

# AMBIVALENCE IN STATE CAPITAL PUNISHMENT POLICY: AN EMPIRICAL SOUNDING

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Introduction ..... 729  
I. Characteristics of Executing and Nonexecuting States ..... 733  
    A. The Geographic Pattern ..... 733  
    B. Execution History of States ..... 733  
    C. Geography or Precedent? ..... 739  
II. The Dynamics of Ambivalence ..... 740  
Conclusion ..... 742

## INTRODUCTION

The unprecedented circumstances surrounding the current administration of the death penalty in the United States have resulted in an ever-increasing number of prisoners sentenced to death. As of April 1990, 2327 persons were held by the states under active sentences of death, yet only eleven persons were executed in 1988 and only sixteen were executed in 1989.<sup>1</sup> The United States thus had a stock of death row inmates equivalent to about 200 years of executions at current rates. The states are presently adding to that death row population at a rate more than twenty times greater than the level of 1988 executions and ten times higher than the highest execution rate of the 1980s.<sup>2</sup>

One further indication of the peculiar status of capital punishment in the United States is the large number of states with death penalty statutes that have not yet carried out any executions. In 1988, twelve years after executions resumed in the United States, thirty-seven of the fifty states had death penalty statutes, yet only thirteen of these jurisdictions have actually carried out executions of persons sentenced to die.<sup>3</sup> This Article offers statistical evidence that the failure to execute persons sentenced to death during the 1980s was not simply the result of the intervention of the federal courts, but reflected conflict and uncertainty about capital punishment in the states themselves. That such

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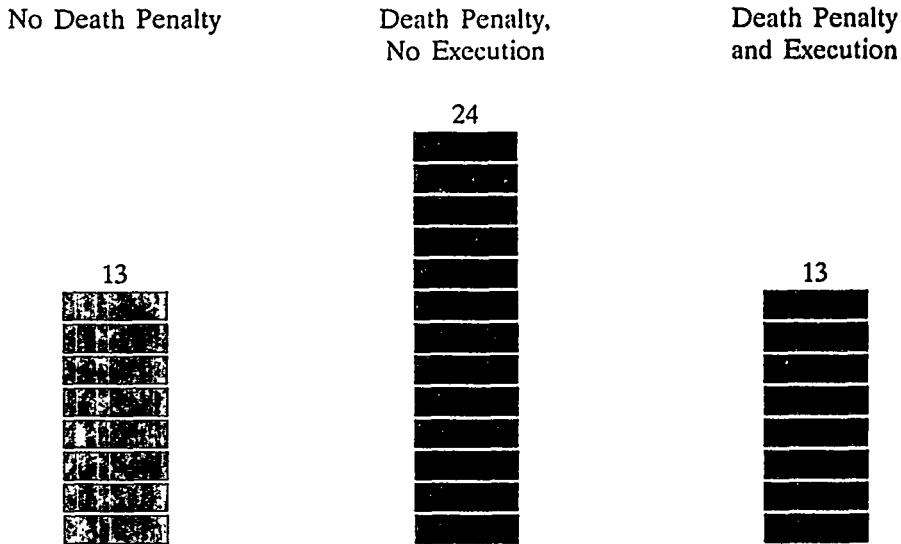
1. See NAACP LEGAL DEFENSE FUND, INC., DEATH ROW U.S.A. 3A (May 2, 1990) [hereinafter DEATH ROW, U.S.A.].

2. The largest total number of executions conducted in one year was twenty-five in 1987. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1988, at 9 (1989).

3. See DEATH ROW, U.S.A., *supra* note 1, at 1-3B.

a conflict exists is evident from the fact that several states with penal codes which include death penalty provisions do not execute condemned persons. As of December 1989 there were twenty-four such states (see Figure One).

FIGURE 1.  
STATUS OF CAPITAL PUNISHMENT POLICY IN FIFTY STATES,  
DECEMBER 31, 1989



Source: NAACP Legal Defense Fund, Inc., *Death Row U.S.A.*, May 2, 1990.

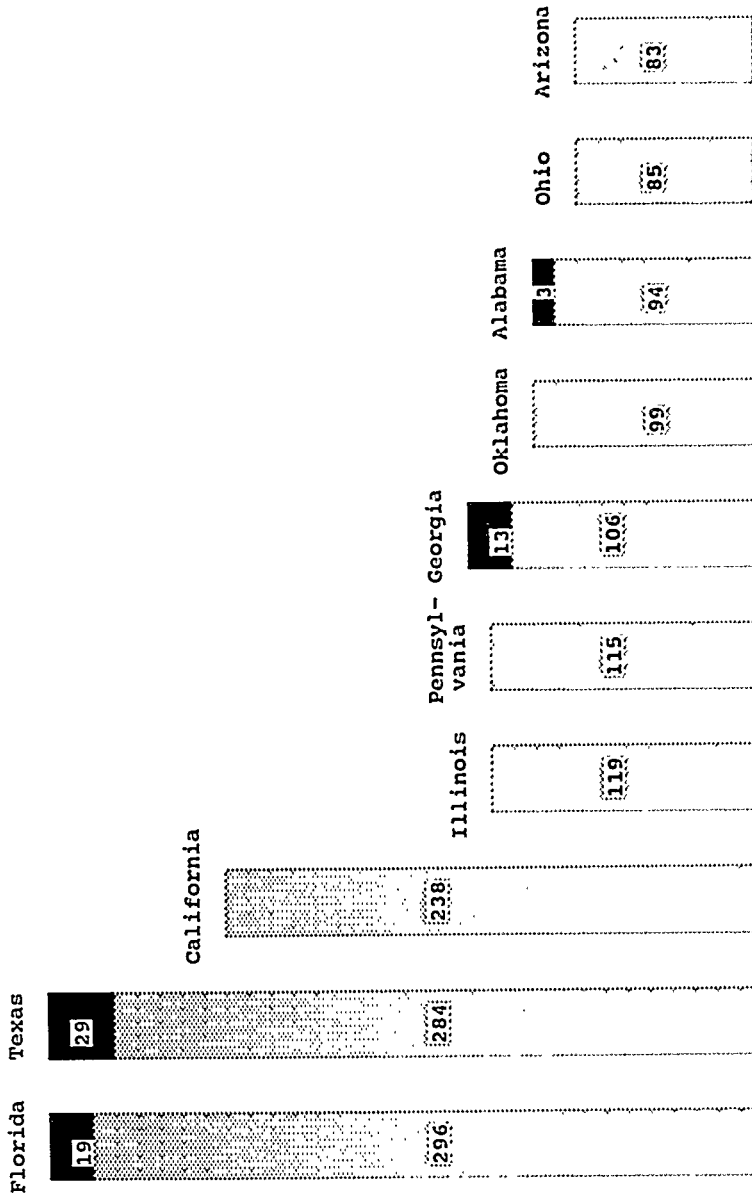
There is reason to doubt that the death penalty/no execution status is solely transitional and without significance. Many nonexecuting states have large death row populations and prisoners who have been under sentence of death for substantial periods. Texas has conducted thirty-one executions during the 1980s while California, Pennsylvania, Ohio, and Illinois had none.<sup>4</sup> In addition, according to Figure Two, six of the ten largest death row states did not execute during the 1980s, including three of the top five death row jurisdictions.

Further, the rate at which states have moved from nonexecuting to executing status declined in the mid-1980s, as is shown in Table One. While the pace of executions has fluctuated from eleven to twenty-five per year during the mid- and late-1980s, the number of states contributing to the total has rarely changed. As Table One indicates, only one of twenty-five states with a death penalty statute but no executions as of June 1985 executed during the following four years.

There are two rival accounts of the policy dynamic at work in these states

4. *Texas Murderer Is Executed*, N.Y. Times, May 24, 1989, at A24, col. 3; see *DEATH Row, U.S.A.*, *supra* note 1, at 3B-3E.

FIGURE 2.  
TEN LARGEST DEATH ROW POPULATIONS, AS OF APRIL 1990



▬ Total death row population, as of April 1990

▬ Total number of executions, January 1977 - April 1990

TABLE 1.  
STATES BEGINNING TO EXECUTE, BY YEAR 1981-1989

<i>Year</i>	<i>Number of States</i>
1981	1
1982	2
1983	4
1984	1
1985	1
1986	0
1987	0
1988	0
1989	1

Sources: F. ZIMRING AND G. HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 129 (1986); NAACP Legal Defense Fund, Inc., *Death Row U.S.A.*, 3B-3E (May 2, 1990).

which might explain nonexecution in states with death penalty statutes — external constraint and internal ambivalence. A constraint model would stress forces external to state political processes as the significant barrier to active execution policy. Under this model, the responsibility for the death penalty backlog in almost every state with condemned prisoners but no executions lies with the intervention of federal courts. This account of nonexecution would be bolstered either by discovering that those states that have executed are not fundamentally different from nonexecuting states with death penalty legislation or by finding that whatever patterned variation exists between executing and nonexecuting death penalty states is attributable to different patterns of external control.

The “internal ambivalence” model, on the other hand, argues that the forces which hinder a state from implementing its capital punishment policies are largely homegrown rather than externally imposed. According to this model, nonexecuting states with death penalty legislation fail to execute persons condemned to death because of internal political conflict that interacts with external restraint.<sup>5</sup> A proponent of this view would expect to find a systematic difference in the political culture of executing and nonexecuting states, with the executing states displaying a stronger historic commitment to capital punishment.

This Article seeks to demonstrate that of the two theories, the internal ambivalence model is better supported by recently compiled statistical data describing trends among states in development of policies towards the use of capital punishment. In developing this thesis, this Article will first review the characteristics of executing and nonexecuting states. This is to be followed by

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5. See F. ZIMRING & G. HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* (1986), at chapter 7.

an analysis of the execution patterns during the 1950s for thirteen states which later resumed executions in the 1980s. The analysis shows that those states which executed in the 1980s do not represent a random selection of states whose penal codes contain death penalty provisions. A corollary is that the residual sample of states which have death penalty statutes but do not execute condemned persons is also self-selected. It thus appears that the internal ambivalence model explains the development of the latter group of states.

## I.

### CHARACTERISTICS OF EXECUTING AND NONEXECUTING STATES

#### A. *The Geographic Pattern*

The first distinctive pattern that separates executing from nonexecuting states is geography. While states with capital punishment statutes are spread over most of the United States, all but four of the states with executions during the 1980s are located in the South. In fact, the majority of southern states have a recent history of execution.<sup>6</sup>

This concentration of active execution states in the South might simply reflect an uneven pattern of external constraint, perhaps because the federal courts are more permissive of execution in the southern states. However, a closer look at the data reveals that this is not the case for two reasons. First, the thirteen executing states are spread over seven of the eleven circuits of the federal courts.<sup>7</sup> It is thus unlikely that the distinctive style of one or two circuit courts would explain the pattern. Second, a majority of the states which have not executed despite having death penalty statutes are also in five of the seven circuits that contain the thirteen executing states.<sup>8</sup> It is clear then that more than regional geography and differences in federal circuit court policy must be sought to explain the particular pattern of the 1980s.

#### B. *Execution History of States*

One dimension for comparing executing and nonexecuting states concerns the executing history of these jurisdictions during the 1950s. Figure Three helps us identify this historic significance of the 1950s by showing the annual number of executions in the United States between 1935 and 1967, the

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6. The left-hand column at Table Two, lists nine southern states (Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia). These nine states have accounted for all but nineteen of the executions in the United States from 1977 through the end of 1990. See DEATH ROW, U.S.A., *supra* note 1, at 5 (Jan. 21, 1991).

7. Circuits with at least one executing state are the 4th (Virginia, North Carolina, South Carolina), 5th (Texas, Louisiana, Mississippi), 7th (Indiana), 8th (Missouri), 9th (Nevada), 10th (Utah), and 11th (Alabama, Georgia, Florida).

8. Sixteen of twenty-four nonexecuting death penalty states are in circuits that have allowed executions: Arizona (9th), Arkansas (8th), California (9th), Colorado (10th), Idaho (9th), Illinois (7th), Kansas (10th), Maryland (4th), Montana (9th), Nebraska (8th), New Mexico (10th), Oklahoma (10th), Oregon (9th), South Dakota (8th), Washington (9th), and Wyoming (10th).

TABLE 2.  
*EXECUTION STATUS OF CAPITAL PUNISHMENT STATES OF THE  
 UNITED STATES DURING THE 1980S*

<i>Executions</i>	<i>No Executions</i>
Alabama	Arizona
Florida	Arkansas*
Georgia	California
Indiana	Colorado
Louisiana	Connecticut
Mississippi	Delaware
Missouri	Idaho
Nevada	Illinois*
North Carolina	Kentucky
South Carolina	Maryland
Texas	Montana
Utah	Nebraska
Virginia	New Hampshire
	New Jersey
	New Mexico
	Ohio
	Oklahoma*
	Oregon
	Pennsylvania
	South Dakota
	Tennessee
	Washington
	Wyoming

\*First Execution after Jan. 1, 1990.

Sources: NAACP Legal Defense Fund, Inc., *Death Row, U.S.A.*, January 21, 1991; BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT 1988-9 (1989).

last year prior to 1977 with an execution. The 1950s were the last decade in United States history prior to the 1980s to have an execution in each year. Nationwide, there were an average of seventy-two executions a year in the 1950s. This figure represents about fifty fewer per year than during the 1940s and about fifty more per year than during the 1960s.<sup>9</sup>

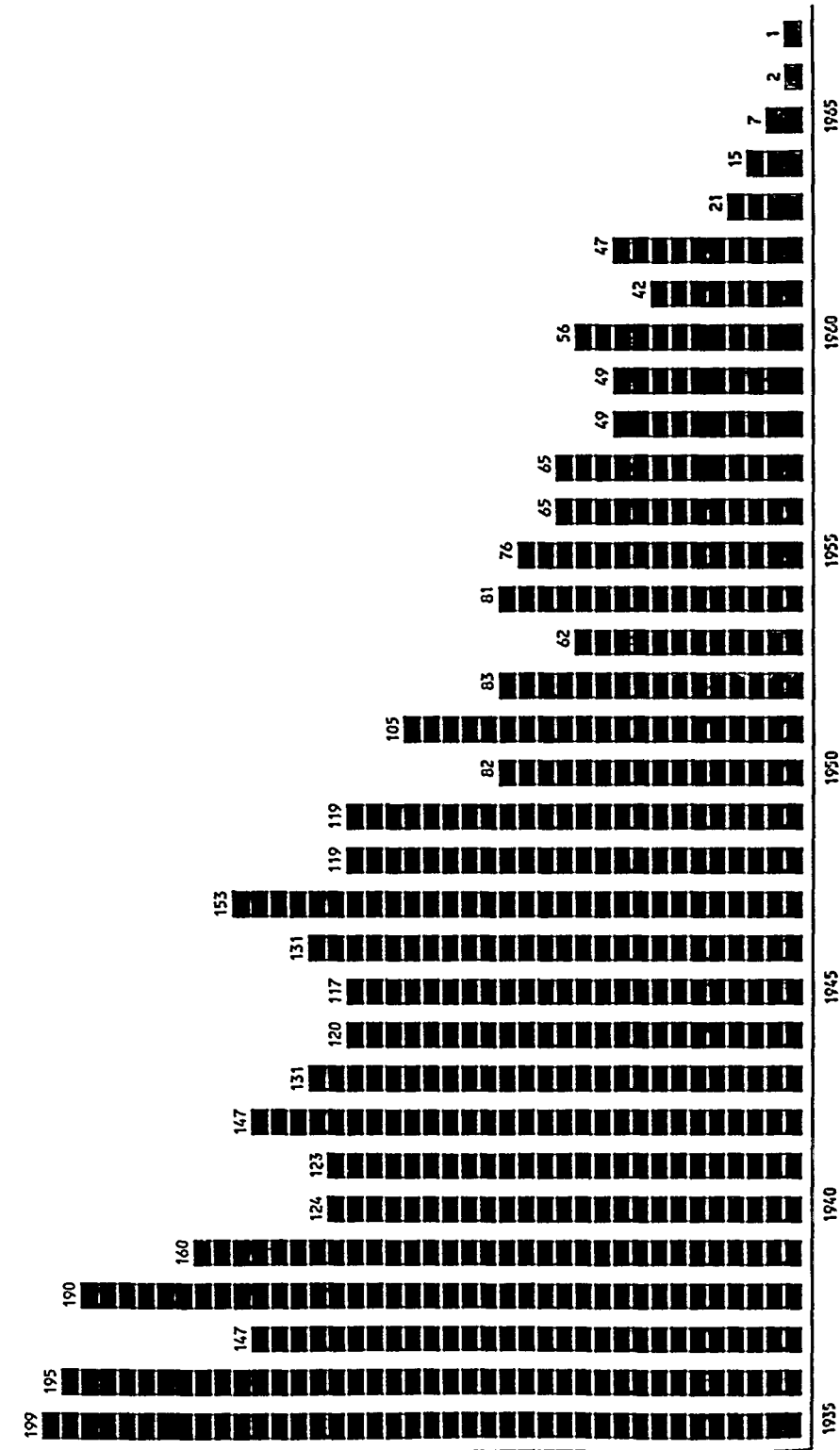
Table Three lists the states that had executions from 1950 to 1959 by the annual rate of executions per million population. The population for each state was determined by adding the census population in 1950 and census population in 1960 and dividing by two.

As Table Three shows, executions occurred in thirty-six states and the District of Columbia during the 1950s. While the rate of executions declined

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9. F. ZIMRING & G. HAWKINS, *supra* note 5, at 30.

FIGURE 3.  
EXECUTIONS IN THE UNITED STATES BY YEAR, 1935-1967



during that decade, three times as many states executed in the 1950s as in the 1980s.

The smaller number of states executing in the 1980s complicates a comparison of 1950s and 1980s execution. Whereas in the 1950s, two-thirds of the states in the United States were executing, those states in the 1980s now fell into one of three categories — executing states, death penalty/nonexecuting states, and non-death penalty states.

Closer examination of this development reveals that there is strong correlation between the 1950s behavior and the 1980s behavior of the states. For example, all of the states that executed in the 1980s executed in the 1950s as well. Eighty-three percent of the nonexecuting death penalty states during the 1980s executed at some point during the 1950s. Furthermore only fifteen percent of the states with no death penalty legislation during the 1980s executed at any point during the 1950s.

Because the 1950s were a period when no general external constraints from federal courts or Congress operated to regulate executions ordered by state courts, the execution policies profiled in Table Three and in Figure Four can only be the result of traditions developed by each individual state before the issue was effectively nationalized by the federal courts.<sup>10</sup>

Figure Four provides one measure of the strength of that tradition, showing that states tended to be in the same relative position on the execution spectrum in the 1980s as in the 1950s. This analysis can be carried one step further by comparing the rate of execution exhibited by a state during the 1950s with executions in more recent years.

One approach to this issue comes from focusing on the 1950s behavior of the thirteen states which have also executed during the 1980s. Ten of these thirteen states were among the top twelve states in rate of execution per million population in the 1950s.<sup>11</sup> It is highly unlikely that such a pronounced tendency for the same states to cluster near the top of the executions distribution in two different periods is due to chance. The probability of repeating ten of the same selections when drawing twelve of thirty-seven numbers is about one chance in 23,000 trials.<sup>12</sup> A more likely explanation is that the same fac-

10. F. ZIMRING & G. HAWKINS, *supra* note 5, at chapter 7.

11. Texas (8), Florida (4), Georgia (2), Louisiana (7), Utah (10), Virginia (12), Nevada (1), Mississippi (3), and Alabama (11). *See id.* at 136; *see also* Table Three, *infra* at p. 738.

12. Steven Rein, a Ph.D. candidate in the Statistics Department of the University of California, Berkeley, describes his calculations as follows:

The chance, assuming a hypothesis of complete randomness, that we observe a distribution at least as extreme as what we actually do observe is referred to as the p-value.

To compute the p-value in this case, the hypothesis is: The states who execute are randomly selected from those who have execution laws, with no regard to the level of execution in the 1950s.

So the p-value can be computed as follows: Given the hypothesis is true, the number of ways that ten or more of the ranks {1,2, . . .,12} can be selected when choosing thirteen numbers from the ranks {1,2, . . .,37} divided by the number of ways



tors which pushed these states to the top of the distribution in the 1950s have resulted in higher than average execution rates during the 1980s.

Such an explanation would necessarily imply that the external forces such as the federal courts are of limited significance in determining which of the states with death penalties moved to conduct executions during the 1980s. Although the federal courts were far more active in the 1980s, external constraints would not produce results that so closely track the pattern of 1950s policies when the federal courts did not restrain executions.

A second comparison between the 1950s and the 1980s indicates that few nonexecuting states had a particularly strong tendency to execute persons sentenced to death during the 1950s. The median rank among the states that execute in the 1980s in per capita execution during the 1950s is eight. (Half of the executing states during the 1980s had a higher rank in the 1950s; half had a lower rank.) For the states with death penalty statutes but no executions during the 1980s, the corresponding figure is twenty-three. A comparison of means instead of medians, while less exact, is just as dramatic.<sup>13</sup>

The contrast in historical policy between executing and nonexecuting death penalty states is clear. The high likelihood of a state with a 1950s proclivity to execute to participate in 1980s executions suggests that persistent emphasis on execution as a state criminal justice priority will produce executions.

What then about the twenty-four states with death penalties but without an execution in the 1980s? The accounts of nonexecution we hear from these states emphasize conflicts with federal courts, unpredictable delays, and chance factors. Policy actors talk as if nonexecution were a frustration of internal consensus policy.

The data presented in this section challenge that interpretation. Why are these idiosyncratic frustrations concentrated in those states that were the least enthusiastic supporters of capital punishment three decades ago? And why is a state with a prior high rate of executions more than six times as likely to complete its first execution in the 1980s as a capital punishment state which was not in the top third in 1950s executions? These patterns are inconsistent with the belief that the major determinants of whether a state has executions lie outside state control.

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that we can choose thirteen ranks from {1,2, . . .,37}. This is a hypergeometric distribution problem.

There are 155,425 ways of selecting 10+ of {1,2, . . .,12} when choosing thirteen numbers from {1,2, . . .,37}, and there are 3,562,467,300 ways of choosing thirteen numbers from {1,2, . . .,37}. So, the probability of seeing ten or more *randomly* chosen states who were top-twelve in the 1950s is calculated at .00004363 (or about 1/22,900).

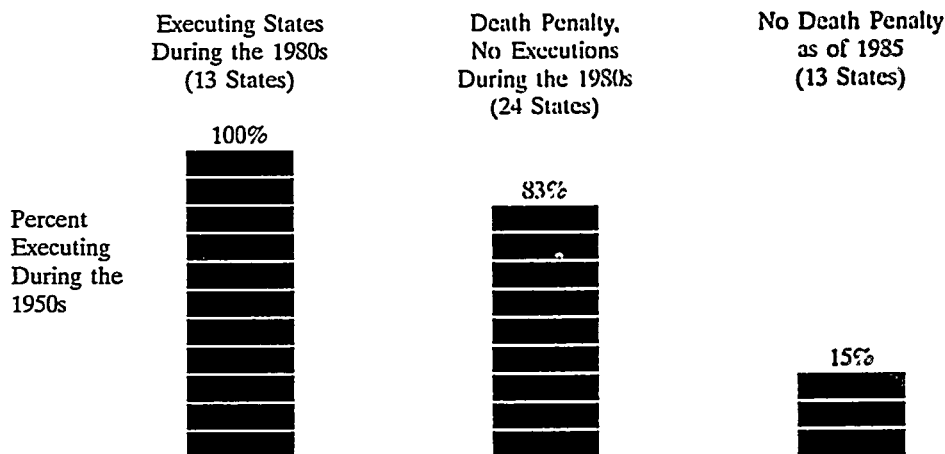
13. Only thirty-seven executing states have a true rate per million during the 1950s. Four states with 1980s death penalties had no 1950s executions. See F. ZIMRING & G. HAWKINS, *supra* note 5, at 136.

TABLE 3.  
*EXECUTION RATES (PER MILLION POPULATION) FOR STATES  
 WITH EXECUTIONS, 1950-1959*

<i>State</i>	<i>Rate</i>	<i>Rank</i>
Nevada	40.4	1
Georgia	23.0	2
Mississippi	16.5	3
Florida	12.4	4
South Carolina	11.6	5
Arkansas	9.7	6
Louisiana	9.1	7
Texas	8.6	8
Arizona	7.8	9
Utah	7.6	10
Alabama	6.3	11
Virginia	6.3	12
California	5.6	13
Kentucky	5.4	14
Vermont	5.2	15
Washington D.C.	5.1	16
Idaho	4.8	17
West Virginia	4.7	18
North Carolina	4.4	19
New Mexico	3.7	20
Ohio	3.6	21
New York	3.3	22
New Jersey	3.1	23
Oklahoma	2.8	24
Pennsylvania	2.8	25
Kansas	2.5	26
Oregon	2.4	27
Tennessee	2.3	28
Washington	2.6	29
Maryland	2.2	30
Connecticut	2.2	31
Colorado	2.0	32
Missouri	1.7	33
Nebraska	1.5	34
Illinois	1.5	35
Indiana	.5	36
Iowa	.4	37

Source: F. ZIMRING & G. HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 136 (1987).

FIGURE 4.  
*EXECUTION STATUS IN THE 1950S BY EXECUTION STATUS IN THE 1980S*



Sources: BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT 1982; NAACP Legal Defense Fund, Inc., *Death Row U.S.A.*, (January 1986).

### C. Geography or Precedent?

However, the historical explanation of a state's tendency to execute in the 1980s is not without challenge. The heavy concentration of states that executed during the 1980s in the South invites a rival hypothesis. According to this alternative explanation, the southern states, although having high historic levels of execution, are more likely to execute than northern states because a different policy climate on this issue prevails both in the southern states and in those federal courts situated within them. But closer analysis reveals the lack of statistical support for this argument.

The most direct test of this theory is a cross-tabulation<sup>14</sup> which is summarized in Table Four. As Table Four shows, the contrast within each region is just as dramatic when the "top twelve" states are compared with "other" states as in the national aggregate.<sup>15</sup>

Eighty-nine percent of the "top twelve" southern states executed during the 1980s compared to thirteen percent of those southern states that had lower historic rates of execution. Two of the three non-southern states that placed in

14. See generally H. ZEISEL, *SAY IT WITH FIGURES* Chapter 9 ("The Cross Tabulation Explains") (1968).

15. One approach to a statistical test of the implications of Table Four is to ask how often such a distribution would happen if the only systematic influence on whether a state had executions was location in the South. The chi-square produced by testing this hypothesis was 8.5, with a p-value of .014. A simulated p-value is .019 + A .0027. This indicates that if history has no impact on execution in the 1980s independent of region, a distribution like that in Table Four would occur only about once in fifty trials.

TABLE 4.  
*EXECUTION STATUS IN THE 1980S BY EXECUTIONS IN THE  
 1950S AND REGION*

	<i>Top Twelve</i>	<i>Other</i>
South*	89% (8/9)	13% (1/8)
North	67% (2/3)	12% (2/17)

\*Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. This regional breakdown is in standard use. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1988 (1989).

Sources: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1988, at 2 (1989).

the top twelve during the 1950s also executed during the 1980s, in contrast to only two of the seventeen states outside the South with lower rates of execution during the 1950s. It appears that execution history, independent of region, predicts 1980s execution behavior.

## II.

### THE DYNAMICS OF AMBIVALENCE

The statistics just reviewed make a circumstantial case that variations in state capital punishment tradition play a major role in distinguishing executing from nonexecuting states, but the approach provides no illumination about how ambivalence toward execution gets expressed in state systems to restrain execution.

Identifying the range of ways ambivalence is expressed is in part a process of elimination. Three explanations of nonexecution that do not fit the facts of our recent history are explicit compromise, policy design, and the reluctance of local judicial systems to produce candidates for capital punishment.

One could cynically argue that an explicit political compromise in state criminal justice would produce a system with a highly visible symbolic threat of the death penalty but no executions. There is, however, no evidence that any such bargain has been struck in any state. Instead, some institutions with veto power seem to operate independently in state government, usually including state courts, and local federal courts in states with weak death penalty traditions. The various policy actors may look like they are each playing pre-assigned roles in a designed system but there is no evidence of that sort of coordination in the recent history of the nonexecuting states. Other institutions may assume the courts will stop executions, but no state executive has stepped forward to stop executions when the courts have failed to do so in states like Missouri and Washington without strong execution traditions.<sup>16</sup> Indeed, while the various contestants in the battle over capital punishment

16. Missouri, ranked only thirty-third in 1950s executions, became the thirteenth state to execute since 1977 in early 1989. DEATH ROW, U.S.A., *supra* note 1, at 3E. Washington came

coordinate some aspects of strategy, the current stock and flow situation was designed by no one. Anti-capital punishment forces design strategies to block all pending executions in a state, for example, but no policy actors design systems to generate large numbers of prisoners in death row and then ban executions. The current system is thus a situation that nobody would wish except as a lesser of evils.

Non-Execution could also be explained by the inability to produce sufficient numbers of candidates for capital punishment. However, no metropolitan state has expressed its ambivalence toward the death penalty in a shortage of prisoners sentenced to death row. The death row populations of nineteen nonexecuting states exceed the total number of prisoners executed so far in Texas, the national leader.<sup>17</sup> Only three states with death penalties — South Dakota, Vermont, and New Hampshire — have no prisoners under current death sentence. California at this writing has eight times as many condemned prisoners as Texas has executed and twice as many as have been executed in the United States since 1977. In the 1980s, a shortage of death sentences did not explain nonexecution.

The most plausible model of the impact of execution history as a policy force is that the lack of a clear historical mandate for execution in a state results in a reduction of the enthusiasm of elected officials and political elites for execution, at the same time that it increases the level of opposition to execution in a particular state. High historic rates of execution are associated with more general pressure for execution and less undifferentiated pressure in opposition. How the difference in opposition pressure gets expressed may vary from state to state and over time. As the aggregate anti-execution pressure goes up, the probability of blocking executions increases. Which point in the process responds to a particular level of pressure may vary depending on the personalities of office holders or accidents of timing, but as long as the overall chances of nonexecution are determined by aggregate pressure levels, the regularities revealed in the previous section can be expected.

Admittedly, the aggregate pressure notion is a hypothesis rather than a finding. This model might be useful to those analyzing the politics of capital punishment even though it cannot be tested rigorously on available data. Application of this theory would predict that those states with higher-than-average execution histories are more likely to begin executions in the 1990s than jurisdictions with lower 1950s rates of executions. To the extent that prior history continues to predict execution policy in the coming years, idiosyncratic explanations of state-level behavior may have to be qualified by a sense of the patterned variation of execution policy in the fifty states.

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within one week of a scheduled execution in March 1989 before a federal court issued a stay. There was no indication of pending executive clemency in Washington.

17. DEATH ROW, U.S.A., *supra* note 1, at 3B.

## CONCLUSION

Two conclusions emerge rather clearly from the data discussed in this Article. First, the events to date in the resumption of executions in the United States do not represent any important break with historical trends in the states. Those states that used to execute at high levels have been the only active execution states in the 1980s and the abolition states of the 1950s continue as such. To this point, the recent history of executions stands for continuity in both attitudes and practices in the United States.

Second, many events to date are also consistent with a long-term decrease in executions in the United States.<sup>18</sup> Only one-third as many states executed in the 1980s as in the 1950s and the concentration of executions in a very few states is also consistent with declining propensity to execute.

It is only the huge overhang of death row inmates that marks a sharp departure from long term trends toward diminished executions. With death row populations climbing toward 3,000, a radical break with historical patterns may be on the horizon in many states. The analysis in this Article suggests that, contrary to popular belief, a new direction in execution policies has not developed yet. Whatever dislocations and conflicts that may be produced by a radical shift in execution policy have been postponed so far with no precise point of reckoning in view.

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18. F. ZIMRING & G. HAWKINS, *supra* note 5, at chapters 2 and 8.