



## ARTICLE

**The American Execution Queue**

Lee Kovarsky\*

**Abstract.** The modern death penalty presents a puzzle: Law and norms heavily constrain how U.S. jurisdictions impose death sentences, but not how they select death row inmates for executions. In this Article, I explain why this strange void persists, argue that its presence undermines equality, and offer workable institutional responses. In short, I advance a comprehensive theory of the American execution queue—the process by which death penalty jurisdictions decide which condemned inmates will actually die.

My first objective is explanatory. Because executing a death row inmate now entails both significant litigation and extensive coordination among weakly motivated state institutions, the process takes ten times as long as it did fifty years ago. Modern executions have become “scarce,” as U.S. jurisdictions simply cannot kill all of their condemned offenders. Even though a state must make choices, there are no rules for choosing. Because there is little consensus around decisionmaking criteria, the process operates with few constraints. By the time the state must decide which condemned inmates to execute, the capacity of familiar decisionmaking criteria to meaningfully sort inmates by death-worthiness—things like offense conduct, blame, or future dangerousness—has been exhausted during prior phases of the capital punishment sequence.

My second objective is normative. I specify several preferred institutional design strategies, anchored to interests in legitimacy, transparency, fairness, and equality. First, jurisdictions should centralize the process by which they select death row inmates for executions; localities should have no role in setting execution dates. Second, a centralized entity should engage in informal (notice-and-comment) rulemaking in order to develop transparent, legitimate selection criteria. Third, jurisdictions should separate the power to determine execution priority from the power to schedule execution dates. By shifting to a centralized process grounded in transparent rulemaking and rational decisionmaking criteria, jurisdictions can curb the arbitrariness that plagues the existing system.

---

\* Professor of Law, University of Maryland School of Law. For their assistance with various elements of this Article, I thank Frank Baumgartner, Jeffrey Belin, Richard Boldt, Josh Bowers, Danielle Citron, Erin Collins, David Dow, Kimberly Ferzan, Brandon Garrett, Adam Gershowitz, Mark Graber, David Gray, Rachel Harmon, David Jaros, Joseph Kennedy, Corinna Lain, Allison Larsen, Kay Levine, Mike Pappas, Jana Singer, Jordan Steiker, and Ronald Wright. I also thank participants in the Criminal Justice Roundtable at the University of Virginia and the Legal Theory Workshop at the University of Maryland.

**Table of Contents**

Introduction.....	1165
I. Execution Scarcity.....	1168
A. Decoupling Death Sentences from Executions.....	1169
B. Institutional Coordination and Political Will.....	1176
C. Scarcity and Arbitrariness.....	1181
II. Sorting Dissensus.....	1185
A. Upstream Sorting.....	1186
B. Downstream Dissensus.....	1191
1. Sorting dissensus and law.....	1193
2. Sorting dissensus and norms.....	1196
III. Evaluating Sorting Criteria.....	1201
A. Blame.....	1201
B. Incapacitation.....	1205
C. Deterrence.....	1206
D. Vindication Surplus and Revenge Utilitarianism.....	1209
E. Accuracy.....	1211
IV. Institutional Design.....	1213
A. Design Principles.....	1214
1. Centralization.....	1214
2. Side-constrained rulemaking.....	1217
3. Separated selection powers.....	1222
B. Nonarbitrariness and Legitimacy.....	1223
1. Nonarbitrariness (equality).....	1223
2. Legitimacy.....	1225
Conclusion.....	1228

## Introduction

There are two American death penalties. The first is the process by which a suspected perpetrator is sentenced to death: a homicide, law enforcement's pursuit of a suspect, a jury trial before peers, and a capital sentence expressing an aggrieved community's judgment for a heinous crime. This process inevitably involves arbitrary decisionmaking, but professional communities and legal institutions have developed norms and laws responsive to that problem. At least theoretically, prosecutors capitally charge only perpetrators of the most heinous crimes,<sup>1</sup> and juries levy death sentences on only the most deserving offenders.<sup>2</sup> In producing death sentences, U.S. jurisdictions<sup>3</sup> expend considerable resources sorting the "worst of the worst" from the "worst of the really bad."

The second American death penalty—and the topic of this Article—is the process by which inmates sentenced to death are actually selected and sequenced for execution, a process I refer to as "execution selection." U.S. jurisdictions maintain no pretense of avoiding arbitrary decisionmaking when they construct their execution queues. There is no federal law on execution selection, and state law usually governs only ministerial authority to seek and set execution dates.<sup>4</sup> Norms and legal rules tell us how the bell will toll, but almost nothing about when or for whom. There are virtually no constraints on execution selection, inviting a raft of questions about the role of chance and arbitrary decisionmaking in the most visible acts of state killing. As a descriptive matter, *why* is the process permitted to remain so underregulated? As a normative matter, should execution selection even be analyzed as "punishment"? And how should institutions respond?

To analyze these questions, I conceptualize the modern American death penalty as a sequence of selection phases. After a homicide, law enforcement uses arrests to select suspects<sup>5</sup> and then uses the charging process to select certain arrestees for capital prosecution.<sup>6</sup> Judges, juries, and lawyers then select

---

1. See *infra* notes 147-50 and accompanying text.

2. See *infra* text accompanying notes 151-64.

3. I use the term "U.S. jurisdictions" throughout to refer collectively to the states and the federal government.

4. See *infra* notes 85-91 and accompanying text.

5. When I say that arrestees are "selected," I mean that institution-level phenomena produce a particular pattern of arrests, not that individual law enforcement officers intentionally forgo arrests of capital murderers.

6. See generally David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486 (2002) (analyzing, among other things, the role of prosecutorial discretion in Nebraska sentencing patterns); Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 *footnote continued on next page*

capitally prosecuted defendants for death sentences by determining guilt and punishment.<sup>7</sup> There is virtually no literature on the final phase, execution selection, for many of the same reasons that norms and laws fail to constrain it.<sup>8</sup> Execution selection is a term in desperate need of coining because almost nobody even thinks of it as a *thing*. The visible parts of American capital punishment are the crime, the arrest, the trial, and the ritualized drama preceding the execution itself.<sup>9</sup>

Important clues explaining the arbitrary construction of the execution queue come from literature about when society tolerates—and even nurtures—random decisionmaking.<sup>10</sup> At the final selection phase, the differences among eligible inmates are either incommensurable or, although commensurable, too small to be reliably ordered using available sorting criteria.<sup>11</sup> Phrased a bit differently, execution selection remains insufficiently constrained because, among other things, institutions cannot agree on sorting tools and, in any event, the available sorting tools are too crude to produce a reliable ordering of execution priority. By imposing some basic rules on the institutional design of execution selection, however, U.S. jurisdictions can suppress the arbitrariness that flourishes in the void.

I explain in Part I why execution selection happens at all—that is, why the inability of U.S. jurisdictions to execute every inmate on death row produces what one might call “execution scarcity.” The first reason involves the separation of death sentences and executions into legally and temporally

---

ARIZ. L. REV. 305 (2009) (studying the effect of prosecutorial discretion in Missouri); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006) (reporting the sensitivity of charging decisions in South Carolina to select variables).

7. In capital cases, the U.S. Constitution requires that juries have ultimate discretion to spare an offender convicted of a capital offense. See *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246-56 (2007).
8. I have simplified the selection sequence by leaving out the selection function performed by the clemency process. See generally Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparring Life*, 56 STAN. L. REV. 1307 (2004) (arguing that executive clemency is a “legally sanctioned alegality”).
9. See DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* 294-301 (2010) (discussing the public consumption of the most visible elements of the capital punishment process).
10. See generally NEIL DUXBURY, *RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION-MAKING* (1999) (presenting various reasons why lottery-based decisionmaking might be irrationally disfavored); Ronen Perry & Tal Z. Zarsky, “*May the Odds Be Ever in Your Favor?*” *Lotteries in Law*, 66 ALA. L. REV. 1035 (2015) (presenting various reasons why lottery-based decisionmaking should be favored).
11. See *infra* notes 165-69 and accompanying text.

distinct events.<sup>12</sup> Executions do not immediately follow death sentences because an increasingly protracted legal process must run its course. Still, even if executions are substantially delayed, something else must explain why so few are ultimately carried out. The second cause of execution scarcity involves a coordination problem and the absence of what Carol Steiker and Jordan Steiker have referred to as “political will.”<sup>13</sup> Most states divide the responsibility for execution selection across multiple, frequently local, institutions.<sup>14</sup> Dispersed institutional responsibility elevates the level of coordination necessary to conduct executions at precisely the moment when reserves of political will to execute are running dry. In this perfect storm, newly condemned inmates will be only slightly more likely to die in an execution chamber than they will be to expire of natural causes or to kill themselves.<sup>15</sup>

If the state cannot execute everyone it sentences to death, it must make choices about which condemned inmates it should kill. In Part II, I shift my focus to a different question: Why are there no criteria for choosing? The major reason that execution selection remains substantively unconstrained is that there are few broadly shared intuitions about how executions should be prioritized.<sup>16</sup> What I call “sorting dissensus” persists in large part because most of the morally significant prioritizing—sorting by reference to offense conduct, blameworthiness, or future dangerousness—has already been performed by the upstream phases of the capital punishment sequence.<sup>17</sup> Sorting dissensus, as I use the term, simply describes a universe of sorting preferences that is highly differentiated.

Sorting dissensus frustrates the development of both legal rules and practice norms that might otherwise impose an order of execution priority. Moreover, the political economy of the execution phase compounds the natural effects of dissensus. Political beneficiaries of flexible execution selection laws tend to be incumbent political entities, so those stakeholders leave that flexibility intact. Norms of execution selection are slow to develop in environments where the decisions to which the norms would apply are infrequent, where the decisionmaking is opaque, where extreme differences in

---

12. See *infra* Part I.A.

13. See Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1873 (2006).

14. See *infra* Part I.B.

15. See TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 248448, CAPITAL PUNISHMENT, 2013—STATISTICAL TABLES 9 tbl.4 (2014), <https://perma.cc/L5AQ-FST7> (showing that in 2013, 31 inmates died of natural causes or suicide and 39 inmates were executed).

16. See *infra* Part II.B.

17. See *infra* Part II.A.

selection processes impair the transmission of occupational practices across jurisdictions, and where regular turnover at the top of local institutions wipes out predecessor practices.

Whereas Parts I and II are explanatory, Part III is a normative inquiry into sorting criteria that might be used to construct the execution queue—most of which turn out to be unworkable. For reasons I explain, blame-based criteria involving offense conduct and culpability fail to sort inmates in ways that are both desirable and workable, as do criteria based on deterrence, incapacitation, and what one might call “vindictive satisfaction.”<sup>18</sup> The fairer criteria tend to be insufficiently precise, and the more precise criteria tend to be insufficiently fair. The one sorting criterion that both captures an important value and lends itself to sensible administration is *accuracy*. Executions involving inmates subject to convictions and sentences that may be wrongful should be deprioritized. More precisely, jurisdictions should deprioritize executions involving inmates whose cases are in certain procedural postures—inmates for whom available judicial proceedings are sufficiently likely to produce an authoritative legal declaration that a conviction or sentence was in error.

I devote Part IV to questions of institutional design, based on the normative premise that no set of constraints can entirely eliminate decisionmaking that is *random*, but that the system should not gratuitously facilitate decisionmaking that is *arbitrary*. First, U.S. jurisdictions should centralize execution selection; the appropriate role of local stakeholders is exhausted during the upstream selection phases, and local involvement in the execution phase does nothing but distort the process in ways that are arbitrary, opaque, and inefficient. Second, jurisdictions ought to use a process of informal (notice-and-comment) rulemaking, like in administrative law, to identify sorting criteria, subject to an accuracy-related side constraint. Third, jurisdictions should separate, on the one hand, the power to schedule executions, and, on the other, the power to determine the identity of those executed. Such selection structure promotes interests in equality and legitimacy that are compromised by the existing chaos in capitally active jurisdictions.

## I. Execution Scarcity

The risk of random and arbitrary treatment arises when human institutions must allocate burdens and benefits incapable of equal distribution.<sup>19</sup> If an insufficiently divisible burden or benefit is also scarce, then it is not possible

---

18. Part III.D below explains this concept in more detail. Generally speaking, it refers to the value realized by the aggrieved community, distinct from incapacitation and deterrence, as it experiences satisfaction from the termination of an offender’s life.

19. See DUXBURY, *supra* note 10, at 48; Perry & Zarsky, *supra* note 10, at 1040; Dael Wolfe, *Chance, or Human Judgment?*, 167 SCIENCE 1201, 1201 (1970).

for each eligible recipient to receive a pro rata share.<sup>20</sup> The United States, for example, has used randomization strategies to distribute the burdens of wartime military service and the benefits of immigration visas.<sup>21</sup> The modern execution belongs in this category. It is obviously indivisible insofar as its primary social burden is borne entirely by the person executed; there is no sharing.<sup>22</sup> In this Part, I explain that executions are also scarce, and that such scarcity produces a decisionmaking climate vulnerable to random and arbitrary choices.

It is easiest to start with the top-line numbers. U.S. jurisdictions do not execute everyone they sentence to death. For example, as of mid-2018, there were 742 inmates on California's death row,<sup>23</sup> although the State has not executed anyone since 2006.<sup>24</sup> There have been seventy-eight federal death sentences since Congress reinstated the federal death penalty in 1988, but only three executions.<sup>25</sup> In what follows, I identify two broad causes of execution scarcity, a phenomenon that forces jurisdictions to choose which condemned inmates to kill. First, over the last forty years, the death sentence and the execution have largely been decoupled into distinct legal events. Second, unlike a death sentence, an execution requires an unusual level of institutional coordination in the face of declining political will to complete the capital punishment sequence.

#### A. Decoupling Death Sentences from Executions

Execution selection is a phenomenon of relatively recent vintage because for most of American history, the death sentence and the execution were not treated as events having distinct legal significance. Condemned inmates were just executed without any legal fuss. As capital punishment was practiced in the colonies and early states, the proverbial moment of truth was the trial—

---

20. See Lewis A. Kornhauser & Lawrence G. Sager, *Just Lotteries*, 27 SOC. SCI. INFO. 483, 492, 495-99 (1988).

21. See, e.g., 8 U.S.C. § 1184(g) (2017) (providing for the H-1B visa lottery); Exec. Order No. 11,497, 3 C.F.R. 210 (1969) (ordering that draftees be chosen at random from a pool of people ages 19 to 25).

22. I do not mean to say that an execution affects only the person executed. I am making the more literal point that multiple people cannot agree to divide a single death.

23. See Div. of Adult Operations, Cal. Dep't of Corr. & Rehab., *Death Row Tracking System: Condemned Inmate List (Secure)* (2018) [hereinafter *California Death Row Inmate List*], <https://perma.cc/58AH-9BPA>.

24. See *Inmates Executed 1978 to Present*, CAL. DEP'T CORRECTIONS & REHABILITATION, <https://perma.cc/JUV2-5LV6> (archived Mar. 29, 2019) (listing the dates of California executions); see also *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006) (holding that California's execution method was unconstitutional).

25. See *Federal Death Row Prisoners*, DEATH PENALTY INFO. CTR., <https://perma.cc/3XQW-96ZL> (last updated Dec. 21, 2018).

rather than some subsequent decision to actually go forward with the execution.<sup>26</sup> Every colonial jurisdiction required the public execution of those convicted of certain offenses “against the state, the person, and property.”<sup>27</sup> There was limited appellate review of the guilt determination,<sup>28</sup> and mandatory capital sentencing meant that there was no sentencing determination to scrutinize.<sup>29</sup> Death simply followed the verdict, and quickly.<sup>30</sup>

Like so many other early American phenomena, the explanation has to do with race. Both before the Civil War and in the postbellum South, the coupled operation of the sentence and the execution was not incidental. It was instead necessary to what was then capital punishment’s *raison d’être*: to reinforce the incumbent racial hierarchy.<sup>31</sup> The modern death penalty is usually conceptualized as an instrument by which the criminal justice system punishes deserving offenders and incentivizes nonoffending conduct,<sup>32</sup> but the eighteenth-century death penalty was better understood as a means by which the incumbent regime suppressed insurgencies and other threats to its power. In this respect, the purposes of the American death penalty required that it be a public display of violence immediately associated with crimes against such power, not entirely unlike how Michel Foucault understood the European death penalty in the eighteenth century.<sup>33</sup>

The swift execution was a substantial part of the pageantry upon which the racially subordinating function of the death penalty depended. The death penalty, for example, was a means by which slave interests in the South projected a threat to potential sources of racial resistance. Southern states used

---

26. See *infra* text accompanying notes 31-45.

27. See Hugo Adam Bedau, *Background and Developments*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 3, 3-4 (Hugo Adam Bedau ed., 1997).

28. See David Rossman, “*Were There No Appeal?*”: *The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 543-50 (1990) (describing review in eighteenth-century state criminal cases).

29. See *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (plurality opinion).

30. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 17 (2002) (explaining that the wait was typically days or weeks); IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 163-65 (reprt. 1997).

31. See Carol S. Steiker & Jordan M. Steiker, *The Racial Origins of the Supreme Court’s Death Penalty Oversight*, 42 HUM. RTS., no. 2, 2017, at 14, 15; see also Dov Cohen, *Law, Social Policy, and Violence: The Impact of Regional Cultures*, 70 J. PERSONALITY & SOC. PSYCHOL. 961, 974-76 (1996); William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 IOWA L. REV. 1505, 1525 (2002).

32. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

33. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 47-50 (Alan Sheridan trans., 1977).



the death penalty as a strategy for containing a broad spectrum of abolitionist activism,<sup>34</sup> activity that was treated as a crime against the state.<sup>35</sup> Slaves accused of plotting to murder their owners were burned at the stake;<sup>36</sup> in at least one instance, insurrectionists were decapitated and had their heads mounted on pikes.<sup>37</sup> Even when not directly related to the threat of rebellion or insurrection, swift and brutal executions helped to preserve stratified racial power. Garden-variety offenses carried minor penalties for white offenders, but entailed capital sentences for free black people and slaves.<sup>38</sup> A Maryland slave convicted of petty arson, for example, “was first to suffer his right hand to be lopped off, then to be hanged, then the head chopped off, what was left of the corpse quartered, and the head and quarters ‘set up in the most public places’ . . . to terrorize [other] slaves.”<sup>39</sup>

The Thirteenth Amendment abolished slavery,<sup>40</sup> but, in many places, the underlying social mandate for racially stratified power survived—and with it, the preference for swift “justice” in cases involving black defendants. As they did across virtually every institution, Southern states formally reconstituted capital punishment without eliminating its racially subordinating function. During and immediately following Reconstruction, lynching emerged as the favored means of using executions to preserve racial hierarchy.<sup>41</sup> Between the 1890s and 1930s, however, lynching activity fell by around 90%.<sup>42</sup> One of the biggest contributors to the “retention (and . . . reinstatement after abolition) of the death penalty” during that period was the belief that it provided a more civilized alternative to lynching.<sup>43</sup> Prosecutors would present capital juries

---

34. See, e.g., Act of Jan. 16, 1832, § 13, 1831 Ala. Laws 12, 17 (making it a capital crime to distribute “seditious papers . . . tending to produce conspiracy or insurrection . . . among the slaves or colored population”).

35. See, e.g., Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2045 n.47 (2010).

36. See CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 7 (2016).

37. See *id.* at 8.

38. See Kevin Barry & Bharat Malkani, *The Death Penalty’s Dark Side: A Response to Phyllis Goldfarb’s Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 74 WASH. & LEE L. REV. ONLINE 184, 188-90 (2017) (responding to Phyllis Goldfarb, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 73 WASH. & LEE L. REV. 1395 (2016)).

39. William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1782 (1996) (quoting Act of July 10, 1729, No. 3, 1729 Md. Laws 2, 2).

40. See U.S. CONST. amend. XIII, § 1.

41. See Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1188-89 (1999).

42. See STEWARD E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930*, at 202 (1995).

43. See STEIKER & STEIKER, *supra* note 36, at 23.

that might otherwise disfavor a death sentence with the specter of mob justice, and law enforcement would assure the expectant mob gathering behind the courthouse that it could stand down—the court would deliver a swift, lawful killing.<sup>44</sup> The executions that quickly followed these Southern death sentences were, in the phrasing of Michael Klarman, little more than “legal lynchings.”<sup>45</sup>

Thus, until the 1960s, the concept of execution selection remained largely meaningless because executions were almost always carried out.<sup>46</sup> To the extent that there was an organizing principle, it was straightforward: Proceed with state-sanctioned killings that promote the subordination of black communities. Moreover, the nexus between racial subordination and the death penalty—particularly in the South—required that hasty trials be followed by virtually instantaneous executions.<sup>47</sup> Starting in the 1930s, however, American legal institutions began to “civilize” the death penalty, and that civilizing activity ultimately decoupled the death sentence from the execution. In *Powell v. Alabama*, the U.S. Supreme Court started incorporating criminal procedure rights against the states.<sup>48</sup> (*Powell* guaranteed an appointed lawyer to defendants facing the death penalty.)<sup>49</sup> Still, during the 1960s, and even after incorporation, execution selection remained a nonissue for a different reason: The political unpopularity of the death penalty meant that executions were not just scarce; they were disappearing.<sup>50</sup> U.S. jurisdictions executed seven

---

44. See Michael J. Klarman, *Powell v. Alabama: The Supreme Court Confronts “Legal Lynchings,”* in CRIMINAL PROCEDURE STORIES 1, 2 (Carol S. Steiker ed., 2006); Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 251 (2015) [hereinafter Steiker & Steiker, *The American Death Penalty*]; Carol S. Steiker & Jordan M. Steiker, Essay, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 648-55 (2010) [hereinafter Steiker & Steiker, *Capital Punishment*].

45. Klarman, *supra* note 44, at 2-3, 5, 11; see also DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 115 (1969) (“[L]ynchings were increasingly replaced by situations in which the Southern legal system prostituted itself to the mob’s demand. Responsible officials begged would-be lynchers to ‘let the law take its course,’ thus tacitly promising that there would be a quick trial and the death penalty.”).

46. See Marah Stith McLeod, *Does the Death Penalty Require Death Row?: The Harm of Legislative Silence*, 77 OHIO ST. L.J. 525, 536 (2016).

47. See Steiker & Steiker, *The American Death Penalty*, *supra* note 44, at 251 (citing Klarman, *supra* note 44, at 1-3, 5, 11).

48. See 287 U.S. 45, 70-73 (1932).

49. See *id.* at 72-73.

50. See BRANDON L. GARRETT & LEE B. KOVARSKY, THE DEATH PENALTY 12 (2018); Chris Wilson, *Every Execution in U.S. History in a Single Chart*, TIME, <https://perma.cc/RK6Q-S2CS> (last updated Apr. 25, 2017).

inmates in 1965, one in 1966, three in 1967, and then they were finished until the Supreme Court rebooted the death penalty in 1976.<sup>51</sup>

If the Supreme Court had not decided *Furman v. Georgia* in 1972—in which it struck down the death penalty in every U.S. jurisdiction<sup>52</sup>—the death penalty might have simply withered on the vine. In *Furman's* aftermath, however, support for the death penalty spiked; thirty-seven states and the federal government responded with a new generation of death penalty statutes.<sup>53</sup> Through five cases decided on July 2, 1976 (the 1976 Cases),<sup>54</sup> however, the Court blessed the modern revival of American capital punishment. The 1976 Cases created a branch of Eighth Amendment law that required a bifurcated death penalty proceeding with a separate punishment phase.<sup>55</sup> A distinct body of substantive constitutional law grew up around that punishment phase, which now forms the basis of complicated, time-consuming litigation on direct appeal and in postconviction proceedings.<sup>56</sup>

After the 1976 Cases fixed the constitutional parameters of modern capital punishment, states began to execute the backlogged set of offenders sentenced to death under the post-*Furman* statutes. During the 1970s through the 1990s, states with next to no capital punishment in the decades before *Furman* used the death penalty vigorously.<sup>57</sup> But these states put people on death row much faster than they conducted executions.<sup>58</sup> The need for meaningful *appellate*

---

51. See U.S.A. Executions—1607-1976: Index by Date—1965, DEATHPENALTYUSA, <https://perma.cc/2T8Q-KQ6Z> (archived Mar. 30, 2019); U.S.A. Executions—1607-1976: Index by Date—1966, DEATHPENALTYUSA, <https://perma.cc/HWV5-MLF9> (archived Mar. 30, 2019); U.S.A. Executions—1607-1976: Index by Date—1967, DEATHPENALTYUSA, <https://perma.cc/UD84-FUN6> (archived Mar. 30, 2019).

52. See 408 U.S. 238, 240 (1972) (per curiam); Brent E. Newton, *The Slow Wheels of Furman's Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 65 (2012).

53. GARRETT & KOVARSKY, *supra* note 50, at 22.

54. For the 1976 Cases, see *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Gregg v. Georgia*, 428 U.S. 153 (1976).

55. Compare, e.g., *Woodson*, 428 U.S. at 286-87, 305 (plurality opinion) (striking down a mandatory scheme), with *Gregg*, 428 U.S. at 162-66, 206-07 (plurality opinion) (upholding a bifurcated scheme).

56. See generally GARRETT & KOVARSKY, *supra* note 50, at 38-62 (describing constitutional rules for determining “eligibility” and “selection”).

57. Cf. Death Penalty Info. Ctr., Facts About the Death Penalty 3 (2019), <https://perma.cc/CSQ3-QURZ> (reporting data on post-1976 execution activity by state). The best pre-*Furman* execution data reside in what is commonly known as the “Espy File,” which is a list of 15,269 executions compiled by M. Watt Espy and John Ortiz Smykla. See *Executions in the U.S. 1608-2002: The Espy File*, <https://perma.cc/J9SL-N5TK> (archived Mar. 30, 2019).

58. Compare *Death Sentences by Year: 1976-2017*, DEATH PENALTY INFO. CTR., <https://perma.cc/5LG4-SJZS> (archived Mar. 30, 2019), with *Executions by Year*, DEATH PENALTY INFO. CTR., <https://perma.cc/A9Z9-EXHY> (last updated Mar. 1, 2019).

review forced certain jurisdictions to decouple death sentences from executions.<sup>59</sup> The real force causing death sentences and convictions to decouple, however, was the lengthier *postconviction* process that enforcement of newer constitutional rights entailed.<sup>60</sup> Congress and the Supreme Court had enlarged the scope of *federal* postconviction jurisdiction, which made federal courts a viable forum for lengthy disputes over the new body of substantive constitutional law.<sup>61</sup> (By the end of the twentieth century, states were also developing more elaborate postconviction frameworks for processing legal challenges to capital convictions and death sentences—although these processes were haphazardly configured and insufficiently resourced, producing extensive delay.)<sup>62</sup>

The combined effect of new substantive law (which gave rise to new rights) and a lengthy postconviction process (which was necessary to enforce them) dramatically extended the time it would take to exhaust litigation options available to capital inmates.<sup>63</sup> That development in turn implicated the only moderately shared constraint on execution selection: Many jurisdictions would refrain from executing inmates while certain appellate and postconviction processes were pending.<sup>64</sup> The more central that appellate review and postconviction process became to the enforcement of constitutional rights, the further the legal and temporal separation between the death sentence and the execution.<sup>65</sup> Until the last decade, the operation of this process was the primary brake on the ability of U.S. jurisdictions to execute their death row inmates.

In the past few years, there has been another reason for the increasing delay between death sentences and executions: the inability of U.S. jurisdictions to kill inmates using a lawful method of execution. Until quite recently, most

---

59. See generally Russell L. Christopher, *The Irrelevance of Prisoner Fault for Excessively Delayed Executions*, 72 WASH. & LEE L. REV. 3 (2015) (discussing the sources of delay in executions).

60. For a general discussion of the phenomena driving the volume of modern postconviction litigation in capital cases, see GARRETT & KOVARSKY, *supra* note 50, at 172-76 (setting forth various categories of constitutional criminal procedure specific to death penalty cases).

61. Congress originally created federal habeas jurisdiction over state criminal convictions in the 1867 Habeas Corpus Act. See Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. In *Brown v. Allen*, the Supreme Court cemented the proposition that federal courts could grant habeas relief for due process violations that did not amount to jurisdictional error. See 344 U.S. 443, 460-64 (1953); see also *id.* at 497-513 (opinion of Frankfurter, J.).

62. See Dwight Aarons, *Getting Out of This Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1, 20-23 (1998).

63. See *infra* notes 77-81 and accompanying text.

64. See FRANK R. BAUMGARTNER ET AL., *DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY* 42 (2018).

65. See Steiker & Steiker, *Capital Punishment*, *supra* note 44, at 683-86.

modern executions went forward using a lethal injection sequence consisting of three standard chemical components.<sup>66</sup> Over the last decade, however, jurisdictions have had more trouble obtaining various drugs in the sequence.<sup>67</sup> As a result, states are experimenting with new ways of killing condemned inmates, including but not limited to using new chemical sequences,<sup>68</sup> using existing sequences with drugs supplied by unregulated sources,<sup>69</sup> and switching to methods of execution other than lethal injection.<sup>70</sup> Attempts to change execution protocols have precipitated considerable litigation touching on, among other things, the chemical makeup of lethal injection sequences,<sup>71</sup> the source and efficacy of the pertinent drugs,<sup>72</sup> the legality of changes to protocols under state administrative law,<sup>73</sup> and state “secrecy” laws designed to shield the identity of lethal injection drug manufacturers.<sup>74</sup> California, the country’s

---

66. See David Kroll, *The Drugs Used in Execution by Legal Injection*, FORBES (May 1, 2014, 4:59 PM), <https://perma.cc/8R9A-88FG>. Until about 2010, the “standard” cocktail was used almost everywhere. See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocuting and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 68 (2002) (noting that “the great majority of states” used the standard cocktail); Denise Grady, *Three-Drug Protocol Persists for Lethal Injections, Despite Ease of Using One*, N.Y. TIMES (May 1, 2014), <https://perma.cc/6RKT-W3BW> (explaining that many states began to defect from using the three-drug cocktail in 2010).

67. For example, Hospira was the only U.S. company that produced sodium thiopental, and it suspended distribution in 2010. See Ed Pilkington, *US Executions Delayed by Shortage of Death Penalty Drug*, GUARDIAN (Sept. 28, 2010, 1:56 PM EDT), <https://perma.cc/KYQ2-4MQ8>.

68. See, e.g., Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1360-62 (2014) (documenting the use of pentobarbital).

69. See, e.g., Della Hasselle, *With Lethal-Injection Drugs Hard to Get, States Turning to Custom Pharmacies*, LENS (Jan. 15, 2014), <https://perma.cc/RA9V-H9CE>.

70. See Brady McCombs, *Firing Squad Gets Final OK. So How Does It Work?*, SALT LAKE TRIB. (Mar. 24, 2015, 8:55 AM), <https://perma.cc/H8RP-826Z>.

71. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (resolving a challenge to the use of midazolam as the first drug in the lethal injection sequence).

72. See Carey Gillam, *Execution Drugs Mixed by U.S. Pharmacies Draw Challenges from Death Row*, REUTERS (Oct. 13, 2013, 4:02 AM), <https://perma.cc/U39M-6TVX>.

73. See Madeline Buckley, *Indiana Chose Experimental Lethal Injection Cocktail Without Following Procedure, Court Rules*, INDYSTAR (updated June 1, 2017, 7:50 PM ET), <https://perma.cc/P9G9-MF6T>.

74. See Ed Pilkington & Jon Swaine, *Guardian Challenges Lethal Injection Secrecy in Landmark Missouri Lawsuit*, GUARDIAN (May 15, 2014, 11:00 AM EDT), <https://perma.cc/A5DD-ZAMS>.

leader in death sentences, has not executed anyone in over a decade because it has been unable to approve a lawful execution method.<sup>75</sup> The federal government has been in the same boat since 2003.<sup>76</sup>

Because executions generally do not go forward until appellate and postconviction review conclude, and because constraints on the method of execution further stall the process, modern capital punishment has effectively decoupled the death sentence from the execution. In the forty-three years since the 1976 Cases, there have been almost 1,500 executions in U.S. jurisdictions.<sup>77</sup> The annual number has been trending downward since 1999, when there were 98 executions.<sup>78</sup> In 2016, there were 20 executions; in 2017, there were 23; and in 2018, there were 25.<sup>79</sup> For those executed in 1960, the average time between sentence and execution was two years.<sup>80</sup> In 2017, it was about two *decades*.<sup>81</sup>

## B. Institutional Coordination and Political Will

Still, delay alone cannot explain execution scarcity. U.S. jurisdictions might have to wait for litigation to conclude, but they could still—at least theoretically—execute everyone in the queue. Most U.S. jurisdictions fail to clear their death rows because the institutional coordination necessary to do so is not matched by what Carol Steiker and Jordan Steiker have described as corresponding “political will.”<sup>82</sup> Specifically, executing a death row inmate

---

75. See *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006) (holding that California’s execution method was unconstitutional); see also *Inmates Executed 1978 to Present*, *supra* note 24.

76. See *Death Penalty in Flux*, DEATH PENALTY INFO. CTR., <https://perma.cc/F7F6-8M46> (archived Mar. 30, 2019).

77. Unlike data on charging decisions and, to a certain extent, data on capital sentencing, data on executions in the United States are effectively compiled and accessible. See, e.g., *Searchable Execution Database*, DEATH PENALTY INFO. CTR., <https://perma.cc/5TUU-DVMV> (archived Mar. 30, 2019) [hereinafter *DPIC Execution Database*] (to access data, click “View the live page,” then click “CSV” at the bottom left of the page).

78. See *id.*

79. See *id.*

80. See Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 181 (1998).

81. See *Execution List 2017*, DEATH PENALTY INFO. CTR., <https://perma.cc/5V39-FSTG> (archived Mar. 30, 2019). These numbers probably understate the delay for inmates who wish to live, as about 10% of modern executions involve “volunteers” who have told their attorneys to drop legal proceedings. See BAUMGARTNER ET AL., *supra* note 64, at 42.

82. See Steiker & Steiker, *supra* note 13, at 1837.

usually requires extreme institutional coordination,<sup>83</sup> but jurisdictions are unable to mobilize the political capital to overcome the collective action problems inherent in the dispersed execution power.<sup>84</sup>

Understanding the institutional coordination necessary for a jurisdiction to kill a death row inmate requires some basic understanding of the process by which executions actually proceed (although the precise mix of coordinated activity varies across jurisdictions). An inmate sentenced to die must be the subject of a “death warrant,”<sup>85</sup> and some entity must set a date for the execution.<sup>86</sup> So there is an entity that actually sets an execution date (usually a court),<sup>87</sup> and there is (usually) an entity that asks that the execution date be set. Depending on the forum, an execution date might be requested by the state supreme court, the governor, the state attorney general, or the local prosecutor. There is considerable cross-jurisdictional variation in date-setting practices. In Texas, the local prosecutor checks with the Attorney General and the Department of Criminal Justice for available execution dates and then moves, in the convicting court, for a death warrant and an order setting the execution date.<sup>88</sup> In Alabama, the Attorney General moves for an execution date, which is ultimately set by the state supreme court.<sup>89</sup> In Missouri, the prosecuting attorney asks for an execution date, which can thereafter be set by

---

83. *See id.* at 1918.

84. *Cf.* MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1-3, 53-65, 125-31 (1965) (advancing the canonical economic theory that concentrated economic interests more effectively mobilize in favor of political preferences than do dispersed ones).

85. “Death warrant” is a fairly archaic term; it authorizes a death row inmate to be executed and specifies the time and manner. *See* 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 147(a)(c)(1) n.15 (West 2018).

86. *See generally* BAUMGARTNER ET AL., *supra* note 64, at 227-33, 230 tbl.11.5, 231 tbl.11.6 (discussing differentiated warrant and date-setting processes in the context of a Pennsylvania case study).

87. In some jurisdictions, a provisional execution date is set immediately upon the verdict or direct review thereof, but because such a schedule will require a stay to facilitate at least some collateral review, the governor is empowered to set the fallback date. *See, e.g.*, ARK. CODE ANN. § 16-90-507(a) (2019); KY. REV. STAT. ANN. § 431.218 (West 2019). In Pennsylvania, the Governor is required by statute to set an execution date. *See* 61 PA. STAT. AND CONS. STAT. ANN. § 4302(a) (West 2019). If he fails to do so, the pertinent state cabinet official is to set it instead. *See id.* § 4302(c).

88. TEX. CODE CRIM. PROC. ANN. art. 43.141 (West 2017); Email from Jordan M. Steiker, Judge Robert M. Parker Chair in Law & Dir., Capital Punishment Ctr., Univ. of Tex. Sch. of Law, to author (Feb. 12, 2019, 12:18 PM) (on file with author) (confirming this general understanding of how Texas sets execution dates).

89. ALA. R. APP. P. 8(d)(1); *see also* Email from Randy Susskind, Deputy Dir., Equal Justice Initiative, to author (Mar. 18, 2016, 10:41 AM) (on file with author) (confirming this general understanding of how Alabama sets execution dates).

the state supreme court or the county court.<sup>90</sup> In Florida, the execution date is set by the Governor, with no need for a motion and without constraint.<sup>91</sup>

Even in situations where one executive agent seeks (or even sets) the execution date, there must usually be coordination with others. For example, in jurisdictions initiating the execution sequence at the behest of the local prosecutor, that prosecutor may need to coordinate with the state attorney general, who will be responsible for defending the judgment during pre-execution litigation in *federal* court.<sup>92</sup> In cases where someone else moves for date setting, there will ordinarily need to be coordination with the local prosecutor, who will typically defend against any such litigation in *state* court.<sup>93</sup> Additionally, the setting of an execution date requires approval from the jurisdiction's department of corrections, which has to ensure the availability of facilities and, critically, guarantee a lawful execution protocol—including the lethal injection supply.<sup>94</sup> Finally, an execution requires a second round of functional approval from every state and federal court entertaining crisis-phase litigation in the case, as well as from whatever entity is responsible for withholding clemency.<sup>95</sup>

Even though jurisdictions distribute execution powers differently, there is usually sufficient dispersion to produce execution scarcity.<sup>96</sup> States like Alabama and Texas that broadly disperse execution powers across multiple institutions require considerable coordination to convert death sentences into

---

90. See MO. ANN. STAT. § 546.700 (2018).

91. See FLA. STAT. § 922.052 (2018).

92. For examples of briefs filed by state attorneys general in capital cases at the federal habeas stage, see Brief for Respondent, *Wilson v. Sellers*, 138 S. Ct. 1188 (2018) (No. 16-6855), 2017 WL 3668991 (Georgia Attorney General); and Brief of Respondents, *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017) (No. 16-5294), 2017 WL 1192089 (Alabama Attorney General).

93. For examples of briefs filed by local state prosecutors in capital cases defending decisions of state courts, see Brief in Opposition to Writ of Certiorari, *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (No. 16-8255), 2017 WL 4311116 (district attorney from Louisiana); and Brief in Opposition to the Petition for a Writ of Certiorari, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) (No. 15-5040), 2015 WL 5766738 (district attorney from Pennsylvania).

94. See *supra* notes 66-76 and accompanying text.

95. Clemency can be structured in many different ways, such as by concentrating it in the governor or in an administrative board. See Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 254-55 (2003).

96. Cf. ELIZABETH DAVIS & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 251430, CAPITAL PUNISHMENT, 2016, at 4 tbl.2 (2018), <https://perma.cc/FPL5-8RS8> (detailing state-by-state death row populations, and showing substantial concentration in high-sentencing states). Interestingly, over the last several years, American inmates have been exiting death rows slightly faster than they have been entering them (through "execution, other death, or appeal"), see *id.* at 6 fig.2, although the death row backlog remains enormous.



executions.<sup>97</sup> There are massive backlogs in each state: Recent statistics show that there are 221 offenders on death row in Texas<sup>98</sup> and 177 in Alabama.<sup>99</sup> But even states that concentrate certain execution powers have similar issues. For example, recent statistics also report that there are 343 inmates still on death row in Florida.<sup>100</sup> To the extent that states like Florida concentrate certain discretionary execution powers in specific officials, they tend to do so in more ambivalent nonlocal actors at significant institutional distance from the stakeholders that produced the death sentence.<sup>101</sup> Moreover, the level of concentration is still relative, and the officials exercising more concentrated power still have to coordinate with other empowered institutions.

No matter what the precise distribution of execution powers is, an execution requires substantial institutional coordination, which in turn requires motivated punishers to mobilize the political capital necessary to overcome collective action problems.<sup>102</sup> When the time comes to schedule executions, however, the reserves of political motivation to execute are severely depleted. The political circumstances under which jurisdictions produce death sentences are not the same as those under which they produce executions. Like an execution, a death sentence also requires the agreement of different institutional actors. The entire theater, however, is local and centralized (a trial), and it takes place under conditions producing political payoffs.<sup>103</sup> A capital trial necessarily involves a community's recent exposure to a heinous crime. Especially in high-sentencing states, the crime will generate media coverage and outrage in its aftermath, which in turn creates political opportunity for local prosecutors—who are often elected—to pursue death

---

97. See *supra* text accompanying notes 88-89.

98. See *Death Row Information*, TEX. DEP'T CRIM. JUST., <https://perma.cc/D4CM-SHYP> (last updated Mar. 1, 2019).

99. See *Alabama Inmates Currently on Death Row*, ALA. DEP'T CORRECTIONS, <https://perma.cc/6THV-GXTB> (last updated Apr. 4, 2019).

100. See *Corrections Offender Network*, FLA. DEP'T CORRECTIONS, <https://perma.cc/7JZ8-K9M9> (last updated Apr. 4, 2019); see also *supra* text accompanying note 91.

101. See STEIKER & STEIKER, *supra* note 36, at 145-47. In other states that concentrate execution selection authority in the governor, see *supra* note 87, there are also major backlogs. As of July 1, 2018, for example, Pennsylvania had 160 inmates on death row. See *Death-Row Prisoners by State and Size of Death Row by Year*, DEATH PENALTY INFO. CTR., <https://perma.cc/77QJ-NE2L> (last updated July 1, 2018). Although Arkansas and Kentucky have significantly smaller death rows (31 and 32 persons, respectively), the difference in size exists not because those States are especially efficient at clearing death row, but because they impose far fewer death sentences than other states. See *id.*; *State Death Sentences by Year*, DEATH PENALTY INFO. CTR., <https://perma.cc/8XZ2-TRCA> (archived Apr. 4, 2019).

102. See STEIKER & STEIKER, *supra* note 36, at 149.

103. See GARLAND, *supra* note 9, at 288-93.

sentences.<sup>104</sup> Independent of any internal moral beliefs a prosecutor may have regarding executions, there are substantial external incentives to seek the death penalty in such situations.<sup>105</sup> Judges and jurors are subject to different rules and accountable to different constituencies, but they, too, exercise trial discretion in the crucible of a homicide's immediate aftermath.<sup>106</sup>

An execution is different. The capital charge and the death sentence largely exhaust the symbolic payoffs to prosecutors.<sup>107</sup> The decisionmaking necessary to go forward with executions differs across jurisdictions,<sup>108</sup> but it tends to be much more institutionally dispersed than the decisionmaking necessary to seek a death sentence.<sup>109</sup> Moreover, regardless of the institutional dispersion, the decisions often take place long after outrage from the crime has dissipated.<sup>110</sup> As a result, some of the very same decisionmakers who faced extraordinary incentives to produce death sentences face substantially diminished ones to convert those sentences into executions.<sup>111</sup> Moreover, the postconviction process and subsequent incarceration will frequently produce information about the condemned inmate's upbringing and mental health, or a record of his upstanding carceral behavior, that will substantially humanize him and reduce the perception that he is dangerous.<sup>112</sup>

To summarize, most jurisdictions disperse authority to execute inmates across many institutions. That institutional dispersion produces coordination problems that require substantial political will to overcome. Local officials who once had the political will to ensure the imposition of the death sentence have a much smaller role in producing executions and tend to experience a far

---

104. *See id.* at 290; STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 213799, PROSECUTORS IN STATE COURTS, 2005, at 11 (2006), <https://perma.cc/X2BR-R5SX>.

105. *See* GARLAND, *supra* note 9, at 290; *see also* James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315, 321-22 (2002).

106. *See* Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L.J. 259, 292-95 (2016).

107. *See* STEIKER & STEIKER, *supra* note 36, at 146.

108. *See supra* text accompanying notes 88-91.

109. *See supra* notes 96-101 and accompanying text.

110. *See* STEIKER & STEIKER, *supra* note 36, at 146.

111. *See id.*

112. In *Wiggins v. Smith*, for example, the capital defendant claimed that trial counsel failed to adequately investigate his background and mental health. *See* 539 U.S. 510, 514-23 (2003). Because the litigation of such a claim requires a postconviction attorney to prove that the deficiency was prejudicial, postconviction lawyers will usually develop new facts pertaining to the prisoner's culpability. *See, e.g.,* *Trevino v. Thaler*, 569 U.S. 413, 419 (2013) ("Federal habeas counsel then told the federal court that [the prisoner's] trial counsel should have found and presented at the penalty phase other mitigating matters that his own investigation had brought to light.").

smaller payoff when doing so. Whatever discipline the political process imposes at the sentencing phase is not reactivated for the execution. Moreover, even in situations where the power to produce executions is incrementally more concentrated—and therefore requires somewhat less coordination—it tends to be concentrated in ambivalent, nonlocal officials who are likely to be far less aggressive in seeking executions than are local prosecutors in seeking death sentences.

### C. Scarcity and Arbitrariness

If a jurisdiction will not execute everyone on its death row—that is, if executions are *scarce*—then it must make choices about whom it executes. Many may assume, incorrectly, that there is some uniform protocol for deciding which condemned inmates the state will actually kill. Across U.S. death penalty jurisdictions, however, there is almost no law dictating which death row inmates are to die, and in what order. (Nor does clemency power function as an alternative source of consistency.)<sup>113</sup> If a court has not invalidated a death sentence, then a jurisdiction can execute pretty much whomever, whenever.

Unlike the complex web of constitutional law with which all state and federal jurisdictions must comply when imposing capital sentences, there is virtually no constitutional law that constrains which death row inmates get executed.<sup>114</sup> In fact, there is only one constitutional constraint, and it exerts almost no meaningful influence in the broad range of cases. In *Ford v.*

---

113. Clemency is supposed to be a safety net that protects against grave injustices, at least as an aspiration; it might ferret out wrongfully convicted offenders or soften punishment to reflect some sort of reduced blameworthiness. See Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 297 (1993). Retail clemency grants—grants other than the group relief necessary to effectuate moratoria or abolition—are almost extinct. See Michael Heise, *The Death of Death Row Clemency and the Evolving Politics of Unequal Grace*, 66 ALA. L. REV. 949, 951 (2015); see also Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 851-56 (2016) (discussing clemency grants in the federal context, that is, clemency granted by the President).

Clemency is itself marked by considerable arbitrariness and politicization. See Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201, 202 (1993); Stephen P. Garvey, Note, *Politicizing Who Dies*, 101 YALE L.J. 187, 208 & n.124 (1991). To compound that problem, the U.S. Supreme Court has almost entirely disclaimed constitutional constraints on the clemency process and has declined to scrutinize the patterns it produces. See, e.g., *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280 (1998) (plurality opinion) (refusing to recognize a due process interest in commutation on the grounds that the “interest has already been extinguished by the conviction and sentence”).

114. Of course, states must comply with basic constitutional requirements constraining any state action. They may not, for example, select only Hispanic inmates for execution or flip coins to decide the execution queue.

*Wainwright*, the Supreme Court barred the execution of mentally incompetent inmates.<sup>115</sup> Because *Ford* is the only meaningful constitutional constraint on execution selection, any applicable law traces to statutes and regulations in death penalty jurisdictions.<sup>116</sup> The formal rules that jurisdictions use to select which condemned inmates will die, however, are almost entirely nonsubstantive; they generally define only the procedures, described above, for requesting and awarding execution dates.<sup>117</sup> The absence of legally enforceable sorting criteria means that there are neither animating nor limiting principles dictating execution priority.

This legal vacuum, combined with the absence of consistency-enforcing norms, contributes to arbitrary, and sometimes random, execution selection.<sup>118</sup> Indeed, modern death penalty history is replete with stories of governors impulsively setting execution dates because they perceive an immediate need to demonstrate tough-on-crime bona fides.<sup>119</sup> The arbitrary pace and

---

115. See 477 U.S. 399, 409-10 (1986).

116. In other words, if a state executes someone, then the selection rules are creatures of subconstitutional state law; if the federal government executes someone, then the selection rules are the subconstitutional law of the federal government.

117. See, e.g., Douglas A. Berman, *Just Why Are the “Waits” on Florida’s Death Row So Long?*, SENT’G L. & POL’Y (Feb. 13, 2012, 11:42 AM), <https://perma.cc/APZ7-62L6> (explaining the randomness involved in who is selected for execution); Aaron Sharockman, *Some 40 Death Row Inmates Awaiting Death Warrant from Governor, Democrat Claims*, POLITIFACT FLA. (Apr. 20, 2011, 10:05 AM), <https://perma.cc/RB43-ASZ7> (describing the Governor of Florida’s “discretion over issuing death warrants”); see also *supra* text accompanying notes 88-91.

118. I forthrightly admit that I cannot quantify arbitrariness through a controlled study. Such a study would require those condemned to be coded by different attributes that might explain selection patterns, and the experiment would have to show that the patterns are sensitive to the wrong variables. No dataset conducive to such an experiment exists. A study of executed inmates—a dataset that does exist in relatively accessible form—would produce underdetermined statistical propositions, because it would omit information about all of those condemned who were *not* executed. In order to test arbitrariness rigorously, a study would have to be limited in geographic and temporal scope. The most viable way to conduct such a study would be to modify the datasets used for famous state-level studies of sentencing. For the “Baldus Study,” perhaps the most famous such study, see DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

119. See, e.g., IRA P. ROBBINS, AM. BAR ASS’N, *TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES: A REPORT CONTAINING THE AMERICAN BAR ASSOCIATION’S RECOMMENDATIONS CONCERNING DEATH PENALTY HABEAS CORPUS AND RELATED MATERIALS FROM THE AMERICAN BAR ASSOCIATION’S CRIMINAL JUSTICE SECTION’S PROJECT ON DEATH PENALTY HABEAS CORPUS* (1990), reprinted in 40 AM. U. L. REV. 1, 138 (1990) (reporting an account provided by the Attorney General of Arkansas). In one particularly unseemly incident, Florida Governor Charlie Crist signed a death warrant in response to public agitation by the sheriff in the convicting county, only to have the execution stayed because of problems in the case. See *High Court Issues Stay in Polk Death Penalty Case*, TBO (updated Mar. 23, 2013, 4:28 PM), <https://perma.cc/5ERN-JP52>.

sequencing of executions is treated as a basic fact about capital punishment in many jurisdictions. For example, in a famous and subsequently overturned 2014 federal district court opinion striking down the California death penalty, the exasperated district judge questioned how the law could forbid a state from “randomly selecting which few members of its criminal population it will sentence to death, but to allow that same state to randomly select which trivial few of those condemned it will actually execute.”<sup>120</sup> In other states in which the political will of punishing institutions aligns only infrequently, the status quo tends to produce bursts of unpredictable execution activity. Missouri, which had executed only two people since 2005, lethally injected one condemned inmate every month except four between November 2013 and July 2015.<sup>121</sup> In April 2017, Arkansas—which had not executed anyone for a dozen years<sup>122</sup>—tried to execute eight inmates in eleven days.<sup>123</sup>

Unconstrained execution activity reproduces the same basic arbitrariness that caused the Supreme Court to shut down death sentencing in *Furman v. Georgia*<sup>124</sup>—just at a slightly different juncture of the capital punishment sequence. As the federal district judge who struck down the California death penalty remarked: “Arbitrariness in execution is still arbitrary, regardless of when in the process the arbitrariness arises.”<sup>125</sup> In jurisdictions like Missouri and Arkansas, which have recently experienced spasms of execution activity—or even in a state like Texas, which regularly executes inmates but cannot keep

---

120. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1063 (C.D. Cal. 2014), *rev'd sub nom. Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015). The Ninth Circuit opinion overturning the district court decision did not dispute the arbitrariness of the process, but held that such arbitrariness did not violate a sufficiently clear rule of constitutional law to support federal habeas relief. *See Jones*, 806 F.3d at 546-53.

121. *See DPIC Execution Database*, *supra* note 77; *see also* Maurice Chammah, *Missouri's Grim Distinction*, ATLANTIC (Aug. 31, 2015), <https://perma.cc/34K7-9NMS> (detailing the increased execution in Missouri during this time period). In the case of Missouri, then-Governor Jay Nixon had been the state attorney general when many of the condemned inmates were sentenced to death and had been representing the state and its department of corrections in all postconviction proceedings. *See Chammah, supra*.

122. *See DPIC Execution Database, supra* note 77.

123. *See Background on Arkansas April 2017 Executions*, DEATH PENALTY INFO. CTR., <https://perma.cc/TUQ3-3LS6> (archived Apr. 4, 2019). The State was ultimately able to kill only four. *See id.* The rash of Arkansas execution activity was apparently a response to the expiration of a batch of midazolam, which the State was using as its lethal injection drug. *See* Jessica Wapner, *Four Arkansas Executions Are Tied to the Expiration Date of a Drug That Does Not Work in Lethal Injections*, NEWSWEEK (Apr. 25, 2017, 1:42 PM EDT), <https://perma.cc/7K5H-28BL>.

124. *See* 408 U.S. 238, 240 (1972) (per curiam); *see also id.* at 291-95 (Brennan, J., concurring) (“[T]he State may not *arbitrarily* inflict an unusually severe punishment.” (emphasis added)).

125. *Jones*, 31 F. Supp. 3d at 1063.

up with death sentences<sup>126</sup>—there is no transparent reason why certain inmates are selected for execution over others.<sup>127</sup> Some selected inmates personally committed brutal murders of young children, and others were merely accomplices of a shooter who killed someone during a robbery gone bad; some remain menacing and violently disruptive, and others have become physically and mentally incapable of harming anyone; some are old and others young; some committed crimes recently and others long ago; some recently exhausted appeals and others have had no active litigation for decades.<sup>128</sup>

\* \* \*

If California were to reactivate its execution practices,<sup>129</sup> then which of its almost 750 death row inmates<sup>130</sup> would go first, and why? There appears to be no answer to that question, even for the biggest death row in the country. The selection practices in Texas, which executes more condemned inmates than any other U.S. jurisdiction,<sup>131</sup> invites the same question. Indeed, an execution carries immense legal and cultural significance, yet U.S. jurisdictions have failed to develop legal and norm-based mechanisms for prioritizing the killing of death row inmates. The process is instead ad hoc and haphazard. In the balance of this Article, I want to solve this puzzle—to explain why this bizarre state of affairs persists—and suggest a framework for rationalizing the final step of the capital punishment sequence.

---

126. See *supra* text accompanying notes 97-98.

127. See, e.g., Berman, *supra* note 117 (explaining the randomness involved in who is selected for execution). As I explain in Part IV.A.2 below, the one more broadly shared attribute of selected inmates is that they have usually completed one round of federal habeas proceedings.

128. Cf. *Jones*, 31 F. Supp. 3d at 1062 (“[F]or an arbitrarily selected few of the 748 inmates currently on Death Row, . . . their selection for execution will not depend on whether their crime was one of passion or of premeditation, on whether they killed one person or ten, or on any other proxy for the relative penological value that will be achieved by executing that inmate over any other. Nor will it even depend on the perhaps neutral criterion of executing inmates in the order in which they arrived on Death Row. Rather, it will depend upon a factor . . . wholly divorced from the penological purposes the State sought to achieve by sentencing him to death in the first instance: how quickly the inmate proceeds through the State’s dysfunctional post-conviction review process.”).

129. To be sure, this is unlikely in light of the moratorium on capital punishment recently announced by Governor Gavin Newsom. See Tim Arango, *California Death Penalty Suspended; 737 Inmates Get Stay of Execution*, N.Y. TIMES (Mar. 12, 2019), <https://perma.cc/6Z3L-4CTX>.

130. See California Death Row Inmate List, *supra* note 23.

131. See Texas, DEATH PENALTY INFO. CTR., <https://perma.cc/5YUL-DS6A> (archived Apr. 4, 2019) (“Texas is first in the number of executions carried out in the United States since 1976.”).

## II. Sorting Dissensus

If it were the case that different jurisdictions merely had different execution selection criteria, then there would be healthy questions about the appropriateness of interjurisdictional variation—questions that would likely resolve with a conclusion that different sovereigns can legitimately make different judgments about how they perform the selection function. After all, the modern death penalty has been abolished in many states, is nominally retained but dormant in others, and is practiced vigorously in a handful of committed jurisdictions.<sup>132</sup> Although state-by-state variation might represent federalism in action, this is not the baffling puzzle. Even *within* jurisdictions, execution selection is virtually unconstrained. Why?

The answer has to do primarily with sorting dissensus—the inability to achieve consensus around the criteria used to sort condemned inmates into a meaningful order of execution priority. In much the same way that institutions gravitate toward chance-based decisionmaking when allocators cannot settle on substantive rules for allocation, jurisdictions permit chaotic execution selection because there is so little agreement on the appropriate principles for selecting.<sup>133</sup> Take three potential (and general) criteria that a jurisdiction might use to prioritize executions. Some might prefer a blame-based rule under which evil, so to speak, goes first. Others might prefer a danger-based rule that prioritizes executions for inmates presenting the greatest safety threat in a carceral setting. Finally, some might prefer a time-based rule of execution priority, pegged to something like the date of the offense. The conditions for dissensus should be apparent: These are only three of many potential sorting criteria, preferences for certain criteria will necessarily splinter into smaller pockets of support for different variations on the more general rule,<sup>134</sup> and groups will lack shared instincts about how each criterion should accommodate other interests. Moreover, I do not mean to suggest that people feel *strongly* about sorting rules; dissensus operates in jurisdictions marked by indifference, too.

Dissensus persists largely because most meaningful criteria that jurisdictions use to prioritize death-worthiness are applied upstream. By the time a condemned inmate lands on death row, the state has already tried to identify

---

132. See *Executions by State and Year*, DEATH PENALTY INFO. CTR., <https://perma.cc/ESP9-99D8> (archived Apr. 4, 2019); *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <https://perma.cc/DY3V-HWSG> (last updated Mar. 13, 2019).

133. Cf. Perry & Zarsky, *supra* note 10, at 1048-49 (discussing a study comparing the desirability of random allocation to other consensus-based methods).

134. For example, a group supporting the “evil-first” rule would have to decide how to weigh the gravity of the offense and the moral blameworthiness of the offender.

that person as an outlier in terms of the severity of his offense conduct, his moral culpability, and the social danger he poses.<sup>135</sup> Criteria like heinousness, blameworthiness, and potential for future violence are less useful as means of sorting *among* condemned inmates—as opposed to means of deciding, at upstream phases, whether someone should be on death row or not. In the downstream environment, where preferences are distributed broadly across many potential sorting rules, and where the sorting needs are too granular for the reapplication of the more intuitive upstream criteria, one would not expect the development of meaningful constraints on the discretion of decisionmakers. Given the political economy of capital punishment, sorting dissensus disrupts the development of shared criteria, whether embedded in positive law or practice norms, for prioritizing executions.

#### A. Upstream Sorting

An execution is the culmination of a punishment sequence comprised of many subsidiary institutional decisions—decisions that are themselves the structured outcomes of internal deliberative processes. One way to think about how that accumulated decisionmaking produces executions is in terms of discrete thresholds that a condemned inmate must cross before the state can complete the capital punishment process: arrest, prosecution, capital sentencing, and execution. At each phase, an offender is selected for progression or deselected for exit.

In the upstream phases, law and practice norms operate together to perform three fairly straightforward selection functions, but they perform only the first at the execution phase. First, they *specify authority* to perform selection activity. Police officers investigate and arrest, the state's attorneys charge and prosecute, judges preside, and juries sentence. Second, law and norms produce *substantive criteria* for who is selected, primarily by reference to blame (desert) or danger. Third, they combine to produce *consistency* across selection activity. This layered sorting process separates the people who will receive a death sentence from the rest of the community and produces at least a veneer of consistency across cases. Upstream selection, however, largely exhausts the sorting value of criteria that might otherwise be used to prioritize executions.

---

135. There are many reasons to believe that most jurisdictions fail to select the worst of the worst for death sentences, but I assume for the sake of argument that they have. *See, e.g.,* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1341 (1997) (analyzing capital sentencing in California); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 765-69 (2005) (summarizing the arbitrariness critique).



The first selection phase following an offense is investigation and arrest. Arrest selection in capital cases is fairly straightforward because every jurisdiction punishes homicidal criminality, and law enforcement seeks pretrial custody of every murderer. Policing norms operate alongside the laws that select homicide arrestees,<sup>136</sup> although policing norms have less effect on homicide apprehension than they do on arrests for other offenses. Subject to data showing that certain variables correspond to different effort levels,<sup>137</sup> policing norms almost unconditionally favor the apprehension of offenders suspected of homicide.<sup>138</sup> The answer to the dominant sorting question in arrest selection—which murderers to apprehend—is straightforward: all of them.

After an inmate is arrested, the prosecutor engages in charge selection.<sup>139</sup> The charging decisions include (1) whether to charge an inmate with an offense denominated as capital murder;<sup>140</sup> and, (2) if the capital murder charge does not itself trigger procedures for imposing death, to initiate such proceedings.<sup>141</sup> There is no expectation that prosecutors capitally charge every offense that might conceivably trigger the death penalty, or that they must seek the death

---

136. Policing norms are the focus of a robust academic literature that is largely beyond the scope of this Article. See generally Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004). Policing norms operate at both an occupational level (across all police officers) and at an institutional level (within a particular administrative unit). See *id.* at 455 n.6.

137. For example, property offenses against nonwhite victims are less likely to result in arrests than are offenses against white victims. See Douglas A. Smith et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234, 245-46 (1984) (finding that for property offenses, arrests are more likely when the alleged offender is a black male or the victim is white). The reasons for these patterns could be animus on the part of specific law enforcement personnel, but the size of the discrepancy suggests institutional biases that are much more systemic, opaque, and complicated. Jeffrey Fagan and Amanda Geller recently completed a study showing that police are more likely to “clear” murder cases—that is, to make an arrest—when the victim is white. See Jeffrey Fagan & Amanda Geller, *Police, Race, and the Production of Capital Homicides*, BERKELEY J. CRIM. L., Fall 2018, at 261, 266.

138. Norms can influence the channeling of resources to apprehension and arrest efforts in certain situations. For example, a manhunt for a cop killer may command more resources than what would be deployed to apprehend and arrest a victim whose death is less affecting to the department.

139. See Shatz & Rivkind, *supra* note 135, at 1292-93. See generally James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (comprehensively exploring the scope and history of prosecutorial power in the United States).

140. See Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 778 (2014) (linking discretion to racialized outcomes).

141. See Robert J. Smith, Essay, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 232-33, 233 n.21 (2012).

penalty in cases where capital murder is alleged.<sup>142</sup> As a result, there is extraordinary discretion exercised during prosecution selection.<sup>143</sup> That discretion is only loosely constrained by law.<sup>144</sup> Other than forgiving limits imposed through the Equal Protection Clause,<sup>145</sup> there are no significant constitutional constraints on charging decisions.<sup>146</sup>

Even though other types of positive law restrictions are few and far between,<sup>147</sup> prosecutors are broadly constrained by norms of institutional practice.<sup>148</sup> Those norms can operate at an occupational level (across all prosecutors), at an organizational level (within an individual office or institution), or somewhere in between.<sup>149</sup> They originate and transmit many of the substantive, procedural, and consistency-enforcing constraints that

- 
142. See John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 467 (1999). The entire equation is even further complicated by plea bargaining, which tends to produce patterns of death sentences that do not necessarily reflect the blameworthiness of offenders. See ROBERT M. BOHM, *DEATHQUEST II: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 207-08 (2d ed. 2003); Albert W. Alschuler, *Plea Bargaining and the Death Penalty*, 58 DEPAUL L. REV. 671, 674-75 (2009).
143. See William W. Berry III, *Eighth Amendment Presumptions: A Constitutional Framework for Curbing Mass Incarceration*, 89 S. CAL. L. REV. 67, 91 (2015).
144. See Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 308 (2009).
145. See *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (“[I]t was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged.”). Although nearly impossible to do in practice, it is at least theoretically possible to show an equal protection violation using only evidence about the pattern of capital charges in a particular prosecutor’s office. See *United States v. Armstrong*, 517 U.S. 456, 458 (1996); Anthony G. Amsterdam, *Opening Remarks, Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 45 (2007).
146. There are some other relatively insignificant constitutional and subconstitutional constraints. See, e.g., *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809-14 (1987) (plurality opinion) (requiring that the prosecutor be disinterested); *Blackledge v. Perry*, 417 U.S. 21, 27-29 (1974) (finding a due process violation for malicious prosecution).
147. Some state jurisdictions have at least entertained positive law constraints on charging practice by requiring periodic review by a state court or administrative agency. See, e.g., GEORGE H. RYAN, GOVERNOR, STATE OF ILL., *REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT* 84-88 (2002), <https://perma.cc/TAF2-FNWL> (recommending a review committee for Illinois capital cases).
148. See generally Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008) (exploring the ways in which norms animate and constrain prosecutors’ behavior).
149. Cf. Armacost, *supra* note 136, at 455 n.6 (explaining this continuum in reference to policing communities).

jurisdictions might otherwise impose through legal rules.<sup>150</sup> As a result, by the time an inmate is capitally charged and presented to a court for trial, prosecutors have already made a rough cut at the sorting criteria that will determine whether the trial will result in a death sentence.

By many orders of magnitude, the most visibly constrained selection phase is the capital trial. I will not spend much time reciting the robust body of statutory and decisional law that regulates sentence selection, but I will mention enough to convey to unfamiliar readers how legal rules sort defendants by reference to offense characteristics, blameworthiness, and danger. Recall that the U.S. Supreme Court inaugurated the modern era of capital punishment with the 1976 Cases.<sup>151</sup> There have been forty-plus years of follow-on litigation since their holding, but the 1976 Cases fixed the broad Eighth Amendment parameters of the modern death penalty.<sup>152</sup> Capital sentencing proceeds, constrained by those parameters, under compliant state and federal statutes.

---

150. Individual offices in larger localities may be particularly likely to develop more durable internal practice norms. *See, e.g.*, Bill Montgomery, Opinion, *Prosecutor: Why Arizona Still Needs the Death Penalty*, AZCENTRAL (Nov. 27, 2017, 6:05 AM MT), <https://perma.cc/98J9-K8PR> (detailing how death penalty cases in Maricopa County, Arizona, are reviewed). Most big-city prosecutor's offices, for example, have some sort of protocol for offering plea bargains to offenders who would otherwise face a capital sentence. *Cf.* Baldus et al., *supra* note 6, at 616-23 (analyzing the effect of the victim's race by reference to "charging and plea bargaining practices in [a state's] major urban counties"); H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 76 n.84 (2011) (explaining how urbanization leads to increased plea bargaining).

Federal death penalty prosecutions are a useful example of how practice norms can heavily constrain selection. Internal rules provide that each charging decision must "be based upon the facts and law applicable to the case and be set within a framework of consistent and even-handed national application of Federal capital sentencing laws," and that "[a]rbitrary or impermissible factors . . . [may] not inform any stage of the decision-making process." U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-10.030 (2018), <https://perma.cc/ZT85-F4RP>. The substantive considerations a prosecutor must analyze include: the degree of aggravation, the balance of aggravation against mitigation, the strength of the evidence, the defendant's role in jointly undertaken activity, the degree of other criminality exhibited by the defendant, the punitive impact of incremental incarceration as compared to the death penalty, and the defendant's acceptance of responsibility. *See id.* § 9-10.140. The procedures used to facilitate those objectives are also highly developed. The U.S. Attorney General makes the final charging decision, and a special committee constituted to support the Attorney General's ultimate decisionmaking function reviews material submitted by the U.S. Attorney (or Assistant Attorney General) and defense counsel. *See id.* §§ 9-10.050, .130.

151. *See supra* text accompanying notes 54-56; *see also* GARRETT & KOVARSKY, *supra* note 50, at 30-32.

152. *See* GARRETT & KOVARSKY, *supra* note 50, at 30-32.

First, the Eighth Amendment is the source of a so-called “proportionality” constraint that categorically forecloses the death penalty in the presence of certain offense or offender attributes.<sup>153</sup> Under the proportionality doctrine, for example, juvenile offenders and offenders with intellectual disability cannot receive death sentences.<sup>154</sup> Nor can states capitally punish offenses that do not result in death.<sup>155</sup> The Eighth Amendment also conditions a modern capital sentence on two findings: an “eligibility” determination about whether the *offense* can be punished capitally, and an individualized “selection” determination about whether the *offender* should indeed be sentenced to death.<sup>156</sup> The selection decision happens at the punishment phase of a bifurcated capital trial and requires the jury to determine whether, in light of mitigating evidence and other information about culpability, the offender should actually receive the death penalty.<sup>157</sup> The sentencing-phase jury must be permitted to hear any evidence about the crime or the offender that might militate against a death sentence,<sup>158</sup> and that jury must actually have a vehicle to reject such a sentence on the basis of the evidence it heard.<sup>159</sup> Many sentencing-phase juries are also required to evaluate future dangerousness.<sup>160</sup> These legal constraints combine to sort convicted offenders into two groups

---

153. See *Graham v. Florida*, 560 U.S. 48, 59-62 (2010) (summarizing the Supreme Court’s proportionality jurisprudence); see also John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 910-26 (2011) (presenting the doctrinal history of proportionality jurisprudence in juvenile offender cases).

154. See *Roper v. Simmons*, 543 U.S. 551, 568-75 (2005) (prohibiting the use of the death penalty against juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304, 318-21 (2002) (prohibiting the use of the death penalty against offenders with intellectual disability).

155. See *Kennedy v. Louisiana*, 554 U.S. 407, 434-46 (2008).

156. See *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) (“Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision.”); Stephen P. Garvey, “*As the Gentle Rain from Heaven: Mercy in Capital Sentencing*,” 81 CORNELL L. REV. 989, 1006 (1996) (“The penalty phase is not unitary, however. It divides the capital sentencing process into two distinct stages—one known as the ‘death-eligibility stage’ and the other as the ‘death-selection stage.’”).

157. See *Eddings v. Oklahoma*, 455 U.S. 104, 112-15 (1982).

158. See *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007).

159. See *id.* (phrasing the requirement as a “meaningful effect” rule).

160. See, e.g., VA. CODE ANN. § 19.2-264.4(C) (2019) (making future dangerousness a prerequisite to a death sentence); WYO. STAT. ANN. § 6-2-102(i)(xi) (2019) (listing dangerousness as an aggravating factor).

based on some combination of offense conduct, blameworthiness, and dangerousness: one sentenced to a term of years, and a much smaller set of outliers bound for death row.<sup>161</sup>

Sentence selection is also influenced by a set of complementary sorting norms. For example, the prosecution's sorting preferences, already manifest by way of charge selection, are reexpressed during jury selection—at which time the prosecution will seek jurors most likely to find whatever conditions are necessary to impose the death sentence.<sup>162</sup> Community norms about death-worthy levels of blame and dangerousness make their way into sentence selection because the jury, which is usually drawn from the community where the crime occurred, actually imposes the sentence.<sup>163</sup> Of course, that same community will have also expressed its sorting preferences by voting for the prosecutors and judges responsible for trying the case.<sup>164</sup>

After a death verdict, then, a death row inmate will have been selected through a layered sorting process. That process will have made sorting determinations about, among other things, offense conduct, blameworthiness, and incapacitation imperatives. If particular criteria are used to define the entire category of death row inmates, then jurisdictions will have a hard time meaningfully reapplying them to prioritize executions *within* that category.

#### B. Downstream Dissensus

Consider the parallels between execution selection and a company's search for employees to fill five identical positions.<sup>165</sup> The company might apply criteria that embody its view of merit and identify a pool of qualified candidates from the universe of applicants. The qualified pool might need to be

---

161. See James S. Liebman & Peter Clarke, David H. Bodiker Lecture on Criminal Justice, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 318-19 (2011) (estimating the fraction of convicted murderers receiving a death sentence at less than 5%).

162. See GARRETT & KOVARSKY, *supra* note 50, at 156-58.

163. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 59 (2003) (explaining that juries exercise "the power to elaborate the governing norms underlying criminal laws from the perspective of the community and its sense of moral blameworthiness"); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 998-99 (2003) ("[V]arious members of the Court have . . . suggested . . . that the death penalty can only be imposed by ordinary citizens with a broader imprimatur of community moral judgment than possessed by single judges . . .").

164. See JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 5-6 (1980) (noting that most local prosecutors are elected); Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409, 1427-31 (1993) (discussing elected judges).

165. See DUXBURY, *supra* note 10, at 86-87 (presenting a variation on the hiring scenario).

pared down to a shortlist. Interviewees can then be selected from that list, and offers can presumptively be extended to anyone receiving an interview. In such situations, the company might find it perfectly sensible to invest lightly in highly deliberative selection of interviewees, on the grounds that the costs of such sorting far outweigh the returns. A nondeliberative process might be especially appealing in situations where distinctions are too fine for the decisionmaking tools,<sup>166</sup> or where differences among applicants are so incommensurable that upstream sorting mechanisms have exhausted more deliberative criteria for separating the pool.<sup>167</sup>

And so it is with execution selection, which produces a pool of offenders either with differences that are incommensurable or with commensurable differences incapable of producing a reliable ordering of condemned inmates.<sup>168</sup> All of the frontloaded, upstream sorting means that those in the pool have already been identified as suitable for a lawful execution because they have committed sufficiently grave offenses, are sufficiently blameworthy, are sufficiently dangerous, or have some other distinguishing attribute of death-worthiness. Notwithstanding the virtues of using the sorting criteria described above to identify the category of death-worthy offenders at the upstream phases of the capital punishment sequence,<sup>169</sup> simply reapplying them at the execution phase to sort *within* that category is unlikely to produce a meaningfully prioritized list of executions. Nor is there some other broadly intuited set of criteria around which execution decisionmakers might coalesce. This downstream sorting dissensus prevents the development of the norms and legal rules that one might otherwise expect to constrain the process. Moreover, the political economy of execution selection, which involves institutional actors that prefer a combination of extreme flexibility and minimal transparency, compounds the effects of sorting dissensus.

---

166. See *id.* at 106-07; John Broome, *Selecting People Randomly*, 95 ETHICS 38, 40-41 (1984) (explaining the benefits of selecting people randomly).

167. See DUXBURY, *supra* note 10, at 86-87.

168. See Perry & Zarsky, *supra* note 10, at 1055-56; see also Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 19-21 (2009) (describing how randomization can be used to sort amongst options that are incommensurable, that is, “when they differ along sufficiently different dimensions”).

169. Applying the sorting criteria in upstream selection phases usually makes economic sense, not because they *must* be enforced there, but because that is where they are enforced *most efficiently*. Waiting until after a capital trial to take up an Eighth Amendment eligibility question necessarily wastes all the resources that go into the trial itself. The only viable, consensus-based retributive constraints on execution selection appear to be those that *cannot* be enforced earlier in the capital punishment sequence—such as the downstream selection rule against executing offenders that have become unable to appreciate the link between their crime and penalty. See *Panetti v. Quarterman*, 551 U.S. 930, 958-60 (2007).

1. Sorting dissensus and law

There is a rich literature on the relationship between preferences and the promulgation of legal rules.<sup>170</sup> That relationship varies significantly depending on (among other things) the form the legal rule takes—whether it is a regulation,<sup>171</sup> a statute,<sup>172</sup> a constitutional rule,<sup>173</sup> or something else. Whereas a greater degree of consensus is necessary to enforce *norm-based* constraints that have no legal enforcement mechanism, political communities can sometimes generate clear *legal rules* in the face of underlying disagreement. Narrower constituencies can secure favorable administrative, legislative, or judicial treatment even in situations where their shared preferences may be insufficient to originate and transmit a norm.<sup>174</sup>

There is some execution selection law, but it is the law that one would expect in the presence of highly differentiated substantive preferences: a set of rules that is almost entirely procedural.<sup>175</sup> The sorting dissensus simply frustrates answers to the basic substantive questions about execution selection. Rules of priority pegged to offense conduct, culpability, and dangerousness fail to command significant support because those criteria have already been

- 
170. See generally HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 556 (1983) (positioning contemporary law as constructed from the bottom up, rather than as representing the top-down preferences of lawmakers); Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1, 8-11 (2003) (discussing the phenomenon in the common lawmaking enterprise); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1543 (1988) (examining the relationship between preferences and legislation in republican theory).
171. See generally Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165 (1999) (exploring, among other things, how preferences should figure into an agency's cost-benefit analysis of its regulations).
172. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528-33 (1992) (discussing the relationship between preferences and federal legislative enactments).
173. See, e.g., Barry R. Weingast, *The Political Foundations of Democracy and the Rule of the Law*, 91 AM. POL. SCI. REV. 245, 251-52, 254-56 (1997) (exploring the relationship between the stability of citizen preferences and, among other things, the durability of constitutional rules).
174. See WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 1-2, 65-66, 111-13 (1982) (noting the difficulties in consolidating the "judgments of citizens" into a usable format); Jerry Mashaw, *Public Law and Public Choice: Critique and Rapprochement*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 19, 20-25 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (discussing politicians' motives in seeking reelection and individuals' ability to affect those motives).
175. One would expect this state of affairs in large part because interest clusters are more likely to invest in procedural rules when, in doing so, they are not upsetting a clear social consensus. See Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J. LEGAL STUD. 259, 260-61 (1999).

applied upstream and are difficult to meaningfully reapply at the execution phase. Nor is there any shared intuition about a particular rule of chronological priority. Should the state start with the oldest condemned inmates? The ones furthest removed from the capital crime? Those who have been on death row the longest? How should jurisdictions incorporate solitary confinement into the priority rules? To the extent that any substantive principle emerges from the noisy collision of varied preferences, it tends to restrain jurisdictions from executing inmates while certain types of litigation remain pending.<sup>176</sup>

The rules that break through the sorting dissensus tend to be procedural to the point of being ministerial: rules about what entities seek execution dates and what entities set them.<sup>177</sup> The constituencies capable of securing a particular outcome need command less preference consensus for these procedural rules, because groups with other preferences are unlikely to oppose procedural rules with the same intensity they might apply against substantive rules.<sup>178</sup> These procedural rules simply fail to implicate the issues that produce resistance in the lawmaking branches or the types of interests that might be expected to produce a set of constitutional constraints.

The political economy of execution selection also reinforces the disruptive effect of sorting dissensus insofar as it impairs the development of legal rules by the politically accountable branches. That reinforcement happens because American capital punishment practice devolves decisionmaking to state and local jurisdictions, and because of how that devolution interacts with incumbency. Sociologist David Garland has demonstrated that the death penalty persists in large part because its retention often benefits the interests of many state and local stakeholders.<sup>179</sup> To name just a few: Police unions in large localities can fight ferociously to retain the death penalty,<sup>180</sup> a capital sentence can be a feather in the hat of an aspiring prosecutor,<sup>181</sup> the media benefits from

---

176. Some states require that execution dates be set within a certain period following some litigation threshold, but those types of automatically set dates almost always must be stayed to facilitate postconviction litigation. *See, e.g.*, MO. ANN. STAT. §§ 546.680, .700 (2018) (providing for Missouri's enter-and-stay approach). The postconviction process never moves as quickly as the automatically set execution deadlines anticipate, and other states will simply delay the setting of an execution date entirely until postconviction litigation has been completed. *See, e.g.*, VA. CODE ANN. § 53.1-232.1 (2019) (requiring an execution date to be set after the completion of postconviction proceedings).

177. *See supra* notes 85-91 and accompanying text.

178. *Cf.* OLSON, *supra* note 84, at 53-57 (explaining how small groups with concentrated interests can be more effective than larger groups with interests that are more broadly distributed).

179. *See* GARLAND, *supra* note 9, at 287-301.

180. *See* Kovarsky, *supra* note 106, at 290.

181. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2078-81 (2000).



breathless coverage of the trial and execution,<sup>182</sup> and a death sentence or an execution can establish a judge's bona fides as a law-and-order jurist.<sup>183</sup> This dynamic explains why executions used to surge during election years, when officials mired in political contests could use executions to protect their incumbency.<sup>184</sup>

When a state lawmaking body drafts a rule touching on an execution selection issue, it is almost certain to consult certain stakeholders<sup>185</sup>: the governor, the attorney general, a capital postconviction chief, local district attorneys, and the judiciary. Each one of these stakeholders has a strong and durable interest in maintaining the flexibility of selection—that is, an interest in selection that takes place without binding legal rules. To crystallize the point, imagine anyone from the governor to a local prosecutor facing reelection. These officials do not want a rule that constrains their ability to seek execution opportunities that are politically helpful or to bypass those that cause political harm. If elected officials retain considerable flexibility in selecting inmates for execution, they will benefit from being able to wield that power when it is politically desirable. Legally binding sorting criteria constrain that discretion, and the most influential stakeholders want to retain it. Incumbent governors, attorneys general, prosecutors, and judges do not readily support rules that will tie their hands during campaign season. The decisionmakers in virtually every law enforcement institution have powerful incentives to stand shoulder to shoulder against binding legal rules for execution selection.

One final phenomenon that reinforces the effect sorting dissensus has on the law is the lack of disclosure associated with the decision to seek and impose an execution date.<sup>186</sup> Regulation of difficult-to-detect prosecution conduct is

---

182. See GARLAND, *supra* note 9, at 288.

183. See *id.* at 290.

184. See Jeffrey D. Kubik & John R. Moran, *Lethal Elections: Gubernatorial Politics and the Timing of Executions*, 46 J.L. & ECON. 1, 3-4 (2003) (finding a 25% increase in execution activity during gubernatorial election years, and that the relationship between elections and execution activity is strongest in the South); William Alex Pridemore, *An Empirical Examination of Commutations and Executions in Post-Furman Capital Cases*, 17 JUST. Q. 159, 172 & tbl.3 (2000). But see John Kraemer, Note, *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, 1397-98 (2008) (noting that some scholars have “found no significant change in the likelihood of commutation in the six months before a gubernatorial election” and that “the influence of political pressures on decisions to commute is unclear”).

185. See Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 111-12 (2015).

186. See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 404 (1986) (“The Governor’s decision was announced on April 30, 1984, when, without explanation or statement, he signed a death warrant for [the prisoner’s] execution.”).

extremely expensive, so the absence of legal regulation is unsurprising.<sup>187</sup> For example, one of the reasons that charging discretion is constrained more by norm than by law is that it is extraordinarily difficult for outsiders to detect the authentic reason for the exercise of discretion and subject it to a legal constraint.<sup>188</sup> Similar discretionary decisions made by courts, governors, or attorneys general present the same types of problems for legal enforcement.

## 2. Sorting dissensus and norms

Of equal importance are the effects of sorting dissensus on norms. I should, at this point, more rigorously define what I mean by “norm,” which is a term that appears across the literature on sociology,<sup>189</sup> economics,<sup>190</sup> and political science.<sup>191</sup> I use the term here to refer to a practice that members of a community observe because they experience some combination of internalized obligation and the threat of nonlegal penalties.<sup>192</sup> Norms perform law-like functions insofar as they direct and constrain deliberative human behavior.<sup>193</sup>

---

187. Cf. Note, *Mechanisms of Secrecy*, 121 HARV. L. REV. 1556, 1563-65 (2008) (discussing the costs of transparency).

188. See Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1373-74, 1430-34 (1987).

189. See, e.g., Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095, 1096 (1986) (describing approaches in sociology and anthropology). For a discussion of scholarly approaches to norms in the social sciences generally, see Richard L. Abel, *What We Talk About When We Talk About Law*, in THE LAW & SOCIETY READER 1 (Richard L. Abel ed., 1995).

190. See, e.g., Eric A. Posner, *Efficient Norms*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 19, 21 (Peter Newman ed., 1998) (explaining several different economic theories of norm operation).

191. See, e.g., PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 39-40 (2004) (discussing political science theories about how norms are developed).

192. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997); cf. Axelrod, *supra* note 189, at 1097 (“A norm exists in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way.” (emphasis omitted)); *id.* at 1104 (discussing the internalization of norms); William K. Jones, *A Theory of Social Norms*, 1994 U. ILL. L. REV. 545, 546 (“The essential feature is that [social] norms constrain one person’s conduct in deference to the interests of others.”).

193. In the interest of explanatory simplicity, I have discussed law and norms without an extended discussion of their interrelationship. Norms and legal rules can be substitutes or complements, and each type of constraint can either undermine or fortify the other. Particularly strong norms might render legal rules superfluous, norms and legal rules might promote the same behavior, or they might point in different directions. See McAdams, *supra* note 192, at 347-48; see also Axelrod, *supra* note 189, at 1096 (explaining that norms often are believed to account for behavior that would otherwise be attributable to compliance with the central law); *id.* at 1106 (“Norms often precede laws but are then supported, maintained, and extended by laws.”). The complex relationship between norms and legal rules can make it very difficult to isolate

*footnote continued on next page*

Professional norms can be occupational, meaning that they transcend individual offices and that they represent the baseline practice for anyone operating within that particular professional community.<sup>194</sup> Professional norms can also be organizational,<sup>195</sup> influencing the behavior within an institution, like the Riverside County District Attorney's Office or the Miami Police Department. Either way, professional norms develop largely out of experience shared with other members operating inside a particular institution, or out of experience shared with similarly situated professionals operating in other institutions.

Sorting dissensus helps explain the absence of norm-based constraints on execution selection—there exists no underlying consensus necessary for professional norms to form or to be transmitted across pertinent communities. Professional and institutional communities that value the esteem of peers—the perception that community members are doing desirable things—nonetheless lack broadly shared instincts about whether particular criteria for execution selection attract or repel that esteem.<sup>196</sup> And the absence of an esteem calculus means that those with roles in execution selection lack incentives to conform to particular practice paths. An execution that one member of a community favors will be disfavored by another; there is no esteem-based mechanism that encourages consistent decisionmaking. Without consistent decisionmaking, there is no tendency toward a common practice, which in turn further arrests the development of any sorting consensus.

---

the effect of each on behavior. For example, laws can change the social meaning attributed to certain behavior, thereby affecting norm development. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 963-72 (1995).

194. See William H. Simon, Essay, *Ethics, Professionalism, and Meaningful Work*, 26 HOFSTRA L. REV. 445, 461-62 (1997).

195. See Arthur B. Laby, *Regulatory Convergence and Organizational Culture*, 90 TUL. L. REV. 1181, 1189 (2016) (explaining “organizational culture” in terms of “firm culture,” which is a more granular cultural unit than the profession to which the firm’s employees belong).

196. Some readers will recognize the esteem-based explanation of norms as coming from Richard McAdams. McAdams’s influential theory posits that norms arise when: (1) there is agreement on the esteem worthiness of *X*; (2) there is some likelihood that *X* will be detected; and (3) the consensus and likelihood of detection is perceived within the pertinent community. See McAdams, *supra* note 192, at 358. Even though “esteem” is a phrasing associated with the influential work of McAdams, it is generally accepted that the development of a norm requires that those deciding whether to engage in certain behavior care about what those in the pertinent community think about norm compliance and defection. See, e.g., Axelrod, *supra* note 189, at 1107 (“An important, and often dominant, reason to respect a norm is that violating it would provide a signal about the type of person you are.”); Jon Elster, *Norms of Revenge*, 100 ETHICS 862, 864 (1990) (“For norms to be social, they must be shared by other people and sustained by their approval and disapproval.”).

There are certainly ways for norms to develop without consensus, but execution selection is not characterized by conditions that are ordinarily necessary to overcome dissensus. First, the sheer infrequency of the events themselves slows the growth of any norms for execution selection. Institutions and the people that comprise them develop durable practices because they encounter the same set of circumstances repeatedly. Through an iterative process, the entities involved in a particular social or political practice (such as punishment) apply learning and experience from previous scenarios when they encounter new ones.<sup>197</sup> Over time, that response becomes routinized insofar as institutions and the people comprising them use results obtained in the prior encounters to streamline subsequent decisionmaking. The key to that iterative process—at least to its velocity, and potentially to its trajectory—is the frequency of the event around which the norm is formed.<sup>198</sup>

The problem is that executions don't happen that often, and they are happening less and less frequently over time. Between 1996 and 2015, states carried out 1,106 executions,<sup>199</sup> spread out over almost forty jurisdictions.<sup>200</sup> Moreover, U.S. jurisdictions are executing fewer and fewer inmates.<sup>201</sup> In 1999, U.S. jurisdictions executed 98 death row inmates.<sup>202</sup> In 2018, they executed 25.<sup>203</sup> The iterative experience necessary to originate and transmit a norm is likely to touch more than one political regime—different governors, different state supreme courts comprised of different judges, and different district attorneys.<sup>204</sup> The changing of such regimes means that the conditioning that forms the basis of norms is interrupted by changes in personnel, procedure, and leadership. Moreover, the increasing concentration of execution practice in particular localities<sup>205</sup> means that, to the extent that executions happen

---

197. See Axelrod, *supra* note 189, at 1097-98; Janet Koven Levit, *Bottom-Up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit*, 57 EMORY L.J. 1147, 1150-51 (2008).

198. See Axelrod, *supra* note 189, at 1097 (“[T]he extent to which a given type of action is a norm depends on just how often the action is taken and just how often someone is punished for not taking it.”).

199. See Kovarsky, *supra* note 106, at 274 tbl.1.

200. See DPIC Execution Database, *supra* note 77.

201. See Kovarsky, *supra* note 106, at 274 tbl.1.

202. *Executions by Year*, *supra* note 58.

203. *Id.*

204. See, e.g., Sharockman, *supra* note 117 (noting the effect of a gubernatorial transition in Florida).

205. See generally Kovarsky, *supra* note 106 (exploring the general trend toward county-level concentration of capital punishment).

frequently enough to achieve a critical mass of experience under a particular regime, the norm develops at a local level—a state of affairs that, ironically, interrupts the development of statewide norms.

Indeed, variation in selection practice severely limits the development of *occupational* norms that influence deliberative behavior across a particular profession. Some jurisdictions do not have the death penalty at all,<sup>206</sup> so execution selection is not part of anyone's professional portfolio. Among the jurisdictions that retain the death penalty,<sup>207</sup> responsibility for the execution selection decision is distributed across very different institutional actors: trial prosecutors, postconviction attorneys within the district attorney's office, governors, boards appointed by governors, trial courts, and state supreme courts.<sup>208</sup> With so much variation within the small community of capably active states, the selection process is short on the shared experience that is the engine of occupational culture formation.<sup>209</sup>

To the extent norms develop, they tend to be particularly fragile—mere organizational norms that direct professional activity only within a particular office. A state supreme court might have some internal operating procedure by which it queues death row inmates for selection, or a local prosecutor's office might have a postconviction chief who determines which inmates are given execution dates. In scenarios where the organizational norm could develop because there is a discrete organizational unit responsible for the selection decision, the thrall of local political culture can still impair norm transmission.

Take the local prosecutor's office. It is an administrative institution accountable to an elected district attorney, so regime changes can have a particularly disruptive effect on norm development.<sup>210</sup> Not every change in leadership, whether it be a new police chief or a new district attorney, has a dramatic effect on the institution's norms. But for organizational practices where decisionmaking is likely concentrated in the upper echelons of an institution, episodic political change can severely disrupt the development of organizational norms. One regime might prioritize executions for a particular type of offense, such as murders of children or police officers. A different regime might prioritize executions of offenders that have spent the most time on death row. Another regime might effectively abstain from executions

---

206. *See supra* text accompanying note 132.

207. *See supra* text accompanying note 132.

208. *See supra* notes 85-91 and accompanying text.

209. *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (exploring the conditions under which law generates norms, and providing some examples).

210. *See, e.g.*, Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 670 (documenting the abrupt cultural change in a Texas local district attorney's office in 2007).

altogether.<sup>211</sup> Change at the top of a selecting institution produces change in its priorities. In an environment that otherwise faces few constraints of positive law or occupational norms, politically sensitive institutional norms are particularly vulnerable to regime change. The result is that particular practices are closer to regime norms than to organizational norms, and, therefore, are far less durable constraints on execution selection.<sup>212</sup>

Finally, opaque decisionmaking also reinforces dissensus. Detection is central to norm origination; norms do not arise unless potentially constrained community members expect that compliance and transgression will be detected and that esteem will be distributed accordingly.<sup>213</sup> Decisionmaking in execution selection, however, is barely visible. To my knowledge, reasons for execution selection are rarely written down or transmitted to others within the occupational community. Even inside a particular organization, such as a district attorney's office, a given prosecutor is unlikely to be asked to provide externally verifiable reasons for seeking a particular execution at a particular time. Even if there were some developing consensus around sorting criteria, the ability to enforce that consensus against deviation is diminished by the lack of disclosure.<sup>214</sup> Institutional entities that violate a sorting norm would have little fear of and face no sanction for deviation—those capable of withholding esteem or expressing distaste will simply remain in the dark as to the deviation.<sup>215</sup>

\* \* \*

The upshot is that the universe of legal and norm-based constraints on execution selection looks a lot like one might expect in an area where there is sorting dissensus. There are no substantive or consistency-promoting constraints because there are no shared instincts around what those constraints should be. Moreover, the political economy of execution selection compounds the natural effects of dissensus. Incumbent stakeholders are usually the political beneficiaries of flexible execution selection, so those stakeholders seek laws

---

211. See, e.g., Mike Tolson, *A New Era of the Death Penalty in Houston*, HOUS. CHRON. (updated Dec. 20, 2017, 10:44 AM), <https://perma.cc/7GR7-NHQP> (reporting the reduction in executions in one of the country's most capially active counties following the election of a reform-minded district attorney).

212. The absence of an institutional network necessary to transmit a norm can be understood as the absence of the norm-transmission conditions of dominance and membership. See Axelrod, *supra* note 189, at 1103-04 (discussing dominance); *id.* at 1105-06 (discussing membership).

213. See McAdams, *supra* note 192, at 358.

214. Cf. Axelrod, *supra* note 189, at 1100-02 (explaining that norm enforcement involves punishing those who defect from norms and those who do not enforce them).

215. Cf. Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2149-50 (1996) (explaining the importance of "social connectedness" to the development of norms).

that leave that flexibility intact. Norms fail to take up the slack, remaining stunted because the decisions around which norms might arise are made infrequently, the decisionmaking is not transparent, and the transmission of occupational practices is impaired by interjurisdictional differences in selection structure.

### III. Evaluating Sorting Criteria

Sorting dissensus persists, at least in part, because the set of potential sorting rules presents a basic dilemma. The ones that sort precisely are not particularly fair, and the fairer ones are insufficiently capable of precision. Consider, for example, the problems with a blame-based rule. Such a rule would require a meaningful schedule of blameworthiness, which would require a jurisdiction to make impossibly granular moral distinctions between different types of offense conduct and offender backgrounds. To complicate matters further, any attempt to equate blame and punishment would require jurisdictions to define the disutility of extended solitary confinement.<sup>216</sup>

A blame-based rule is, of course, just one example; criteria based on consequentialist theories—incapacitation,<sup>217</sup> deterrence,<sup>218</sup> and utility to the aggrieved community<sup>219</sup>—present their own problems of justice and workability. In this Part, I explain—largely through process of elimination—that the only nonrandom sorting criterion that is both decently fair and administrable involves the availability of proceedings capable of confirming the *accuracy* of the underlying criminal judgment.<sup>220</sup>

#### A. Blame

If forced to suggest one rule for prioritizing executions, I suspect that most would gravitate toward a blame-based criterion. Under such a rule, the worst condemned inmates would die the soonest—an “evil-first” principle.<sup>221</sup> The penal theory most readily associated with blame-based punishment is retributivism, and I use it to anchor my discussion of blame-based rules for execution priority. Under a retributivist framework, punishment is pegged to “desert,”<sup>222</sup> and desert reflects both the gravity of the offense and the

---

216. See *infra* Part III.A.

217. See *infra* Part III.B.

218. See *infra* Part III.C.

219. See *infra* Part III.D.

220. See *infra* Part III.E.

221. See *supra* notes 133–34 and accompanying text.

222. See Michael S. Moore, *The Moral Worth of Retribution*, in *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY* 110, 110 (Andrew von Hirsch et al. eds., 3d ed. 2009).

blameworthiness of the offender.<sup>223</sup> Graver offense conduct committed by more blameworthy offenders deserves more punishment, and lighter conduct committed by relatively blameless offenders deserves less.<sup>224</sup> The retributivist community lives under a big tent, so there is disagreement about (among other things) whether desert obliges a state to punish or merely permits it to,<sup>225</sup> about whether there is a meaningful difference between completed and uncompleted attempts,<sup>226</sup> and about whether the impact of the penalty should be measured objectively or subjectively.<sup>227</sup> These differences are material to many important questions about punishment, but the arguments that I make here do not require that they be resolved. It is enough to understand in retributivist frameworks, more serious offending by more blameworthy offenders (desert) corresponds with greater deserved punishment.

Blame-based sorting is ultimately unworkable, however, for two primary reasons. First, even if one could somehow score blame, there are vexing questions about whether the wait is worse than the guillotine—whether increased punishment severity actually correlates with swifter executions. Second, notwithstanding the presence of some inmates whose offense conduct and background would produce outlier scores (i.e., the most evil), a blame-based rule is probably incapable of drawing sufficiently granular moral distinctions among the rest. As explained using different terminology in Part II above, desert simply works much better as an upstream sorting criterion.<sup>228</sup> I take each of these problems in turn.

---

223. See RICHARD G. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 14-18, 33-34 (1979).

224. See Kent Greenawalt, *Commentary, Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347-48 (1983).

225. See, e.g., Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93, 158-64 (2003) (assigning tenets of retributivism to positive and negative categories); R.A. Duff & D. Garland, *Introduction: Thinking About Punishment*, in *A READER ON PUNISHMENT* 1, 7 (R.A. Duff & D. Garland eds., 1994) (contrasting positive and negative retributivism).

226. See, e.g., Kenneth W. Simons, *On Equality, Bias Crimes, and Just Deserts*, 91 J. CRIM. L. & CRIMINOLOGY 237, 249 n.32 (2000) (describing a category of retributivists who believe that the state should punish completed attempts more severely).

227. See generally David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619 (2010) (exploring the difference between subjectivist and objectivist theories and ultimately endorsing the latter).

228. See Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 NEW CRIM. L. REV. 595, 606 (2013); *supra* Part II.A.



First, the requirement that punishment be graded to desert runs into trouble because it is not clear how to grade the severity of the punishment possibilities.<sup>229</sup> A death sentence actually entails two incommensurable punishments: (1) an execution that is preceded by (2) prolonged incarceration on death row. A condemned inmate spends the time between his sentence and his execution, if it ever occurs, in a correctional facility—and likely in some sort of administrative segregation (solitary confinement).<sup>230</sup> The execution plus such incarceration may be a greater punishment than immediate execution alone. If an offender were to otherwise live to the age of eighty and be capitally sentenced at thirty, then a schedule of punishment severity depends on the value assigned to the fifty additional years of incarceration on death row. Is the value of death row incarceration positive or negative? Does the answer change depending on the age of the condemned inmate? These commensurability questions are unavoidable but have no good answers, and certainly none capable of generating consensus.<sup>231</sup>

Nor are commensurability problems with the punishment metric just about the *duration* of death row incarceration; they are also about its *conditions*. In light of the solitary confinement in which most condemned inmates live,<sup>232</sup> there is no consensus behind the proposition that an execution is worse than the alternative. Popular discourse about the death penalty reveals genuine ambivalence about whether life without parole in an administratively segregated prison environment is actually preferable to death.<sup>233</sup>

---

229. See Russell L. Christopher, *Death Delayed Is Retribution Denied*, 99 MINN. L. REV. 421, 452-72 (2014).

230. See THE ARTHUR LIMAN PUB. INTEREST PROGRAM, YALE LAW SCH., RETHINKING DEATH ROW: VARIATIONS IN THE HOUSING OF INDIVIDUALS SENTENCED TO DEATH 4-6 (2016), <https://perma.cc/72QM-GR6D> (collecting data from different jurisdictions on how death row inmates are housed).

231. See Christopher, *supra* note 229, at 452-72 (discussing the complications that extended death row incarceration presents for the retributivist framework).

232. Over 60% of death row inmates are isolated for more than twenty hours a day. See Gabriella Robles, *Condemned to Death—and Solitary Confinement*, MARSHALL PROJECT (July 23, 2017, 10:00 PM), <https://perma.cc/P8LC-JGRV>.

233. See WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 157-58 (2006); 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, 1124-25 (2010); Alex Kozinski, *Worse than Death*, 125 YALE L.J.F. 230, 230 (2016); Masha Gessen, *Can Life in Prison Be Worse than Death?: Some Tsarnaev Jurors Think So*, WASH. POST (Feb. 25, 2015), <https://perma.cc/MB6L-5LWS>.

Even if there were some way to rank-order the severity of execution-incarceration combinations, there are still major problems with the desert side of the equation. I do not want to canvass all of the theoretical problems with computing desert here, as such problems have consumed the literature for as long as people have been thinking about retributivism. Suffice it to say that under virtually any retributivist framework, there is enormous disagreement over how to compute and weight the determinants of desert.<sup>234</sup> That problem is compounded at the execution phase because the retributive criteria must perform a much more granular sort—among a pool of condemned inmates that naturally represents a very narrow band of desert.

I am not suggesting that executions are peripheral to retribution in capital cases. A retributive encounter might remain incomplete until punishment commensurate with desert is exacted.<sup>235</sup> As long as a guilty capital offender lives, the balance between that offender and his community might remain materially unrestored. Or a retributivist might care deeply about executing condemned inmates because of the performative aspects of punishment.<sup>236</sup> The only point I am making is that in terms of *ordering* condemned inmates for execution, retributivist sorting criteria are largely unworkable.

---

234. See, e.g., Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 268 (“Retributivism, of course, has analogous problems: Rank ordering crimes and punishments for just deserts is the work of individuals, not computers, and therefore subject to each person’s perspective on which crimes and punishments are more serious than others.”); Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 WM. & MARY L. REV. 1831, 1840-42 (2007) (describing the difficulties in having moral philosophers theorize desert); Christopher Slobogin, *Some Hypotheses About Empirical Desert*, 42 ARIZ. ST. L.J. 1189, 1189-93 (2010-2011) (questioning whether desert could ever be meaningfully estimated empirically).

235. See generally Christopher, *supra* note 229 (arguing that a delayed execution fails to meet the purposes of retributivism).

236. Specifically, some retributivists justify punishment as a moment during which the state *communicates* punishment to an offender and *expresses* its disapproval to the broader community. See, e.g., R.A. Duff, Essay, *Guidance and Guidelines*, 105 COLUM. L. REV. 1162, 1182 (2005) (“The account that I favor is retributivist in the sense that it takes the primary communicative purpose of punishment to be the communication to offenders of the condemnation they deserve for the wrongs they have committed, and explains that purpose in backward-looking terms of what we, as a polity, owe to victims, to offenders, and to ourselves as a political community . . . .”); see also Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 910 (2010) (emphasizing both the communicative and expressive functions of punishment). If the pertinent punishment is a death sentence, then the communicative and expressive value of the encounter might not be perfected until the moment the state actually takes the life of the offender.

## B. Incapacitation

One welfarist justification for the death penalty is that it incapacitates dangerous offenders.<sup>237</sup> Indeed, executions achieve complete incapacitation,<sup>238</sup> whereas maximum-security incarceration produces something less than that.<sup>239</sup> A yet-to-be-executed inmate could theoretically have a violent altercation in the correctional facility or use gang activity to project violence beyond prison walls. An execution excludes even the remote possibility of such behavior. As with retribution, however, I do not analyze incapacitation as a broader, justificatory account of the death penalty;<sup>240</sup> rather, I consider whether danger is a suitable criterion for prioritizing executions.

Using incapacitation as a criterion would require that executions of the most dangerous inmates proceed first. Within the universe of potential sorting criteria, incapacitation is indeed somewhat alluring. But there are a few big problems with such an approach. First, estimates of future dangerousness are notoriously bad,<sup>241</sup> especially as formerly violent offenders age out of juvenile

---

237. See Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1157 (2003). See generally Marah Stith McLeod, *The Death Penalty as Incapacitation*, 104 VA. L. REV. 1123 (2018) (discussing ways to strengthen the fit between death penalty practice and the incapacitation rationale).

238. See JACK P. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE 58 (1975) (“[O]nly execution incapacitates absolutely.”).

239. But see Michael Mello, Essay, *Certain Blood for Uncertain Reasons: A Love Letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 VT. L. REV. 765, 797 (2008) (“Maximum-security prisons are as incapacitating as executions, even though there is a small risk of escape or murder in prison.”); cf. *Harris v. Alabama*, 513 U.S. 504, 517-18 (1995) (Stevens, J., dissenting) (“In capital sentencing decisions, however, . . . incapacitation is largely irrelevant, at least when the alternative of life imprisonment without possibility of parole is available . . .”).

240. The Supreme Court has never comfortably embraced incapacitation as a justification for the death penalty. See William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 913-18 (2010).

241. See Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1254-58 (2000) (surveying criminological research); see also Brief Amicus Curiae for the American Psychiatric Ass'n at 6, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080), 1983 U.S. S. Ct. Briefs LEXIS 1529, at \*28-29 (expressing the consensus view of the psychiatric community); Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 695-96 (1974) (arguing that sentencing based on future dangerousness is arbitrary); Jaymes Fairfax-Columbo & David DeMatteo, *Reducing the Dangers of Future Dangerousness Testimony: Applying the Federal Rules of Evidence to Capital Sentencing*, 25 WM. & MARY BILL RTS. J. 1047, 1059 (2017) (contemplating problems that modern expert testimony requirements create for predictions about future dangerousness). But see Randy K. Otto, *On the Ability of Mental Health Professionals to “Predict Dangerousness”: A Commentary on Interpretations of the “Dangerousness” Literature*, 18 LAW & PSYCHOL. REV. 43, 62-63 (1994) (suggesting that clinical predictions are at least slightly superior to randomly assigned guesses).

impulsiveness and aggression. Second, estimates of *carceral* violence are exceptionally unreliable, especially taking into account that 61% of death row inmates serve their sentences in administrative segregation (solitary confinement).<sup>242</sup> Third, even assuming a reasonably accurate model of future dangerousness exists, any estimate would be extremely volatile over time, because both age and prior years in a prison setting substantially reduce the risk of violent behavior.<sup>243</sup>

Not only are estimates of dangerousness exceptionally unreliable, but a meaningful schedule of execution priority would require micrometric sorting. The three problems mentioned above plague jurisdictions that use future dangerousness upstream as a means of separating murderers into a huge category of noncapital sentences and a tiny category of capital ones.<sup>244</sup> In the same way that meaningful blame-based sorting requires moral distinctions that are impossibly granular, a meaningful schedule of dangerousness-based priority would be exceptionally challenging—even in a counterfactual world where precise measurement instruments existed. There are bound to be isolated cases where inmates present outlier violence risks<sup>245</sup> or are especially networked in enterprise criminality, but an incapacitation criterion is useless for the rest. In practice, it would be an execution lottery—or worse, a sorting tool that racializes threat estimates.<sup>246</sup>

### C. Deterrence

The major consequentialist justification offered in support of the death penalty is that it deters criminality. Transforming that justification into a downstream sorting principle for execution selection, however, is impossible.

---

242. See Robles, *supra* note 232. Moreover, less than 2 per 1,000 capital inmates returned to general population commit another murder. See Sorensen & Pilgrim, *supra* note 241, at 1256.

243. See John D. Wooldredge, *Correlates of Deviant Behavior Among Inmates of U.S. Correctional Facilities*, 14 J. CRIME & JUST., no. 1, 1991, at 1, 4-8; Kevin N. Wright, *A Study of Individual, Environmental, and Interactive Effects in Explaining Adjustment to Prison*, 8 JUST. Q. 217, 220 (1991).

244. Cf. Liebman & Clarke, *supra* note 161, at 318-19 (noting the small fraction of convicted murderers that receive the death penalty).

245. See, e.g., *Arave v. Creech*, 507 U.S. 463, 465-66 (1993) (deciding an inmate murder case in which the perpetrator was already serving time for killing at least twenty-six other people).

246. For example, the Supreme Court recently decided *Buck v. Davis*, in which a trial expert had “stated that one of the factors pertinent in assessing a person’s propensity for violence was his race, and that [the defendant] was statistically more likely to act violently because he is black.” 137 S. Ct. 759, 767 (2017).

Even if data confirmed the scattered intuition that more rapid executions increase deterrence,<sup>247</sup> that information wouldn't suggest that the *sequence* of executed inmates suppresses criminality.

I forgo a lengthy summary of the empirical work on the death penalty's deterrent effect; suffice it to say the prevailing wisdom in the academic community is that existing work has failed to prove that the death penalty meaningfully deters homicides.<sup>248</sup> (Note that the failure of studies to show a deterrent effect is different from studies successfully showing that there is no deterrent effect.) The question whether the institution of capital punishment deters crime, however, is obviously distinct from the question whether there is any deterrent benefit in a particular schedule of executions.

---

247. Cf. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 36 (David Young ed. & trans., Hackett Publ'g Co. 1986) (1764) (explaining famously that prompt punishment reinforces the notion that the penalty is "the necessary and inevitable result" of the offense); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 172-73 (J.H. Burns & H.L.A. Hart eds., Univ. of London Athlone Press 1970) (1789) (arguing that the less the temporal proximity of punishment, the less the deterrent effect); Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization?: Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 230 (2012) (suggesting that the delay between sentence and execution undercuts deterrence).

248. Early studies used matching techniques comparing homicide rates of nearby states, homicide rates during periods of capital activity and inactivity, and homicide trends before and after high-profile capital events. See BOHM, *supra* note 142, at 105-08 (collecting studies). No study using these matching techniques disclosed a deterrent effect. See *id.* at 108.

In 1975, Isaac Ehrlich used multivariate regression analysis of midcentury data to report a deterrent effect. See Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 398, 406 (1975). Ehrlich's study was later criticized heavily and largely discredited. See BOHM, *supra* note 142, at 109 (criticizing Ehrlich on the ground that he "fail[ed] to compare the effectiveness of capital punishment with that of particular prison terms"); David C. Baldus & James W.L. Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170, 179-80 (1975) (arguing that Ehrlich used insufficient statistical controls); Peter Passell & John B. Taylor, *The Deterrent Effect of Capital Punishment: Another View*, 67 AM. ECON. REV. 445, 447 (1977) (pointing out that in Ehrlich's dataset, the effect disappeared if the last seven years of data were removed). The National Academy of Sciences eventually issued a report refuting Ehrlich's methods and conclusions. See DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 358-59 (Alfred Blumstein et al. eds., 1978). Attempts to revive Ehrlich's standing by proving a deterrent effect have failed to convince most leading empiricists. See John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 793-94, 793 n.11 (2005) (collecting newer studies purporting to find a deterrent effect and expressing "profound uncertainty" as to their conclusions).

A regime with death sentencing but no executions might do an inferior job of deterring capital criminality relative to a regime that executes its condemned inmates. There is no spot-on empirical work that tests this intuition,<sup>249</sup> but it is sensible enough to warrant some discussion. It might also be that no deterrence is realized *until* a state executes some threshold number of death row inmates, or that no marginal deterrence is realized *after* the state executes some threshold. The point is simply that there may be some deterrent value in executing one or more offenders who are subject to a capital sentence.

The available data suggest that a capital jurisdiction that fails to execute its condemned inmates is probably no worse at deterrence than a regime that imposes executions. (Some data suggest that it's better.)<sup>250</sup> The reason is that a regime that capitally sentences but does not execute is effectively imposing life without parole, and empirical evidence indicates that the death penalty achieves no incremental deterrent effect over that alternative.<sup>251</sup> As leading empiricist John Donohue has put it: "It is now widely accepted among top-flight empirical scholars that not a single study credibly supports the view that capital punishment as administered anywhere in the United States provides any added deterrent beyond that afforded by a sentence of life imprisonment."<sup>252</sup>

---

249. This possibility is related to the intuition that swifter punishment deters more effectively.

250. The "brutalization effect," a cost frequently associated with the death penalty, refers to the idea that executions normalize revenge-oriented violence, thereby yielding an increase in homicidal activity. See Steiker, *supra* note 135, at 786-87. The empirical work on brutalization runs the gamut, ranging from studies concluding that there is no such effect, to those concluding that every execution produces such effect, to those that find such an effect to be observable over the first *n* executions but to disappear thereafter. See Donald P. Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management*, 33 U.C. DAVIS L. REV. 155, 225-26 (1999) (identifying examples of such studies on a spectrum); see also, e.g., Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203, 240 (2005) ("My results suggest that a substantial brutalization effect is generally present after an execution, regardless how many executions the state has already conducted recently.").

There is, to my knowledge, no study that disentangles the brutalization effect of a death sentence from the execution. Notwithstanding the absence of good data, most of the pertinent literature appears to assume that the primary mechanism of brutalization is the execution. This makes sense: Executions receive extensive media coverage, see GARLAND, *supra* note 9, at 294, increasing the visibility of the state-sanctioned violence. The capital sentence is effectively a declaration that the offender will be killed, but the more powerful moment of legitimation comes when the punishment is actually exacted.

251. See *supra* note 248.

252. John J. Donohue, *Empirical Analysis and the Fate of Capital Punishment*, 11 DUKE J. CONST. L. & PUB. POL'Y 51, 58 (2016).

A slightly different welfarist argument might be that there is deterrent value created when the state is free to pick and choose whom, and when, it executes. There is no well-supported theory to this effect, however, and so there is no existing empirical work capable of testing it.<sup>253</sup> Moreover, the proposition that the composition of the execution queue might produce different amounts of deterrence still leaves open the big question: Which executions promote deterrence better than others? For example, a regime that executes the most culpable murderers seems consistent with retributive norms of punishment, but there is no reason to believe that such a protocol would maximize deterrence.

All of this discussion hints at a larger point. Deterrent value is not a good sorting criterion at the execution phase because it's not a good sorting criterion at *any* phase. The standard account of American penal practice is that it conforms with a "synthetic" theory of punishment—that is, a theory that is part consequentialist and part retributive.<sup>254</sup> Specifically, consequentialist benefits globally justify the retention of capital punishment, but the application of capital punishment (its specification) is limited by retributive constraints.<sup>255</sup> In other words, we have the death penalty because we believe that it deters, but we sort the death-worthy from those whose lives should be spared by reference to desert. One reason that U.S. jurisdictions settle on punishment practices consistent with the synthetic theory is that deterrence is a poor sorting criterion. If it is unworkable for sorting at upstream phases, then there can be no serious argument that it works for downstream selection.

#### D. Vindication Surplus and Revenge Utilitarianism

There are justificatory theories centered on the psychic value that communities realize when condemned inmates are executed—roughly, the sum of individual satisfaction in knowing that the arc of violence and punishment is complete. I refer to this value as the "vindication surplus," although others have less charitably referred to similar arguments as

---

253. One might argue that a state could efficaciously deter by selecting the highest-profile killers for execution, thereby maximizing awareness about punishment for homicidal criminality. But there are no data to support that speculation, and using such a rule could entail massive violations of retributive norms.

254. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 76-79 (2005).

255. See *id.* (showing that every U.S. jurisdiction largely conforms to the principle of "limiting retributivism" (citing NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 161, 182-87, 196-200 (1982)). The American Law Institute's Model Penal Code on Sentencing embraces the idea that retributive interests limit the permissible severity of punishment. See MODEL PENAL CODE: SENTENCING § 6.02(4) (AM. LAW INST., Proposed Final Draft 2017); see also *id.* § 6.02 cmt. b.

“revenge utilitarianism.”<sup>256</sup> Like incapacitation, perhaps vindication surplus could do double duty as an abstract justification for the death penalty and as a sorting criterion for execution selection.

A vindication surplus (revenge utility) takes at least two distinct forms. First, it represents the satisfaction and closure experienced by those affected by a crime.<sup>257</sup> Aggrieved parties can move on with their lives, believing that the community has exacted the appropriate punishment from the offender. Second, an execution may produce a vindication surplus by displacing other, less desirable means of exacting punishment.<sup>258</sup> The extent to which such loss aversion exists depends largely on the degree to which the alternatives are realistic—that is, whether an execution really displaces private forms of revenge, such as lynching or vigilantism.

Any practical attempt to sort condemned inmates using vindication surplus would be morally unacceptable. Prioritizing executions because they produce, for example, the greatest risk of lynching or other vigilantism, would reproduce many of the same evils that the displaced extrajudicial punishment entails. The result would be a sorting mechanism that would prioritize the killing of inmates who are black or who killed white women.<sup>259</sup> Even taking race out of the equation, such a sorting rule would result in the prioritization of condemned inmates convicted of killing sympathetic victims—something that, because of things like the availability of effective witnesses, would naturally correlate with socioeconomic status and national origin.<sup>260</sup> Stated a little more pithily, using vindication surplus to prioritize executions doesn’t work because American institutions don’t practice revenge utilitarianism.

Even if one could move beyond the justificatory difficulties, there would simply be a major, and in part familiar, workability problem. Vindication

---

256. See Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1169-73 (1980).

257. See PRIMORATZ, *supra* note 30, at 21-22 (using the term “vindictive satisfaction” to describe this phenomenon).

258. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (raising the specter of displaced private revenge); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 41-42 (Dover Publ’ns, Inc. 1991) (1881) (“If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.”).

259. Cf. Sheri Lynn Johnson, *Coker v. Georgia: Of Rape, Race, and Burying the Past*, in *DEATH PENALTY STORIES* 171, 192-93 (John H. Blume & Jordan M. Steiker eds., 2009) (explaining the persistence of the black defendant-white victim problem in capital rape cases).

260. This likely result mirrors some of criticism leveled at victim impact testimony in death penalty cases, which becomes problematic when it suggests that certain lives are more valuable than others. See, e.g., Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 157-58 (1999).



surplus is a theoretical justification for the death penalty, but how it could be reduced to a value necessary to prioritize executions lies beyond the moral and algorithmic capacity of human institutions.

E. Accuracy

One normative proposition that should command something approaching unanimity is that execution priority ought to be sensitive to “accuracy,” by which I mean that inmates subject to convictions and sentences that may be wrongful should be deprioritized. There is no god’s-eye view into the accuracy of a conviction and death sentence, but the set of death row inmates is broadly differentiated by procedural posture—ranging from postures capable of producing substantial confidence in the punishment to postures in which uncertainty remains entirely unliquidated. Sentences can be pending on direct appeal from the criminal judgment, or the litigation might be in one of several different stages of state or federal postconviction review. The more operationally precise statement of an accuracy interest, therefore, is that jurisdictions should not select inmates for whom available judicial proceedings are sufficiently likely to produce an authoritative legal declaration that a conviction or sentence was in error. Jurisdictions can promote an accuracy interest by constructing execution queues from cases in certain procedural postures.

The relationship between accuracy and procedural posture is increasingly apparent. Declarations of error happen in appellate and postconviction litigation, and those proceedings are central to the accuracy of criminal punishment because a new generation of criminology has revealed that a shocking number of guilt- and punishment-phase verdicts are wrong.<sup>261</sup> The “innocence revolution” has disclosed rates of error previously considered hyperbolic,<sup>262</sup> and there is reason to think that guilt-phase error is especially common in death penalty cases.<sup>263</sup> (Chief among these reasons is that a “death-

---

261. See Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 73 (2003) (“[F]or every defendant who is exonerated because of DNA evidence, there have been certainly hundreds, maybe thousands, who have been convicted of crimes on virtually identical evidence.”). See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011) (comprehensively analyzing the causes of wrongful convictions based on a dataset of the first 250 DNA exonerations).

262. See generally Lawrence C. Marshall, Walter C. Reckless Memorial Lecture, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 575 (2004) (explaining how the rash of exonerations during the 1990s and 2000s changed fundamental assumptions about the criminal process).

263. By the beginning of 2019, 20 of the 364 Americans exonerated by DNA evidence had been on death row. See *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://perma.cc/D7D8-GMBR> (archived Apr. 6, 2019). Hugo Bedau and Michael Radelet have identified 350 inmates on death row that they believed to be

*footnote continued on next page*

qualified” jury, which excludes people with philosophical objections to the death penalty, is unusually prone to convict at the guilt phase).<sup>264</sup> Moreover, unlike noncapital cases, postconviction litigation involving death sentences often alleges constitutional error in the determination of punishment.<sup>265</sup> State and federal postconviction law might be nightmarishly byzantine,<sup>266</sup> but it is the primary mechanism for disclosing wrongful verdicts.

An interest in “accuracy” leads to questions about *how much*. Punishment regimes do not pursue accuracy at all costs, and do not really extinguish all metaphysical doubt before imposing penalties. The accuracy interest must necessarily be balanced against competing values generally associated with the finality of punishment.<sup>267</sup> Certainty regarding guilt or sentencing will rarely hit one hundred percent, as things like mens rea and death-worthiness are legal constructs rather than phenomena that exist in the natural world. Judges and other criminal justice institutions treat jury verdicts on these questions as true because authoritative legal process has declared them so.<sup>268</sup> Phrased differently,

---

innocent and published a series of books and law review articles on the subject. See generally MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992) (discussing the stories of over 400 people wrongly convicted of capital crimes); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (presenting 350 such cases); Hugo Adam Bedau & Michael L. Radelet, Comment, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988) (addressing attacks on the methodology of their study). But see Stephen J. Markman & Paul Cassell, Comment, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988) (taking issue with the methodology used by Bedau and Radelet).

Methodologically rigorous attempts to hypothesize a wrongful conviction rate in death cases have produced estimates between 3.3% and 4.1%. See Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230, 7234 (2014); see also D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (offering an estimated range of 3.3% to 5%).

264. See William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 104 (1984) (finding that jurors qualified for capital trials were more likely to vote for conviction in capital cases).

265. See *supra* text accompanying notes 154-56.

266. See Lee Kovarsky, *The Habeas Optimist*, 81 U. CHI. L. REV. DIALOGUE 101, 116-17 (2014) (discussing the state postconviction process); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 727 & n.128 (2002) (collecting authority on federal habeas).

267. See generally Lee Kovarsky, *Preclusion and Criminal Judgment*, 92 NOTRE DAME L. REV. 637 (2016) (exploring the interests in having restrictive preclusion rules in collateral litigation that attacks criminal convictions).

268. See Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1195 (1979) (explaining that legal institutions encourage the public to treat jury verdicts as authoritative, and that the popular perception that juries find “truth” may be no more than a means to that end).

the truth of such phenomena is established by proxy of reliable legal procedure.<sup>269</sup> Even for more empirically determinate phenomena—like whether a convicted offender wielded the murder weapon at a particular time and place—the truth of the fact is often assumed simply because there is a settled procedure for assuming it.

An increment of procedure could always add an increment of accuracy, but how much, and at what price? Throughout postverdict litigation, the key question is at what point the finality interest should dominate the accuracy interest—the point at which legal institutions should no longer give practical effect to the theoretical uncertainty around any capital sentence.<sup>270</sup> At what point should state and federal courts no longer continue postconviction challenges, and, in death cases, at what point should executions proceed? There is no magic threshold of postverdict process beyond which repose is morally required—balancing accuracy and finality is comparing apples and oranges.

This incommensurability notwithstanding, the institutional structure of capital punishment lends itself to an execution constraint based on accuracy. It is a criterion that tracks meaningful values. As I explain in Part IV below, confidence in judgments is both highly differentiated within the death row population and, because the vulnerability of a sentence correlates with procedural posture, capable of being administered effectively. In these respects, accuracy differs markedly from other rational, nonrandom sorting criteria—blame, incapacitation, deterrence, and vindication—which are either precise but insufficiently fair, or fair but insufficiently precise.

#### **IV. Institutional Design**

Because so many of the problems that surface during the construction of an execution queue are the result of the way the American death penalty is practiced upstream, they remain unsolvable without comprehensive change to the entire capital punishment sequence. Even in the absence of comprehensive upstream reform, however, jurisdictions need not gratuitously facilitate arbitrary execution selection practice. In this Part, I set forth several principles of institutional design, anchored to interests in legitimacy, transparency,

---

269. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 446-48 (1963) (explaining that judgments should not be accorded final effect because they are *in fact* free of error, but because sufficient process has been brought to bear to justify the exercise of power they entail).

270. Justice Jackson coined perhaps the most famous phrasing of this idea in a case about whether to permit federal courts to review the merits of postconviction claims decided in state court: “We are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

fairness, accuracy, and equal (nonarbitrary) treatment. In institutional spaces where rational sorting criteria cannot meaningfully guide a selection practice, a more random, order-of-entry rule should be favored over a process that is purposeful but arbitrary.

#### A. Design Principles

In what follows, I recommend three broad principles of institutional design. First, execution selection should be centralized; localities should not have a direct role in setting execution dates. Second, a centralized entity should engage in rulemaking, using processes akin to those in administrative law, in order to develop transparent sorting criteria. These criteria should be subject to an accuracy “side constraint”—meaning that inmates whose cases are in certain procedural postures should not be executed. Third, an ideal scheme would separate the power to fix the queue from the power to schedule execution dates.

##### 1. Centralization

In many states, local prosecutors and judges retain substantial responsibility for setting execution dates.<sup>271</sup> That practice should be replaced with one in which the execution queue is set centrally. By “centrally,” I mean that state governments should administer the process for states, and that the federal government should administer the process for the United States. Arrest, charge, and sentence selection exhaust the appropriate role for local stakeholders in the capital punishment sequence. Centralizing the selection function will suppress arbitrariness without curtailing meaningful participatory values.

After an inmate lands on a jurisdiction’s death row, local influence does little more than promote arbitrariness in selection priority. Because political constraints, bureaucratic aptitude, professional ambition, and financial resources are locally differentiated, there is enormous local variation in any decentralized selection practice.<sup>272</sup> Decentralized capital punishment practice generally tends toward an equilibrium in which a few large, urban counties will account for most of a state’s death penalty activity.<sup>273</sup> In such a regime, a condemned inmate may be significantly more likely to be selected for

---

271. *See supra* text accompanying notes 88-91.

272. *See* Kovarsky, *supra* note 106, at 289-96; *see also* Jon B. Gould & Kenneth Sebastian Leon, *A Culture That Is Hard to Defend: Extralegal Factors in Federal Death Penalty Cases*, 107 J. CRIM. L. & CRIMINOLOGY 643, 658-60 (2017) (describing the variation between states in resources provided to defendants).

273. *See* Kovarsky, *supra* note 106, at 279 tbl.6, 280 tbl.7.

execution if he is from one county rather than another.<sup>274</sup> Unless the geography of decentralized execution selection is somehow tracking morally significant sorting criteria (and there is no reason to think that it is),<sup>275</sup> substantial local variation is a strong indicator of arbitrariness.<sup>276</sup>

Furthermore, decentralization produces arbitrariness *within* a single locality. One district attorney may seek to aggressively set execution dates, but the next may not. There is therefore substantial volatility inherent in local regime change. Because certain local officials must be more responsive to local political climates,<sup>277</sup> they are especially prone to setting execution dates in cases that present political rewards—when there are sympathetic victims, when the offender might be part of an outgroup (like undocumented immigrants), or during local elections.<sup>278</sup> In other words, decentralized execution selection tends much more toward a politics of revenge utilitarianism, in which the selected inmates are those who produce the biggest payoffs for the institutional stakeholders capable of exercising power.<sup>279</sup>

Taking county officials out of the process ensures that execution selection occurs by reference to something other than the need to please organized local constituencies.<sup>280</sup> A centralized decision to proceed with an execution would instead reflect a condemned inmate's position vis-à-vis the rest of the inmates in the state. Of course, a state or the federal government can be influenced by politics in the same way that a local official can,<sup>281</sup> but there are reasons to believe that the most distorting influences dissipate more as the decision is further removed from the site of criminal transgression. When the execution

---

274. See Frank R. Baumgartner et al., *Event Dependence in U.S. Executions*, PLOS ONE 5, 6 fig.2 (Jan. 2, 2018), <https://perma.cc/VK57-CAFQ>.

275. See *id.* at 2 fig.1, 3; Frank R. Baumgartner et al., *The Geographic Distribution of US Executions*, DUKE J. CONST. L. & PUB. POL'Y, nos. 1-2, 2016, at 1, 16-19.

276. Cf. Baumgartner et al., *supra* note 274, at 3 (“[T]he historical track record of a given county in carrying out previous death sentences should not be a ‘legally relevant factor’ in determining whether the next inmate deserves the ultimate punishment. That should relate solely to the nature of the crime and the characteristics of the offender.”).

277. See William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1344 (1993).

278. Cf. Amanda S. Hitchcock, Comment, *Using the Adversarial Process to Limit Arbitrariness in Capital Charging Decisions*, 85 N.C. L. REV. 931, 954-57 (2007) (documenting the sympathetic victim effect in capital charging decisions of local prosecutors).

279. See GARLAND, *supra* note 9, at 290.

280. Cf. 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, 817 (1995) (advocating that capital punishment decisions should be made by judges outside “the locality of the crime”).

281. See *id.* at 760-68, 784-92 (documenting state-level politicization).

selection function is centralized, organized local constituencies otherwise capable of securing preferred executions (like police unions) will necessarily compete for sovereign action in a more competitive political environment. At the state and national level, electoral distortions are more likely to affect the pace and volume of executions, rather than the identity of selected inmates. Moreover, centralized decisionmaking can be even further insulated from politics if, as I suggest below, the power to set the queue is assigned to something like a sentencing commission.<sup>282</sup>

Nor are *local* officials the agents of meaningful community participation; if there is some sort of participatory interest at the execution phase, that interest is the one that is channeled through *state* and *national* institutions. The value of local participation is almost entirely exhausted at the conclusion of sentence selection. The participatory values represented by the presence of a trial jury are self-evident; comprised of community peers, the criminal jury plays a unique role in legitimating capital sentence selection.<sup>283</sup> Trial process must allow jurors to give a “reasoned moral response” to all evidence of an offender’s reduced desert,<sup>284</sup> but no such feedback is required for execution selection. Quite tellingly, no U.S. jurisdiction enrolls juries—or anything like them—when selecting inmates for execution. Indeed, the participatory interest at stake is nothing more than whatever is expressed when designated state agents—governors, attorneys general, district attorneys, and judges—undertake authorized activity. Assuming for the sake of argument that rearranging the execution powers of various state officials nontrivially implicates some participatory value, the pertinent question lingers: *whose* participation.

Some might argue that participatory interests are interests owned by a particular locality.<sup>285</sup> That position ignores the morally significant features of the decision the jurisdiction is making. If execution selection is about rationally prioritizing punishment across an eligible population, then it is a relational decision for which the participation of the entire political unit is appropriate. The major argument for privileging local participation, were someone to make it, would almost certainly center on the need to allow organized local constituencies to secure preferred executions—something that looks a lot like a morally impermissible variant of revenge utilitarianism. In fact, the dominant norms of American penal practice reject the proposition that once an inmate is

---

282. See *infra* Part IV.A.2.

283. See Jeffrey Abramson, Essay, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 162 (2004); see also *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975).

284. See *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-65 (2007).

285. See Emma Kaufman, *Extraterritorial Punishment*, 20 NEW CRIM. L. REV. 66, 91-93 (2017).

sentenced, a particular community has a superior role in the infliction of punishment.<sup>286</sup> State executions take place in the state's execution chamber, without respect to the inmate's site of criminal transgression. There is no normative mandate for local participation in punishment administration.

## 2. Side-constrained rulemaking

The second important institutional design principle involves the implementation of sorting criteria and borrows from administrative law. The sorting criteria should be developed by an administrative commission, through informal, notice-and-comment rulemaking, and side constrained by statutory law that promotes an accuracy interest—that is, set up so that jurisdictions may not execute inmates whose cases remain in certain prespecified procedural postures.<sup>287</sup> The process could look much like the work performed by criminal sentencing commissions,<sup>288</sup> except that it would entail the development of sorting criteria for execution selection. No matter what criteria jurisdictions decide to use for prioritizing executions, they should be (for the most part<sup>289</sup>) statutorily barred from setting execution dates before one round of federal habeas proceedings is complete or while any postconviction attack remains pending.<sup>290</sup>

The administrative function could be performed by existing sentencing commissions or by new, standalone entities.<sup>291</sup> Either way, the responsible commission would conduct informal, notice-and-comment rulemaking to identify the appropriate criteria for prioritizing executions—whether those criteria involve age, duration of death row incarceration, date of offense,

---

286. *See id.* at 68.

287. *See supra* Part III.E.

288. *See generally* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 798-812 (2005) (arguing that sentencing commissions perform better when they are equipped to handle extensive politicization); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 1, 7-23 (1991) (setting forth the powers and duties of the U.S. Sentencing Commission and exploring deviations from the typical agency model).

289. I do not mean to suggest that an inmate can avoid an execution date by refusing to undertake timely postconviction litigation—hence the noncategorical language.

290. The first round of habeas proceedings is generally essential to enforcing constitutional rights bearing on the accuracy of the sentence—including the Sixth Amendment right to effective assistance of counsel and the due process right of access to exculpatory evidence. *See* Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 456-58 (2017); *see also* McMann v. Richardson, 397 U.S. 759, 771 (1970); Brady v. Maryland, 373 U.S. 83, 87 (1963).

291. Not every state has a sentencing commission. *See* NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 4 (2008), <https://perma.cc/TDM7-7W2F>.

offense conduct, blameworthiness, future dangerousness, or some combination thereof. Pursuant to the strictures of notice-and-comment process, the commission would: (1) develop a proposed rule internally, in conjunction with appropriate stakeholders; (2) give substantial public notice of the proposed rule's content; (3) provide an opportunity for public participation by taking comments; and (4) after deliberation, publish the rule in some official form, with a concise statement of its purpose.<sup>292</sup> Mirroring the practice of the (federal) U.S. Sentencing Commission, the execution commission would also have to consult with authorities on, and representatives from, the criminal justice system.<sup>293</sup> And, as is the case with most sentencing commission recommendations, a state legislature would have to approve the final sorting criteria.<sup>294</sup>

So, for example, a jurisdiction might select an “evil-first” rule, which would require some determinate schedule of blameworthiness. Each inmate would receive a score, and the ordering of inmates according to that score would form a prioritized queue. As I explained in Part III.A above, I doubt that blame-based sorting criteria are capable of tracking the most granular moral distinctions, but at least such a process would proceed according to a neutral, transparent, and plausible rule. The same holds true for any rule based around other aforementioned criteria, including deterrence or future dangerousness. If the legal criteria are arbitrary, impermissibly discriminatory, or otherwise unlawful, then they would—like all administrative rules—be subject to legal challenge in court.<sup>295</sup>

If a jurisdiction prefers a more determinate criterion, it could queue executions using an order-of-entry rule,<sup>296</sup> such as the date of offense, date of conviction, or date on which the first round of postconviction proceedings concluded. In fact, an order-of-entry rule can be an important backstop against

---

292. These principles are embedded in the federal laws for informal rulemaking. *See* 5 U.S.C. § 553 (2017). There is considerable variation in administrative rulemaking across states, but similar procedures appear in Article 3 of the 2010 Revised Model State Administrative Procedure Act. *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT §§ 301-318 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

293. *See* 28 U.S.C. § 994(o) (2017).

294. The U.S. Sentencing Commission's recommendations are subject to congressional veto. *See id.* § 994(p).

295. The federal Administrative Procedure Act requires that agency action be capable of surviving “arbitrary and capricious” review. *See* 5 U.S.C. § 706(2)(A); *see also* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). Review under the arbitrary and capricious standard has been lavished with extraordinary scholarly attention, which I do not recite here. *See, e.g.,* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 29 (2009).

296. *See generally* Ronen Perry & Tal Z. Zarsky, *Queues in Law*, 99 IOWA L. REV. 1595 (2014) (developing a framework for “first in, first out” rules).



arbitrary selection practice. If an order-of-entry rule is used, every condemned inmate will be sequenced according to a single timestamp that is, from the perspective of a queue maker, distributed randomly—thereby creating an equiprobable risk distribution in which every qualified condemned inmate has the same risk of being executed next. The queue maker is effectively forced behind a veil of ignorance, incapable of basing decisions on variables distributed less randomly than timestamps. Aside from a jurisdiction's decision whether to use an order-of-entry rule in the first place, there is little of the purposeful decisionmaking that produces the arbitrariness that plagues the status quo. As Billy Ehn and Orvar Löfgren have put it, “being beautiful, wealthy, or well-connected should mean nothing once you are standing in line.”<sup>297</sup> Such controlled randomness—where outcomes are not subject to purposeful but arbitrary decisionmaking—produces a procedural equality that might be the best that an institutional designer can do.<sup>298</sup>

The important feature of an order-of-entry rule is that it functions, from the perspective of the queue maker, as a random timestamp. The order-of-entry rule is probably superior to other time-based rules because it affords the least opportunity for gamesmanship on the part of the inmate or the state. If the execution queue is set using some order-of-exit rule—for example, by reference to the time inmates' state postconviction proceedings conclude—then inmates could lower their execution priority by stalling. (I doubt, however, that incentives to stall would offset other incentives to move as quickly as possible, such as a statute of limitations, even with an order-of-exit rule.)<sup>299</sup> On the other side, the state would have potentially undesirable incentives to artificially accelerate the postconviction process to secure a higher spot in the queue. There are, to be clear, only minor differences between an order-of-entry and an order-of-exit rule; but, to the extent that a jurisdiction chooses randomness as a backstop sorting principle, it should choose the more random criterion.

Whatever criteria are used to prioritize executions, the queue should be subject to a statutory, accuracy-related side constraint. Because legal institutions frequently ensure accuracy by proxy of reliable procedure,<sup>300</sup> the accuracy side constraint can take the form of a rule that executions not take

---

297. BILLY EHN & ORVAR LÖFGREN, *THE SECRET WORLD OF DOING NOTHING* 42 (2010).

298. See Neil MacCormick, *Norms, Institutions, and Institutional Facts*, 17 *LAW & PHIL.* 301, 307 (1998); see also Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 *VA. L. REV.* 1447, 1493 (2016) (collecting sources endorsing the possibility that random outcomes can be procedurally fair). But see Perry & Zarsky, *supra* note 296, at 1609-10 (explaining the limits of a “first in, first out” rule).

299. See, e.g., 28 U.S.C. § 2244(d)(1) (setting a federal statute of limitations applicable to claims of state inmates).

300. See Bator, *supra* note 269, at 456-57.

place while cases sit in certain procedural postures. In order to ensure that accuracy-promoting rules are enforced, a jurisdiction should be largely unable to schedule executions for inmates who either (1) have not completed one round of federal habeas proceedings, or (2) have subsequent postconviction proceedings that are pending.<sup>301</sup> Of all execution selection constraints, the rules and norms against setting execution dates during the pendency of certain appellate and postconviction proceedings already have the greatest penetration. Many jurisdictions currently do not set execution dates during the pendency of at least some postverdict activity.<sup>302</sup> Moreover, courts routinely stay executions to permit postconviction proceedings to run their course.<sup>303</sup> So as to prevent an inmate from moving to the back of the queue through serial challenges to his sentence, a condemned inmate whose execution would be scheduled but for the side constraint might return to his original spot in the queue when the pending proceeding concludes.

These postverdict proceedings are particularly central to the interest in accuracy.<sup>304</sup> The first round of federal postconviction proceedings, for example, is too often the first time that capitally sentenced inmates get decent lawyers, if they get decent lawyers at all.<sup>305</sup> Condemned inmates are statutorily entitled to representation during those proceedings,<sup>306</sup> so that process can be especially crucial to ensuring that the conviction and sentence were imposed lawfully and accurately.<sup>307</sup> Moreover, there is certain successive postconviction litigation, based on new law or the discovery of new facts,<sup>308</sup> that might also be instrumental in ensuring the lawfulness of a capital sentence. For example, when the Supreme Court declared that people with intellectual

---

301. I say “largely” because there are outlier scenarios in which, for example, an inmate has not undertaken federal habeas proceedings and is, after some period of time, procedurally foreclosed from doing so. In such cases, the fact that federal habeas proceedings are not complete would not bar the state from setting an execution date.

302. See BAUMGARTNER ET AL., *supra* note 64, at 42.

303. See *id.* at 220.

304. See *supra* Part III.E.

305. See Kovarsky, *supra* note 290, at 448-50 (documenting the failure of representation in state postconviction proceedings); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 686-97 (2007) (explaining why defense trial attorneys can be ineffective).

306. See 18 U.S.C. § 3599 (2017).

307. The recent decisions in two major U.S. Supreme Court cases reflect the Court’s awareness that federal habeas proceedings are particularly central to the enforcement of Sixth Amendment rights. See *Trevino v. Thaler*, 569 U.S. 413, 421, 429 (2013); *Martinez v. Ryan*, 566 U.S. 1, 9, 17-18 (2012).

308. See, e.g., 28 U.S.C. § 2244(b)(2) (2017) (providing a gateway through the otherwise-applicable bar on successive federal habeas petitions based on the presence of new law or new facts).

disability were ineligible for capital punishment,<sup>309</sup> many inmates on death row had to lodge their intellectual disability challenges in successive postconviction litigation.<sup>310</sup> Almost all postconviction activity used to be maligned as vexatious litigation undertaken by desperate inmates with creative lawyers,<sup>311</sup> but there is now clear evidence that it can be central to the truth-finding function of criminal proceedings.<sup>312</sup>

For these reasons, U.S. jurisdictions should not set execution dates while such challenges are pending. Decades ago, attorneys general and other law enforcement personnel would argue that setting an execution date was the only way to force a condemned inmate to commence litigation,<sup>313</sup> but that incentive has become unnecessary. Statutes of limitations combine with other unforgiving procedural rules to provide healthy encouragement for inmates to present their claims as soon as is practicable—in the first petition, as fast as they can.<sup>314</sup> No sane attorney withholds claims, hoping to assert them in a subsequent filing; the risk of losing them forever is simply too enormous.<sup>315</sup>

Nor would the accuracy side constraint double as a blank check for gamesmanship—that is, as an opportunity for inmates to delay their execution dates indefinitely by filing frivolous postconviction challenges in successive habeas petitions. Successive postconviction challenges are not generally treated as “pending” immediately upon the filing of papers seeking relief.<sup>316</sup> Most jurisdictions instead require that successive petitions be preauthorized as containing claims that are sufficiently meritorious.<sup>317</sup> These successive petition constraints are ordinarily very stringent, thereby precluding pendency in the vast majority of cases. In federal court, for example, there is a categorical rule

---

309. See *Atkins v. Virginia*, 536 U.S. 304, 318-21 (2002).

310. See Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 108 & n.245 (2011).

311. See, e.g., *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983) (Burger, C.J., concurring in denial of application for stay) (“The argument so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of 10 years on death row inflicted upon this guilty defendant by lawyers seeking to turn the administration of justice into the sporting contest that Roscoe Pound denounced three-quarters of a century ago.”); see also Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. ANN. REP. 395 (1906).

312. See Kovarsky, *supra* note 290, at 458-60.

313. See ROBBINS, *supra* note 119, at 138-39 (collecting testimony from state officials who take this position).

314. See *supra* text accompanying note 299.

315. See Stevenson, *supra* note 266, at 729-30.

316. See, e.g., FLA. R. CRIM. P. 3.851(e)(2); OHIO REV. CODE ANN. § 2953.23(A) (LexisNexis 2019); OKLA. STAT. ANN. tit. 22, § 1086 (West 2019).

317. See, e.g., 28 U.S.C. § 2244(b) (2017); TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5 (West 2017).

against authorizing litigation on any claim that has already been litigated,<sup>318</sup> as well as a categorical rule against new claims—subject to two narrow exceptions for new rules of substantive law and new, overwhelming evidence of actual innocence.<sup>319</sup> If an inmate's case is not in a qualifying procedural posture, then he assumes the assigned spot in the queue, and if the execution is to be stayed, it must be by court order. Such a device honors the basic accuracy principle that executions should be deprioritized when remaining judicial proceedings are sufficiently likely to produce an authoritative legal declaration that a conviction or sentence was in error.

### 3. Separated selection powers

The third institutional design principle for distributing execution power involves separating the authority to set execution dates from the authority to determine priority—that is, separating the power to determine timing and volume from the power over the queue. Decisions to pace and schedule execution activity are very different from decisions about how to prioritize condemned inmates. The development of consistency-promoting criteria requires the political insulation, transparent deliberation, and professional expertise that typically characterize sentencing commissions. None of those attributes are necessary, or really even appropriate, when deciding the timing and volume of execution activity. Those functions should, by contrast, be performed by a more politically accountable entity.

If a state or the federal government believes that the death penalty is particularly central to its interests in retribution, deterrence, and incapacitation, and believes that a high execution-to-sentence ratio is necessary to secure that interest, then it can calibrate execution frequency accordingly. The ability to secure those interests is unlikely to be compromised by a change in the queue. The only reason why the entity in charge of pacing executions would need authority to alter the queue is if the queue were being altered to facilitate a particular execution—a justification that would defeat the entire purpose of having neutral, consistency-enforcing criteria for execution selection.

In terms of competence, a politically accountable institution or official, such as a governor or the President, is the more appropriate site of decisionmaking over timing and volume. The expertise of judges, prosecutors, defense lawyers, wardens, and other criminal justice professionals would not make such decisionmaking better—because the decisionmaking represents a response that is less technocratic than moral. The politically accountable decisionmaker could structure the execution calendar however it pleased,

---

318. *See* 28 U.S.C. § 2244(b)(1).

319. *See id.* § 2244(b)(2).

subject to whatever statutory restrictions the legislature places on its authority. The important feature is that when setting the calendar, it is not deciding *which* inmate to execute.

## B. Nonarbitrariness and Legitimacy

The ultimate payoffs of a well-designed execution selection protocol include a reduction in arbitrariness and the promotion of legitimacy. These two benefits are related. The interest in nonarbitrary treatment is a moral interest in procedural equality. The perception of procedural equality, facilitated by transparent decisionmaking, dramatically improves the legitimacy of criminal justice institutions.

### 1. Nonarbitrariness (equality)

Different execution selection rules produce different outcomes, and those differences implicate an interest in equality. Whether derived from some other political or penal theory,<sup>320</sup> justified by reference to its consequences,<sup>321</sup> imposed by specific artifacts of positive law,<sup>322</sup> or simply required by freestanding moral commitment,<sup>323</sup> the notion that similarly situated people should be treated the same way suffuses Western thought.<sup>324</sup> Even more specifically, equality is a basic normative commitment of American criminal punishment.<sup>325</sup>

---

320. See, e.g., Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 613 (1983) (responding to Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); and Anthony D'Amato, Comment, *Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983)) ("Their equality or inequality is nothing but a derivative and conclusory statement of what it means to have compared them to one another by reference to a given descriptive standard.").

321. See Christopher J. Peters, Response, *Outcomes, Reasons, and Equality*, 80 B.U. L. REV. 1095, 1097-99 (2000) (responding to Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693 (2000)) (contrasting the deontological and consequential paradigms of equality).

322. See, e.g., U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

323. See generally Kent Greenawalt, Response, *"Prescriptive Equality": Two Steps Forward*, 110 HARV. L. REV. 1265, 1265-67 (1997) (responding to Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997); and Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996)) (arguing that equality has a "normative force" independent of the substantive rules that prescribe treatment in individual cases).

324. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542-43 & nn.17-19 (1982) (collecting sources on the study of equality and justice).

325. Cf. Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1200-06 (2000) (discussing the extent to which the equality norm is embedded in capital jurisprudence).

I do not want to dwell too much on the source of the equality norm, as I am more interested in how execution selection implicates it. The important point is that the neutral application of sorting criteria enhances an interest in equal treatment. State action breaches an equality norm when a decision rule requires a particular consequence for an offender (a “treatment”), and when that treatment is distributed unevenly across the treated population.<sup>326</sup> If a rule yields multiple treatments that are not alike, then equality requires that differentiated application of the treatment be normatively justified.

Achieving perfect equality in execution selection is obviously impossible, and most legal institutions aspire merely to promote procedural equality and nonarbitrariness. Indeed, arbitrary punishment practice is the *bête noire* of modern death penalty precedent.<sup>327</sup> The opinions in *Furman v. Georgia* itself were generally phrased so as to express not a concern about equality per se, but as a narrower response to arbitrariness.<sup>328</sup> “Arbitrariness” might be casually used to describe a single punishment in a vacuum, but recognizing arbitrariness usually involves a comparison of treatments across multiple cases—a comparison necessary to identify unjustified deviations. Arbitrariness is distinguished from its less sinister cousin, randomness, by a decisionmaker’s *purposeful* reliance on variables that should be morally irrelevant and that fail to generate an equiprobable distribution of execution risk across the eligible population.<sup>329</sup> A more robust law of execution selection, including substantive criteria or order-of-entry rules, would significantly reduce arbitrariness.

---

326. Some have argued that equality norms do little independent work in scenarios where a single rule requires a single treatment. In that situation, what looks like “equality” is simply a faithful application of the underlying substantive rule. *See, e.g., Peters, Equality Revisited, supra* note 323, at 1228 (“[P]rescriptive equality, even in its nontautological sense, has no independent normative force.”); *Westen, supra* note 324, at 551 (“But it is wrong to think that, once a rule is applied in accord with its own terms, equality has something additional to say about the scope of the rule—something that is not already inherent in the substantive terms of the rule itself.”).

327. *See Kovarsky, supra* note 106, at 322-29 (discussing the concepts of arbitrariness embedded in current Eighth Amendment doctrine).

328. *See* 408 U.S. 238, 249 (1972) (Douglas, J., concurring); *id.* at 293 (Brennan, J., concurring); *see also id.* at 309 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”). *Furman* may have been directed at the arbitrariness of death sentencing, but it is uncontroversial to say that arbitrary execution patterns are problematic for many of the same reasons. *See, e.g., id.* at 242, 247-48 (Douglas, J., concurring).

329. *See* Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 969-70 (2011) (explaining the difference between randomness and arbitrariness by reference to the concurrences of Justice Stewart and Justice Marshall in *Furman* (citing *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring); and *id.* at 365-66 (Marshall, J., concurring))).

Centralizing execution selection functions should, in and of itself, substantially reduce arbitrariness. As explained throughout this Article, local influences politicize and introduce tremendous volatility into the entire process.<sup>330</sup> Both across geographic space and over time, outcomes of a decentralized selection process are far more likely to be driven by electoral cycles, happenstance differentiation in the endowment of local economic resources, and the idiosyncrasies of local decisionmakers. By ensuring that the important decisionmaking takes place at the seat of state or national government, there is less risk that these disfavored phenomena will play a significant role in deciding who lives and who dies.<sup>331</sup>

Reliance on some combination of substantive sorting criteria and order-of-entry rules would also reduce arbitrariness, producing a pattern that would either track the preferred substantive criteria or reflect a more equitable distribution of execution risk. Whatever else such a system might do, the government would not be sorting condemned inmates through the ad hoc decisionmaking of officials charged with various ministerial responsibilities. The degree to which substantive sorting criteria address arbitrariness, however, depends on how one feels about the specific sorting criteria themselves. If the operative criteria capture differences across the morally appropriate attributes,<sup>332</sup> then there is no inappropriate bias. Conversely, if the criteria sort condemned inmates by nonrandom reference to certain attributes that are morally irrelevant, then arbitrariness may persist.

Whatever its imperfections, a centralized process of execution selection, reliant on neutral sorting criteria, would significantly equalize treatment of condemned inmates. It would exclude from decisionmaking the entities most likely to distort the process in normatively undesirable ways and, in setting the execution queue, apply the same set of criteria to every offender.

## 2. Legitimacy

Related to an interest in improved procedural equality is an interest in legitimacy—an experience with legal authority that produces compliance out of a sense of obligation (rather than sanction).<sup>333</sup> Theories positing that when the state acts legitimately, it can secure public cooperation through means

---

330. See, e.g., *supra* text accompanying notes 272-79.

331. See *supra* Part IV.A.1.

332. No two crimes are *exactly* alike. The analytic proposition that similarly situated offenders be treated the same way is thus predicated on a logically anterior (moral) proposition about what kinds of likeness matter to penal treatment.

333. See generally Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2268-77 (2014) (collecting authority on legitimacy in criminal enforcement).

other than carrots and sticks, trace generally to Max Weber.<sup>334</sup> Without a more extended social science aside on legitimacy, suffice it to say that criminal law and criminal justice institutions are viewed as more legitimate when communities perceive a likelihood of equal treatment,<sup>335</sup> and when those communities receive cues that decisionmaking authorities are trustworthy and accountable.<sup>336</sup> Perhaps the gravest harm of the existing lack of execution selection constraints is to the legitimacy interest.

The interest in legitimacy is an interest that attaches to *process* more than it does to *outcomes*.<sup>337</sup> To be sure, there is an extensive literature on the degree to which legitimacy reflects the fit between punishment and private blaming preferences<sup>338</sup>—literature that includes Paul Robinson’s theory of empirical desert.<sup>339</sup> Extensive psychological research shows, however, that a community’s general compliance level is particularly sensitive to its perception of procedural fairness,<sup>340</sup> and that this relationship remains robust across demographic groups.<sup>341</sup>

---

334. See 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 212-15 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968).

335. See Ouziel, *supra* note 333, at 2269-70; Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 239 (2008); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCHOL. 117, 122 (2000) [hereinafter Tyler, *Social Justice*].

336. See Tyler, *Social Justice*, *supra* note 335, at 122.

337. See Tom Tyler, Comment, *Governing Pluralistic Societies*, LAW & CONTEMP. PROBS., Spring 2009, at 187, 187-88.

338. See, e.g., Alice Ristroph, Essay, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151, 1151 (2010-2011) (“We have heard previously the argument that criminal law should reflect common moral intuitions, and the claim that failure to reconcile criminal law and common morality will undermine respect for the law and produce social disutility.”).

339. See generally PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 139-40 (2008); PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 1-7 (1995); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 8-10 (2007).

340. See TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 53-56, 84 (2002). Tyler’s work frequently focuses on buy-in with respect to a specific institution based on that institution’s practices, such as the effect of the New York Police Department’s practices on its legitimacy, whereas I am making a point about the effects of a specific practice on the legitimacy of many criminal justice institutions more generally. See, e.g., Tyler & Fagan, *supra* note 335, at 241 (“The procedural justice model of policing argues that the police can build general legitimacy among the public by treating people justly during personal encounters.”).

341. See Jason Sunshine & Tom Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 532 & tbl.1 (2003).



The dominant approach to execution selection damages the legitimacy of criminal punishment in many ways. In 2017, 71% of scheduled executions were stayed.<sup>342</sup> An opaque process that results in the setting, canceling, and resetting of execution dates causes confusion for the public and degrades the public's respect for the criminal justice system.<sup>343</sup> And, of course, the perception of procedural fairness across cases is extraordinarily difficult to maintain when decentralized decisionmaking produces erratic, arbitrary selection patterns.

The transparency issues afflicting the existing selection schemes exact a heavy toll on the system's legitimacy. In most jurisdictions, the public is almost completely unaware of who is making selection decisions, let alone of what criteria drive them.<sup>344</sup> In terms of the *who*, a centralized selection structure will ensure that there is a single entity responsible for seeking executions, thereby reducing the transparency problems associated with dispersed responsibility and accountability. In terms of the sorting rules themselves, expressly stated sets of neutral criteria, developed through informal rulemaking by statutorily authorized commissions, would go a long way toward promoting transparency.<sup>345</sup> Transparency in execution selection, like transparency for most state activities, tends to increase the confidence in government and the legitimacy of its decisionmaking.<sup>346</sup>

Moreover, procedural fairness in execution selection is, I submit, likely to figure quite prominently in how members of a regulated community view the procedural fairness of its criminal justice institutions more generally.<sup>347</sup>

---

342. See Keri Blakinger, *71 Percent of Scheduled Executions Not Carried Out in 2017*, CHRON (updated Dec. 20, 2017, 11:56 AM CST), <https://perma.cc/4QMA-DMRA>.

343. See ROBBINS, *supra* note 119, at 138.

344. *Cf. id.* (“[B]ecause it is typically done in a political manner, the setting and constant resetting of execution dates or signing of death warrants also needlessly confuses the public and foments disrespect.”).

345. See Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1734 (2012) (“By almost any measure, the conventional model of informal rulemaking is quite transparent.”).

346. See Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1530 (2006).

347. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 292 (2003) (collecting studies and concluding that “while people could potentially be influenced by either the fairness of the outcomes they receive or the fairness of the procedures by which legal authorities exercise their authority, procedural fairness typically shapes both decision acceptance and evaluations of the decision maker”).

The execution is an exceptionally visible feature of American criminal punishment,<sup>348</sup> and capital punishment is a prism through which many view the fairness of criminal justice institutions.<sup>349</sup> The very public experience of chaotic, unprincipled execution selection produces disutility by chipping away at the voluntary compliance that legitimacy produces.

### **Conclusion**

As political communities become less interested in clearing their death rows, the failure of U.S. jurisdictions to formulate and observe rational execution selection rules will become more consequential. Whereas jurisdictions tend to settle on substantive criteria for earlier selection phases, there is no similar tendency toward consensus regarding which condemned inmates to execute. Instead, downstream selection remains a largely arbitrary exercise dotted with political opportunism. In so doing, U.S. jurisdictions have managed to reproduce the very evil that triggered *Furman v. Georgia*, but have simply sent it to the end of the capital punishment sequence.

---

348. See GARLAND, *supra* note 9, at 297-98.

349. See, e.g., Douglas A. Berman, *From Lawlessness to Too Much Law?: Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 437-38 (2002) (flagging this dynamic in the context of the representation of criminal defendants).