IS THERE A LEGITIMACY CRISIS IN AMERICA’S DEATH PENALTY SYSTEM?
A SURVEY OF CAPITAL CASE WORKERS

By
SHERRI DIOGUARDI

A DISSERTATION PRESENTED TO THE GRADUATE SCHOOL
OF THE UNIVERSITY OF FLORIDA IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

UNIVERSITY OF FLORIDA
2011
To my parents, Georgene and Jack DeToffol;  
my beloved brother,  
Richard Leo DeToffol; and  
my former mother-in-law, Nancy Wiener –  
all of whom I still miss and love
ACKNOWLEDGMENTS

I am grateful for all who have helped me throughout my graduate school experience. That gratitude extends to my dissertation chair, Ronald L. Akers, and to the rest of my committee: Albert R. Matheny, Lonn Lanza-Kaduce, and Lora M. Levett.

I am especially grateful to the 597 judges, prosecutors, and defense attorneys who gave so generously of their time and who shared with me so much of their knowledge. Without them, this research would not have been possible.

I am also grateful to all of the Sociology and Criminology & Law graduate students at the University of Florida. I especially thank Saskia D. Santos, who was my “comps” study partner and a much-needed friend during my time at University of Florida.

Also, I will remain eternally grateful to Mike DioGuardi for always keeping me grounded; Liz Yoder for providing me (until her untimely death) with loving care packages; Irene LaPorte for remaining steadfast in her concern for me; Richard Bennett for ensuring that I was constantly kept up-to-date on events happening in the outside world; and Ben Bendola for taking such good care of my Fort Myers home.

Lastly, I am grateful for my many undergraduate students at the University of Florida and at Elizabeth City State University. It is through them that my passion for teaching has been rediscovered and my faith in the future has been somewhat restored.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACKNOWLEDGMENTS</td>
<td>3</td>
</tr>
<tr>
<td>LIST OF TABLES</td>
<td>8</td>
</tr>
<tr>
<td>LIST OF FIGURES</td>
<td>10</td>
</tr>
<tr>
<td>LIST OF ABBREVIATIONS</td>
<td>11</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>12</td>
</tr>
<tr>
<td>CHAPTER</td>
<td></td>
</tr>
<tr>
<td>1 INTRODUCTION</td>
<td>14</td>
</tr>
<tr>
<td>Overview of the Research</td>
<td>14</td>
</tr>
<tr>
<td>Why Study the Death Penalty?</td>
<td>15</td>
</tr>
<tr>
<td>Death Penalty Legitimacy</td>
<td>18</td>
</tr>
<tr>
<td>Broader Implications of Death Penalty Legitimacy</td>
<td>20</td>
</tr>
<tr>
<td>Overview of Remaining Chapters</td>
<td>21</td>
</tr>
<tr>
<td>2 OVERVIEW OF THE DEATH PENALTY</td>
<td>23</td>
</tr>
<tr>
<td>Death Penalty History in America</td>
<td>23</td>
</tr>
<tr>
<td>Genesis of Capital Punishment</td>
<td>23</td>
</tr>
<tr>
<td>The Ohio Death Penalty System</td>
<td>29</td>
</tr>
<tr>
<td>The Oregon Death Penalty System</td>
<td>35</td>
</tr>
<tr>
<td>The South Carolina Death Penalty System</td>
<td>38</td>
</tr>
<tr>
<td>United States Constitution and Supreme Court Rulings</td>
<td>41</td>
</tr>
<tr>
<td>Brief Overview of the Judicial Branch of Government</td>
<td>48</td>
</tr>
<tr>
<td>The Role of the Court</td>
<td>49</td>
</tr>
<tr>
<td>The Role of Prosecutors</td>
<td>54</td>
</tr>
<tr>
<td>The Role of Defense Attorneys</td>
<td>61</td>
</tr>
<tr>
<td>3 THEORETICAL FRAMEWORK</td>
<td>66</td>
</tr>
<tr>
<td>Legitimacy of the Death Penalty and the Marshall Hypothesis</td>
<td>66</td>
</tr>
<tr>
<td>Symbolic Interactionism: Reframing State Killings</td>
<td>72</td>
</tr>
<tr>
<td>4 LITERATURE REVIEW</td>
<td>78</td>
</tr>
<tr>
<td>Introductory Remarks on the Literature</td>
<td>78</td>
</tr>
<tr>
<td>The Marshall Hypothesis</td>
<td>79</td>
</tr>
<tr>
<td>Political Culture</td>
<td>81</td>
</tr>
<tr>
<td>Legitimacy of the Death Penalty</td>
<td>82</td>
</tr>
</tbody>
</table>
Emotion’s Role in Legitimacy ................................................................. 87
Organizational Role Ambivalence and Legitimacy .............................. 90
Criminal Justice Models and Legitimacy ........................................... 92
Social Cognitive Theory of Moral Agency and Legitimacy ............... 93
The Role Organization Theories Play in Legitimacy ......................... 99
Conflict Theory and Legitimacy ......................................................... 104
Contribution to Existing Research ................................................... 105

5 DATA AND METHODOLOGY ................................................................. 107

Research Design for Quantitative Study .......................................... 107
Methodology Introduction ................................................................. 107
Sampling Frame for Quantitative Study .......................................... 107
Survey Response Rate ................................................................. 108
Survey Instrument ................................................................. 109
Research Hypotheses ................................................................. 110
Quantitative Measurements .......................................................... 111
Choose Not to Answer Options ...................................................... 111
Dependent Variables ................................................................. 111
Death Penalty Support ................................................................. 111
Legitimacy Measurement .............................................................. 112
Death Penalty Suggestion .............................................................. 113
Independent Variables for Marshall Hypothesis Testing ................. 113
Capital Experience ................................................................. 113
Legal Years Scale ................................................................. 113
Current Occupation ................................................................. 114
Underlying Belief: Morality Basis for DP Opinion ......................... 114
Underlying Belief: Fundamentalism .............................................. 114
Underlying Belief: View of Criminal Justice System ..................... 114
Underlying Belief: View of Criminal Behavior ................................ 115
Political Culture ................................................................. 115
Independent Variables for Legitimacy Testing ............................... 116
Capital Case Role ................................................................. 116
Current Occupation ................................................................. 116
Death Penalty Experience ............................................................ 116
Death Penalty Appropriateness ...................................................... 117
Lingering Stress ................................................................. 117
Political Culture ................................................................. 118
Independent Variables for Legitimacy-Support Testing .................. 118
Legitimacy Scale ................................................................. 118
Capital Case Role ................................................................. 118
Death Penalty Experience ............................................................ 119
Underlying Belief ................................................................. 119
Political Affiliation ................................................................. 120
State ................................................................. 120
Control Variable ................................................................. 120
Analytic Plan for Survey Data ......................................................... 121
10 DISCUSSION AND CONCLUSIONS................................................................. 202
  Discussion and Conclusion about the Quantitative Study ...................... 202
    Quantitative Study Limitations ........................................................... 202
  Discussion about the Quantitative Study .............................................. 202
  Conclusion on Quantitative Study ....................................................... 207
  Discussion about the Qualitative Study .............................................. 208
    Qualitative Study Limitations ............................................................. 208
    Summary of Qualitative Study ............................................................ 209
  Policy Implications from Both Studies ............................................... 210
  Implications for Future Research ....................................................... 218
  Concluding Remarks ........................................................................... 220

APPENDIX

A WEB-BASED SURVEY .................................................................................. 222
B E-MAIL RECRUITMENT LETTER FOR QUANTITATIVE STUDY ............ 232
C E-MAIL RECRUITMENT LETTER for QUALITATIVE STUDY .................. 234
D INTERVIEW GUIDE .................................................................................... 236
E INFORMED CONSENT .............................................................................. 238
F CORRELATION MATRIX FOR MODEL 2 .................................................... 240
G CORRELATION MATRIX FOR MODEL 5 .................................................... 241
H CORRELATION MATRIX FOR MODEL 8 .................................................... 242
I HYPOTHESIS CONCLUSION TABLE ......................................................... 243

LIST OF REFERENCES .................................................................................... 244
CASES CITED ................................................................................................. 265

BIOGRAPHICAL SKETCH .............................................................................. 266
# LIST OF TABLES

<table>
<thead>
<tr>
<th>Table</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-1</td>
<td>Executions and death row population in U.S. and sampled states</td>
<td>27</td>
</tr>
<tr>
<td>5-1</td>
<td>Missing data frequency distribution</td>
<td>124</td>
</tr>
<tr>
<td>5-2</td>
<td>Cross-tabulation of missing responses and current occupation</td>
<td>125</td>
</tr>
<tr>
<td>5-3</td>
<td>Demographics for survey respondents (n=568)</td>
<td>134</td>
</tr>
<tr>
<td>5-4</td>
<td>Cross-tabulation of current occupation and state</td>
<td>135</td>
</tr>
<tr>
<td>5-5</td>
<td>Capital case involvement by state</td>
<td>136</td>
</tr>
<tr>
<td>6-1</td>
<td>Variables for Marshall Hypothesis and political culture</td>
<td>137</td>
</tr>
<tr>
<td>6-2</td>
<td>Cross-tabulation of DP support and capital case experience</td>
<td>138</td>
</tr>
<tr>
<td>6-3</td>
<td>Cross-tabulation of DP support and political affiliation</td>
<td>138</td>
</tr>
<tr>
<td>6-4</td>
<td>Cross-tabulation of pro-death penalty (0/1) and political affiliation</td>
<td>139</td>
</tr>
<tr>
<td>6-5</td>
<td>Cross-tabulation of DP support and state</td>
<td>139</td>
</tr>
<tr>
<td>6-6</td>
<td>Cross-tabulation of DP support and classic orientation</td>
<td>140</td>
</tr>
<tr>
<td>6-7</td>
<td>Cross-tabulation of DP support and moral basis</td>
<td>141</td>
</tr>
<tr>
<td>6-8</td>
<td>OLS regression to test Marshall Hypothesis (H1a – H2)</td>
<td>143</td>
</tr>
<tr>
<td>7-1</td>
<td>Capital case worker descriptive statistics</td>
<td>148</td>
</tr>
<tr>
<td>7-2</td>
<td>Missing data for support-legitimacy variables</td>
<td>151</td>
</tr>
<tr>
<td>7-3</td>
<td>Factor analyses for legitimacy, appropriateness, and lingering</td>
<td>152</td>
</tr>
<tr>
<td>7-4</td>
<td>Two-way ANOVA: Legitimacy by capital role and by state</td>
<td>153</td>
</tr>
<tr>
<td>7-5</td>
<td>OLS regression for legitimacy (DV)</td>
<td>155</td>
</tr>
<tr>
<td>7-6</td>
<td>Cross-tabulation of DP support and current occupation (capital dataset)</td>
<td>157</td>
</tr>
<tr>
<td>7-7</td>
<td>Cross-tabulation of DP support and state (capital dataset)</td>
<td>158</td>
</tr>
<tr>
<td>7-8</td>
<td>Frequency distribution of capital adversarial role by state</td>
<td>159</td>
</tr>
<tr>
<td>7-9</td>
<td>Cross-tabulation of DP support and capital role experience</td>
<td>159</td>
</tr>
</tbody>
</table>
# LIST OF FIGURES

<table>
<thead>
<tr>
<th>Figure</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-1</td>
<td>Illustration of Blackstone's Ratio</td>
<td>20</td>
</tr>
<tr>
<td>3-1</td>
<td>Conceptual model for the underlying research</td>
<td>71</td>
</tr>
<tr>
<td>8-1</td>
<td>Pie chart of suggestions from DP proponents</td>
<td>167</td>
</tr>
</tbody>
</table>
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AD</td>
<td>Appellate Defense</td>
</tr>
<tr>
<td>ADA</td>
<td>Assistant District Attorney</td>
</tr>
<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
</tr>
<tr>
<td>APD</td>
<td>Assistant Public Defender</td>
</tr>
<tr>
<td>ASA</td>
<td>Assistant State Attorney</td>
</tr>
<tr>
<td>CA</td>
<td>Court-Appointed</td>
</tr>
<tr>
<td>CJS</td>
<td>Criminal Justice System</td>
</tr>
<tr>
<td>DA</td>
<td>District Attorney</td>
</tr>
<tr>
<td>DCA</td>
<td>District Court of Appeals</td>
</tr>
<tr>
<td>DP</td>
<td>Death Penalty</td>
</tr>
<tr>
<td>DPIC</td>
<td>Death Penalty Information System</td>
</tr>
<tr>
<td>LLP</td>
<td>Lower Level Proceedings</td>
</tr>
<tr>
<td>LWOP</td>
<td>Life without the Possibility of Parole</td>
</tr>
<tr>
<td>PCR</td>
<td>Post-Conviction Relief</td>
</tr>
<tr>
<td>PD</td>
<td>Public Defender</td>
</tr>
<tr>
<td>PDO</td>
<td>Public Defender’s Office</td>
</tr>
<tr>
<td>SA</td>
<td>State Attorney</td>
</tr>
<tr>
<td>SAO</td>
<td>State Attorney’s Office</td>
</tr>
<tr>
<td>SC</td>
<td>Supreme Court</td>
</tr>
<tr>
<td>USSC</td>
<td>United States Supreme Court</td>
</tr>
</tbody>
</table>
The finality and irrevocability of a death sentence requires the highest standards of prosecution, defense, and judicial action in order to maintain capital punishment as a legitimate and acceptable government sanction. For years, a death penalty proceeding was presumed to have achieved such a gold standard for due process. Recent advances in forensic science have exposed wrongful capital convictions, resulting in the question: How fair are capital case proceedings? Does the continued use of capital punishment by several states, despite increasing numbers of death row exonerations, reveal a legitimacy crisis? Frontline capital workers are in the best position to know or to have direct, hands-on, informed opinions and assessments about the process and outcome of death penalty legal proceedings. In this research project, a 91-item survey was distributed to a convenience sample of criminal law practitioners in Ohio, Oregon, and South Carolina, and also 27 capital case workers from within those three states were interviewed in-depth regarding their opinions about the death penalty.

Experiential knowledge of capital punishment was found to be inversely correlated with death penalty support. Also, respondents claiming a moral basis for their death
penalty opinion were less likely to be supportive of capital punishment, as were those claiming sociological-based reasons for criminal behavior (i.e., a positivist perspective). The majority of survey respondents, as well as interviewees, did not believe the death penalty was a necessary component in the criminal justice system. Findings suggest that prosecutors, as compared to defense attorneys, are more likely to support the death penalty.

As far as legitimacy (perception of death penalty fairness) is concerned, while the mean legitimacy score for the death penalty was low, 54% of the variation in that legitimacy score was explained by organizational role, belief in the appropriateness of capital punishment, and whether or not participation in capital case proceedings had lasting emotional and spiritual after-effects. Findings also suggest that opinions on whether capital punishment is a safe, necessary, and cost-effective sanction are dependent on one’s capital role experience. For capital case workers, 67% of the variation in support/nonsupport of the death penalty was explained by (a) whether or not they believed the death penalty system was fair, (b) their degree of experience in capital cases proceedings, (c) whether or not they believed proceedings were safe, necessary, and cost-effective, (d) their underlying beliefs in fundamentalism and morality, and (e) interactions between various capital case roles and legitimacy. The majority of respondents offered suggestions for how the death penalty system could be improved, but the most frequent suggestion was to abolish the death penalty.
CHAPTER 1
INTRODUCTION

Overview of the Research

The doctoral dissertation research utilized qualitative and quantitative methods to evaluate legitimacy of capital case litigation, to solicit suggestions for improving death penalty proceedings, and to explore the possibility of vicarious traumatization with frontline capital case workers. A list of experienced capital case workers from three death penalty states was compiled (Ohio, Oregon, and South Carolina)\(^1\) based in large part on case numbers from death penalty notices or aggravated murder charges filed in all judicial circuits from within those three states. In addition, a list of local bar members specializing in criminal law from counties with populations exceeding 100,000 was compiled. For the qualitative study, a purposive selection of three judges, three prosecutors, and three defense attorneys from the above-compiled capital sampling frame were interviewed in-depth regarding their capital case experience. Each interview lasted approximately one hour. In addition to these qualitative interviews, a quantitative study was conducted through the use of a web-based survey that was disseminated by email to members on both the capital list and the noncapital list if, through months of research, a valid email address had been found. That was a convenience sample due to the fact that the survey link was only provided to those list members for whom an active email address had been found\(^2\). The web-based survey

---

\(^1\) States were selected in accordance with Elazar's Political Culture Theory ([1972] 1984), explained in detail in Chapter Three entitled “Theoretical Framework.”

\(^2\) A fax recruitment was also done for known prosecutor offices and public defender offices from all three states if individuals’ email addresses could not be found; however, this method was more time-consuming and less effective than the email recruitment. Response rate was 9% (17/180).
(Appendix A), accessible through Survey Monkey,™ was comprised of 91 items that were specifically designed to answer the following research questions:

RQ\textsubscript{1} Are death penalty proceedings perceived as being needed by capital case workers?

RQ\textsubscript{2} Are death penalty proceedings perceived as being fair by capital case workers?

RQ\textsubscript{3} Do perceptions of need vary by professional role or across states?

RQ\textsubscript{4} Do perceptions of fairness vary by professional role or across states?

RQ\textsubscript{5} Has participating in capital case proceedings produced personal-professional conflict or stress in capital case practitioners?

RQ\textsubscript{6} Do capital case proceedings need to be improved? If so, how?

RQ\textsubscript{7} What model of criminal justice, according to experienced criminal courtroom workers, best represents the criminal justice system as it currently operates?

RQ\textsubscript{8} What model of criminal justice, according to experienced capital case workers, best represents the death penalty system as it currently operates?

RQ\textsubscript{9} Does death penalty support vary among courtroom elites? Is such variance explained by underlying belief systems?

**Why Study the Death Penalty?**

The death penalty has become a divisive force in America. Passions run high because capital punishment involves legal, moral, and scientific issues. Dealing with liberty and death, capital punishment breaks down barriers between church and state, law and science, reason and emotion, and it epitomizes the tension between state power and individual liberty. People’s perceptions of the death penalty law may be influenced by their religious beliefs. Hall (1978) claims that “[t]he influence of religion is so pervasive that it is impossible to limit its impact on law to any list of specific instances” (p. 1267). Roscoe Pound (1921) wrote that “[t]he prevailing view has been
that, after the stage of primitive law is passed, religion has played relatively a small part in legal history…Yet I venture to think that the influence of religious ideas in the formative period of American law was often decisive and that without taking account of Puritanism we shall fail to get an adequate picture of American legal history and shall not understand American law as it was in the last century” (p. 24-25). Individuals' religious beliefs may also influence people’s support of a law (Tyler 1990), and Justice Marshall in *Furman v. Georgia*, 408 U.S. 238 (1972) recognized that with his claim that a person’s underlying belief system would intervene in the relationship between death penalty knowledge and death penalty support. This research specifically looks at the relationship between frontline workers' underlying belief systems and their support/nonsupport of the death penalty.

The capital case proceeding, because of enhanced safeguards built in by Supreme Court directives due to the severity of the potential sentencing outcome, is also the criminal case proceeding in which the highest standards of procedural fairness must be applied; therefore, examining its legitimacy is – by extension – also an exploration of the legitimacy of the criminal justice system overall. Does the capital case proceeding represent the *gold standard*, or is it treated no *differently* in terms of its administration?

Examining first-hand accounts of capital procedures has elicited rich empirical data that will advance knowledge about the present death penalty system. This is the first study to investigate across states how capital judges, prosecutors, and defense attorneys perceive capital case legitimacy. The vast majority of death penalty workers are governmental agents; as such, they are responsible for carrying out procedures that
may result in a state killing. Do these state agents think of their responsibility as being legal or moral, or some combination thereof? Do they perceive of a death penalty proceeding as being the same as any other felony case, or is it perceived as being more burdensome? Is there any feeling of complicity with a death penalty conviction? To what extent do the personnel responsible for administering that portion of the criminal justice system believe in, or question, the legitimacy of the death penalty? This research is unique in that it (1) directly asks capital frontline workers about their perceptions of the fairness for the death penalty; (2) directly asks them about their perceptions on whether or not the death penalty is necessary; and (3) solicits suggestions from these experienced capital case agents on how (if at all) death penalty proceedings might be improved. This study provides a greater understanding of the capital justice system, explores the societal impact of death penalty proceedings becoming increasingly routinized, and identifies the possible consequences of such routinization to key court workers, which is a group largely ignored in existing literature. As frontline workers, judges and attorneys are an invaluable, yet largely underutilized, resource for understanding procedural justice and for clarifying the careful balance that must be maintained in the American system of justice between equity and efficacy.

The death penalty is the ultimate punishment in America. When the state executes one of its citizens, such punishment is final and irrevocable. Recent death row exonerations have confirmed that systematic mistakes can, and do, happen\(^3\). Death row exonerees have been deprived of their liberty for a length of time but, because of

---

advances in forensic science and post-trial retention of evidence, they have subsequently been able to reclaim that liberty. What if executions had occurred before the wrongful convictions could be revealed? Do the benefits derived from the death penalty outweigh these risks? What knowledge can those with the most experience provide?

Opinion polls generally ask laypeople to think of the death penalty issue as an abstract hypothetical; however, capital case workers confront the issue head-on with each capital case in which they are personally involved. Based on their experience, how do frontline capital workers perceive the death penalty in comparison with other felony cases in terms of its legitimacy and in terms of its usefulness or necessity?

**Death Penalty Legitimacy**

Even though every criminal case looks to be a story about offender and victim, and there seems to be a concentrated movement to show criminal case proceedings as ever-looping perpetual plots of good versus evil⁴, some scholars view capital cases as being largely representative of a completely different and much more complex picture.⁵ The defendant and the victim are seen as stand-in actors for the ongoing tension between transgressing citizen and controlling government. The death penalty is merely the most extreme case at either end: ultimate transgression and ultimate control. Such weightier extremes theoretically demand stronger procedural safeguards, hence the *super due process* identified by the United States Supreme Court as being essential supports for capital case litigation.⁶

---


⁵ Messner, Baumer & Rosenfeld (2006).

⁶ Furman v. Georgia, 408 U.S. 238 (1972) where Court ruled “Death is different.”
The possibility that a guilty person might be executed by a government is an important issue, for capital case workers in particular, for the criminal justice system in general, and for society overall. The possibility that the state, with impunity, might actually kill an innocent substantially raises the moral/legal stakes and introduces a legitimacy issue to the entire American death penalty system. Legitimacy, defined as “genuineness” and “the condition of being in accordance with law or principle,”7 has also been operationalized in prior research8 as being the perception of fairness; therefore, it is not necessary for an innocent person to actually be executed for a full-blown legitimacy crisis to occur. A central assumption of this research is a legitimacy crisis may develop if capital case workers believe one or more of the following: (1) that the death penalty system is fundamentally unfair; (2) that the criminal justice system is operating outside of its foundational principles;9 and (3) that there is a recognized risk of a wrongful execution, possibly one in which they participated. Habermas (1979) and Friedrichs (1980) have both identified a legitimacy crisis as existing when people stop regarding the legal system as being worthy of respect. Much research has been conducted on how defendants (Casper 1978; Frazer 2006), victims (Erez and Tontodonato 1992; Kelly 1984; Law Enforcement Assistance Administration 1977), and the general public (Jacob 1971; Hagan and Albonetti 1982; Rottman 1998) regard the criminal justice system. However, this research is, to the best of my knowledge, the first

---


8 Tyler (2003, 2006).

9 “[W]hen evasion or contravention of the generally understood meaning of an order has become the rule, the order can be said to be ‘valid’ only in a limited degree and, in the extreme case, not at all” (Weber, 1978, p. 32)
to investigate how those occupying legal roles in the system who have the most direct knowledge and professional involvement view the death penalty/criminal justice system.

**Broader Implications of Death Penalty Legitimacy**

Are death penalty proceedings perceived as being fair by frontline capital workers, those who are in the very best position to know? Perhaps the more relevant question would be: Is the death penalty being perceived as a necessary component of the American criminal justice system? In other words, would an alternative punishment such as life without the possibility of parole (LWOP) accomplish the same societal goal?

The United States Constitution and American jurisprudence have both been predicated on the Blackstone Ratio10: It is better to let 10 guilty men escape than to convict one innocent person.

![The High Priority of Liberty](image)

Figure 1-1. Illustration of Blackstone’s Ratio

The Blackstone Ratio was referencing noncapital convictions. Presumably the ratio for capital conviction would be much more extreme. Is a suitable safety measure feasible for such an irrevocable state sanction? As the trend in American criminal courts has been to become more punitive, have even state killings become routinized to such an extent that they are now being perceived as blasé and being administered in a rote manner? In practice, are capital defendants presumed – by the judge, by the jury,

10 Blackstone, William (1760-1769).
and by the attorneys – to be innocent throughout the formal death penalty proceedings, as due process requires, or has the presumption become one of guilt so that the burden of proof has shifted from state to citizen?

**Overview of Remaining Chapters**

Chapter 2 provides a concise summary of the American death penalty and tracks Supreme Court rulings on the constitutional issues\textsuperscript{11} and the moral issues, i.e., evolving standards of decency. It also explains the functions of judges, prosecutors, and defense attorneys.

Chapter 3 provides the theoretical framework for the proposed research. The Weberian definition of legitimacy is provided as well as elaborations and expansions on that definition. It also provides a conceptual model for the underlying research. Death penalty researchers have focused on a variety of issues concerning death penalty legitimacy, such as: deterrence, constitutionality (human rights), retribution/morality, disproportionality/inequality, and citizen oppression/government control (Bedau 1997; Sarat 2001). Many researchers have separated out the following as three distinct perspectives from which to study death penalty legitimacy: (1.) legal, (2.) moral, and (3.) social (Banner 2002; Bedau 1997; Radelet and Borg, 2000; Sarat 2001; Zimring 1999). The challenge herein is to remove the dividers between those three concepts and allow frontline criminal workers to identify the issues that they believe are most important in capital case administration currently, and it may be that the lines between legal, moral, and social will blur because of overlap among the three concepts in the minds of the study participants.

\textsuperscript{11} Fifth, Eighth, Ninth, Tenth, and Fourteenth Amendments
Chapter 4 is a review of the literature on Political Culture Theory, the Marshall Hypothesis, and legitimacy of the death penalty. The research on legitimacy has examined the role that law, emotion, morality, and culture (organizational and political) has played in legitimating capital punishment.

Chapter 5 enumerates the research questions that this study was designed to answer and lists the hypotheses formulated from those research questions. It also details the research data and methodology. It summarizes the sampling techniques, the data collection procedures, and the analytic strategies. It also identifies the dependent and independent variables and provides justification for their inclusion in conceptual and statistical models. It explains how the survey instrument was developed through pilot-testing and why it is deemed valid and reliable in measuring the relevant concepts.

Chapters 6 through 8 present the findings from the quantitative components of this research. These are the chapters where most of the tables, figures, and models are included. Chapter 6 is the chapter entitled “Quantitative Analysis of DP Support,” and it uses the complete sample dataset. Chapter 7 is entitled “Quantitative Analysis of Legitimacy,” and it uses the subset of capital respondents. Chapter 8 analyzes suggestions solicited from survey respondents.

Chapter 9 presents the results from the qualitative study, and Chapter 10, entitled “Discussions and Conclusions,” discusses all of the findings from Chapters 6 through 9, gives the conclusions reached from those findings, identifies the policy implications, and makes suggestions for future research.
CHAPTER 2
OVERVIEW OF THE DEATH PENALTY

Death Penalty History in America

Genesis of Capital Punishment

Capital punishment can be traced back in writings to approximately 1780 BC with the Code of Hammurabi (Stohr, Walsh, and Hemmens, 2009). During the reign of Hammurabi, social status was extremely important, and the class system in place at the time was uncompromising. For example, “If a man should enable a place slave…to leave through the main city-gate, he shall be killed” (Roth 1995: 84). Executions were carried out immediately, and premeditation or mens rea were not relevant considerations. “If a fire breaks out in a man’s house, and a man who came to help put it out…takes household furnishings belonging to the householder, that man shall be cast into that very fire” (Roth 1995: 85). There were 25 different offenses for which death was the prescribed punishment, and the Code of Hammurabi is an early example of how a governing ruler adopted and formalized the concepts of lex talionis and controlled vengeance in order to establish and maintain social order (Stohr et al. 2009).

Early executions, such as stoning, tended to be extremely violent and often involved the whole community (Johnson 1998). During the Middle Ages, executions increasingly became more formal and ceremonial. While capital punishment has a long history in Great Britain, there were abolitionist periods. For example, William the Conqueror outlawed executions except during war times. During the reign of King Henry VIII, however, it is estimated that over 70 thousand people were executed, and many of those executions were for relatively minor crimes. It was during the Early Modern Era that executions most resembled staged pageantry throughout England and
were viewed almost as theatrical entertainment. Oftentimes, those in high society would host post-execution parties and would send out engraved invitations: “We hang at eight, breakfast at nine” (Newman 1978: 144).

When the New World colonies were established, the earliest founders/settlers retained the death penalty system from their mother land. The first recorded execution occurred in the Jamestown Colony. Captain George Kendall was hung for being a spy for Spain (Bohm 2007). Due to religious differences, capital-eligible offenses varied across American colonies (Banner 2002). The Puritans of Massachusetts Bay Colony authorized death for 12 capital offenses, ranging from blasphemy to man-stealing. Witnesses were executed for giving false testimony in a capital case. The Quakers, on the other hand, took a more lenient stance and abolished the death penalty for all crimes until 1691, when capital punishment was reinstated for treason and murder (Bohm 2007). During those early days in the American colonies, the populace viewed all humans as being born with original sin; therefore, each societal member was equally susceptible to egregious transgressions. For that reason, executions were public rituals that served as the platform from which religious leaders preached redemption and warned those in attendance of the dangers involved with succumbing to temptation (Banner 2002).

To some degree, in the pre-prison era, capital punishment was practical because there was typically no place for convicts to be housed, especially for long periods of time. Even after state prisons were built, however, there were problems because prison escapes numbered in the thousands (Breslin, Howley and Appel 2008; McKelvey 1997). Eventually prisons became more secure, and present day prison escapes are rare. The
Bureau of Justice Statistics (2008) reveals that 2,512 state prisoners escaped in 2008 from a total state prison population of approximately 1.4 million. Over time, prison escapes have decreased, and the vast majority of escapees (92%) from medium-security and high-security prisons are apprehended quickly (Culp 2005).

Just as prison security procedures have evolved over time, so have death penalty procedures. Throughout the 17th and 18th centuries, capital cases were often one-day proceedings, and there was no appeal process instituted until the 19th century (Latzer and McCord 2011). By the end of the 1800s, many states abandoned death as a mandatory punishment, in large part because of jury nullification; impaneled juries were bringing in not guilty verdicts even when states had met their burden of proof on certain cases. During that period, there was also a movement across states to reduce the number of crimes that were death-eligible (Latzer and McCord 2011).

It was in this same period that executions, for the most part, stopped being public events. States began to take over execution power from local jurisdictions, and executions were increasingly held within the confines of a state prison (Latzer and McCord 2011). The last public hanging in the United States took place in Kentucky in 1936 (Banner 2002). The literature speculates on reasons for the change: (1) the public was becoming troubled by botched executions, (2) unruly crowds in attendance, (3) abolitionist groups were being organized to such an extent that historians refer to their activities as a reform movement (Banner 2002); (4) states were looking to concentrate and centralize power and executions provided the means by which that could be accomplished. Once the state took over authority, executions became “highly bureaucratic jobs with clearly delineated roles, responsibilities, and procedures.
articulated in execution protocols” (Johnson 1998: 42). Through the impersonality of bureaucratization, executions were routinized. At the current time, many executions take place but receive very little media coverage (Johnson 1998); therefore, the American public, for the most part and except in a purely abstract sense, is disengaged from state killings that are being done on their behalf.

During the first part of the 20th Century, renewed efforts were undertaken to abolish the death penalty, but the momentum was lost when the Great Depression occurred (Bohm 2003), and executions soon began to increase. On average, there were 167 executions annually in the 1930s (Schneider and Smykla 1991). In the 1950s, primarily due to a backlash from what happened during World War II, executions decreased dramatically (Bohm 2003). Once the Civil Rights Movement got underway, national attention was brought to the fact that African Americans were disproportionately being executed in America. That, coupled with declining public support, provided a pathway to the Furman decision where the USSC declared certain death penalty statutes to be unconstitutional. While researchers started collecting data from individual states to examine the racial disparity claim, one nonacademic began collecting data nationally as he traveled across country on business trips (Espy and Smykla 2004).

The leading resource for executions in America is the Espy File which was compiled by salesman-turned-historian, M. Watt Espy. Over a period of 30 years, he researched all known executions in America. He estimated the frequency of American state-sanctioned executions¹ from early settlement up to 2002 as totaling 15,311 (Espy

---

¹ This total does not include lynchings, which Espy estimated as numbering 10,000.
and Smykla 2004). His data can be broken down by century as follows: 1600s = 162; 1700s = 1,391; 1800s = 5,381; 1900s = 8,141.

Table 2-1 shows the breakdown of executions in Ohio, Oregon, South Carolina, and the United States according to the Espy File. Information for Table 2-1 has also been pulled from the U.S. Census Bureau and the three sample states’ departments of correction for percentage of the population in 1950 and in 2009 that were black and also for how many people currently await execution in the United States and in the three states sampled in the underlying study.

**Table 2-1. Executions and death row population in U.S. and sampled states**

<table>
<thead>
<tr>
<th>Region</th>
<th>Total Executions</th>
<th>% Black Executions</th>
<th>% Black in Population 1950</th>
<th>Current Death Row Population</th>
<th>% Black on Death Row</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ohio</td>
<td>443</td>
<td>30%</td>
<td>6%</td>
<td>153</td>
<td>51%</td>
</tr>
<tr>
<td>Oregon</td>
<td>124</td>
<td>4%</td>
<td>1%</td>
<td>36</td>
<td>11%</td>
</tr>
<tr>
<td>So. Carolina</td>
<td>668</td>
<td>71%</td>
<td>39%</td>
<td>54</td>
<td>55%</td>
</tr>
<tr>
<td>United States</td>
<td>15,311</td>
<td>48%</td>
<td>10%</td>
<td>3,261</td>
<td>42%</td>
</tr>
</tbody>
</table>

*As of May 2011

From the years 1792 to 2002, Ohio executed 443 of its citizens; 132 of whom were black; 300 of whom were white. Conspiracy to commit murder was the only known crime besides murder for which executions occurred. One black male was executed for that offense. Seven people were executed under the age of 18, all of whom were white males. Only four females were executed in that 210-year period (Espy and Smykla 2004). Since 2002, 40 people have been executed in Ohio; all of whom were male, and 15 of whom were black. One woman and 152 men are currently on Ohio’s death row (Ohio Department of Rehabilitation and Correction 2011).
From the period from 1815 to 2002, there were 124 executions of males for the crime of murder in Oregon; 27 of whom were identified as being nonwhite; 17 of whom were Native American; and five of whom were African American. One person was under the age of 18 at the time of execution, and that was a Hispanic male who was gassed in 1942 (Espy and Smykla 2004) Oregon has not executed anyone since 1997. At the present time (May 2011), there are 36 people on Oregon’s death row (Oregon Department of Corrections 2011); one of whom is a 42 year-old white female who was sentenced to death in February 2011 for torturing and killing her 15 year-old daughter (Associated Press 2011). The racial composition for Oregon’s death row population is as follows: There are 28 white inmates, 4 African Americans, 3 Hispanics, and one Native American (Oregon Department of Corrections 2011).

From the years 1718 to 2002, South Carolina executed 668 people. For crimes other than murder, there were 209 people executed, and 68% were black (n=143). Out of total executions for all crimes, 475 were black, and 183 were white. Race for 10 people is unknown. There were 15 people executed who were under 18 years of age, all of whom were black, and two of whom were female. Two people were executed at 14 years of age for murder. Both 14 year-olds were black; and one was female (Espy and Smykla 2004). Since 2002, there have been 15 executions in South Carolina, two of which were by the electric chair. As of May 2, 2011, there are 54 male inmates waiting on South Carolina’s death row (South Carolina Department of Corrections 2011).

In the United States currently, there are 36 separate death penalty systems in America. This includes 34 individual states as well as the United States government and the U.S. military (Death Penalty Information Center 2011). The last state to abolish
the death penalty is Illinois when its governor, Pat Quinn, signed a bill on March 9, 2011, which officially ended the death penalty as of July 1st. The death sentences of all prisoners on death row at that time (n=15) were commuted to life imprisonment (Wills 2011).

**The Ohio Death Penalty System**

Since becoming a state in 1803, and until new law was written in 1885, Ohio carried out its executions by publicly hanging the convicted criminal in the county in which the crime had been committed. Then, in 1885, new law required that all state executions be carried out at the state prison. The electric chair replaced the gallows in 1897 (Ohio Department of Rehabilitation and Correction 2011).

When the Supreme Court declared various state death penalty statutes as being unconstitutional in 1972, sixty-five Ohio death row inmates had their sentence commuted to life imprisonment. It was not until 1981 that Ohio was able to redraft a death penalty statute that survived higher court review (Ohio Rev. Code 2929.04). Even so, 1999 was the first post-Furman execution, and that occurred because the death row inmate waived all appeals and essentially volunteered to be executed by lethal injection.

Lethal injection became the only execution method in Ohio once the electric chair was eliminated as an option in 2001 (Ohio Department of Rehabilitation and Correction 2011). Ohio was the first state, in 2009, to change its lethal injection method to a one-drug procedure, using Sodium Thiopental. Hospira is, as of May 2011, the only drug manufacturer approved by the Food and Drug Administration. After moving its plant operations to Italy, a country that is against capital punishment, Hospira has
discontinued making Sodium Thiopental.\(^2\) This resulted in Ohio being forced to use an alternative drug, Pentobarbital, in all of its executions. The sole U.S. manufacturer of Pentobarbital, Lundbeck Inc., recently sent a protest letter to the Ohio Department of Rehabilitation and Correction because it also does not want its drug to be used in executions (Johnson 2011).

The American Bar Association (ABA 2007) assessed Ohio’s current death penalty system and “is convinced that there is a need to improve the fairness and accuracy in Ohio’s death penalty system” (p. iii). While the ABA report (2007) stressed that the problems in any death penalty system tended to be interconnected and cumulative, it did identify specific areas in the Ohio death penalty system where reforms were needed:

1.) Procedures to protect the innocent: Despite having exonerated five people who had been convicted of capital crimes, no official policy has been implemented to address key issues involved in wrongly convictions such as ensuring that biological evidence is preserved, requiring national certification of law enforcement agencies as well as crime laboratories, and requiring evidence-based witness identification procedures;

2.) A policy allowing capital defendants’ access to experts and investigators: The ABA assessment team determined that too many capital defendants are being denied access to resources that would provide necessary legal help;

3.) Insufficient qualification standards for defense counsel: The ABA report determined that Ohio falls short of the standards set forth in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases;

\(^2\)“Italy’s Radical Party brought a motion to Parliament, which passed overwhelmingly on Dec. 22, requiring Hospira to ensure that the drug would be used only for medical purposes and would not find its way into prisons.” Hospira did not feel it could make that assurance and, therefore, made the decision to continue manufacturing Sodium Thiopental (Associated Press 2001, p. xx). Retrieved May 18, 2011, at http://www.foxnews.com/us/2011/01/21/drug-maker-discontinues-key-death-penalty-drug/#ixzz1BhqUF1xP
4.) Insufficient compensation for capital defense counsel representing indigent capital defendants and death row inmates: It was determined that the compensation is inadequate to guarantee a vigorous defense.

5.) Inadequate error review: The ABA assessment team determined that Ohio is applying an overly strict waiver standard and was over-utilizing the harmless error standard.

6.) Deficient proportionality review: The Ohio Supreme Court needs to conduct more meaningful comparisons between death-eligible and death-imposed cases.

7.) Need for post-conviction discovery provisions: While capital defendants are required to allege all available grounds for seeking relief from a death sentence, they are being denied access to discovery materials and resources.

8.) Racial disparities in administering the death penalty: Even though the Ohio Commission on Racial Fairness (1999) has explicitly stated that a “perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black” (p. 37), the State of Ohio has not taken any action to address this issue.

9.) Too many capital defendants and death row inmates suffer severe mental disability.

The ABA assessment team enumerated 14 specific reforms and concluded:

“[T]he State of Ohio should impose a temporary suspension of executions until such time as the State is able to appropriately address the issues and recommendations through this Report, and in particular the Executive Summary” (p. vii).

Ohio Supreme Court Justice Pfeifer (2011), who was one of the original drafters of the Ohio death penalty statute, has now publicly declared himself as being against capital punishment. He was reelected to the Ohio Supreme Court in November; and at his swearing-in ceremony on January 19, 2011, he stated that the death penalty was not being administered as the statute intended; and, for that reason, life without the possibility of parole should be the ultimate punishment.
Ohio consists of 88 counties; in each of those counties there is an elected prosecutor (Ohio Prosecuting Attorneys Association 2011). It is the Ohio elected prosecutor who decides whether to seek a death penalty indictment in a case that fits within the parameters of the statute. To qualify to be indicted for a capital offense, the defendant must have been at least 18 years of age at the time of the offense, and the offense must fit within the statute’s definition of an aggravated murder. In addition, the capital indictment must allege at least one of the aggravating circumstances or death specifications that are set forth in Revised Code 2929.04(A)(1) – (A)(10).

Aggravated murder, as defined by R.C. 2903.01, means that the murder was committed in one of the following ways: (1.) “Purposely, and with prior calculation and design, causing the death of another or the unlawful termination of another’s pregnancy; (2.) purposely causing the death of another or the unlawful termination of another’s pregnancy, while committing, attempting to commit, or fleeing after committing or attempting to commit, kidnapping, rape, arson, robbery, burglary, or escape; (3.) Purposely causing the death of anyone under the age of 13; (4.) purposely causing the death of another while under detention; or (5.) purposely causing the death of a law enforcement officer when the offender knows or has reason to know he/she is a law enforcement offender, and the officer was engaged in his/her duties or it was the defendant’s specific intention to kill a law enforcement officer” (DeWine 2011: 4).

Studies have shown that there is wide variation within Ohio on capital case charging decisions (Shank 2002). In 2005, there was a total of 73 capital indictments filed in 27 counties, and 37% of those indictments were filed in Cuyahoga County. No other county filed more than five (Office of the Ohio Public Defender 2011). Time and
money factor in because capital trials cost more than noncapital trials and require additional time at each stage of the proceeding, from initial jury selection to final sentencing, and some counties are less able to bear the additional financial burden (Simon 2002). Certain prosecutors have publicly admitted to seeking capital indictments because it provides leverage in helping to secure pleas from defendants who are willing to forgo their right to a trial in exchange for getting the threat of the death penalty removed (Shank 2002). In Ohio, when a capital defendant pleads guilty, a three-judge panel determines the sentencing outcome (Death Penalty Information Center 2011).

The majority of defendants charged with capital crimes are indigent (Freedman 2003). In Ohio, two defense lawyers are appointed to represent each indigent defendant for death penalty trials (Ohio Rules of Court 2011, Rule 20), and – similar to the majority of the states with death penalty statutes – the trial is bifurcated. Stage one is the guilt or innocence phase, and stage two is the penalty phase (Ohio Rev. Code Ann. 2929.03(C)(2)(b). The capital defendant has the right to a trial by jury in both phases. If the defendant waives that right, however, a bench trial comprised of a three-judge panel will decide guilt and sentence.

Pursuant to Rule 20, defense lawyers must be certified by a committee appointed by the Ohio Supreme Court before they can appear on capital cases. The lead attorney, or the First Chair, must: be admitted to practice in the State of Ohio; have at least five years of civil, criminal, or appellate experience; have had some experience with prior felony trials; and the co-counsel must also similarly qualify, but the Second Chair may qualify with considerably less experience (Rule 20.01). Both lead and co-counsel must undergo at least 12 hours of committee-approved training every two years.
(Rule 20.04). If a defendant is sentenced to death, he\textsuperscript{3} has the opportunity to directly appeal his case to the Ohio Supreme Court. At that point, the indigent capital defendant would utilize the services of the Office of the State Public Defender as opposed to the county attorneys that were appointed to represent him in the lower level court proceedings.

The public defender system in Ohio was established in 1976 to oversee indigent defense statewide and to assist counties obligated to provide counsel for impoverished defendants. “Arguably, from a fiscal perspective, the Public Defender's most significant role is as administrator of the subsidy program that partially reimburses counties for indigent defense expenditures related to the operation of local public defender offices or the use of appointed counsel” (Rogers 2007: 657). Counties, however, bear the brunt of the majority of those costs, which may help to explain why there is a variety of county indigent defense systems across Ohio. Most counties use the Court-Appointed Counsel System (45%); the second most popular system is the County Public Defender system (32%); then 13\% of the counties contract with the Office of the State Public Defender; and the remaining 10\% of counties contract with local non-profit corporations (OPD 2010). Demand for public defender services is driven by the socio-economic situation of the individual defendants as well as by arrest rates, but attorney representation is a constitutional requirement regardless of state and local budgetary woes. The recent economic downturn has left all of these systems in Ohio with little recourse except to cut back staff and increase the remaining attorneys’ workloads, which results in less time spent on each individual case. It has been demonstrated that a death penalty case

\textsuperscript{3} For readability (and because the vast majority of capital defendants are male), the male pronoun will be used throughout this manuscript.
requires the defense to put in at least 1,200 hours in preparation time, even if the case pleads out (Spencer 1998). Most defense attorneys, and especially public defenders or court-appointees, cannot spare that amount of time on one case. Research has found a negative correlation between time spent on case preparation and death penalty conviction, and studies have also found an inverse relationship between money spent and sentencing outcome (Gould and Greenman 2010).

Capital judge assignment In Ohio is typically done randomly. In most counties, once a particular judge gets randomly assigned to a capital case, he or she will then be removed from that capital assignment pool, and that continues until all judges have been assigned to preside over a capital case. Then, at the point when all judges have been so assigned, the process begins anew (Local Rules 2011).

The Oregon Death Penalty System

Oregonians have been inconsistent throughout history in supporting the death penalty. Capital punishment was twice abolished by popular vote. No provision for the death penalty was included in Oregon’s original state constitution (Oregon Department of Corrections 2011). The first death penalty statute was enacted in 1864 (Deady and Lane 1874). Public hangings were under the authority of the county sheriffs until 1903 when the legislature required that all executions take place at the state penitentiary. In 1914, the death penalty was repealed by a slight majority of state voters. Six years later, the death penalty was reinstated by a slightly larger voting majority. Forty-four years after that, in 1974, Oregonians again voted to repeal the death penalty but changed its mind in 1978 by voting to allow execution by legal gas. The revised statutes, ORS 163.116, called for the capital sentence to be determined by the presiding trial judge, and that was struck down by the Oregon Supreme Court in 1981 as being a denial of
the capital defendant’s right to a jury trial (State v. Quinn, 290 Or. 383). While capital indictments are increasing being sought, most convicted defendants end up receiving life imprisonment. Out of 795 death-eligible murder cases in Oregon, only 60 resulted in death sentences (Zaitz 2011).

Oregon’s death penalty statute is a modification of Texas’ death penalty scheme, commonly referred to as a directed question scheme (Public Defense Services Commission 2008). The death penalty is a potential punishment for all aggravated murders, and the statute includes 33 different factors that can elevate any murder to a death-eligible aggravated murder. For that reason, the statute has been criticized as being too broad in that it does not reserve the death penalty for the worst of the worst (Public Defense Services Commission 2008). After the jury finds that the capital defendant is guilty of aggravated murder, it is given a verdict form which contains four questions, three of which must pass the beyond a reasonable doubt threshold. The jury is instructed that it may consider any mitigating factors in deciding how to answer. The four questions are as follows and must be answered affirmatively by every juror in order for the death penalty to be imposed: 1) whether the murder was committed deliberately, 2) whether a probability of recidivism exists in the defendant, 3) whether the conduct of the defendant was unreasonable in light of any provocation by the victim and, 4) whether the conduct of the defendant warrants a death sentence (Ore R.S.163.150).

Oregon has a district attorney elected to serve 4-year terms in each of its 36 counties. The district attorney decides whether or not to charge aggravated murder; however, unlike other states, the district attorney is not required to file a notice of intent to seek the death penalty. The death penalty is on the table for all aggravated murder
indictments. Oregon prosecutors have viewed this as being a cost-saving mechanism for them because they rationalize that having the death penalty as leverage often results in defendants pleading guilty in exchange for life sentences; therefore, the prosecutor makes a minimum investment for a maximum return. From the perspective of the indigent defense system, which is a system also funded by public taxpayers, this strategy is not a cost savings at all because the defense is constitutionally required to put on a vigorous defense and cannot afford to wait until the last minute to mount it (Public Defense Services Commission 2008).

Approximately 28 aggravated murder indictments are handed down annually in Oregon; and, on average, four proceed to trial. The aggravated murder cases that do proceed to trial are determined by the defendants’ unwillingness to plea rather than by the heinousness of the crime. In 2007, there were 54 aggravated murders pending for the whole state, and 60% of those cases (n=32) originated in three counties: Clackamas, Multnomah, and Washington (Public Defense Services Commission 2008).

Eighty percent of Oregon’s capital cases at the lower court level are defended by private attorneys under contract with the Public Defense Services Commission. Their contract requires an 1800-hour commitment and roughly equates to a $90 per hour rate. The remaining defendants indicted for aggravated murder are represented by court-appointed attorneys who get compensated by the statutorily-set rate of $60 per hour, which is low by national standards. As mentioned, studies have found a direct correlation between defense costs and case outcomes (Public Defense Services Commission 2008). Little research has been done specifically on Oregon’s death penalty. One notable except is Bailey (1979) who set out to determine whether the oft-
cited conclusions of economist Ehrlich (1975) that “an additional execution per year over the period in question may have resulted, on average, in seven to eight fewer murders” (p. 414) would be supported by Oregon’s data. Bailey (1979) found no death penalty deterrent effect in Oregon.

Much of Oregon is made up of rural counties. In those areas, there may only be one judge handling the criminal docket. When the death penalty is sought by the district attorney, that judge must preside over it. In larger urban counties where there are numerous criminal court judges, the local bar often submits a list of recommended judicial candidates, and capital assignments will be made off of that list.

The South Carolina Death Penalty System

The State of South Carolina has executed 282 people since 1912. The youngest person executed by the state was 14 years old. Prior to 1912, each county had execution authority. Currently, death row inmates have the choice between the electric chair and lethal injection. In the pre-Furman period, the death penalty was the prescribed punishment in South Carolina for a number of crimes unless the sworn-in jury affirmatively recommended mercy. After rewriting its statute to meet USSC guidelines set forth in Furman, the death penalty in South Carolina was reinstated in 1985. Since that time, 43 people have been executed (South Carolina Department of Corrections 2011).

South Carolina is divided up into 16 judicial circuits, each of which has a resident judge. There are 46 judges, sometimes called circuit riders, who travel throughout those 16 circuits on a rotating basis. There is also one elected prosecutor, called a solicitor, within each of the circuits. (South Carolina Judicial Department 2011). South Carolina solicitors are unique in that they are given the authority by statute to control the
court docket (S.C. Code of Laws 1-7-330). When a solicitor’s office notices a death penalty, a form must be filed with the South Carolina Judicial Department (the Department of Court Administration), and then it is the South Carolina Chief Justice who makes the decision on which judge will be assigned to that specific death penalty case. Oftentimes, that means the judge has to travel quite a distance away from his own home circuit.

In South Carolina, the death penalty can be sought for aggravated homicides. The statute originally listed seven aggravating circumstances, but at the present time it lists twelve. This expansion has now made every homicide potentially death-eligible. According to Blume (2010), “[t]he statute’s failure to limit the death penalty to only the most extreme and egregious cases returns the decision to the hands of solicitors, judges, and jurors and renders South Carolina’s system susceptible to impermissible inequities among defendants and abuses of discretion by state officials” (p.483). The solicitor has sole discretion on whether or not to file a notice of intent to seek the death penalty in all homicide cases.

Paternoster (1983) studied the death penalty system in South Carolina and found that solicitors were almost 10 times more likely to seek the death penalty when the victim was white and the defendant was black. In a more recent study, Songer and Unah (2006) found that South Carolina solicitors were three times more likely to seek the death penalty when the victim was white rather than black. Both studies also found geographic variation for death penalty decision-making by solicitors. Death penalty seek rates ranged from a low of 1.9% to a high of 14.9% (Songer and Unah 2006). Blume (2010) analyzed aggravated homicides which were committed in Charleston from
2002 to 2007 and found that the solicitor only sought the death penalty in 4.3% of those cases. Similar research was done in Richland County for the years 2000-2008, and the solicitor only sought the death penalty in 3.4% of those aggravated homicides (Blume 2010). In South Carolina, every judicial circuit solicitor’s office has prosecuted capital cases in the post-Furman period. From 1977 to 1999, a total of 8,451 murders were committed in South Carolina where there was an apprehended offender. During that time, 138 death sentences were imposed. That equates to approximately 16 death sentences imposed for every 1,000 homicides (Blume 2002).

Research was conducted on individual judicial circuits in South Carolina. In 2009, all of the elected solicitors in the state of South Carolina were white, as were most of their assistants (Blume, Johnson, Paavola, and Weyble 2010). In the Ninth Judicial Circuit (which includes Charleston and Berkeley Counties) for the period of 1981-1990, the solicitor sought the death penalty in 40% of the cases where the defendant was black and the victim was white, but only sought the death penalty in approximately 3% of the cases where both defendant and victim were black (Blume et al. 2010). In the Eleventh Judicial Circuit (which is comprised of Lexington, Edgefield, McCormick, and Saluda), 10% of aggravated homicides with white victims were prosecuted as capital cases during the years 2000 to 2008; whereas, the solicitor never sought the death penalty during that time period when the death-eligible homicide was committed against a black victim (Blume et al. 2010). Aggravated homicides were also analyzed during the period of 1977 through 1997 in the Seventh Judicial Circuit (Cherokee and Spartanburg Counties), and findings were that, while the death penalty was never
sought for black victim homicides, it was sought for 50% of white victim homicides
(Johnson 2007).

Blume et al. (2010) found that, even in the post-Furman era, panels of all white
juries came back with death sentence verdicts for at least 12 separate capital trials with
black defendants. Research has found that, compared to mixed-race juries, all-white
juries are significantly more likely to impose the death penalty (Bowers, Steiner and
Sandys 2001).

There are also 16 public defenders in each judicial circuit of South Carolina.
However, rather than being elected by popular vote, they are selected by the Board of
Directors of a nonprofit corporation organized by each county’s bar association.
Funding is provided by the state’s Office of Indigent Defense and by the counties served
by the circuit (South Carolina Commission on Indigent Defense 2011). As of 2003, two
defense attorneys must be appointed to represent capital defendants (S.C. Code Ann.
17-27-160).

Until the Office of Indigent Defense Services was created in 1993, capital
defense attorney compensation from the state was almost nonexistent, and court-
appointed defense attorneys had to depend almost exclusively on county funding
(Blume 2010).

United States Constitution and Supreme Court Rulings

In 1972, the Supreme Court, by a five to four decision, ruled that the death penalty
in Furman v. Georgia (408 US 238) and its companion cases\(^4\) were in violation of the
Eighth Amendment’s prohibition against cruel and unusual punishment. The Furman

\(^4\) Jackson v. Georgia and Branch v. Texas.
ruling, in effect, placed executions on hold in the United States until states restructured their statutes to deal with the issue of unguided discretion. Paternoster (1991) summed up the USSC’s plurality position in Furman: “[W]hile the process of having defendants sentenced to death by juries lacking formal guidance is consistent with the Fourteenth Amendment’s requirement of due process, the product, an arbitrary and freakish pattern of death sentencing, is condemned by the Eighth Amendment” (emphasis in original).

Justice Thurgood Marshall concurred in the Furman opinion and wrote in detail on what would later be referred to by scholars as “the Marshall Hypothesis.” The following is one excerpt from his lengthy opinion:

While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, its utility cannot be very great. This is because whether or not a punishment is cruel and unusual depends, not on whether its mere mention “shocks the conscience and sense of justice of the people,” but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable (p. 145)

Justice Marshall proceeded to list some examples of what he deemed would be the most critical information from which informed death penalty opinions would be based, such as the lack of a deterrent effect, the rarity of executions, the low recidivism rate for convicted murderers, and the high cost as compared to life imprisonment. He also mentioned that, while retribution could not be justified as the primary goal of capital punishment, it might be an influencing factor for death penalty support. Of particular relevance to this dissertation research is Marshall’s stated opinion in Furman that “the death penalty wrecks havoc with our entire criminal justice system” (p. 365). It was Justice Marshall’s opinion that people who were fully informed about both the purposes for capital punishment and its liabilities would be non-supportive. Capital case
practitioners, due to their training and experience, would likely be more fully informed about the death penalty than the average citizen.

In *Furman*, the Supreme Court was looking at how unbridled jury discretion contributed to outcome unfairness as compared to the 1971 case of *McGautha v. California* (402 US 183) where it looked at jury discretion in terms of procedural fairness. In the McGautha case, “[t]he court reviewed the instructions given the juries and previous efforts to implement standards and concluded that standards would be of such minimal utility in enhancing procedural fairness that they were not mandated by the requirements of the due process clause” (Lanza-Kaduce, 1982).

With the majority ruling of *Gregg v. Georgia* (428 U.S. 153) in 1976, the constitutionality of the death penalty appeared to be settled law. That, however, was not the unanimous view of the justices. An analysis of rulings regarding the death penalty over time show how there was, and still remains, some division among justices on the Supreme Court regarding both the legality and the morality of the death penalty.

The following amendments are identified as having particular relevance to capital punishment for the reasons stated: Amendment V which contains the due process clause; Amendment VI which gives defendants the right of counsel; Amendment VIII which prescribes against cruel and unusual punishment; Amendment IV which makes it clear that the rights enumerated in the Constitution are not necessarily all-inclusive; Amendment X which gives States, or the people, all power not reserved by the United States as long as there is no prohibition against that exercise of power; Amendment XIV gives all citizens of the United States equal protection and specifically instructs the States to apply all the rights and privileges outlined in the Constitution to the citizenry.
The United States Supreme Court, until the twentieth century, rarely considered the validity of capital punishment except in terms of jurisdictional authority [(US v. Dawson & Baylor 56 U.S. 467 (1854); Jones v. US, 137 U.S. 202 (1890)] and the appropriateness of the execution method [(Wilkerson v. Utah, 99 US 130 (1878); In re Kemmler (136 US 436 (1890)]. Challenging the validity of the death penalty with the Eighth Amendment clause of cruel and unusual punishment occurred in re Wilkerson; however, the court ruled that death by shooting (as opposed to hanging) was not cruel and unusual and was rightfully within the state or territory’s power to decide. In re Kemmler, the petitioner sought relief under the Eighth and Fourteenth Amendments by claiming death by electrocution violated his due process right to be free from cruel and unusual punishment under the United State Constitution (U.S. Const. Amend. VIII and U.S. Const. Amend. XIV). The Court ruled otherwise and affirmed the execution by means of the electric chair.

Cruel and unusual punishment was the underpinning for the Furman decision. Until that ruling, the issue of whether the death penalty, in and of itself, fit the definition of cruel and unusual punishment had not really been explored (Granucci 1969). Berger (1982) cited Justice Berger to conclude that the Constitution framers deliberately excluded the death penalty from the Eighth Amendment’s definition of cruel and unusual punishment and also to demonstrate that the death penalty was generally accepted by American’s colonial society: “When this country was founded…the practice of punishing criminals by death was widespread and by and large acceptable to society (Furman, p. 305). Also, the Fifth Amendment itself makes reference to “capital” crimes, and so the death penalty being an acceptable punishment in the view of the Constitution framers
cannot reasonably be disputed. The dispute has rested on whether the standard for cruel and unusual punishment changes in accordance with societal norms in a progressing society.

Referring to a dynamic government and a progressing society, Justice Frankfurter in a 1957 Supreme Court decision regarding the constitutionality of a death sentence (Louisiana ex rel Francis v. Resweber, Sheriff, et al. 329 U.S. 459), wrote:

Until July 28, 1868, when the Fourteenth Amendment was ratified, the Constitution of the United States left the States free to carry out their own notions of criminal justice, except insofar as they were limited by Article I, § 10 of the Constitution which declares: "No State shall . . . pass any Bill of Attainder, [or] ex post facto Law . . ." [***428] The Fourteenth Amendment placed no specific restraints upon the States in the formulation or the administration of their criminal law. It restricted the freedom of the States generally, so that States thereafter could not "abridge the privileges or immunities of citizens of the United States," or "deprive any person of life, liberty, or property, without due process of law," or "deny to any person within its jurisdiction the equal protection of the laws."

These are broad, inexplicit clauses of the Constitution, unlike specific provisions of the first eight amendments formulated by the Founders to guard against recurrence of well-defined historic grievances. But broad as these clauses are, they are not generalities of empty vagueness. They are circumscribed partly by history and partly by the problems of government, large and dynamic [*467] though they be, with which they are concerned. The "privileges or immunities [**378] of citizens of the United States" concern the dual citizenship under our federal system. The safeguards of "due process of law" and "the equal protection of the laws" summarize the meaning of the struggle for freedom of English-speaking peoples. They run back to Magna Carta but contemplate no less advances in the conceptions of justice and freedom by a progressive society.

A “dynamic government” and a “progressive society” as the context for constitutional interpretation became apparent in subsequent USSC decisions. It also increasingly became a cornerstone for challenging death sentences.

If the standard for cruel and unusual does change over time in accordance with evolving norms, the dispute then becomes 3-fold: (1) who has the authority (and
expertise) to identify the evolved norms; (2) once identified, who has the expertise to establish the new standard; and, finally, (3) once established, who has the authority to enforce that standard.

Attacking the constitutionality of capital punishment originally happened when there was a change from established methods or procedures (Banner 2002). However, because most of the changes involved innovations which resulted in less painful punishment, the death penalty was not found to violate the prescription against cruel and unusual punishment. Eventually the argument focused on disproportionately severe sentences rather than on execution methods.

The watershed case was a noncapital one: United States v. Weems, 217 U. S. 349 (1910). Paul A. Weems, an officer in the Coast Guard who was stationed in the Philippines, was sentenced to hard labor in prison for 15 years and lost all civil rights. Justice McKenna wrote the judgment of the court: “The punishment of fifteen years' imprisonment was a cruel and unusual punishment, and, to the extent of the sentence, the judgment below should be reversed on this ground” (p. 217). Justice McKenna also reintroduced the idea that the U.S. Constitution could be interpreted within the framework of an evolving society by stating:

*Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions* (p. 217).

From that point forward, the USSC continued to view the U.S. Constitution as a living, dynamic document that needed to be understood within the evolving standards over time. In 1947, Justice Frank Murphy was explicit in an unpublished dissent in *Louisiana ex rel. Francis v. Resweber*:
A punishment which is considered fair today may be considered cruel tomorrow. And so we are not dealing with a set of absolutes. Our decision must necessarily spring from the mosaic of our beliefs, our backgrounds and the degree of our faith in the dignity of the human personality (Urofsky, 2003).

How did the Constitutional framers interpret cruel and unusual punishment?

Apparently some were unclear as to its definitive meaning. The delegate from South Carolina, Williams Smith, objected because he considered the clause “nor cruel and unusual punishments” to be indefinite (Gales and Seaton 1789, p. 782). Despite his on-record objection, the majority voted to leave the phrase in, unchanged and unexplained (Heffernan 2005).

Modern morality, in essence, became the standard by which the clause cruel and unusual would come to be defined. In Trop v. Dulles, 356 U. S. 86 (1958), Chief Justice Warren explicitly stated in the majority opinion:

The words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society….The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation (p. 356).

Justice Thomas (1993) revealed his unease with the word moral being inserted in legal opinions. At the same time, he conceded that the death penalty was a moral issue:

Any determination that death is or is not the fitting punishment for a particular crime will necessarily be a moral one, whether made by a jury, a judge, or a legislature. But beware the word ‘moral’ when used in an opinion of this Court. This word is a vessel of nearly infinite capacity -- just as it may allow the sentencer to express benevolence, it may allow him to cloak latent animus. A judgment that some will consider a ‘moral response’ may secretly be based on caprice or even outright prejudice” (Graham v. Collins, 506 U.S. 461, 494).

The above quote by Justice Thomas regarding the utilization of a moral response to justify punishment is key to understanding how extremists on both sides of the death
penalty debate are able to use it to support their positions. In other words, extreme proponents justify a state execution as being a moral necessity (taking a *lex talionis* stance); whereas, extreme opponents use the argument that taking a human life is always morally wrong, regardless of whether it is state-sanctioned or not. Realizing how underlying moral belief systems function as a double-edged sword is necessary to understand how moral beliefs may moderate, or even mediate, the relationship between experiential knowledge and the dependent variables in the underlying study: legitimacy and death penalty support.

**Brief Overview of the Judicial Branch of Government**

The United States Constitution divided its democratic government into three separate and independent branches: (1) executive (2) legislative (3) judicial. The first two branches are institutions which were created to reflect “the will of the majority” (Baar 1999) since they are composed of elected and appointed officials who represent the American people as a whole. A basic component of the United States government is the principle of the *Rule of Law*, which basically means that no one is above the law; and that citizens are to be governed by laws rather than by men (Baar 1999).

The judiciary, the third branch of government, is authorized by the U.S. Constitution to enforce those laws. “A well-functioning judiciary in which judges apply the law in a fair, even, and predictable manner without undue delays or unaffordable costs is part and parcel of the rule of law” (Shihata, 1995: 14, as cited by Baar 1999: 341). All states are obligated to comply with the U.S. Constitution as the *supreme law of the land*, and are given authority – through the Tenth Amendment of the U.S. Constitution, commonly referred to as the *reserve clause* – to enact its own laws as long as those laws are not prohibited by the U.S. Constitution (Smith, Greenblatt and Buntin
The 1803 precedent-setting case of *Marbury v. Madison* (5 US 137), however, gave the judicial branch the power to declare legislation and executive orders void through its judicial review authority. In that way, the United States Supreme Court has made itself the final arbiter of what is and is not legally legitimate in America.

**The Role of the Court**

When we speak of “the court,” we are really referring to the black-robed judge, the neutral arbiter of justice who represents American law. It is considered common knowledge that judges rule within their courtrooms. They have the power to imprison and to penalize. They establish the rules. They have positional power as well as symbolic power with their black robes and gavel (Rainey 2003). They have become cultural icons. No other figure in the criminal justice system has acquired such elevated status or, up until relatively recently, enjoyed such autonomy (Cavender, Gray, McCleary, and Ramsey 1982).

Before 1960, courtrooms across the country were autonomous and operated by the presiding judges without outside interference. It was a simple system; sometimes it worked; sometimes it did not. There was no consistency from courtroom to courtroom, much less from county to county or from state to state, and the only time the practice was questioned was when a miscarriage of justice was nationally publicized (Lightcap 2003).

American society underwent a transition. Drugs became more prevalent; family values changed; and populations exponentially increased. With those changes came higher rates of crime, divorce, and civil litigation as well as a more complex court system (NCSC 2004). Caseloads began to become unmanageable since judges spent
more time in court and had less time to devote to operational management (Henley and Suhr 2004).

The wheels of justice slowed down and, in some places, ground to a halt. Because courts were generally self-funded with the fines and fees they imposed (Henley et al. 2004), the degree of justice received often depended on exactly where the courthouse was located or how overloaded the judge’s caseload was.

“The law must be stable and yet it must not stand still” was a quote by Roscoe Pound (1906), the Harvard Law School Dean credited with first reforming the American court system. When he spoke at an annual meeting of the American Bar Association, he claimed that trial courts in the United States were “inefficient, unresponsive, and archaic” (Henley et al. 2004). His speech was entitled, “The Causes of Popular Dissatisfaction with the Administration of Justice” (Kasparek 2005). Sixty-three years later, Chief Justice Warren Berg also addressed the American Bar Association and reiterated much of the same arguments for modern court reform (Kasparek 2005).

Early court reforms concentrated on the judges: improving the selection process, establishing judicial qualifications, and developing education and training programs. Then the focus changed to organizational reform, which occurred in three stages: (1) consolidating and simplifying jurisdictional structures, (2) developing more coherent and professional administration, and (3) budgetary unification (Henley et al. 2004).

The court reform efforts did not abolish the culture where the judge is deemed the ultimate ruler of the courtroom, nor did it intend to since that culture was deeply ingrained and thought to be essential for maintaining order in society. So, instead of attempting to change a culture which was firmly established and highly resistant to
change (Rainey 2003), the reform strategy was to separate out a judge’s courtroom
decision-making duties from his operational management duties. That was the most
rational choice since that was perceived to be an achievable goal (Rainey 2003).

In the majority of states, the chief judge is still given – at least on paper – the
ultimate authority on decisions outside as well as inside the courtroom. However,
because most states have hired professional court administrators to manage the
operations of the court system, the presiding judge’s authority has increasingly become
more nominal than actual (Kasparek 2005) when it comes to the day-to-day operations.
Such titular authority leaves the court’s dignity intact and allows the operations manager
to be more directly responsible for accountability issues and for establishing and
maintaining performance measures. The addition of a professional court manager
allows “an operational bridge to other components of government” to be built while still
buffering the judicial process (Henley 2004: 30).

The court system is constitutionally empowered to serve the public; its primary
function is to dispense justice. Fairness is a fundamental criterion. Environmental
factors impact and often impede its ability to do so. Population increases, crime rate
levels fluctuate, legislators add new crimes to state statutes (Alschuler 1972), and other
external factors are outside the court’s span of control and yet significantly influence the
input into a court’s extremely open system (Rainey 2003). In order to be effective, each
input (or case) must be processed fairly and efficiently. These two criteria are
somewhat conflicting and can even be contradictory because maximizing fairness may
lead to minimized efficiency (Rainey 2003) and vice versa.
Judicial independence is essential to American government. The principle is that “no judicial decision should be influenced by any factor other than the relevant law and the evidence presented in the case, and that in particular other components of government should not play an inappropriate role in determining judicial outcomes” (Henley et al. 2004:29). That is the reasons that courts were given the authority to govern themselves and why judicial salaries are usually legislatively protected; it is to protect the integrity of the legal system by reducing, as much as possible, the opportunity for financial or political pressure to be applied in order to influence a judge's decision.

Capital cases are unique for a myriad of reasons, but the main reason is because of the potential for a final and irreversible sanction. Also, many capital trials involve a sensationalized crime, and there is a larger expenditure of state and local resources in terms of both time and money. All these cue the assigned judge that the stakes are considerably higher than the typical murder trial. The capital case is sometimes the focus of intensified media and public attention. It is conceivable that the assigned judge may feel that his/her own professional reputation is at risk, which may add considerable stress. There is also the probability of organizational pressure being brought to bear on the judge as a representative of the state judiciary and as a governmental employee. Role theory posits that individual members are influenced by their organization's expectations (Gibson 1983). For judges who are elected, this may also translate into concern for their constituency. Vigorita (2003) has identified court culture and financial concerns as significant influences on judges.
All modern judges have been trained as lawyers before they take on their judicial positions. Lawyers are trained in legal rhetoric in order to construct effective and persuasive legal arguments. Judges are intimately aware of the posturing and social constructing that oftentimes take place in courtroom proceedings and, therefore, may tend to be extremely skeptical of claims of innocence or presentations of mitigation. The transition from lawyer to judge requires switching from an advocacy position to that of being an impartial referee. Making that switch requires the adoption of new roles and attitudes to adequately respond to positional and organizational demands (Alpert, Atkins and Ziller 1979).

American judges are placed on the bench in three different ways – appointment, election, or through a merit-based policy – depending on court level or geographic location (Alpert et al. 1979). Originally, the majority of judges were appointed, but currently the preferred method is by popular vote. In that way, in theory, judges are held more accountable to the public (Adamany and Dubois 1976).

Common pleas is the jurisdictional court in Ohio that handles capital cases (Ohio Bar Association 2008), and there is one common pleas court in each Ohio county (n=88). Common pleas court judges are elected on a nonpartisan ballot to serve for 6-year terms (Ohio Rev. Code 2301.01). In order to qualify, judicial candidates must have been in the practice of law for six years. In 2004, there were 645,000 new cases filed in common pleas with 380 judges assigned to handle them (Ohio Bar Association, 2008).

In Oregon, it is the circuit court which is the trial court of general jurisdiction that handles capital cases. There is one circuit court within each of the state’s 36 counties with 173 judges (Oregon Judicial Department 2011). Oregon circuit court judges are,
similar to Ohio, elected by nonpartisan ballot for terms of six years. Qualifications for circuit court judgeships are: active membership in the Oregon State Bar, 3-years state residence, and 1-year judicial district residence (Oregon State Bar 2011). In 2009, there were 599,605 new cases filed; and of that total, 346,148 were criminal case filings (Oregon Judicial Department).

In South Carolina, it is the Court of General Sessions, a division within each of the state’s 16 circuit courts, which hears capital cases. Circuit court judges in South Carolina are elected by the General Assembly instead of directly by the voters. They serve for staggered terms of six years (South Carolina Judicial Department 2011). Judicial candidates are screened by a 10-member Judicial Merit Selection Commission. Five of those members are appointed by the Speaker of the House of Representatives; three members are appointed by the Chairman of the Senate Judiciary Committee, and two members are appointed by the President Pro Tempore of the Senate (SC ST SEC 2-19-10). From the period of time from July 1, 2009, through June 30, 2010, there were 119,903 new criminal case filings throughout the state (South Carolina Judicial Department 2011).

**The Role of Prosecutors**

The prosecutor role in America has evolved over time from originally being merely a figurehead to becoming arguably the most powerful member of the courtroom elite (Worrall 2008). Prosecutors have a dual role in that they are the designated representatives of their political state and are also considered to be “the people’s attorney” (Nugent-Borakove 2008, p. 91). They have a four-fold mission: (1.) to represent the state in criminal matters, (2.) to administer justice, (3.) to convict guilty
defendants, and (4.) to protect society from crime (Nugent-Borakove 2008; Anderson 2001; Heymann and Petrie 2001).

Prosecutors play a pivotal role in the criminal justice process because they decide whether criminal charges will even be filed; and, once that decision is made, they decide what those charges will be. The Fifth Amendment does state that “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” While the USSC has ruled that this part of the Fifth Amendment is not binding on the states, most jurisdictions still require the prosecutor to convene a grand jury in order to procure a capital indictment. However, since the 1970’s much has been written about grand juries merely following the prosecutor’s lead since the prosecutor is the one who decides what cases will be brought before the grand jury, has subpoena power over all witnesses and documents, and serves as the grand jury advisor (Vaira 1984). Despite almost total charging discretion being placed in their hands, relatively little research has been done on prosecutorial decision-making (Worrall 2008). It has been speculated that this lack of interest is due to a misunderstanding about the prosecutor’s role; that perhaps they are being perceived merely as case processors (Worrall 2008). Nothing can be further from the truth. The prosecutor, by being given charging discretion, is a powerful player in the criminal court system.

It was as early as 1940 when prosecutorial power was recognized by Supreme Court Justice Robert Jackson (and former Attorney General) who stated, “The prosecutor has more control over life, liberty, and reputation than any other person in America” (p. 3). Since that time, prosecutorial power has increased. Sentencing
guidelines and “get tough” legislation in the past few decades have essentially removed power from judges and passed it over to prosecutors (Engen 2008). One concern with this shift in power is that judicial decision-making always has to be placed on an official court record which is subject to being reviewed by a higher court. Prosecutorial decisions, however, are made behind closed doors, and are not appealable.

There is an internal check on prosecutors because, at least in-office and for public record, their performance is measured by conviction rates5. This would usually ensure that the weakest cases get screened out early on in the process. However, research has shown that the standard of evidentiary proof varies in relation to the plea-trial ratio (Boland and Forst 1985; Wright and Miller 2002). Some prosecuting offices demand higher levels of negotiating skills from their attorneys so that weaker cases – instead of being dropped – get disposed of in plea bargaining (Forst 2008).

Prosecutors are elected by popular vote and “straddle a line that separates courts from politics” (Worrall 2008, p. 4). The general public, when reading newspaper accounts of how aggressive their local prosecutor is being with charging decisions, is usually assured that their elected official is properly doing his/her job.

When it comes to capital punishment, prosecutors are the ones who start the execution process. As Lifton and Mitchell (2000) state, “Their significance can hardly be overstated, for the machinery cannot grind forward at all without the original decision by a district attorney to seek a death penalty” (p. 107). There is no nationwide policy in place to oversee state prosecutors’ death penalty charging decision-making (DeMay 1998). Higher courts have been reluctant to interfere as long as constitutional barriers

5 Wright and Miller (2002) argue that the more accurate measurement would be the “as charged conviction rate” because that would uncover the concessions made in plea bargains (p. 35).
are not breached (DeMay 1998), and most states’ death penalty statutes have been broadly written to encompass a wide spectrum of murders. The USSC ruled in McCleskey v. Kemp that, even to draw an inference of prosecutorial abuse of discretion would require “exceptionally clear proof” (481 US 279 1987, p. 297).

Lifton and Mitchell (2000) classify prosecutors into three groups: (1) zealot prosecutors, who see themselves as dedicated warriors in the fight against crime; (2) uncertain prosecutors, who may start out having moral reservations against capital punishment but who eventually become converted into being death penalty supporters; and (3) reluctant prosecutors, who never get over feeling conflicted between their professional job responsibilities and their personal beliefs.

Sievert (1999) described going through a conversion process after he became employed as an assistant district attorney. At his hiring interview at a district attorney’s office in Texas, he was asked how he felt about the death penalty, and he answered what was true for him at that time: that he was not excited about it because it had not been shown to be a deterrent. After being assigned to murder cases and reviewing crime photos and autopsy reports, a change in attitude took place. He began to feel empowered with rage at the “particular class of criminals” that were responsible for such carnage, and he started thinking of the defendants as “domestic terrorists who posed a greater threat to security in America from the inside than any foreign country from the outside” (Sievert 1999: 105). He saw himself as being society’s protector.

He, presumably like most prosecutors, took his oath of office and statutory duty very seriously. He reviewed all the facts in every murder case brought in to make sure that, at least in his mind, there was no doubt of the defendant’s guilt. Two standards
went into his analysis: (1.) the strength of the evidence and (2) whether the case *cried out* for the death penalty.

When discussing whether racial prejudice ever entered into prosecutorial decision-making, Sievert (1999) admitted, “It would be inaccurate to say there was absolutely no animosity toward black defendants. But although this was many years ago, in our discussions this attitude was rarely, if ever, supported by thinking and arguments that echoed the prejudice and bigotry associated with the Old South. Rather, it always came across as an outgrowth of the fact that these attorneys considered themselves crime fighters and statistics, reinforced by daily observations at docket call, established that a very large percentage of the violent crime, for whatever reason, was being committed by members of the county’s minority population. A few prosecutors were thus angry at that segment of the population and I believe they would have had similar feelings whether the defendants were mostly Irish, Italian, Polish, Arab, or African-Americans” (p. 108).

Sievert identified how heuristic reasoning can factor into jury selection due to prevailing beliefs – oftentimes derived from research findings – that certain groups, whether they be occupational or racial, are less prone to convict, more oriented toward a rehabilitative crime approach, less trusting of police officers, or more sympathetic to defendants. He also claimed that the closing argument in a capital case “was the ultimate highlight of a state prosecutor’s career” (p. 113), and that the Texas District Attorney’s Offices kept standard arguments on hand that had been proven to be very persuasive to a jury on bringing back a verdict for death, many of which made reference to God and the Bible.
Regarding juries, in capital cases all jurors are death-qualified. Any prospective jurors who claim to be so opposed to capital punishment that they would absolutely refuse to follow the judge’s instructions on the law are eliminated from serving on a capital case. This is one reason why jury selection is a lengthier procedure in death penalty trials.⁶

It is often the prosecutor’s anger and outrage toward the defendant that will empower his/her argument with complete moral conviction. Prosecutors, according to Sievert (1999) become “the avenging voice of the community, the one speaking representative of a just society. At the height of your argument you felt this emanate from your very being as if you were somehow spiritually connected with the county’s 600,000 people and you were energetically, persuasively, thunderously speaking their words. You were an instrument. I cannot overstate this feeling, yet words cannot adequately reflect it. It is a very powerful moment. The jury could not help but get the message” (p. 114).

From a prosecutor’s perspective, each defendant has already been determined to be guilty by the screening-out process in his/her office. In a homicide, the prosecutor evaluates the evidence to determine if that particular case, according to the law, fits the standard for which the death penalty is an appropriate punishment. If and when it does, prosecutors are assured that they are merely performing their professional duty in pursuing a death sentence (Little 2004).

⁶ While there is a large body of literature and a number of Supreme Court rulings on the death-qualification of jurors in capital proceedings, except for opinions elicited from respondents in the survey and interviews reported herein, that issue is beyond the scope of this research. This dissertation focuses specifically on the criminal courtroom workgroup; i.e., the judges, prosecutors, and defense attorneys.
Few empirical studies have been done on prosecutors, however, to test their views on death penalty administration from both legal and moral bases. “Surprisingly little is known about how capital punishment laws and the responsibility for administering them have affected prosecutors personally or have altered their work environments. Nor has research explored the impact of death penalty legislation on the morale and job commitment of ADAs or their general opinions about the capital sanction” (Callahan, Acker and Cerulli 2000:18).

A survey was conducted of prosecuting attorneys in Wisconsin, which is a state that abolished the death penalty in 1853, and findings were that 49% of respondents believed capital punishment to be morally wrong (State Bar of Wisconsin 1995, as cited by Mann 1996). Whitehead (1998) surveyed chief prosecuting attorneys (as well as legislators and chief public defenders) in Tennessee, a state with a death penalty statute, and found that 91% of respondents supported the death penalty, but 17% had moral doubts, and 26% opined that the death penalty was being arbitrarily applied. Numerous studies have been conducted, however, on the prosecutorial decision-making process in noncapital cases (Benson, Maakestad, Cullen, and Geis 1988; Hollett, Lochner, Nelson, Esmith, and Wolfe 2002; Petersilia 1973); on their attitudes regarding legal sanctioning (Johnson, Haugen, Maness, and Ross 1989), and on new law implementation (Miethe and Moore 1988).

Callahan, Acker and Cerulli (2000) surveyed 191 assistant district attorneys in New York after the death penalty was reinstated to determine those ADAs’ experiences and opinions. Overall, 72% of the ADAs expressed being supportive of the death penalty for first-degree murder. There was a gender difference on whether or not,
within the context of personal, moral, and ideological beliefs, respondents viewed capital cases as being “more troubling to prosecute” (p. 21). Females were more likely to admit feeling increased uneasiness at the prospect of prosecuting a capital case and were more likely to prefer an alternative sanction. The tendency was for all respondents to overestimate the number of their colleagues who supported capital punishment; also, approximately 20% felt that opposition to the death penalty could have negative implications on career advancement opportunities (Callahan, Acker and Cerulli 2000).

Parker and Coate (2008) reviewed newspaper accounts of capital-case reversals for the period of time from 1981 through 2005 and analyzed the contents for capital trial attorneys’ reactions. The objective was to compare the 197 prosecutors’ reactions they found in newspaper archives with the 145 defense attorneys’ reactions. Findings were that the majority of prosecutors criticized the upper court’s rulings, and those reactions did not vary with case characteristics. Parker and Coate (2008) concluded that prosecutors operated under a completely different paradigm from that of defense attorneys in that the prosecutors’ organizational story is being written from a crime control model perspective; whereas, defense attorneys base their story on a due process paradigm, which offers them a narrative of innocence.7

The Role of Defense Attorneys

When the state seeks to take away a citizen’s life or liberty because of an alleged crime committed, the accused has the constitutional right, according to Amendment VI, 7 Herbert Packer (1964) identified the Crime Control Model and the Due Process Model as two major paradigms for the criminal process. The Crime Control Model prioritizes public safety and is outcome-oriented in the sense that the means are justified by its goal-outcome; whereas, the Due Process Model prioritizes individual rights and assumes if the process is respecting of individual rights, then the ends will automatically be just.
to have assistance of counsel. For many years, this amendment was interpreted to mean that the accused had the right to hire counsel to assist him in his defense. If the accused could not afford counsel, they were forced to represent themselves. Then the United States Supreme Court ruled in 1932 (Powell v. Alabama, 287 U.S. 45) that in federal capital cases indigent defendants who were incapable of adequately defending themselves due to “ignorance, feeble-mindedness, illiteracy or the like” (p. 71) must be assigned counsel by the court. This right was extended to capital cases filed in state courts in 1963 (Hamilton v. Alabama, 368 U.S. 52), and then extended further to cover noncapital felony cases in both federal and state courts with the 1963 landmark decision of Gideon v. Wainwright (372 U.S. 335). Problems then arose because of the inconsistent quality of the representation provided across the county. As early as 1973, formalized standards were compiled by the U.S. Justice Department to assist various indigent defense providers across the country so that they would better understand what a quality defense entailed. It was not until Strickland v. Washington (466 U.S. 668 (1984), however, that the U.S. Supreme Court ruled that assistance of counsel had to be effective assistance of counsel, which then mandated a representation standard.

While the right to effective counsel, even for indigents, is well established law and recognized throughout the country, its application is affected by regional differences. The Justice Department reported in 1999: “Although our Constitution guarantees defendants the right to a lawyer in criminal cases, the implementation of this constitutional right is applied unevenly across the nation” (p. v) Findings were that standards were often not being met, workloads were too high, funding was too low; that contracts were frequently being awarded solely because of price, and quality was being
ignored. Janet Reno, Attorney General at the times, stated: “the lack of competent, vigorous legal representation for indigent defendants calls into question the legitimacy of criminal convictions and the integrity of the criminal justice system as a whole” (p. ix).

The usual standards for assessing competent counsel do not apply to the capital defender (Goodpaster 1983). Capital trials, because they are comprised of two phases and because of the potential outcome, are fundamentally different than noncapital murder trials. For that reason, they require capital defense attorneys to possess different advocacy skills. Defense attorneys with proven records for successfully litigating complex, noncapital criminal cases may be incompetent to represent a capital defendant (Goodpaster 1983). The American Bar Association (2003) implemented performance guidelines specifically for defense counsel in death penalty cases, and in those guidelines, they cite Vick (1995):

Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law (p. 357-358).

The ABA guidelines require the capital defender to integrate within phase 1 their projected strategy for phase 2. In other words, capital defenders must not only prepare their case fully for the first phase (innocence/guilt) as they would in a noncapital murder case by independently investigating every elements of the crime as charged by the state and by investigating potential affirmative defenses, but they must also ensure that any strategy they utilize during that phase does not have the potential to negatively
influence the outcome in the second phase (the penalty phase) if the jury rejects their defense and finds the defendant guilty in phase 1. It is a daunting task.

Insufficient funding, cited as a major factor for inadequate indigent defense systems, is even more of a concern when looking at capital case representation. The vast majority of capital defendants are indigent; and a capital case is many times more costly to defend than would be its noncapital counterpart. It is widely recognized that defender offices are inadequately funded (American Bar Association 2003). A second major factor cited by the U.S. Justice Department (1999) for ineffective indigent defense systems nationwide is the overly heavy workloads. Capital public defenders do not have the luxury of ignoring all their noncapital cases to focus solely on an ongoing death penalty case. Private defense counsel who are assigned or appointed to capital cases usually find the trial preparation work to be overwhelming, and yet the net compensation received is usually insufficient to cover both their time and their office overhead. They are, therefore, oftentimes forced to use evenings and weekends to work on other cases so that they may still have a private practice in operation when the capital case finally ends.

When researching articles about capital defense attorneys in the literature, one finds articles entitled “Bad Lawyering: How Defense Attorneys Help Convict the Innocent” (Berry, 2003); “Fatal Defense: Trial and error in the Nation's Death Belt (Coyle and Strasser 1990); and “Counsel for the Poor: The Death Sentence Not for the Worst Crime but For the Worst Lawyer” (Bright 1993). All blame for wrongful (or unwrongful) convictions seems to be placed on the capital defenders, and it is possible that they did the best they could under very trying circumstances.
Clarence Darrow is known, according to Bohm (2003), as being “the most successful capital punishment defense attorney in American history” (p. 180) because he tried over 100 capital cases without having the death penalty imposed on any client. According to Gross (1998b), many capital defenders may be more skilled than noncapital criminal attorneys because of their increased experience in both capital and noncapital litigation. While that may be true, they rarely have the resources to match that skill (Bohm 2007), and that may handicap them in capital proceedings.
CHAPTER 3
THEORETICAL FRAMEWORK

Legitimacy of the Death Penalty and the Marshall Hypothesis

Max Weber conceptualized legitimacy as citizens’ belief in the validity or fairness of a government (Grafstein 1981). He also identified three ways by which legitimacy could be granted: (1) on rational grounds; (2) on traditional grounds; (3) on charismatic grounds (Wolin 1981). The law is widely recognized as being both rational (Garth and Sterling 1998) and traditional (Blumenthal 2002). Weber (1978) elaborated on when a social order, such as law, could lose its legitimacy:

To be sure, when evasion or contravention of the generally understood meaning of an order has become the rule, the order can be said to be ‘valid’ only in a limited degree and, in the extreme case, not at all (p. 32).

According to Weber (1978), law gains its legitimacy through rational-legal authority. The rule of law on which American jurisprudence is based is a prime example of how legitimacy is based on the “belief in the legality of enacted rules and the right of those elevated to authority under such rules” (p. 215).

The United States Constitution is explicit that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws” (Amendment XIV 1868). Because a guilty verdict in a capital case means loss of life or liberty, due process is paramount in such proceedings. If there is even the slightest possibility that frontline capital workers believe that such a fundamental right is being undermined, that would – at least according to Weber (1978) – bring into question the validity of state executions among those workers. By extension of the Marshall
Hypothesis\(^1\) then, if such belief or knowledge became more widely spread beyond those workers, the same questioning of the legitimacy of state executions would be done by the public.

Marshall used Weberian-based formal reasoning to underpin his *Furman* opinion. He framed the legitimacy of the death penalty in a purely rational context and concurred that the validity of the death penalty should not be based on the personal values of any of the justices but rather on legitimate societal goals, such as deterrence. Retribution, for him, was just another word for vengeance, which – from his interpretation of the Eighth Amendment and a review of its legal history – could never be the sole goal for capital punishment (Lanza-Kaduce 1982). The Marshall Hypothesis is based, in part, on his words in *Furman* on page 163: “Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice.” Surveying capital case workers is a chance to gather more knowledge on the death penalty than what may presently exist. The underlying research tests the Marshall Hypothesis on non-average citizens,

\(^1\) While Justice Marshall’s opinion in the *Furman* case dealt specifically with the Eighth Amendment issue of death being a cruel and unusual punishment, which is a moral outcome issue (and a substantive justice concern rather than a procedural justice concern), his prediction that death penalty support would be altered by knowledge of the death penalty can conceivably be extended to link both procedural and substantive law into the overall legitimacy question, especially when considering the fact that Justice Marshall supported his opinion in *Furman* by referencing wrongful convictions. When analyses of death row exonerations were done, the following “processes” were identified as being recurring causes for wrongful convictions (outcomes): flawed science, faulty eyewitness testimony, jailhouse informants, coerced confessions, prosecutorial misconduct, and ineffective assistance of counsel (Scheck, Neufeld, and Dwyer 2000). In the underlying research, respondents were asked their opinions on outcome fairness and were also asked to assess procedural fairness based on their professional experience. Frontline capital case workers are the ones with firsthand knowledge of the processes which lead to capital sentencing outcomes. The argument herein is that process and outcome cannot be separated out from each other when looking at death penalty legitimacy. Whether or not the death penalty is considered by frontline workers as an appropriate punishment may depend on their assessment about whether or not capital defendants are receiving a fair trial procedurally-wise.
criminal case workers (both capital and non-capital), who have gained knowledge of the
death penalty through their own experience.

Habermas (1979) defined a legitimation crisis as occurring from *internal contradictions*, such as when the *legitimacy of the law is threatened or when legal practitioners perceive that its outward or explicit claims are not, in actuality, being put into practice*. This weakens the system and places stress on the system workers (and the public) who believed in the rhetoric and might feel betrayed by the reality. Miller (2006) claims, “Quite simply, the American system of capital punishment is facing a legitimacy crisis in the wake of high profile exonerations. The most common causes of wrongful convictions are faulty eyewitness identification, flawed science, false confessions, misuse of informants, prosecutorial misconduct, and ineffective assistance of counsel (Scheck, Neufeld, and Dwyer 2000). While researchers have begun to examine the issue of wrongful convictions, the situation has yet to be examined as a catalyst for a legitimacy crisis” (p. 3).

Legitimacy is a complex concept (Hyde 1983) that is based on a variety of factors: political culture (Elazar [1972] 1984), legal and organization culture (Friedrichs [1979] 2006), knowledge and perception (Tyler 2005). Conflict theories identify and elaborate on the tensions that have historically existed, and continue to exist, between government control/public safety and individual rights/personal security within America. In this research, the argument is made that the concepts and issues related to legitimacy of the law and conflict theory are closely connected. Theoretical perspectives are placed in broader categories such as (1.) Political Culture Theory (Elazar [1972] 1984) and Organization Theories (Eisenstein and Jacob 1977; Feeley
1973; Jacob [1983a] 1983b); (2.) Criminal Justice System Theories, which include
Conflict Theories (Chambliss 1969; Quinney 1964; Vold 1958) and the Due Process
Model (Packer [1968] 1993); (3.) and Social Constructionism (Berger and Luckmann
1966) which places the death penalty in a symbolic interactionist context.

This dissertation compares the death penalty opinions of criminal law practitioners
across states (Ohio, Oregon, and South Carolina) as well as political affiliations
(Republican, Democrat, Independent, or Other) and also across organizational roles
(judge, prosecutor, and defender) to explore whether there is a political culture effect or
an organizational role effect that may confound any relationship between DP support
and capital case procedural knowledge. Criminal courts separate participants into two
major groups: (1.) the courtroom workgroup, and (2.) the defendants. Group One is
comprised of the law enforcers/administrators which includes judges, prosecutors, and
defense attorneys. Group Two is comprised of those people for whom the law is being
enforced. All members within Group One are system insiders and, as such, are familiar
with the laws regulating criminal court proceedings; i.e., due process. Group Two, on
the other hand, is made up of people who are system outsiders and who, for the most
part, are dependent on Group One to ensure that court proceedings remain rule-bound.
This grouping dichotomy renders Conflict Theory a relevant foundation from which to
frame the opinions of Group One. Legal terms such as justice, fairness, and equality
are open to interpretation, and such interpretation is subjective in that the definition of
those terms may be socially constructed and, therefore, may vary depending on
intragroup role or even on underlying personal belief system.
Justice Thurgood Marshall, who was unique among justices because of his prior experience with capital case proceedings (Uelman 1994), expressed the view that the American public is (a) ignorant about how the death penalty operates and (b) is unaware of all the underlying issues that fuel its operation; and he concluded that, if more fully aware of both (a) and (b), the public would no longer support capital punishment; the implication being that the public, once it acquired more knowledge, would have legitimacy-related concerns about the death penalty.

The Marshall Hypothesis requires a compilation and integration of all the aforementioned theories (i.e., Theory of Legitimacy, Political Culture Theory, Organization Theory, Conflict Theory, Social Constructionism) because knowledge is not acquired in a vacuum. People process new information through filters established over a lifetime. While there is a specialized segment of the public that is more fully aware of both how the death penalty actually operates and all of the issues underlying the death penalty, namely those directly involved in administering justice in capital cases, this dissertation does not assume that their death penalty opinions can be calculated from a simplistic formula. Instead, the dissertation proposes, as the following conceptual model demonstrates (Figure 3-1), that the pathway leading to DP opinion is a complex one.
Figure 3-1. Conceptual model for the underlying research

All respondents are from three states that currently have a death penalty system in place where capital proceedings are held on a fairly regular basis. Each has a common educational background because all have graduated from law school and all have successfully passed a state bar examination. After becoming active bar members, there was divergence into different roles. For example, one or more attorneys may have attained employment at a state attorney’s office immediately upon completion of law school and continually remained in that position; other attorneys may have been employed at private firms or at public defender officers. Still others may have worked as prosecutors, as defense attorneys, and as judges. As the findings from the underlying study indicate, some respondents have experience across roles. Yet, most relevant is that some of the sample also share the common bond of having appeared on one or more death penalty proceeding. It is primarily that experience that is the focus of this research because it is proposed that such experience forms the basis for
respondents’ knowledge of death penalty proceedings; and this dissertation specifically looks at the effect that such experiential knowledge may have on respondents’ assessment of fairness in capital case proceedings (legitimacy), and how that legitimacy perception, which is to some degree based on experiential knowledge and underlying belief systems, then gets translated into DP support/nonsupport (Marshall Hypothesis). The criminal case workers without capital experience are the comparison group; however, it should be recognized that even that group has more knowledge about capital case proceedings than the general public, which is the group that is typically sampled to test the Marshall Hypothesis.

**Symbolic Interactionism: Reframing State Killings**

Zimring (2003) argues a social constructionist theme for why the death penalty has been resurrected in the United States at the same time that it has been abandoned elsewhere in the modern world. Globally, the death penalty has been viewed as the ultimate infringement of the state on individual human rights; whereas, in the United States the death penalty has been symbolically transformed so that, instead of human rights, it is now being aligned more narrowly with victim rights. Harsher punishments signal stronger victim support. By reframing the fundamental issues, the state becomes the savior instead of the one reneging on the social contract (where its obligation or responsibility is public safety). The following statement from former Attorney General Janet Reno illustrates how the social contract has been renegotiated:

*I draw most of my strength from victims for they represent America to me: people who will not be put down, people who will not be defeated, people who will rise again and stand again for what is right…you are my heroes and heroines. You are but little lower than the angels* (Ogletree 2003:1058).
In its original form, the government would be the party that failed to fulfill its contractual obligation when a crime occurred. In the new symbolic reconstruction, the government is on the sidelines pointing its finger at a lone transgressor and creating a craving for retribution. The citizenry willingly sacrifices civil liberties, along with living pieces of itself for state execution, and does not fully realize such concessions have not yielded the promised return: protection.

Logan (1999) expounded on how victims are being used as the political platform under which government hides its ineffectiveness and also as the podium from which it can claim unearned legitimacy. “Especially in recent years, the political use of victims has helped promote government power and justify our hard-line response. Victims could as easily represent the state’s failure, but by co-opting victims and the victim movement, the state may use them to portray its apparent concern and promote its legitimacy instead” (p. 52). Concern for victims and their families is frequently seen as the legitimating lynchpin for the death penalty.

Capital punishment proponents often accuse the criminal justice system of devaluing the victim if the death penalty is not sought in particular cases. The debate has become dichotomous: everyone is either pro-death penalty or anti-victim (Bandes 2008). It is no longer possible to be both anti-death penalty and pro-victim, even though both stances recognize the intrinsic worth of all human beings. It is not uncommon, in closing arguments, to hear prosecutors ask jurors to return a verdict so as to affirm the worth of the victim, as if the higher or harsher the defendant’s sentence, the higher the victim’s value. For decades, claims were made that co-victims – family and friends of murder victims – supported the death penalty, but in 1998 such claims were empirically
tested, and the findings were that co-victim experience did not reliably predict support for the death penalty (Borg 1998).

Special interest groups have even called the government out on being co-opting. Support groups often evolve to become interest groups that pursue policy objectives (Milakovich and Gordon 2004). That happened with two groups that were founded on behalf of co-victims who are also anti-death penalty. Because many times the expectation is that all co-victims will support capital punishment, those in opposition may find themselves having to deal with discrimination from members of the public, the media, and even the criminal justice system (Sharp 2005).

Murder Victims’ Families for Reconciliation (MVFR) was started in 1976 and has grown to become an international organization. Its motto is _Helping Heal Grief Through Action_. The Chairperson explains MVFR’s mission:

> MVFR staff, board, members and supporters oppose the death penalty for a variety of reasons – endless trials re-open emotional wounds and put off the time when real healing can begin, the vast resources and attention spent on the death penalty is better spent supporting victims and preventing crime in the first place, the risk of executing the innocent is too high a price to pay, biases of geography, race and class plague the system, executions create more families who have lost a loved one to killing, and many of us think it is just plain wrong for the state to kill (MVFR 2008).

Another organization, Murder Victims’ Families for Human Rights (MVFHR), was founded in 1988 by Renny Cushing, a former New Hampshire Representative, whose father was a murder victim. One of the members of MVFHR, whose daughter was killed in the Oklahoma City bombing, sums up the organization’s underlying philosophy in the following way:
The death penalty is about revenge and hate, and revenge and hate is why my daughter and those 167 people are dead today (MVFHR, 2008).

The government has, at times, used closure for co-victims as a rationale for the death penalty. However, some co-victims are offended by the thought that executing the murderer would either benefit them or honor their loved one. One mother of a murder victim made her views known by stating publicly, “To say an execution of some malfunctioning individual would help me heal insults the memory of my little girl. She is worthy of a more noble, honorable, and beautiful memorial” (Goodwin 1997:4, bold italics added for emphasis).

The idea of closure is rarely, if ever, brought up by the co-victims themselves. Most, according to Armour and Umbreit (2006), abhor the word because of its implication that they can, or even should, get over their loved one’s death. Some co-victims in support groups refer to closure contemptuously as “the C-word” (Kujan 2007).

For political reasons, state killings have been socially reconstructed so that they are increasingly being seen as the appropriate response to victim demands; in other words, public punishment for private purposes (Zimring 2003). Researchers sometimes offer social reconstruction as an explanation for regional differences in the death penalty. It is hypothesized that this new political spin might be resurrecting the vigilante spirit that theoretically exists in southern and border states. “The citizen who embraces vigilante values identifies legal punishment as a communal rather than a governmental activity” (Messner, Baumer, and Rosenfeld 2006:562). The vigilante tradition helps to neutralize government distrust since state executions may be viewed as carrying out the community’s will (Zimring 2003:89).
There are two distinctly different worldviews of government: one, that it represents the will of the people (consensus); two, that it operates as a tool for the “over” class to retain power and control of the “under” class (conflict). The latter perspective offers an explanation for why more whites favor capital punishment or why more blacks oppose it. Black heritage and history is replete with accounts of government abuse. Those accounts live on in that group’s cultural memory. On the other hand, government has traditionally supported demands of an elite (white) class, and those who benefit from being privileged may not always recognize or acknowledge that advantage. A close look at Congress reveals that white males are disproportionately represented (Tate 2002).²

Scott Turow (2003) – a death penalty attorney, legal scholar, fiction writer, and appointee on the Illinois Commission on Capital Punishment³ – wrote how he was reminded of the political relevance of state executions when appearing at the American Academy in Berlin. In heavily accented English, a very elderly German law professor explained it to him: “Here, we could neffer efen consider again allowing zee state to kill” (p. 41).

One cannot look at legitimacy without looking at its base definition: conformity to law or principle. The underlying principle in any criminal justice system is justice. “Law is, rather, impossible without a well-conceived idea of justice. Justice is a legal concept as much as an ethical one; we should not distinguish between law and ethics” (Bianchi

² For the 112th Congress, White males make up approximately 73% of the House of Representatives and 81% of the Senate. While Blacks (both male and female) comprise 13% of the population, according to the U.S. Census (2009), they only make up 8% of the Congress (Senate and House of Representatives combined).

1994:4). The legal system was established, in large part, as the means by which the state was empowered to settle private disputes. In civil court that philosophy has persisted; however, in criminal court, the state usurped the victim’s role because of the need to establish its authority and to prevent vigilantism. In this sense, criminal courts are more bureaucratic than civil courts because they take conflict and settlement power out of the people’s hands. A legal bureaucracy separates the people from the process and operates to keep the people on the outside looking in (Bianchi 1994).
CHAPTER 4
LITERATURE REVIEW

Introductory Remarks on the Literature

The challenge in reviewing the literature that relates to the underlying research is that the topic, death penalty legitimacy, is a subjective concept that spans disciplines. Also, testing the Marshall Hypothesis requires the conceptualization of knowledge, and each individual’s knowledge is an end result of information acquired directly or indirectly through education or experience, both of which are processed within the context of a personal perspective. Also, because the death penalty is acknowledged to be an emotional, moral, political, social, and legal issue that impacts individuals as well as society, relevant research has been conducted by criminologists, political scientists, psychologists, sociologists, and economists; and such studies have been done at both the micro and macro level.

The death penalty system itself involves all branches of government: executive, judicial, and legislative. For it to function and be maintained, it requires workers who operate in various venues (i.e., courts and corrections), and who belong to diverse professions: corrections, law, medicine, politics, and sociology. Additionally, there has historically been a clear division between law and the social sciences and, correspondingly, somewhat of an antipathy between practitioners and theorists. This divisiveness contributes to the lack of clarity that currently exists in America on the issue of capital punishment. All of the following subheadings, and the theories identified within the body of the text, identify factors that appear to influence perceptions of legitimacy for the death penalty system, or they identify factors that may call legitimacy into question. According to Friedrichs (2006), “Every legal culture explicitly or implicitly adopts a view
of what makes a legal system valid and deserving of support and obedience” (p. 263). That is the essence of the underlying research: to explore whether criminal case workers believe that the current system conforms to their view of what legitimacy would be for the criminal justice system in general and for the death penalty system in particular, and also to explore how their perceptions of legitimacy may be explaining their death penalty opinions (support or non-support).

**The Marshall Hypothesis**

Justice Thurgood Marshall hypothesized in *Furman v. Georgia* (1972) that the more informed people became about the death penalty, the more anti-death penalty they would be, and the only exception would be if their underlying belief system was deeply rooted in retribution (Bohm 2007). Social scientists have conducted public opinion research about the death penalty (e.g., Durham, Elrod, and Kinkade 1996; Zeisel and Gallup 1989) as well as studies on the experience of capital juries (e.g., Bowers 1995; Foglia 2003, Geimer and Amsterdam 1988). Studies have been done on college students where their opinions on capital punishment were sought prior to being given information on the death penalty and then were sought again once the information was provided as a way to determine whether support decreased after becoming more informed (Bohm 2007). When undergraduates at Stanford University were surveyed, findings were that increased knowledge, rather than diminishing support as the Marshall Hypothesis predicts, tended to polarize opinions. Students, who declared themselves pro death penalty at the onset, ended up being even more supportive after they were exposed to more information. Conversely, for death penalty opponents, receiving additional information about the death penalty tended to strengthen their opposition (Lord, Ross, and Lepper 1979).
This opinion strengthening effect was confirmed in subsequent research (Bedantam 2006). When it comes to the death penalty, which appears to be a highly emotionally topic for most Americans, people tend to -- instead of allowing their opinion on capital punishment to be formed from facts -- engage in tunnel vision and hone in narrowly on those facts that best support their emotion-based opinion (Bandes 2008). Kahan and Braman (2005) also found that there was a “tendency of individuals to trust only those who share their orientation,” and that served to make “the belief-generative power of culture feed on itself” (p. 154). Also, Bohm (2007) found that, while death penalty support did decrease significantly after new knowledge was acquired, such changes in opinion tended to rebound over time back to their pre-knowledge state. These findings suggest that death penalty opinions are only temporarily altered by knowledge acquisition. Bohm concluded that additional knowledge may merely serve to polarize opinions (1990, 2007); that publicly-declared opinions may become immutable (1990); that underlying beliefs concerning “deterrence, revenge, and incapacitation generally are not affected by additional knowledge about these issues” (2007:377); that, instead, opinions will only be altered by information relating to system legitimacy; i.e., wrongful convictions or racial bias.

To date, few studies have been conducted on those most informed about the death penalty, the frontline capital workers, to find out how they perceive the fairness of the capital trial process (Callahan, Acker, and Cerulli 2000). Surveys of police, correctional officers, and criminologists reveal that the death penalty is not considered to be an effective law enforcement tool in that its deterrent effect is no greater than an alternative, irrevocable punishment (Dieter 1995; Dieter 1997; Radelet and Akers 1996).
Public opinion on the death penalty has increasingly become politicized (Gross 1998b; Steblay, Besirevic, and Fulero 1999) as well as polarized (Haney 1995; Hartnett and Larson 2005). The underlying research, which surveys criminal court workers and interviews capital court workers, directly tests the Marshall hypothesis, informs policy, and provides scholars with possibly a more realistic view of capital case proceedings.

**Political Culture**

Daniel J. Elazar ([1972] 1984) looked at political culture across regions and devised a three-part typology for all of the states. States were classified according to dominant political culture. Each individual state was determined to be: (1.) moralistic with high degree of civic involvement, (2.) individualistic where politics was viewed as a professional career choice, or (3.) traditionalistic in that a hierarchical system persists so that the upper class is politically active; the lower class is not. Political culture, according to Elazar, is shaped by sectionalism, migration patterns, and shared religious beliefs (1984). In my study, three states with active death penalty statutes have been selected in order to represent the full range of Elazar’s political typology ([1972] 1984). Ohio is individualistic; Oregon is moralistic; and South Carolina is traditionalistic. As well as representing each typology, there is geographic variation in that Oregon is northwest; Ohio is Midwest, and South Carolina is southeast. Also, while there is variance on death row populations in these three states, each is active in seeking death penalties for aggravated murders. Applying Elazar’s Political Culture Theory to the death penalty, the two extreme views would be South Carolina and Oregon. South Carolina (as a traditionalistic state) would theoretically be the most accepting of state executions; whereas, Oregon (as a moralistic state) should be the most conflicted because of its longstanding emphasis on individual freedom and governmental
accountability. Ohio, according to the theory, would be in between these two extremes; however, because of Ohio being an individualistic state, the theory would suggest that its citizenry might have more confidence in law, as a legal bureaucracy, to best accomplish societal goals.

Fisher and Pratt (2004) in a paper presented at the Southern Political Science Association wrote that “political culture, as measured by Daniel Elazar’s (1984) prototype classifications of American political subcultures, is an excellent determinant of whether or not states implement the death penalty and the degree to which they do so” (p. xx). Statewide political culture has been found to be surprisingly persistent and static over time (Morgan and Watson 1991). Political culture has been described as “a powerful element” in explaining policy (Cook 1979:249), sentence severity, and criminal justice decision-making (Broach, Jackson, and Ascoliilo 1978; Eisenstein, Fleming, and Nardulli 1988). Heuristic thinking may drive capital case decision-making due to media attention, public pressure, limits on knowledge-building, and severe constraints on time (Grattet, Jenness, and Curry 1998). Political culture, therefore, can become the fall-back position or the automatic response because of it being embedded in societies (Elazar 1972).

In the modern world, it is impossible to think of government without bringing in politics. Politics have become increasingly polarized in American, and bipartisan politicians have become increasingly adept at the ancient art of sophistry, employing “arguments which are intentionally deceptive” (Oxford English Dictionary 2011).

**Legitimacy of the Death Penalty**

As well as being a political issue, the death penalty is also a divisive and emotional issue in America (Costanzo and White 1994; Pierce and Radelet 1991). There have
been many debates on whether the death penalty is being operated in a fair way to ensure that miscarriages of justices cannot happen (Gross 1996; Harmon 2001; Huff 2002; Leo 2005; Liebman, Fagan, Gelman, West, Davies, and Kiss 2002; Medwed 2005; Radelet 2002; Radelet, Bedau, and Putnam 1992). In September 2011, the execution of Troy Davis, which took place in spite of seven of the original nine eyewitnesses having signed affidavits which either recanted or disavowed some or all of their original testimony, created a national controversy and is cited by Strauss (2011) as the reason that the most recent Gallup poll\(^1\) showed public opposition of the death penalty at its highest level since March 1972, three months prior to the *Furman* decision by the U.S. Supreme Court.

Recent death row exonerations have occurred only because of the technological advances in forensic science (Scheck, Neufeld, and Dwyer 2000). DNA testing has proven conclusively that some innocent persons have been wrongfully convicted in our country, so many that Florida enacted in 2008 a law that awards $50,000 for each year that someone was imprisoned when they were actually innocent (Burstein 2010). Other states have enacted similar legislature to compensate exonerees unjustly deprived of liberty (Bernhard 2003). In light of the recent exonerations, numerous public opinion polls have been conducted on the death penalty, and many have shown a significant decline in death penalty support (Cochran 2005). Even with wrongful convictions being publicized, however, most Americans still support the death penalty. Some scholars have attributed this persistence to Americans being supportive of retribution (Acker,

\(^1\) Gallup poll results based on telephonic interviews of random sample of 1,005 adults taking place between October 6\(^{th}\) and October 9\(^{th}\), 2011, which found death penalty support to be at a 39-year low and also found it to be regionalized and politicized as Midwesterners, Southerners, and Republicans were more likely to be supportive (Newport 2011).
Bohm, and Lanier 1998; Gross 1998a); a carry-over of violence from the old west days (Lifton and Mitchell 2000), or to the fact that LWOP alternatives do not exist in certain states or that, if the LWOP sentence does exist, the public is skeptical of it (Acker et al. 1998; Gross 1998a); or the fact that, in general, Americans are ignorant of death penalty procedures or overinflate the procedural safeguards (Acker et al. 1998; Gross 1998a; Mello 1996; Johnson 1998).

By declaring the death to be different and by requiring additional rules and regulations, the perceived legitimacy of capital punishment has increased for the public, for policy makers, and even for criminal case practitioners; however, it has been speculated that, when examined more thoroughly, the increased reliability that might be expected with increased regulation may not really exist. Thus, legitimacy would be revealed as more of a superficial cover or false facade (Rhetoric 2000). Steiker and Steiker (1995) have referred to this as a “false aura of rationality” (p. 433) that is perpetuated by media accounts of lengthy delays and inexhaustible appeals.

In light of death row exonerations, how fair are death penalty proceedings? Legitimacy, most often defined in the literature as perceived fairness (Tyler 2003; Weber 1949) is widely recognized as being the key component to law (Habermas 1979; Sherman 1992; Tyler 2006; Tyler and Boeckmann 1997). What is less recognized is how legitimacy of death penalty proceedings impacts frontline justice practitioners. Research conducted by the National Law Journal (Coyle, Strasser, and Lavelle 1990) found, in an examination of death penalty proceedings in six southern states, that not one trial met the minimum standards of fairness established by the United States Supreme Court. This failure to meet minimum standards becomes especially relevant
to legitimacy and the death penalty because research has shown that, even when capital cases are perceived by all courtroom workers as being conducted fairly, those workers are at considerable risk of vicarious traumatization (Gil, Johnson, and Johnson 2006; Saakvitne and Pearlman 1996), meaning that courtroom workers may be emotionally, physically, or psychologically harmed merely by being present during a trial where graphically violent testimony is presented and where defendants are on trial for their life. Some courtroom personnel have been required by physicians to undergo psychological counseling and endure lengthy debriefing sessions once capital trials have concluded (Bienen 1993; Lyon 1991; Murphy, Hannaford, Loveland, and Munsterman 1998). If death penalty trials are not perceived by the participating judges and attorneys as being legitimate, that potential for traumatization may be increased (Chamberlain and Miller 2008). These frontline workers, most of whom are public servants, may even feel like unwilling accomplices to an execution. Berman (2002), who was merely a law clerk for a United States Supreme Court justice and had no participatory role in capital case proceedings, still found death penalty cases to be “by far the most emotionally wrenching part of the job” (p. 1130). He recounted how he and other law clerks, although recognizing they had no specific decision-making role in death penalty proceedings, still worried about the fact that they were “part of the administrative bureaucracy of the killing state” (p. 1130). They wondered whether some day they might be called on to account for their own complicity. If a law clerk felt like this when his job only required him to review the official court record, how might the frontline capital case workers feel?
While criminal justice literature has defined legitimacy in terms of perception, political science literature defines it simply as a political state’s right to rule (Gilley 2009). To bring the two concepts closer together, we might say that it is the people’s belief in the state that is the source of that state’s authority. “[A]ll legal philosophers are agreed that before a rule can be called ‘legal,’ the system to which it belongs must be substantially effective” (Hall 1978:1279). Effectiveness can be measured by system goals (i.e., deterrence, retribution, social order, and public safety), and it can be measured by system processes (i.e., procedural fairness). Dilulio, Alpert, Moore, Cole, Petersilia, Logan, and Wilson (1993) were explicit in stating that due process and standards of fairness were important factors in measuring a prison system’s performance. One way, and arguably the best way, to measure system processes would be to directly survey the workers who are most involved in that process. In the case of the death penalty system, that can be done by surveying and interviewing capital case workers.

There has been little, if any, research done to explore how front-line court workers view criminal justice proceedings. Weiss (2003) asserts that the “literature provides little scholarly assessment of the general subjective outlooks of any criminal court practitioner” (p. 3), and yet these are the assessments that are most critical for a fuller, more complete understanding of procedural justice.

Capital case practitioners are unique because, depending on their adversarial role, they perceive different missions: Prosecutors are concerned with just deserts and case resolution, and defenders are trying to save their client from being executed by the
state. Both are burdensome responsibilities, neither of which has been fully acknowledged or addressed by the current criminal justice system.

The closest analogy would be medical personnel working at an abortion clinic (King 2003). These professionals, because of job responsibilities, are required to put aside personal feelings and beliefs in order to perform role-assigned duties, and they are poorly understood and often even maligned by members of society. The analogy is not completely apt, however, because those medical workers freely chose their careers knowing that abortions would be an integral part of their professional requirements, and their adult patients typically volunteer to undergo the surgical procedure. Trial attorneys, on the other hand, are usually ill-prepared to deal with death (Hawkins 2006) and, until relatively recently, had not even received training to assist them in preparing for capital case representation (Leyte-Vidal and Silverman 2006). Also, needless to say, the capital defendant has virtually no say in whether or not the death penalty will be imposed.

Research studies have just begun to explore how perceptions of legitimacy are shaped by procedural justice (Tyler 2003). When it comes to capital case proceedings, due process may be more important than the actual imposition of a death sentence “when it comes to shaping individuals perceptions of fairness” (DeAngelis and Kupchik 2007, p. 655.) Seven factors have been identified as being associated with perceptual legitimacy in criminal proceedings. These are: representation, consistency, impartiality, quality of decisions, correctability, ethicality, and outcome (Tyler 1990).

Emotion’s Role in Legitimacy

Even though emotion is not something usually dealt with, at least not directly, by the criminal justice literature, some scholars have argued that it needs to be (Sherman
Participating in capital case proceedings is likely to be an emotional ordeal for frontline court workers. This has been recognized by researchers, and “there is evidence that juries, judges, prosecutors, defense attorneys, prison personnel, and witnesses to an execution may experience prolonged trauma” (King 2003: 242).

Attorneys are classified as white collar workers, and Lynch (1999) has identified the major stressors for white collar workers as being: (1) quantitative role overload (too much work), (2) qualitative role overload (too difficult of work), (3) role insufficiency (too little work, no challenge), and (4) role conflict (contradictory professional/ personal identity)

It has been well documented in the literature that capital case proceedings are usually longer in duration and much more complex than a noncapital first-degree murder trial, partly due to the fact that a death penalty trial is divided up into two phases: (1) the guilt or innocence phase, and (2) the penalty phase (Driggs 2002). The first phase is similar to any other criminal trial where the state puts on its evidence in an effort to prove guilt beyond a reasonable doubt, and then the defense is given the opportunity to rebut the state’s case. The second stage, the penalty phase, only occurs in a capital case if the defendant is found guilty in phase one, and this is the stage of the capital trial where prosecutors present aggravating evidence in order to justify death over a life-without-parole sentence, and the defense presents evidence in mitigation.

Since the Supreme Court has mandated that “death is different,” capital trial attorneys are obligated to fully investigate the personal history of each capital defendant to allow the jury or judge to view the capital offense within the larger context of a whole
lifetime (Latzer 2002). Knowing someone’s arrest record is not nearly enough. Such investigations take a great deal of time and energy and are typically replete with horror stories of child abuse, neglect, and mental illness.

Justice Barkett, at the time that she was a Florida Supreme Court Justice, wrote this in a capital case review:

[In] far too many cases we see at this Court, horrible crimes are repeatedly committed by those who endure sickening abuse and deprivation as children. Many, like Freddie Lee Hall, are also mentally retarded and suffer particularly severe abuse because their parents do not understand the nature of retardation. The connection between an individual’s childhood and his or her later ability to function as a productive member of society is obvious to those of us who routinely review criminal cases, and while a tragic childhood and mental retardation do not “excuse” later criminal behavior, they do reflect on an individual’s culpability (Hall v. Florida 1999).

Capital trial attorneys become intimately knowledgeable about a capital defendant’s life history; and, because of that knowledge and also because of the close contact they must sustain with the defendant throughout the course of the capital case developing, they do not have the luxury of seeing the defendant as an abstract concept. He is flesh and blood, has family members, and has a personal history. The murder victim is also revealed as three-dimensional and real and, as the innocent, may take on larger-than-life dimensions and relevance. The case facts themselves can, and often do, cause people involved in capital cases to question the meaning of life, become disillusioned with the ability of the legal system to dispense equitable justice, and to confront personal immortality issues (King 2003).

---

2 However, it should be noted that Butler and Moran (2002) have found that jurors who are death-qualified (according to the qualification standard from the 1985 USSC case of Wainwright v. Witt) tend to be much more receptive to aggravating circumstances and much less receptive to mitigating circumstances presented in the second phase of capital trial proceedings than would be venire who cannot be death-qualified and are, therefore, excludable from serving on a capital jury panel. For that reason, the second phase of the capital trial may not actually be functioning as originally intended.
According to Saakvitne and Pearlman (1996), all criminal trial attorneys, along with criminal court judges, are at increased risk of suffering vicarious traumatization and/or compassion fatigue. Signs and symptoms of compassion fatigue/vicarious traumatization include: (1) cognitive changes; (2) increased anxiety, guilt, anger, rage, or depression; (3) behavioral changes, (4) spiritual changes where meaning and purpose of life are questioned; (5) interpersonal changes; (6) physical changes; and (7) work performance changes (Figley 2002). If all criminal trial attorneys are prone to suffer from vicarious traumatization, then it is only common sense to believe that capital trial attorneys may be at even higher risk.

**Organizational Role Ambivalence and Legitimacy**

Research has shown that it is more difficult for people to be objective in their judgments about organizational legitimacy when they have an *insider* perspective (Terry and O’Brien 2001). In their classic treatise, Berger and Luckmann (1966) reveal how individuals, as well as organizations and institutions, socially construct various realities, and how members of such organizational entities will be influenced by such group construction. Berger and Luckmann (1966) stated: “[The] institutional order is real only insofar as it is realized in performed roles and that, on the other hand, roles are representative of an institutional order that defines their character (including their appendages of knowledge) and from which they derive their objective sense” (p. 78). According to Berger and Luckmann (1966), analysis can be made to determine how macro-level influences are manifested in the consciousness of individuals, and vice versa. This is directly relevant to the underlying research where the worldview of the adversarial legal institution, divided up into the two competing camps of prosecution and defense, is compared to the perceptions of the capital case attorneys employed within
that bifurcated structure. In simpler terms, one of the research goals of this research was to find out whether the assigned role of a capital attorney “fits” comfortably or whether it is ethically constricting, and to also explore whether the assigned adversarial role may determine the perceived legitimacy of procedural justice in death penalty cases.

Parker and Coate (2008) have identified distinctly different criminal justice system models for prosecutors and defense attorneys. Defense attorneys tend to depend on a due process model which “demands fair play by the government in achieving convictions,” and operates under a prevailing presumption of innocence; whereas, prosecutors are more likely to rely on a crime control model in which there is always a presumption of factual guilt (Parker and Coate 2008: 380). After analyzing 424 newspaper articles that reported death sentence convictions being overturned by a higher court and recording the reactions of the trial attorneys who had participated in the lower court proceedings, Parker and Coate (2008) concluded: “Theoretically, prosecutors and defense attorneys are officers of the court who share an interest in seeing that justice shall be done, but they react quite differently to reversals in individual death penalty cases” (p. 380). In Weberian terms, prosecutors conceivably would rely on formal rationalized law to serve as sole justification for a death penalty sentence; e.g., the defendant was afforded his day in court and a lawfully impaneled jury rendered its verdict; therefore, the death sentence itself is just and should not be overturned. On the other hand, defenders might be more reliant on substantive rationality wherein the law itself “is subordinated to a greater ideology or value system so that the contents of legal rules and the outcomes of cases are derived from the dictates of these larger
abstract rules or principles” (Lanza-Kaduce 1982, p. 73); e.g., the death penalty is morally wrong; therefore, any ruling which overturns it, for whatever reason, would be just.

**Criminal Justice Models and Legitimacy**

Due process is the constitutional safeguard for fundamental fairness in criminal procedures. Ideally, the criminal justice system would operate based on the Due Process Model (King 1981; Packer 1968). This research is concerned with legitimacy; therefore, how frontline capital workers perceive courtroom procedure in capital cases is directly relevant to that legitimacy issue. Hyde (1983) has contended that legitimation is a concept that cannot be scientifically measured; however, he was looking at a much narrower definition of legitimacy than how it is being defined for this study. Hyde (1983) was defining it from an individual behavior perspective; i.e., people follow a law because of their belief in its legitimacy. This view is consistent with the theory of legitimacy propounded by Tyler (1990). Although Friedrich (2006:264) claims that “legitimacy may describe both a state of affairs and a process” (1979), it may be more accurate and precise to have legitimacy represent a state of affairs and to have legitimation represent the process. A legitimacy crisis with the death penalty may occur when the processes that create legitimacy in the first place (such as the presumption of innocence and other constitutional safeguards) are not being practiced. My contention is that, because legitimacy is (by its base definition) conformity to law, it would be difficult (if not impossible) to find people who would be more qualified to address it than my sample of judges and lawyers; they are, after all, the people who are most knowledgeable about both *the law on the books* and *the law in practice*. Operationalizing the concept by analyzing the informed opinions of legal practitioners allows the measurement of
legitimacy to be based more on specific knowledge derived from personal experience rather than on abstract or second-hand knowledge.

Tyler (1990), in his seminal research, surveyed lay people on their perceptions of legitimacy, and the findings from Tyler’s research has advanced current knowledge on why people obey the law. For example, Tyler (1990) found that people are more likely to obey the law when they perceive it as being fair, but that obedience is also predicated on personal morality. This research examines the issue from a different perspective in that it explores how the criminal justice system is currently behaving and whether or not the system’s behavior is, from the viewpoint of the frontline workers, in accord with fundamental legal principles.

Social Cognitive Theory of Moral Agency and Legitimacy

One impact on frontline capital case workers is that they may not be able to fully operate as “autonomous moral agents” merely because their professional role requires them to function as death penalty administrators and/or enforcers (Osofsky, Bandura and Zimbardo 2005:371). Bandura’s social cognitive theory of moral agency (1986, 1991) identifies moral disengagement as a potentially harmful consequence for workers whose jobs require them to become directly involved in state killings. According to Moore (2008), moral disengagement may allow people to “pre-empt the discomfort of cognitive dissonance” because it allows them to reframe issues so that morality considerations are excluded. Cognitive dissonance theory (Festinger 1957) posits that, when confronted with an irreconcilable conflict between attitude and behavior, people will be more apt to modify their attitude rather than to change their behavior. Burke (2006) identified cognitive dissonance as the explanation for prosecutors’ persistence in believing in a defendant’s guilt even when confronted with incontrovertible evidence of
innocence and made the point that “[a] prosecutor may give short shrift to claims of innocence, in other words, not because she is callous about wrongful convictions, but because she cannot bring herself to believe that she has played a part in one” (p. 1613).

Moral disengagement is theorized to operate through a variety of cognitive mechanisms (Bandura 1986). First, behavior that would normally be viewed as being injurious or wrong, such as the killing of an individual, is reframed by euphemistic language to sound more righteous (Osofsky et al. 2005; Bolinger 1980; Gambino 1973). For instance, state killings become known as capital punishment (Sarat 2001). The injurious conduct becomes morally justified, such as with Just Desert or utilitarian philosophies where the former would claim that a defendant is merely getting what he rightfully deserves, or the latter’s argument would be that murderers must be sacrificed in order to restore balance for the whole of society (Bandura 2003; Reich 1990). Then, there is another type of mechanism for disengagement which originates when individual agents are able to displace responsibility onto a higher authority (Osofsky et al. 2005; Diener 1977; Milgram 1974).

In the case of the death penalty, the law itself would be the higher authority. This deflection of responsibility can occur through division of labor where an agent’s role is highly specialized, which allows him not to see the forest for the trees or to forget how his actions might be contributing to an eventual injurious outcome, and/or by being part of a larger collective where the agent can feel inconspicuous or anonymous, and such anonymity would allow him to minimize his own individual accountability (Osafsky et al. 2005; Kelman and Hamilton 1989; Zimbardo 1995). This is essentially the contradiction, and potentially fatal flaw, in bureaucracies because such a narrowed
viewpoint is due to learned allegiance to an agency mission which tends to prevent agents from understanding how their devotion to overly rationalized, ritualized, and rationed means may be leading to unjustified ends. From a moral perspective, it demonstrates how ethics can be violated by the most dedicated of lawyers or those who take pride in always maintaining professionalism. In other words, the road to perdition may very well be paved with the best of intentions. Moral disengagement is also accomplished when the person being injured is dehumanized (the cold-blooded murderer with a malignant or depraved heart) or is deemed to be completely blameworthy; e.g., by committing murder, the defendant brought this punishment solely upon himself (Bandura et al. 1975; Haritos-Fatouras 2002; Huggins, Haritos-Fatouros and Zimbardo 2002; Keen 1986). All of these mechanisms operate to prevent the activation of moral self-regulation.

The relevance of moral disengagement to the underlying research is in thinking about how lack of autonomy and displacement of responsibility become embedded into a system, such as the death penalty. Once this happens, there is the possibility that – while a law might be perceived as being legitimate – actual legitimacy is lost. Not only might it explain how mistakes in the process go undetected and become cumulative, but it also offers an explanation for how over time the public at large might become increasingly less concerned about its government routinely pronouncing death sentences and also how capital case workers may increasingly become more detached from these types of proceedings and, as a consequence, lose sight of the overall gravity of the situation. Also, a legitimate government, one concerned with public safety, cannot overlook the psychological harm that might be inflicted on its citizenry who have been
given the responsibility for enforcing and/or administering a morally controversial law. Ironically, the more professional these workers become at performing their jobs, the more at risk they may be for moral disengagement. According to Osofsky et al. (2005), “moral self-restraints are gradually weakened through participation” (Bandura 1999; Kelman and Hamilton 1989; Sprinzak 1990). Legitimacy of state behavior has to be assessed according to the human consequences that result rather than being assessed by how state behavior has been officially defined (Kelman 1969).

In 2005, research was conducted to test whether there would be variations in levels of moral disengagement for workers with differing degrees of involvement in the execution process (Osofsky et al. 2005). The study involved three subgroups of prison personnel employed at maximum-security correctional institutions located in the southern United States: Group #1 were prison guards without any direct involvement; group #2 were execution support team members; and group #3 were actual execution team members (Osofsky et al. 2005). Findings were that the actual execution members, who tended to be employed longer at the prisons, were moral disengagers even at the onset of their being assigned to the execution team and then remained basically at that same level of moral disengagement as their involvement in executions increased. The support team members, however, “began as moral engagers but gradually rose to be moral disengagers with their more extensive participation in executions” (Osofsky et al. 2005:384-385). These findings have relevance in that they may be applicable to frontline capital case workers; i.e., judges, prosecutors and defense attorneys.
Division of labor results in diffusion of responsibility, which is identified (Osofsky et al. 2005) as one of the activating mechanisms for moral disengagement. Despite the softening language used to describe death penalty systems, the reality is that all the workers involved are participating in a government-directed process that potentially requires that a human being's life will be taken in the final outcome. The participants themselves have not been personally harmed by the capital defendant’s alleged homicidal behavior, and so in many ways such behavior is an abstract concept for all of them. Their direct dealings with the capital defendant may even reveal the defendant’s demeanor to be benign, especially given the security-enhanced environment. Therefore, in order for these capital case workers to fully participate as professionals in the death penalty process, regardless of (and sometimes even despite) their own personal views on the morality of state killing, it may be necessary for them to undergo various interrelating processes, as enumerated by Kelman (1973):

(1.) Authorization process – the individual has been relieved of the responsibility to make moral choices because a standard has been set by a governing authority where an exception to a general moral principle has already been applied;

(2.) Routinization process – the proceedings have been organized in such a way so that there is little or no opportunity for the individual to raise moral questions or make moral decisions;

(3.) Dehumanization process – within a closed system, the individual is given a particular role to perform where he is expected to merely perform a job function (reflected by the various addresses given of Your Honor, the Court, Mr. Prosecutor or Madame Prosecutor, or Mr. Public Defender or Madame Public Defender) and is, therefore, isolated from his integrated sense of self and any external community connections (such as church and family); in addition, the recipient of the eventual violence is continually referred to by an impersonal label rather than by a given birth name; e.g., as a defendant or alleged murderer.
While Kelman (1973) does not apply these processes specifically to death penalty administrators, he does make reference to “a well-organized, efficient death industry” (p. 31). While these processes may explain in part the administration of the death penalty in America, there is also a rival explanation. Morality arguments for or against the death penalty run on a continuum with “Do not kill” at one extreme and *lex talionis* on the other. Retribution (*just deserts*) can be considered as a morality-based philosophy. Therefore, for those workers starting out with a belief in retribution, there would be little need for moral disengagement because the death penalty, for them, might fit seamlessly within that particular paradigm and, thus, seem to be morally justified.

Kelman (1969) also described the concept of normative integration within a political system. When people are normatively integrated, they do not perceive themselves as being autonomous agents, but instead view themselves as being obligated to support a public policy even when it may conflict with their own personal beliefs or preferences. In contrast, Kelman (1969) also identified loyal functionaries who, unlike the normatively integrated individuals who may feel bereft of personal choice, voluntarily commit themselves to an organization and, by doing so, allow the organization’s moral code to override their own.

Much of moral disengagement theory seems to have been derived from Weber (1925, 1978) and his views on rationalization, defined as the process by which “institutions become increasingly governed by methodical procedures and calculable rules” (Appelrouth and Edles 2008:146). As an institution, such as the law, becomes increasingly bureaucraticized and rule-bound in its attempt to achieve efficiency and
impersonality, the institutional agents may begin to see rule adherence as the sole institutional purpose and lose sight of the reason why those rules were established in the first place. Due process (and particularly the super due process required in death penalty proceedings) is where procedural law and substantive law must converge in order to maintain the spirit of the law. Law’s value (or substance) derives from the legal principles upon which it rests, such as equal protection and the presumption of innocence. The proceedings are merely the means by which these valued legal principles are theoretically being carried out. Justice is a value-outcome and, as such, it must mean more than the end result of a routine process. If it does not, then – similarly to how Weber (1977) characterized that “in the United States, the pursuit of wealth, stripped of its religious and ethical meaning, tends to become associated with purely mundane passions, which often actually give it the character of sport” (Appelrouth and Edles 2008:165) – justice may become a shallow concept. If that happens, then there might be the tendency, even in death penalty proceedings, for the capital practitioner to consider himself as merely a player paid to compete in a government-sponsored game or as “a small cog in a ceaselessly moving mechanism which prescribes to him an essentially fixed route of march” (Weber 1925, as quoted by Appelrouth and Edles 2008:187).

The Role Organization Theories Play in Legitimacy

Death penalty participants tend to be specialized practitioners with a great deal of experience in criminal court and high profile proceedings. Previous research has looked to organization theories to explain the operation of the court system (Blumberg 1967; Carter 1974; Eisenstein and Jacob 1977; Eisenstein, Flemming, and Nardulli 1988; Feeley 1998; Flemming, Nardulli, and Eisenstein 1992; Nardulli, Eisenstein and
Much of the court-as-organization research has concentrated on the interactional relations among the frontline court workers: judges, prosecutors, and defense attorneys.

At first, the focus of such research was on the increased practice of plea bargaining. Blumberg (1967) theorized that increased criminal filings, along with decreased resources, led to plea bargaining as an efficient non-trial alternative. Instead of being adversarial, Blumberg (1967) claimed the criminal court system was bureaucratized because “the organization appears to exist to serve the needs of its personnel rather than its clients” (p. 47). Blumberg (1967) believed that this bureaucratic structure created conflict, especially for defense attorneys, because being an officer of the court required team-playing at the same time that being retained as counsel required the zealous pursuit of a client’s interests. For a defense attorney, the client would typically be represented for a specific case during a set period of time; whereas, the odds were the defense attorney would repeatedly work with other members of the courtroom workgroup. Therefore, the defense attorney’s future survival depended more on how well he/she got along with prosecutors and judges from within such a workgroup rather than on how well the client’s interests were represented. Thus, the adversarial system would be undermined by such divided loyalties (Jacob 1983).

Eisenstein and Jacob (1977) expanded and elaborated on using organizational theory to explain criminal court proceedings. They coined the phrase “courtroom workgroup” and backed away from seeing courts as bureaucracies because, to Eisenstein and Jacob (1977), courts lacked “the hierarchy of bureaucratic organizations…[and were not merely] assembly line operations” (p. 9). However, they
recognized that courtroom workgroups developed strategies to make the criminal proceedings more efficient, and that such strategies often became standard practice over time (Eisenstein and Jacob 1977). Thus, although goals of the sponsoring organizations of each team member may be different and even in competition with each other (i.e. prosecutor’s office wishing to convict; public defender’s office wishing to acquit; and the trial court wishing to make reverse-proof rulings); all courtroom workgroup team members share both a mission of case disposition and a respect for the law. Galanter (1974) theorized that over time repeat players in legal disputes would develop efficient systems for processing cases and for maximizing mutual benefits from these interactions. Since capital case workers are highly specialized, they theoretically would end up working together repeatedly in the same workgroup teams; therefore, the tendency might be for them to develop mutually beneficial systems over time; however, one objective of the underlying research is to explore whether the life-or-death court struggle of a capital case prevents it from being treated in such a standard way. As Feeley (1998) claims, “A court is not an assembly line, and court officials are not automatons mindlessly stamping out endless copies of the same product” (p.12). The extreme sanctions at stake in a capital case would theoretically make it more likely that capital workgroups would be fully engaged and invested in such litigation.

According to Eisenstein and Jacob (1977) the importance of any workgroup relationship is the impact it has on (1.) unilateral decisions, (2.) adversarial proceedings, and (3.) negotiations. In most court cases, negotiations would be the most common method of interaction, and unilateral decision-making the least common. It was the interdependence of courtroom workgroups that most interested Eisenstein and Jacob
and was explored further by Nardulli (1978) who referred to the judge, prosecutor and defense counsel in a courtroom setting as the *courtroom elite*. Nardulli (1978) explored how the courtroom elite reconciled individual role goals with combined courtroom goals. According to Nardulli, most cases would be free from outside pressure; however, heavily scrutinized cases – such as death penalty cases because of publicity and/or offense severity – would hold higher dispositional value for the courtroom elite. Research was done to determine the impact of political culture on court performance (Eisenstein, Flemming, and Nardulli 1988; Flemming, Nardulli, and Eisenstein 1992; Nardulli, Eisenstein, and Flemming 1988). Jurisdictional size was found to be a statistical significant influence on courthouse communities, a term Eisenstein et al. (1988) used to describe courtroom workgroups within their organizational structure. External elites are the outside influences, such as media and politics. According to Eisenstein et al. (1988), the larger the court, the lower the effect of the external elites and the higher the effect of the internal elites. This inverse relationship would be moderated by a sensationalized crime, such as would be the case with death penalty proceedings. With these cases – because of the increased scrutiny, greater interest by the general public, and the higher level of perceived risk – the sponsoring organizations would likely play a more influential role.

Flemming et al. (1992) placed courtroom events within a larger political context. “[I]t is necessary to locate [courts] not only as systems which have created their own internal dynamic, but also as institutions responding to their environment” (Feeley 1979:20). What might appear to be quick and autonomous decisions are really a complex balance “of the individual and collective interests in the courtroom workgroup...
with the constraints and goals of the sponsoring organizations and the influence of the environment” (Feeley 1979: 21). With capital cases, other important variables may be the internal elites’ personal feelings about the death penalty along with moral and political ideology.

Jacob (1983) extended the research on the organizational structure of courts by targeting trial judges and evaluating how they might be influenced by their sponsoring organization, which at the present time would typically be that state’s supreme court through court administration. Court systems are not structured uniformly across states; however, there are shared characteristics, especially with regards to death penalty systems. A major court reform in recent history has been budgetary unification. Fiscal power shifted from local governments to the state supreme court; the assumption being that centralized funding would increase overall trial court resources (Tobin 1999). This reform was driven by the recognition, beginning in the 1970s, of widespread dissatisfaction with the court system. Efforts to improve the situation led to Alternative Dispute Resolution (ADR) and an increase in courts being established to resolve specialized cases (Tobin 1999). Budgetary concerns are particularly relevant to capital case litigation since death penalty proceedings are more expensive than their noncapital counterparts (Dieter 2009). All procedural justice is expensive (Feeley 1998); the invocation of super due process (Radin 1980) – the capital case version of due process – is close to being cost-prohibitive (Dieter 1997).

Organizational theorists have studied how the courtroom elite may influence case outcomes, and scholars and society alike hold front-line workers as being largely responsible for both carrying out official policy and for ensuring procedural fairness.
The assumption being that policy and procedure are compatible concepts that, combined, would lead to justice system goals. However, few studies have given elite workers the opportunity to offer their perspective on the validity of the current system. For example, Heumann (1978) suggested that plea bargains were a manifestation for a weakened innocence presumption, and yet little research has been done to find out how courtroom elites evaluate the prevailing presumption that is being practiced in court proceedings.

**Conflict Theory and Legitimacy**

At the heart of Conflict Theory (Chambliss 1964, 1969; Quinney 1964, 1970; Turk 1966; Vold 1958) – which is sometimes used synonymously with Marxist Theory or the more modernized, but less clearly defined, *Critical Theory* (Akers and Sellers 2009) – is the idea that society is dichotomized; i.e., those with power versus those without; law-abiding citizens versus criminals, law-makers versus law breakers; and/or those deserving of the death penalty versus those who are undeserving, Conflict theory has been used to explain why “[t]he most likely offender-victim combination to result in prosecution for first-degree murder and the death penalty is that of a Black murderer and a White victim, even when all measurable legal variables are controlled” (Akers and Sellers 2009:225, citing Radelet 1981and Radelet and Pierce 1991).

From a conflict perspective, society would classify certain categories of people as being more expendable (Kelman 1969). Black (1976) defines law as behaving in accordance with the rank of the transgressor as well as the rank of the transgressee. Spitzer (1975) hypothesized that American society, as a whole, looks upon certain populations – usually minority – as being threats to social order; therefore, public policies are implemented in order to control these marginalized groups. “For many
whites, violent crime is perceived as a black problem; hence, they see the death penalty as a black punishment” (Johnson 1998, p. 6). Because African Americans are disproportionately poor (Reiman 2004), it may be that socioeconomic status, rather than race, is a punishment predictor. Studies often use race as a proxy for socioeconomic status (Hawkins 1987). According to Land, McCall and Cohen (1990), poverty and race are confounded in America, and “[F]or most theorists, class and race cannot be treated as separate dimensions of inequality. Rather, race and class are considered part of the same system and need to be understood through an analysis of the system as a whole” (Kubrin, Stucky, and Krohn 2009:235). Research, however, has shown a positive correlation between racial prejudice and death penalty support (Barkan and Cohn 1994).

**Contribution to Existing Research**

“The trial…is a distinctive domain for the production of legal meaning. It is a luminal legal space, one situated between – and one that mediates the relation between – formal legal rules and the unofficial world of norms, customs, common sense, and social codes” (Umphrey 1999:395). Criminal justice research can be considered to have evolved over time. Such evolution occurred in approximately three stages. First was the norm-centered scholarship which focused on values and asked the question: What *should be happening* in the criminal justice system? Next was practice-centered research, which was launched with the Legal Realist Movement, and asked the research question: What is *actually happening* in the criminal justice system? Lastly is legitimacy-centered scholarship. This research is the most current and integrates norm-centered scholarship with practice-centered research. It has a perception-based focus and asks the research question: What do people *believe is happening* in the criminal
justice system? The underlying research goes directly to the source, the frontline criminal case workers, to find out their assessments of capital case legitimacy (specifically) and criminal justice system legitimacy (generally). The public sees capital case workers as representing the death penalty system in America. Finding out how these frontline death penalty workers perceive capital proceedings in terms of procedural fairness and discovering how supportive they are of the death penalty system overall is an important research objective that has not been pursued in the literature. In addition, the research solicited suggestions for improvements to the death penalty system currently in place.

The major focus of this dissertation research was to provide new data on the Marshall Hypothesis and the related issues of legitimacy and death penalty support among capital case workers. The mixed method approach utilized (quantitative survey and qualitative interviews) enabled a fuller examination of how opinions on capital punishment are formed. While Justice Marshall proposed that an underlying belief in retribution would influence death penalty support, there may also be other influential belief systems or philosophies. Underlying beliefs regarding human nature, criminal justice system ideology, punishment philosophy, and social science may create the platform upon which opinions about death penalty legitimacy (and ultimately support) are constructed. That is the reason these “platform” variables are being examined.
CHAPTER 5
DATA AND METHODOLOGY

Research Design for Quantitative Study

Methodology Introduction

This study used a mixed method design to find out how judges, prosecutors, and defense attorneys assess the criminal justice system in general and how they assess capital case proceedings more specifically. The quantitative component of the study solicited a sample of elite criminal courtroom workers across three states – Ohio, Oregon, and South Carolina – to take a 91-item web-based survey. For the qualitative components of the study, 27 capital case workers from those same three states were interviewed in-depth.

Sampling Frame for Quantitative Study

Prior to commencement of the study, a list of known experienced capital case attorneys in each of the three representative states (Ohio, Oregon, and South Carolina) was compiled. As previously mentioned, these states were purposively chosen because each one represented one of the three political culture typologies from Elazar's Political Culture Theory (1972). The list of experienced capita case workers was created by searching each state’s Supreme Court records, newspaper accounts, as well as other public records or secondary data sources pertaining to capital case filings. Knowing upfront that the possibility existed for the sampling frame to be under-represented (in that the list of experienced capital case within that state, despite this researcher’s best efforts, would likely not be a 100% compilation), the sampling frame was expanded to include all actively licensed attorneys in counties with populations over 100,000 who self-identified through their state or local bar association as specializing in
criminal law practice. By broadening the sampling frame to include criminal case workers within populated counties, this not only allowed the recruitment effort to capture capital workers not previously identified, but it also allowed the study to have a comparison group for the capital case workers.

Months were spent attempting to find email address for all the names in the sampling frame as well as for all state prosecutors, public defenders, and circuit court judges within the three states. In the end, an initial email recruitment letter\(^1\) was sent to 3,104 criminal court workers; then, after an 8-week period of time, a follow-up recruitment email was sent to everyone. It is recognized that these 3,104 recruits are only a fraction of the criminal court workers within those states.

**Survey Response Rate**

The total number of “failed” email deliveries from both recruitments was 382. The final result was that, out of 2,722 recruitments, 568 criminal court workers filled out the survey, which is essentially a 21% response rate across all states. Ohio’s response rate was 18% (249 out of 1,340); Oregon’s response rate was 22% (216 out of 974); and South Carolina’s response rate was 25% (103 out of 408). One note of caution, however: It must be realized that, even when a failed delivery notification was not received, the recruitment emails may not have reached the intended target. Some recipient servers might have had strong spam filters which conceivably could have blocked the recruitment emails. Also, while some firms sent email notifications that a particular attorney was no longer employed with them, there would be no way of knowing if other firms just deleted the email of a former associate without bothering to

---

\(^1\) Appendix B (Email Recruitment Letter for Quantitative Study)
send such notification. After I sent the initial recruitment email, I received numerous phone calls and emails. Many people requested further information about me and my research. Quite a few expressed concern about clicking on a link sent from an unknown entity. A few recruits informed me that they had trouble accessing the survey through the link provided. One mentioned that the survey did not work with a BlackBerry®.

When I sent the follow-up recruitment email, I received more phone calls and emails. Some wanted to “set the record straight” by telling me that they had never received my first email.

For all of the above reasons, there is no way to know for certain how many people actually received one of my requests. Then, even if they received an email, there is no way of determining who actually chose not to take the survey or who had trouble accessing it on their various computer systems. For all those reasons, I suspect that the response rate may, in reality, be higher than reported. That suspicion is also based on the fact that, when I called to set up appointments for the qualitative component of this study, the second phase, most people I contacted – whether judge, prosecutor, or defense attorney – graciously and without hesitation agreed to be interviewed.

**Survey Instrument**

The anonymous 91-item survey (Appendix A) was kept open for a 5-month period and was specifically designed to answer the following research questions:

- **RQ₁**  Are death penalty proceedings perceived as being needed by capital case workers?
- **RQ₂**  Are death penalty proceedings perceived as being fair by capital case workers?
- **RQ₃**  Do perceptions of need vary by professional role or across states?
RQ₄ Do perceptions of fairness vary by professional role or across states?

RQ₅ Has participating in capital case proceedings produced personal-professional conflict or stress in capital case practitioners?

RQ₆ Do capital case proceedings need to be improved? And, if so, how?

RQ₇ What model of criminal justice, according to experienced criminal courtroom workers, best represents the criminal justice system as it currently operates?

RQ₈ What model of criminal justice, according to experienced capital case workers, best represents the death penalty system as it currently operates?

RQ₉ Does death penalty support vary among courtroom elites? Is such variance explained by underlying belief systems?

Most survey items contained drop-down options; however, there were also provisions for respondents to elaborate on answer choices. The questionnaires were designed to be completed within 30 minutes. The survey was an expansion of a survey that had been developed and used in a Florida pilot study conducted during the spring of 2010; the feedback received on that survey format was positive, and the response rate for that Florida pilot study was 29%.

Research Hypotheses

Based on prior research on the Marshall Hypothesis and based on the literature regarding legitimacy, organization theory, and political culture theory, the following hypotheses were formulated:

\[ H_{1a} \text{ There will be a negative correlation between death penalty support and capital case experience. (This is test of the Marshall Hypothesis.)} \]

---

The Florida pilot study limited its sampling frame to experienced capital prosecutors and capital defense attorneys. The current study also recruited experienced capital judges and, in addition, expanded the sampling frame to include noncapital judges, prosecutors, and defense attorneys. The findings from the Florida pilot study are on file with the Principal Investigator, Sherri DioGuardi.
H1b Underlying personal belief systems will moderate the relationship between death penalty support and capital case experience.

H2 The relationship between death penalty support and capital case experience will be moderated by political orientation.

H3a There will be a correlation between capital case role and legitimacy.

H3b There will be a correlation between current occupation and legitimacy.

H3c Death penalty legitimacy scores will vary across states.

H4a There will be a positive correlation between death penalty support and legitimacy.

H4b Role of capital case practitioner will moderate the relationship between death penalty support and legitimacy.

H5 Regardless of self-reported death penalty support, the majority of capital case practitioners will have suggestions for improving death penalty proceedings.

Quantitative Measurements

Choose Not to Answer Options

In the majority of survey items, respondents were given the opportunity to elaborate on their answer and were also given the option to “choose not to answer.” However, before calculating descriptive analyses or running inferential statistical analyses, all “choose not to answer” responses were re-coded to be missing responses.

Dependent Variables

Death Penalty Support

For Hypotheses One (H1a and H1b testing the Marshall Hypothesis), Two (H1b testing Elazar’s Political Culture Theory), and Hypothesis Three (H3d and H3e testing the theory of legitimacy), the full dataset was utilized (n=568), and the dependent variable is death penalty support. That dependent variable was conceptualized by measuring the
response from a single survey item, Survey Item #38, which stated: Understanding and respecting that capital case representation may be part of your professional responsibilities, how do you PERSONALLY feel about the death penalty? The answer choices were: 1 = anti-DP definitely; 2 = anti-DP somewhat; 3 = no strong feelings one way or the other; 4 = pro-DP somewhat; 5 = pro-DP definitely. The data for support are not normally distributed in that many more respondents were non-supportive of the death penalty. Skewness = .94, \( p < .001 \), and the kurtosis = 2.40, \( p < .001 \).

**Legitimacy Measurement**

For Hypotheses Three (\( H_3a \) through \( H_3c \) testing the theory of legitimacy), the dependent variable is a scale created by summing up five survey items dealing with fairness perception which loaded high (>5.5) on factor analysis. The first four item response choices were on a 4-item Likert scale; the last item was on a 5-item Likert scale. The first two items were from Survey Item #16, which asked respondents to rate their agreement with the statement: In terms of DUE PROCESS or PROCEDURAL FAIRNESS, death penalty proceedings:

- Represent the ‘gold standard’ (strongly disagree, disagree, agree, and strongly agree).
- Are UNFAIR in terms of due process (strongly disagree, disagree, agree, and strongly agree).\(^3\)

The next two items in the legitimacy scale were from Survey Item #18, which stated: In terms of how the death penalty IS BEING APPLIED, please indicate your agreement/disagreement with the following statements:

- Charging decisions tend to be fair and equitable (strongly disagree, disagree, agree, and strongly agree).

\(^3\) This item was reverse-coded before factor analysis was conducted.
Outcome decisions tend to be fair and equitable (strongly disagree, disagree, agree, and strongly agree).

The final item in the legitimacy scale was Survey Item 34b, which stated: Please indicate your agreement/disagreement with:

The death penalty system in my state has sufficient safeguards in place (strongly disagree, disagree, uncertain, agree, and strongly agree).

The legitimacy scores range from 5 to 21, with the highest score possible as 25. Mean is 10.94. Skewness = .66, and the kurtosis = 2.60; both of which tested jointly have a p < .01. Out of 164 responses, 114 responses scored 12 or lower. While the median score is 10, 25% of the respondents had a score of 8 or below.

Death Penalty Suggestion

For H₃f (Regardless of self-reported DP support, the majority of capital case practitioners will have suggestions for improving DP proceedings), the dependant variable is whether or not respondents wrote in suggestions on the essay box provided for Survey Item #21: “If you do have suggestions for improving capital case proceedings, please elaborate.”

Independent Variables for Marshall Hypothesis Testing

Capital Experience

The key independent variable for testing the Marshall Hypothesis was capital case experience. This was measured by a single response item from the survey, Survey Item #6, which asks: Have you been involved in one or more capital case proceedings? The variable was coded dichotomously: 1 = yes; 0 = no.

Legal Years Scale

A scale of two items (Factor Analysis in Table 5-1) was created after they loaded with a sufficiently high Eigenvalue on one factor (>1) and were found to have a
sufficiently high alpha scale reliability score (> .70). The following two items were scaled after being standardized: bar membership years, years in present occupation.

**Current Occupation**

Present occupation of the respondents was measured categorically with Survey Item #3, which asks: “What is your present employment?” The following series of dummy indicators were constructed with prosecutor as the reference category: Judge, Public Defender, Private Defense, Retired, and Other.

**Underlying Belief: Morality Basis for DP Opinion**

In order to explore whether respondents believe that their death penalty opinion is based on religious belief or moral philosophy, Survey Item #39 asks: To what extend do you believe that your personal feelings about the death penalty are based on religious belief or moral philosophy? This concept was measured ordinally and responses were coded as follows: “No personal feelings one way or the other” and “not at all” were coded 0; “Hardly at all” was coded as 1; “Somewhat” was coded as 2; “Completely or almost completely” was coded as 3.

**Underlying Belief: Fundamentalism**

Fundamentalism was measured by responses to a single item, Survey Item #44, which asked respondents to indicate their agreement/disagreement with the statement: “I believe in a literal interpretation of the Bible or some other sacred book or text.” That variable was coded as follows: 1 = strongly disagree; 2 = disagree; 3 = agree; and 4 = strongly agree.

**Underlying Belief: View of Criminal Justice System**

Underlying belief regarding the criminal justice system was measured by ranking responses on a single item, Survey Item #32a, which asked respondents whether they
strongly disagreed (coded 1), disagreed (coded 2), agreed (coded 3), or strongly agreed (coded 4) with this statement: “The ideal criminal justice system dispenses justice equitably.”

**Underlying Belief: View of Criminal Behavior**

Classic orientation was conceptualized from Survey Item 27a, which stated: “Humans are rational and free-willed beings who constantly pursue self-interest, even at the expense of others, unless deterred from doing so.” Response choices were on a 4-part Likert Scale and coded accordingly: 1 = strongly disagree; 2 = disagree; 3 = agree; 4 = strongly agree.

A positivist orientation was conceptualized with one survey item, Survey Item 27c, wherein responses were coded in an ordinal measurement. Respondents were asked whether they strongly disagreed (coded 1), disagreed (coded 2), agreed (coded 3), or strongly agreed (coded 4) with the following statement: “Poverty, strain, and/or blocked opportunity leave some people with little choice but to commit crime.”

**Political Culture**

Political culture was conceptualized in three separate ways. First, the three states were measured categorically with Oregon as the reference category. Secondly, the four political affiliation choices (i.e., Republican, Democrat, Independent, and Other) were measured categorically with Democrat as the reference category. Lastly, lifelong residency was measured categorically from responses on a single survey item which asked respondents, “Are you a lifelong resident of your state?” The answer options of “yes,” “no,” “Born elsewhere but lived here most of my life” were dummy-coded with yes as the reference category.
Independent Variables for Legitimacy Testing

Hypothesis Three (H₃a through H₃c) are statements about the relationship between legitimacy and capital case role, current occupation, and state. The data utilized are the subset of capital case practitioners (n=246).

**Capital Case Role**

The role respondents had in capital cases was measured categorically with Survey Item #8, which asks: “In your involvement with capital case proceedings, what was your role?” The following series of dummy indicators were constructed with prosecutor as the reference category: Judge, Multiple Defense Roles, Public Defender, and Court-Appointed.

**Current Occupation**

Again, the present occupation of respondents was measured categorically with Survey Item #3, which asks: “What is your present employment?” A series of dummy indicators – Judge, Public Defender, Private Defense, and Other – were constructed with prosecutor as the reference category:

**Death Penalty Experience**

Number of capital cases was conceptualized by responses from a single survey question, Survey Item 7, which asked respondents: “To the best of your knowledge, how many times have you been directly involved in capital case proceedings? (Please write in your estimate of the number of times.)” The range of experience is 199; minimum is one capital case; maximum is 200 capital cases. The mean is 11.76; the median is four. Because the raw data are highly skewed, the responses were collapsed into four categories: Category one combined responses that had experience in either one or two capital cases (n=82); category two combined responses that had experience
in three to nine capital cases (n=77); category three combined responses with experience in 10 through 20 capital cases (n=35), and the last category combined responses with experience in 21 through 200 capital case proceedings (n=28).

**Death Penalty Appropriateness**

Four survey items loaded high on Factor Analysis (2.585) using the principal-factors and Varimax rotation methods, and all four appeared to tap into respondents’ beliefs about the appropriateness of the death penalty as a punishment in terms of safety, necessity, and cost-effectiveness. The four items were Survey Items 34a, 34c, 34e, and 34f, each of which had response choices from a 5-item Likert Scale (1=strongly disagree, 2=disagree, 3=uncertain, 4=agree, and 5=strongly agree), and were stated as follows:

- **Item 34a:** It is possible to administer the death penalty system to ensure that innocence people will not be executed.
- **Item 34c:** The death penalty system is a waste of taxpayers’ money (reverse-coded before scaling).
- **Item 34e:** The death penalty is cost-effective.
- **Item 34f:** The death penalty is a necessary component in our criminal justice system.

**Lingering Stress**

Through principal-factors analysis and Varimax rotation, two items loaded high (Eigenvalue = 2.566) on one factor regarding respondents’ perception of how they were impacted from involvement with death penalty proceedings. They were items numbered 22k and 22l on the survey in which respondents were asked to choose from five Likert-scaled responses (1=strongly disagree, 2=disagree, 3=neutral, 4=agree, 5=strongly agree) on the following regarding their capital case involvement:

- **Item 22k:** It has had a lasting emotional impact on my life.
Political Culture

For legitimacy theory testing, political culture was conceptualized in two ways. First, the three states were measured categorically with Oregon as the reference category. Secondly, the four political affiliation choices (i.e., Republican, Democrat, Independent, and Other) were measured categorically with Democrat as the reference category.

Independent Variables for Legitimacy-Support Testing

Hypothesis Four (H4a and H4b) are statements about the relationship between legitimacy and death penalty support. Again, as with the legitimacy theory testing, the data utilized are the subset of capital case practitioners (n=246).

Legitimacy Scale

The same legitimacy scale was used to measure legitimacy as an independent variable as was used when legitimacy was measured as the dependent variable. A scale was created by summing up five survey items – two from Item #16, two from Item #18, and Item #34b – which dealt with fairness perception and loaded high (>5.5) on factor analysis. As previously mentioned, the legitimacy scale ranged from 5 to 21 with the highest score possible being 25. Mean was 10.94. There were 164 responses, 114 of which had legitimacy scores of 12 or less.

Capital Case Role

As explained previously, the role respondents had in capital cases was measured categorically with Survey Item #8, which asked: “In your involvement with capital case proceedings, what was your role?” A series of dummy indicators were constructed for
Judge, Multiple Defense Roles, Public Defender, and Court-Appointed. Prosecutor was the reference category.

**Death Penalty Experience**

Death penalty experience was operationalized in three ways. First, in the same way described in the independent variables for testing legitimacy, number of capital cases was conceptualized by responses from a single survey question, Survey Item 7, which asked respondents: “To the best of your knowledge, how many times have you been directly involved in capital case proceedings? (Please write in your estimate of the number of times.)” Because of skewness of the data, the responses were collapsed into four categories: one or two cases, three to nine cases, ten to 20 cases, 21 to 200 cases.

The second way experience was measured was by responses to a single survey item, Item #10, which asked: “Your capital case experience involved how many judicial circuits?” While respondents had seven choices from which to choose, 111 out of the 214 responses indicated they had only had experience in one judicial circuit. For that reason, the responses were dichotomized (0=only 1 circuit; 1=2 or more circuits). Lastly, experience was measured with responses on Survey Item #11, which asked: “In your involvement with one or more capital cases, did any of those capital cases go to trial?” Responses were coded 0 for no; 1 for yes.

**Underlying Belief**

Underlying belief was measured in two ways. First, fundamentalism was measured by 4-Likert scaled responses to a single item, Survey Item #44, which asked respondents to indicate their agreement/disagreement with the statement: “I believe in a
literal interpretation of the Bible or some other sacred book or text.” Responses were coded 1 for strongly disagree, 2 for disagree, 3 for agree, and 4 for strongly agree.

Morality basis for death penalty opinion was measured ordinally by responses to Survey Item #39 which asked: To what extend do you believe that your personal feelings about the death penalty are based on religious belief or moral philosophy? “No personal feelings one way or the other” and “not at all” were coded 0; “Hardly at all” was coded as 1; “Somewhat” was coded as 2; “Completely or almost completely” was coded as 3.

Political Affiliation

Survey Item #42 asked respondents to identify their primary political party affiliation. The categorical responses (Republican, Independent, and Other) were dummy coded with Democrat retained as the reference category.

State

Because the states are considered categorical-level variables, dummy codes were constructed for Ohio (0 for not Ohio; 1 for Ohio) and South Carolina (0 for not SC; 1 for SC). Oregon was designated as the reference category.

Control Variable

There is only one control variable: gender. This was coded: 0 = female; 1 = male. Research has found little evidence of reliable relationships between socio-demographic factors and attitudes toward the death penalty except for two: race and gender (Murray, 2003). Race was not examined in this research because the goal was to elicit honest answers to what could be considered by some to be very controversial questions. In a specialty practice, such as capital case litigation, participants are well known to one
another. Also, experienced capital case workers tend to be White⁴; therefore, race may be enough information with which to identify a respondent, and anonymity was assured for all quantitative survey participants. All respondents are professionals in a very specialized and narrow criminal justice practice. These capital case workers’ livelihoods depend on discretion. In the pilot study conducted, one respondent made this point clear in the optional final survey item: “Nothing more on the survey, but I do want to remind you that, because I am now a judge, I should not state some of these opinions publicly. I think it is appropriate in an academic setting like this, particularly in light of the fact that the identities of the participants will not be revealed, but I hope you will be especially careful about that. Thank you.”

Analytic Plan for Survey Data

To test the Marshall Hypothesis, the full dataset (n=568) will be used. The experienced death penalty practitioners (capital judges, capital prosecutors, and capital defense attorneys) will be the research group (n=246), and the non-experienced criminal law practitioners will be the comparison group (n=315). Eight respondents chose not to answer whether or not they had capital case experience, and so they were dropped from the final statistical models. For testing the Theory of Legitimacy, only the subset of capital case practitioners will be utilized. That is because, once the respondents identified that they had been involved in death penalty proceedings, they were given the opportunity to answer 36 survey items that related to their death penalty experience.

⁴ Only 4.6% of employed attorneys in 2008 are African American, and yet African Americans comprise 14% of the population in America (U.S. Census Bureau, 2008).
For both the Marshall Hypothesis testing as well as the Theory of Legitimacy testing, quantitative statistical analyses were utilized to look at relationships between variables. Descriptive statistics, as well as correlations and factor analyses, were the first analyses done. For the sake of parsimony, all items were factor-analyzed to see if they could be scaled down. Because it was anticipated that certain variables might be combined to create scales, it was necessary to reverse-code certain responses that were stated negatively in the survey instrument because the industry standard is to recode variables so that higher scores always reflect a greater quantity of a particular variable. In that way, all items can be directly interpreted, and such standardization is a crucial first step before constructing scales or indexes (Acock 2006). Each hypothesis dictated a specific analytic strategy.

For the two hypotheses (H1a and H1b) designed to test the Marshall Hypothesis, the plan is to fit a Ordinary Least Squares regression model with DP Support as the dependent variable and having Capital Experience as the main predictor. For the hypotheses designed to test the Theory of Legitimacy (H3a through H3b), ANOVA and OLS regression models will be estimated. For H3c comparing legitimacy across states (the test of Elazar’s Political Culture Theory), ANOVA will be the analytic strategy. For H4a and H4b, an OLS regression model will be estimated in order to determine the correlation between DP support and legitimacy and whether or not capital role is modifying that relationship. For H5, to determine whether there is a relationship between DP support and written-in suggestion, a chi-square test will be run.

Management of Survey Data

While the survey contains 91 separate items within 45 questions, 36 of those items deal specifically with firsthand knowledge about death penalty proceedings; therefore,
those items were hidden from any respondents who claimed to have no experience with capital litigation. SurveyMonkey™ has an imbedded skip logic that was utilized. If respondents answered “no” to Question #6, “Have you been involved in one or more capital case proceedings,” they were automatically redirected to Question #27, and in that way they skipped 21 questions (which contained 36 separate items).

Research Focus

To reiterate, the two-fold purpose of this study is: (1) to explore whether or not death penalty support is associated with firsthand knowledge of capital case proceedings, which tests the Marshall Hypothesis; and also (2) to determine whether there is a legitimacy crisis in America’s death penalty system. The main dependent variables are death penalty support and legitimacy. The complete sample was used for the first determination; however, only the subset of capital case practitioners was used for the second determination.

Factor Analysis

Because there were a lot of survey items that could conceivably fall within that concept, factor analyses were done to determine whether all variables, or a portion thereof, would load together on one factor. Principal-factor method was used with Varimax rotation. When scale reliability coefficients were high (> .70) scales, indexes, or scores were created.

Factor analysis is widely recognized as having a 3-fold purpose: (1) it summarizes data; (2) it helps to identify relationships among variables (Kachigan 1986); (3) then, once relationships are revealed, it often makes it possible to reduce large numbers of variables down to a smaller number of factors.
**Missing Data**

Missing data is an inevitable problem with surveys because participants are free to skip items. For this study, that problem manifested itself after the survey’s first page, and it was more of a problem on the last page, which unfortunately is where the death penalty support item and the moral base item were located, along with perception of need and demographic variables. A total of 108 respondents skipped the question which read, “Understanding and respecting that capital case representation may be part of your professional responsibilities, how do you PERSONALLY feel about the death penalty,” and 10 chose not to answer. For that reason, the sample size for that item decreased down to 450. Table 5-2 shows the frequency distribution.

**Table 5-1. Missing data frequency distribution**

<table>
<thead>
<tr>
<th>Death Penalty Support</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>I am definitely pro-death penalty</td>
<td>43</td>
<td>9.35</td>
</tr>
<tr>
<td>I am somewhat pro-death penalty</td>
<td>63</td>
<td>13.70</td>
</tr>
<tr>
<td>I have no strong feelings about the death penalty one way or the other</td>
<td>22</td>
<td>4.78</td>
</tr>
<tr>
<td>I am somewhat anti-death penalty</td>
<td>96</td>
<td>20.87</td>
</tr>
<tr>
<td>I am definitely anti-death penalty</td>
<td>226</td>
<td>49.13</td>
</tr>
<tr>
<td>I choose not to answer this question</td>
<td>10</td>
<td>2.17</td>
</tr>
</tbody>
</table>

To check for whether there was a correlation between the missing data and other variables, the death penalty support variable was re-coded as a dummy variable (m_dpsupp) where 1 indicated a missing response and 0 indicated no missing response. Using binary logits, that dummy variable was regressed against numerous predictors (e.g., gender, current and past occupation, capital experience, religiosity, political orientation), and the results showed no significant associations. That statistical
check was repeated for all variables with over 100 missing responses, and no significant correlations were indicated except for the DP need variable.

A binary logit regression confirmed this close relation by finding that belief in the death penalty as a necessary component in the criminal justice system explained 38% of the variation in DP support. The correlation between missing responses on DP support and missing responses on DP need was nearly perfect (Cronbach’s alpha = .98).

Table 5-2 shows the frequency of missing responses cross-tabulated with the current occupation of respondents.

Table 5-2. Cross-tabulation of missing responses and current occupation

<table>
<thead>
<tr>
<th>Current Occupation</th>
<th>DP Support Response</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Missing</td>
</tr>
<tr>
<td>Judge</td>
<td>6</td>
</tr>
<tr>
<td>Prosecutor</td>
<td>12</td>
</tr>
<tr>
<td>Public Defender</td>
<td>16</td>
</tr>
<tr>
<td>Private Attorney</td>
<td>62</td>
</tr>
<tr>
<td>Judicial Clerk</td>
<td>0</td>
</tr>
<tr>
<td>Retired</td>
<td>2</td>
</tr>
<tr>
<td>Other Than Listed</td>
<td>8</td>
</tr>
<tr>
<td>Totals</td>
<td>106</td>
</tr>
</tbody>
</table>

As the Table 5-2 indicates, one-fourth of the current judges chose not to answer whether or not they supported the death penalty, and 16% of both prosecutors and public defenders skipped that question. Almost one-fifth of private attorneys declined to answer, as did 22% of respondents who at the present time are retired.

Limitations with Survey Sample

As is always is the case with voluntary surveys, there is a recognized risk of response bias. In other words, those who choose to take the survey may have much
more in common with each other than those who chose not to take the survey. Also, it is common sense to believe that, when soliciting busy professionals to fill out a 91-item survey, those who participate may have stronger feelings about the issue being addressed. One respondent actually wrote in the last essay box, “Completing this was not fun.” It is for those reasons that the results of this study should not be interpreted as being necessarily representative of all criminal justice workers, much less all capital case workers. However, due to the fact that the majority of respondents have a great deal of experience in the criminal justice system and are all educated in the law, their opinions are informed to a greater degree than the average citizen. It is for this reason, if for no other, that their views are believed to be of considerable value.

Another limitation is that prosecutors and judges are underrepresented in this study, and that underrepresentation does not necessarily reflect their unwillingness to participate. Instead, it is a consequence of the email recruitment process. There was difficult in obtaining email addresses for many known judges and prosecutors. In those cases, faxes were sent as an alternative recruitment method; however, because the response rate from faxed recruitments was low (<10%), it is suspected that most were either not delivered or were discarded upon receipt. All elected prosecutors’ offices were sent recruitment emails and asked to distribute the survey link to their associates; however, it is possible that assistant prosecutors, for whatever reason, were never provided the survey link. This underrepresentation was anticipated, due to prosecutors also being underrepresented in the pilot study, and that is one reason why face-to-face interviews were planned in the research design stage as being a critically important supplement to the survey.
Research Design for Qualitative Study

Qualitative Research Sample

Three capital judges, three capital prosecutors, and three capital defense attorneys were purposively selected from within each of the following three states: Ohio, Oregon, and South Carolina. The 2-fold criteria used for selecting prospective interviewees were: (1.) capital case experience; and (2.) geographic location. The goal was to make certain that capital case workers were interviewed in various locations across each individual state in an effort to control for any intrastate regional effects or anomalies. While it is recognized that nine capital workers per state (27 total) are not a sufficient number from which to generalize, the primary purpose for the qualitative component of this research was to uncover richer and more in-depth data from capital case practitioners than what could be learned from the survey alone. In other words, the face-to-face interviews were an attempt to supplement and enrich insights and conclusions based on the quantitative data. The qualitative data could conceivably uncover important death penalty issues that somehow was overlooked in the survey. The open-ended interview format provided the opportunity for experienced capital workers, as system insiders, to inform and comment on any and all issues that they considered as relevant regarding the death penalty.

Qualitative Research Methodology

The typical recruitment method used was to call up each potential recruit and then follow up with an email which fully explained the research (Appendix C). Attached to each email was the Interview Guide (Appendix D) and the Informed Consent (Appendix E). Twenty-seven interviews were conducted for the qualitative portion of this research, nine capital case workers from each of the three chosen states: Ohio,
Oregon, and South Carolina. All but one interview was conducted face-to-face. Due to an unanticipated scheduling conflict where a capital defender was summoned to appear at an out-of-town court proceeding, that interview was conducted the following week via telephone. Before conducting that interview, however, the Informed Consent was signed and received. The majority of the interviews lasted approximately one hour. The Oregon interviews took place between May 31st and June 7th, 2011; the Ohio interviews took place between June 13th and June 21st, 2011; and the South Carolina interviews took place between July 8th and July 15th, 2011.

Because all participants were busy professionals, most times when I arrived for the scheduled interview, I found that they had already printed out the Informed Consent that had been attached in my introductory email, and oftentimes had even signed it in advance of my arrival. Once it was submitted, I used an interview guide to elicit information. A copy of the interview guide (Appendix D) was also provided prior to the scheduled session. As an initial icebreaker, all interviewees were first asked to give a brief overview of themselves, when they decided to go to law school, why criminal law became their career choice, and the progression to their current position. They were then asked to generally describe their capital case experience, the magnitude of that experience, and whether or not they anticipated being further involved in the future. They were asked whether being an active participant created any personal or professional concerns, conflicts, or stresses; and, if so, to identify what those were. All interviewees were asked whether or not they had suggestions or recommendations for improving capital case proceedings; and, if they did, to elaborate. They were also asked to share their opinion on why people committed crime and how the criminal
justice system responded when crimes were committed. Finally, they were asked outright whether or not they believed the death penalty was a necessary component in the current criminal justice system and to identify the basis for that belief, and that was followed up with the question, Item #11, “Realizing that capital case litigation may be part of your professional job responsibilities, how do you personally feel about the death penalty?” Then they were asked whether those personal feelings were based on religious or moral beliefs, or to explain why they felt the way they did about capital punishment. Lastly, they were asked whether there was anything else they believed was important for me to know that I had not asked about or whether there was anything they wanted to add about the death penalty specifically or about the criminal justice system generally.

While the above interview guide was the starting point for the questions, the interviewees were given wide latitude to talk about any and all issues that they felt were relevant. For that reason, a few of the interviews lasted significantly longer that the 60 minutes that had been originally estimated. The shortest interview lasted 45 minutes; the longest interview lasted in excess of three hours. Most interviewees gave their permission to have the session tape-recorded, and all recordings were subsequently transcribed verbatim5.

The final transcription of all these qualitative interviews ended up being in excess of 600 single-spaced typewritten pages. All participants were extremely generous with

5 Because some of the interviews took place within courthouse settings, there were a couple jurisdictions where the on-site court security staff would not allow me to enter the courthouse with a tape recorder. On those occasions, detailed handwritten notes were taken; and, immediately after the interview concluded, those scribbled notes were put in typewritten format.
their time and were gratifyingly forthcoming with information about capital case proceedings. All took the time to explain recent reforms within their respective states.

Once all the interviews were transcribed, I reviewed them in detail order to find emergent themes from within and across all interviews. Charmaz (2006) claims that, “Coding full transcriptions can bring you to a deeper level of understanding” (p. 70). The coding process enabled me to compare and contrast the experiences and perceptions of all participants so that the commonalities and differences could be revealed and analyzed.

Because this research explored certain issues that have never been fully explored in the existing criminological literature and had only been peripherally examined in the sociological literature, during the coding process I remained alert to the ways my personal perspective might be shading and shaping the data (Charmaz 2006).

**Personal Perspective**

One of my first jobs post high school was working as a secretary at a state attorney’s office, and thereafter I was a court reporter, both freelance and official, for over 20 years. I also had experience as a co-victim in a criminal case because my older brother had been an innocent victim of a shooting which left him, from the age of 20 to his death at 33 years old, paralyzed from the waist down. Then, for the past three years, I taught criminological theory at the undergraduate level. While being raised Roman Catholic, I had never taken a personal stance on the death penalty and remain, to this day, very conflicted on the issue. However, Emerson, Fretz, and Shaw (1995) insist that “the researcher’s point of view and theoretical priorities are not simply pre-given; they are shaped and influenced by the relationships he forms with the people whose social worlds he is trying to understand” (p. 215).
My paradigm or the “basic set of beliefs that guide action” (Cresswell, 2007, p. 19) in the qualitative research are constructivist because my reflexive focus was on how participant-interviewees interpreted and relayed their own capital case experiences. The aim of the qualitative component of this research was to give capital case workers the opportunity to tell their own stories. My role, as Principal Investigator, was merely to listen and be receptive to their narrative realities (Gubrium and Holstein, 2009). In order to do that, I needed to understand their perspective and make the concentrated effort to look beyond their words so that individualized and collective constructions and interpretations would be more readily revealed. This was necessary because words like justice and fairness are oftentimes subjective. In other words, an outcome that a prosecutor perceives as being just may seem like injustice to a defense attorney, and vice versa; and a judge’s idea of justice may differ from both attorney adversaries because judges may be looking at it more narrowly from within the framework of the law and/or may be basing their judgment on whether or not they believe the official record is reverse-proof.

Before describing and analyzing the qualitative component of my dissertation research, I feel it only fair that I disclose my personal perspective because of its potential for bias. While I strived hard to ensure that no such bias has crept in to my analyses, I will describe my personal history so that the reader can reach his or her own conclusions on the issue.

Having been a court reporter for much of my adult life where I spent hundreds of hours in criminal courtrooms among elite6 courtroom workgroups (judges, prosecutors

---

6 A term first coined by Nardulli (1978).
and public as well as private defense attorneys), my experience had led me to generally view criminal case practitioners as being highly dedicated professionals who care deeply about seeing justice done. While prosecutors and criminal defense attorneys might completely disagree on what justice means in specific cases, I firmly believed that the vast majority would still share the common bond of being fully committed to the criminal justice system overall. That belief has, for the most part, been reinforced by this research.

Now, in addition to the above disclosure, I also confess to learning early on in life that it is usually possible to find that for which you are seeking. My maternal grandmother was a fastidious housekeeper, so much so that she actually used a white glove to test household surfaces. One day, as a somewhat obnoxious teenager, I was determined to find dirt in her seemingly spotless house. After concentrated effort, I did manage to find some dirt. In similar fashion, I have no doubt that, had I continued to interview capital case workers in the states of Ohio, Oregon, and South Carolina, I would have found one or more who would have fit the profile of the hang ‘em high judge, the overly zealous prosecutor, and/or even the incompetent defense attorney. I persist, however, in my belief that these stereotypes do not accurately describe the majority of capital case workers. They definitely do not accurately describe the 27 workers who were interviewed for this study. It is my sincere belief that an overlooked problem with some death penalty research is that it does not always recognize or acknowledge the difficult job these frontline capital workers perform, many of whom are regulars in the system. Rarely is consideration given as to how participation in death penalty proceedings might be impacting those who, day in and day out, strive so hard to
try and make the system work. We, as a society, ask a lot from capital workers – way too much if we do not even attempt to understand the challenges they face or when we do not fully appreciate the efforts they make on our behalf.

Limitations with Qualitative Study Sample

As with the survey sample, the qualitative sample may not be representative of the larger population. It was recognized upfront that three capital judges, three capital prosecutors, and three capital defense attorneys would not be a sufficient number so as to be considered as a representative sample for the population of capital workers in any one state. Also, the 27 interviewees were purposively chosen from each state based on known capital case experience and geographic location.

Prospects were contacted by either telephone, email, or both. In Oregon, the first nine selected contacts who were initially contacted all readily agreed to be interviewed. Those nine interviews in Oregon were scheduled over a period of seven days. In both Ohio and South Carolina, additional contacts had to be made in order to schedule the nine interviews. One initial contact in Ohio ended up having to cancel, and a last minute substitution had to be made. Ohio’s nine interviews were conducted over a period of five days. In South Carolina, the nine interviews were conducted over a period of eight days.

Descriptive Data on Survey Sample

As mentioned, out of the 2,722 recruitment emails that were presumably delivered successfully, 568 responses were received. Table 5-5 gives the demographics for all survey respondents.
Table 5-3. Demographics for survey respondents (n=568)

<table>
<thead>
<tr>
<th>State</th>
<th>Ohio</th>
<th>Oregon</th>
<th>S.Carolina</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Active Bar Members</td>
<td>247</td>
<td>216</td>
<td>100</td>
<td>563</td>
</tr>
<tr>
<td>Range of Active Mem.</td>
<td>1-48</td>
<td>0-60</td>
<td>1-48</td>
<td>---</td>
</tr>
<tr>
<td>Current Occupation</td>
<td></td>
<td></td>
<td></td>
<td>562</td>
</tr>
<tr>
<td>Judge</td>
<td>18</td>
<td>7</td>
<td>5</td>
<td>24</td>
</tr>
<tr>
<td>Prosecutor</td>
<td>24</td>
<td>18</td>
<td>33</td>
<td>75</td>
</tr>
<tr>
<td>Public Defender</td>
<td>46</td>
<td>36</td>
<td>19</td>
<td>101</td>
</tr>
<tr>
<td>Private Attorney</td>
<td>151</td>
<td>135</td>
<td>36</td>
<td>322</td>
</tr>
<tr>
<td>Law Clerk</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Retired</td>
<td>1</td>
<td>6</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>None Applicable</td>
<td>18</td>
<td>7</td>
<td>5</td>
<td>30</td>
</tr>
<tr>
<td>Years at Current Ocp.</td>
<td></td>
<td></td>
<td></td>
<td>562</td>
</tr>
<tr>
<td>Less than 1 year</td>
<td>18</td>
<td>22</td>
<td>6</td>
<td>46</td>
</tr>
<tr>
<td>One to five years</td>
<td>72</td>
<td>59</td>
<td>36</td>
<td>167</td>
</tr>
<tr>
<td>Six to ten years</td>
<td>38</td>
<td>44</td>
<td>11</td>
<td>99</td>
</tr>
<tr>
<td>Eleven to 15 years</td>
<td>41</td>
<td>30</td>
<td>11</td>
<td>82</td>
</tr>
<tr>
<td>Over 16 years</td>
<td>76</td>
<td>59</td>
<td>30</td>
<td>165</td>
</tr>
<tr>
<td>“Choose not to answer”</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Past Occupation</td>
<td></td>
<td></td>
<td></td>
<td>552</td>
</tr>
<tr>
<td>ALL 3: Judge, Pros, &amp; Defense</td>
<td>10</td>
<td>15</td>
<td>8</td>
<td>33</td>
</tr>
<tr>
<td>BOTH: Prosecutor &amp; Defense</td>
<td>4</td>
<td>3</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>Judge</td>
<td>4</td>
<td>8</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>Prosecutor</td>
<td>57</td>
<td>50</td>
<td>45</td>
<td>152</td>
</tr>
<tr>
<td>Defense Attorney</td>
<td>152</td>
<td>132</td>
<td>39</td>
<td>323</td>
</tr>
<tr>
<td>Law Clerk</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>None Applicable</td>
<td>7</td>
<td>1</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>“Choose not to answer”</td>
<td>6</td>
<td>4</td>
<td>2</td>
<td>12</td>
</tr>
</tbody>
</table>

The majority, or 57% of respondents across all states, showed their current employment as that of being a private attorney. Many respondents, however, had prior experience as public defenders, prosecutors, and/or even as judges. Some respondents, 6%, had experience in all three roles. The average respondent had been an active bar member for close to 20 years.

One important thing to note about this sample is the proportion of prosecutors who responded in each state. As indicated in Table 5-3, there is a disproportionate amount of prosecutor-respondents in South Carolina, and also less private defense attorneys from that state participated in the survey than would be expected by chance. As already indicated, that is likely due to the recruitment procedures employed in this
research rather than due to South Carolina solicitors being more willing to participate in this survey.

Table 5-4 shows the frequency of responses by state and by current occupation, and gives the results of a chi-square test conducted to show the expected frequencies and whether or not there are statistically significant differences from what would be expected by chance and what is being seen with this data. Also reported is the Cramer’s V score which indicates the strength of associated differences. Each cell in Table 5-4 shows the frequency of responses followed by the expected frequency in parentheses.

Table 5-4. Cross-tabulation of current occupation and state

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Ohio</th>
<th>Oregon</th>
<th>S. Carolina</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>7 (11)</td>
<td>13 (10)</td>
<td>5 (4)</td>
<td>25</td>
</tr>
<tr>
<td>Prosecutor</td>
<td>24 (33)</td>
<td>18 (29)</td>
<td>33 (13)</td>
<td>75</td>
</tr>
<tr>
<td>Public Defender</td>
<td>46 (44)</td>
<td>36 (38)</td>
<td>19 (18)</td>
<td>101</td>
</tr>
<tr>
<td>Private Attorney</td>
<td>151 (142)</td>
<td>135 (123)</td>
<td>36 (58)</td>
<td>322</td>
</tr>
<tr>
<td>Retired &amp; Other</td>
<td>19 (17)</td>
<td>13 (15)</td>
<td>7 (7)</td>
<td>39</td>
</tr>
<tr>
<td>Total</td>
<td>247</td>
<td>215</td>
<td>100</td>
<td>562</td>
</tr>
</tbody>
</table>

\[ X^2 (8, N=562) = 48.55, p<.001; \text{Cramer's V} = .21 \]

While the relationship between current occupation and state is statistically significant (<.001), it is moderately weak (Cramer’s V = .21). As mentioned, the differences in responses by occupation and by state are likely due to the recruitment method and should not be interpreted to mean that respondents in any particular occupational category or in any particular state were more, or less, likely to participate.

Capital experience is a criterion variable for this research. Table 5-5 shows how many respondents had capital experience and how extensive that experience was.
Approximately 44% of the sample had involvement with capital case proceedings (n=246); and 56% had no such experience (n=315). Seven chose not to answer that question. Capital experience across states varies in that South Carolina capital workers are less represented (n=37) as compared to Ohio (n=103) and Oregon (n=106).

Table 5-5. Capital case involvement by state

<table>
<thead>
<tr>
<th>Capital Case Experience (missing = 7)</th>
<th></th>
<th></th>
<th></th>
<th>TOT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Ohio</td>
<td>Oregon</td>
<td>S.Car</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>103</td>
<td>106</td>
<td>37</td>
<td>246</td>
</tr>
<tr>
<td>No</td>
<td>142</td>
<td>110</td>
<td>63</td>
<td>315</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Participation in Cap Cases [(missing=30) (m = 11.65)]</th>
<th></th>
<th></th>
<th></th>
<th>TOT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Ohio</td>
<td>Oregon</td>
<td>S.Car</td>
<td></td>
</tr>
<tr>
<td>None</td>
<td>142</td>
<td>110</td>
<td>63</td>
<td>315</td>
</tr>
<tr>
<td>One or two times</td>
<td>28</td>
<td>41</td>
<td>14</td>
<td>83</td>
</tr>
<tr>
<td>Three to nine times</td>
<td>30</td>
<td>32</td>
<td>14</td>
<td>76</td>
</tr>
<tr>
<td>Ten to nineteen times</td>
<td>14</td>
<td>6</td>
<td>3</td>
<td>23</td>
</tr>
<tr>
<td>Twenty to forty-nine times</td>
<td>15</td>
<td>10</td>
<td>1</td>
<td>26</td>
</tr>
<tr>
<td>Fifty to two hundred times</td>
<td>9</td>
<td>4</td>
<td>2</td>
<td>15</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Type of Capital Case Proceedings (missing = 31)</th>
<th></th>
<th></th>
<th></th>
<th>TOT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complete 2-phase proceedings</td>
<td>51</td>
<td>53</td>
<td>25</td>
<td>129</td>
</tr>
<tr>
<td>Phase one only (guilt/innocence)</td>
<td>15</td>
<td>9</td>
<td>2</td>
<td>26</td>
</tr>
<tr>
<td>Phase two only (life or death)</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Bench trials only</td>
<td>3</td>
<td>1</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>Plea agreements only</td>
<td>8</td>
<td>18</td>
<td>1</td>
<td>27</td>
</tr>
<tr>
<td>PCRs or appeals only</td>
<td>6</td>
<td>3</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>None Applicable</td>
<td>9</td>
<td>8</td>
<td>2</td>
<td>19</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Capital Case Participatory Role (missing = 28)</th>
<th></th>
<th></th>
<th></th>
<th>TOT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>2</td>
<td>1</td>
<td>3</td>
<td>15</td>
</tr>
<tr>
<td>Prosecutor</td>
<td>20</td>
<td>19</td>
<td>15</td>
<td>54</td>
</tr>
<tr>
<td>Defense Attorney</td>
<td>72</td>
<td>58</td>
<td>15</td>
<td>145</td>
</tr>
<tr>
<td>Other</td>
<td>3</td>
<td>7</td>
<td>1</td>
<td>11</td>
</tr>
</tbody>
</table>
CHAPTER 6
QUANTITATIVE ANALYSIS OF DP SUPPORT

Testing the Marshall Hypotheses and Political Culture Theory (H_{1a}, H_{1b}, and H_2)

Table 6-1, shows the descriptive statistics for all variables used to test the Marshall Hypothesis and Elazar’s Political Culture Theory. The correlation matrix of all the independent variables can be found in Appendix F.

Table 6-1. Variables for Marshall Hypothesis and Political Culture

<table>
<thead>
<tr>
<th>Variable</th>
<th>MEAN</th>
<th>MODE</th>
<th>SD</th>
<th>MIN</th>
<th>MAX</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death penalty support (n=450)</td>
<td>2.11</td>
<td>AntiDEF</td>
<td>1.40</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Capital case experience (n=561)</td>
<td>0.44</td>
<td>NO</td>
<td>0.49</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Bar member years (n=563)</td>
<td>19.53</td>
<td>3</td>
<td>12.34</td>
<td>0</td>
<td>60</td>
</tr>
<tr>
<td>Years in current occupation (n=562)</td>
<td>2.29</td>
<td>6-10 YRS</td>
<td>1.39</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Current occupation (n=562) (mode = private)</td>
<td>3.23</td>
<td>PRIV</td>
<td>1.18</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>Moral (n=448)</td>
<td>1.48</td>
<td>SOMEWHAT</td>
<td>1.05</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Fundamentalist (n=454)</td>
<td>1.57</td>
<td>STR DISAG</td>
<td>0.84</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>CJS ideal goal is equitable justice (n=453)</td>
<td>3.16</td>
<td>AGREE</td>
<td>0.82</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Classic orientation (n = 456)</td>
<td>2.60</td>
<td>AGREE</td>
<td>0.71</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Positivist belief: strain (n = 457)</td>
<td>2.46</td>
<td>-TIE-</td>
<td>0.79</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Political Affiliation (n=455)</td>
<td>2.32</td>
<td>DEM</td>
<td>1.15</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Victimization (n=449)</td>
<td>0.39</td>
<td>NO</td>
<td>0.49</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Male (n=465)</td>
<td>0.75</td>
<td>MALE</td>
<td>0.43</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>State (n=568) (mode=Ohio)</td>
<td>1.74</td>
<td>ORE</td>
<td>0.74</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Lifelong residency (n=457)</td>
<td>1.07</td>
<td>BORN</td>
<td>0.88</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

The first hypotheses (H_{1a} and H_{1b}) are: “There will be a negative correlation between death penalty support and capital case experience,” and “Underlying personal belief system will moderate the relationship between death penalty experience and death penalty support.”

Table 6-2 explores the bivariate relationship between death penalty support and capital case experience. H_{1a} predicts that respondents with capital case experience will be less likely to support the death penalty than respondents without any capital case experience.
Table 6-2. Cross-tabulation of DP support and capital case experience

<table>
<thead>
<tr>
<th>DP Support &amp; Capital Case Experience</th>
<th>YES, Capital Case Experience</th>
<th>NO Capital Case Experience</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-DP Definitely</td>
<td>15 (19)</td>
<td>28 (24)</td>
<td>43</td>
</tr>
<tr>
<td>Pro-DP Somewhat</td>
<td>21 (27)</td>
<td>41 (35)</td>
<td>62</td>
</tr>
<tr>
<td>No Strong Feelings</td>
<td>11 (10)</td>
<td>11 (12)</td>
<td>22</td>
</tr>
<tr>
<td>Anti-DP Somewhat</td>
<td>36 (42)</td>
<td>59 (53)</td>
<td>95</td>
</tr>
<tr>
<td>Anti-DP Definitely</td>
<td>114 (99)</td>
<td>110 (125)</td>
<td>224</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>197</td>
<td>249</td>
<td>446</td>
</tr>
</tbody>
</table>

\[ X^2 (4, N=446) = 10.10, p<.05; \text{Cramer's } V = .15 \]

This suggests that the first part of Hypothesis One (H\(_{1a}\)) is supported because 18% of capital-experienced respondents claim to be pro-death penalty (n=36) as compared to 28% (n=69) without any experience in DP proceedings. That difference in opinion is statistically significant (p<.05); however, it is not strong (Cramer’s V = .15).

The second hypothesis (H\(_2\)) is: “The relationship between capital case experience and death penalty support will be moderated by political orientation.” Table 6-3 suggests that political affiliation has a significant (p<.001) and moderately strong association (Cramer’s V = .28).

Table 6-3. Cross-tabulation of DP support and political affiliation

<table>
<thead>
<tr>
<th>DP Support &amp; Political Affiliation</th>
<th>Rep</th>
<th>Dem</th>
<th>Indep</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-DP Definitely</td>
<td>23 (8)</td>
<td>7 (20)</td>
<td>8 (9)</td>
<td>1 (2)(^a)</td>
<td>39</td>
</tr>
<tr>
<td>Pro-DP Somewhat</td>
<td>21 (12)</td>
<td>15 (29)</td>
<td>19 (14)</td>
<td>2 (2)(^a)</td>
<td>57</td>
</tr>
<tr>
<td>No Strong Feelings</td>
<td>6 (4)(^a)</td>
<td>8 (10)</td>
<td>5 (4)(^a)</td>
<td>0 (1)(^a)</td>
<td>19</td>
</tr>
<tr>
<td>Anti-DP Somewhat</td>
<td>21 (19)</td>
<td>38 (47)</td>
<td>24 (22)</td>
<td>8 (4)(^a)</td>
<td>91</td>
</tr>
<tr>
<td>Anti-DP Definitely</td>
<td>15 (43)</td>
<td>147 (109)</td>
<td>43 (50)</td>
<td>7 (9)</td>
<td>212</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>86</td>
<td>215</td>
<td>99</td>
<td>18</td>
<td>418</td>
</tr>
</tbody>
</table>

\[ X^2(12, N=418) = 95.84, p<.001; \text{Cramer’s } V = .28 \]

\(^a\)Six cells contain expected frequencies of less than five (30%). For that reason, cross-tabulations were reconstructed for just the pro-death penalty group in Table 6-4.
Table 6-4 examines solely the supporters and performs a cross-tabulation between DP support and political affiliation.

<table>
<thead>
<tr>
<th>Pro-DP &amp; Political Affiliation</th>
<th>Rep</th>
<th>Dem</th>
<th>Indep</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-DP Definitely</td>
<td>23</td>
<td>7</td>
<td>8</td>
<td>1</td>
<td>39</td>
</tr>
<tr>
<td>Pro-DP Somewhat</td>
<td>21</td>
<td>15</td>
<td>19</td>
<td>2</td>
<td>57</td>
</tr>
<tr>
<td>Total</td>
<td>86</td>
<td>215</td>
<td>99</td>
<td>18</td>
<td>418</td>
</tr>
</tbody>
</table>

\[ X^2(12, N=418) = 59.79, p<.001; \text{Cramer’s V }= .38 \]

There is a moderate association between the Pro-Death Penalty and political affiliation. Over half of the self-identified Republicans (51%) support capital punishment as opposed to 11% of Democrats, 27% Independents, and 17% who self-identified with the “Other” political affiliation.

A chi-square test was run to determine if there was a correlation between DP support and state in Table 6-5.

<table>
<thead>
<tr>
<th>Frequency (Expected Frequency)</th>
<th>Ohio (n=201)</th>
<th>Oregon (n=173)</th>
<th>S Carolina (n=76)</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-DP Definitely</td>
<td>17 (19)</td>
<td>7 (16)</td>
<td>19 (7)</td>
<td>43</td>
</tr>
<tr>
<td>Pro-DP Somewhat</td>
<td>28 (28)</td>
<td>21 (24)</td>
<td>14 (10)</td>
<td>63</td>
</tr>
<tr>
<td>No Strong Feelings</td>
<td>8 (10)</td>
<td>10 (8)</td>
<td>4 (4)</td>
<td>22</td>
</tr>
<tr>
<td>Anti-DP Somewhat</td>
<td>51 (43)</td>
<td>32 (37)</td>
<td>13 (16)</td>
<td>96</td>
</tr>
<tr>
<td>Anti-DP Definitely</td>
<td>97 (101)</td>
<td>103 (87)</td>
<td>26 (38)</td>
<td>226</td>
</tr>
<tr>
<td>Total</td>
<td>201</td>
<td>173</td>
<td>76</td>
<td>450</td>
</tr>
</tbody>
</table>

\[ X^2 (8, N=450) = 36.70, p<.001; \text{Cramer’s V }= .20 \]

Table 6-5 shows the relationship between death penalty support and state of residency is statistically significant (<.001) but fairly weak (Cramer’s V = .20). Fewer
respondents from Oregon are strongly supportive of the death penalty, and a higher number of Oregonians are more strongly opposed than would be expected by chance. More respondents from South Carolina, than would be expected by chance, are strongly supportive of the death penalty; however, these findings may be due to the larger percentage of current prosecutors from South Carolina (33%) responding to the survey as compared to Ohio (10%) and Oregon (8%).

Classic orientation is the conceptualization for ideology oriented toward the idea that deviance is a free-willed choice of individuals. It is reasonable to assume that respondents who hold individuals personally responsible for their criminal behavior would be more likely to support harsher punishments, or be retributive (H₁b), than would respondents who view deviant behavior as being largely influenced by factors beyond an individuals’ control (the positivist perspective); therefore, the expectation would be that classic orientation would positively correlate with DP support. Table 6-6 looks at the relationship between classic orientation and death penalty support.

Table 6-6. Cross-tabulation of DP support and classic orientation

<table>
<thead>
<tr>
<th>DP Support</th>
<th>YES, Classic Orientation</th>
<th>NO Classic Orientation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-DP Definitely</td>
<td>35 (25)</td>
<td>7 (17)</td>
<td>42</td>
</tr>
<tr>
<td>Pro-DP Somewhat</td>
<td>40 (37)</td>
<td>23 (26)</td>
<td>63</td>
</tr>
<tr>
<td>No Strong Feelings</td>
<td>14 (13)</td>
<td>8 (9)</td>
<td>22</td>
</tr>
<tr>
<td>Anti-DP Somewhat</td>
<td>61 (54)</td>
<td>32 (39)</td>
<td>93</td>
</tr>
<tr>
<td>Anti-DP Definitely</td>
<td>107 (129)</td>
<td>112 (91)</td>
<td>219</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>257</td>
<td>182</td>
<td>439</td>
</tr>
</tbody>
</table>

X² (4, N=439) = 21.87, p<.001; Cramer’s V =.22

The association between classic orientation and DP support is significant (<.001) and low-to-moderate in strength (Cramer’s V = .22). The relationship that classic
orientation has on DP Support appears to be more apparent at opinion extremes in that respondents who claim to be definitely pro-death penalty are more likely to agree with the statement, “Humans are rational and free-willed beings who constantly pursue self-interest, even at the expense of others, unless deterred from doing so,” and respondents who claim to be definitely anti-death penalty are more likely to disagree.

One of the main research goals was to test the Marshall Hypothesis, based on Justice Marshall writing in a Supreme Court opinion of his belief that increased knowledge about the death penalty would tend to decrease support unless there was a strong underlying belief in retribution. For that reason, Survey Item #39 asked respondents: “To what extend do you believe that your personal feelings about the death penalty are based on religious belief or moral philosophy?” Eleven respondents “chose” not to answer that question, and 109 respondents skipped that item altogether. The majority of respondents claim there is a moral basis for whether they support capital punishment or not. Table 6-7 is the cross-tabulated display of that relationship.

<table>
<thead>
<tr>
<th>DP Support &amp; Moral Basis</th>
<th>No At All</th>
<th>Hardly at All</th>
<th>Some-what</th>
<th>Completely or Almost Completely</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-DP Definitely</td>
<td>10 (11)</td>
<td>8 (8)</td>
<td>17 (17)</td>
<td>8 (8)</td>
<td>43</td>
</tr>
<tr>
<td>Pro-DP Somewhat</td>
<td>20 (16)</td>
<td>13 (12)</td>
<td>22 (25)</td>
<td>8 (11)</td>
<td>63</td>
</tr>
<tr>
<td>No Strong Feelings</td>
<td>14 (5)</td>
<td>3 (4)</td>
<td>2 (8)</td>
<td>1 (3)</td>
<td>20</td>
</tr>
<tr>
<td>Anti-DP Somewhat</td>
<td>23 (24)</td>
<td>25 (18)</td>
<td>39 (37)</td>
<td>9 (16)</td>
<td>96</td>
</tr>
<tr>
<td>Anti-DP Definitely</td>
<td>44 (55)</td>
<td>34 (41)</td>
<td>93 (86)</td>
<td>49 (37)</td>
<td>220</td>
</tr>
<tr>
<td>Total</td>
<td>111</td>
<td>83</td>
<td>173</td>
<td>75</td>
<td>442</td>
</tr>
</tbody>
</table>

Even though the relationship between DP Support and Moral Basis is somewhat weak, it is highly significant (p<.001), and an interesting pattern is revealed. It is the
strongly anti-death penalty group that is more likely to claim morality reasons for their stance on capital punishment. Of the respondents who claim that their DP opinion is based at least somewhat on moral or religious beliefs ("Somewhat" and "Completely or Almost Completely" combined), 77% are not supporters of the death penalty, and only 22% are DP supporters.

**Regression Models for Marshall Hypothesis Testing**

Because death penalty support was conceptualized by responses from a single survey item which was coded from 1 through 5, Ordinary Least Squares Regression (OLS) was the analytic method utilized.

Collinearity diagnostics revealed that, with the exception of the interaction items constructed to include in the estimated model, no independent variable had a variance inflation factor (VIF) substantially greater than 1. The mean VIF is 1.47.

Four observations, 51, 61, 90, and 332 have high deviance residual scores; however, none of those have unacceptable leverage scores. While 26 observations do exceed the leverage cut-off point, which is calculated by dividing number of parameters by number of observations, no DFBETAS exceed one (1.0); and, according to Agresti and Finlay (1999), only DFBETAS with absolute values greater than one (>1) would be indicative of a particular observation having a substantial influence on the parameter estimate.

As an added precaution, models were estimated with and without observations having high Cook’s residual as well as high leverage scores. Results were that the coefficients and robust standard errors were strikingly similar.
<table>
<thead>
<tr>
<th>OLS Regression Model for Testing Marshall Hypothesis</th>
</tr>
</thead>
<tbody>
<tr>
<td>DV=Supportive of DP (1→5)</td>
</tr>
</tbody>
</table>

| Model | Capital Experience (0/1) | Legal Years Scale | Judge (0/1) | Public Defender (0/1) | Private Defense (0/1) | Moral | Religion – Fundamental (0→4) | CJ Goal IS Equitable Justice (1→4) | Explains Behavior by Strain (1→4) | Republican (0/1) | Independent (0/1) | Victimization (0/1) | Male (0/1) | Ohio (0/1) | South Carolina (0/1) | Not Lifelong Resident (0/1) | Yes But Born Elsewhere (0/1) | Capital Experience X Moral | Cap Exp X Classic View of Behavior | Cap Experience X Republican | Cap Exp X South Carolina | Constant |
|-------|--------------------------|------------------|-------------|----------------------|----------------------|-------|-----------------------------|-----------------------------------|----------------------------------|----------------|----------------|------------------|------------|-----------|----------------------|-----------------------------|--------------------------|-----------------------------|-----------------------------|-----------------------------|---------------------|
| Model 1 | **-.350 (.13)** | *-.238 (.14) | *-.122 (.06) | **-.761 (.19)** | ***-.715 (.16)** | **-.122 (.06) | **.162 (.07) | **.164 (.07) | **-.383 (.08) | ***1.035 (.17) | ***.431 (.15) | -.152 (.12) | .218 (.15) | **.394 (.18) | -.127 (.13) | ***.252 (.09) | -.157 (.12) | ***.475 (.17) | -.309 (.31) | -.156 (.32) | **2.269 (.09) |
| Model 2 | -.350 (.13) | -.238 (.14) | -.122 (.06) | -.761 (.19) | -.715 (.16) | -.122 (.06) | .162 (.07) | .164 (.07) | -.383 (.08) | 1.035 (.17) | .431 (.15) | .152 (.12) | .218 (.15) | .394 (.18) | .127 (.13) | .252 (.09) | .157 (.12) | .475 (.17) | .309 (.31) | .156 (.32) | 2.269 (.09) |
| Model 3 | -.350 (.13) | -.238 (.14) | -.122 (.06) | -.761 (.19) | -.715 (.16) | -.122 (.06) | .162 (.07) | .164 (.07) | -.383 (.08) | 1.035 (.17) | .431 (.15) | .152 (.12) | .218 (.15) | .394 (.18) | .127 (.13) | .252 (.09) | .157 (.12) | .475 (.17) | .309 (.31) | .156 (.32) | 2.269 (.09) |

| Adj. R² | .0132 | .3555 | .3657 |
| Number of Observations | 446 | 373 | 373 |
| **p<.01; **p<.05, *p<.10 | F(1, 444)=6.95 | F(18, 354)=12.40 | F(22, 350)=11.75 |
| p<.01 | p<.0001 | p<.0001 |

Model 2 in Table 6-8 reveals that all coefficient signs are as predicted, except for CJ Goal ideology. The model itself is statistically significant (p < .0001) and explains slightly over 35% of the variation in death penalty support. Experience, the main research criterion, is in the direction predicted: As each standardized unit of experience increases, death penalty support decreases. This inverse correlation between death
penalty support and capital case experience is statistically significant ($p < .10$) and is supportive of Hypothesis 1a, which predicted that there would be negative correlation between death penalty support and capital case experience. Being currently employed as a public defender or private defense attorney (as compared to being employed as a prosecutor) makes one less likely to support the death penalty, and those correlations are statistically significant ($p < .01$). Having a fundamentalist view toward religion and having an idealistic view of how the criminal justice system should operate both positively correlate with death penalty support and are statistically significant ($p < .05$). Explaining criminal behavior by a positivist perspective (strain) negatively correlates with death penalty support, and that relationship is statistically significant ($p < .01$). Being a Republican or an Independent, as compared to being a Democrat is a statistically significant correlate for death penalty support ($p < .01$). Respondents from South Carolina, as compared to respondents from Oregon, were more likely to be DP-supportive, and that relationship is statistically significant ($p < .01$). Somewhat surprisingly, respondents who lived in their state for most of their life but were born elsewhere were more likely to support capital punishment as compared to respondents who were born and raised within their state.

Legal years of experience, being a judge (as compared to being a prosecutor), having a classic view of the criminal behavior, victimization experience, being from Ohio (as compared to Ohio), and not being a lifelong resident were also included as independent variables. None of these variables, however, were found to be statistically significant predictors for death penalty support.
Interaction terms are estimated “to infer how the effect of one independent variable on the dependent variable depends on the magnitude of another independent variable” (Norton, Wang, and Ai 2004, p. 154). Because the Marshall Hypothesis predicts that belief in retribution will have an impact on the relationship between death penalty support and knowledge, it was deemed necessary to create an interaction with the “moral basis” variable. Also, because Hypothesis 1b states that “Underlying personal belief systems will moderate the relationship between death penalty support and capital case experience,” an interaction term was created for capital case experience and “Classic View of Behavior.” Also, because Hypothesis 2 states that “the relationship between death penalty support and capital case experience will be moderated by political orientation,” an interaction term was constructed for capital case experience and “Republican” as well as for capital case experience and South Carolina (which was the only state that, when compared to Oregon, was a statistically significant predictor for death penalty support.

Model 3, which is the additive model with the interaction terms included, is statistically significant (p < .0001) and explains slightly less than 37% of the variation in death penalty support, which is an improvement over Model 2. In Model 3, the interaction between capital case experience and moral basis for DP opinion is non-significant; and, with the insertion of interaction terms, the moral basis for DP opinion has become non-significant. The interaction between capital case experience and classic view of criminal behavior is statistically significant (p < .01) and positively correlates with death penalty support, independent of the main effects from both variables. This would be supportive of Hypothesis 1b, which claims that underlying
personal belief systems will moderate the relationship between capital case experience and death penalty support. Hypothesis Two is not supported because the interaction between capital case experience and being Republican (as opposed to Democrat) is non-significant, and the interaction between capital case experience and South Carolina is non-significant. South Carolina (p ≤ .05) and being Republican (p < .01), however, remain significant as solo predictors in Model 3.

In conclusion, the models suggest that 37% of the variation for DP support is explained by capital case experiential knowledge, current occupation, a fundamentalist view of religion, a view of the CJS goal as being equitable justice, underlying belief in how criminal behavior is explained, political orientation, and political culture. These results seem to confirm what previous research has indicated: death penalty opinion is a complex concept which may be, in large part, culturally imbedded in American’s institutions: work, church, and polity. In future chapters, dealing with the qualitative data, economics will be introduced as an influence for death penalty support because many interviewees were anti-death penalty due to the high costs associated in seeking and confirming a death sentence.

**Summary and Conclusions**

The first part of Hypothesis One (H1a) is supported by this research because capital case experience was found to be a statistically significant predictor for death penalty support. The Marshall Hypothesis is also supported because a statistically significant inverse relationship between death penalty knowledge (in terms of actual capital case experience) and death penalty support was found. The second part of Hypothesis One (H1b), which stated that an underlying belief system would moderate the DP support-knowledge relationship, is also supported because – even though the
interaction between moral basis for DP opinion and DP support was not found to be significant – the interaction between classic view of criminal behavior and capital case experience was found to be positively correlated with death penalty support.

Hypothesis Two (H₂) stated that the relationship between capital case experience and death penalty support would be moderated by political orientation, and that has not been supported in this research because the interaction term between Republican and capital case experience was non-significant. Political affiliation, however, is found to be a statistically significant direct predictor for death penalty support.

This research suggests that there is a prosecutorial effect on death penalty support. As compared to prosecutors, private and public defenders are less likely to support the death penalty, and that relationship is statistically significant.

Further research needs to be done to explore this prosecutorial effect. It may be that prosecutors are more likely than defense attorneys to believe in retributive justice and that is why they first chose their profession, or it may be that the experience of being a law enforcer has shaped their views of capital punishment and that their allegiance to death penalty law increases or becomes more firmly established during their professional tenure.
CHAPTER 7
QUANTITATIVE ANALYSIS OF LEGITIMACY

Theory of Legitimacy Test (H3a through H3c)

From the 568 responses received, 246 of the respondents claimed capital case experience. It is that capital experience that we want to tap into for testing the support-legitimacy association. For Hypotheses Three, the capital subset will be the sample.

Table 7-1 describes the characteristics of this sample.

Table 7-1. Capital case worker descriptive statistics

<table>
<thead>
<tr>
<th>Characteristics</th>
<th>Mean</th>
<th>Mode</th>
<th>Med</th>
<th>SD</th>
<th>Range</th>
<th>Total</th>
<th>Miss’g</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male (0=F; 1=M)</td>
<td>.8</td>
<td>Male</td>
<td>.40</td>
<td>0-1</td>
<td>205</td>
<td>41</td>
<td></td>
</tr>
<tr>
<td>State (1=OH; 2=OR; 3=SC)</td>
<td>1.7</td>
<td>Oregon</td>
<td>.71</td>
<td>1-3</td>
<td>246</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Bar Member Years</td>
<td>25.6</td>
<td>30</td>
<td>27</td>
<td>10.38</td>
<td>2-60</td>
<td>246</td>
<td>0</td>
</tr>
<tr>
<td>Current Occupation</td>
<td>3.3</td>
<td>Private</td>
<td>1.18</td>
<td>0-5</td>
<td>245</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Yr RANGE Curr Occ</td>
<td>2.8</td>
<td>&gt;16 yrs</td>
<td>11-15</td>
<td>1.32</td>
<td>0-6</td>
<td>246</td>
<td>0</td>
</tr>
<tr>
<td>Past Occupation</td>
<td>3.1</td>
<td>Defense</td>
<td>1.74</td>
<td>0-9</td>
<td>241</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Cap Number</td>
<td>11.8</td>
<td>1</td>
<td>3</td>
<td>23.95</td>
<td>1-200</td>
<td>222</td>
<td>24</td>
</tr>
<tr>
<td>Cap Role</td>
<td>5.9</td>
<td>CA Def</td>
<td>3.62</td>
<td>0-13</td>
<td>224</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>Circuit Experience</td>
<td>2.1</td>
<td>One Circ</td>
<td>1</td>
<td>1.85</td>
<td>0-7</td>
<td>214</td>
<td>32</td>
</tr>
<tr>
<td>Cap Trial Exp (0/1)</td>
<td>.8</td>
<td>Yes</td>
<td>.41</td>
<td>0-1</td>
<td>222</td>
<td>24</td>
<td></td>
</tr>
<tr>
<td>Cap Jury Experience</td>
<td>2.1</td>
<td>Ph 1 &amp; 2</td>
<td>1.30</td>
<td>0-7</td>
<td>222</td>
<td>24</td>
<td></td>
</tr>
<tr>
<td>Future Cap (0/1)</td>
<td>.6</td>
<td>Yes</td>
<td>.49</td>
<td>0-1</td>
<td>220</td>
<td>26</td>
<td></td>
</tr>
<tr>
<td>Rep Gold Standard</td>
<td>2.2</td>
<td>Disagree</td>
<td>.95</td>
<td>4 Likert</td>
<td>205</td>
<td>41</td>
<td></td>
</tr>
<tr>
<td>Same Fair Non-cap</td>
<td>2.2</td>
<td>Disagree</td>
<td>.74</td>
<td>4 Likert</td>
<td>198</td>
<td>48</td>
<td></td>
</tr>
<tr>
<td>DP Unfair</td>
<td>2.4</td>
<td>Disagree</td>
<td>1.00</td>
<td>4 Likert</td>
<td>194</td>
<td>52</td>
<td></td>
</tr>
<tr>
<td>Charging Fair</td>
<td>2.0</td>
<td>Strong Dis</td>
<td>1.00</td>
<td>4 Likert</td>
<td>216</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>Outcome Fair</td>
<td>2.1</td>
<td>Disagree</td>
<td>.89</td>
<td>4 Likert</td>
<td>210</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>Suggestions (0/1)</td>
<td>.7</td>
<td>Yes</td>
<td>.47</td>
<td>0-1</td>
<td>215</td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>Personal Conflict</td>
<td>2.9</td>
<td>Agree</td>
<td>1.17</td>
<td>5 Likert</td>
<td>216</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>Professional Conflict</td>
<td>2.6</td>
<td>Disagree</td>
<td>1.19</td>
<td>5 Likert</td>
<td>215</td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>No Major Impact</td>
<td>3.7</td>
<td>Agree</td>
<td>1.15</td>
<td>5 Likert</td>
<td>216</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>Time Constraints</td>
<td>3.2</td>
<td>Agree</td>
<td>1.20</td>
<td>5 Likert</td>
<td>217</td>
<td>29</td>
<td></td>
</tr>
<tr>
<td>Money Constraints</td>
<td>3.3</td>
<td>Agree</td>
<td>1.34</td>
<td>5 Likert</td>
<td>216</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>Adequate Staff</td>
<td>2.9</td>
<td>Disagree</td>
<td>1.20</td>
<td>5 Likert</td>
<td>215</td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>Family Stress</td>
<td>3.0</td>
<td>Agree</td>
<td>1.14</td>
<td>5 Likert</td>
<td>217</td>
<td>29</td>
<td></td>
</tr>
<tr>
<td>Hurt Relation/Friends</td>
<td>2.3</td>
<td>Disagree</td>
<td>.96</td>
<td>5 Likert</td>
<td>217</td>
<td>29</td>
<td></td>
</tr>
<tr>
<td>Mental Health</td>
<td>2.7</td>
<td>Disagree</td>
<td>1.13</td>
<td>5 Likert</td>
<td>216</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>Physical Health</td>
<td>2.6</td>
<td>Disagree</td>
<td>1.10</td>
<td>5 Likert</td>
<td>217</td>
<td>29</td>
<td></td>
</tr>
<tr>
<td>Lasting Emotional</td>
<td>3.3</td>
<td>Agree</td>
<td>1.15</td>
<td>5 Likert</td>
<td>217</td>
<td>29</td>
<td></td>
</tr>
<tr>
<td>Lasting Spiritual</td>
<td>2.9</td>
<td>Neutral</td>
<td>1.06</td>
<td>5 Likert</td>
<td>216</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>No Different</td>
<td>4.0</td>
<td>Str Agree</td>
<td>1.10</td>
<td>5 Likert</td>
<td>217</td>
<td>29</td>
<td></td>
</tr>
<tr>
<td>DP Choice</td>
<td>2.7</td>
<td>Tot Choice</td>
<td>1.70</td>
<td>0-4</td>
<td>217</td>
<td>29</td>
<td></td>
</tr>
<tr>
<td>DP Counseling</td>
<td>.0</td>
<td>No Need</td>
<td>.218</td>
<td>0-1</td>
<td>221</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>DP Training</td>
<td>2.2</td>
<td>Adequate</td>
<td>1.32</td>
<td>0-4</td>
<td>213</td>
<td>33</td>
<td></td>
</tr>
<tr>
<td>Characteristics</td>
<td>Mean</td>
<td>Mode</td>
<td>Med</td>
<td>SD</td>
<td>Range</td>
<td>Total</td>
<td>Miss'g</td>
</tr>
<tr>
<td>----------------------------------------</td>
<td>------</td>
<td>--------</td>
<td>------</td>
<td>-----</td>
<td>-------</td>
<td>-------</td>
<td>--------</td>
</tr>
<tr>
<td>Classic</td>
<td>2.43</td>
<td>Agree</td>
<td>.74</td>
<td>4</td>
<td>Likert</td>
<td>196</td>
<td>50</td>
</tr>
<tr>
<td>Self-Control</td>
<td>3.12</td>
<td>Agree</td>
<td>.60</td>
<td>4</td>
<td>Likert</td>
<td>198</td>
<td>48</td>
</tr>
<tr>
<td>General Strain</td>
<td>2.44</td>
<td>Disagree</td>
<td>.78</td>
<td>4</td>
<td>Likert</td>
<td>197</td>
<td>49</td>
</tr>
<tr>
<td>Social Learning</td>
<td>2.34</td>
<td>Disagree</td>
<td>.66</td>
<td>4</td>
<td>Likert</td>
<td>196</td>
<td>50</td>
</tr>
<tr>
<td>Peer Association</td>
<td>3.19</td>
<td>Agree</td>
<td>.51</td>
<td>4</td>
<td>Likert</td>
<td>198</td>
<td>48</td>
</tr>
<tr>
<td>Social Bonding</td>
<td>3.17</td>
<td>Agree</td>
<td>.48</td>
<td>4</td>
<td>Likert</td>
<td>197</td>
<td>49</td>
</tr>
<tr>
<td>Bio-Psyche</td>
<td>3.10</td>
<td>Agree</td>
<td>.70</td>
<td>4</td>
<td>Likert</td>
<td>199</td>
<td>47</td>
</tr>
<tr>
<td>Theory Use</td>
<td>.72</td>
<td>Yes</td>
<td>.45</td>
<td>0-1</td>
<td></td>
<td>202</td>
<td>44</td>
</tr>
<tr>
<td>Loc News Accurate</td>
<td>2.29</td>
<td>Disagree</td>
<td>.99</td>
<td>5</td>
<td>Likert</td>
<td>202</td>
<td>44</td>
</tr>
<tr>
<td>Nat News Accurate</td>
<td>2.29</td>
<td>Disagree</td>
<td>.85</td>
<td>5</td>
<td>Likert</td>
<td>200</td>
<td>46</td>
</tr>
<tr>
<td>Loc Radio Accur</td>
<td>2.21</td>
<td>Disagree</td>
<td>.91</td>
<td>5</td>
<td>Likert</td>
<td>201</td>
<td>45</td>
</tr>
<tr>
<td>Nat Radio Accur</td>
<td>2.27</td>
<td>Disagree</td>
<td>.89</td>
<td>5</td>
<td>Likert</td>
<td>198</td>
<td>48</td>
</tr>
<tr>
<td>Media NOT Accur</td>
<td>3.73</td>
<td>Agree</td>
<td>.95</td>
<td>5</td>
<td>Likert</td>
<td>200</td>
<td>46</td>
</tr>
<tr>
<td>Local TV Accurate</td>
<td>2.17</td>
<td>Disagree</td>
<td>.94</td>
<td>5</td>
<td>Likert</td>
<td>200</td>
<td>46</td>
</tr>
<tr>
<td>Nat TV Accurate</td>
<td>2.27</td>
<td>Disagree</td>
<td>.87</td>
<td>5</td>
<td>Likert</td>
<td>199</td>
<td>47</td>
</tr>
<tr>
<td>CJ Goal Equitable</td>
<td>3.15</td>
<td>Agree</td>
<td>.85</td>
<td>4</td>
<td>Likert</td>
<td>200</td>
<td>46</td>
</tr>
<tr>
<td>Ideal NOT CJ Goal</td>
<td>2.77</td>
<td>Agree</td>
<td>.85</td>
<td>4</td>
<td>Likert</td>
<td>196</td>
<td>50</td>
</tr>
<tr>
<td>CJS Gap</td>
<td>1.80</td>
<td>Disagree</td>
<td>.67</td>
<td>4</td>
<td>Likert</td>
<td>199</td>
<td>47</td>
</tr>
<tr>
<td>1x Goal/No Longer</td>
<td>2.64</td>
<td>Agree</td>
<td>.81</td>
<td>4</td>
<td>Likert</td>
<td>192</td>
<td>54</td>
</tr>
<tr>
<td>DP Can Be Safe</td>
<td>1.99</td>
<td>Strong Dis</td>
<td>1.28</td>
<td>5</td>
<td>Likert</td>
<td>203</td>
<td>43</td>
</tr>
<tr>
<td>DP IS Safe Here</td>
<td>2.14</td>
<td>Strong Dis</td>
<td>1.33</td>
<td>5</td>
<td>Likert</td>
<td>201</td>
<td>45</td>
</tr>
<tr>
<td>DP Not Waste of $$</td>
<td>1.99</td>
<td>Strong Dis</td>
<td>1.37</td>
<td>5</td>
<td>Likert</td>
<td>201</td>
<td>45</td>
</tr>
<tr>
<td>DP More Deterrent</td>
<td>1.72</td>
<td>Strong Dis</td>
<td>1.12</td>
<td>5</td>
<td>Likert</td>
<td>201</td>
<td>45</td>
</tr>
<tr>
<td>DP Cost Effective</td>
<td>1.49</td>
<td>Strong Dis</td>
<td>1.22</td>
<td>5</td>
<td>Likert</td>
<td>200</td>
<td>46</td>
</tr>
<tr>
<td>DP Necessary</td>
<td>2.09</td>
<td>Strong Dis</td>
<td>1.40</td>
<td>5</td>
<td>Likert</td>
<td>200</td>
<td>46</td>
</tr>
<tr>
<td>More Det Than LWP</td>
<td>2.20</td>
<td>Strong Dis</td>
<td>1.37</td>
<td>5</td>
<td>Likert</td>
<td>202</td>
<td>44</td>
</tr>
<tr>
<td>Rehab &amp; Illness</td>
<td>1.78</td>
<td>Disagree</td>
<td>.68</td>
<td>4</td>
<td>Likert</td>
<td>192</td>
<td>54</td>
</tr>
<tr>
<td>Mgt &amp; No Presump</td>
<td>2.47</td>
<td>&quot;Agr &amp; Dis&quot;</td>
<td>.74</td>
<td>4</td>
<td>Likert</td>
<td>186</td>
<td>60</td>
</tr>
<tr>
<td>Punish &amp; Guilt</td>
<td>2.69</td>
<td>Agree</td>
<td>.81</td>
<td>4</td>
<td>Likert</td>
<td>192</td>
<td>54</td>
</tr>
<tr>
<td>DueProc &amp; Innoc</td>
<td>2.13</td>
<td>Disagree</td>
<td>.86</td>
<td>4</td>
<td>Likert</td>
<td>193</td>
<td>53</td>
</tr>
<tr>
<td>Shaming &amp; Guilt</td>
<td>2.26</td>
<td>Disagree</td>
<td>.78</td>
<td>4</td>
<td>Likert</td>
<td>191</td>
<td>55</td>
</tr>
<tr>
<td>Power Maintain</td>
<td>2.58</td>
<td>Agree</td>
<td>.95</td>
<td>4</td>
<td>Likert</td>
<td>185</td>
<td>61</td>
</tr>
<tr>
<td>Contradictory</td>
<td>2.82</td>
<td>Agree</td>
<td>.88</td>
<td>4</td>
<td>Likert</td>
<td>192</td>
<td>54</td>
</tr>
<tr>
<td>None Fit CJS</td>
<td>.73</td>
<td>Strong Dis</td>
<td>1.21</td>
<td>4</td>
<td>Likert</td>
<td>198</td>
<td>48</td>
</tr>
<tr>
<td>DP Opinion</td>
<td>1.60</td>
<td>AntiDP SW</td>
<td>1.02</td>
<td>0-4</td>
<td></td>
<td>203</td>
<td>43</td>
</tr>
<tr>
<td>Moral Baseb</td>
<td>2.58</td>
<td>Somewhat</td>
<td>1.00</td>
<td>0-4</td>
<td></td>
<td>202</td>
<td>44</td>
</tr>
<tr>
<td>Male</td>
<td>.8</td>
<td>Male</td>
<td>.40</td>
<td>0-1</td>
<td></td>
<td>205</td>
<td>41</td>
</tr>
<tr>
<td>Lifelong Resident</td>
<td>1.16</td>
<td>Born</td>
<td>.84</td>
<td>0-2</td>
<td></td>
<td>200</td>
<td>46</td>
</tr>
<tr>
<td>Victimization Exp</td>
<td>.46</td>
<td>No</td>
<td>.50</td>
<td>0-1</td>
<td></td>
<td>196</td>
<td>50</td>
</tr>
<tr>
<td>Political Affiliation</td>
<td>2.26</td>
<td>Democrat</td>
<td>1.07</td>
<td>1-4</td>
<td></td>
<td>199</td>
<td>47</td>
</tr>
<tr>
<td>Literal Interp Bible</td>
<td>1.54</td>
<td>Strong Dis</td>
<td>.82</td>
<td>4</td>
<td>Likert</td>
<td>199</td>
<td>47</td>
</tr>
<tr>
<td>ID with 1 Religion</td>
<td>2.39</td>
<td>Agree</td>
<td>1.09</td>
<td>4</td>
<td>Likert</td>
<td>200</td>
<td>46</td>
</tr>
<tr>
<td>Reg Attends Serv</td>
<td>2.21</td>
<td>Strong Dis</td>
<td>1.03</td>
<td>4</td>
<td>Likert</td>
<td>201</td>
<td>45</td>
</tr>
<tr>
<td>Belief in 1 God/SB</td>
<td>2.75</td>
<td>Agree</td>
<td>1.07</td>
<td>4</td>
<td>Likert</td>
<td>191</td>
<td>55</td>
</tr>
<tr>
<td>Essay Elaborations</td>
<td>223</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*95 respondents agreed, and 91 respondents disagreed (a tie) on the Mgt & No Presump; *bFour picked option, “I choose not to answer this question, and these responses were later dropped from analysis. “I choose not to answer this question.” *cNine picked option, “I choose not to answer this question.”
Missing Responses

There were only 34% of the surveys which contained no missing item responses (n=85), and 38% of the surveys contained between one to four missing item responses (n=93). Because there were 13 items that were in open-ended essay format, allowing respondents to write in whatever they wished on any issue on the survey, a few respondents skipped the closed-ended items altogether and just wrote in those open-ended spaces. Some respondents only filled out the first page of the survey; others closed out after completing the second page. As Table 7-3 demonstrates, one respondent chose to answer only five of the survey items, at least one of which happened to be the optional last question item. Another respondent explained in the last text box item that he/she was too busy to take the time to fill out the survey in detail as he/she was currently on a death penalty trial, but that he/she would give me his “sum-up” of how he/she assessed capital case proceedings in his/her state. That observation, while not optimum, is still valuable, which is why I opted to include it and organize it, along with other essay-type responses, by qualitative themes in Chapter 8. I realize I probably could have “fit” at least some of the essay answers into one or more closed-ended items; however, the qualitative answers were often written in such a way that it would have required arbitrariness on my part, and so the decision was made to leave those particular surveys “untouched” and analyze them qualitatively rather than quantitatively. I did, however conduct a logistic regression after running “misschk” in Stata. The “misschk” checks for missing data within variables; and for each variable created a new variable dummy-coded (0=not missing; 1=missing). In that way, binary logit regressions could be run with the “dummies” as the dependent variable to reveal
associations. Table 7-2 is a summary of exactly how many variables are missing data and then shows the frequency of missing data counts.

Table 7-2. Missing data for support-legitimacy variables

<table>
<thead>
<tr>
<th>Missing for How Many Variables</th>
<th>Frequency</th>
<th>Percent</th>
<th>Cum Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>85</td>
<td>34.35%</td>
<td>34.35%</td>
</tr>
<tr>
<td>1</td>
<td>39</td>
<td>15.85%</td>
<td>50.41%</td>
</tr>
<tr>
<td>2</td>
<td>31</td>
<td>12.60%</td>
<td>63.01%</td>
</tr>
<tr>
<td>3</td>
<td>19</td>
<td>7.72%</td>
<td>70.73%</td>
</tr>
<tr>
<td>4</td>
<td>4</td>
<td>1.63%</td>
<td>72.36%</td>
</tr>
<tr>
<td>5</td>
<td>8</td>
<td>3.25%</td>
<td>75.61%</td>
</tr>
<tr>
<td>7</td>
<td>3</td>
<td>1.22%</td>
<td>76.83%</td>
</tr>
<tr>
<td>8</td>
<td>4</td>
<td>1.63%</td>
<td>78.46%</td>
</tr>
<tr>
<td>9</td>
<td>3</td>
<td>1.22%</td>
<td>79.67%</td>
</tr>
<tr>
<td>13</td>
<td>1</td>
<td>0.41%</td>
<td>80.08%</td>
</tr>
<tr>
<td>15</td>
<td>1</td>
<td>0.41%</td>
<td>80.49%</td>
</tr>
<tr>
<td>17</td>
<td>1</td>
<td>0.41%</td>
<td>80.89%</td>
</tr>
<tr>
<td>21, 27, 30</td>
<td>4</td>
<td>1.63%</td>
<td>82.52%</td>
</tr>
<tr>
<td>31, 48, 49</td>
<td>3</td>
<td>1.22%</td>
<td>83.74%</td>
</tr>
<tr>
<td>50</td>
<td>12</td>
<td>4.88%</td>
<td>88.62%</td>
</tr>
<tr>
<td>51, 52, 64</td>
<td>4</td>
<td>1.63%</td>
<td>90.24%</td>
</tr>
<tr>
<td>76</td>
<td>2</td>
<td>0.81%</td>
<td>91.06%</td>
</tr>
<tr>
<td>85</td>
<td>21</td>
<td>8.54%</td>
<td>99.59%</td>
</tr>
<tr>
<td>86</td>
<td>1</td>
<td>0.41%</td>
<td>100.00%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>246</td>
<td>100.00%</td>
<td></td>
</tr>
</tbody>
</table>

When running a logit regression with “m_dpsupp” and “m_dpneed” as the dependent variables (missing items for the death penalty support variable and the variable that asks whether the death penalty is a needed component in the criminal justice system), and specifying “State,” “Male,” “Capital Role,” “Capital Number,” and “Politic” as independent variables, it was found that no predictor was statistically significant (p<.10). Gender, however, showed itself to be only marginally non-significant which necessitated a closer look at the data. Cross tabulations revealed that only two people who self-identified as males failed to respond to the death penalty support item, and no self-identified females skipped that question. Similarly, three self-identified males skipped the death penalty necessity item, as did two females. The conclusion was that there was no discernible pattern associated with missing responses.
Factor Analysis

The capital dataset variables were split into two, and factor analyses were run to see whether scales and/or items could be produced. Factor analysis is widely recognized as having a 3-fold purpose: (1) it summarizes data; (2) it helps to identify relationships among variables (Kachigan 1986); (3) then, once relationships are revealed, it often makes it possible to reduce large numbers of variables down to a smaller number of factors. For example, in the survey, there are seven items (Question #34) that, on their face, all deal with the effectiveness of a death penalty system; i.e., safeguards, cost, deterrence, and necessity), but it could be that there are multiple concepts being addressed in those items. Factor analysis is a means by which to explore and clarify concepts.

Table 7-3. Factor analyses for legitimacy, appropriateness, and lingering

<table>
<thead>
<tr>
<th>Scales (items standardized when appropriate)</th>
<th>Factor Loadings</th>
</tr>
</thead>
<tbody>
<tr>
<td>LEGITIMACY of Death Penalty</td>
<td></td>
</tr>
<tr>
<td>Item 1: Gold standard applied</td>
<td>0.85</td>
</tr>
<tr>
<td>Item 2: Fair in terms of due process</td>
<td>0.77</td>
</tr>
<tr>
<td>Item 3: Outcome decisions fair</td>
<td>0.65</td>
</tr>
<tr>
<td>Item 4: Charging decisions fair</td>
<td>0.72</td>
</tr>
<tr>
<td>Item 5: My state has sufficient safeguards</td>
<td>0.70</td>
</tr>
<tr>
<td>Eigenvalue = 5.514</td>
<td></td>
</tr>
<tr>
<td>α = 0.87</td>
<td></td>
</tr>
</tbody>
</table>

| APPROPRIATENESS of Death Penalty             |                 |
| Item 1: Possible to ensure no wrongful conviction | 0.70          |
| Item 2: DP is a necessary component in CJS      | 0.77            |
| Item 3: DP is NOT a waste of money*            | 0.63            |
| Item 4: DP system is cost-effective            | 0.71            |
| Eigenvalue = 2.585                            |                 |
| α = 0.79                                     |                 |

| LINGERING Impact from DP Involvement          |                 |
| Item 1: It has had lasting emotional impact   | 0.79            |
| Item 2: It has had lasting spiritual impact   | 0.80            |
| Eigenvalue = 2.566                            |                 |
| α = 0.80                                     |                 |
As Table 7-3 indicates, after rotation, five items loaded high (Eigenvalue = 5.514) on the first factor. Those five items were summed together to comprise a legitimacy scale (α = 0.87). For Appropriateness, four items high on the one factor (Eigenvalue = 2.585) and fit together conceptually because they all address general safety concerns, the necessity for capital punishment, and the cost effectiveness of the death penalty. A scale was created (α = .79). Two survey items regarding lasting stress experienced from death penalty involvement loaded high on one factor (Eigenvalue = 2.566) and scored .80 on the alpha reliability scale.

**Analysis of Variance (ANOVA) for Legitimacy**

The first part of Hypothesis Three (H3a) states that DP legitimacy will be predicted by the professional role taken by respondents in capital case proceedings. The third part of Hypothesis Three (3c) states that death penalty legitimacy scores will vary across states. A two-way analysis of variance was calculated to look at how legitimacy is distributed across capital roles and across states, and it also looks at whether or not there is an interaction between capital case role and state.

<p>| Table 7-4. Two-way ANOVA: Legitimacy by capital role and by state |</p>
<table>
<thead>
<tr>
<th>Partial SS</th>
<th>DF</th>
<th>MS</th>
<th>F</th>
<th>p</th>
<th>n’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Model</td>
<td>1447.044</td>
<td>17</td>
<td>85.120</td>
<td>8.34</td>
<td>.0000</td>
</tr>
<tr>
<td>Capital Role</td>
<td>363.662</td>
<td>6</td>
<td>60.610</td>
<td>5.94</td>
<td>.0000</td>
</tr>
<tr>
<td>State</td>
<td>33.555</td>
<td>2</td>
<td>16.778</td>
<td>1.64</td>
<td>.1966</td>
</tr>
<tr>
<td>Capital Role X State</td>
<td>128.799</td>
<td>9</td>
<td>14.311</td>
<td>1.40</td>
<td>.1919</td>
</tr>
<tr>
<td>Residual</td>
<td>1489.462</td>
<td>146</td>
<td>10.202</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>2936.506</td>
<td>163</td>
<td>18.015</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The overall ANOVA model in Table 7-7 is statistically significant (p < .001). There is a statistically significant difference in legitimacy across capital role, F (6, 144) = 1.05,
p < .0001. The overall effect size is large ($r^2 = .44$). According to this model, a little less than half of the variation in legitimacy is being explained by capital case role. The mean difference across states is not statistically significant, which means that Hypothesis $3_c$ is not supported. The interaction between capital role and state is also non-significant in explaining legitimacy variation.

A series of one-way analyses of variance were calculated with post-hoc comparisons using the Bonferroni method to determine how legitimacy varied across capital case roles. Results were $F (6, 157) = 20.91, p < .001$, meaning there is a statistically significant difference between legitimacy means across capital case role. The results for Bartlett’s test for equal variances was $x^2 (6) = 7.48, p > .20$, which satisfies the equal assumption requirement for ANOVA. The Bonferroni table indicated that capital prosecutors are more likely to view the death penalty as being legitimate as compared to all capital defender roles (i.e., public defender, court-appointed, private defense, and multiple roles). Those findings are all statistically significant ($p < .001$). The only other statistically significant comparison concerned judges. The findings suggest that, similar to prosecutors, judges are more likely to consider the death penalty to be legitimate as compared to all capita defense roles.

Results indicate that legitimacy scores do vary significantly across capital case roles (with prosecutors and judges, as compared to defense attorneys, viewing the death penalty as being more legitimate), but the difference between legitimacy scores across the three states is not significant. Therefore, $H_{3a}$ (“Organizational role will predict whether or not the death penalty is perceived as being legitimate”) is supported, but Hypothesis $H_{3c}$ (“Death penalty legitimacy scores will vary across states”) is not.
A regression model (Table 7-5) was fitted to determine whether capital role would remain statistically significant even after the following predictors were added to the model: Number of capital cases, capital case role, current occupation, DP Appropriate Scale, Lingering Impact from DP Involvement Scale, Republican, South Carolina, and male.¹

**OLS Regression Model for Legitimacy**

Table 7-5. OLS regression for legitimacy (DV)

<table>
<thead>
<tr>
<th>DV = DP Legitimacy scale</th>
<th>Model 4</th>
<th>Model 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of capital cases (1→4)</td>
<td>***-.945 (.32)</td>
<td>*-.489 (0.26)</td>
</tr>
<tr>
<td>Capital Role (Reference = Prosecutor)¹</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judge (0/1)</td>
<td></td>
<td>-1.960(1.50)</td>
</tr>
<tr>
<td>Public Defender (0/1)</td>
<td></td>
<td>***-.2.998 (1.10)</td>
</tr>
<tr>
<td>Court-Appointed (0/1)</td>
<td></td>
<td>**-1.528 (0.72)</td>
</tr>
<tr>
<td>Multiple Defense Roles (0/1)</td>
<td></td>
<td>** -1.757 (0.79)</td>
</tr>
<tr>
<td>Current Occupation (Reference =Prosecutor)²</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judge Now (0/1)</td>
<td></td>
<td>.068 (1.34)</td>
</tr>
<tr>
<td>Public Defender Now (0/1)</td>
<td></td>
<td>*** -4.998 (1.16)</td>
</tr>
<tr>
<td>Private Attorney Now (0/1)</td>
<td></td>
<td>***-4.938 (0.89)</td>
</tr>
<tr>
<td>Other Occupation Now (0/1)</td>
<td></td>
<td>**-4.189 (1.65)</td>
</tr>
<tr>
<td>Appropriate (scale)</td>
<td></td>
<td>*.197 (0.12)</td>
</tr>
<tr>
<td>Lingering (scale)</td>
<td></td>
<td>**-.623 (0.26)</td>
</tr>
<tr>
<td>Republican (0/1)</td>
<td></td>
<td>.844 (65)</td>
</tr>
<tr>
<td>South Carolina (0/1)</td>
<td></td>
<td>.351 (.73)</td>
</tr>
<tr>
<td>Male (0/1)</td>
<td></td>
<td>.277 (.64)</td>
</tr>
<tr>
<td>Constant</td>
<td>***12.853 (.73)</td>
<td>***18.949 (1.24)</td>
</tr>
<tr>
<td>Adjusted R²</td>
<td>.0452</td>
<td>.5398</td>
</tr>
<tr>
<td>Number of Observations</td>
<td>163</td>
<td>150</td>
</tr>
</tbody>
</table>

F (1, 161)=8.68 | F (14, 135)=13.48 | p <.01 | p <.0001

¹ Due to Capital Role, Current Occupation, Political Affiliation, and State being categorical, a series of dummy variables were constructed. References are Prosecutor, Democrat, & Oregon.

Overall, Model 5 in Table 7-5 is statistically significant (p < .001) and explains 54% of the variation in legitimacy. This model suggests that capital role, current occupation, and political affiliation are significant predictors of legitimacy.

¹ The correlation matrix for all independent variables can be viewed in Table G-1 in Appendix G.
occupation, amount of capital case involvement, belief about DP appropriateness, and lingering emotional/spiritual impact are all statistically significant predictors for legitimacy. Having experience as a capital case judge (as compared to a capital prosecutor), political affiliation, state, and gender are non-significant.

Coefficient signs are as expected in that the higher the number of capital cases, the lower the legitimacy score; respondents who claim to have experienced a lasting impact from capital case involvement have lower legitimacy scores than do respondents not claiming such lingering effects. Public defenders, court-appointed attorneys, and attorneys who have taken on multiple defense roles in capital proceedings have lower scores on legitimacy than do capital prosecutors. In a similar way, respondents who are currently employed as public defenders, private defense, or in “other” occupations have lower legitimacy scores than do prosecutor-respondents. Respondents who view the death penalty as an appropriate punishment in terms of safety, cost, and need have higher legitimacy scores than respondents who do not see capital punishment as being safe, cost-effective, or necessary.

Hypothesis 3a is supported by Model 5. Capital role is a statistically significant predictor (p<.01) for whether or not the death penalty is perceived as being legitimate. H3b is also supported because current occupation is a statistically significant (p<.01) legitimacy predictor.

**Post-Model Diagnostics**

Diagnostics were performed to identify outliers, and all outliers were re-checked for coding errors. The mean variance inflation factor (VIF) for all independent variables was 1.72, and no VIF exceeded 3.4.
The DP Support–Legitimacy Relationship Explored (H4a and H4b)

Hypotheses H4a and H4b address the relationship between death penalty support
and perceived fairness of capital case proceedings (legitimacy). H4a states: There will
be a positive correlation between perceived fairness of capital case proceedings and
death penalty support. H4b states: Role of criminal low practitioner will moderate the
relationship between perceived fairness of capital case proceedings and death penalty
support.

Bivariate Analyses of DP Support (Capital Dataset)

Because this analysis is only utilizing the subset of capital case practitioners and
the sample size is considerably reduced, it is worthwhile to re-examine bivariate
relationships through cross-tabulations and then compare them to the cross-tabulations
constructed with the full sample (all criminal case workers). In Chapter 6, the
relationship between DP support and current occupation was explored, and that
relationship was found to be significant (<.001) and moderately strong (Cramer’s V =
.36). Table 7-6 shows the chi-square test for that relationship with this subset of capital
case practitioners.

Table 7-6. Cross-tabulation of DP support and current occupation (capital dataset)

<table>
<thead>
<tr>
<th>DP Support &amp; Occupational Category</th>
<th>Judge</th>
<th>Pros</th>
<th>PD</th>
<th>Private</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-DP</td>
<td>3 (2.5)</td>
<td>21 (5)</td>
<td>2 (6.5)</td>
<td>13 (23.5)</td>
<td>1 (2)</td>
<td>40</td>
</tr>
<tr>
<td>Anti-DP</td>
<td>9 (9.5)</td>
<td>5 (21)</td>
<td>29 (24.5)</td>
<td>100 (89.5)</td>
<td>9 (8)</td>
<td>152</td>
</tr>
<tr>
<td>Total</td>
<td>12</td>
<td>26</td>
<td>31</td>
<td>113</td>
<td>10</td>
<td>192</td>
</tr>
</tbody>
</table>

$X^2 (4, N=192) = 67.32$, p<.0001; Cramer’s V = .59

The relationship between DP support and current occupation is statistically
significant (p<.0001) and is even stronger (Cramer’s V = .59) than the relationship
revealed with the full sample (Cramer’s V = .36). This suggests that capital case experience may be a support/nonsupport enhancer for prosecutors and defenders. The death penalty opinion of current judges, similar to results in the full sample, was exactly as would be expected. Current prosecutors with capital case experience, however, are four times more likely than what would be expected randomly to be death penalty supportive, which is an increase over the slightly more than twice as likely that was found in the full sample. Current public defenders with experience in capital litigation are two-thirds less likely to be death penalty supportive; whereas, they were one-third less likely to be DP supportive in the full sample.

The relationship between DP Support and state was shown to be statistically significant (p<.001) but rather weak in the bivariate analysis of the full dataset, and South Carolina, as compared to Oregon, was a statistically significant and positive correlate for death penalty support in the multivariate analysis (Table 6-8). For that reason, Table 7-7 cross-tabulates DP support with state for this subset of the sample that includes only capital case workers.

Table 7-7. Cross-tabulation of DP support and state (capital dataset)

<table>
<thead>
<tr>
<th>Frequency (Expected Frequency)</th>
<th>Ohio (n=84)</th>
<th>Oregon (n=77)</th>
<th>S Carolina (n=31)</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-DP</td>
<td>14 (17.5)</td>
<td>15 (16)</td>
<td>11 (6.5)</td>
<td>40</td>
</tr>
<tr>
<td>Anti-DP</td>
<td>70 (66.5)</td>
<td>62 (61)</td>
<td>20 (24.5)</td>
<td>152</td>
</tr>
<tr>
<td>Total</td>
<td>84</td>
<td>77</td>
<td>31</td>
<td>192</td>
</tr>
</tbody>
</table>

\[X^2 (2, N=192) = 5.00, p<.10; \text{Cramer's V} = .16\]

The relationship between death penalty support and state is statistically significant (p<.10) but weak (Cramer’s V = .16). Because previous analyses showed capital adversarial role to be a statistically significant correlate for death penalty support, it is useful to chart how many of the capital case respondents had death penalty experience
solely as prosecutors or solely as defenders. The frequency distribution across the
three states for respondents with varied capital role experience, only capital prosecutor
experience, and only capital defender experience is shown in Table 7-8.

Table 7-8. Frequency distribution of capital adversarial role by state

<table>
<thead>
<tr>
<th>Frequency (Expected Frequency)</th>
<th>Ohio (n=84)</th>
<th>Oregon (n=77)</th>
<th>S Carolina (n=31)</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Varied Capital Experience</td>
<td>5</td>
<td>17</td>
<td>4</td>
<td>26</td>
</tr>
<tr>
<td>Sole Defender Experience</td>
<td>72</td>
<td>58</td>
<td>15</td>
<td>145</td>
</tr>
<tr>
<td>Sole Prosecutor Experience</td>
<td>19</td>
<td>19</td>
<td>15</td>
<td>53</td>
</tr>
<tr>
<td>Total</td>
<td>96</td>
<td>94</td>
<td>34</td>
<td>224</td>
</tr>
</tbody>
</table>

Similar to the full dataset of criminal case workers, prosecutors are
underrepresented in this capital case sample, and respondents with experience only in
death penalty defense are overrepresented. How that capital case role experience
relates to death penalty support is shown in Table 7-9. Due to the smaller sample size,
expected cell frequencies are smaller than 5 for 40% of the cells, and this cell frequency
problem could not be corrected by collapsing categories. For that reason, the Fisher’s
exact test was also conducted (p<.001), which confirmed the relationship that is being
revealed in Table 7-9.

Table 7-9. Cross-tabulation of DP support and capital role experience

<table>
<thead>
<tr>
<th>DP Support</th>
<th>Varied Capital Experience</th>
<th>Capital Defense Experience</th>
<th>Capital Prosecutorial Experience</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-DP Definitely</td>
<td>1 (2)</td>
<td>1 (10)</td>
<td>13 (3.5)</td>
<td>15</td>
</tr>
<tr>
<td>Pro-DP Somewhat</td>
<td>3 (3)</td>
<td>7 (16.5)</td>
<td>15 (6)</td>
<td>25</td>
</tr>
<tr>
<td>No Strong Feelings</td>
<td>5 (1)</td>
<td>4 (7)</td>
<td>2 (2.5)</td>
<td>11</td>
</tr>
<tr>
<td>Anti-DP Somewhat</td>
<td>6 (4)</td>
<td>23 (25)</td>
<td>9 (9)</td>
<td>38</td>
</tr>
<tr>
<td>Anti-DP Definitely</td>
<td>7 (12)</td>
<td>99 (75)</td>
<td>8 (26)</td>
<td>114</td>
</tr>
<tr>
<td>Total</td>
<td>22</td>
<td>134</td>
<td>47</td>
<td>203</td>
</tr>
</tbody>
</table>

X² (8, N=203) = 91.96, p<.001; Cramer’s V = .47
Respondents with experience solely as capital prosecutors are nearly three times as supportive of the death penalty than what would be expected merely by chance, and respondents with experience solely as capital defenders are 30% more strongly anti-death penalty. The relationship between capital adversarial role and DP opinion is moderately strong (Cramer’s V = .47) and statistically significant (p<.001).

OLS Regression Models for DP Support-Legitimacy (Capital Dataset)

Table 7-10 contains three OLS regression models to further analyze the death penalty opinion and legitimacy relationship.²

Table 7-10. OLS regression of legitimacy on DP support

<table>
<thead>
<tr>
<th>DV = DP Support (1→5)</th>
<th>Model 6 b (se)</th>
<th>Model 7 b (se)</th>
<th>Model 8 b (se)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legitimacy Scale (5→20)</td>
<td>***.208 (.02)</td>
<td>***.159 (.02)</td>
<td>***.210 (.02)</td>
</tr>
<tr>
<td>Number of capital cases (1→4)</td>
<td>***.215 (.08)</td>
<td>***.205 (.07)</td>
<td></td>
</tr>
<tr>
<td>Capital jury trial experience (0/1)</td>
<td>***.496 (.19)</td>
<td>***.525 (.17)</td>
<td></td>
</tr>
<tr>
<td>More than 1 circuit exp (0/1)</td>
<td>-.300 (.16)</td>
<td>-.227 (.15)</td>
<td></td>
</tr>
<tr>
<td>Appropriate (scale)</td>
<td>***.137 (.03)</td>
<td>***.132 (.03)</td>
<td></td>
</tr>
<tr>
<td>Capital Role (Ref = Prosecutor)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judge (0/1)</td>
<td>***-1.358 (.32)</td>
<td>-.525 (.40)</td>
<td></td>
</tr>
<tr>
<td>Public Defender (0/1)</td>
<td>-.052 (.28)</td>
<td>-.403 (.33)</td>
<td></td>
</tr>
<tr>
<td>Court-Appointed (0/1)</td>
<td>-.103 (.17)</td>
<td>-.241 (.16)</td>
<td></td>
</tr>
<tr>
<td>Fundamentalist (1→4)</td>
<td>.155 (.09)</td>
<td>**.174 (.08)</td>
<td></td>
</tr>
<tr>
<td>Moral (0→3)</td>
<td>**-.187 (.07)</td>
<td>***-.196 (.07)</td>
<td></td>
</tr>
<tr>
<td>Republican (0/1)</td>
<td>**.500 (.21)</td>
<td>**.445 (.20)</td>
<td></td>
</tr>
<tr>
<td>South Carolina (0/1)</td>
<td>.301 (.22)</td>
<td>.032 (21)</td>
<td></td>
</tr>
<tr>
<td>Judge X Legitimacy</td>
<td></td>
<td></td>
<td>***.269 (.08)</td>
</tr>
<tr>
<td>Public Defender X Legitimacy</td>
<td></td>
<td></td>
<td>**-.284 (.11)</td>
</tr>
<tr>
<td>Court-Appointed X Legitimacy</td>
<td></td>
<td></td>
<td>***-.139 (.04)</td>
</tr>
<tr>
<td>Constant</td>
<td>***-3.313 (.22)</td>
<td>***-2.909 (.41)</td>
<td>***-3.497 (.39)</td>
</tr>
</tbody>
</table>

Adjusted R² | .4375 | .6167 | .6713
Number of Observations | 163 | 135 | 135

² Due to Capital Role, Political Affiliation, and State being categorical, a series of dummy variables were constructed with Prosecutor, Democrat, and Oregon as reference categories.

² The correlation matrix for all independent variables for Model 8 is in Appendix H.
Model 6 includes only legitimacy as a predictor \[F (1, 161) = 127.01, \ p < .0001\], and suggests that it alone explains 44\% of the variation in death penalty support. Model 7 includes capital case role as a predictor, along with the following IV's: number of capital cases, capital jury trial experience, judicial circuit experience, Appropriateness of the DP Scale, fundamentalism, moral basis for DP opinion, political affiliation, and state. Model 8 includes three interaction terms: Judge X Legitimacy, Public Defender X Legitimacy, and Court-Appointed X Legitimacy.

Overall, Model 7 is statistically significant \((p<.0001)\) with a pseudo \(R^2\) value of .6167. DP Support is positively correlated with legitimacy, and also with the appropriate scale; and both these positive correlations are statistically significant \((p < .01)\). While circuit court experience negatively correlates with support and is statistically significant \((p < .10)\), capital experience (in terms of the number of capital cases and whether or not there was capital jury trial experience) positively correlates with support \((p < .01)\). This might suggest regional differences in how capital cases are being administered. Capital judges (as compared to capital prosecutors) are less likely to be proponents of the death penalty, and that inverse relationship is statistically significant \((p < .01)\). While there is a weak negative correlation between having been a capital public defender and death penalty support (and the same with court-appointed capital workers), those negative correlations are not statistically significant in Model 7 \((p > .10)\). Those claiming to have a moral basis for their DP opinion were less likely to be death penalty supportive, and that inverse correlation between moral basis and DP support is statistically significant at the .05 level. Model 7 suggests that being Republican (as opposed to being a Democrat) would make one more likely to be supportive of capital
punishment, and that positive correlation is statistically significant (p < .05). Hypotheses 4a is supported by Model 7 because there is a positive correlation between death penalty support and legitimacy, which is statistically significant (p < .01). For every standardized unit increase in legitimacy, death penalty support increases by .159.

Hypothesis 4b predicts that the relationship between DP support and legitimacy will be moderated by capital case role. In order to test that hypothesis, interaction terms were inserted into Model 8. That model looks at the interaction between the role played in capital case proceedings and legitimacy (i.e. Judge X Legitimacy, Public Defender X Legitimacy, and Court-Appointed X Legitimacy). Overall, Model 8 is statistically significant [F(15, 119)=19.25, p < .0001] and explains 67.13% of the variation in death penalty support for the capital dataset respondents. The statistically significant positive correlations are legitimacy (p < .01), number of capital cases (p < .01), capital jury trial experience (p < .01), appropriateness of the DP scale (p < .01), fundamentalism (p < .05), and Republican (.05). Respondents who scored the death penalty higher on legitimacy were more likely to support capital punishment. Similarly, those with higher involvement in capital cases and with involvement with capital jury trials (as compared to plea bargains and bench trials) were more likely to be supportive of the death penalty than were respondents with lower numbers of capital cases and experience in only plea agreements or bench trials. While Model 7 did not find capital role (other than judge) to be a statistically significant predictor for DP support, once interaction terms were inserted to determine if the DP support-legitimacy relationship was being modified by capital role, findings are that all direct capital role effects wash out, but that all capital role and legitimacy interaction terms inserted are statistically significant predictors for
DP support. It was predicted in H4b that capital role would moderate the relationship between death penalty support and legitimacy, and Model 8 supports that hypothesis because there are statistically significant role-legitimacy interactional effects on DP support, and yet – even with those interactional effects – legitimacy remains a statistically significant (p < .001) standalone predictor for DP support. Therefore, both parts of Hypothesis Four are supported. There is a positive correlation between death penalty support and legitimacy (H4a), and the role of capital case practitioner does moderate the relationship between death penalty support and legitimacy (H4b).

Summary and Conclusions

Two of the three components of Hypothesis Three tested in Model 5 (Table 7-5) are supported (H3a and H3b). There is a statistically significant correlation between capital case role and legitimacy (H3a), and there is also a statistically significant correlation between current occupation and legitimacy (H3b). All capital defense roles are more likely, as compared to capital prosecutors, to score the death penalty lower on legitimacy. All current defenders are also more likely to score the death penalty lower on legitimacy than current prosecutors. Respondents who claim to have experienced lingering emotional and spiritual effects from death penalty involvement are less likely to view the death penalty as being legitimate than are those not having experienced lingering emotional and spiritual after-effects. The final component of Hypothesis Three (H3c) was not supported because death penalty legitimacy scores did not vary across states, and state was not a statistical significant predict for legitimacy.

Both sub-parts of Hypothesis Four were supported because there was a positive correlation between death penalty support and legitimacy (H4a), net of capital case experience, appropriateness, capital case role, fundamentalism, moral basis, political
orientation, and state; and there was also a statistically significant role-legitimacy interaction effect and death penalty support which washed out the stand-alone role effect but did not wash out the stand-alone legitimacy effect. This suggests that the role of the capital case practitioner is moderating the relationship between death penalty support and legitimacy ($H_{4b}$).
CHAPTER 8
CAPITAL CASE WORKER SUGGESTIONS

Improving the Death Penalty (H₅)

In order to explore suggestions from capital case workers, it required that written-in suggestions be categorized by theme. The 13 categories of suggestions for death penalty reform are: abolition, training, funding, oversight, “fair play,” sanctions, jury issues, statute, non-partisan/non-elected, appointment/assignment, penalty phase, PCR and/or appellate, and overhaul.

Bivariate Analyses of Suggestions

Hypothesis Five (H₅) states: Regardless of self-reported DP support, the majority of capital workers will have suggestions for improving the death penalty system, and it was found that, out of the 215 capital case respondents who answered, “Do you have any suggestions that, in your opinion, would improve capital case proceedings,” 68% wrote in suggestions (n=147). Table 8-1 cross-tabulates suggestions and current occupation.

Table 8-1. Cross-tabulation of suggestion and current occupation

<table>
<thead>
<tr>
<th>Current Occupation</th>
<th>Wrote in Suggestion</th>
<th>Did NOT Write in Suggestion</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>9 (12)</td>
<td>8 (5)</td>
<td>17</td>
</tr>
<tr>
<td>Prosecutor</td>
<td>12 (19)</td>
<td>16 (9)</td>
<td>28</td>
</tr>
<tr>
<td>Public Defender</td>
<td>21 (23)</td>
<td>12 (10)</td>
<td>33</td>
</tr>
<tr>
<td>Private Attorney</td>
<td>93 (83)</td>
<td>29 (39)</td>
<td>122</td>
</tr>
<tr>
<td>Retired &amp; Other</td>
<td>12 (10)</td>
<td>3 (5)</td>
<td>15</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>147</strong></td>
<td><strong>68</strong></td>
<td><strong>215</strong></td>
</tr>
</tbody>
</table>

$X^2 (4, N=215) = 15.06, p<.01; \text{Cramer’s } V = .27$
A slight majority (53%) of judges wrote in suggestions (n=9) while less than half (43%) of prosecutors did (n=12). Nearly 64% of public defenders made recommendations (n=21) as compared to 76% of private defense attorneys (n=93) and 80% of “Others” (n=12). Judges and prosecutors were less likely than what would be expected by chance to write in a suggestion. On the other hand, private attorneys and respondents under the “Retired or Other” category were more likely to make recommendations for death penalty improvement.

To test $H_3f$, Table 8-2 looks at the relationship between death penalty support and written-in suggestion.

Table 8-2. Cross-tabulation of suggestion and DP support

<table>
<thead>
<tr>
<th>DP Support</th>
<th>YES, Wrote In Suggestion</th>
<th>NO Suggestion</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-DP</td>
<td>17 (26)</td>
<td>21 (12)</td>
<td>38</td>
</tr>
<tr>
<td>Anti-DP</td>
<td>111 (102)</td>
<td>37 (46)</td>
<td>148</td>
</tr>
<tr>
<td>Total</td>
<td>128</td>
<td>58</td>
<td>186</td>
</tr>
</tbody>
</table>

$X^2 (1, N=186) = 12.90, p<.001; Cramer’s V = .26$

Less than half (45%) of those in support of the death penalty offered suggestions or recommendations (n=17). This finding is not supportive of Hypothesis Five ($H_5$) that the majority of capital case practitioners, regardless of their opinion on the death penalty, would make recommendations on how the system could be improved. Instead, there is a moderately weak relationship (Cramer’s V = .26) but statistically significant difference ($p<.001$) between DP support and suggestions. In contrast to those who are pro-DP, 75% of those who are non-supportive of capital punishment wrote in suggestions (n=111). Figure 8-1 shows a pie chart for the distribution of suggestions from DP proponents. Charging Concerns is a sub-category of the “Oversight” theme.
Seven DP proponents suggested appellate (and/or PCR) reforms, and those related to streamlining the appellate process, eliminating delays, or “providing docket priority for capital appeals.” In contrast, only one proponent recommended abolition, and that recommendation was based on the exorbitant cost and “the racial skewness” of DP administration. The death penalty proponents who wrote in suggestions for improving capital proceedings included 12 former capital prosecutors (eight of whom are current prosecutors; one of whom is a current judge; and three of whom are currently in private practice), four former court-appointed capital defenders (all of whom are currently in private practice), and one former capital public defender (who presently remains a public defender).

**Suggestion Themes**

In looking at all 147 suggestions from proponents and opponents alike, Table 8-3 lists the frequencies for each one of the 13 suggestion themes and then provides representative examples.
Table 8-3. Frequencies for suggestion themes with examples

<table>
<thead>
<tr>
<th>THEMES</th>
<th>FREQ (%)</th>
<th>EXCERPTED RESPONSE(S) AS THEME EXAMPLE(S)³</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abolition</td>
<td>76 (31%)</td>
<td>#156: Eliminate it. It is too costly, financially, and in terms of the toll it takes on judges, attorneys, defendants, and families.</td>
</tr>
<tr>
<td>Training</td>
<td>11 (4%)</td>
<td>#81: Better training and procedures for law enforcement and prosecutors. #154: Better training for judges, #306: Need more specially qualified defense attorneys.</td>
</tr>
<tr>
<td>Funding</td>
<td>27 (11%)</td>
<td>#129: Improve funding or get rid of it.</td>
</tr>
<tr>
<td>Oversight</td>
<td>30 (12%)</td>
<td>#1: Requirement to videotape all interrogations and lineups from first contact. #48: Require pretrial proportionality review. #231: Have special prosecutor appointed to decide if case is death-worthy. #363: Instead of county-by-county approach, there should be statewide advisory panel.</td>
</tr>
<tr>
<td>“Fair Play”</td>
<td>8 (3%)</td>
<td>#607: Both sides should fully exchange information.</td>
</tr>
<tr>
<td>Sanctions</td>
<td>2 (1%)</td>
<td>#1: Heavy penalties for officers or prosecutors who “hide the ball.” #102: Discipline attorneys for intentionally injecting error into the record.</td>
</tr>
<tr>
<td>Jury Issues</td>
<td>14 (6%)</td>
<td>#47: Allow meaningful voir dire. #78: Would not death-qualify jurors for the guilt phase of a trial. Use separate juries for guilt and penalty phase. #627: Drop judicial voir dire.</td>
</tr>
<tr>
<td>Statute</td>
<td>5 (2%)</td>
<td>Aggregated: Narrow statutory criteria for capital murder so punishment restricted to “worst of the worst.” #36: Independent judiciary; #123: Lifetime appointment of judges by bipartisan panel; #182: No more elected state prosecutors or state judges.</td>
</tr>
<tr>
<td>NonPartisan</td>
<td>3 (1%)</td>
<td>#48: Appoint defense counsel from list of peer-reviewed and qualified counsel; appointments by independent, non-elected non-public employee entity. #136: Limit number of cases assigned to an attorney; i.e., no more than two pending at one time.</td>
</tr>
<tr>
<td>Appointment</td>
<td>11 (4%)</td>
<td>#390: Penalty phase should be restricted to evidence that directly addresses future dangerousness if imprisoned for life. #441: DP should be based on what defendant did, not on what he/she might do in future. #806: In S.C., we should allow defendant to plead guilty in the guilt phase and have jury trial in penalty phase.</td>
</tr>
<tr>
<td>Penalty Phase</td>
<td>7 (3%)</td>
<td>#334: If defendant knows he is guilty and just wants to get it over with, why waste time and money? #395: If the DP statutes are not repealed, the post-conviction and habeas corpus proceedings should not be as time consuming.</td>
</tr>
<tr>
<td>PCR/Appellate</td>
<td>13 (5%)</td>
<td>#136: State should adopt ABA Guidelines. #167: Moratorium should be imposed until comprehensive, non-biased study can be conducted.</td>
</tr>
<tr>
<td>Overhaul</td>
<td>5 (2%)</td>
<td></td>
</tr>
</tbody>
</table>
| TOTAL           | 212      |³NOTE: 42 respondents wrote in more than one suggestion.
The first theme, abolition, was derived because 76 respondents wrote in the essay box provided within the survey itself that, in their opinion, the death penalty could not be improved; and that it should be abolished. Many elaborated on their reasons, one of the main ones being that, since the provision of a true life penalty (LWOP), state killing could no longer be justified. Thirty-one percent of the respondents (n=76) wrote in to abolish the death penalty; however, it must be noted that Prosecutor was the only categorized group which did not list abolition as a reform option. Slightly over 26% of currently seated judges did (n=5); as did 38% of public defenders (n=37), 36% of private attorneys (n=52), and 29% of “Other” (n=5). Also, it is worthwhile to note that my specific survey question was written in such a way that some respondents may not have felt that abolition was a response option that was available to them. The question asked, “Do you have any suggestions that, in your opinion would improve capital case proceedings?” A few respondents did qualify their answers, as the following responses (one chosen from each state) demonstrate:

Observation 83: Getting rid of it is the best response. If it is going to be here, we need resources, education, review boards reviewing the initial decision with objective criteria, the trial, the performance of judge, prosecutor, and defense team.

Observation 356: Pay attorneys well, but make sure they provide competent representation. Require judges to be educated in capital proceedings. Revamp habeas corpus laws so that the writ is available to all. Of course, eliminating the death penalty in the first place would be the best remedy; most of the rest of the "civilized" world has done so.

Observation 802: Removal of the option of death in all jurisdictions. Short of that, proper funding of defense for indigents who are charged with capital offenses.

The second theme, “Training,” included all instances wherein respondents listed either more training or education was needed, whether that training be for judges,
prosecutors, defenders, or law enforcement officers. Nine respondents with past capital experience solely as defense counsel listed training as a major mechanism for improving the death penalty system in their state; in contrast, only one prosecutor did, as did one in the Judge/Dual Role/Other/Undisclosed combination category.

Increased funding was a suggestion by 11% of respondents. Again, it was more of a concern from those who had been involved in capital defense than it was for those involved in judging or prosecution. Over 17% of capital defenders urged that funding be increased (n=25), as compared to 6% of prosecutors (n=2), and none in the combined category. One respondent made the suggestion that monies needed to be increased or redirected so that independent experts, accessible to both sides, could be hired. Another suggested that all capital prosecutions be funded by states, rather than individual counties. Concern for how much death penalty litigation cost – in terms of money, time, and human resources – was identified by 22% of respondents (n=10).

The need for increased oversight was made by 15% of respondents (n=30). This included a broad range, all the way from videotaping interrogations and lineups in a probable capital offense to increased scrutiny of federal appellate proceedings/rulings. Suggestions were made to take the initial charging decision out of the hands of a sole prosecutor and give it to a grand jury, a review board, or a nonpartisan panel or, alternatively, to develop statewide standards on capital charging practices.

“Fair Play” was the theme name given when respondents suggested ethical improvements. Only 4% of respondents did so, and this suggested improvement was made by all three capital role groups: 4 capital prosecutors, three capital defenders, and one respondent with past experience in all three roles. Prosecutors addressed a need
to place limitations on the number of motions being heard on “frivolous” matters and a need to crack down on defense tactics to prolong or delay proceedings or even to “intentionally” inject PCR remedies in lower level court proceedings. Capital defenders, on the other hand, suggested a need for regulating file discovery\(^1\), improving two-way communication, and requiring advance notice from prosecutors on charging decisions. Additionally, the suggestion was made to have the community itself more involved with initial charging decisions and mitigation issues.

While only two responses were included in the “Sanctions” theme, it was left as a separate category because, at least in this researcher’s mind, neither fit well into either the “Oversight” or “Fair Play” themes because each advocated disciplinary actions for ethical violations. As Table 8-2 indicates, the following sanction suggestions were made: #1: Heavy penalties for officers or prosecutors who “hide the ball” (defense attorney); #102: Discipline attorneys for intentionally injecting error into the record (prosecutor).

Jury issues also ranged across a wide spectrum. Over six percent of respondents (n=14), 86% of which were capital defenders (n=12), suggested improvement on capital jury selection procedures, such as expanded opportunity for questioning the prospective capital panel; the elimination of death-qualification, at least for the first phase; and the allowance for a second jury to be selected for the penalty phase (bifurcated juries). Observation #340 stated this view: \textit{I believe we might have fewer Innocent Project cases if the juries were not first death-qualified.}

\(^1\) One prosecutor (#185) also addressed the need for open file discovery by the state.
The seventh theme identified was labeled as “Statute,” and this grouped together all suggestions to narrow the scope of the death penalty statute in individual states. Five respondents (two capital-experienced prosecutors and three capital-experienced defense attorneys) opined that the death penalty statute, as currently written, allowed for too many aggravated murders to be death-eligible.

“NonPartisan” included proposed improvements to eliminate politics from death penalty proceedings. Three capital defenders suggested doing so in the following ways: lifetime appointments of judiciary by bipartisan panel; placing capital decision-making in the hands of a nonelected or nonpartisan entity; and even having an independent agency make decisions on funding requests from capital defense teams.

Court-appointment suggestions were combined into one category labeled “Appointment.” Slightly over 5% of respondents (n=11), 82% of whom were capital defense counsel, expressed the need to improve the appointment process. One respondent referred to the current method as “play for pay,” and another respondent elaborated on that concept by stating that truly qualified defense counsel should be appointed rather than “those who best get along with judges and prosecutors” (Observation #48) or have connections with the decision-makers. While hourly appointment rates tend to be low on the industry pay scale, annual contracts are often lucrative and in the six-figure range.²

Capital proceedings are unique because of the two-phase proceedings. There is a guilt and innocence phase (often referred to merely as the “guilt phase”), and then there is the penalty phase. “Penalty Phase” became its own theme because six capital

² In the qualitative study conducted, this was referred to as a burgeoning “cottage industry.”
defenders and one capital judge identified a need for improvement in this stage of death penalty proceedings. Respondent #231 wrote in: *Have a secondary hearing, after a finding of guilty, that is divorced from the local politics and passions.* Additional excerpts are provided in Table 8-2.

“PCR/Appellate” includes suggestions for improving post-conviction relief or appellate proceedings. A higher number of prosecutors suggested reforms in these proceedings. Sixty-two percent of responding capital prosecutors (n=8) wrote in that capital case proceedings would be improved by streamlining these post-trial processes. Two percent of capital defenders (n=3) expressed concerns with what they perceived as a lack of thoroughness in the post-trial reviews, as did one percent of the combined role of “Other” (n=2).

“Overhaul” was the last theme, and this one had five responses; four DP defenders and one “Other.” Included in this category were responses that suggested a moratorium as well as responses similar to the following: *Can’t answer in less than 5,000 words* (Observation #321).

As Table 8-1 (inserted at the start of this chapter) indicated, there is a significant (<.01) and moderate relationship (Cramer’s V = .27) between the respondent’s current occupation and whether or not he/she wrote in a suggestion. Prosecutors and judges were less likely to write in suggestions; however, 53% of the judges did so (n=9), as did 43% of prosecutors (n=12). Private attorneys were more likely to, which needs further exploring because that may relate to court-appointment on capital cases. Table 8-4 shows the association between current occupation and whether or not respondent’s capital experience was as court-appointed counsel.
Table 8-4. Cross-tabulation of current occupation and past court-appointment

<table>
<thead>
<tr>
<th>Current Occupation</th>
<th>YES, Court Appointed</th>
<th>NO, Not Court Appointed</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>1 (5)</td>
<td>16 (12)</td>
<td>17</td>
</tr>
<tr>
<td>Prosecutor</td>
<td>0 (8)</td>
<td>29 (21)</td>
<td>29</td>
</tr>
<tr>
<td>Public Defender</td>
<td>8 (9)</td>
<td>25 (24)</td>
<td>33</td>
</tr>
<tr>
<td>Private Attorney</td>
<td>53 (36)</td>
<td>76 (93)</td>
<td>129</td>
</tr>
<tr>
<td>Retired &amp; Other</td>
<td>0 (4)</td>
<td>16 (12)</td>
<td>16</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>62</strong></td>
<td><strong>162</strong></td>
<td><strong>224</strong></td>
</tr>
</tbody>
</table>

\[ X^2 (4, N=224) = 33.03, p<.01; \text{Cramer's V} = .38 \]

Table 8-4 does suggest that attorneys currently in private practice are more likely to have been court-appointed on capital case proceedings. The relationship is strong (Cramer’s V=.38) and significant (<.01). Despite improvements over time, court appointment fees are still generally considered relatively low\(^3\), and this may explain the higher incidence of suggestions from respondents who are currently in private practice.

Table 8-5 explores the relationship between capital role and written-in suggestion, with capital roles collapsed into three groups.

Table 8-5. Cross tabulation of capital role and written suggestions

<table>
<thead>
<tr>
<th>Capital Case Role</th>
<th>Written In Suggestion</th>
<th>No Written In Suggestion</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge, Dual Roles, Plus</td>
<td>11 (17)</td>
<td>14 (8)</td>
<td>25</td>
</tr>
<tr>
<td>Capital Defender Experience</td>
<td>108 (95)</td>
<td>32 (44)</td>
<td>140</td>
</tr>
<tr>
<td>Capital Prosecutor Experience</td>
<td>27 (34)</td>
<td>23 (16)</td>
<td>50</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>146</strong></td>
<td><strong>69</strong></td>
<td><strong>215</strong></td>
</tr>
</tbody>
</table>

\[ X^2 (2, N=214) = 16.47, p<.001; \text{Cramer's V} = .28 \]

\(^3\) For instance, in Oregon court-appointment rates are $55 an hour.
Slightly over 77% of capital defenders had suggestions for death penalty reform (n=108), as compared to 44% of capital judges (n=11) and 54% of capital prosecutors (n=27). However, when comparing the suggestion rates for those supportive of the death penalty to those non-supportive, there was a statistically significant difference (p<.001) between support groups. Those who claimed to be death penalty opponents were more likely to make recommendations, and only 45% of DP opponents wrote in suggestions for improving the death penalty system (n=17). For that reason, H3f is not being supported by these findings.

Summary and Conclusions

The last hypotheses established to test death penalty legitimacy, H3f, was not supported. That hypothesis stated that, “Regardless of self-reported death penalty support, the majority of capital case practitioners will have suggestions for improving death penalty proceedings.” While the majority (68%) of capital case practitioners overall (n=147) did have suggestions for improving death penalty proceedings, less than half (45%) of death penalty proponents wrote in suggestions (n=17). A group effect is once again being revealed. Currently-employed private defense attorneys were the group that disproportionately made suggestions for improving DP proceedings, and 57% of those private attorneys had been court-appointed on capital cases in the past (n=53). It is plausible that their experience as court-appointees is responsible for the disproportionate increase in DP suggestions. Judges and prosecutors were the two groups much more likely (almost two times) NOT to write in suggestions for DP reform.

Analysis of the suggestions strongly implies an adversarial effect in that former and current prosecutors tended to suggest reforms which would eliminate delays between sentence and execution; whereas, former and current defenders were more
likely to offer suggestions for increased funding. However, there were some agreements across adversarial groups. Respondents from both sides suggested jury reforms (e.g., eliminating death qualification), the need for increased oversight of DP administrative procedures, and the establishment of some sort of sanctioning mechanism for procedural rule-breakers.
CHAPTER 9
QUALITATIVE ANALYSIS OF INTERVIEWS

*The better the lawyer, the more likely the result of not a death penalty, which buttresses the argument that it's fair.*

—Anonymous Interviewee

This section, Chapter 9, will present the findings from interviews conducted with 27 capital case workers across Ohio, Oregon, and South Carolina. The times that quotes or paraphrases are utilized, as per restrictions placed on this research by the Institutional Review Board, they will not be credited to any particular group, whether that be capital judges, prosecutors, or defenders. For the most part, the responses from the interviews have been broken down into themes, and that is how they will be presented. The instances where quotes or paraphrases are provided (in italics or quotes), they are done so as a means by which to convey an important concept that I thought might be minimized or even lost if it were not stated exactly as was told to me verbatim in these face-to-face sessions. Besides, all of the interviewees are highly skilled communicators. My attempt to reword what they said would likely result in considerable less clarity. Another important issue that must be kept in mind while reading my summary of the 27 interviews: all of the information compiled from these interviews was filtered through my own cognitive and emotional filters. While I tried hard to be scientific in my analytic approach, it must be recognize that complete and absolute objectivity is simply not possible. The transcript of these interviews exceeded 600 single-spaced pages. Writing a one-chapter review required me to categorize and summarize, and I used my own developed interpretative skills to decide which portions of these interviews to prioritize for this dissertation. It was a judgment call. Another interviewer may very well have chosen differently.
Summary of Interviews

A total of 27 interviews were conducted during the months of May 2011 through July 2011. Nine capital case workers from Ohio, Oregon, and South Carolina were interviewed. A summary of interviewees’ responses on six of the interview guide questions is displayed in Table 9-1.

Table 9-1. Summary table of interviewee responses

<table>
<thead>
<tr>
<th>State</th>
<th>Role</th>
<th>Sup</th>
<th>Mor</th>
<th>Nec</th>
<th>Prime Suggestion(s)</th>
<th>CJ Model for DP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ore</td>
<td>Jud</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Do away with PCR</td>
<td>Crime Ctrl &amp; Due Proc</td>
</tr>
<tr>
<td>Ore</td>
<td>Pros</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Remove habeas corpus or PCR</td>
<td>Due Process</td>
</tr>
<tr>
<td>Ore</td>
<td>Jud</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Leave it up to voters</td>
<td>--&lt;sup&gt;a&lt;/sup&gt;</td>
</tr>
<tr>
<td>Ore</td>
<td>Jud</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>2 juries</td>
<td>Retribution</td>
</tr>
<tr>
<td>Ore</td>
<td>Def</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Abolish</td>
<td>Due Process qualified</td>
</tr>
<tr>
<td>Ore</td>
<td>Def</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Abolish</td>
<td>Crime Control</td>
</tr>
<tr>
<td>Ore</td>
<td>Pros</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Better funding across board</td>
<td>Due Process closest</td>
</tr>
<tr>
<td>Ore</td>
<td>Pros</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Oversight on def appel/PCR costs</td>
<td>Administrative</td>
</tr>
<tr>
<td>Ore</td>
<td>Def</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Abolish</td>
<td>Varies</td>
</tr>
<tr>
<td>Ohio</td>
<td>Jud</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Comm to make DP seek decision</td>
<td>Combination of all</td>
</tr>
<tr>
<td>Ohio</td>
<td>Pros</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Abolish</td>
<td>Crime Control</td>
</tr>
<tr>
<td>Ohio</td>
<td>Def</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Open discovery, funding, 2 juries</td>
<td>Contradicting</td>
</tr>
<tr>
<td>Ohio</td>
<td>Def</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Fund, ind. voir dire, change venue</td>
<td>Vengeance</td>
</tr>
<tr>
<td>Ohio</td>
<td>Pros</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>State funds DP pros, limit appeals</td>
<td>Due Process</td>
</tr>
<tr>
<td>Ohio</td>
<td>Jud</td>
<td>Yes</td>
<td>Yes</td>
<td>--&lt;sup&gt;b&lt;/sup&gt;</td>
<td>Leave it up to legislators</td>
<td>Varies</td>
</tr>
<tr>
<td>Ohio</td>
<td>Pros</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No unanimous verdict</td>
<td>Administrative</td>
</tr>
<tr>
<td>Ohio</td>
<td>Def</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Bring in indigent defense earlier</td>
<td>Crime Control</td>
</tr>
<tr>
<td>Ohio</td>
<td>Jud</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Abolish</td>
<td>Due Process</td>
</tr>
<tr>
<td>SC</td>
<td>Def</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Higher qual.stands, ind. voir dire</td>
<td>Crime Ctrl &amp; Contradict</td>
</tr>
<tr>
<td>SC</td>
<td>Pros</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Oversight def $$, shorten appeals</td>
<td>--&lt;sup&gt;a&lt;/sup&gt;</td>
</tr>
<tr>
<td>SC</td>
<td>Jud</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Allow plea ph#1 &amp; jury trial ph#2</td>
<td>Due Process</td>
</tr>
<tr>
<td>SC</td>
<td>Jud</td>
<td>--&lt;sup&gt;b&lt;/sup&gt;</td>
<td>--&lt;sup&gt;b&lt;/sup&gt;</td>
<td>No</td>
<td>Leave it up to legislators</td>
<td>Due Process</td>
</tr>
<tr>
<td>SC</td>
<td>Def</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Fund, 2 juries, seek decis reform</td>
<td>Crime Control</td>
</tr>
<tr>
<td>SC</td>
<td>Jud</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>State pros panel for seek decisions</td>
<td>Due Process</td>
</tr>
<tr>
<td>SC</td>
<td>Def</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Abol,narrow, def rep, PCR ord, hab</td>
<td>Varies</td>
</tr>
<tr>
<td>SC</td>
<td>Pros</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No unanimous verd, improve chrgs</td>
<td>Due Process</td>
</tr>
<tr>
<td>SC</td>
<td>Pros</td>
<td>Yes</td>
<td>No</td>
<td>***</td>
<td>Retain jury sequestr, appel reform</td>
<td>Due Process</td>
</tr>
</tbody>
</table>

<sup>a</sup>Could not decide; <sup>b</sup>felt it inappropriate to answer

Of the 27 interviews, 62% were non-supportive of the death penalty (n=16). One judge abstained from giving an opinion. All prosecutors, except for one in Ohio, were supportive. In contrast, all but one of the nine defense attorneys were anti-death
penalty. Out of the eight judicial responses, 88% were anti-death penalty (n=7). When interviewees were asked whether or not the death penalty was a necessary component in the criminal justice system, 80% of those who responded (n=25) said that it was not necessary, and that included three of the nine prosecutors who agreed to answer that question. One prosecutor declined to respond because he/she felt that was a question best left up to the legislators to answer.

Interviewees were asked to make suggestions for improving the death penalty system in their state. One judge felt that was better left to the legislators. Six (one judge, one prosecutor and four defense attorneys) felt the death penalty needed to be abolished. Again, similarly to the survey, the issue of abolition was not addressed outright; the question explicitly asked whether or not they had recommendations or suggestions for improving the death penalty in their state. Seven suggested appellate reforms, and four of those suggestions were from prosecutors: one suggested eliminating the dual protection of PCR and habeas corpus because only one was sufficient to safeguard defendant rights; one prosecutor felt the process should be streamlined to eliminate delay between sentence and execution; another prosecutor felt that the issues preserved should be the same as for noncapital cases except to allow any residual doubt issue to be reviewed. One judge also felt that the state post-conviction relief was redundant and was concerned with how expensive it had gotten in recent years. That dovetails with two prosecutors who suggested that better oversight was needed on appellate defense funding. One defense attorney suggested reform at two of the post-trial stages. He/she suggested that the habeas corpus needed to be a more meaningful review and also suggested that judges at the post-conviction relief
hearings be required to draft their own orders instead of allowing the Attorney General’s Office to do so.

Three suggestions were for bifurcated juries: one jury impaneled for the guilt/penalty phase and a separate jury impaneled for the penalty phase. That suggestion was made by a judge as well as by two defense attorneys. Two judges and one defense attorney recommended that the decision to seek the death penalty in any case be taken out of a single prosecutor’s discretion and either require a panel of statewide prosecutors or an appointed committee to make that decision.

Three defense attorneys recommended that defense funding be increased. One prosecutor suggested that death penalty prosecutions be state-funded. One prosecutor recommended better funding across the board.

Two prosecutors want to eliminate the requirement for unanimous verdicts in the sentencing phase and, instead, allow 11-1 or 10-2. Two defenders suggested that individual voir dire remain and that more meaningful jury-attorney exchanges be allowed. One interviewee suggested that standards for capital qualification be raised, and another defense attorney also expressed the need for better defendant representation. One interviewee was concerned about the jury sequestration rules being relaxed and felt strongly that capital jury sequestration needed to remain regardless of the expense incurred. Another recommended that the change of venue rule be relaxed, and one prosecutor recommended that jury charges be improved.

One Ohio respondent suggested an open file discovery more expansive than the one put in place earlier in the year. A South Carolina respondent recommended that statutory reform is needed to limit the amount of aggravated murders in which the death
penalty could be sought. Another interviewee from South Carolina suggested that a capital defendant who wished to plead guilty be allowed to have a jury decide his penalty; at the present time the jury is required to hear both phases; therefore, if a defendant pleads guilty, he must be sentenced by a judge. One Ohio interviewee suggested that fairer outcomes would be accomplished if indigent defense was brought into the case earlier, before the death penalty seek decision had already been made.

When interviewees were asked to pick, from a menu of criminal justice models, which one they felt best represented capital case proceedings, there was a wide range of responses. Nearly 41% of the interviewees chose the due process model (n=11): five judges, five prosecutors, and one defense attorney. Two identified their own model; one judge described capital case proceedings as being based on a retribution model, and one defense attorney said they were based solely on vengeance. A little over 22% chose the crime control model (n=6): one judge, one prosecutor, and four defense attorneys. Seven percent (two prosecutors) chose the administrative model (n=2); and seven percent (two defense attorneys) chose the contradiction model (n=2). Three respondents – one judge, and two defenders -- felt that, except for the rehabilitation model, any one of the other models could apply, depending on the presiding judge, the litigants, and the defendant. One judge felt that a capital case, because of being broken down into two stages, was a combination of the different models. Most interviewees were uncomfortable with this type of question. A few just wanted to describe to me a summary of their experiences and let me decide where I wanted them to fit. Another interviewee expressed disdain at such “pigeonholing.”
New Information Uncovered

New information was uncovered through the interview process, information that had not been revealed in the survey. I believe that is because a survey instrument, no matter how many open-ended essay boxes it contains, tends to constrain responses. A non-directed interview, on the other hand, gives the interviewee more freedom to express himself/herself. Oftentimes, that meant going outside the interview guide. For example, more than one interviewee used sports analogies to describe their experience with death penalty litigation, such as referring to it as being the Super Bowl of criminal law or the Lawyers’ World Series. The adrenaline rush that usually accompanies high stakes litigation was not something revealed in the survey or acknowledged in previous literature, but it came up in quite a few interviews. As one interview explained it: In comparison, other felony cases seem trivial. Also, many capital experienced attorneys went into law in the first place because they wanted to be litigators and try cases in front of juries. In civil law, litigation has decreased over the years; and, when it comes to those high-money cases, the established civil firms will not take the chance of having younger associates try cases. In criminal law, novice attorneys are allowed to try cases immediately at the misdemeanor level until they gain the experience that allows them to move up to the felony division. Now, in the modern era, with over 90% of criminal cases being settled, a considerable amount of capital cases can still be counted on to go to trial; and those trials are more grandiose than noncapital case trials because of the extended voir dire, the 2-phase proceedings, and the risk of death being attached. One interviewee told me that trying a major case, such as a capital one, is “the most fun you can have with your clothes on.” Others felt a let-down when a capital case was over and they had to go back to more mundane criminal matters. I also heard the
phrase that it was akin to being forced to tail-gate after having recently been the star quarterback.

During the face-to-face interviews, when I asked: “Has being an active participant in the capital punishment system created any personal or professional concerns, conflicts, or stresses?” some interviewees looked at me kind of funny and said, “Well, of course,” as if the answer should have been blatantly obvious. However, other interviewees explained how, in certain job-related ways capital litigation was considerably less stressful than noncapital murder cases. There are a variety of reasons: guilt or innocence is often not a hotly contested issue in death penalty cases; there is an established body of law regarding death penalty jurisprudence; more money is approved for hiring experts and/or consultants in capital cases; both capital prosecutors and capital defenders work in 2-member teams; and there is always advance knowledge on exactly when the case will be tried. Oftentimes, for noncapital felony cases, the trial date is not definitively established until the last minute. Sometimes litigants show up for a docket call with their case at the very bottom of the roster, but then all preceding cases unexpectedly settle. That means that their case gets called up, and they must be prepared to pick a jury and try the case immediately. This never happens in capital cases because a lot of preliminary planning has to be done to accommodate the additional procedural requirements.

There is another irony in capital litigation not found in other criminal proceedings. The better job that a defense attorney does, the less reversible error in the record; therefore, if a jury decides to bring in a death verdict – and, as I was told over and over again, no matter how skilled your litigation skills, you can never be 100% certain what a
 jury is going to do – then that defense attorney has hurt, rather than helped, his client. For those capital defenders whose ultimate goal is to save their client’s life, the temptation is great to deliberately insert error into the record. In fact, many capital defense attorneys pride themselves on being able to place a little appellate insurance premium in the record. Judges who themselves may be personally anti-death penalty, or merely ambivalent, can also be similarly conflicted. If they step in when they feel a defense attorney is doing an improper job in order to protect the record, then they are, in essence, paving the way for the death penalty to be affirmed upon review. While all of those interviewed strongly supported America’s jury system, many had serious reservations about capital juries having to be death-qualified.

**Economic Issues**

*Super due process, to me, means you should have a Cadillac defense.*

*Now what’s being said is that a Kia is good enough.*

—Anonymous Interviewee

When wrongful convictions were revealed because of advances in DNA science, many states and counties jointly took action to provide more funding at lower court, PCR, and appellate levels. However, since that time, the economy has taken a steep down-turn, and state and county budgets have shrunk. In order to balance fairness against fiscal responsibility, many jurisdictions have again started placing limits on capital funding but have done so in ways that appear at first glance to be reasonable and even justifiable. When taking a second look at it, however, a different picture may start to emerge. One respondent explained that those holding the purse strings have become more savvied in the past few years; that, instead of approving full funding request, they will approve a partial amount. By restricting the funding in such a way,
they force defense to either go to the second-rate expert or settle for state-employed consultants. All interviewees conceded that currently the justice system in America is grossly underfunded at all levels.

It was also explained that, in certain impoverished counties, capital charges are not filed (or “noticed,” depending on the state) merely because those counties cannot afford the expense. Other counties will limit the number of capital cases according to what that year’s budget will allow. What that means is that, even before knowing what death-eligible crimes will be committed, however heinous, the yearly budget may only allow for two aggravated murders to be capital-charged or noticed. So, even though prosecutors have told me outright that they do not believe in free crimes, they may at times be giving a discount for some death-eligible crimes because the probability is great that, once the capital case quota in their county has been reached, the death penalty will be off the table completely or will remain merely as a “bluff” in order to secure an LWOP plea.

**Using the Death Penalty as Leverage**

Over and over again, it was explained to me how the death penalty is being utilized as leverage. This is widely practiced across the country. One reason many prosecutors support the death penalty is because, without it as the high level mark, aggravated murder cases would tend to settle at a lower level than they currently do. If Life without the Possibility of Parole (LWOP) was, instead, the highest level of punishment, then their concern is that most aggravated murders would end up with life-with-parole sentences; whereas, at the present time, most capital cases – whether they go before a jury or not – end up getting LWOP. LWOP, in other words, is the current compromise sentence, both for the jury and for the defendant. They fear that, if the
death penalty were not available, the compromise sentence would decrease appreciably.

**The Morality of the Death Penalty**

*There have been times when I said that I'm going to have to answer to God for what I have done. And at times that has given me some angst, and then I thought: Well, did you do it responsibly? Did you do it for the right reasons? Did you do anything unethical? If you can answer those questions, then you can answer to God for it.*

—Anonymous Interviewee

When talking about the morality of the death penalty, it was sometimes impossible to keep emotions out of the discussion. Active participation in capital proceedings required everyone to reexamine their philosophies, their religious beliefs, and their individual feelings of right and wrong. Is killing, if done by the state and in the name of justice, right or wrong? No capital case worker can avoid asking that question. It is too simplistic to say: It is the law, and officers of the court must follow the law. It is easy for outsiders to bypass the question because they are only looking at the death penalty in the abstract. Frontline capital workers are not afforded the luxury of looking at it from that far-off perspective. They are right there in the trenches and are staring at the issue dead-on. Whether they like it or not – and regardless of what role they play in the proceedings – they have to learn every detail of the murder(s); they have to become intimately familiar with the victim(s) as well as with the defendant. They are daily reminded of the victim(s); they share physical space with the defendant. As much as they may want to, they cannot ignore the humanity of either one. Often the family and friends of the deceased, as well as the family and friends of the defendant, are present in the courtroom. They see their sorrow; they hear their grief; they smell their anxiety.
It is easy to polarize when you are far away; it is much more difficult to do it when you are up so close that it all becomes immediate and somehow very, very personal.

Ŷou can either become callous
by what you see or let it consume you.

—Anonymous Interviewee

Many of the 27 interviews were intense, to the extent that even I could not help feeling emotionally impacted by the cracking voices, watering eyes, or shaking hands. Twice, interviewees broke down and cried¹, and I was forced to use every ounce of will power possessed not to join in or run out of the room. It gave me an inkling of how difficult it must be to maintain professional composure when participating in death penalty proceedings.

There were also, however, interviewees who were very matter-of-fact about their participation. Two out of the 27 provided what I considered to be “pat” answers to all my questions, refusing to reflect any deeper than what appeared to be the “official policy” of their position. Part of this conclusion was reached because they each made comments about the confidentiality agreement contained within the Informed Consent; both wanted the record to be made clear that they were not the ones insisting that the interviews be kept confidential; one even wrote that underneath his/her signature. Still, they both were diligent about answering every single question preprinted on the interview guide, which had been provided to them in advance.

¹ I have often been told that I have a “motherly” demeanor, and perhaps that explains how these interviews progressed. Another explanation may be that these interviewees are seldom provided the opportunity to talk about these issues. More than one person stated that they had learned early on in death penalty involvement not to burden family or friends with their personal feelings about it. I may have merely provided a “vent” for them.
When interviewees were asked whether their opinions about the death penalty were based on religious beliefs or were morality-based, 73% said they were morality-based (n=19). A little over 62% percent of judges felt that way (n=5); 67% of prosecutors (n=6); and 89% of defense attorneys (n=8). Some interviewees revealed to me their religion’s stance on the death penalty; however, none of them thought that their opinions were based on their religious beliefs.

While the majority (n=16; 62%) of total interviewees were not supportive of the death penalty, there were a variety of reasons given for their non-support; e.g., the infallibility of the system; the moral opprobrium that killing is always wrong (even if the killer is the state); the idea that LWOP accomplishes the same objective; the high cost, the strain on the system, or the utilization of resources which would better serve society if applied elsewhere. However, the ones who did support it mainly did so for only one reason: no faith in the criminal justice system to sustain LWOP or a true life sentence in the future. One supporter told me, “I have very little faith that true life will mean true life.” Another said it more bluntly: “I don’t trust the system.”

Some prosecutors expressed distaste for the death penalty, but were resigned to the fact that it was what the voters wanted, and so they were obligated to provide it. Others felt that, in order not to be overwhelmed with personal angst, they had to believe in the morality of the death penalty. Others expressed to me that they hated the fact that the death penalty was necessary, but the presence of evil in the world made it so.

Some judges expressed frustration with the system because of the requirements placed on them to regulate it and make it work perfectly when there were so many uncontrollable variables which prevented it from reaching anything remotely close to
perfection. More than a few judges confessed that my questions made it difficult for them because they were sworn to uphold the law (and the death penalty was the law in their state), and I was asking them to look beyond the law and reveal personal feelings. For them, the law was often seen as a blinder, similar to what is placed on racehorses, so that they would not be distracted from the task in front of them. A few had experienced times during the course of a death penalty trial when they were woken up from a sound sleep besieged with doubts about the morality of it. A tiny percentage perceived their job as one that prevented them from expressing personal opinions, even with my assurance of confidentiality, because their oath of office required them to enforce and uphold the law regardless of personal feelings.

The Best of the Best

In death penalty litigation,
you want the best quality prosecutor
just like you want the best quality defense.

—Anonymous Interviewee

Neither capital prosecutors nor capital defenders make the kind of money that their level of education, skill, and trial experience would earn them in the private sector. The ones who stay in the field for any extended length of time tend to feel very strongly committed to their profession. This may be why stories abound about the overzealous prosecutor or the cause defense lawyer. For those who specialize in capital litigation, their commitment over time can become a crusade. Many capital defenders admit that, unlike other major felony work where they strive to inject reasonable doubt and to hold the government accountable for proving guilt, in death penalty proceedings their goal is strictly to save their client’s life. Prosecutors, on the other hand, feel a similarly strong responsibility to protect society from evil-doers. When asking prosecutors about the
necessity of the death penalty now that LWOP is available as a sentencing option and now that maximum security prisons have been built to resolve safety concerns, I was told about their fears for the prison guards, the medical staff, and even other inmates who are being exposed to these convicted capital murderers. It was obvious, when hearing them express their concerns, that these prosecutors felt a personal responsibility as well as a professional duty to be society’s protector.

I heard over and over again from attorneys on both sides of the death penalty debate that, “I want to do right.” Both sides stated a preference for having their opponents be highly skilled capital litigators because that helped alleviate their fears about mistakes being made in the process.

Many defenders admitted to feeling like David to the government’s Goliath and having had a lifelong desire to stick up for the “underdog.” I also saw a common theme with the prosecutors being very service-oriented. As an example, most offered (without being asked) to help me navigate their cities by drawing me maps or giving me detailed directions. Many of the people I interviewed had been influenced by television shows exposed to in early childhood. Others had originally planned to go into corporate law or private defense law but were permanently sidetracked by taking on internships or first jobs at either a prosecutor’s or public defender’s office. Compared to civil law, criminal law seemed exciting and raw with its constant flow of human drama.

I was told that it is not unusual for courtroom workers – whether prosecutor, defense attorney, or even judge\(^2\) -- to get assigned to one death penalty case and then,

\(^2\) In some jurisdictions, all of the felony criminal court judges are placed on random rotation to hear capital cases; in most, however, there is an assignment process, and the willingness of the judges to preside over these cases is taken into consideration. Also, attorneys do have the right to request a change of judge. The exact procedure varies across jurisdictions.
no matter what the outcome, declare: Never again! This may be unfortunate because, according to my interviewees (the majority of whom have vast experience in capital litigation), it takes multiple involvements before participants may stop feeling as if they are walking on eggshells throughout the entire length of proceedings. It is common, when you’re a novice, to second-guess everything you say and do. Dwelling on the possible outcome in DP cases can be counterproductive and cause participants to feel overwhelmed. While the weight of responsibility does not necessarily lessen with experience, it does tend to feel less burdensome and more manageable. There is, however, also the possibility that capital case workers may get so efficient at handling these cases that they become more focused on form and, consequently, lose sight of substance. From a procedural standpoint, capital cases generate enormous volumes of paperwork. Super due process requires capital defenders to leave “no stone unturned” in representing their clients. I was told of times where written motions were filed that contained the wrong name of either the victim or defendant, or both, because these papers were prepared hurriedly from templates. Due to the enormity of the task, there is a recognized risk that capital defenders will scramble to check off all their required “to-do” items and then not have any time or energy left over to put forth quality witness examinations, impassioned pleas, or creative arguments; this is what interviewees referred to as a “rote” defense which may look at least marginally acceptable on the official transcript of proceedings but which falls far short of impressing a jury or truly being effective. And it is that lower level trial transcript that becomes the lynchpin to which all future review decisions are pinned.
Responding to a Higher Calling

*Most successful defense attorneys don’t believe they’re on a mission for God and separate themselves from their client. The ones that are the most obnoxious are the ones who take it all so very personally.*

—Anonymous Interviewee

There is a high attrition rate with capital workers. Those who remain in the capital bar tend to diverge onto two different pathways, and this applies to judges, prosecutors, and defenders. The first *pathway* would be those who have developed a very efficient system for managing capital cases. They have learned to become very business-like in their approach and focus in a laser-like fashion on the law. They are the ones who could be described as being morally disengaged from the process. The second *pathway* would be those who have, instead, become moral crusaders. These are the ones who hear the voice of a higher calling. Both pathways are fraught with risks that create vulnerability for the workers themselves. The risks in the first pathway are not immediately apparent because the vulnerabilities of the workers on that pathway are kept hidden from any outside onlookers and even from the workers themselves. The risks in the second pathway, however, are more likely to be exposed fairly early on in the process by death penalty regulators; however, the workers themselves may remain unaware that they are on a risky path, and some of them are able to traverse it without ever causing harm to themselves or others. Others on the second path may reach a point, though, where they longer trust the law to do what is morally right. They are the ones most likely to circumvent the law in order to achieve a higher end.

**The Worst of the Worst**

The majority of interviewees frankly admitted that the death penalty in their states was not being reserved for the *worst of the worst*. In various instances, the most vicious
killers, the ones deemed most deserving of death under the law, had been allowed to plead to lesser sentences. In fact, an oft-cited reason for not supporting capital punishment is that convicted murderers who best fit the profile of cold-blooded psychopath – someone who possesses high intelligence but is totally bereft of conscience – are better at manipulating the system than the so-called average capital defendant, described by many as being deficient in mental and social skills. One illustration was about a serial killer who was allowed to plead to LWOP in exchange for revealing where his victims’ bodies were buried. Another multiple-victim killer had fled the country, and that country would not allow him to be extradited until the state agreed not to seek the death penalty.

Exposing Super Due Process

Presumption of innocence is an artificial bubble you place in one place and one place only: the courtroom.

—Anonymous Interviewee

There was a story told at a trial skills seminar to teach defenders better jury selection techniques. The seminar leader told the participants to pretend as if each were a prospective juror and that he was the defense attorney conducting the voir dire examination. He gave them a sample of how to effectively address a prospective panel on the presumption of innocence in such a way that the venire might understand its limitations in a humorous way:

Seminars Leader: We all make presumptions when we walk into a room. When you saw the guy up on the high throne with the black robe on, what did you presume?

Participant: I presumed he was the judge.
Seminar Leader: Well, when you saw this guy over here with three police officers and with the power suit on and with the power tie, what did you presume?

Participant: Well, I presumed he was the prosecutor.

Seminar Leader: And how many of you, when you saw this man seated next to me, said to yourself: There’s the man that I presume to be innocent?

While the due process model was chosen by 11 interviewees across all roles as being most descriptive of what occurs in death penalty proceedings, when interviewees recounted their experiences, I heard over and over again that “guilt was not an issue in this case.” It made me begin to wonder if guilt was ever an issue in death penalty cases. I finally asked one respondent who chose the due process model as the one being most representative: How can that be the prevailing model when you just told me guilt was not an issue in his case? The response was that everyone went out of their way to protect the capital defendant’s rights. My rejoinder was, “But isn’t one of his rights the presumption of innocence?” It was explained that death penalty cases are carefully screened by the prosecutor’s office; that prosecutors will not seek the death penalty if they do not have the evidence to prove it. When defense attorneys are appointed or assigned to one of these cases, they already know that winning in the innocence/guilt phase is highly unlikely. Defense attorneys across states did express the view that most of the safeguards put in place for capital defendants, such as the super due process protections (including the presumption of innocence), tended to be more theoretical than real. Prosecutors, for the most part, were adamant that due process was present to an even greater extent than it was in a noncapital case. However, it should also be noted that most of the prosecutors I interviewed – confirming the survey finding – did not find capital cases to be particularly stressful. For
most of them, it was the same as any other murder case, and some considered them to be less stressful due to the strength of their case and the highly structured environment.

Another respondent described the structure in a negative way by stating that it was like there was a script where everybody involved knows what they must say, and heaven help them if they happen to stray from that script; that it often felt like there was a systematic approach: How do we efficiently move this person from defendant to death row inmate? Another brought up Judge Roy Bean’s brand of justice: *Let’s give the defendant a fair trial, and then go out back and hang him.*

Even those who insisted the proceedings were fair revealed reservations. The biggest concern seemed to be the jurisdictional variation with capital charging and death penalty outcomes. Certain counties in all three states were known for aggressively seeking the death penalty and having jury-eligible citizens that would always vote for death. Juries in one particular county were referred to as “the 12 Dobermans.” Other counties never sought the death penalty regardless of the numbers of aggravated murders committed within their jurisdiction. Some counties would consistently seek the death penalty, but they were known for having juries that always compromised with an LWOP verdict.

The second major concern was the quality of the defense being provided, and that also appeared to be jurisdictionally related. In some areas, there was the perception that aggressive defending was not tolerated; that appointments were given to a certain favored few who were more willing to compromise their client in order to maintain good relations with those having the most political power and/or those controlling the purse strings.
Concern about capital jurors’ understanding of how to apply the law was also an issue brought out. It was opined that capital jurors probably used a preponderance of evidence standard (charges are more likely true than not) despite being instructed by the court to use the standard of beyond a reasonable doubt. In one state, new restrictions have recently been placed on voir dire examinations which prevented defense attorneys from utilizing jury screening skills developed from attending national conferences. Also, instead of allowing individual voir dire, a new trend has been to question the venire in small groups. Some jurisdictions have started to discontinue capital jury sequestration. Both of these last two changes have been implemented to cut down on costs associated with capital trials.

Ego was identified as a factor that can often loom large in death penalty proceedings, and it can also be aggravated by the media. Once elected prosecutors publicly announce that they are going after the death penalty, it can be difficult for them to back down from that position even when new information later surfaces that would seem to justify a softening stance. At the same time, however, I was told about honest and conscientious prosecutors who, while they have to maintain appearances, will tell the defense attorneys that – even though they felt forced to seek the death penalty because of the media uproar over the crime – the case will just get dragged along until the media has redirected its focus, and then they will offer the defendant a deal.

Everyone interviewed acknowledged that improvements have been made over time and felt that the system was evolving. The question that persists is whether these improvements are enough to ensure fairness throughout all jurisdictions. Understandably, none of the respondents were willing to speak on behalf of other
jurisdictions, but all were aware of the variations in charging practices and were outspoken about how the dynamics involved with each individual case might influence outcomes.

Besides lower court level variations, higher level court variances were identified by numerous interviewees. Certain federal circuit courts are known to the inner circle as being very liberal in their practice of reversing and remanding capital cases back for retrial on what might be considered by all as trivial issues; whereas, other federal circuit courts have the reputation for never ruling in favor of a capital defendant, no matter how valid the constitutional claims asserted may be. It is similar with the three state supreme courts. In one state, it was identified as a running joke that its highest court will “stretch the taffy to affirm every capital conviction.” Harmless error is seen by many as the catch-all phrase to keep capital convictions intact.

**Measuring the Value of Life**

*A civilized society is not one that punishes less and less and less.*
*It’s one that is more discriminating about it.*

—Anonymous Interviewee

One aspect in particular was brought out which might explain, in part, some of the findings from past research regarding bias in death sentencing. The system itself forces its workers, as well as capital juries, to compare the value of a life by measuring one person’s worth as compared to another. Prosecutors, in screening out cases in which to seek the death penalty, evaluate the crime, the criminal, and even the victim. The latter assessment, rather than being racially motivated, is – as it was explained to me – based on the prosecutor’s perception of whether the victim is a “true innocent,” how much the impaneled jurors will care about that particular person’s death, and whether
their outrage will be sufficient to sustain a death penalty verdict. The prosecutor is forced to make these calculations because of the high costs attached to a death penalty pursuit. Experience has demonstrated to these prosecutors that typically victims who, possibly as a consequence of low socio-economic status, have a shady past (in that they might have been chronically unemployed, a substance abuser, or a welfare recipient) are often viewed by the sworn-in jurors as being less valuable to society; therefore, the price for murdering him/her will end up being discounted by the jury bringing in a verdict other than death. On the other hand, the victim who is a true innocent (and these types of victims may have lived a more sheltered life) will be perceived by the jurors as being more deserving of having the death penalty imposed on the murderer as a way to validate their lives. As one interviewee explained it to me, the reality of the situation is that – no matter how harsh it may sound – community members just do not give a damn about the crack addict who is murdered; and now that the money is so tight prosecutors cannot afford to seek the death penalty when the odds are that it will never bring in a 12-vote death verdict.

**Summary and Conclusions**

While 10 out of the 27 interviewees claimed to be supportive of capital punishment, only five respondents believed that the death penalty was actually necessary. The death penalty trial is perceived by participants as being the *Super Bowl* of criminal law. As a group, judges were the least likely to appreciate the thrill aspect of these cases. This is perhaps because their role is more as referee, whereas the capital prosecutors and defenders players are the star quarterbacks. In an era where full-fledged jury trials are becoming increasingly rare, the 2-stage capital proceeding is one of the few remaining platforms where criminal litigators can be
assured that their highly honed trial skills will be tested. The high stakes involved add to the accompanying adrenaline rush.

Although the stress that accompanies capital case involvement cannot be ignored, much of that stress is manifested only after the case concludes. While the capital trial is underway, attention is diverted away from mundane concerns such as lack of sleep and insufficient diet, and attention is even diverted from morality issues that surround the death penalty. Active involvement in capital case proceedings requires a certain degree of professional callousness on the participants’ part, which also helps to explain why death penalty trials have been likened to sporting events, and such professionalism callousness may be the result of moral disengagement.

Overall, judges expressed frustration at the amount of paperwork that needed to be generated in a capital case and at the amount of money that needed to be spent in order to try and reach the level of super due process that was being required. None of the judges, however, wanted to see the requirements for super due process relaxed. They were more concerned with it not being fully realized in capital case proceedings and rather pessimistic about any capital case proceeding being safe enough to ensure that a miscarriage of justice would not occur. As a group, they were also discouraged about the numbers of capital defendants who appeared to have personality deficits, some degree of cognitive impairment, or substance use disorders.

Most, if not all, of the defenders interviewed felt that their job was an uphill battle from the very start. Except for three of them who had been extremely successful in representing capital defendants, defenders did not hold out much hope for any acquittals and were not even optimistic about being able to keep their clients from being
sent to death row. The vast majority of capital defenders viewed their clients as being flawed human beings who had made a huge mistake by committing a horrific crime.

All of the prosecutors that were interviewed were completely convinced of the rightness of their position, and that was revealed in everything they said. They were also sometimes indignant when discussing how their professional efforts were thwarted by the system or undermined by opposing counsel. The feeling was conveyed that, while the system might falter in its overall mission of justice, they never would. For those who were the staunchest supporters of capital punishment, a basic mistrust of the criminal justice system was revealed. Many of them were skeptical of a life sentence, even an LWOP, being sustained or upheld in the future, and that was one of the main reasons given for supporting the death penalty. Prosecutors overall were also cynical about human nature and believed that criminals were becoming increasingly more violent, increasingly more devoid of conscience, and increasingly less reluctant to kill.3

The vast majority of capital prosecutors, with their furious4 focus on the facts of each case, are merely doing their job as representatives of society when they show righteous (but rational) indignation and controlled outrage at those who undermine social order and jeopardize public safety. Judges, with their legal blinders securely fashioned, as is required, bring even more rationality to death penalty proceedings as they referee both sides to make sure they stay within rigidly-established rules and regulations. It is the capital defender alone who must represent society’s heart, and –

---

3 This assessment, however, contradicts the statistics from the Uniform Crime Reports (2010) which report a decrease in violent crime across all U.S. regions.

as most of us might have already learned in life – the heart knows no reason. In the capital case arena which requires legal reasoning and highly rationalized arguments, the benign heart – even if bleeding – stands little chance against the retributively-charged head.
CHAPTER 10
DISCUSSION AND CONCLUSIONS

Discussion and Conclusion about the Quantitative Study

Quantitative Study Limitations

This study did not use a random sample. Instead, it was a convenience sample. Recruitment was basically limited to criminal law practitioners from counties with a population over 100,000 who were active bar members with publicly-accessed email addresses. The survey was web-based and required some level of computer literacy. Participation was voluntary, and the survey was fairly lengthy and required an investment of time to complete. More defense attorneys participated, as compared to prosecutors and judges. For all the aforementioned reasons, the findings may not be representative of the larger population of capital case workers or noncapital case workers in the three states under study, much less generalizable to either group nationwide.

Discussion about the Quantitative Study

Five main hypotheses were formulated for this dissertation, and three of those contained sub-parts. To test the Marshall Hypothesis, Hypothesis One was stated in two parts. \( H_{1a} \) stated: There will be a negative correlation between death penalty support and capital case experience. \( H_{1b} \) stated: Underlying personal belief systems will moderate the relationship between death penalty experience and death penalty support. Hypothesis One was formulated because Justice Marshall made the claim: As people become more knowledgeable about the capital punishment and how it operates, the less supportive of the death penalty they will be, and the only exception would be if there was an underlying belief system that was deeply rooted in retribution.
Before testing whether Hypothesis One was supported, bivariate analyses were done to determine if there was a statistically significant, stand-alone correlation between any one independent variable (predictor) and the dependent variable of DP support. Much of this initial analysis was exploratory. By doing these bivariate analyses, a foundation was laid for the multivariate analysis that would follow wherein a regression model would be estimated to determine the net effect of any one single predictor on DP support and the overall effect of all predictors on DP support. The initial exploratory analyses revealed a significant but weak inverse correlation between capital case involvement and DP support and revealed a much stronger (and still statistically significant) relationship between death penalty opinion (support/non-support) and professional role.

From the beginning, it was suspected that legitimacy, defined as the perception of fairness, would be a determinant of DP support. For that reason, a lot of time was devoted to exploring how respondents viewed the death penalty system overall, as well as in their respective states, and in terms of it having sufficient safeguards in place to prevent the risk of an innocent person being executed. The majority (81%) of respondents (n=373) had doubts about whether it was even possible to administer the death penalty in such a way as to ensure that no innocent person would be executed, and a slightly less majority (78%; n=356) had doubts on whether their own states had sufficient safeguards in place.

In times of a troubled economy, cost can become the driving force for public policy decisions. It may also be at least a partial explanation for death penalty support. Over
93% of respondents (n=428) either expressed doubts about the cost-effectiveness of the death penalty or were convinced that it was not cost effective.

One justification for capital punishment is its deterrent effect on murder. For instance, Former President George W. Bush asserted in a public debate at Washington University in 2000 that the death penalty saves lives through deterrence. Less than 10% of survey respondents (n=45) agreed with the ex-president that the death penalty, separate and apart from alternative penalties, deterred homicides.

The death penalty is one component of the criminal justice system, and so the legitimacy issue also had to look at how respondents viewed the overall operation of the criminal justice system. Nearly 74% of respondents (n=323) believed that the criminal justice system operated in a contradictory fashion by emphasizing case processing and by proclaiming an innocence presumption when, in actually, a guilt presumption was really being maintained.

When the final OLS regression model (Model 3 in Table 6-8) was estimated to test the Marshall Hypothesis with the full dataset, the statistically significant predictors were: capital experience, professional role, underlying belief (in fundamentalism, in explanations for human behavior, in equitable justice as the CJS goal), political affiliation, and specific state experience. Non-significant predictors were: legal years of experience, moral basis, victimization, and gender.

The first hypothesis (H1a) was supported because there was a negative correlation found between death penalty support and capital case experience. There was mixed support for H1b, which stated, "Underlying personal belief systems will moderate the relationship between death penalty experience and death penalty support," because
the interaction between capital experience and moral basis for DP opinion was not statistically significant; however, the interaction between capital experience and a classic view of behavior was statistically significant. Adding the classic-experience interaction term did not wipe out the statistically significant direct effects of either capital experience or the variable which measured a classic view of human behavior.

Hypothesis Two (H₂) stated that the relationship between DP support and capital case experience would be moderated by political affiliation, and that was not supported because the interaction between Republican and capital experience was not statistically significant, nor was the interaction between state and capital experience.

While the dissertation was organized so that the Marshall Hypothesis was tested first, using the full dataset and specifically looking at the relationship between DP support and experience, it is impossible to ignore what might be considered the elephant in the room: the legitimacy issue. When Justice Marshall hypothesized that the American public was largely supportive of the death penalty only because they were ignorant of how it operated, he was implying that increased knowledge would reveal system unfairness. Therefore, DP support – in Justice Marshall’s mind – would be determined by direct knowledge, and such direct knowledge would be based on: (1.) information received from experience, and then (2.) information processed through perception. By testing the Theory of Legitimacy (or assessing perceptions of fairness), the partial dataset of capital case practitioners was utilized (n=246). The rationale being: Those respondents are the ones with direct experiential knowledge of death penalty proceedings; therefore, they are in the best position to provide a perspective on whether or not the death penalty is being operated fairly or legitimately (in accordance
with the law). Then, once that analysis was completed, further analysis could be done to find out whether or not legitimacy would be a primary predictor for DP support. The problem, however, with using legitimacy as a variable is that fairness (the key component in legitimacy) is recognized as being somewhat of a nebulous and/or subjective term. For that reason, time and effort was devoted to finding out what the possible predictors for legitimacy were before setting up the final multivariate model to estimate the support-legitimacy relationship.

In Table 7-5, an OLS regression model was fit with legitimacy (operationalized as a scale ranging from 5 to 20) as the dependent variable and the following eight independent variables: Number of capital cases, capital role, current occupation, DP is Appropriate (scale), Lingering Emotional/Spiritual (scale), Republican, state, and gender. Just slightly over half of the variation in legitimacy scores (53.98%) was explained by Model 5. All predictors were statistically significant except for the role of judge (in capital proceedings and in current occupation), political orientation, state, and gender. It is strongly suspected that the prosecutor effect, found in previous bivariate analyses, is also strongly present in Model 5 because all defender roles, as compared to the reference category of prosecutors, negatively correlate with legitimacy, and those relationships are statistically significant (p<.05).

When the final OLS regression model was built to test the DP support and legitimacy relationship (Model 8 in Table 7-10), the following predictors were statistically significant: Legitimacy, number of capital cases, capital jury experience, belief in DP appropriateness, fundamentalism, moral basis for DP opinion, Republican, and the interaction terms of judge-legitimacy, public defender-legitimacy, and court appointed-
legitimacy. Both sub-parts of Hypothesis Four were supported because DP support positively correlated with legitimacy, which is supportive of $H_{4a}$; and the interaction terms for role and capital experience were statistically significant predictors of DP support, net of capital experience being a statistically significant direct effect. The latter supports $H_{4b}$, which stated that the role of criminal law practitioner would moderate the relationship between DP support and legitimacy.

Hypothesis Five ($H_5$), which stated, “Regardless of self-reported death penalty support, the majority of capital case practitioners will have suggestions for improving death penalty proceedings” was not supported because, even though the majority (68%) of capital case practitioners ($n=147$) did have suggestions for improvements, only 45% of those who were supportive of the death penalty ($n=17$) wrote in suggestions. Out of all the suggestions made, the most frequent was to abolish the death penalty. The second most frequent suggestion was to have better oversight over death penalty proceedings. The third most frequent written-in recommendation was for increased funding.

**Conclusion on Quantitative Study**

A summary of whether each hypothesis was supported or not, along with the page number and identification of the analytic technique utilized, is in Table I-1 in Appendix I. In analyzing the full dataset, capital experience negatively correlates with death penalty support, but that experience effect is moderated by whether or not the respondent is a prosecutor or non-prosecutor. There is a strong prosecutor effect to death penalty support, which appears to be amplified by capital prosecutor experience.

Legitimacy, or fairness perception, is also a robust predictor for death penalty support. Again, there is a strong prosecutor effect on legitimacy. This effect is also
revealed in the legitimacy-support relationship because there are statistically significant role-legitimacy effects on DP support. Having a fundamentalist view is also a statistically significant predictor for DP support, as is being a Republican.

When analyzing the full dataset on the views about whether or not the death penalty is necessary, 75% of respondents either did not think so, or they had serious doubts about whether or not it was needed. In the capital dataset (subset), 78.5% either strongly disagreed, disagreed, or were uncertain about whether capital punishment is a needed. It is especially important to note that a significant percentage of capital prosecutors (47%) had serious doubts about the necessity for capital punishment or were firm in their conviction that the death penalty was not needed.

Discussion about the Qualitative Study

Qualitative Study Limitations

Interviewees were purposively selected by the following main criteria: capital case experience and geographic location. The goal was to interview from each state three sitting judges, three active prosecutors, and three capital defenders, and that was accomplished. While an effort was made to find candidates from various jurisdictions, it must still be recognized that nine capital case workers in each state is too low of a number from which to make broad generalizations for all capital workers within either Ohio, Oregon, or South Carolina. While common themes did emerge and important information was uncovered, time was limited, and the interview itself was semi-structured. Interviewees may not have been provided sufficient opportunity to convey their full range of opinions on the death penalty or to completely communicate the broad expanse of their knowledge and experience. Also, once the interviews were transcribed, they ended up being over 600 single-spaced pages. Those 600-plus pages
were compressed into a 23-page summary. While the effort was made to objectively identify all major issues and common themes, it must be acknowledged that some contextual nuances may have been inadvertently missed.

**Summary of Qualitative Study**

Perhaps it was all the sports analogies I heard, but after completing all 27 interviews I could not stop likening the modern death penalty trial to the gladiator battles during the reign of the Roman Empire. Today's capital litigants pit their highly honed trial skills against each another in a fight to the death. The difference being that, instead of one of the attorney-combatants being put to death, it is the defendant going to death row; or, if his attorney wins the battle, he will spend the rest of his life in prison. Even if he gets a death sentence, he may still end up spending his life in prison. The appeal process takes years to complete, and there is a high likelihood that his case will be remanded somewhere along the line and need to be retried.

Also, something surfaced in these interviews that should be examined more closely: the idea that criminal case practitioners, many of whom became attracted to criminal court work in the first place because of the opportunity to litigate in front of juries, are being forced by the system to choose between two options: (1) the thrill of a full-scale jury trial at a time when litigation is increasingly rare or (2) negotiating yet another plea settlement. While the one offers a glimpse of glory, the other must seem merely mundane. For the elite\(^1\) capital case workers, the 2-stage death penalty proceeding really is their Super Bowl challenge. While that attitude is understandable and should even be expected, it is nonetheless unseemly when the stakes are so high

\(^1\) Nardulli (1978).
for the defendant who, unless a true psychopath, would be hard-pressed to feel even the slightest glimmer of excitement or anticipation at the prospect of being put on trial for his life. It is also likely that the co-victims, or family members of the murder victim, dread the whole ordeal, but endure it in order to reach some semblance of justice at the end.

Policy Implications from Both Studies

The death penalty trial was described as being a dog and pony show, and the increased funding allowed may serve merely to make it a much more expensive and more elaborate dog and pony show. If the death penalty has now been accepted as a leveraging tool to the degree that I think it has been, then these “slam-dunk” cases seem like perfect candidates on which to apply that leverage before doling out taxpayer’s money on an elaborate trial where hundreds of thousands of dollars have to be spent in its preparation. Many of the capital defendants, however – according to both survey respondents and interviewees – possess a potentially lethal combination of characteristics: they have below average IQs, they lack social skills, and they have a deep distrust of the system. For these defendants, an offer of LWOP in exchange for pleading guilty may seem like a system setup and something to avoid at all costs.

Suggestions were made to have some type of statewide oversight for capital charging decisions. Such oversight would likely eliminate geographic inequalities and would ensure that DP proportionality is attained. It would also be a way to ensure that the death penalty is being reserved for “the worst of the worst” because that oversight committee would have access to all DP seeks within the state and, therefore, would be in the best position to compare across aggravated murders and across alleged murderers. This would eliminate the victim-value calculus that is currently taking place.
Allowing locally elected prosecutors, who may be politically motivated, to make capital charging decisions is a recipe for potential disaster for both the accused and for the elected prosecutors. Elected prosecutors are currently very vulnerable when highly publicized murders occur within their jurisdictional circuit. Taking that decision out of their hands would eliminate the possibility that their popularity would be compromised by one single sensationalized crime.

Most of the interviewees, as well as most of the survey respondents, do not believe that the death penalty is needed. Instead, they believe that the LWOP alternative can ensure public safety just as well and at a substantial reduction in cost and resource allocation. The money saved could be used to fund victim services or to provide programs for at-risk youth.

Research has suggested that most capital jurors have already decided punishment even before the innocence/guilt phase has been concluded (Bowers 1995; Bowers and Foglia 2002). The way most capital trials are being conducted at this point with this implicit concession on “liability” and the fight being only over damages, Phase One is a complete waste of time and money. An alternative solution might be, as one respondent suggested, having defense attorneys “tag-team” each other in the 2-stage capital trial. One defense member could be there mainly for the first phase, and the second member could take over the lead in the penalty phase. It was explained how sometimes 2-member defense teams will assume different roles, similar to the good cop/bad cop scenario at police interrogations. One will take the “My guy is innocent, and how dare the state put him through this” stance and be aggressive with cross-examinations, and the other will be the more hesitant and soft-spoken one who only
examines witnesses that are relatively benign and then takes over as the lead, if necessary, in the penalty phase. Also, the jury could be told upfront how the capital trial must proceed and why the 2-stage proceeding is so awkward for the defense. Once a jury verdict comes in at the end of phase one, the opportunity to litigate innocence or guilt is lost, possibly forever. If all, or even most, of the defense focus from day one is on saving the defendant’s life, then the chance to litigate innocence or guilt may have already been forfeited at trial commencement. Some survey respondents and interviewees recommended a bifurcated jury, and that may be a viable resolution.

Not easily resolved are the innate contradictions that are presently built into death penalty litigation. Many capital defense systems rely heavily on defenders who are willing to take a cut in compensation in order to represent a capital client. This means that many of the capital defenders who are willing to accept such appointments are probably strongly opposed to the idea of capital punishment, and it is that opposition that motivates them to work at a substantially reduced rate. A certain percentage will likely fit within the category of moral crusader. Moral crusaders are at increased risk to become conflicted by their personal principles and their professional responsibilities. The temptation to insert reversible error in a capital proceeding will be great. The potential to represent a cause and not the client will be present. Under these circumstances, it might be the case that the government is taking unfair advantage of these crusading defenders by allowing them to work at nonprofit levels that put their private practices at risk.

There is also a built-in contradiction in death penalty systems for judges who are personally opposed to the death penalty but who are nonetheless obligated by
professional oath to apply the death penalty statutes. The goal for a trial judge is to create a reverse-proof record so that the case will not get remanded and retried on legal error. Death penalty proceedings are more rule-bound than noncapital proceedings, and there are various points within every capital case where the presiding judge has to make on-the-spot decisions to ensure constitutional protections are being provided to the accused. Sometimes this might mean educating an inexperienced capital defender on what objections must be preserved; sometimes it will mean approving an expense voucher; at other times it may be reining in a prosecutor during opening statements or closing arguments. The types of decisions and the number of decision-points that might occur in one single death penalty proceeding are incalculable. The capital judge who personally has reservations about capital punishment is often placed in a quandary. As it stands now, the more fair the lower court proceeding looks to the jury, the more likely it is that a death sentence will be imposed. An absence of error within the written transcript is almost a guarantee that the verdict will be upheld and the state killing will occur in record time. Should the judge step in and actively micro-manage the case to ensure the appearance of fairness for the jury panel and to preserve the integrity of the transcript if or when he/she might have serious reservations about procedural fairness? That, for the judge, is an ethical dilemma that the DP system has overlooked. While this type of dilemma may also exist in noncapital murder cases, the ramifications are not as radical or irreversible.

Capital prosecutors are not immune from being compromised by capital case contradictions. When the death penalty is sought, there is more pressure brought to bear on the assigned prosecutor to either negotiate an LWOP guilty plea or, if the case
proceeds to trial, to obtain a capital conviction. These assigned prosecutors are not always privileged to be part of the upfront decision-making to seek the death penalty in a particular case. In many states, that decision is left solely up to the elected prosecutor, and often that elected official is an administrator and not a litigator. Some of these elected prosecutors stay out of the criminal courtroom altogether except to make short-term, temporary appearances on high profile cases. However, it is the elected prosecutor who may feel intense pressure from the public and from the media to seek the death penalty in order to appear appropriately tough on crime once a murder has occurred that has escalated fear in the minds of constituents. The elected prosecutor, who possesses absolute charging discretion, does not have to bear the brunt for that charging decision. He/she has the option to pass the burden of litigation on to an employee, and he/she does not even have to cover the heavy costs which are incurred as a result of that decision. In many ways, the system has been designed to give the elected prosecutor complete authority without much accountability. Seeking the death penalty is almost always a win-win for the elected prosecutor. The public is satisfied that their prosecutor is enforcing the law and protecting the community. Granted, there will be added expense to that elected prosecutor because certain members of his/her staff will have to devote months of full-time attention to a single case, but the cost of bringing in an expanded venire, the cost of sequestering the sworn-in jury panel, and the cost of indigent defense are all borne elsewhere; and very few people connect those additional expenses (that must be paid by the taxpaying public) to the prosecutor’s initial charging decision. Then, when the conviction gets remanded and must be retried, which is what happens with the majority of cases, the prosecutor can express outrage at
the system and expound in public forums on the time and effort that his/her office must devote to the retrial, but he/she never has to seriously consider the lion’s share of the costs because those bills will be paid by other publicly-funded agencies.

Prosecutors are socialized on the job to become law enforcers. Death penalty law is clear that, if reversible error is found in the official transcript of proceedings, the case will get remanded and must be retried. However, some prosecutors may, over time, become scornful and cynical about that aspect of the death penalty law being followed. They may misperceive it as, instead of the law being applied as it was designed to be, a miscarriage of justice. They may begin to believe that they know better and that these safeguard laws are bogus. Similar to the police, prosecutors are law enforcers. Also, similar to the police, they are susceptible to the *slippery slope* (Sherman 1974) that causes some police officers to stumble and cross over the line from law enforcement to law subversion. While the presumption of innocence must prevail in a criminal case proceeding for the judge and defender and jury, the prosecutor and the police – by the very nature of their jobs – must presume guilt because, if not, they would not be justified in bringing charges against the accused in the first place; they would not be justified in withholding a person’s liberty until the trial could be commenced or until bail could be posted. If prosecutors were not firmly convinced of the accused’s guilt, both of these routine practices would be considered unethical and indicators of prosecutorial misconduct. Because prosecutors start out with this baseline belief in guilt, they may be more likely to interpret all incoming information from this guilt perspective.

For prosecutors, the value-of-life calculation that is becoming routinely accepted in death penalty charging and outcome decision-making is ethically problematic. It has
escalated with the politicized polarization of victim and defendant in capital cases.

When an innocent child is born, what is its value? As a teenager, if that child is adjudicated as a delinquent, how much depreciation occurs? By the time that child reaches adulthood, can enough value be lost so that, if that person should become a victim, he or she will become discounted? The claim that a prosecutor is forced, in the current economy, to only seek the death penalty for an innocent victim because that will be the criterion by which the jury will decide its verdict is specious and renders the victim calculus redundant. The death penalty laws, through statutory aggravating circumstances, already give consideration to the victim in death-eligible murders. Often, it is because the murdered victim was a child that the crime is elevated to the status of a capital crime. Also, the phrase “innocent victim” is, at best, ambiguous. At worst, it’s illogical. If someone cannot rightfully be called an innocent victim, then would he/she be a guilty victim? Victim, according to Black’s Law Dictionary, is “[t]he person who is the object of a crime or tort” (p. 1405). A guilty victim would then have to be a person who is the object of a crime committed by him or herself, such as a suicide or a self-mutilation. Perhaps a non-innocent victim is a provocateur, or someone who provokes the crime for which he/she is the object; however, the non-innocent victim assessment that is currently being applied is not specifically reserved for provocateurs.

Death penalty proceedings are deeply polarized, as are death penalty opinions. The issue of capital punishment evokes visceral responses from almost everyone; however, the super due process required in capital trials is often portrayed as being followed in a highly regimented and emotional-free manner. State-sanctioned executions are justified by the retributive theory of punishment or by just deserts.
Retributivism sounds reasonable, but in truth what may be lurking underneath its rational mask is the enraged face of vengeance. When it comes to death penalty proceedings, the criminal justice system may be over-inflating law’s ability to rationally dispense justice.

When the issue of wrongful convictions and the risk of error present in capital case proceedings was raised, some DP proponents brought in examples from the civil side of law: e.g., drug manufacturers being allowed to sell their products even though there is a known fatality risk to certain individuals or car manufacturers being allowed to sell vehicles to citizens even though there is a known risk of traffic fatality. I found these examples to be, at best, inappropriate and, at worst, illogical because the drug or car manufacturers’ original intent was not to kill people. A better example might be an imaginary scenario about a hospital with a policy to euthanize newborns with severe mental and physical deformities (those deemed to be incapable of ever living a productive life) so that their stem cells could be used to treat diseases in productive members of society, and then discovering that a small percentage of those euthanized were unintentionally done in error; that, in fact, those infants’ defects did not reach the level required in the euthanasia procedure handbook. The reason for the error was lack of training across-the-board for all medical staff, lack of funding to ensure a high level of professional integrity, and lack of adequate regulatory oversight.

The utilitarian basis for death penalty support is that society gains some overall benefit by killing off convicted capital murderers, and that this benefit outweighs the harm that society will suffer if it accidentally executes a few innocent citizens in the process. In a capital case, if society were the capital defendant, the utilitarian argument
would likely not prevail in Phase One because the question would simply be whether or not someone was wrongfully killed, and whether or not that killing was premeditated and intentional. Only after society was found guilty could mitigation evidence be brought in to show all the good works throughout time that society had done.

**Implications for Future Research**

Further research is needed to determine whether, and to what degree, death penalty decision-making is being based on extralegal considerations; i.e., economics or politics. For example, are county budgets a primary determinant? Is there a growing trend to not sequester capital juries? Has the time allotted for capital trials been reduced? How are jurisdictions handling voir dire? Expense vouchers need to be researched. How much money is currently being spent on mitigation investigators and expert witnesses? Elected prosecutors need to be surveyed to find out how and why charging decisions are made. How many would willingly turn over their DP-seeking discretion to a non-partisan decision-making panel? County-by-county seek rates need to be uncovered, as do non-DP settlement rates for aggravated murders. Many prosecutor offices have unwritten policies that need to be uncovered. How many of them do a formal or informal calculation for the value of a victim’s life?

During this research, it was discovered that some elected prosecutors refuse, as a matter of principle, to use the death penalty as leverage while others have a strict timeline for when life settlements may be negotiated. Capital cases that were settled with life pleas need to be examined and compared to capital cases that proceed to trial. Are there significant differences in the heinousness of those murders or in the arrest records of those defendants?
Comparison studies need to be conducted on sentence severity of non-death-penalty-state aggravated murders and death-penalty-state aggravated murders. What are the plea rates, and is there a substantial difference in negotiated plea bargain outcomes?

Capital judges need to be surveyed. They are the neutral arbiters in death penalty proceedings. They have the knowledge and experience to inform policy-makers, and – as revealed in this study – many are willing (some even eager) to communicate what they have learned in order to improve the criminal justice system. The impression received in this mixed method study was that they are not often (if ever) asked to give their opinions.

Ideally, a multi-state, fully-funded, triangulated research project needs to be conducted where official records are collected, capital case workers are randomly surveyed, and a select sample are interviewed. Time would have to be devoted to ensure that all capital case workers are proportionately represented, unlike this research project where judges and prosecutors were underrepresented.

Research needs to be done on the presumption of innocence in death penalty proceedings. Are defense attorneys putting enough effort into the first phase of the proceedings? How does the capital bar feel about bifurcating death penalty proceedings in order to put time and distance between stage one and stage two?

Death row exonerations are now a fact of life that weighs heavily on the minds of many capital case workers. They need to be reassured that society is doing everything in its power to ensure that all their hard work is not being compromised by a system over which they have little control.
Concluding Remarks

The overall question in this dissertation was whether a legitimacy crisis exists with the death penalty system in America, and I examined the death penalty in three different states by surveying criminal justice workers and by interviewing a sample of the capital bar in those states. The finding that may be most relevant to the legitimacy question is the loss, or at least the lessening, of the presumption of innocence in capital case proceedings. Besides the survey results, which indicate that the due process model is not perceived by most as being representative of death penalty proceedings, the majority of interviewees in the qualitative study made it clear that in the vast majority of capital trial proceedings guilt is not really contested. I was told repeatedly by judges, prosecutors, and defense attorneys: But guilt really wasn’t an issue in this case. And we were never talking about the same case. If it were a civil case, the parties would be declaring at the onset: There’s no issue of liability; we’re just arguing damages. Yes, the presumption of innocence may be an artificial bubble that only exists inside the courtroom, but it may even be missing in the courtroom for capital cases. When capital defenders – no matter how dedicated and well-meaning – start out with the goal of saving the defendant’s life, it seems to me that they have already reconciled themselves to their client’s guilt and his inevitable conviction. Almost all of those interviewed acknowledged that they direct most of their efforts toward the penalty phase of the proceedings. I have to wonder: How is that attitude not being conveyed to the judge, to the jury, to the defense investigators, and to the mitigation experts? Is the defendant aware of that shift in focus, and is he in agreement? Most interviewees acknowledge that the capital defendant population tends to be uneducated, below average IQ, and personality-disordered.
Prior research has advised, and the ABA guidelines are somewhat in agreement, that putting on an innocence defense when the evidence clearly does not support it can backfire and ensure a death sentence in the second phase. Still, it defies logic to think that the majority of death penalty cases are really the total losers that I have been led to believe. If so, then it might be the evidence, rather than the heinousness of the crime or the prior record of the defendant, that is really driving the death charge. If that is the case, then it may be that the highly organized and more rational murderers (i.e., the “worst of the worst” and the population that the death penalty post-Furman was designed to “serve”) would be the ones less likely to leave forensic evidence at a murder scene; whereas, the lower functioning, irrational murders would be the ones leaving the clearest trail for the police to follow.

I was told by judges how frustrating it was to deal with capital defendants who will not accept a plea offer of life when everyone – that is everyone except the defendant – knows that the death penalty is a foregone conclusion if the case proceeds to trial. This reluctance to plead guilty under those circumstances is attributed to ignorance, youth, and inexperience. Do we really want the death penalty reserved for the dumbest, youngest, and most naïve defendants?
APPENDIX A
WEB-BASED SURVEY

1. Today's date is? __________

2. How long have you been a member of the bar? (Please write in the number of years.) __________

3. What is your present employment? (Please put a check mark or X in one of the boxes OR circle your choice.)
   - I am a judge
   - I am a prosecutor
   - I am a public defender
   - I am a private defense attorney
   - I am retired
   - None of the above
   - I do not wish to answer this question

4. In the past, I have been employed as a ______: (Please choose all that apply.)
   - Judge
   - Prosecutor
   - Defense attorney
   - I have not been employed in any capacity other than my current occupation
   - I choose not to answer this question

5. How long have you been at your present place of employment?
   - Less than one year
   - One to five years
   - Six to ten years
   - Eleven to fifteen years
   - Over sixteen years
   - I choose not to answer this question

6. Have you been involved in one or more capital case proceedings? (After responding, PLEASE be sure to click on 'Next' to go to nextpage.)
   - Yes
   - No  (If no, please skip to Item #; if yes, please proceed to Item #7.)

7. To the best of your knowledge, how many times have you been directly involved in capital case proceedings? (Please write in your estimate of the number of times.)

______________________________
8. In your involvement with capital case proceedings, what was your role? (Please pick all that apply; you will have the opportunity to explain further in the next survey item.)
☐ Judge
☐ Prosecutor
☐ Public defender
☐ Court-appointed defense attorney
☐ Private defense attorney
☐ Appellate prosecutor
☐ Appellate public defender
☐ Appellate private defense
☐ Other. (Please specify your involvement in the next item.)

9. If you answered "Other" in the preceding question, or if you wish to elaborate on any item so far, please do so below.


10. Your capital case experience involved how many judicial circuits?
☐ Two
☐ Three
☐ Four
☐ Five
☐ Six to ten
☐ Over ten
☐ I have only had capital case experience in one circuit
☐ No judicial circuit court experience

11. In your involvement with one or more capital cases, did any of those capital cases go to trial?
☐ Yes ☐ No
12. In your involvement with one or more capital proceedings, did any of the cases go before a jury?

☐ Yes, but only for the first phase (guilt or innocence).
☐ Yes, both the guilt phase and the penalty phase.
☐ No, my only experience was with plea bargaining.
☐ No, my only experience was with bench trial(s).
☐ No, my only involvement was with post-conviction relief proceedings.
☐ My involvement was in appellate review(s).
☐ None of your choices fit my situation. (Please explain in the next item.)

13. If you answered "None of the choices fit my situation" in the previous question, please explain.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

14. Do you anticipate being involved with capital case proceedings in the future?

☐ Yes      ☐ No

15. If you do not anticipate being involved in future capital cases, please explain why.

________________________________________________________________________

________________________________________________________________________

16. Please indicate your agreement/disagreement (and you will have the opportunity to explain in the next item).
   In terms of DUE PROCESS or PROCEDURAL FAIRNESS, death penalty proceedings:

   - Represent the "gold standard"                      Strongly Disagree      Disagree      Agree      Strongly Agree

   - Are NO MORE or NO LESS FAIR than other felony proceedings

   - Are UNFAIR in terms of due process
17. Please elaborate on your answers to the preceding items regarding the PROCEDURAL FAIRNESS of capital case proceedings.


18. In terms of how the death penalty IS BEING APPLIED, please indicate your agreement/disagreement with the following statements:

<table>
<thead>
<tr>
<th>Charging decisions tend to be fair and equitable.</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outcome decisions tend to be fair and equitable.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

19. Please elaborate on your answer as to how the death penalty is currently being applied.


20. Do you have any suggestions that, in your opinion, would improve capital case proceedings?
   ☐ Yes  ☐ No

21. If you do have suggestions for improving capital case proceedings, please elaborate.


225
22. Please check each of the following regarding your capital case involvement:

<table>
<thead>
<tr>
<th>Statement</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>It created personal conflict.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>It created professional conflict.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>It affected me no more than everyday life events.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I felt hampered by time constraints.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I felt hampered by money constraints</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I had adequate support staff.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>It created family stress.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>It hurt my relationship with friends.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>It affected my mental health.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>It affected my physical health.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>It has had a lasting emotional impact on my life</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>It has had a lasting spiritual impact on my life</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>It is no different than non-capital case involvement.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

23. Please feel free to elaborate on the previous item.

_____________________________________________________________________

_____________________________________________________________________

24. When you participated in capital case proceedings, were you given the choice to become involved?

☐ I had a choice. I could have said no and suffered no career consequences.
☐ I had a choice; however, if I had said no, I probably would have suffered some career consequences.
☐ I assumed I had no choice. Maybe I did but did not know it at the time.
☐ I had no choice if I wanted to keep progressing in my career.
☐ I never thought about it in terms of a choice.
☐ I never participated in capital case proceedings.

25. After being involved in capital case proceedings, did you feel the need to seek any form of counseling in order to cope with the life and death issues that were confronted?

☐ Yes ☐ No
26. My understanding is that you received special training in order to become qualified to be involved in capital cases. If that is so, how would you assess the training you have received? (After responding, PLEASE be sure to click on "NEXT" to proceed to last page.)

- The training was excellent and fully prepared me.
- The training was adequate as a SUPPLEMENT to my own professional experience.
- The training could have been better.
- The training was not even close to being adequate.
- I had no training.

27. There are many explanations for criminal behavior. Please give your opinion on the following:
   (You will be given the opportunity to elaborate in the next survey item.)

<table>
<thead>
<tr>
<th></th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Humans are rational and free-willed beings who constantly pursue self-interest, even at the expense of others, unless deterred from doing so.</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
<td>☐</td>
</tr>
<tr>
<td>Some people were not well socialized in childhood and, as a consequence, did not develop self-control and therefore are prone to being impulsive, risk-taking, and/or violent all their lives.</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
<td>☐</td>
</tr>
<tr>
<td>Poverty, strain, and/or blocked opportunity leave some people with little choice but to commit crime.</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
<td>☐</td>
</tr>
<tr>
<td>All behavior, even criminal behavior, is socially learned; therefore, such behavior can also be unlearned.</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
<td>☐</td>
</tr>
<tr>
<td>People are largely influenced by their family and friends.</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
<td>☐</td>
</tr>
<tr>
<td>Lack of attachment and involvement with others prevents some people from feeling any connection or commitment to society.</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
<td>☐</td>
</tr>
<tr>
<td>Some people, either because of genetics, poor nutrition, brain disorders, mental illness, or early life injuries are predisposed to antisocial behavior.</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
<td>☐</td>
</tr>
</tbody>
</table>

28. Based on your expertise, why do you believe humans behave criminally?

___________________________________________________________

___________________________________________________________

___________________________________________________________
29. When you have been involved in criminal cases, did you ever refer to any established criminological, psychological, or sociological theory (scientific explanation) to help you understand the criminal behavior or to assist you in your professional responsibilities?

☑ Yes ☐ No

30. Please describe any social science to which you referred, and please explain why you made reference to it.

---

31. Please give your opinion on the following regarding media coverage of capital case proceedings:

<table>
<thead>
<tr>
<th>Local newspapers accurately report capital case proceedings.</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>National newspapers accurately report capital case proceedings.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>Local radio stations accurately report capital case proceedings.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>National radio stations accurately report capital case proceedings.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>Overall, media does NOT accurately portray capital case proceedings.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>Local television news accurately reports capital case proceedings.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>National television news accurately reports capital case proceedings.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
</tbody>
</table>

32. Please indicate whether or not you agree to the following regarding the goal of the criminal justice system and its current operation.

<table>
<thead>
<tr>
<th>The ideal criminal justice system dispenses justice equitably.</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>The ideal that justice is dispensed equitably is NOT THE GOAL of the criminal justice system.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>While the ideal is to dispense justice equitably, there is A GAP between that ideal and how the criminal justice system operates.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>While the ideal that justice is dispensed equitably was once the goal of the criminal justice system, it is NO LONGER the goal.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
</tbody>
</table>
33. If you wish to further explain your response to the previous item, please elaborate here.

_________________________________________________________________________________

_________________________________________________________________________________

_________________________________________________________________________________

34. Please indicate your agreement/disagreement with the following statements: (And the next item gives you the opportunity to elaborate.)

<table>
<thead>
<tr>
<th>Statement</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Uncertain</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>It is possible to administer the death penalty system to ensure that innocent people will not be executed.</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>The death penalty system in my state has sufficient safeguards in place.</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>The death penalty system is a waste of taxpayers' money.</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>The death penalty system is more effective in preventing homicide than alternative penalties.</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>The death penalty system is cost-effective.</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>The death penalty is a necessary component in our criminal justice system.</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>The death penalty is no more of a deterrent than LWOP.</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
<td>□</td>
</tr>
</tbody>
</table>

35. Please elaborate on your responses to the previous item regarding death penalty risk of error, current system in place, utility, necessity, or cost-effectiveness.

_________________________________________________________________________________

_________________________________________________________________________________

_________________________________________________________________________________

_________________________________________________________________________________
36. In addition to scientific explanations for human behavior, there have also been attempts to explain the operation of the criminal justice system itself. Please give your opinion for each of the following in terms of how the criminal justice system operates. (The next item will give you the opportunity to elaborate.)

<table>
<thead>
<tr>
<th>Emphasis is on rehabilitation of individuals with more of a presumption of illness rather than innocence/guilt.</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Emphasis is on managing and processing cases efficiently without any presumption of individual guilt or innocence.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Emphasis is on punishing law-breakers with an implicit presumption of guilt for all defendants.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Emphasis is on protection of individual rights with an explicit presumption of innocence for all defendants.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Emphasis is on public shaming with an implicit presumption of guilt for all defendants.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Emphasis is on maintaining a certain power structure in society.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Emphasis is on case processing with an innocence presumption proclaimed but with a guilt presumption actually being maintained.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NONE OF THESE DESCRIPTIONS appropriately describe the present system. (Please provide your own description in the next item.)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

37. Please feel free to describe the operation of the criminal justice system in your own words.

______________________________

______________________________

38. Understanding and respecting that capital case representation may be part of your professional responsibilities, how do you PERSONALLY feel about the death penalty?

- [ ] I am definitely pro-death penalty.
- [ ] I am somewhat pro-death penalty.
- [ ] I am definitely anti-death penalty.
- [ ] I am somewhat anti-death penalty.
- [ ] I have no strong feelings about the death penalty one way or the other.
- [ ] I choose not to answer this question.
39. To what extent do you believe that your personal feelings about the death penalty are based on religious belief or moral philosophy?

☐ Completely or almost completely.
☐ Somewhat.
☐ Hardly at all.
☐ I have no personal feelings about the death penalty one way or the other.
☐ I choose not to answer this question.

40. Please identify your gender.

☐ Female  ☐ Male  ☐ I choose not to answer

41. Are you a life-long resident of your state?

☐ Yes  ☐ No  ☐ I was born elsewhere but lived here most of my life  ☐ I choose not to answer

42. Have you personally experienced violent victimization (whether to yourself, a family member, or a close friend)?

☐ Yes  ☐ No  ☐ I choose not to answer

43. Please identify your primary political party affiliation.

☐ Republican  ☐ Democrat  ☐ Independent  ☐ Other  ☐ Choose not to answer

44. Please indicate your agreement/disagreement with each of the following:

<table>
<thead>
<tr>
<th>Item</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>I believe in a literal interpretation of the bible or some other sacred book or text.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>Identify with one particular religious affiliation.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>Regularly attend religious services.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>I believe in one God or one Supreme Being.</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
</tbody>
</table>

45. This is the last survey item, and it is optional. It is your opportunity to add anything that you think might be important for death penalty academics to know, or the chance to further elaborate on previous answers. Feedback on this survey -- whether positive, negative, or neutral -- would also be greatly appreciated.
Hi, [Attorney/Judge/Solicitor] [Insert LASTNAME].

I am Sherri DioGuardi, a University of Florida Ph.D. Candidate who has received IRB2 approval (Protocol #2010-U-926) to ask attorneys and judges with criminal case experience in various states to share their knowledge of the criminal justice system. Please help me out by participating in a 45-item web-based survey. The survey is completely confidential as no personal or case identifying questions are being asked, not even geographical location (other than state), and no ISP addresses are being collected.

Even if you have very limited criminal court experience, I urge you to participate. It could take as little as 10 minutes to complete. If you have capital case experience, it may take up to 30 minutes. If you have no death penalty experience, there will only be 25 items in total to answer. Your feedback is essential. You can access it here:

https://www.surveymonkey.com/s/crim1a

Your participation is completely voluntary. You may also choose not to answer any question, but I respectfully request that you check that option so that I know that the item was not unintentionally missed. The questions will ask you regarding: your experience in the criminal court system; your perceptions of fairness in capital and non-capital proceedings; your opinions about the criminal justice system in general and also the death penalty system specifically; your suggestions, if any, for improving the system; whether you had involvement in capital cases; and, if so, how those proceedings compare with regular felony proceedings; whether such involvement created personal or professional stress or conflict; and opinions about criminological theory and its usefulness for you in your professional practice.

This study is interested in feedback from court workers with ALL experiences in criminal case proceedings -- plea bargaining, lower level, post-conviction relief, appellate, capital, and non-capital proceedings. The research goal is to receive a high rate of response from all ranges of criminal case participation.

Just to give you some of my background, I was a court reporter (both official and freelance) for over 20 years. I worked in Illinois, Florida and South Carolina. Through that experience, I developed a great deal of respect for criminal judges, prosecutors, public defenders, and private defense lawyers; and I have an appreciation for many of the challenges you regularly face in doing your job. I believe strongly that you, as a criminal justice practitioner, are an extremely important and invaluable source of information for social science.

As mentioned, the online survey can be accessed here:

https://www.surveymonkey.com/s/crim1a
First there is an informed consent. Once that's read, you click NEXT and will be taken immediately to the survey, which consists of either 25 or 45 items (depending on whether you have had involvement with death penalty proceedings). Most of the questions have scroll-down choices or have been designed so that responses can be checked-in quickly. However, you will always have the opportunity, through text boxes, to elaborate further on any item.

I sincerely hope that you will be gracious enough to participate in this important research project. If you have any questions or concerns, please do not hesitate to respond to this email. You can also reach me at my Gainesville telephone number [xxx-xxx-xxx]; or, if you prefer, you can text me via my cell phone: [xxx-xxx-xxxx].

Thank you. I really appreciate your willingness to help.

Respectfully yours,

________________________________________________________________________
Sherri DioGuardi, MBA, BA, Ph.D. Candidate, Course Instructor
University of Florida, Department of Sociology and Criminology & Law
3219 Turlington Hall, Post Office Box 117330
Gainesville, FL 32611-7330
sherridio@ufl.edu
Hi, [Attorney/Judge/Solicitor] [Insert LASTNAME].

My name is Sherri DioGuardi, and I am a University of Florida Ph.D. Candidate who has received IRB2 approval (Protocol #2010-U-926) to ask attorneys and judges with capital case experience across three states to share their knowledge and experience. Weeks back you may have received a recruitment email regarding the quantitative component of the study, which was a 91-item web-based survey wherein 568 responses were received. If you participated, I thank you and hope you will be willing to help me out even further. At this point, I’m involved in the qualitative component, which is where I interview capital practitioners in-depth.

I am scheduling face-to-face interviews with nine experienced capital case workers in South Carolina (three judges, three prosecutors, and three defense attorneys). I just returned from Ohio and Oregon where I completed 18 interviews, and also Florida was used in my pilot study, which was completed over a year ago.

I have made plans to be in South Carolina from July 5th through July 15th; and, as mentioned, I am hoping you will be available at some point during that time and would be willing to be interviewed. The interview is expected to take no more than an hour of your time, and it will be kept completely confidential. As per Institutional Review Board protocol, if you agree to participate, an informed consent would need to be signed by you. I am attaching to this email a copy of that Informed Consent as well as the Interview Guide I would be using.

The purpose of the study is: to find out how experienced capital case workers assess capital case proceedings, as compared to non-capital proceedings; also, to find out whether there is a reliance, explicitly or implicitly, on social science throughout the criminal justice process; whether conflict between professional duties and personal ethics is ever experienced; and, lastly, to find out whether or not these experienced front-line courtroom workers have any suggestions for improving the criminal justice system or for improving the death penalty system (realizing that they may not feel there is any need for improvement).

All interviewees’ identities will remain confidential. I, alone, will know who I have interviewed. If permission is given to tape-record the interview, no personal identifiers will be revealed and any such recording will be destroyed immediately after transcription. Any list containing names of potential interviewees is kept under my personal control and will also be destroyed upon completion of the study. In addition, no direct quotes or even paraphrases will be linked in any way to your occupation role, nor to your regional location (other than generally by state) in any subsequent scholarly report or professional journal publication. To ensure permanent confidentiality, no identifiers will be included in any transcript, writings, or reports -- no names of judicial circuits, counties, defendants, presiding judges, court cases, or any courtroom personnel will ever be revealed by me. The signed informed consent will be kept in a
locked file box at my home. If requested, a copy of the study's findings will be provided.

In case you want to know more about me, I was a court reporter for over 20 years (both freelance and official) in the states of Florida, Illinois, and South Carolina (at-large reporter, based in Charleston, from 1992-1997). I have tremendous respect for criminal justice workers. Since Fall 2007, I have been in the doctoral program at the University of Florida. At this point, I am "ABD" in that I have completed all course work, have successfully passed two comprehensive exams, and am on track to earn my Ph.D. once I have my dissertation completed and successfully defended (tentatively scheduled for October 2011). In addition to being a student, as of January 3, 2011, I am employed as a full-time instructor at Elizabeth City State University in North Carolina.

I need to set up all the interviews in advance because I am organizing them so that they take place in various locations in South Carolina (to try and control for regional variance, even though I recognize upfront that nine interviews are not a sufficient number from which to generalize). The face-to-face interviews will serve as more of a "check and balance." Basically it's a way to ensure that no major issue is inadvertently being overlooked by me.

Please let me know if you would be willing to participate. I apologize for writing such a long email, but I wanted to make sure you had sufficient information from which to decide.

Thank you! I look forward to hearing back from you. If you would prefer to talk to me via phone, please feel free to call collect: [xxx-xxx-xxxx].

Sherri
-------------------------------------------
Sherri DioGuardi, Ph.D. Candidate
University of Florida
Department of Sociology and Criminology & Law
PO Box 117330, 3219 Turlington Hall
Gainesville, FL 32611-7330
sherridio@ufl.edu

-AND- Instructor at Elizabeth City State University
Department of Criminal Justice, Sociology and Social Work
Moore Hall Room 214 Campus Box 851
Elizabeth City, NC 27909
sdioguardi@mail.ecsu.edu
APPENDIX D
INTERVIEW GUIDE

1. Please tell me about yourself.

2. Without revealing any individual case specifics, please tell me generally about your experiences regarding capital case proceedings.

3. Are you likely to be involved in a future capital case? Why or why not?

4. Has being an active participant in the capital punishment system created any personal or professional concerns, conflicts, or stresses? If so, please identify and elaborate.

5. As a criminal justice system professional, do you have any suggestions or recommendations for improving capital case proceedings? If so, please elaborate.

6. How do you explain criminal behavior?

7. Criminologists have come up with the following six mainstream theories to explain deviance:

   I. Classical/Rational Choice: Humans are rational and free-willed beings who constantly pursue self-interest, even at the expense of others, unless deterred from doing so;

   II. Low Self-Control: At an early age some people were not well socialized and, as a consequence, did not develop self control and therefore are prone to being impulsive, risk-taking, and/or violent all their lives;

   III. Relative Deprivation: Poverty, strain, and/or blocked opportunity leave some people with little choice but to commit crime;

   IV. Social Learning: All behavior, even criminal behavior, is socially learned; therefore, such behavior can also be unlearned;

   V. Social Bonding: Lack of attachment and involvement with others prevents some people from feeling any connection or commitment to society;

   VI. Biological and/or Psychological: Some people, either because of genetics, poor nutrition, brain disorders, mental illness, or early life injuries are predisposed to antisocial behavior.
7a. Do you think that your previous answer would be able to fit within one of these theory categories? Why or why not?

8. How do you explain the operation of the criminal justice system?

9. Similar to the previous theories to explain behavior, criminologists have developed the following six models to explain the operation of the criminal justice system:

   I. Medical Model: Emphasis is on rehabilitation with more presumption of illness (rather than guilt);

   II. Administrative Model: Emphasis is on managing and processing cases efficiently without any presumption of innocence or guilt;

   III. Crime Control Model: Emphasis is on punishing law-breakers with implicit presumption of guilt;

   IV. Due Process Model: Emphasis is on protection of individual rights with explicit presumption of innocence;

   V. Power Control Model: Emphasis is on maintaining a certain power structure in society.

   VI. Status Passage Model: Emphasis is on public shaming with implicit presumption of guilt;

   VII. Contradicting Model: Emphasis is on control and processing with an innocence presumption proclaimed but with a guilt presumption actually maintained.

9a. Do you think that your explanation for how the criminal justice system operates can be fit within one of the preceding models? Why or why not?

10. Do you believe the death penalty is a necessary component in our criminal justice system? Why or why not?

11. Realizing that capital case litigation may be part of your professional job responsibilities, how do you personally feel about the death penalty?

11a. Are your feelings about the death penalty based on religious or moral beliefs, or why do you feel as you do about capital punishment?

12. Is there anything you believe academics should know about the death penalty system currently in place or about the criminal justice system in general? If so, please elaborate.
APPENDIX E
INFORMED CONSENT

Informed Consent #1: Interviewing Capital Case Workers

Protocol Title: Interviewing Capital Case Workers and Surveying Capital/Noncapital Criminal Case Workers

Purpose of the research study:
The purpose of this study is to find out how experienced capital case workers assess capital proceedings as well as noncapital proceedings in terms of procedural fairness; whether such assessment may be related to experience, courtroom role, advocacy position, political orientation, state location, or underlying morality belief systems; whether there is a reliance, explicitly or implicitly, on social science throughout the criminal justice process; whether such reliance or utility, if any, may be related to advocacy position; whether or not capital workers, through their involvement with capital case proceedings, experienced conflict between professional duties and personal ethics; and whether or not there may be suggestions for criminal justice system improvement.

What you will be asked to do in the study:
As an experienced capital case worker, you will be asked to participate in a semi-structured interview. You will be asked whether such an interview may be recorded on audiotape. If permission is granted by you, an audiotape recording will be produced. If permission is not given, handwritten notes will be taken throughout the interview procedure. During the interview, you will first be asked generally about your experience in the capital trial proceedings and your assessment of same in terms of procedural fairness, outcome achieved, and current status. You will be cautioned not to reveal any case specifics. Secondly, you will be asked whether your capital case responsibilities created any personal conflicts or concerns, again without revealing any specific details from individual capital cases. Thirdly, you will also be asked how you would explain criminal behavior and how you would explain the operation of the criminal justice system. Lastly, you will be asked your opinion about the current death penalty system.

Time required:
One hour

Risks and Benefits:
No more than minimal risk is anticipated, and there will be no compensation or other direct benefits to the participants.

Compensation:
There will be no compensation.

Confidentiality:
Your identity will be kept confidential to the extent provided by law. Your information will be assigned a code number. If permission is granted to record the interview on audiotape, such tapes will be transcribed as soon as possible, and all audiotapes will immediately thereafter be permanently erased. The list connecting your name

Approved by
University of Florida
Institutional Review Board 02
Protocol #: 2010-U-426
For Use Through: 11-01-2011
to the assigned code number will be kept in a locked file under the Principal Investigator’s personal control. When the study is completed and the data have been analyzed, the list will be destroyed. Neither your name nor the caption of any capital case will be used in any report, and neither will the judicial circuit from which the data were obtained be identified in any report. In addition, no direct quotes, or even paraphrases, will be linked in any way to your occupational role (i.e., judge, prosecutor, defense attorney), nor to your regional location (other than generally by state) in any subsequent scholarly report or professional journal publication. To ensure permanent confidentiality, no identifiers will be included in any transcription, writings, or reports — no names of judicial circuits, counties, defendants, presiding judges, counsel, cases, or any courtroom personnel will ever be revealed by me. You may also request a summary report of this study’s findings by emailing the Principal Investigator in May 2011 (sherridio@ufl.edu).

Voluntary participation:

Your participation in this study is completely voluntary. There is no penalty for not participating.

Right to withdraw from the study:

You have the right to withdraw from the study at any time without consequence.

Whom to contact if you have questions about the study:

Sherri DioGuardi, Principal Investigator/Ph.D. Student
Department of Sociology and Criminology & Law
PO Box 117330, 3219 Turlington Hall, Gainesville, FL 32611-7330
Telephone (352) 378-5327; cell phone (239) 776-5109.

Whom to contact about your rights as a research participant in this study:

IRB02 Office, Box 112250, University of Florida, Gainesville, FL 32611-2250 Telephone (352) 392-0433.

Agreement:

I have read the procedure described above. I voluntarily agree to participate in the procedure, and I have received a copy of this description.

Participant: ___________________________ Date: ___________________________

Signature

Approved by
University of Florida
Institutional Review Board 02
Protocol # 2010-U-926
For Use Through 11-30-2011
### APPENDIX F

**CORRELATION MATRIX FOR MODEL 2**

#### Table F-1. Correlation matrix (1 of 2) for test of the Marshall Hypothesis

<table>
<thead>
<tr>
<th></th>
<th>Cap</th>
<th>Yrs</th>
<th>Jdge</th>
<th>PD</th>
<th>Priv</th>
<th>Mor</th>
<th>Rel1</th>
<th>CJS</th>
<th>Class</th>
<th>Strain</th>
<th>Rep</th>
<th>Ind</th>
<th>Victim</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cap</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yrs</td>
<td>***.41</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jdge</td>
<td>***.15</td>
<td>***.14</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PD</td>
<td>-.07</td>
<td>***.15</td>
<td>**-.10</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Priv</td>
<td>.03</td>
<td>***.13</td>
<td>***-.24</td>
<td>***-.54</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mor</td>
<td>**-.10</td>
<td>.06</td>
<td>**-.09</td>
<td>.07</td>
<td>-.02</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rel1</td>
<td>-.04</td>
<td>-.02</td>
<td>-.03</td>
<td>-.01</td>
<td>-.04</td>
<td>***.21</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CJS</td>
<td>-.01</td>
<td>-.00</td>
<td>.07</td>
<td>-.01</td>
<td>-.06</td>
<td>-.02</td>
<td>-.00</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class</td>
<td>***-.21</td>
<td>***-.16</td>
<td>.00</td>
<td>-.05</td>
<td>-.07</td>
<td>-.06</td>
<td>***.22</td>
<td>.08</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Strain</td>
<td>-.02</td>
<td>-.04</td>
<td>**-.10</td>
<td>***.12</td>
<td>**.11</td>
<td>-.05</td>
<td>**-.13</td>
<td>-.00</td>
<td>***-.16</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rep</td>
<td>-.06</td>
<td>*-.09</td>
<td>**.10</td>
<td>**-.11</td>
<td>-.07</td>
<td>-.06</td>
<td>***.24</td>
<td>-.03</td>
<td>***.22</td>
<td>***.26</td>
<td>1.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ind</td>
<td>-.06</td>
<td>.05</td>
<td>-.04</td>
<td>-.02</td>
<td>.03</td>
<td>-.01</td>
<td>-.00</td>
<td>-.05</td>
<td>-.02</td>
<td>.00</td>
<td>***-.29</td>
<td>1.00</td>
<td></td>
</tr>
<tr>
<td>Victim</td>
<td>***.13</td>
<td>.09</td>
<td>-.04</td>
<td>.03</td>
<td>-.03</td>
<td>**.11</td>
<td>-.01</td>
<td>**-.11</td>
<td>-.05</td>
<td>.04</td>
<td>-.04</td>
<td>-.02</td>
<td>1.00</td>
</tr>
<tr>
<td>Male</td>
<td>**.10</td>
<td>***.24</td>
<td>.06</td>
<td>**-.12</td>
<td>***.14</td>
<td>-.06</td>
<td>.02</td>
<td>.05</td>
<td>**.09</td>
<td>-.08</td>
<td>-.00</td>
<td>*.08</td>
<td>-.03</td>
</tr>
<tr>
<td>Ohio</td>
<td>-.03</td>
<td>.01</td>
<td>*-.08</td>
<td>.01</td>
<td>.07</td>
<td>-.04</td>
<td>.07</td>
<td>-.01</td>
<td>*-.08</td>
<td>**.10</td>
<td>.05</td>
<td>-.06</td>
<td>*.08</td>
</tr>
<tr>
<td>SC</td>
<td>-.06</td>
<td>-.03</td>
<td>.02</td>
<td>.01</td>
<td>***-.20</td>
<td>.04</td>
<td>**.12</td>
<td>.00</td>
<td>*.08</td>
<td>-.06</td>
<td>.02</td>
<td>***-.18</td>
<td>-.02</td>
</tr>
<tr>
<td>NotLife</td>
<td>***.13</td>
<td>***-.21</td>
<td>***-.15</td>
<td>**.10</td>
<td>-.01</td>
<td>.05</td>
<td>*-.08</td>
<td>.00</td>
<td>-.07</td>
<td>.03</td>
<td>*-.09</td>
<td>.05</td>
<td>.03</td>
</tr>
<tr>
<td>BornElse</td>
<td>-.02</td>
<td>***-.13</td>
<td>*.09</td>
<td>.05</td>
<td>***-.12</td>
<td>.00</td>
<td>*.08</td>
<td>.00</td>
<td>*.08</td>
<td>-.03</td>
<td>**.11</td>
<td>***-.11</td>
<td>-.02</td>
</tr>
</tbody>
</table>

***p<.01; **p<.05; *p<.10

#### Table F-2. Correlation matrix (2 of 2) for test of the Marshall Hypothesis

<table>
<thead>
<tr>
<th></th>
<th>Male</th>
<th>Ohio</th>
<th>SC</th>
<th>NotLife</th>
<th>BornElse</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>.04</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SC</td>
<td>-.02</td>
<td>***-.41</td>
<td>1.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NotLife</td>
<td>-.06</td>
<td>***-.20</td>
<td>-.02</td>
<td>1.00</td>
<td></td>
</tr>
<tr>
<td>BornElse</td>
<td>-.06</td>
<td>***-.33</td>
<td>-.01</td>
<td>***-.20</td>
<td>1.00</td>
</tr>
</tbody>
</table>

***p<.01; **p<.05; *p<.10
## APPENDIX G

### CORRELATION MATRIX FOR MODEL 5

Table G-1. Correlation matrix for Model 5 (DV = legitimacy scale)

<table>
<thead>
<tr>
<th></th>
<th>Cap#</th>
<th>Judge</th>
<th>PD</th>
<th>CA</th>
<th>Multi</th>
<th>Jdg2</th>
<th>PD2</th>
<th>PRIV</th>
<th>Other</th>
<th>Approp</th>
<th>Ling</th>
<th>Rep</th>
<th>SC</th>
<th>Male</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cap#</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judge</td>
<td>.06</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PD</td>
<td>*.12</td>
<td>-.08</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CA</td>
<td>-.02</td>
<td>**.16</td>
<td>***.19</td>
<td>.10</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Multi</td>
<td>***.34</td>
<td>**.15</td>
<td>***.17</td>
<td>***.34</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jdg2</td>
<td>-.06</td>
<td>**.73</td>
<td>-.09</td>
<td>**.14</td>
<td>**.16</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PD2</td>
<td>-.02</td>
<td>*-.11</td>
<td>***.44</td>
<td>-.03</td>
<td>.07</td>
<td>*-.12</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PRIV</td>
<td>.08</td>
<td>**.31</td>
<td>**.21</td>
<td>***.35</td>
<td>*.13</td>
<td>***.34</td>
<td>***.50</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>.06</td>
<td>-.05</td>
<td>-.06</td>
<td>*-.13</td>
<td>**.16</td>
<td>-.06</td>
<td>-.08</td>
<td>**.23</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Approp</td>
<td>**-.18</td>
<td>.08</td>
<td>-.05</td>
<td>*.14</td>
<td>**.21</td>
<td>.11</td>
<td>*-.12</td>
<td>**.26</td>
<td>-.01</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ling</td>
<td>.10</td>
<td>**.17</td>
<td>-.01</td>
<td>.06</td>
<td>***.20</td>
<td>**.14</td>
<td>.11</td>
<td>.04</td>
<td>.10</td>
<td>**.25</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Repub</td>
<td>-.03</td>
<td>**.19</td>
<td>-.01</td>
<td>.04</td>
<td>**.15</td>
<td>*.13</td>
<td>-.08</td>
<td>-.06</td>
<td>-.09</td>
<td>**.32</td>
<td>***.20</td>
<td>1.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SC</td>
<td>-.09</td>
<td>.04</td>
<td>**.17</td>
<td>***.21</td>
<td>-.05</td>
<td>.09</td>
<td>.01</td>
<td>**.22</td>
<td>.04</td>
<td>**.18</td>
<td>.01</td>
<td>.01</td>
<td>1.00</td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>.02</td>
<td>.08</td>
<td>*-.13</td>
<td>**.15</td>
<td>-.08</td>
<td>.05</td>
<td>*-.13</td>
<td>.09</td>
<td>-.04</td>
<td>-.04</td>
<td>-.11</td>
<td>.05</td>
<td>.01</td>
<td>1.00</td>
</tr>
</tbody>
</table>

***p<.01; **p<.05; *p<.10
**APPENDIX H**

**CORRELATION MATRIX FOR MODEL 8**

**Table H-1. Correlation matrix for Model 8 (DV = death penalty support)**

<table>
<thead>
<tr>
<th></th>
<th>Legit</th>
<th>Cap#</th>
<th>J Trial</th>
<th>Circs</th>
<th>App</th>
<th>Judge</th>
<th>PD</th>
<th>CA</th>
<th>ReligF</th>
<th>Moral</th>
<th>Repub</th>
<th>SC</th>
<th>JxLeg</th>
<th>PDxLeg</th>
<th>CAxLeg</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legit</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cap#</td>
<td>***.23</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>J Trial</td>
<td>-.01</td>
<td>***.25</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Circs</td>
<td>***.21</td>
<td>***.45</td>
<td>***.22</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Approp</td>
<td>***.50</td>
<td>**-.18</td>
<td>.06</td>
<td>-.11</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judge</td>
<td>***.24</td>
<td>.06</td>
<td>-.03</td>
<td>-.04</td>
<td>.08</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PD</td>
<td>**-.16</td>
<td>-.12</td>
<td>***.18</td>
<td>***.18</td>
<td>-.05</td>
<td>-.08</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CA</td>
<td>***.22</td>
<td>-.02</td>
<td>-.04</td>
<td>***.20</td>
<td>**.14</td>
<td>**.16</td>
<td>***.19</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ReligF</td>
<td>.04</td>
<td>.00</td>
<td>.09</td>
<td>-.04</td>
<td>.08</td>
<td>-.05</td>
<td>.05</td>
<td>**.14</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Moral</td>
<td>-.10</td>
<td>.07</td>
<td>.10</td>
<td>**.17</td>
<td>**.17</td>
<td>.03</td>
<td>**.18</td>
<td>**.15</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Repub</td>
<td>***.24</td>
<td>-.03</td>
<td>.02</td>
<td>-.05</td>
<td>***.32</td>
<td>***.19</td>
<td>-.01</td>
<td>-.04</td>
<td>***.22</td>
<td>***.21</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SC</td>
<td>.14</td>
<td>-.09</td>
<td>.13</td>
<td>-.03</td>
<td>**.18</td>
<td>.04</td>
<td>***.17</td>
<td>***.21</td>
<td>.11</td>
<td>.04</td>
<td>-.01</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>JxLeg</td>
<td>***.31</td>
<td>.10</td>
<td>-.02</td>
<td>-.02</td>
<td>.08</td>
<td>***.75</td>
<td>-.07</td>
<td>-.13</td>
<td>-.03</td>
<td>-.13</td>
<td>*.14</td>
<td>-.02</td>
<td>1.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PDxLeg</td>
<td>***.23</td>
<td>.09</td>
<td>.12</td>
<td>.11</td>
<td>.10</td>
<td>.06</td>
<td>***.67</td>
<td>*.14</td>
<td>.10</td>
<td>-.05</td>
<td>.06</td>
<td>***.27</td>
<td>.04</td>
<td>1.00</td>
<td></td>
</tr>
<tr>
<td>CAxLeg</td>
<td>**-.43</td>
<td>-.12</td>
<td>-.01</td>
<td>-.06</td>
<td>*15</td>
<td>.06</td>
<td>***.39</td>
<td>-.08</td>
<td>-.05</td>
<td>-.05</td>
<td>.06</td>
<td>.05</td>
<td>-.05</td>
<td>1.00</td>
<td></td>
</tr>
</tbody>
</table>

**p<.01; **p<.05; *p<.10**
## APPENDIX I
### HYPOTHESIS CONCLUSION TABLE

Table I-1. Hypothesis support summary showing pages for analytic technique

<table>
<thead>
<tr>
<th>Hypothesis</th>
<th>Supportive of Hypothesis?</th>
<th>Y/N</th>
<th>Pg</th>
<th>Test</th>
</tr>
</thead>
<tbody>
<tr>
<td>H&lt;sub&gt;1a&lt;/sub&gt; There will be a negative correlation between DP support and capital case experience (Marshall H)</td>
<td>Y</td>
<td>Y</td>
<td>136</td>
<td>X&lt;sup&gt;2&lt;/sup&gt;</td>
</tr>
<tr>
<td>H&lt;sub&gt;1b&lt;/sub&gt; Underlying personal belief systems will moderate the relationship between capital case experience and DP support (Marshall Hypothesis)</td>
<td>N</td>
<td></td>
<td>143</td>
<td>OLS</td>
</tr>
<tr>
<td>H&lt;sub&gt;2&lt;/sub&gt; The relationship between capital case experience and DP support will be moderated by political orientation (Political Culture Theory)</td>
<td>N</td>
<td></td>
<td>143</td>
<td>OLS</td>
</tr>
<tr>
<td>H&lt;sub&gt;3a&lt;/sub&gt; Capital case role will predict whether or not the death penalty is perceived as being legitimate (Theory of Legitimacy)</td>
<td>Y</td>
<td>Y</td>
<td>153</td>
<td>ANOVA</td>
</tr>
<tr>
<td>H&lt;sub&gt;3b&lt;/sub&gt; There will be a correlation between perceived fairness of capital case proceedings and current occupation (Organization Theory)</td>
<td>Y</td>
<td></td>
<td>155</td>
<td>OLS</td>
</tr>
<tr>
<td>H&lt;sub&gt;3c&lt;/sub&gt; Death penalty legitimacy scores will vary across states (Elazar's Political Culture Theory)</td>
<td>N</td>
<td></td>
<td>153</td>
<td>ANOVA</td>
</tr>
<tr>
<td>H&lt;sub&gt;4a&lt;/sub&gt; There will be a positive correlation between perceived fairness of capital case proceedings and DP support (Theory of Legitimacy)</td>
<td>Y</td>
<td></td>
<td>160</td>
<td>OLS</td>
</tr>
<tr>
<td>H&lt;sub&gt;4b&lt;/sub&gt; Role of criminal law practitioner will moderate the relationship between perceived fairness of capital case proceedings and DP support (Theory of Legitimacy)</td>
<td>Y</td>
<td></td>
<td>160</td>
<td>OLS</td>
</tr>
<tr>
<td>H&lt;sub&gt;5&lt;/sub&gt; Regardless of self-reported DP support, the majority of capital case practitioners will have suggestions for improving DP proceedings (Theory of Legitimacy)</td>
<td>N</td>
<td></td>
<td>166</td>
<td>X&lt;sup&gt;2&lt;/sup&gt;</td>
</tr>
</tbody>
</table>
LIST OF REFERENCES


Acock, Alan C. 2006. A Gentle Introduction to Stata. College Station, TX: StataCorp LP.


244


Burstein, Jon. 2010. “Fort Lauderdale man to get $179,000 under Florida wrongful conviction law.” *Sun Sentinel* (February 14, 2010).


CASES CITED

*Furman v. Georgia* 408 U.S. 238 (1972)

*Gideon v. Wainwright* 372 U.S. 335 (1963)


*Hall v. Florida* 742 So.2d 225 (1999)


*In re Kemmler* 136 U.S. 436 (1890)

*Jones v. US,* 137 U.S. 202 (1890)

*Louisiana ex rel Francis v. Resweber* 329 U.S. 459 (1947)


*Powell v. Alabama* 287 U.S. 45 (1932)

*State v. Quinn* 290 Or. 383 (1981)


*U.S. v. Dawson & Baylor* 56 U.S. 467 (1854)


*Wilkerson v. Utah* 99 U.S. 130 (1878)
BIOGRAPHICAL SKETCH

Sherri DioGuardi earned her Bachelor of Arts degree in liberal studies from Florida Gulf Coast University (2002), her Master of Business Administration from Saint Leo University (2006), and her Doctor of Philosophy in Criminology, Law and Society from the University of Florida (2011). Since January 2011, she has been employed as an instructor at Elizabeth City State University in North Carolina.