A Statistical Portrait of the Death Penalty

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Individual Chapters drafted by students in POLI 490, Fall 2015

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Supplemental Materials for Web Site

- Data for all figures, with do-files
- Additional details on data, such as state-by-state breakdowns if applicable
- Films, books, documentaries, other resources

- SC decisions and articles from JSTOR: One-stop shopping to do research following up on our book
- Etc

Notes to students: This is a fantastic first draft, but only a first draft. There is a lot of work to go before the semester is over, so we can move this to the next level of professionalism before the semester is over. After the semester, there will be still more work. At that point the goal is to move the book to a publishable level, which means professional level citations, literature review, etc. Some of you may want to be involved in that. But everyone needs to pull weight to get the book to as good a place as we can possibly get it by the end of the semester. Here are some things to do for sure:

Formatting and details. Details matter in writing a book. It has to look right, first of all. You need to review the template I sent out and scrupulously follow the formatting. Use the Word "outline" view to see your entire chapter. Use the "styles" to make section headers, normal text, tables, chapter titles, and all the rest. This is a pain when we think of a 300 page document and the professor is supposed to fix all the little formatting issues! So give me a break and follow the template.

Re-organizing and re-weighting. Now that you can see what else is there, there will be places where we can all see that: a) something needs to be moved; b) there is too much on one topic and maybe not enough on another; c) we need to make references to other chapters. Foreshadow a later chapter when you write about something that will be covered in more detail later (e.g. "as we show in greater detail in Chapter x."). Refer back to things covered in previous chapter ("as we saw in Chapter y, such and so.").

Please put your names after the chapter title for each chapter. List everyone who deserves credit. If someone helped at first but someone else did more, put an asterisk by the name of the ones who did more work.

Charts are referred to as Figure 2.1, Figure 2.2, etc., Tables are Table 2.1, 2.2, etc. See this example for how to give a title.

Table [or Figure] 3.1. Homicide Victims by Gender.
[text of the table goes here]
Source: xxx.
Note: xxx.

The point in a table or figure is that the Title to it should explain what it is, and that the notes at the bottom, just below the table, should give more explanation such as sources or how to read the table if it is complicated.

1

The US Death Penalty

Kaneesha Johnson

The 1960s marked the beginning of 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 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].

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

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 penalty. Following this decision, 35 states (graph for the 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*). Table

1.3 shows the year in which each state reinstated the death penalty following the Furman decision.

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.

Capriciousness/Arbitrary

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)

No 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.

No retribution

The notion of the death penalty as a tool for retribution, or punishment that is inflicted on someone as vengeance for a wrong criminal act, was supported by three justices; White,

Marshall, and Brennan. 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 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.

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).

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 (table 1.2) 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*

[In the process of flushing this section out]

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

In June 2002 the Supreme Court found that the execution of mentally retarded persons is considered cruel and unusual in the landmark case *Atkins v. Virginia*[2].

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

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].

The constitutional question of inequalities from racial bias did not stop in *Furman*. 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 does not consider those harms as absolute. In *McCleskey v. Kemp (1987)* Justice 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].

Although the proof of innocence would usually be considered reason to overturn or restrict the use of the death penalty, the Supreme Court does not so quickly accept this view. In *Herrera v. Collins (1993)* the Supreme Court held that the defendant's claim of actual innocence did not entitle him to federal habeas relief[5].

What are the Constitutional Thresholds?

When assessing the points outlined above, it is possible to establish a threshold in which the Supreme Court of the 1972 decision would deem the death penalty unconstitutional. The overwhelming consensus of the Justices lay in the capricious and arbitrary nature in the application of the death penalty. It is therefore reasonable for us to assume that if the current state of the death penalty would result in a capricious or biased application, such as a race

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

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

[5] Herrera v. Collins 506 U.S. 390 (1993)

playing a significant role in the trail and appeals process, the rationale of the 1972 Court would again rule the death penalty unconstitutional.

Another popular view was the danger of an inhumane or cruel nature of the punishment. Capital punishment was commonplace when other barbaric practices, such as slavery, lynching, and branding, were conventional. However, as those practices dies out, and the American people embraced evolving standards of decency, capital punishment remained on the books.

The evolving standards of decency commonly cited in the Supreme Court begs the question whether or not we have moved beyond the current standards of decency in the United States use of the death penalty.

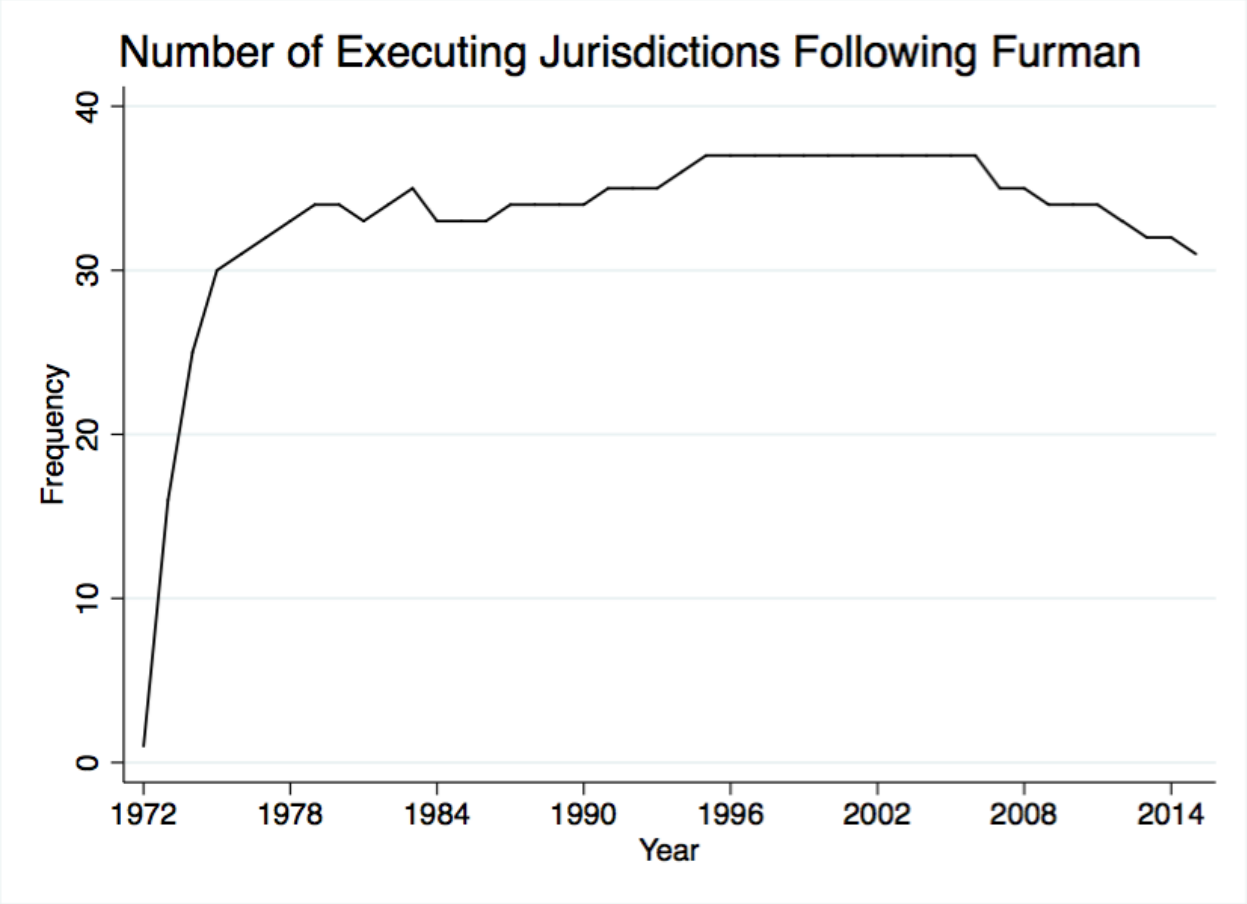
United States Aggressive Response to *Furman*

The United States is not unique in its 1972 decision to outlaw capital punishment. The United Nations has made multiple efforts to restrict and limit the use of the death penalty. [insert section here that explains the efforts made by the UN to eradicate/restrict the use of capital punishment in its member states].

[insert chart about here that shows western countries with and without CP]

What is unique to the United States is the aggressive response to the Supreme Courts decision. Following the 1972 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

There is a further important element to consider in the *Furman* response. 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).

Table 1.2 States that reenacted death penalty statutes following Furman

State	Date Reenacted
Florida	12/7/72
Arkansas	3/22/73
North Carolina	1973
Georgia	3/27/73
Nebraska	4/19/73
Indiana	5/1/73
Oklahoma	5/16/73
Idaho	6/30/73
Nevada	6/30/73
Louisiana	7/1/73
Utah	7/1/73
Arizona	8/7/73
Connecticut	9/30/73
California	12/31/73
Ohio	12/31/73
Texas	12/31/73
Tennessee	2/26/74
Montana	3/1/74
Pennsylvania	3/25/74
Delaware	3/28/74
Mississippi	4/22/74
Illinois	7/1/74
South Carolina	7/1/74
Colorado	1/1/75
Kentucky	1/1/75
Maryland	6/30/75
Virginia	9/30/75
Washington	11/4/75
Alabama	5/2/76
Wyoming	2/27/77
Oregon	12/6/78
South Dakota	12/31/78

New Mexico	7/1/79
New Jersey	8/6/82
U.S. Military	12/31/83
U.S. Government	12/31/87
New Hampshire	1/1/91
Kansas	4/22/94
New York	9/1/95

Note: data obtained from www.deathpenaltyinfo.org/state_by_state

[This is for personal reference, it will not appear in the chapter - perhaps on the website, but in a different format]

Table 1.3 Argument page references in *Furman*

	Brennan	**Stewart**	**White**	**Marshall**	**Douglas**
Arbitrary/ Capricious	291 293 295 305	309	313		242 254 249 252
Deterrence	302 303		312 313		
Retribution	276 279 295 305		312		
Cruel/ Inhumane	265 270 271 282 285 287 305				242
Bias		310*			245 255 256 257

References

Atkins v. Virginia 536 U.S. 304 (2002)

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Gross, Samuel R. "David Baldus and the Legacy of McCleskey v. Kemp." *Michigan Law* 97.6 (2012): 1905-924. Print.

Herrera v. Collins 506 U.S. 390 (1993)

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

Nagin, D. and J. Pepper (2012). "*Deterrence and the Death Penalty".* Committee on Law and Justice at the National Research Council.

Riedel, Marc. (2014). "The Death Penalty and Discretion: Implications of the Furman Decision for Criminal Justice". Retreived from http://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1157&context=jssw

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The Moral Permissibility of Capital Punishment***references to be added**

[Section to be added somewhere either in Chapter 1 or in the last chapter.]

An examination of moral arguments supporting the general infliction of punishment identifies retribution, deterrence, rehabilitation, and incapacitation as primary justifications. In applying these theories to the use of capital punishment in the United States, retribution and deterrence come forward as the most prominent, while incapacitation and rehabilitation render somewhat less relevant. The following discussion of each theory, specifically retribution and deterrence,

exhumes the discrepancy between the death penalty Americans wish and think they have, and the death penalty that exists.

Incapacitation

Advocates of incapacitation, the institutionalizing of offenders, believe removing an offender from free society produces desirable social effect. If an offender is imprisoned, then he or she can no longer commit crimes against citizens. Incapacitation, specifically the principle of mass incapacitation, relies on the assumption that the more people you incarcerate, the lower the crime rate will be. Selective incapacitation reserves institutionalization for the most serious and active offenders, and contends that society will experience the greatest "crime-savings" when certain types of offenders are incarcerated. While executing certain offenders indeed prevents those individuals from further inflicting harm on society, it cannot be said that greater imposition of the death penalty would reduce the number of murders, for not all homicides and felony murders are subject to the death penalty. For example, the death penalty is not an available means of punishment for the "most serious" offenders in nineteen states.

Rehabilitation

Rehabilitation remains the most socially utilitarian justification of punishment because it uses punishment as a means to decrease the probability of recidivism in the future upon return to society. However, the success of rehabilitation depends entirely on the effectiveness of rehabilitation programs on high-risk offenders. Because the death penalty is not rehabilitative in the sense that it does not intend to return condemned individuals to society, this justification is not applicable in this discussion of capital punishment.

Retribution, Deterrence, and the Death Penalty

Retribution, also known as "Just Deserts", is perhaps the most common justification for punishment. Retributivism is thought to restore the balance of justice through exacting the principle of *lex talionis,* an eye for an eye. This theory of punishment is different in that it does not seek to neither reform an offender, nor reduce future crime.

The deterrence theory assumes "crime as choice" as the primary explanation for criminal conduct. Thus, deterrence relies on the basis that punishment increases the social costs of engaging in criminal conduct and that this increase in cost is enough to reduce the number of people who will then choose to commit a crime. Examples of the costs of engaging in criminal conduct include loss of liberty, independence, and other constitutional freedoms. General deterrence argues that society as a whole observes punishment and its effects on an individual and as a result will deter other individuals from unwanted behavior.

The justification of capital punishment is largely a function of deterrence and retribution. We assume in this case that a core principle of justice is responsibility and as a result, people deserve to be rewarded and punished accordingly. Proponents of these theories in accordance to the death penalty contend that (1) the right to life is conditional; (2) murderers forfeit their right to life when committing such a crime; therefore (3) the state has justification to execute the murderer. We also contend that the guilty, and only the guilty deserve to be punished in proportion to the severity of their crimes. Naturally, this raises the issue of punishing the innocent. Moreover, while retribution and deterrence appear as reasonable justifications for the infliction of capital punishment in theory, the death penalty is ultimately unjust in practice due to its discriminatory and arbitrary application. There is no reason to believe that capital punishment is necessary to deter future murders. The relationship between homicides and the death penalty in the United States is a paradox in itself; homicides are extremely common, while executions

are extremely rare. Perhaps one could justify capital punishment as an effective deterrent to murder and means of retribution if and only if it was administered quickly, fairly, and often enough. However, this is simply not the case. The aforementioned justifications render a theoretical use of the death penalty morally permissible, not the punishment faced by thousands of American death row inmates.

2

Who gets executed?

Chapter is missing.

3

Characteristics of the Victims

The single most reliable predictor of whether a defendant in the USA will be executed is 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. Though some of the relationships described in this chapter may seem intuitive, others may surprise the reader in their articulation.

Table 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 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	0.00	-	-	-
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	0.00	-	-	-
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	0.00	-	-	-
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 1, the victims of executed death row inmates are most commonly white males. Almost as common are the executions of inmates who murdered white females. As Black men are the highest number of murder victims in general homicide data, one might expect their murderers to be most represented on death row. 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

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[6].

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.

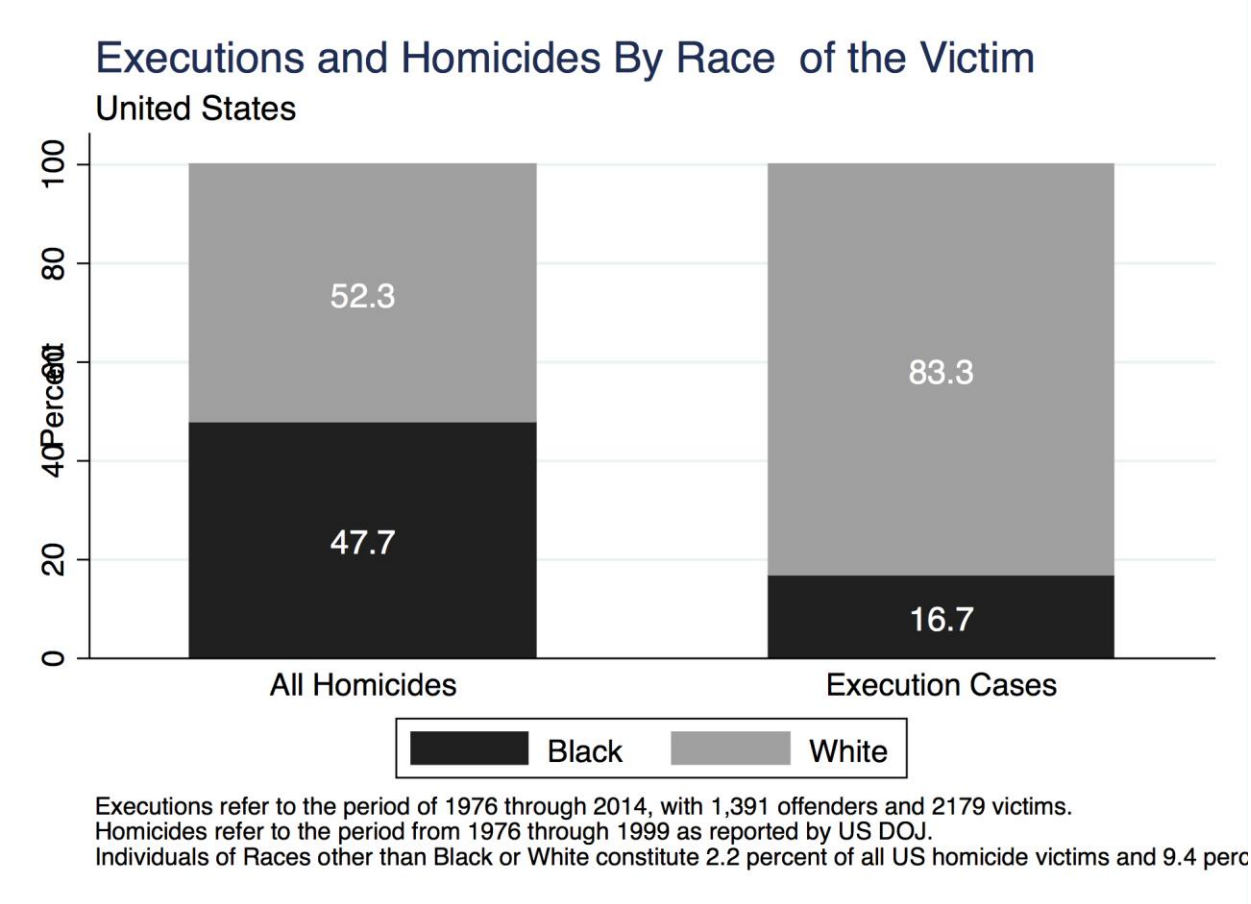
Only 15% of victims of executed defendants have been Black, while Black victims constitute half of U.S. homicide victims and only 12% of the U.S. population.

Academics and activists have argued for years that the judicial system places more value on the lives of Whites, resulting in disproportionately harsh treatment of Black criminals who have White victims[7]. This argument can arguably be seen in the statistics involving executions of perpetrators killing victims with certain characteristics, whether they are female or White.

As Figure 3.2 shows, Whites are overrepresented among victims of those executed as compared to homicides in general. On the contrary, perpetrators having Black victims are underrepresented on death row in relation to the amount of homicides they commit.

Figure 3.2

[6] GAO, 1990
[7] ACLU 2007; Baldus, Pulaski, and Woodworth 1983; NAACP 2013



Gender of the Victims

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[8].

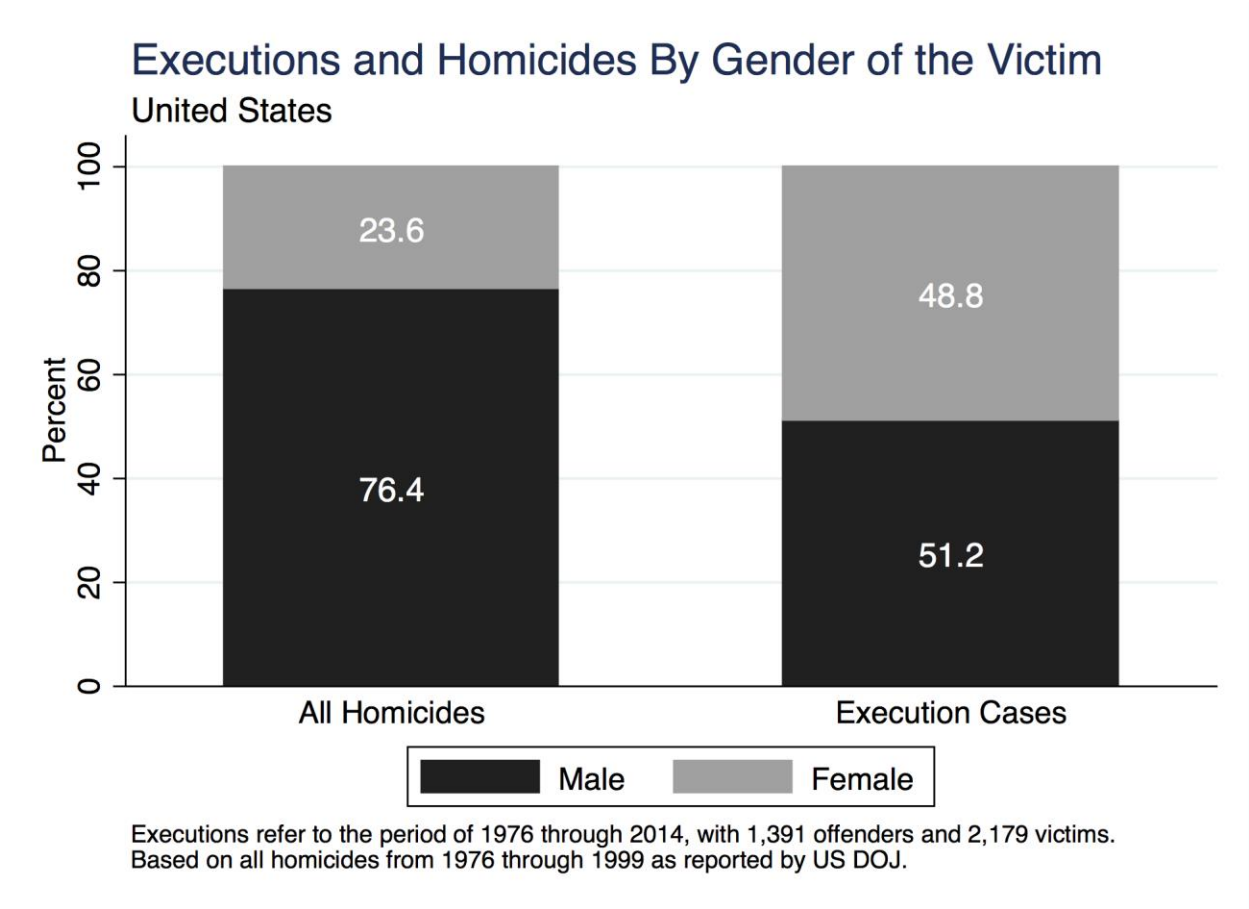
In one study on the victim death penalty effects in Georgia, the odds of receiving a death sentence for killing a white female were 14.5 times higher than the odds for killing a black male. The odds of receiving a death sentence were also significantly higher for killing a white female than the odds for killing either a black female or a white male. Overall, the researchers found that

[8]Royer, Hritz, Eisenberg, Wells 2014

victim gender was a main effect, with the odds of a death sentence 3.43 times higher when the victim was female[9].

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 3.3



[9] Georgia stats come from Marian R. Williams, Stephen Demuth & Jefferson E. Holcomb, Understanding the Influence ofVictim Gender in Death Penalty Cases: The Importance of Victim Race, Sex-related Victimization, and Jury Decision Making,45 CRIMINOLOGY 865, 878 (2007)

Race and Gender of the Victims

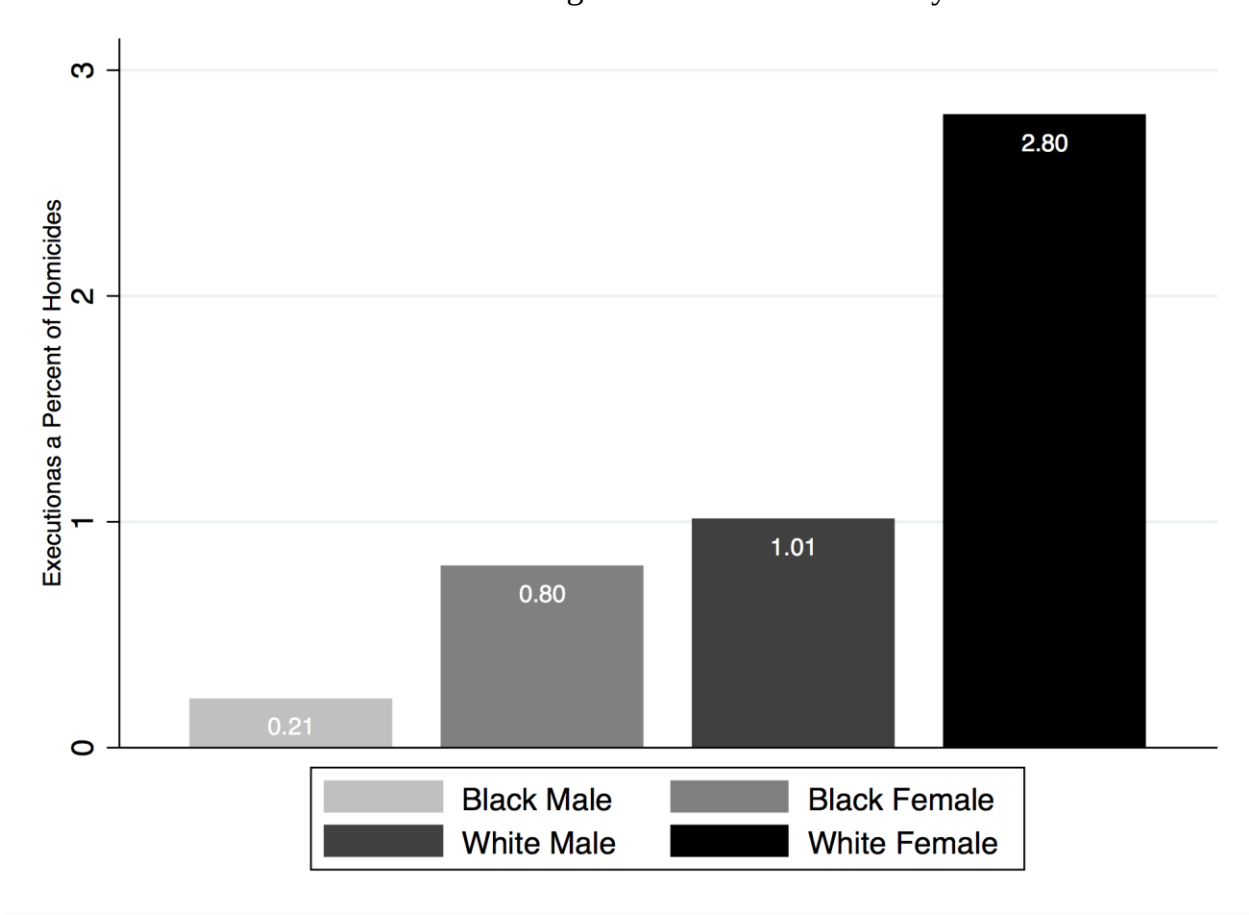
To understand whom the victims of those executed are, it is not sufficient to just look at the variables of race and gender individually. Looking at these characteristics individually, while helpful, cannot give a complete representation of their makeup. Understanding which perpetrators will eventually 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 1,418 executions, an interesting number if you consider an average of 10,000 (source??) homicides per year[10]. 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. Figure 3.5 shows what the percent likelihood of a homicide to lead 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 X percent. This figure allows a comparison between the general number of X percent, and how that changes depending on the variables of race and gender.

[10] Death Penalty Information Center

Figure 3.5

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



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.

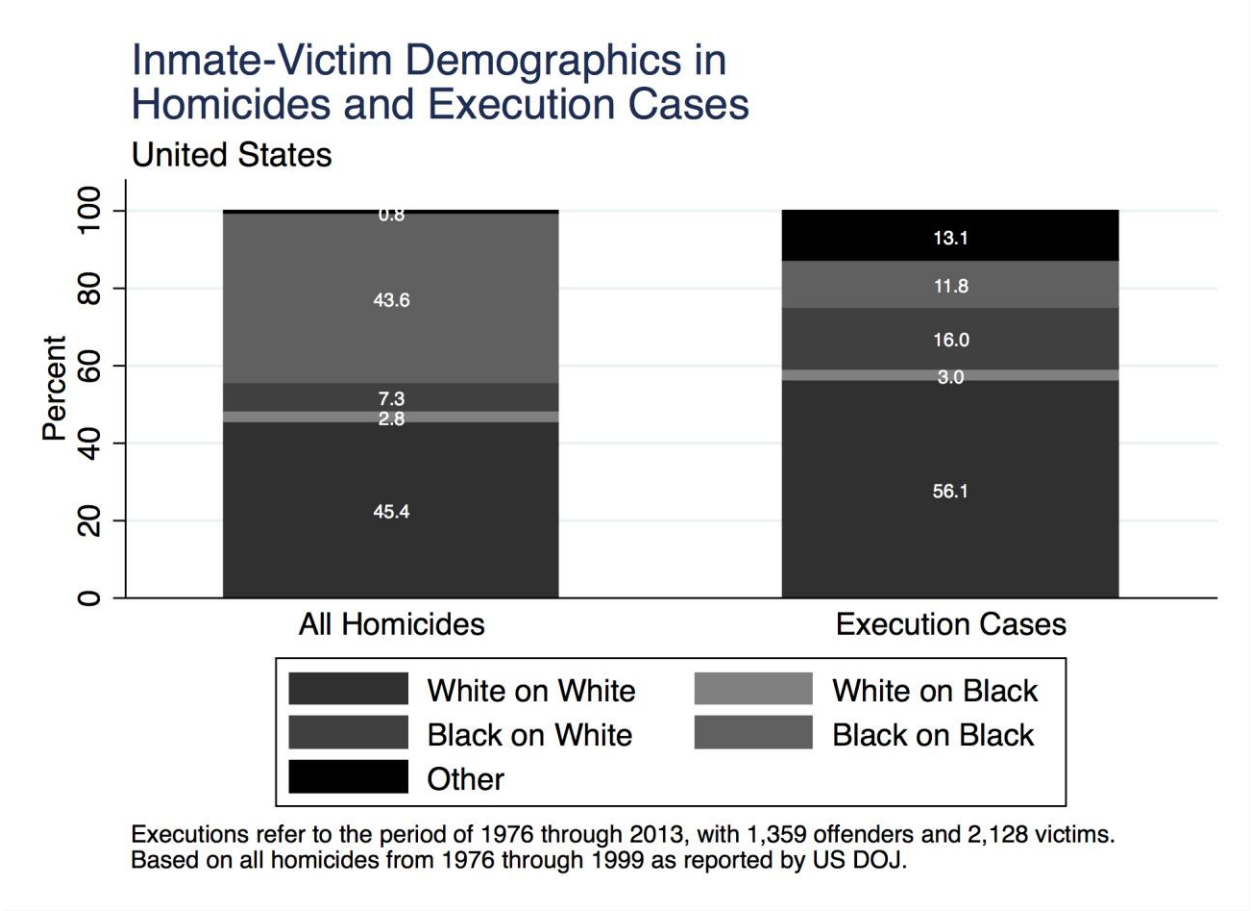
Looking at homicides, White women represent about 14% percent of all homicide victims; however, they are over represented when it comes to executions, reaching 42 percent. On the other hand, Black males fall victim to 38 percent of all homicides; however, their representation on death row is only a fraction,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

Relationships Between Victim and Perpetrator

Homicides are primarily intra-racial activities, accounting for 89% of all cases and 72% of cases that led to executions. Overall, black/white killer/victim combinatorial relationships contribute to about 99% 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 3.6 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% of all homicides; however, that number jumps to 56% of executions. Black on Black crimes, accounting for nearly 44% of homicides, are represented in only 12% of executions.

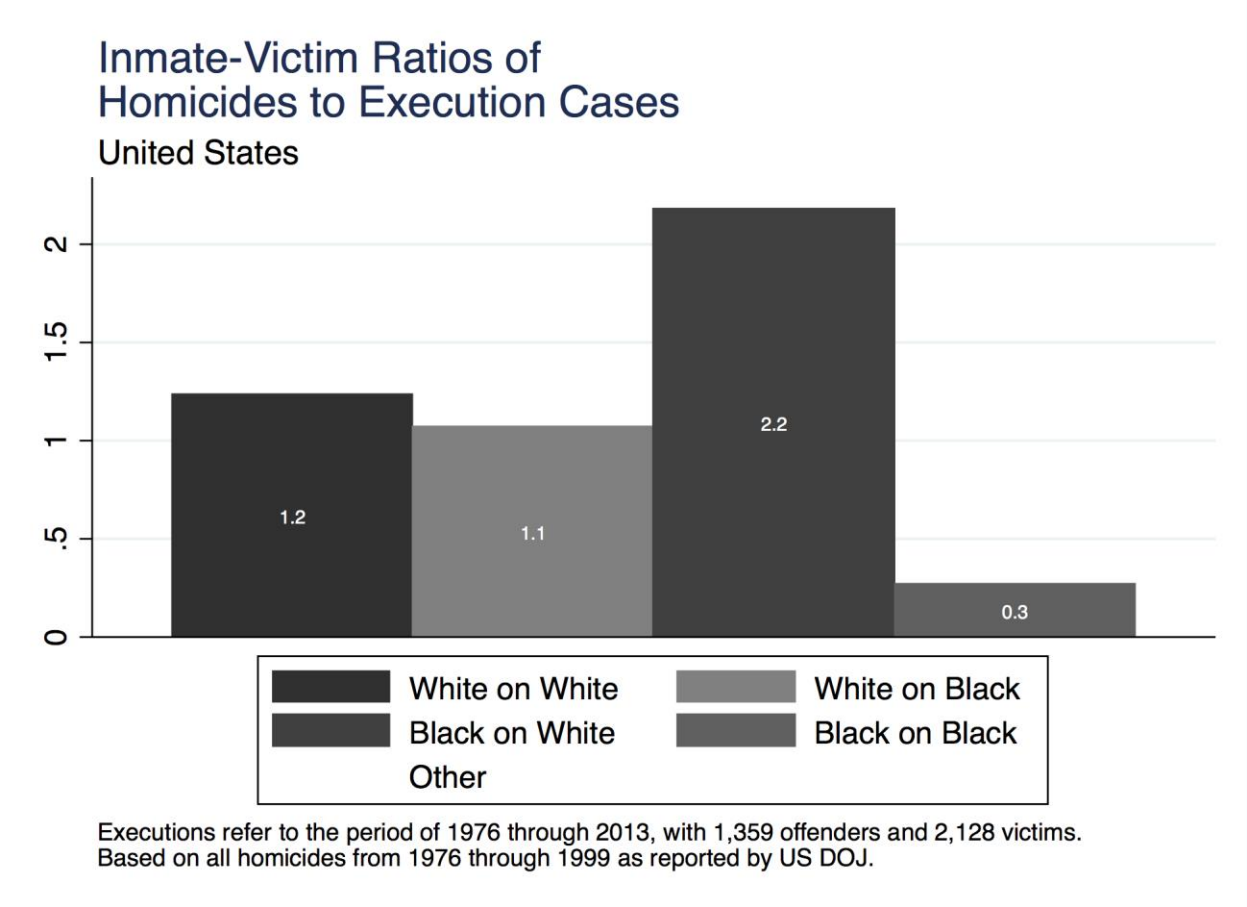
Figure 3.6



Most homicides are interracial, nearing 89% of all cases. In cases that have led to executions, however, 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.

Figure 3.7



A large percent (FIND NUMBER) of homicides are interracial. Therefore, Black offenders generally have Black victims and White offenders generally have White victims. When Black offenders commit a homicide with a Black victim they have a dramatically low rate of execution. For the slight percent of time that they kill a white victim they have a much higher rate of execution. On the other hand, when a White offender has a White victim, they have a

certain percent chance (FIND NUMBER) of getting the death penalty. When they have a Black victim that percent drops slightly. This is why they are roughly equally represented on death row.

Figure 3.7 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.

Race and Gender of Victims by State

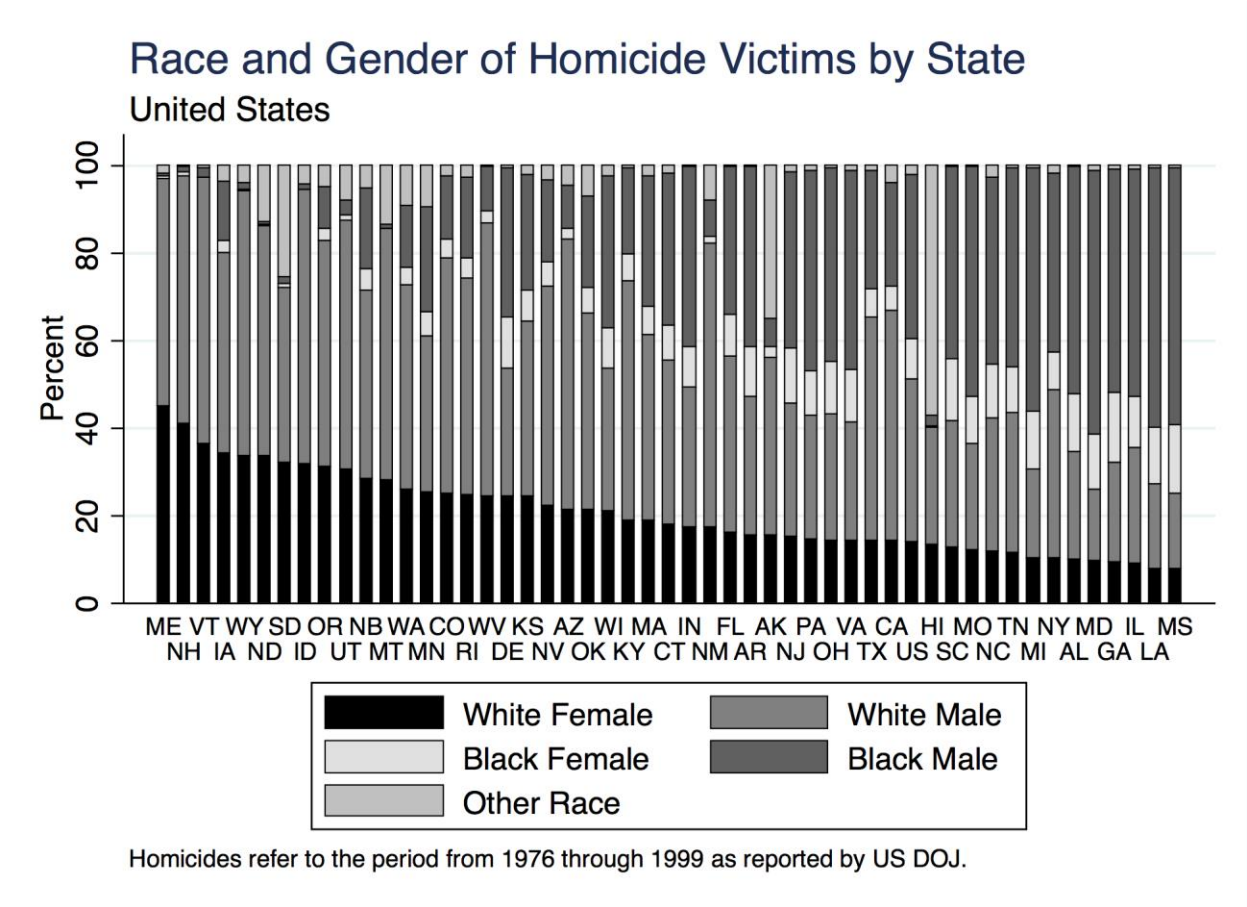
Up to this point, this chapter has focused on the analysis of homicide victims and the victims of those executed at a national level. While it is important to recognize trends of victim characteristics between those who have been killed and those whose killers are executed at an aggregate level, it is 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 3.8 shows the differences in race and gender of victims across the United States, broken down by state.

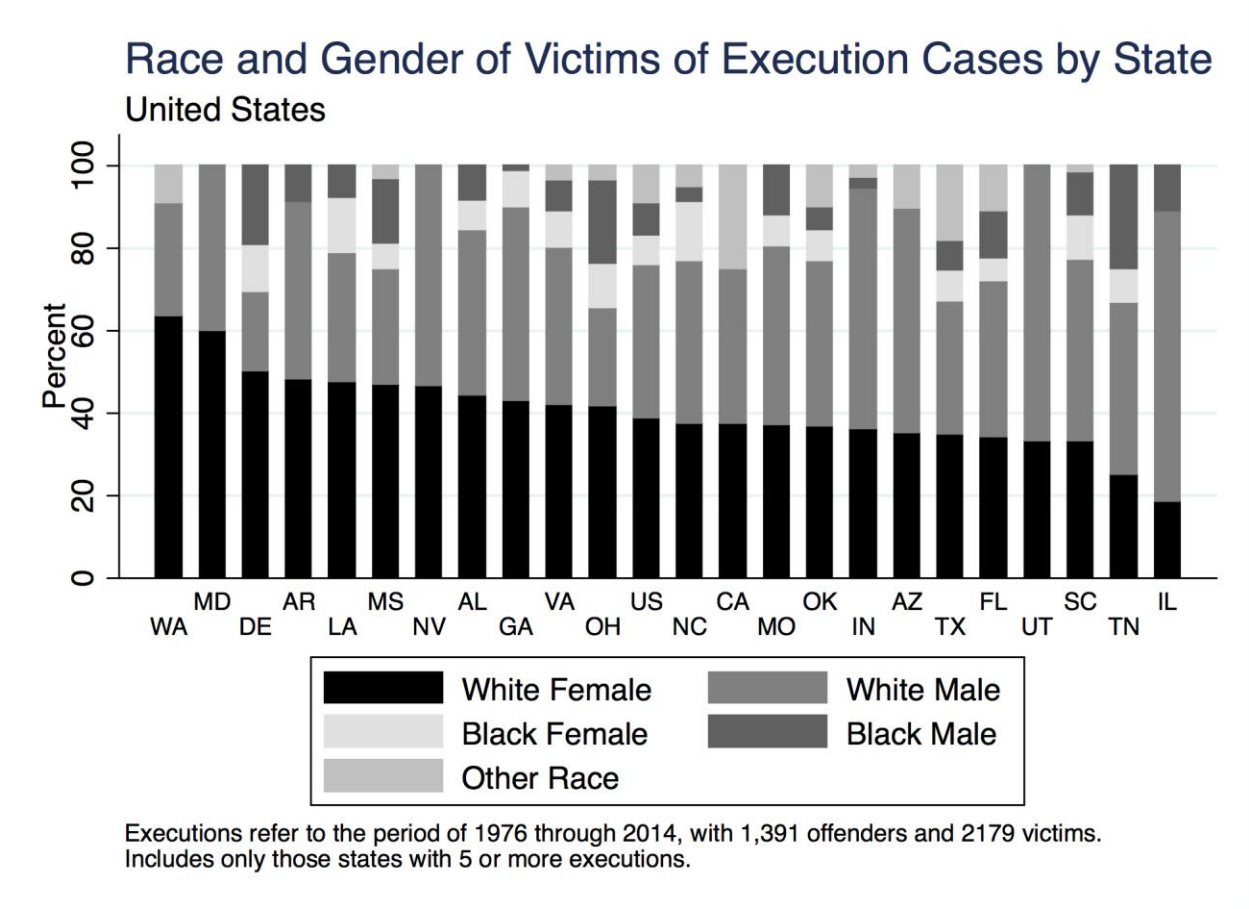
Figure 3.8



For example, while nearly 50% of homicide cases in Missouri involve a Black male, Figure 3.9 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.

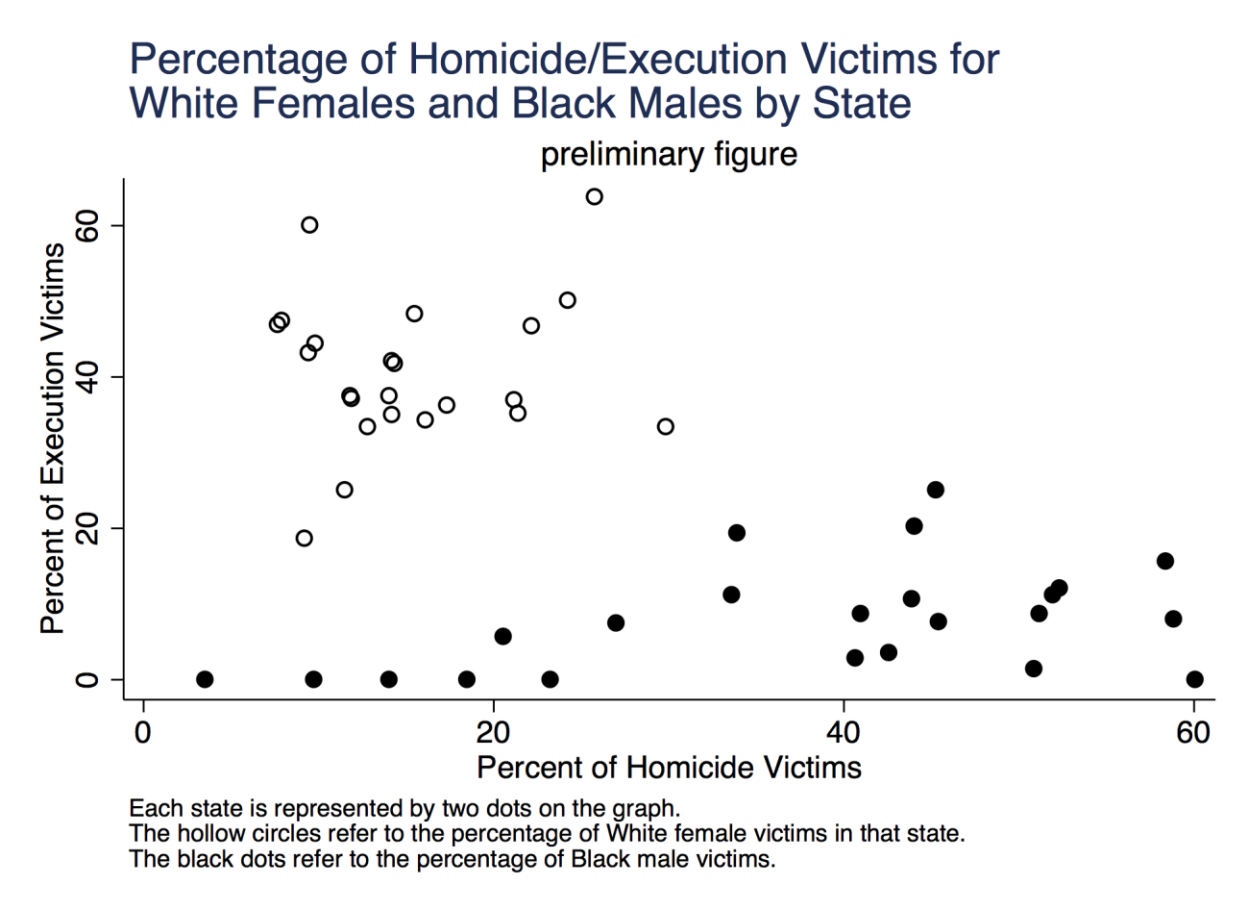
Figure 3.9, mentioned above, shows the victim characteristics of executions by state, only including states with five or more executions.

Figure 3.9



Washington, as seen through Figure 3.9, has not executed perpetrator with a Black male victim; however, Black male victims account for nearly 20% of all homicides in Washington. Over 20% of homicide victims in Washington are White females. White female victims are largely overrepresented on Washington's execution history, resting at over 60%. Washington State does not have a history of only avoiding executing perpetrators with Black males; they rarely execute any Black person, regardless of race. Over 90% of Washington executions have a White victim, male or female. (Washington has only had 5 executions so idk if this would be a good example??)

Figure 3.10



Explain Figure 3.10 when we decide whether or not to keep.

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 3.2 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 3.2 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.

References

Excel graphs, most % calculations are from data in Excel files, in turn derived from data in Table-race-gender-inmate-victim-hom-exec.docx file.

Frank R. Baumgartner, Amanda J. Grigg & Alisa Mastro (2015): #BlackLivesDon'tMatter: race-of-victim effects in US executions, 1976–2013, Politics, Groups, and Identities, DOI: 10.1080/21565503.2015.1024262

Royer, Caisa Elizabeth; Hritz, Amelia Courtney; Hans, Valerie P.; Eisenberg, Theodore; Wells, Martin T.; Blume, John H.; and Johnson, Sheri Lynn, "Victim Gender and the Death Penalty" (2014). Cornell Law Faculty Publications. Paper 838.

http://www.unc.edu/~fbaum/teaching/articles/InvisibleBlackMale-RR.pdf (used in Liz's section race of victim)

Figure 1 - Breakdown of inmate-victim racial relationships as percentages of all homicides. W is White, B is Black, O is 'Others'. (NOTE: generated in Inmate-Victim Demo Relationships.xlsx, data derived from Table-race-gender-inmate-victim-hom-exec.docx)

Figure 2 - Breakdown of inmate-victim racial relationships as percentages of homicide cases that led to executions. W is White, B is Black, O is 'Others'. (NOTE: generated in Inmate-Victim Demo Relationships.xlsx, data derived from Table-race-gender-inmate-victim-hom-exec.docx)

Figure 3 - Figure 4 - Breakdown of inmate-victim racial relationships as percentages of all homicides. W is White, B is Black. (NOTE: generated in Inmate-Victim Demo Relationships.xlsx, data derived from Table-race-gender-inmate-victim-hom-exec.docx)

Figure 4 - Figure 4 - Breakdown of inmate-victim racial relationships as percentages of homicide cases that led to executions. W is White, B is Black. (NOTE: generated in Inmate-Victim Demo Relationships.xlsx, data derived from Table-race-gender-inmate-victim-hom-exec.docx)

Figure 5 - Comparison of victim black/white inmate/victim relationship proportions in cases leading to executions versus corresponding proportions of all homicides. Ratio above 1.00 indicates higher percentage of executions than homicides. (Is basically value in Figure 7 divided by values in Figure 6). (NOTE: generated in Inmate-Victim Demo Relationships.xlsx, data derived from Table-race-gender-inmate-victim-hom-exec.docx)

4

Top Crimes That Did Not Receive the Death Penalty

Sarah Tondreau

In theory, capital punishment exists in order to provide fair and adequate consequences for the most heinous of crimes: "Since *Gregg*[11], our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes."[12] Its purpose is to secure justice by means of retribution, deterrence, rehabilitation, and incapacitation of members of society who have proven to be an extreme threat and danger to the rest of the population. As was mandated by the U.S. Supreme Court 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…"[13]

- Constitutionality raised in Gregg
    - Cruel and unusual based on 8th and 14th Amendments
- Baldus study: *Comparative review of death sentences: an empirical study of the Georgia experience*
    - Proportionality review; court determining whether a death sentence is consistent with the usual pattern of sentencing decisions in similar cases or is comparatively excessive
    - Proportionate vs. disproportionate
        - Is the sentence of death proportionate to the crime that was committed
        - How often are sentences given that are not proportionate to the crime committed
            - Both sentencing death in cases that either don't deserve it, or don't deserve it as much as a case that did not get a death sentence
- Donahue study- jurisdiction dramatically affects sentencing
    - Introduce and explain the Donahue study
        - Discuss Donahue's methodology of egregiousness scoring

[11] *Gregg v. Georgia*, 428 U.S. 153 (1976)
[12] *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)
[13] *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)

        - Include requirements for both measures
        - Using requirements, score each case presented in this chapter. Find place to include pathway chart (p. 132 Donahue study).
    - "Specifically, of the 4686 murders committed during the sample period, 205 are death eligible cases that resulted in a homicide conviction, and 138 of these were charged with a capital felony. Of the 138, 46 were allowed to plead guilty to a non-capital offense. Of the remaining 92, 66 were convicted of a capital felony and 26 were acquitted of a capital felony. Of the 66, 29 then went to a death penalty sentencing hearing, resulting in 9 sustained death sentences, and one execution (in 2005)." (p.1)
    - Explain methodology of egregiousness scoring; include score for each case making it clear that it is not precise due to lack of coding ability
    - Pathway chart?
- Michael Radelet
- McClesky v. Kemp
    - Warren McClesky, black, Convicted of 2 counts of armed robbery and 1 count of murder in Fulton County, Georgia; 1978
        - Robbery of a furniture store and killing of a white police officer
    - Two aggravating circumstances found
        - Murder committed during armed robbery
        - Murder committed upon a peace officer engaged in performance of his duties
    - Sentenced to death
    - Filed a petition for a writ of habeas corpus raising claims that
        - Georgia capital sentencing process is administered in a racially discriminatory manner; violates 8th and 14th Amendments
        - Cited Baldus study; Baldus was also attorney
    - His sentence was upheld

Many amendments have been made to the original federal statute of capital punishment in order to create an extremely specific and detailed set of guidelines regarding which crimes are not only eligible for the death penalty but, as long as they can be determined beyond any measure of reasonable doubt, should guarantee a death sentence. The following represent a small portion of murder cases in which the evidence of guilt was proven to be grossly clear and factual, yet the perpetrator did not receive the death penalty. Each case has a general overview of the crime committed, people involved, and sentencing. A list of sources providing more depth and detail for each case is provided following the cases.

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. However, regardless of evidence proving intent, premeditation, the identity of the assassin beyond reasonable doubt, etc., the majority of these cases do not end with a capital conviction or death sentence. Even in cases where the defendant did receive a death sentence, nobody has ever actually been executed for killing the President of the United States.

Sirhan Bishara Sirhan[14]

On June 5, 1968, Senator Robert Francis "Bobby" Kennedy was shot in the kitchen of the Ambassador Hotel in Los Angeles, California, by 24-year-old Sirhan Sirhan. He died the next day. 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 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[15]

On November 22, 1963, as President John F. Kennedy's motorcade moved through Dealey Plaza in Dallas, Texas, former United States Marine Lee Harvey Oswald fired three shots from a rifle as he stood on the sixth floor of the building where he worked nearby. Kennedy was hit by two of the three shots. He died later that afternoon at Parkland Memorial Hospital. After fleeing the

[14] Sirhan Bishara Sirhan, Murderpedia.
[15] Lee Harvey Oswald Biography, The Biography.com Website.

scene of the crime, Oswald shot and killed officer J.D. Tippit when he attempted to apprehend Oswald. Police finally caught him and he was taken into custody, where he would remain for the next two days. On November 24th, as Oswald was being transferred to the Dallas county jail, he was shot and killed by a man named Jack Ruby, preventing him from ever being tried, convicted, and sentenced for the assassination. Ruby was convicted for Oswald's murder and although he initially received a death sentence, he was never executed.[16]

Jack Ruby[17]

Born Jacob Rubenstein, Jack Ruby, was arrested and charged for the murder of Lee Harvey Oswald on November 24, 1963, in Dallas, Texas. At the time of the murder, Oswald was in custody for the assassination of President John F. Kennedy. Ruby's lawyers attempted to prove that Ruby was legally insane and therefore should be found not guilty by reason of insanity. The court rejected this claim and Ruby was convicted of "murder with malice" and 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, 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 situation he was in, and his conviction and sentence were overturned. A new trial was scheduled for February 1967, but it never took place because on January 3, 1967, Ruby died of a pulmonary embolism.

[16] See section on Jack Ruby for further information regarding his case.
[17] Jack Leon Ruby, Murderpedia.

John Hinckley Jr.[18]

On March 30, 1981, John Hinckley Jr. attempted to assassinate President Ronald Reagan by firing multiple rounds from a .22 caliber revolver at him as he was leaving the Hilton Hotel in Washington, D.C.. Although he did not kill Reagan, he placed the President and the White House Press Secretary, James Brady, in the hospital with critical wounds. Hinckley had struggled with depression and severe obsessive tendencies his whole life and in the early '70s he began intensely stalking actress Jodi Foster. Hinckley was tried in 1982 in D.C. and claiming that he performed the assassination attempt in a desperate act to impress Foster, he was found not guilty by reason of insanity and was institutionalized at St. Elizabeths Hospital immediately following his trial. In 2014, Brady died as a result of the gunshot wound inflicted by Hinckley 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[19]

On April 4, 1968, James Early Ray shot and killed civil rights leader Martin Luther King Jr. with a rifle through the window of a hotel room facing the balcony of King's room at the Lorraine Motel in Memphis, Tennessee. Ray fled the scene, triggering an FBI search that lasted nearly three months. After searching five countries, Ray was discovered in London, England, on July 19, 1968. 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.

[18] John Hinckley Jr. Biography, The Biography.com Website.
[19] James Earl Ray Biography, The Biography.com Website.

Arthur Herman Bremer[20]

On May 15, 1972, in Wheaton, Maryland, Arthur Herman Bremer fired five bullets at Governor George Wallace, Governor of Alabama, in an attempt to assassinate him. Although Bremer did not kill Wallace, the gunshot wounds left him paralyzed from the waist down. Bremer had been planning and plotting an assassination for nearly two months prior to the attempt. At trial, Bremer's lawyers argued that he suffered from schizophrenia and was legally insane at the time of the shooting. However the prosecution provided ample evidence proving that Bremer was completely sane and knew exactly what he was doing, citing a multitude of diary entries written by Bremer that stated he wanted to assassinate Wallace in order to ensure he would go down in history. On August 4, 1972, 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."[21] 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[22]

On July 20, 2012, James Eagan Holmes entered a movie theater in Aurora, Colorado, carrying multiple firearms and opened fire on the room of movie-watchers, killing twelve people and injuring seventy. Holmes had no criminal history, but after he was apprehended later that day, it

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

was discovered that he had been planning the shooting for roughly four months prior to carrying it out. Holmes' first day in court was on July 23rd. As the proceedings took place, Holmes was said to have appeared "dazed and confused", never speaking or looking at the judge. On July 30, Holmes was charged with illegal possession of weapons, 116 counts of attempted murder, and 24 counts of first-degree murder. In the following months, Holmes' attorneys requested and received approval to postpone his preliminary hearing and pre-trial hearing due to the fact that his mental state had grown increasingly unstable, which was evident through a number of suicide attempts. In March of 2013, Holmes attempted to plead guilty to all of his charges if he could receive a sentence of life in prison without the possibility of parole instead of the death penalty. His request was denied and the prosecution moved forward with pursuing a death sentence. However, on May 31, 2013, Holmes entered a plea of not guilty by reason of insanity. 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.

Whitey Bulger[23]

Born James Joseph Bulger Jr., Whitey Bulger was born and raised in Boston, Massachusetts, where he began his building his criminal record at the age of fourteen when he was arrested for the first time for stealing. Throughout the next few years he was arrested for a number of crimes including forgery, armed robbery, larceny, and assault and battery. He spent five years in a juvenile detention center before he joined the Air Force, where he served time for another assault charge. In 1952, after a second military arrest, he was honorably discharged and moved back to Boston. He was arrested again in 1956 and sentenced to 25 years in prison for a multitude of bank robberies that he committed in a variety of states. After serving nine years of his sentence,

[23] White Bulger Biography, The Biography.com Website.

he was released and once again returned home to Boston. It was at this time that he became involved in Boston's organized crime scene. In 1979 he became the leader of the Winter Hill Gang and spent the next sixteen years controlling a huge portion of Boston's drug scene, loan shark operations, and bookmaking. A large piece of his role as the leader of this gang was both sanctioning and committing a huge number of murders. From 1975 to 1990 Bulger was also working as an informant for the FBI in order to help them take down an even larger group involved in New England's organized crime scene. However, in helping the FBI take this group down, Bulger was simultaneously strengthening his own group which was becoming increasingly more violent and out of control. In 1994, an official investigation into Bulger's various operations was launched by the Drug Enforcement Administration, Massachusetts State Police, and Boston Police Department. 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.

Ted Kaczynski[24]

Ted Kaczynski, born Theodore John Kaczynski, known to most by the name the Unabomber, conducted a mail-bombing spree that took place over nearly a twenty year time span, killing three people and injuring twenty-three. Kaczynski began his undergraduate studies at Harvard University in 1958 when he was only 16 years old. After graduating in 1962, he began studying

[24] Ray, 2015.

mathematics as a graduate student at the University of Michigan where he earned his PhD in 1967. For the next two years, while working as a professor at the University of California at Berkeley, Kaczynski began to develop is deep hatred and resentment for technology and the industrial system as a whole. By 1971 Kaczynski had quit his job and moved into a small cabin with no electricity or running water that he had built on a plot of land that he and his brother, David, had purchased in Montana. It was there that Kaczynski would spend the next 24 years constructing and mailing out his bombs and writing his 35,000-word anti-technology manifesto. Because Kaczynski targeted primarily universities and airlines, the FBI began the University and Airline Bombing, or "UNABOM," task force. It was from this that Kaczynski got his byname, "the Unabomber." Kaczynski created his bombs in such a way so that there was not a single useful shred of physical evidence left over after they detonated so there was no way for investigators to track them, and the only eyewitness account description of the bomber was a man in a hoodie with sunglasses. It was not until April of 1995, seventeen years after the bombings had begun, that the investigators began making real progress in discovering the identity of the bomber. *The New York Times* received a letter from someone claiming to be the Unabomber, stating that they would stop the bombings if a 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 investigators claiming that he recognized the writing to be that of his brother, Ted, and offering to help them find him 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 against him, he received life in prison without the possibility of parole.

Jeffrey Dahmer[25][26]

Born in 1960 in Milwaukee, Wisconsin, Jeffrey Dahmer was convicted in 1991 for the murders of seventeen young men over the course of thirteen years. Dahmer's first murder occurred in 1978 when he was 18 years old. The victim was a hitchhiker by the name of Steven Hicks. After picking him up, Dahmer brought him back to hangout at his parents' house where he was living. The two of them got drunk and as Hicks was getting ready to leave, Dahmer hit him in the head with a barbell, killing him instantly. Dahmer then proceeded to dismember Hicks' corpse, place the body parts in plastic bags, and bury them in the woods behind the house. Dahmer's second murder, Steven Toumi, took place in 1987 while he was living at his grandmother's house. Dahmer met Toumi at a gay bar and proceeded to kill him in a hotel room later that night. The next morning he brought Toumi's corpse back to his grandmother's home, engaging in sexual relations with the dead body before dismembering and disposing of it. Over the next four years, Dahmer would go on to kill fifteen more young men and boys by drugging and strangling them. He followed each murder by engaging in sexual activity with the corpse and dismembering and disposing of the body. He also began photographing his victims and keeping various body parts as souvenirs. As the frequency of his murders increased, so did the gruesomeness of his methods. By 1990 Dahmer had begun using different chemical mixtures as a means of corpse disposal, and he had also started engaging in acts of cannibalism. His desire to exercise control over his victims led him to begin experimenting with the performing of lobotomies while his victims were still alive and pouring chemicals into their skulls to try and control them, not just when they were dead, but while they were still living as well. Finally, on July 22, 1991, police came across Tracy Edwards as he was wandering Dahmer's neighborhood in a similar manner as

[25] Jeffrey Dahmer, 2015.
[26] Jeffrey Dahmer Biography, The Biography.com Website.

Sinthasomphone had been two months earlier. Edwards led the police back to Dahmer's apartment where he told police he had escaped from after Dahmer had forced him into the bedroom with a kitchen knife. Upon entering the apartment to find said knife, the officers came across an extensive amount of evidence pertaining to the multitude of murders that Dahmer had committed, including pictures of the corpses, a severed head in his refrigerator, a number of skulls, and much more. Dahmer was immediately arrested and indicted on 17 charges of murder. At his trial on January 30, 1992, Dahmer pled not guilty by reason of insanity. 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

Charles Manson[27][28]

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 are a small percentage of these cases.

[27] Charles Manson Biography, The Biography.com Website.
[28] Charles Miles Manson, Murderpedia.

David Berkowitz

David Berkowitz, also known as "The Son of Sam" and "The .44 Caliber Killer," began a serial killing spree throughout New York in the summer of 1976. Between July of 1976 and August of 1977, Berkowitz shot and killed six people over the course of nearly ten attacks. On July 29, 1976, Jody Valenti and Donna Lauria were sitting in a car outside of Lauria's Bronx apartment when Berkowitz shot them, killing Lauria. Nearly three months later, on October 23rd, Berkowitz shot Rosemary Keenan and Carl Denaro as they sat in a parked car in Queens, claiming Keenan as his second victim. Yet again, on January 30, 1977, Christine Freund and John Diel were shot while sitting in their car. Freund died and it was at this point that police began to suspect that these murders were all related due to the similarity of the victims and the fact that each person had been shot by a .44 caliber revolver. However it was the death of Virginia Voskerichian, who was shot and killed by Berkowitz on March 8, 1977, that authorities officially declared the murders as having been committed by the same suspect when ballistics revealed that the .44 caliber bullet recovered from this shooting matched the ones from the July 29th shooting. A task force was established by the New York police department focused on finding and apprehending this killer, and a statement was released announcing that the suspect was murdering women with a .44 caliber revolver due to some type of vendetta fueled by a history of rejection. The news of the task force spread rapidly, and the media began using the name "The .44-Caliber Killer." On April 16, 1977, before any progress could be made, Alexander Esau and Valentina Suriani were shot and killed, and authorities discovered a hand-written note that was left on the ground next to the victims. Although anonymous, the letter appeared to have been written by the suspect and in it he denounced the accusation that he was targeting his victims based on a hateful vendetta against the female population. Instead, he claimed to be acting as "The Son of Sam," Sam being an abusive and twisted father who commanding him to commit the murders. On May 30, 1977,

the state of New York received another hand-written note from Berkowitz. Sent to *New York Daily News* columnist, Jimmy Breslin, the shooter shared his appreciation for Breslin's column and asked him what he would be writing about in the upcoming column on July 29th, the anniversary of his first shooting. The second note was published and released to the public. On July 30, 1977, Berkowitz killed for the final time, shooting

Edmund Kemper- The Co-ed Killer

Roy Norris- The Tool Box Killers with Larry Bittaker

Kenneth Bianchi and Angelo Buono- The Hillside Stranglers

Dennis Rader- the BTK killer

Arthur Shawcross

Gary Ridgway- The Green River Killer

Kristen Gilbert

Dorothea Puente

Patrick Wayne Kearney

Altemio Sanchez- The Bike Path Rapist

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5

What Crimes Are Eligible For Capital Punishment?

Arvind Krishnamurthy and Liz Schlemmer

Though much of this book entails a discussion regarding the *application* of the death penalty, it is necessary to first understand what crimes are eligible for the death penalty across the United States. This chapter aims to answer that question by providing categorized data on the type of crimes that are eligible for capital punishment as well as the aggravating and mitigating factors that weigh in a death penalty sentencing, state by state.

Capital Punishment Eligible States

Thirty-two states currently have death penalty statutes on the books, with the remaining 18 states containing no laws permitting capital punishment. Individual states create the underlying legal framework for defining capital punishment eligibility their state code. All of the capital punishment eligible crimes, aggravating and mitigating circumstances discussed in this chapter come from the statutes of these 32 states. It's worth noting that there exists a geographical skew for states that still have the death penalty. Every Southeastern state has the death penalty, while 14 of the 18 states that do not have the death penalty are in the Northeast or Midwestern United States.

Capital Eligible Crimes

Since 2008, the only crimes eligible for capital punishment in the United States are murder and treason. In its decision of *Kennedy v. Louisiana*, the Supreme Court ruled against the application of the death penalty in the case of the brutal rape of a child as a violation of the

Eighth Amendment. The ruling set a new standard for death penalty eligibility. Following the decision, capital punishment would be permitted 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 under such offenses as espionage, terrorism, drug trafficking or treason.

The majority based its opinion on the principle of proportionality, that regardless of the nature of a non-homicide crime—no matter how heinous—death penalty is unjustifiable except in cases in which a life has been taken. The opinion of the Supreme Court delivered by Justice Kennedy states, "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."

Beyond these two conditions, death penalty eligibility is determined by the states.

Table 1.1 Capital Eligible Crimes -- Murder

State	(Murder) Death Eligible Crimes
Alabama	Intentional Murder with aggravating factors
Arizona	First degree murder including pre-meditate murder and felony murder with aggravators
Arkansas	Capital Murder with aggravating circumstances
California	First degree murder with special circumstances
Colorado	First degree murder with aggravating factors
Delaware	First degree murder with aggravating circumstance
Florida	First degree murder or felony murder
Georgia	Murder with aggravating circumstances
Idaho	First Degree Murder
Indiana	Murder with aggravators

Kansas	Capital Murder with aggravators
Kentucky	Capital Murder with aggravating circumstance
Louisana	First degree murder
Mississippi	Capital Murder
Missouri	First Degree Murder
Montana	Capital Murder
Nevada	First Degree Murder with aggravators
New Hampshire	Murder with specific aggravators
North Carolina	First degree murder w/ aggravators
Ohio	Aggravated Murder with aggravating circumstances
Oklahoma	First Degree Murder with aggravating circumstances
Oregon	Aggravated Murder
Pennsylvania	First Degree Murder with aggravating circumstance

South Carolina	Murder with aggravating circumstance
South Dakota	First Degree Murder with aggravating circumstance
Tennessee	First Degree Murder with Aggravating Circumstances
Texas	Criminal Homicide with aggravating circumstances
Utah	Aggravated Murder
Virginia	First Degree Murder with aggravating circumstances
Washington	Aggravated First-Degree Murder
Wyoming	First-Degree Murder with aggravators

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Death Penalty for Non-Murders

A number of states have statutes that uphold the pursuit of capital punishment for crimes not involving murder. It is presumed that any of these crimes which do not fit the criteria originating in *Kennedy v. Louisiana* would not be applied. Death sentences for non-homicides are historically rare. No one currently on death row has been sentenced under one of these charges.

Table 1.2 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

.

Aggravating Factors

(define aggravating factors, discuss trends within the aggravating factors, and understanding the differing frequencies of *objective* aggravating factors and *subjective* aggravating factors)

Table 1.3 Aggravators – Alabama to North Carolina

	AL	AZ	AR	CA	CO	DE	FL	GA	ID	IN	KS	KY
Kidnapping	X	X	X	X		X	X	X	X	X	X	X
Robbery	X	X	X	X		X	X	X	X	X		X
Burglary	X	X	X	X		X	X	X	X	X		X
Arson	X	X	X	X		X	X	X	X	X		X
Criminal Sexual Conduct	X	X	X	X		X	X		X	X	X	X
For Gain	X	X	X	X	X	X	X	X		X	X	X
Directed Another					X	X		X		X	X	

Victim on Public Duty	X	X	X	X	X	X	X	X	X	X	X	X
Victim Vulnerability	X	X	X		X	X	X		X	X	X	X
Defendant's Criminal History	X	X	X		X	X	X		X	X	X	X
Heinousness	X	X	X		X	X	X	X	X		X	
Premeditation		X				X	X		X			
Type of Weapon	X	X	X	X	X	X	X		X	X		
Risk to Multiple Victims	X	X			X	X	X	X			X	X
Location of Weapon or Victim	X		X	X						X		
Torture				X	X	X		X	X	X		
Poisoning				X		X			X			
Relationship of Defendant to Victim							X					
Drug-Related Charges			X							X		
Piracy or Wrecking	X		X	X			X	X		X		
Terrorism		X	X						X			
Gang Activity		X		X			X			X		
Escape or Avoiding Arrest			X		X	X	X	X	X		X	
Treason				X	X			X				
Hate Crime				X	X	X						
Interfering with Victim's Free Speech						X						
Stalking Victim or Lay in Wait				X	X				X			
Serial Killing					X							
Interfering with Justice	X			X		X	X	X	X	X	X	

Defendant is Future Danger												

Table 1.4 Aggravators – Ohio to Wyoming

	OH	OK	OR	PA	SC	TN	TX
Kidnapping	X	X	X		X	X	X
Robbery	X	X	X		X	X	X
Burglary	X	X	X		X	X	X
Arson	X	X	X		X	X	X
Criminal Sexual Conduct	X	X	X	X	X	X	X
For Gain			X	X	X	X	
Directed Another			X	X	X	X	
Victim on Public Duty	X	X	X	X	X	X	X
Victim Vulnerability	X	X	X		X	X	X
Defendant's Criminal History	X	X	X	X	X	X	X
Heinousness	X		X			X	X
Premeditation		X	X				
Type of Weapon	X	X	X	X			
Risk to Multiple Victims	X	X			X	X	X
Location of Weapon or Victim	X		X	X			
Torture		X	X	X	X	X	
Poisoning					X		
Relationship of Defendant to Victim	X				X		
Drug-Related Charges		X	X	X	X		
Piracy or Wrecking							
Terrorism	X	X				X	
Gang Activity							
Escape or Avoiding Arrest	X	X	X		X	X	X
Treason				X			

Hate Crime							
Interfering with Victim's Free Speech						X	X
Stalking Victim or Lay in Wait							
Serial Killing				X			
Interfering with Justice	X		X			X	
Defendant is Future Danger							

Mitigating Factors

(define mitigating factors, discuss trends within the aggravating factors, and understanding the differing frequencies of *objective* mitigating factors and *subjective* mitigating factors)

Table 1.5 Mitigators – Alaska to North Carolina

	AL	AZ	AR	CA	CO	DE	FL	GA	ID	IN	KS	KY
No Past Criminal History	X		X	X			X			X	X	X
Mental Disturbance	X		X	X	X	X	X			X	X	X
Victim is Participant	X									X	X	X
Minor Participation	X	X	X	X	X		X			X	X	X
Acted under duress or domination	X	X	X	X	X	X	X			X	X	X
Age	X	X	X	X	X	X	X			X	X	X
Capacity to Conform Conduct Compromised	X	X	X	X	X	X	X			X	X	X
Could not have foreseen death	X	X			X							
Aided in arrest of another												

Defendant believed there was moral justification					X							X
Discretionary mitigators		X		X	X	X	X			X		
Defendant was acting in heat of passion												

Table 1.6 Mitigators – Ohio to Wyoming

	OH	OK	OR	PA	SC	SD	TN	TX
No Past Criminal History	X		X	X	X		X	
Mental Disturbance	X		X	X	X		X	
Victim is Participant				X	X			
Minor Participation	X			X	X			
Acted under duress or domination	X		X	X	X		X	
Age	X		X	X	X			
Capacity to Conform Conduct Compromised	X			X	X			
Could not have forseen death								
Aided in arrest of another								
Defendant believed there was moral justification		X			X			
Discretionary mitigators	X	X		X		X	X	X

Defendant was acting in heat of passion								

Felony Murder (discussion of felony murder definition, and cases in which an accomplice was executed)Ten men have been executed under the death penalty for murders their jurors knew they did not commit. They were an accomplice, lookout guard, or get-away driver, but not the one who pulled the trigger or threw the fatal punch. In three of those cases, the murderer received a lesser sentence.

Six states allow the sentence of capital punishment for felony murder, or aiding in a situation that led to a murder regardless of culpability for the murder itself.

(Discussion—maybe even table of states that allow for the possibility of felony murder being sentenced with capital punishment.)

Conclusions

(discuss the general trends in mitigators and aggravators, and capital eligible crimes. Here, analyze of the objectivity of the crimes that are eligible but the inherent subjectivity of the aggravating factors. Does the number of subjective aggravators a state has, have any correlation with the number of executions or death sentences that state doles out?)

sums of number of states with each eligible crime, and sums per state

discussion of range of categories within reduced categories

discussion of outliers

Appendix

6

How Long Does It Take?

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.

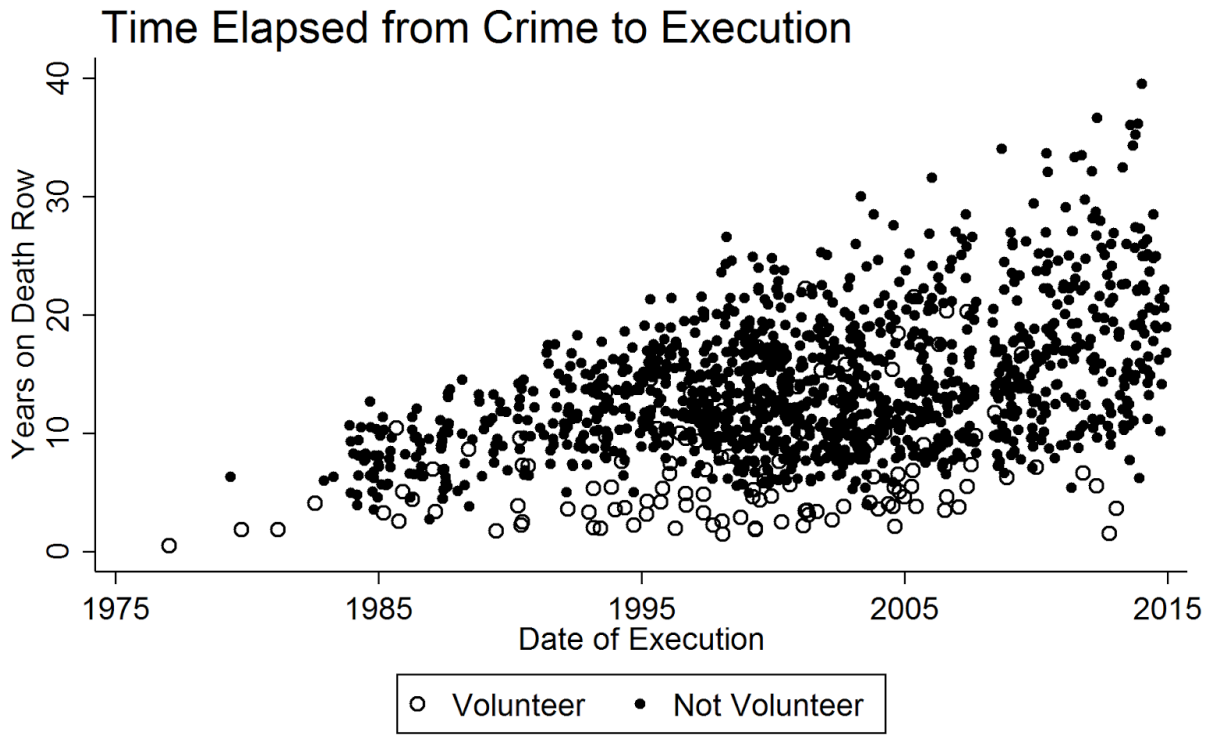
On April 18, 1978, Clarence Allen Lackey was sentenced to death by the state of Texas for the 1977 murder of Diane Kumph. In 1994 Lackey filed his first federal habeas petition in which he argued that executing him after such a lengthy delay of sixteen years would be considered cruel and unusual and 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 5.1 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 5.1 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 5.1



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 5.1. 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.

The data in Figure 5.1 show an average increase of 124 days per year in the time between the crime and the execution: about 1 increased year of delay every 3 years. However, they also show an increased spread. 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.

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.

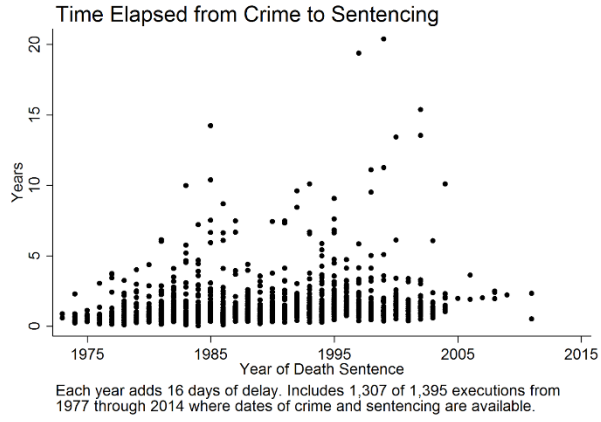
The question then arises, where does most of the time get consumed along the way between when a capital murder is committed and the subsequent execution? From the data that follows, it is readily apparent that the period between a murder and sentencing is fairly expedient. The true consumption of time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

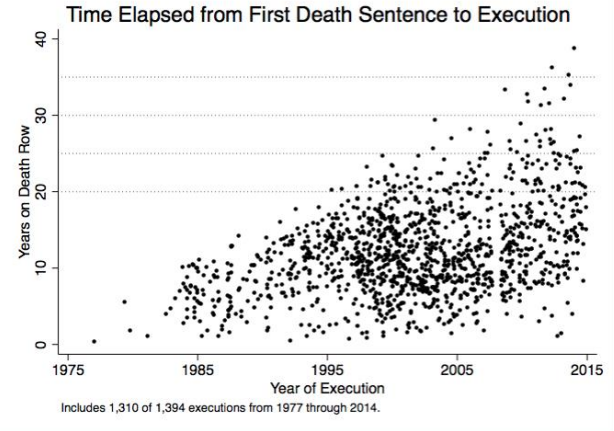
Figure 5.2 shows the time elapsed from a murder to the completion of the bifurcated sentencing phase of a capital trial. As you can see, most of the observations are concentrated near

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 litigation.

Figures 5.2 and 5.3





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 sentence

Question of Constitutionality

Include info and conclusions form cases from deathpenaltyinfo.net here

Breakdown by State

Need to meet to analyze data state by state in terms of delays form crime to execution, crime to sentencing, and sentencing to execution.

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Jones v. Chappell, 31 F. Supp. 3d 1050 (C.D. Cal. 2014).

Lackey v. Texas, 514 U.S. 1045 (1995)

7

Which Jurisdictions Execute and Which Don't?

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 person. 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 a limited number of locations that issues death sentences, and also have the infrastructure and willingness to carry out executions. Only a few counties routinely execute, but those 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, 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 amount of funding in the county seat, 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 placed a moratorium on the death penalty in part due to its arbitrary and capricious nature, it is shocking that such disparities exist to this day and to such a severe degree.

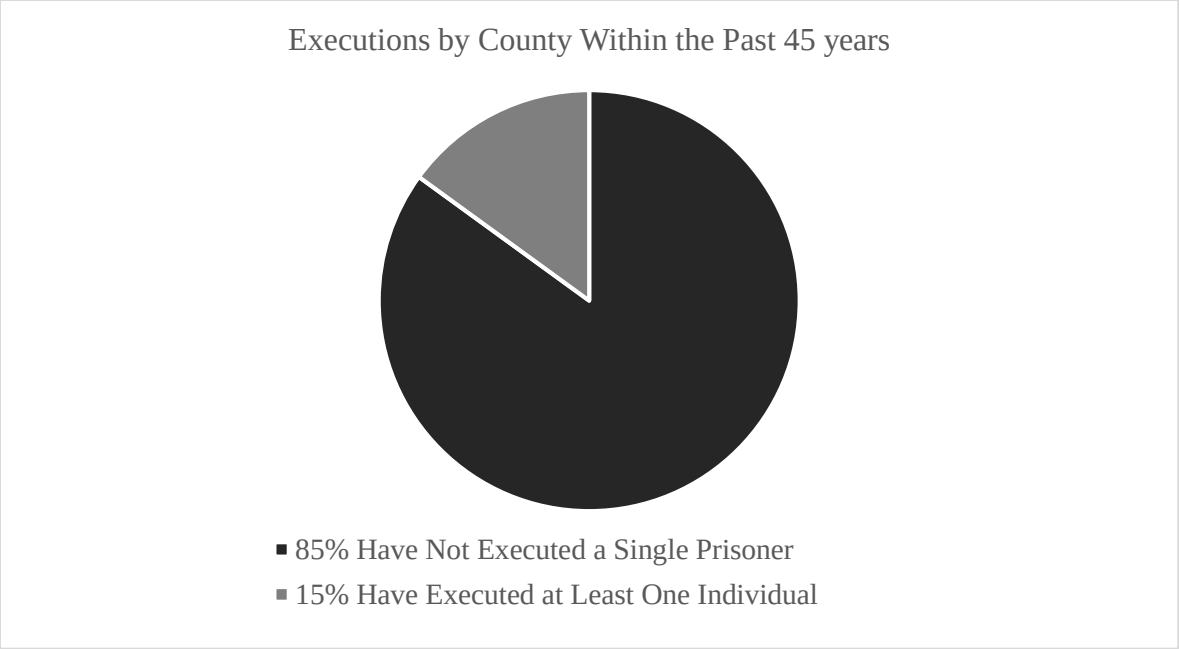

Figure 6.1
Note: This graph shows the sharp disparity between counties which execute and counties which do not (2% Report)

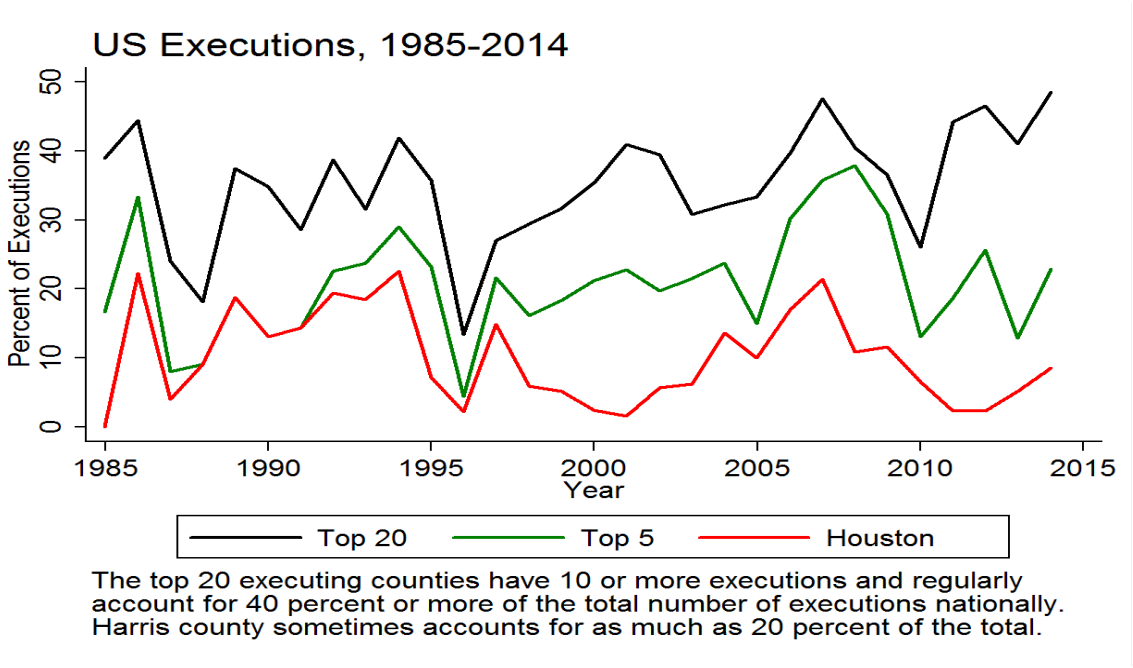

Figure 6.2
Note: This figure highlights the fact that a minority of counties are responsible for the bulk of executions, with the top twenty counties making more than 40% of the national total of executions during some parts of the 1980s and mid 2000s.

Top Executing Counties and Trends

In Table 1 the counts and percentages of the top fifteen executing counties are listed. This information displays the predominance of these counties as top executing localities. With regards to geography, a difference in a few feet of ground where a crime takes place, the dividing place between county lines can be the difference between whether a crime will be death eligible or not. Based on the percentages of In the majority of death penalty is a possible punishment in thirty-one States. There are 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 skew in localities where executions take place have such a low probability of being created by chance, it is almost a statistical impossibility. The fact that there is such a sharp disparity between states and between counties in the same states shows a deep flaw in the death penalty system that goes beyond state and county legal autonomy. It ventures into territory violative of the the 8th amendment's precept that a punishment must not be arbitrary and capricious.

Table 1. Executions by County

	State	*County*	*Executions*	*National Total*	*Cumulative Total*
1	Texas	Harris	123	8.67%	8.67%
2	Texas	Dallas	53	3.74%	12.41%
3	Oklahoma	Oklahoma	39	2.75%	15.16%
4	Texas	Bexar	38	2.68%	17.84%
5	Texas	Tarrant	38	2.68%	20.52%
6	Missouri	St. Louis	23	1.62%	22.14%
7	Oklahoma	Tulsa	18	1.27%	23.41%
8	Texas	Jefferson	15	1.06%	24.47%
9	Texas	Nueces	14	0.99%	25.46%
10	Texas	Montgomery	13	0.92%	26.38%
11	Arizona	Pimas	13	0.92%	27.29%
12	Florida	Miami-Dade	12	0.85%	28.14%

13	Texas	Lubbock	12	0.85%	28.98%
14	Florida	Orange	11	0.78%	29.76%
15	Texas	Brazos	11	0.78%	30.54%
				Top 15 Total	30.54%

Figure 6.3
Note: Executions by County. This graph shows the top executing counties and the proportions of national percentage. Out of 3,143 counties, 15 make up almost 31% of executions.

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 the latter being far more dependent on public opinion (Ellis 2012). While the prosecutor is supposed to make sentencing decisions based on heinousness and other factors in a crime, the influence from public opinion on the prosecutor as an elected official can make a prosecutor more avidly supportive of the death penalty. This leads to a geographic disparity in the number of death sentences in a particular county as public support may vary from one county to the other, based on perceived threat from crime in that area, or longitudinal leanings towards capital punishment as a preferred method of punishment for murder. Over time this can also lead to certain precedent in particular counties where the new prosecutor will continue their predecessor's level of capital case proceedings.

Funding in the County Seat

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 due the fact that it is financially untenable for them to house death row inmates and create an infrastructure to handle continuous appeals and later to execute them. County seats 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 or poorer counties. 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. Financial constraints lead to arbitrariness due to the fact that less heinous crimes in a high rate of execution county will receive a 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 used 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. Systems, once put in place, perpetuate themselves. Once counties 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.

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. Additionally, 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 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 period of the death penalty. Though the reason for this is not completely understood, Harris county and Texas as a whole has streamlined their procedures to secure death penalties and has 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).

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. There is a high bar to prove that a lawyer did not sufficiently defend his client, 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.

As well as that, many states allow the governor to grant clemency at the last minute when an execution is taking place. 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). This limits the governor's power to commute a sentence, and diminishes his power in that capacity. The panel systemizes the clemency power and helps maintain the penalty of death up to the point where the execution takes place.

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 common executing state of Oklahoma.

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 awaiting an execution date, 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. 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).

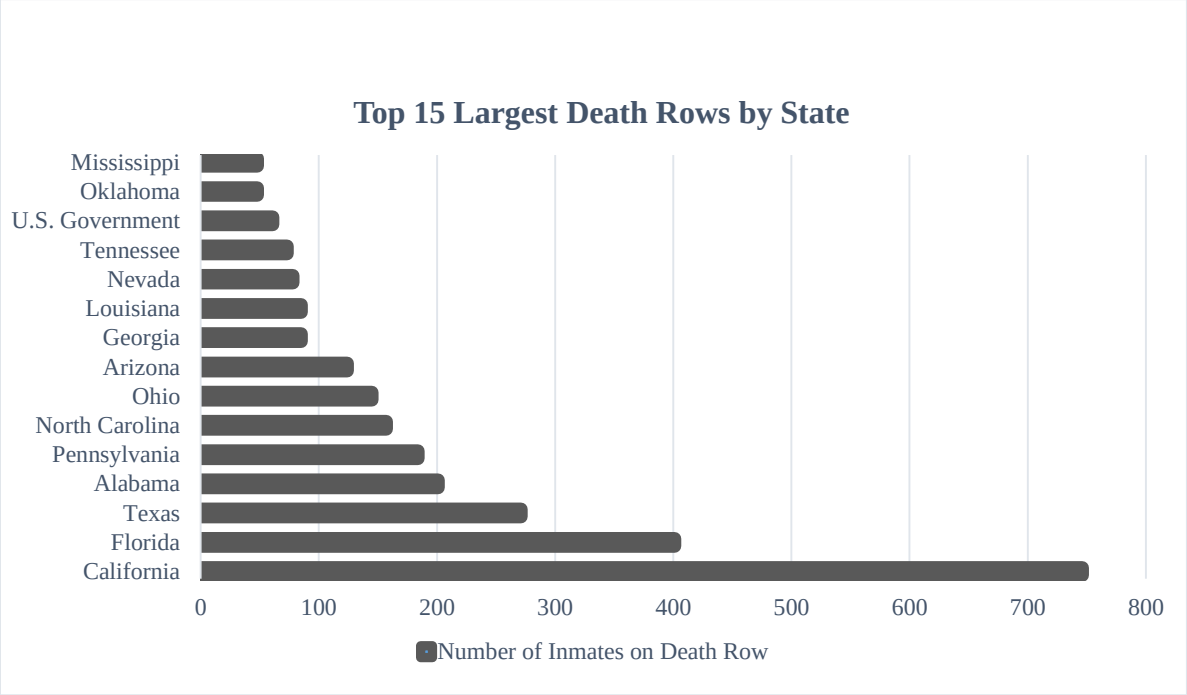

Figure 6.7
Note: This figure shows the size of the top 15 largest death rows in the United States, with the length of the grey bar indicating the number of inmates on each state's death row.

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. 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 high crime rates (state crime rates), but not beyond what would be expected for such heavily populated areas. 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 (statistical analysis). 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. Such parity of statistics does not occur in any county such that favorable towards that conclusion.

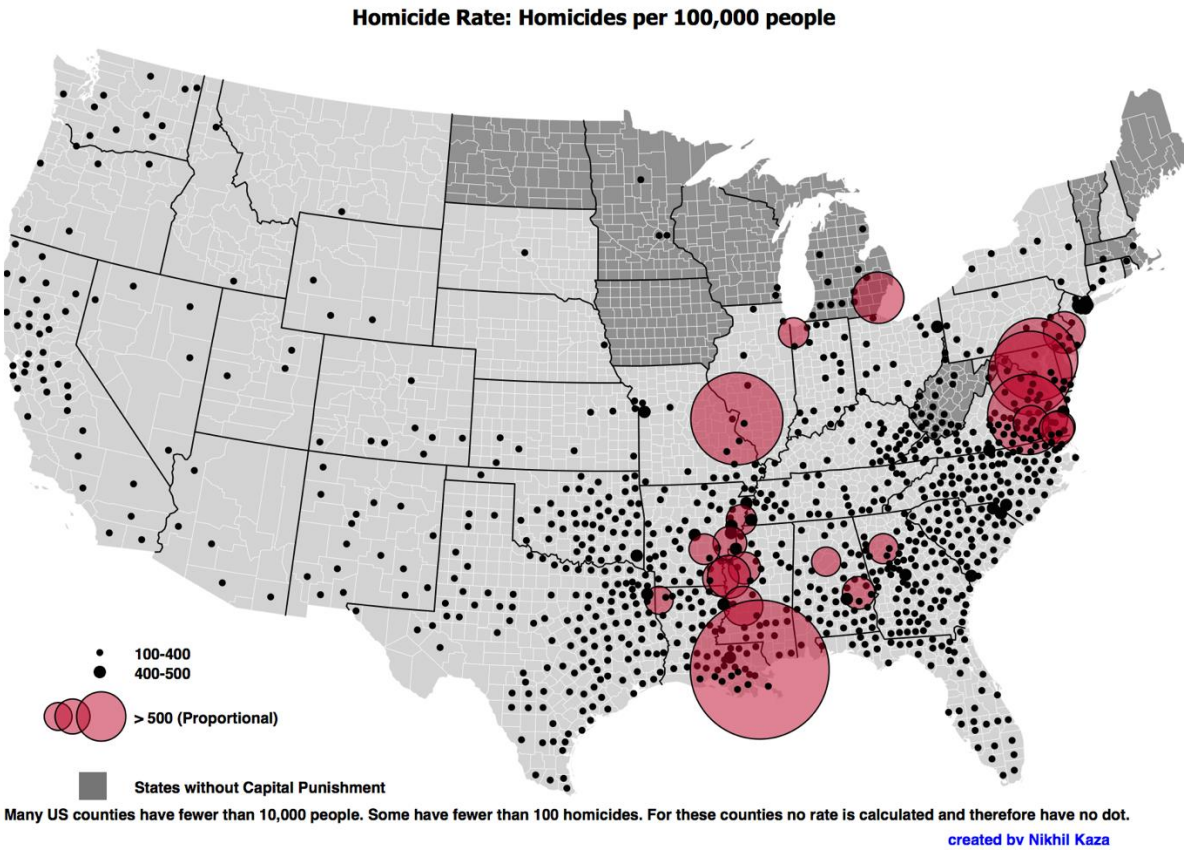

Figure 6.5
Note: This figure shows the homicide rate per 100,000 people. With the largest red dots being the places with the highest homicide rates in the country.

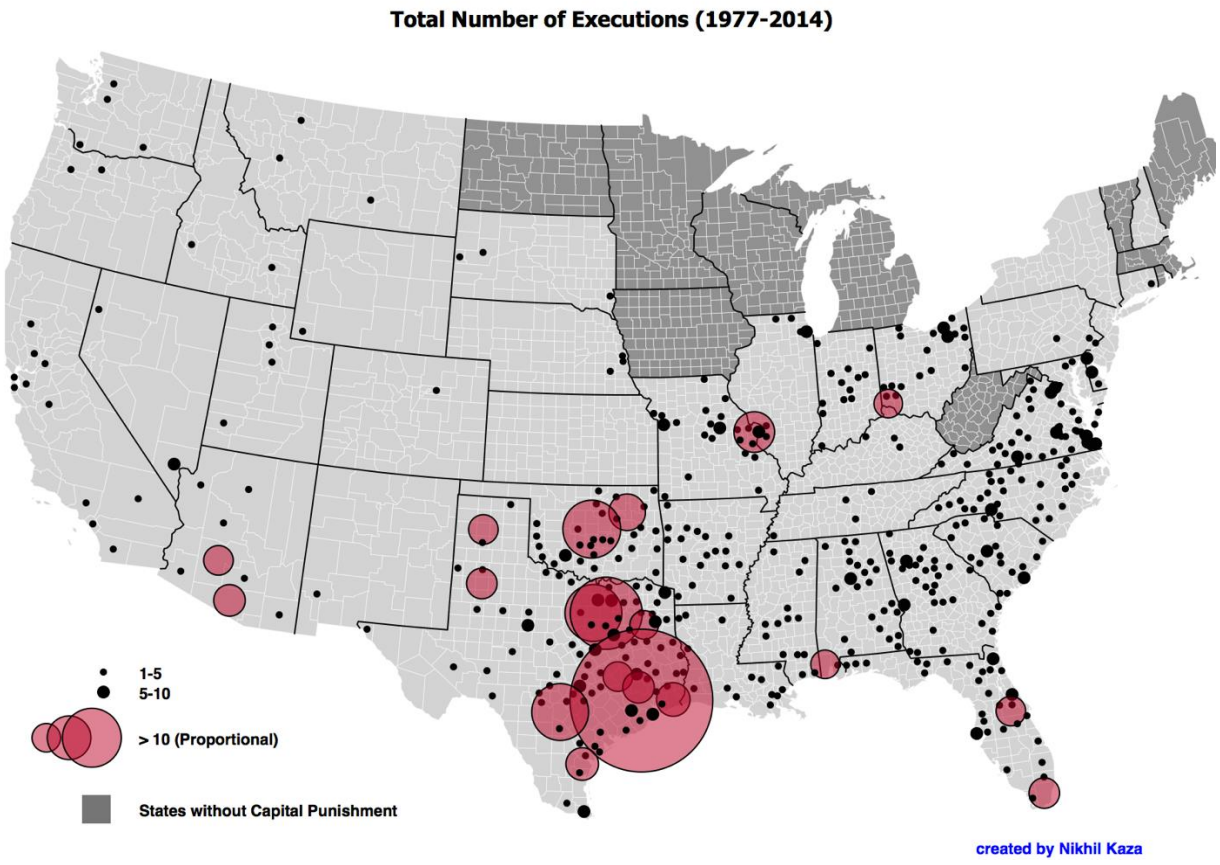

Figure 6.6
Note: This figure shows the total number of executions in the modern era of the death penalty. If homicide rate correlated with execution rate then figure 6.5 and figure 6.6 would have approximately the same geographic distribution.

If executions occurred with more frequency, the death row sizes would shrink dramatically. Due to the lack of executions in some regions like California but a continuous sentencing to death row, leads to the swelling of death penalty. It turns into a death row of a different sort, where inmates will die of old age while waiting for execution.

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8

Death Sentence Reversals

The Capital Punishment Appeals Process [29][30]

The death penalty trial and appeals process is long and arduous. Figure 7.1 shows the death penalty appeals process, while the process differs across states, it shows the usual course of action a defendant will take in a full appeals process. While, historically, death sentences were carried out relatively quickly, the mandated provisions provided by the courts in *Gregg v. Georgia (1976)* resulted in a lengthier appeals process. In addition, the changes in laws and technologies have added to the appeal lengths. In fact, death row appeal wait times have become so prevalent that psychologists and lawyers in the United States and other parts of the world have argued that the lengthy periods of time spent of death row can make inmates "suicidal, delusional and insane"[31]. The conditions on death row have been referred to as the "death row phenomenon" and have lead to psychological effects that result in "death row syndrome"[32].

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 made during the trial and sentencing stage that convicted him. 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

[29] http://search.proquest.com.libproxy.lib.unc.edu/docview/194787426?pq-origsite=summon
[30] http://www2.law.columbia.edu/instructionalservices/liebman/liebman/Liebman%20Study/docs/1/section5.html

[31] http://www.deathpenaltyinfo.org/time-death-row
[32] http://www.deathpenaltyinfo.org/time-death-row

state's highest court. The direct appeal is limited to issues that arose in the trial. 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.

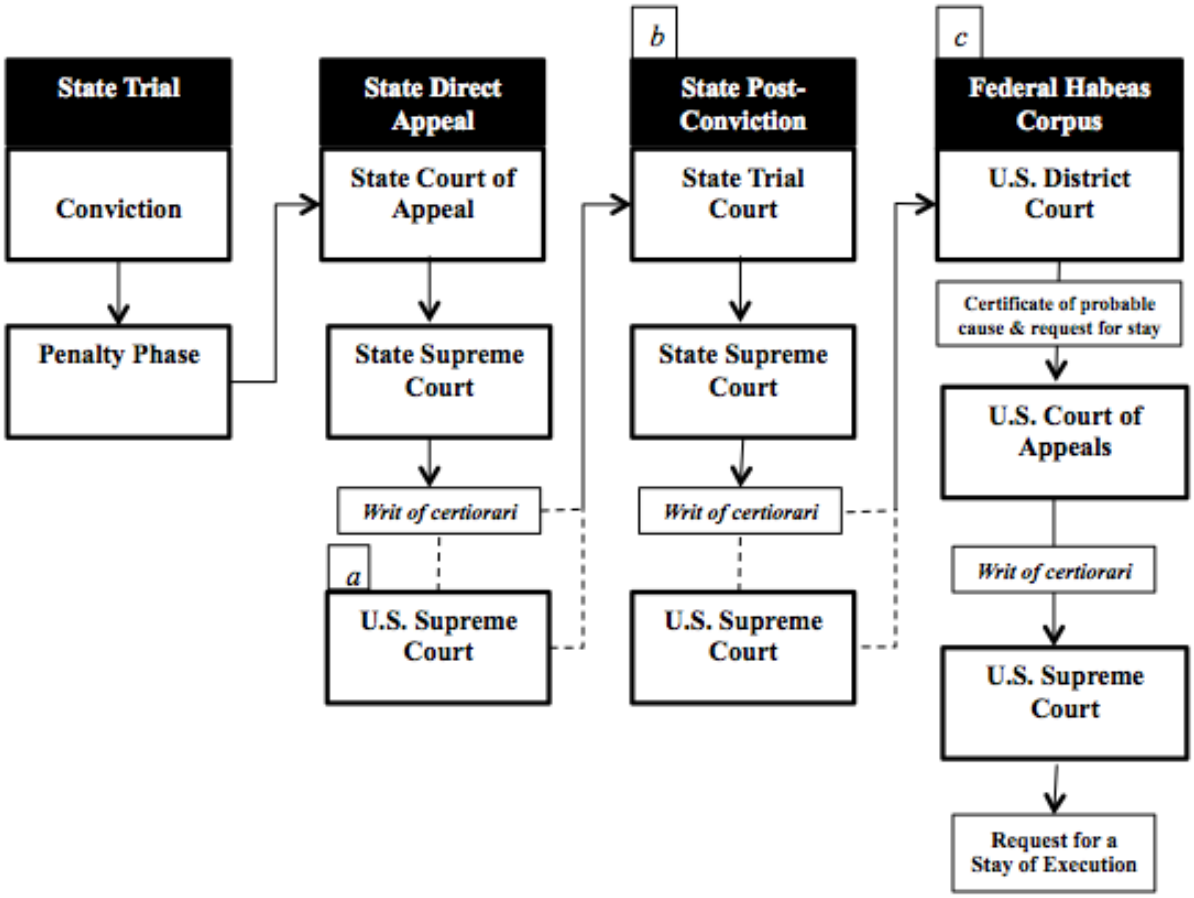
The second stage of the appeals process concerns issues outside of the conviction and sentencing, such as ineffective assistance of counsel, juror misconduct, new evidence or Brady violations. Once the defendant has exhausted State appeals, they may petition to the U.S. Supreme Court for a *writ of certiorari*.

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.

Figure 7.1 Appeals process for capital cases[33][34]

[33] "Death Penalty Appeals Process." *CQ Weekly* (May 26, 1990): 1655. http://library.cqpress.com.libproxy.lib.unc.edu/cqweekly/WR101409415.

[34] Bohm, Robert M. *Deathquest: an introduction to the theory and practice of capital punishment in the United States*. Anderson Publishing Company. 1999



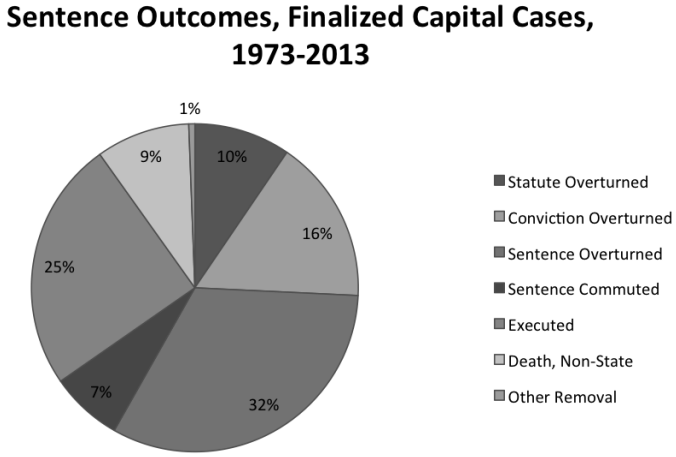
Note: the above graph shows the stages of events that would occur if the defendant, or petitioner, were unsuccessful at every stage. If the defendant is successful at any stage, they will be removed from death row and given the relevant trials or remedies.
a: If the decision runs against the defendant 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 from the date of post-conviction

Capital Sentence Outcomes: How Likely is Execution?

Despite receiving a death sentence, many capital defendants will not face execution or even remain on death row. Based on a review of all 5, 487 finalized cases in which a death sentence was given between 1973 and 2013, a total of 3,194 sentences were overturned at some stage in the appeals process by state or federal courts. Making up more than half of all finalized cases at

58 percent, overturned sentences occur for three primary reasons: (1) the underlying statute was ruled unconstitutional, occurring in 10 percent of cases; (2) the conviction itself was overturned, occurring in 16 percent of cases; (3) the death sentence was overturned but guilt was sustained, occurring in 32 percent of cases.[35]

Figure 7.2 Sentence Outcomes in Finalized Capital Cases, 1973-2012[36]



An additional 392 inmates, and 7 percent of total cases, received commutations, removing the possibility of execution and the inmate from death row; however, this act of executive clemency did not lift their conviction of guilt. As seen in Figure 7.2, in total, 65 percent of all finalized cases resulted in some form of sentence overturn that removed the inmate from death row, while execution has occurred in 1,359 or 25 percent of all cases. The remaining 10 percent of finalized cases that did not result in an execution were comprised of non-state administered deaths, at nine percent, and other unspecified removals, at one percent. Ultimately, for finalized cases, an inmate only has a 1-in-4 chance of being executed, while nearly two-thirds

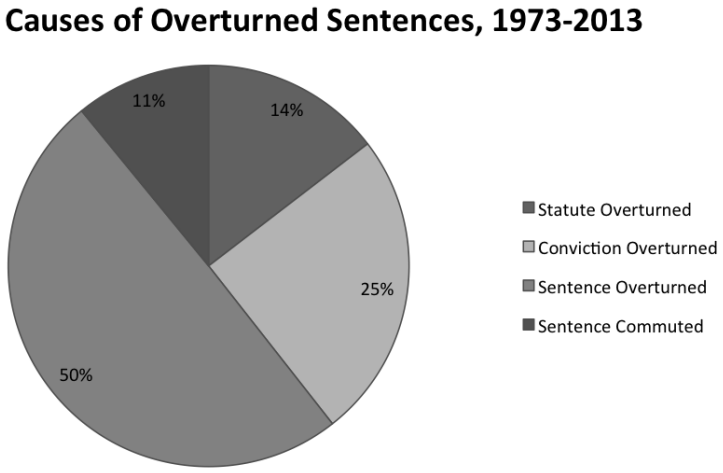
[35] Figure 7.2
[36] BJSTable16-2013.xlsx

of inmates will see their death sentence overturned at some stage, greatly reducing the finality of the most severe punishment.

Why are Sentences Overturned?

Based on the review of all finalized capital cases in the United States in the modern period of the punishment, it was found that a death row inmate is more than twice as likely to see their sentence overturned, as they are to face execution.[37] This high rate of overturn is the result of four primary sentence outcomes: (1) the original statute was ruled unconstitutional; (2) the original sentence was overturned but guilt was sustained; (3) the original conviction was overturned; or (4) the sentence was commuted but guilt was sustained.[38]

Figure 7.3 Cause of Overturned Sentences in Final Capital Cases, 1973-2013[39]



Of those 3, 586 cases that were ultimately overturned, in 523 or 14 percent of cases the underlying statute was ruled unconstitutional, in 890 or 25 percent of cases the conviction was

[37] Figure 7.2
[38] Figure 7.2
[39] BJSTable16-2013.xlsx

overturned, in 1,781 or 50 percent of cases the death sentence was overturned but guilt was sustained, and in 392 or 11 percent of cases the death sentence was commuted.[40]

Conviction Overturned

Of the over 3,000 cases in which a death sentence was overturned, 890 defendants had their conviction overturned by an appellate judge, accounting for 25 percent of all overturned sentences during the review period. [41] 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 defendant's conviction, should they be able to prove that an error or errors occurred and that those errors significantly contributed to their conviction.[42]

Following a sentence of guilt, the burden of proof weighs upon the defendant and to achieve a conviction reversal, a defendant must prove that (1) a legal error in his or her case was "prejudicial" because there is "reasonable probability that, but for the error, the outcome would have been different;" (2) the error had an identifiable affect on the verdict; or (3) that the error was "inherently prejudicial."[43] One example of an inherently prejudicial error is the holding of a trial in a community in which publicity and/or media coverage has "saturated" the community and as such made it "highly likely or almost unavoidable"[44] that jurors would be biased against the defendant, potentially causing the defendant's guilty conviction. If a defendant is able to successfully show that at least one of these issues was present in their original trial, their conviction may be overturned; however, such success does not necessarily mean the defendant is

[40] Figure 7.3
[41] Figure 7.3
[42] Gelman et al. (2004)
[43] Gelman et al. (2004)
[44] Standler (2004)

innocent or cleared of charges. Most often, an overturned conviction comes with a call for a retrial to determine the guilt or innocence of the defendant.

Case Study: Montez Spradley, AL 2011

Sentence Overturned

Among capital cases tried between 1973 and 2013, the most common form of reversal is sentence 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% of those who were granted reversals (Fig. 7.2), had their conviction of guilt upheld but sentence of death overturned. A death sentence may be overturned for a variety of reasons, including those relating to prejudicial versus harmless errors as discussed in conviction over turns, as well as a proportionality review.[45] 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." [9] 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.

Case Study: ***Penry v. Johnson***, 532 U.S. 782 (2010)

Statute Overturned

Responsible for 523 reversals between 1973 and 2013, the overturn of an underlying statute occurs when the court finds that the statute under which defendants were sentenced to death are unconstitutional. When such findings occur, all individuals sentenced to death under such

[45] OHIO REV. CODE § 2929.05(A) (West 2007)

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 lack of maturity, being easily influenced, and lack of developed character, as preventing juveniles from being "reliably classified among the worst offenders"[46] as cause for sparing 72 death row inmates in 20 states.

Case Study: Connecticut, 2015

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, this "does not cancel guilt, nor does it imply forgiveness" and instead it reduces his or her capital sentence to "life imprisonment, either with or without paroles eligibility" (Acker & Lanier, 2000). 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.

Case Study: Tommy Lee Waldrip, GA 2014, granted before scheduled DOE

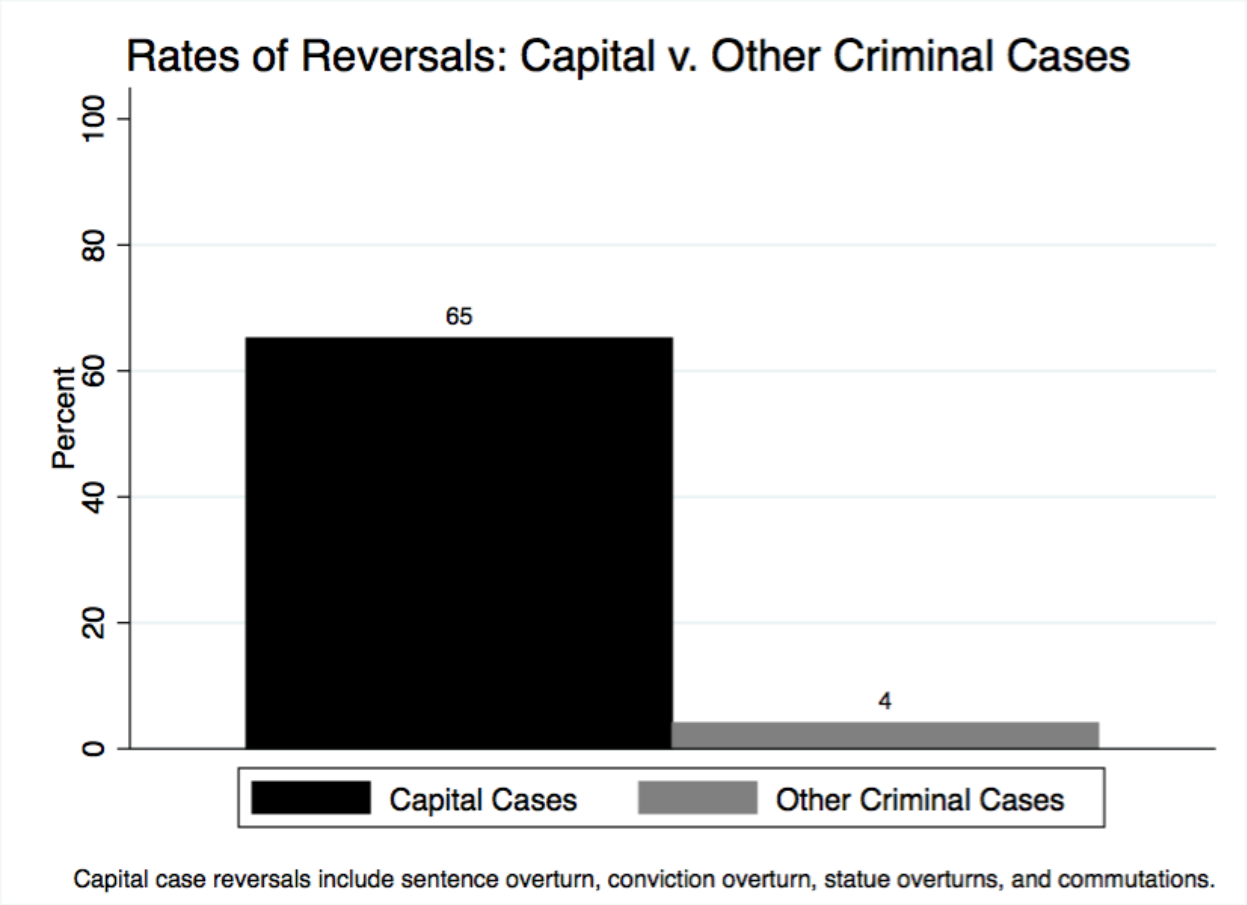
National Reversals

Between 1976-2013 there have been 2791 death sentences overturned and 340 sentences commuted in the United States. Nationally, in the post-Furman era, almost 65 percent of capital cases have been overturned on appeal. These extraordinary high reversal rates are a result of errors in the initial trial such as ineffective assistance of counsel, discrepancies in jury selection,

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

and tainted evidence[47]. But despite the extensive safeguards put into place to protect against such errors, there is still a drastically higher rate of capital punishment reversals when compared to non-capital punishment reversals, which is around 1-7 percent[48]. Most states do not exceeded 1 percent of their noncapital felony cases resulting in appellate reversals[49].

Figure 7.4

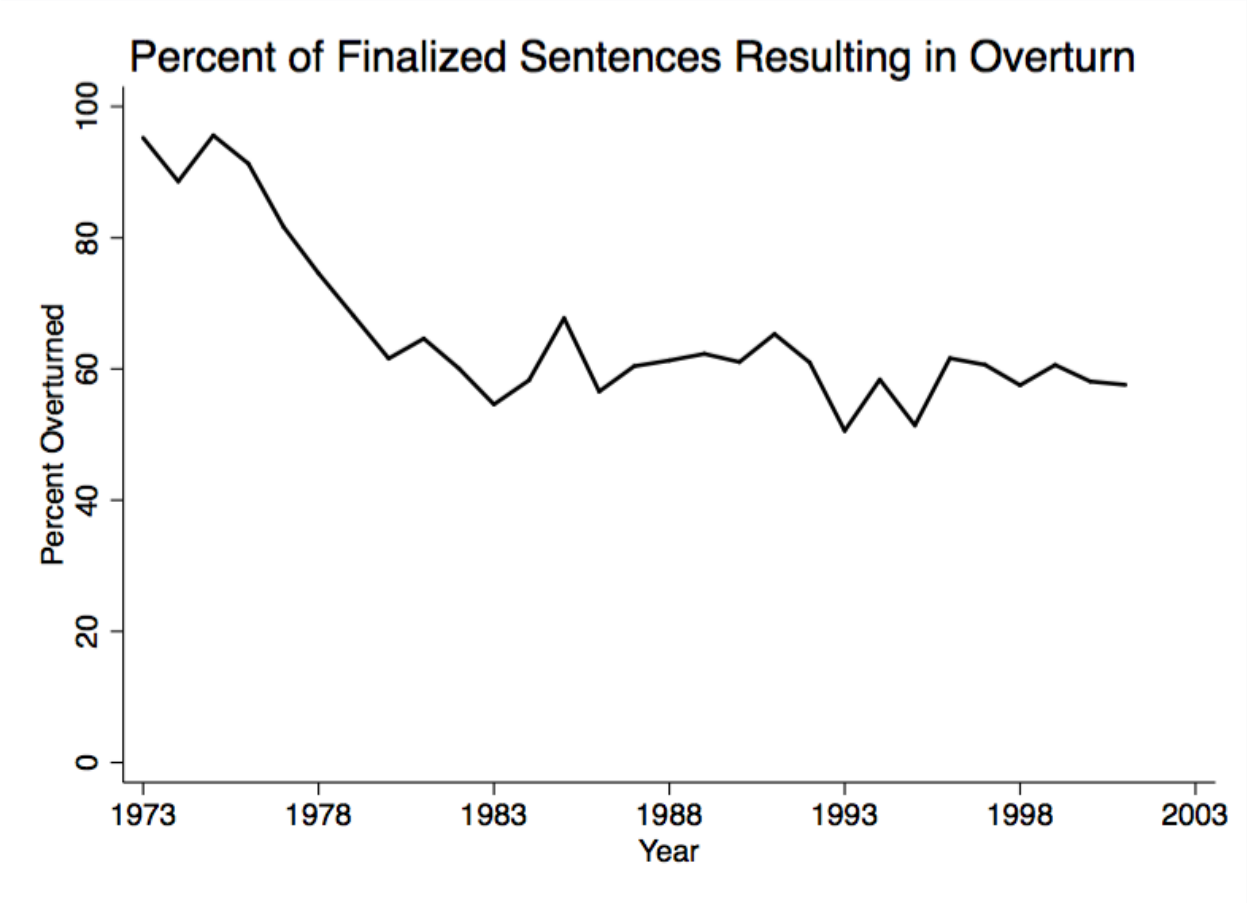


Examining national trends of overturns allows us to see how liberally overturns have been granted on appeal over time, and if those trends have changed. Figure 7.5 shows the

[47] Bohm, Robert M. *Deathquest: An introduction to the theory and practice of capital punishment in the United States* Anderson Publishing Company. 1999
[48] Bohm, Robert M. *Deathquest: An introduction to the theory and practice of capital punishment in the United States* Anderson Publishing Company. 1999
[49] White, Welsh S. *The Death Penalty in the Eighties: An examination of the modern system of capital punishment.* Ann Arbor: University of Michigan Press. 1987

national rates of finalized death sentences over turned by year, which includes statute overturns, conviction overturns, sentence overturns, and commuted sentences. The graph omits any years where the there is a finalized sentence rate of less than 40 percent, which leaves the years 1973-2001.

Figure 7.5 National Rates of Death Sentences Overturned, 1973-2001[50]



The above graph shows that from 1973 to the mid 1800s, there were a declining number of death sentence reversals, in 1983 the trend begins to level off at around 60 percent of death sentences resulting in an overturn.

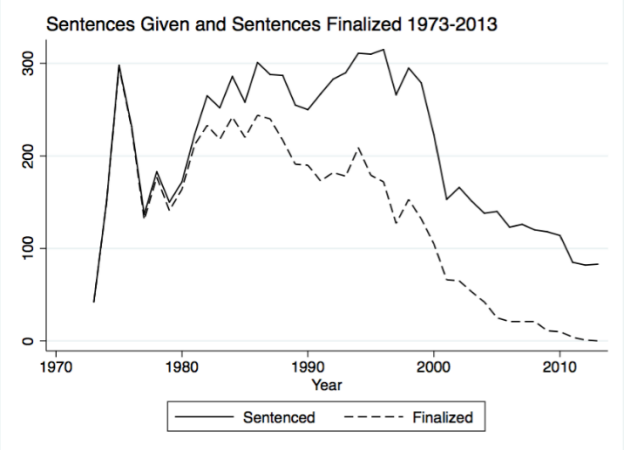
[50] BJSTable16-2013.xlsx

[The following section is more of a guidance section - it will not appear in the final chapter, but is helpful to determine how to present the information given in Figure 7.4]

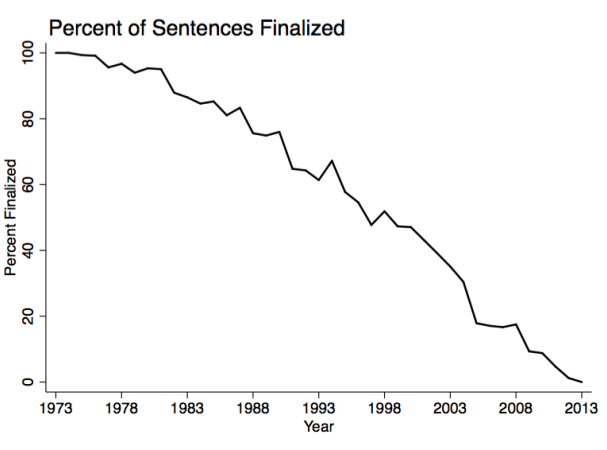
It is important to note, that figure 7.3 is not static, it changes as sentences become finalized, and as highlighted in chapter five, the lengthy process of capital cases is becoming an increasing burden on the courts ability to finalize the capital cases they are delivered. Figure 7.6a shows the comparison between finalized sentences and sentences that were administered that year. The graph shows that most cases were finalized up until the early 1980s, which is where there is a divergence between the two trends. Figure 7.5b shows the percentages of sentences that have been finalized.

Figure 7.6

7.6a



7.6b



Regional Rates of Overturn

In his 2013 report, "The 2% Death Penalty," Richard C. Dieter found that there are vast geographic discrepancies in application of capital punishment in the modern era. Since 1976, 82 percent of all executions have been carried out in the South, with the Midwest carrying 12 percent of executions, the West accounting for six percent, and the Northeast only responsible

for <1% of all executions.[51] With such vast differences in application of the punishment, there were likely to be differences in rate of overturn as well. To review both sentences handed down and sentences overturned within proper context of trends of application, states were broken down into five groups for review: (1) Major Death States; (2) the South; (3) the Midwest; and (4) the Northeast.

Regional Breakdowns

Major Death States

For the purpose of this chapter, the number of executions each state had within the modern era and which had the most determined which ten states were classified as Major Death States.[52] The Major Death States, not in order, are: (1) Florida; (2) Texas; (3) North Carolina; (4) Ohio; (5) Alabama; (6) Oklahoma; (7) Georgia; (8) Mississippi; (9) South Carolina; and (10) Virginia.[53] These states had the greatest number of death sentences and as a result had the highest number of overturned sentences; however, their rate of overturns, or percentage of total sentences that once finalized were reversed, were relatively lower than their regional counterparts.

The Northeast, South, and Midwest

After identifying and separating states that qualified as Major Death States, the four primary regions and their states, as indicated by the classification provided in the Bureau of Justice Statistics report, are as follows:

(1) **Southern Region**: Louisiana, Delaware, Tennessee, Maryland, Kentucky, and Arkansas.
(2) **Midwestern Region**: South Dakota, Nebraska, Kansas, Indiana, and Missouri.
(3) **Northeastern Region**: Rhode Island, Massachusetts, New York, Connecticut, and New Jersey.

[51] Dieter, Richard C. *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases, An Enormous Costs to All.* Penalty Info Center. 2013.
[52] http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976

[53] BJSTable17-2013

Table 7.8 Regional Sentence Outcomes, 1973-2013

Region	Sentenced	Overturned	Executed	Death Row
Major Death States				
Alabama	439	157	56	190
Florida	1040	487	81	398
Georgia	325	170	53	82
Mississippi	197	117	21	50
North Carolina	536	317	43	151
Ohio	419	205	52	136
Oklahoma	353	180	108	48
South Carolina	204	108	43	45
Texas	1075	249	508	273
Virginia	152	28	110	7
Northeast				
Connecticut*	15	4	1	10
Massachusetts	4	4	0	0
New Jersey	52	41	0	0
New York	10	10	0	0
Rhode Island	2	2	0	0
South				
Arkansas	114	47	27	37
Delaware	60	27	16	17
Kentucky	83	41	3	33
Louisiana	245	126	28	84
Maryland	53	40	5	5
Tennessee	225	123	6	75
Midwest				
Indiana	103	63	20	14
Kansas	13	4	0	9
Missouri	186	60	70	45
Nebraska	33	14	3	11
South Dakota	7	0	3	3
West				
Colorado	22	16	1	3
Idaho	42	24	3	12
Montana	15	8	3	2
Nevada	33	14	3	11
New Mexico	28	24	1	2
Oregon	63	24	2	34
Utah	27	11	7	8
Washington	40	25	5	9

Wyoming	12	9	1	1

Comparing Regional Sentence Outcomes

Between 1973 and 2013, a total of 8, 466 death sentences were handed down in the United States and in Figure 7.9, the average outcomes of each of those cases have been collected, separated by the four primary regions and Major Death States, as well as the addition of national averages. From this figure a trend emerges suggesting that those states that are less likely to give a death sentence are also more likely to grant a reversal at some stage of the appeals process. Looking at the Northeast, the region responsible for <1% of all executions[54] is also the region with the greatest percentage of overturned sentences, with a regional rate of overturn of 83 percent.[55] Following this trend, the Western region, which is responsible for roughly six percent of executions, the region is second highest in reversal of sentences, once California is removed from the region and placed in the Major Death State Category, as it is an anomaly compared to the rest of the Western United States in terms of number of death sentences. Major Death States sentence outcomes are most similar to those of the national aggregate outcomes, though this may be attributed to the size of those death row populations, with states such as Florida and California having over 1,000 sentences during the modern era.[56]

State Reversals

Which States Have the Highest and Lowest Rates of Reversals?

Overturns

[54] Dieter, Richard C. *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases, An Enormous Costs to All.* Penalty Info Center. 2013.

[55] Table 7.8
[56] BJSTable17-2013

The state with the highest raw number of overturned sentences is Florida, with 469 overturned sentences, which is 45% of the overall death sentences given. The state with the highest percentage of death sentences overturned is Rhode Island and New York, with 100% of their sentences overturned; both of these states have outlawed capital punishment. Of the states that still have death penalty statutes, at 75%, Wyoming has the highest percentage of overturned sentences. New Hampshire and South Dakota have had no overturned death sentences in the modern death penalty era, both of which still have active death penalty statutes.

Commutations

Despite their abolition of the death penalty in 2011, Illinois is the state with the highest rates of commutations, with 171 commutations. However, it should be noted that Illinois is an extreme outlier due to the 2003 sweeping commutation of 167 individuals on death row by Governor George Ryan [57]. Of the states with death penalty statutes still in place, Texas emerges as the state with the highest rates of commutations, with 55 individuals. The states with no commutations include; Connecticut, Kansas, Mississippi, New Hampshire, New York, Oregon, Rhode Island, South Dakota, Washington, and Wyoming. Of those with no commutations New York, Rhode Island, and Connecticut are the only states that have abolished the death penalty.

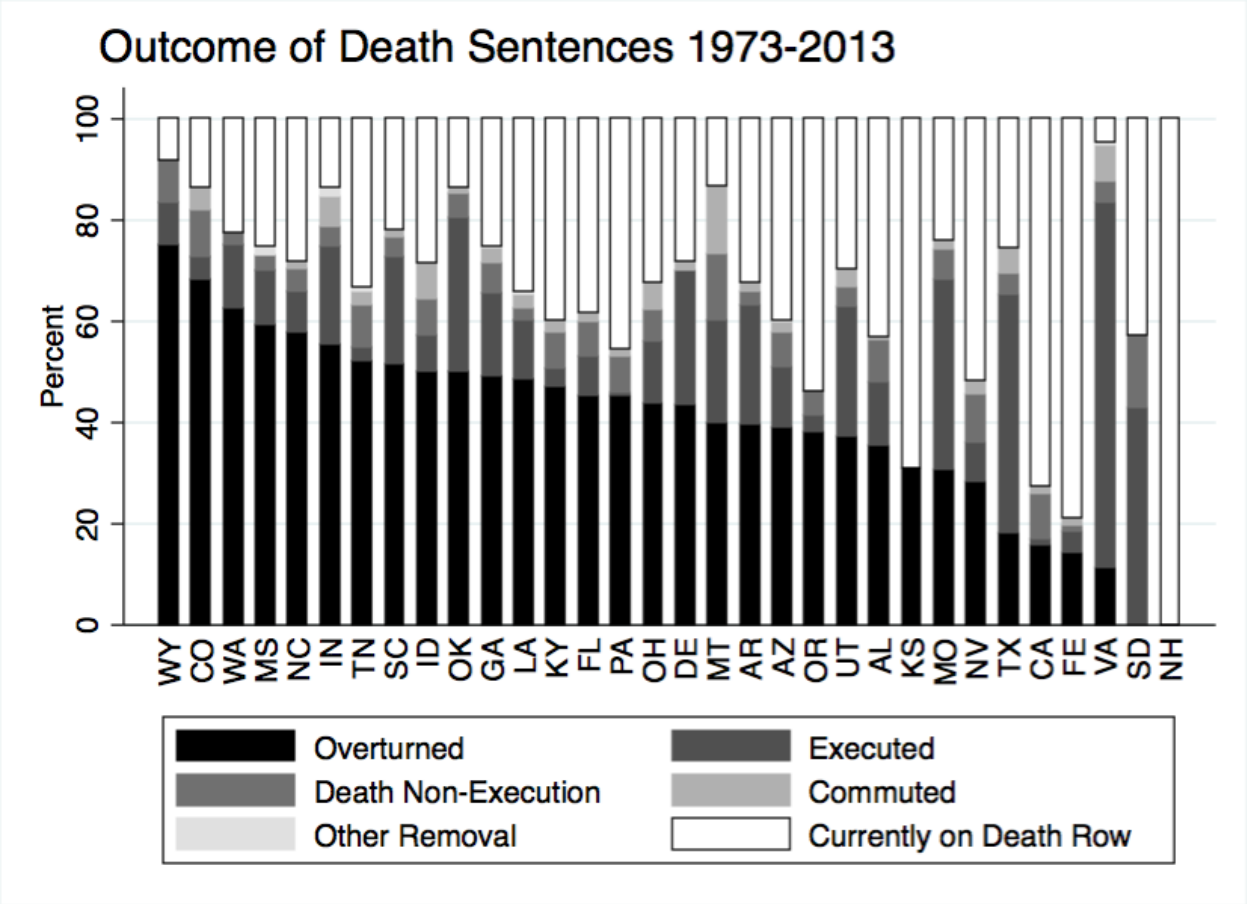
State Sentence Outcomes

Figure 7.9 shows the outcomes of sentences in those states that currently have death penalty statutes. The graph shows the drastic differences in the rates that sentences are overturned; Wyoming overturns the majority of their sentences, at almost 75 percent, while New Hampshire and South Dakota have overturned not one of their sentences. However, it is important to note that New Hampshire has only issued one death sentence in this time, and South Dakota only 7

[57] http://www.deathpenaltyinfo.org/ryans-words-i-must-act

death sentences. Virginia, which is considered one of the major death states executing a total of 110 people second to only Texas, has an overturn rate of roughly 10 percent.

Figure 7.9 Outcomes of Death Sentences by State, 1973-2013



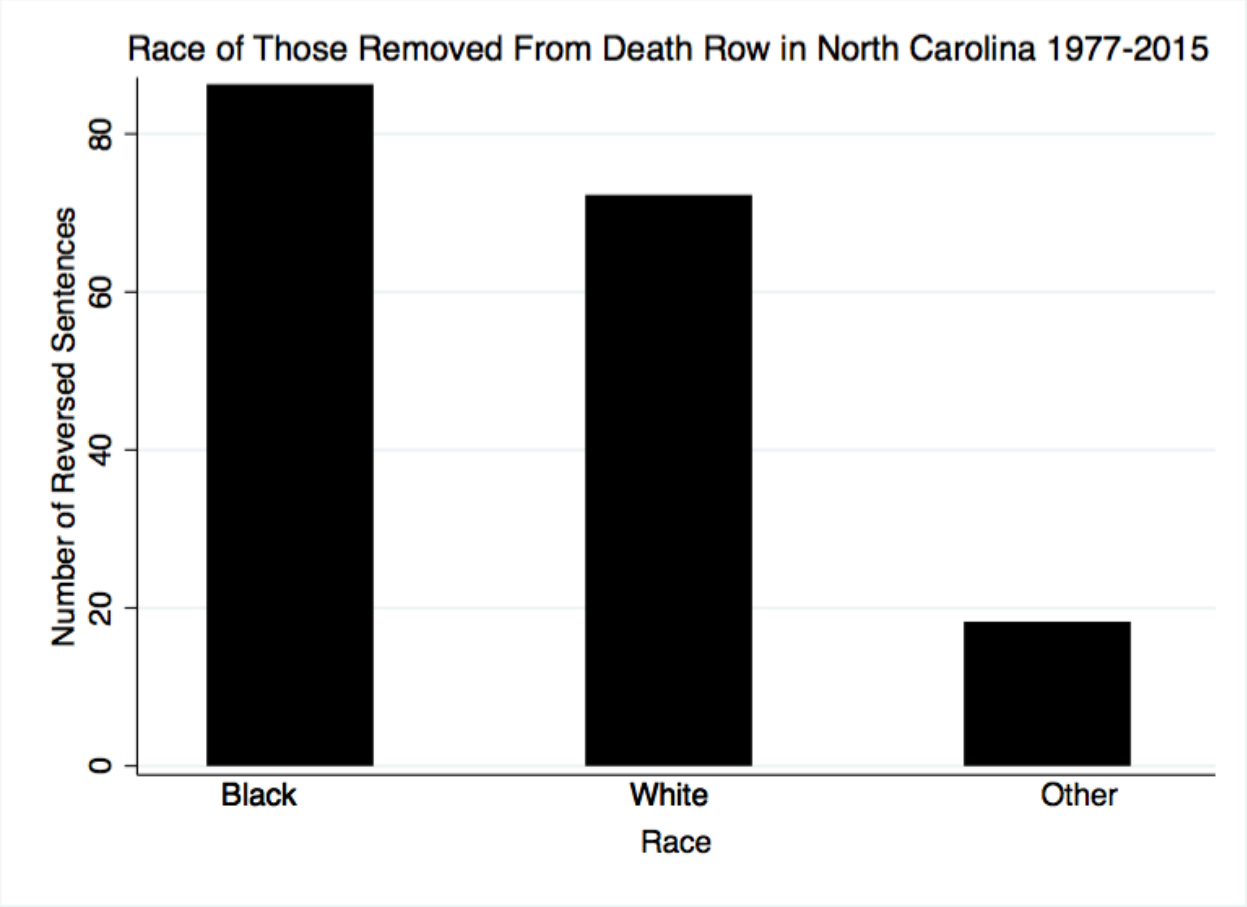
Race and Reversals: A North Carolina Case Study

[This is a new section and still in the process of gathering data to finish- KJ]

Unfortunately, there is no comprehensive data that allows us to study the national characteristics of those removed from death row. There are some states, however, that provide such data. The North Carolina department of safety provides a record of all of those removed from death row, including the inmate's gender, race, and age at time of removal. Figure 7.10 shows the number of

people removed from death row, according to race. Removals include; sentence reduced, either to life or another length, commutations, and release. It can be observed that a higher number of Blacks are removed over both Whites and other racial groups. Those who were removed from this data are those awaiting retrial or resentencing, those who have been executed, and those who died of natural causes, suicide, or by another inmate.

Figure 7.10 Race of those inmates removed from Death Dow in North Carolina



[make another chart that shows the breakdown of the races – i.e. blacks (commutation, reduction in sentence, and removal)]

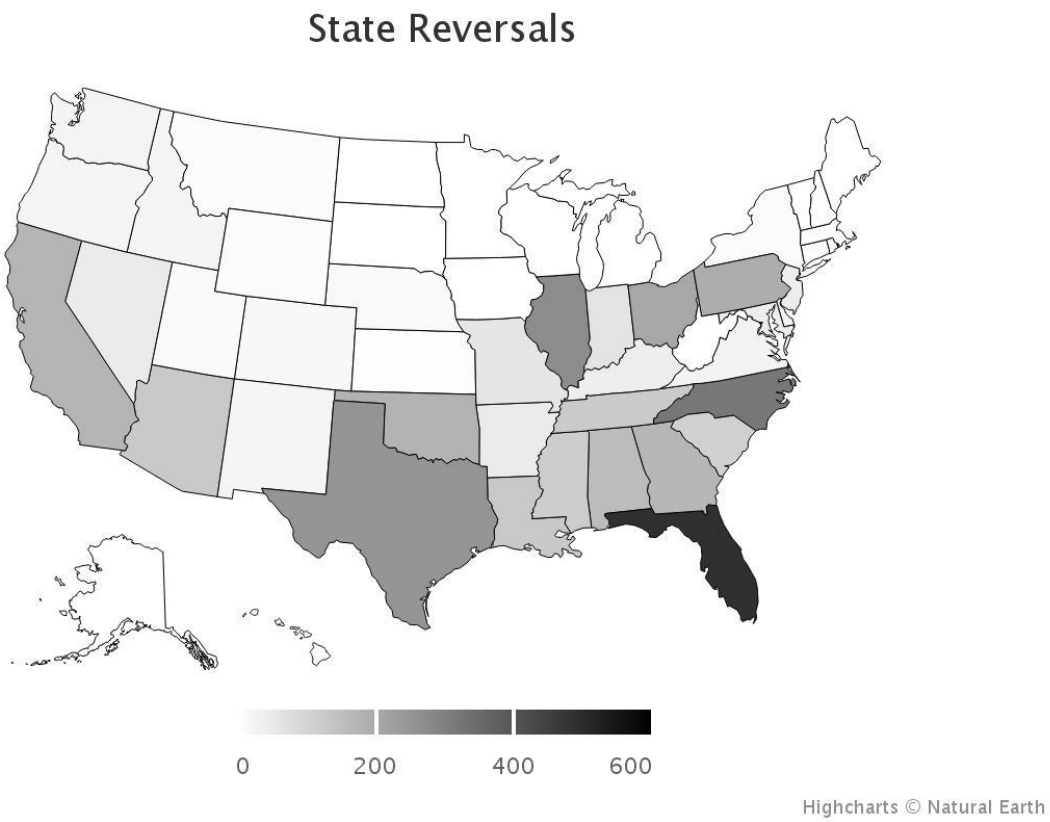
The Constitutional Question

The overwhelming rate of sentence reversals casts doubts on the death penalty institution. The 65 percent of sentences that are overturned nationally hints at the ineffective and faulty nature of the trial and sentencing phases of the initial trial. Given the extraordinarily high rate of reversal of death sentences compared to those of other criminal cases, it seems that the safeguards that were established in *Gregg*, specifically the bifurcated trial, seems to not be effectively reducing the excessiveness nor the number of errors in the punishments being imposed in the initial trial. It could be argued that the current system has resulted in an institution that exhibits systematic error in the trial stage.

The notion of evolving standards of decency is also suggested in the extraordinarily high rates of sentence reversals. The fact that most sentences are later reversed points at the idea that the initial death sentence that was imposed was far beyond what should have been given to the defendant.

To be inserted in the body of the chapter

Figure 7.11: shows the geographical spread of death penalty reversals



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Sarah Tondreau, Lanie Phillips, & Candice Holmquist

9

How Often Are People Exonerated from Death Row?

The following is the criteria for exoneration as is stated by the Death Penalty Information Center (DPIC). It is also the set of requirements that need to be met in order to be included in the DPIC 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"[58]

The University of Michigan Law School's National Registry of Exonerations, a source which this chapter draws from heavily, presents this definition in a more elaborate way explaining 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." One can be exonerated through a complete pardon, or an acquittal or dismissal of "all charges factually related to the crime for which the person was originally convicted." [59] As is stated in the DPIC criteria, a pardon can be given by the governor or other qualified authority, however an acquittal or dismissal but be given by a prosecutor or the court. The result of any of these three situations must be at least partially due to new evidence of innocence and cannot take into account evidence that was originally presented in trial. The two possible scenarios for the acceptance of new evidence are either a) evidence which failed to be

[58] Innocence: List of Those Freed From Death Row, 2015.
[59] Glossary, 2015.

introduced at trial when the defendant was convicted, or b) if a defendant pled guilty, evidence that neither the defendant, the court, nor the defense attorney, were aware of at the time that said plea was entered (Glossary, 2015).

In the case of *Kansas v. Marsh*[60], 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."[61] 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 is the fact that the DPIC innocence list[62] directly violates its own set of criteria by including the cases of people who did not have their convictions reversed because of innocence but because of legal insufficiency. 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."[63] The DPIC Innocence List includes people who have given appellate reversals, prosecutorial dismissals, and acquittals on retrial, which means that the state was not able to prove that they were guilty beyond reasonable doubt but does not mean that they have been found innocent.[64][65] A jury is required to acquit "someone who is probably guilty but whose guilt is not established beyond a reasonable doubt,"[66] therefore when someone is acquitted, or dismissed, it does not necessarily mean that they are innocent and that an innocent person was convicted for a crime which they

[60] 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.
[61] Campbell, 2008.
[62] Innocence: List of Those Freed from Death Row, 2015.
[63] *Jackson v. Virginia,* 443 U.S. 307 (1979).
[64] Campbell, 2008.
[65] 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."*
[66] Campbell, 2008.

did not commit. Justice Scalia claims that the DPIC inflates the word exoneration with regards to its Innocence List by "mischaracterizing reversible error as actual innocence"[67] and therefore presenting the 115 exonerations that have occurred as all being cases of people wrongfully convicted on the basis of actual innocence.

Regardless of the reason for exoneration, there are seven main contributing factors that play a role in the occurrence of the majority of exonerations. These factors are DNA, False Confession, False or Misleading Forensic Evidence, Inadequate Legal Defense, Mistaken Witness Identification, Official Misconduct, and Perjury or False Accusation. 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. The following list provides an explanation of each of the contributing factors along with their respective abbreviation:[6869]

Perjury or False Accusation (P/FA)

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.

Official Misconduct (OM)

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.

[67] Campbell, 2008.
[68] Glossary, 2015.
[69] The list of contributing factors is presented by frequency from highest to lowest.

Mistaken Witness Identification (MWID)

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 (ILD)

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 (F/MFE)

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.[70]

[70] This final situation can also be considered Official Misconduct.

False Confession (FC)

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.

Charts and Tables

From 1989 to 2015 there have been 1,663[71] exonerations. 115 of these 1,663 were death row exonerations. Figure 1.1 presents the breakdown in percentages of the amount of exonerations each contributing factor was involved. Figure 1.2 depicts the amount of death row exonerations that each contributing factor played a role in. Table 1.1 shows the exact number of cases that these percentages represent.

Table 1.1

	Death Row Exonerations: 115		**All Exonerations: 1,663**	
	# of Cases	**% of Cases**	**# of Cases**	**% of Cases**
Official Misconduct (OM)	86	75%	786	47%
Perjury or False Accusation (P/FA)	84	73%	931	56%
False or Misleading Forensic Evidence (F/MFE)	32	28%	378	23%
Inadequate Legal Defense (ILD)	30	26%	391	24%
DNA	25	22%	407	24%
Mistaken Witness Identification	25	22%	543	33%

[71] This only accounts for exonerations up to September 10, 2015.

(MWID)				
False Confession (FC)	21	18%	212	13%

Note: When added up, the number of cases and percent of cases that each factor plays a role in for both all exonerations and death row exonerations does not add up to one hundred because of the fact that cases are typically influenced by more than one contributing factor. **shorten this and specify that it is 115 and not 155 because we did not include cases prior to 1989 because of lack of information**

Death Row Exoneration Cases

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. *These show where the errors present themselves.*

Paul G. House[72]

As is shown in Figure 1, False or Misleading Forensic Evidence has contributed to 22.66%, or 378, of the 1,663 exonerations since 1989, and to 27.83%, or 32, of the 115 death row exonerations since 1989. The case of 23-year-old Paul G. House depicts a number of ways in which False or Misleading Forensic Evidence is known to lead to wrongful convictions and exonerations. In 1986 House was convicted of the murder of Carolyn Muncey in Luttrell, Tennessee, and sentenced to death. He spent the next 22 years of his life on Tennessee's death row.

Muncey was found dead near her home on the bank of a creek having been raped and beaten. House's mother happened to live nearby where the murder took place and House had just moved in with her a few months prior to the killing. Since House was an outsider and had an existing criminal record, local police immediately suspected that he was the murderer. House's trial took place in February of 1986. The state presented two witnesses who testified to having seen House wiping off his hands near the creek on the night of the murder. A forensic expert also

[72] Jackson, 2012.

testified that blood found on a pair of blue jeans that were confiscated from House matched Muncey's blood type, and that semen found in Muncey's underwear matched House's blood type. An FBI expert concluded that House's blood type antigens were the only ones that could have possibly been the source of the semen. House was convicted of first-degree murder and sentenced to death.

During House's first appeal, a number of witnesses brought new evidence to the table that suggested that Muncey's husband had killed. One woman claimed to have seen Mr. Muncey physically abusing his wife in public, two other woman said that they had heard Mr. Muncey confess to the murder, and another woman declared that Mr. Muncey had asked her to provide an alibi for him on the night of the crime. At the same time that these women came forward, it became clear that there was significant reason to doubt that the blood found on the jeans was even deposited at the time of the actual murder. A former Tennessee State Medical Examiner testified that the blood on the jeans showed enzyme decay, which was consistent with the blood taken from Muncey during her autopsy and transported in vials to the FBI lab. He also testified to the fact that when being transported, these vials were not properly preserved or refrigerated. Such decay would not have been found in blood that came in direct contact with House's blue jeans while Muncey was alive. It became known that the vials of blood collected at Muncey's autopsy had been driven to the lab by two officers and when they arrived they were noticed to not have been sealed, to have spoiled from over exposure to heat, and that a significant amount was missing from the vials. Soon it was proven that the blood in the vials had in fact spilled onto House's blue jeans long after they had been collected and placed into evidence. By the late 1990s, DNA testing had become increasingly advanced and using the new tests it was revealed that the semen on Muncey's underwear belonged not to House, but to her abusive husband.

In 2005, after multiple courts rejected House's appeals to overturn his conviction due to the immense amount of new evidence, his case was brought to the Supreme Court. On June 12, 2006, after The Innocence Project filed for a friend-of-the-court brief on House's behalf, the Supreme Court sent House's case back to Tennessee for a full review, ruling that any "reasonable juror" would not have convicted House in the first place if they had been aware of all of the evidence. U.S. District Court Judge Henry Mattice Jr. of Tennessee overturned House's conviction and ordered that the state of Tennessee either release House or retry him within the next 180 days. The state of Tennessee appealed Judge Mattice Jr's decision but they lost and, due to an anonymous donor[73], on July 2, 2008, House was released on bail. Almost a year later further DNA testing by the prosecutors discovered even more forensic evidence that proved House's innocence and on May 12, 2009, all of the charges that had been brought against him were dropped and after spending 22 years on death row, Paul G. House was exonerated.

Anthony Hinton[74]

A prime example of the effects of Mistaken Witness Identification, False or Misleading Forensic Evidence, and Inadequate Legal Defense can be seen through the case of 29-year-old Anthony Hinton. As a result of a false identification by a witness, along with factors of False or Misleading Forensic Evidence and Inadequate Legal Defense, Hinton spent nearly 30 years on death row. He was wrongfully convicted in 1986 and not released until 2015.

In Birmingham, Alabama, on February 23, 1985, 49-year-old John Davidson was robbed, shot, and left in the cooler of the restaurant where he worked as an assistant manager. Davidson was discovered still alive in the cooler later that evening. Having been shot twice in the head, he died two days later on February 25th shortly after receiving surgery. Five months later on July 2,

[73] Bail was set at $500,000, and then reduced to $100,000, and then the donor paid for the 10% bond.
[74] Possley: Anthony Hinton, 2015.

39-year-old Thomas Wayne Vason of Bessemer, Alabama, was found dead in the cooler of the restaurant that he managed. He too had suffered from two gun shot wounds to the head. On July 25, less than a month after Vason's murder, 55-year-old Sidney Smotherman, the night manager of a local steakhouse, had stopped at a grocery store after closing up the restaurant. On his way home he was hit from behind by another car. With a gun pointed at him, the driver of the other car made Smotherman to drive him back to the restaurant where he emptied the safe and proceeded to force him into the restaurant cooler. Due to the amount of media and publicity that the murders of Davidson and Vason had received, Smotherman knew that the man was going to shoot him and leave him in the cooler to die. Knowing that the cooler locked from the inside he attempted to shut the door before the gunman could kill him. He managed to shut the door but only after having two non-fatal shots fired at him. After the gunman had left the restaurant, Smotherman immediately called the police, who compared the two bullets fired at Smotherman to those from Davidson and Vason's murders and concluded that they had all come from the same gun.

After seeing a composite sketch of the suspect based on Smotherman's description, Reginald White, an employee of the steakhouse where Smotherman worked, went to the police claiming that he knew who the suspect was. White identified the sketch as Anthony Hinton, who he knew from his time working for another job in Hoover, Alabama. White told police that roughly two weeks prior to the attack on Smotherman, Hinton had approached him asking a series of questions about the steakhouse's manager and hours. On July 31, 1985, after Smotherman had selected Hinton from a photographic lineup, police searched Hinton's house and discovered an old .38-caliber revolver hidden under a mattress. Although they were unable to find any evidence at all that linked him to the robberies and murders, Hinton was arrested. He

was initially charged for the Smotherman robbery and after the Alabama Department of Forensic Sciences test-fired the gun and declared that all six bullets did in fact come from that gun he was also charged for the murders of Davidson and Vason.

There were several extenuating circumstances that contributed to Hinton's wrongful conviction. The first was that the prosecutor assigned to his case had a documented history of racial bias. The second was that Hinton had no history of violent crime. The third was that Hinton had taken a polygraph test and the results showed that Hinton presented no deception when he denied being involved with any of the crimes in any way, however the trial judge would not allow the polygraph results to be presented to the jury. The fourth was that his original lawyer was under the impression that he only had $1,000 available to him to use in hiring a ballistics expert. Since hiring such an expert required much more money than $1,000, Hinton's lawyer resulted to hiring a one-eyed civil engineer that had minimal training and admitted in court that he was visually impaired and therefore had difficulty operating a microscope when examining bullets. In December of 1986 Hinton was sentenced to death.

By 2002, the Equal Justice Initiative who had began working on Hinton's case in 1988, was able to secure three of the nation's top firearm examiners to testify in court. All three experts testified that they could not conclude that any of the six bullets had been fired from the revolver that was discovered in Hinton's home. Finally, in 2014, SCOTUS vacated Hinton's conviction and death sentence and ordered a new trial. They said that Hinton's original lawyer was constitutionally deficient and that the trial judge was also at fault for misinforming the defense of the available finances by telling them that they only had $1,000 when they correct statute allowed for "any expenses reasonably incurred" as long as the judge approved of them. It was

decided that Hinton's case should be retried. On April 2, 2015, Hinton's charges were dismissed and he was released.

Debra Milke[75]

The case of 25-year-old Debra Milke provides evidence of the types of effects of False Confession, Official Misconduct, and Perjury or False Accusation. Only after spending 23 years on death row, Milke was the second woman in the U.S. to have her murder conviction dismissed and to be released from prison.

In 1989, Milke and her 4-year old son, Christopher, moved into an apartment in Maricopa County, Arizona. A 42-year-old man by the name of James Styers was living in the same apartment building and befriended Milke. On December 2, 1989, Styers took Christopher to see Santa Clause at a shopping mall in Phoenix, Arizona. A few hours after Styers and Christopher had left the apartment, Milke received a phone call from Styers saying that Christopher had gotten lost in the mall and that he was working with mall security to find him. When Milke did not hear back from Styers after an hour, she called the police herself and they came and set up her apartment to trap and trace any phone calls that may have been received regarding ransom money. Meanwhile, at the mall, Styers and his friend Roger Scott who had met Styers at the mall when he and Christopher had first arrived, were being questioned about how Christopher had gone missing. When Christopher still had not been found by the next morning, Detective Armando Saldate Jr. was brought onto the case. Saldate was well known for his success in conducting interrogations that result in confessions. After a questioning session filled with intimidation and threats, Scott, who was a chronic alcoholic and suffered from brain damage that caused frontal lobe seizures due to a number of past head injuries, told Saldate that he knew the

[75] Possley: Debra Milke, 2015.

location of Christopher's body. The next day the boy's body was found with three gunshot wounds to the head.

Immediately following the discovery of the body, Saldate questioned Milke. Even though Saldate's supervisor had explicitly told him to secure the entire interrogation on tape, Saldate did not record it. A written report stating that Milke had confessed to arranging the murder of her son was released. Even though there was no forensic or physical evidence linking Milke to the murder, she was charged with conspiracy to commit first-degree murder, kidnapping, child abuse, and first-degree murder, and was convicted and sentenced to death in October 1990.

In 1993, the Arizona Supreme Court upheld Milke's conviction. Milke's legal team spent thousands of hours searching through court records looking for evidence of forced confessions by Saldate. The research revealed considerable evidence, including eight counts of misconduct.

In 2007, the ACLU of Arizona raised questions regarding the admissibility of the confession. Six years later, the US Court of Appeals threw out Milke's conviction, ruling that she did not receive a fair trial. It stated that her rights had been violated and that during the interrogation there were multiple instances of misconduct. Additionally, since the file containing this information had been withheld, the state of Arizona was found as having violated its obligation to turn over evidence to the defense. The Court of Appeals said the "egregious misconduct" was a "severe stain on the Arizona justice system."

Glenn Ford[76]

As is shown in Figure 1, Inadequate Legal Defense has contributed to 10.7%, or 391, of the 1,663 exonerations since 1989, and to 9.9%, or 30, of the 115 death row exonerations since 1989. Every day, court assigned attorneys are assigned numerous cases. They often cannot dedicate the

[76] Possley: Glenn Ford, 2015.

time or resources to ensure that each client receives the same attention they would be afforded if they were able to pay for their own attorney. The case of 34-year-old Glenn Ford provides strong examples of the ways in which Inadequate Legal Defense along with Official Misconduct, False or Misleading Forensic Evidence, and Perjury or False Accusation contribute to many exoneration cases. As a result of the effects of these factors, Ford was wrongfully convicted of the murder of 56-year-old Isadore Rozeman and subsequently spent 30 years in prison.

In November of 1983, Isadore Rozeman was found dead in his jewelry store as a result of a single gunshot wound to the back of the head. Glenn Ford was Rozeman's yardman and admitted he had been near the story at some point earlier in the day. Multiple witnesses at the trial identified him as being near the store. Although police were unable to find any crime evidence at Ford's house, residue from a gunshot wound was found on his left and dominant hand. Additionally, Marvella Brown told police that a group of men that included Ford were at her house the day of the crime. When they returned, she testified that Ford was carrying a brown paper bag and had a gun in his waistband. Brown said that her boyfriend, who had accompanied Ford, showed her a bag containing watches and rings. Ford was charged with capital murder and conspiracy to commit armed robbery in February 1984.

Due to his inability to pay, Ford was assigned two attorneys by the state. His lead attorney was an oil and gas lawyer who had never tried any type of case before a jury. His second attorney had only two years of experience doing insurance slip and fall cases. Due to this inexperience, the prosecution blocked all African Americans from being on the jury. This all-white jury was not representative of the area where the crime was committed, leading to a racist connotation being connected to the case. While Brown was testifying, she fell apart and said that

detectives had fabricated her responses and that she had lied in her earlier testifying. Even so, Ford was convicted and sentenced to death without a murder weapon linking him to the crime.

In a 2004 hearing, several defense experts testified and said that most of the evidence presented in the first trial was "speculation at best" and that the gunshot residue evidence was "meaningless". Ford's lawyers also testified that they were very inexperienced in criminal cases in general and had zero training in capital defense. Multiple police reports had never even been disclosed to the defense. However, the post-conviction motion was denied.

In 2013, an unidentified informant told prosecutors that a different man, Brown's boyfriend, Jake Robinson, admitted to shooting and killing Rozeman. In 2014, Ford's legal team filed a motion to vacate his conviction based on the fact that there was no credible evidence that supported that Ford was present at, nor a participant in, the robbery and murder of Rozeman. That same month, State District Judge overturned the conviction.

Gussie Vann[77]

The case of 42-year-old Gussie Vann provides a compelling example of the effects that False or Misleading Forensic Evidence can have. As a result of False or Misleading Forensic Evidence and factors of Inadequate Legal Defense, Vann was sentenced to death and spent 14 years on death row and 3 years in prison for the murder and rape of his 8-year-old daughter, Necia.

On July 30, 1992 Bernice Vann, Gussie's wife, called the police when she found her daughter with a rope around her neck and was not breathing. Necia was pronounced dead on arrival at the hospital where it was also found that she had been strangled and raped as a gold necklace fell out of her underpants upon examination. Both Gussie and Bernice were charged with capital murder, rape and incest upon arrest. While Gussie was awaiting trial, his 12-year-old

[77] Possley: Gussie Vann, 2015.

niece came forward and testified that he had raped her in 1991, which then led to him being charged with 2 counts of aggravated rape. Bernice was charged as an accomplice. Bernice, who had an IQ of 62, took a plea deal in which she testified against Gussie which led to him being sentenced to 50 years in prison. After this sentence, he then had to await the trial for the alleged murder of his daughter, which also took place in 1994.

Majority of the evidence that the prosecutor had against Gussie was circumstantial. There was a strip of a bed sheet that was tied to the knob on the dresser, which was claimed to have been tied by an adult and matched another torn sheet found in a different part of the house. Upon search of the house, they found some concerning things which including: pornographic videos and magazines, a rope tied in a noose, as well as a box of condoms. Upon arrival to the hospital, Necia's clothes did not have any blood, semen or saliva; however, there were semen stains on her bed sheets that were a match to Gussie's DNA.

At Gussie's sentencing hearing Ronald Toolise, a state medical examiner, proceeded to testify that Necia had a depression in her neck, which matched the noose that was found in Gussie's house. He also claimed that the girl had been sexually abused many times, the most recent occurring on the night of the girl's death. This included anal penetration, which would have not been likely considering the girl's hymen was intact. Gussie's brother then testified on his behalf saying that he was one of fourteen siblings and although his father abused him he remained the sole caretaker of them all. Also at the hearing, Gussie then testified that he had an IQ of 69 and had an unpleasant life growing up. He started working as a truck driver early in his life and was injured on the job when he became addicted to his pain medicine which caused him to be hospitalized and was followed by a mental breakdown. He also suffered from brain injuries since he was later beaten after his truck was robbed which caused him to suffer from re-

occurring seizures. Gussie denied the murder as well as the sexual abuse of his daughter. This was not enough as he was not only found guilty of capital murder and two counts of incest and he was sentenced to death in August of 1994.

After the Tennessee Supreme Court would not waiver on his conviction in September of 1998, he was appointed a lawyer who filed an amended post-conviction petition in May 2003 and his evidentiary hearing began in May 2007. At this hearing, Darinka Mileusnic-Polchan, another medical examiner, testified that Toolsie's theory of Necia being strangled was inadequate and that she had actually died an accidental death. She also stated that there had been no evidence of sexual abuse, and that Toolsie had mistaken his claims of anal penetration with the natural physical reaction of the anal relaxing post mortem. If this wasn't enough, another expert Dr. William McCormick also backed up Mileusnic-Polchan's claims. On top of re-examining the medical records, it was also found that the bed sheet was tied to the knob of the dresser to help pull open the drawer and it was possible that Necia fell into the sheet while standing on the edge of the drawer and this is what caused her death. After all of this was presented, Senior Judge Donald P. Harris set aside Gussie's conviction in June 2008 as he claimed he had inadequate legal defense. He went on to say the attorneys were "disastrous" and that they allowed their client to be convicted on the basis of "inaccurate, exaggerated, and a speculative medical testimony."

Gussie's case did not come to retrial as his attorneys "filed a motion to dismiss the indictment and to bar jury instructions for lesser included offenses of felony murder." The prosecution dismissed the charges on September 29, 2011 and Gussie was released in 2015.

Joe D'Ambrosio[78]

The effects of False or Misleading Forensic Evidence, Official Misconduct, and Perjury or False Accusation are presented in the case of 26-year-old Joe D'Ambrosio who was charged for the murder of 19-year-old Estel Anthony Klann. Due to the presence of these factors, D'Ambrosio wrongfully spent 17 years on death row and 6 years in prison.

On September 24, 1988 Klann was found having been stabbed in the chest 3 times and had his throat cut out. There were 3 men charged with the murder: Thomas Michael Keenan, Joe D'Ambrosio, and Edward Espinoza. Espinoza almost immediately pleaded guilty and testified against both D'Ambrosio and Keenan. He was sentenced to 15 – 75 years in prison while Keenan and D'Ambrosio were then charged separately. On February 6, 1989 D'Ambrosio was first to go on trial in front of a panel made up of 3 judges. At this trial Paul Lewis was one of the first to testify and said that he and Klann had visited a bar called the Saloon on September 23, 1998 where he saw Keenan who was a former employee of his. He then said that he and Keenan left together and went to a bar called Coconut Joe's where Klann, Espinoza, and D'Ambrosio showed up. He proceeded to testify that Espinoza got into an argument with Klann and then left alone sometime between 10:45 and 11:45 p.m. Counter to this, Espinoza testified that he left the bar around 1:30 a.m. with D'Ambrosio and went to his apartment when Keenan showed up asking for help to find Lewis since he had allegedly stole some drugs from him. Espinoza then said that D'Ambrosio grabbed a knife and he grabbed a baseball bat and they went to look for Lewis.

Carolyn Rosel, a neighbor of Lewis' then testified that the three men awakened her and James Russel at 3 a.m. She then went on to say that they were talking about killing Lewis since

[78] Possley: Joe D'Ambrosio, 2012.

he "ripped Keenan off" but neither Rosel nor Russel knew where Lewis was. Espinoza then continued his testimony saying that they continued their search for Lewis when they saw Klann walking on the road and Keenan wanted to interrogate him about Lewis so he forced him into the truck. When Klann claimed that he didn't know anything, Espinoza said he hit him in the head with the baseball bat, which in turn led to Klann providing Lewis' address. When they arrived at 3:30 a.m. residents said they heard Keenan and Espinoza banging on the door and yelling "I want my dope." One of the residents, Adam Flanik, testified that they were banging on his door and when he pointed them to Lewis' door they kicked it in and even though Lewis wasn't there, Flanik saw D'Ambrosio pointing a knife at Klann. Espinoza then claims that they left and returned to Rosel's house where they told her to tell Lewis that they had Klann and that he was "dead meat." Then he testifies that Keenan drove to Doan's Creek and took D'Ambrosio's knife, cut Klann's throat and pushed him into the creek. Klann then got up and began running, screamed, and then D'Ambrosio killed him. There was no weapon found linked to the crime, but prosecutors presented a knife that would have been similar to the murder weapon. Although there was no hard evidence to link the two to the murder, both Keenan and D'Ambrosio were sentenced to death on February 21, 1989.

After the trial, the Ohio Supreme Court found that the prosecutor in both Keenan and D'Ambrosio's case had committed official misconduct. Keenan's conviction and sentence were both overturned so he was re-tried but then again was sentenced to death. However, after D'Ambrosio lost his appeal and was denied a post conviction petition that he filed, his lawyer filed for a federal petition for a writ of habeas corpus in 2000, as there was some insight to some new information. Neil Kookoothe, a spiritual counselor to D'Ambrosio, found that Klann had

suspected Lewis of sexually assaulting a man named Christopher Longenecker and that he had told the police he suspected that Lewis killed Klann.

In light of this information and the petition, a district judge ordered for all of the documents related to this case in the hands of the Cleveland police to be turned over. With this came the finding of some information that the defense had never seen before, which led to an evidentiary hearing in July of 2004. Of the first to testify at the evidentiary hearing were 2 former Cleveland police detectives. They testified that body was dumped at the creek, but Klann was killed somewhere else since the grass and the weeds seemed to be undisturbed in the area where Klann was found. Longenecker also testified that he was roommates with Klann, and Lewis had raped him not long before Klann was killed. The manager of Coconut Joe's, Steven Gaines, also testified saying that he remembered Espinoza and Klann fighting; however it was on a Thursday night instead of a Friday night like Espinoza had claimed in his testimony. Gaines also claimed that he called the police after Espinoza threw a beer bottle. In addition to these new claims, other witnesses testified that Klann was the one selling drugs for Keenan and they had gotten into an argument because Keenan wanted to pay Klann with cocaine, but Klann wanted cash. The last big piece of new evidence was that several people also testified that on the night of September 23, 1988 D'Ambrosio was hosting a party at his apartment and ended up passing out on his bed, instead of being out at Coconut Joe's like Espinoza had testified.

Judge O'Malley granted the writ that D'Ambrosio's lawyer filed on March 24, 2006 due to the fact that the prosecutor did not turn over exculpatory evidence. D'Ambrosio's conviction was vacated and he was granted a new trial. The U.S. Court of Appeals for the 6th circuit confirmed this appeal on June 5, 2008 as the withheld evidence would have without a doubt made a difference had it been presented in the original trial. The court then went on to say that

this evidence not only discredited Espinoza's testimony, which was the prosecutions only witness, but it also gave a motive for Lewis to kill Klann.

After another attempt by the prosecution to keep D'Ambrosio in custody, he was finally released on April 27, 2009. O'Malley expunged his conviction and sentence from his record since the prosecution repeatedly withheld evidence. The prosecution then waited until July 2009 to inform the defense that they would not be looking for a re-trial, as it would not be fair since Espinoza had died upon release from prison, and they would not be able to cross-examine him with the new evidence. This whole case was finally brought to a close in 2010 when The Sixth Circuit Appeals Court confirmed the ruling that O'Mally had granted the defense the motion to bar a retrial as well as the U.S. Supreme court denied a petition for a write of certiorari in January of 2012.

Ricky Jackson, Wiley Bridgeman, and Kwame Ajamu (Ronnie Bridgeman)[79]

The cases of Ricky Jackson, Wiley Bridgeman, and Ronnie Bridgeman, provide strong evidence of the effects that Perjury or False Accusation and Official Misconduct can have on exoneration cases. Although each received individual trials, their cases are all intertwined.

On May 19, 1975, in Cleveland, Ohio, two men approached 59-year-old Harold Franks as he was leaving a local grocery store. In an attempt to rob Franks, the two men struck him in the head with a pipe, threw acid in his face, fired two shots into his chest and one into the store window, hitting and injuring store owner, Ann Robinson. Robinson survived, Franks died, and the two men got away with Franks' briefcase containing over four hundred dollars. Ricky Jackson, Ronnie Bridgeman, and Wiley Bridgeman were taken into custody on May 25, 1975, under the charges of aggravated robbery, aggravated murder, and aggravated attempted murder.

[79] Possley: Ricky Jackson, 2015.

The arrest was conducted based on the eyewitness testimony of 12-year-old Eddie Vernon who claimed that he had been riding on the bus home from school when he saw the two men attack Franks as he was getting out of his car and heading into the grocery store. He identified Jackson as the one who fired the shots and proceed to flee the scene in a green car driven by the Bridgeman brothers.

The trials[80] took place in August of 1975 in Cuyahoga County Court of Common Pleas. There was no forensic or physical evidence presented that connected any of them to the crime. The prosecution rested entirely on the eyewitness testimonies of Vernon and Robinson. Robinson's statement at trial was consistent with what she had reported on the day of the crime, which was that she was hit in the neck by a bullet that had entered her store through the front window. On the other hand, Vernon's statement at trial did not match up with his initial statement. Unlike what he said on the day of the crime, at trial Vernon said that he saw Franks get attacked as he was leaving the grocery store after he had gotten off of the school bus. However, a number of Vernon's classmates testified that they had been on the school bus at the time of the murder and that not only was Vernon on the bus with them, but also that the location where the attack took place was not visible from any point in the bus. The defense also presented the eyewitness testimony of a 16-year-old girl who stated that she had entered the grocery store immediately before the attack occurred and had observed the crime take place. She testified that neither Jackson nor either of the Bridgeman brothers had been present at the time that the two men approached Franks outside of the store. Although Jackson and both Bridgeman brothers admitted to having been present amongst a large crowd that had gathered at the grocery store after the attack, all three of them presented solid alibies to prove that they could not have been

[80] All three had their own separate trials.

there when the crime took place. By September of 1975 all three had been convicted and sentenced to death.[8182]

Thirty-six years later, in 2011, a reporter by the name of Kyle Swenson published an article for the Cleveland Scene magazine that presented a detailed analysis and overview of the case. Swenson exposed the fact that Robinson's husband had paid Vernon fifty dollars in order to convince him to testify. Following the article, Swenson attempted to reach out to Vernon for an interview but Vernon refused to speak to anybody about his role in the case, including his pastor, Arthur Singleton. It was not until 2013, when Singleton visited Vernon while he was hospitalized due to high blood pressure, that Vernon recanted his testimony. He told Singleton that he had lied to the police about witnessing the murder on the day of the crime in 1975, but had tried to drop the lie very early on. However, the police told him that he could not change his story, and since he was just a child he did not argue.

Upon learning of Vernon's recantation, the Ohio Innocence Project began re-investigating the case[83]. Attorneys Brian Howe and Mark Godsey discovered that when Vernon had originally tried to recant he was met with extreme levels of police intimidation pressuring him to follow through, and that police had been pursuing two other suspects, Paul Gardenshire and Ishmael Hixon, but immediately dropped the investigation of these men when Vernon identified Jackson and the Bridgeman brothers.[84] Upon further examination of Hixon and Gardenshire, they found that in 1976 Hixon had pled guilty to more than twelve counts of aggravated robbery. They also found that the license plate on the green car that Vernon claimed

[81] Wiley Bridgeman and Jackson were convicted in August of 1975 and Ronnie Bridgeman was convicted in September of 1975.
[82] All three sentences were later commuted to life in prison.
[83] They filed a petition for a new trial for Jackson and similar petitions were filed for Wiley Bridgeman and Ronnie Bridgeman later on.
[84] Ronnie Bridgeman had changed his name to Kwame Ajamu.

to have seen Jackson and the Bridgeman brothers drive away in matched the license plate of a car registered under Hixon's name that had been recorded in a police report as having been involved in another robbery and shooting a year before the attack on Franks.

In a hearing held in November of 2014 Vernon testified to the fact that on the day of the attack, Vernon had approached police officers regarding a rumor he had heard after getting off of the bus that claimed that Jackson and the Bridgeman brothers were guilty. When he tried to take back what he had told them, the officers threatened to arrest his parents since he was too young to go to prison himself. Ronnie Bridgeman, now known as Kwame Ajamu, had been released on parole in 2003, and on December 9, 2014 his conviction was vacated and the charges against him were dropped. On November 21st the convictions of Jackson and Wiley Bridgeman were vacated, all of the charges against them were dropped, and they were released. Ricky Jackson left prison having served the longest sentence of any exoneree in U.S. history: 39 years, three months, and nine days. [85]

Data Analysis[86]

Although there is documentation of all 155 exonerations, full case overviews exist for only 119 of these cases[87]. 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.[88] Information regarding the race of the victims in each case was

[85] Wiley Bridgeman was released on parole in 2002 but returned to prison soon after his release due to a run-in with Vernon, which was against the guidelines of his parole. Jackson was the only one to serve the full 39 years while the others spent time on parole.
[86] 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.
[87] The National Registry of Exonerations only accounts for the 115 that occurred after 1989.
[88] Ten of the remaining 37 cases occurred after 1989 however they were never fully analyzed and summarized.

extremely scarce as well.[89] Due to the lack of information prior to 1989 only cases that occurred after that year have been taken into consideration throughout this analysis.

When looking at the contributing factors for all exonerations between 1989 and 2015 there are 2 that seem to stand out: Perjury or False Accusation and Official Misconduct. Of these two, Perjury or False Accusation occurred in 55.82% of the cases and Official Misconduct occurred in 47.12% of the cases. When comparing this to the contributing factors for exonerations from death row between 1989 and 2015 there is a similar theme, as these are the two factors that occurred in majority of the cases. For the death row exonerations, Perjury or False Accusation occurred in 73.04% of the cases and Official Misconduct occurred in 74.78% of the cases.

When looking at the "tags" or other relevant details related to all exonerations between 1989 and 2015 the one that tends to stand out is that no crime was ever committed. Of the 1,668 cases, the no crime committed tag occurred in 28.54% of the exonerations. When comparing this to the exonerations from death row between 1989 and 2015 there is now some variation as this tag only occurred in 3.48% of the cases. There are however two tags that stand when looking at the death row exonerations and they are: the co-defendant confessed and that there was a jailhouse informant. Of the 115 cases, the co-defendant confessed in 25.22% of the cases and there was a jailhouse informant in 22.61% of the cases.

With 18 cases, Illinois is the state that has had the most exonerations. Of these 18 cases, 11 of them were in Cook County, which is the county that has had the most exonerations in the entire country. The average age of exonerees at the time the crime that they were convicted of was committed is 27.73 with the youngest person being 15 years old and the oldest person being

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

53. At the time of exoneration, the average age of exonerees is 43.63 with the youngest person being 19 and the oldest being 71. Many of the exonerees spent time on death row and also in prison. The average amount of time that exonerees spent on death row is 10 years, while the average amount of time exonerees spent incarcerated in general is 13.47 years. Of the 119 fully documented cases, 81 (68.07%) were dismissed, 33 (27.73%) were acquitted, and 5 (4.2%) were pardoned.

DNA is described by The Innocence Project as "a molecule that contains genetic information". It can be found in blood, saliva, sweat, semen, hair and skin. Because each person's genetic code is unique, DNA profiles are distinct. There have been several different tests that can help profile biological evidence. The current standard for DNA testing is the Short Tandem Repeat (STR) test. This test allows for small and degraded samples to be tested successfully.

There have been 330 post-conviction DNA exonerations in the United States. Exonerations have been won in 37 states. The first DNA exoneration occurred in 1989. Of the 330 exonerations, 263 of them have occurred since 2000. In 162 of the DNA exoneration cases, the true suspect and/or perpetrator have been identified.

However, these numbers can be misleading. DNA is not necessarily the solution to all wrongful convictions. Since the introduction of DNA testing, the average number of exonerations has steadily increased. DNA exonerations represent only 12% of the total cases.

Conclusion

- What happens to these people after they are released
    - Compensation- Robert Norris
- Campbell, 2008.
    - When dozens of innocent people are being sentenced to death, and dozens of guilty people are working [walking] free because the State has convicted the wrong person, we must ask ourselves what went wrong in that trial process.

- [t]here is one other thing we should keep in mind. If the wrong person is on death row for a murder, if somebody is convicted of a murder they did not commit, that means that the real murderer is still running loose. Maybe everybody can feel comfortable that we have locked up somebody for the murder, but if there is still a killer on the loose, everything has broken down. Not only is an innocent man on death row, but a guilty man is running free.
- Justice Souter cited the evidence of "repeated exonerations of convicts under death sentences" and argued that those concerns were of "cautionary" and "practical" relevance to the constitutionality of Kansas' procedure for determining a capital sentence.

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10

Methods of Executions

Introduction

Constitutional Foundation

The Supreme Court has almost consistently operated under the assumption that the death penalty is constitutional.[90] "From that assumption, it follows that there must be a constitutional means of carrying out a death sentence."[91] The responsibilities of implementing these means, as well as the task of refining them to be more scientifically-grounded and humane, fall to legislatures.[92] The role of the Court in this process is to assess the methods on the basis of their constitutionality. To this end, it is consistent with their disposition towards the death penalty that the Supreme Court "has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."[93]

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."[94] 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."[95] 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."[96] To constitute cruel and unusual, then, an execution method must create a "substantial" or "objectively intolerable" risk of serious harm.[97] The procedures creating this risk must be "sure or very likely" to cause imminent, needless dangers and suffering.[98]

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[90] Baze Alito 1
[91] Baze Alito 1
[92] Baze Roberts 12
[93] Baze Roberts 9
[94] In re Kemmler Fuller 136 U.S. 447
[95] Baze Roberts 2
[96] Baze Roberts 11
[97] Baze Roberts 2
[98] Helling 509 U.S. 25, 33, 34-35 (used in Baze Roberts 11)

These conditions create an immensely 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 infrequent, "isolated mishaps" in the Court's eyes that cannot prove the method systemically gives rise to substantial risks. 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.

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 a spy for Spain. 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." 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, this rarely occurs. After the prisoner is dropped from a platform with the noose around their neck, more often than not they will have to slowly 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 weight and the position of the noose. Hanging is still legal in Delaware and Washington, though lethal injection remains as an alternate method.

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 inmate's blood. After a doctor locates the prisoner's heart with a stethoscope, a white, circular cloth is pinned in front of the heart to act as a target. Shooters are armed with .30 caliber rifles and supplied with single round ammo. One of the shooters is given blanks, and all shooters fire from behind a cloth screen between them and the inmate. 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. "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" (6) http://cdn.ca9.uscourts.gov/datastore/opinions/2014/07/21/14-16310.pdf

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 prisoner will be strapped to the chair with belts that go across their chest, groin, legs and arms. 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 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."

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 while he was sleeping, but found this method ineffective because the gas leaked out of his cell. 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. The inmate will not lose consciousness immediately. 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." 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. 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." After the inmate's death from 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. 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 started immediately. Once the needles are in and the saline solution has begun, the warden will give a signal and the curtain obscuring the execution chamber from witnesses will be raised. 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 anesthetic overdose and cardiac and respiratory arrest while the inmate is unconscious. 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.

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. In a country that believes in an evolving standard of decency, governments will have to continue searching for more humane methods to carry out inhumane acts in an attempt to pacify the public. Lethal injection was never studied on human beings either scientifically or medically. (Continue with more evidence and history/medical prof. opinions) "What was needed was a new method of execution that could appear to be both humane and efficient, a symbol of scientific progress in the service of modern capital punishment. The solution to this problem was the invention of lethal injection in the 1980s." "But even with the obvious distinction of a scheduled and known time of execution, what may have made the idea of injection appealing is that the untried practice lacked all of the brutal and anachronistic associations that hanging, gassing, and electrocution had accumulated." (51) Zimring, Franklin E.. Contradictions of American Capital Punishment. Cary, NC, USA: Oxford

University Press, 2004. ProQuest ebrary. Web. 28 September 2015.

3-drug protocol: anesthetic + pancuronium bromide + KCl

1-drug protocol: anesthetic overdose

The most deceptive aspect of lethal injection is the use of pancuronium bromide. This paralytic stops the prisoner from being able to call out or signal to the executioner in the event that the anesthetic has worn off before they have died. The idea is that the prisoner will simply drift off to sleep and never wake up. However, how would anyone know if this has actually occurred when the prisoner is completely and totally paralyzed? One of the most frightening thing about researching botched lethal injections is that we should assume that because of the use of pancuronium bromide, we are not aware of many botched executions. In many cases a prisoner may have been fully awake and conscious during their execution, but were unable to notify anyone, and as such were subjected to the full pain of a slow cardiac and respiratory arrest. The pancuronium bromide has a cosmetic appeal that is hard for anyone in the prison system to ignore. Paralyzing a prisoner as they die, strapped to a gurney in front of witnesses, will incapacitate a prisoner so witnesses will not have to contend with death spasms or anything else potentially unsavory.

What are the Problems Associated with Specific Execution Methods?

Botched Executions

The risk of messing up 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 well, the electrical current will make the electrical current move more efficiently, killing the prisoner faster. Without the presence of a sponge (or with a misplaced sponge), the electricity will disperse across the prisoner's body, causing immense pain. 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.

Water, particularly salt water, is a good conductor of electricity. Having the brine-soaked sponge causes the electricity to move in a more efficient line, thus killing the prisoner faster

(comparable to a fast blow to the head with a large hammer). Without the sponge, the electricity would simply disperse over the body, meeting with a lot of resistance, causing the body to cook, and death would be much more agonizing, as seen during Del (Michael Jeter)'s execution (comparable to getting hit all over the body with a lot of small hammers).

[Shift to emphasis on Lethal Injections, because is big deal current controversy]

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. Typically regarded as the most humane of all execution methods, lethal injection executions are actually botched at a higher rate (7 percent) than any other method used since the late 19th century.

Often times, 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 overlook patients during surgery to ensure 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.

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.

Because problems in drug delivery systems and equipment malfunction can lead to the ineffective administration of anesthesia, the American Society of Anesthesiologists (ASA) emphasizes the importance of having medical personnel check the functioning of the anesthesia delivery system every time it is going to be used.157 The ASA stresses the importance of having a checklist protocol for the anesthesia machines and equipment, to assure that the desired doses of anesthetic drugs will be delivered.158 We do not know how many states check their

intravenous equipment before using it for executions, nor do we know the qualifications of the persons who do the checking. A warden in North Carolina admitted that, while his execution teams do have a checklist protocol, it is "not used or practiced. I don't know the last time [it] was actually used."159

The nature of the set up in execution chambers also increases the possibility of problems with the equipment. All the lethal injection drugs are administered from behind a screen or wall several yards away from the prisoner. The length of the intravenous tubing itself is thus problematic, because it requires multiple IV extension sets and connectors, increasing the risk of kinks and leaks.160

The ASA (in its Practice Advisory) underscores the importance of having an anesthesiologist near the patient to in order to verify that the intravenous access equipment, including its infusion pumps and connections, are properly functioning and to visually monitor the flow of the anesthesia into the veins.161 In lethal injection executions, however, such monitoring is not possible because of the distance of the execution team from the equipment. For example, because of the distance, the executioners cannot immediately determine if the anesthesia is leaking into the surrounding muscle tissue because of an improperly inserted or secured needle.162

Qualification of Execution Teams

- http://abcnews.go.com/TheLaw/interview-executioner/story?id=4015348

Most lethal injection protocols say little or nothing at all about the training, credentials, or experience required of persons who will be on the execution team, either the person who inserts the catheter or the persons responsible for injecting and monitoring the drugs. No state lethal injection protocol expressly requires the team to include an anesthesiologist or someone with training in anesthesiology.

Twelve state lethal injection protocols contain no reference at all to the qualifications of the executioners.140 Eight protocols refer generally to "training," "competency," "preparation," or "practice," but they do not elaborate further.141 For example, North Carolina's protocol states: "Appropriately trained personnel enter behind the curtain." But it does not explain what would constitute appropriate training.142 According to Texas's protocol, "a medically trained individual (not to be identified) shall insert an intravenous catheter into the condemned inmate's arms."143 The frequent problems Texas executioners have had with the insertion of catheters

certainly raises questions about the actual training of the individuals who insert the catheter. (See Chapter Six on "Botched Executions" for descriptions of such problems.) Texas's protocol does not refer to the qualifications of any other participants in the execution. California's protocol states: "The angiocath shall be inserted into a usable vein by a person qualified, trained, or otherwise authorized by law to initiate such a procedure."144 Again, like Texas, there is no reference to qualifications of other members of the execution team. Similarly, Florida's protocol does not refer to the qualifications of the execution team members. Florida does require the presence of a doctor and a physician's assistant in the room, but their role in the execution is not clear.145 What is known is that Florida pays its executioner, described only as a "private citizen," $150 for each execution. Florida recruits its executioners by advertising in local newspapers.146

Even though not expressly included in their protocols, a number of states have disclosed the qualifications of at least some of their execution personnel. In Pennsylvania, Colorado, and Georgia, for example, the corrections departments use trained Emergency Medical Technicians (EMTs) to insert the catheter.147 Ohio uses an EMT and a phlebotomist to start the IVs, and an EMT administers the medication.148 Tennessee uses two paramedics to insert the IVs.149 Oklahoma uses a phlebotomist to insert the IVs.150

Emergency Medical Technicians may be trained to insert catheters, but they are not ordinarily trained in the intravenous administration of anesthesia. Indeed, they may not even have a basic knowledge of the nature of the drugs they will administer. For example, Louisiana EMTs who administer the drugs during lethal injection executions have revealed they knew nothing about the drugs used in the procedure, including the anesthetic.151 The warden of Louisiana's State Penitentiary, who is responsible for ensuring that the EMTs involved in Louisiana's execution are qualified to perform lethal injection executions, recently stated that he has "no clue" as to whether the EMTs on his lethal injection execution team have been trained in intravenous administration of anesthesia.152 North Carolina's Secretary of the Department of Corrections has acknowledged that he is ultimately responsible for his state's lethal injection executions.153 Yet when asked about the medical qualifications of the execution team, he stated: "I don't know what—I would assume a nurse at least or someone else who is certified to insert a needle."154

The absence of appropriate medical training extends to something as basic as strapping the prisoner correctly. If the straps used to secure an inmate to the gurney are improperly secured, they can stop the delivery of the drug from the intravenous site in the prisoner's arm to the prisoner's brain.155 A member of Louisiana's execution strap-down team acknowledged he had never received any training from medical personnel about how to fasten the straps without restricting the prisoner's circulation.156 One of the botched executions in Chapter Six, below, exemplifies the problem of too-tight straps.

Refusal of Participation by Medical Professionals

i. http://muse.jhu.edu/journals/human_rights_quarterly/v024/24.2legraw.html

ii. http://www.nejm.org/doi/full/10.1056/NEJMe0800032

iii. http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1124498/

iv. It is technically illegal for medical professionals to participate in lethal injections but since the American Medical Association does not sanction or punish medical professionals that do take participate in executions, doctors continue to participate if they do not personally hold it morally reprehensible. (Expand)

Lethal Drugs Used

Need to talk about issues associated with pancuronium bromide, potassium chloride -- Paralysis, suffocation, burning up veins

The three-drug sequence used today in lethal injections was developed almost three decades ago and then, over the following two decades, was adopted by all but one of the death penalty states.117 Despite the passage of time, and medical advances, states have not changed this three-drug sequence. As the Tennessee Supreme Court acknowledged in 2005, while the "state of the art" of pharmacology has changed in the last thirty years, the chemical agents Tennessee uses to execute their prisoners have not.118 Chapman chose the specific drugs to be used in Oklahoma's prototype lethal injection protocol based on what was widely used in medical surgeries at the time. He explained to Human Rights Watch that "at the time, I could not have seen that chemical agents used to induce anesthesia would change so markedly. . . . Today,

I would have just not been so specific in my drug language in the protocols, so that corrections officials could use the best agents of their time."119

Over the years, states have tinkered with certain relatively insignificant aspects of their death penalty procedures, for example, addressing how an inmate is brought into the execution chamber,120 whether to pay their executioners in cash or by check,121 how to accommodate media access,122 what type of catheter to use,123 and what time of day the execution will take place.124 But they have left intact the three-drug protocol and the basic process of administration

Inability to Procure the Lethal Drugs

-http://www.deathpenaltyinfo.org/compounding-pharmacies

-http://www.deathpenaltyinfo.org/documents/HillStayOrder.pdf

Compounding pharmacies combine, mix, or alter drugs; traditionally compounding is used to meet the specific needs of an individual patient in response to a prescription. For example, a drug might be altered to remove an inactive ingredient for a patient with an allergy, or a medication that typically comes in pill form might be put into liquid form for a child who can't swallow pills. However, some compounding pharmacies are more like drug manufacturers, producing large quantities of drugs that are copies or near-copies of commercially-available drugs, rather than customizing drugs for specific prescriptions. The Food and Drug Administration does not approve the products of compounding pharmacies. Compounding pharmacies must be licensed by their state's pharmacy board, but do not have to register with the FDA or inform the FDA what drugs they are making.

Compounding pharmacies in the United States may be accredited by the Pharmacy Compounding Accreditation Board, but accreditation is not required.

Risk of Pain & How Often Lethal Injections Fail

Lethal injection has been advertised and supported as a humane form of execution because the inmate is anesthetized before the life ending drugs are injected. However, there have been multiple problems with the drugs used in lethal injections. One of the most popular drugs used in the three drug cocktail, thiopental, is no longer produced in the U.S. because of problems associated with it. One study conducted by the PLoS journal found California inmates

"continued to breathe for up to 9 minutes" after the thiopental injection. (PLoS) In many states, the minimum amount of thiopental injected was not enough to kill, and if thiopental failed to cause anesthesia, possibly cognitive inmates could die due to "pancuronium-induced asphyxiation" (PLos)

Its replacement in several states, midazolam, has similar problems. It is supposed to be a sedative which will make the inmate unconscious before the rest of the cocktail is administered. However, its usage as a sedative is in dispute after the execution of Clayton Lockett. Midazolam was an experimental drug during Lockett's execution. The phlebotomist had issues finding a vein, before inserting it in Lockett's groin and midazolam was administered. Ten minutes later, Lockett was proclaimed unconscious and the rest of the cocktail was given. Three minutes after injection, "Lockett began breathing heavily, writhing on the gurney, clenching his teeth and straining to lift his head off the pillow" (DPIC). Twenty minutes after Lockett first received the drugs, the execution was halted. Lockett died of heart attack in the execution chambers 43 minutes later. It is unclear what precisely caused his death, but what is clear is that midazolam did not fully sedate him before the life ending drugs were administered to his system.

Another replacement is pentobarbital, used as a single injection and also a part of the drug cocktail. [examples of botched execution?]However, the use of pentobarbital is problematic for another reason. Its manufacturing and sale in Europe has recently ceased. With supplies running low, prisons are [scrambling] for a new type of drug for executions. This leads to human experimentation, such as occurred with Lockett, because new drug combination are tested on inmates who have no control over the situation.
http://www.nytimes.com/2014/04/14/opinion/secret-drugs-agonizing-deaths.html?_r=0

The origins of lethal injection are problematic. Rooted in the idea animals are routinely euthanized painlessly, lethal injections for humans have been considered the most painless choice. However, euthanizing animals "is a routinely regulated and reviewed process. It's subject to constant revision by veterinary associations and animal care committees at labs and universities, conducted by trained technicians, and reevaluated by ongoing research" (World Science Fair). The drug cocktail created for lethal injections was created by an Oklahoma medical examiner, based upon "his own experience as a patient" (PLoS). This cocktail has only been marginally modified, and only because thiopental is no longer available in the U.S.

Additionally, there is no system set up to monitor the risk of pain in executions. Protocol

information “from Texas and Virginia showed that executioners had no anesthesia training, drugs were administered remotely with no monitoring for anesthesia” (The Lancet) Guards have no training, which implies errors. Of the 45 notable botched executions DPIC lists, 65% of lethal executions had problems with finding the inmates veins, and in 15% of cases, the inmate had to insert the needle into their vein themselves.

Because there is no medical training for executioners, the experience is more painful for inmates, mentally and physically. 30% of inmates had a violent reaction to lethal injection’s drug cocktail, and 43% of inmates emitted sounds of pain during their execution, regardless of execution method. Many executions last for over 30 minutes, some taking longer than two hours.

Executions that last for over half an hour inflict physical and mental harm on the patients. Executions are meant to be quick and painless, as modern as possible. But the experience of botched execution inmates demonstrates otherwise.

No consistent data is collected on executions, regardless of whether they are botched or not. Without data collection, execution methods cannot improve, nor can any accurate record be created. This leaves a gap in our knowledge on execution methods and their successes, and also prevents improvement.

LI vs. Past Methods

Lethal injection is considered the most modern execution method. It was created because it seems clean, medical and had no dangerous history. Each method of execution, however, has their own flaws and lethal injection is not necessarily an improvement.

Gas Chamber

- On DPIC’s notable botched execution list, 100% of asphyxiated prisoners had a violent reaction to the cyanide
- 100% made sounds of pain during the execution. (Weisberg, 1991)
- [The decrease in gas chamber usage is not because of it’s perceived cruelty, or issues as an execution method, but rather an image problem. Gas chambers have had an association with Nazis since World War II and the Holocaust, attributing to its rapid decline.] (pg 50, Zimring, Franklin E.. Contradictions of American Capital Punishment. Cary, NC, USA: Oxford University Press, 2004. ProQuest ebrary. Web. 28 September 2015.)

Method	Problem finding vein	Inmate had to find vein	Problem with cocktail	Needle pops out	Multiple Jolts	Burning flesh	Fire	Bleeding	Sounds of pain	"Human Error"	Equipment Failure
Lethal Injection	65%	16%	19%	41%	0%	0%	0%	?	47%	81%	3%
Electrocution	0%	0%	0%	0%	80%	50%	30%	20%	0%	50%	87%
Asphyxiation	0%	0%	0%	0%	0%	0%	0%	0%	100%	0%	0%

Electrocution

- Of DPIC's notable executions, 80% of electrocutions consisted of multiple jolts of electricity.
- Smoke rose in 50% of DPIC's cases
- 30% of inmates caught on fire during the execution itself.

Lethal Injection

The switch to lethal injection occurred because of the high demand for a more humane form of execution after Furman. Lethal injections seems medical and efficient. However, while 3% of all forms of execution are botched in some form, lethal injection has a higher botch rate than all other methods of executions at 7%. (*http://www.thedailybeast.com/articles/2014/04/30/lethal-injection-leads-to-the-most-botched-executions.html*)

Figure 9.1

Out of 45 notable botched executions listed on DPIC's website, these are the problems that frequently arose.

Figure 9.2

Out of 45 notable botched executions listen on DPIC's website, these are the problems that frequently arose. Gathered from 32 lethal injections, 10 electrocutions and 2 gas chamber asphyxiations.

The botched executions exhibit high levels of brutality and pain, and a plethora of ways in which they can go awry. Lethal injection, even though it appears more humane and professional, is no different.

http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0040156

Method	Problem finding vein	Inmate had to find vein	Problem with cocktail	Needle pops out	Multiple Jolts	Burning flesh	Fire	Bleeding	Sounds of pain	"Human Error"	Equipment Failure
Lethal Injection	21	5	6	3	0	0	0	?	15	26	1
Electrocution	0	0	0	0	8	5	3	2	0	0	7
Asphyxiation	0	0	0	0	0	0	0	0	2	1	0
Total	21	5	6	3	8	5	3	2	17	27	8

Constitutional Wrap Up

The issues we have identified with lethal injection invites review within the constitutional perspective. Can it be argued that lethal injections, as an execution method, violate the 8th Amendment? What avenues of 8th Amendment challenges have been pursued by death row inmates and defense attorneys? How has the Supreme Court responded to these challenges? To recall, the Supreme Court has prescribed conditions that a challenge must meet. First, petitioners must prove the execution method presents "substantial" or "objectively intolerable" risk of serious harm. Second, petitioners must proffer a significantly safer, readily implementable alternative method. Third, the possibility and occurrence of botches do not prove that a lethal injection procedure possess substantial risks. Keeping in mind these conditions, we explore some of the most significant arguments brought before the Court.

Intrinsic Risk of Pain? Pancuronium Bromide and Potassium Chloride

The combination of pancuronium and potassium chloride has been asserted, in no uncertain terms, to be capable of causing torturous deaths.[99] 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, anesthesia-overdose protocol common in veterinarian practice. They argue that the exclusion of pancuronium and KCl 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, and when demonstrably safer alternatives exist.

In response to intense exhortations against pancuronium and KCl, however, the Supreme Court asserts it is satisfied with the safeguards implemented to prevent inmates from being conscious during 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.[100] 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, then, the Court is not interested in challenges that proffer

[99] Declaration of Dr. Mark Heath 3
[100] Baze Roberts 2

"slightly or marginally safer alternatives."[101] Nitpicking over drugs in execution methods would, in the view 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 prerogative of states to use procedures of their choosing. Consequently, the Court upholds the constitutionality of the three-drug protocol and firmly 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 against lethal injection 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 extremely high dosage called for in executions. Support for the dosage, petitioners criticize, comes from experts who have extrapolated the effects from studies done at lower, therapeutic levels. Consequently, petitioners argued that there is no evidence that the dosage used in lethal injection conditions, in combination with pancuronium or KCL, will be effective. Additionally, petitioners have asserted that anesthetics can possess a "ceiling effect" at which higher doses do not increase anesthetic effectiveness. If this ceiling occurs below the dosage required by protocol and 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, it is 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 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

[101] Baze 3

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 analogous to those in executions. Of course, studies of this nature, emulating 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.[102] From these examples, the bar for petitioner challenges do appear disparate 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, 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 not been surmounted, and the Court affirms the utility of the anesthetic, and in extension, the constitutionality of the three-drug protocol.

Supreme Court Ideal versus Reality

- Supreme Court's putdown of constitutional challenges seem pretty comprehensive, but *Glossip* passed with only a 5-4 majority.
    - Mention Sotomayor's/Breyer's dissents
- Precedential powers of *Baze* largely limited because of the degree to which states have altered their protocols (Denno, D. W. (2013). Lethal injection chaos post-Baze. *Geo. LJ*, *102*, 1331.)
    - Many states switch to 1-drug protocols to avoid litigious baggage of 3-drug protocol
    - Adoption of new drugs because of shortages, as mentioned in section above

[102] Glossip Alito 20

- Argument: The "narrowness and ineffectiveness of the *Baze* opinion" has failed to settle the procedural and risks concerns integral to the lethal injection debate. On the contrary, the decision has led to a wave of challenges. Between April 2008 and May 2013, 333 cases have cited *Baze* in their decisions. These citations are applied to a variety of challenge angles such as protocol implementation, executioner qualifications, drug procurement, and drug choices. Furthermore, they consistently fall back on the assertion that the challenges failed to establish evidence of substantial risks. From this, it is clear that rather than creating a lasting directive and guidance for the implementation of lethal injection, *Baze* has instituted an ambiguous standard in the form of "substantial risks" that invites relentless attacks on minute procedural details. Consequently, the institution of capital punishment requires constant reassurances by the judicial system 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: a calculated attack taking advantage of states' demonstrated difficulties in procuring lethal drugs. The Supreme Court's reply also fits into this pattern, falling back on the old recourse of asserting the challenge does not meet "substantial risks" standards. Thus, the result of *Baze* appear to be the endless embroilment of courts in lethal injection debates.

- Judicial restraint paradox
  - SC doesn't want to be involved in implementation of methods:
    - Don't want to infringe on state prerogatives
    - Don't want to be embroiled in scientific arguments beyond their expertise
  - But constant challenges to lethal injection protocol asks SC to micromanage executions
    - In the past 56 executions, 29 cases (51%) had media attention concerning challenges the inmates/defense made against some aspect of lethal injection protocol
      - Compared with first 50 executions since 2000, 1/50 cases had media attention concerning lethal injection challenge

        - Arguments used: 8th Amendment risk of pain; pentobarbital use; midazolam use; secrecy of protocols/procurement; qualification of executioners
        - Delivery of death has gotten complicated. Has this been an issue with previous execution methods?
            - Hanging – weight-rope length tables
            - Firing squad
            - Lethal gas
- Medicalization paradox
    - Delivery of death given a medical veneer in the form of lethal injections (discussed above). Looks nice, clean, humane
        - Issue is lethal injection is complicated; ideally utilizes/requires medical professionals
            - Medical procedural aspects of lethal injection: IV access, delivery of drugs, and monitoring of consciousness
            - Yet medical professionals refuse to participate on principle. Lethal injection emulates a field that rejects it.
            - Consequence is that complicated procedures are handled inefficiently
                - Botching risks
                - Uncertainty in anesthesia
                - Inability to procure drugs
                - SC forced to put up with challenges that tear apart/nitpick minute details of execution protocols

11

Stays of Execution

For a capital defendant, the execution process begins with the issuance of a death warrant by a designated judicial or executive official, typically at the conclusion of his or her appeals process. At the state level, death warrants can be issued by one of three actors: (1) the trial court judge; (2) the state supreme court; or (3) the governor, depending on each state's protocol. Upon receiving the warrant, the state Department of Corrections is then authorized to carry out the sentence of death prior to the expiration of the warrant and its execution window, typically set at a period of 60 to 90 days after the issuance of the warrant. Despite starting the execution process and placing an inmate under threat of death, a death warrant does not guarantee that the execution of the sentence will occur, with warrants often launching a new wave of appeals and requests for clemency on behalf of capital defendants that result in stays of execution and expired warrants.

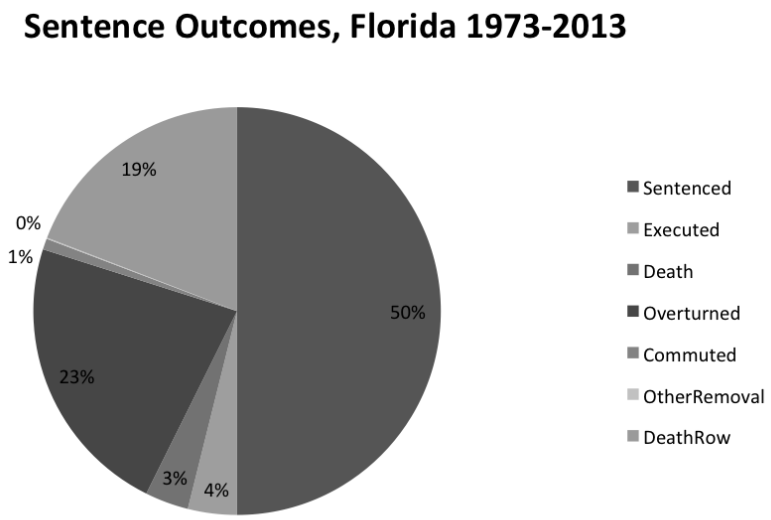
Stays of execution are court-ordered delays in carrying out an execution that can be granted at any time in the process, even mere hours or minutes before an inmate is scheduled to die. In state capital cases, multiple actors, including the Governor of the state, a state appeals or trial court, and federal courts, including the United States Supreme Court, can grant a stay of execution for a variety of reasons, though most often to allow a defendant more time for appeals. Each stay has a set window of time in which it is effective, with some expiring before the death warrant, and others preventing the issuance of a new warrant for several years. For many on death row, multiple death warrants and periods under threat of death are common, with stays granting them only temporary reprieve.

The process of issuing and carrying out a death warrant varies across states, with each having their own protocol for who can sign the warrant, the timeframe within which an execution must be carried out, and how stays of execution and expired warrants are addressed.

Florida

In the state of Florida, of the 1080 inmates sentenced to death between 1973 and 2013, a total of 89 inmates have been executed since the reinstatement of the death penalty in 1976.[103]

Figure 10.1 Sentence Outcomes, Florida Capital Cases, 1973-2013[104] (may not use these but could be useful for state profiles before going through the legal portion)



[Further summary of state of DP in Florida/intro to warrant process/stays]

[103] BJSTable17-2013.xlsx
[104] BJSTable17-2013.xlsx

Florida Protocol: Warrant[105][106] [This is direct pull from FL law, will be processed/formatted more]

(1) When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record of the conviction and sentence, and the sheriff shall send the record to the Governor and the clerk of the Florida Supreme Court.

(2)(a) The clerk of the Florida Supreme Court shall inform the Governor in writing certifying that a person convicted and sentenced to death, before or after the effective date of the act, has:

1. Completed such person's direct appeal and initial post-conviction proceeding in state court and habeas corpus proceeding and appeal therefrom in federal court; or

2. Allowed the time permitted for filing a habeas corpus petition in federal court to expire.

(b) Within 30 days after receiving the letter of certification from the clerk of the Florida Supreme Court, the Governor shall issue a warrant for execution if the executive clemency process has concluded, directing the warden to execute the sentence within 180 days, at a time designated in the warrant.

(c) If, in the Governor's sole discretion, the clerk of the Florida Supreme Court has not complied with the provisions of paragraph (a) with respect to any person sentenced to death, the Governor may sign a warrant of execution for such person where the executive clemency process has concluded.

(3) The sentence shall not be executed until the Governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing the warden to execute the sentence at a time designated in the warrant.

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[105] **History.**—s. 270, ch. 19554, 1939; CGL 1940 Supp. 8663(280); s. 136, ch. 70-339; s. 1, ch. 96-213; s. 1838, ch. 97-102; s. 6, ch. 2000-161; s. 12, ch. 2013-216.

[106] **Note.**—Former s. 922.09.

(4) If, for any reason, the sentence is not executed during the week designated, the warrant shall remain in full force and effect and the sentence shall be carried out as provided in s. 922.06.

Florida Protocol: Stay of Execution

1) The execution of a death sentence may be stayed only by the Governor or incident to an appeal.

(2)(a) If execution of the death sentence is stayed by the Governor, and the Governor subsequently lifts or dissolves the stay, the Governor shall immediately notify the Attorney General that the stay has been lifted or dissolved. Within 10 days after such notification, the Governor must set the new date for execution of the death sentence.

(b) If execution of the death sentence is stayed incident to an appeal, upon certification by the Attorney General that the stay has been lifted or dissolved, within 10 days after such certification, the Governor must set the new date for execution of the death sentence.

When the new date for execution of the death sentence is set by the Governor under this subsection, the Attorney General shall notify the inmate's counsel of record of the date and time of execution of the death sentence.

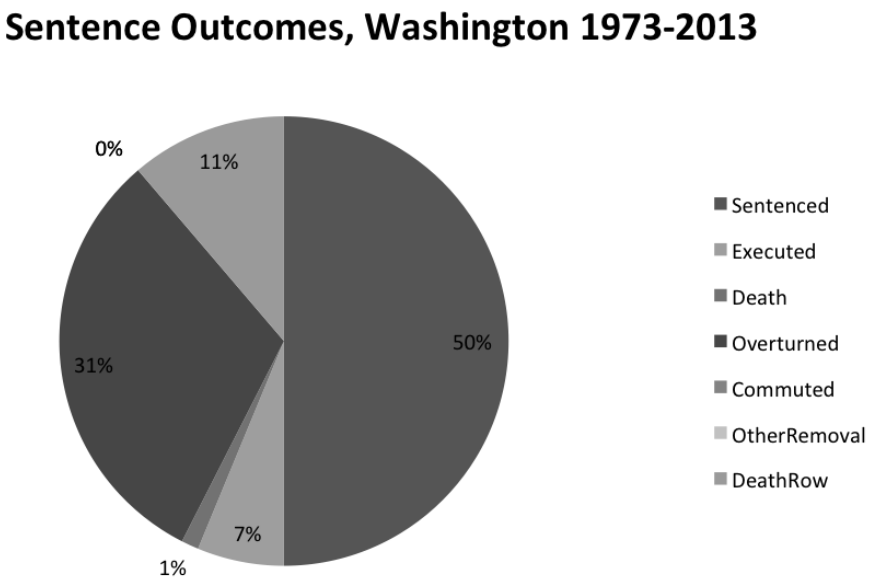
History.—s. 267, ch. 19554, 1939; CGL 1940 Supp. 8663(277); s. 133, ch. 70-339; s. 2, ch. 96-213.

[Florida has extensive info on execution process, post-execution protocol for warrants, and FL 922.105 covers unconstitutional method impact on warrants/process]

Washington

In the state of Washington, 40 individuals have been sentenced to death since 1973, yet only five have been executed and nine remain on death row.[107]

Figure 10.1 Sentence Outcomes, Washington Capital Cases, 1973-2013[108] (may not use these but could be useful for state profiles before going through the legal portion)



[Further summary of state of DP in Washington/intro to warrant process/stays]

Washington Protocol: Warrant

10.95.160: (1) If a death sentence is affirmed and the case remanded to the trial court as provided in RCW 10.95.140(2), a death warrant shall forthwith be issued by the clerk of the trial court, which shall be signed by a judge of the trial court and attested by the clerk thereof under the seal of the court. The warrant shall be directed to the superintendent of the state penitentiary and shall state the conviction of the person named therein and the judgment and sentence of the court, and shall appoint a day on which the judgment and sentence of the court shall be executed by the

[107] BJSTable17-2013.xlsx
[108] BJSTable17-2013.xlsx

superintendent, which day shall not be less than thirty nor more than ninety days from the date the trial court receives the remand from the supreme court of Washington.

Washington Protocol: Stay of Execution

10.95.160: (2) If the date set for execution under subsection (1) of this section is stayed by a court of competent jurisdiction for any reason, the new execution date is automatically set at thirty judicial days after the entry of an order of termination or vacation of the stay by such court unless the court invalidates the conviction, sentence, or remands for further judicial proceedings. The presence of the inmate under sentence of death shall not be required for the court to vacate or terminate the stay according to this section.

[Washington has laws/info on execution process, post-execution protocol for warrants]

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 (Baylor 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 (Baylor 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 (Baylor 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 10.1 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 (Baylor 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 (Baylor 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 (Baylor 1993).

Table 10.1 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 10.1- 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

Information on stays granted for Lethal injection purposes (DPIC) Baze v Rees

As we can see in table 10.1 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.

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 punishment?

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. Glossip was sentenced to death for orchestrating the murder of his boss, Barry Van Treese (Berman). While Glossip did not personally kill Van Tresse, he was convicted for paying a co-worker, Justin Sneed, to perform the task. He did so by bludgeoning Van Trees to death with a baseball bat (Berman). It was the testimony of Sneed that lead to the conviction of Glossip who was sentenced to death in 1998. In exchange for his testimony, Sneed was sentenced to life in prison without parole (Berman). Glossip's original death sentence was, however overturned when a state court deemed his legal council in his original trial to be ineffective. Glossip was re-sentenced to death in 2004 (Berman).

To this day, Glossip has received four separate stays of execution (Conor). As is the case with a great deal of death row inmates in this day and age, much of the controversy surrounding Glossip's numerous stays of execution has 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). This first delay of execution due to issues surrounding the Oklahoma lethal injection protocol foreshadowed the significant legal struggle that first brought 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 sparked a great deal of controversy surrounding the nature of capital punishment and the process of lethal injection in regards to its potential violation of the 8th amendment protecting against cruel and unusual punishment (Ford). 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). The decision of the court did not favor the plaintiffs, however. 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 setting a new Execution date of September 16th, 2015 for Glossip (Berman).

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). 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). 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). Following this latest attempt at reprieve, Glossip was scheduled, yet again, to be executed on September 30th, 2015 (Lucero).

Once again, however, Glossip's execution was stayed in the eleventh hour by Oklahoma governor Mary Fallin (Berman). 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). Fallin claimed that her decision to stay the execution for over a month was a made in attemts to ensure that the drugs used in the execution complied with Oklahoma Execution protocol (Berman). According to Fallin's order, the drug menat to be used for stopping Glossips heart was potassium acetate, but the drug allowed for by the Oklahoma execution protocol is potassium chloride (Berman). 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). 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 when attempting to gain his first two stays were in relation to the drugs used in the Lethal injection protocol as proscribed by the State of Florida.

Manuel Valle was sentenced to die in 1978 for the murder of Officer Louis Pena, shot dead after pulling Valle over for running a red light in Coral Gables, Florida (Clark Prosecutor)[109]. Valle sat on Florida's death row for over three decades, one of the longest-serving death row inmates in Florida prior to his execution in September of 2011 (Clark Prosecutor). [110]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)[111]. While Valle was originally sentenced to die in 1981, a retrial ordered by the Florida Supreme Court that same year followed by another vacated death sentence by order of the U.S. Supreme court in 1986 lead to considerable delay in eventually setting an execution date (Clark Prosecutor)[112] 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

[109] Retrieved from Tampa Bay Online, September 28th 2011
[110] Retrieved from Miami Herald, Patricia Mazzei, 9/28/2011
[111] Retrieved from Miami Herald, Patricia Mazzei, 9/28/2011
[112] Retrieved from Tampa Bay Online, September 28th 2011

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 filed by Valle's legal council on his behalf (Pilkington 2011). Valle's Lawyers, in this alst 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. 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. 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. 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.

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.

12

How Many Inmates Just Give Up?

When an individual receives the death sentence the next immediate step is the appeals process; a both drawn out and lengthy process exacerbated by both a lawyer's unwillingness to allow their client to be sentenced to death and the modern safeguards instituted by the Supreme Court's decision in Gregg v. Georgia. There are inmates, however, who, after being sentenced to death, decide to waive all chances of appeal and allow the death sentence to be carried through.

Figure 11.1- Elapsed Time for Executed Inmates by Year of Execution

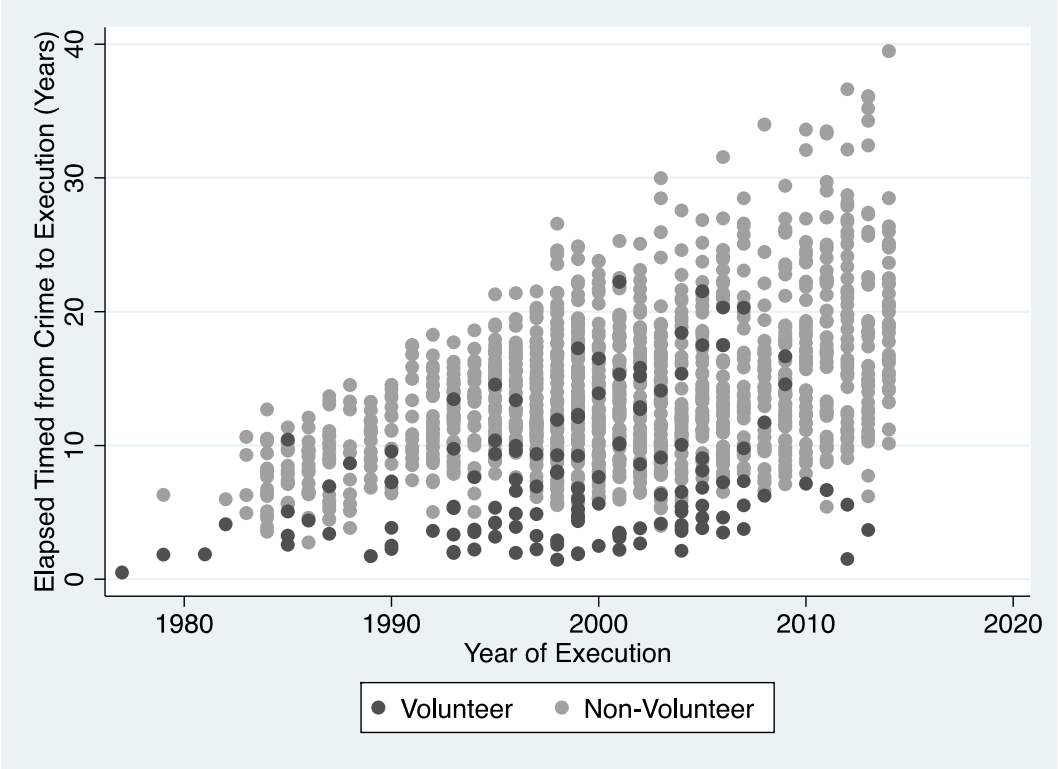


Figure 11.2-Average Elapsed Time for Executed Inmates by Year of Execution

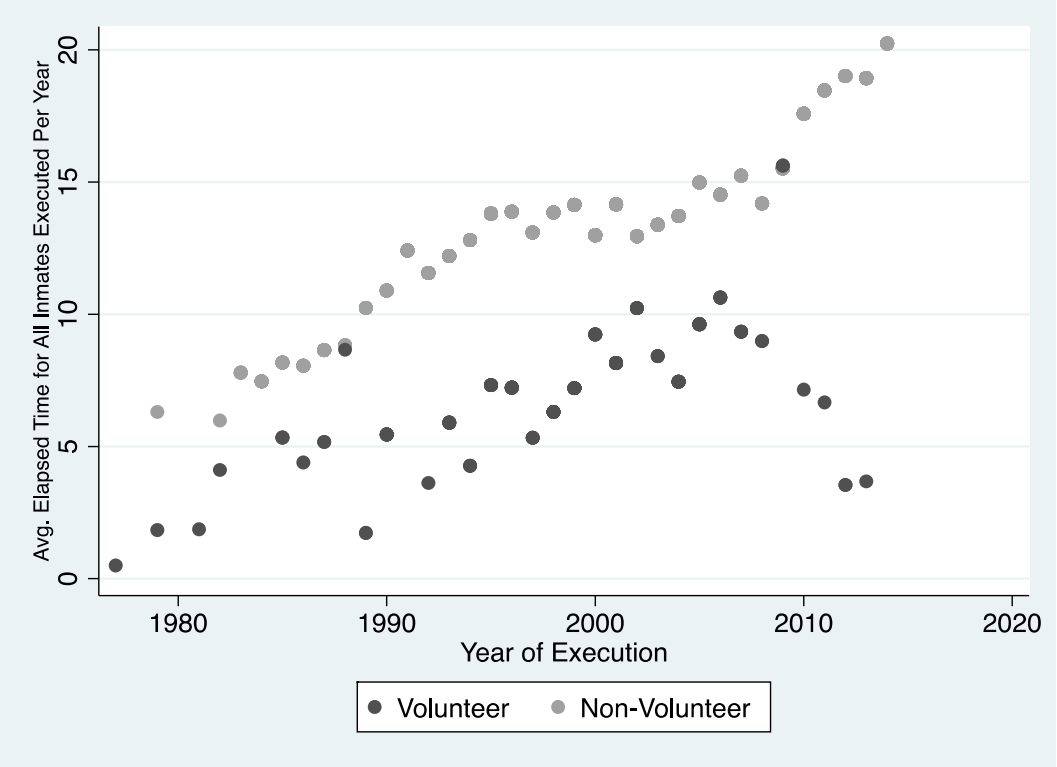
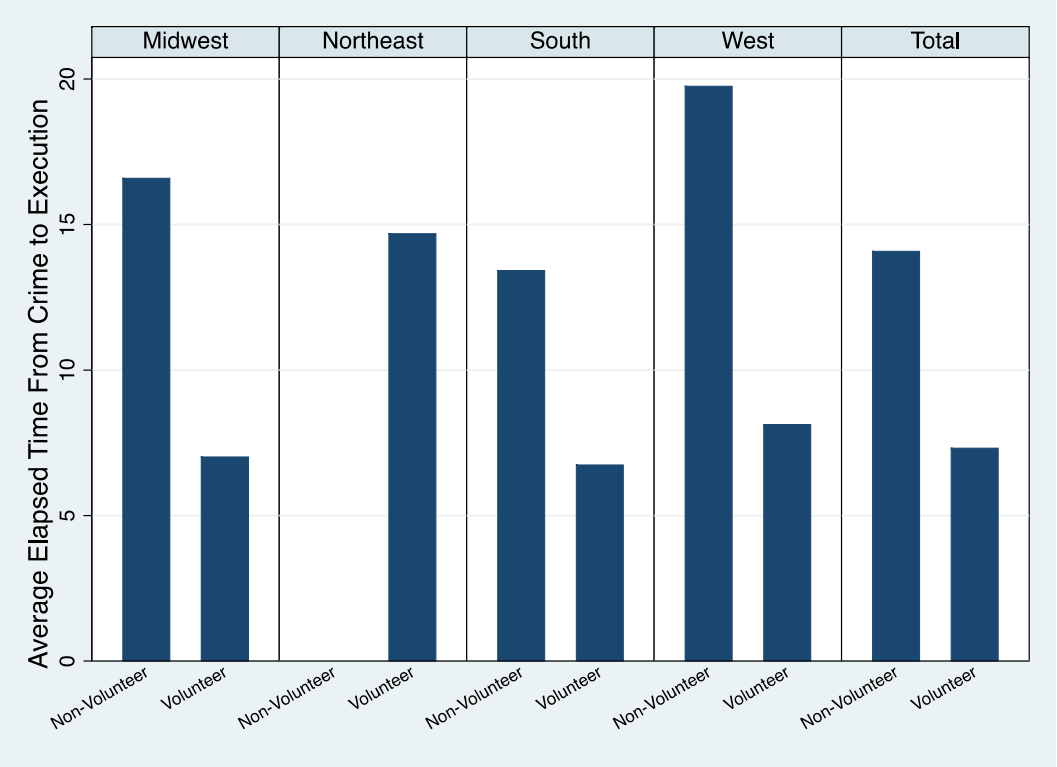


Figure 11.3- Average Elapsed Time by Volunteer Status and Region



Method:

The themes in this chapter were developed from news coverage of a volunteer's case. Themes were developed by incorporating personal statements from the inmate on death row, press releases from county prosecutors and defense attorneys, and testimony from family, friends, and personal acquaintances of the accused inmate.

Volunteers with the Shortest Wait Period

"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[113], furthered his infamy by waiving all legal appeal rights and volunteering to be placed to death by the state.

Up until this point, Gilmore had an army of legal lawyers willing to help with his appeals process; however, Gilmore wanted to die 'like a man' and be sentenced to death by Utah's firing squad, which at the time was composed of five riflemen "armed with .30-.30 deer rifles, four loaded with steel-jacketed shells, the fifth with a blank"[114].

The personal circumstances that surrounded Gilmore's case were often overshadowed by the media's circus. Most of this circus spawned from the puzzlement over why Gilmore decided to waive all rights of appeal. During his trial, Gilmore was deemed to be "intelligent" by a

[113] Time Magazine. "The Law: A Sudden Rush for Blood." (Nov. 22, 1976)
[114] Time Magazine. "The Law: After Gilmore, Who's Next to Die?" (Jan. 31, 1977)

certified Utah prison psychiatrist[115]. His rationale for waiving all appeal rights was irrational and difficult to fully grasp and understand.

At the time, Gilmore's decision to waive all appeal rights was highly controversial; however, examining Gilmore's personal history helps to develop a better understanding as to why he acted in a certain manner. As a young man, Gilmore was admitted twice to a psychiatric ward within Oregon due to emotional disturbances[116]. In addition, most of Gilmore's life had been spent institutionalized as he periodically entered and left jail for various crimes.

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, who described life in prison as a "cruel and unusual punishment"[117]. In fact, Gilmore attempted suicide and failed while his legal case was underway[118].

For Gary Gilmore, his death sentence appeared to be a way to escape his habitual pattern of being institutionalized. 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 decided to let the death sentence be administered. Fear of being imprisoned for the rest of his life may have been a factor in Gilmore's decision to waive all rights of appeal.

For volunteers, it is difficult to determine why anyone would give up the legal fight to overturn a death sentence; however, for most volunteers, there is an underlying thematic story that helps to reveal why the decision was made to waive all rights of appeal. Using the ten volunteers with the shortest wait period between date of crime and date of execution, a list of general themes was developed to help better understand why these individuals volunteered to be sentenced to death.

Table 11.1. Common Themes for Volunteers with Shortest Wait Period

Theme	Inmates
Fear or disdain for being imprisoned for rest of life	*Steven Judy, Gary Gilmore, Eric Robert, Aaron Foust*
Regret for actions, including regrets supported by religious motivations	*Gary Gilmore, Steven Renfro, Sean Flannagan, Eric Payne, James Clark Jr.*
Legal uncertainty, unwillingness to participate in the appeals process	*Jesse Bishop, Aaron Foust, Eric Payne*
Non-Discernible Reason and/or Arbitrary	*Aaron Foust, Andrew Chabrol, James Clark Jr.*

Note:

Longest Wait Time for Volunteers

Robert Lee Massie waived all of his rights to appeals as he was hoping for a "swift execution." Massie had a long history with the prison system as he was first sentenced to death

[115] See note supra 2
[116] See note supra 2
[117] See note supra 1
[118] See note supra 1

in 1965 for 3 separate robberies, turned murders, on January 7, 1965. He attempted to waive his appeals for this sentence as well, but he was diagnosed with a disorder "tantamount to an acute schizophrenic reaction" by a prison psychiatrist so he lost his right to waive the appeals. His sentence was then commuted to life in prison as the court case of Furman v. Georgia stated that the death penalty was unconstitutional in 1972.

After 13 years in prison, Massie was paroled in 1978 when he then engaged in more illegal activity. On January 3, 1979 Massie robbed a liquor store which then resulted in the murder of Boris G. Naumoff who was the owner of the store. Massie yet again pleaded guilty to the crime and was sentenced to death on May 25, 1979. This sentence was quickly reversed by the "Rose Byrd" California Supreme Court as his lawyer stated he did not consent to this guilty plea. Massie claimed that if he were to be retried it would be a case of double jeopardy and therefore was illegal, but this did not make much of a difference. Massie was tried in front of a jury in 1989 where he was once again found guilty and was sentenced to death. 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.

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. The judge for this case however, claimed that Massie was competent enough to waive the right to his appeals and that is exactly what he did. Massie claimed that "[he did] not consider forgoing the raptures of another decade behind bars to be an irrational decision" and that the conditions on death row "were harsh and cruel." He also was hopeful that his death would result in a challenge to California's death penalty system. He went on to say that he saw "dishonesty and incompetence leading to unnecessary death all around [him], every day" and so something needed to change. Massie was executed by lethal injection on January 27, 2001 with his last words being "Forgiveness, Giving up all hope for a better past." For volunteers, it is difficult to determine why anyone would give up the legal fight to overturn a death sentence; however, for most volunteers, there is an underlying thematic story that helps to reveal why the decision was made to waive all rights of appeal. Using the twenty volunteers with both the shortest and longest wait periods between date of crime and date of execution, a list of general themes was developed to help better understand why these individuals volunteered to be sentenced to death.

Table 11.2. Common Themes for Volunteers with Longest Wait Period

Theme	Inmates
Fear of Returning to Prison and/or Being Imprisoned for Rest of Life	*Daryl Mack, Kevin Conner, Robert Lee Massie, Edward Lee Harper*
Repentance for Actions, including Religious Reasons	*Peter Miniel, Michael Ross, Jack Trawick, Robert Charles Comer*
Need for Efficiency and/or Quick Judicial Processing (Fear of uncertainty/ legal wrangling with regards to appeals) Let's get it over with, appeals will fail and/or futile	*Kevin Conner, David Dawson*
Discernible Mental Instability	*Pernell Ford, Jack Trawick.*

Note:

Fear or Disdain for Being Imprisoned for Rest of Life

For several of the inmates with the shortest wait period, the theme of being imprisoned for rest of their lives and their fear or disdain associated with it popped up regularly.

- Steven Judy he declared multiple times throughout his trial that he preferred to die than stay in prison for the rest of his life[119].
- Gary Gilmore shared a similar sentiment; he described life in prison as a form of 'cruel and unusual punishment' and preferred death to sitting in a prison cell[120].
- Eric Robert was sentenced to death after attempting to escape from prison and murdering a prison guard. Robert was already serving an 80-year sentence when he attempted to escape from prison[121]. When given the chance to waive all rights of appeal, Robert stated to the judge that if he were not sentenced to death there would be no guarantee he would not kill again[122].
- Aaron Foust espoused his sentiments against being imprisoned by stating that "[he did not] want to spend the rest of [his] life without a woman" and that "[he did not] want to spend the rest of [his] life being told what to do, not having any freedom"[123].
- 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 LSD possession"[124]. Payne's attorney, [NAME], who described Payne's upbringing as a continual experience of "extreme violence and institutionalization", stated that Payne never received the necessary counseling while in jail and was under destress after being institutionalized for a long period[125].
- Daryl Mack stated that "he'd rather be executed than spend the rest of his life locked up on death row."
- Kevin Conner claimed that "killing a person is far more honest and human than imposed repression under the guise of justice in the penal system." His final words were "everybody has to die sometime, so...let's get on with the killing."
- Robert Lee Massie stated in a phone interview that he was tired and that "[he] just [didn't] want to live the rest of his life in prison."
- Edward Lee Harper shared the disdain of all of the following above him and claimed that "he preferred death to the slow torture of life in prison"

Normative

- Steven Judy's decision may have been promoted by the fact that he was habitually institutionalized for most of his life, beginning at the age of 13 when he was 'committed

[119] Based on New York Times analysis of Steven Judy's trial: The New York Times. "Nevada Executes Man in Homosexual Killings." (June 24, 1989).
[120] See note supra 1
[121] Kolpack, Dave and Kristi Eaton. "Eric Robert Execution: South Dakota Executes Inmate Who Killed Prison Guard." Washington Post, The. (December 16, 2012).
[122] See note supra 9
[123] Graczyk, Michael. " Remorseless Killer Executed". Amarillo Globe News. (April 29, 1999).
[124] Associated Press. "2 Put to Death for Slayings in Texas, Virginia." Los Angeles Times, The. (April 29, 1999).
[125] Associated Press. "VA. Man Executed for 1997 Slayings." Washington Post, The. (April 29, 1999).

to Central State Hospital at age 13 after he raped a woman then stabbed her with a knife and struck her with a hatchet'[126].

Regret for Actions, including Religious Reasons

For several of the inmates, regret was a motivating reason for why they decided to waive all rights of appeal. This regret includes religious motivations, such as conversion to Christianity or newly founded spiritual beliefs.

- According to Gary Gilmore's assigned Chaplin on death-row, "[Gilmore's] desire to be executed [was] sincere and sane" and that his decision to die reflected an opportunity for Gilmore to repent for his reckless actions, which resulted in the needless deaths of two innocents"[127].
- Steven Renfro's final words were "Take my hand, Lord Jesus … I'm coming home"[128]. According to the Harrison County prosecutor, Rick Berry, who prosecuted Renfro, the death sentence served as a way for Renfro to be admitted to heaven[129]
- Sean Flannagan, who struggled with his sexuality, murdered his victims due to his inability to cope with same-sex attractions and by "the thought that [he could do] some good for ... society" by killing homosexuals[130]. While on death row, Flannagan stated that "After giving my life to Jesus, [he] couldn't hurt anybody again"[131]. His willingness to choose death was supported by a personal statement where he described his "execution [as being] proper and just"[132].
- After Payne's execution, his attorney, Carolyn Grady released a statement quoting Payne with the following: "He wished to say that he [was] deeply sorry for the tremendous pain that he caused each and every one of [the victims] and that he's at peace"[133]
- Peter Miniel's decision to be executed came largely from the idea of letting go of his past and he wanted his future "to be more peaceful in a better place." He also claimed that "[he] learned from all of [his] mistakes in the past" and that he was "sorry for what [he's] done." Miniel's last words were "into your hands, O Lord, I commence my spirit. Amen. I'm ready."
- Robert Charles Comer had to undergo a fight to prove to the court that he was competent to waive all of his appeals. He claimed that "[he was] competent to make that decision, saying he owes it to his victims, society, and himself."

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[126] Sheppard, Nathaniel. "Indiana Murderer Executed At Prison." New York Times, The. (March 9, 1981).
[127] People's Magazine. "Firing Squad or Drug Overdose: Gary Gilmore Claims His Right to Die." (*November 29, 1976*)
[128] Katz, Jesse. "Texas Takes Another Life, Minus Crowds, Crusaders and Cameras." (February 12, 1998). Los Angeles Times.
[129] Associated Press. "Man Who Killed Three Put To Death In Texas." (February 10, 1998). The Spokesman Review.
[130] Ryan, CY. "Nevada governor denies 11th hour plea to halt execution." (June 22, 1989) United Press International.
[131] Associated Press. "Nevada Executes Man in Homosexual Killings." (June 24, 1989). The New York Times.
[132] See note supra 19
[133] See note supra 13

- Jack Trawick, upon other reasons, decided to volunteer to be executed as he had some remorse on top of a long history of mental illness. In Trawick's last words 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."
- Michael Ross, who claimed that he himself was personally opposed to the death penalty, decided to waive all of his rights to appeals as "he wanted to spare the families of his victims and himself, from that torment."

Legal uncertainty, unwillingness to participate in the appeals process

For all of the inmates sampled, each expressed an unwillingness to participate in the appeals process. By waiving all rights of appeal, the consciously chose to abstain from any part of procedures for appeals. For most inmates, this unwillingness to participate was not directly related to the legal process but was motivated through personal circumstances.

- Jesse Bishop, unwillingness to participate in the appeals process was summarized in the personal statement: "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"[134].
- Eric Payne's attorney [NAME] quoted Payne as not wanting "to stay on death row any longer than necessary"[135]
- David Dawson's attorney said that "he's given me the impression that he's tired...he's tired of this type of life, and he's ready to go home." Dawson was also quoted saying that "he had considered his situation carefully and was ready to die."
- On top of his concern of being imprisoned for the remained of his life, Kevin Conner was also looking to expedite the process. Conner's final words were "Everybody has to die sometime, so...let's get on with the killing."

Non-Discernible Reason and/or Arbitrary

A substantial portion of the inmates sampled had no clear and discernible reason as for why they decided to waive all rights of appeal.

- Aaron Foust's final words were "Adios, amigos … I'll see ya'll on the other side. That's it. I'm ready, ready when ya'll are"[136].
- According to Andrew Chabrol's attorney, Bill Brown, Chabrol had already made up his mind of waiving all appeal rights; "He's made up his mind, and it's been made up for a long time"[137]
- James Clark Jr. final words were: "Hey, Jerry, hey listen, my soul is free, man. I'm in no more pain, you know. Thanks for everything, all right?"[138]
    - James Clark was imprisoned for abusing a three year old child, when he was 16, and was subsequently sentenced to 30 years in prison, but only served 21 years[139]

[134]Cannon, Carl. "Birth of Gas Chamber and Death of an Inmate." Real Clear History. (February 8, 2013).
[135]See note supra 13
[136]See note supra 11
[137]Associated Press. "Va. Executed Former Naval Officer." Washington Post, The. (June 18, 1993).
[138] Associated Press. "Delaware Executed Man Who Killed His Parents." New York Times, The. (April 20, 1996).
[139]See note supra 26

Discernible Mental Instability

- Pernell Ford, on top of some remorse at some points, seemed to have waived all of his rights to appeals as he suffered from some type of mental instability. This was seen in many instances throughout his trial including at one point where he wore a bed sheet and asked that the bodies of his victims be brought into the room so that God could resurrect them. On top of this he also claimed that he was able to escape death row through "translation" where he claimed that he had already visited heaven and other places throughout the world while imprisoned. Ford was an interesting case as he would periodically "give up his appeals but then would resume them when his mental health stabilized."
- Jack Trawick not only decided to volunteer to be executed due to repentance, but he also had some mental illness as well. According to his attorney, his execution "ended a life that was plagued by mental illness." Although it wasn't enough to stop him from being executed he exhibited this behavior on certain occasions like when he told the Circuit Judge that "if he did not sentence him to death but to time in the prison system, he would kill a prison system employee."

****Transition to Mental Illness Chapter**

Possible Section on Female Volunteers

- Aileen Wournos
- Lynda Lyon Block
- Christina Riggs

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13

Mental Health

In 2002, a case took place questioning the constitutionality of executing someone with mental health concerns. Daryl 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 retarded was cruel and unusual and was therefore a violation of the 8th amendment. This case has since changed the rule for all mental health issues in the context of the death penalty.

In 2006, the American Bar Association redefined the criteria for being executed when you have a mental illness on the basis of Atkins v. Virginia. It established three new policies and procedures to carry out as follows:

> 1. Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.
>
> 2. Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.
>
> 3. Mental Disorder or Disability after Sentencing
> (a) Grounds for Precluding Execution. A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case.

I think it is really important to include the exact statement of how competency is defined and determined, but this is really long. Do you think we should keep the whole thing or put it in an appendix?

Atkins v. VA was not the only 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. In 1994, Bernard v. Collins also brought up a similar issue where the court ruled that mental illness could be different than awareness and competency. Bernard was diagnosed with a mental illness with psychotic elements and suffered from many hallucination 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. 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 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 them 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

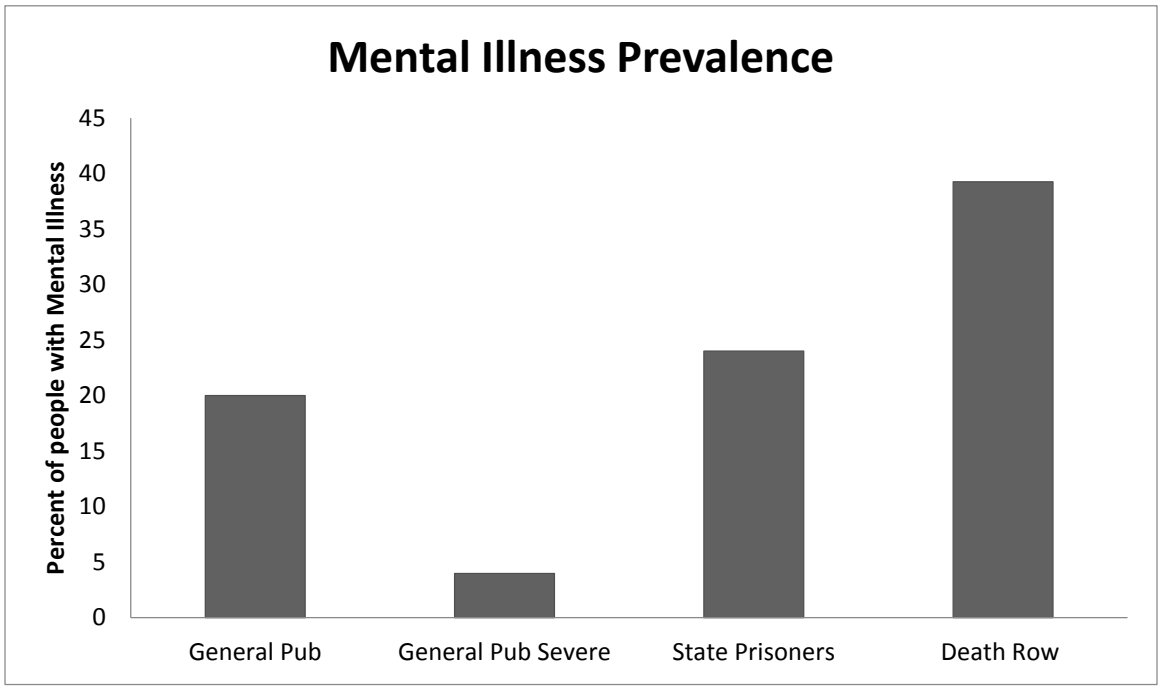
officially declared unconstitutional to forcibly medicate someone with a mental illness with the intent of changing his or her mental status from incompetent to competent.

The way that the court decides whether or not someone meets these criterion for competency is determined by hearing the expert option 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.

Prevalence of Mental Illness

The data for death row inmates does not include substance abuse disorders which is in the DSM V and technically a mental illness. **When I run the data, I will have another column on the graph that includes all disorders (regular and substance use) in addition to mental illness without substance use disorders factored in.** In the United States, 1 in 5 people are affected by a mental illness. Included in that are anxiety disorders which effect 18% of the United States. On death row, there are very few cases of anxiety disorders 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.



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 3.9% for executed inmates. 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 present 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 light up 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). **There are also other studies that replicated this and are more recent than this, this was just the original one that showed this effect. Would you like me to cite multiple?** 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)

Schizophrenia is defined in the Diagnostic Statistical Manuel V (DSM V):

A. Two (or more) of the following, each present for a significant portion of time during a1-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 symptom 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).

This is a really long DSM V criteria.. I want them to be able to get a feel for how someone is diagnosed, but I don't want to overwhelm them with it. I also wasn't sure how to format it. I also feel like I gave a lot of information on Schizophrenia and I don't want to overwhelm the reader or get sidetracked, but I know there are a lot of stigmas and a lot of skepticism about psychotic disorders and I don't want this chapter to get brushed over because the reader believes that these individuals are faking illnesses. What do you think? Should we leave it all, or cut some things out? If we do cut some things out, what do you think is the most vital information?

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 contributed to 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 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, 10.06% of them have attempted suicide in their lifetime **I cannot find this data for the general public, but I will keep looking**. Of the 796 of them, 21.57% were diagnosed with some sort of depressive disorder, or exhibited suicidal thoughts or tendencies. In 2005, John H. Blume did a study of death row inmates that

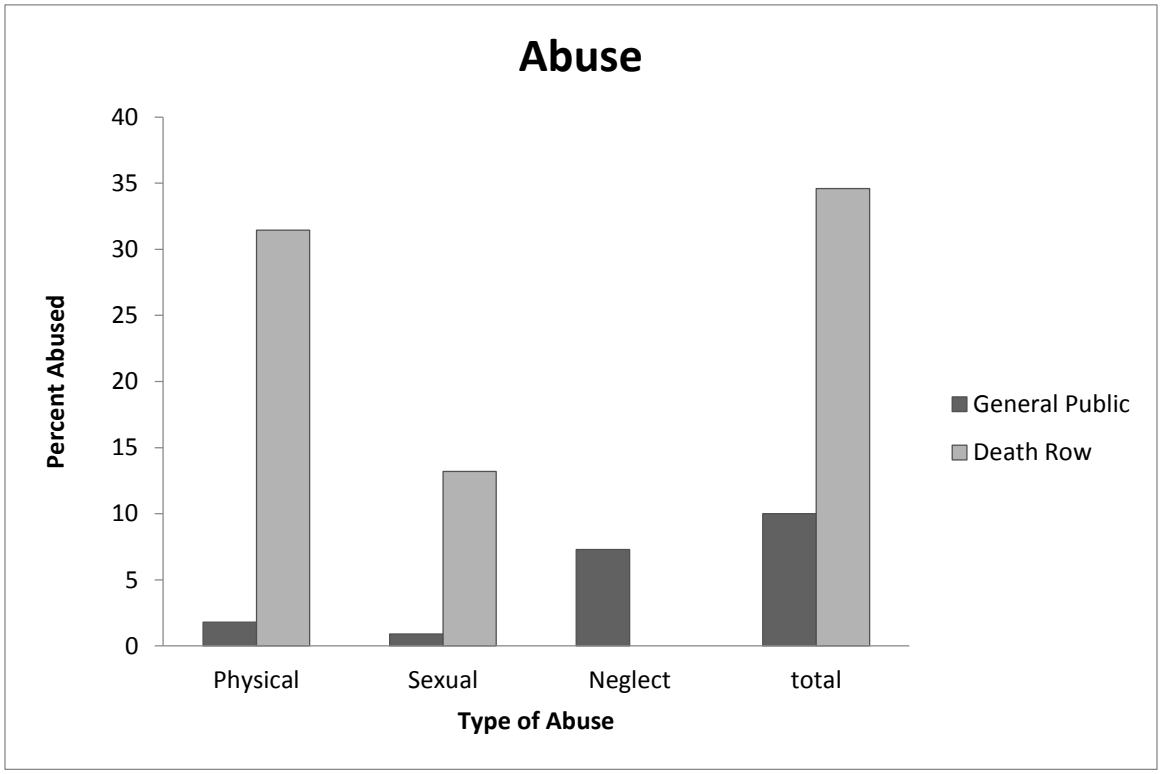
volunteered to skip the appeals process and be executed right away. He found that of the inmates that volunteered between 1976 and 2003, 88% had a mental illness or substance abuse disorder. We have also done this with our own data and shown that **(I have emailed Marty for his spread sheet and then I will run those numbers against our final data to hopefully add on to Blume's data and to compare it to mental illness of non-volunteers. Depending on the data, we could possibly make the argument of state-assisted suicide. I am not sure if you want to make arguments in this book or just present the stats so we can always leave out the blatant argument if you want. Let's talk about this once I have data)**

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.

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 has 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. Larry Eugene Mann had a history of suicide attempts. He killed a 10-year old girl names Elisa Nelson, and then later that 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."

Abuse

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: 34.59% experience some type of abuse, 31.45% of them were physically abused, and 13.21% were sexually abused.

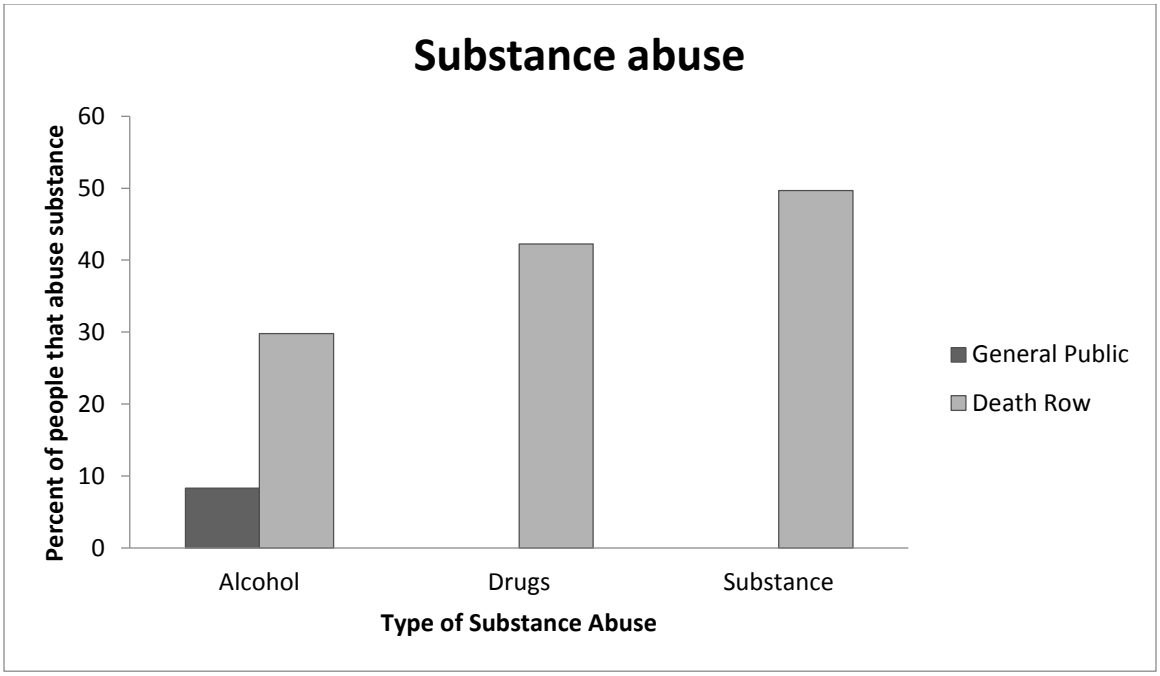


******We don't have neglect stats yet, so right not they are inputted as 0 for death row.**

Our statistics make up the abuse the is reported as mitigating circumstances at trial and is therefore the bear minimum of abuse cases on death row.

Substance Abuse

Substance abuse was measured if evidence was presented that the executed inmate abused or was dependent on the substance. We found that a higher percentage of executed inmates abused alcohol and drugs than in the general population of the United States.



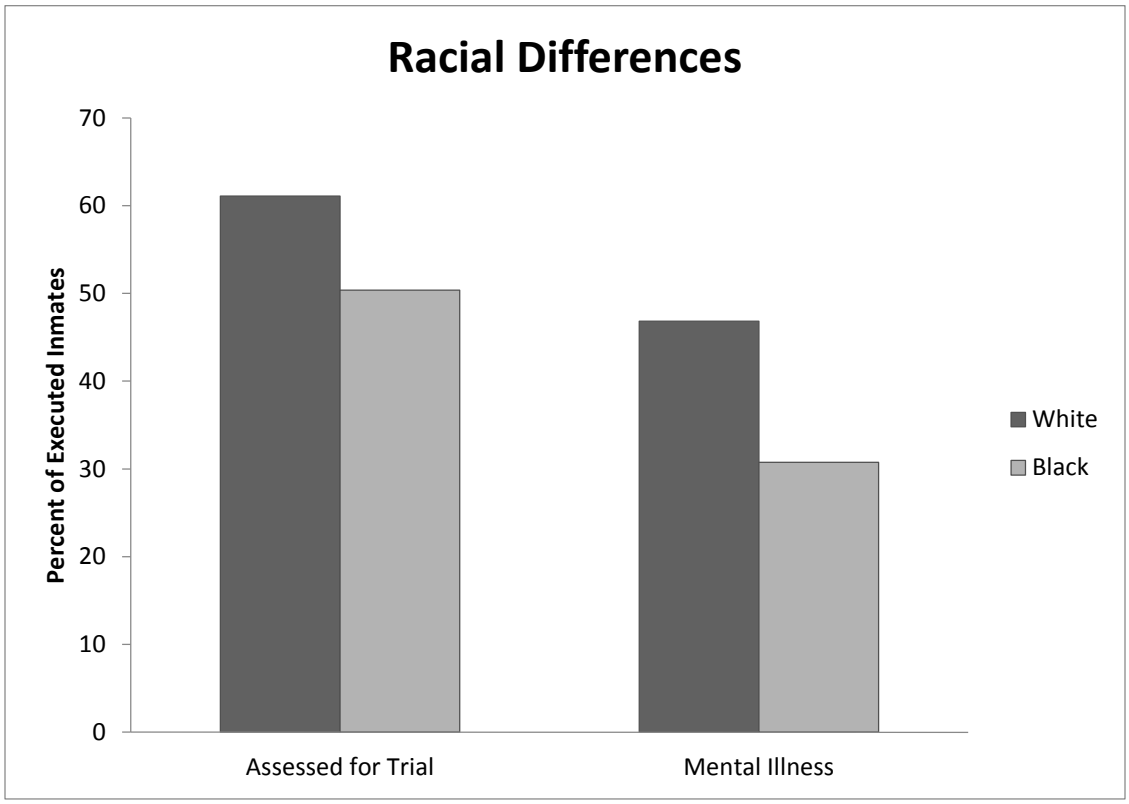
******* I still don't have national stats for drug and general substance *abuse*, only use or "in the past year/30 day"**

Mental Retardation

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 factors into mental retardation competency. Often times, someone scores differently each time they take an IQ test. Rickey Lynn Lewis is one of 26 inmates between 2003-2014 that scored below a 70 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.

Racial Differences

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.



I can also run this as an ANOVA to see if there is an interaction between assessment and race if you want.

References

Atkins v. Virginia, 536 U.S. 304 (2002).

D.A. Silbersweig, E. Stern, C. Frith, C. Cahill, A. Holmes, S. Grootoonk, J. Seaward, P. McKenna, S.E. Chua, L. Schnorr, T. Jones, R.S.J. Frackowiak. *A functional neuroanatomy of hallucinations in schizophrenia*. Nature, 378 (1995), pp. 176–179

I'll cite this later:

http://www.deathpenaltyinfo.org/documents/122AReport.pdf

https://ncadd.org/about-addiction

14

Public Opinion

At this point it is necessary 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. 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?" Support for the death penalty is the majority; however, this is in the abstract. When we factor in mentally disables, 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 1993l Cullen et al. 2000; Durham et a. 1996; Ellsworht and Gross 1994; Fox et al. 1991; Vidmar and Ellsworth 1974)

Some people claim that they support the death penalty in large part for its ability to act as a deterrent.

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? 1999, 55% said they would still support it

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? 2000, 62% thought it had a deterrent effect

2003 question: Why do you favor the death penalty for persons convicted of murder?

An eye for an eye/Took a life/Fits the crime 36

Save taxpayers money/Cost associated with prison	8
Deterrent for potential crimes/Set an example	9
Depends on the type of crime they commit	4
Fair punishment	3
They deserve it	12
Keep from repeating the crime	6
Biblical reasons	5

Another interesting facet regarding public opinion on the death penalty is that public opinion support or disapproval many not always match up with what occurs in practice. 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% support, and then again in 1997 where it generated 27% support. We can see that general public support for this crime to receive the death penalty is not substantial; however, we have seen it occur.

This disconnect between policy and public opinion can call into question constitutionality of the practice. The U.S Supreme Court has explicitly said that public opinion on the death penalty may serve as a relevant in determining the constitutionality of the practice (Baumgartner Decline of Death Penalty Pg 169). This is one example of how public opinion does not correspond to the usage of the death penalty. *Weems v. United States* on 8th amendment: "is not fastened to the absolute but may acquire meaning as public opinion becomes enlightened by a humane justice" (Weems 1910)

1997 was the highest support for public opinion since the death penalty was reinstated in 1976, and 2014 has been the lowest it has been since the death penalty was reinstated in *Gregg v Georgia*. 1997 has such high support levels because 50% of the questions asked that year were regarding support for the death penalty for Timothy McVeigh, the Boston bomber. Therefore, we used 1995 instead to show a broader range of questions. Public support in 1976 is so low because 44% of the questions were whether the respondent supported the death penalty for crimes other than murder including: rape, skyjacking, mugging, and killing a police officer. Support for the death penalty for these types of crimes is generally low.

Talk about how certain questions can change what those numbers look like. How can you alter the question wording to get more or less support for the death penalty?

Table 2. Public Support for Death Penalty Based on Different Questions in 1995

% Support	Pro Option	Question
80	Favor	Death penalty for murder
71	Yes, Death penalty	Death penalty for Susan Smith
52	Favor	Death penalty for juveniles
32	Favor	Death penalty for accomplice to murder
14	Yes, happened in the past 20 years	Innocent person executed

Exact question wording:

1) Do you favor or oppose the death penalty for persons convicted of murder?
2) 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?
3) (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?
4) 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?
5) 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?

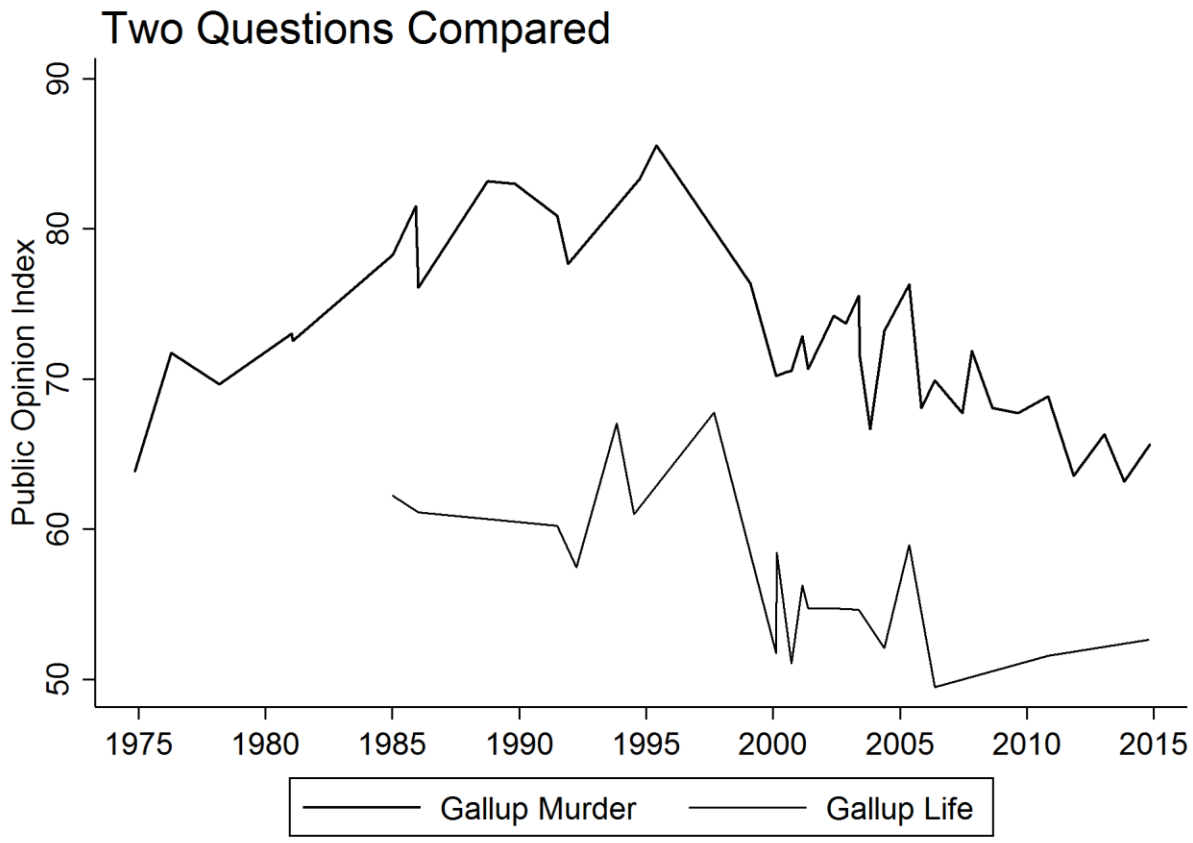
This table, although only shows data for a specific year, gives insight into how different questions on the death penalty generate vastly different answers. The questions regarding the death penalty for murder is the most commonly asked question by survey organizations regarding the death penalty. This question often ends up being the harshest in terms of percent support. This question doesn't instigate any emotional understanding of the policy, and insinuates the "eye for an eye" message.

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 very high levels of support, averaging about __ percent. Similarly, questions about Susan Smith in

1995 generated a high level of support, at 71 percent. However, this doesn't really match up with the fact that some perpetrators who kill prominent people have not been given the death penalty (find specific examples and incorporate).

The question regarding whether or not the public believes that an innocent person has been executed in the last 20 years 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.

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.



General understanding of the death penalty over time on a quarterly basis dating back to 1936. Talk about trends and how they came about. Death penalty has stayed fairly stable
The current state of public opinion is the lowest it has ever been since the death penalty was reinstated in 1976, as seen through the index. The data for the index was gathered through the IPOLL Roper center. Upon searching for "death penalty" from the years 1936 until present, 392 surveys appeared. These surveys enabled us to come to a conclusive trend of public support on the death penalty through the usage of Jim Stimson's WCALC program.

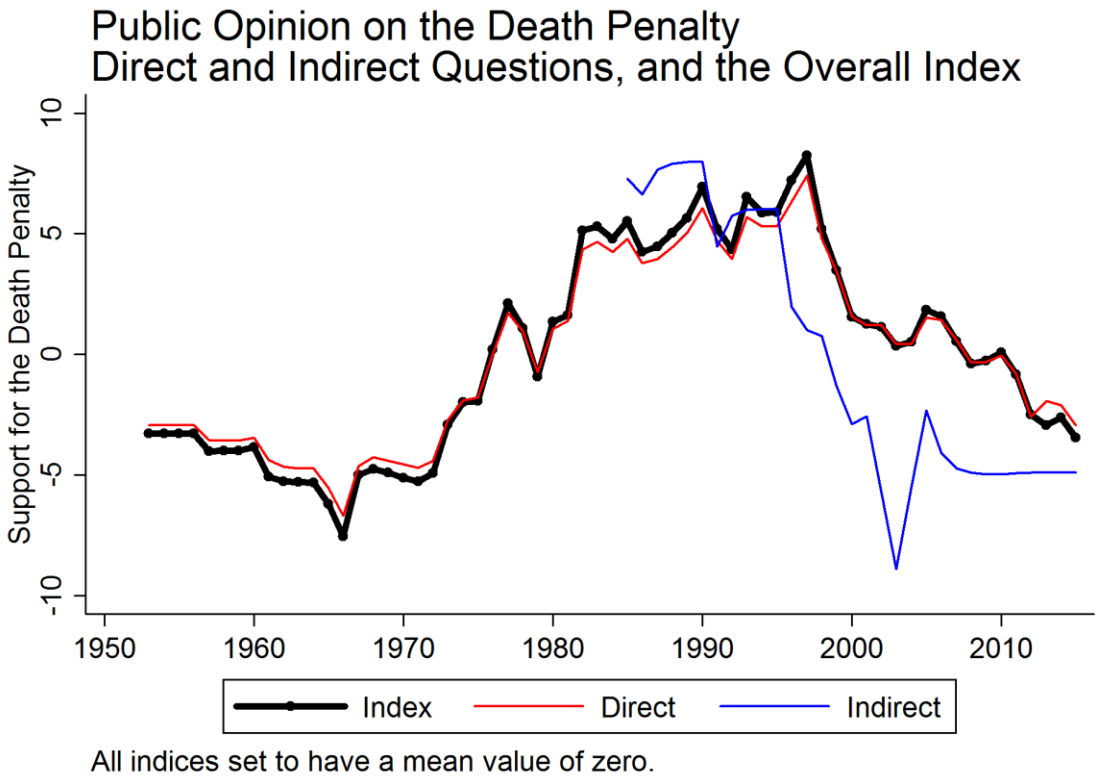


Figure (public opinion on the death penalty direct and indirect questions) shows the index created from 372 national polls from 1953 until 2015, as well as where the direct and indirect questions fall. Direct questions were any questions that specifically targeted opinion towards favoring and disapproving of the death penalty. 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. Other questions, deemed in direct, are questions that do not specifically target opinions on the death penalty. For example, a question that asks whether or not the respondent believes the death penalty acts as a deterrent would be an indirect question. The indirect questions often fall below the index (this is interesting because isn't the reason people support the death penalty for reasons outlined in' indirect questions? i.e cost of LWOP, deterrence, retribution) As discussed in Chapter 12, the cost of LWOP is often dramatically less than the cost of the death penalty. This, amongst others, shows us that the public is largely misinformed about the death penalty (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. (pg 170 Death penalty)

The above figure(public opinion on the death penalty) shows the index we created in the form of a line, and then also includes dots which represent each of the 372 national polls used to form the index. The dots that appear far below the index line generally refer to questions that receive very low support on the death penalty or indirect questions.

Direct questions also 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 (or maybe later), 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 X% support. This question has also been asked the most over time, and represents many of the dots above the index line.

HAR_RET- 71% think that retarded people shouldn't be executed. Related this to mental illness chapter?? If so many people are mentally ill, and 71% believe that the meantally ill shouldn't be executed, is this reason enough to believe that the public does not support the death penalty. Interesting contradiction is you ask if the Unabomber should get the DP even if he is insans… USODFOX.012098.R3 (FOX_UNAI)

USNBCWSJ.071188.R28- if presidents opposed the death penalty would you be more or less likely to vote for them. This means that both sides will support the death penalty. Translates into policy. It doesn't appear to be that controversial because all candidates run under that platform. 1988 has a lot of questions about presidential opinions on DP and whether that influences voters decisions.

People generally favor and oppose the death penalty for men and women about the same, granted MOE. Why don't we see women being executed proportionally? And when they are…relate to girl in class study on women and who their victims are.

Case study on Houston/Harris county. Is the public support for the death penalty in this place high enough to account for the amount of people it kills comparatively? One would think the public would support it a lot more than other parts of the country considering their track record. However, if the public is supportive, as they are across the nation, one would think that maybe everyone would be like Harris county? So what effect does public opinion really have and why is this.

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.

No death penalty:

High use of death penalty:

Low use of death penalty:

GSS
Gallup
CBS/NYT

"Are you in favor of the death penalty for persons convicted of murder?"

state data on this question using the MRP approach

Table 1. Support for the Death Penalty Depending on Different Question Wording

Year	Index	Question 1	Question 2	Question 3	Question 4	Question 5	Question 6	Question 7	Question 8
1976	59	72							
1977	61		64						
1978	59	70							
1979	57								
1980	60								
1981	60	73							
1982	64								
1983	64								
1984	63								
1985	64	78						62	67
1986	63	76	80					61	66
1987	63								
1988	64	83							
1989	64	83							
1990	66								
1991	64	80						60	55
1992	63							58	
1993	65							67	
1994	64	83						61	
1995	64	86		83.33					
1996	66								
1997	67			76.00				68	
1998	64								
1999	62	76			73				
2000	60	71			71			54	
2001	60	71		77.00		70		55	
2002	60	74			76	70	57	55	

2003	59	72		76	67		55	
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		
2008	58	68		77	67	59		
2009	58	68		78	67	63		
2010	59	69		81	69	62	52	
2011	58	64		73	70			33
2012	56	66			63			
2013	55	63	66	52	67	57		
2014	56	66		57	69	55	53	
2015	55		62		66			

Note: Question wording is as follows:
Question 1: Are you in favor of the death penalty for persons convicted of murder?
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?
Question 3: Do you favor or oppose the death penalty for Timothy McVeigh if he is convicted of bombing a Federal building in Oklahoma City?
Question 4: In your opinion, is the death penalty imposed too often today or not often enough?
Question 5: (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?
Question 6: Generally speaking, do you believe the death penalty is applied fairly or unfairly in this country today?
Question 7: 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?
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?

Comes from these organizations:
GAL_MUR QUI_TERR PSR_TIM GAL_OFT GAL_ACC GAL_APP GAL_LIF GAL_DETER

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 and leads in capital convictions; moreover, the African American population in the Houston area is the fifth largest in the country. The combination of these various factors plays into how supportive Texans are of the death penalty and also highlights the importance of why Texas is an important case study.

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. Moreover, taking a look at Texas provides insight into what extent public opinion shapes the death penalty in the state and whether or not it truly is a measure of the evolving standards of decency. (How much context is needed?)

In examining public support of the death penalty of Texas, Table 1 shows survey questions from various sources regarding Texans' opinions on the death penalty in differing contexts dating as early as 1986. Additionally, the table shows the percentage of pro-death penalty responses from these repeatedly asked questions. Questions and possible responses varied among these questions, as did the percentage of support for the death penalty. (Need to differentiate between Texas questions and just Harris county questions)

Table X. Texas and Harris County Public Opinion on the Death Penalty

	Harris County	Texas

	Question Wording				
Year	1	2	3	4	5
1985					
1986					
1987					
1988					
1989					
1990					
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				
2009		63	63		
2010	40			81	
2011		63	67	78	
2012	32			77	
2013		56	62		
2014	29				
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. 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

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).

When taking a closer look at Texas public opinion on the death penalty, it is also important to specifically examine Harris County, which is a major contributor to the state's death penalty statistics. In (provide year), the Houston Chronicle conducted a poll, which compared support of the death penalty in 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, which aligns with the logic of Texas as a major outlier in executions. However, Harris County repeatedly showed a lower percentage of pro-death penalty responses in comparison to Texas.

Overall, public opinion in Texas and specifically the Houston area does not seem to deviate from the rest of the country's public opinion as to provide a reason for why the state practices the death penalty so frequently. 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. However, it is worth noting the decline in death penalty support and the subsequent implications for the state.

Looking back at figure 1, 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 October 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 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, public opinion clearly serves as some indicator into how often the death penalty is used.

15

Why Does the Death Penalty Cost So Much?

Quantifying the costs associated with the administration of capital punishment has proven to be a difficult task over the course of the past several decades. In order to answer the question "what are the costs," scholars, law enforcement officials, and the judicial system must first define what exactly is encompassed in the word "cost." Common metrics include not only the monetary facet, but also the opportunity costs associated with the capital trial, lengthy appeals process, and the physical administration of the death penalty.

In order to properly quantify dollar and human resource contributions spent on capital punishment, it's also advantageous to establish a starting and ending point for our analysis. For simplicity purposes and to reflect the extent of existing cost studies, our focus of attention will begin from the initial arrest up until the actual execution of capitally convicted inmates.

With multiple interpretations relating to the word cost and judicial processes that vary among states, no two cost studies use the exact same measurements. For example, when analyzing the cost of the death penalty in Colorado, Marceau and Whitson (2013) aggregated only the number of days spent in court by each capital-eligible inmate and compared the results to cases in which the death penalty was not sought against first-degree murder defendants. This is drastically different than Collins, Boruchowitz, Hickman, Larrañaga (2015), who used specific methods to examine the monetary costs between capital and non-capital cases and then formed a gross savings estimate if the death penalty was abolished in the state of Washington.

Even when we separate studies that focus on financial metrics from those of opportunity cost, there is considerable variety in the variables authors include, or have access to, in order to come to a cumulative cost estimates. For instance, the Kansas Judicial Council (2014) focused

solely on financial costs in the bifurcated trial process while the Office of Performance Evaluations for the Idaho legislature incorporated both costs of defense for the trial and the entire appeals process.

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. Reasons include: Requirement of two attorneys, longer appeals processes, longer times spent in prison, etc.

In order to create to create the most comprehensive analyses of costs related to the death penalty, normalization needs to be a priority of the state governments, scholars, and non-profit organizations that conventionally conduct these studies. By breaking down each individual judicial and procedural step in the capital punishment system, authors will be able to effectively provide precise measurements of the cost of the death penalty.

Even then, accurate data also depends on the source. District Attorney offices across the United States often do not keep detailed records of time and money spent on capital trials and even then, some jurisdictions are reluctant to release information to those who conduct studies relating to general trends of the death penalty.

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 approximately 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” and “cost of capital punishment” have currently yielded 20 additional articles and academic publications, which are currently under review as to their comprehensiveness.

What Costs Are Explicitly Being Measured?

The most common metric used to measure the cost of the death penalty involves comparing the cost associated with a capitally charged murder trial with that of a capital eligible case in which prosecutors decided not to pursue the death penalty.

This methodology appears simple enough: look at the costs side by side and come to a numerical conclusion. The process is actually much more intricate.

As has been enumerated in more detail earlier, the procedural differences between a capital versus non-capital case is quite vast. Capital murder trials involve a bifurcated process, one in which the trial and sentencing activities are handled separately. Let us explore more in depth about the explicit costs associated with these two stages and then elaborate more on the appeals process that ultimately follows every death sentence conviction.

Trial Stage:

2 Attorneys

Sentencing Stage:

Jury costs

Court Personnel

Judge costs

Appeals Process:

State appeals

Federal Habeus Corpus appeals

[Briefly revisit the structure of the appeals process and highlight costs associated with petitions and counsel expenses]

The Data:

Geographic Scope	Time Range	Cost Saving Estimate	Savings Frequency	Gross Savings	X Times More Expensive Per Case
.	.	.	.	.	.
.	.	.	.	.	.
Washington	1997-2010	$1,150,000	Per Case	$120,000,000	1.4-1.5
Nevada	2000-2013	$532,000	Per Case	.	.
Kansas	2004-2011	$296,799	Per Case	.	.
Idaho	1977-2014	.	.	$4,133,831	.
Colorado	1999-2010	.	.	.	.
California	1978-2011	.	.	$4,600,000,000	10, 20
Maryland	1978-1999	.	One Time	$186,000,000	
Nevada	2009-2011	$170,000-$212,000	Per Case	$15,000,000	.
Washington	.	$754,000	Per Case	.	.
New Jersey	1983-2005	.	One Time	$253,000,000	.
Tennessee	1993-2003	$15,297	Per Case	.	0.48
Kansas	1994-2003	$520,000	Per Case	.	0.7
USA	1982-1997	.	One Time	$1,600,000,000	.
Indiana		$407,229	Per Case	.	10
North Carolina	2005-2006	$10,800,000	Annually	.	.
North Carolina	1991-1992				
Florida	1979-2000	$51,000,000	Annually	.	.
Oregon	2002-2012	$221,958	Per Case	.	.

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.

Geographic Scope	Specifically Saved
Washington	Personal restraint petitions/appeals, court, police/sheriff, prosecution (trial), defense (trial), jail
Nevada	Not enacting procedural safeguards
Kansas	Defense
Idaho	Defense, Appeals
Colorado	.
California	Pre-trial and trial costs, automatic appeals and state Habeus Corpus petitions, federal Habeus Corpus appeals, costs of incarceration
Maryland	
Nevada	Defense (pretrial, trial, penalty, post-conviction activities)
Washington	Defense, prosecution, court personnel, appellate defense, personal restraint petitions
New Jersey	Defense, prosecution, courts, correctional facilities
New York	
Tennessee	Appendix C
Kansas	Investigation, prosecution, defense, court, appeals, incarceration, execuation
Indiana	
North Carolina	Defense, jurors, post-conviction costs, resentencing hearings, costs to prison system
Oregon	At the trial level only

Size of Studies and Methodologies

Geographic Scope	Sample Size
Washington	147
Nevada	28
Kansas	17
Idaho	251
Colorado	22
California	1940
California	.
Maryland	.
Nevada	22
Washington	78
New Jersey	197
New York	
Tennessee	250
Kansas	22
Oregon	61

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.

What 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.

Seminal Studies

In the analysis, some studies appeared more comprehensive than others in terms of breadth of specific costs. We will now review several of those studies that could easily serve as references for future state cost studies and help normalize the process of measuring aggregate costs of the death penalty in the United States.

[1] The Costs of Processing Murder Cases in North Carolina. Cook, Slawson, Gries (1993).

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. From one facet, 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 results in a conviction and a 20 year prison sentence. They estimated savings 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 went beyond the typical government survey method and requested that the North Carolina Supreme Court keep detailed records pertaining to time and resource allocation on each murder case they encountered. They concluded that an appeal in a death 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: "comparing two hypothetical cases, one of which concludes with the defendant's execution after ten years on death row, and the other with the defendant serving 20 years in prison, yields an answer of $163 thousand as the extra cost for the capital case"

[2] Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle. Alarcón and Mitchell

California, a state with over 700 people currently sitting on death row, has been the subject of several cost study analyses, the most striking coming from Alarcón and Mitchell. Since the reinstatement of the death penalty in California in 1978, taxpayers have spent roughly 6.4 billion dollars up until 2011. With only 13 executions being carried out over the period from 1978-2011, this equates to nearly 500 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, it also markets the largest analysis of any cost study. Here are several other calculations that show where most of the costs are distributed during a capital case and subsequent happenings:

Pre-trial and trial costs: $1.94 billion

Appeals and State Habeus Corpus petitions: $925 million

Federal Habeus Corpus appeals: $775 million

Cost of incarceration: $1 billion

16

Is the Death Penalty Dying?

Within the past two decades the use of the death penalty has declined significantly. With only 31 states currently having capital punishment statutes, and an increasing number of counties abandoning the use of the punishment, there is no denial that the death penalty is a declining practice in the abstract. This chapter will explore the declining use of the death penalty. Through tracking the trends at both the national, state, and county level over the modern execution period, we are able to paint a more comprehensive picture on the details of whether capital punishment is in fact a declining practice in the United States.

State Abolishment of the Death Penalty

There are currently 31 states that have death penalty statutes, plus the United States government and military, as seen in table 14.1.

Table 14.1: States with and without capital punishment, as of 2015[140]

States With Capital Punishment		States Without Capital Punishment	
			Year abolished
Alabama	Oregon		1847
Arizona	Pennsylvania	Michigan	1853

[140] http://www.deathpenaltyinfo.org/states-and-without-death-penalty

Arkansas	South Carolina	Wisconsin	1887
California	South Dakota	Maine	1911
Colorado	Tennessee	Minnesota	1957
Delaware	Texas	Alaska	1957
Florida	Utah	Hawaii	1964
Georgia	Virginia	Vermont	1965
Idaho	Washington	Iowa	1965
Indiana	Wyoming	West Virginia	1973
Kansas	U.S. Government	North Dakota	1981
Kentucky	U.S. Military	Dist. Of Columbia	1984
Louisiana		Rhode Island *	1984
Mississippi		Massachusetts	2007
Missouri		New Jersey	2007
Montana		New York **	2009
Nevada		New Mexico ^	2011
New Hampshire		Illinois	2012
Ohio		Connecticut	2013
Oklahoma		Maryland	2015
		Nebraska #	

* In 1979, the Supreme Court of Rhode Island held that a statute making a death sentence mandatory for someone who killed a fellow prisoner was unconstitutional. The legislature removed the statute in 1984.

** In 2004, the New York Court of Appeals held that a portion of the state's death penalty law was unconstitutional. In 2007, they ruled that their prior holding applied to the last remaining person on the state's death row. The legislature has voted down attempts to restore the statute.

^ In March 2009, New Mexico voted to abolish the death penalty. However, the repeal was not retroactive, leaving two people on the state's death row.

In May 2015, Nebraska voted to abolish the death penalty. The status of the 10 inmates on death row is uncertain at this time. A petition has been submitted to suspend the repeal and put it to a voter referendum. The petition is pending signature verification.

Following the decision in *Furman v. Georgia (1972)* the United States had a severe countermovement to reinstate the death penalty[141], with some states imposing mandatory capital sentences for eligible crimes (see *Woodson v. North Carolina* and *Roberts v. Louisiana*). The only state that did not reinstate the death penalty following *Furman* was North Dakota.

Why Did States Abolish Capital Punishment?

The reasons and conditions leading up to individual state abolition of the death penalty are diverse. While some states have more standard abolition procedures, such as New Mexico, Connecticut, Nebraska, and Maryland, others have some interesting backgrounds that should be considered.

North Dakota has never been a state that has been in wide support of the death penalty, and is the earliest in the modern death penalty era to eliminate their states capital punishment statutes. In 1915 North Dakota abolished the death penalty for all crime except murder by an inmate already serving a life sentence and treason. The last of the eligible punishments were abolished in 1973[142].

The District of Columbia repealed their death penalty by resident voter referendum in 1992. Washington D.C. has historically be governed by federal statutes, and despite the District of Columbia having its own code of laws, the federal government has sought the death penalty for capital eligible crimes that occurred in D.C.[143].

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[141] Sarat, Austin and Jürgen Martschukat. *Is the Death Penalty Dying?* Cambridge University Press. 2011

[142] http://www.deathpenaltyinfo.org/north-dakota-0

[143] http://www.deathpenaltyinfo.org/district-columbia

Rhode Island, perhaps the most confused states on their stance of the death penalty, first abolished the death penalty in 1852, making it one of the first states to do so, it was reinstated in 1873 of those who committed crime while serving a life sentence. Following the *Furman* decision, Rhode Island instituted a mandatory punishment of the death sentence for murder while under confinement in a state penitentiary; this was later declared unconstitutional in 1979. The state removed death as a form of punishment in 1984, several attempts have been made to reinstate the death penalty, but none have proven successful thus far[144].

Massachusetts abolished its death penalty in 1984, in the case *Commonwealth v. Colon-Cruz*. The death penalty law was ruled constitutional on the grounds that it was not applied fairly; only defendants who went to trial were eligible for the sentence, thus deeming those who plead guilty ineligible for the punishment[145]

New Jersey ruled the death penalty unconstitutional for administering procedures in 2004; however, the rewritten procedures were never finalized, and expired in 2005. Immediately following this executions were suspended while a study that examined the fairness and expense of the states death penalty. In 2007 a bill to replace capital punishment with life in prison without the possibility of parole was signed by Governor Richard Codey[146].

New York also has an interesting history. In 1860, the death penalty was accidently abolished due to a law passed that banned execution by hanging, without providing any other

[144] http://www.deathpenaltyinfo.org/rhode-island-0
[145] http://www.deathpenaltyinfo.org/massachusetts-0
[146] http://www.deathpenaltyinfo.org/new-jersey-1

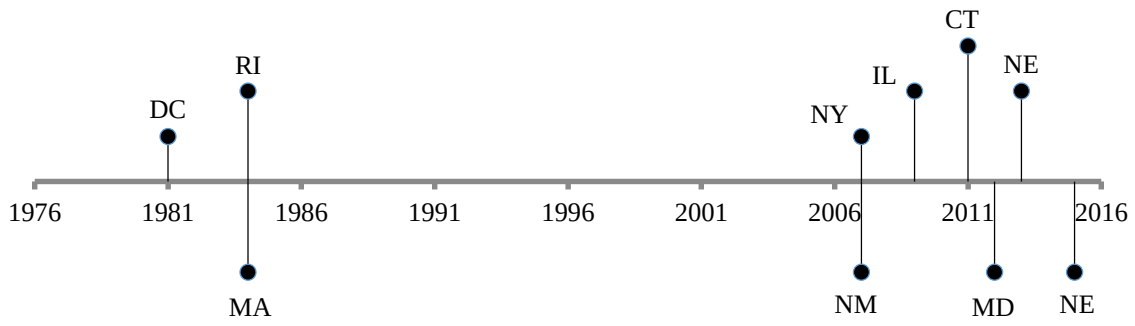
means for putting someone to death. This was remedied a year later in 1861 when they imposed statutes allowing execution by electrocution.

In 2003, Illinois Governor George Ryan declared a moratorium on executions to study the state of Illinois death row. Just two days before he was set to leave office, Governor Ryan determined that the death penalty was fraught with error, and commuted all 167 death row inmates to life terms[147].

While the abolishment reaction from individual states was not evident immediately following Furman (as demonstrated in chapter one), in recent years, the traction has begun to rise. Figure 14.2 shows the timeline of states abolishing capital punishment post *Gregg v. Georgia*, or the modern death penalty era. Following the Gregg decision, the first jurisdiction to abolish capital punishment was the District of Columbia in 1981, shortly after, in 1984, Rhode Island followed suit. There was then a 35-year period in which no state abolished the death penalty. This trend changed in 2007 when both New York and New Jersey ended capital sentencing. In the period from 2007-2015 seven states eradicated their capital sentencing statutes.

Figure 14.1: Time line of states abolishing capital punishment in the modern death penalty period[148]

[147] http://www.deathpenaltyinfo.org/illinois-1
[148] http://www.deathpenaltyinfo.org/states-and-without-death-penalty



When studying the states that have abolished death penalty statues in the modern death penalty era, it becomes clear that each state that had abolished the penalty were instates where the practice had fallen to disuse. Prior to their abolition of capital punishment, neither New York nor New Jersey had used the death penalty since 1963[149]. New Mexico had not used the punishment since 2001, Illinois since 1999, Connecticut since 2005, Maryland since 2005, and Nevada since 1997. Is it reasonable to expect that those states that have not used the death penalty for a significant amount of time is leaning toward abolishment?

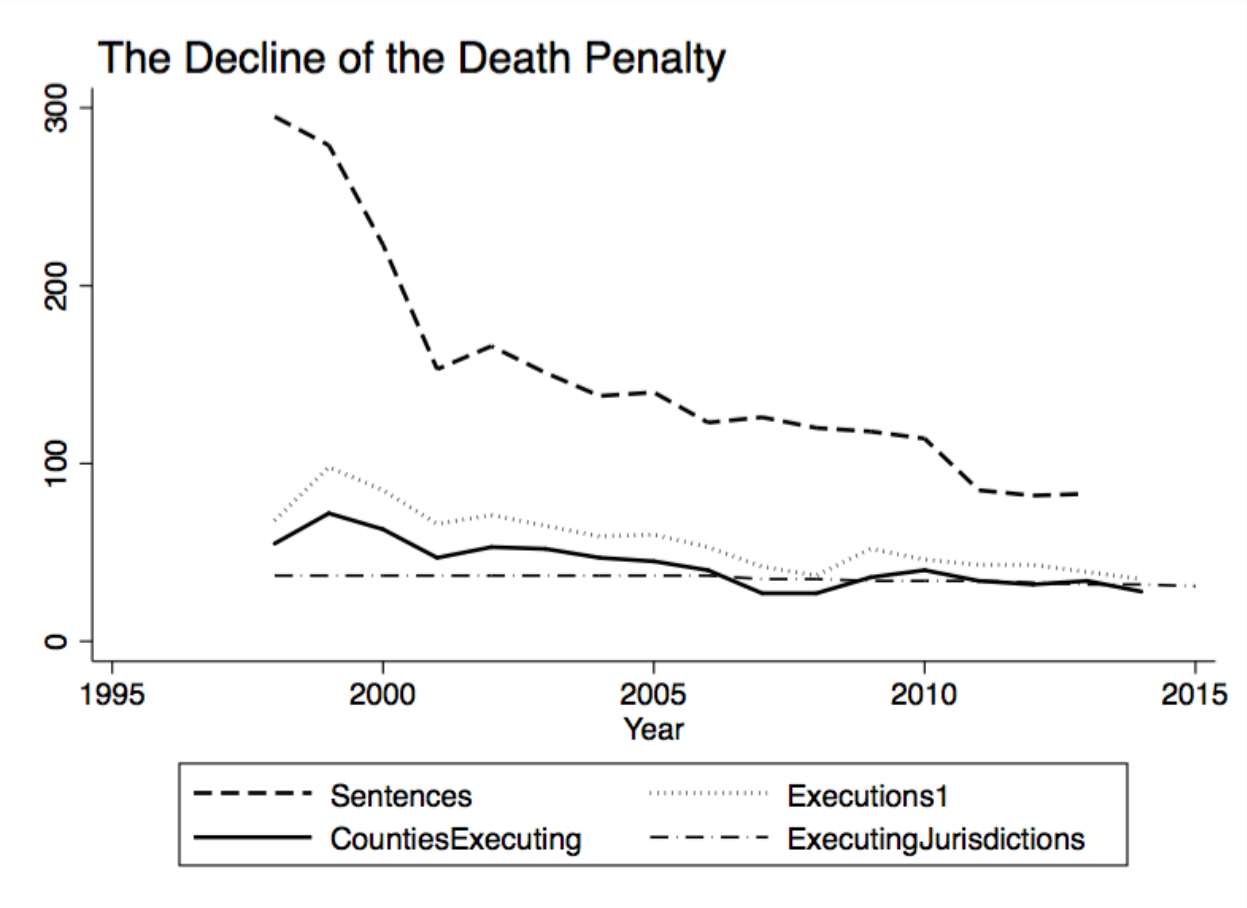
The Peak to Present

The peak of the use of the death penalty in the modern era was in 1999, at 98 executions. Since that year, the number of executions has been decreasing at quite an alarming rate. Additionally, the number of jurisdictions with death penalty statutes, counties that have actually executed individuals, and the number of death sentences that has been given out have all been declining from the late 1999 onwards. Figure 14.? Shows the trends of sentencing, executions, counties

[149] Death Penalty USA. org

that have executed inmates, and states with capital punishment statutes; all exhibiting declines in recent years.

Figure 14.?

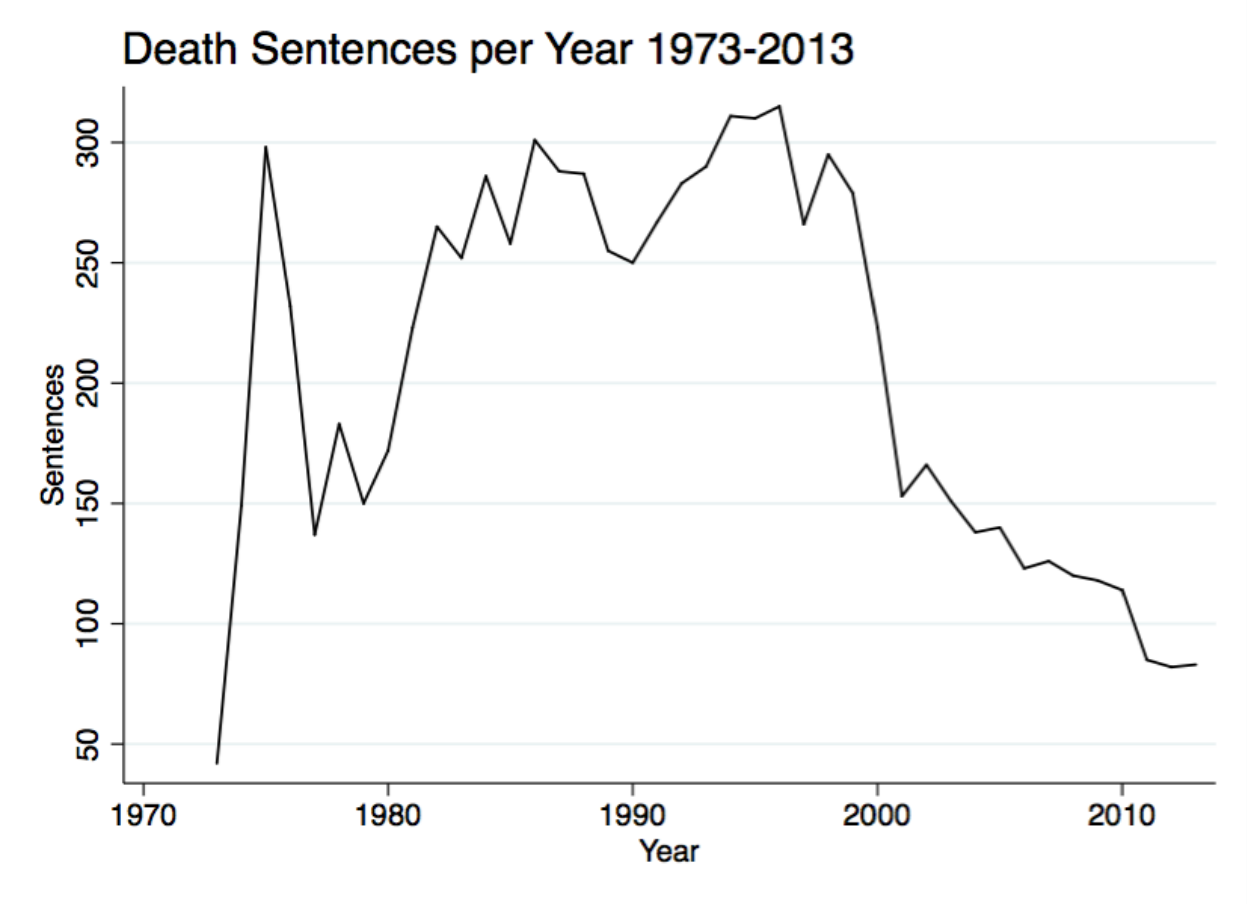


Executing jurisdictions have decreased from 37 in the 2000s to 31 in 2015,

Sentencing Trends

National Sentencing Trends

Figure 14.2 National sentencing trends



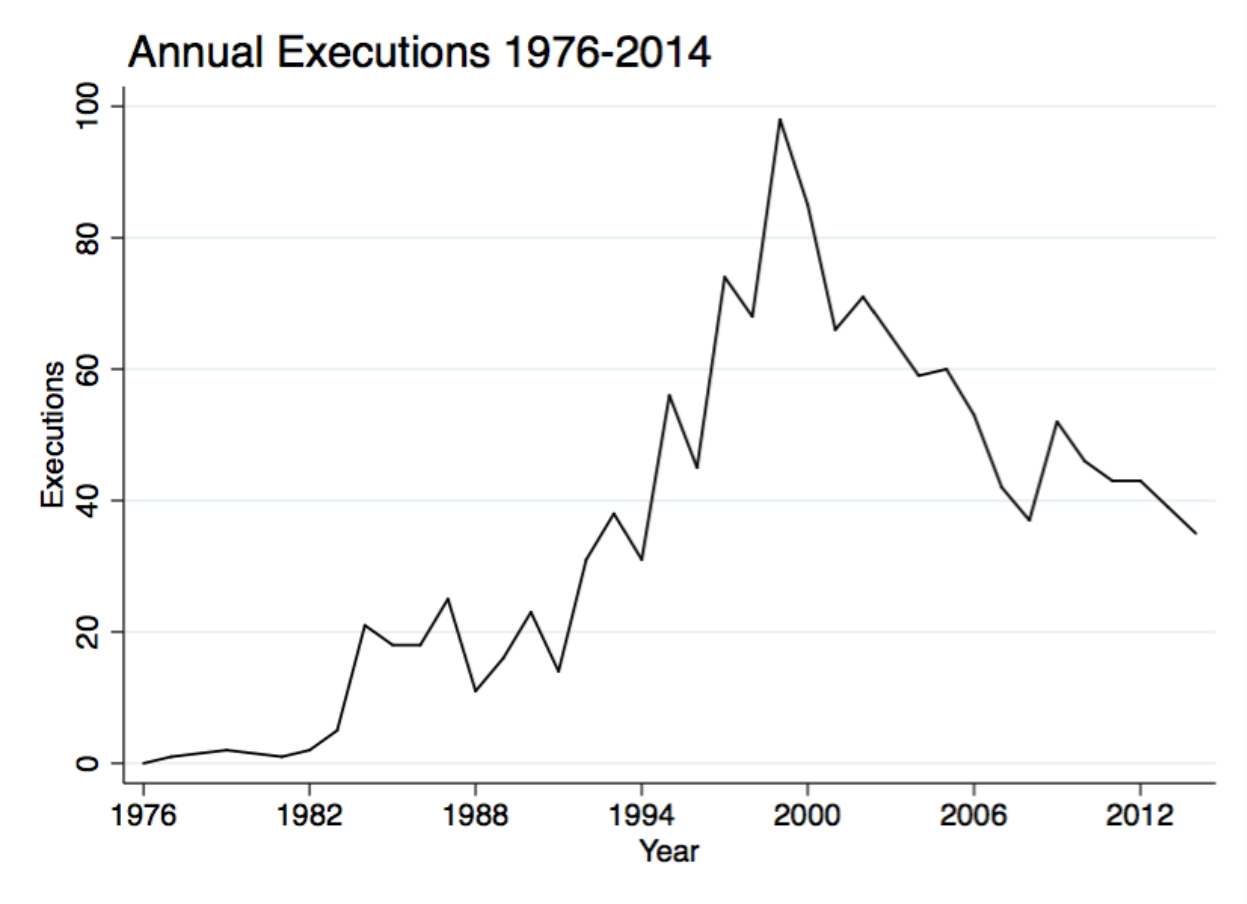
Execution Trends

National Execution Trends

Figure 14.3 shows the trends of executions from 1976-2014. Nationally, there was a peak in 1999 at 98 executions performed that year; following there has been a steady decrease in the rates of executions.

Figure 14.3 National rates of executions per year, 1976-2013[150]

[150] Data from execs7714_master.xlsx



State Execution Trends

There is a significant division in the states use of the death penalty. The vast majority of executions are carried out in the South, at just above 80 percent. The top ten executing states, and their number of executions, are Texas (528), Oklahoma (112), Virginia (110), Florida (90), Missouri (86), Alabama (56), Georgia (57), Ohio (53), North Carolina (43), and South Carolina (43)[151]. With the majority of the executions being carried out in the South

County Execution Trends

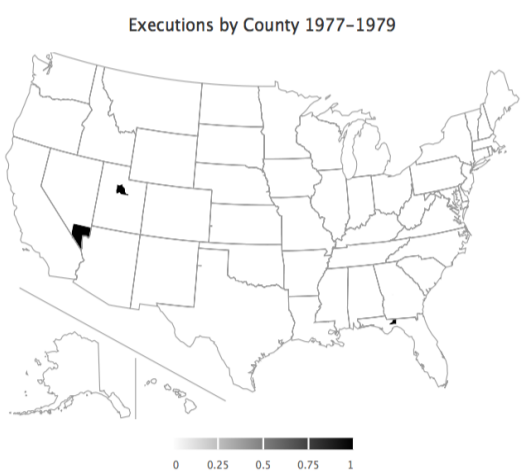
[151] http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976

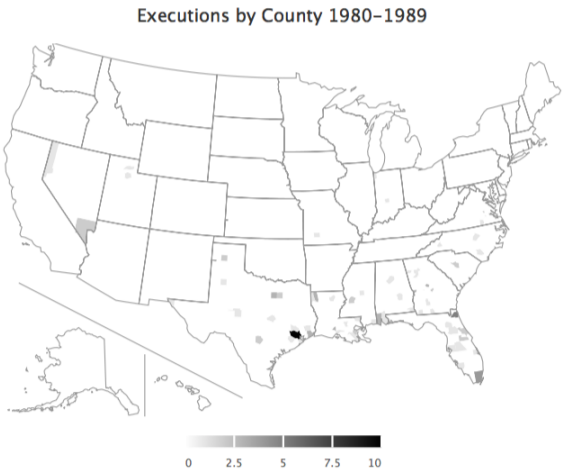
It is widely recognized that there are vast discrepancies in the executions carried out by counties across the United States[152]. Another component to consider when looking at the declining use of the death penalty is the geographical spread of its use.

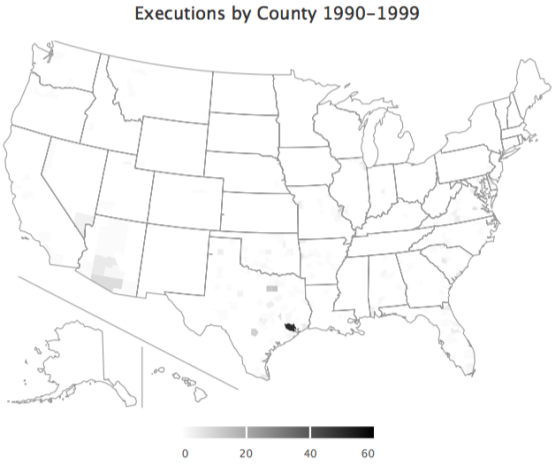
Figure 14.4 shows five maps that show county executions for each decade in the modern death penalty era (1977-2014). **[may remove these maps]**

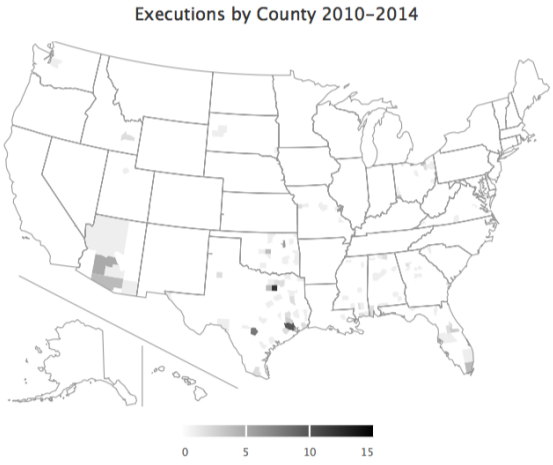
Figure 14.5 County executions by decade

[152] 2% Report









By dividing county executions by decade and displaying those figures in map formation, it becomes increasingly obvious that there are only a small number of counties that carry out executions in the United States. The maps displayed in in Figure 14.4 show that the execution hubs have stayed fairly consistent over time – mostly in the south, and with the bulk of the main executing counties centered in Texas.

Homicide v. Death Penalty Trends

Homicide Trends

Is it the case that there is a decline in the use of the death penalty because there is a decrease in the rates of homicides in the United States? The trends shown in figure 14.6 show national homicides and death sentencing rates from 1976 – 2005. In 1980 the homicide rate reached the highest rate of the twentieth century to that date (Harries and Cheatwood 1997), then declined throughout the remainder the early 1980s and began to climb significantly during the late 1980s and early 1990s. The first peak, in 1980, could be attributed to the crack cocaine epidemic that ravaged urban areas, thus increasing lethal violent crime (Harries and Cheatwood). The enormity of the crime problem called for harsher control mechanisms, a higher armed police force, national guard presence in some neighborhoods, more prisons and higher sentencing rates, and increased infrastructure to restrict crime leaking into adjacent neighborhoods (Harries and Cheatwood, 29). Those who advocated higher control mechanisms in response to the increase in crime rates also encouraged increased use of capital punishment.

Figure 14.6 National trends for homicides, executions, and death sentences

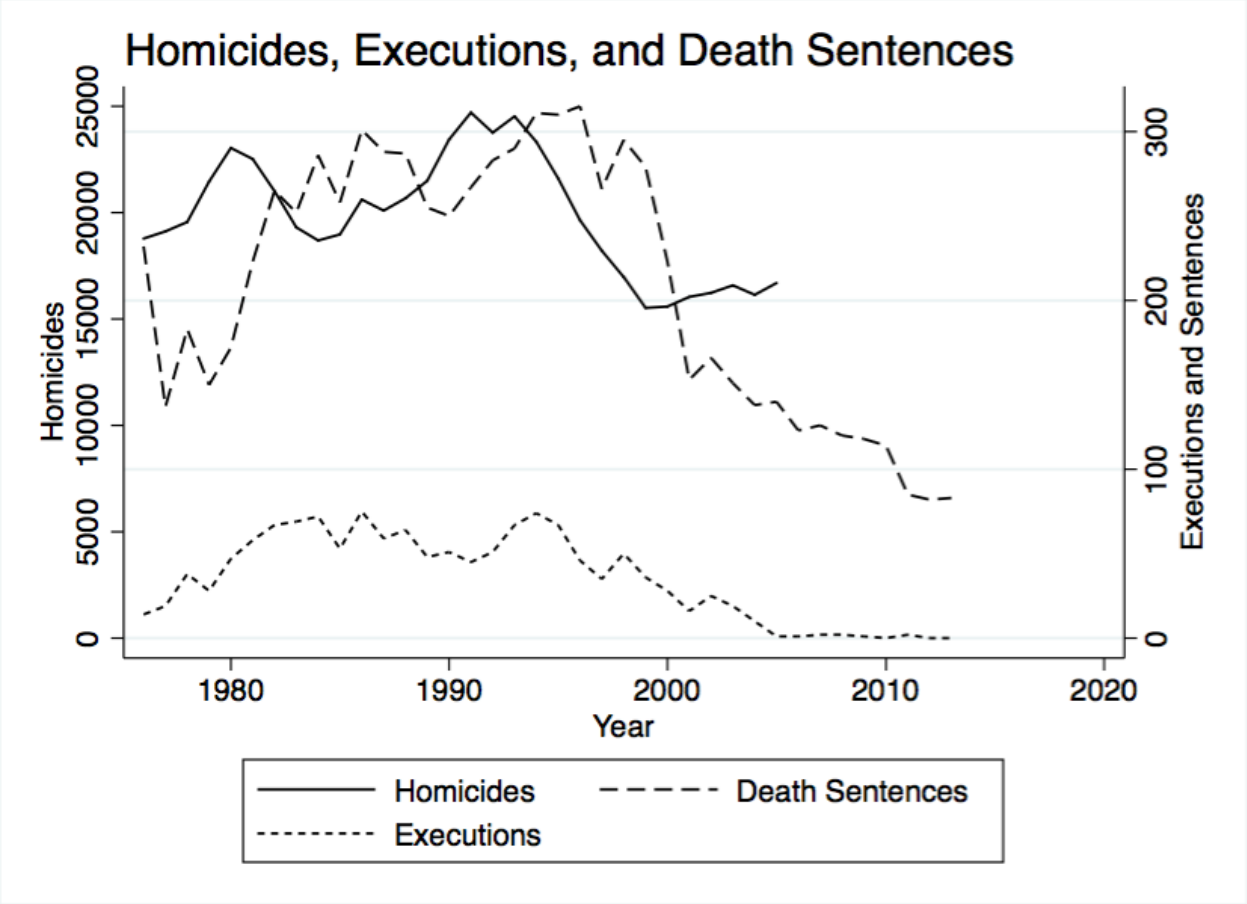


Figure 14.6b shows the national homicide and death sentencing rates 1976-2005[153].

As seen in figures 14.6, there is little similarity in the trends of national homicide rates and total death sentenced given that respective year.

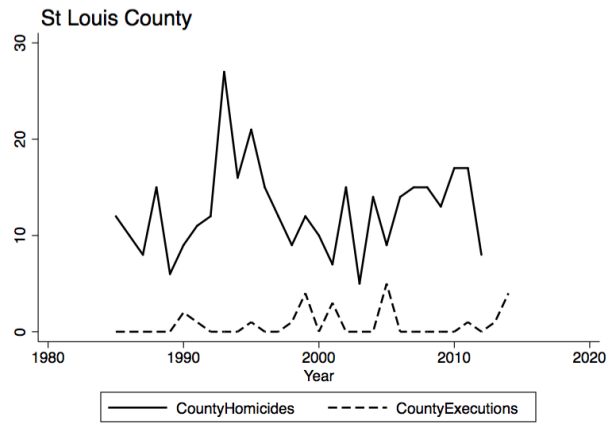
A St. Louis Case Study: Homicides and Executions

An interesting case study when considering homicide and execution is in the comparison between St. Louis County and St. Louise City, where the former has low homicide rates and the later has high homicide rates. The interesting part, however, is that St. Louis county has a much higher number of executions.

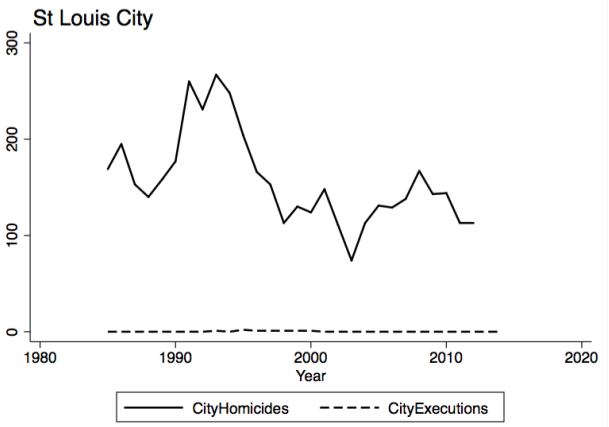
[153] Data from: Homicide-victims-1950-2011_6.3 and BJSTable16-2013 (c14_homicidenational)

Figure 14.7 St. Louis County v. St. Louis City: Homicides and Executions

14.7a St. Louis County



14.7b St. Louis City



Note: Data was obtained from FBI Uniform Crime Reporting Statistics[154]

Figure 14.7 shows the comparison of executions and homicides in St. Louis County (fips code: 29189) and St. Louis City (fips code: 29510). St Louis County has had a total of 354 homicides and 23 executions, whereas St. Louis City has had an alarming 4,412 homicides, but only 8 executions. This case study clearly shows that homicides are not always a strong predictor of the use of the death penalty at county level.

[154] http://www.ucrdatatool.gov/Search/Crime/Local/RunCrimeTrendsInOneVar.cfm

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17

Has The Modern Death Penalty Solved the Constitutional Issues Rejected by the US Supreme Court in *Furman*?

"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." Writing for the court, Justice Potter Stewart issued this decree in her scathing indictment of capital punishment in the United States during the 1972 Supreme Court Case *Furman v Georgia*. The 5-4 vote in *Furman v Georgia* created a de facto moratorium on the death penalty, due to the capricious and discriminatory manner in which capital punishment had been applied. As Justice Douglas put it, "Application of the death penalty is unequal: most of those executed were poor, young, and ignorant."

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. And in the four years following the courts 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. Though the

moratorium was later lifted with *Gregg v Georgia*, the question still remains: How much has 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. By providing data on these factors both pre-*Furman* and post-*Furman* a comparison of how the death penalty has changed, if at all, becomes a viable option

Gender

A specific disparity cited by Justice Thurgood Marshall in his concurring opinion in *Furman v Georgia* is the difference in how capital punishment is applied to the genders. "There is also overwhelming evidence that the death penalty is employed against men and not women. … 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 in his explanation of why he ruled that the death penalty was fundamentally unconstitutional. 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.

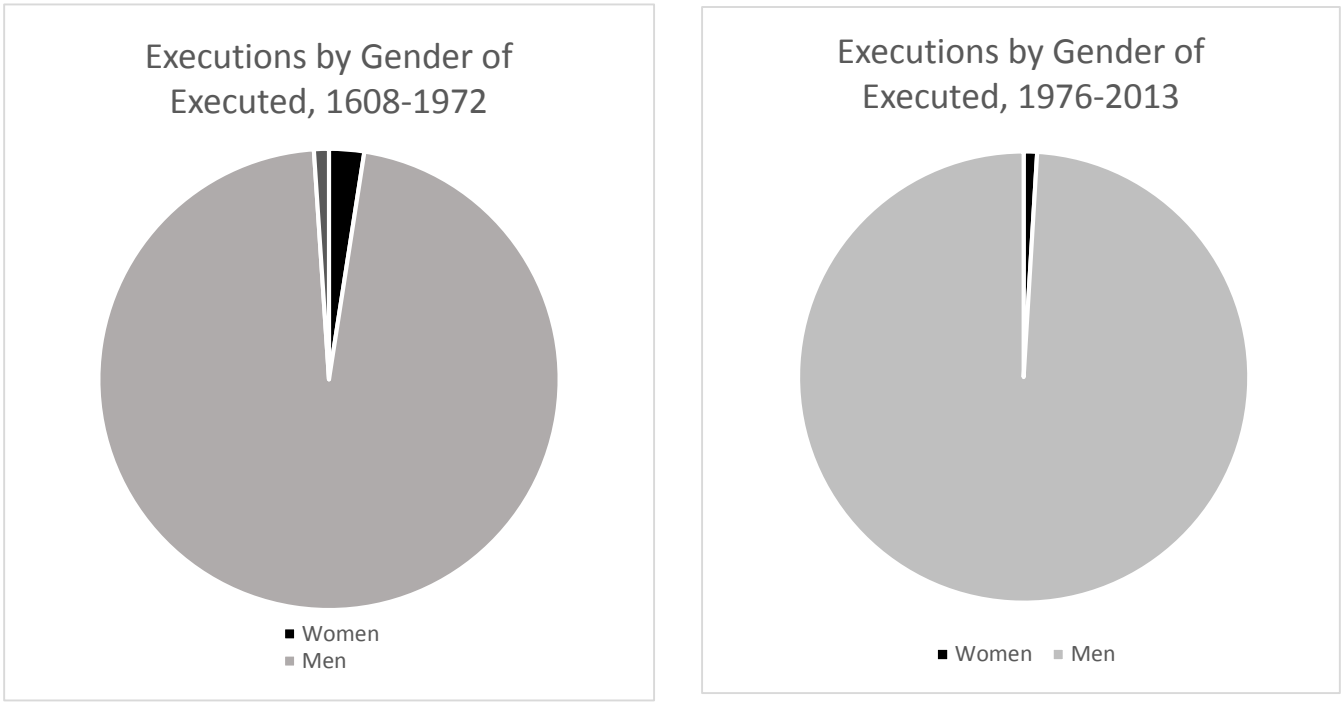
Table 15.1 Executions by Gender.

Gender	1608-1972	Percentages	1976-2013	Percentages
Men	13,981	96.57%	1,345	99.04%
Women	356	2.46%	13	0.96%
Unknown	152	1.05%	0	0.00%
Total	14,478	100.00%	1,358	100.00%

Note:

Table 15.1, listed above, enumerates the breakdown in executions by gender both before and after *Furman v Georgia.* Prior to 1972, Women constitute nearly 2.5% of all executions, 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, indicating they are disproportionately executed in the post *Furman v Georgia* application of the Death Penalty. Figure 15.2 presents a visual representation of this data – showing clearly how Women have decreased in proportionality post-*Furman v Georgia.*

Figure 15.2 – Executions by Gender Pre and Post *Furman*



Here the conclusions are quite clear: the amount of women executed in the post *Furman v Georgia* application of the death penalty has only decreased – falling in market share from 2.46% to 0.96%. 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 only become *more* disproportionate.

Race

"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 *Furman v Georgia.* 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 the racially discriminatory effects it had in practice. 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.

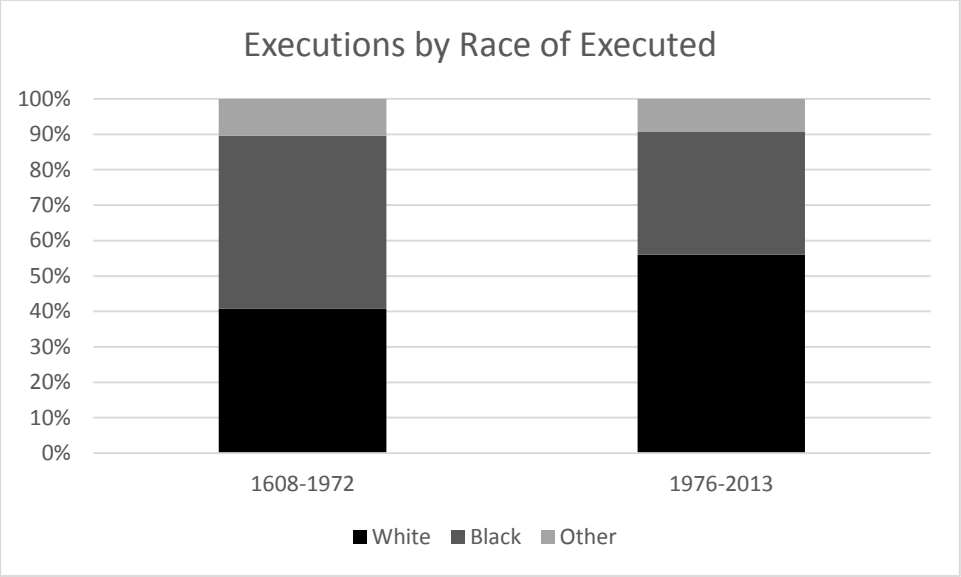
Table 15.3 Executions by Race.

Race	1608-1972	Percentage	1976-2013	Percentage
White	5,902	40.73%	696	55.99%
Black	7,094	48.89%	432	34.75%
Other	1,503	11.38%	115	9.25%
Total	14,489	100.00%	1,243	100.00%

Note:

Table 15.3, seen above, outlines the aggregate amount and frequencies of executions by race both pre and post *Furman v Georgia.* Prior to *Furman v Georgia*, Blacks made up a plurality of all those executed – constituting a market share of 48.89%. However in the post *Furman v Georgia* application of the death penalty, Whites have increased from only 40.73% of all executions, to 55.99% of all executions. On the other hand Blacks have decreased in representation – falling by 14% post *Furman v Georgia* to constitute only 34.75% of all executions. Figure 15.4, below, visually represents this data in a bar-chart.

Figure 15.4 Executions by Race



However, explaining the nature of this decrease in racial bias is multifaceted and complex. While the decrease in market share of executions for Blacks indicates 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* not the offender. 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. 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 at a death sentence and execution.

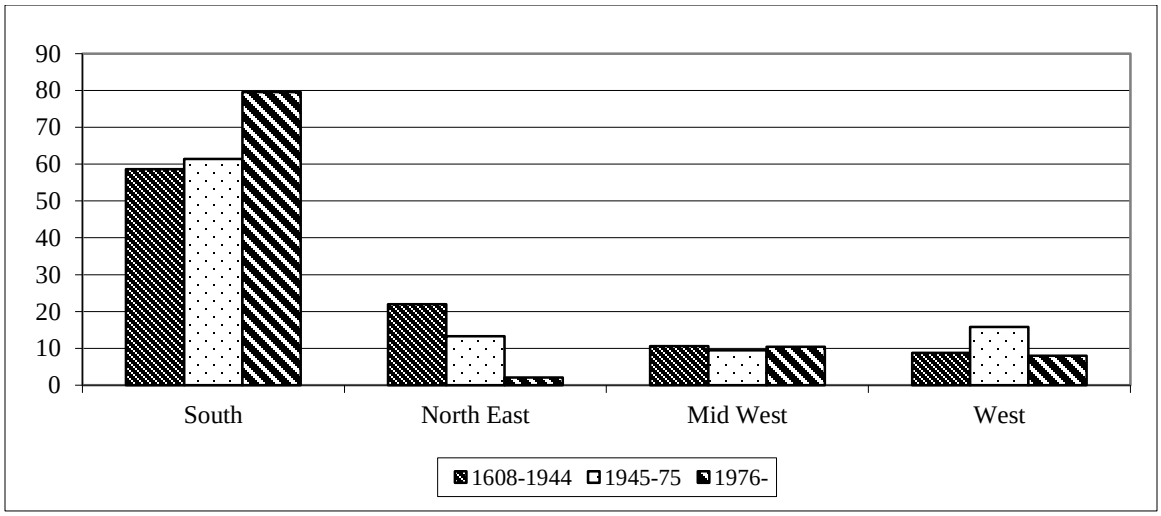
The data on race of victims and executions can, and has, been presented to quantify these claims on the significance of the race of the victim. However, this data is only available for the Post *Furman v Georgia* application of the Death Penalty. Comprehensive data on the race of victims for all executions prior to 1972 is not available and therefore can not be presented for comparative purposes. It is still worth noting this trend to help explain and better understand this disparity in racial market share for executions.

Geography

In *Furman v Georgia* Justice Stephen Douglas also wrote that, "A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily." 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 central 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 then others. This variance creates a level of 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 instead of Orange County, North Carolina.

Figure 15.5, seen below, shows the percentage of all executions broken down both by region – South, Northeast, Midwest and West - and stratified into three different eras: 1608-1944, 1945-1975, and 1976 until the present. The first two 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.

Figure 15.5 Executions By Region – Pre and Post *Furman v Georgia*



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 2 and 15 percent of all executions. The South has increased in market from 58.67% of all executions in Pre-*Furman* v *Georgia* era, to 79.56% of all executions in the Post-*Furman v Georgia* era. This increase in market share, coupled with a minimal market share for the Northeast, and around

10% market share for both the Midwest and West indicates that the arbitrariness of the death penalty, in a geographic context, has only *increased* in the Post-*Furman v Georgia* era.

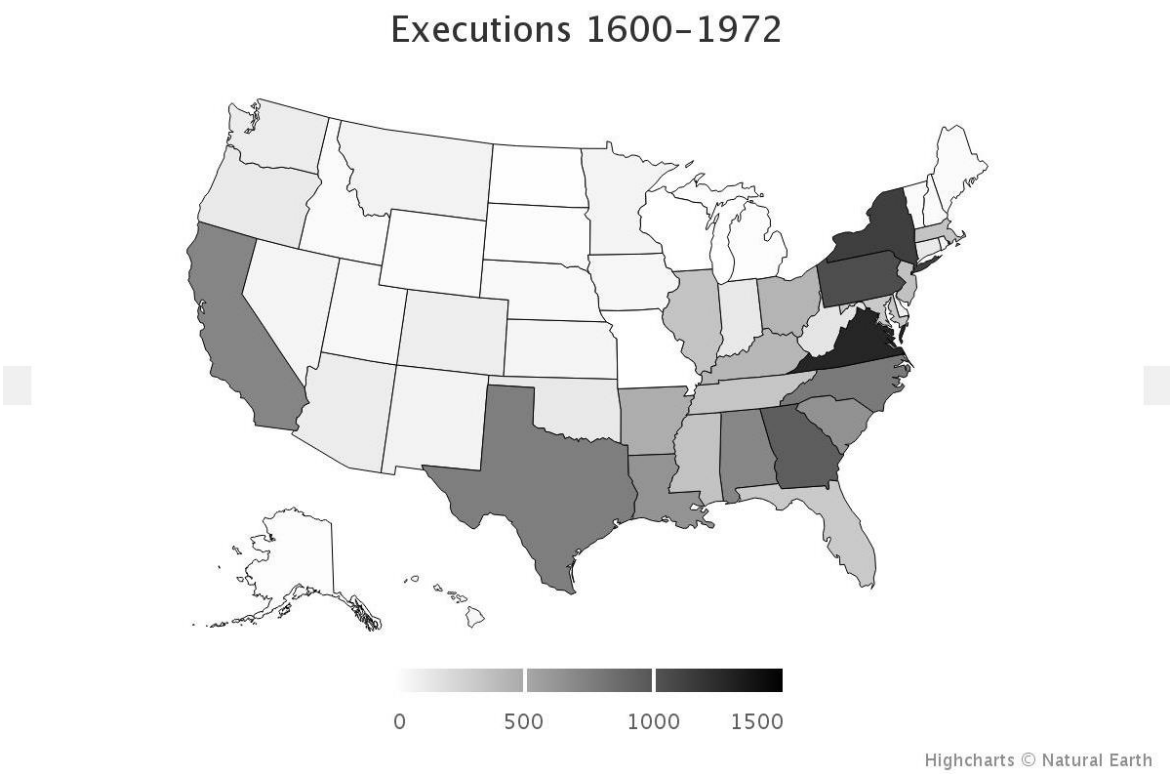
Table 15.6 High Execution States – Pre and Post *Furman v Georgia*

State	1608-1972	Percentages	State	1976-2013	Percentages
Virginia	1,277	10.10%	Texas	530	37.37%
New York	1,130	8.96%	Oklahoma	112	7.84%
Pennsylvania	1,040	8.25%	Virginia	111	7.83%
Georgia	950	7.53%	Florida	90	6.34%
North Carolina	784	6.21%	Missouri	86	6.06%
Texas	755	5.98%	Georgia	58	4.09%

Table 15.6, seen above, lists the six highest frequency execution states in the Pre and Post *Furman v Georgia* era while also showing what percentage of *all* executions each state makes up. Prior to *Furman v Georgia*, the six highest execution states were Virginia, New York, Pennsylvania, Georgia, North Carolina and Texas. Together, these six states constitute nearly half of all executions prior to 1972, making up 47.03% of all executions. Post *Furman v Georgia,* three of the same states – Texas, Virginia and Georgia – remained high frequency executors. These three states, along with Oklahoma, Florida and Missouri make up the six highest execution states post *Furman v Georgia.* But in the post *Furman v Georgia* application of the death penalty the six most frequent execution states constitute 69.53% of all executions – a 22% increase in market share from the pre *Furman v Georgia* era. This increase in market share for the six most frequent execution states, especially when viewed in conjunction with figure 15.5, is a strong indicator that the arbitrariness of the death penalty has only increased post *Furman v Georgia.* The South does not make up 80% of all homicides, nor do the six most frequent execution states in the United States make up 70% of all homicides, yet South makes up 80% of all executions, while the six most frequent executors in the United States account for

nearly 70% of all executions. This disproportionate representation is a strong indicator that the death penalty is applied arbitrarily across the states.

Map 15.8 – Executions Heat Map Pre *Furman v Georgia*



Map 15.9 – Executions Heat Map Post *Furman v Georgia*

(include map here of Executions post 1972)

Maps 15.8 and 15.9, included above, provide heat maps for executions in the pre and post *Furman v Georgia* era. As Map 15.8 indicates, the South and part of the Northeast make up nearly all executions in the pre *Furman v Georgia* era. This disproportionate dispersal of executions across the nation is only heightened in Map 15.9, which shows that in the post *Furman v Georgia* era, the South makes up an even more sizable market share of all executions. This geographical arbitrariness has only increased since *Furman v Georgia* – failing to address the concerns that Justice Douglas raised some forty years ago.