

THE COVERT ABOLITION OF THE DEATH PENALTY: A COMPARATIVE ANALYSIS
OF FRANCE AND MISSISSIPPI

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Table of Contents

I. Introduction.....	2
II. Abolition in France	3
III. Mississippi	9
IV. Literature Review and Framework	12
V. Findings.....	18
A. Executions.....	20
B. Death Sentences	24
C. Bankruptcy.....	28
D. Public Discourse	31
VI. Why (and How) Mississippi Is Abolishing the Death Penalty	33
VII. Conclusion	36

I. INTRODUCTION

Throughout history, there have been no recorded instances of a mass abolition movement led by the public against the death penalty in any country. How then has it come to be abolished in 106 countries?¹ This study places that question in the context of two places which both share a common history of using brutal death penalties: France and Mississippi. This thesis seeks to answer the question of what the abolition of the death penalty in France suggests about the likelihood of its abolition in Mississippi, in light of a cultural comparison of their respective attitudes toward crime and punishment.

France, the land of beheading, abolished the death penalty in 1981. Mississippi, the land of hanging, has not executed anyone since 2012. At first glance, conservative Mississippi seems to embrace different values than progressive France, indicating divergent approaches to criminal

¹ Amnesty International, *Global Report: Death Sentences and Executions 2017* (London: Amnesty International Ltd, 2018), <https://www.amnesty.org/download/Documents/ACT5079552018ENGLISH.PDF>.

justice. A closer examination of the actual use of the death penalty in both jurisdictions suggests that Mississippi might be following the same trajectory toward abolition, just at a slower pace.

In Mississippi, there is a disconnect between what people say and do. Despite the public rhetoric and opinion of Mississippians, their actions (or lack thereof) with respect to the death penalty may suggest a deeper connection to French thoughts and attitudes than one might expect. This thesis compares the two cultures and extrapolates data that informs the question of whether death penalty abolition – *de facto* or *de jure* – will become a reality in Mississippi in the near future.

In Part II, the thesis begins by providing an overview of the French death penalty and how it came to be abolished. Part III briefly traces the history of the death penalty in the United States and specifically within the state of Mississippi. Part IV surveys current scholars' analyses of American retention of the death penalty and addresses an existing gap at the state level that this thesis seeks to fill. Part V of the thesis outlines four key findings used to form its argument that Mississippi is following a trajectory toward *de facto* abolition of the death penalty. Finally, Part VI provides a discussion of why (and how) Mississippi is abolishing the death penalty.

II. ABOLITION IN FRANCE

While France first used its most famous form of execution, the guillotine, in 1792, its origins lie in the late 1780s, and they are a result of egalitarian ideals that were emphasized during the French Revolution. Dr. Joseph-Ignace Guillotin proposed the concept as, he believed, a more humane alternative to the tortuous execution methods that were historically used. The State would put all citizens to death in the same way—by decapitation.² At the time, capital punishment took many forms in the country, each method being dependent upon the offender's

² *Encyclopaedia Britannica*, s.v. "Guillotine," last modified October 26, 2017, <https://www.britannica.com/topic/guillotine>.

social status and category of crime committed. Hanging was the most commonly used method, although nobles could be decapitated with a sword. Those coming from lower classes might be burned, boiled, dismembered, or executed by wheel.³ Michel Foucault gives a striking anecdote of this process at the opening of his philosophical *Surveiller et Punir*.⁴ The opening lines of the book graphically describe the true story of Robert-François Damiens's execution in 1757 before that shift, when effective punishment needed to be physical and public. His execution was very long; it lasted almost the entire day due to the many elements involved, and the fact that they were botched along the way. Before the main door of the Church of Paris, Damiens had

[T]he flesh...torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt away with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds.⁵

For the physical machine of the guillotine, a doctor named Antoine Louis developed the mechanics, which Tobias Schmidt, a German harpsichord maker, built. At first, it was called a *louisette* or *louison*, after Dr. Louis, but it came to be known as the *guillotine*, an homage to the originator.⁶ Shortly after its invention came the so-called "Reign of Terror" of the mid-1790s. The French State used the apparatus to execute 17,000 French citizens, sometimes at a rate of three hundred per day.⁷

³ Michael R. Lynn, "Executions, The Guillotine and the French Revolution," *Ultimate History Project*, accessed January 29, 2020, <http://ultimatehistoryproject.com/executions-the-guillotine-and-the-french-revolution.html>.

⁴ The work, written in 1975, presents a larger theoretical argument about the birth of the prison system. Foucault believes a historical shift occurred around theories of punishment from a focus on the physical body to the inner soul, which is a private and inward thing.

⁵ Michel Foucault, *Surveiller et punir* (Paris: Editions Gallimard, 2014), 3.

⁶ Encyclopaedia Britannica, s.v. "Guillotine."

⁷ Encyclopaedia Britannica, s.v. "Reign of Terror," last modified January 24, 2020, <https://www.britannica.com/event/Reign-of-Terror>.

In France, the 18th century is known as the *Siècle des Lumières*, or “Period of Enlightenment.”⁸ It was an age when philosophical writing and debate flourished. The death penalty became one of the oft-debated topics on which each *philosophe* was expected to form an opinion. A majority of the French population remained largely illiterate, however, and so these essays were written by social elites with the intention of being circulated among elites. Victor Hugo wrote one of the most influential publications concerning the death penalty in 1829. He anonymously released an epistolary novel entitled *Le Dernier Jour d’un Condamné*, or The Last Day of a Condemned Man. It described the last twenty-four hours of a man awaiting execution, focusing on the prisoner’s feelings of anxiety and agony, and not revealing who the man was or what crime he committed. The story was designed to appeal to readers’ emotions and build a sense of empathy toward convicts, as well as revulsion to the act of killing, whether it be by any individual or by the State.⁹

The last public execution in France was performed in 1939.¹⁰ During this period, many countries echoed the decision to stop public executions. In the wake of the mass-scale killings of World War I and with World War II on the horizon, there came to be a shared discomfort around putting state-ordered death on display in such a highly visible way.¹¹ Albert Camus penned a highly influential extended essay in 1957 called *Reflexions sur la Guillotine*. Unlike Hugo, Camus uses a logical argument and not one of sympathy. He cites data to explain that its abolition in other countries did not lead to a rise in crime. In the eyes of Camus, the premeditated murders carried out by the State are worse than the murders that convicts commit. He says that

⁸ Immanuel Kant, *Qu’est-ce que les Lumières*, 1784.

⁹ Victor Hugo, *Le Dernier Jour d’un Condamné*, (Paris: Gosselin, 1829).

¹⁰ “France’s final guillotine: 40 years since the end of the death penalty,” *Euronews*, September 11, 2017, <https://www.euronews.com/2017/09/11/frances-final-guillotine-40-years-since-the-end-of-the-death-penalty>.

¹¹ Andrew Hammel, *Ending the Death Penalty: the European Experience in Global Perspective* (Hampshire: Macmillan Publishers Ltd, 2010), 133.

the equivalent would be for the criminal to warn the victim of his impending horrible death, when it will take place, and then locking the victim up for months before actually murdering him.¹² Camus's essay was part of a larger body of work, *Reflexions sur la Peine Capitale*, which he co-authored with Arthur Koestler. Koestler had been previously sentenced to the death penalty, but had been later acquitted. In 1955, Koestler led a national campaign for its abolition, and this book was a by-product of that campaign.

The last execution in France by guillotine was in 1977, and only six prisoners were executed during those last five years of use. Robert Badinter was a key activist in the fight for abolition of French capital punishment. Born to a Jewish family, his father was deported and killed at the Nazi Sobibór extermination camp in 1943.¹³ Badinter became a defense lawyer and represented a number of murder convicts, the most famous of whom was Patrick Henry. In 1976, Henry kidnapped and killed an eight-year-old boy. Badinter defended Henry, not by contesting his guilt but rather contesting the application of the death penalty in any context.

In 1981, newly elected socialist president François Mitterrand appointed Badinter *Garde des Sceaux*, a title held by the Minister of Justice. Four years after the last use of the guillotine, Badinter stood before the French *Assemblée Nationale* in September and delivered a pivotal speech in which he highlighted France's role as the first in Europe to abolish torture and one of the first to abolish slavery; he argued that it therefore does not make sense that France would be almost the last country in western Europe to abolish the death penalty.¹⁴ He gave a history of the various political changes in France and why each prevented the country from reaching abolition,

¹² Albert Camus, "Reflexions sur la Guillotine," in *Reflexions sur la Peine Capitale* (Paris: Calmann-Lévy, 1957).

¹³ France Culture, "Biographie de Robert Badinter," *Radio France* online, accessed January 27, 2020, <https://www.franceculture.fr/personne-robert-badinter.html#biography>.

¹⁴ Robert Badinter, "Le discours sur la peine de mort," September 17, 1981, Assemblée Nationale, Paris, France, <https://www.lefigaro.fr/politique/le-scan/2014/04/08/25001-20140408ARTFIG00067-le-discours-de-badinter-sur-la-peine-de-mort.php>.

but he implored the Assembly that they were making a moral choice, and it is one that must be made if France wants to continue considering itself a great country. The reasons France believes it is great lie not only in its power, but also in its brilliance of ideas and generosity during the important moments of its history.¹⁵ The next day, the French Assembly voted 363-117 to eliminate capital punishment. After a contested battle in the *Sé debates*, the death penalty was thereafter abolished in France with the Act of 9 October 1981.¹⁶ Its Constitution was amended with Article 66-1, stating simply:

*Nul ne peut être condamné à la peine de mort,*¹⁷ or none may be condemned to the death penalty.

(for current legal sentences for murders in France, see *Appendix A*)

The day after the vote, the French newspaper *Le Figaro* published survey data and reported that 62% of citizens still supported capital punishment.¹⁸ L'IFOP, *L'Institut Français d'Opinion Publique*, performed a survey two years later that found 59% of the public to be in support its reestablishment.¹⁹ A majority of the French public wanted to retain its death penalty, but elites within the society decided to collectively disregard those desires and pursue abolition, in spite of public opinion.

In France, cultural elites were able to enact policy decisions without consideration of public opinion because they are not held captive to its wishes to the degree that American cultural elites are. Given that it is a key component in the argument of this thesis, it is important to define the term “cultural elite.” For the purposes of this thesis, an elite is one who belongs to

¹⁵ Ibid.

¹⁶ “Abolition of the Death Penalty in France,” France Diplomatie Ministry for Europe and Foreign Affairs, accessed October 30, 2019, <https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/death-penalty/france-and-the-death-penalty/>.

¹⁷ FRENCH CONST. art. 66, §1

¹⁸ “Ce jour-là...le 18 septembre 1981,” *Le Figaro*, last modified October 14, 2007, https://www.lefigaro.fr/debats/2007/09/18/01005-20070918ARTFIG90053-ce_jour_la_le_septembre_.php.

¹⁹ Ibid.

the group that holds the power to make decisions within a society; these can be cultural elites or intellectuals, such as aforementioned Foucault or Hugo, or they may be political elites, such as lawyers and government officials. As Leslie Rado sought to define cultural elites, she considered

[W]ho either chooses or is asked to define moral issues in our society? And how and why do they become involved in this activity if the cultural task involved does not reside within the institutionalized work of an established organization or a single discipline?²⁰

Elites' decision-making is influenced by the level of accountability to which they are held by a society, and also by the magnitude of the subsequent repercussions for their decisions. Within the American system, not only senators and representatives but also judges and district attorneys are elected, and thus they are beholden to their constituents' approval. They rely on a positive public opinion in order to be reelected and maintain their decision-making power. French judges, however, are considered magistrates.²¹ This distinction requires intense judicial training, including both classes and internships beyond law school.²² Following that training, they are required to take another exam by which the entire class is ranked; they are then allowed to choose, in accordance with the ranking, from a list of open job positions. The training is intentionally different from that of practicing lawyers; they are thought of as two distinct professions with distinct goals. Whereas lawyers work to win the case, France trains judges on a "civil service model,"²³ with a primary goal of truth-seeking. French judicial promotions are based off of professional evaluations by their fellow judges, and so they have greater incentive for good performance.²⁴ Unlike the American judges, French judges rely on the opinion of their equally-specialized peers, and not the opinion of the general public.

²⁰ Leslie Rado, "Cultural Elites and the Institutionalization of Ideas," *Sociological Forum* 2, no. 1 (1987): 43.

²¹ Renée Lerner, "The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises." *U. Ill. L Rev.* (2001): 9.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

Nationally, France has a more centralized state than the United States. The entire country is subject to decisions made by the *Assemblée Nationale* and *Sénat* in Paris. French officials and cultural elites are generally thought of as having expertise in their field, and thus French citizens are often less suspicious and anti-statist than American citizens. Part V will further analyze the way this difference in political structure shapes policy.

III. MISSISSIPPI

With respect to the death penalty, the United States has followed a historical trajectory similar to other western European nations. Its last public execution was in 1936, three years earlier than in France.²⁵ Many capital crimes in England became capital crimes in American colonies, although the colonies exhibited region variation among their criminal codes from their onset.²⁶ In Banner's *The Death Penalty: An American History*, he explains that early southern colonies for the most part did not enact their own criminal codes as northern colonies did, but rather continued to use English law.²⁷ Before 1936, the public nature of executions was stressed, and they were designed to "broadcast terror as widely as possible."²⁸ Evolving from a spectacle meant to incite terror, a public hanging in the 20th century became what *The New York Globe* called a "carnival of brutality."²⁹ It was a widely attended community event, often accompanied by food and drink vendors and speeches from politicians.³⁰

Mississippi, like France, has an infamous association with public execution, and it was the site of thousands. In Mississippi's legacy, most of these were extrajudicial and racially motivated; it is the state with the highest number of recorded lynchings, both absolute and per

²⁵ Renee Montagne, "The Last Public Execution in America," May 1, 2001, in *Morning Edition*, NPR.

²⁶ Stuart Banner, *The death penalty: An American history* (Cambridge: Harvard University Press, 2009), 5-6

²⁷ *Ibid*, 7.

²⁸ *Ibid*, 11.

²⁹ "Capitalizing Capital Punishment in Mississippi," *Literary Digest* 51 (1915): 338.

³⁰ Banner, *The Death Penalty*, 155-156.

capita by total population.³¹ Between 1877 and 1950, 654 African Americans were lynched in the state.³² Hanging was the method of both the extra-judicial and judicial executions in Mississippi until 1940, when judicial executions were replaced by the electric chair; the gas chamber then replaced the chair in 1955.³³

Within Mississippi, the death penalty remains a legal punishment for capital murder under Mississippi Code § 97-3-21(3), which provides:

Every person who shall be convicted of capital murder shall be sentenced (a) to death; (b) to imprisonment for life in the State Penitentiary without parole; or (c) to imprisonment for life in the State Penitentiary with eligibility for parole as provided in § 47-7-3(1) (f).

In Mississippi, first-degree murder is considered capital murder if certain elements are present in the case pursuant to § 97-3-19(2) (a-k) (see *Appendix B*).

The Supreme Court held in the 1972 case *Furman v. Georgia* that the death penalty violated the Eighth Amendment, which forbids the use of “cruel and unusual punishments.”³⁴ Specifically, the Court barred the use of the death penalty because its use by the states was arbitrary and random, such that it was like “being struck by lightning.”³⁵ Their concern was particularly related to its proclivity for black defendants, which was disproportionate to the demographics of murder convictions. It was not a ruling on the moral concept of death as a punishment for criminal behavior. Merely four years later, in 1976, capital punishment was again ruled constitutional in *Gregg v. Georgia*.³⁶

³¹ Equal Justice Initiative, *Lynching in America; Confronting the Legacy of Racial Terror*, 3rd ed. (2017), Table 1, <https://lynchinginamerica.eji.org/report/>.

³² *Ibid.*

³³ “Mississippi: History of the Death Penalty,” *Death Penalty Information Center*, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/mississippi>.

³⁴ U.S. CONST. amend. VIII.

³⁵ *Furman v. Georgia* 408 US 238 (1972).

³⁶ *Gregg v. Georgia* 428 US 153 (1976).

After working to meet the new standards outlined in *Gregg*, Mississippi reinstated its death penalty in 1977.³⁷ The state's first execution, however, caused immediate controversy. In 1983, Jimmy Lee Gray was executed after convicted of kidnapping, raping, and murdering three-year-old Deressa Jean Scales.³⁸ At that time, an iron bar was located behind the inmate's chair inside the gas chamber. When the gas was released, Gray began to thrash his head around with no headrest or strap restraining him. To the horror of those present, he repeatedly struck his head into the iron bar before losing consciousness.³⁹ After eight minutes, officials decided to clear the room from observers, including a United Press International reporter Dan Lohwasser, because of Gray's injuries. Gray's lawyer, Dennis Balske, gave an account that "Jimmy Lee Gray died banging his head against a steel pole in the gas chamber while reporters counted his moans (eleven, according to the Associated Press)."⁴⁰

Following this incident and procedural changes made in other states, Mississippi switched to lethal injection in 1984.⁴¹ From 1984 to 2010, Mississippi executed 12 people, which is a relatively low number compared to other southern states like Texas and Virginia, with 463 and 107 executions respectively.⁴² In 2011, the legislature introduced a bill HB 127, "to provide a moratorium on the imposition and execution of the death penalty for the purpose of completing a study on the impact of the death penalty,"⁴³ but it did not pass. Capital punishment therefore

³⁷ "Mississippi: History of the Death Penalty," *Death Penalty Information Center*, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/mississippi>.

³⁸ "Botched Executions," *Death Penalty Information Center*, <https://deathpenaltyinfo.org/executions/botched-executions>.

³⁹ *Ibid.*

⁴⁰ "Father Says Execution Won't Erase His Memories," *The New York Times*, September 3, 1983.

⁴¹ "Mississippi: History," *Death Penalty Information Center*.

⁴² "Executions in the United States," *Death Penalty Information Center*, <https://deathpenaltyinfo.org/executions/executions-overview>.

⁴³ Miss. Legislature, House, *House Bill No. 127*, Regular sess. 2011, <http://billstatus.ls.state.ms.us/documents/2011/pdf/HB/0100-0199/HB0127IN.pdf>.

remains lawful in Mississippi and in twenty-eight other states, although four of these currently have a government-imposed moratorium on the practice.⁴⁴

In 1994, 80% of Americans were in favor of the death penalty for a person convicted of murder. According to 2019 data from Gallup, that number had dropped to 56% in favor.⁴⁵ When presented alongside life imprisonment without parole, support drops further still, to 36%.⁴⁶ This current favorability is lower than it was in 1983 in post-abolition France. Today, American opinions on the death penalty align closely to modern French opinions. In Part IV, this thesis will explore current analyses of the factors that allowed this country to abolish its death penalty and, subsequently, why the United States has not. It remains the sole Western democracy to allow the death penalty.

IV. LITERATURE REVIEW AND FRAMEWORK

Because of that singularity, the persistence of the death penalty in the United States has produced an abundance of academic analysis. This thesis takes its primary framework from five leading scholars studying the American death penalty. They are James Q. Whitman, Franklin E. Zimring, Carol Steiker, David Garland, and William Berry. Three of the five subscribe to an idea of “American cultural exceptionalism,” which is to say that there is some element embedded in American culture that is inherent to its society and accounts for its retention of the death penalty.

American cultural exceptionalism is an idea first suggested by Alexis de Toqueville in the 1840,⁴⁷ and sociologists Lipset and Marks present several characteristics which have given the United States a distinctive value system that is “qualitatively difference from those of other

⁴⁴ “State by State,” *Death Penalty Information Center*, accessed October 15, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>.

⁴⁵ “Death Penalty,” *Gallup*, accessed February 12, 2020, <https://news.gallup.com/poll/1606/death-penalty.aspx>.

⁴⁶ *Ibid.*

⁴⁷ Alexis de Toqueville, *The Social Influence of Democracy*, vol. 2, *Democracy in America* (New York: J. & H.G. Langley, 1840), 36.

western nations.”⁴⁸ These characteristics include: social egalitarianism, ethnic and racial diversity, economic productivity, individualism, populism, anti-statism, strength of religion, and an absence of feudal remnants.⁴⁹ Much of current legal scholarship has adopted American cultural exceptionalism to present an essential relationship between American institutions and capital punishment.

James Q. Whitman from Yale University argues in his book *Harsh Justice: Criminal punishment and the widening divide between America and Europe* that an absence of dignity distinguishes the United States from European societies’ approaches toward justice, which have been shaped by a history of hierarchy and status. Specifically, he cites the anti-aristocratic transformation of France and Germany to support his thesis. Whitman argues that when judicial systems were reformed in Europe, a “leveling-up”⁵⁰ of justice occurred. The treatment of commoners was elevated to that of the noble class. The element of dignity in punishment had been previously reserved for aristocrats but became accessible to the lower social classes in the process of “leveling-up.” The United States, however, does not have this legacy of nobility.

Its origin, according to Whitman, is in a strict sense of Protestant egalitarianism, brought over by Europeans who wished to escape from that very environment of hierarchy and control. Since all citizens theoretically began with the same status, although this thesis challenges the accuracy of that notion, a criminal would therefore be degraded, leading to a “leveling-down”⁵¹ of justice. That is his form of punishment for violating the social contract, and Whitman believes it explains the particularly punitive policies in the United States today. This analysis, however,

⁴⁸ David Garland, “Capital punishment and American culture,” *Punishment & Society* 7, no. 4 (2005): 348.

⁴⁹ Seymour Martin Lipset, *American Exceptionalism: A double-edged sword* (New York: Norton, 1996), 61.

⁵⁰ James Q. Whitman, *Harsh Justice: Criminal punishment and the widening divide between America and Europe*. (OUPress, USA, 2003), 10.

⁵¹ *Ibid*, 12.

disregards rehabilitative efforts that were widespread in the United States until the 1970s,⁵² and generally glosses over the level of variation within the United States, within Europe, and in both places over time. Whitman also fails to acknowledge the racially based status systems that imposed a strict hierarchy, especially in the American South, well into the 20th century. At its founding, slaves and nonwhites did not hold the same status as whites in the political or cultural sphere. Following the Three-Fifths Compromise of 1787, each slave legally represented three-fifths of a population number; they were not counted a whole number of person until 1868.⁵³ Theoretical equality among citizens is lauded as a pillar the United States, but true equality was not, and some debate still is not, a reality.

Franklin E. Zimring at California Berkeley believes that the origin of American cultural exceptionalism lies in its tradition of “vigilante values”⁵⁴ from the 19th century, specifically those in the American South. He argues in *The Contradictions of American Capital Punishment* that capital punishment comes out of a legacy of lynching and a “deeply held American belief in violent social justice.”⁵⁵ Today, Zimring argues that society has reconceptualized lynching as a private service performed for the victim’s family, rather than as an exhibition of power by the State or a certain social group. The substance of his argument is a statistical correlation performed between patterns of lynching in the 1890s and patterns of executions one hundred years later, in the 1990s.⁵⁶ His findings indicate that states that had higher numbers of illegal lynchings now show higher numbers of legal executions.

⁵² David Garland, “Capital punishment and American culture,” *Punishment & Society* 7, no. 4 (2005): 353.

⁵³ U.S. CONST. art. I, §2 (repealed 1868).

⁵⁴ Franklin E. Zimring, *The Contradictions of American Capital Punishment*. (Oxford: OU Press, 2004), 8.

⁵⁵ *Ibid.*

⁵⁶ David Garland, “Capital punishment and American culture,” 352.

There are weaknesses with Zimring's argument, and he admits that cases like Mississippi, for example, confound his correlation: historically, it had high levels of lynching, but today it has low levels of execution, relative to other states measured.⁵⁷ An important caveat of Zimring's statistical analysis is that it compares lynching with states' execution *behavior*, not with execution *sentences* or *laws*. Another weakness, highlighted by David Garland, is that vigilante justice seeks to fill the gap of absent or ineffective criminal justice, but lynching in the American South occurred despite the existence of a legitimate criminal justice system.⁵⁸ Garland also critiques Zimring's analysis for confounding the rationale behind capital executions with an accurate description of that practice.⁵⁹

Carol Steiker from Harvard University also subscribes to American cultural exceptionalism. In her essay "Capital Punishment and American exceptionalism," she argues that diminishing support for the death penalty in the European context has likely been a product of the abolition itself, and not a prerequisite for abolition.⁶⁰ With regard to American exceptionalism, she explores ten possible bases, but each in a noncommittal way. She does address American structural elements within its political system which play a significant role to retain the death penalty, such as lay juries and elected judges and prosecutors. She also discusses the populist tendencies of Americans, which are reinforced through institutions like the electoral primary system and referenda.⁶¹

David Garland from New York University rejects the theory of American cultural exceptionalism in his extensive body of work surrounding the United States' judicial system.

⁵⁷ David Garland, "Capital punishment and American culture," 352.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid, 348.

⁶¹ Carol Steiker, "Capital Punishment and American exceptionalism," 114-15, 118-20.

Specifically in his essay, “Capital punishment and American culture,” Garland attributes the U.S. divergence to a difference in its state formation under the federal system, the importance of the free market, and the symbolic function of the death penalty in America. Its retention and role as a cultural symbol, as he argues in *Peculiar Institution: America’s Death Penalty in an Age of Abolition*, is the result of specific political events and histories, and not of unchanging cultural mores. American penal policy is a much recent phenomenon than cultural exceptionalists indicate, and Garland finds their arguments to be overly simplistic and deterministic.⁶² They tend to place the United States and other western countries in contrasting terms by comparing the worst with the best and downplaying “periods and practices that do not fit this schema.”⁶³

Rather, the existence of the death penalty today is a practice contingent on “a series of political and legal decisions.”⁶⁴ It is only since 1976 that the United States looks significantly different, and its distinctiveness lies in the timing, not in the trajectory, of a practice that Garland describes as “a residual continuation of a penalty that was once standard in every western nation.”⁶⁵ The reinstatement in *Gregg* came out of a conservative backlash to the Supreme Court’s ‘interference’ in several liberal rulings during the 1950s and 60s,⁶⁶ and also to the larger “symbolic battlefield” of the post-1960s culture wars.⁶⁷ Admittedly, the United States is unique in the fact that it elects sheriffs, judges, and prosecutors. Thus, they have a much stronger incentive than their European counterparts to align their decisions with current public opinion.

⁶² David Garland, “Capital punishment and American culture,” 349.

⁶³ Jerome Skolnick, “Gentle Europe, Tough America,” *The American Prospect*, May 16, 2003, <https://prospect.org/features/gentle-europe-tough-america/>

⁶⁴ David Garland, “Capital punishment and American culture,” 350.

⁶⁵ David Garland, “Capital punishment and American culture,” 356.

⁶⁶ see *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954), *Mapp v. Ohio* 367 U.S. 643 (1961), and *Miranda v. Arizona* 384 U.S. 436 (1966).

⁶⁷ David Garland, “Capital punishment and American culture,” 359.

This results in what Rachel Barkow calls a “penal populism”⁶⁸ in the United States. The public’s fear-based (and generally uninformed) demands for public safety, even as the national crime rate drops, lead politicians to implement harsher responses to crime.

William Berry at the University of Mississippi also rejects American cultural exceptionalism in favor of American procedural exceptionalism, which he argues actually functions as a deterrent to the abolition of the death penalty. There is a positive correlation between the public’s confidence in its legal process and its support for the death penalty.⁶⁹ In “American Procedural Exceptionalism: A Deterrent or Catalyst for Death Penalty Abolition?” Berry highlights the jury system, the writ of *habeas corpus*, and the 6th Amendment right to counsel as factors that increase our system’s perceived legitimacy. The public presumes that cases resulting in execution must therefore be “just and deserved.”⁷⁰ The apparent checks within the system create a sense of trustworthiness with citizens and thus increases public confidence that laws and the sentences given are correct.⁷¹ Trial by jury makes the decision appear based directly on the will of the American people and not from a controlling State.⁷²

Berry believes the *perception* of fairness in the justice system is more important than its *reality* in providing legitimacy to American capital punishment and thus explaining its persistence, as public support ebbs and flows with those feelings of legitimacy.⁷³ Jonathan Yehuda applies Berry’s concept to the *method* of execution, which he argues is an equally important aspect as *conviction* and *sentencing* in the retention of the death penalty in the United

⁶⁸ Rachel Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* (Cambridge: Harvard University Press, 2019): 111.

⁶⁹ William W. Berry III, “American Procedural Exceptionalism: A Deterrent or Catalyst for Death Penalty Abolition?” *Cornell Journal of Law and Public Policy* 17, no. 3 (2008): 481

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, 489-90.

⁷² *Ibid.*, 491.

⁷³ *Ibid.*, 487, 490.

States. Its use of lethal injection “perpetuates the notion of a more ‘humane’ death penalty.”⁷⁴ As he discusses in “Tinkering with the Machinery of Death: Lethal injection, procedure, and the retention of capital punishment in the United States,” Yehuda explains that America views its death penalty as fundamentally “different” than other countries.⁷⁵ Because of its perceived procedural protections, lethal injection takes on a quasi-medical status which only serves to further entrench its use for the public.

In all the arguments proposed by these authors, they compare France or western Europe with the United States as a whole. As Garland acknowledges, the United States operates under federalism, so much of the judicial process occurs on a more local level of democracy. The United States is a vast country filled with regional variety. It contains ninety-four federal judicial districts,⁷⁶ and judicial procedures and attitudes vary from state to state. What all these scholars’ perspectives lack is the application of their arguments to the local level. It is inadequate to compare Europe, with forty-five sovereign countries, to the United States, with fifty different state constitutions, as two monoliths. This thesis seeks to fill a gap in the ongoing discussion by taking a state-based approach and looking specifically at the cases of Mississippi and France to see how their theoretical arguments are or are not supported by one state’s data.

V. FINDINGS

Analyzing the likelihood of death penalty abolition lies in understanding whose attitudes matter in a society, and how those ideas are then translated into policy. This thesis argues that Mississippi is following the same trajectory toward death penalty abolition as France, only at a

⁷⁴ Jonathan Yehuda, “Tinkering with the Machinery of Death: Lethal injection, procedure, and the retention of capital punishment in the United States,” *NYU L Rev.* 88 (2013): 2319.

⁷⁵ *Ibid.*, 2320.

⁷⁶ “Court Role and Structure,” *United States Courts*, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure>.

slower pace that is due in large part to a difference in political systems. Mississippi is currently undergoing a process of *de facto* abolition of its death penalty, even while it remains *de jure* available. This *de facto* abolition is, in a manner similar to France's, driven by cultural elites independent of the will of the public. Whereas the motivations of the elites in France were based on moral arguments, the motivations of Mississippian elites are primarily economic and practical; they are not even necessarily a conscious effort to abolish the death penalty, but the results are the same. Four findings, discussed in this section, show a declined use of the death penalty and point to its *de facto* abolition in Mississippi:

1. The state is not executing its death-row prisoners
2. The state has significantly decreased the number of death sentences it imposes
3. Resumption of executions would bankrupt the state's judicial system
4. State executions are no longer part of its public discourse

Lawyers in Mississippi are deferring to life in prison without parole as a much quieter, simpler, and faster process than the death penalty. Elites in the state, as was in France, are working to abolish capital punishment. Unlike France, this is not the concentrated work of a group of elites in agreement with one another. It is a diffuse effort led by the choices of individual elites across the state. The phenomenon of *de facto* abolition is not driven by their rhetoric nor their politics, but purely by their actions. Based on these four findings, *de facto* abolition appears imminent. This thesis argues that Mississippi is on an eventual trajectory to legally abolish the death penalty; however, institutional differences, a lack of collective action by elites, and an absence from the state's public discourse indicate that a complete *de jure* abolition remains distant.

A. Executions

According to the Death Penalty Information Center, Mississippi has only executed twenty-one prisoners since 1976.⁷⁷ This is significantly lower than some other states. Texas, for example, has overseen five-hundred sixty-eight executions in that same period of time.⁷⁸ Over half (57%) of executions performed in Mississippi (12) have come from just five of the state's eighty-two counties,⁷⁹ and there have been no executions since 2012.⁸⁰ Mississippi has stopped executing its prisoners, and its recent ambivalence or hesitation around the practice of execution echoes across the country. The American 'death row' now contains more than 3,500 condemned prisoners, yet only executes around twenty per year, and these are regularly performed after the convict has waited in prison for more than fifteen years.⁸¹

Mississippi is not executing its prisoners in large part because of ongoing litigation around its method of execution. Garland notes that a "search for the painless, problem-free execution"⁸² has been more prevalent in the United States than in other countries. This search has resulted in a strict regulation of executions by lethal injection, becoming a quasi-medical process.

The modernization of the method used in executions may function as both *cause* and *effect* in the retention of the American death penalty. At first glance, executions by lethal injection can seem like being "put under"⁸³ for a medical procedure, appearing humane and

⁷⁷ "Executions by State and Year," *Death Penalty Information Center*, <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year>.

⁷⁸ "Executions by State and Year," *Death Penalty Information Center*, <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year>.

⁷⁹ William W. Berry III, "Unusual State Capital Punishments," *Florida Law Review* 72, no. 1 (2020): 33.

⁸⁰ "Executions by State and Year," *DPIC*.

⁸¹ David Garland, "Capital punishment and American culture," 351.

⁸² David Garland, *Peculiar Institution: America's death penalty in an age of abolition* (Oxford: OU Press, 2010): 111.

⁸³ Jonathan Yehuda, 2333

painless. Bienen highlights the irony in protocol, such as using sterile instruments and swabbing with alcohol before injecting the lethal chemicals.⁸⁴ Death penalty procedure in the United States generally consists of three drugs: firstly, a barbiturate to make the prisoner unconscious; secondly, a paralytic agent to asphyxiate and also prevent the prisoner from secreting fluids and thrashing on the table; thirdly and finally is potassium chloride, used to stop the prisoner's heart.⁸⁵

The medical nature and the lack of physical reaction from the prisoner (given that he or she is paralyzed) has made the idea of execution more 'palatable' for the public. A Gallup poll in 2004 found that 75% of Americans support lethal injection as a method of execution and believe it is not a cruel and unusual form of punishment.⁸⁶ The absence of external signs of pain, therefore, makes it difficult for the courts to repeal lethal injection on the basis of the Eighth Amendment, as was done with previous methods of execution (see *Campbell v. Wood*, *Fierro v. Gomez*, and *Dawson v. State*).

Litigation over lethal injection has instead turned its focus to the risks of incorrect administration. Over the past decade, several Mississippi inmates have engaged with the state in a cycle of filing and losing appeals, specifically over its use of midazolam. Midazolam is currently the first step in Mississippi's execution procedure. Until 2012, Mississippi was using pentobarbital in accordance with state law's requirement of an "ultra-short-acting barbiturate."⁸⁷ However, its supply ran low when pharmaceutical companies began choking off execution

⁸⁴ Leigh Bienen, "Anomalies: Ritual and Language in Lethal Injection Regulations," *Fordham Urb. LJ* 35 (2008): 857.

⁸⁵ Jonathan Yehuda, 2332.

⁸⁶ Dennis Welch, "Lethal Injections: Cruel and Unusual Punishment?" *Gallup*, May 18, 2004, <http://www.gallup.com/poll/11716/Lethal-Injections-Cruel-Unusual-Punishment.aspx>.

⁸⁷ Associated Press, "Death penalty stalls in Mississippi," last updated October 9, 2016, <https://www.clarionledger.com/story/news/politics/2016/10/09/death-penalty-stalls-mississippi/91839484/>.

supplies; many drug companies have done so in recent years for either moral or business reasons.⁸⁸

Midazolam is not a barbiturate, and so the concern is that it would not properly render the prisoner unconscious and lead to pain later in the procedure. A series of botched executions around the U.S. in 2014 reported prisoners coughing, gasping for air, and moving during their executions.⁸⁹ This was the catalyst for the ongoing debate over midazolam's use, which Supreme Justice Court Sonia Sotomayor said is "the chemical equivalent of being burned at the stake."⁹⁰

Eddie Loden, who has been a Mississippi death row inmate since 2000, filed appeals over the painfulness of midazolam with both the Mississippi Supreme Court and also federal court. He, along with death row inmates across the U.S., is challenging the safety of execution drugs.⁹¹ Richard Jordan is the longest serving inmate on Mississippi death row at 37 years. He and Ricky Chase, on death row since 1990, have appealed to the Supreme Court to prevent Parchman state penitentiary from using an uncertified compounded pentobarbital or similar drugs in the three-drug protocol that they argue would cause "a tortuous death."⁹² They are ineligible to receive an execution date until these filings are handled.

Attorney Jim Craig, representative of the defendants, says their litigation attempts do not intend to overturn the death penalty in the state; they are only searching for a better method of

⁸⁸ Erik Eckholm, "Pfizer Blocks the Use of Its Drugs in Executions," *The New York Times*, May 13, 2016, <https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html>.

⁸⁹ Jeff Amy, "Mississippi justices reject challenges over execution drug," *AP News*, December 6, 2018, <https://apnews.com/52c4a0c5df064d94ba23a704b72d8b27>.

⁹⁰ *Glossip v. Gross* 576 US (2015) (Sotomayor, dissenting).

⁹¹ Jeff Amy, "Mississippi says it has execution drugs amid secrecy fight," *Clarion Ledger*, last updated August 16, 2017, <https://www.clarionledger.com/story/news/2017/08/16/mississippi-execution-drugs/573766001/>.

⁹² Patsy R. Brumfield, "Death row inmates claim win in case over lethal injection ingredients," *Mississippi Today*, September 2, 2016, <https://mississippitoday.org/2016/09/02/death-row-inmates-claim-win-in-case-over-lethal-injection-ingredients/>.

execution.⁹³ He argues that the particular use of midazolam is in violation of the Eighth Amendment and continues to file new appeals and seek rehearing each time the lawsuits are dismissed.

The legislature has tried to fight his challenges, even changing the Mississippi Code in 2017 through H.B. 638 to allow execution methods of poison gas, electrocution, and firing squad in case lethal injection were to be overturned by a court.⁹⁴ This is a safeguard by the legislature to guarantee that, regardless of the ruling from the lethal injection litigation, courts will not abolish the death penalty as a result. Lawmakers have given the corrections system many options for death penalty execution, including the militant and archaic-seeming practice of firing squad.

H.B. 638 sends a provocative message showing that the legislature is willing to take strong action to retain the death penalty. But in reality, it is an elaborate misdirection. The legislature's true intention was to relieve the anxieties of death penalty supporters and turn their focus away from the fact that the death penalty had not been enacted, at that point, for five years.

In the United States, the death penalty has taken on a unique importance, functioning as a cultural battlefield for other societal divisions. Kahan highlights several of these: "righteousness with tolerance, southernness and westernness with easternness, compassion for victims of crime with compassion for victims of social deprivation."⁹⁵ Mississippi's state government is staunchly conservative in an increasingly partisan America. It has an anti-federal legacy and stubbornly independent spirit stemming from its secession to join the Confederacy in 1861; the death penalty is one policy among many that lawmakers view as a rejection of current liberal interference from the federal level.

⁹³ Associated Press, "Death penalty stalls in Mississippi," *Clarion Ledger*, last updated October 9, 2016, <https://www.clarionledger.com/story/news/politics/2016/10/09/death-penalty-stalls-mississippi/91839484/>.

⁹⁴ MISS. CODE § 99-19-51 (2-5).

⁹⁵ Dan M. Kahan, "The secret ambition of deterrence," *Harvard Law Review* 113 (1999): 450.

Given the precedent set in 2008 by *Glossip v. Gross*,⁹⁶ it seems unlikely that Chase’s, Jordan’s and Loden’s challenge against midazolam will be successful. The petitioners in that Kentucky case argued that the risk of incorrect administration was too great with the first drug in their three-drug sequence, sodium thiopental.⁹⁷ The Supreme Court upheld the protocol, and Chief Justice Roberts wrote in his plurality that “a condemned prisoner cannot successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative.”⁹⁸

Whether they be successful or not, the end result of Craig’s and the defendants’ litigation is a stalling of the death penalty in Mississippi. U.S. District Judge Henry T. Wingate issued a preliminary injunction to freeze executions, but even when judges lifted the freeze in 2017, the executions did not resume.⁹⁹ The Mississippi Supreme Court has yet to set any execution dates, despite the fact that no judge has specifically barred them.¹⁰⁰ It remains very unlikely that the state would schedule an execution before the three-drug protocol debate over midazolam is resolved, but elites like Jim Craig are continuing to fight to keep the litigations open and, in effect, creating *de facto* abolition.

B. Death Sentences

The second finding which points to a *de facto* abolition is the significant decrease in the number of death sentences Mississippi imposes. As previously stated, there have been zero executions in Mississippi since 2012, and in those years it has only imposed nine death

⁹⁶ *Glossip v. Gross* 576 US (2015).

⁹⁷ Jonathan Yehuda, 2346.

⁹⁸ Jonathan Yehuda, 2347.

⁹⁹ Associated Press, “Death penalty stalls in Mississippi,” *Clarion Ledger*, last updated October 9, 2016, <https://www.clarionledger.com/story/news/politics/2016/10/09/death-penalty-stalls-mississippi/91839484/>.

¹⁰⁰ Jeff Amy, “Execution plans can be kept secret Mississippi Supreme Court says,” *Clarion Ledger*, last updated April 14, 2017, <https://www.clarionledger.com/story/news/2017/04/13/miss-supreme-court-execution-plans-can-kept-secret/100446916/>.

sentences.¹⁰¹ This is a dramatic decrease from previous years where, for comparison, nine death sentences were given in 1996 alone.¹⁰² Two death sentences were given in 2018, which represents half of 1% of the four hundred twenty homicides reported by the state during that year.¹⁰³ Mississippi continues to impose a declining number of death sentences. The same phenomenon was seen in France in the years before it abolished the death penalty, again suggesting that Mississippi is on a similar trajectory toward abolition. However, there are important differences between criminal justice institutions in France and in the U.S., and these contribute to the difficulty of *de jure* abolition in Mississippi.

In France, the trial serves a more inquisitorial function, where the primary purpose is “truth-seeking.”¹⁰⁴ Whereas the American system focuses on established rules and procedural due process and blind justice, the French system has a very individualized justice. The judge wants to apply a sentence that is appropriate in regard to the defendant’s childhood experiences, and mental wellbeing.¹⁰⁵

Judges are given more discretion in France, where citizens are less wary of state power. They are not elected by the people, but rather appointed based on knowledge and skill. At the *Cours d’Assises*, three active judges aid the six jurors in sentencing those charged with murder. While it seems obvious to the French, merit selection performed by the state is a more contested notion in Mississippi. Americans tend to be distrustful of a powerful central government. This

¹⁰¹ “Death Sentences in the United States Since 1977,” *Death Penalty Information Center*, <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year>.

¹⁰² *Ibid.*

¹⁰³ Courtney Ann Jackson, “Mississippi homicides keeping pace with 2018’s record-breaking numbers,” *WLOX*, last updated March 4, 2019, <https://www.wlox.com/2019/03/05/mississippi-homicides-keeping-pace-with-s-record-breaking-numbers/>.

¹⁰⁴ Renée Lettow Lerner, “The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d’Assises,” *U. Ill. L. Rev.* (2001): 4.

¹⁰⁵ For further reading on differences within trials, see *Lerner and Mckillop*

anti-statism, referenced by Lipset and Marks, has become a salient belief, particularly within the American Republican Party. In his 1981 inaugural speech, President Ronald Reagan stressed that “government is not the solution to our problem; government is the problem,” and warned Americans against believing that “government by an elite group is superior.”¹⁰⁶ Current President Donald Trump echoes that disdain for a political system comprised of cultural elites, repeatedly calling on the American people to “drain the swamp”¹⁰⁷ of Washington, D.C.

Anti-statism and anti-elitism affect judicial selection in the United States. From many American judges’ and attorneys’ perspectives, like Mississippi prosecutor Carroll Rhodes, “It’s always best to let everyday ordinary citizens decide than an elitist group.”¹⁰⁸ American judges are elected, and the subsequent importance of judicial elections puts candidates at risk for campaign misconduct. Judges “must ask for votes and campaign funds from supporters, many of whom may appear before them in a court of law.”¹⁰⁹

Historically, Mississippi citizens have voted for judges who have then proven themselves unable to perform the job. For example, Judge Ellis Willard of Sharkey County was removed for a host of misdeeds: dismissing cases, wrongfully suspending fines, using a local pawn shop to conduct court business, and providing prospective defendants with free legal advice.¹¹⁰ Thorough legal training is not required, and as the *Clarion Ledger* points out, Justice Court Judges are only required to have a high school diploma.¹¹¹

¹⁰⁶ Pres. Ronald Reagan, “Inaugural Address” (speech, Washington D.C., January 20, 1981).

¹⁰⁷ Trevor Hughes, “Trump calls to ‘drain the swamp’ of Washington,” *USA Today*, October 18, 2016, <https://www.usatoday.com/story/news/politics/elections/2016/2016/10/18/donald-trump-rally-colorado-springs-ethics-lobbying-limitations/92377656/>.

¹⁰⁸ “Mississippi Judicial Elections,” *Brennan Center for Justice*, (2004): 4.

¹⁰⁹ *Ibid.*, 1.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

Like judges, American district attorneys are also elected, and prosecutors in the United States have a large amount of discretion in the way they pursue cases. The law often provides a range of punishments available for a crime, and prosecutors are allowed to try the defendant in any manner from the minimum punishment to the maximum, and they are not required to justify their reasoning for choosing one or the other. Death penalty cases are subsequently tried most often only in counties with more aggressive prosecutors. Death sentencing data shows that current Mississippi death row inmates received their sentences in twenty-eight different counties, which represents only 34% of the total number of counties in Mississippi.¹¹² Prosecutors in the majority of counties are not pursuing the death penalty; those who are, therefore, are considered unusual when looking at the state as a whole. Doug Evans, the District Attorney of Mississippi's Fifth Circuit Court, is one such prosecutor. He tried one man, Curtis Flowers, six individual times over the same 1996 murder in Winona, and he pursued the death penalty every time.

Despite aggressive prosecutors like Evans, capital punishment has become a rare choice in Mississippi by prosecutors and judges of defendants convicted with capital murder. In January of 2020, even Doug Evans recused himself from trying the Flowers case a seventh time.¹¹³ Now, prosecutors in a majority of cases instead offer plea bargains for life without parole.

A recent example from 2020 comes from Lafayette County on a 2018 capital murder charge.¹¹⁴ The defendant has an extensive criminal history over a span of ten years as well as three co-defendants who are willing to testify against him, which make this a would-be typical death-penalty case. Despite these factors, the Assistant District Attorney decided, without

¹¹² William W. Berry III, "Unusual State Capital Punishments," *Florida Law Review* 72, no. 1 (2020): 33.

¹¹³ Parker Yesko, "Evans quits the case," *APM Reports*, January 6, 2020, <https://www.apmreports.org/story/2020/01/06/doug-evans-recusal-curtis-flowers-case>.

¹¹⁴ Alyssa Schnugg, "Two of Four Charged in Abbeville Man's Murder Will Serve 28 Years in Prison," *Hotty Toddy News*, April 30, 2019, <https://hottytoddy.com/2019/04/30/two-of-four-charged-in-abbeville-mans-murder-will-serve-28-years-in-prison/>.

pressure from the defendant's counsel, to no longer pursue the death penalty. It remains a capital murder charge, but the prosecutor is seeking life without parole as punishment instead of the death penalty. This saves the prosecutor from the extra time and diligence required to convict a defendant in a capital murder trial and allows them to use that time pursuing other cases. Rather than imposing a death sentence, pursuing life without parole is a trend seen from prosecutors throughout the state.

C. Bankruptcy

Mississippi cannot afford to execute its prisoners on death row without bankrupting its already-failing corrections system. While the U.S. prison system supervises a daily average of 6.5 million individuals, fewer than 160 offenders receive a capital sentence each year. In Garland's words, the death penalty has both "a miniscule impact and disproportionately high costs."¹¹⁵ There is no widespread consensus or data to prove that that capital punishment is an effective crime deterrent, and yet it costs tax payers significantly more than life in prison.

Seeking the death penalty is simply more expensive. A 2017 study for the Oklahoma Death Penalty Review Commission compared the cost difference between first-degree murder cases in which the death penalty is sought, and in similar cases in which it is not sought, between 2004 and 2010. They found that the estimated average per-case difference in total costs when the death penalty is sought is approximately \$110,000.¹¹⁶ They then reviewed fifteen other state-level studies that were conducted between 2000 and 2016 and found that "on average, it costs approximately \$700,000 more in case-level costs to seek the death penalty than to not."¹¹⁷ In

¹¹⁵ David Garland, "Capital punishment and American culture," 361.

¹¹⁶ The Oklahoma Death Penalty Review Commission, *An Analysis of the Economic Costs of Capital Punishment in Oklahoma*, (2017), <https://files.deathpenaltyinfo.org/legacy/files/pdf/Report-of-the-OK-Death-Penalty-Review-April-2017-a1b.pdf>.

¹¹⁷ Ibid.

2012, University of Mississippi law professor Valena Beety contacted every Mississippi county with an inmate on death row; she found that each trial cost at least \$50,000 and much higher the majority of the time.¹¹⁸ County budgets in Mississippi generally cannot afford to hold trials that seek the death penalty. Due to a lack of electronic records, specific numbers are often difficult to find. This thesis instead supports the finding through anecdotal data.

One such county is Quitman, Mississippi, which convicted two men, Anthony Carr and Robert Simon Jr., of capital murder and sentenced them to the death penalty in 1990.¹¹⁹ The Parker family had come home while the two were burglarizing their home, and Carr and Simon shot them multiple times. They raped the nine-year-old daughter and cut off the father's, Carl's, finger to steal his wedding ring. Leaving the bodies inside, Carr and Simon burnt the house down. In order to pay for their defenses and appeals, Quitman County was forced to raise taxes three years in a row and borrow \$150,000 for their defenses, in spite of the fact that the two had already pleaded guilty.¹²⁰ The pair remains on death row today.

Carr v. State and *Simon v. State* weaken the pro-death penalty argument that executions provide closure for a victim's family. Not only have the cases dragged on for years, but also the victims' family members are now dying from natural causes. Dean Parker, the son of Carl, died October 31, 2016. Even the claim that an execution provides closure to the community at large is weak. It is an entirely new generation of citizens now living in Quitman County who have been paying the taxes with which the lawyers are prosecuting the case. In 2016, this Mississippi Delta county's population was 7,634 with a poverty rate of 37.5%.¹²¹ The benefit of 'closure' that

¹¹⁸ Parker Yesko, "Execution in Mississippi: Who lives and who dies," *APM Reports*, July 3, 2018, <https://www.apmreports.org/story/2018/07/03/execution-in-mississippi-who-lives-and-who-dies>.

¹¹⁹ Jimmie E. Gates, "Inmate could face execution again," *Clarion-Ledger*, last updated June 9, 2015, <https://www.clarionledger.com/story/news/2015/06/09/judge-death-row-inmate-faking-memory-loss/28775741/>.

¹²⁰ *Ibid.*

¹²¹ "Quitman County, Mississippi," *United States Census Bureau*,

citizens would receive from the two executions does not outweigh the financial and emotional burden of keeping the case ongoing.

The Mississippi Department of Corrections, hereafter referred to as MDOC, is not in a condition to perform executions. MDOC's budget has consistently been cut by the legislature in recent years. Despite the cuts, MDOC continues to imprison people at a high rate, the third-highest in the country,¹²² and because of Mississippi's habitual laws, more than one-third of those imprisoned are serving sentences of twenty years or longer.¹²³ The underfunding has led to high rates of unemployment within the prison system and thus an inability to keep the prisons safe. Things reached a breaking point in late December 2019 and early 2020, and the system is now experiencing a full civil rights crisis. Between December 29, 2019, and February 26, 2020, nineteen prisoners died within the MDOC system. The men on death row have been forced to go on lockdown, even though they are not directly linked with the chaotic incidents happening inside Parchman's Unit 29, where death row prisoners are held. Death row prisoners have experienced days without medication, including psychotropic drugs, and meals gone by without being fed.¹²⁴ They also lack adequate access to power and a proper sanitation system.¹²⁵ Unit 29 has been deemed "unsafe" in its health inspection.¹²⁶ The U.S. Department of Justice is currently investigating MDOC on the basis of human rights and yet, MDOC still receives less

¹²² FWD.us, *We All Pay: Mississippi's Harmful Habitual Laws Hold Us All Back*, (2019), <https://www.fwd.us/news/we-all-pay/>.

¹²³ Ibid.

¹²⁴ Michelle Liu, "Mississippi's death row inmates weren't involved with recent prison violence, but are suffering because of it, lawyers say," *Mississippi Today*, January 20, 2020, <https://mississippitoday.org/2020/01/20/mississippis-death-row-inmates-werent-involved-with-recent-prison-violence-but-are-suffering-because-of-it-lawyers-say/>.

¹²⁵ Ibid.

¹²⁶ Alissa Zhu, "Parchman prison Unit 29 deemed unsafe. Where will 625 Mississippi inmates go?" *Clarion-Ledger*, last updated January 15, 2020, <https://www.clarionledger.com/story/news/2020/01/15/parchman-unit-29-found-unsafe-mississippi-prison-inmates/4465269002/>.

money than it requests from the state each year.¹²⁷ The legislature is sending a clear signal that the prison system is not a priority within the state's budget. If Mississippi cannot afford to keep its prison units open or its prisoners alive, it certainly will not be able to devote the necessary amount of taxpayer money or proper departmental attention to perform an execution.

D. Public Discourse

The last vestige of the American death penalty is its presence and continued symbolic role within the national conversation. Nonetheless, in recent years, executions have been dropped from Mississippi's public discourse, showing further progress in the trajectory toward *de facto* abolition.

Despite the media attention and public outcry against the crisis within the Mississippi Department of Corrections, capital punishment has yet to appear on the 2020 Mississippi legislative agenda. The state wants to draw attention away from its flawed handling of prisoners, so scheduling their executions under circumstances even remotely questionable would be a politically disastrous move. Mississippi judges and politicians have likely decided it is not worth the risk of public backlash, and so have quietly postponed the action of a litigation battle over lethal injection. This decision is made because it is personally advantageous and, frankly, makes the elites' jobs easier. Mississippian elites have not intentionally united to form a consensus like the French had, but by each individual's reluctance to engage with the death penalty, it has slowly faded from public life.

It is no longer politically necessary for the Mississippi Republican Party to stress itself as the "tough-on-crime" party or the party of "law-and-order." Spikes in numbers of death penalty

¹²⁷ Kayleigh Skinner and Adam Ganucheau, "Prison brass warned of dangerous conditions a year ago, but lawmakers did not act," *Mississippi Today*, January 6, 2020, <https://mississippitoday.org/2020/01/06/prison-brass-warned-of-dangerous-conditions-a-year-ago-but-lawmakers-did-not-act/>.

executions within America have historically correlated to political election cycles. This has been true in Mississippi. Since 2000, all years with more than one execution have coincided with state elections: gubernatorial, senatorial, or for the state legislature.

*Figure 1: Total Number of Executions in Mississippi*¹²⁸

<i>Year</i>	<i>Number of Executions</i>
2000	0
2001	0
2002	2
2003	0
2004	0
2005	1
2006	1
2007	0
2008	2
2009	0
2010	3
2011	2
2012	6
2013	0
2014	0
2015	0
2016	0
2017	0
2018	0
2019	0
Total	17

In 2012, Mississippi held election races for a U.S. senator, four congressmen for the U.S. House of Representatives, four judges for the Mississippi Supreme Court, and a Court of Appeals judge

¹²⁸ “Executions by State and Year,” *Death Penalty Information Center*, <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year>.

in its second district.¹²⁹ During that year, it also executed six individuals. Executions can be scheduled strategically to garner public support, especially during judicial elections.

Even so, during the 2016 general election and the particularly contentious elections for senator in 2018 and governor in 2019, candidates did not make reimplementing of executions part of their platforms. Jim Hood, who was the acting Attorney General during his 2019 race for governor, did not invoke executions in attempt to draw supporters. Candidates are no longer stressing executions because they are less of a priority to lawmakers and the public. Less attention has contributed to the quiet decline in the number of death penalty executions within the state, and this has gone largely unchallenged by Mississippians, who are knowingly or unknowingly contributing to *de facto* abolition.

VI. WHY (AND HOW) MISSISSIPPI IS ABOLISHING THE DEATH PENALTY

While this thesis argues that the intersection of cultural, political, and economic realities in Mississippi are leading to its *de facto* abolition of the death penalty, they have simultaneously entrenched its *de jure* retention. This is because of what Andrew Hammel calls the “stabilization effect,” meaning that status quo is difficult to change and thus reinforces itself.¹³⁰ Through its continued existence, the death penalty becomes increasingly viewed by the public as a legitimate form of punishment. Hammel argues that death penalty abolition therefore requires two factors be present: firstly, “a unified group of elites who oppose the death penalty,” and also “a centralized political system that can allow for the top-down abolition experience in Europe.”¹³¹

¹²⁹ “Sample Official Election Ballot: 2012 General Election,” *State of Mississippi*, November 6, 2012, <https://www.sos.ms.gov/links/elections/home/tab1/GE12%20Sample%20Ballot%209%2012%202012.pdf>

¹³⁰ Andrew Hammel, *Ending the death penalty: the European experience in global perspective* (Hampshire: Palgrave Macmillan, 2010): 36.

¹³¹ Andrew Hammel, *Ending the death penalty: the European experience in global perspective* (Hampshire: Palgrave Macmillan, 2010): 169-178.

France had both of these requirements before reaching *de jure* abolition; Mississippi, however, does not currently have either.

In France, the choice to abolish the death penalty was intentional. It was a concentrated effort by the cultural elites that deliberately went against the will of the public. France was able to do this because of its more centralized, less populist judicial and political systems. In Mississippi, however, the process toward abolition has been the result of individual elites' choices, especially prosecutors. The vast majority of prosecutors in Mississippi now defer to life imprisonment without parole instead of pursuing the death penalty. Because of the subtlety and diffuse nature of their choices, the public has not taken notice and has unintentionally authorized a suspension of executions. The number of death sentences and executions have decreased significantly, just as they did in France's final years of capital punishment, but it is the consequence of personal action, rather than a collective action.

In accordance with Hammel's first requirement, Mississippi's prosecutors, judges, and lawmakers will have to unify in an explicit effort to abolish the death penalty. In France, lawmakers were able to vote on their moral consciousness, outside of party. Within America's highly polarized partisan climate, the death penalty in Mississippi continues to function as a vestige of anti-elitism and anti-statism, and this renders unification unlikely. Mississippi does not currently have an equivalent to the French intellectuals' theoretical arguments and body of pro-abolition writings. Perhaps the presence of such a group, along with pressure from a portion of the public, could influence Mississippi's elites to pursue *de jure* abolition.

Hammel's second requirement is a centralized political system that can provide top-down abolition. France has a much more centralized political system than the United States', and this has been a barrier to *de jure* abolition in Mississippi. Berry points out that American federalism

and its current political climate make it exceedingly difficult to abolish the death penalty through legislation, as was done in the European context.¹³² A top-down abolition remains unlikely in the United States, as it would require a constitutional amendment to be made. This action at the federal level would also have to be supported by at least three-fourths of individual states.¹³³ As aforementioned, half of the states have still not abolished the death penalty within their own states, so this possibility remains unlikely.

Reinstatement of the federal death penalty in 1976 with *Gregg* was an “unintended consequence”¹³⁴ of the strategies used by NAACP Legal Defense and Educational Fund and the ACLU four years earlier. They chose to fight the death penalty through the courts, rather than the legislature. Their primary argument was procedural inequality, and capital punishment cases have continued to be litigated this way, as proven in the challenges over lethal injection. Consequently, the courts will very likely be the arena in which the U.S., or Mississippi individually, decides to retain or abolish the death penalty.

All significant rulings on capital punishment since 1972 have focused primarily on procedure, and not on the ethics or social impact of putting offenders to death. In the 2002 case *Atkins v. Virginia*,¹³⁵ Atkins’ defense argued that mentally disabled defendants would be “less able to give meaningful assistance to their counsel...and their demeanor may create an unwarranted impression of lack of remorse for their crimes.”¹³⁶ The attorneys did not try to make a moral argument of the wrongfulness of executing those with a mental handicap. Likewise, in

¹³² William W. Berry III, “Book Review – The European Prescription for Ending the Death Penalty.” 2011 *Wisconsin Law Review* (2011): 1015-6.

¹³³ U.S. CONST. art. V.

¹³⁴ David Garland, “Capital punishment and American culture,” 358.

¹³⁵ *Atkins v. Virginia* 536 US 304 (2002).

¹³⁶ *Ibid*, (320-321)

2005 with *Roper v. Simmons*,¹³⁷ the defense argued that juries deciding on juvenile cases might not be able to mitigate “arguments based on youth as a matter of . . . immaturity, vulnerability, and lack of true depravity,”¹³⁸ instead of stressing the possibility of young people to rehabilitate. This precedent set on proper procedure and equal application has directly shaped the litigations over lethal injection in Mississippi. Elites in the state who are challenging the death penalty, such as Jim Craig, do so by devoting their time and energy to debates over the effectiveness of midazolam, instead of questioning the larger application of the death penalty, in the way that Robert Badinter did.

The absence of Hammel’s two requirements would seem to indicate that death penalty abolition in Mississippi is impossible. This thesis acknowledges that the state’s stagnant political nature and its lack of attention to the death penalty are impediments to *de jure* abolition for the foreseeable future. Cultural elites in France based their decisions on the death penalty in the correct moral choice; political elites in Mississippi are basing their decisions on the death penalty in what makes economic sense and is politically advantageous. Ironically, the result of these decisions is the same. The government is no longer executing its prisoners.

VII. CONCLUSION

Scholars have often compared European abolition of the death penalty with American retention in order to make a determinative argument about American culture. This level of comparison, however, is inadequate as it does not allow for America’s political and cultural variation at the state level. When comparing France’s process toward death penalty abolition with Mississippi’s use of the death penalty specifically, it appears as though Mississippi is following the same trajectory toward abolition that France did four decades earlier. Four key

¹³⁷ *Roper v. Simmons* 543 US 551 (2005).

¹³⁸ *Ibid*, 573.

findings support this observation: Mississippi is not executing its death-row prisoners, Mississippi has significantly decreased the number of death sentences it imposes, resumption of executions would bankrupt the state's judicial system, and state executions are no longer part of its public discourse.

Despite some scholars attributing America's death penalty retention to long-existing primordial differences, historically, France and the United States were on the same trajectory. Due to a specific set of legal and political decisions during the 20th century, American abolition fell behind Europe's. The American death penalty took on a political significance in a way that it did not in other countries, and this made it an important symbol of American culture and identity. This thesis finds that, at least in the context of Mississippi, executions no longer hold that level of significance or symbolism in public life, and so the state is once again following the trajectory toward abolition. Although *de jure* abolition remains distant in its current political climate, *de facto* death penalty abolition, in every manner but the law, appears imminent.

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CODE PÉNAL

CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE

MISSISSIPPI CODE

U.S. CONSTITUTION

Appendix A: Mississippi Code § 97-3-19(2) (a-k)

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

- (a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term “peace officer” means any state or federal law enforcement officer, including, but not limited to, a federal park ranger, the sheriff of or police officer of a city or town, a conservation officer, a parole officer, a judge, senior status judge, special judge, district attorney, legal assistant to a district attorney, county prosecuting attorney or any other court official, an agent of the Alcoholic Beverage Control Division of the Department of Revenue, an agent of the Bureau of Narcotics, personnel of the Mississippi Highway Patrol, and the employees of the Department of Corrections who are designated as peace officers by the Commissioner of Corrections pursuant to Section 47-5-54, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;
- (b) Murder which is perpetrated by a person who is under sentence of life imprisonment;
- (c) Murder which is perpetrated by use or detonation of a bomb or explosive device;
- (d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;
- (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;
- (f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony;
- (g) Murder which is perpetrated on educational property as defined in Section 97-37-17;
- (h) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official;
- (i) Murder of three (3) or more persons who are killed incident to one (1) act, scheme, course of conduct or criminal episode;
- (j) Murder of more than three (3) persons within a three-year period;
- (k) Murder which is perpetrated by the killing of a person who: (i) is or would be a witness for the state or federal government in a criminal trial; (ii) is a confidential informant for any agency of the state or federal government; or (iii) is any other person who was cooperating or assisting the state or federal government or was suspected of cooperation or assistance to the state or federal government, if the motive for the killing was either the person’s status as a witness, potential witness or informant, or was to prevent the cooperation or assistance to the prosecution. It shall not be a defense to a killing under this subsection that the defendant erroneously suspected or believed the victim to have cooperated or assisted the state or federal government.

Appendix B: Code Pénal

Titre II: Des atteintes à la personne humaine,

Chapitre Ier: Des atteintes à la vie de la personne

Section 1: Des atteintes volontaires à la vie

Article 221-1

Le fait de donner volontairement la mort à autrui constitue un meurtre. Il est puni de trente ans de réclusion criminelle.

Article 221-2

Le meurtre qui précède, accompagne ou suit un autre crime est puni de la réclusion criminelle à perpétuité.

Code pénal - Dernière modification le 01 janvier 2020 - Document généré le 04 février 2020 Copyright (C) 2007-2020 Legifrance

Le meurtre qui a pour objet soit de préparer ou de faciliter un délit, soit de favoriser la fuite ou d'assurer l'impunité de l'auteur ou du complice d'un délit est puni de la réclusion criminelle à perpétuité.

Les deux premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables aux infractions prévues par le présent article.

Article 221-3

Le meurtre commis avec préméditation ou guet-apens constitue un assassinat. Il est puni de la réclusion criminelle à perpétuité.

Les deux premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables à l'infraction prévue par le présent article. Toutefois, lorsque la victime est un mineur de quinze ans et que l'assassinat est précédé ou accompagné d'un viol, de tortures ou d'actes de barbarie ou lorsque l'assassinat a été commis sur un magistrat, un fonctionnaire de la police nationale, un militaire de la gendarmerie, un membre du personnel de l'administration pénitentiaire ou toute autre personne dépositaire de l'autorité publique, à l'occasion de l'exercice ou en raison de ses fonctions, la cour d'assises peut, par décision spéciale, soit porter la période

de sûreté jusqu'à trente ans, soit, si elle prononce la réclusion criminelle à perpétuité, décider qu'aucune des mesures énumérées à l'article 132-23 ne pourra être accordée au condamné ; en cas de commutation de la peine, et sauf si le décret de grâce en dispose autrement, la période de sûreté est alors égale à la durée de la peine résultant de la mesure de grâce.

Article 221-4

Le meurtre est puni de la réclusion criminelle à perpétuité lorsqu'il est commis :

1° Sur un mineur de quinze ans ;

2° Sur un ascendant légitime ou naturel ou sur les père ou mère adoptifs ;

3° Sur une personne dont la particulière vulnérabilité, due à son âge, à une maladie, à une infirmité, à une déficience physique ou psychique ou à un état de grossesse, est apparente ou connue de son auteur ;

4° Sur un magistrat, un juré, un avocat, un officier public ou ministériel, un militaire de la gendarmerie nationale, un fonctionnaire de la police nationale, des douanes, de l'administration pénitentiaire ou toute autre personne dépositaire de l'autorité publique, un sapeur-pompier professionnel ou volontaire, un gardien assermenté d'immeubles ou de groupes d'immeubles ou un agent exerçant pour le compte d'un bailleur des fonctions de gardiennage ou de surveillance des immeubles à usage d'habitation en application de l'article L. 271-1 du code de la sécurité intérieure, dans l'exercice ou du fait de ses fonctions, lorsque la qualité de la victime est apparente ou connue de l'auteur ;

4° bis Sur un enseignant ou tout membre des personnels travaillant dans les établissements d'enseignement scolaire, sur un agent d'un exploitant de réseau de transport public de voyageurs ou toute personne chargée d'une mission de service public, ainsi que sur un professionnel de santé, dans l'exercice ou du fait de ses fonctions, lorsque la qualité de la victime est apparente ou connue de l'auteur ;

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4° ter Sur le conjoint, les ascendants ou les descendants en ligne directe ou sur toute autre personne vivant habituellement au domicile des personnes mentionnées aux 4° et 4° bis, en raison des fonctions exercées par ces dernières ;

5° Sur un témoin, une victime ou une partie civile, soit pour l'empêcher de dénoncer les faits, de porter plainte ou de déposer en justice, soit en raison de sa dénonciation, de sa plainte ou de sa déposition ;

6° et 7° (abrogés)

8° Par plusieurs personnes agissant en bande organisée ;

9° Par le conjoint ou le concubin de la victime ou le partenaire lié à la victime par un pacte civil de solidarité ;

10° Contre une personne en raison de son refus de contracter un mariage ou de conclure une union.

Les deux premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables aux infractions prévues par le présent article. Toutefois, lorsque la victime est un mineur de quinze ans et que le meurtre

est précédé ou accompagné d'un viol, de tortures ou d'actes de barbarie ou lorsque le meurtre a été commis en bande organisée sur un magistrat, un fonctionnaire de la police nationale, un militaire de la gendarmerie, un membre du personnel de l'administration pénitentiaire ou toute autre personne dépositaire de l'autorité publique, à l'occasion de l'exercice ou en raison de ses fonctions, la cour d'assises peut, par décision spéciale, soit porter la période de sûreté jusqu'à trente ans, soit, si elle prononce la réclusion criminelle à perpétuité, décider qu'aucune des mesures énumérées à l'article 132-23 ne pourra être accordée au condamné ; en cas

de commutation de la peine, et sauf si le décret de grâce en dispose autrement, la période de sûreté est alors égale à la durée de la peine résultant de la mesure de grâce.