

THE DEATH OF DEATH ROW CLEMENCY AND THE EVOLVING POLITICS OF UNEQUAL GRACE

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ABSTRACT

While America's appetite for capital punishment continues to wane over time, clemency for death row inmates is all but extinct. Moreover, what little clemency activity that persists continues to distribute unevenly across gender, racial and ethnic groups, geography, governors' political affiliation, and over time. Insofar as courts appear extremely reluctant to

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review—let alone interfere with—clemency activity, little, if any, formal legal recourse exists. Results from this study of clemency activity on state death rows (1973–2010) suggest that potential problems arise, however, to the extent that our criminal justice system relies on clemency to function as a coherent extrajudicial check.

I. INTRODUCTION

Opining that “the concept of mercy went out of fashion” in the United States by the 1980s, the *New York Times* characterized the clemency system as “in a state of collapse.”¹ Moreover, in April 2014, the U.S. Department of Justice articulated a “New Clemency Initiative” that seeks, in part, to prioritize certain clemency applications from federal inmates.² Described as “the most sweeping reinvigoration of the clemency power in nearly four decades,” it is also widely understood that the Justice Department’s clemency initiative seeks to address a perception that the application of mandatory minimum sentencing to low-level drug offenders has generated unduly harsh sentences.³

Amid the increasingly heated normative debates about clemency activity in general, that clemency activity is virtually nonexistent as a descriptive matter aptly characterizes the death penalty context. Among those convicted of capital crimes and sentenced to death, clemency’s application across states trends toward extinction. Moreover, what little clemency activity persists distributes unevenly across death row inmates. While much is known about capital punishment, clemency activity for death row inmates, by contrast, is far less understood, as are reasons for its increasingly diminished and persistently uneven use. Anecdotes, typically involving high-profile examples of factually-innocent death row inmates, and political campaign ads risk skewing public perceptions of clemency.⁴ Conventional wisdom typically emphasizes clemency’s uneven distribution across inmates partly owing to political factors.⁵ Insofar as the Supreme

1. See Editorial, *Mercy in the Justice System*, N.Y. TIMES, Feb. 10, 2014, at A20.

2. Press Release, U.S. Dep’t of Justice, Announcing New Clemency Initiative, Deputy Att’y Gen. James M. Cole Details Broad New Criteria for Applicants (Apr. 23, 2014), available at <http://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new>.

3. See, e.g., Editorial, *Reviving Clemency, Serving Justice*, N.Y. TIMES, Apr. 24, 2014, at A30.

4. See, e.g., David Grann, *Trial By Fire: Did Texas Execute an Innocent Man?*, THE NEW YORKER, Sept. 7, 2009, at 42 (arguing that Texas executed a factually-innocent inmate); Mimi Hall, *Record Number Seek Clemency: Obama Grants No Mercy Yet in 2,361 New Requests*, USA TODAY, Apr. 28, 2010, at A1 (describing the political dimensions to clemency grants).

5. See, e.g., Chad Flanders, *Pardons and the Theory of the “Second-Best”*, 65 FLA. L. REV. 1559 (2013) (describing claims that Mississippi Governor Haley Barbour politicized his use of clemency power).

Court acknowledges that our criminal justice system relies upon clemency, an accurate understanding of how clemency operates and its distribution are critical, particularly for death row inmates.⁶

A more accurate understanding of clemency in the death row context requires greater attention to data. Results from this study of almost four decades of death row clemency data underscore three main findings that provide uneven support for prevailing wisdom. First, if capital punishment in the United States can be fairly characterized as being in a slow, steady decline over the past decade, individualized clemency for death row inmates, while never particularly robust, has functionally disappeared. Scholars note that historically, “executive clemency was dispensed regularly in capital cases in order to help offset harsh laws that automatically required punishment by death on conviction for [certain] crimes.”⁷ More recently, or since 1977, the use of clemency in the death row context has never been particularly significant.⁸ During the modern death penalty era, occasional spikes in death row clemency activity are almost exclusively explained by the rare and well-publicized “blanket” or “mass” commutations or by post-conviction evidence, typically DNA evidence, which reveals actual innocence.⁹ Moreover, that the diminishing amount of clemency activity distributes unevenly across such factors as gender, race, and geography raises additional, troubling questions.

Second, the “politics” of clemency for death row inmates continue to evolve. Writing in 2000, Acker and Lanier ascribe the precipitous plummeting of clemency in capital cases partly to the “widespread perception” that “a governor’s decision to commute a death sentence is tantamount to committing political suicide.”¹⁰ Despite the highly-charged politics that nest clemency decisions, particularly those involving death row inmates, political variables’ salience was mixed. On the one hand, political party affiliation mattered as Democratic governors were more likely than Republicans to grant clemency to death row inmates. On the other hand, and notwithstanding notable political campaign ads featuring

6. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (“Executive clemency has provided the ‘fail safe’ in our criminal justice system.”).

7. James R. Acker & Charles S. Lanier, *May God—Or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 211 (2000); see KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 17–18 (1989); Michael A. G. Korengold et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 350 (1996); Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889, 895–96 & n.27 (1981).

8. For data on clemencies, see *infra* Figure 3.

9. As discussed in Part III, *infra*, this study distinguishes “pure” (or individualized) clemency decisions from “blanket” or “mass” (or non-individualized) clemency decisions.

10. Acker & Lanier, *supra* note 7, at 210–11 & nn.53–55.

clemency issues, presidential or gubernatorial election year politics did not systematically influence clemency decisions.

Third, how states structured clemency decision-making authority did not systematically inform clemency decision outcomes. That is, clemency decision outcomes in states that place clemency authority in administrative boards did not materially differ from states where governors possess sole clemency authority. While how a state structured clemency authority did not matter, however, geography proved critical. Death row inmates in southern states were far less likely than their northern counterparts to receive favorable clemency decisions.

Overall, these findings provide mixed support for various “conventional wisdoms” regarding clemency in the death penalty context and cast uneasy light on the use of clemency for defendants facing execution. In so doing, and to the extent that our criminal justice system in general, and the death penalty context in particular, rely upon a functioning and coherent administration of clemency, these findings provide supplemental support for the broader critique that the administration of capital punishment is both arbitrary and inconsistent.¹¹

Part II briefly reviews the relevant literature, emphasizing the empirical assessments of clemency in the death row setting. The data and empirical strategy are described in Part III. Part IV discusses descriptive results. Part V considers whether the descriptive findings persist through regression analyses and explores the results’ broader implications. Part VI concludes and suggests possible extensions to this research line.

II. LITERATURE REVIEW

Because of its legal, social, and moral implications and ramifications, the death penalty continues to attract considerable attention from judges and scholars. On the judicial front, recent Supreme Court decisions

11. See *Furman v. Georgia*, 408 U.S. 238, 248–50 & n.11 (1972) (Douglas, J., concurring) (noting the arbitrary and discriminatory application of the death penalty); JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995*, at i–iv (2000) (arguing that error rates in capital cases undermine the death penalty’s effectiveness); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1658 n.61, 1660 n.69, 1742–45 (1998) (arguing that the death penalty is biased); Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1, 2 (2001) (arguing that the death penalty is applied in a discriminatory manner and risks executing innocents); Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996) (arguing that the death penalty is prone to error); Samuel R. Gross, *Still Unfair, Still Arbitrary—But Do We Care?*, 26 OHIO N.U. L. REV. 517 (2000) (arguing that the death penalty is unevenly applied); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991) (arguing that restraints on state imposition of death penalty are weakening).

evidence the judiciary's increased wariness with the death penalty. Since the turn of the twenty-first century, the Court has prohibited executions of the mentally retarded,¹² individuals who were under eighteen when they committed their capital offense,¹³ and those convicted of non-homicidal rape.¹⁴ Any increased wariness aside, however, as recently as 2008 the Court has also made clear its position that capital punishment is not unconstitutional.¹⁵

Within the academic community, death penalty supporters are “few and far between.”¹⁶ Perhaps not surprisingly, the overwhelming weight of scholarship tilts strongly against capital punishment and its application.¹⁷ A 2005 *Stanford Law Review* symposium illustrates. The symposium includes a paper by Professor Cass Sunstein and Adrian Vermeule that muses about the costs to governments for *not* meting out the death penalty.¹⁸ To be clear, the Sunstein and Vermeule paper falls far short of a clear defense of the death penalty. Nonetheless, the paper managed to elicit “two ferociously strong rebuttals by prominent professors representing the nearly unanimous academic consensus that the death penalty is both immoral (Carol Steiker) and inefficient (John Donohue).”¹⁹

Notwithstanding the significant—and fervent—public, legal, and academic attention focusing on the death penalty, comparatively less scholarly attention focuses on clemency. The existing scholarly literature on clemency in the death row context is predominately qualitative, as only a small (though growing) handful of studies empirically explores factors influencing clemency for death row inmates.²⁰

12. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

13. See *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

14. See *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008); *Coker v. Georgia*, 433 U.S. 584 (1977).

15. See *Baze v. Rees*, 553 U.S. 35, 47 (2008) (“We begin with the principle, settled by *Gregg*, that capital punishment is constitutional.”); *id.* at 63 (Alito, J., concurring) (“[W]e proceed on the assumption that the death penalty is constitutional.”); *id.* at 87 (Stevens, J., concurring) (“This Court has held that the death penalty is constitutional.”).

16. Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 *NEW CRIM. L. REV.* 595, 596 (2013).

17. Indeed, few aspects of the death penalty escape scholarly attention, including empirical studies of a death row inmate's final meal. See, e.g., Kevin M. Kniffin & Brian Wansink, *Death Row Confessions and the Last Meal Test of Innocence*, 3 *LAWS* 1 (2014) (arguing that aspects of a defendant's last meal speak to the defendant's self-perceptions of factual innocence).

18. See Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 *STAN. L. REV.* 703 (2005); see also Cass R. Sunstein & Adrian Vermeule, *Detering Murder: A Reply*, 58 *STAN. L. REV.* 847 (2005).

19. See Flanders, *supra* note 16, at 596; see also Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 *STAN. L. REV.* 751 (2005); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 *STAN. L. REV.* 791 (2005).

20. Leading studies include William Alex Pridemore, *An Empirical Examination of Commutations and Executions in Post-Furman Capital Cases*, 17 *JUST. Q.* 159 (2000) (using data from

Results from past empirical studies of clemency activity in the death row context consistently point to a few factors that correlate with clemency decisions and a few other factors that benefit from mixed support. For example, while the small number of women on death row reduces statistical power, what is consistently clear from past research is that women benefit from clemency at rates that far exceed those of their male death row counterparts.²¹ Geography's salience is equally clear from past research. Specifically, clemency for death row inmates is less likely in southern states.²² Evidence of a racial effect is mixed, however. While some studies found that inmate race correlated with clemency decisions, other studies did not.²³

While most of the prior empirical studies rely on a common data set, all observe different time frames and many vary, sometimes subtly, in terms of variable coding protocols. In addition, the most recent empirical study employing regression analyses only includes data gathered by the U.S. Justice Department's Bureau of Justice Statistics (BJS) through 2005.²⁴ Since 2005, however, such factors as the influence of the Innocence Project, for example, have undoubtedly informed clemency decisions. Moreover, since 2005 the Supreme Court has restricted further those eligible for the death penalty, and additional states have formally abolished the death penalty.²⁵ Given the acceleration of changes in the death penalty

1974 to 1995); Laura M. Argys & H. Naci Mocan, *Who Shall Live and Who Shall Die? An Analysis of Prisoners on Death Row in the United States*, 33 J. LEGAL STUD. 255 (2004) (using data from 1977 to 1997); Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239 (2003) [hereinafter Heise, *Mercy*] (using data from 1973 to 1999); Jeffrey D. Kubik & John R. Moran, *Lethal Elections: Gubernatorial Politics and the Timing of Executions*, 46 J.L. & ECON. 1 (2003) (using data from 1972 to 2000); John Kraemer, *An Empirical Examination of the Factors Associated with the Commutation of State Death Row Prisoners' Sentences Between 1986 and 2005*, 45 AM. CRIM. L. REV. 1389 (2008) (using data from 1986 to 2005); and Matthew C. Heise, *The Geography of Mercy: An Empirical Analysis of Clemency for Death Row Inmates*, 39 T. MARSHALL L. REV. 3 (2013) [hereinafter Heise, *Geography*] (using data from 1973 to 2010).

21. For a summary, see Kraemer, *supra* note 20, at 1393. See also, e.g., Argys & Mocan, *supra* note 20, at 272, 277 tbl.4; Heise, *Mercy*, *supra* note 20, at 274 tbl.3.

22. See Heise, *Mercy*, *supra* note 20, at 274 tbl.3; Kraemer, *supra* note 20, at 1414. See generally Heise, *Geography*, *supra* note 20.

23. Compare Argys & Mocan, *supra* note 20, at 275–76 tbl.5 (finding a racial effect), and Kraemer, *supra* note 20, at 1410 (same), with Heise, *Mercy*, *supra* note 20, at 281–82 (no racial effect), and Pridemore, *supra* note 20, at 171 (same).

24. While Matthew Heise's 2013 paper uses the most current BJS data set (1973–2010), his paper focuses on descriptive analyses and statistical tools. See Heise, *Geography*, *supra* note 20.

25. For post-2005 Supreme Court restrictions to executions, see *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (prohibiting execution for those convicted of non-homicidal rape). Between 2005 and 2010, three states formally abolished the death penalty either legislatively or judicially. See *People v. Taylor*, 878 N.E.2d 969 (N.Y. 2007) (vacating death sentence); *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004) (declaring New York's death penalty jury instructions unconstitutional); Amanda Marzullo, *Last Man Out: People v. Taylor and Its Precursors in New York Death Penalty Jurisprudence*, 11 U. PA. J. L. & SOC. CHANGE 271, 271 (2007–08) (noting "the end of New York's most recent experiment with capital punishment"); Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES, Dec. 17, 2007, available at <http://www.nytimes.com/2007/12/17/nyregion/17cnd->

context, the availability of an additional five years of clemency data warrants a fresh look at the most recent BJS death penalty clemency data set.

III. DATA & METHODOLOGY

The dominant data source for empirical studies of clemency in the death row setting includes data gathered by the BJS.²⁶ BJS gathers data on every individual who is or has been under a sentence of death in the United States since 1973.²⁷ Available data are current through 2010, inclusive, and contain 9,058 observations.²⁸ The BJS data come from the prisons incident to the National Prisoner Statistics Program.²⁹ These data contain an array of background characteristics on all those sentenced to death as well as information about how defendants were removed from death row.³⁰

I excluded from analyses the small number of defendants who received a death sentence in the District of Columbia (N=3) and from federal courts (N=73). These exclusions yield 8,982 observations in the BJS data.³¹ Finally, for reasons explained more fully below, the (168) defendants removed from death row due to a governor who exercised clemency authority in an indiscriminate or blanket manner were removed from many of the substantive analyses.

To address censoring and to focus only on defendants who have been removed from death row, those defendants not removed by December 31, 2010 (N=3,158) were excluded from most substantive analyses. The remaining defendants (5,397), and the focus of this study, were removed

jersey.html (New Jersey, 2007); Press Release, Death Penalty Information Center, Death Penalty Abolished in New Mexico—Governor Says Repeal Will Make the State Safer (Mar. 19, 2009), available at <http://www.deathpenaltyinfo.org/death-penalty-abolished-new-mexico-governor-says-repeal-will-make-state-safer> (New Mexico, 2009).

26. Studies using the BJS data include Pridemore, *supra* note 20; Kraemer, *supra* note 20; Argys & Mocan, *supra* note 20; Heise, *Mercy*, *supra* note 20; and Heise, *Geography*, *supra* note 20. Kubik & Moran, *supra* note 20, uses data from BJS and the Death Penalty Information Center. For a detailed description of the BJS data, see *infra* Part III.

27. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT IN THE UNITED STATES, 1973–2010 (Inter-University Consortium for Political and Social Research No. 34366) [hereinafter BJS].

28. In a small number of circumstances (9.9%), the same defendant may generate more than one observation in the BJS data set. This could happen if an individual was sentenced to death, removed from death row, and then reentered after a related legal proceeding or, perhaps, from a subsequent conviction and death sentence.

29. See BJS, *supra* note 27.

30. Regrettably, the data set does not include information on two salient aspects: victim race and whether the murder involved “intimates” or took place within the domestic sphere. The former point limits the analysis on the potential influence of race, the latter of gender.

31. It is important to note that the final disposition of a significant number of death row inmates is not yet known. On the final date of the reporting period covered by these data (12/31/2010), 3,158 defendants remain on death row. See BJS, *supra* note 27.

from death row for one of three substantive reasons.³² The removal reasons include state execution (N=1,231), clemency grant (N=394), and removal due to subsequent legal procedures, including successful appeals (N=3,772).

Further investigation into the shrouded world of clemency in the death row context reveals complexity that requires further data adjustments. Much of the complexity focuses on blanket, indiscriminate clemency grants that expressly did not account for specific defendant circumstances or involve a careful, individualized review of a defendant.³³ For example, then-Illinois Governor George Ryan removed all of Illinois's death row inmates in December 2003 (N=155).³⁴ Governor Ryan specifically noted his concerns about the possibility of error and the state execution of innocents as justification for his blanket exercise of executive clemency.³⁵ Similar smaller-scale events took place in New Jersey and New Mexico where then-Governors Corzine and Anaya, respectively, removed all defendants from death row (NJ, N=8; NM, N=5).³⁶ In contrast to Governor Ryan's concerns about possible false convictions in Illinois, New Mexico Governor Anaya, a Catholic, noted his personal opposition to the death penalty for his executive decision.³⁷ Figure 3 charts clemency trends over time and vividly illustrates the impact of (in one spectacular instance, sizable) indiscriminate clemency grants. A separate trend line in Figure 3 illustrates clemency activity after excluding the small handful of examples of indiscriminate clemency grants. Removing those clemency grants awarded in a reflexive and indiscriminate manner (N=168) leaves a total of 226 "pure" clemency grants.³⁸

32. Defendants "removed" from death row due to death *other* than by state execution, clemency, or subsequent legal reversal were excluded from most analyses. Ironically, many death row inmates die prior to any possible execution. See DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 11 (2010) (citing "natural causes" as the leading cause of death for death row inmates).

33. For a discussion of mass clemencies, see generally AUSTIN SARAT, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* (2009) and Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 *STAN. L. REV.* 1307 (2004).

34. FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* 40 (2008). While Baumgartner *et al.* note that Illinois Governor Ryan removed 167 defendants from death row, twelve of those removals arguably did not involve a reflexive, "blanket" clemency grant. In the interests of prudence and caution throughout this Article I followed the data set's description of Governor Ryan's clemency activity in 2003.

35. *See id.* at 67. For a discussion of "mass" commutations, see, for example, SARAT, *supra* note 33.

36. *See Heise, Geography, supra* note 20, at 10.

37. *Id.*; see James Coates, *Lame-Duck Governor Hit on Commutations*, *CHI. TRIB.*, Dec. 4, 1986, at 24; Colman McCarthy, *Toney Anaya's Enlightened Use of Power*, *WASH. POST*, Dec. 14, 1986, at G2.

38. *See BJS, supra* note 27. Other scholars who likewise exclude "mass" or "blanket" clemencies include Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 *MICH. L. REV.* 1 (2014) and Kraemer, *supra* note 20, at 1399.

Insofar as this study focuses on clemency outcomes in the death penalty context, three important data assumptions and limitations warrant note. First, this study assumes that the quality of clemency petitions was uniform across petitioners and over the time period of this study. While I am confident that prior to putting an inmate to death the state at least considered whether clemency was appropriate, I am less confident about the assumption that the quality of clemency petitions was uniform across petitioners.³⁹ Unfortunately, data do not readily exist that permit a meaningful assessment of clemency petition quality.

A second, related limitation flows from this study's implicit assumption of general uniformity of the defendants' capital crimes. To be sure, capital crimes and their heinousness can vary, sometimes tremendously. And these variations may influence the outcome of a defendant's clemency petition. Aside from data on whether the defendant has prior felony convictions, these data do not include granular information about the precise nature of or circumstances surrounding the capital crime committed. Despite important variation among capital crimes, any such variation is not without important boundaries. This study's focus on defendants charged with and convicted of a capital crime, and sentenced to death for that crime, substantially limits the degree of variation of criminal conduct.

A third assumption involves the static nature of the states' clemency decision mechanisms during this study's time period. While state legislatures no doubt adjusted some aspects of their clemency mechanisms between 1973 and 2010, much of the activity focused on due process concerns raised by the Supreme Court's *Furman* decision.⁴⁰ Moreover, provisions for clemency are moored in many state constitutions,⁴¹ thereby

39. To some degree, the quality of a defendant's clemency petition is frequently a function of the quality of the defendant's legal representation. With respect to the latter, it is widely acknowledged that the quality of legal representation varies and that, in some instances, this variation is extraordinary. See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 800–03 (1995) (noting that decisions in capital cases increasingly have become campaign fodder in both judicial and non-judicial elections).

40. One discernable period of time during which some states changed their clemency decision-making structures was the first half of the twentieth century, well before the time period of this study. For a discussion, see Elkan Abramowitz & David Paget, Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 141 (1964).

41. See ALA. CONST. amend. 38; ALA. CODE § 15-18-100 (2011); ARIZ. CONST. art. V, § 5; ARIZ. REV. STAT. ANN. §§ 31-443, 31-445 (2002); ARK. CONST. art. VI, § 18; ARK. CODE ANN. § 5-4-607 (2013); ARK. CODE ANN. § 16-93-204 (2006); CAL. CONST. art. V, § 8; CAL. GOV'T CODE § 12030(a) (West 2011); COLO. CONST. art. IV, § 7; COLO. REV. STAT. ANN. §§ 16-17-101 to -102 (West 2006); CONN. CONST. art. IV, § 13; CONN. GEN. STAT. ANN. § 54-103a (West 2009); DEL. CONST. art. VII, § 1; DEL. CODE ANN. tit. 29, § 2103 (2003); FLA. CONST. art. IV, § 8; FLA. STAT. ANN. § 940.01 (West 2006); GA. CONST. art. IV, § 2, para. 2; GA. CODE ANN. §§ 42-9-20, 42-9-42 (2014); IDAHO CONST. art. IV, § 7; IDAHO CODE ANN. § 67-804 (2014); IDAHO CODE ANN. § 20-240 (2004); ILL. CONST. art. V, § 12; 730 ILL. COMP. STAT. ANN. 5/3-3-13 (West 2007); IND. CONST. art. V, § 17;

dampening the likelihood of frequent tinkering. Of late, the most significant state-level activity involved states suspending executions pending reviews of relevant procedures and processes.⁴²

IV. INITIAL OBSERVATIONS

To better frame clemency outcomes in the death penalty context, clemency activity needs to be understood within the context of all possible outcomes for death row inmates. Descriptive data on death sentences, executions, legal reversals of death sentences, and successful clemency applications—and how they have evolved over time—are presented below.

A. *Death Sentences*

The United States grows increasingly ambivalent about the death penalty. In Figure 1, the left-hand axis (corresponding with the solid line) represents annual death sentences. From 1980 through 2000, the number of death sentences remained relatively stable and loosely tracked the number of murders in the United States (reflected by the dashed line and the right-

IND. CODE ANN. § 11-9-2-1 to -4 (West 2004); IND. CODE ANN. § 35-38-6-8 (West 2012); KAN. CONST. art. I, § 7; KAN. STAT. ANN. § 22-3701 (2007 & Supp. 2013); KY. CONST. § 77; LA. CONST. art. IV, § 5(E); LA. REV. STAT. ANN. § 15:572 (2012 & Supp. 2015); MD. CONST. art. II, § 20; MD. CODE ANN., CORR. SERVS. § 7-601 (LexisNexis 2008 & Supp. 2014); MISS. CONST. art. V, § 124; MISS. CODE ANN. § 47-5-115 (2011); MO. CONST. art. IV, § 7; MO. ANN. STAT. § 552.070 (West 2002); MO. ANN. STAT. § 217.220 (West 2013); MONT. CONST. art. VI, § 12; MONT. CODE ANN. §§ 46-23-301 to -316 (2014); NEB. CONST. art. IV, § 13; NEB. REV. STAT. §§ 83-1,127 to -1,132 (1999); NEV. CONST. art. V, § 13; NEV. REV. STAT. ANN. § 213.080 (LexisNexis 2013); N.H. CONST. pt. 2, art. 52; N.H. REV. STAT. ANN. § 4:23 (2014); N.J. CONST. art. V, § 2, para. 1; N.J. STAT. ANN. §§ 2A:167-4 to -12 (West 2011); N.M. CONST. art. V, § 6; N.M. STAT. ANN. § 31-21-17 (LexisNexis 2000); N.Y. CONST. art. IV, § 4; N.Y. EXEC. LAW §§ 15–19 (McKinney 2010); N.C. CONST. art. III, § 5(6); N.C. GEN. STAT. §§ 147-23 to -25 (2013); OHIO CONST. art. III, § 11; OHIO REV. CODE ANN. §§ 2967.01–2967.12 (LexisNexis 2006 & Supp. 2014); OKLA. CONST. art. VI, § 10; OKLA. STAT. ANN. tit. 21, § 701.11a (West 2002); OR. CONST. art. V, § 14; OR. REV. STAT. §§ 144.649–144.670 (2003); PA. CONST. art. IV, § 9; S.C. CONST. art. IV, § 14; S.C. CODE ANN. §§ 24-21-910 to -1000 (2007 & Supp. 2014); S.D. CONST. art. IV, § 3; S.D. CODIFIED LAWS §§ 23A-27A-20 to -21, 24-14-1 (1998); TENN. CONST. art. III, § 6; TENN. CODE ANN. §§ 40-27-101 to -109 (2012 & Supp. 2014); TEX. CONST. art. IV, § 11; TEX. CODE CRIM. PROC. ANN. art. 48.01 (West 2006 & Supp. 2014); UTAH CONST. art. VII, § 12; UTAH CODE ANN. § 77-27-5.5 (West 2012); VA. CONST. art. V, § 12; VA. CODE ANN. § 53.1-230 (2013); WASH. CONST. art. III, § 9; WASH. REV. CODE ANN. § 10.01.120 (West 2002 & Supp. 2015); WYO. CONST. art. IV, § 5; WYO. STAT. ANN. § 7-13-801 (2013). In addition to variation in how states structure clemency decision-making authority, variation also exists in each state's clemency procedures. For a summary, see Stephen E. Silverman, Note, *There Is Nothing Certain Like Death in Texas: State Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates' Last Appeals*, 37 ARIZ. L. REV. 375, 389–95 (1995) (surveying state clemency practices).

42. See, e.g., Francis X. Clines, *Death Penalty Is Suspended in Maryland*, N.Y. TIMES, May 10, 2002, at A20. Subsequently, and after the time period of this study, the state of Maryland abolished the death penalty. See Michael Dresser, *O'Malley Signs Death Penalty Repeal*, BALT. SUN, May 2, 2013, at 2.

hand axis). After 2001, however, the number of death sentences dropped steadily and relative to what the number of murders would imply.

Comparing death sentence and murder trends is important for at least two reasons. While not a perfect proxy during the entire period of this study (1977–2010), death sentences were typically reserved for those convicted of murder.⁴³ Thus, one would expect murder and death sentence trends over time to track one another. My argument that the nation's appetite for imposing death sentences has declined must account for changes in the number of murders. Figure 1 makes clear that the decline in death sentences after 2001 cannot properly be ascribed to a reduction in murders as the raw number of murders remained relatively flat from 1999 through 2010. Thus, Figure 1 provides indirect support for the argument that the nation's demand for death sentences declined at about the turn of the twenty-first century.

Many factors fueled the diminished appetite for death sentences, particularly Americans' growing ambivalence towards capital punishment, the financial costs associated with seeking a death sentence, and perhaps most importantly, the prospect of error and false convictions. These evolving attitudes and trends have contributed to a net reduction in death sentences since 1977 and a distinct reduction since 1998.

Americans' ambivalence with the death penalty has increased over time. While Gallup Poll surveys continue to illustrate that a majority of Americans support the death penalty in principle, popular support in 2013 (60%) fell to a fifty-two-year low.⁴⁴ An array of factors fuel increased ambivalence. The United States finds itself among a small and diminishing number of western industrialized nations that have not abolished capital punishment.⁴⁵ Indeed, this very point contributes to discomfort in diplomatic and international law contexts.⁴⁶ As well, the availability of life without the possibility of parole as a sentencing option, available in all fifty states, blunts those who worry about inmates' future dangerousness.⁴⁷

Increasingly, law and economic arguments enter capital punishment debates. The exceptionally high financial costs associated with capital trials

43. See BJS, *supra* note 27.

44. *Death Penalty*, GALLUP.COM, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Jan. 6, 2014).

45. See, e.g., Op-Ed., *The Rights and Wrongs*, ECONOMIST, May 12, 2001, at 11 (noting that, by administering the death penalty, the United States places itself "alongside countries such as Congo, Iran and China").

46. See generally William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After Graham v. Florida*, 71 OHIO ST. L.J. 1109 (2010) (discussing the life without parole sentencing option).

47. See John H. Blume & Sheri Lynn Johnson, *Unholy Parallels Between McClesky v. Kemp and Plessy v. Ferguson: Why McClesky (Still) Matters*, 10 OHIO ST. J. CRIM. L. 37, 62 (2012).

further erode support for the death penalty in the United States. Scholars note that “[t]he high cost of administering the death penalty has become a prominent—perhaps the most prominent—issue in contemporary discussions about whether the [death] penalty should be limited or abolished.”⁴⁸ Driving the increased costs include mitigation experts, extended voir dire, protracted punishment-phase proceedings, automatic appeals, and the “inevitable ineffective assistance of counsel claims when the mitigation case fails.”⁴⁹ As a consequence, while capital punishment exists in a majority of states as a potential sentence for death-eligible crimes, prosecutors appear increasingly unlikely to seek the death penalty.⁵⁰

But perhaps nothing diminishes support for the death penalty more than human error and the potential for false convictions. Writing in 2012, Professors Blume and Johnson report that “more than one hundred and twenty-five persons sentenced to death in this country have subsequently been exonerated, and the risk of executing the innocent seems more real than it did in the past.”⁵¹ Analyzing a sub set (1973–2004) of the BJS data used in this study and supplemental data generated by the Death Penalty Information Center, Professor Samuel Gross et al. conservatively estimate that if death row inmates remained on death row indefinitely, “at least 4.1% would be exonerated.”⁵² Finally, the success of the Innocence Project in identifying—and defending—factually-innocent individuals sentenced to death certainly dampens Americans’ support for the death penalty.⁵³ Responding to the obvious and often visceral problems posed by the prospect—however small—of factually innocent defendants receiving death sentences and confronting the prospect of death, an increasing number of states have suspended executions pending reviews of relevant procedures and processes.⁵⁴

48. Carol S. Steiker & Jordan M. Steiker, *Costs and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 118 (2010); see also Justin F. Marceau & Hollis A. Whitson, *The Cost of Colorado’s Death Penalty*, 3 U. DENV. CRIM. L. REV. 145 (2013) (finding that in Colorado death penalty prosecutions are far costlier than prosecutions for life imprisonment without the possibility of parole).

49. Carol S. Steiker & Jordan M. Steiker, *Miller v. Alabama: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37, 46 (2013).

50. For data on death sentences, see Figure 1, *infra*. For a general discussion, see Steiker & Steiker, *supra* note 49, at 46 (“Prosecutors are increasingly willing to forego the possibility of a death sentence to avoid the extensive cost of a capital trial.”).

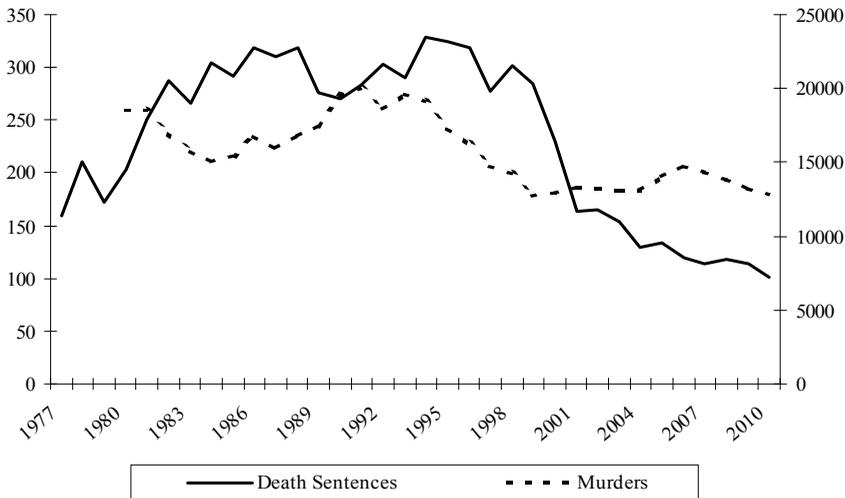
51. Blume & Johnson, *supra* note 47, at 62.

52. Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are on Death Row*, 111 PNAS, no. 20, 2014, at 7230 (arguing that the 4.1% estimate is a conservative estimate).

53. See generally THE INNOCENCE PROJECT, <http://www.innocenceproject.org/> (last visited Mar. 23, 2015). For one journalistic account of the execution of a potentially innocent person, see Grann, *supra* note 4.

54. See, e.g., Clines, *supra* note 42. Subsequently, and after the time period of this study, the state of Maryland abolished its death penalty. See Dresser, *supra* note 42.

Figure 1. The Imposition of the Death Penalty and Murders (1977–2010)



NOTE: Death sentences appear on left-hand axis; murders appear on right-hand axis.

SOURCES: Capital Punishment in the United States, 1973–2010 (2010) (death sentences); Federal Bureau of Investigation; Supplementary Homicide Reports 1980–2011 [machine-readable data files] (murders).

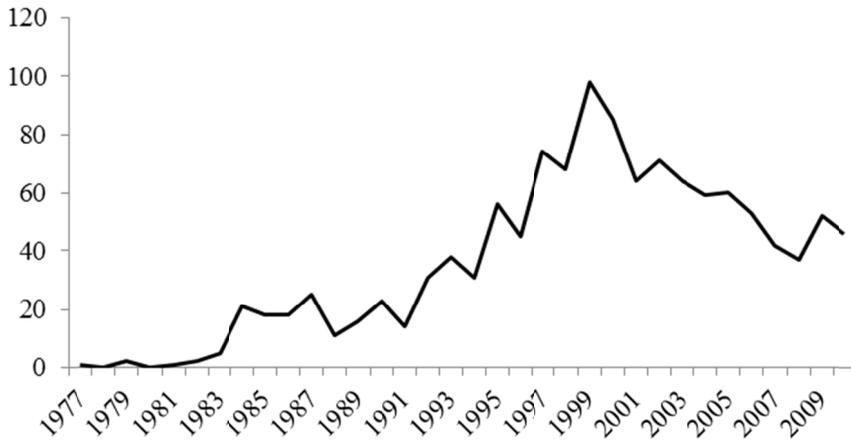
B. Executions

While the Supreme Court continues to narrow the range of defendants eligible for execution, the Court has also reaffirmed the proposition that capital punishment, when properly administered, does not offend the Constitution.⁵⁵ Despite a diminished taste for pursuing death sentences (Fig. 1), Figure 2 makes clear that states continue to execute death row inmates. Two main points flow from Figure 2. First, despite a minor spike in 2009, the number of state executions has generally declined steadily since 1999. Second, state executions of death row inmates generally track death sentencing patterns. Specifically, the sharp reduction in death sentences beginning in 2000 (Fig. 1) visually corresponds with a similar drop in the number of state executions of death row inmates illustrated in Figure 2. A positive relation between the number of death sentences and state executions (given an appropriate time lag) makes obvious sense in

55. See *Baze v. Rees*, 553 U.S. 35 (2008).

that death sentences define the universe from which state executions are drawn.

Figure 2. Executions by States of Death Row Inmates (1977–2010)



SOURCE: Capital Punishment in the United States, 1973–2010 (2010).

C. Legal Reversals & Clemency

The universe of possible outcomes for criminal defendants charged with and convicted of a capital crime and sentenced to death is fixed and includes only death or removal. Two quite distinctive causes account for death among death row inmates: state execution and “natural” death suffered while on death row. Removal from death row is another outcome that, again, can result from two distinctive sources. A successful legal appeal can result in a removal from death row. As well, an inmate’s successful clemency petition can also lead to removal from death row.⁵⁶

A brief discussion of legal reversals is important as this study assumes that those death row inmates who proceeded to the clemency petition stage previously exhausted all plausible legal appeals.⁵⁷ Thus, the array of legal

56. As previously noted, in a cross-sectional study, such as mine, the outcome for 3,158 death row inmates was not known as of Dec. 31, 2010. *See supra* note 31. While individual-level outcomes for these inmates were not known by the close of this study period, what is known is that the universe of possible outcomes for these inmates is fixed and includes only death or removal from death row.

57. Whether all those on death row do, in fact, exhaust all appeals options and pursue clemency remains contested. *See, e.g.,* Meredith Martin Rountree, “I’ll Make Them Shoot Me”: *Accounts of Death Row Prisoners Advocating for Execution*, 46 *LAW & SOC’Y REV.* 589 (2012) (arguing that a small but non-trivial number of death row inmates abandon their post-conviction appeals); John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 *MICH. L. REV.* 939 (2005) (same).

appeals served as the final filter that death row inmates exhausted prior to their clemency petitions.

For whatever reason, or array of reasons, clemency petitions have met decreased enthusiasm from those authorized to grant clemency. At the federal level, concern over the decline in presidential clemency granting activity recently prompted an Obama Administration initiative seeking to revive clemency activity.⁵⁸ Setting aside what the future might hold for clemency in general, what is presently clear is that clemency has been virtually extinct for those on state death rows.

As Figure 3 illustrates, clemency activity for death row inmates—never terribly notable since 1977—has remained flat, at best, or trended down slightly, save for explainable “spikes” associated with mass clemency activity. Conventional wisdom for the paucity of clemency activity for death row inmates focuses on general political factors and electoral implications of granting clemency to an individual convicted of a capital crime and sentenced to death.

A brief international comparison offers some context. A recent study of clemency for death row inmates in five Southeast Asian countries reveals important variation across countries.⁵⁹ One country—Singapore—exercised clemency in approximately 1% of the cases between 1975 and 2013.⁶⁰ Thailand’s practice of granting clemency in more than 90% of the cases, however, stands in stark contrast.⁶¹

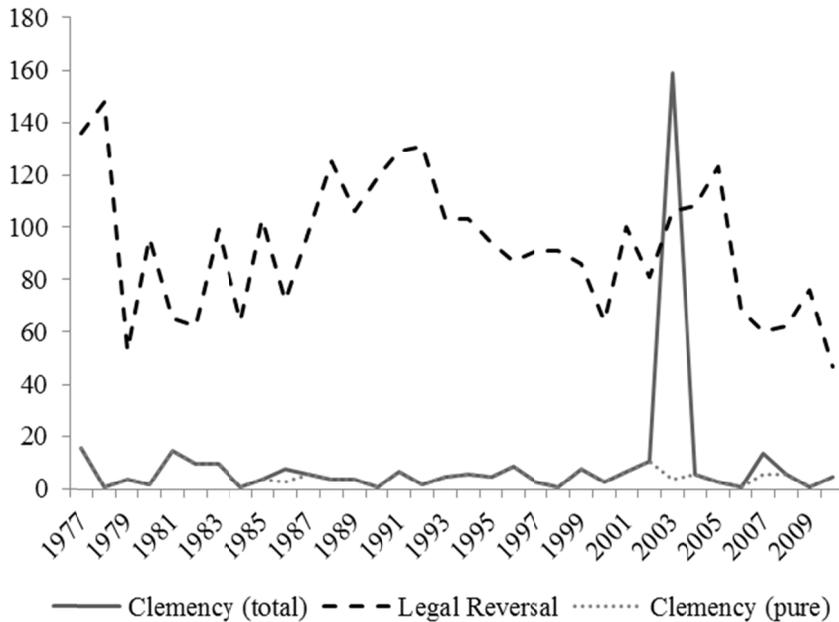
58. *See supra* note 2 and accompanying text.

59. DANIEL PASCOE, CTR. FOR INDON. LAW, ISLAM AND SOC’Y & ASIAN LAW CTR., CLEMENCY IN SOUTHEAST ASIAN DEATH PENALTY CASES (2014), *available at* <http://www.law.unimelb.edu.au/files/dmfile/ALC-CILISPolicyPaper-Pascoe52.pdf>.

60. *Id.* at 5.

61. *Id.*

Figure 3. Clemency Grants and Legal Removals from Death Row (1977–2010)



NOTES: The tremendous spike in clemency grants in 2003 along with lesser spikes in 1986 and 2007 are attributable to governors' blanket or indiscriminate decisions to commute the death sentences of all prisoners on death row in their respective states. The tremendous spike in 2003 is attributable to then-Illinois Governor George Ryan's decision to commute the death sentences of all prisoners on death row in Illinois as of January 11, 2003. Governor Ryan's decision accounted for 155 of the 159 commutations in 2003.⁶²

SOURCE: Capital Punishment in the United States, 1973–2010 (2010).

While general political factors certainly contribute to clemency activity in important ways—indeed, many argue that as a normative matter political considerations *should* contribute—political factors alone do not displace all other influences. Two under-appreciated factors, the increased use of DNA evidence and the judiciary's exceptionally deferential posture towards clemency challenges, warrant discussion.

62. See BAUMGARTNER ET AL., *supra* note 34, at 40.

1. *DNA and the Innocence Project*

An underappreciated explanation for clemency's general decline over time involves increased DNA testing and its successful leverage by the Innocence Project. Increased public ambivalence about the death penalty, the threat of human error, increased use of DNA evidence, and heightened financial considerations likely contributed to the reduction in death sentences during the past decade. These factors, along with others, informed prosecutors' decisions about whether to pursue the death penalty for death-eligible defendants as well as informed judges and jurors' sentencing decisions. To the extent that this filtering helped reduce death sentences by weeding out comparatively weaker cases, it follows that those defendants who resisted the filtering and wound up on death row were comparatively stronger candidates for the death penalty and, concurrently, *less* plausible candidates for clemency.

The increased awareness of DNA evidence illustrates this somewhat counterintuitive point. Contributing greatly to DNA evidence's heightened profile is the Innocence Project. The Innocence Project's work, particularly in identifying factually-innocent death row inmates, dramatically increased awareness of DNA testing as well as contributed to the growing clamor for making such testing available to death row inmates, where relevant. Consequently, DNA evidence increasingly informs prosecutors' decisions to pursue capital charges, jury decisions about whether to impose a death sentence, and death row inmates' post-conviction appeals activity.

To the extent that the Innocence Project motivated prosecutors to more fully investigate and pursue DNA testing during investigatory stages and trial, however, this activity would have filtered factually-innocent defendants, deflected them from a capital conviction, and in so doing, reduced the possibility of factual error for those sentenced to death row. Moreover, one less appreciated aspect of increased DNA testing in the post-conviction appeals context is that from a statistical standpoint, DNA testing supports capital convictions far more often than it calls convictions into question. Thus, one paradox of the Innocence Project's legacy is that while it reduced the universe of defendants for whom prosecutors will seek the death penalty and removed from death row individuals for whom post-conviction DNA testing uncovers actual innocence, it also *reduced* the clemency prospects for the vast majority of a comparatively smaller number of death row inmates.

2. *Judicial Deference to Clemency Decisions*

The judiciary's relation with clemency remains uneasy. On the one hand, the U.S. Supreme Court has made clear its view that our criminal

justice system relies on a functioning clemency doctrine.⁶³ On the other hand, the Court notes that clemency decisions do not readily lend themselves to judicial supervision or review.⁶⁴ Moreover, federal courts' review of state clemency procedures is cursory at best. In *Ohio Adult Parole Authority v. Woodard*, a slim majority of Justices hinted at some minimal level of procedural safeguards for death row inmates, but noted, in dicta, that any such procedural rights would only guard against entirely arbitrary clemency decisions.⁶⁵ Lower federal courts have taken this "procedural minimalism" approach to heart. The Fifth Circuit, for example, found no due process violations where the Texas clemency authorities did not physically meet, board members "faxed in" their clemency petition votes, and board members did not receive relevant information relating to clemency appeals.⁶⁶

State courts convey similar reluctance to review clemency decisions. Just before leaving office in 2012, Mississippi Governor Haley Barbour pardoned more than two hundred convicted criminals, with most receiving full, unconditional, and complete pardons, which essentially cleaned their records.⁶⁷ Soon thereafter, Mississippi's Attorney General challenged 21 of Barbour's pardons for failing to comply with publication requirements contained in Mississippi's constitution.⁶⁸ Contributing to the public maelstrom surrounding this issue was that among those pardoned by Governor Barbour was an individual in jail at the time for his fourth DUI charge.⁶⁹ Another pardon recipient included football star Brett Favre's brother, who was convicted of killing a friend in a drunk-driving accident.⁷⁰ Despite acknowledging that some of the pardons fell short of the Mississippi Constitution's publication requirement, the Mississippi Supreme Court nonetheless refused to void Governor Barbour's pardons, citing separation-of-powers concerns.⁷¹ The court's reasoning implies that not only does the Mississippi Constitution vest the Governor with plenary

63. See *Herrera v. Collins*, 506 U.S. 390, 411–12, 415 (1993) ("Executive clemency has provided the 'fail safe' in our criminal justice system.").

64. See *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) ("[P]ardon and commutation decisions have not traditionally been the business of [the] courts.").

65. 523 U.S. 272, 289 (1998).

66. See *Faulder v. Tex. Bd. of Pardons & Paroles*, 178 F.3d 343, 344 (5th Cir. 1999); see also *Faulder v. Tex. Bd. of Pardons & Paroles*, 990 S.W.2d 944 (Tex. Ct. App. 1999).

67. See generally *Flanders*, *supra* note 5.

68. See MISS. CONST. art. 5, § 124.

69. See *Campbell Robinson & Stephanie Saul*, *List of Pardons Included Many Tied to Power*, N.Y. TIMES, Jan. 28, 2012, at A1.

70. See *Flanders*, *supra* note 5, at 1561.

71. *In re Hooker*, 87 So. 3d 401, 401, 414 (Miss. 2012).

pardon authority, but also that such authority extends to interpreting “whether the Constitution’s publication requirement was met.”⁷²

The wide legal berth federal and state courts afford exercises of clemency authority is not without consequences. By imposing little more than minimal procedural safeguards and invoking separation-of-powers arguments to justify judicial deference, courts essentially preference political boundaries over legal rules when it comes to patrolling clemency activity. That is, the courts’ decision to virtually cede jurisdiction over legal challenges to clemency decisions, combined with current political trends, contribute to a general decline in clemency activity in general and in the death row context in particular.

D. The Distribution of Death, Clemency, and Clemency Authority

In addition to overall aggregate death penalty outcome trends, how various outcomes distribute across death row inmates warrants careful analysis as well. Of particular interest is whether decision patterns emerge once an inmate has exhausted all legal appeals and what remains includes only a binary outcome—execution or clemency. Table 1 presents means for each outcome for particular variables of interest. Although the analyses reported in Table 1 are merely descriptive, I nonetheless note where the differences between means differ at standard significant levels (independent t-tests). Notably, African-Americans, women, those with comparatively less formal education, and younger inmates systematically received more favorable clemency outcomes. Those with prior felony convictions were less likely to receive favorable clemency decisions. These descriptive results inform later more sophisticated modeling efforts. Even more dramatic, perhaps, are differences involving southern states and outcomes decided either after 1984 or the *Atkins* decision in 2002. Here, geography and time influenced clemency outcomes. Finally, also notable is the absence of any systematic differences involving political factors. At the descriptive level, no systematic differences emerge between, for example, Democratic and Republican governors or decisions that took place during either gubernatorial or presidential election years.

72. *Id.* at 403.

Table 1. Descriptive Statistics (Means)

| | Executed | Granted Clemency | (Sig.) |
|----------------------------|----------|------------------|--------|
| <i>Defendant:</i> | | | |
| African-American | 0.35 | 0.43 | * |
| Hispanic | 0.08 | 0.08 | |
| Female | 0.01 | 0.05 | ** |
| Age at removal | 42.17 | 36.47 | ** |
| Education | 4.72 | 4.11 | ** |
| Married | 0.28 | .031 | |
| Prior felony | 0.63 | 0.40 | ** |
| <i>Political:</i> | | | |
| Presidential election year | .023 | 0.23 | |
| Governor election year | 0.25 | 0.30 | |
| Elected state judges | 0.61 | 0.58 | |
| Democratic governor | 0.38 | 0.43 | |
| Catholic governor | 0.16 | 0.18 | |
| Governor age at removal | 55.47 | 56.16 | |
| Female governor | 0.06 | 0.04 | |
| <i>Structural:</i> | | | |
| Pure executive clemency | 0.25 | 0.22 | |
| Pure admin. clemency | 0.06 | 0.08 | |
| Southern state | 0.86 | 0.62 | ** |
| Post-1984 | 0.97 | 0.54 | ** |
| Post- <i>Atkins</i> | 0.36 | 0.16 | ** |
| (N) | 1,231 | 226 | |

NOTES: * $p < 0.05$; ** $p < 0.01$. A standard independent sample t-test was used to calculate differences between the means.

SOURCE: Capital Punishment in the United States, 1973–2010 (2010).

Similar to clemency outcomes, how states structure clemency authority varies. As Table 2 illustrates, the thirty-five states that either executed or granted clemency between 1973 and 2010 reflect three general clemency-granting authority models: executive, administrative, and “blended.” In the executive model, the most popular form of clemency authority (operating in fourteen states), the governor possesses sole clemency decision-making authority. Though comparatively less popular and located at the other end of the clemency authority spectrum, the administrative model vests

clemency authority exclusively in an administrative board. While the administrative model, operating in five states, seeks in part to “de-politicize,” “institutionalize,” and “professionalize” clemency decisions, electoral politics remains salient to some degree. The possibility that governors may seek to influence administrative boards’ clemency decisions in various ways cannot be dismissed. Indeed, some commentators emphasize the role of the governor even in states with a pure administrative clemency model.⁷³ Despite an array of threats to an administrative board’s independence, distinctions separating the executive and administrative models retain much of their traction. No amount of formal or informal efforts to influence an administrative board’s clemency decisions can alter the board’s ultimate responsibility for its own decisions.

The third general form of clemency authority includes two versions that blend aspects of the executive and administrative models. Eight states (22.9%) use a variation of the executive model but restrict its use absent an affirmative clemency recommendation from an administrative board or advisory group. Another variation of the executive model—also used by eight states—grants the governor clemency authority but only after a non-binding recommendation from an administrative board or advisory group.

Table 2. Models of Clemency Authority and Death Penalty Outcomes

| Model | Percent of States | Percent Executions | Percent Clemency Grants |
|-------------------------------------|-------------------|--------------------|-------------------------|
| Executive – Gov. sole authority | 40.0 | 25.1 | 21.7 |
| Admin. – Board sole authority | 14.3 | 5.8 | 8.4 |
| <i>Blended models:</i> | | | |
| Gov. – Plus board recommendation | 22.9 | 56.5 | 50.0 |
| Gov. – May have nonbinding bd. rec. | 22.9 | 12.6 | 19.9 |
| (N) | (35) | (1,231) | (226) |

SOURCE: Capital Punishment in the United States, 1973–2010 (2010).

73. See, e.g., Bruce Ledewitz & Scott Staples, *The Role of Executive Clemency in Modern Death Penalty Cases*, 27 U. RICH. L. REV. 227, 228–29 (1993) (noting the influence of governors even in states with administrative clemency models).

Given the distribution of clemency decision-making authority, the results in Table 2 do not surprise. First, as one might expect, clemency activity generally tracks execution activity. Second, the three executive models dominate and account for more than 90% of the clemency activity. One-half of all clemency grants involved states where the governor possessed clemency authority but could not act absent a board or advisory group recommendation. What is critical for this study, however, is that this distribution of clemency models bounded within a single context—clemency petitions from those on death row—facilitates exploring whether the manner in which a state structures clemency authority influences clemency petition outcomes. Indeed, variation among the thirty-five states over a thirty-eight-year period generates a quasi-natural experimental design and helps uncover whether any particular model might be more prone to favorable clemency petitions than other models.

V. MODELING CLEMENCY OUTCOMES

Descriptive results imply that the clemency outcomes were distributed unevenly across racial and ethnic groups as well as between genders. Moreover, structural and geographic variables also influenced clemency outcomes. Perhaps surprising to some, however, standard political variables did not appear influential. This section explores whether these general descriptive findings persist in regression models that simultaneously account for more than one independent variable.

Table 3 presents results from three versions of the main (full) model of clemency for death row inmates. Column A includes results for the full, main model. Column B includes results for the full, main model less the defendant's education level.⁷⁴ The final variation of the full model, presented in column C, reflects yet another important wrinkle. Specifically, the literature notes the legal uncertainty of the death penalty until 1985.⁷⁵ To accommodate any potential distorting influence, column C presents results from the standard run for death row removals that took place after 1984. The results across columns A, B, and C remain quite stable and robust across all three variants of the full model.

74. While missing data issues are not generally problematic, the defendants' education level includes the most missing data triggering an exclusion of 115 cases from the main, full model (A). In an abundance of caution and as a further robustness check, the analysis in column A is replicated in column B, less the defendant education level variable. As a comparison of the results in columns A and B illustrate, the results are quite robust.

75. For example, Professors Blume and Eisenberg note the "effects of early twists and turns in the post-*Furman* death penalty era" and accordingly limited their use of the BJS data set to those defendants sentenced after 1984. See John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 479 & n.52, 480 & n.53 (1999).

A. Clemency Applicant Characteristics

1. Gender

The conventional wisdom that capital punishment, including clemency, operates in a gendered manner finds ample and consistent empirical support.⁷⁶ The conventional wisdom attracts considerable scholarly attention, particularly among feminist scholars.⁷⁷ Qualitative research makes clear that women are far less likely to receive the death penalty than their male counterparts, and those few women sentenced to death row are almost never executed.⁷⁸ That female death row inmates are far more likely than male death row inmates to receive clemency partly accounts for the comparative paucity of executions of women inmates.

Selection effects at various key points are critical to understanding gender's role in the death penalty and clemency processes. First, women are overall less likely than men to commit crimes.⁷⁹ Consequently, far fewer women are available for death row clemency studies. Second, when women murder they are much more likely to murder those known and intimate to them, particularly within the domestic abuse context.⁸⁰ This distinction possesses critical sentencing implications, as while a predatory murder of a stranger is typically considered an aggravating factor that increases the possibility of a death sentence, a murder within a typical domestic abuse context is not.⁸¹

76. Scholars note, for example, that the presence of a female victim increases the probability of a capital crime prosecution and conviction. *See, e.g.,* Caisa Elizabeth Royer et al., *Victim Gender and the Death Penalty*, 82 UMKC L. REV. 429 (2014); Scott Phillips et al., *Disentangling Victim Gender and Capital Punishment: The Role of the Media*, 7 FEMINIST CRIMINOLOGY 130 (2012).

77. *See, e.g.,* Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 LAW & SOC'Y REV. 367, 368 (1991) ("At worst, [a feminist's complaint about gender discrimination] suggests a campaign to exterminate a few more wretched sisters."). To be sure, however, as Professor Pridemore observes, generalizations about how women fare in the death penalty context are difficult owing to the small number of women involved. *See* Pridemore, *supra* note 20, at 176.

78. *See, e.g.,* Blume & Eisenberg, *supra* note 75, at 494 tbl.5, 497 tbl.7 (finding that male defendants eligible for the death penalty are more likely than female defendants eligible for the death penalty to be placed on death row and that, once on death row, male defendants have more difficulty getting off death row through various mechanisms); Kraemer, *supra* note 20, at 1406, 1407 tbl.2 ("Consistent with all other studies on this topic, the prisoner's sex was found to be significantly associated with the likelihood of commutation."); Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 OHIO N.U. L. REV. 581, 584 (2000) (concluding that men are statistically more likely to be put to death than women after holding germane background variables constant). For a similar judicial reaction, see, for example, *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring) ("There is also overwhelming evidence that the death penalty is employed against men and not women.").

79. *See generally* FRANCES HEIDENSOHN, WOMEN AND CRIME 142–43 (2d ed. 1995).

80. *See* Amy E. Pope, *A Feminist Look at the Death Penalty*, 65 LAW & CONTEMP. PROBS. 257, 274 (2002).

81. *See* Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1511–13 (1996).

Finally, even when men and women commit similar death-eligible murders, scholars consistently note that women defendants are less likely to receive the death penalty than otherwise similar male defendants.⁸² Obviously, prosecutors do not pursue capital punishment against every death-eligible defendant. Even when prosecutors seek the death penalty, judges and jurors can disagree. To the extent that structural gender bias exists within the criminal justice system, it is precisely the sifting and discretion exercised by prosecutors, jurors, and judges as they sort through what type of murders warrant capital charges and death sentences that one would expect gender stereotypes and bias to manifest in ways that systematically advantage women in the death penalty context. If so, and insofar as the clemency stage is the final decision-point in the capital punishment context, one might plausibly expect that gender discrimination favoring women would persist. Indeed, that is a plausible account of the robust results in Table 3, which make powerfully clear that being female increases a death row inmate's probability of receiving clemency.

Given the selection effect considerations described above, however, it is also plausible to envision how women on death row might be less attractive candidates for clemency. The existence of a gendered criminal justice system and its influence on all of the various and numerous decisions involving multiple actors and institutions, however, implies that those (admittedly few) women sentenced to death possess more aggravating factors than their male counterparts. At the very least, women who wind up on death row can be plausibly viewed in a criminal sense as functional equivalents of their male death row counterparts.⁸³ Indeed, in the rare instance when a woman receives a death penalty, the underlying crime typically involves important aggravating factors.⁸⁴ To the extent that aggravating factors inform clemency decisions, such women would be comparatively *weaker* candidates for clemency. Results in Table 3, however, clearly imply that the opposite is true and that a gender bias favoring women in the death penalty context persists through the clemency stage. Indeed, one reason why women are "almost never executed"⁸⁵ is that they receive clemency at a disproportionate rate.

Results from this study finding a robust advantage for female clemency applicants comport with prior research as well as the overwhelming weight

82. See Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 435 (2002).

83. See Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845, 878-79 (1990) (arguing that women on death row possess many of the same criminal characteristics as male death row inmates).

84. See Rapaport, *supra* note 81, at 1517 tbl.2.

85. See Streib, *supra* note 82, at 469.

of qualitative and anecdotal evidence.⁸⁶ Whether owing to gender stereotypes,⁸⁷ the sheer “unusualness” of women sentenced to death,⁸⁸ the different ways in which men and women murder,⁸⁹ or an unbroken run of extraordinary “good luck” that simply defies standard mathematical probabilities, the weight of existing evidence consistently demonstrates that male and female death row inmates receive different treatment when it comes to clemency grants.

2. *Race and Ethnicity*

Similar to gender, race and ethnicity have been long assumed to influence capital punishment generally and, by implication, clemency, in pernicious ways. When it comes to prosecutorial decisions about whether to pursue the death sentence as well as decisions by jurors and judges regarding death sentencing, the empirical literature consistently finds a racial tilt disadvantaging racial and ethnic minorities. An early groundbreaking study in the 1970s by David Baldus and colleagues notes that victim race systematically influenced whether a defendant received the death penalty.⁹⁰ Indeed, the specter of racial taint in the capital punishment context was strong enough to prompt some states to pass laws enabling

86. See Kraemer, *supra* note 20, at 1393 (finding an advantage for female clemency applicants); see also, e.g., Argys & Mocan, *supra* note 20, at 272 tbl.4; Heise, *Mercy*, *supra* note 20, at 274 tbl.3. For a discussion of qualitative work, see, for example, Rapaport, *supra* note 78 (concluding that men are statistically more likely to be put to death than women after holding germane background variables constant); Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427, 430–31 (2000) (same); and Streib, *supra* note 82 (same). See also Furman v. Georgia, 408 U.S. 238, 365 (1972) (Marshall, J., concurring) (“There is also overwhelming evidence that the death penalty is employed against men and not women.”).

87. See Chimène I. Keitner, *Victim or Vamp?: Images of Violent Women in the Criminal Justice System*, 11 COLUM. J. GENDER & L. 38, 38 (2002) (arguing that an “uncritical resort to sex-role stereotypes” pervades the criminal justice system, including the death penalty); Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 508 (1990) (describing the “chivalry” theory’s explanation for the influence of gender on the application of the death penalty). Concerns about women serving in combat roles also provide a possible analogy and reflect this general point. See Col. Fred L. Borch III, *Camouflage Isn’t Only for Combat: Gender, Sexuality, and Women in the Military—Battle Cries and Lullabies: Women in War from Prehistory to the Present*, 164 MIL. L. REV. 235 (2000) (book reviews); David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1001 (2002) (“Many laws and government practices in the United States also treat males and females as fundamentally different types of creatures.” (citing Rostker v. Goldberg, 453 U.S. 57 (1981))); see also Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding the U.S. Navy’s exclusion of women from certain combat flying positions).

88. See Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women’s Capital Cases*, 4 BUFF. CRIM. L. REV. 967, 979 (2001) (arguing that women might enjoy the benefits flowing from “fast track” review, which includes greater scrutiny of their cases because of the small number of women on death row); Rapaport, *supra* note 78, at 585 (same).

89. See Rapaport, *supra* note 81, at 1517.

90. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 141 (1990).

death row inmates to use statistical evidence to establish that racial bias influenced their death sentences. Successful inmates could transform a death sentence into a life sentence without the possibility of parole. North Carolina passed such a law in 2009, which quickly resulted in 95% of the state's death row population initiating litigation.⁹¹ Despite—or perhaps because of—the law's popularity among death row inmates, North Carolina lawmakers repealed the law in 2013.⁹²

Research findings illustrating a racial and ethnic bias in capital punishment contribute to the conventional wisdom that a similar racial bias influences clemency decisions for death row inmates. Results in Table 3, however, suggest otherwise. The probability of African-American death row inmates receiving clemency significantly exceeds that of non-African-Americans. That is, when it comes to clemency decisions, any systematic racial tilt *favours* African-Americans.

How might one endeavor to reconcile for the well-documented finding that race disadvantages defendants at various stages of the capital punishment process and benefits death row inmates at the clemency decision stage? One explanation might be that African-Americans committed less severe capital crimes. Within the narrow band of death-eligible crimes variation exists in the severity of capital crimes committed. To the extent that African-Americans committed less severe capital crimes than their non-African-American counterparts, one would expect to find a corresponding higher clemency rate. Such an explanation assumes that the capital offenses committed by those on death row vary in any meaningful manner.⁹³ Data limitations preclude an empirical test of this assumption, however.

Alternatively, the pernicious racial effects that disadvantage African-American defendants during the capital punishment process might make African-Americans' advantage at the clemency stage necessary. By definition, the universe of those eligible to receive clemency from death row includes only those sentenced to death row. To the extent that the criminal justice system in general, and the capital punishment component in particular, are biased against African-American defendants, one would expect to find comparatively less-deserving African-American death row inmates. If, in fact, African-Americans on death row are comparatively less

91. N.C. GEN. STAT. §§ 15A-2010 to -2012 (2011), *repealed by* Act of Jun. 19, 2013, 2013 N.C. Sess. Laws 154. For a general description of the Act and discussion about its particular popularity among North Carolina's death row inmates, see Rees Alexander, *A Model State Racial Justice Act: Fighting Racial Bias Without Killing the Death Penalty*, 24 GEO. MASON U. C.R. L.J. 113, 132 (2014).

92. Alexander, *supra* note 91, at 127.

93. For examples of scaling capital offenses by severity, see Baldus et al., *supra* note 11, at 1711 tbl.11, 1712 tbl.12 and Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 287–89 & tbl.2 (2001).

deserving than their non-African-American counterparts, the results in Table 3 illustrating that African-Americans were more likely to receive clemency should not surprise.

Findings on the potential influence of ethnicity on clemency decisions, however, are more muted and possess complicating wrinkles. Results from the full model, presented in Table 3 (column A), illustrate how both African-Americans and those with comparatively less formal education increase the probability of a favorable clemency decision. When education level is removed from the model (column B), however, Hispanics emerge with a significantly increased probability of receiving clemency. What this interaction suggests is that the educational level's independent influence on clemency decisions overwhelms the independent influence of being Hispanic. When it comes to race, however, the influence of being African-American achieves statistical significance independent of educational level. Thus, while the influence of ethnicity on clemency decisions is more muted and model specific, the influence of being African-American is robust across various model specifications.

3. *Education Level*

Another critique of the death penalty and, by implication, the clemency process, is that both systematically disadvantage defendants with mental or cognitive limitations.⁹⁴ In the death penalty context, the Court has embraced various clinical definitions of mental retardation that include, in part, “significantly subaverage intellectual functioning.”⁹⁵ To the extent that the death penalty tilts against defendants with significant “subaverage intellectual functioning,”⁹⁶ it follows that such defendants would be similarly disadvantaged in the clemency process as well. Moreover, to the extent that a defendant's educational attainment is at least a not-implausible proxy for the defendant's intellectual functioning, one would expect to find that a higher educational level corresponds with an increased probability for a successful clemency petition. Results presented in Table 3 imply the opposite relation, however. That is, the comparatively better educated defendants fared *less* well when it came to clemency outcomes.

94. While the clinical field increasingly uses the term “intellectual disability,” the Supreme Court used the term “mental retardation” in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding the death penalty unconstitutional for mentally retarded defendants). See, e.g., Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116 (2007) (explaining that change in terminology within AAIDD involves no change in definition); see also John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. L. & PUB. POL'Y 689, 690 n.4 (2009).

95. *Atkins*, 536 U.S. at 308 n.3.

96. *Id.* at 307, 308 n.3.

Problems flowing from the application of the death penalty to mentally retarded defendants include their diminished ability to assist with their defense and the reduced relevance of retribution and deterrence.⁹⁷ These problems, and others, prompted the Supreme Court in 2002 to conclude in *Atkins v. Virginia* that the application of the death penalty to mentally retarded defendants was unconstitutionally cruel and unusual punishment.⁹⁸ Part of the Court's rationale included its observation that a "national consensus" had developed against the use of capital punishment for mentally retarded defendants.⁹⁹

While the data set does not include information on defendants' mental capacities salient in *Atkins*, the data set does include data on the defendants' educational attainment. If one accepts educational attainment as an admittedly crude proxy for an inmate's ability to assist with a post-capital conviction defense, clemency decisions between 1973 and 2010 may have participated in (or reflected) that consensus. Education level achieves statistical significance in the main model (column A) even after accounting for the *Atkins* decision's independent influence. That is, whatever one might think about the Court's description of a "national consensus" disfavoring capital punishment for the mentally retarded, clemency outcomes provide evidence of a tilt favoring the comparatively less educated.¹⁰⁰

B. Structural Factors

The clemency grant models consider two broad forms of factors described as "structural." One involves three various models of clemency decision-making authority: executive, administrative, and a blend of the two.¹⁰¹ Conventional wisdom suggests that because administrative boards are more insulated from direct political and popular pressures than popularly elected governors, administrative boards are more likely to reach decisions that conflict with public opinion and prevailing political pressures. To the extent that many politicians—notably governors—now

97. *Id.* at 320–21.

98. *Atkins*, 536 U.S. 304.

99. *Id.* at 316.

100. For a general critique of the Court's conclusion of a "national consensus" opposing death penalty for juveniles, see, for example, W. Matt Nakajima, *Life or Death: How Roper v. Simmons Affects Juvenile Abortion Jurisprudence*, 34 N. KY. L. REV. 389 (2007).

101. With each state's clemency decision-making authority falling into one of three models and the presence of each model captured by a distinct dummy variable, I selected the blended model as the reference group and, as a result, omitted it from the model. The blended group was a particularly attractive and logical reference group because I was most interested in the possible influence of the two models that generate the clearest contrast: the executive and administrative models. The selection of the blended group as the reference did not distort the results. For a discussion of reference group selection, see MELISSA A. HARDY, REGRESSION WITH DUMMY VARIABLES 9–10 (1993).

feel that clemency grants to death row inmates risk “political suicide,” conventional wisdom suggests that, on balance, administrative boards will typically favor clemency more than governors will.¹⁰²

The conventional wisdom that administrative boards will be structurally more amenable to clemency than publicly elected governors is not without irony, however. During the first half of the twentieth century, many states relocated clemency authority from governors to administrative boards precisely because of real or perceived abuses of clemency authority, including its *overuse*, by governors.¹⁰³ More specifically, the politicization by governors of the clemency process and their numerous, promiscuous, politically-motivated clemency grants, fueled the development of the administrative clemency model. To be sure, the line between “executive” and “administrative” clemency models remains far from clean, particularly as in many states governors can seek to influence otherwise independent administrative clemency boards through appointments to such boards.¹⁰⁴ That said, a governor seeking to influence future clemency decisions through board appointments may be frustrated by appointees who do not remain loyal to the appointing governor’s wishes.¹⁰⁵

A second set of “structural” factors involves geography and notable death penalty legal decisions. Geography is one of the factors thought to distort the distribution of capital punishment. Some scholars point to southern states as having a greater proclivity for capital punishment than their non-southern counterparts.¹⁰⁶ Legacies of the Jim Crow era include, according to Professor Ogletree, vestigial connections between racial hostility and capital prosecutions and executions.¹⁰⁷ Professor Ogletree identifies a “Death Belt,” which he defines to include the “southern states

102. See Acker & Lanier, *supra* note 7, at 210–11 & nn.53–55.

103. See Heise, *Mercy*, *supra* note 20, at 298.

104. For a discussion, see Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 444 (1999) (noting the possibility that governors seek political “window dressing” through their appointments to clemency boards).

105. One possible analogy is the uncertainty presidents confront who seek to influence legal decisions through their nominations to the federal bench. Many presidents, as history makes clear, have been quite surprised by decisions of some of their own appointees. See *Should Ideology Matter?: Judicial Nominations 2001: Hearing Before the Subcomm. on Admin. Oversight and the Courts*, 107th Cong. (2001) (statement of Sen. Orrin G. Hatch, Ranking Member), reprinted in *Senate Committee Hearings on the Judicial Nomination Process*, 50 DRAKE L. REV. 429, 501 (2002) (noting the unpredictability of federal judges once confirmed to the federal bench and commenting that “history is replete with examples of judges who surprised even the very Presidents who appointed them”).

106. See, e.g., Heise, *Geography*, *supra* note 20; Charles J. Ogletree, Jr., *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15 (2002); Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227 (2012); GEORGE FORT MILTON, S. COMM’N ON THE STUDY OF LYNCHING, LYNCHINGS AND WHAT THEY MEAN: GENERAL FINDINGS OF THE SOUTHERN COMMISSION ON THE STUDY OF LYNCHING 74 tbl. II (1931).

107. See Ogletree, *supra* note 106, at 18.

that together account for over 90% of all executions carried out since 1976.”¹⁰⁸ Ogletree notes that the nine “Death Belt” states “overlap considerably” with the southern states that had the “highest incidence of extra-legal violence and killings during the Jim Crow era.”¹⁰⁹ Ogletree argues that southern states’ particular experience with extrajudicial lynchings frames their amenability to the death penalty.¹¹⁰ Thus, if regionalism affects the distribution of capital punishment and a “geography of the death penalty” exists,¹¹¹ then regionalism should similarly inform the distribution of clemency, and we should observe a similar geography of mercy.¹¹²

Moreover, insofar as this study of clemency outcomes spans thirty-eight years and relevant legal doctrine has evolved over this time period, the influence of critical legal decisions warrants examination. After a series of Supreme Court decisions, prompted by the *Furman v. Georgia* decision in 1972, the constitutional clarity surrounding a state’s use of the death penalty gelled. Death penalty scholars identify 1984 as the year demarcating systematic differences in the administration of capital punishment.¹¹³ In a similar, though more recent, way, the Court’s *Atkins* decision in 2002 may also systematically influence the death penalty and, by implication, clemency for death row inmates. Consequently, to assess the possible influence of the *Furman*-inspired litigation and the *Atkins* decision, the models include dummy variables for each. As an additional robustness check, the main model is re-run for clemency decisions reached after 1984 to see if more recent clemency decisions systematically differ.

Bringing data to hypotheses concerning the various structural factors thought to influence clemency decisions generates mixed results. Findings presented in Table 3 illustrate that *how* states structure clemency authority did not influence clemency outcomes. That is, clemency decisions reached by governors and administrative boards did not systematically differ. This null finding lends itself to multiple (and perhaps competing) explanations. First, it simply may well be that administrative and executive models of clemency authority—despite important differences—do not differ in a way that would present in different outcomes when it comes to clemency decisions. One competing interpretation, however, might emphasize the possibility that the absence of any difference in clemency outcomes reflects

108. *Id.* at 19. The nine “Death Belt” states include: Texas, Florida, Louisiana, Georgia, Virginia, Alabama, Mississippi, North Carolina, and South Carolina.

109. *Id.*

110. *Id.*

111. See Smith, *supra* note 106, at 228.

112. See Heise, *Geography*, *supra* note 20.

113. See, e.g., Blume & Eisenberg, *supra* note 75, at 479–80; Pridemore, *supra* note 20, at 175 (“Governors seemed jittery in the years following *Furman* . . .”).

governors' success in capturing administrative boards through appointive powers.

While variation in clemency decision-making models did not influence clemency outcomes, other structural factors did emerge as influential. That is, prior (including quite recent) empirical research consistently finds that clemency outcomes distribute unevenly between southern and non-southern states.¹¹⁴ Specifically, the prospects for clemency for death row inmates were far less favorable in the South, and this geography effect persists across all model specification.¹¹⁵

The influence of critical death penalty decisions was mixed. On the one hand, 1984 emerged as a pivotal year, with clemency petitions after 1984 far less likely to succeed. The *Atkins* decision in 2002, however, did not achieve statistical significance. Of course, insofar as *Atkins* was decided almost two decades after 1984, it remains possible that the data set (which includes clemency outcomes through 2010) has not yet had enough time to fully digest the *Atkins* decision. Moreover, other scholars note that some states, in light of *Atkins*, have nonetheless adopted more limited definitions of mental retardation and, as such, diluted *Atkins*' potential impact.¹¹⁶

C. Political Factors

The politics of clemency in the death row context are complicated and evolving and, as a result, anything but clear. By definition, a state's exercising death penalty authority is, to some degree, a political act.¹¹⁷ Moreover, clemency authority fulfills a political function by permitting an extrajudicial check over legal determinations that the death penalty is warranted. The exceptionally high degree of judicial deference to executive or administrative exercises of clemency authority also helps protect political influences. Thus, an assessment of politics' influences on the administration of clemency properly begins from the assumption that political factors are supposed to play some role. Despite politics' proper role in clemency decisions, understanding political influences is important as death penalty critics point to "politics" as contributing to clemency's inconsistent and uneven application.¹¹⁸

114. See Heise, *Geography*, *supra* note 20, at 3.

115. See *id.*

116. See, e.g., Blume et al., *supra* note 94, at 691–94 (arguing that state "deviations have the effect of excluding from *Atkins*'s reach some individuals who plainly fall within the class it protects").

117. See, e.g., Op-Ed., *supra* note 45, at 13 (noting that the death penalty is the "strongest" message a society can make).

118. See, e.g., Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 941–43 (1994) (noting the pressures generated by prosecutors' electioneering); Ronald J. Tabak, Commentary, *Politics and the Death Penalty: Can Rational Discourse and Due*

Even if one concedes that political factors do—and, perhaps, *should*—influence clemency decisions, the increasingly complex political landscape makes the direction and form of politics’ influence anything but clear. On the one hand, one strain of conventional wisdom underscores the influence of political sensitivity and electoral exposure to “get tough on crime” sentiments as informing (and reducing) governors’ appetites for exercising clemency authority. In the late 1980s, many political commentators pointed to Michal Dukakis’s response to a death penalty question during a live, televised debate as a reason for his doomed his presidential candidacy.¹¹⁹ In the early 1990s, then-Governor Bill Clinton, while campaigning for President, conspicuously flew from New Hampshire to Arkansas during the peak of the campaign season to personally deny clemency and sign a death warrant for the execution of a brain-damaged defendant.¹²⁰ Consequently, this conventional wisdom implies that, for example, governors will view granting clemency with general disfavor.

The increasingly complex and nuanced political terrain for clemency decision makers, particularly governors vested with clemency authority, fuels an alternative conventional wisdom, one that views clemency as one antidote to a flawed criminal justice system. Indeed, among the more recent—and notable—gubernatorial activities on the death penalty clemency front involves a small handful of governors who have exercised “blanket” or “indiscriminate” clemency authority, usually (though not exclusively) incident to problems with death penalty convictions. The most vivid example thus far involves then-Illinois Governor George Ryan who, after noting his concerns about the possibility of error and the execution of innocents, removed all (N=155) of Illinois’s death row inmates in 2003 just before departing office.¹²¹ Similar, although smaller-scale, events took place in New Jersey and New Mexico where then-Governors Corzine and Anaya, respectively, removed all defendants from death row—eight and five, respectively.¹²² Rather than the possibility of error, New Mexico Governor Anaya, a Catholic, cited to his personal opposition to the death penalty.¹²³

Regardless of whether political winds incline governors to be more—or less—partial to clemency for death row inmates, what is clear is the

Process Survive the Perceived Political Pressure?, 21 *FORDHAM URB. L.J.* 280, 280–81 (1994) (noting the perceived political pressures associated with death penalty decisions).

119. See, e.g., Roger Simon, *Death-Penalty Question Was Death Knell for Dukakis*, *SEATTLE TIMES*, Nov. 6, 1990, at F1.

120. See, e.g., Thomas B. Edsall, *3 Democrats Now Willing to Support Death Penalty; Candidates Abandon Traditional Liberal Tenets*, *WASH. POST*, Jan. 23, 1992, at A14.

121. See BAUMGARTNER ET AL., *supra* note 34, at 67, 69. For a discussion of “mass” commutations, see, for example, SARAT, *supra* note 33.

122. See Heise, *Geography*, *supra* note 20, at 10.

123. See McCarthy, *supra* note 37; Coates, *supra* note 37.

extraordinary degree of judicial deference afforded to executive and administrative clemency decisions. Besides noting clemency's centrality in the criminal justice system, courts display an extreme reluctance to second-guess clemency decisions. To the extent that courts do not generally judicially review clemency decisions and few states impose substantive legislative guidelines for clemency, politics serves as clemency's principal boundary.¹²⁴ As such, the question is not whether political considerations inform clemency decisions—clearly they do and, in fact, to some degree, they should—but rather *which* political factors inform clemency decisions. And which political factors inform clemency decisions matters, especially to death penalty critics who point to such influences as one important explanation for the death penalty's inconsistent (and unequal) application over time.¹²⁵

Results presented in Table 3 point in potentially conflicting directions. On the one hand, some standard political factors, such as whether a clemency decision was reached during either a national presidential or gubernatorial election year, did not systematically influence clemency decision outcomes in any sustained manner. Similarly, despite capital punishment and clemency systems' clear tilt in a direction favoring women defendants and death row inmates, female and male governors did not act any differently when it came to clemency decisions. However, other political variables did achieve statistical significance. Democratic governors were systematically more likely than their Republican counterparts to approve clemency applications. Also, governors' partiality towards clemency increased with age. Finally, judges on a state's highest court who were elected were more favorable to clemency for death row inmates than judges who were appointed to their position.

124. See *supra* Part IV.C.2. Only a few states have substantive legislation germane to clemency activity. See, e.g., ARIZ. REV. STAT. ANN. § 31-402(C)(2) (1998); COLO. REV. STAT. § 16-17-101 (1998); MONT. CODE ANN. § 46-23-301(2) (1997).

125. See, e.g., Bresler, *supra* note 118 (noting the pressures generated by prosecutors' electioneering); Tabak, *supra* note 118 (noting the perceived political pressures associated with death penalty decisions).

Table 3. Removed From Death Row Through Clemency

| Clemency granted (1=Yes) | (A) Full Model | (B) Without educ. level | (C) Post-1984 |
|----------------------------|-------------------|-------------------------------|------------------|
| <i>Defendant:</i> | | | |
| African-American | 0.60 (0.21)** | 0.54 (0.20)** | 0.68 (0.23)** |
| Hispanic | 0.55 (0.37) | 0.79 (0.34)* | 0.68 (0.39) |
| Female | 1.88 (0.59)** | 1.85 (0.56)** | 2.24 (0.59)** |
| Age | -0.03 (0.01)* | -0.03 (0.01)** | -0.02 (0.01) |
| Education | -0.19 (0.05)** | --- | -0.22 (0.06)** |
| Married | 0.10 (0.22) | 0.04 (0.21) | 0.02 (0.25) |
| Prior felony | -0.51 (0.21)* | -0.43 (0.20)* | -0.28 (0.23) |
| <i>Political:</i> | | | |
| Presidential election year | -0.02 (0.24) | -0.21 (0.24) | 0.52 (0.25)* |
| Governor election year | 0.28 (0.22) | 0.27 (0.21) | 0.32 (0.24) |
| Elected state judges | 0.49 (0.23)* | 0.40 (0.22) | 0.54 (0.25)* |
| Democratic governor | 0.44 (0.22)* | 0.44 (0.21)* | 0.58(0.24)* |
| Catholic governor | -0.17 (0.29) | -0.13 (0.26) | 0.04 (0.30) |
| Governor age at removal | 0.04 (0.01)** | 0.03 (0.01)* | 0.03 (0.02) |
| Female governor | -0.59 (0.45) | -0.51 (0.42) | -0.59 (0.45) |
| <i>Structural:</i> | | | |
| Pure executive clemency | -0.02 (0.28) | 0.06 (0.26) | 0.05 (0.30) |
| Pure admin. clemency | 0.22 (0.37) | -0.04 (0.37) | 0.57 (0.38) |
| Southern state | -1.73 (0.25)** | -1.76 (0.23)** | -1.80 (0.26)** |
| Post-1984 | -2.57 (0.31)** | -2.85 (0.29)** | --- |
| Post- <i>Atkins</i> | -0.38 (0.25) | -0.40 (0.24) | -0.31 (0.25) |
| Constant | 1.08 (0.96) | 1.12 (0.86) | -1.71(1.03) |
| pseudo R ² | 0.22 | 0.26 | 0.16 |
| (N) | 1,296 | 1,411 | 1,226 |

NOTE: * $p < 0.05$; ** $p < 0.01$.

SOURCE: Capital Punishment in the United States, 1973–2010 (2010).

D. Interacting Political and Structural Factors: Politics and Governors

Even decidedly “mixed” results for the standard political variables imply—however softly—that strong forms of the “death penalty is politicized” argument might be overstated. Particularly notable are the null findings regarding clemency decisions reached during presidential and

gubernatorial election years.¹²⁶ To the extent that political factors influence clemency decisions, they are most likely to do so in states that vest the governor with exclusive clemency authority.¹²⁷ To test this belief, and as an additional robustness check on results presented in Table 3, analyses on the three clemency models were re-run for states with pure executive clemency authority. Table 4 presents the results.

Notably, political factors did not influence clemency application outcomes even after focusing only on states with a pure executive clemency model. In fact, not a single political variable achieved statistical significance. Thus, despite examining the very context where one might most expect political forces to emerge—pure executive clemency states—political factors, again, were inconsequential. As well, while no new variables achieved statistical significance, a few variables which were influential in the full models (Table 3), including clemency applicant characteristic variables and geography, were not systematically influential in the supplemental runs that involved only states with executive clemency models.

Technical issues may contribute to the null findings, however. For example, a focus on only pure executive clemency states reduces the sample size in the full models (columns A) from 1,296 to 288. Such a drop reduces statistical power and, in so doing, makes it more difficult for any mathematical differences to achieve statistical significance. Not only might the reduction in statistical power help account for the absence of political factors' influence, but also for some variables achieving significance in the full sample (Table 3) but not in the pure executive clemency models (Table 4). Finally, the main change regarding structural models involves geography, which emerged as statistically significant in the full models but not in the pure executive models. Other scholars have noted that the pure executive clemency model is quite popular in southern states. As a result, a focus on pure executive clemency model states may, in fact, focus disproportionately on southern states which, along with reduced statistical power may destabilize the coefficient for the "Southern state[s]" variable.

126. Obviously, caution is particularly warranted when drawing an inference from a statistically insignificant finding. The power of a statistical test is the likelihood of detecting an effect of a specific size at a specified significance level (here, the standard $p < .05$ level). If the test used is not very powerful, the likelihood of detecting a statistical effect is diminished. Thus, perfectly designed and executed studies may fail to detect socially important differences "simply because the sample sizes are too small to give the procedure enough power to detect the effect." STANTON A. GLANTZ, PRIMER OF BIOSTATISTICS 215 (6th ed. 2005). Therefore, it is important to consider a test's power when one claims that no significant effect has been detected. Here, however, my sample size is large enough to reduce the potential that it accounts for the insignificant findings regarding the influence of political variables.

127. See Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 310, 349, 362–63 (1996) (explaining that the foremost reason for the decline in grants of executive clemency is the political consequences to the executive).

Despite technical factors that might complicate comparing results in Tables 3 and 4, what remains clear is that political variables did not emerge as influential even after focusing on the clemency authority model—pure executive—that is the model most plausibly exposed to political influence.

Table 4. Pure Executive Clemency Model: Removals From Death Row Through Clemency

| Clemency granted (1=Yes) | (A) Full Model | (B) Without educ. level | (C) Post-1984 |
|----------------------------|-------------------|-------------------------------|------------------|
| <i>Defendant:</i> | | | |
| African-American | 0.68 (0.48) | 0.59 (0.48) | 0.61 (0.50) |
| Hispanic | --- | 0.88 (1.36) | --- |
| Female | 1.02 (1.34) | 0.67 (1.40) | 1.89 (1.46) |
| Age | -0.07 (0.03)* | -0.07 (0.03)* | -0.04 (0.03) |
| Education | -0.32 (0.13)* | --- | -0.33 (0.14)* |
| Married | 0.03 (0.55) | -0.0 (0.55) | -0.19 (0.60) |
| Prior felony | -0.22 (0.53) | 0.13 (0.49) | -0.12 (0.55) |
| <i>Political:</i> | | | |
| Presidential election year | 0.59 (0.50) | 0.29 (0.48) | 0.94 (0.53) |
| Governor election year | 0.29 (0.52) | 0.26 (0.53) | 0.60 (0.54) |
| Elected state judges | 0.97 (0.55) | 0.48 (0.50) | 0.80 (0.58) |
| Democratic governor | 0.57 (0.53) | 0.49 (0.51) | 0.41 (0.54) |
| Catholic governor | -1.06 (0.94) | 0.20 (0.69) | -0.93 (0.92) |
| Governor age at removal | -0.01 (0.04) | -0.04 (0.03) | -0.00 (0.04) |
| Female governor | --- | --- | --- |
| <i>Structural:</i> | | | |
| Southern state | --- | -1.29 (0.79) | --- |
| Post-1984 | -0.86 (0.89) | -2.42 (0.69)** | --- |
| Post- <i>Atkins</i> | -0.29 (0.77) | -0.79 (0.76) | -0.54 (0.77) |
| Constant | 1.78 (2.18) | 4.86 (2.09)* | -0.72 (2.31) |
| pseudo R ² | 0.15 | 0.33 | 0.13 |
| (N) | 288 | 347 | 279 |

NOTE: * $p < 0.05$; ** $p < 0.01$.

SOURCE: Capital Punishment in the United States, 1973–2010 (2010).

VI. CONCLUSION

Even if the Obama Administration's nascent effort to reinvigorate federal clemency authority succeeds, it remains far from certain whether the states will join in this effort. Moreover, even if the New Clemency Initiative both succeeds and ignites similar state-level efforts, it is unlikely that clemency activity will increase in any meaningful manner for death row inmates. Absent dramatic Innocence Project-inspired revelations of a death row inmate's actual innocence, typically moored in DNA evidence, clemency activity for death row inmates will likely continue to perform a small and ever-diminishing role. Indeed, the most dramatic deployments of clemency authority in the death row setting of late involve a small number of governors exercising indiscriminate or "blanket" clemency authority that speaks more to systematic problems with the death penalty and criminal justice systems as a whole rather than the particular circumstances of individual clemency applicants.

Worse still, what little clemency activity exists across state death rows distributes unevenly. A paucity of data-driven assessments facilitates various conventional wisdoms that typically dwell on racial, gender, geographic, and political factors. Holding these conventional wisdoms to data, however, reveals some surprises. Results from this study support conventional wisdom when it comes to gender, as women on death row are exceptionally more likely than their male counterparts to receive clemency. Race, however, turns prevailing wisdom upside down. Specifically, despite (or, as I consider, perhaps *because* of) a criminal justice system that systematically tilts against African-American defendants, African-Americans on death row are more likely to receive clemency than their non-African-American counterparts.

Conventional wisdoms find only partial support when it comes to the influence of politics on clemency. On the one hand, neither presidential nor gubernatorial election cycles influenced clemency decisions. On the other hand, as prevailing wisdom implies, Democratic governors were more amenable to clemency for death row inmates than Republican governors were. Finally, structural factors long-assumed to influence clemency decisions find only partial support. Despite popular assumptions to the contrary, pure executive and pure administrative models of clemency authority did not perform systematically differently when it came to clemency application outcomes. Conventional wisdoms concerning the influence of geography and time did, however, find empirical support. Southern states were far more prone to denying clemency petitions than non-southern states. Moreover, the probability of a successful clemency application dropped significantly after 1984.

Overall, these findings update prior empirical research on clemency activity in the death row context and identify subtle changes over time. As well, the findings' weight and direction pose troubling questions for those concerned with clemency's role in the criminal justice system. The Supreme Court has made clear its view on clemency's integral role and how our criminal justice system indeed relies upon a coherently functioning clemency system.¹²⁸ While the data analyzed in this study do not—indeed, cannot—provide satisfactory answers to all of the salient questions, they warrant attention as, at the very least, some of the results imply problems.

Findings from this study also speak to a number of potential practical and policy implications. Results from this study underscore the importance of data, especially in a context where the stakes involve—quite literally—questions about who lives and dies. Arguments that decisions involving clemency in particular and the death penalty in general are arbitrary or inconsistently distributed would benefit from closer attention to data. Too often, anecdotes and misperceptions distort public and academic debates.¹²⁹ An empirical look at these issues reveals that some common assumptions about clemency are correct, but others are either incorrect, misleading, or both. In this regard, the fact that political factors did not emerge as significant is especially important given the rhetoric that typically accompanies debates about clemency in particular and the death penalty more generally. The combination of the results in Table 3 and, in particular, Table 4 suggests that critiques advanced against the use of clemency should focus on nonpolitical factors as reasons for the inconsistent application of clemency.

Of course, claims that a problem flows from a steady diminution of successful clemency grants begs one important question: Does the dwindling number of successful clemency petitions reflect an ever-decreasing number of worthy clemency candidates or, rather, evolving perceptions about the appropriate use of clemency? Indeed, other actors in the death penalty process—notably, prosecutors, jurors, and judges—might effectively be performing some (but not all) of the functions that clemency is designed to perform when they consider aggravating and mitigating circumstances surrounding capital cases.¹³⁰ Regrettably, a satisfactory

128. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (“Executive clemency has provided the ‘fail safe’ in our criminal justice system.”).

129. For a discussion of the power of anecdotal evidence in legal policy, see David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 *IND. L.J.* 797 (1998) (illustrating how anecdotes distort health care policy development).

130. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (noting that the Eighth Amendment does not erect a per se bar excluding victim impact evidence from capital sentencing juries); *Zant v. Stephens*, 462 U.S. 862, 878 (1983) (discussing the role of aggravating factors in capital sentencing);

response to this question eludes available data. Although it remains far from clear what the optimal rate of clemency grants might be, the dramatic change in the clemency-to-execution ratio before and after 1984 at the very least suggests that concern over how clemency now functions is not misplaced. This concern rests partly on the reasonableness of the assumption that prosecutors, jurors, and judges have performed generally consistently during the past few decades. If so, and if death row inmates' general culpability has not changed dramatically over time, we must look elsewhere to explain the dramatic decline in the use of clemency.

The empirical uncertainty alone should concern states, governors, and clemency boards. States committed to the death penalty must take clemency seriously. This requires an accurate understanding of how clemency operates and how it is distributed. Quality data and empirical analyses contribute—and, indeed, are essential—to our understanding of clemency, especially its role in the death penalty context. Results from this study uncover critical misperceptions and reveal disquieting influences on clemency decisions. Clemency's unique and critical functions and its life and death consequences require that its application be clear, evenhanded, and transparent.

Lockett v. Ohio, 438 U.S. 586, 608 (1978) (concluding that the state may not preclude consideration of relevant mitigating factors in capital sentencing).