

THE GEOGRAPHY OF MERCY: AN EMPIRICAL ANALYSIS OF CLEMENCY FOR DEATH ROW INMATES

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Conventional wisdom notes persistent regional differences in the application of the death penalty, with southern states' appetite for capital punishment exceeding that of non-southern states. Scholars analyzing the distributions of death sentences and state executions find a geographic influence. Less explored, however, is a possible regional difference in the distribution of executive clemency even though clemency is an integral component of a criminal justice system that includes capital punishment. If geography influences the distribution of the death penalty, geography should also influence the distribution of clemency. Data, however, reveal some surprises. Using a recently-released data set of all state death row inmates from 1973 to 2010, this paper considers whether clemency is exercised in southern and non-southern states in systematically different ways. No statistically significant differences exist between southern and non-southern states when it came to clemency, even though southern states were more prone to execute and less prone to disturb death sentences through reversal on appeal than northern states. When it comes to the influence of geography in the death penalty context, the findings provide mixed support and convey a complicated picture.

I. INTRODUCTION

American courts rely on a system of checks and balances—or divided authority—as a mechanism to enhance individual liberty, reduce the chances of tyranny, and maximize justice. As a check, executive clemency serves as an important extra-judicial limit on judicial authority, particularly given the wide judicial discretion courts grant to governors and presidents in the exercise of clemency authority.¹ Clemency's function as an executive limit on judicial authority is most dramatic in the context of the

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1. See generally Mark Strasser, *Some Reflections on the President's Pardon Power*, 31 *CAP. U. L. REV.* 143, 153-57 (2003). See also Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 *U. ST. THOMAS L.J.* 698, 703-04 (2012) (arguing for greater judicial review of clemency authority).

death penalty. As the Supreme Court observed in *Gregg v. Georgia*, a judicial system that enforced the death penalty without executive clemency would be “totally alien to our notions of criminal justice.”² In other words, states can only attempt to administer capital punishment coherently if executive clemency functions coherently.

Partly because death is different,³ the administration of the death penalty by states continues to attract scholarly attention, particularly from empirical legal scholars.⁴ One persistent critique of the death penalty turns on its uneven application and distribution. Geography is one of the factors thought to distort the distribution of capital punishment. Some scholars point to southern states as having a greater appetite for capital punishment than their non-southern counterparts.⁵ This scholarly work, combined with conventional wisdom, forms a public consensus about differences between southern and non-southern states when it comes to the administration of capital punishment.

Prior scholarly literature exploring geographic variation in the administration of capital punishment dwells primarily on regional differences in the distribution of capital sentences and state executions. Less explored are possible regional differences in the distribution of executive clemency, an equally important component of the criminal justice system that includes capital punishment. Given the fact that the Supreme Court has described clemency as supplying a “fail-safe” for our criminal justice system, careful attention to clemency and its distribution warrant scrutiny.⁶ The few empirical studies that exist on this subject rely on older data sets that fail to reflect emerging death penalty trends.⁷ If existing

2. *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976).

3. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring); *id.* at 360 (Stewart, J., concurring).

4. See, e.g., DAVID BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 *STAN. L. REV.* 791 (2005); James S. Liebman, *Slow Dancing With Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 *COLUM. L. REV.* 1 (2007).

5. See, e.g., Charles J. Ogletree, *Black Man’s Burden: Race and the Death Penalty in America*, 81 *OR. L. REV.* 15 (2002); Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 *B.U. L. REV.* 227 (2012); SOUTHERN COMMISSION ON THE STUDY OF LYNCHING, *LYNCHINGS AND WHAT THEY MEAN* 74, Table II (1931) [hereinafter COMMISSION].

6. *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

7. See generally John Kraemer, *An Empirical Examination of the Factors Associated With the Commutation of State Death Row Prisoners’ Sentences Between 1986 and 2005*, 45 *AM. CRIM. L. REV.* 1389 (2008); Michael Heise, *Mercy By the Numbers: An Empirical*

scholarship on capital sentencing and state executions and conventional wisdom are correct, we should expect to find that southern governors use executive clemency authority to remove inmates from death row less than governors of non-southern states. This hypothesis comports with the public notion that southern states possess a greater appetite for state-sanctioned death. If regionalism affects the distribution of capital punishment and a “geography of the death penalty” exists,⁸ then regionalism should also inform the distribution of clemency and we should find a similar geography of mercy.

This paper seeks to extend scholarly literature by exploring regional differences in the distribution of clemency from an empirical perspective. Using a recently-released data set of all state death row inmates from 1973 to 2010, this paper considers whether clemency is exercised in southern (defined in three distinct, though related, groupings) and non-southern states in systematically different ways. The results of this study offer some surprises. First, no statistically significant differences exist between southern and non-southern states (no matter how “southern” states are defined). This finding conflicts with the South’s hypothesized greater affinity for death. Next, southern states are more prone to execute and less prone to disturb death sentences through reversal on appeal than non-southern states. One complicating wrinkle is that southern states are similar to non-southern states when it comes to reversing death sentences for African-American inmates. On balance, findings from this study are mixed and paint a complicated picture of regional differences in the capital punishment context.

Part II includes a brief overview of the relevant scholarly literature exploring the influence of geography on the death penalty and clemency. Part III describes the data and research methodology. The results of the study are discussed and their implications are considered in Part IV. Finally, Part V concludes and considers possible future research directions.

Analysis of Clemency and Its Structure, 89 VA. L. REV. 239, 249-51 (2003) (using data collected between 1973-99); William A. Pridemore, An Empirical Examination of Commutations and Executions in Post-Furman Capital Cases, 17 JUST. Q. 159, (2000) (using data collected between 1974-95). Prior studies on this topic cover older data, while the current study benefits from an additional five years of capital punishment and clemency data.

8. See Smith, *supra* note 5.

II. LITERATURE REVIEW

Three distinct—though related—scholarly literatures inform this paper and frame its contribution. One literature, descriptive in nature, concentrates on history to account for southern states' distinctive legal, social, and political experiences with capital punishment. A second literature assesses the nation's experience with capital punishment from an empirical perspective. Finally, a third developing empirical literature focuses on clemency activity in the death penalty context. While clemency studies typically focus on modeling the decision to grant clemency, few note the importance of regional influences.

History casts the death penalty in unflattering light, and reinforces the conventional wisdom that geography influences the death penalty's various components. Within this public death penalty narrative, the southern states' experience surrounding the Civil War plays a key role. Underneath this overhang of history, Professor Charles Ogletree links capital prosecutions and executions to legacies of the Jim Crow era.⁹ Professor Ogletree identifies a "Death Belt," which he defines to include the "southern states that together account for over 90% of all executions carried out since 1976."¹⁰ Central to Professor Ogletree's observation is that the nine "Death Belt" states "overlap considerably" with the southern states that had the "highest levels of extra-legal violence and killings during the Jim Crow era."¹¹ According to Ogletree's thesis, it is not a coincidence that southern states with a particular appetite for the death penalty also have a past of extra-judicial lynchings.¹² Rather, the factors that explain the high levels of lynching also help explain the states' impulse to impose the death penalty.¹³ Other scholars have refined Ogletree's instinct with alternative—and broader—geographic boundaries to define "southern" states. Many death row scholars note that conventional wisdom suggests that southern states—

9. See Ogletree, *supra* note 5, at 18.

10. *Id.* at 19. The nine "Death Belt" states include: Texas, Florida, Louisiana, Georgia, Virginia, Alabama, Mississippi, North Carolina, and South Carolina. See also Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1924 n.14 (1994).

11. *Id.* States with the highest levels of lynching activity between 1900 and 1929 include the nine Death Belt states, along with Arkansas, Kentucky, Missouri, Oklahoma, and Tennessee. See also COMMISSION, *supra* note 5.

12. See Ogletree, *supra* note 5, at 18.

13. *Id.*

and by that they mean former confederate states—are particularly death penalty prone.¹⁴

Given the recent surge in empirical legal studies,¹⁵ it was inevitable that scholars would subject capital punishment—including the widespread assumption that southern states are systematically different than non-southern states when it comes to the death penalty—to empirical scrutiny. Of all the death penalty's various parts, death sentences and executions have received the overwhelming amount of public and scholarly attention. Some scholars have focused their attention on the influence of race on various components of the capital punishment system.¹⁶ Early path-breaking work by Professor Baldus (and colleagues) strove to examine the subtle, nuanced judgment calls made by law enforcement, prosecutors, and others throughout the criminal justice system that paved the way for the prosecution of capital cases.¹⁷ What Baldus found particularly striking were prosecutors' charging disparities in death-eligible cases involving black defendants and white victims compared to those involving black defendants and black victims.¹⁸

More recent death penalty scholarship explores geographic influences. Professor Smith finds uneven distributions across the country.¹⁹ Smith

14. The list of former eleven confederate states included in this data set expands the list of nine Death Belt states by two (Arkansas and Tennessee). See, e.g., John Blume, Theodore Eisenberg & Martin T. Wells, Explaining Death Row's Population and Racial Composition, 1 J. EMPIRICAL LEGAL STUD. 165, 182 (2004) (expecting but not finding higher death penalty rates in the South); *id.* at n.49; BALDUS ET AL., *supra* note 4, at 235 (same).

15. See generally Daniel E. Ho & Larry Kramer, Introduction: The Empirical Revolution in Law, 65 STAN. L. REV. 1195 (2013); Michael Heise, The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism, 2002 U. ILL. L. REV. 819 (2002) (discussing the surge in empirical legal studies).

16. For a collection of studies, see David Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings From Philadelphia, 83 CORNELL L. REV. 1638, 1658-62, 1742-45 (1998). See also John Blume & Theodore Eisenberg, Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study, 72 S. CAL. L. REV. 465, 500 (1999); John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, Post-McCleskey Racial Discrimination Claims in Capital Cases, 83 CORNELL L. REV. 1771 (1998); RICHARD C. DIETER, THE DEATH PENALTY IN BLACK AND WHITE: WHO LIVES, WHO DIES, WHO DECIDES Figure 7 (1998), available at <http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides#Fig.%207>; BALDUS ET AL., *supra* note 4; SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989).

17. See, e.g., BALDUS ET AL., *supra* note 4, at 7-8.

18. *Id.*

19. See Robert J. Smith, The Geography of the Death Penalty and its Ramifications, 92 B.U. L. REV. 227 (2012).

notes that the geographic distribution of death sentences and state executions clusters “around a narrow band of counties.”²⁰ Professor Smith also notes that the influence of geography on the death penalty practices can affect legal challenges to death penalty activity, including such practical issues as how scarce defense resources can be used more effectively in the death penalty context.²¹

A final strain of empirical scholarship focuses on the clemency component within the death penalty context. Although a key aspect of the death penalty apparatus, clemency has received comparatively less public and scholarly attention. While results from leading studies differ in terms of various political, structural, and inmate factors that help explain clemency decisions, they all make quite clear that the use of clemency has diminished considerably over time.²² While not the focus of these studies, scholars have noted geography’s influence on clemency grants’ distribution.²³

This paper contributes to the already available clemency literature by using recently-released death penalty data and moving geography to the center of clemency analysis. To the extent that decisions to prosecute capital cases and execute death row inmates vary by region, it follows that these same geographic factors should also affect the distribution of clemency for death row inmates. Obviously, the direction of geography’s influence on clemency will be opposite to that of state executions. That is, if southern states, however defined (“Death Belt,” “Lynching South,” or “Old Confederacy”), evidence a disproportionate appetite for the death penalty, removals from death row due to clemency in these states should be fewer. In other words, when it comes to possible geographic influences, the influence on state executions and clemency should work in opposite directions.

20. *Id.* at 228.

21. *Id.* at 229.

22. See, e.g., Kraemer, *supra* note 7, at 1414; Laura M. Argys & H. Naci Mocan, *Who Shall Live and Who Shall Die? An Analysis of Prisoners on Death Row in the United States*, 33 *J. LEGAL STUD.* 255, 270–77 (2004); Heise, *supra* note 7; Jeffrey D. Kubik & John R. Moran, *Lethal Elections: Gubernatorial Politics and the Timing of Executions*, 46 *J.L. ECON.* 1, 6–7 (2003); Pridemore, *supra* note 7.

23. See Kraemer, *supra* note 7, at 1414.

III. DATA & RESEARCH DESIGN

A. *Data*

The Bureau of Justice Statistics (BJS) gathers data on each prisoner in the country who has been convicted and sentenced to death between 1973 and 2010.²⁴ The data, current through 2010, contain 9,058 observations.²⁵ The BJS data come from the prisons, which gather data under the National Prisoner Statistics Program.²⁶ These data include numerous background characteristics on all individuals sentenced to death as well as information on defendants who were removed from death row.

The small number of defendants who received a death sentence in the District of Columbia (N=3), as well as those sentenced by federal courts (N=73), were excluded from the analyses. These restrictions yielded 8,982 observations in the BJS data.²⁷ Finally, for reasons explained more fully below, the 168 defendants whose removal from death row came from a governor's indiscriminate blanket commutations were also removed from many of the analyses.

As this study focuses on variations in death row final dispositions, the defendants removed from death row by December 31, 2010 (N=3,158) were excluded from the analyses. This study focuses on the remaining defendants (5,397) removed from death row based on one of three reasons: state execution (N=1,231), legal reversal of a death sentence on appeal (N=3,772), or clemency grant (N=394).

Because clemency activity evolved during the study's time period (1973-2010), the distribution of clemency activity in these data requires closer inspection. Further investigation of the shrouded world of clemency in the death row context reveals nuances that require further data filtering. Much of the complexity arose when commutations were granted in a blanket, indiscriminate manner that did not account for individual

24. See U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT IN THE UNITED STATES, 1973-2010, ICPSR No. 34366 (2010) [hereinafter BJS].

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

26. See *id.* at xix.

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

defendants or review of a specific defendant's particular case or circumstance. For example, then Illinois Governor George Ryan removed all of Illinois' death row inmates in December 2003 (N=155). Governor Ryan specifically noted his concerns about the possibility of error and the state execution of innocent people as justification for his blanket exercise of executive clemency.²⁸ Similar, although smaller scale, events took place in New Jersey and New Mexico that caused then Governors Corzine and Anaya, respectively, to remove all defendants from death row (NJ, N=8; NM, N=5). New Mexico Governor Anaya, a Catholic, expressly noted his personal opposition to the death penalty for his executive decision.²⁹ Removing those clemency grants awarded in a reflexive and indiscriminate manner (N=168) leaves a total of 226 "pure" clemency grants.

B. Research Design

This paper explores whether, and if so how, geography influences clemency activity for death row inmates. Prior scholarship and conventional wisdom imply that vestiges of the Civil War contribute to clemency activity that systematically differs in southern and non-southern states. Standard t-tests are used to assess whether mean clemency activity in southern states systematically differed from that in non-southern states.

How to define "southern" states is not obvious. This paper considers three alternative specifications for "southern states" described in Table 1. One specification borrows from Professor Ogletree's description of the "Death Belt" that includes the nine southern states that accounted for "over 90% of all executions carried out since 1976."³⁰ A second specification identifies states that fought with the Confederacy in the United States Civil

28. See FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* 67 (2008); AUSTIN SARAT, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* (2005) (discussing "mass" commutations).

29. See Colman McCarthy, *Toney Anaya's Enlightened Use of Power*, WASH. POST, Dec. 14, 1986, available at 1986 WLNR 1932513; James Coates, *Lame-Duck Governor Hit on Commutations*, CHI. TRIBUNE, Dec. 4, 1986, at 24, available at http://articles.chicagotribune.com/1986-12-04/news/8603310666_1_commuted-death-row-inmates-sentences.

30. See Ogletree, *supra* note 5, at 18-19 (the nine Death Belt states include Texas, Florida, Louisiana, Georgia, Virginia, Alabama, Mississippi, North Carolina, and South Carolina); See also Note, *supra* note 10, at 1924-25, n.14.

War.³¹ The final specification identifies the 14 Southern states that led the nation in lynching activity between 1900 and 1929.³²

TABLE 1: SOUTHERN STATES ALTERNATIVES

Death-Belt	Old Confederacy	'Lynching' South
Alabama	Alabama	Alabama
Florida	Arkansas	Arkansas
Georgia	Florida	Florida
Louisiana	Georgia	Georgia
Mississippi	Louisiana	Kentucky
N. Carolina	Mississippi	Louisiana
S. Carolina	N. Carolina	Mississippi
Texas	S. Carolina	Missouri
Virginia	Tennessee	N. Carolina
	Texas	Oklahoma
	Virginia	S. Carolina
		Tennessee
		Texas
		Virginia

31. See, e.g., Blume, et al., supra note 14, at 182 (defining their "old south" variable to include the 11 former Confederate states). Similarly, in this study, the 11 "Old South" states include, Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

32. See Ogletree, supra note 5, at n.20 ("States with the highest levels of lynching activity between 1900 and 1929 include the nine Death Belt states in addition to Arkansas, Kentucky, Missouri, Oklahoma, and Tennessee."); see also COMMISSION, supra note 5.

IV. RESULTS & DISCUSSION

A. Clemency Rates

An effort to gain some insight into a state's "appetite" for clemency requires assessing states' clemency rates. A state's clemency rate is generated by dividing the total number of a state's pure clemency grants by the sum of that state's total pure clemency grants and executions. At one extreme, states that granted clemency at least once but did not execute any death row inmates between 1973 and 2010 have a clemency rate of 1.00. Conversely, states that did not grant any clemency but executed at least one death row inmate have a clemency rate of 0.00. (States either lacking capital punishment or any death row execution or clemency activity during these years were excluded.)

State clemency rates—defined as the ratio of clemency grants to the sum of clemency grants and executions—convey one helpful perspective on a state's proclivity for clemency. Focusing only on the sub-universe of inmates who were either granted clemency or were executed avoids a censoring challenge posed by inmates who remained on death row after 2010. Almost by definition, an inmate granted clemency, requested it. As well, it is almost inconceivable that any state put a death row inmate to death without at least considering, even briefly, the prospect of clemency.³³ Experienced death row defenders note that some death row inmates welcome death and intentionally forego fully exhausting legal appeals or pursuing clemency applications.³⁴ Precise estimates vary, due partly to limited data. Despite this uncertainty, it remains safe to assume that death row inmates who resist execution overwhelmingly outnumber those who do not.

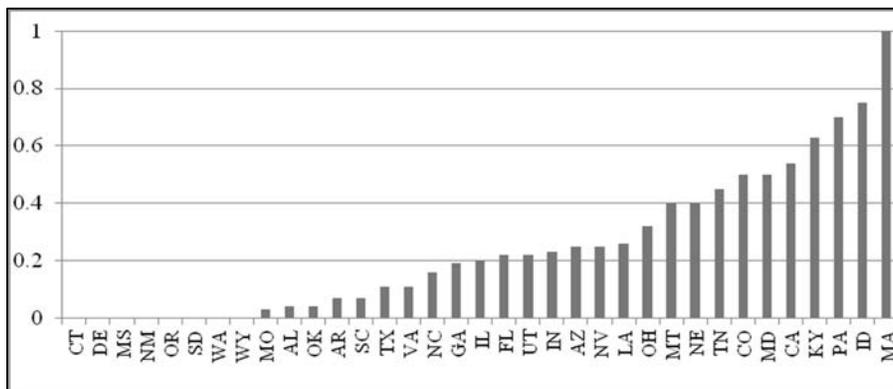
Figure 1 displays state clemency rates. States with the lowest clemency rate appear on the left; states with the highest clemency rates appear on the right. One point Figure 1 makes clear is the important and surprising interstate variation in clemency activity. At one extreme is

33. See James R. Acker & Charles S. Lanier, *May God—or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 202–03 (2000), <http://www.deathpenaltyinfo.org/documents/AckerClemency.pdf> (noting that clemency decisions are typically made in the final few days prior to a scheduled execution).

34. See John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939 (2005) (arguing that 12.9% of the state executions in the "modern" era involved death row inmates who "volunteered" to be executed).

Massachusetts, which did not execute a single death row inmate between 1973 and 2010. Massachusetts instead granted clemency to every death row inmate who failed to receive a legal reversal of their death sentence. The other extreme in Figure 1 includes such states as Missouri, which had a three percent clemency rate.

FIGURE 1: STATE CLEMENCY RATES (1973-2010)

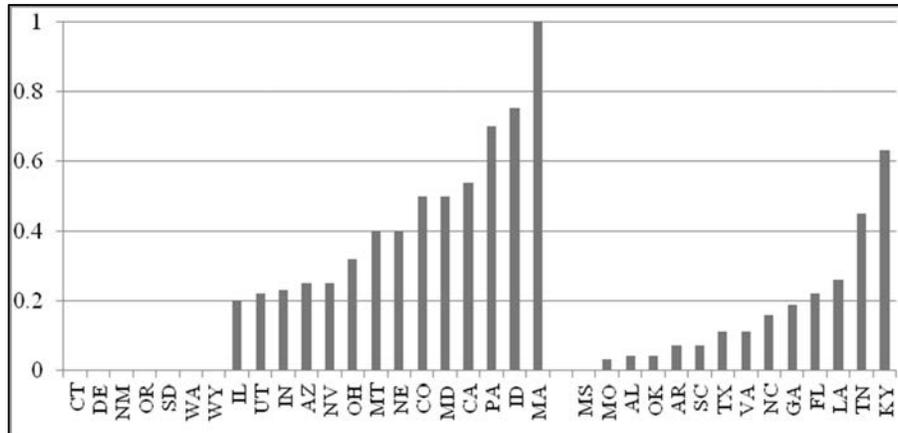


Source: U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment in the United States, 1973—2010 (ICPSR 34366).

Figure 2 reorganizes Figure 1 to aide comparisons between southern and non-southern states' clemency rates. In Figure 2, non-southern states appear on the left-hand side; southern states on the right.³⁵ While comparing the right and left-hand clusters of states suggests that clemency rates in non-southern states, on average, exceed those in southern states, the visual differences do not appear facially disproportionate. Because Figures 1 and 2 present state clemency rates, and the volume of capital punishment activity varies tremendously among states, the rates presented in Figures 1 and 2 do not reflect the influence of high-volume capital punishment states. Finally, although Figures 1 and 2 provide helpful descriptive evidence and visual support for conventional wisdom, more sophisticated analyses are required.

35. Southern states in Figure 2 include the most expansive definition ("Lynching South").

FIGURE 2: CLEMENCY RATES, NON-SOUTHERN V. SOUTHERN STATES
(1973-2010)



Source: U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment in the United States, 1973—2010 (ICPSR 34366).

B. Executions and Death Sentence Reversals

While this paper focuses on geography's possible influence on clemency activity in the death penalty context, the death penalty context is better understood as including three distinct—though related—components: executions, death penalty reversals (or penalty modifications that result in a removal from death row), and clemency. To better understand geography's potential role, Table 2 presents results from differences-in-means tests involving the three different versions of southern states and non-southern states. Detangling capital punishment into its three core components helps make clear where regional differences emerge. Overall, Table 2 illustrates that while a regional influence exists, the influence is not uniform across all three capital punishment components or across black and non-black death row inmates. All three variations of southern states were systematically more prone to execute and less prone to reverse death sentences. However, differences in southern and non-southern states' clemency activity did not achieve standard statistical significance.

When scholars speak of regional differences in the capital punishment context, they typically speak only in terms of state executions of death row inmates. Existing scholarship and conventional wisdom suggest that southern states are more likely to execute inmates on death row than non-

southern states. While reasons for this regional difference remain contested, lingering vestiges of the Civil War and the odious Jim Crow era are often cited. To the extent that southern states exhibit a greater proclivity for executing death row inmates, it follows that this would be even more pronounced for black death row inmates.

In terms of state executions of death row inmates, results presented in Table 2 comport with prior scholarship and conventional wisdom. Differences in execution means from all three specifications of “southern states” and non-southern states achieve statistical significance. The negative coefficients in Table 2’s “Execution” column signal that southern states’ execution means exceed those of non-southern states. In other words, southern states engaged in more execution activity than non-southern states. Also consistent with prior empirical scholarship and popular convention, the southern states’ inclination toward executing death row inmates remains when the analysis focuses exclusively on black inmates.

If southern states are more inclined than non-southern states to execute death row inmates, as Table 2 implies, it would follow that southern states would be less inclined to reverse or upset death sentences on appeal. After all, legal systems in southern states, possessing a commitment to carry out death sentences in a manner that systematically differs from non-southern states, should be similarly less inclined to reverse death sentences. A comparative reluctance to reverse death sentences in southern states may help contribute to the southern states’ greater comparative proclivity to execute death row inmates.

Results in Table 2 largely confirm this hypothesis, but include an interesting twist. Results in the top panel of the “Reversal” column suggest that, as hypothesized, differences in mean reversal rates between southern and non-southern states achieve statistical significance. The positive coefficients indicate that death sentence reversals were less likely in southern states.

Further analysis of death sentence reversal patterns, however, uncovers one unexpected finding. The bottom panel in Table 2’s “Reversal” column presents results that focus exclusively on black death row inmates. When it comes to mean reversal rates for black death row inmates, southern and non-southern states did not act systematically different. Mean reversal rates differed for all death row inmates (top panel), but not for black inmates (bottom panel), which implies that the overall difference in reversals between southern and non-southern states can be attributed to white death

row inmates. So, while southern states reversed death sentences less often than non-southern states, southern states were particularly adverse to reversing death sentences for white death row inmates.

A number of explanations might account for this finding. One possible explanation assumes racial discrimination against black defendants presented at earlier stages in a capital prosecution that resulted in trial courts erroneously or unjustly imposing death sentences on black defendants. If one assumes that black defendants were more exposed to discriminatory policies and practices during pre-trial and trial proceedings, then we should expect more death sentences of black death row inmates reversed on appeal (unless, of course, one assumes that appellate courts were similarly discriminatory). An alternative explanation relies on the appellate courts' perceptions of past (and possibly current) discrimination against black death row inmates. If appellate courts perceived that black death row inmates were ill-treated at trial (or during the investigation, prosecution, or charging stages), appellate judges may be especially partial to reversing black inmates' death sentences. A third explanation draws from the Innocence Project's stunning success.³⁶ Innocence Project attorneys seek to correct wrongful convictions of factually innocent defendants principally through DNA evidence. To the extent that black defendants enjoyed less access to DNA evidence at trial than white defendants, black defendants should be better positioned to benefit from DNA evidence on appeal.

C. Clemency

The central focus of this study is whether geography influences clemency for death row inmates. So far, consistent with this theory and prior research, results in Table 2 illustrate that, overall, geography influences executions and reversals of death sentences and in the expected directions. As hypothesized, all three versions of southern states evidenced a greater aptitude for executions and a corresponding comparative aversion to reversing death sentences. To the extent that clemency activity in the context of the death penalty is analogous to executions and reversals, one

36. See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011); Barry C. Scheck, *Innocence, Race, and the Death Penalty*, 50 *HOW. L.J.* 445 (2007) (describing the Innocence Project's death penalty work); Barry C. Scheck, *Barry Scheck Lectures on Wrongful Convictions*, 54 *DRAKE L. REV.* 597 (2006) (describing the Innocence Project).

would expect to find comparatively less clemency activity in southern states than in their non-southern counterparts.

However, results in the “Clemency” column in Table 2 do not support the geography hypothesis. When it comes to death row clemency activity, southern and non-southern states did not act systematically different. Unlike the reversal findings, the clemency findings persist independent of race. In other words, clemency rates for black and white defendants do not appear to differ, at least at statistical levels. This study’s core finding—that differences in mean clemency grants between southern and non-southern states do not achieve statistical significance—conflicts with prior research.³⁷ There are a number of possible explanations for this difference. Data and research design differences across studies may contribute to inconsistent findings. Prior empirical studies of clemency used data from slightly different time periods and filtered data in slightly different ways.³⁸ In addition, the statistical test used in this study, a t-test designed to identify differences in the means between southern and non-southern states, differs from the statistical tests used in other studies.³⁹

37. See Kraemer, *supra* note 7, at 1414.

38. See Heise, *supra* note 7, at 264–65 (using 1973–1999 death row data); Kraemer, *supra* note 7, at 1399 (using data collected between 1986–2005; excludes Illinois blanket commutations, but not those involving New Jersey or New Mexico).

39. See, e.g., Heise, *supra* note 7, at 262–63 n.92.

TABLE 2: DIFFERENCE IN MEANS—VARIOUS SOUTH ALTERNATIVES
VERSUS NORTH

	<i>Execution</i>	<i>Reversal</i>	<i>Clemency</i>	(N)
<i>Southern States:</i>				
Death Belt	-0.148** (0.010)	0.054** (0.013)	-0.002 (0.005)	3,089
Old Confederacy	-0.138** (0.011)	0.038** (0.013)	-0.001 (0.005)	3,330
“Lynching” South	-0.190** (0.011)	0.049** (0.013)	0.007 (0.005)	3,870
[Blacks only]:				
<i>Southern States:</i>				
Death Belt	-0.133** (0.015)	0.005 (0.012)	0.000 (0.008)	1,415
Old Confederacy	-0.126** (0.015)	-0.012 (0.019)	0.002 (0.008)	1,494
“Lynching” South	-0.181** (0.016)	0.011 (0.020)	0.004 (0.008)	1,674

Notes: A negative coefficient indicates that the southern states’ mean exceeds the northern states’ mean. Differences in means computed using “t-test” command in Stata 13.0. ** p < 0.01.

Source: U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment in the United States, 1973-2010 (ICPSR 34366).

In addition, variations in coding protocols across various studies using similar data might contribute to different outcomes. Clemencies in this study excluded “indiscriminate” or “blanket” clemency grants by governors.⁴⁰ The most dramatic clemency involved then-Illinois Governor George Ryan who removed all of Illinois’ death row inmates in December 2003 (N=155) in a single, blanket exercise of executive authority.⁴¹ Similar events took place in New Jersey and New Mexico, where governors Corzine and Anaya, respectively, removed all defendants from death row.⁴²

40. See *supra* Part III.A.

41. See *id.*

42. Clemency, DEATH PENALTY INFORMATION CENTER, www.deathpenaltyinfo.org/clemency (last visited Sept. 16, 2013).

Defining clemency in this way had the effect of reducing the number of clemency grants included in these analyses. All of the excluded clemency grants (N=168) involved non-southern states, and this exclusion muted the differences between southern and non-southern states in this study.⁴³ While it is defensible to construe indiscriminate and blanket grants of clemency as different from case-specific clemency reviews that have carefully considered the merits of specific individuals, it is important to note how this coding decision differs from coding decisions by other scholars and how it influences this study's findings.

D. Discussion: The Inconsistent Salience of Structure

The findings presented in Table 2 raise a question: Why do southern and non-southern states behave differently when it comes to executions and death sentence reversals, but similarly when it comes to clemency activity? After all, the relevant context—the death penalty—is held constant. Theory provides little basis for such a distinction, so it is worth considering structural factors. Differences in how state supreme court justices are selected might help explain systematic differences in executions and legal reversals of death sentences between southern and non-southern states. Interestingly, differences in how the source of clemency was structured between southern and non-southern states did not lead to differences in clemency decisions. In the end, a second factor—the sheer reduction of clemency grants over time—might provide some insight by reducing the opportunity to detect statistical differences in the clemency activity of southern and non-southern states.

1. The Salience of Structure: Executions and Reversals

Differences exist in mean execution and death sentence reversal rates between southern and non-southern states. Consistent with Ogletree's observation that southern states are more bloodthirsty than non-southern states, defendants who commit capital offenses in southern states are more likely to be executed and less likely to have death sentences reversed on appeal.⁴⁴ Certain structural factors, including variations in how state

43. Heise, *supra* note 7, at 244.

44. See, e.g., Ogletree, *supra* note 5.

supreme court justices are selected, might contribute to geographic differences in execution and death sentence reversal rates.

Of the 5,397 death row inmates removed from state death rows between 1973 and 2010, 5,003 were removed by execution or death sentence reversal. Table 3 organizes death row-inmate removals through either execution or reversal according to the three major ways state supreme court justices are selected. The most striking result in Table 3 is that state supreme court justices in southern states are far more likely to have been elected to the bench than in non-southern states. By contrast, differences between southern and non-southern states in terms of the number of appointed and merit-selected state supreme court justices are minor.

Structural factors presented in Table 3, combined with the distribution (southern state v. non-southern state) volume of death row removal activity between 1973 and 2010, help explain why (as Table 2 makes clear) southern states were more likely than non-southern states to execute death row inmates and less likely to reverse death sentences. Almost 70 percent of the death row removals included in Table 3 took place in southern states, where state supreme court justices were more likely to have been elected to the bench. The interactions between the state supreme court justice selection method and the distribution (southern state v. non-southern state) volume of death row removal activity between 1973 and 2010 help account for the results in Table 3, and underscore the influence of such factors on regional differences involving executions and death row sentence reversals.

TABLE 3: EXECUTIONS, REVERSALS, AND STATE SUPREME COURT JUSTICE SELECTION METHODS

	Elected	Appointed	Merit Selection	(N)
<i>Southern States:</i>				
Death Belt	1,883	291	591	2,765
Old Confederacy	1,969	291	718	2,978
“Lynching” South	2,036	291	1,151	3,478
Non-Southern States	741	296	488	1,525
[All states]	2,777	587	1,639	5,003

Note: “Non-Southern States” includes states outside of “Lynching” South.

Source: U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment in the United States, 1973-2010 (ICPSR 34366).

2. *The Lack of Structural Salience: Clemency*

One crucial structural factor, state supreme court justice selection, helps account for differences between southern and non-southern states relating to executions and reversals in the capital punishment context. As southern and non-southern states did not systematically differ in terms of clemency activity, one would not expect to find any salient structural differences germane to clemency.

Along with information on executions, the data set includes information on the 226 “pure” clemency grants to state death row inmates. Table 4 organizes the clemency activity by the three basic models of clemency authority. Sources of clemency authority range from exclusive gubernatorial authority to clemency authority vested solely in a state administrative board. Placing clemency authority in governors emphasizes direct political accountability. Locating clemency authority in a state administrative board, by contrast, reduces direct, popular political exposure.

Although Table 4 suggests that clemency authority in southern and non-southern states differs, the structural differences did not generate corresponding regional differences in clemency activity. Unlike the findings of structural factors, executions, and death sentence reversals

(Table 3), the main finding suggested by Table 4 is the absence of any clear structural influence on clemency activity. Structural differences may help explain why death row inmates in the South are more likely to be executed and less likely to have their death sentences reversed on appeal; however, when it comes to clemency grants, southern and non-southern states did not behave systematically different despite variation in clemency source.

More than one-half of the clemency activity took place in states where clemency authority resides with both the governor and an administrative board. In most southern states, however, clemency authority is vested solely with a popularly elected governor. While the results in Table 4 indicate that southern states vesting clemency authority solely with governors were more likely to grant clemency than northern states vesting clemency authority solely with governors, the raw numbers in Table 4 are close, particularly when adjusting for the higher volume of capital punishment activity in southern states.

The results indicate that the sole-governor clemency authority model is more likely to be found in southern states than non-southern states. One explanation for the reduction of clemency grants over time may be publicly elected officials' aversion to granting clemency because of adverse political repercussions.⁴⁵ The prevalence of vesting governors with sole clemency authority in southern states increases the expectation that comparatively less clemency activity would take place in the South. However, findings in Table 4 undermine this expectation. Among the three clemency authority models, the discrepancy between southern and non-southern states is largest with exclusive gubernatorial authority. To the extent that one expects geographic variation in how clemency authority is structured to help account for regional variation in clemency activity, results in Table 4, at best, do not support that expectation and, at worst, point in a different direction.

45. See, e.g., Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 *TEX. J. C.L. & C.R.* 191 (2003).

TABLE 4: CLEMENCY GRANTS AND SOURCES OF CLEMENCY AUTHORITY

	Gov—Sole Authority	Blended Gov-Board Authority	Board—Sole Authority	(N)
<i>Southern States:</i>				
Death Belt	26	85	11	122
Old Confederacy	28	90	11	129
“Lynching” South	33	96	11	140
Non-Southern States	16	62	8	86
[All states]	49	158	19	226

Note: “Non-Southern States” includes states outside of “Lynching” South.

Source: U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment in the United States, 1973-2010 (ICPSR 34366).

3. What Accounts for Structure’s Inconsistent Influence?

Comparing Tables 3 and 4 raises another question: Why do structural factors play a role in executions and death row reversals but not clemency grants? In other words, what explains structure’s inconsistent role in the death penalty context? Efforts to reconcile structure’s inconsistent influence in the capital punishment context must initially acknowledge that state-enforced capital punishment has an undeniable uniqueness flowing partly from its legal complexities. In addition to capital punishment’s unusual complexity, governors’ increased reluctance to use their clemency authority—particularly involving death row inmates—contributes to structure’s inconsistent influence.

Any inconsistency in the capital punishment context, geographic or structural, might simply be an artifact of capital punishment’s unique context. Justice Brennan’s observation that “death is different” might explain a lot in the death penalty setting, including these findings.⁴⁶

46. Furman, 408 U.S. at 286-89 (Brennan, J., concurring) (“Death is a unique punishment ... [d]eath ... is in a class by itself.”).

Helping distinguish the death penalty from other legal contexts is unusually complex.⁴⁷ The unusual procedural complexity comes from an effort to minimize reversals of death penalty convictions as well as to provide defendants with the fullest and most robust opportunity to mount a legal defense. An example of this unusual complexity is that states—such as California—impose experiential and competency requirements on those appointed as lead counsel in death penalty appeals.⁴⁸

A second factor that might help reconcile structure's inconsistent influence in the death penalty setting is the increased aversion to using clemency authority, especially by governors on behalf of death row inmates.⁴⁹ After rising sharply during the mid-1970s (after *Furman v. Georgia*), the number of defendants on death row began to decline after 2000.⁵⁰ Despite the trending decline, there were more than 3,000 inmates on death row in 2009.⁵¹ State executions followed a similar pattern, with 52 inmates executed in 2009.⁵² In contrast to death row and execution trends, however, the number of death row inmates granted clemency has remained small. Only one death row inmate received clemency in 2009. In addition to governors, United States presidents are reluctant to exercise clemency authority. The *New York Times*, among others, recently criticized the Obama Administration for its “historically low” use of pardon authority.⁵³

While scholars recognize governors' increased aversion to clemency, explanations for the growing reluctance vary. One obvious explanation is that clemency has become increasingly political.⁵⁴ The increased public appetite for “getting tough on crime,” as well as a fear of stigma flowing from granting clemency, might help explain governors' increased

47. See generally DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* (2010) (describing the death penalty in the United States as peculiar); Russell D. Covey, *Death In Prison: The Right to Death Penalty Compromise*, 28 GA. ST. U. L. REV. 1085, 1096 (2012) (describing the death penalty's procedural complexities as “necessary”).

48. See, e.g., CAL. R. CT. 8.605.

49. See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1348-49 (2008).

50. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 231676, *CAPITAL PUNISHMENT, 2009—STATISTICAL TABLES 1, 1* (2010), available at <http://www.bjs.gov/content/pub/pdf/cp09st.pdf>.

51. *Id.*

52. *Id.* at 8.

53. See Editorial, *What Happened to Clemency?: Despite Justice Reform Promise, Pardon Rate Remains Low*, N.Y. TIMES, Aug. 22, 2013, at A26.

54. See Joanna M. Haug, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE L.J. 131, 149-50 (2010).

reluctance to use clemency.⁵⁵ Professor Burnett criticizes the undue political intrusion into clemency activity and urges states to “depoliticize” the administration of clemency.⁵⁶

A second explanation for governors’ growing reluctance to exercise clemency authority is the increased “legalization” of capital punishment prompted by the *Furman* decision.⁵⁷ Since states revamped their death sentencing regimes to comport with procedural requirements found in the *Furman* decision and endorsed by the Court in *Gregg v. Georgia*, governors can now paradoxically point to such changes as one less reason for them to exercise clemency authority.⁵⁸

The diminution of clemency argument, however, is subject to two important caveats. First, a small number of governors have engaged in wholesale clemency activity for death row inmates. Perhaps most notable is former Illinois Governor George Ryan who, owing to fears of actual innocence, used his clemency authority to unilaterally empty Illinois’ death row.⁵⁹ Second, work performed by the Innocence Project and others, while not restricted to death row inmates, has contributed to clemency grants for defendants convicted of capital crimes. Even though governors fear political backlash for exercising clemency authority on behalf of death row inmates, governors also invite political backlash if they do not use their clemency authority for those who have been wrongfully convicted. “Blanket” clemency grants and clemency grants incident to wrongful convictions—while certainly important—remain infrequent enough to leave intact a general trend tilting in the direction of an overall reduction of clemency grants in the death penalty setting.⁶⁰

55. See *id.* at 49-52 (noting, ironically, that re-election is not diminished by exercising clemency authority).

56. See Burnett, *supra* note 45, at 205.

57. *Furman*, 408 U.S. at 240.

58. See generally 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, 225-28 (2012).

59. See FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* 67-68 (2008).

60. *Id.*

V. CONCLUSION

Results from this study expand our understanding of the death penalty and reveal interesting surprises. By extending existing scholarship of the influence of geography on clemency in the death penalty context, this study reveals subtle variations across the death penalty terrain. Given prior works' emphasis on geography's influence on death sentences and death sentence reversals, the absence of a geographic influence in clemency activity found in this study is surprising. Geography's inconsistent influence across capital punishment's various components implies a level of complexity and nuance often overlooked in death penalty literature.

Geography's inconsistent influence in the context of the death penalty provides mixed support for conventional wisdom. On one hand—and consistent with prior research—findings from this study show that southern and non-southern states behave systematically different when it comes to state executions and reversing death sentences on appeal. These geographic differences lead to an image of a more “bloodthirsty” south. Contrary to conventional wisdom, however, states did not behave differently when it came to clemency activity. While structural differences that distinguish methods of selecting state supreme court justices help account for geographic disparities involving death sentences and reversals, structural variation in clemency authority failed to generate the anticipated geographic differences in clemency activity.

Not surprisingly, such findings raise important questions that should receive further attention from scholars. Future research could extend, and possibly strengthen, this paper's findings in a few ways. This study's research design explores a possible geographic influence solely in terms of variation between southern and non-southern states, which is consistent with prior work. Such research design ignores potentially interesting and important variations within both southern and non-southern states. The conduct of particular states deserves closer study. In addition, while this study considered clemency activity solely within the death penalty context, future scholars might broaden the scope and consider clemency activity in other contexts.

Results from this study also speak to legal and public policy issues. When it comes to individuals facing the most significant form of state authority—state imposed death—it is especially important that policymakers and legal actors benefit from an accurate picture of how the death penalty actually operates. The growing number of states that have

either eliminated or suspended capital punishment illustrates increased public ambivalence about the death penalty.⁶¹ States committed to reviewing capital punishment policies, practices, or procedures should also commit to careful, empirical study. Once again, the mixed results from this study illustrate how using data to examine conventional wisdom can uncover unexpected surprises. Decisions involving the future of capital punishment are far too important to leave solely in the hands of conventional wisdom and anecdotes.

61. See Editorial, *Movement on the Death Penalty*, N. Y. TIMES, May 3, 2013, at A22, <http://www.nytimes.com/2013/05/03/opinion/death-penalty-news.html> (stating that on May 2, 2013, Maryland became the 18th state to abolish the death penalty and the first state located south of the Mason-Dixon Line to do so).