

VII. The National Capital Punishment Report Card

In this Part, we present a “national composite capital-sentencing report card.” The report card describes a variety of information, including the error rates found to characterize, and the time needed to review, death sentences in capital states during the study period. This Part also explains the two-page report card format that we use to report state, federal judicial circuit and regional as well as national data. (In Part VIII below, we present state-by-state comparisons of the information on state report cards for the 28 death-sentencing states in which at least one final direct appeal and federal habeas decision occurred during the 1993-1995 period.¹³³ In Part IX below, we present similar comparisons of information on the federal judicial circuit court/regional report cards.¹³⁴)

The national capital-sentencing report card is set out below. It combines information about the rates of error detected on direct appeal of capital judgments imposed in all **34** death-sentencing states in which at least one state capital direct appeal was completed during the 1973-1995 study period. Our 34-state cohort is: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. Because capital cases in six states (Colorado, Connecticut, New Jersey, New Mexico, Ohio and Oregon) had not advanced far, or at all, into the state post-conviction stage of review, and no case from those states had completed federal habeas review, the bulk of the composite data—those covering the state post-conviction and federal habeas stages and the “overall rates”—omit these states and focus on what we call our **28**-state cohort.

National Composite Capital Punishment Report Card, 1973-1995

History (34 States)

| | |
|--------------------------------|------|
| First Death Sentence | 1973 |
| First Direct Appeal | 1973 |
| First Consensual Execution | 1977 |
| First Non-Consensual Execution | 1979 |

Sentences and Executions (34 States)

| | |
|---|-------|
| Total Number of Death Sentences | 5,760 |
| Total Number of Executions | 313 |
| Percentage of Death Sentences Carried Out | 5% |

Error Rates

State Direct Appeal (34 States)

| | |
|---|-------|
| Number Reviewed on Direct Appeal | 4,578 |
| Number Reversed on Direct Appeal | 1,885 |
| Percentage Reversed on Direct Appeal | 41% |
| Number Awaiting Direct Appeal | 1,182 |
| Percentage Awaiting Direct Appeal | 21% |
| Number Forward to State Post-Conviction | 2,693 |

State Direct Appeal (28 States)

| | |
|---|-------|
| Number Reviewed on Direct Appeal | 4,364 |
| Number Reversed on Direct Appeal | 1,782 |
| Percentage Reversed on Direct Appeal | 41% |
| Number Forward to State Post-Conviction | 2,582 |

State Post-Conviction (28 States)

| | |
|--|---------|
| Number Reviewed on Post-Conviction | Unknown |
| Number Reversed on Post-Conviction | ≥248 |
| Percentage Reversed on Post-Conviction | ≥10% |

| | |
|---|---------|
| Number Forward to Federal Habeas Corpus | Unknown |
|---|---------|

State Direct Appeal and State Post-Conviction Combined (28 States)

| | |
|---|------|
| Overall Rate of Error Found by State Courts | ≥47% |
|---|------|

Error Rates (Continued)

Federal Habeas Corpus (28 States)

| | |
|-------------------------------|-----|
| Number Reviewed on Habeas | 599 |
| Number Reversed on Habeas | 237 |
| Percentage Reversed on Habeas | 40% |

Overall Rates Including [and Excluding] State Post-Conviction (28 States)

| | |
|----------------------|-----------|
| Overall Error Rate | 68% [64%] |
| Overall Success Rate | 32% [36%] |

Time (28 States)

| | |
|--|-----|
| Time From First Death Sentence to First Non-Consensual Execution | 6 |
| Average Time from Sentence to Execution | 9 |
| Average Time from Sentence to Final Federal Relief | 7.6 |

Sentencing and Execution Rates (34 States)

| | Death States | Whole Nation |
|------------------------------------|--------------|--------------|
| Death Sentences per 1000 homicides | 14.90 | 12 |
| Death Sentences per 100,000 pop. | 3.9 | 2.46 |
| NC Executions per 1000 homicides | .68 | .54 |

Demographic Information (34 States)

| | Death States | Whole Nation |
|---|--------------|--------------|
| Average Population | 181,374,347 | 237,905,964 |
| Average Homicides | 16,860 | 21,197 |
| Average Homicides Rate per 100,000 Population | 9.3 | 9 |
| Percentage Population Non-White | 19% | 20% |

Sources: DRcen; Death Row U.S.A., Winter 2000; DADB; HCDB; Appendix C; UCRDB; USCen

The National Composite Capital Punishment Report Card contains six categories of information for either the 34 capital-sentencing states in which at least one capital judgment had been finally reviewed on state direct appeal during the study period, or for the 28 of those states in which at least one capital judgment was finally reviewed on federal habeas during the study period. Because the same six categories appear on all of the succeeding report cards—along with a seventh category in the state report cards—this section describes the types of information that all seven categories contain, then discusses the actual national composite results for each category.

A. Capital-Sentencing History

In the “History” category of each report card is information about the years in which four important capital-sentencing events occurred in the jurisdiction or set of jurisdictions in question following the Supreme Court’s invalidation of all preexisting capital statutes and sentences in *Furman v. Georgia*.¹³⁵ The requisite information for the *nation as whole* (in this case comprised of the 34-state cohort of capital-sentencing jurisdictions) as revealed by the top category in the National Report Card is as follows:

- The **first post-*Furman* death sentences** were meted out in **1973**.¹³⁶
- The **first post-*Furman* state direct appeal decision** finally determining the legality of a post-*Furman* death sentence also occurred in **1973**.¹³⁷
- The **first post-*Furman* execution** of any sort (Gary Gilmore’s consented-to execution by the State of Utah) was in **1977**.¹³⁸
- The **first “non-consensual” execution after *Furman***—*i.e.*, the first time an American jurisdiction carried out a post-*Furman* capital judgment that had passed inspection by all available levels of judicial review—was in **1979**, when Florida executed John Spenkelink.¹³⁹ We focus on

non-consensual, as well as all, executions because we are interested in error rates, and only non-consensual executions reveal the inspection system's conclusion that the death sentence is free of "serious error" as defined above.¹⁴⁰

B. Sentences and Executions

This section reports the number of death sentences imposed, the number of executions carried out, and executions as a proportion of death sentences in each jurisdiction or group of jurisdictions. Nationally, during the years 1973-1995, 34 American jurisdictions imposed **5,760 death sentences**¹⁴¹ and carried out **313 executions**.¹⁴² In other words, **only 5% of the death sentences imposed were carried out.**

C. Error and Success Rates

The third section of the report cards identifies (1) the rates of serious, reversible error discovered at each level of judicial inspection,¹⁴³ (2) the overall error rate, meaning the proportion of capital judgments undergoing judicial inspection that were thrown out before reaching the end of the inspection process,¹⁴⁴ and, conversely, (3) the overall success rate, meaning the proportion of capital judgments found after full review to be *free* of serious error. In the "overall rates" category, we give the error and success rates considering all three judicial inspections and also, in brackets, the rates considering only the direct appeal and federal habeas inspections. Nationally, our data reveal that:

- **Direct appeal.** State courts in 34 capital-sentencing jurisdictions finally reviewed 4,578 death sentences on direct appeal during 1973-1995.¹⁴⁵ Because 5,760 death sentences were imposed during that period, this figure reveals that 1,182—or **21%—of the death sentences were awaiting direct appellate review at the end of the study period.**¹⁴⁶ Of the 4,578 capital judgments finally reviewed on direct appeal, **1,885—or 41%—were overturned based on**

serious error.¹⁴⁷ This means that 2,693 death sentences¹⁴⁸ from 34 jurisdictions passed the first judicial inspection and were available to be reviewed at the second, state post-conviction stage of review.¹⁴⁹ Many of our subsequent analyses focus on the 28 capital-sentencing jurisdictions in which a full complement of review procedures took place in at least one capital case between 1973 and 1995. On the national report card, therefore, we calculate the direct appeal error rates a *second* time for just the 28 states. That analysis reveals **the same 41% rate of serious error** detected at that stage (1,782 capital judgments overturned due to serious error, out of 4,364 reviewed at that stage), and shows that 2,582 capital judgments from the 28-state cohort passed the first judicial checkpoint and were available for state post-conviction review.¹⁵⁰

- **State post-conviction.** As is discussed above and in Appendix C, our state post-conviction data include only known state post-conviction reversals during the 23-year study period; it does not contain information about the number of state post-conviction proceedings that actually were *completed* during that period.¹⁵¹ For that reason, each report card lists as “*Unknown*” both the “Number Reviewed on Post-Conviction” (*i.e.*, the number of capital judgments that went forward to state post-conviction review and were finally reviewed there), and also the “Number Forward [from State Post-Conviction] to Federal Habeas Corpus.” What we *are* able to calculate is the known reversals¹⁵² as a proportion of the number of capital judgments moving forward from state direct appeal to state post-conviction in our 28-state cohort of capital-sentencing jurisdictions.¹⁵³ Although we report this calculation as the rate of error discovered on state post-conviction—*i.e.*, as the “Percentage Reversed on [State] Post-Conviction”—we in fact *underestimate* that error rate by a substantial amount, because we take the known reversals as a percentage of the cases

available for review, rather than as a proportion of the cases *actually* reviewed, during the study period.¹⁵⁴ That underestimation accounts for our use of the “≥” symbol in this row of each report card and our use of the phrase “at least” in discussing that row. Nationally, for the relevant 28 study states, there were at least **248** state post-conviction reversals due to serious error during the study period, so that **serious error was found in more than— probably *significantly* more than— 10% of the cases reviewed at that stage.**¹⁵⁵ Although state post-conviction proceedings are not generally thought to be major sources of post-sentencing reversals of seriously flawed capital judgments, in fact **there were more state post-conviction findings of reversible error infecting American capital judgments (248) than there were analogous federal habeas findings (237).**

- **State direct appeal and state post-conviction combined.** This item in the national report card indicates the combined rates of error found at the two **state court** checkpoints. Nationally, state courts as a whole found **47%—nearly one out of every two—**capital judgments they reviewed to be infected with serious error.¹⁵⁶
- **Federal habeas corpus.** Between 1973 and 1995,¹⁵⁷ federal habeas courts with jurisdiction over prisoners in capital-sentencing states around the nation **finally reviewed**¹⁵⁸ **599 death sentences.** They **overturned 237—or 40%—of those sentences based on serious error.**¹⁵⁹
- **Overall rates:** This portion of the report card gives the overall error (and success) rates, meaning the proportion of capital judgments from the relevant jurisdiction or set of jurisdictions that underwent full judicial inspection and were found to have (and to be free of) serious error.¹⁶⁰ Overall, between 1973 and 1995, **less than one-third—32%—of all death sentences passing**

through the nation's state and federal judicial inspection system were cleared of serious error. Conversely, over two-thirds—68%—were thrown out because of serious error.¹⁶¹

The information presented thus far make this a useful place to discuss **error rates over time**. Earlier, in discussing Figure 2, pp. 12-13 above, we touched on patterns of capital error and success rates over time. There, we noted that, although executions have been on the rise since 1988, the principal cause of that rise seems to be the steady increase in the number of individuals piled up on death row who are potentially available to be executed, and not any sharp increase in the success rate of capital judgments. Figures 3 and 4 below look at patterns over a longer period of time, beginning in 1973.

Figure 3 below depicts the rates of error detected on state direct appeal, federal habeas corpus, and in those two stages combined, by year, from 1973 to 1995.¹⁶² (The first two years for which we plot the rate of error found on federal habeas review are 1978 and 1980, because no capital habeas proceedings were completed before 1978 or during 1979.) Figure 3 reveals the following about error rates detected over time during the first (state direct appeal) and third (federal habeas) inspection stages:

- From the 1970s through 1982, when relatively few cases were under review, rates of error detected on state direct appeal and federal habeas review were extremely volatile and high.
- As of 1983, as larger numbers of capital judgments came under review at both stages, error rates stabilized, and they remained relatively stable throughout the remainder of the period. Thus, **during the final 13 study years (1983-1995):**

1. **Capital-sentencing error rates found on state direct appeal across the nation consistently remained within the 30% to 45% range.**
2. With the exception of three years (two with a lower rate; one with a higher rate), **capital**

error rates found on federal habeas review stayed within that same 15-point range.

3. With one exception, the **combined error rates detected at those two stages stayed consistently within the 54% to 69% range.**
4. Broadly speaking: while the error rate found on federal habeas modestly dipped during the 1987-1991 period, the error rate found on state direct appeal (affecting a much larger pool of cases) modestly rose during that same period. Both rates dipped some during the years 1992 through 1994, then rose sharply in 1995.

Figure 3 is incomplete because it does not contain rates of serious error found, by year, at the state post-conviction stage, nor thus any *overall* reversal rate, by year, for the three inspection stages as a whole. Rates of serious error detected during state post-conviction review cannot be calculated because only data on the number of *reversals*—but not on the total number of cases *decided*, and thus the reversal *rate*—are available by year for the state post-conviction stage.¹⁶³ The next chart, however —Figure 4—provides some information about state post-conviction error rates over time, revealing that in the same years when a modest downward trend in federal habeas reversal rates was occurring (1987-1994), **a marked increase in state post-conviction reversals occurred.**¹⁶⁴ If we assume (though we can't know for certain) that the number of capital state post-conviction cases finally decided during the 1985-1994 period was fairly steady, then an increase in the error rate detected at the state post-conviction stage would have occurred and offset the decrease in the federal habeas reversal rate. Making that assumption leads to an estimate of **the overall rate of error detected by all three judicial inspections during the 1988-1994 period of roughly 60-65%.**

Figure 3: Error Rates Detected on State Direct Appeal, Federal Habeas, and the Two Combined, 1973-95

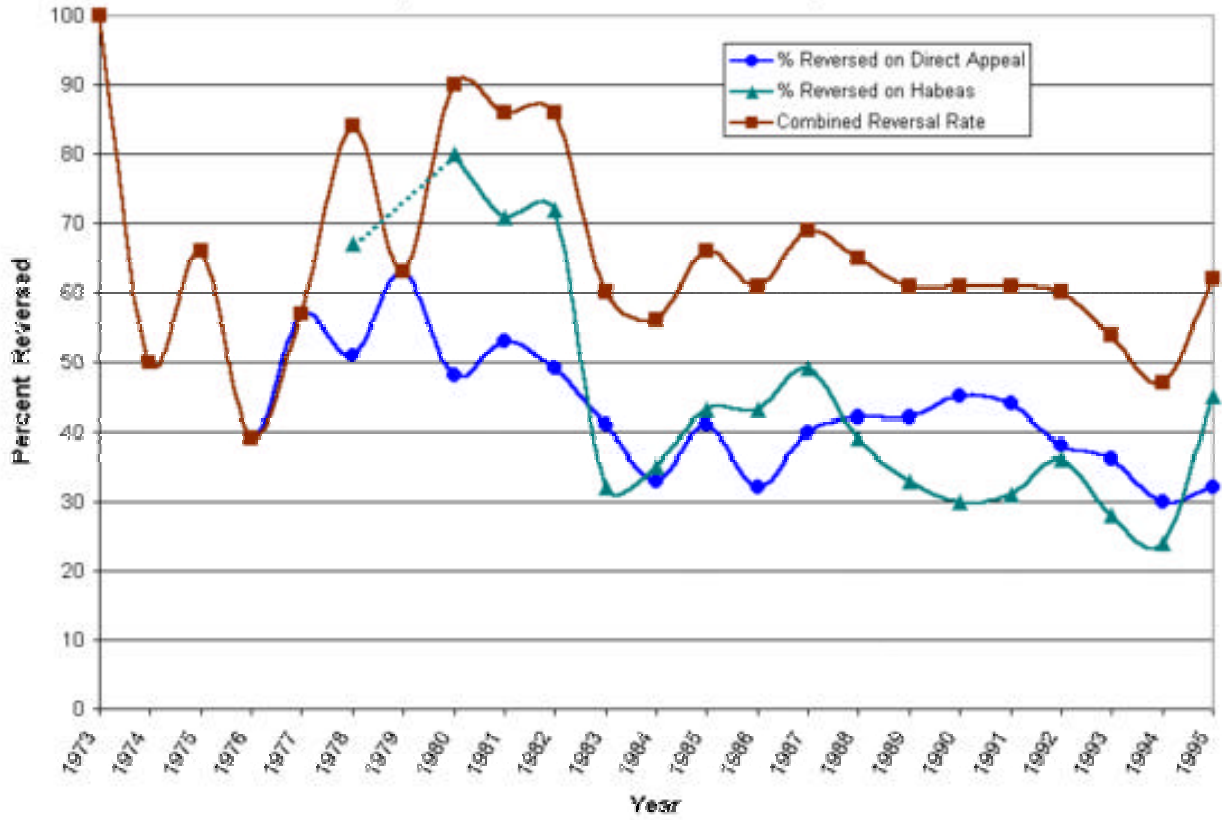
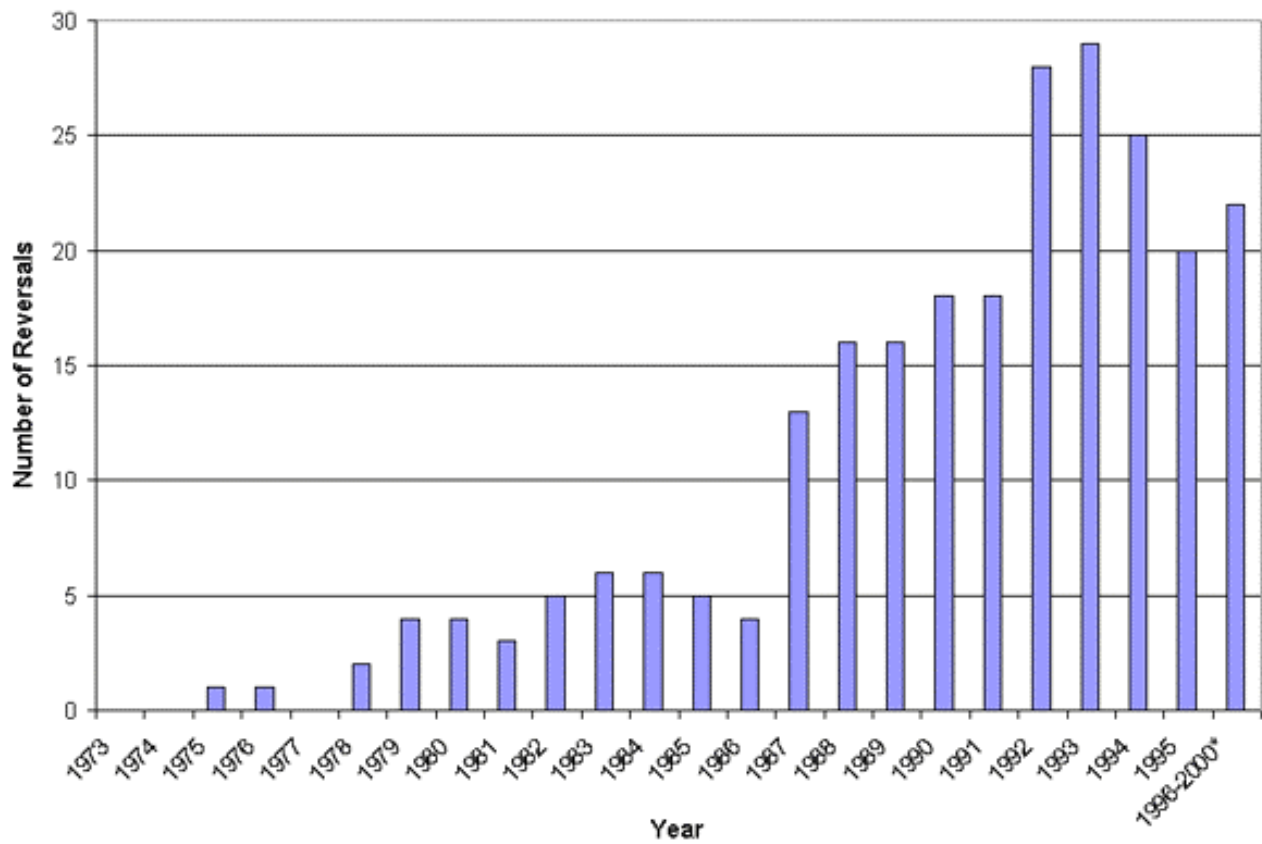


Figure 4. Known State Post-Conviction Reversals, 1973-2000



D. Length of Time of Review

This section of each report card provides information for the relevant jurisdiction or set of jurisdictions on (1) the number of years that elapsed between the state's first death sentence and its first non-consensual execution (not necessarily in the same case); (2) the average number of years it took death sentences to proceed through the three-stage inspection process to execution in the small proportion of cases in which an execution took place; and (3) the average time from death sentence to federal habeas reversal in the 10% of cases in which reversal occurred at the third (federal habeas) checkpoint, as opposed to taking place at one of the earlier (state court) checkpoints. The national report card reveals the following about the length of time required to identify the high amounts of error described above:

- Nationally, 6 years passed between the imposition of the first death sentence and the first non-consensual execution.¹⁶⁵
- We don't know how much time was required for judicial inspection of death sentences at the direct appeal and state post-conviction stages. One of the report-card categories discussed above—the percentage of death sentences awaiting direct appellate review as of the end of 1995—does, however, suggest the extent to which the direct appeal stage is a bottleneck in the review process. Nationally, **21% of all death sentences imposed between 1973 and 1995 were still awaiting a state direct appeal decision as of 1995.**¹⁶⁶ That 21% (1,182 death sentences) represents close to **five years' worth of death sentences backed up at the direct appeal stage** as of the end of 1995, at the average annual rate of 250 death sentences imposed per year.¹⁶⁷ This suggests that, as of 1995, an average of about 5 years was elapsing between imposition of a death sentence and the end of state direct appeal—and thus that **about half of the time required for the entire**

review process was being consumed by the first, state direct appeal inspection.

- **In the minority of cases in which death sentences passed the three-stage inspection and were carried out by execution, the average time, nationally, from sentence to execution was 9 years.** In the last 9 study years (1987-1995), by which point the pile-up on death row was substantial (*see* Figure 2, p.12 above), the average time from sentence to execution had **increased to 10.6 years.**¹⁶⁸
- **In cases in which serious error was detected during the third, federal habeas review, the average time from sentence to federal reversal was 7.6 years.**¹⁶⁹

E. Capital-Sentencing and Execution Rates

The report cards next answer two questions. (1) How often does the relevant jurisdiction or set of jurisdictions impose death sentences? To answer this question, we consider death sentences as a proportion of three populations: per 1,000 homicides, per 100,000 population, and (in the state report cards, but not the national one) per 1,000 incarcerated inmates in the jurisdiction. (2) How often (relative to homicides, population and prison population) does the jurisdiction execute offenders? Because we are interested in success rates, we consider only “non-consensual” executions, *i.e.*, ones based on capital judgments that have been fully reviewed and found to be free of serious error.¹⁷⁰ Because not all states have the death penalty, our national report card computes these figures for the nation as a whole and for our 34-state cohort.

These numbers are most useful for the comparative purposes to which we put them below.¹⁷¹ Providing a national baseline for those comparisons, the capital-sentencing and execution rates for the nation as a whole, and for the 34 death-sentencing states that decided at least one direct appeal during the study

period, are as follows:

- For the 34 capital-sentencing states, an average of 14.9 death sentences were imposed for every 1,000 homicides during the study period. For the same states, an average of 3.9 death sentences were imposed for every 100,000 people during the same period.¹⁷²
- Because so few death sentences actually result in executions, the execution rates determined by each of these population categories are much lower. During the study period, death-sentencing states carried out an average of: .68 executions for every 1,000 homicides; and .15 executions for per 100,000 persons.¹⁷³
- Comparing the last two points reveals that during the study period, **death states capitally sentenced 22 times more defendants per 1,000 homicides than they executed. And they sentenced 26 times more defendants per 100,000 population, than they executed.**
- For the whole nation during the study period, an average of: (1) 12 death sentences were imposed for every 1,000 homicides; (2) 2.46 death sentences were imposed for every 100,000 people; and (3) .54 non-consensual executions were carried out for every 1,000 homicides.¹⁷⁴

F. Demographic Factors

The demographic information reported in the sixth report card category reveals the population pools against which each jurisdiction's number of death sentences and executions are compared to determine sentencing and execution rates. They also provide bases for distinguishing among states and thus, potentially, for explaining variations among states in terms of the capital error rates detected on direct appeal and habeas corpus inspection. At the national level we again report data for the 34 death states as well as for the nation at large.

“Average population” is the relevant jurisdiction’s yearly average population from 1973-1995. For the whole nation, the average population during the study period was 237,905,964. For the 34 death states, it was 181,374,347.¹⁷⁵

“Average homicides” are the total number of homicides from 1973-1995 divided by 23, the number of years in our study . For the whole nation, the average number of homicides each year during the study period was 21,197. For the 34 death penalty states, it was 16,860.¹⁷⁶ Comparing this and the last category reveals that death-sentencing states account for about 76% of the nation’s population and about 80% of its homicides.

Homicides per population establishes a jurisdiction’s homicide rate. By “average homicides/average population,” we mean the number of homicides per year for every 100,000 persons in the jurisdiction, averaged over the population during the study period. For the whole nation, average homicides/average population during the study period was 9. For the 34 death sentencing states, it was 9.3.¹⁷⁷ This again reveals that homicide rates are slightly higher in death-sentencing than in nondeath-sentencing states.

“Average prison admissions” means the average number of persons admitted each year to the state’s prisons during the study period.¹⁷⁸

“Average prison population” means the jurisdiction’s average population over study period.¹⁷⁹

We also report here the percentage of each jurisdiction’s population during the study period that was nonwhite, which for the nation as a whole was 20% and for the 28 study states was 19%.¹⁸⁰

G. Court Factors: The Context of State Court Decision Making

In the state (but not the national and circuit/regional) report cards, we report four measures of the social and political contexts in which judges make decisions. Contextual measures such as those analyzed here have been shown in empirical studies to help explain variation in sentencing from county to county within states and across states.¹⁸¹ We consider them here to see whether they can help explain state variations in capital-sentencing error rates, and also in capital-sentencing and execution rates themselves.

The “political pressure” index measures the extent to which state judges are subject to electoral scrutiny and discipline. Although nearly all the state judges in our study are subject to election at some point if they wish to remain in office, the forms and frequency of elections differ in ways that are likely to increase or decrease the extent to which judges are put at political risk because of the capital outcomes produced in their courts (meaning, at the trial level, whether the verdict was death or life and, at the appellate level, whether a death sentence under review was affirmed or reversed). The index considers whether judges initially are elected or appointed, whether judicial elections are partisan, the length of judges’ terms of office, and whether judges’ continuation in office is determined by contested or retention elections.¹⁸²

The “party competition index” is a composite of the vote share of each party in state gubernatorial elections from 1968-1996.¹⁸³

Our penultimate (“state court criminal caseload”) item reports the yearly average number of criminal case filings in each jurisdiction from 1985-1994 per 1,000 people in the population.¹⁸⁴ We include this figure to test the hypothesis that high criminal caseloads may in some way affect the quality of state-court capital judgments.

Finally, aiming to test a similar hypothesis having to do with available judicial resources, we report

each state's average annual court-related expenditures during the fiscal years 1982-1992.¹⁸⁵