prison, life in a psychiatric hospital, time in a psychiatric hospital until she's well
FOX_CHI	Do you favor or oppose making the death penalty mandatory for anyone found guilty of abducting and murdering a child?
FOX_KHA	Now that Khalid Shaikh Mohammed, the terrorist who is believed to have helped plan the 9/11 (2001) attacks (on the World Trade Center and the Pentagon), has been captured, what do you think should happen to him? If Mohammed is convicted of mass murder, what do you think is the appropriate penalty: death penalty, or life in prison?
FOX_MUR	Do you favor or oppose the death penalty for persons convicted of premeditated murder?

FOX_NIK	In fact, Terry Nichols is facing the same charges in the Oklahoma City bombing as Timothy McVeigh faced. If Nichols is convicted of committing the bombing, do you think he should receive the death penalty or life in prison?
FOX_RET	Do you favor or oppose the death penalty for a person convicted of premeditated murder, if that person is shown to be mentally retarded?
FOX_SAD	If convicted, what do you think should happen to Saddam (Hussein)--life in prison or the death penalty?
FOX_SCOTT	(Last week Scott Peterson was found guilty of murdering his wife and unborn son.)...What do you think is the appropriate penalty for Scott Peterson--should he be sentenced to death or sentenced to life in prison without the possibility of parole?
FOX_TEEN	Do you think teens who kill other teens should face the possibility of the death penalty?
FOX_TIM	Later this month (May, 2001), Timothy McVeigh will be executed by lethal injection for the bombing of a federal building in Oklahoma City that left 168 people dead. Do you think the death penalty is the right punishment for McVeigh's crimes or not?
FOX_UNA	Authorities believe that the Unabomber used 16 bombs to kill 3 people while injuring 23 others. If Ted Kaczynski, the alleged Unabomber, is convicted of committing these bombings, do you think he should receive the death penalty or life in prison?
FOX_UNAI	Do you think Kaczynski (the alleged Unabomber) should get the death penalty even if he is insane?
GAL_18	Do you favor or oppose the death penalty for...juveniles?
GAL_21	ARE YOU IN FAVOR OF THE DEATH PENALTY FOR PERSONS UNDER 21 WHO ARE CONVICTED OF MURDER?
GAL_21_YN	If so, are you in favor of it (the death penalty for murder) for persons under 21?
GAL_ACC	(Next, I'm going to read you a list of issues. Regardless of whether or not you think it should be legal, for each one, please tell me whether you personally believe that in general it is morally acceptable or morally wrong.) How about...the death penalty?
GAL_AND	Do you think Andrea Yates should or should not be sentenced to the death penalty if she is convicted of murdering her five children?
GAL_APP	Generally speaking, do you believe the death penalty is applied fairly or unfairly in this country today?
GAL_BLK	(As I read each of these statements, would you tell me whether you agree or disagree with it.) A black person is more likely than a white person to receive the death penalty for the same crime.
GAL_BUR	We have some questions about Buford Furrow, the man charged with an attack in Los Angeles which killed one postman and wounded several workers and children at a Jewish daycare facility. Which sentence do you think Furrow should get for this crime--the death penalty, or life imprisonment, with absolutely no possibility of parole?

GAL_DET	Do you feel that the death penalty acts as a deterrent to the commitment of murder, that it lowers the murder rate, or not?
GAL_DRGN	Do you favor or oppose the death penalty for drug dealers not convicted of murder?
GAL_EVRIN	How often do you think that a person has been sentenced to the death penalty who was, in fact, innocent for the crime he or she was charged with--do you think this has ever happened in the past 20 years, or do you think it has never happened?
GAL_EVRIN5	How often do you think that a person has been executed under the death penalty who was, in fact, innocent of the crime he or she was charged with--do you think this has happened in the past five years, or not?
GAL_EXT	(Please tell me whether you would generally favor or oppose each of the following proposals which some people have made to reduce crime.)... Extending the death penalty for some serious crimes other than murder.
GAL_JUA	Thinking about the drug kingpin Juan Raul Garza, the man convicted of murder and controlling a large drug trafficking operation, which comes closest to your view--you generally support the death penalty and believe Garza should be executed, you generally oppose the death penalty, but believe Garza should be executed in this case, or you generally oppose the death penalty and believe Garza should not be executed?
GAL_LIFE	If you could choose between the following two approaches, which do you think is the better penalty for murder...the death penalty or life imprisonment, with absolutely no possibility of parole?
GAL_MAND	(The following is a list of some programs and proposals that are being discussed in this country today. For each one, please tell me whether you strongly favor, favor, oppose or strongly oppose)... A mandatory death penalty for anyone convicted of premeditated murder
GAL_MAND_YN	There various proposals being discussed in this country today. Would you tell me whether you generally favor or generally oppose each of these proposals. A mandatory death penalty for anyone convicted of murder
GAL_MEN	Do you favor or oppose the death penalty for...the mentally ill?
GAL_MOR	Which cimes closer to yiur view? There should be a moratorium, or temporary halt, on the death penalty until it can be better determined if the death penalty is being administered accurately and fairly inthis country. There should not be a moratorium, or temporary halt, on the death penalty because there are already sufficient safeguards in the current justice system to prevent the execution of innocent people?
GAL_MUR	Are you in favor of the death penalty for a person convicted of murder?
GAL_MUR_YN	(Suppose that on Election Day, November 2 (1982), you could vote on key issues as well as candidates. Please tell me how you would vote on each of these propositions.)...I favor the death penalty for persons convicted of murder, I oppose the death penalty for persons convicted of murder.
GAL_NIK	If Terry Nichols is convicted for the bombing in Oklahoma City, what do you think should be the penalty--the death penalty or life imprisonment, with absolutely no possibility of parole?

GAL_NOTEV	Suppose new evidence showed that the death penalty does not act as a deterrent to murder, that is does not lower the murder rate. Would you favor or oppose the death penalty?
GAL_NOTEV	Suppose new evidence showed that the death penalty does not act as a deterrent to murder--that it does not lower the murder rate. Would you favor or oppose the death penalty?
GAL_OFT	In your opinion, is the death penalty imposed too often, about the right amount, or not often enough?
GAL_OJ	Based on your understanding of the case, what do you think should be the penalty if O.J. Simpson is found guilty of the murders he has been charged with (of his ex-wife, Nicole Brown Simpson and her friend, Ronald Goldman)--the death penalty or life imprisonment, with absolutely no possibility of parole?
GAL_PCT	Just your best guess, about what percent of people who are executed under the death penalty are really innocent of the crime they were charged with?
GAL_POOR	As I read each of these statements, would you tell me whether you agree or disagree with it. A poor person is more likely than a person of average or above average income to receive the death penalty for the same crime.
GAL_PRES	Do you favor or oppose the death penalty for persons convicted of... attempting to assassinate the President?
GAL_RAPE	Do you favor or oppose the death penalty for persons convicted of... rape?
GAL_RET	Do you favor or oppose the death penalty for...the mentally retarded?
GAL_SAD	Thinking for a moment about the trial of former Iraqi leader Saddam Hussein...If Saddam Hussein is found guilty of serious crimes during his trial, would you favor or oppose the death penalty for him?
GAL_SKY	Do you favor or oppose the death penalty for persons convicted of... hijacking an airplane?
GAL_SPY	Do you favor or oppose the death penalty for persons convicted of... spying for a foreign nation during peacetime?
GAL_SUS	In a recent criminal case that received a lot of media attention, Susan Smith confessed to drowning her two young sons in her car. If found guilty of murder in this case, do you think Susan Smith should receive the death penalty, or not?
GAL_TEEN	When a teenager commits a murder and is found guilty by a jury, do you think he should get the death penalty or should he be spared because of his youth?
GAL_TEN	ARE YOU IN FAVOR OF THE DEATH PENALTY FOR PERSONS UNDER 21?
GAL_TIM	Thinking about Timothy McVeigh, the man convicted of murder in the Oklahoma City bombing case and sentenced to death, which comes closest to your view? You generally support the death penalty and believe McVeigh should be executed. You generally oppose the death penalty, but believe McVeigh should be executed in this case. You generally oppose the death penalty and believe McVeigh should not be executed?
GAL_TRE	Are you in favor of the death penalty for persons convicted of: Treason?

GAL_UNA	If Theodore Kaczynski is convicted for the Unabomber murders, what do you think should be the penalty--the death penalty, or life imprisonment, with absolutely no possibility of parole?
GAL_WOM	Do you favor or oppose the death penalty for...women?
GEN_BRU	Which of the following murder cases, if any, would you consider justification for the death penalty?If murder is especially brutal
GEN_CHI	Which of the following murder cases, if any, would you consider justification for the death penalty?If victim was a child
GEN_CON	Which of the following murder cases, if any, would you consider justification for the death penalty?If murder is for hire
GEN_CRM	For what crimes besides murder should the death penalty be imposed?Drug dealing
GEN_MOL	For what crimes besides murder should the death penalty be imposed?Child molestation or abuse
GEN_POL	Which of the following murder cases, if any, would you consider justification for the death penalty?If victim was a prison guard If convicted of killing more than
GEN_TRE	For what crimes besides murder should the death penalty be imposed?Rape Treason against the U.S. (traitors,
GREEN_FAV	Now I'd like your opinion on several other issues. Please tell me if you favor or oppose the following....The death penalty...(If Favor/Oppose, ask:) Is that strongly favor/oppose or somewhat favor/oppose?
HAR	Do you believe in capital punishment, that is the death penalty, or are you opposed to it?
HAR_18	In many states, one of the criminal punishments that is available is the death penalty. Some people think that persons convicted of murder committed when they are under 18 years old should never be executed, while other people think it is right to execute those who are under the age of 18 at the time the crime was committed. Which is closer to the way you think, that young people who are convicted of a murder, committed whey they are younger than 18, should never be executed, or it is right to execute young people for a murder they committed before they were 18?
HAR_APP	Based on what you have read or heard, do you think the criminal justice system in death penalty cases is generally fair or generally unfair?
HAR_DETEF	Suppose it could be proven to your satisfaction that the death penalty was not more effective than long prison sentences in keeping people from committing crimes such as murder. Would you be in favor of the death penalty or opposed to it?
HAR_EVERIN	If you believed that quite a substantial number of innocent people are convicted of murder, would you then believe in or oppose the death penalty for murder?
HAR_MUR	Do you favor or oppose the death penalty for individuals convicted of serious crimes such as murder?
HAR_OJ	If O.J. Simpson is guilty of murder (in the charges he murdered his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman) do you think he should get the death penalty, or not?

HAR_RET	Some people think that persons convicted of murder who have a mental age of less than 18 (or the 'retarded') should not be executed. Other people think that 'retarded' persons should be subject to the death penalty like anyone else. Which is closer to the way you feel, that 'retarded' persons should not be executed, or that 'retarded' persons should be subject to the death penalty like anyone else?
HI_EVIN	If you believe that quite a substantial number of innocent people are convicted of murder, would you then believe in or oppose the death penalty for murder?
HI_MOR	Do you think there should be a temporary moratorium or halt in the death penalty to allow government to reduce the chances that an innocent person will be put to death, or do you think there should not be a moratorium because there are already sufficient safeguards to prevent the execution of innocent people?
HTR	Do you favor or oppose the death penalty?
HTR_MOR	Recently there has been some discussion about whether the death penalty is fairly applied. Which of the following statements comes closer to your view? Statement A: There should be a moratorium on state executions until death penalty procedures are officially reviewed. Statement B: No moratorium on state executions is needed--states only need to ensure that the accused receive fair trials.
ICR_MUR	Do you favor or oppose the death penalty for persons convicted of murder?
ISPOS_LIFE	Do you favor or oppose the death penalty for people convicted of murder? (If Favor/Oppose, ask:) Is that strongly favor/oppose or somewhat favor/oppose?
ISPOS_MUR	Which punishment do you prefer for people convicted of murder?...The death penalty, life in prison without the chance of parole, a long prison sentence with the chance of parole
ISPOS_OSA	If Osama bin Laden is captured, tried and convicted of being a terrorist, which punishment should he receive?...The death penalty, life in prison without the chance of parole, a long prison sentence with the chance of parole
KAN_MUR	Do you favor or oppose more frequent use of the death penalty for people convicted of murder and other really serious crimes?
KN_LIFE	In general, what do you think should be the punishment for people convicted of murder?...Death penalty, life in prison with no chance of parole, depends on the circumstances
KRC_FAV	I'd like to talk to you about some public policy issues. For each issue I read, please tell me if you strongly favor, somewhat favor, somewhat oppose, or strongly oppose it.... The death penalty
LAT	Do you approve or disapprove of the death penalty?
LAT_BLK	On another subject, say a non-white person and a white person are convicted of the same serious crime. Under our criminal justice system, do you think the non-white person is more likely to receive the death penalty than the white person, is less likely to receive the death penalty or are both equally likely to receive the death penalty?

LAT_EVERIN	Regardless of how you personally feel about the death penalty, do you think that there ever have been circumstances in which an innocent person was executed, or do you not think that has occurred?
LAT_FAV	Generally speaking, do you approve or disapprove of the death penalty?
LAT_MUR	Generally speaking, are you in favor of the death penalty for persons convicted of murder, or are you opposed to that--or haven't you heard enough about that yet to say? (If in favor or opposed) Is that (in favor/opposed) strongly or (in favor/ opposed) somewhat?
LAT_SEX	In your opinion, what is the appropriate punishment for sexual abuse of a child? Should the child abuser be given the death penalty, or sent to jail for more than twenty years, or sent to jail for more than five years, or sent to jail for from six months to five years, or given probation--or don't you think that punishment is appropriate?
LAT_SOM	Would you ever favor the death penalty for certain crimes, or are you opposed to the death penalty under any circumstances?
LHA	Do you believe in capital punishment (death penalty) or are you opposed to it?
LHA_COP	Do you feel that all persons convicted of killing a policeman or prison guard should get the death penalty, that no one convicted of killing a policeman or prison guard should get the death penalty, or do you feel that whether or not someone convicted of killing a policeman or prison guard gets the death penalty should depend on the circumstances of the case and the character of the person?
LHA_MUG	Do you feel that all persons convicted of...Mugging...should get the death penalty, that no one convicted of...Mugging... should get the death penalty, or do you feel that whether or not someone convicted of...Mugging...gets the death penalty should depend on the circumstances of the case and the character of the person?
LHA_MUR	Do you feel that all persons convicted of first degree murder should get the death penalty, that no one convicted of first degree murder should get the death penalty, or do you feel that whether or not someone convicted of first degree murder gets the death penalty should depend on the circumstances of the case and the character of the person?
LHA_RAPE	Do you feel that all persons convicted of...Rape...should get the death penalty, that no one convicted of...Rape... should get the death penalty, or do you feel that whether or not someone convicted of...Rape...gets the death penalty should depend on the circumstances of the case and the character of the person?
LHA_SKY	Do you feel that all persons convicted of...Skyjacking...should get the death penalty, that no one convicted of...Skyjacking... should get the death penalty, or do you feel that whether or not someone convicted of...Skyjacking...gets the death penalty should depend on the circumstances of the case and the character of the person?
LHA_TER	Now let me ask you about some solutions that have been proposed as ways of dealing with terrorism. For each, tell me if you favor or oppose that

	solution....All those caught committing acts of terror should be convicted and given the death penalty
LUN_ACC	The death penalty is morally wrong and should never be instituted, regardless of the crime committed. Strongly agree, somewhat agree, somewhat disagree, strongly disagree
NBC_APP	From what you know, do you think that the death penalty is or is not applied fairly?
NBC_CON	(Let me read you a number of different proposals people have made about how to change the U.S. (United States) Constitution. For each proposal, please tell me whether you would favor or oppose this change in the Constitution.)... Amending the Constitution to outlaw the death penalty as cruel and unusual punishment.... Would you favor or oppose this change in the Constitution?
NBC_DRUG	In cases where death is caused from the use of drugs, would you favor or oppose the death penalty for the drug dealer who supplied the drugs?
NBC_FAV	Do you strongly favor, favor, oppose or strongly oppose the death penalty for persons convicted of murder?
NBC_MOR	RC05B (I'd like to read you a list of changes that have been proposed and for each one I read, I'd like you to tell me whether you strongly favor, somewhat favor, somewhat oppose, or strongly oppose that change.)... Impose the death penalty in more criminal cases.
NBC_MUR	Do you favor or oppose the death penalty for persons convicted of murder?
NBC_OJ	If O.J. Simpson is found guilty of the murders of Nicole Brown Simpson (his ex-wife) and Ron Goldman, do you think he should be sentenced to the death penalty?
NBC_UNA	If Ted Kaczynski, the man on trial for being the so-called Unabomber, is convicted, do you feel that he should or should not be given the death penalty?
NORC_WOR	Do you think that having a death penalty for the worst crimes is a good idea or are you against the death penalty?
NOR_18	QA30 Several hundred murders are committed each year by persons under the age of 18. Taking this into consideration, do you favor or oppose the death penalty for persons convicted of murder who were under the age of 18 when they committed the crime?
NOR_MUR	Do you favor or oppose the death penalty for persons convicted of murder?
OMNI_MUR	Do you support the death penalty for persons convicted of first-degree murder?
ORC_AGA	Are you in favor of the death penalty for persons convicted of the following crimes?Against death penalty
ORC_CRU	As you may know, according to the US (United States) Constitution, any punishment that is considered 'cruel and unusual' cannot be used on people convicted of any crime. Do you consider the death penalty to be a cruel and unusual punishment, or don't you feel that way?
ORC_HIJ	Are you in favor of the death penalty for persons convicted of the following crimes?Hijacking of an airplane

ORC_KHA	(Now here are some questions about Khalid Sheik Mohammed who may be responsible for planning the 9/11 (September 11, 2001 terrorist) attacks (on the World Trade Center and the Pentagon) and who is now in custody at a US (United States) military prison in another country.)...If Khalid Sheik Mohammed is found guilty of planning the 9/11 attacks, which of the following statements best describes your view?...You generally support the death penalty and believe he should be executed if he is found guilty. You generally oppose the death penalty, but believe he should be executed in this case if he is found guilty. You generally oppose the death penalty and believe he should not be executed if he is found guilty.
ORC_KID	Are you in favor of the death penalty for persons convicted of the following crimes?Kidnapping
ORC_LIF	If you could choose between the following two approaches, which do you think is the better penalty for murder--the death penalty, or life imprisonment, with absolutely no possibility of parole?
ORC_MUR	Do you favor the death penalty?
ORC_OTH	Are you in favor of the death penalty for persons convicted of the following crimes?Other crimes
ORC_POL	Are you in favor of the death penalty for persons convicted of the following crimes?Murder of police officer
ORC_ZAC	Now thinking about Zacarias Moussaoui, the man charged with crimes associated with terrorism, which sentence do you think Moussaoui should get for this crime--the death penalty, or life imprisonment with absolutely no possibility of parole?
PC_CRM	Do you support or oppose the death penalty for major drug dealers? And do you strongly support/oppose or only somewhat support/oppose?
PENN_MUR	(For each of these proposals, please tell me whether you favor or oppose them.)... Do you favor or oppose instituting the death penalty for first-degree murder?
POS_FAV	And, do you favor or oppose the death penalty for convicted murderers? (If favor/oppose, ask:) Do you strongly favor/oppose or just somewhat favor/oppose?
PPR_DP	Which one of the following four statements comes closest to your opinion of who should be subject to the death penalty...only those convicted of murder, only those convicted of the most brutal murders, mass murders and serial killings, all those convicted of murder, other especially violent crimes and major drug dealing or do you oppose the death penalty in all cases?
PPR_MUR	In moving on to another topic, do you favor or oppose the death penalty for persons convicted of murder?
PPR_MUR_YN	Are you in favor of the death penalty for persons convicted of murder?
PRRI_ACC	(Next, I'm going to read you a series of statements about personal behavior. Regardless of whether or not you think it should be legal, for each one, please tell me whether you personally believe that it is morally acceptable or morally wrong.)...The death penalty...Is this morally acceptable, or morally wrong?

PRRI_FAV	(Do you favor or oppose the following issues?...Strongly favor, favor, oppose, strongly oppose)...The death penalty for persons convicted of murder.
PRRI_LIF	Which punishment do you prefer for people convicted of murder--the death penalty or life in prison with no chance of parole?
PRRI_MUR	Now, I'd like to get your views on some other issues that are being discussed in the country today. All in all, do you strongly favor, favor, oppose, or strongly oppose...the death penalty for persons convicted of murder?
PRRI_SUP	And all in all, do you strongly favor, favor, oppose, or strongly oppose...the death penalty for persons convicted of murder?
PSR_ACC	Please tell me whether you would generally favor or oppose the death penalty for murder in each case of the following circumstances. If the convicted person was... only an accomplice to the person who actually did the killing... would you favor or oppose the death penalty?
PSR_APP	Generally speaking, do you believe the death penalty is applied fairly or unfairly in this country today?
PSR_BLK	As I read off each of the following statements would you tell me if you agree or disagree with it.... A black person is more likely than a white person to receive the death penalty for the same crime.
PSR_DET	Whatever your position on the death penalty, do you think it is a major deterrent to violent crime, a minor deterrent, or not a deterrent at all?
PSR_EVERIN	Since the death penalty was reinstated in the 1970s, do you think many innocent people have been wrongly executed, only some, very few, or none?
PSR_FAV	Do you strongly favor, favor, oppose or strongly oppose the death penalty for persons convicted of murder?
PSR_LVL	I have some questions about the death penalty. Which of the following four choices comes closest to your opinion about who should be subject to the death penalty? Should it be used for...all those convicted of murder, other especially violent crimes, and major drug dealing, limited to those convicted of murder, further limited to cases of the most brutal murders, mass murders and serial killing, or do you oppose the death penalty in all cases?
PSR_MAN	In general, do you favor or oppose the death penalty for a man convicted of murder?
PSR_MUR	Do you favor or oppose...the death penalty for persons convicted of murder?
PSR_TEEN	(Please tell me whether you would generally favor or oppose the death penalty for murder in each of the following circumstances.) If the convicted person was...a young teenager at the time of the crime, would you favor or oppose the death penalty?
PSR_TIM	Timothy McVeigh, who was sentenced to death for murder in the Oklahoma City bombing case, is scheduled to be executed by lethal injection. Do you personally favor or oppose the death penalty for Timothy McVeigh?
PSR_WOM	In general, do you favor or oppose the death penalty for a woman convicted of murder?
QUI_LIF	Which punishment do you prefer for people convicted of murder--the death penalty or life in prison with no chance of parole?

QUI_MEN	In general do you agree or disagree with the decision that banned the death penalty for the mentally retarded?
QUI_MUR	Do you favor or oppose the death penalty for persons convicted of murder?
RBI_MOR	Now, I'd like to get your views on some issues that are being discussed in this country today. All in all, do you strongly favor, favor, oppose, or strongly oppose...the death penalty for persons convicted of murder?
RBI_MUR	Now a few questions about some legal issues that are pending before courts and legislatures around the country. Do you believe that the death penalty should ever be imposed for serious crimes or do you believe the death penalty should never be used?
RF_DETER	Does the death penalty discourage murder?
RF_MUR	Do you favor or oppose the following policies? The death penalty for persons convicted of murder.
ROP_ARM	Opinions differ as to whether there should be a death penalty for certain very serious crimes, or whether there should not be a death penalty for any crime, no matter how serious it is. How do you feel--are you in favor of the death penalty for certain crimes, or opposed to the death penalty under any circumstances? (If favor death penalty:) For which of these crimes, if any, would you favor the death penalty?armed robbery that results in death E. Favor the death penalty for
ROP_ARS	Opinions differ as to whether there should be a death penalty for certain very serious crimes, or whether there should not be a death penalty for any crime, no matter how serious it is. How do you feel--are you in favor of the death penalty for certain crimes, or opposed to the death penalty under any circumstances? (If favor death penalty:) For which of these crimes, if any, would you favor the death penalty?arson that results in death J. Favor the death penalty for
ROP_CON	Opinions differ as to whether there should be a death penalty for certain very serious crimes, or whether there should not be a death penalty for any crime, no matter how serious it is. How do you feel--are you in favor of the death penalty for certain crimes, or opposed to the death penalty under any circumstances? (If favor death penalty:) For which of these crimes, if any, would you favor the death penalty?a paid killing D. Favor the death penalty for
ROP_HIJ	Opinions differ as to whether there should be a death penalty for certain very serious crimes, or whether there should not be a death penalty for any crime, no matter how serious it is. How do you feel--are you in favor of the death penalty for certain crimes, or opposed to the death penalty under any circumstances? (If favor death penalty:) For which of these crimes, if any, would you favor the death penalty?hijacking a plane that results in death I. Favor the death penalty for
ROP_KID	Opinions differ as to whether there should be a death penalty for certain very serious crimes, or whether there should not be a death penalty for any crime, no matter how serious it is. How do you feel--are you in favor of the death penalty for certain crimes, or opposed to the death penalty under any circumstances? (If favor death penalty:) For which of these crimes, if any,

	would you favor the death penalty?kidnapping when the victim is killed H. Favor the death penalty for
ROP_MUR	Opinions differ as to whether there should be a death penalty for certain very serious crimes, or whether there should not be a death penalty for any crime, no matter how serious it is. How do you feel--are you in favor of the death penalty for certain crimes, or opposed to the death penalty under any circumstances? (If favor death penalty:) For which of these crimes, if any, would you favor the death penalty?in death F. Favor the death penalty for
ROP_OPP	Opinions differ as to whether there should be a death penalty for certain very serious crimes, or whether there should not be a death penalty for any crime, no matter how serious it is. How do you feel--are you in favor of the death penalty for certain crimes, or opposed to the death penalty under any circumstances? (If favor death penalty, ask:) For which of these crimes, if any, would you favor the death penalty?Oppose death penalty
ROP_POL	Opinions differ as to whether there should be a death penalty for certain very serious crimes, or whether there should not be a death penalty for any crime, no matter how serious it is. How do you feel--are you in favor of the death penalty for certain crimes, or opposed to the death penalty under any circumstances? (If favor death penalty:) For which of these crimes, if any, would you favor the death penalty?the killing of a policeman or prison guard B. Favor the death penalty for
ROP_PUB	Opinions differ as to whether there should be a death penalty for certain very serious crimes, or whether there should not be a death penalty for any crime, no matter how serious it is. How do you feel--are you in favor of the death penalty for certain crimes, or opposed to the death penalty under any circumstances? (If favor death penalty:) For which of these crimes, if any, would you favor the death penalty?assassinating a high public official G. Favor the death penalty for blowing up a government building that results
ROP_TRE	Opinions differ as to whether there should be a death penalty for certain very serious crimes, or whether there should not be a death penalty for any crime, no matter how serious it is. How do you feel--are you in favor of the death penalty for certain crimes, or opposed to the death penalty under any circumstances? (If favor death penalty:) For which of these crimes, if any, would you favor the death penalty?treason, espionage Favor the death penalty for
STAR_FAV	Do you favor or oppose the death penalty for persons convicted of murder? (If favor/oppose ask:) And is that strongly or somewhat (favor/oppose)?
STA_MUR	Now, thinking about the death penalty. Do you favor or oppose the death penalty for people convicted of murder?
STA_RAP	Do you favor or oppose the death penalty for people convicted of rape of an adult?
STA_RET	Some people feel that there is nothing wrong with imposing the death penalty on persons who are mentally retarded, depending on the circumstances. Others feel that the death penalty should never be imposed on persons who are mentally retarded under any circumstances. Which of these views comes closest to your own?

STA_SEX	Do you favor or oppose the death penalty for people convicted of sexual abuse of a child?
TNS_MUR	Are you personally in favor or against the use of the death penalty?
WAS_ACC	(I'm going to read you a list of issues. For each one, please tell me whether you think of it as a 'moral' issue involving your beliefs about what is morally right and wrong or you don't think of it as a moral issue.) How about...the death penalty?
WAS_COC	Do you think that people convicted of selling cocaine should be given the death penalty, life imprisonment, a long jail term, or a short jail term?
WAS_MUR	Do you favor or oppose the death penalty for persons convicted of murder?
WIR_CRM	Do you feel there are any crimes that would justify the death penalty?
WP_MUR	Do you favor or oppose the death penalty for persons convicted of murder?
YAN_ARM	(Do you favor the death penalty for someone convicted of each of the following?)... Armed robbery
YAN_BUR	(Do you favor the death penalty for someone convicted of each of the following?)... Burglarizing a home
YAN_CRM	(Do you favor the death penalty for someone convicted of each of the following?)... Selling drugs to children
YAN_DETER	Do you think having the death penalty deters people from committing crimes, or don't you feel that way?
YAN_HIJ	Now I'd like to know how you feel about a number of important issues that face the country. Do you favor or oppose: Wider use of the death penalty for certain crimes such as hijacking or the killing of a police officer
YAN_MUR	Do you favor or oppose the death penalty for individuals convicted of serious crimes, such as murder?
YAN_POL	(Do you favor the death penalty for someone convicted of each of the following?)... Murdering a police officer
YAN_RAP	(Do you favor the death penalty for someone convicted of each of the following?)... Rape
YAN_RET	Do you favor or oppose the death penalty for mentally retarded individuals convicted of serious crimes, such as murder?
YAN_SEX	(Do you favor the death penalty for someone convicted of each of the following?)... Sexually molesting a child
YAN_TIM	As you know, Timothy McVeigh was convicted of murder in the Oklahoma City bombing. Do you think Timothy McVeigh should receive the death penalty, or not?
YSW_KID	Now here are some statements which represent some traditional American values. Will you tell me for each one whether you strongly believe in this statement, partially believe it or don't believe it. The death penalty should be restored for certain crimes like kidnapping or hijacking.

Technical data from Wcalc concerning the construction of our index.

Estimation Report for File: C:\FB\DP\StatisticalPortrait\PublicOpinion\DPOpinionNov10.dta
488 records after date scan
Period: 1976 to 2015, 40 Time Points
Number of Series: 66
Exponential Smoothing: On

Iteration History: Dimension 1

Iter	Convergence	Criterion	Items	Reliability	AlphaF	AlphaB
1	.5934	.001	66	.953	.627	.970
2	.0161	.001	66	.971	.638	.844
3	.0036	.001	66	.971	.626	.855
4	.0008	.001	66	.971	.624	.857

Xxx maybe give information about how to read this table:

Table 17.2. Loadings and descriptive variable information

Vn	Variable	Cases	Dim 1 Loading	Dim 2 Loading	Mean	Std Dev
1	GAL_MUR	25	.956	.000	72.977	6.225
2	NOR_MUR	24	.961	.000	73.584	4.523
20	GAL_LIFE	16	.845	.000	57.509	5.245
49	GAL_ACC	15	.773	.000	69.209	3.048
39	PSR_MUR	10	.921	.000	71.596	5.188
43	GAL_OFT	13	.622	.000	72.984	8.387
53	GAL_APP	10	.674	.000	59.660	2.880
15	AWP_MUR	8	.821	.000	73.427	5.659
13	NBC_MUR	7	.929	.000	75.286	3.107
17	ABC_MUR	6	.957	.000	72.188	5.904
29	CBS_MUR	6	.901	.000	70.413	6.221
26	CNY_MUR	5	.917	.000	73.071	4.169
64	FOX_MUR	5	.893	.000	75.729	2.154
19	GAL_DET	5	.876	.000	51.694	13.886
10	GAL_RAPE	4	.953	.000	45.578	7.249
37	PSR_LVL	4	.853	.000	40.117	8.053
27	YAN_MUR	4	.792	.000	81.066	1.369
44	ABC_LIFE	3	1.000	.000	49.705	3.579
59	PSR_FAV	3	.999	.000	62.582	2.890
51	HAR_MUR	3	.974	.000	71.084	2.130
11	GAL_SKY	4	.715	.000	41.696	10.683
55	GAL_EVRIN5	3	.940	.000	29.676	5.195
33	CBS_LIFE	4	.639	.000	58.090	5.421
65	CBS_LIF	3	.844	.000	45.529	17.614
18	GAL_BLK	3	.788	.000	52.719	3.957
7	CNY_ANY	3	.755	.000	78.220	1.720

34	GAL_TIM	3	.702	.000	68.640	10.399
3	HAR_DETEF	2	1.000	.000	48.453	6.284
8	LHA_TER	2	1.000	.000	72.283	8.329
12	GAL_TRE	2	1.000	.000	43.089	1.229
14	LAT	2	1.000	.000	71.961	3.829
24	GAL_SPY	2	1.000	.000	48.089	2.437
25	CPS_MUR	2	1.000	.000	80.198	.653
28	CBS_DET	2	1.000	.000	56.291	9.100
31	GAL_EXT	2	1.000	.000	58.141	5.016
32	HTR	2	1.000	.000	75.134	.134
35	GAL_EVRIN	2	1.000	.000	9.935	3.749
36	PSR_ACC	2	1.000	.000	29.375	2.493
40	CBS_TIM	2	1.000	.000	77.935	.309
46	HI_EVIN	2	1.000	.000	51.442	8.109
50	HI_MOR	2	1.000	.000	35.677	.193
56	GAL_PCT	2	1.000	.000	60.548	1.408
58	ORC_LIF	2	1.000	.000	51.257	2.278
62	YAN_HIJ	2	1.000	.000	79.793	3.751
66	GAL_SAD	2	1.000	.000	67.843	6.384
63	ABC_HER	2	1.000	.000	34.024	.351
21	GAL_POOR	3	.549	.000	34.374	2.215
4	LHA	4	.345	.000	74.725	2.561
16	GAL_MAND	3	.404	.000	65.340	7.641
60	PRRI_LIF	3	.385	.000	46.408	3.232
9	ROP_MUR	6	.173	.000	75.310	6.607
38	PSR_TIM	3	.332	.000	79.615	2.718
48	AWP_LIFE	4	.245	.000	51.971	.921
54	QUI_MUR	3	.215	.000	68.944	.914
57	QUI_LIF	4	.026	.000	50.275	2.110
5	LHA_COP	2	-1.000	.000	75.794	1.984
6	LHA_MUR	2	-1.000	.000	73.262	2.210
23	GAL_PRES	2	-1.000	.000	62.963	2.324
30	PSR_TEEN	2	-1.000	.000	54.670	3.022
41	GAL_WOM	2	-1.000	.000	63.461	6.642
42	WP_MUR	2	-1.000	.000	72.396	.521
47	HTR_MOR	2	-1.000	.000	47.448	15.190
52	CBS_PAR	2	-1.000	.000	50.000	3.571
61	YAN_DETER	2	-1.000	.000	58.985	12.594
22	LAT_MUR	3	-.910	.000	81.018	1.241
45	HAR	3	-.965	.000	73.259	1.815

Dimension 1 Information
Eigen Estimate 5.33 of possible 7.35
  Pct Variance Explained: 72.51

Weighted Average Metric: Mean: 60.17 St. Dev: 4.59

18

Why Does the Death Penalty Cost So Much?

Dean Murphy

Introduction

Throughout the existence of capital punishment in modern societies, arguments for and against the death penalty have centered primarily on ethics, deterrence, retribution, and the potential of taking the life of an innocent individual.

Over the past decade though, another facet has become an emerging point of analysis for policy advocates and state legislatures, one which involves assimilating the extra costs associated with maintaining the institution of government-administered executions. Commentators of cost point to extreme inefficiencies in the contemporary system. The death penalty is theoretically reserved for the vilest criminals in society, but we often find this is not the outcome. Even when sentenced to death, approximately 20% of the convicted actually face the gurney and when they do, it is often decades following their initial convictions. The time and resources consumed in maintaining this establishment become extravagant despite little to show in terms of executions carried out. After reinstating the death penalty in 1995, New York State pumped an estimated $170 million into its death penalty system. When the New York Supreme Court reversed the reinstatement 9 years later, not a single execution had taken place. Similarly, New Jersey has depleted over a quarter billion dollars since 1982 in maintaining its death penalty system, which has also not resulted in one execution of its approximately 200 capital convictions.

For many, the cost consideration has introduced a new dynamic to the policy debate, one that attracts attention from all sides of the political spectrum. In 2015, the Nebraska legislature, an historically Republican body, passed a resolution barring the death penalty. Following a

gubernatorial veto and widespread public political pressures on individual representatives to reverse the legislation, Nebraska's senators held their ground. Conservative and libertarian-leaning lawmakers are beginning to alter their stances on capital punishment as new cost reports highlight elevated expenditures at every level of the capital punishment process. Legislative chambers across the country now ring with outcries of the opportunity costs of capital punishment. In the states where capital punishment cases cost half a million or more relative to non-capital cases, public officials are calling for abolishment and reallocation of funds. Instead of financing expensive and inefficient government executions, lawmakers see greater good coming from spending tax dollars on education, law enforcement, public welfare, and reducing debts and deficits incurred during the economic recession.

What Costs Are Explicitly Being Measured?

The most accurate and encompassing method of quantifying the costs of maintaining a system of capital punishment involves breaking down each individual stage of the process, starting from trial and ending with the convict's execution, and enumerating the differences relative to a non-capital trial. This poses a difficult challenge for researchers though, as each state adopts its own distinct procedural safeguards that it deems for the proper administration of justice. *Heterogeneity in the structure of each state's institutions and procedural rules invariably leads to variation in aggregate cost estimates, as we shall see*. The U.S. Supreme Court mandates some aspects of capital murder proceedings while others are dependent on the authority of state legislatures. The following section will attempt to distinguish all of the crucial differences between capital and non-capital proceedings. Once these distinctions are enumerated, they will ultimately help in determining which of the existing death penalty cost studies are the

most comprehensive in nature. Structuring the cost makeup now will also help serve as a basis of normalization for future cost studies.

The decision to pursue the death penalty rests on the discretion of district attorneys. Once the conclusion is made to seek the death, an entirely different course of events ensues relative to non-capital murder proceedings. When the specific case comes to court, the first significant difference exists in the structure of the trial. In 1976, the majority in *Gregg v. Georgia* extended its scope of policy influence by explicitly enumerating procedural safeguards that would make capital punishment legal again. Among the most critical listed was the division of the physical trial and sentencing phases, creating a bifurcated process that is now employed uniformly throughout the United States. In the trial phase, guilt or innocence is determined. If the accused is convicted, the sentencing stage serves as an extension of the trial, and the jury comes to the conclusion of whether or not to institute the death penalty contingent on the particular aggravating or mitigating circumstances present in each case.

Trial Stage:

Compared to non-capital trials, capital cases are essentially the same. The trial takes place in front of a 12-person jury, is mediated by a judge, subpoenas witnesses, and incurs administrative and personnel costs necessary to maintain the order of the courtroom.

The most apparent dissimilarity manifests in the amount of defense and prosecutorial manpower each side employs or is required by law. For example, In North Carolina, state code requires defendants in capital murder trial to be allotted two defense attorneys, with the intention that this will ensure adequate counsel. The prosecution also has the discretion to increase the amount of assistance it deems appropriate to prove the state's case, and sometimes employs multiple prosecutors in the courtroom.

In addition to the extra costs associated with having more attorneys working on each case, several studies have found that more monetary resources are spent on expert testimony for both the defense and prosecution. The process of recruiting a jury of peers for capital cases has been deemed a harder process also, as the time spent amassing the jury is often multiple times more than in non-capital murder trials.

In essence, *capital trials are more contentious* than non-capital trials and therefore the *stakes are higher* for the parties involved. In the face of a potential death sentence, more legal safeguards are instituted and both the defense and prosecution engage in strategies that amplify their chances of receiving their ideal verdicts. This often results in higher expenditures and resource utilization.

Sentencing Stage:

In many ways, the same actors are present in the sentencing stage as in the trial stage. The judge, jury, attorneys, experts, and personnel are commonly the same people. The sentencing stage can thus be characterized as an extension of the trial, requiring similar responsibilities from the actors involved but as a result, expenditures are increased because of the additional time demanded of them relative to a case in which the death penalty is not a pursuable option.

Appeals Process:

The appeals stage is easily the most prolonged process involved with the death penalty. As has been enumerated in previous chapters, upon the deliverance of a sentence of death, the convicted embarks on a journey of seemingly endless appeals, both at the state level and in the federal court system, in order to either review the constitutionality of the ruling or contest the

facts presented in the original trial. On average, these appeals last approximately 15 years from death sentence to execution.

After the death penalty imposition, the wheels of direct appeal immediately start moving. Direct appeals are typically made to the state supreme court and concern issues that arose in trial. Following state direct appeals, the convicted may continue with post-conviction appeals. After this, if relief is not obtained at the state level, attorneys can then seek relief at the federal level, through a federal Habeus Corpus petition, which is concerned solely with constitutional issues raised on appeal in the state courts. Finally, if to no avail, an execution date is set, but attorneys can also file for a stay of execution, a last ditch effort to prevent the administration of the death penalty. At three different points in the appeals process, a defendant can seek judicial review via writ of certiorari.

Numerous fees and expenses can accrue over this time period. Death row attorneys often only work for their clients for small snippets at a time, whether in the form or consultations or assembling the various brief, motions, and writs that are required at different times during the appeals cycle. State and federal courts of appeals and supreme courts often spend many hours tending to these appeals. Clerks, judges, and justices have responsibilities of reviewing these legal documents and conducting hearings if they believe material mistakes were made in the process or unique constitutional issues have come forth. The most comprehensive studies would take into account both the work hours and resulting monetary costs that come at each stage of successive appeals.

The appeals process for individuals sentenced to life without parole if much less convoluted and typically is not contested with the same frequency as in a death penalty case.

Similarly to capital appeals, defendants can file a notice of appeals immediately after a sentence imposition.

Incarceration:

The incarceration conditions of death row inmates contrast drastically from those of the general population. Individuals sentenced to die are effectively are placed in a completely separate unit where they do not interact with other prisoners and are subject to the close scrutiny of prison staff.

For prisons officials, this means physically building different facilities to accommodate the needs of death row inmates, and continually expanding if this specific prison subgroup grows over the years. Costs skyrocket for death row inmates because they are traditionally placed one per cell and have a higher proportion of security to inmates.

Executions:

Occasionally, an inmate will exhaust every available avenue in seeking relief from their sentence and an execution will be fulfilled by the state. When that fateful day arrives, it almost invariably costs the state relatively little in terms of time and expenditures unless it has to build a new facility for the executions to take place.

Lethal injections, which are currently the most widely accepted form of execution in the country, typically require the purchase of three different drugs: a barbiturate, paralytic, and a sodium-based solution. While comparatively inexpensive, many states are now finding it increasingly difficult to obtain these drugs due to policy pressures on pharmaceuticals to refrain from selling to clients who will use them in executions. With shortages widespread, states are either substituting traditional lethal injection drugs or are going through hurdles to import drugs

from abroad. The constantly evolving market to purchase lethal injection drugs makes accurate cost estimates a complicated task.

In addition to drugs, states generally require a medical doctor to be present to monitor the progress of executions while prison officials administer the lethal concoction. Extra security is occasionally needed if the execution attracts publicity from the media and anti death penalty advocates and protests form as a result.

Seminal Studies

So far, we have identified a multitude of sources for monetary outlays related to the death penalty and also expanded upon some of the opportunity costs associated with diverting resources to the lengthy appeals process. Before reviewing the aggregated cost data of various states, it would be advantageous to elaborate on two cost studies that have been considered seminal works in the field due to the comprehensiveness of the data collection process and the breadth of variables observed. The first is a North Carolina case study conducted by a Duke University professor and the other by a judge on the Ninth Circuit U.S. Court of Appeals along with a law professor at Loyola.

Considered to be one of the most comprehensive death penalty cost studies of all time, *Cook et. al* analyzed costs at the trial, appeals, and imprisonment level in the state of North Carolina. *Cook* looked at the cost of adjudicating a capital first-degree murder trial all the way to execution versus a non-capital first-degree murder case that resulted in a conviction and a 20-year prison sentence. They estimated additional costs of $329,000 per case.

An average bifurcated capital trial cost $87,000, while the non-capital counterpart was $17,000. Using regression analysis, the financial difference between a bifurcated trial and non-capital murder trial is approximately $55,000.

Cook expands beyond the typical government survey method and requested that the North Carolina Supreme Court keep detailed records pertaining to time and resource allocation of each first degree murder appeal that came before the court. They concluded that an appeal in a capital case is $7,000 more expensive than a life case.

Cook then offers a unique calculation that is often overlooked relating to imprisonment: an inmate that serves ten years on death row and is then subsequently executed saves the Department of Corrections $166,000 when compared to an inmate serving a "life" term who is paroled after 20 years.

In summary, the additional cost per death penalty imposed was over $250,000 and exceeded $2 million per execution, contingent on the assumption that 10% of those sentenced to death will ultimately be executed.

California, a state where over 700 people currently sit on death row, has been the subject of several cost study analyses, the most striking stemming from Alarcón and Mitchell in 2011. Since the reinstatement of the death penalty in California in 1978, taxpayers have spent roughly 4.6 billion dollars in maintaining its death penalty system. With only 13 executions between 1978-2011, this equates to nearly 300 million dollars for each execution.

The authors also determined that capital cases range from 10 to 20 times more expensive than if the death penalty were to not be pursued. With a sample size of 1940 inmates, or the entirety of California's death row, the study represented the largest and most robust cost analysis in United States history. Alarcón and Mitchel also do a super job of determining the concentration of costs in the death penalty process. Nearly $2 billion, or half, of monetary outlays are spent at the pre-trial and trial stage, $1 billion in automatic appeals and state Habeus

Corpus petitions, $775 million for federal Habeus Corpus appeals, and $1 billion for incarceration related expenditures.

Methodology:

The starting point for collecting cost studies relating to the administration of the death penalty was the Death Penalty Information Center, which has already amassed a collection of academic and journalistic cost studies from a variety of states across the United States. This collection served as the basis for finding other cost studies. By reviewing the references of each study, several other publications have become available. A Google Scholar search using keywords such as "death penalty costs," "cost of capital punishment," and "price of capital punishment" has currently yielded 6 additional articles, which are currently under review as to their comprehensiveness.

The Data:

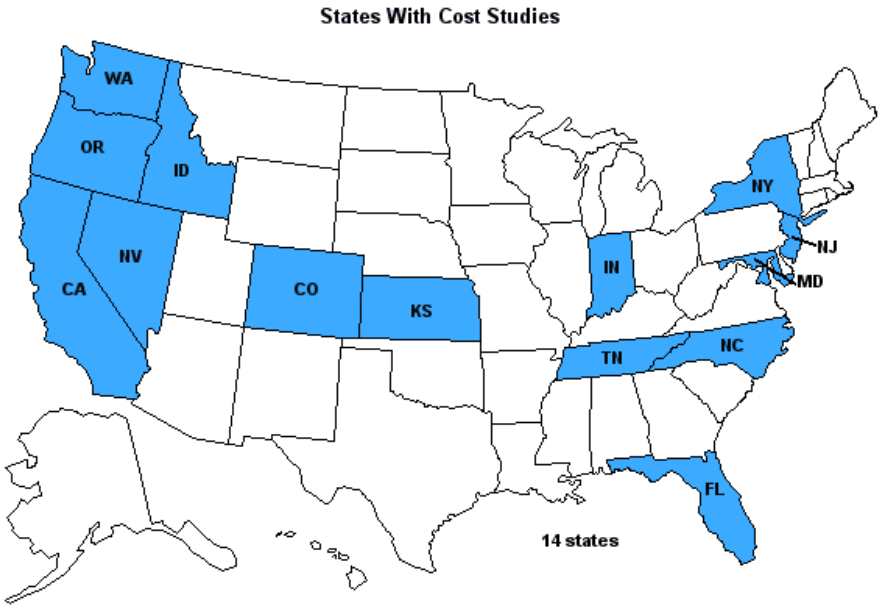
When reviewing existing studies, authors almost exclusively focus on a particular state for their basis of cost analysis. This method is extremely relevant and effective, given that each state has different safeguards and procedures in place that alter where costs will be concentrated in the trial, sentencing, and various appeals processes. Comparing two different states would be analogous to comparing apples and oranges.

All cost studies are relatively recent. Specifically, each study takes into account costs in the post 1976 after the death penalty was reinstituted after the *Gregg v. Georgia* Supreme Court ruling. Studies extend as far as 2014 in their time horizon.

While almost all the studies have similarities in the basis of their methodology, variation begins to manifest in actual cost estimates. Cost studies most often reach estimates that are based on an annual, one-time, or per-case basis. Other focus solely on providing an aggregate sum of

fiscal outlays over the time period the author's analyzed. To put costs in relative terms, some authors elected to construct a ratio that juxtaposes the average cost of death penalty versus non death penalty cases. This produces a number that shows how much more expensive capital cases are from non-capital cases.

In total, cost analyses span 14 individual states, the entire U.S., and the federal government.



Scope and Methodology of Studies

The sample size for each study ranges from as little as 17 to as large as 1940. Specifically, the samples are composed of individuals who have been tried and convicted capitally and those who have not.

Most authors depend on self-reporting surveys that are sent out to various law enforcement officials, defenders' offices, prosecutors' offices, and state supreme courts. That being said, the results of the cost studies are dependent on the cooperation of various government departments. The most common downside to this type of methodology is poor response rates,

responder bias, or just the mere fact that many offices work with specific fixed budgets each year, and do not necessarily keep detailed records of all expenses and labor hours incurred during death eligible cases. Table 18.1 summarizes the results.

Table 18.1 Summary of Existing Cost Studies

Study	Geographic Scope	Time Range
Collins, Boruchowitz, Hickman, Larrañaga (January 1, 2015)	Washington	1997-2010
Legislative Auditor, Carson City Nevada (December 2, 2014)	Nevada	2000-2013
Kansas Judicial Council (February 13, 2014)	Kansas	2004-2011
Office of Performance Evaluations, Idaho Legislature (March 2014)	Idaho	1977-2014
Marceau, Whitson (2013) (Solely a Time-Based Study)	Colorado	1999-2010
Alarcón, Mitchell (2011)	California	1978-2011
Chalfin, Darmenov, Knight, Roman, Sundquist (March 8, 2008)	Maryland	1978-1999
Miethe (February 2012)	Nevada	2009-2011
Gould, Greenman (September 2010)	Federal	1998-2004
Washington State Bar Association (December 2006)	Washington	.
Forsberg (November 2005)	New Jersey	1983-2005
Morgan (July 2004)	Tennessee	1993-2003
State of Kansas Legislative Division of Post Audit (December 2003)	Kansas	1994-2003
Baicker (July 2001)	USA	1982-1997
Legislative Services Agency (January 2010)	Indiana	2000-2007
Cook (December 11, 2009)	North Carolina	2005-2006
Cook, Slawson, Gries (May 1993)	North Carolina	1991-1992
Palm Beach Post (January 4, 2000)	Florida	1979-2000
Kaplan (February 2, 2013)	Oregon	2002-2012
Minsker (March 2009)	California	1996-2006

Geographic Scope	Cost Estimate	Frequency
California	$139,000,000	Annually
Florida	$51,000,000	Annually
North Carolina	$10,800,000	Annually

Geographic Scope	Cost Estimate	Frequency	Gross Cost
Federal	$540,000	Per Case	.
Indiana	$407,229	Per Case	.
Kansas	$296,799	Per Case	.
Kansas	$520,000	Per Case	.
Nevada	$532,000	Per Case	.

Nevada	$170,000-$212,000	Per Case	$15,000,000
North Carolina	$163,000	Per Case	.
Oregon	$221,958	Per Case	.
Tennessee	$15,297	Per Case	.
Washington	$1,150,000	Per Case	$120,000,000
Washington	$754,000	Per Case	.

Geographic Scope	Gross Cost	Frequency
California	$4,600,000,000	One Time
Idaho	$4,133,831	One Time
Maryland	$186,000,000	One Time
New Jersey	$253,000,000	One Time
USA (Capital Trials Only)	$1,600,000,000	One Time

As can be seen from the data output, there is significant variation in costs associated with the death penalty across states. Some of this variation stems from authors measuring different variables and even more comes from the differences in procedural safeguards across the country.

With the exception of Tennessee, all other states would save upwards of $100,000 with each murder case if it decided to pursue life without parole instead of the death penalty. In some instances, such as the cases of the federal government and the state of Washington, maintaining the death penalty institution costs approximately $750,000 per case, a staggering amount considering the alternative of pursuing life without parole.

Despite the variation across studies, several prominent themes can be ascertained from them all:

1. Cases that are tried capitally take longer to complete than non-capital trials because of the existing procedural safeguards.
2. Capital cases are also more expensive than non-capital cases.

Which Process Costs the Most?

At first glance, one would assume most of the costs associated with the administration of the death penalty would be concentrated in the seemingly never ending appeals process. On the

contrary, *most of the costs stem from the bifurcated trial process*, as evidenced in several of the studies that explicitly broke down where costs were most prevalent. Alarcón and Mitchell note that nearly half of all California's expenditures stem from costs incurred in the pre-trial and trial stages. Likewise, more than 60% of Cook's cost estimate in his updated version of his 1993 seminal paper was attributed to extra defense costs in the trial phase.

Striking Facts: There can be moved to the beginning or on the side

- California: "The authors calculated that, if the Governor commuted the sentences of those remaining on death row to life without parole, it would result in an immediate savings of $170 million per year, with a savings of $5 billion over the next 20 years.

19

The Decline of the Death Penalty

Kaneesha Johnson

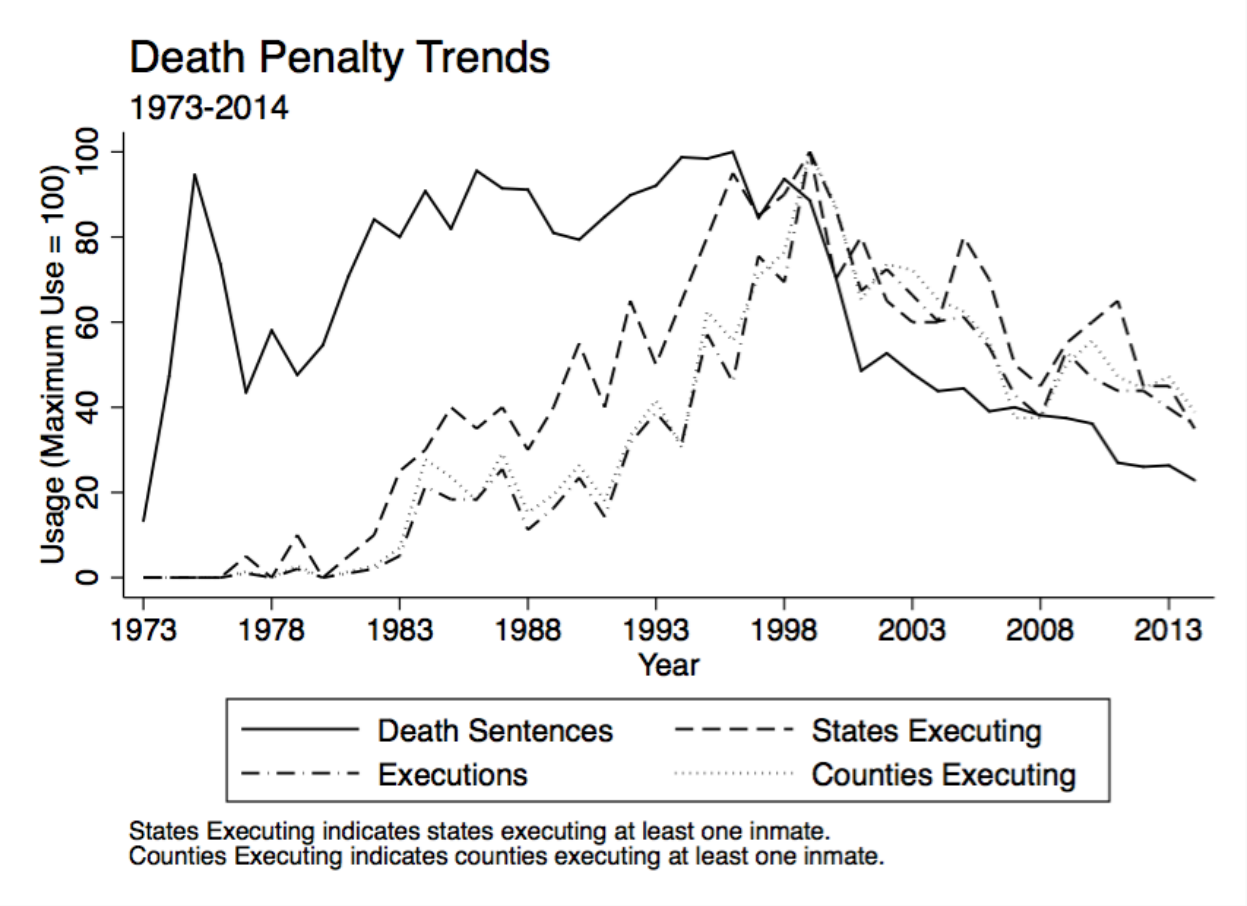
Throughout the modern capital punishment period, there has been some intense fluctuation in the use of the penalty. As chapter fourteen highlighted, public opinion was increasing up until the mid 1990s, following which public discourse on the penalty turned, and is now lower than the beginning of the modern death penalty period. The same is true for the use of the death penalty.

After reaching its peak usage in the late 1990s, the practice of capital punishment has been steadily decreasing. Through tracking the trends of executions, sentences, and the concentration of jurisdictions actually using the punishment over time, this chapter will highlight the general trends of capital punishment in the United States and then focus of the era of decline and what that may mean for the future of the capital punishment institution in the United States.

Trends of the Modern Capital Punishment Era

Death penalty use in the United States from 1976 to 2014 has two distinct periods, the period where there was expansion of use and the period where there was decline of its use. Following the *Gregg v. Georgia* decision in 1976 there was rapid expansion in the use of the death penalty, and the trends of capital punishment were, across the board expanding. Figure 19.1 shows the trends of capital punishment use from 1976 to 2014. These variables included in the trend have been set to have their maximum use peak at 100, meaning that those trends can be interpreted at the percentage of maximum use of each given variable.

Figure 19.1: Death penalty trends, four indicators 1977-2014



As shown in figure 19.1, all of the indicators of death penalty use reached their peak within a two-year period, and then followed a similar downward trajectory.

Following the *Furman* decision, there was a quick response to increase the number of death sentences. In 1975 there were 298 sentences given, coming close to its peak use in 1996 with 315 sentences. Following this there has been a steady decline to only 72 sentences in 2014, a decrease of almost 80 percent.

The peak year for executions arrived three years after the maximum sentencing year with a total of 98 executions in 1999. The number of executions in 2014 was almost a third of the number of executions in its peak year, decreasing from 98 to 35 executions, roughly 65 percent.

Not only did the number of sentences and the numbers of executions decrease, but the number of states and counties that performed at least one execution also declined. In 1998 the

number of states and counties that had at least one execution reached it highest use, with 20 states and 72 counties having at least one execution. The number of states has since declined to only 7 states performing at least one execution, or roughly 7 percent of the states. Counties executing at least one inmate decreased from 72, or 3.4 percent of US counties, in 1998 to 28, or 0.9 percent of all US counties, in 2014. These numbers indicate that there is not only a decline in the use of the death penalties, but that there is also an increasing geographical concentration of the penalty.

The Era of Decline

Following the peak in the mid- to late- 1990s, the increase in the use of the death penalty took a U-turn and began its descent. The frequency of executions, death sentences, states that carried out executions, as well as counties that carried out executions have all been steadily declining. This chapter will now direct attention towards the most recent period of capital punishment use and study the trends of the decreasing use of the death penalty.

The understanding of this decline is not novice, and many scholars have tried to explain the reasoning behind the decreasing support and practice of the punishment. Some have cited this decline to the discovery of innocence (Baumgartner, Boef, Boydstun 2008), reasoning that the reframing of the death penalty in terms of an innocence frame that surfaced during the mid 1990s successfully contributed to the decline in its use.

Sentencing

The number of death sentences given by the courts has been declining since 1996, where there were a peak number of sentences at 315 given that year. As seen in figure 19.1, 2014 saw less than a quarter of that number given, at 72 sentences.

Unfortunately, there are no data that provides comprehensive sentencing figures for the individual states over the modern death penalty period. However, various state organizations provide some information for us to infer some more information. The Texas Coalition to Abolish the Death Penalty stated that Texas have dropped by almost 80 percent since 1999 (TCADP). Further, in the first six months of 2015, Texas gave out no death sentences.

Ohio has experienced a drop in sentences by 77 percent in the past five years, while experiencing increase of life sentences by an astonishing 92 percent (Caniglia 2015). This hints at the idea that more and more people are finding that a more fitting punishment for death-eligible crimes could have shifted from execution to life in prison.

Virginia has also decreased substantially, from 40 sentences given out in the years 1998-2005, to only six sentences from 2006 through April 2015 (Garrett 2015). Even the number of capital indictments that went to trial dropped from 34 percent to 19 percent, hinting at prosecutors negotiating pleas for lesser sentences at higher rates.

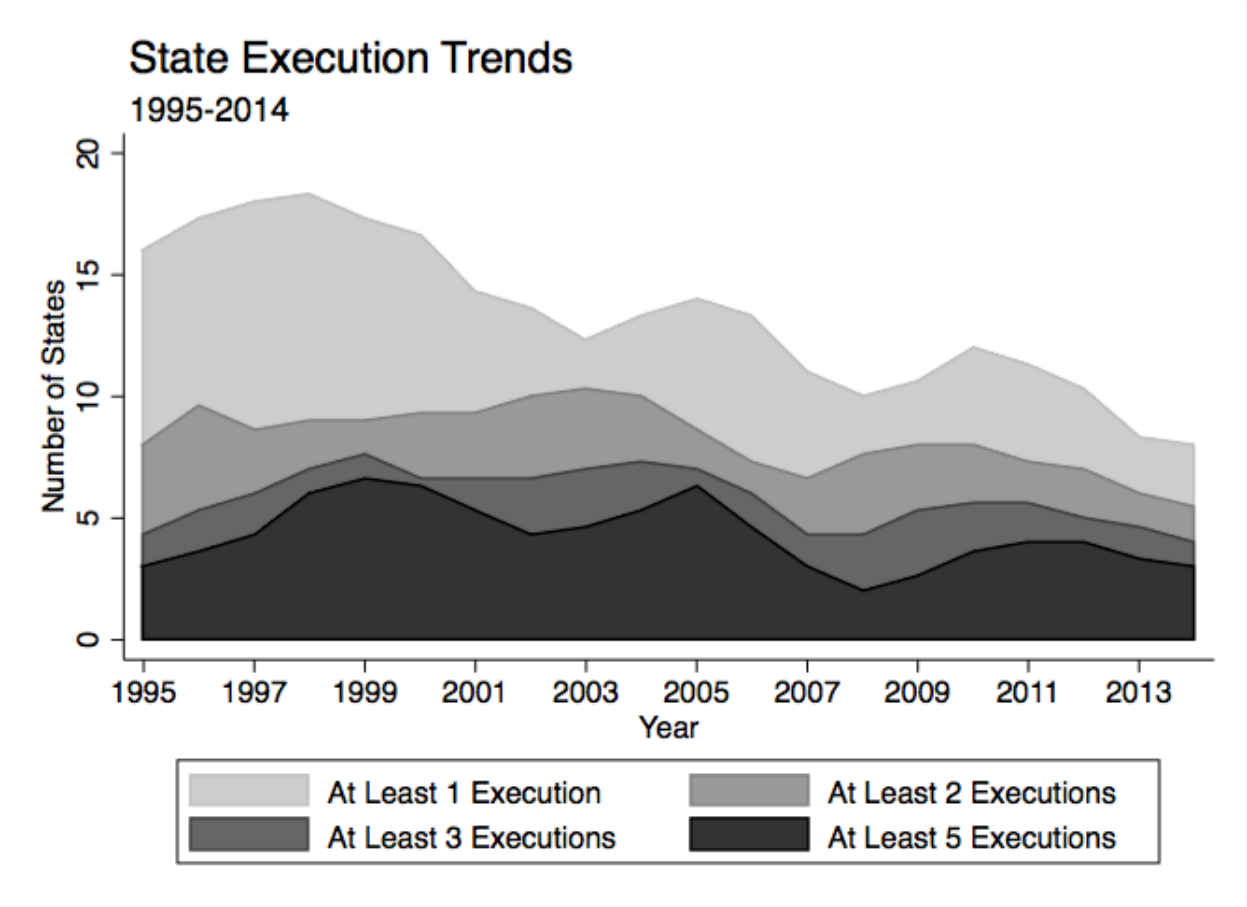
Executions

Executions are a rare punishment in the United States, with no more than 40 percent of the states executing at least one inmate in a year. As we have just highlighted, the number of executions per year is decreasing substantially, from 98 executions in 1999, to 35 in 2014. It is also worth looking at states that have more than one execution per year to determine if it simply a matter of low usage state abandoning the punishment altogether.

Figure 19.2 shows the trends of states executing at least one, two three and five inmates. To obtain the figure, we created a three-year moving average, this eliminates minor fluctuation, and gives a good representation of general trends. It becomes clear that the executions are not

only declining for those states that are executing a single inmate in a year, but also those states that are executing at a higher rate.

Figure 19.2 States executing at least one, two, three, and five inmates per year, 1995-2014

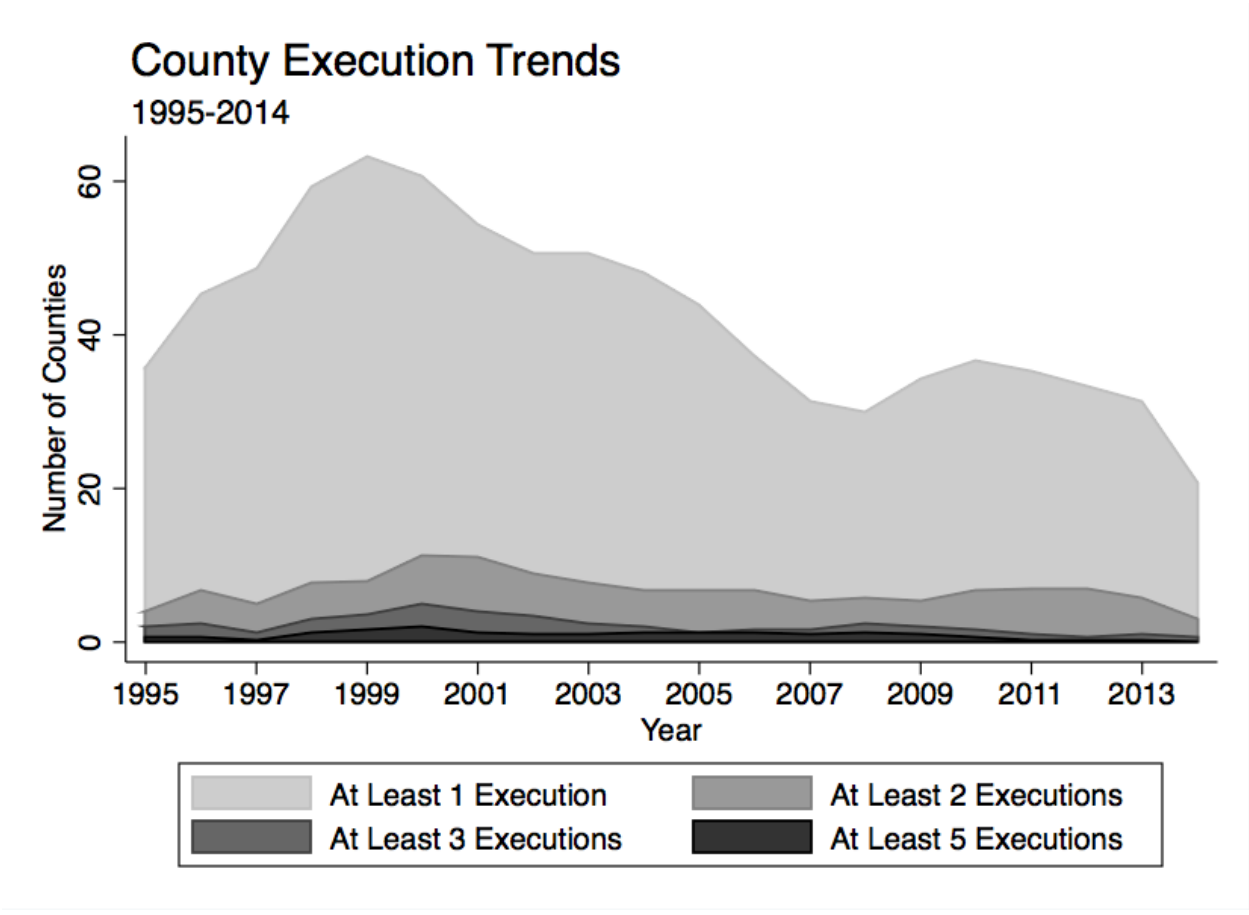


Although at a slower pace, those states that have annual executions of at least two, three, and five executions are also declining, and at similar trends of overall decline. The number of states that were executing at least two inmates peaked three times; 1995, 1999, and 2002 at 11 states. In 2014 there were five states executing at least two inmates. States executing at least three inmates peaked in 2005 with nine states, in 2014 that number of states more than halved, to four. States executing at least five peaked in 1999 at eight states, and in 2014 that number is almost a third of its peak down to three states carrying out at least five executions. These

numbers show that even those states where the death penalty is most popular and are executing at higher rates are executing less over this period of capital punishment decline, from 1995-2014.

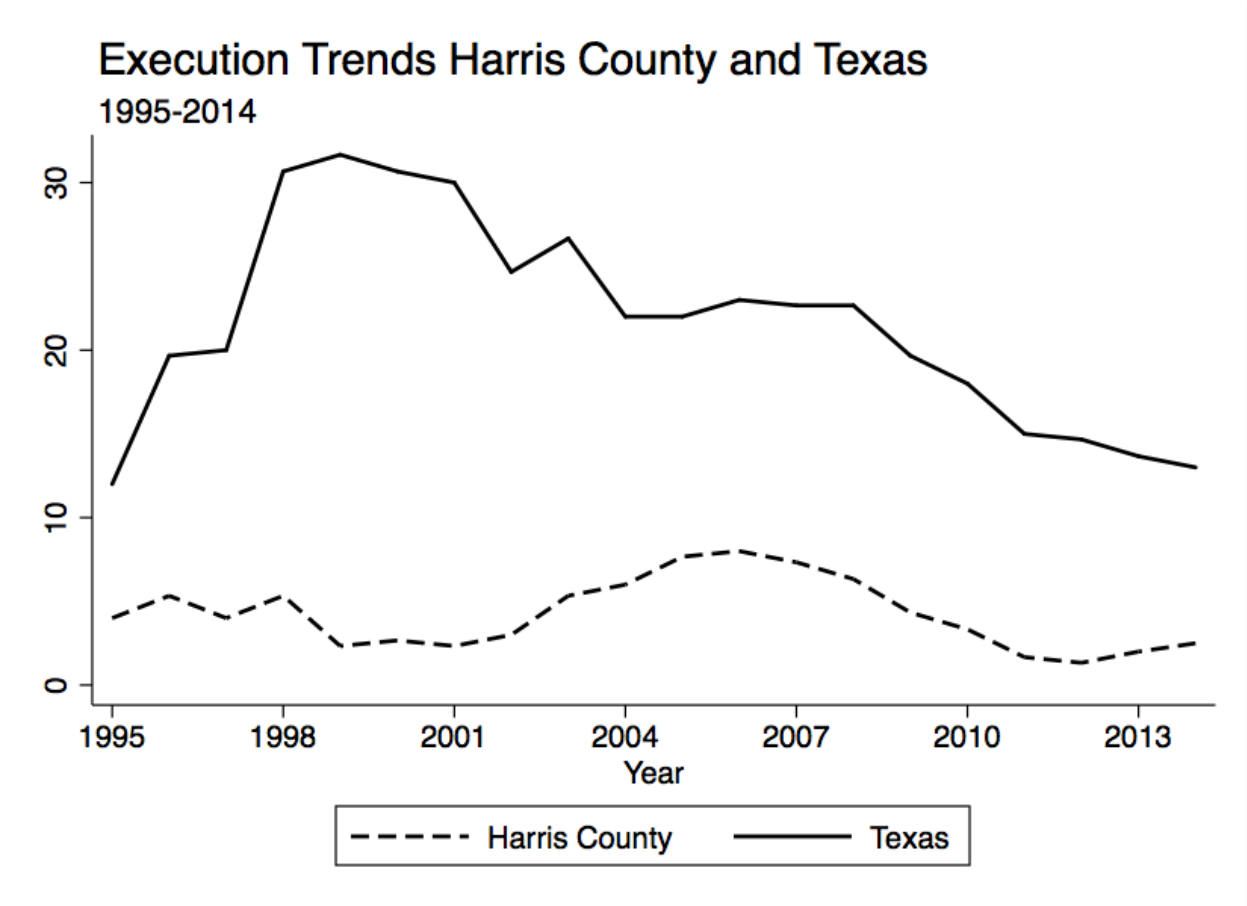
The number of counties that carry out all of the executions is very small, the number of counties that execute more than one inmate per year is miniscule. Figure 19.3 shows the county yearly executions divided into the same categories as Figure 19.2 and adopting the same three-year average. No more than 72 counties have carried out at least one execution in a single year. There have been no more than 12 counties executing at least two inmates in a year. Only six counties have executed at least three inmates in a year. Only three counties have executed at least 5 inmates in a single year, cumulatively, there have been only 22 counties that have ever executed more than 4 inmates in a year. All of these indicators reached their peak in 1999.

Figure 19.3 Counties executing at least one, two, three, and five inmates per year, 1995-2014



Declining trends also holds true for the state and county that execute at the highest rates, Texas and Harris County, seen in Figure 19.4. Texas accounts for 518 executions in the modern period, almost 40 percent of all executions carried out in the United States. Harris County is attributable for 123 of those executions. Again, we have used a three-year moving average to track the trends. This allows minor fluctuations to be omitted so we can track the general trends more effectively.

Figure 19.4 Execution trends Texas and Houston County, 1995-2014

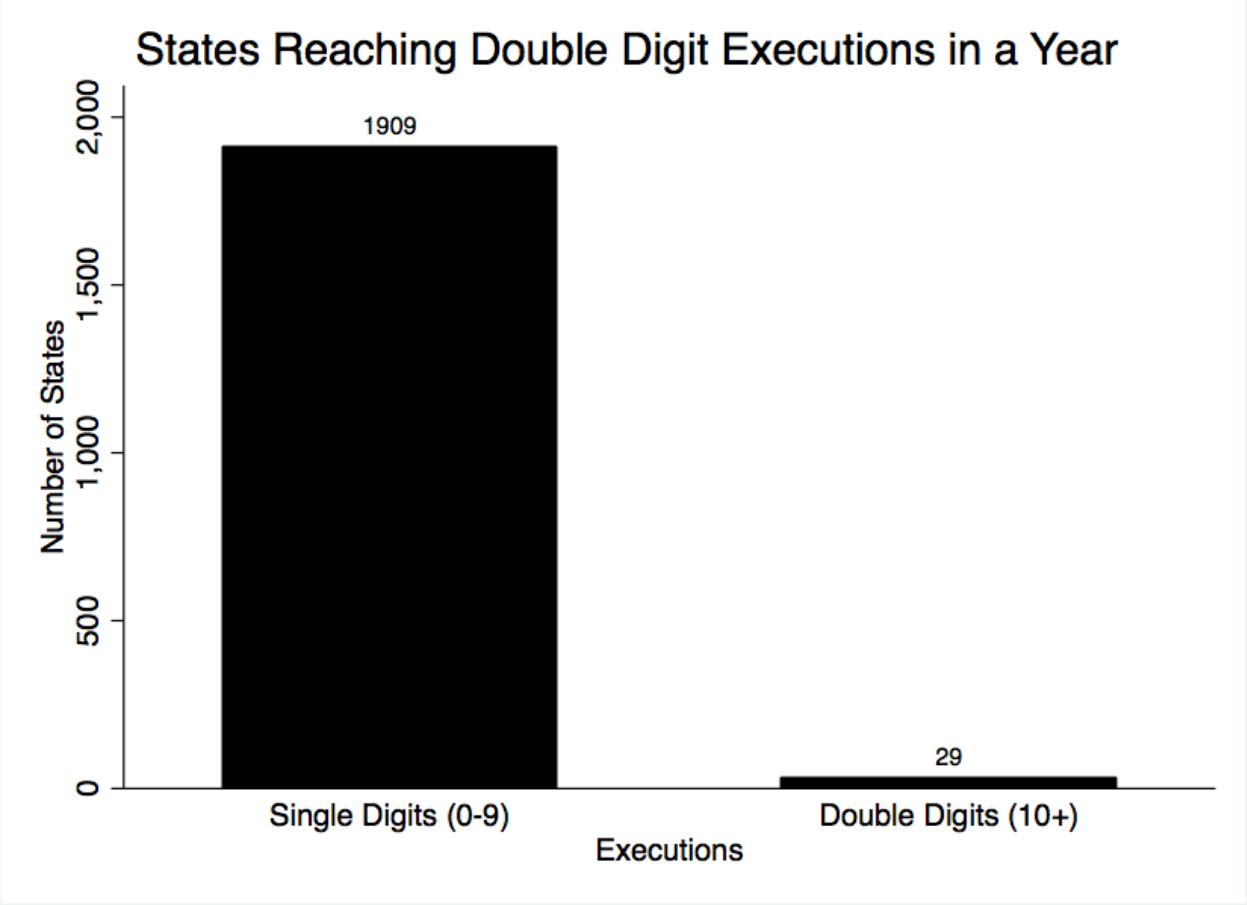


Texas has clearly been declining in its use of the death penalty, reaching a peak in the late 1990s, in line with the trends of the nation. Harris County has experienced slightly more fluctuation. Its peak use was in 1997 with 11 executions. However, declines in Harris County can be seen beginning in the mid- 2000s.

The Rarity of the Death Penalty

The death penalty is a rare punishment. With no more than 98 executions or 366 sentences given out in a single year across the United States. In fact, in the modern death penalty era, there have only been 29 states that have executed 10 or more inmates per year, as shown in Figure 19.5. Only four states make up those who executed 10 or more inmates in a year from 1973-2014. 23 were accountable by Texas, three by Oklahoma, two by Virginia, and one by Missouri.

Figure 19.5 States executing 10 or more inmates per year, 1973-2014



States Abandonment of Capital Punishment

The United States had a unique response to the abolishment of the death penalty following *Furman* in 1972, with a rapid influx of states reinstituting their capital punishment statutes. However, in recent years, this attitude has shifted. The abandonment trend for the states

began in 2007 with New Jersey and New York, which prompted seven states to strike their capital punishment laws in the following years. Currently, there are 31 states that have active death penalty statutes.

The events and stages preceding capital punishment abolishment usually follow a similar path. Historians have outlined the key stages of the death penalty decline, (1) a reduction in the range of capital eligible offences and offenders, (2) the abolition of aggravated death sentences, (3) the removal of execution form the public gaze, (4) adopted energies to reduce the pain during executions, (5) divisions in public opinion of the death penalty, (6) adoption of safeguards in the legal proceedings, (7) a steady decline of its use, finally (8) the movement toward partial and then complete abolishment (Garland 2005)[172]. The death penalty in the United States appeared to be following this trajectory in the pre Furman era, and despite its reinstatement, we could argue that a similar pattern is emerging in the current era of decline. Every system has anomalies, and the increase in death penalty use following *Furman* appears to be an slight glitch in the United States decreasing use of the death penalty.

The Increasing Punishment: Life Sentences

While death sentences have been loosing popularity, its alternative sentence has been gaining significant traction, life in prison. With the exception of Alaska, every state has the option of life in prison without the possibility of parole (LWOP) in every state. As of 2012, 159,520 people were serving life sentences, 49,081, or 30.8 percent, of them were serving LWOP sentences (Nellis 2013). There was an 11.8 percent rise in the number of people serving life sentences from 2008 to 2012, LWOP increased by 22.2 percent from 40,174 in 2008 to 49,081 in 2012 (Nellis

[172] Radzinowicz (1948), Spierenburg (1984), Beattie (1986, 2001), McGowen (1987), Gatrell (1994), Evans (1996) and Banner (2002). Council of Europe (1999) and Hood (2002).

2013). Florida currently has the largest LWOP population with 7,992 people serving the sentence.

Conclusion

All the evidence points to capital punishments decline. Across the board, both nationally and in those states and counties where the punishment has been popular, there are less people getting killed by the state.

In October 2015, Justice Scalia, arguably the most avid supporter of the death penalty on the current court, stated in an appearance at the University of Minnesota Law School that he would not be surprised if the Supreme Court struck down the death penalty. At the event, Justice Scalia said that it has become, "practically impossible for states to impose the death penalty" (Kaste 2015), referring to the recent complications in the drug cocktail used in executions. If the staunchest supporter of the death penalty is having doubts on the system, what position does that leave us in?

It seems we are faced with two options; abolish the death penalty because of the continuing errors in its application, or eliminate the need to hide the gruesome act of executing a person and returning to a system less riddled with error. However, it is important to stress that the second option has a caveat; the public believes that we have evolved past old methods in which the state puts someone to death, such as electrocution and firing squad, and with the very important rhetoric of evolving standards of decency, is it even possible that the American people or the Supreme Court would support returning to a system we considered behind our current standards? In the broad light of day, it seems our options are limited.

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20

Has The Modern Death Penalty Solved the Constitutional Issues Rejected by the US Supreme Court in Furman?

Arvind Krishnamurthy and Brandon Morrissey

Introduction

Writing for the court, Justice Potter Stewart issued this decree in his scathing indictment of capital punishment in the United States during the 1972 Supreme Court Case *Furman v Georgia*: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to death, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed" (Pg. 310). The 5-4 vote in *Furman v Georgia* created a de facto moratorium on the death penalty, on the basis of the capricious, arbitrary and discriminatory manner in which the death penalty had been utilized. Justice Douglas, writing a concurring opinion in the very same case, stated that the "Application of the death penalty is unequal: most of those executed were poor, young, and ignorant" (Pg. 250).

To meet the criteria set forth in *Furman v Georgia*, the death penalty must be applied in a fashion devoid of arbitrariness, caprice or discrimination. In the four years following the Court's

ruling in *Furman v Georgia*, 37 states enacted new death penalty laws in an attempt to avoid the capriciousness that had plagued capital punishment in the year's prior (Olasky). In 1976 *Gregg v Georgia* ended the de-facto moratorium, but only did so upon the grounds that "no longer can a jury wantonly and freakishly impose the death sentence," as stated by Justice Stewart (Pg. 207). So, the question remains: How much has the death penalty changed since *Furman v Georgia?*

Through a historical analysis of judicially prescribed executions predating the 1972 *Furman v Georgia* ruling, trends in the data emerge that help provide an answer to the question of just exactly how much things *have* changed since *Furman v Georgia.*. This analysis is focused primarily upon three different aspects of the pre-*Furman* death penalty: gender, race, and geography. These three categories each were cited in *Furman* as areas in which disparities, caprice, and arbitrariness occurred. By providing data on these factors both pre and post *Furman*, a comparison of how the death penalty has changed, if at all, becomes viable. All historical data on executions is courtesy of the Espy file found on the Death Penalty Information Center (DPIC) website ("Executions in the US 1608-2002: The Espy File").

Xxx note from FB: I think we need to update the data so that they are Espy from 1608-1975, and our master database from 1976 to present.

Gender

A specific disparity cited by Justice Thurgood Marshall in his concurring opinion for *Furman v Georgia* was the imbalance in death sentences and executions between the genders. "There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. It is difficult to understand why women have received such favored treatment since the purposes

allegedly served by capital punishment seemingly are equally applicable to both sexes," wrote Marshall (Pg.408). By providing a historical analysis of the gender of those executed prior to *Furman v Georgia* in 1972, and the gender of those executed after *Furman v Georgia* this section provides the data to allow for a comparative analysis.

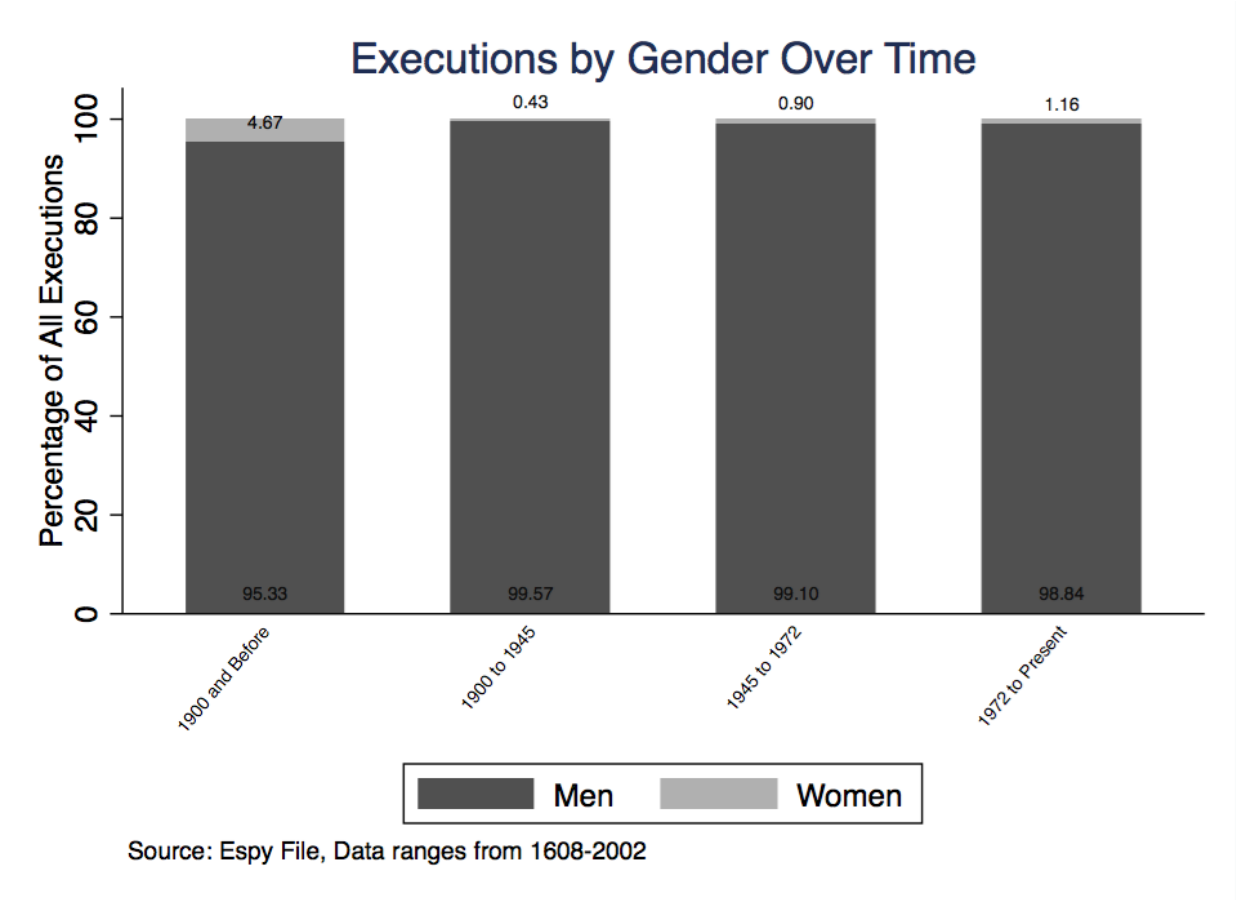
Figure 20.1, listed below, provides a visual representation of the disparities in executions by gender. The data is broken up into four time periods - prior to 1900, from 1900-1945, from 1945 to 1972 and from 1972 until 2002. Women constitute nearly 2.5% of all executions prior to 1972, the year of *Furman v Georgia*, an amount that is still disproportionately low for the amount of homicides they commit. But post *Furman v Georgia*, Women make up around 1% of all executions – an even lower amount. Women constitute 10% of all homicides currently, indicating they are executed at a disproportionately low rate in the post *Furman v Georgia* application of the death penalty.

Some scholarship has attempting to help explain this disparity through the lens of heinousness - or as Duke law professor Elizabeth Marie Raza phrased it the “statutory bias”. Marie Reza and Elizabeth Rapaport, a law professor at the University of New Mexico each provided data indicating that the reason women are so infrequently executed is because even if they do commit a murder, they are less likely to commit the murder in a fashion that includes a statutory aggravator (Rapaport 1990). As Marie Reza puts it “aggravating factors are based on how men are more likely kill” (Marie Raza 2005).

It is also worth noting that a host of literature, and the analysis conducted in Chapter 3 (“Who Were the Victims”) indicates that the gender of the *victim* plays a significant role in determining who is sentenced to death. In the Post-*Furman* era, individuals who kill a man are executed at a rate of 29 per 10,000 homicides, while individuals who kill a female are executed

at a rate 91 per 10,000 homicides (Baumgartner, 2016). However, data regarding the gender of the victim and homicide rates prior to 1972 is unavailable. As such it is not possible to make a comparison between the two eras.

Figure 20.1. Executions by Gender Over Time



Here the conclusions are quite clear: the amount of women executed in the post *Furman v Georgia* application of the death penalty has not increased by any significant amount. In the 27 years prior to *Furman v Georgia*, women constituted 0.90% of all executions. Since *Furman*, women constitute 1.16% of all executions - a nominal increase. This is directly in contrast to the concerns that Justice Thurgood Marshall raised in *Furman v Georgia*. Arguing that the Death Penalty had only been applied to men, Justice Marshall issued a challenge to administrate the

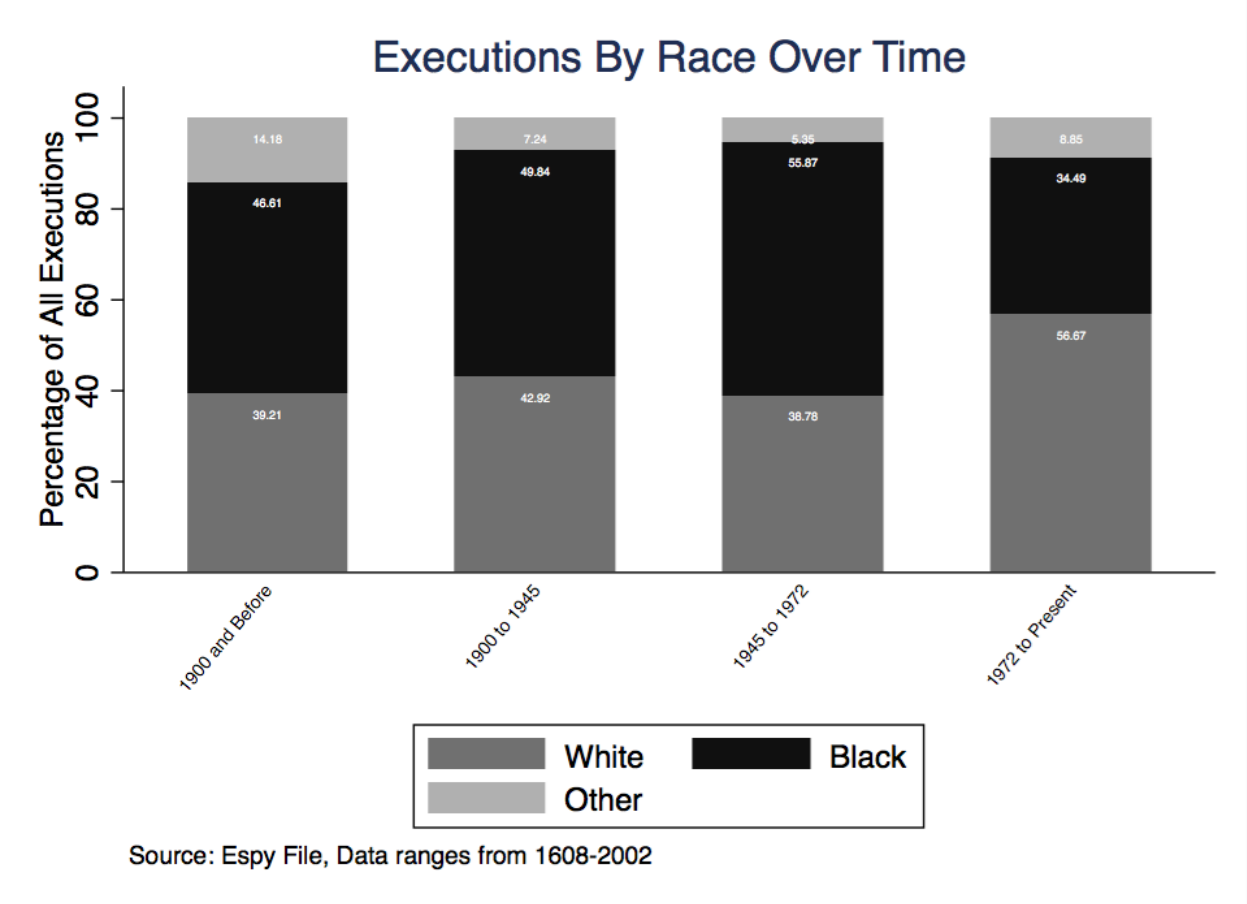
capital punishment in a more proportionate fashion. Since he issued that challenge, the death penalty has not become any less disparate with regards to gender.

Race

Another disparity that concerned the Supreme Court in *Furman v Georgia* was the stark racial differences present in the death penalty's application. In fact, the central justification given by the five justices who ruled that the Death Penalty, in its application at the time of *Furman v Georgia*, was unconstitutional, was its racially discriminatory effects. "It would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race…or if it is imposed under a procedure that gives room for the play of such prejudices," wrote Justice Stephen Douglas in his concurring opinion for *Furman v Georgia* (Pg. 242). This section aims to understand whether or not the concerns that Justice Douglas wrote of in 1972, have been ameliorated in any way with the present application of the death penalty.

Courtesy of the data provided by the Espy file, prior to *Furman v Georgia* in 1972, Blacks made up a plurality of all those executed – constituting 48.89% of all executions. During this same time period Whites formed 40.73% of all executions. However in the post *Furman v Georgia* application of the death penalty, Whites have increased to 56.67% of all executions. On the other hand Blacks have decreased in representation – falling by 14% in the years following *Furman v Georgia* to form 34.49% of all executions. Figure 20.2, below, visually represents this data in a bar-chart.

Figure 20.2. Executions by Race Over Time



The data presented in figure 20.2 appears to paint a rather clear picture. In the 27 years immediately preceding *Furman v Georgia*, Whites constituted 38.78% of all executions while Blacks constituted 55.87% of all executions, with all other races constituting the remaining 5.35%. In the years following *Furman*, Whites have increased to 56.67% of all executions, with Blacks falling to only 34.49% of all executions. Based solely upon this data, it would be easy to assume that the racial bias that concerned the Supreme Court in *Furman* had been mitigated.

However, explaining the nature of this apparent decrease in racial bias is multifaceted and complex. While the decrease in share of executions for Blacks appears to indicate less racial bias in the post *Furman v Georgia* administration of the death penalty, making a direct comparison simply based upon this data is insufficient. Present scholarship has shown that the single biggest

factor in the present day administration of the death penalty is the race of the *victim* rather than the offender (Baumgartner 2015). This explains why data may indicate that Blacks are underrepresented in execution data – because the majority of homicides with black offenders also have black victims, while the majority of homicides with white offenders also have white victims (Baumgartner 2015). Simply put a host of data, including that presented in Chapter Three, shows that killing a black male or female will seldom result in a death sentence or execution, while killing a white male or female will result in an increased chance of death sentence and execution.

The data on race of victims and executions can, and has, been presented to quantify these claims on the significance of the race of the victim. To briefly restate, since 1972, post-*Furman*, those who kill a white person are executed at a rate of 65 per 10,000 homicides, while those who kill a black person are executed at a rate 14 per 10,000 homicides (Baumgartner 2016). However, this data is only available for the Post *Furman v Georgia* application of the death penalty. Comprehensive data on the race of victims for all executions prior to 1972 is not available and therefore can not be presented for comparative purposes. This trend is worth noting to help explain and better understand this racial disparity in executions.

Because data on the race of victims prior to 1972 is not available, it is very difficult to make any definitive conclusions regarding the increase or decrease of racial biases in the application of the death penalty post-*Furman*. It is indisputable that blacks now make up less of a share of all executions than they did pre-*Furman*, a positive step to ameliorate the concerns Justice Douglas enumerated. However the fact that those that kill a white individual are executed at a rate nearly 6 times the rate of those that kill a black individual indicates that racial disparities

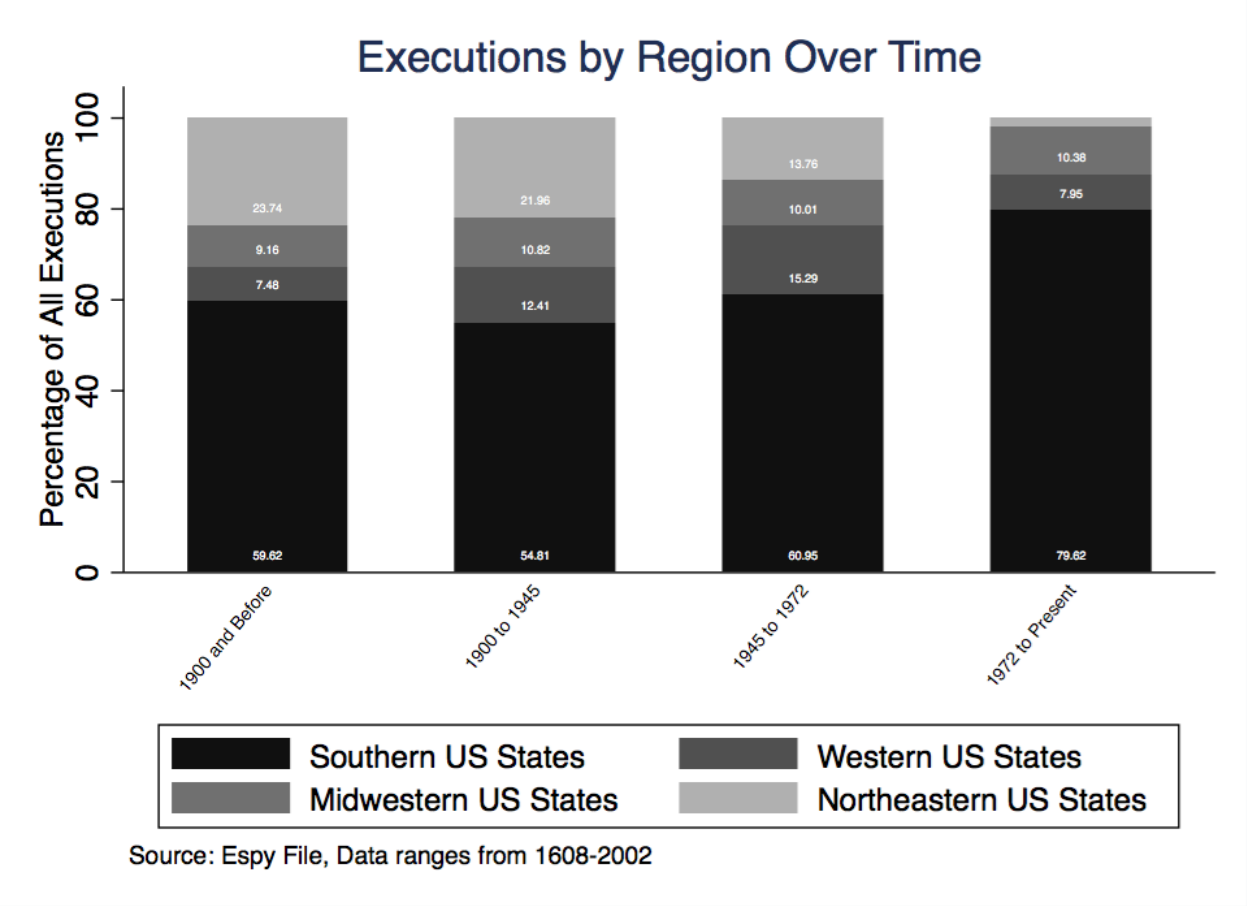
have not disappeared in the post-*Furman* era. They remain, but may simply be manifesting in a different fashion.

Geography and Arbitrariness

In *Furman v Georgia* Justice Stephen Douglas also wrote that, "A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily" (Pg. 249). Arbitrary, in the context of geography, deals with the disproportionate impact that location plays in determining if an individual will receive the death penalty. Execution is a punishment to be reserved for only the most heinous of crimes. But because the location of the alleged crime is a key-determining factor in receiving a death sentence or execution, it often plays a more critical role than the actual severity of the crime. As the data will show, some states apply the death penalty more liberally than others. This variance creates arbitrariness in *who* receives the death penalty. The same crime may be punished in an entirely different fashion simply based upon whether it took place in Harris County, Texas or Orange County, North Carolina.

Figure 20.3, seen below, shows the percentage of all executions broken down both by region – South, Northeast, Midwest and West - and stratified into four different eras: Before 1900,1900-1945, 1945-1972, and 1972 until the present. The first three temporal eras are in the pre *Furman v Georgia* application of the death penalty, with the final era representing the post *Furman v Georgia* era. The regional designations of South, Northeast, Midwest and West were assigned based upon the Census Bureau's official regional delineations (US Census Bureau).

Figure 20.3. Executions By Region Over Time

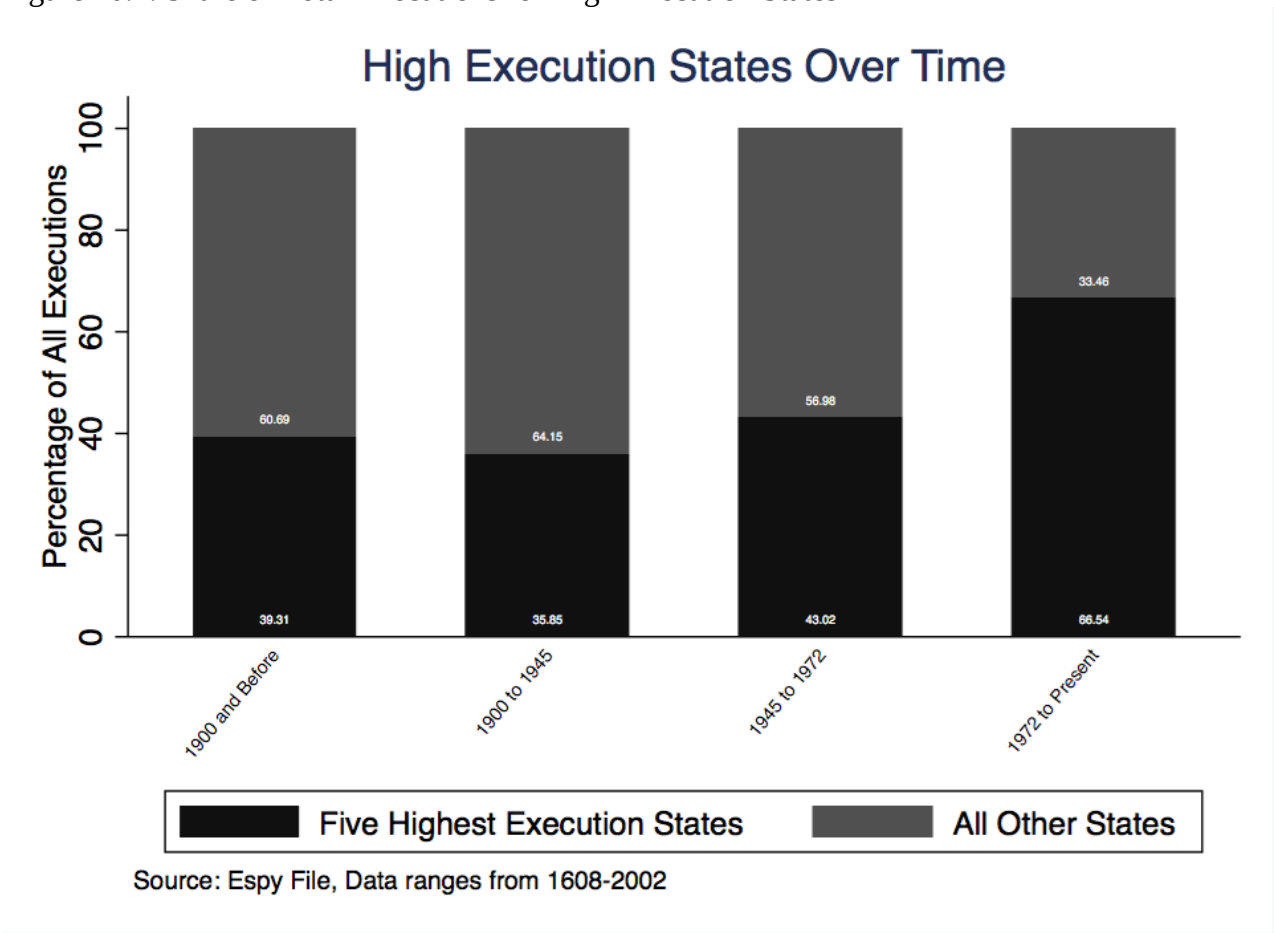


The implication of this data is quite clear: over time, the trends are fairly consistent. In both the Pre-*Furman* v *Georgia* era, and Post-*Furman v Georgia* era the South has made up a majority of all executions, with the Northeast, Midwest and West fluctuating between 7 and 23 percent of all executions in a given time period. The South has increased in market from 58.67% of all executions in Pre-*Furman* v *Georgia* era, to 79.62% of all executions in the Post-*Furman v Georgia* era. In the 27 years immediately preceding *Furman v Georgia*, the South constituted 60.95% of all executions. In the years following *Furman*, the South has increased to constitute 79.62% of all executions. The Northeast, which prior to 1900 constituted 23.74% of all executions, makes up only 1% of all executions since *Furman*.

In fact, in the post-*Furman* era, Oklahoma executes 1.7 individuals per 100 homicides, while neighboring Kansas voted to ban the death penalty in 2004, and has not executed an individual since 1965 - pre *Furman* (Baumgartner 2016). This is not an anomaly either - 19 states currently do not have the death penalty as a permissible punishment, and 17 states have not executed a single individual in the post-*Furman* era (Dieter). In an eye-opening piece for the DPIC, executive director Richard Dieter showed that only 2% of the counties in the US have been responsible for 52% of all executions, and constitute 56% of all individuals on death row in this nation. The aptly titled "2% Report" also showed that the vast majority of counties have had no one on death row, and have had no executions in the post-*Furman* era - a clear indicator of the massive geographic arbitrariness that plagues capital punishment (Dieter).

Figure 20.4, displayed below, is another indicator of the disproportionate share of all executions that only a handful of states have. The data is stratified into four different eras: Before 1900, 1900-1945, 1945-1972, and 1972 until the present, with the first three eras taking place prior to *Furman v Georgia* and the final era occurring post *Furman v Georgia.* Two categories are then labeled - "Five Highest Execution States" and "All Other States". The first category is the sum of the five states with the most executions in the given time period, while the second category is the sum of all remaining states in the same time period. The two categories are then displayed, indicating what percentage of *all* executions in the given time period each category forms.

Figure 20.4. Share of Total Executions for High Execution States



In the 27 years immediately preceding *Furman v Georgia* the five highest execution states only constituted 43.02% of all executions - actually an uptick from the 35.85% and 39.31% of all executions the five highest execution states formed in 1900-1945 and prior to 1900 respectively. But in the post-*Furman* era, the five highest execution states constitute 66.54% of all executions - a 23% increase from the years immediately preceding *Furman*. This drastic increase in share indicates that capital punishment is more and more defined by its outliers - a point that the literature has echoed.

The maps presented in Figures 20.5 and 20.6 further reinforce the geographic disparities and rampant arbitrariness that has defined capital punishment in the post-*Furman* era. Each of

these figures is a heat map - indicating the pattern and spread of executions geographically in the pre and post *Furman* eras.

Figure 20.5. Executions Heat Map Pre *Furman v Georgia*

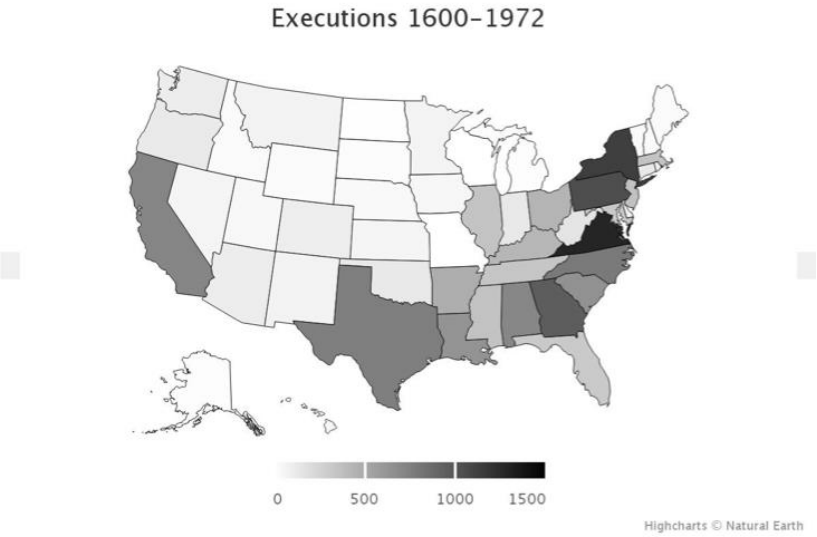
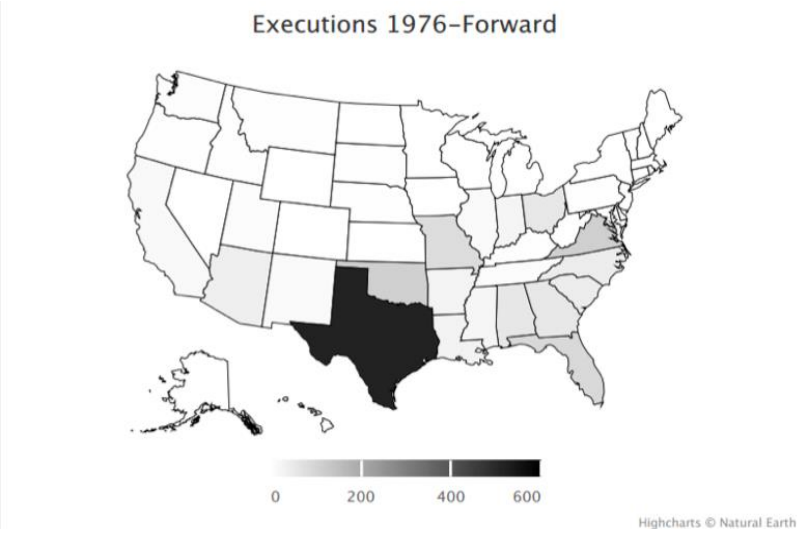


Figure 20.6. Executions Heat Map Post *Furman v Georgia*



Map 20.5 shows that death penalty was more prevalent in the South and Northeast, and was used very sparingly in the West and Midwest regions. Map 20.6 presents a clear picture. It lacks the gradient that was present in Map 20.5. Here, the South constitutes almost all executions with the Northeast, Midwest and West only faintly shaded, if at all. And unlike the pre-*Furman*

map, a single state, Texas, dwarfs the entire remainder of the United States. Even a casual glance at these two maps allows for an understanding of a clear trend: the death penalty is becoming even more geographically arbitrary and concentrated.

The application of the death penalty prior to *Furman* was viewed to be too arbitrary and capricious for it to continue. But alarmingly, in the post-*Furman* era, capital punishment has only become more arbitrary, capricious and wantonly. Only 2% of counties constitute a majority of all executions, while only five states constitute 66% of all executions, a 23% increase from the years immediately preceding *Furman.* The present application of the death penalty has one geographic region forming four-fifths of all executions - a nearly 20% increase from the years immediately preceding *Furman*. Each of these statistics suggests a fearsome conclusion: the death penalty has increased in geographic arbitrariness dramatically in the post-*Furman* era.

Conclusion

In 1972 during *Furman* the Supreme Court ruled the death penalty to be unconstitutional in its application. It was viewed as "wantonly and so freakishly imposed" and its petitioners were " among a capriciously selected random handful upon whom the sentence of death has in fact been imposed" (Justice Stewart, Pg. 309). The judges raised concerns regarding the gender and racial disparities present in the death penalty's application as well as its particularly discretionary and arbitrary use. 43 years later, the numbers do not lie: the same disparities not only remain, but have widened in some cases. The death penalty has only become *more* arbitrary and wantonly. An individual's gender, home state, geographic region and the race of the individual they killed each play central roles in determining whether an individual is executed. As a result the stated aim of the death penalty - to execute the most heinous crimes, the worst of the worst - has fallen by the wayside.

This book presented a statistical portrait of the death penalty, attempting to determine if the court made a sound ruling in *Gregg v Georgia*, to lift the moratorium placed upon the death penalty. As Justice Breyer put it in *Glossip v Gross,* "In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed" (Pg. 52). While this is a particularly bleak depiction of capital punishment, it is also empirically sound. The death penalty is rife with bias, disparities, arbitrariness, caprice and the discretionary. For the ultimate punishment, that is unacceptable.

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Appendix

Xxx We can use this as the beginnings of a document which may be partially included as an appendix to the book: Further Resources, and some of which may be hyper links on an associated web site. See also the set of capital-eligible laws compiled by Arvind and Liz associated with their chapter 5, above. We can both archive the laws on the books, as they have done, and give a live link to the sections of those state codes that they have compiled.

We should dramatically expand our list of extra resources, including perhaps an annotated bibliography of the best 25 sources or so for general background, or starting places. We can use our own bibliography for that section.

Further Resources:

Compiled by Kelsey Britton

Websites Facts and Statistics on Inmates, the Death Penalty and more:

A comprehensive website detailing many aspects of the death penalty and its use – 2015
http://www.deathpenaltyinfo.org/

U.S. Executions from 1976 – October 1, 2014
http://www.clarkprosecutor.org/html/death/usexecute.htm

Death Penalty Documentaries:

At The Death House Door – 2008
An investigation into the execution of Carlos DeLuna which shows he may have been innocent.
http://www.dvd.netflix.com

Life and Death Row – 2014
Three episodes that investigate various aspects of life on death row, from execution to legal aspects.
http://channel.nationalgeographic.com/life-and-death-row/

Into the Abyss – 2011
Texas death row inmates are interviewed, their victim's families, and member of the criminal justice system.
http://www.netflix.com

The Execution – 1999
A documentary that covers Clifford Boggess, a death row inmate who was executed by lethal injection in 1998.
http://www.pbs.org/wgbh/pages/frontline/shows/execution/etc/foreducators.html

Multimedia Links on the Death Penalty:

The American Civil Liberties Union death penalty film list:
https://www.aclu-de.org/wp-content/uploads/2012/04/2.-Films-on-the-Death-Penalty.pdf

Capital Punishment in Context: Multimedia resource on capital punishment ranging from books to movies
http://www.capitalpunishmentincontext.org/resources/media

Death Penalty Information Center Multimedia Archive 1995-2004
http://www.deathpenaltyinfo.org/multimedia-archive-1995-2004

Death Penalty Information Center: An extensive list of books on capital punishment – 2015
http://www.deathpenaltyinfo.org/category/categories/resources/books

Faces of Death Row
http://apps.texastribune.org/death-row/

The Texas Coalition to Abolish the Death Penalty media list
http://tcadp.org/get-informed/films-books-theatre/

Books on the Death Penalty:

Anatomy of Injustice by Raymond Bonner: The true story of Edward Lee Elmore – 2013
http://www.penguinrandomhouse.com/books/212280/anatomy-of-injustice-by-raymond-bonner/9780307948540/

Detour to Death Row. - By David Atwood – 2000

http://www.amazon.com/Detour-Death-Row-David-Atwood/dp/1438277733

Just Mercy- By Bryan Stevenson – 2015
http://bryanstevenson.com/

I am Troy Davis - By Jen Marlow and Martina Davis-Correia, With Troy Anthony Davis – 2013
http://www.haymarketbooks.org/pb/I-Am-Troy-Davis

The Last Lawyer: The Fight to Save Death Row Inmates – By John Temple
http://www.amazon.com/The-Last-Lawyer-Fight-Inmates/dp/1604733551

Picking Cotton-By Jennifer Thompson- Cannino and Ronald Cotton with Erin Torneo – 2009
http://www.pickingcottonbook.com/home.html

Gruesome Spectacles By Austin Sarat: A history of botched executions in the U.S. from 1890 to the modern era. – 2014

http://www.sup.org/books/title/?id=23979

Book Lists:

Southern Center for Human Rights: Comprehensive list of death penalty books, reports and articles
https://www.schr.org/action/resources/books - 2013

Good Reads: Fiction and non-fiction literature on the death penalty – 2015
https://www.goodreads.com/shelf/show/death-penalty

Maybe add:

Works of fiction
Movies
Academic resources / bibliography
Legal resources / court cases