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Ambivalence versus Aggression: The Application of the Death Penalty in California and Texas

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Abstract

Three Thousand Two Hundred Fifty-Four prisoners were under sentence of death in the United States at the end of 2005, with Texas and California having by far the largest death row populations. Despite similar racial populations, crime rates, murder rates, and rates of sentencing to death, Texas executes inmates at a rate many times that of California. Franklin Zimring (1991, 1996) has argued that differences in execution rates may best be understood as a general state of ambivalence on the part of the executing state government, explained either by external constraint or internal ambivalence. This research found that both external constraints and internal ambivalence were possible explanations for the large numbers of offenders sentenced to death in California. However, Zimring's theory does not explain the aggressiveness exhibited by the state of Texas in executing convicted offenders. This paper explores the history of the application of the death penalty in each state, the administrative and judicial barriers to execution, and the sociocultural factors that lead to ambivalent and aggressive rates of execution.

Introduction

Three Thousand Two Hundred Fifty-Four prisoners were under sentence of death in the United States at the end of 2005, with Texas and California having by far the largest death row populations (California -- 646, Texas -- 411) (United States Department of Justice, 2006). While these states have substantially similar death row populations in terms of number of prisoners and rate of capital sentencing, Texas executes convicted offenders at a much higher rate, far and away leading the country in executions per year. In fact, of the 1,004 prisoners executed in the United States since the death penalty's reinstatement in 1976, 355 (35%) were executed in the state of Texas. In reference, California drags far behind, having executed only 12 inmates (1% of the nation's executions) during the same period.

The nationwide trend toward increased executions peaked in 1999, when 98 inmates were executed. Since that time, executions have decreased in large part due to the pending Supreme Court decsion on the Constitutionality of lethal injections, yet the rate at which inmates are sentenced to death yields an interesting finding: if current trends continue, more than a third will come from or reside in two jurisdictions: California and Texas (Bureau of Justice Statistics, 2000).

While controversy continues to surface over the motivation (Finckenauer, 1998), arbitrary application (International Commission of Jurists, 1997), racial subjectivity (Friedman, 2000; Lungren & Krotoski, 1995; Tabak, 1991), and constitutionality of the death penalty (Shatz & Rivkind, 1997; Meltsner, 1973), perhaps its most interesting feature remains overlooked. Why do so many states sentence defendants to death yet rarely execute? Of the 38 jurisdictions that maintained a death penalty during the 1980s, only 13 (34%) performed an execution (Zimring, 1991).

Franklin Zimring (1991, 1996) has argued that many states show ambivalence toward applying the death penalty, actively supporting the principle for symbolic reasons but rarely administering the sentence. To support his ambivalence theory, Zimring offered competing hypotheses: external constraint and internal ambivalence.

The external constraint model supposes that states' ability to swiftly execute convicted capital defendants is constrained by external forces. "Under this model, the responsibility for the death penalty

backlog in almost every state with condemned prisoners but nonexecution lies with the intervention of federal courts" (Zimring, 1991, p. 732). Zimring believed that this theory would be supported by data indicating that executing and non-executing states have similar death penalty legislation but increased level of external control, in particular from federal courts. In his 1991 Buffalo Law Review article, entitled *Ambivalence in State Capital Punishment Policy: An Empirical Sounding*, Zimring purportedly disproved the external constraint model by demonstrating that no significant difference in federal court action had taken place between 1980 and 1989 in executing and non-executing states. However, after looking at data from The General Social Survey from 1990, it appears that Zimring has undervalued the external constraint hypothesis, at least in California and Texas.

Zimring's second explanation for the discrepancy in execution rates, the internal ambivalence model, argues that:

> the forces which hinder a state from implementing its capital punishment policies are largely homegrown rather than externally imposed. According to this model, nonexecuting states with death penalty legislation fail to execute persons condemned to death because of internal political conflict that interacts with external restraint. A proponent of this view would expect to find a systematic difference in the political culture of executing and nonexecuting states, with the executing states displaying a stronger historic commitment to capital punishment (1991, p. 732).

Zimring confirmed his internal ambivalence model in multiple studies (1996, 1991), each of which discounted the role of the external influences, in particular the federal courts. Conclusively, Zimring found that the ambivalence expressed in states' execution rates was largely the result of internal political conflict and historical precedent.

To test Zimring's theories of external constraint and internal ambivalence, and uncover the underlying causes of the disparity in execution rates for the country's two largest death row populations, a structural analysis of the two legal systems was conducted. Data from the U.S. General Social Survey, U.S. Department of Justice Statistics, California Corrections Statistics, Texas Corrections Statistics, and previously published research was analyzed to assess the differences in the structure, workload, and composition of the judiciary, as well as the intersection of public opinion, culture, and race in the administration of the death penalty.

Zimring's theory of external constraints and internal ambivalence led to the hypothesis that public opinion, political climate, and the structure, composition, and workload of the courts of each state influence the way capital cases are handled at trial and on appeal, and at least partially explain the variation in execution rates. Finally, the intersection of culture and structure, as influenced by racial prejudice, was identified as a significant issue affecting the way death penalty cases are adjudicated and carried out in California and Texas.

The Sentence to Death - From Trial through Appeal

Prosecutorial Discretion

Prosecutorial discretion has been identified by multiple researchers as the single most important variable in understanding variations in capital sentencing rates (Pierece & Radalet, 1991; Tabak, 1991; Bohm, 1984). The prosecutor's power is almost absolute from decisions not limited to "whether to arrest; whether to charge and, if so, with what offense; how much bail should be set; how much evidence should be disclosed to the defense prior to the trial; whether to plea bargain and what sentence to offer a defendant in return for a guilty plea" (Meltsner, 1973, p. 74). In his dissenting opinion in *DeGarmo v. Texas*, United States Supreme Court Justices Brennan and Marshall wrote that:

> The selection process for the imposition of the death penalty does not begin at trial: it begins in the prosecutor's office. His decision whether or not to seek

> capital punishment is no less important than the jury's... [T]he decisions whether to prosecute, what offense to prosecute, whether to plea bargain or not to negotiate at all are made at the unbridled discretion of individual prosecutors (DeGarmo v. Texas, 1985).

A prosecutor's discretion, in and of itself, does not explain disparities in execution rates. However, in light of the fact that prosecutors in particular jurisdictions must present "tough on crime" personas to attract re-election votes, the cultural climate and the latitude of a prosecutor influences whether a defendant from a particular region is more or less likely to be charged of a capital crime (Bright, 1995; Pierce & Radelet, 1991). In California, capital review panels mitigate the influence of political pressure and the discretion of the prosecutor. Not so in Texas, where county prosecutors are given free reign on decisions to charge and try capital cases. Compared to prosecutors in California, Texas prosecutors are subject to less administrative review and fewer restraints in prosecutorial discretion, making them more subject to political pressure. The influence of political pressure on prosecutors and the judiciary is significant.

Quality of Counsel

While prosecutors are afforded the cooperation of law enforcement and the resources of the state and federal attorney general's office, defense attorneys and their clients suffer from a contrasting deficit in resources and institutional power. Most defendants are indigent, seriously disadvantaged in their defense, and have relatively little access to the facts (Meltsner, 1973, p. 93). The prosecutor has superior resources for investigation, cooperation of the police, control over the timing of the litigation, and a typically friendly jury. The indigent's attorney enters the case late with witnesses who are difficult to find and typically unappealing as witnesses. The defendant is frequently jailed in default of bail and cannot assist in defense investigation. The processes of state court justices are often hurried and inexcusably lax in guaranteeing the constitutional prerequisites of fair trial.

Senator Rodney Ellis, the most outspoken legislative advocate for indigent defenders in Texas, reported the quality of the defense has been so poor that he is "convinced that there are people in jail in this state when their lawyer should be" (Ellis, 2001a).

Of the 131 cases where a death row inmate was executed under ex-governor George W. Bush, "40 involved trials where the defense attorneys presented no evidence or only one witness during the sentencing phase" and "43 included defense attorneys publicly sanctioned for misconduct—either before or after their work on these cases" (Mills, Armstrong, & Holt, 2000). When asked about the quality of counsel in these instances, Bush's criminal justice policy director responded that:

We have a system in place that is very careful and gives years and years of super due process to make sure that no innocent defendants are executed and that the defendant received a fair trial. We think we have a good criminal justice system in Texas. It's not perfect, but it's one of the best around. (Mills, Armstrong, & Holt, 2000).

Despite having nearly one third of the state's cases being handled by defense attorneys with questionable competence during his tenure, Governor Bush signed a bill designed to speed up the pace of executions, and later opposed a proposal to ban the execution of mentally retarded defendants. Governer Bush also vetoed a measure designed to improve legal representation for the indigent (Mills, Armstrong, and Holt, 2000).

Although a poor person accused of a crime is constitutionally entitled to an attorney at trial and for one round of appeals, direct state post-conviction reviews and federal habeas corpus reviews have been handled differently in California and Texas. Prior to 1995, Texas and California maintained federally funded organizations to oversee and appoint counsel to post-conviction inmates. However, in 1995, Congress eliminated funding to these sites, and the Texas Resource Center closed shortly thereafter (Bright, 2000). California continues to maintain state and privately funded post-conviction appeals bureaus for indigent defendants. Texas does not. After the closing of the Texas Resource Center, the

state legislature gave the Court of Criminal Appeals the responsibility to appoint competent counsel. The Court of Criminal Appeals performed this duty with suspect diligence from 1995 to 1999, appointing former law clerks with no experience with capital appeals proceedings, campaign contributors, and generally incapable lawyers to represent the condemned in the most complicated and structurally rigid portions of the capital process (Bright, 2000).

According to Senator Rodney Ellis, Texas is one of only four states that contribute no state funding to indigent defense, and Texas ranks second to last in the nation in per-capita spending on indigent criminal defense, spending less than $5 per capita on counsel for the poor (2001c). To this end, the senator proposed legislation SB 247, which would have improved the quality of defense attorneys for indigent clients by allocating funds and establishing a system of judicial appointment of counsel. Although the bill passed both houses of the Texas legislature by unanimous votes, the bill was vetoed by then-governor Bush.

Despite Texas' history of limited resources for defendants, the Texas Court of Criminal Appeals has upheld death sentences "even in cases in which defense lawyers slept through trial" (Bright, 2000, p. 1806). Summarizing the Court of Criminal Appeal's handling of the appointment of post-conviction counsel, it is clear that attorneys incapable of preparing petitions or filing them on time created a serious breach of fairness which has been neither recognized nor reversed by the state's highest criminal court.

Clemency

The historic role of clemency in capital cases is significant. At one point in time, about one in four or five death row inmates could expect to have his or her sentence commuted to life in prison; the most recent data suggest that this rate has been reduced to about one in forty (Bowers, 1984; Bedau, 1991). From the 3,625 inmates on death row throughout all U.S. jurisdictions in 1999, only 5 commutations were granted; during the same period, 8 prisoners were exonerated and freed by the courts (Death Penalty Information Center, 1999). In his research, Bedau found roughly similar rates of commutations in California and Texas during the middle part of the last Century, but did not examine more recent trends in either state (1991).

While Bush served as governor, he commuted only one sentence and presided over 136 executions. Since 1990, California governors have commuted 4 sentences, as compared to only 1 in Texas. Although the exact number of applications for clemency is not known, it is generally considered one of the more expeditious appeal measures, and all but a few inmates who appeal at any level file an application for clemency (Bedau, 1991).

The change in the rate of clemencies granted is due in large part to the structure of Texas' appeal process. Like most states, California allows its governor to fully or conditionally pardon, reprieve, or commute a sentence. The governor may obtain a nonbonding recommendation from the Board of Prison Terms, though this is merely a formality. Clemency is, more broadly, a proceeding whose participants include the district attorney for the county that obtained the conviction, the defendant's counsel, and the victim's survivor (should they choose to participate). If the defendant had a felony conviction before receiving the death sentence, the Governor must obtain permission from a majority of the California Supreme Court in order to consider clemency, though that is the extent of the outside influences involved in the governor's almost absolute discretion.

Texas appeals are substantially different. After appeal to the state's highest criminal court, the Texas Court of Appeals, death row inmates appeal to the Texas Board of Pardons and Paroles, an 18-member board with almost exclusive power over the right to grant clemency. The Board is the only body that can recommend clemency, which then must be signed and granted by the governor. Since its creation, the Texas Board of Pardons and Paroles has been criticized by the press as being secretive, overwhelmed by the thousand appeals it reviews a month, and out of step with the current policies of handling death row inmates in other states. However, its power has not been seriously challenged by the legislature, and continues to have wide latitude in its handling of executions (Rimer &

Yardley, 2000). The Board's general reluctance to grant stays or clemency is yet another structural constraint which, when compared to California's clemency process, expedites executions by insulating the governor and other state officials from political pressure and scrutiny should they grant a stay, pardon, or clemency.

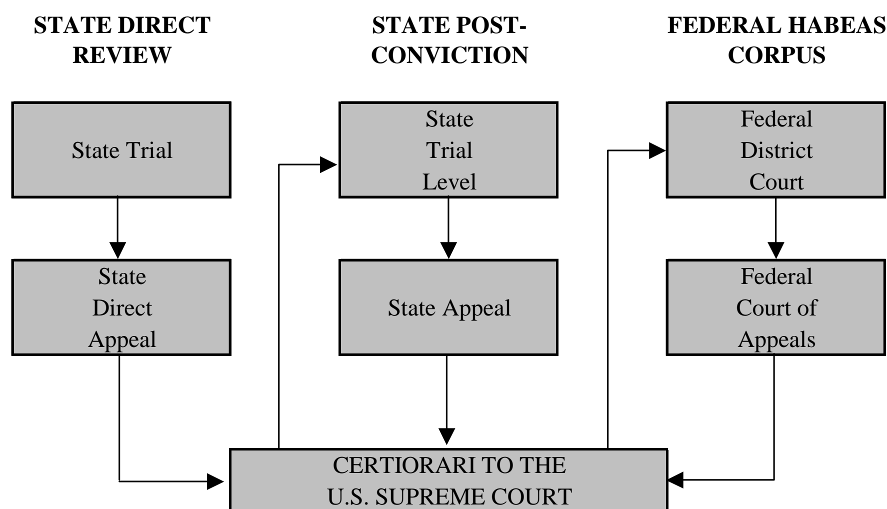
If Texas' legislative history has moved more toward expedient sentencing, California's legislative history has moved in the opposite direction. Capital murder has remained the only offense punishable by death since 1957. The framework of the death penalty prosecution has remained basically unchanged since 1957, when Penal Code section 190.1 provided for a separate penalty phase in a death penalty trial. During this sentencing phase, the prosecution and defense may present circumstances of the offense, the defendant's background and history, and any relevant aggravating or mitigating facts. The limited revisions in California law and the overall definitions for capital crimes (both historically and as they exist today) make charging a criminal with a capital crime significantly different. A person who commits a murder in Texas is much more likely to fall into capital charge on the face of the statute, as compared to California, whose list of circumstances where a capital charge can be brought by the prosecutor is substantially smaller. Finally, when one looks at the sentencing guidelines for Texas at the penalty phase, a significant difference exist, in that California jurors are afforded more options in assessing the appropriateness of a death sentence or a sentence of life in prison without parole.

The Appeals Process

When it reinstated the death penalty in 1976, the Supreme Court urged state supreme courts to review all capital convictions on direct review. In all states but Alabama and Ohio, where defendants receive two rounds of state direct review, capital judgments are appealed either to the state supreme court or the state's highest criminal court. Reversal of a capital conviction or sentence on direct appeal requires a showing of "serious error" by the trial court. Once this avenue has been exhausted, a defendant may seek certiorari in the United States Supreme Court, although at this point, certiorari is extremely rare.

In most instances, defendants appeal immediately to federal district court seeking habeas corpus relief. These appeals arise when a defendant believes he or she cannot or has not been allowed to fairly litigate his or her claims at trial or appeal. This argument may be based on a number of circumstances, as when a police officer or government official suppresses relevant facts or coerced a confession from the defendant, where counsel was incompetent, where evidence was not made available to the defense, or where a new rule of law has been established that would retroactively apply to the defendant's case (Friedman, 2000). If relief is denied by the Circuit Court, defendants may again seek certiorari from the U.S. Supreme Court, though, this is granted only in unusual cases.

After certiorari has been explored, defendants may appeal to the federal Court of Appeals. In order to appeal to the Court of Appeals, the defendant must show a substantial constitutional claim, and stays of execution are rarely granted at this stage of the appeal because of the standard of proof, i.e., "serious error" at previous stages of trial and appeal. A final appeal may be made to the Supreme Court, however the appeal is rarely heard or granted. For simplicity, a chart diagramming the stages of appeal for capital cases is presented below.



Reversal Rates

During the first round of state appeals, studies have demonstrated no significant difference in error rates between California and Texas. Both states found errors in 31% of its capital convictions on direct state appeal (Liebman, 2000). The overall error rates detected by the California and Texas courts on both state direct appeal and state post-conviction were only slightly different during the same period: Texas state courts reversed 35% of the cases it reviewed and California reversed 33% of the reviewed cases. These figures imply that the state courts operate in substantially similar fashion. However, this is not necessarily the case, and does not take into account the post-Furman policies that impacted death row inmates in the decade following Furman.

Apart from the expediency of cases being reviewed by the Circuit courts, federal courts find fault with capital convictions of Texas and California at substantially different rates. Between 1976 and 1995, the Fifth Federal Circuit Court of Appeals overturned 36 of the 139 (26%) Texas death penalty cases it reviewed (Liebman, 2000). During the same period, the Ninth Federal Circuit Court of Appeals overturned 4 of the 5 (80%) death penalty cases it reviewed (Liebman, 2000). Previous research has documented a pattern of the Circuit courts to be more lenient than the state courts, particularly in the case of the Ninth Circuit. These assertions are substantiated by Liebman's findings that between 1976 and 1995 the Fifth Circuit overturned only 63 of the 200 (32%) death penalty cases it reviewed, compared to the Ninth Circuit Court, which overturned 21 of the 34 (64%) death penalty cases it reviewed during the same period (Liebman, 2000). This seems to explain at least one barrier to executions in California, as compared to Texas. When one takes into account the levels of reversals at the state direct appeal, state post-conviction, and federal habeas corpus review, California's capital convictions are overturned at a much higher rate (87% versus 52% for Texas). These numbers suggest that California's death row inmates are much more likely than Texas death row inmates to be removed from the wait list for execution, reducing the number of inmates eligible for execution.

The Scheduling of Execution Dates

In Texas, after the Federal Court of Criminal Appeals has denied relief, the trial court may set a defendant's execution date. If this is the defendant's first execution date, the execution may not be set for fewer than 91 days from the date of the order (Texas Office of the Attorney General, 2000). If the defendant had previously had a date for execution scheduled, the trial court may not set the execution for fewer than 31 days from the date of the order.

California attorneys, on the other hand, are afforded numerous opportunities to delay the appeals process. Perhaps the most notable is the certification process. In California, the statutory time for rendering a decision on appeal is 60 days after the decision at trial has been certified. After what is

normally a lengthy capital trial, the certification can be delayed by defense attorneys who must certify the court transcripts. Defense attorneys have regularly sent back numerous requests for minor revisions in the transcripts, a tactic that caused the legislature to amend the California Rules of Court in 1982 to encourage a more expeditious record certification by using computer generated transcripts and delays for only egregious and misleading errors in the transcripts. However, despite this amendment, a study by the California Department of Justice provided by the Deputy Attorney General, a survey of 84 pending appeals found a range of 14 to 66 months between the certification of the decision until the filing of the opening appellate brief.

The procedural differences and practice of the appellate attorneys in California and Texas have created a significant difference in the time between sentencing, appeal, and execution for death row inmates in each state. Texas appeals must meet rigorous deadlines with little or no sympathy given to inmates who are unable to meet deadlines, whereas California attorneys are afforded numerous structural opportunities and wide latitude by the courts to extend the time of the certification of the death sentence and beginning of the appeal.

The differences in California and Texas begin at the trial stage with the aggressiveness of the prosecution and quality of the defense counsel, and they carry forward throughout the trial, sentencing, clemency, and appeals processes. The differences are many, and they are significant. Taken as a whole, the structural explanations demonstrate the reasons for California's lower rate of execution rate. They do not, however, explain why more than a third of the executions in the country since 1976 have been carried out in Texas.

Regional Differences and Southern Culture

Since the death penalty's reinstatement in 1976, more than half of the 1,004 men and women executed in the United States have been executed in the South (as defined by the U.S. Census Bureau). The breakdown of executions by state between 1976 and 2005 is as follows:

Southern States

State	Executions
Texas	**355**
Virginia	94
Oklahoma	79
Florida	60
North Carolina	39
Georgia	39
South Carolina	35
Alabama	34
Louisiana	27
Arkansas	27
Delaware	14
Mississippi	7
Maryland	5

(US Department of Justice, 2006)

All Other Regions

State	Executions
Missouri	66
Arizona	22
Indiana	16
Illinois	12
California	**12**
Nevada	11
Utah	6
Nebraska	3
Pennsylvania	3
Washington	4
Montana	2
Wyoming	1
Idaho	1

The above chart points to the importance of political climate, but does not explain, per se, why southern states execute at a higher rate. Southern support for the death penalty has been explained by a variety of theories including a belief in "just deserts" (Bedau, 1978; Finckenauer, 1988), Biblical "eye for an eye" justice, and justifiable retribution (Vidmar & Ellsworth, 1982).

Research on attitudes, characteristics, and demographics of pro-death penalty advocates has found that respondents who support the death penalty tend to be "older, less educated, male, more wealthy,

white and from urban areas" and "a greater percentage of blue collar workers, manual laborers, and farmers favor capital punishment than do professionals and businesspersons" (Vidmar & Ellsworth, 1982, p. 72). Borg's (1997) analysis of public support for the death penalty uncovered no significant difference between southerners and northerners, but found regional differences in racial prejudice, religious fundamentalism, and political conservativism, which he believed correlated to greater and lesser degrees of support for the death penalty.

Multiple studies have been performed to measure public support for the death penalty; however, the range of support has varied widely between samples (USA Today, 2000; Baldassare, 2000; Public Policy Institute of California, 2000).[1] While current national polling suggest that 69% of Americans support the death penalty for convicted murderers (Gallup News Service, 2007) Californians have historically support at only 58%, compared to 75% for Texans (USA Today, 2000; Public Policy Institute of California, 2000). Historical trends from the GSS are as follows:

STATE	1974-1979	1980-1989	1990-1998
California			
Favor	536 (66.7)		
Don't Know	40 (5.0)	1127 (78.4)	938 (73.5)
Oppose	227 (28.3)	73 (5.0)	75 (5.9)
		238 (16.6)	264 (20.7)
Texas	238 (65.0)		
Favor	11 (3.0)		
Don't Know	336 (32.0)	513 (75.6)	626 (74.5)
Oppose		42 (6.2)	65 (7.7)
		124 (18.3)	149 (17.7)

n=5622

As the chart indicates, there is no statistical difference in support for the death penalty between California and Texas according to the GSS data. While there have been some historical shifts across time, the shifts seem to be mirrored in each state, challenging Borg's theory of regional differences and Zimring's belief that each state should exhibit different levels of support.

Borg's second hypothesis, that religious attitudes influence support for capital punishment, is supported by additional research by Ellison (1991) and others (Matthews, 1977; Newman & Halvorson, 1984; Shibley, 1991; Stump, 1986), each of whom found that religion plays a significant role in legitimating violence, particularly in southern protestant churches (Borg, 1997). Reviewing data from the General Social Survey, it was found that Texans identify as fundamentalist at significantly higher rates than Californians.

STATE	Fundementalist	Moderate	Liberal
California	767 (22.7)	1579 (46.8)	1028 (30.5)
Texas			
	832 (43.4)	736 (38.4)	347 (18.1)

n=5289

These results support Borg's contention that more punitive regions should exhibit greater levels of fundamentalist affiliation, but again, the lack of a difference in overall public support for the death penalty challenges the original hypothesis. These results do, however, support Zimring's contention that the political and cultural climates influence the state's level of ambivalence, and that in the case of Texas, a historical precedent may be supported in the fundamentalist affiliations of its citizens (1991).

[1] USA Today found that 66% of Americans support the death penalty for convicted murderers. The level of support reported for Californians varies between 58% and 73.5%. Levels of support for Texans vary between 74.5 and 75% (USA Today, 2000; Public Policy Institute of California, 2000).

Borg's final hypothesis, that regional differences in political affiliation would affect support for capital punishment was supported by additional research by Grasmick and McGill (1994), who found that that religious conservatives exhibit greater levels of punitiveness in particular situations. Previous studies have found a general move of the electorate toward more conservative ideology at the national level (Benedetto, 1996). General Social Survey Data identified a significant difference in the reported conservative versus liberal identifications of Texans and Californians.

STATE	Conservative	Moderate	Liberal
California	1073 (33.2)	1091 (33.8)	1064 (33.0)
Texas	676 (38.9)	653 (37.6)	410 (23.6)

n=4967

These differences in political climate support Zimring's internal ambivalence hypothesis, in that each state has a unique political climate, characterized in this case by a more fundamental, conservative electorate in Texas as opposed to California.

Perhaps not surprisingly, the general state of punitiveness in each state has translated into a greater number of death sentences per 1,000 homicides (14.39 for Texas compared to 7.75 for California) (Liebman, 2000). The overarching "southern subculture of violence," characterized by higher homicide, assault, and gun ownership rates, has been explained by differences in structure, particularly socioeconomic inequalities and migration rates (Baron & Straus, 1988; Doerner 1978). More culture approaches (Ellison, 1991; Ellison & McCall, 1989; Ellison & Musick, 1993) have stressed that southern support for the death penalty is tied to the historic way that southerners have responded to conflicts with violence (Borg, 1997).

Each of these theoretical approaches have fallen short under empirical review, yet while the general condition of punitiveness and tendency toward particular types of violence has not been adequately explained, research has determined "particular situations" in which southerners seem more prone to aggressive behavior (Borg, 1997).

The Myth of the Frontier and Boundary Maintenance

Richard Slotkin (1992, 1986, 1973) and Frederick Jackson Turner (1920) have traced the development and evolution of American Southern culture. Focusing particularly on Slotkin's Frontier Myth, it seems that America's entry into Industrialization forced the culture to either "liquidate" or "renaturalize" the values and social structures of entrepreneurial-agrarian democracy; according to Slotkin, at least portions of America chose the latter (1986, p. 530-531).

> At the core of the Myth is the belief that economic, moral and spiritual progress are achieved by the heroic foray of civilized society into the virgin wilderness, and by the conquest and subjugation of wild nature and savage mankind. …The meaning and direction of American history … is found in the metaphoric representation of history as an extended Indian war…
>
> Behind the mystique of the Indian war lay a concept of social relations that insisted on the racial basis of class difference, and insisted that in a society so divided, strife was unavoidable until the more savage race was wholly exterminated or subjugated (Slotkin, 1986, p. 531).

Laurence French's *boundary maintenance* theory offers a related hypothesis integrating Patterson's ordeal of integration and the socio-historical climate in both states. French argues that the administration of the death penalty, particularly in the South, serves to maintain rigid class and racial boundaries purportedly dismantled by post-Civil War legislation. Citing Garfinkel's (1949) 11-year study of homicide proceedings in North Carolina, French (1987) argues that racial boundaries have been enforced by applying different protocols in capital proceedings depending upon the race of the victim

and defendant, creating a legal system which reinforces prevailing social inequalities (p. 425). The death sentence is used "primarily in response to the most socially condemned form of boundary crossing – a crime against a majority group member by a minority group member" (Bowers, 1984, p. 231). In Texas, Bowers found that "among black offenders, those with white victims are eighty-seven times more likely than those with black victims to receive the death penalty; and among the killers of whites, black offenders are six times more likely than white offenders to be sentenced to death" (1982, p. 227).

The imposition and administration of the death penalty serves a deeper, underlying mechanism of social control reflecting the tacit, if not overt, acceptance of the majority culture. The widespread acceptance and support for the death penalty among a threatened white upper-class, and the fact that numerous points of institutional pressure from public opinion exist in the adjudication and administration of the death penalty, lends credence to the assertions that culture and structure work together in affecting sentencing and execution rates (Borg, 1997; Ellison, 1991). The feeling of social unrest, combined with the influence of the media, encourages politicians to actively pursue symbolic warfare against perceived threats, usually in the form of "crime waves," but more accurately a tide of social unrest caused by unwanted social mobility.

The Ordeal of Integration

In *The Ordeal of Integration*, Orlando Patterson made the contentious argument that "in absolute terms, Afro-Americans, on average, are better off now than at any other time in their history" (1997, p. 17). From political life to cultural contributions and influence, from the power of African-American icons such as Oprah Winfrey and Michael Jordan to the participation and courting of African-Americans in the daily marketplace of ideas and electoral challenges, Patterson argues that African-Americans have made huge strides in closing the gap between white privilege and African-American servitude. Among the achievements of African-Americans recognized as indicating social and political movement are African-Americans' prominance in the leadership of the armed forces, the staggering increase in the rate at which African-Americans now graduate from high school or four years of college, the rise in African - American standardized test scores, and the dramatic increase in the wealth accumulated by the top quintile of African-Americans between 1967 and 1995.

Although African-Americans have suffered as many setbacks in terms of underlying poverty, drug use, imprisonment and parole rates, Patterson believes that to see things as getting worse is really a reaction to the fact that things are getting better. The legal and social separation of African-Americans and whites for more than 350 years necessitates friction, as evidenced by the media's constant hunger for more and more 'proof' that Afro-Americans and Euro-Americans can never get along successfully. While African-Americans have become an integral part of American culture, class differences and prejudices have made the integration painful, and these prejudices may be contained and supported by legislation, media portrayal, and the judicial handling of capital cases, particularly where African-Americans and other ethnic minorities are involved. In some ways, revisiting French's boundary maintenance hypothesis, the integration of African-Americans and ethnic minorities is a violation of the societal boundaries of segregation and social class. The threat, as expressed by Patterson, now occupies almost every point of insertion: education, cultural values, societal role models, electoral trends, the workforce, and (perhaps most pressing) the increase in wealth and opportunities for middle class African-Americans.

The large number of executions in the South correspond to more troubling numbers in terms of overall sentencing rates for African-Americans; "people of color make up 43% of those executed nationally" and over 80% of the inmates on death row in the states are there for killing whites (Friedman, 2000, p. 76). Race occupies a separate chapter because it appears to be an intersecting variable between culture and structure.

Previous research on sentencing and execution rates has documented the significance of race at trial and on appeal. In their research, Keil and Vito (1992) found that Southern states "consistently" executed more blacks than whites during the 20th Century. Marquart et al's study of capital punishment

in Texas found that in the two decades following Furman, former confederate states accounted for approximately 90% of the total executions, with Texas far and away leading in numbers of execution (1994). Additional research too voluminous to mention in more than passing has demonstrated an ongoing disparity and racial bias, pre- and post-Furman, in the sentencing of African-American and white offenders. Baldus, Woodworth, and Pulaski (1990) found that in Georgia the odds of receiving the death sentence was four times higher for killing a white person than an African-American person. In Southern cases with White victims, especially with Afro-American killers, defendants are much more likely to receive a death sentence, a figure which only partially presents “evidence of discrimination against Blacks at every stage of the [legal] process” (Keil & Vito, 1992, p. 224).

Despite having almost identical non-white populations as a percentage of total population in 2000 (California -- 25%, Texas -- 24%), (Liebman, 2000), California and Texas have slightly different death row populations in terms of demographics. As the Chart below indicates, Texas’ death row has a significantly higher percentage of non-whites facing execution.

Death Row Inmates (by Race)

RACE	California	Texas
Caucasian	316 (40.0)	161 (36.0)
African-American	285 (36.0)	183 (41.0)
Latino	150 (19.0)	99 (22.0)
Other	40 (5.0)	4 (.09)

(Death Penalty Information Center, 2000)

When one considers the executions carried out by both states in terms of racial characteristics, these racial differences are even greater (though the small number of executions in California does not allow a proper test of significance).

Inmates Executed (by Race)

RACE	California	Texas
Caucasian	8 (73.0)	124 (51.0)
African-American	1 (9.0)	80 (33.0)
Latino	0 (0.0)	38 (16.0)
Other	2 (18.0)	2 (1.0)

(Death Penalty Information Center, 2000)

Three broad categories integrating cultural and structural explanation for racial disparities have been offered by previous research. A brief exploration of these theories are as follows.

Historical Discrimination

Historical discrimination is a product of cultural history, and translates into reactions from key decision makers imbedded at the structural level. In the case of the death penalty, “… prosecutors, judges, jurors, and even defense attorneys intentionally discriminate against Black defendants and victims because Blacks are feared, disliked, or both (Bohm, 1994). This explanation has been at least partially supported in previous research by Bohm (1991), Marquart et al. (1994), Ellison (1991), Ellison and McCall (1989), and Ellison and Musick (1993).

Racial Identification

Disparities in sentencing for White-on-White killings as opposed to Black-on-White killings has been explained by victim-based racial identification, where White “jurors are more likely to be horrified by the killing of a White than of a Black, and more likely to act against the killer of a White than the killer of a Black (Gross & Mauro, 1989, p. 113). The theory offers that racial identification is not as much racial hostility, as natural patterns of interracial relations and has been supported in research by Gross and Mauro (1989).

Institutional Racism

The final explanation incorporating the structural and cultural elements of race and racial prejudice is that racial prejudice has established biases in the institutions of social justice. These biases have created subordination and an increase of negative outcomes for Blacks through the normal functioning of social institutions. The subordination of Blacks occurs through "either overt or unconscious racially discriminatory behaviors or attitudes become normative through their general acceptance over a period of time" (Bohm, 1994).

Synthesis of the Structural Arguments

Each of the structural theories indicates correctly the disparities in structural opportunities and barriers that exist in overlapping arenas of social participation. In the case of the capital trial and appeal, racial discrimination and identification are passed down through many levels. Political pressure encourages legislators to pass laws that make offenses perpetrated by one race subject to the death penalty. Prosecutors are encouraged to press for prosecution and maximum sentences, particularly in cases where racial boundaries are crossed. Finally, juries and judges convict or acquit capital defendants that create inequality between and among races and state officials expediently or reluctantly execute or pardon based upon race.

The explanation for aggressive prosecutorial action and judicial expediency is at least partially explained by a prevailing attitude among politicians fueled by media sensationalization, oversimplification, and distortion of crime (Pierce & Radelet, 1991). Journalists select and define crimes as newsworthy based upon the sensationalism of a crime (rather than upon the prevalence of a particular type of crime) in order to expand market shares and attract advertisers. The public fear created out of this message is assuaged by politicians who tout the death penalty as a symbolic tool, establishing the politician as a defender of a superior, community-focused, moral code, which in reality diverts attention away from realistic solutions to crime and disorder. The political climate fosters pro-death penalty candidates, as candidates with anti-death penalty views are labeled "soft on crime" (Pierce & Radelet, 1991).

In their analysis of Texas' death penalty, Marquart et al. argued that the underlying disparities in execution rates was essentially born from a "cultural tradition of exclusion" (1994, p. x). In the case of Texas, the above findings imply that culture and structure have intersected because of, or in the case of, racial tensions. In tandem with Patterson's articulation that Blacks are increasingly crossing moral and social boundaries, and when one considers the historic precedents explored by the Myth of the Frontier and the southern subculture of violence, evidence suggests that the political climate has shifted, reacting to a threat in social boundaries with a punitive response. The growing numbers and prosperity of minorities, particularly African-Americans, is a challenge to historical values of exclusion. The boundaries must be maintained, reestablished. The political climate in Texas has grown more punitive and repressive. "Hang-em-high" judges and politicians thrive and prosper. For those who are successfully labeled "soft on crime," political futures can be brief.

Political Pressure

The International Commission of Jurists "Study of the Administration of the Death Penalty in the United States" noted a dangerous bi-product of judicial elections in capital trial and appeals (1997). According to their report, "a major consequence of the practice of electing judges is the temptation generated to pander to public opinion," a concern echoed by Supreme Court Justice Stevens (The International Commission of Jurists, 1997; Harris v. Alabama, 1995).

According to Justice Stevens:

The 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office - or who merely wish to remain judges - must constantly profess their fealty to the death penalty…the danger [is] that they will bend to political pressures when pronouncing sentence in highly publicized capital cases (Harris v. Alabama, 1995, pp. 5-19, n.5).

In their research on the role of public pressure placed upon judges and prosecutors, legal scholars Bright & Keenan found that:

> Decisions in capital cases have increasingly become campaign fodder in both judicial and nonjudicial elections. The focus in these campaigns has been almost entirely on the gruesome facts of particular murders, not the reason for the judicial decisions. Judges have come under attack and have been removed from the bench for their decisions in capital cases – with perhaps the most notable examples in states with some of the largest death rows and where the death penalty has been a dominant political issue. Recent challenges to state court judges in both direct and retention elections have made it clear that unpopular decisions in capital cases, even when clearly compelled by law, may cost a judge her seat on the bench, or promotion to a higher court (1995, p. 760).

Studying the degree to which judges were subject to "electoral scrutiny and discipline," Liebman's "political pressure" index found that nearly all state judges are subject to election at some point to remain in office; however, "the forms and frequency of elections differ in ways that are likely to increase or decrease the extent to which judges are put at political risk because of the capital outcomes produced in their courts (meaning, at the trial level, whether the verdict was death or life, and at the appellate level, whether a death sentence under review was affirmed or reversed)" (Liebman, 2000).

Liebman's index considered such factors as whether judges were initially elected or appointed, whether judicial elections are partisan, the length of judges' terms in office, and whether judges' continuation in office is determined by contested or retention elections. The study found members of the California judiciary to be much less accountable to public pressure than their counterparts in Texas. Recent findings showing that when one considers the political pressure as compared to the death sentences per 1,000 homicides, states with more political pressure execute at a higher rate, particularly the case in Texas (Liebman, 2000).

Public sentiment and political pressure has played a role in the death penalty's administration in California. For example, in 1986, the same year Governor Gray Davis won an election as state controller, voters turned out three Supreme Court Justices for their anti-death penalty stands. These Justices, including Chief Justice Rose Bird, comprised a majority of the court that had overturned 94% of the death penalty cases brought before the Court (Lindlaw, 2000). The behavior of the Bird Court supplies ample evidence explaining why 87% of the 531 death penalty cases disposed by California trial courts were "reversed or remanded for new trial by appellate court and via federal habeas corpus petitions" between 1976 and 1995 (Brazil, 2000).

The removal of the justices fostered a significant turn in the Court's policy. The Chief Justice who replaced Justice Bird, Justice Malcom Lucas, has affirmed 23 death sentences in his first year, rejecting eight. Perhaps more importantly, public awareness heightened and the press responded. Recent articles in California newspapers have framed capital punishment as a "broken down" system in need of reform. The Recorder documented that four times as many California death row inmates have died in San Quentin of causes other than execution (Elias & Fried, 1999). The San Jose Mercury reported that California had become reluctant to execute, citing that between 1992 and 2000 California's death row population grew by over 200 inmates, but executed only 7 men during the period (Mintz, 2000). During the same period, "the Texas judiciary has responded to the clamor for executions by processing capital

cases in assembly-line fashion with little or no regard for the fairness and integrity of the process" (Bright, 2000, p. 1805).

Conclusively, as offered by the American Bar Association, "the death penalty and politics are inseparable …." (1986). Judges are reluctant to take action in cases involving the death penalty because of the highly publicized and politicized environments created in states where the death penalty is a central issue in electoral politics, creating an atmosphere where judicial fairness is surpassed by judicial ambition. The role of race, politics, and punitiveness in shaping media portrayals of crime and a political climate which praises expeditious executions over deliberate legal scrutiny has created a climate in which death sentences continue to mount. However, unlike California, the judiciary in Texas, responding to a higher degree of political pressure from the state electorate, has aggressively pushed death sentences through the appellate and sentencing processes. The conspicuous rate of sentencing and executing non-Whites in Texas as compared to California, lends credence to previous theory suggesting that a violation of social boundaries leads to more punitive measures against the unwanted socially mobile (French, 1987).

Conclusion

Despite the similarities in terms of prison population, death row population, and overall rate of capital sentencing, California and Texas execute convict offenders at a widely disparate rate. Franklin Zimring (1991, 1996) has argued that this phenomenon may best be understood as a general state of ambivalence, explained either by external constraint or internal ambivalence. Contrary to Zimring's findings, this research found that both external constraints and internal ambivalence were possible explanations for the large numbers of offenders sentenced to death in California. However, Zimring's theory does not explain the aggressiveness exhibited by the state of Texas in executing convicted offenders. The structural and cultural mechanisms operating in each state's adjudication, appeal, and enforcement of capital sentencing, particularly the role of race, boundary maintenance, and the political pressure unduly affecting Texas' judiciary, explain the preponderance of the difference in execution rates. As Zimring hypothesized, there is a "systematic difference in the political culture" of Texas and California, with Texas "displaying a stronger historic commitment to capital punishment" (1991, p. 732). However, more than historically rooted, Texas' appellate structure, relative incompetence of counsel, and judicial pressure have formed structural differences which expedite executions at a rate much higher than any other state or federal jurisdiction in U.S. history.

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