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The McDonaldized Death Penalty: Neoliberalism, Governmentality, and American Capital Punishment

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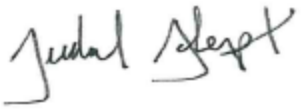

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ABSTRACT

An extensive literature examines the modern era (1976-present day) of American capital punishment. Some has focused on why the institution persists despite abolition from the rest of the Western world. An example of this is Steiker and Steiker (2016) who argue that judicial rationalization of capital law has helped to legitimate and thus sustain the modern death penalty. However, no work attempts to understand capital punishment or its persistence in America in regards to neoliberalism. To address this void in understanding, I conceptualize Ritzer's four tenets of McDonaldization (predictability, calculability, efficiency, control) as a representation of market rationality, which neoliberalism seeks to insert into various societal spheres (including penality). I examine modern era developments in capital punishment in the United States through the contextual framework of McDonaldization to understand how McDonaldization has served to legitimate the institution. My analysis suggests a transition of the neoliberalized death penalty in the direction of government of government, or what Dean (2010), drawing on Foucault's treatment of governmentality, calls reflexive government.

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Chapter 1

Introduction

There has been a wealth of literature written about American capital punishment. Much of the work, such as that of Banner (2003) or Paternoster et al. (2007), has focused on the history of the institution. Some more recent work by Steiker and Steiker (2014, 2016) has focused on the rationalization of the death penalty, and the legitimating effects that come from it. Despite all that has been written, no one has applied Ritzer's (2013) concept of McDonaldization, or more broadly neoliberal theory, as a contextual theoretical framework for understanding modern capital punishment in the United States. Ritzer (2013) defines McDonaldization as "the process by which the principles of the fast-food restaurant are coming to dominate more and more sectors of American society as well as the rest of the world" (p. 1). Briefly, neoliberalism is, as the name suggests, the "new" form of liberalism which can broadly be said to privilege the free market and individual freedom over everything else. Of course, as I say this is a broad definition, as there are many variations within neoliberalism, and contradictions in theory and practice (Harvey, 2005). The part of neoliberalism that I am most concerned with, and will discuss at greater length later, is its tendency to insert market rationality into numerous spheres of society (Harvey, 2005). The reason I am combining both neoliberalism and McDonaldization in my analysis is because I argue that the four tenets of the latter (predictability, calculability, efficiency, control) are a representation of market rationality.

The importance of the analysis that I am undertaking is that it can help in understanding the issues that surround modern capital punishment, as well as how capital punishment is legitimated. As I mentioned, there has been much written about capital punishment, a large portion of which is concerned with the issues or problems that plague the system. Recent work by Steiker and Steiker (2014, 2016) has focused on the problems that have arisen from the complex decisions of the Supreme Court which have dealt with capital law. They have also explored how the appearance of strict, rationalized regulation has been a legitimating agent that has helped the death penalty to continue on in America. However, I posit that there is a gap in our current understanding of the issues and legitimating forces that exist within capital punishment, and that my analysis offers a new way to expand the current knowledge-base that surrounds the death penalty.

The reason I argue this is, firstly, McDonaldization itself is a legitimating force. This is something which Ritzer (2013) hints at, but does not tread into in-depth. However, it is obvious by understanding how McDonaldization operates that it has the ability to reify. An example of this would be the fast food industry, which is objectively harmful to society, yet which is one of the most successful business sectors in the world, and which has become ingrained within our society. As Ritzer (2013) notes, people long for the four tenets of McDonaldization in their everyday lives, and are willing to overlook numerous issues (or "irrationalities"), such as ill health, in order to have them. Secondly, McDonaldization can provide a better understanding of the issues within capital punishment through the irrationality of rationality. The irrationality of rationality

is defined broadly as “a label for many of the negative aspects of McDonaldization” (Ritzer, 2013, p. 123). Ritzer (2013) acknowledges the dialectical nature of McDonaldization and rationalization in general when he mentions that “irrationality can be seen as the opposite of rationality” (p. 123). By acknowledging the dialectic inherent in rationalization, we can understand that McDonaldization will inevitably produce irrationalities, and hence reproduce itself in an effort to address them. We might also say that the more rationalization a system is subject to, the more irrationalities that will manifest. In terms of the death penalty, the increasing regulation and rationalization that it is subject to will result in more irrationalities popping up over time. With these comes a reproduction of rationalities.

There is a good deal of literature concerning neoliberal theory that is available. I have chosen to rely mainly two sources which I feel provide adequate accounts of neoliberalism, and do so from different angles. In the second chapter, I draw much from Harvey’s (2005) *A Brief History of Neoliberalism*, which as the name suggests, accounts for the spread of neoliberalism around the globe, as well as why and how it is implemented. Harvey (2005) also discusses the theoretical side of neoliberalism and how it compares to its actual implementation in practice, pointing out certain contradictions between the two. The other main source I draw from is Dean’s (2010) *Governmentality: Power and Rule in Modern Society*, specifically the eighth chapter, which focuses on neoliberalism. Dean (2010) goes down a much different avenue than does Harvey (2005), as he addresses neoliberalism mostly from a theoretical basis. What Dean’s (2010) account best explains is the bio-politics of neoliberalism, as well as how it

reinforces its own legitimacy. While quite different in their approaches, together these works provide a solid, broad understanding of neoliberalism.

Also included along with the discussion on neoliberalism will be one concerning classical liberalism. This is important because, as we will see, the former borrows much of its ideology from the latter. And while one does not necesarrally have to be versed in classical liberalism to grasp neoliberalism, it certainly helps to understand where neoliberalism comes from in order to understand its underlying assumptions and motives. Here again I draw on Dean's (2010) work in *Governmentality* in order to lay out the theoretical basis of classical liberalism. The discussion is not intended to be an exhaustive examination of either classical or neoliberalism, but rather a brief overview of the tenets that they share, are most applicable to modern capital punishment, and that have intersectionality with McDonaldization.

The third chapter will then provide a condensed historical overview of capital punishment in the United States, both in terms of law and administration. In the neoliberal era, the Supreme Court has taken on the task of legislating capital punishment using highly technical language and procedure (Garland, 2010). However, such was not the case in the pre-modern era (the pre-*Furman* period) when capital punishment was rarely regulated in any way by the Court. Where instructions were given, their content was mostly at the full discretion of the presiding judge (Bohm, 2012). Hence, this paper will explore the pre-modern era to understand both the setting in which the Court's decisions concerning capital punishment in the 1970's took place, and how capital punishment was operating before *Furman v. Georgia* temporarily shut it

down. In addition, I will provide an account of the important cases and features of capital punishment in the modern era as well in order to lay the groundwork for the next chapter.

The fourth chapter is where I will fill in the gap that I argue exists by applying the four tenets of McDonaldization to the institution of modern American capital punishment. I draw on the work of Ritzer (2013) to first establish the bounds of McDonaldization, which as he demonstrates is pervasive in numerous areas of society. I will then explore both capital jurisprudence and administration during the modern era to show that McDonaldization is a useful heuristic for expanding upon current understanding of the American death penalty. Ritzer's (2013) concept of "the irrationality of rationality" (p. 15) will also be used to explore some of the issues that plague modern capital punishment. Specifically, in the irrationality section, I will analyze the problems, or "irrationalities", that have inevitably resulted from rationalization.

The final chapter will then examine the implications of my analysis. Ritzer (2013) says that McDonaldization is not likely to go away, but will instead spread to new areas. This is precisely because it spawns from the very irrationalities that it itself generates. This is similar to the view of Weber, whom Ritzer (2013) draws upon heavily. According to Feldman (1991), Weber thought that formal rationality, which is deeply ingrained in McDonaldization, would continue to overtake the West, then spread to the rest of the world (which it has). We have no reason then to think any different of the McDonaldized death penalty. Assuming the death penalty continues on in America, we can be sure it will not "DeMcDonaldize" and revert to an earlier state. Rather, it is much more likely

that the iron cage will close around it ever more, with more complex, technical regulation and rationalization. This is not to say that McDonaldization does not change. Ritzer (2013) explores a few ways McDonaldization adapts to changing climates, and we can expect the same of the death penalty. However, despite change, the four tenets and the principles of McDonaldization stay the same, as does the likelihood of it producing irrationalities, and further rationalities in response.

Chapter 2

Classical Liberal and Neoliberal Theory

This chapter will briefly explore some of the tenets of classical liberalism and neoliberalism. The discussion here is not meant to be an in depth analysis of either, as that is not necessary for this thesis. Rather, the point here is to lay the groundwork for an understanding of the tenets that are most applicable to developments in American capital punishment over the last 40 or so years.

Classical Liberalism

The roots of classical liberalism can be traced back to the archaic Greeks (Garland, 2010), when influential philosophes such as Plato, Socrates, and Aristotle were espousing radical ideas (for the time) that would be later picked back upon during the Enlightenment by some of the West's most renowned "modern" thinkers. However, in a general sense, during the Classical Age liberalism was a fringe line of thought that was, for the most part, confined to extra-governmental intellectuals. Liberalism was broadly a philosophical concept that did not yet penetrate society or greatly influence political or economic policy (Garland, 2010). The emergence of classical liberalism as a political force used to effect change did not occur until the Enlightenment, largely (but certainly not exclusively) during the latter half of the 18th century (Young, 1981). Also, as Young (1981) notes, it was not until this time that the tenets of classical liberalism were applied to issues such as criminality.

The tenet perhaps most well-known and foundational to classical liberalism is that of individual freedom. I say that this tenet is foundational because many of the other tenets discussed below are based upon it. Garland (2010) states that classical liberalism envisages a "social order that values individual freedom and autonomy" (p. 136). Importantly, the freedoms that individuals are entitled to cannot be granted by a despot, but are natural in their origin. The distinction matters because rights that are not granted by a despot cannot then be recanted by the despot. Considering that the Enlightenment was a reaction against the often cruel and repressive practices that European despots employed against their citizens, such as the notorious *Ancien Regime*, it is no surprise that the classical liberals who emerged during this era would favor the idea of rights that were bound up in nature.

Another central tenet of classical liberal theory is that of self-determination, which goes hand-in-hand with individual freedom. As Young (1981) writes, the classical liberal view of man is that of the "sovereign individual" (p. 6) who can decide upon where his interests lay, and thus ought to be free to rationally determine what ends to pursue for himself. Of course, the underlying assumption here is that humans are universally endowed with reason, and can act rationally when faced with a choice or obstacle. The notion that individuals are rational and can choose with course of action is best for them (and by extension those around them, such as family) leads into three other important tenets of classical liberalism: proportional justice, limited government, and market freedom.

As mentioned prior, the Enlightenment was a reaction to the often iron-fisted rule of European monarchies, one part of which was the lack of any real, rationalized apparatus of "justice". Instead, the accused were regularly given harsh sentences for relatively minor offences, and the death penalty was used often and as part of a gruesome spectacle as a state building exercise (Foucault, 1995). Seeking to guard against the arbitrary justice of the monarchs, classical liberals such as Bentham and Beccaria argued for justice that was proportional to the crime committed (Young, 1981). They also argued that justice should be ensconced in law so that the people, the rational beings, would know the consequences were they to transgress. Thus, classical liberal thought led to changes in the death penalty, as it began to be reserved for heinous crimes that were deemed proportionate (Paternoster et al, 2007). As Garland (2010) points out, the "early-modern death penalty had been phrased in the language of tradition, of religion, and of the divine right of kings" (p. 137). As classical liberalism took hold, the language shifted to the death penalty's utility for things like deterrence and crime control, which are still repeated today, at least at an ideological level. So, while classical liberalism narrowed the scope of the death penalty, it also provided an avenue for its continuation, provided that those in power could frame it within the proper justifications and rationales.

The liberal conception of government, which in many ways continues to dominate Western society to this day, is one of limited government interference. As was previously mentioned, this idea flows from the tenet of individual freedom, which holds that the individual is sovereign and thus entitled to certain rights. The job of the

government under classical liberalism then becomes to ensure the protection of these rights, and to properly restrain itself from encroaching upon them (Dean, 2010). One of the central notions of classical liberalism is of course the social contract, which assumes that society was formed as a pact, created at the consent of the governed so that they may be protected by civilized government (Young, 1981). The important assumptions here are that people are naturally evil, that these evils must be kept in check by government, and that government gets its legitimacy from the people. Thus, a government by the people should also be for the people, protecting the typical (but sometimes varying) classical liberal rights such as liberty, security, and property (Young, 1981).

The last tenet which will be discussed is the freedom of the market. As classical liberalism sees people as naturally free and rational, capable of making their own decisions, it holds to reason that the market ought to be open so that citizens will be able to exercise their rational choice in the best way possible. In other words, individuals "should self-govern as *responsible subjects"* (emphasis in original) (Dean, 2010, p. 136). Many classical liberals, such as Adam Smith, conceived of the free market economy as a natural order, separate from society that was bound to be reached and would constitute an end to history (Callinocos, 2011). However, classical liberalism also sees the need for regulation in order to provide for the rights of the lower classes, as well as to hold together "the fragility of the conflict-ridden unity of society" (Dean, 2010). This is evidenced by the conception of the welfare state by many Western nations.

There are numerous contradictions within classical liberalism, a discussion of which is outside of the scope of this chapter. However, the contradiction concerning limited government has particular relevance to modern capital punishment. Seeing as people are theoretically free under classical liberalism, and the government is supposed to be set up so as to ensure freedom, it would seem that people would be free to act as they wish, so long as they do not behave criminally. However, as Dean (2010) discusses, liberalism seeks to ensure that citizens practice freedom in a way that it beneficial to the norms and values that it itself holds to be essential. In other words, the practice of freedom requires certain guidelines and "regulating principle(s)" (Dean, 2010, p. 143) so as to ensure that citizens act accordingly. If too many citizens use their "freedom" to read Marx and decide upon a socialist revolution, then what good is the freedom from the perspective of liberalism? This controlled/structured choice-making is in contradiction with liberalism's notion of freedom, as it places limits upon it; it is also in tension with the notion of limited government, as the regulation of freedom can lead to expansive government. This contradiction is noticeable in modern capital punishment in the form of the rationalized juror instructions (which will be further explored in chapter four) meant to guide how capital jurors exercise their choice.

Neoliberalism

Neoliberalism can be described as the "dominant rationality of government" (Dean, 2010, p. 176) the world over. While classical liberalism was mainly confined to the Western world, neoliberalism, by hook or by crook, has branched out beyond the West to the likes of China, Chile, Slovakia, and numerous other nations (Harvey, 2005).

This means that, as Harvey (2005) discusses, there are varying forms of neoliberalism. For instance, neoliberalism was introduced to Chile via authoritarianism, while in the US it was "freely" elected into office. However, in spite of this variation, there are central tenets to neoliberalism that can be found wherever its hegemonic gaze has reached. The following discussion will briefly explore the main tenets of neoliberalism, focusing mainly on what we might call the Western tradition, as it is most applicable to American capital punishment.

First, it should be noted that neoliberal theory has quite a bit in common with classical liberalism. For instance, the belief in individual freedom is theoretically foundational to both. (Harvey, 2005). However, there are of course differences between the two in regards to what that freedom means, and how exactly it should manifest itself. We might say that neoliberalism goes further in its belief in individual freedom than does classical liberalism, as evidenced by Margaret Thatcher's famous quote "there is no such thing as society". As Dean (2010) discusses, this quotation is a reflection of the fact that neoliberalism greatly privileges individualism over social obligation. This is quite different from classical liberalism, which has a strong belief in civil society and collective responsibility (Dean, 2010). Also classical liberalism sees individual liberty as something that is natural, stemming either from a creator or from the natural sovereignty of the people (Dean, 2010). For neoliberalism though, freedom is "a technical instrument in the achievement of governmental purposes and objectives" (Dean, 2010, p. 182). In other words, freedom arises from processes of government, and is the result of a certain type of governmentality. As such, it serves governmental

purposes, and by implication, the interests of groups with greater control over government and economy.

Both classical liberalism and neoliberalism share the notion of responsible individual freedom, which was discussed earlier in this chapter; however, neoliberalism has a different conception of it. Given that neoliberalism holds freedom to be the result of governmentality, it would then seem that "free" choice no longer stems from reason, or at least not from reason alone. Put another way, reason does not operate in a vacuum. Neoliberalism does not recognize a "natural interest" (Dean, 2010, p. 186); it creates interest. Freedom becomes something that is "calculable and (can be) manipulated by working on the environment and spaces within which it is exercised" (Dean, 2010, p. 186). This means, in short, that neoliberalism applies market rationality to individual behavior, seeing it as amenable to manipulation for its purposes.

This then leads us to the next tenet of neoliberalism, which is the sanctity of the free market. Here again is another example of a tenet which neoliberalism derives from classical liberalism, but which pushes the logic further. As mentioned in the previous section, classical liberalism's belief that the government must provide for and protect the individual rights of all citizens (hence its emphasis on collectivism) leads to its belief in what Dean (2010) refers to as "social insurance" (p. 179), best exemplified by the welfare state. However, because neoliberal theory holds that people are only truly free as long as the market is also free, such regulation as a social safety net would entail is problematic (Harvey, 2005). When social services are provided, it is best according to neoliberal theory that they be offered by private organizations, which operate according

to market logic, and are framed as being more efficient than governmental bureaucracy (Harvey, 2005).

Neoliberalism also goes a step further in its belief in the free market than classical liberalism by seeking to insert market rationality into as many spheres as possible (Dean, 2010). This is done so as to make these other spheres, such as healthcare (Ritzer, 2013), operate as productively as does the fee market (according to neoliberal theory). A useful way to think about market rationality is through the lens of Ritzer's (2013) concept of McDonaldization, which will be discussed in much greater depth in chapter 4. Briefly though, the four tenets of McDonaldization are: predictability, calculability, efficiency, and control. We can consider these tenets integral to market rationality in that any system which seeks to operate as neoliberals envision the free market operating must conform to them. Private entities (which control many spheres under neoliberalism), and any entity which operates according to the bottom line, must especially adhere to these tenets. And, as Harvey (2005) discusses, in cases of privatization, which involves private property rights, neoliberalism holds that the state should "use its power to impose or invent market systems" (p. 65). What this means is that the state should set clear rules, or laws that define private property rights (Harvey, 2005). This inevitably leads to an increase in what Weber referred to as "formally rational legal thought" (Feldman, 1991, p. 227), or, law that is rational in that it is increasingly predictable. Essentially, technical, complex law and market rationality go hand in hand, and must be inserted in the same spheres (again, think healthcare) so that the system may operate according to the tenets laid out by Ritzer (2013). What this also

reveals is a contradiction in neoliberalism; the state should stay out of the economy, but the need to protect privatization and private property rights dictates clear legal boundaries which must be dictated by the state (Harvey, 2005). The effect is a light hand of regulative tendencies at the top of the class strata coupled with a heavy one at lower levels (Wacquant, 2010).

The last feature of neoliberalism to be discussed here is its penchant for elitism (Harvey, 2005, Burton, 2013). This, like the other features that have been discussed, has roots in classical liberalism. As Callinicos (2011) discusses, the most famous classical liberals were liberal nobles who often sought to establish constitutional monarchies by enacting enlightened reform rather than through revolution. These same nobles were wary of giving too much power to the people, as evidenced in places like the United States and France where property requirements made it so that only a small proportion of the population (mostly bourgeoisie men) could vote. This is precisely why Harvey (2005) describes neoliberalism as "suspicious of democracy" (p. 66), a characterization that might appear odd considering the prevalence of democracy in many neoliberal nations, especially in the United States and Europe. However, neoliberalism can institute elitist tendencies within democratic nations. For instance, the redistribution of wealth in New York City in the early to mid-1970's is characterized by Harvey (2005) as "a coup by the financial institutions against the democratically elected government" (p. 45), which resulted increasingly in power being consolidated by the financial elite. New York was only the beginning, as the decades after have seen a continuing shift of power towards financial elites (Harvey, 2005) Extensive regulation and deregulation have also

favored elites (Burton, 2013); laws such as the Citizens United ruling have allowed the super-rich to have an integral role in politics, as well as further wedding the political and economic spheres.

Chapter 3

A Historical Overview of American Capital Punishment

There are various time period classifications for mapping the history of capital punishment. The two sources I have drawn from the most in regards to time period are Garland (2010) and Paternoster et al (2007), the former constructing a more European based model, and the latter focusing solely on the United States of America. I have drawn from Garland (2010) for purposes of organization and information; however, my breakdown of capital punishment eras most closely resembles the model of Paternoster et al (2007). My classification is broader however, as I have dichotomized the death penalty into two eras: the pre-modern era, lasting from colonial times until the *Furman* decision, and the modern era, encompassing the time from after *Furman* up until the present day. The early and pre-modern eras have been combined because the purpose of this chapter is to provide a succinct account of the history of American capital punishment, and the modern rationalized era is most relevant to the central argument of this thesis.

Early and Pre-Modern Administration

While today capital punishment in America is restricted to a small number of offenses, most of them having to do with aggravated murder, in the Thirteen Colonies it was applied to a laundry list of criminal acts (Banner, 2003). In this way, the colonies were not much different from much of the rest of the Western world. Indeed, given that

most colonies adopted their laws from England's "Bloody Code" (which was especially notorious for making numerous property offenses punishable by death), it is no surprise that acts as "robbery, burglary, arson, counterfeiting, (and) theft" (Banner, 2003, p. 5), among many others, were by law capital offenses. There was though differentiation between the northern colonies and their mother country concerning crimes that were marked as capital, which is to be expected considering that capital punishment was (and still is in many ways) a local affair (Garland, 2010); concerning property crimes, in general, capital punishment was not sought nearly as often in the north for property offenses, and a smaller number of property crimes were punishable by death than was the case in England (Banner, 2003). Steiker and Steiker (2016) and Banner (2003) both note that capital punishment in the northern colonies had a heavy religious influence as well, much more so than under English law. This bend towards the protection of Biblical values was due in large part to the fact that many northern colonies were founded by religious groups, such as the Quakers.

As one would expect, the administration of capital punishment in the southern colonies was quite different from that in the north. While in the north the death penalty was used as punishment for a wide range of morality offenses, it resembled more closely the English common law in the south (Steiker & Steiker, 2016). The south had an economy built on slavery during this time, and white slave owners employed terror to preserve their economic system and property rights. Thus, more capital offenses focused on property, and a large number of those executed were current or former slaves (Acker, 2003). Just as the Bloody Code in England served to base the enforcement

of the criminal law around terror (Hay et al., 1975), the death penalty in the southern colonies was intended to strike fear in the hearts of slaves, serving as a message that conveyed the consequences of non-conformity to the slave economy. Naturally, since the goal of capital punishment in the South was often to scare and deter potential insurrectional behavior, the methods used were often more gruesome than in the north, with slaves often being tortured before execution (Steiker & Steiker, 2016). Naturally, too, the line between legal and extra-legal executions was thinner.

As time went on, and the US moved through and then out of the Enlightenment era, the number of capital offenses narrowed significantly (Garland, 2010). Indeed, given that America was founded during the Enlightenment on "enlightened principals", and was led by white liberal nobles, we would then expect its capital punishment apparatus to follow the rest of the Western world in becoming more "civilized." Starting in the 1790's in Pennsylvania, attempts to narrow the death penalty became common across numerous states. The now common practice of dividing murder into various "degrees" started with the Pennsylvania statute passed in 1794 (Steiker & Steiker, 2016). Nearly all attempts to narrow or do away with the death penalty in the early days of the republic were led by American Enlightenment thinkers who had often been influenced by European intellectuals such as Beccaria. As Steiker and Steiker (2016) point out, John Hancock in Massachusetts, John Jay in New York, and Thomas Jefferson (all Enlightenment disciples) were, among others, leaders of the charge against the overreach of capital punishment for lesser crimes.

Throughout the nineteenth century, other states took on the issue of capital punishment as well. On the eve of the Civil War, all northern states had narrowed death eligible crimes to murder and treason (Banner, 2003). Complete abolition was realized in Rhode Island and Wisconsin, and as Steiker and Steiker (2016) note, "Michigan became the first English-speaking jurisdiction in the world to abolish the death penalty for murder" (p. 11). The narrowing of capital offenses also took place in the southern states. As Banner (2003) points out: "By the Civil War capital punishment for whites was, with a few exceptions, in practice reserved for murder throughout the South nearly as much as in the North" (p. 139). However, though reform of crimes eligible for capital punishment did happen in the southern states, it was only applicable to whites (Steiker & Steiker, 2016).

As the death penalty became increasingly more civilized, the arena for its display changed as well. The spectacle surrounding executions began to wither around the beginning of the nineteenth century, and middle to upper class folk began to see attending a public execution as something beneath their status (Banner, 2003). Considering that "it is not clear that actual practices had changed so significantly" (Steiker & Steiker, 2016, p.12), the change in perception appears a bit odd. Even more, Banner (2003) points out that executions in pre-modern America were often somber events (with a few notable exceptions). This shift in the populace toward more enlightened sensibilities (what the Supreme Court has referred to as "evolving standards of decency") coincided roughly with the transition from public to private executions carried out inside prison walls. Steiker and Steiker (2016) note that the trend toward

private executions began in the 1830's, and by the end of the nineteenth century, "the vast majority of states had passed private execution statutes" (p. 12).

The move of executions to private areas is in part a reflection of a broader trend in Western society, namely that of rationalization (an increase in formal rationality) and bureaucratization. This is to say, Western society has increasingly become concerned with Ritzer's (2013) four tenets of rationalization: predictability, calculability, efficiency, and control. There is no clear starting point for the trend towards rationalization, and at least some measure of rationality and bureaucracy has been present in nearly all societies (the Roman Empire had a highly complex imperial governing system with a large bureaucracy). However, what we can say is that the desire for more formally rational systems and institutions became more widespread in the nineteenth century (around the time Weber was writing), no doubt spurred on by the development of capitalism and industrialization. When comparing public and private executions through the lens of rationality, we see that private executions are much more in line with formal rationality.

Public executions did not provide a high measure of predictability because they included potentially thousands of actors with agency who could act in any number of uncertain ways. Though crowds at American executions were often relatively mild-mannered (Banner, 2003), there was always a chance that a riot or fight could break out, interrupting the proceedings (which did happen on numerous occasions). Public executions were often overseen by the local sheriff (Banner, 2003), himself a governmental official. However the actual executioner could be someone picked off the

street, a volunteer, or even a convict given the job in exchange for clemency (Banner, 2003). Thus, it is safe to say that public executions were not professional, and a lot could go wrong, such as the accidental decapitation of the person being hanged (Banner, 2003).

Private executions on the other hand, while not at all free of irrationality, at least aimed to be more rational, and fulfilled formally rational goals more so than public executions. Executions conducted in private, such as in a prison setting, are more predictable simply by the elimination of the crowd, and increased control over witnesses. These changes cut down on the threat of mob violence significantly, and allow those conducting the execution to be more certain about how the proceedings are going to unfold. Also, private executions came increasingly to be conducted by "officials" or "experts." Coinciding with the rise of the prison, private executions were often themselves conducted by jail officials who had experience in the matter, and who were more likely to do the job right than some vagabond off the street (Banner, 2003). I do not say all of this to imply that pre-modern executions served no purpose, or that they were completely irrational. How much rationality is present within a system can vary across a spectrum, and institutions like pre-modern capital punishment do not always fit neatly into one category of rationalization. Indeed, from a functionalist perspective, it seems clear that pre-modern capital punishment served much more of a purpose in society than does modern capital punishment, which is itself relegated largely to a symbolic function (Garland, 2010). Pre-modern, public executions fulfilled what Weber called substantively rational goals, or goals that are important to

individuals or the local community for expressive purposes (Feldman, 1991). For example, as Banner (2003) rightly points out, public executions served a religious function in that they gave the criminal a chance to repent before God and the community, which many felt was necessary for the community so that it may heal after the chaos of criminal action. The death penalty was also a symbolic marker of status, and in the South, race (Steiker & Steiker, 2016). Durkheim would point to the re-affirmation of religious and status norms as exemplary of the communicative function of the death penalty during this time period.

Along with the move from public to private executions, the change in execution methods during the nineteenth century was also part of a larger process that served to modernize the death penalty. From the time of the colonies until around the beginning of the Civil War, the primary method of execution had been hanging (Steiker & Steiker, 2016), which was in large part a legacy of America's ties with England. However, during the middle to late nineteenth century, when the death penalty was undergoing processes of rationalization and modernization, new execution methods began to take hold (Garland, 2010). As mentioned prior, hanging could be an unpredictable execution method. It was often carried out by someone who was not qualified, and even if it was done under the supervision of a "professional", there was always the chance that the person being executed might not die right away, or that they may be partially or wholly decapitated (Banner, 2003). In essence, hanging is not a very rational way to execute someone; it does not provide a high measure of predictability, and because the hanged may not die right away if something goes awry, it does not provide a large degree of

efficiency. Also, hanging (especially when something goes wrong *a la* decapitation) does not fit well with Enlightenment sensibilities, and, during a time when industrialization was taking hold and new machines and forms of technology were popping up daily, hanging seemed to be an archaic and barbaric way to execute criminals. In contrast, new forms of technology like the electric chair were touted as providing a humane alternative to hanging (Steiker & Steiker, 2016), and were (in theory) more rational and knowledge-based.

In addition, the previous two forms of death penalty modernization were complemented by the move from purely local administration of the death penalty to greater centralization of process (Steiker & Steiker, 2016). Executions in America had always been a local affair for a few obvious reasons. One, during colonial times, the colonies were an ocean away from their father country, and thus local rule was necessary for governance. Also, once America became a republic, the states retained a lot of autonomy and were wary of giving too much power to a centralized government because of perceived overreach by the English during the colonial days. Therefore, death penalty administration was then, as it is now, a reflection of broader governmental administration; capital punishment administration in contemporary times is rationalized, bureaucratized, and centralized, much like the modern system of governance in general.

The modernization of the death penalty resulted in a change in who oversaw the proceedings. Until around the time of the Civil War, the job was carried out by the local sheriff (Banner, 2003). However, due to the centralizing and rationalizing ethic

mentioned prior, the job was then tasked to state "officials" who were qualified to oversee executions in a manner that fit in with the desires for modernization and the change in public sensibilities concerning violence and visible trauma. However, it is important to keep in mind that, while it became less local during the pre-modern era, capital punishment was still tied with localism (Garland, 2010). Centralization took place mostly at the state level, with the federal government largely staying away from regulation or intervention during this era. This is made clear by examining the difference in administration across the states. To cite an extreme example, Michigan executed its last person in 1830 when it was still a territory. Texas, on the other hand, became (and still is to this day) notorious for executing criminals. Indeed, the high number of executions carried out in Texas throughout history is a peculiar point of pride for many people (though the number executed has dropped off significantly). This difference also highlights the divide between north and south in America, itself another reflection of localism tied with capital punishment.

Naturally, all these factors I have mentioned- the change in public sentiment, the narrowing of capital crimes, the desire for rationalized governance- led to a decline in executions during the later years of the pre-modern era, culminating in 1968 when the ten year moratorium began (Bohm, 2012). Decline can be noticed in the late nineteenth century. However as Banner (2003) points out, the early twentieth century saw the most significant decline. While for much of American history the number of annual executions was measured in the hundreds, by the late 1950's, the number had dropped to double digits (Banner, 2003). Banner (2003) also points out that, while decline

happened in the south as well, the north saw the largest decline in both usage of and support for the death penalty, which resulted in a shift in death penalty practice geographically from north to south.

The death penalty also saw a decrease in public support in the early twentieth century, and Banner (2003) lays out a few reasons why this took place. One reason is that there was a rethinking of capital punishment's deterrent value during this time. Capital punishment had not always been linked with deterrence or crime control in general during the pre-modern period. Instead, these types of formally rational goals had started to be assigned to capital punishment as it came to be increasingly rationalized (Steiker & Steiker, 2016). And while the deterrent value of the death penalty may have been afforded hegemonic common sense status for some time, in the early twentieth century, more people began to try to ascertain whether it was "good sense" (Harvey, 2005) that the death penalty worked as a deterrent. The debate concerning deterrence in general was changing during this time period as well, as social science underwent numerous changes (Banner, 2003). The cause or causes of crime, once thought to be well known, were being thrown in to question. In particular, Cesare Lombroso's idea of the "criminal man", which postulated that certain people were predisposed to criminality, threw a wrench in criminological thought. Banner (2003) notes that, as biological positivism became more widespread, people began to question whether deterrence could work at all.

Another reason Banner (2003) gives is the rise of data and empirical thinking within social science. For the first time, murder rates could be compared in places with

and without the death penalty to measure its effectiveness as a deterrent. The results of the analyses were not always favorable for capital punishment, as many results showed that places without capital punishment often had lower murder rates (Banner, 2003). While statistical analysis did not sway the opinions of many by itself, it did have the effect of casting more doubt onto the efficacy and necessity of capital punishment.

Lastly, the racial disparity of capital punishment during the early twentieth century is important as well. After the formal end of slavery, many southern whites viewed capital punishment as necessary to control a "primitive, animalistic black population" (Banner, 2003, p. 140). This is one reason why the primary location of the death penalty shifted from the north to the south. While sentiment in the south was pro-capital punishment, in the north, concerns about lynching and civility were more common (Banner, 2003). Lynching and capital punishment were closely linked during this time period, and it offended the sensibilities of many people in the north, as well as some in the south, that capital punishment was so disproportionately employed against black people. Even more troubling to many people perhaps was the fact that, for crimes not involving murder, such as rape or property offenses, black people were overwhelmingly more likely to be executed than white people (Steiker & Steiker, 2016). In fact, there is no record of a white person being executed for rape in the South after the Civil War (Banner, 2003). The disproportionate racial bias of capital punishment caused many to withdraw their support for the institution.

Pre-Modern Legal Transitions

As discussed earlier, the administration of capital punishment in the pre-modern period was characterized in large part by localism and a lack of intervention by the federal government. Much of the same can be said concerning the legal issues with capital punishment during this time period. While in modern times the US Supreme Court has made a point of regulating and intruding upon death penalty practice, before 1968, it heard only two cases that were a threat to capital punishment's constitutionality (Bohm, 2012): *Louisiana ex rel. Francis v. Resweber*, which will be discussed later in the chapter, and *Solesbee v. Balkcom*, "which allowed a governor to determine an inmate's sanity" (Bohm, 2012, p. 24). However, as Steiker and Steiker (2016) point out, this was not because of the lack of opportunity, as there were numerous calls and appeals for the Court to step in and address the institution's many ailments. We can likewise not say that members of the Court were completely apathetic to the need to regulate capital punishment. Rather, we know the Court to be a pragmatic body, and the lack of intervention reflects their desire to preserve the status quo of governance. While not the only course the Court could have taken, their non-interventionist stance was much a reflection of power and politics of the era (Steiker & Steiker, 2016). Indeed, Steiker and Steiker (2016) mention that the Court was often reluctant to take on capital punishment because of the fear that reprisals in the form of mob justice and lynching would become even more widespread, particularly in the south. In essence, the legalistic death penalty served as a release valve for the tension

and anger that builds up around cases where the public or state has an interest in seeing the defendant put to death.

Thus, the Supreme Court's non-regulative stance means that there are not a plethora of cases that had much of an impact during the premodern era. This does not mean, however, that the Court stayed out of death penalty affairs completely (Bohm, 2012). As Steiker and Steiker (2016) note, calls for the Court to decide on capital punishment matters began during the nineteenth century, with most challenges being levied against execution methods (p. 26-27). From this we can notice that, when the Court did dabble in regulating the death penalty during this era, its stance was often much in tune with that of liberal nobles, otherwise known as the prime movers of Enlightenment thought. One aspect of the Enlightenment often overlooked is that it was not from the start a democratic movement. Rather, Enlightenment ideals sprang in general from liberal nobles in Western Europe (and to a lesser extent the United States as well). Often put off by the sentiments of the common man, liberal Enlightenment thinkers fancied themselves above the notions of the herd, and sought to impose upon their society modernized and civilized values and sensibilities (Young, 1981). This shift toward civilized values can be noticed in America as well during the nineteenth century, when many middle and upper class Americans stopped going to and campaigned against public executions on the grounds that they were archaic and barbaric (Banner, 2003). When hanging was done away with (for the most part at least, the last hanging in America occurred in 1994), it would be safe to say that a significant portion of Americans still supported the gallows, and were enraged to see it fall by the wayside.

Indeed, one has only to look at the number of lynchings in the south (and some in the north) to see that a large section of the populace favored a method that liberal nobles dismissed as uncivilized.

In attempting to regulate methods of execution, the Court was playing the part of an enlightened body, hoisting its enlightened opinion upon an institution that had yet to be brought into the civilized fold. The desire to usher America away from hanging can be noticed in the case of *Wilkerson v. Utah* (1879), the Court's first challenge to a particular execution method's constitutionality (Bohm, 2012). In this case, the Court upheld the constitutionality of the firing squad as constitutional under the Eighth Amendment (Bohm, 2012). And while the firing squad may not be seen as the most civilized method of execution, it was a step away from what many thought to be an outmoded method that was borrowed from a mother country with a penal code that had the reviled "Bloody" attached to it. I should note that I am not making the argument that the Court always played the role of enlightened body vis-a-vis the populace. Indeed, as many cases from the pre-modern era show, the Court often took a more pragmatic approach, likely trying to strike a balance between civilizing the death penalty and releasing the pressure that might result in insurrection in the form of lynching (Steiker & Steiker, 2016; Garland, 2010). *Wilkerson* is actually an example of the Court trying to maintain said balance, as it ruled that Utah could use any method of execution that was not "cruel and unusual". I am also not making the argument that *Wilkerson* was a clear message that the Court was sending in regards to its desire to civilize capital punishment. However, what is telling about the *Wilkerson* case is that the Court applied

the Eighth Amendment to a territorial statute (and by default all territorial capital statutes in terms of what execution methods they used). This is noteworthy because the Eighth Amendment, and the rest of the Bill of Rights, would not be determined to apply to the states via the Fourteenth Amendment until the 1960's (Steiker & Steiker, 2016). Indeed, there are quite a few cases from this era, some dealing with capital punishment but most not, where the Court neglects to apply the Bill of Rights to the states. Obviously Utah, as a territory, was afforded different status than a state. However, the Court was still intervening in what can be considered local affairs, something it had neglected to do before. This case, along with *In re Kemmler*, when the Court ruled that the electric chair was constitutional, both paint the Court as desiring to move away from hanging towards more modern, mechanical and ostensibly civilized forms of execution.

The Court's enlightened tendencies also become apparent in two cases involving appeal on Fourteenth Amendment grounds, the first being *Moore v. Dempsey* (1923). In this case, five black men were tried and convicted of murder of a white man and sentenced to death in a trial that was surrounded by an unruly mob and a vitriolic atmosphere (Waterman & Overton, 1933). This was an altogether too common occurrence in the pre-modern era, particularly in the south. The defendants appealed on the grounds that they were not given a fair trial, which a district court subsequently dismissed (Bohm, 2012). The Supreme Court however, reversed, mandating a review by the lower court. Then in 1932, the Court heard the famous *Powell v. Alabama* case, also known as the Scottsboro Boys case. The Scottsboro Boys were eight young black men who were accused of raping two white women (Linder, 2007). Like the *Moore* cases, the

atmosphere surrounding the trial was heated and racially prejudiced; a mob that sought to lynch the group the night of their arrest was stopped only when the Alabama National Guard was called in (Linder, 2007). As Bohm (2012) notes, the trial was remarkably fast as well, with only one week passing from arrest to conviction. The defendants appealed to the Supreme Court, which vacated all the convictions due to "special circumstances" (Bohm, 2012, p. 36) surrounding the case. What is notable about *Moore* and *Powell* is that the Court ruled against popular mob sentiment in both instances. Not only that, but the Court risked the backlash of lynching that it so sought to avoid (Steiker & Steiker, 2016) by deciding against public opinion (at least local public opinion, which counted most) in both cases. It is in these cases most of all that we can see the Court's enlightened sentiment, and its knowledge of the need for and desire to impose rational regulation on capital punishment.

Again though, the Court justices did not always behave as enlightened liberal nobles during this era. It is perhaps best to view the Court as pragmatic in that the justices were trying to balance their own desires for reform (which, based on certain cases, are desires we can logically deduce they harbored) with the sentiments of the populace, whom they viewed as ready to lash out should the Court upset the balance (Steiker & Steiker, 2016). Indeed, were the Court a truly enlightened group, then the end results of the *Wilkerson* and *Kemmler* cases would have surely called them into action to declare both the firing squad and the electrocution chair unconstitutional; Wilkerson bled out for nearly half an hour after the bullet missed its mark, and Kemmler had a current run through him twice until "Smoke rose from (his) head, and the smell of

his burning flesh filled the room" (Steiker & Steiker, 2016, p. 29). Indeed, the Court would not take on the issue of two electrocutions to the same person until fifty seven years later, and then it ruled in favor of the practice in *Louisiana ex rel. Francis v. Resweber*. It is worth noting that Francis was a black man (or perhaps boy, as he was only sixteen) who had been convicted of killing a white person in Louisiana, and the Court likely feared backlash had it ruled in favor of him.

The Court's pandering to the populism is apparent in a case even more abhorring than *Francis*; that of *Frank v. Magnum*. Frank's case mirrors several aspects of Francis': racial bias (Frank was a Jew), the victim was white (compounding the crime in the eyes of the public), and an enraged populace out for blood (Bohm, 2012). Frank was convicted in a trial surrounded by "a charged atmosphere of virulent anti-Semitism" (Bohm, 2012, p.34). Frank then appealed his conviction to the Georgia Supreme Court on Fourteenth Amendment grounds, claiming the atmosphere surrounding his trial had been unfair, and that he had not been tried by an impartial jury due to the outside pressure from the mob (Steiker & Steiker, 2016). The Georgia court denied his appeal, after which the US Supreme Court did as well, citing the fact that the Georgia court had heard his appeal as evidence that he had been provided with "due process of law". The Court's decision in this case seems clearly aimed at satisfying the blood lust of the mob; however it was to no avail. The governor of Georgia (guided by a conscience not displayed by the Court) commuted Frank's sentence to life imprisonment. This had the predictable effect of angering the populace even further; Frank was taken from his cell by a mob and publicly lynched.

The last two capital cases the Court heard in the pre-modern era were *McGautha v. California* (1971), and *Furman v. Georgia* (1972) (Bohm, 2012). I have not included either of these cases within the prior discussions on balancing or enlightening because they do not fit well into either category. In *McGautha*, the Court struck down the need the regulate juror discretion so as to protect against arbitrariness, but there was no outrage around the case, and no lynch mobs ready to pursue their own brand of justice. In fact, popular opinion had been swinging away from capital punishment at the time, and the number of capital convictions and executions had been in decline for quite some time (Garland, 2010). Instead, it would appear that the Court's rejection of regulation was due to pragmatic concern about the possibility of doing so in a way that would work. Justice Harlan, writing the majority opinion in *McGautha*, famously voiced his concern that it was not humanly possible to regulate juror discretion in a way that would be sensible and practical (Bohm, 2012). However much Justice Harlan might have thought his words would serve as guidance in the future to the Court regarding capital punishment cannot be known, but it is doubtful that he believed that the Court would go against his advice only a year later. This was the case however, as in 1972 the Court struck down capital punishment as then applied with the reasoning that it was plagued by arbitrariness due to runaway juror discretion (Bohm, 2012).

Upon first glance, *Furman* appears to be a classical liberal case. After all, it was a case of liberal elites acting in an enlightened manner, striking down a punishment that was a hold-over from the past, and was in decline across the Western world. But upon closer inspection, what we see is that *Furman* was a prelude of what was to come in

terms of capital punishment jurisprudence. Had *Furman* been a purely classic liberal decision, it would have done away with capital punishment completely. Instead, the Court struck down capital punishment only as it had been, on narrow grounds, leaving the door open for revival. In this way *Furman* set the stage for political backlash and capital punishment's comeback, as well as for the cases that were to be decided in the modern era. Indeed, the long term effect of *Furman* was to technicalize capital punishment, to define the limits within which future discussion and jurisprudence would take place. This has had the effect of making capital jurisprudence in the modern era increasingly technical and complex.

What can we take away from the Court's jurisprudence during the pre-modern era? As mentioned prior, the Court sought to strike a balance between its own desires for central regulation and the desires of the populace, mostly in the south. The Court knew the reality of power and politics of this era, and thus took what we might call a realistic or pragmatic approach in its decision making. However, it takes a deft hand to balance competing sentiments, and that is especially true in this case where the competing sentiments (reformism and revanchism) are so at odds with one another. The Court, in its desire to balance, showed that it lacked the deft touch, and instead of providing sound, middle-of-the-road centrist decisions that satisfied both sides, they instead handed down decisions that have no clear rhyme or reason, and can be described as schizophrenic. At times the Court did look like an enlightened body, as in the case of the Scottsboro Boys. However, other times, as in the case of Leo Frank, the Court's ruling appears entirely unjust, and seems an atrocious attempt to satisfy the

people's desire for revenge. What these two cases also show is that two extremes do not balance. This is not to discard the Court's balancing intent as itself atrocious or unnecessary. On the contrary, reality demanded either a balanced approach or a complete siding with the populace, and balance is clearly the better of the two. Thus, while the Court's intentions in these cases may have been benevolent, the decisions they handed down did not create the balance they sought. The cases established the stage for the rationalization of the death penalty.

Modern Administration and Practice

After the moratorium starting in 1968 and ending in 1977, executions began anew with Garry Gilmore in Utah, who was executed by firing squad (Lyons, 2000). Though the modern era of executions was begun by a firing squad, the method has in no way been characteristic of executions since Gregg; only three executions by firing squad have been carried out since 1976, all of them in the state of Utah. The dominant method of execution in the modern era has been lethal injection, accounting for around 87 percent of executions. Other forms of execution have managed to persist since the *Gregg* decision; there have been numerous electrocutions, a handful of gas chamber executions, and three hangings. However, all these now "archaic" methods of execution have existed on the periphery of the modern institution. The modern death penalty has been sanitized so as to fit in with current civilized sensibilities, and it has been designed so as to not violate current taboos (such as the visibility of pain or blood). Essentially, the death penalty has become highly rationalized to conceal suffering and violence.

I discussed rationalization in the pre-modern administration section of this chapter as something that was present quite a while before the onset of the modern era. Indeed, there were many forms of rationalization that took hold on the death penalty during the nineteenth century, such as the move from public to private executions. However, while rationalization was present before the modern era, it never took hold on the scale that it has in contemporary times. The death penalty today is rationalized both in terms of its administration and legality. This does not mean that the administration of the death penalty is inherently logical, nor that it even makes sense. In fact, as I will discuss later in the chapter, current death penalty administration makes little sense. But, what it means is that modern death penalty administration is subject to various highly technical laws and procedures that govern how it operates. Lethal injection provides for a rationalized death penalty more so than any other method of execution before it. Once again, I am not making the claim that lethal injection is the best form of execution, but that it best fulfills the managerial goals of the modern death penalty.

The push towards rationalization has penetrated western society rapidly in the last forty to fifty years (Ritzer, 2013), and can be viewed within the larger context of the neoliberal turn, which occurred around the mid 1970's (Harvey, 2005). There are many parallels between modern death penalty administration and neoliberal theory, perhaps the most obvious of which is the use of lethal injection. Going back to Ritzer's (2013) four tenets-predictability, calculability, efficiency, control-we can see that lethal injection satisfies all of them, at least in appearance. Lethal injection is predictable in

that it allows officials to determine when cause of death will be with a reasonable degree of accuracy, is calculable in that officials can calculate (or at least claim to be able to) the exact dosage required to do the job, is efficient in that it works relatively quick and (most of the time) without incident, and allows for a high degree of control over all actors involved in the execution. It is, in short, amenable to careful management.

Another integral aspect of neoliberal theory is the marriage of private and public institutions. As Harvey (2005) puts it "Neoliberals are particularly assiduous in seeking…privatization" (p. 65). This is something that is prevalent and easily noticeable in the broader society, such as our military's close cooperation with civilian contractors and mercenary groups in Iraq. Lethal injection is an avenue of intersection of the private and public spheres, as the drug or drugs states use for execution come from private companies (Denno, 2007) (though it should be noted that some companies, such as Pfizer, have stopped providing lethal injection drugs, putting some states in a conundrum). States also often rely on private actors from the medical field for consultation, oversight, or implementation of lethal injection, something most doctors are reluctant to do because of ethical considerations (Denno, 2007).

Regulation is a point of contention in neoliberal theory, and in fact creates a contradiction. Neoliberal theory espouses a belief in unobstructed individual freedom, as well as freedom of the market (Harvey. 2005). Thus, neoliberal theory wants government to stay out of market affairs. However, neoliberalism upholds private property as sacred and essential to "economic development and the improvement of

human welfare" (Harvey, 2005, p. 65). Naturally, the only way to ensure the sanctity of private property is via strong state regulation and protection of assets; under the neoliberal theory, the government has to regulate. Because of this tension, what occurs is tight-fisted regulation of the poor and indigent, also known as people who might be a threat to mass accumulation of private property, and loose regulation of people with money and/or influence, as well as government officials. The former lack the capacity to resist regulation that the latter possess. A blatant example of this in the US is welfare, a system so obsessed with regulating and catching fraud that it has employed invasive mass surveillance techniques in order to catch perpetrators (Gilliom, 2001). On the other side of the coin is Wall Street and the financial sector in general, an area so deregulated and abused that it was a major part of the Great Recession of 2007-8. However, despite known abuses, the financial sector is lightly regulated, and white collar crime often goes by unnoticed.

I mention this because the same type of regulation is present in contemporary capital punishment. The administration of capital punishment in the modern era appears to be tightly regulated. However, upon closer inspection we see that this is not always the case, and when it comes to areas that are regulated, the regulation is often more symbolic and legitimating than real. Let us think about capital punishment regulation in general, which is most stringent when it comes to areas that most visibly link it with lynching. The shift in administration from the pre-modern to modern era represents a move away from the specter of lynching. While, as mentioned prior, there were rationalizing and centralizing forces at work long before the modern era, capital

punishment was still a local institution sought for and carried out by local actors (Banner, 2003). However, contemporary capital punishment is much more centralized in terms of administration. The legal parameters for capital trials are set forth by federal law, although there is variation within juror instructions across states. The method and site of execution are also centralized and are carried out and determined by state officials. There are numerous reasons for a more centralized administration, one of them being a desire to decouple the death penalty from its brutal history that involves lynching. Garland (2010) says that lynching was an exercise in "local popular justice" (p. 32), an outcry of anger, frustration, and fear from the community. Centralizing the death penalty gives it a civilized appearance that helps to gloss over issues or injustices that might exist under the surface, such as overrepresentation of minorities, and affirms the state's monopoly on violence and the use of force, something which lynching threatened.

There are other factors that link capital punishment to lynching that have been symbolically regulated as well. The most fundamental regulation has been targeted at juries, which were often a site of atrocious miscarriages of justice in the days of lynching. To remedy this problem, juries have been regulated so that they must conform to guided discretion (Steiker & Steiker, 2014). And while numerous works, such as that of Steiker and Steiker (2014) and Cunningham and Sorensen (2014), have shown that guided discretion has many issues and often results in arbitrariness, it has the symbolic effect of making the death penalty appear civilized and rationalized, and thus long removed from its violent past. The same can also be said of the appeals process, which

in theory guards against misconduct and abuse on the part of the state, and ensures that defendants are afforded due process. The desire to ensure capital defendants are in fact guilty also stems from one of the many problematic issues of the lynching period, which was innocence of the defendant. From Leo Frank to the Scottsboro Boys, there are numerous high profile cases in which the defendants were wrongly accused, often due to racial or cultural bias (Steiker & Steiker, 2016). By having a lengthy appeals process, the modern iteration of capital punishment can appear civilized and fair, as if it is doing all possible to guard against wrongful convictions (think of the protracted and rationalized appeals process).

Thus, while capital punishment appears highly rational because of the amount of symbolic regulation it is cloaked in, there are issues under the surface that undermine rationality, issues and irrationalities which have been subject to little or no regulation. The most striking area that has been left largely unregulated is prosecutorial discretion. Prosecutors have wide discretion in choosing what charges to levy against a defendant, and whether or not to seek a death sentence. This has resulted in a large percentage of capital cases being sought by a small number of prosecutors ("America's Top Five Deadliest Prosecutors", 2016). According to the report "America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty", the total number of capital convictions of five prosecutors studied in the report is equal to around 15 percent of the contemporary death row population. Knowing this, it is no surprise that the geographical implementation of capital punishment is highly inconsistent as well. In fact, over half of capital cases leading to execution since executions resumed in 1977

have come from 2 percent of counties nationwide ("The 2% Death Penalty", 2013). This sort of caprice is particularly troubling for the modern death penalty because it is supposedly a rationalized institution, and rationalized institutions need consistency and standardization (Feldman, 1991). And, considering that the death penalty was struck down by the Supreme Court in 1972 due to arbitrariness, the uneven administration becomes even more significant. Centralization has changed who carries out an execution, as well as where it occurs, but has done nothing about how capital cases are pursued and by whom, thus leaving contradictions under the surface that exists in tension with the rest of the rationalized system. The effect is to generate irrationality that begets rationalized efforts to regulate and legitimate capital punishment.

The function of the modern death penalty also warrants consideration. There have been works that have addressed the issue of the death penalty's purpose in contemporary times, and for good reason, considering that for such an institution to persist, we should like to think that it serves some purpose. What is clear to every observer of the modern death penalty is that it is no longer a vehicle for the goals that it once was: retribution, deterrence, and, to lesser degrees, incapacitation and cost savings. One does not need a deep analysis to realize that the death penalty no longer functions to provide for these goals, as it is readily apparent. With the rise of supermax prisons, incapacitation of dangerous criminals does not require them to be killed (Cunningham & Sorensen, 2014). The death penalty is carried out in too sparse a fashion in order to be retributive. It is the case now that someone sentenced to death is more likely to die of natural causes than to be executed (Garland, 2010). And those who do

meet the fate of execution do so after a lengthy appeals process that takes years and can often take decades (Bohm, 2012). Thus, when the execution is carried out, the crime to which it is attached may have been forgotten in the public conscience, and there is a real possibility that the people who are invested in the execution the most, the victim's family and friends, may have deceased in the time that has passed. This passage of time is also a reason why the death penalty has no deterrent effect either (I say all this under the assumption that deterrence works at all, which research suggests is questionable). If a potential offender cannot with any degree of certainty know they will be put to death, then there is no deterrence to be found. Modern methods of execution can also be argued to be anti-deterrent, as lethal injection is akin to a highly rationalized medical procedure.

But, just because the death penalty fails to meet the crime control and financial goals that many would like for it to, does not mean it is without purpose or function. Much as Foucault argues that the failure of penal systems is functional (Garland, 1990), it would seem that there is a function that is served by the death penalty despite its failure. As was discussed earlier in this chapter, the purposes of the pre-modern death penalty were relatively apparent, and one can make the case that the death penalty served an important role in the community. The modern death penalty, on the other hand, does not serve an apparent purpose (Garland, 2010). Rather, the function of the death penalty in contemporary times is much more subtle and subliminal, though that does not mean it is not powerful. Garland (2010) discusses Foucault's functionalist, "positive" view of capital punishment, arguing that it is "productive, performative, and

generative-that it *makes thing happen*" (p. 285). Essentially, the contemporary death penalty is more about form than substance; it's about sending a message. Politicians in the modern era have used capital punishment as a vehicle for expressing their values, such as a support for crime control, victim's rights, or even a support for conservative principles in general (Garland, 2010). More fundamentally, capital punishment, like war, symbolizes the state's power over death, thus promoting subjugation and governmentality.

The broader utilities of capital punishment, such as traditional state building among emerging nation-states or crime control in established ones, have changed. The death penalty now serves more "private or professional purposes of specific actors" (Garland, 2010, p. 286). Indeed, it is clear that the death penalty is not necessary for the penal system to function. It should be no surprise then that the death penalty does not operate as if it is vital to penal function; only a handful of people are executed annually. Whereas once capital punishment served an objective purpose or purposes, today its significance is subjective, to be used as a "currency" (Garland, 2010, p. 286) by political entrepreneurs who realize that it is attached to other issues, and who know how to employ it to their own ends. What becomes clear is that capital punishment serves a mostly symbolic function in the modern era, and is largely communicative. And though it sends messages about crime, criminals, and victims, the most fundamental imagery communicated is in regard to state power, both its exercise and its restraint.

Saying that the contemporary death penalty is symbolic does not mean that it is devoid of instrumental purpose or value. On the contrary, as Garland (2010) points out,

the death penalty can be quite useful for the justice system, and it is no coincidence that actors within the system are often some of its biggest advocates. Police officers, for instance, often see the death penalty as a form of safety in that it may be the only incentive that an offender has to refrain from murder. Prosecutors also make practical use of the death penalty, employing the mere threat of it "to crack cases, as a platform for gaining media attention, and as an issue for mobilizing political support" (Garland, 2010, p. 289). Capital punishment is a vital tool in the modern justice system because of its role as a valuable plea bargaining chip. And, considering that 95 percent of cases result in a plea bargain (Bohm, 2007), it is obvious that there is ample opportunity for a prosecutor to use capital punishment to their advantage.

Modern capital punishment is a complex social institution, and like most social institutions in the modern Western world, it is cloaked in various forms of rationality and civility. The rationalization of the death penalty has helped it to persist, as it has hid many of the flaws and inadequacies that exist under the surface (Steiker & Steiker, 2014). The death penalty has become more centralized, more bureaucratized, and in this way is a reflection of society in general. As capital punishment has changed, the purposes it serves have changed as well, something we should expect. Whereas once capital punishment served a crime control function, before that its main intended purpose was state building (Garland, 2010). Thus, capital punishment has changed before as the society around it has changed. However, while it has adapted to be functionally positive in modern American society, it is important to remember that real

issues persist within capital punishment, and that its increase in rationality has served largely to hide these issues or make them appear resolved.

Modern Legal Transitions

The capital punishment jurisprudence of the Supreme Court in the modern era is characterized by a desire for increased centralized regulation, alongside a desire to pay homage to a traditional posture of deference to localized actors. This is what one would expect for two reasons. First, though, the Court often took a hands-off approach to capital punishment before the modern era, they did impose their will on a few important cases, such as that of the Scottsboro Boys. This willingness on the part of the Court to regulate happened largely in the early to mid-twentieth century. Therefore, knowing that the Court was willing to regulate in the years leading up to *Furman*, we can view their desires for centralization and rationalization of the death penalty as a continuation of something that had already begun to take root. Second, the decision in *Furman* set the stage for what was to come after, and since it dictated that unguided juror discretion was unconstitutional, heightened procedural regulation was the only path that could be taken were capital punishment to continue on. Thus, by striking down capital punishment via *Furman*, the Court had actually set the stage for the assertion of its own will upon the institution.

The modern era of capital punishment began in 1976 when the Court heard the cases of *Gregg v. Georgia* and *Woodson v. North Carolina*, both of which rose out of the popular and legislative backlashes that sprung up after *Furman* (Garland, 2010).

Whereas in the years leading up to abolition, around half of the populace was against capital punishment, polls in 1976 showed that Americans favored the death penalty "by a 2-1 margin" (Bohm, 2012, p. 55). In addition to the grassroots movement that had taken hold after 1972, 35 states had drawn up new capital statutes along the lines of either guided discretion or mandatory death sentences for certain crimes (Garland, 2010). Also, as Bohm (2012) notes, a number of members of Congress had been working to institute an amendment to the Constitution to bring capital punishment back, and in 1976 "it appeared that they had the votes to succeed" (p. 55). The *Furman* backlash is important to understand because it provides a context in which the Court's decisions in 1976 were to be rendered. While the political realities in 1976 were different than those of the pre-modern era when the Court had to worry that an unpopular decision might result in insurrectional lynching, it is important to keep in mind that the justices were in no way immune from outside political and popular pressure. The environment that the Court delivered the *Gregg* opinion in was much different than when *Furman* had been decided. *Furman* came at a time when the Civil Rights movement still had momentum, and the conservative backlash had yet to coalesce. As Bohm (2012) notes, had the backlash not been so widespread, and the atmosphere surrounding the death penalty (and other hotbed issues like abortion) not been so charged, it is possible that the Court would have struck down the new death penalty statutes in 1976.

The Court heard five cases in total concerning the new state capital statutes: *Jurek v. Texas, Gregg v. Georgia, Profitt v. Florida, Roberts v. Louisiana,* and *Woodson v. North Carolina* (Garland, 2010). The latter two concerned mandatory death penalty

statutes that some states had drawn up in response to *Furman*. Here, the justices rejected mandatory capital laws because "defendants are different" (Bohm, 2012), and the Court did not wish to set a standard that would treat every capital offender the same. What the *Woodson* decision demonstrates is that the Court was trying, as it had done in the premodern era, to create a balance. Whereas before the balance had been between the opposing forces of reformism and revanchism, now it shifted to creating an equilibrium between individualization and consistency (Steiker & Steiker, 2014). Mandatory death sentences provide consistency, but do not allow for individual consideration, which did not satisfy a Court that wished for different cases to be treated as such. This established the stage for the proliferation of the concept of capital mitigation.

We can also view this as the Court trying to avoid both underinclusion and overinclusion, two sub-themes Steiker and Steiker (2014) mention that fall under the larger theme of "fairness" (p. 80), and that are connected to individualization and consistency. The problem of underinclusion had been present in the run up to *Furman*, when the death penalty had started to fall out of favor with the public, and with Western society as a whole (Garland, 2010). During this time, capital sentences had become increasingly rare, something that the Court had taken into consideration in *Furman* when deciding that the death penalty was arbitrary. As fewer sentences are handed down, arbitrary outcomes become ever more likely, especially when jurors have total discretion in their decision making. The concern that arises with underinclusion is why capital punishment is doled out in only certain cases when there are still a large

number of crimes for which it may be or is appropriate. Even more, the people who were being targeted for the death penalty before *Furman* were indigent, and the number of black people given capital convictions was highly disproportionate, especially for rape (Garland, 2010). So, while in the grand sense the death penalty was arbitrary in that it was applied infrequently, when it was applied it was done so consistently to the same types of people.

Overinclusion was not so much an issue that the Court actively sought to curb, but rather one they sought to avoid for posterity. There were also other problems with mandatory sentencing besides overinclusion and a lack of individual consideration that the Court wanted to avoid. As Garland (2010) mentions, the Court wanted to "civilize" (p. 258) the death penalty to make sure that it fit with contemporary norms and values; the death penalty had to satisfy "evolving standards of decency". Part of civilizing the death penalty was ensuring that it in no way resembled lynching. According to Garland (2010), "the specter (of) lynchings has long haunted the American legal system" (p. 33). Any resemblance to lynching is not only an affront to modern norms and values, but also serves of a recollection of a time when the US government did not have a monopoly on violence (a time difficult to imagine in the modern age of militarized police). Lynchings were not only horrid displays of violence; they were a threat to the legitimacy of the state, whose purpose above all else is the welfare of its citizens. Thus, we can see why the Court would want the modern form of capital punishment to be the exact opposite of lynching. The linkage between mandatory sentencing and lynching

was likely on the Court's mind when it was considering *Woodson*, as there are a few obvious links between the two.

First, both are forms of what we might refer to as "no nonsense" justice. In other words, "they don't mess around". Lynchings in America, depending on the type being perpetrated, did involve different forms of ceremony or spectacle. However, the person being lynched seldom had a chance for reprieve, and those involved had their minds set on a fixed outcome. With mandatory sentencing, there is also ceremony and spectacle (the trial), but once the sentence has been handed down, the fixed outcome is put into place. All parties involved can be sure of what is to happen. Second, there is no individual consideration given to the person who is to be put to death. Lynch mobs were not plagued by any humanistic desires to individualize justice. In some ways, the person being lynched did not matter at all. While black people were lynched disproportionately, they were not the only minority group to be victims of the practice. This does not mean that race did not matter, as it clearly did. However, what could matter just as much or more in some cases was what the person was thought to have done. The same is true largely of mandatory sentencing; the offense dictates the punishment, not the offender's characteristics. With no individual consideration, the defendant becomes faceless, and factors that might allow them to escape the death penalty become lost in the mix.

Another issue with mandatory death sentencing is that it has the potential to sow the seeds for its own demise in the form of jury nullification. In the days of mandatory capital sentencing (mid-nineteenth century and prior), jurors would "acquit

(defendants) of capital crimes even in the face of compelling evidence of guilt" (Steiker & Steiker, 2016). The Court was in the process of making capital punishment formally rational, and mandatory capital sentencing, though in theory providing greater consistency, threatened to throw an irrational wrench into the mix. This would not be an issue if capital trials did not involve a jury. However, in a trial by jury, individual jurors bring their own substantive values (substantive rationality) with them to the courtroom. Substantive rationality is in constant tension with formal rationality, and can serve to undermine a formally rational system (Feldman, 1991). Such could well have been the case if mandatory capital sentencing had been allowed in the modern era.

As mentioned earlier, the Court sought balance in its new capital punishment scheme, and they found the desired equilibrium in *Gregg v. Georgia*. In *Gregg*, the Court decided that guided juror discretion, in the form of aggravated criteria and jury instructions, addressed the arbitrariness issue which had caused capital punishment to be struck down in *Furman*. Theoretically, underinclusion would not be an issue because structured discretion would ensure a standard by which like cases would be treated the same. On the other hand, overinclusion would be curbed because the individual consideration still present would allow jurors the ability to "distinguish the deserving from the undeserving" (Steiker & Steiker, 2014, p. 81). The companion case *Jurek v. Texas* took individual consideration even further (or gave the appearance of doing so). The Texas capital statute, written as part of the wide legislative backlash after *Furman*, included a special issue requiring the jury to confirm that the defendant posed a "continuing threat to society" before they could be sentenced to death. In the other

companion case of *Proffitt v. Florida*, the Court upheld the right of the trial judge to make the final decision regarding the death penalty (Bohm, 2012), thus making the jury's "verdict" a *de facto* recommendation (this would in theory make Florida's death penalty system more predictable, as trial judges are likely to be more consistent than a jury).

The Court continued its quest to institute the desired adequate individual consideration into the death penalty in *Lockett v. Ohio* (1978). This ruling held that capital trials had to provide for consideration of any mitigating factors the defense introduced which might warrant a sentence less than death (Bohm, 2012). Up until *Lockett* was decided, Ohio only allowed for the consideration of mitigators that were statutorily listed (Bohm, 2012). The "open-ended" mitigation that has been the result of *Lockett* seems in theory a good way to individualize capital punishment. During the course of a trial (usually in the sentencing phase), a defendant, rather their attorney, may present literally any evidence that they feel demonstrates that the death penalty should not be handed down. Open-ended mitigation, along with other methods of individualization, are forms of rationalization, a process which can itself confer legitimacy upon a process or institution (Steiker & Steiker, 2014). This has been the case with open-ended mitigation, which has given the appearance that the Court has gone to great lengths to ensure that the defendant receives fair consideration in the face of the ultimate penalty. It is not only *Lockett* and *Gregg* that have had this legitimating effect; as we will delve into more later in this chapter, there are other cases that have given capital punishment a rationalized appearance and helped to ensure its continuation.

Based on appearances then, it may seem that mitigation, as it exists in the capital process, is thoroughly appropriate and just. However, this is the effect of rationalized legitimation; to cover up issues that exist under the surface. As Haney (2014) points out, one issue with open-ended mitigation is that jurors are often unclear or confused about what mitigation is, even when given instructions on the subject. Thus, in a trial in which mitigation is presented that is not statutorily listed, it is entirely possible for jurors to be confused about whether or not what is presented is actually mitigating. Haney (2014) has also found that aggravating circumstances are presented in clearer language that are mitigating circumstances. Couple this with the fact that mitigators are by their nature often unclear, and do not fit in with popular notions of crime and criminality (offenders are "different", "evil"), and the issue becomes clear. However, because of the appearance of rigid regulation on the part of the Court, these issues rarely manifest above the surface, and are only known to those who study capital punishment in depth.

The guise of rationality and its legitimating effects can also be seen in *Batson v. Kentucky*, which dealt with the striking of jurors during the jury selection process. In this non-capital case, the Court ruled 7-2 that prospective jurors may not be struck based on their race (Bohm, 2012). Applied to capital punishment, *Batson* was also clearly an attempt to separate capital punishment from the legacy of lynching, which I have discussed previously; all-white juries were a staple of the lynching era. And while the decision to prevent striking jurors based on race looks good, the devil is in the details. It is difficult to prove that a juror was struck because of race. In reality, all a lawyer

accused of such would need to do would be to say that they did not strike the juror based on race, and unless there is hard proof (such as in writing or video form), there is no way to make such an accusation stick. Also, a lawyer may strike a juror for any stated reason (such as long hair) while their real reason for doing so may well have been race. Effectively, *Batson* legitimized the jury selection process by covering up such issues and making the process appear to be fair and rational.

The Court took on concerns of racial discrimination in the administration of the death penalty in 1987 when it heard *McCleskey v. Kemp*. Race discrimination has long plagued the American death penalty and was the reason that the NAACP's Legal Defense Fund first took on the death penalty in the 1960's (Garland, 2010). In *McCleskey*, the defense presented evidence from the so-called "Baldus study" that unequivocally showed Georgia's capital system to be racially biased by race of victim (Steiker & Steiker, 2016). In spite of the overwhelming evidence, the Court ruled against Warren McCleskey. What is odd about this case is that the Court did not reject the scientific evidence of the Baldus study; on the contrary, the Court accepted the evidence presented as valid. However, the Court knew that if they ruled in favor of McCleskey, the capital statutes (and likely the criminal justice systems) of every state would be called into question, opening up an issue that would be impossible to resolve. Hence, the Court ruled on narrow grounds that it was the burden of the defense to prove that racial bias affected their particular case.

The lesson of *McCleskey* for outside observers is that formal rationality is not always sensible, and that it can act as a defense mechanism for a flawed system. By

ruling on narrow, technical grounds in *McCleskey*, the Court created an impossible standard for defendants trying to assert racial bias in their case, and made it useless for a defendant to assert that the entire system is plagued by racial bias. Aggregate data, regardless of its validity, was rendered worthless. By using formally rational rules to narrow the parameters within which racial bias can be asserted by the defense, the Court effectively built a shell around capital punishment, insulating it from challenge or reform except in isolated instances and fragmentary form. Thus, formal rationalization was still a big part of *McCleskey*, but it was used in a manner different than the previous cases I have highlighted; while in those cases the Court's rationalization served to give the death penalty a good appearance by hiding issues under the surface, in *McCleskey* the admittance of racial bias in no way made capital punishment look good. Instead, rationalization was used to make the procedure of challenging the death penalty on racial grounds effectively nigh undoable.

From the previous cases, we can discern a pattern of rationalization on the part of the Court. And while this pattern and smaller patterns within the individualization-standardization dialectic do exist, it is important to keep in mind that the Court is not a homogenous body, as it is comprised of nine members of varying political and legal views. Also, the Court has changed in composition numerous times during the modern era. Because of this, there are bound to be cases that do not fit in with the rationalization trend. An example of this is *Payne v. Tennessee* (1990), in which the Court permitted the use of victim-impact statements in the courtroom. This case sticks out among the Court's capital jurisprudence because victim-impact statements are not

formally rational, are not professional, and, although they are subject to parameters, are not standardized. What also makes *Payne* peculiar is that the Court had previously struck down the use of victim-impact statements a few years earlier in *Booth v. Maryland*, a case much more consistent with the Court's trend toward formal rationalization.

When we think about victim-impact statements within the bounds of Weber's concepts of rationalization, it becomes clear why permitting them into the capital process could be problematic for the Court. Victim-impact statements are substantively irrational in that they satisfy "(individual) values and needs" (Feldman, 1991, p. 213), and are in large part tied to cultural values and notions of morality. As Weber wrote, formal and substantive rationality are in constant tension, and have the potential to undermine one another (Feldman, 1991). Thus, we can see that substantively rational victim-impact statements are quite distinct from formally rational aspects of the capital trial that the Court approved of, such as standardized jury instructions. We can then assert that victim-impact statements are formally irrational because they are not predictable. This leads to the conclusion that victim-impact statements are or could be arbitrary, and are thus easy targets for legal challenge. In other words, victim-impact statements have the potential to subvert other areas of the Court's formally rational jurisprudence in regards to capital law. In essence, the Court here opened its flank to attack for the purpose of pandering to substantive values and goals.

Two cases concerning lethal injection are also of note when discussing the Court potentially creating problems for itself in the future: in *Baze v. Rees* (2007) and *Glossip*

v. Gross (2014), the Court upheld the use of certain drugs (a three-drug cocktail in *Baze*, midazolam in *Glossip*) for lethal injection. Lethal injection is, at least in theory, highly rational. It is based on forms of accepted scientific knowledge, and is administered according to specific rules and procedures that cause it to appear similar to a medical procedure. However, certain drugs that have been used as part of lethal injection, such as the aforementioned midazolam, have resulted in irrational outcomes, such as when it took forty-three painful minutes for Clayton Lockhart to be executed. The Court's willingness to essentially "kick the can on down the road" means that it is likely that similar issues will occur in the future, and that lawyers will have a clear avenue on which to challenge lethal injection, or the death penalty as a whole.

In the modern era, as with the pre-modern era, there exists a pattern in the Court's jurisprudence; however, the pattern in the modern era is much easier discerned. The Court clearly set out to rationalize the death penalty in the modern era in large part because it was the only path they could take in the aftermath of *Furman* if capital punishment were to persist. It is in this vein that cases such as *Lockett* and *Batson* were decided. And the Court's efforts have had the intended purpose of legitimating the death penalty by making it appear rational and by distancing it symbolically from the history of lynching. However, the "irrationality of rationality" (Ritzer, 2013, p. 15) is blatantly apparent in the death penalty, as though formal rationalization has been imposed upon it, capital punishment is not predictable, not calculable, and nowhere near efficient. Indeed, the case can be made that the death penalty is now more arbitrary than ever (Steiker & Steiker, 2014). The addition of cases like *Payne* that were

in no way driven by formally rational legal thought does not aide in making the death penalty more sensible. What we can conclude is that which has already been concluded by the likes of Steiker and Steiker (2016); the Court's efforts to impose rationalization on the death penalty in the modern era have failed, and the institution is in practice arbitrary, capricious, and rogue.

Chapter 4

Application of McDonaldization to Modern Capital Punishment

Garland (1990) says that "cultural mentalities and sensibilities influence penal institutions" (p. 193). This is inclusive of capital punishment as well, and it is in this way that I seek to understand modern capital punishment; as an artifact of neoliberalism. This chapter will examine modern (post-*Gregg*) capital punishment jurisprudence and administration in regards to neoliberalism. To examine the application of neoliberal theory to capital punishment in the modern era, I will use Ritzer's (2013) four tenets of McDonaldization, as a framework. While Ritzer (2013) does not discuss neoliberalism in his work on McDonaldization, there is a clear link between them. For example, both rely on formally rational rules or laws. Neoliberalism, as discussed in chapter 2, relies on complex and often rigid laws to protect private property, accumulation, and consumption (Harvey, 2005). McDonaldized institutions implement rules for operation that are also complex and rigid so as to promote efficiency (Ritzer, 2013). Also, McDonaldization itself is market rationality, which neoliberalism seeks to insert into as many societal spheres as possible. Further intersectionality between neoliberalism and McDonaldization will be demonstrated in this chapter as well. Each of the four tenets of McDonaldization (predictability, calculability, efficiency, control) will be explained briefly, then discussed in regards to relevance to modern capital punishment. It should be noted that certain aspects of modern capital punishment do not fit exclusively into a

given category of McDonaldization, and may appear across categories in the following discussion. For instance, capital juror instructions seek to make capital punishment more predictable, more efficient, and they are a form of control placed upon jurors. This is to be expected given that there is much interplay between the categories, and none of them are in any way exhaustive on their own. For example, to make a process more efficient and predictable, it is important to exercise adequate control over actors.

Predictability

Ritzer (2013) defines predictability as "the assurance that products and services will be the same over time and in all locales" (p. 14). In other words, predictability concerns itself greatly with uniformity. This is obvious in the fast food industry that Ritzer (2013) writes most about, where the exact same food can be bought on opposite ends of the globe. As Ritzer (2013) points out, predictability is desirable for people who frequent fast food restaurants. Neoliberalism also values predictability, an example of this being its penchant for legislation to protect business interests and private property; by setting clear standards, legal decisions concerning private property can be made to be more predictable. Also, as discussed in Chapter 2, the bio-political aspect of neoliberalism which Dean (2010) discusses seeks to make "freedom" predictable.

Prediction

As was discussed in chapter 3, there have been numerous attempts to make capital punishment more rational and predictable in the past via the seeking of new methods of execution (Banner, 2003). The need for predictability in execution methods

became even more important when the Supreme Court began to insert itself evermore into capital punishment affairs. The reason for this was because the Court ruled that capital punishment could not be arbitrary; *ipso facto*, in order to persist it needed to be more predictable. In the modern era, the execution method that has come to the forefront is lethal injection. Out of the 1,452 executions that have been carried out since capital punishment was reinstated by *Gregg v Georgia*, 1,277 have been by lethal injection ("Execution Methods: Authorized Methods", 2017).

When we think in terms of predictability and uniformity, it is clear why lethal injection is the preferred method of execution. Lethal injection is designed to be predictable and uniform, something that is apparent from the fact that it is modelled after a medicalized procedure (Garland, 2010). Any medical procedure is supposed to be uniform so as to ensure the best results, and the same can be said of lethal injection. The tools used during the process are medical, and the execution drugs are inserted into the body intravenously, much as is done in a hospital. While medical professionals rarely involve themselves in executions due to ethical concerns, those whose job it is to carry out the procedure dress and behave the part. In fact, someone watching an execution via lethal injection without any foreknowledge of what was taking place would not be remiss to believe they were witnessing a medical procedure.

The execution process is also similar to a medical procedure in that it is technical. As Garland (2010) says "every stage of the procedure is precisely specified in advance and then logged and recorded as the process unfolds" (p. 53). Essentially, the execution process is laid out into a protocol so as to allow those overseeing and those

partaking to know with a reasonable degree of certainty what to expect. There is of course variation across states in execution procedure; however the purpose of the processes involved, and the rules that govern them, remain the same.

Rationalized jury instructions, mandated by *Gregg v. Georgia*, are also designed to make capital punishment more predictable. The Supreme Court struck down the death penalty as practiced in *Furman v. Georgia*, with their main reasoning being that its arbitrary implementation made it unconstitutional (Banner, 2003). In other words, the Court was saying that the death penalty at that point was largely unpredictable. When *Gregg* was decided four years later, the Court saw guided juror discretion in the form of instructions as a sufficient way to make capital punishment more predictable. It was also important that capital punishment be more predictable so that it would be more equitable. Even though the lawyers in *Furman* and *Gregg* were not making their argument on the grounds of racial discrimination, the Court knew that capital punishment disproportionately targeted black people. Thus, by inserting rules and structure into the process, the Court thought the death penalty's racism issue could be fixed. As Feldman (1991) states, in theory "abstract and depersonalized formal rules… (ensure) equal judgement under the rule of law" (p. 228), which is something the Court appears to have believed in.

Also, rationalized juror instructions fall in line with neoliberal theory. Included in the last chapter was a brief overview of Dean's (2003) discussion concerning the bio-political bend in neoliberalism. Garland (1997) also discusses this, saying "The neo-liberal strategy is to require all the actors in an organization to become responsible

decision-makers" (p. 197). Essentially, neoliberalism seeks to make its subjects behave in a "responsibilized" (Garland, 1997, p. 192) manner. Though it is more overt than at the societal level that Dean (2003) and Garland (1997) discuss, we can notice this delegation of responsibility with rationalized juror instructions. In the years before the *Furman* decision, two problems that had plagued capital punishment in America were jury nullification and the conviction of (mostly black) defendants who were clearly not guilty (Garland, 2010). The Court could have tried to remedy these issues with mandatory sentencing. However they rejected it in *Woodson v. North Carolina* (Bohm, 2012). As Steiker and Steiker (2014) point out, since the Court wished to include individual consideration in the capital punishment process, they had to leave certain decisions up to the jury. Being that too much choice is unpredictable, the juror instructions which the Court approved would then be designed to structure choice so as to encourage jurors to carry out their duty responsibly. Thus by "responsibilizing" (Garland, 1997, p. 197) jurors and structuring the limits within which choice occurs, the Court sought to make capital punishment sentencing more predictable.

Calculability

Calculability refers to "the quantitative aspects of products…and services" (Ritzer, 2013, p. 14). Ritzer (2013) observes that, under McDonaldization, "quantity tends to become a surrogate for quality" (p. 72). In his discussion on calculability, Ritzer (2013) demonstrates that fast food is not the only sphere of society where numerical logic is pervasive. For example, higher education has increasingly become all about the numbers, as a given student's worth is often summed up by their grade point average,

and funding is directed based on metrics (Ritzer, 2013). One aspect of calculability and quantitative logic is actuarialism, to which the field of healthcare is greatly subject (Ritzer, 2013). Actuarialism, or risk-management, can be expected to increase in a neoliberal society. Privatization is encouraged by neoliberalism, and private companies are profit-driven, i.e. they are concerned mainly with the bottom line. As we will see, quantitative logic is present in modern capital punishment as well.

The Numbers Game

The insertion of quantitative logic into the capital punishment system is quite apparent in the case of aggravating and mitigating circumstances. In order to hand down a death sentence, jurors must find that one of a list of statutory aggravating circumstances (factors that might warrant a death sentence) is present in their particular case (Steiker & Steiker, 2016). While aggravating factors can differ according to state, each state has a list of them, and many are present in multiple state statutes. Jurors must consider mitigating circumstances as well, which are factors which warrant that a death sentence not be given (Steiker & Steiker, 2016). Aggravating circumstances which the jury is allowed to consider are all listed. However, while some states do have listed statutory mitigating circumstances, jurors must in addition be allowed "to consider any evidence that could reasonably support a sentence less than death" (Steiker & Steiker, 2016, p. 166). Thus, any evidence which the defense chooses to present as mitigation can be considered as such.

The job of the jurors then becomes to consider which factors are more important in their case. The process becomes an exercise in "weighing" circumstances against one another. Many of the factors, such as whether or not the murder was committed in an "especially heinous, cruel or depraved manner" (*Walton v. Arizona*, 1990) rely on subjective language. Therefore, the assumption that underlies this "weighing" process is that objective, quantitative logic can be applied to the qualitative realm. It would also seem implicit here that quantitative logic supersedes the qualitative. Theoretically, jurors could then calculate whether or not a death sentence should be given. For example, if two aggravating circumstances and only one mitigating circumstance are found, then it would seem that a death sentence must be given. It then becomes a numbers game to determine whether or not a defendant "deserves" to be put to death. This type of logic seeks to make qualitative factors standardized, so that it would seem *a priori* that there is a point (perhaps on a numbered scale) at which a murder becomes heinous or cruel.

As mentioned previously, part of calculability involves risk-management, which can be noticed in the focus of capital punishment administration on future dangerousness. The concept of future dangerousness was formulated by Texas lawmakers when states were restructuring their capital statutes after *Furman* (Cunningham & Sorensen, 2014). Under Texas law, future dangerousness is a special issue that must be confirmed in order for a death sentence to be given (Cunningham & Sorensen, 2014). The statute states that jurors must confirm "Whether there is a probability the defendant would commit criminal acts of violence that would constitute

a continuing threat to society" (Cunningham & Sorensen, 2014, p. 289). The special issue was upheld by the Supreme Court in *Jurek v. Texas*, a companion case to *Gregg*, and has also been adopted by Oregon (Cunningham & Sorensen, 2014). In addition, four other states have future dangerousness on their statutory list of aggravating factors (Cunningham & Sorensen, 2014). In addition to it being ensconced in law, future dangerousness is also something that jurors frequently consider on their own (Cunningham & Sorensen, 2014); trying to predict future dangerousness is "common sense" (though this does not mean it is good sense, as we will see later).

In determining future dangerousness, jurors are essentially given the same type of risk-assessment job one might expect to find at an insurance agency. In fact, Cunningham and Sorensen (2014) mention that the risk-assessment models most often used to predict the likelihood of future dangerousness (which jurors are shown before making their decision) "is extensively employed in the insurance industry" (p. 295). The logic at work here is that the use of a prediction-based market tool can help to determine in which cases capital punishment is appropriate.

Efficiency

Ritzer (2013) conceives of efficiency as "the optimum method for getting from one point to another" (p. 13). Striving for efficiency is a staple of the fast food industry (think of the drive-thru window), as well as many other consumer-oriented businesses (Ritzer, 2013). As Ritzer (2013) points out, the efficiency offered by the fast food industry has caused many other sectors to adapt their business models to be more

efficient themselves, as consumers now demand products and services at a faster rate. Efficiency is a crux of business in a capitalist society, as faster and cheaper production means a higher profit margin. The increasing importance of efficiency means that it has become pervasive in many societal spheres, including criminal justice (Bohm, 2007). This is also true of capital punishment, which the following discussion will demonstrate.

An Expedient System

Most of the efforts discussed in this chapter that have McDonaldized the death penalty have been, in some way, the result of Supreme Court jurisprudence. However, one of the most ambitious efforts to make the death penalty more efficient involved legislation passed by Congress. The Anti-Terrorism and Effective Death Penalty Act (henceforth referred to as AEDPA), passed into law in 1996, sought to speed up the capital punishment process by cutting down on the length of the appeals process (Steiker & Steiker, 2016). As Blume (2006) notes, before the passage of AEDPA, there was no timetable for inmates filing for habeas relief. AEDPA (which was passed during a resurgence of "tough on crime" politics) addressed this non-regulated area by creating a one year window for petitioners to file a habeas claim (Steiker & Steiker, 2016). Also noted by Steiker and Steiker (2016) is that AEDPA established new barriers to multiple (habeas) filings" (p. 139). In addition to petitioners, AEDPA targeted federal courts as well by raising the standard for the granting of review (Blume, 2006). According to Steiker and Steiker (2016), under AEDPA, "federal courts cannot ordinarily reverse state court decisions unless they are not simply wrong, but "unreasonably" wrong" (p. 139). What this last quotation demonstrates is not only did legislators (along with President

Clinton, who signed AEDPA into law) wish to make the death penalty more expedient, but also that they were willing to tolerate a certain amount of error in the system in order to do so. In other words, quality was sacrificed for speed and cutting down on expense, as some error was assumed to be a natural byproduct.

The Court has also made efforts to cut down on the appeals process, evidenced in *McCleskey v. Zant*. Warren McCleskey (also the subject of *McCleskey v. Kemp,* which will be discussed later) was convicted of murder in part based on evidence provided by Offie Evans, a jailhouse snitch whom the state sought to use to gain evidence on the former (*McCleskey v. Zant*, 1991). After he was sentenced to death, McCleskey filed a federal habeas petition. In his first petition, McCleskey "did not raise a *Massiah* claim" (*McCleskey v. Zant*, 1991). A *Massiah* claim challenges testimony given by a defendant when counsel is not present (*McCleskey v. Zant*, 1991). After the first petition failed, McCleskey filed a second which included a *Massiah* claim. The Court declined to grant relief to McCleskey, not on the ground that his claim lacked merit, but because he failed to file the *Massiah* claim in the first petition (*McCleskey v. Zant*, 1991). In effect, the Court chose to rule on technical, procedural grounds instead of considering the substantive issues present in McCleskey's case. This also shows that, like the legislators who passed AEDPA, the Court privileged an efficient, technicalized, process-oriented system over the substantive legal rights of petitioners.

The preferred method of execution in the modern era, lethal injection, also attempts to make capital punishment more efficient. Executions of the pre-modern era, particularly in the time before privatization, often involved some sort of pomp and

circumstance; an execution was a community event. However, as Garland (2010) discusses, modern executions are more about "nonperformance" (p. 52); i.e. they are about routinization of the process. Modern executions have cut loose two aspects of past executions that serve as a threat to efficiency; the crowd and the brutality. In place of the crowd now is a tightly controlled, selected group of witnesses who have virtually no effect on the proceedings (Garland, 2010). Also, instead of the brutality, blood, and spectacle that was once present, now the condemned lies still on a gurney, and is administered fluids through an IV. The whole process is made to appear professional, speedy, and routinized, with all the trappings of efficiency.

Lastly for this section, the narrowing of the class of death-eligible crimes and defendants has been an attempt at making the death penalty more efficient. As was discussed in Chapter 3, in the pre-modern era of capital punishment, there were a relatively wide range of crimes that could be punished capitally (Banner, 2003). One of these crimes, rape, became part of the death penalty's crisis of legitimacy in the lead-up to *Furman*; as the vast majority of people sentenced to death for rape were black (often with white victims), this offense was a clear site of racial discrimination and a threat to capital punishment's legitimacy (Garland, 2010). It seems clear that the Court recognized the threat that the inclusion of rape posed to capital punishment, as they struck it down as a capital offense in *Coker v. Georgia* in 1977, shortly after they reinstated the death penalty in the *Gregg* decision (Garland, 2010). The linkage of racially disproportionate execution for rape to the lynching roots of capital punishment

undermined the death penalty's efficiency. *Coker* rectified this without explicitly mentioning race.

As Garland (2010) notes, a plethora of cases in the modern era have served to narrow the class of the death eligible. These include: the aforementioned *Coker v. Georgia*, which did away with the rape of an adult; *Ford v. Wainwright*, which excluded defendants who are insane at the time of their execution; and *Atkins v. Virginia*, which excluded the intellectually disabled. Having a large number of crimes and offenders that can be punished capitally is a potential impediment to the efficiency of capital punishment because, to use quantitative terminology, it puts more variables in play. This is especially true in the modern era when, despite aforementioned efforts to cut down on the number of appeals, the appeals process is still rather lengthy (Steiker & Steiker, 2016). Therefore, it has been necessary for the Court to cut down the number of potential capital cases in order to try to avoid logjams. In addition, having too many crimes punishable by death is a threat to the legitimacy of the death penalty, as modern sensibilities are not in line with punishing by death crimes which do not involve death (Garland, 2010). So, the narrowing of the class of the death-eligible has at the same time sought to legitimate capital punishment, as well as to make it more efficient.

Control

The last tenet of McDonaldization concerns the assertion of control over actors. As Ritzer (2013) discusses, in business, numerous forms of control are implemented to manage employees. A high amount of control is usually aimed more at lower-level

employees, especially in the fast food industry where such employees receive training on how to perform a small number of tasks in a standardized manner. It is natural that lower-level employees are subject to stricter forms of control because they are at the bottom of the hierarchy that delineates responsibility and decides upon the division of labor. Control also necessitates the existence of a bureaucracy, as well as clear and often rigid rules and regulations (Ritzer, 2013). In the fast food industry, and others in which consumers must set fit in an establishment, control is also exercised over non-employees. For example, the menus at fast food restaurants offer a limited range of options to encourage consumers to choose quickly, eat quickly, and leave (Ritzer, 2013).

Managing the System

No examination of control and capital punishment can be said to be complete without considering the role of the Supreme Court. As discussed in chapter 3, the Court for the most part stayed out of death penalty matters prior to the *Furman* decision. However, since that time, the Court has been at the forefront of capital punishment litigation (Steiker & Steiker, 2016). The Court's assertion of control can be said to have begun with the dissent in *Furman*, when it set the parameters within which capital punishment could be constitutional, i.e. guided discretion or mandatory sentencing. Four years later, the Court tightened its grip with the *Gregg* decision when it approved the new rules which would govern the capital punishment process. Since then, "the Court (has) embarked on a course of continuing constitutional regulation of capital punishment" (Steiker & Steiker, 2014, p. 77). The vast majority of regulation which capital punishment is now subject to has been imposed by the Court (with a few notable

exceptions, such as AEDPA). The Court's control over capital punishment is much in line with neoliberal theory. Harvey (2005) points out that neoliberalism is "profoundly suspicious of democracy" (p. 66). He also states that, within neoliberal theory, "a strong preference exists for government by executive order and judicial decision rather than democratic and parliamentary decision-making" (Harvey, 2005, p. 66).

Even in nations with democratic principles and institutions, neoliberals would prefer key decisions be made by elites, as populism can serve as a reaction formation against neoliberalism. This is evidenced by the popular backlash to *Furman*. This is certainly applicable to capital punishment. Though rules and regulations concerning capital punishment have been made and implemented by representative elected officials, they have (during the modern era) been subservient to the Supreme Court. The fact that the Court has taken the role of crucial end-game decision-maker upon itself *vis-à-vis* capital punishment is very much in line with neoliberal theory. It should be noted though that the Court has not assumed all decision-making, and has granted deference to states and local actors; however, as will be discussed later, this can be thought of as simply another form of control.

We might also view the Supreme Court's interjection into capital punishment affairs as a form of class control. A foundation for this argument is laid out by Soviet scholar E.B. Pashukanis, who postulated that "there is an homology between the logic of the commodity form and the logic of the legal form" (Beirne & Sharlet, 1980, p. 274). In other words Pashukanis is saying that, in capitalist societies, the law legitimates capitalist ideology, and vice versa (Garland, 1990). This form of control over the law

which Pashukanis postulates is of course not blatant, and is legitimated by the law's "claim to be a neutral guarantor of individual freedoms" (Garland, 1990, p. 113). However, Pashukanis also discusses a more direct form of control, which might best thought of as an intervention by state actors. Garland (1990) in his discussion of Pashukanis' work, states "there will be occasions when the exigencies of the political situation lead the state authorities to dispense with the niceties of legal form and pursue their class objectives by more direct means" (p. 113-114). This quotation seems almost a complete characterization of the Supreme Court's decision in *McCleskey v. Kemp*.

In *McCleskey*, the defense put forth empirical evidence that Georgia's capital punishment system was racially biased (Bohm, 2012). The chief piece of evidence presented by the defense was the Baldus study, which demonstrated that Georgia's capital system was racially biased based on race of victim (Bohm, 2012). Essentially, a black defendant who murdered a white person was significantly more likely to receive a death sentence than a white defendant who killed a black person. The case was important because it demonstrated racial bias, which had been a concern of the Court when it struck down capital punishment as then practiced in *Furman* (Garland, 2010). Despite the study, the Court upheld McCleskey's death sentence on the reasoning that the defense had not presented evidence of racial bias in their particular case (Bohm, 2012). Garland (2010) characterizes the Court's decision in *McCleskey* as "(drawing) back" (p. 274) from its regulatory duties. In a way this is correct, as the Court reasoned that such decisions regarding racial bias should be left up to the states (Garland, 2010).

I would argue, however, that *McCleskey* was a site of the Court inserting itself and protecting class interests. *McCleskey* presented clear evidence that racial bias plagued Georgia's system, which, due to all states having to conform to a certain model system as decided in *Gregg*, meant that such bias was likely present in other (or all) jurisdictions as well. As Banner (2003) notes, if the Court had decided in favor of McCleskey, it would have opened up the potential for inquiries about other forms of bias as well (such as gender bias), and likely meant that the entire criminal justice apparatus would be targeted for inquiry. The Court even recognized this in its written decision (Garland, 2010). Camp (2016) makes the argument that the criminal justice system is a form of class control, and that mass incarceration has come about as a protection of neoliberal class interests. Taking Camp's (2016) argument into consideration, we can see that a decision in favor of Warren McCleskey would have been a massive threat to class interests. Circling back to Pashukanis' argument, it would seem then that *McCleskey* was an instance of the Court "dispens(ing) with the niceties of legal form" (Garland, 1990, p. 113). In short, the Court took the gloves off, and took a direct approach to protect class interests, a form of control which separates itself from much of the rest of its modern capital jurisprudence.

Control is also exercised in a different manner in modern capital punishment by what might be called the diffusion of responsibility. As Ritzer (2013) discusses, modern fast food jobs are characterized by employees being assigned specific, repetitive tasks that are relatively simple, and act as one part in a larger process. This type of standardized, compartmentalized labor can also be found in modern capital punishment

via lethal injection (Banner, 2003). Steiker and Steiker (2014) state that the modern death penalty's division of labor has "had a legitimating effect on actors within the justice system", and has "create(d) a false aura of rationality, even science, around the necessarily moral task of deciding life or death" (p. 92). This is a point that Banner (2003) echoes, saying that actors who take place in the execution procedure can think of themselves as "a mere link in a long chain" (p. 299).

But, the diffusion of responsibility does not only apply to the actors who take place in the actual execution (Steiker & Steiker, 2014). In reality, any actor who in any way has anything to do with the capital punishment system may be subject a diffusion of responsibility. Part of this is due to the elaborate appellate review system which has been imposed upon capital punishment (Steiker & Steiker, 2014). So then, as Steiker and Steiker (2014) point out, theoretically it is easier for actors in the system to make decisions for which they do not have to feel ultimately accountable. For instance, a juror can rest easy if they vote for death with some uncertainty because their decision will be subject to automatic review. A local prosecutor who pursues the death penalty in a case where perhaps it is less appropriate can feel good about the fact that their error in judgement will be subject to intense state and federal scrutiny later in the process. All the while, higher level actors can point to their respect for local autonomy and deference to lower level actors This form of control, because it is not overt and thus not easily noticeable, is arguably more effective. By making it so that people do not have to actively engage with the role they play in the process (or making it easier for them to rationalize their engagement), the death penalty's division of labor makes moral

disengagement more expedient than it might otherwise be. Essentially, regulation and bureaucratization serves the purpose of making the entire capital punishment process more personally disinterested.

The Irrationality of Rationality

McDonaldization is an attempt to insert formal rationality within systems to make them more predictable, calculable, efficient, and controllable. However, as Ritzer (2013) points out, "rationalized systems inevitably spawn irrationalities that limit, eventually compromise, and perhaps even undermine their rationality" (p. 123). Ritzer (2013) asserts that irrationality is "at the most general level…a label for many of the negative aspects of McDonaldization…the opposite of rationality" (p. 123). We can also think of irrationalities as caused by contradictions that lie underneath the surface of different rationally-imposed aspects of capital punishment. Until this point, the discussion concerning McDonaldization and capital punishment has not addressed irrationality. This is because the point until now has been to, in Marxian terms, "abstract" the modern American death penalty so as to illustrate the operation within it of neoliberal market rationality, which is what I argue McDonaldization is. For the rest of this chapter, we will take a more "realistic" view of the death penalty to view the numerous irrationalities that exist in its operation.

Harmful Effects

First to be addressed here will be lethal injection, American capital punishment's preferred *modus operandi*. I discussed in the first section of this chapter that the

adoption of lethal injection has been an attempt to make capital punishment more predictable and uniform in its implementation. However, an irrationality that has caused lethal injection to become somewhat unpredictable is the shortage of certain drugs used to execute the condemned. Steiker and Steiker (2016) mention that, when execution drugs were more readily available, “the most common lethal injection protocol was a three-drug combination that included a barbiturate sedative, a paralytic agent, and a heart-stopping drug” (p. 15). In recent years, such drugs have been harder to come by due to manufacturers not wanting to be associated with capital punishment (Steiker & Steiker, 2016). This has caused states to seek out and use new drugs, either alone or as a combination, which are often not tested. As might be expected, this has led to irrationality. In the year 2014 alone, “four separate executions using new drug protocols were seriously botched in Ohio, Oklahoma, and Arizona” (Steiker & Steiker, 2016). The most well-known of the four occurred during the gruesome execution of Clayton Lockett. In this case, Oklahoma was using a new three-drug cocktail that included midazolam, which has been under much scrutiny since it was adopted in lethal injections (Lain, 2015). Locket was described as “writhing and twitching in pain” (Lain, 2015, p. 831) during the execution. In addition he continually tried to raise himself up off of the gurney in agony, until he eventually died of a heart attack (Lain, 2015, p. 831).

Though botched lethal injections are a product of the drug shortage, they are certainly not exclusive to recent years. Lethal injection has been presented, and is often thought of, as a humane method of execution that is painless (hence its comparison to a medical procedure). However, botches are very much a part of the history of lethal

injection. In his study of executions, Sarat (2016) found lethal injection to have 7 percent rate of botched executions since its implementation. Compared with other methods of execution (firing squad, gas chamber, hanging, and electrocution), lethal injection has the highest botch rate, with the gas chamber coming in second at 5.4 percent (Sarat, 2016). So, the obvious irrationality here is that lethal injection is less predictable than more archaic methods of execution that it is often thought to be superior to. It should be noted that the percent of botched lethal injections may actually be greater than Sarat (2016) estimates. The reason for this is that lethal injections include a paralysis-inducing drug which can hide pain. Thus, it is possible that numerous inmates have suffered intense pain during an execution but have not been able to express it physically.

Also addressed in the predictability section were capital juror instructions. The purpose of juror instructions is to guide the discretion of jurors in order to make capital sentencing less arbitrary, and by implication more predictable. The underlying assumption of juror instructions, or guided discretion in general, is that jurors are capable of understanding facts relevant to capital punishment, that they will follow the instructions, and that they will be able to consistently make the correct decision. However, there are a few tensions that lie under the surface of guided discretion that work against its purpose and lead to irrationalities.

As Haney (2014) notes, “the most significant problems stem from the general incomprehensibility of the instructions” (p. 501). In a study conducted by Haney and Lynch (1994), it was found that “college-educated students” (p. 420) struggled to

comprehend California's death penalty instructions (this is made more troubling by the fact that most jurors are not college-educated). Furthermore, Haney and Lynch (1994) found that only 15 percent of their studied population could define the concept of aggravation, and only 12 percent could do so concerning mitigation. Only 8 percent of their sample could define both terms correctly. Also, Haney (2014) says that "jurors who had served in actual capital cases were plagued by fundamental misconceptions about what the instructions meant" (p. 502). Aggravation and mitigation are both important concepts, as jurors are tasked with weighing them against one another in order to determine whether or not a death sentence is appropriate. So, what this research demonstrates is that the vast majority of jurors are likely under informed about the subjects they are dealing with when they make their decision.

We might conclude based on the research mentioned in the previous chapter that, since jurors often misunderstand the instructions that are designed to guide them, they are likely to be wrong (or at the least misguided) in their decision-making, and that capital sentences are doled out in a manner that is arbitrary. There is some research that backs up these inferences. First, let us return to the special issue of future dangerousness. As mentioned previously, in Texas and Oregon, in capital cases jurors must conclude that a defender poses a "continuing threat to society" (Cunningham & Sorensen, 2014, p. 289) in order to give them a death sentence (Cunningham & Sorensen, 2014). Research conducted concerning the accuracy of these predictions has found that jurors who affirmed the special issue were correct only 5.5 percent of the time, and that they would have a better chance of predicting future dangerousness by

simply guessing (Cunningham & Sorensen, 2014). In addition, the aforementioned "2% Death Penalty" report found that only 2 percent of counties in the United States have produced over half of the death sentences which have led to executions in the modern era. Thus it would appear that the contradictions underlying juror instructions (failure to comprehend) have resulted in a death penalty that is unpredictable and arbitrary.

As discussed previously in this chapter, there have been many efforts to make capital punishment more efficient. Here, we will focus on the narrowing of the class of death-eligible defendants and crimes. I mentioned before that the number of crimes that can be punished capitally in the modern era has been significantly narrowed compared to the premodern era (Banner, 2003). This has been the case with defendants as well, such as the intellectually disabled. Theoretically, the fact that juror discretion has been guided in the modern era would suggest a narrowing of kinds of defendants sentenced to death, as jurors would be more informed during the decision-making process.

However, in reality, the narrowing that appears to have taken place is largely a façade. Baldus, Woodworth, and Pulaski (1990) demonstrate this, saying that "virtually all persons sentenced to death in Georgia before *Furman* would have been deemed death eligible under Georgia's post-*Furman* statute" (p. 102). While Baldus et al. (1990) only mention Georgia, given that all death penalty states have the same general template for their capital statutes, we can reasonably infer that the same is true in numerous other jurisdictions besides Georgia. There are, perhaps, a few reasons for this, one of which is certain language within capital statutes. One statutory aggravating

factor in many states is the aforementioned “heinous, atrocious, and cruel” qualification. As Steiker and Steiker (2014) mention, “factors that focus on whether an intentional murder was “especially heinous” or manifested an “utter disregard for human life” invite an affirmative answer in every case” (p. 85).

Many statutes say that any murder is heinous, atrocious, or cruel in some way, which then gives jurors the job of determining what constitutes “especially” (Steiker & Steiker, 2014). Given that jurors are told that any murder is heinous, atrocious, and cruel, making the subjective leap to “especially” seems, as Steiker and Steiker (2014) say, likely to “invite an affirmative answer” (p. 85). The same can be said of the future dangerousness special issue in Texas and Oregon. Asking jurors if someone who has been found to have committed aggravated murder might pose a “continuing threat to society” seems almost a method designed for obtaining a positive answer.

Also, some of the Supreme Court’s efforts at narrowing have left open holes that undermine real attempts at cutting down on who can be sentenced to death. A good example of this is *Atkins v. Virginia*. Decided in 2002, *Atkins* took on the issue of executing defendants who are intellectually disabled (not to be confused with mentally ill). The court decided that it was in violation of the Eighth Amendment to execute the intellectually disabled, but failed to adopt a measure to define intellectual disability (Bohm, 2012). This means that it has become the job of states to do so, and as we might expect, states have adopted varying standards (Steiker & Steiker, 2016). This means that it is entirely possible for people who might be considered intellectually disabled outside of a given state’s guideline to be executed. An example of this would be Atkins himself,

who was sentenced to death even though he had an IQ of only 59, which is well below the usual standard of 70 (Bohm, 2012). The Court's deferment to local actors in this case is odd, as it would seem that jurors are quite unfit to determine intellectual disability, especially as it relates to culpability in a murder. We might view this as a form of "responsibilitization", or "rule-at-a-distance" (Garland, 1997, p. 194) logic on the part of the Court, which is quite typical of neoliberalism. Whatever the case, deferment by the Court has resulted in irrationalities that undermine their original goal.

Chapter 5

Conclusion

I have argued in this thesis that modern capital punishment in the United States can be understood by situating it within the framework of neoliberal market rationality, as illustrated by McDonaldization. My argument stems from the idea that punishment is an artifact of culture, which has been put forth by Garland (1990). Neoliberalism and McDonaldization are both cultural products with deep structural undertones, and being as they are both so prevalent in society, it should be no surprise that they have a great effect on punishment, which has been demonstrated by Bohm (2007) and Wacquant (2010), though not in regards to capital punishment. Ritzer (2013) has established the cultural aspects of McDonaldization by showing that it is a significant part of pop culture, and that a significant part of the population of America (and many other nations) desire it (the rubber cage). By applying the four tenets of predictability, calculability, efficiency, and control to modern era capital punishment, I have illustrated the infusion of neoliberal market rationality into this institution. In addition to these four tenets, the application of the irrationality of rationality demonstrates many of the seemingly irrational issues that surround the American death penalty, and that these issues often stem from rationalization itself.

The argument I have put forth shows that rationalization/McDonaldization has resulted in capital punishment becoming a process-oriented system. The process is

reified in two ways: the Supreme Court via direct action (*McCleskey v. Kemp*), and, more often and more importantly, the legitimacy that the appearance of the four tenets of McDonaldization provide. Steiker and Steiker (2014) have explored the legitimating effects of rationalization on capital punishment in the modern era, however, not through the lens of McDonaldization. I would argue that McDonaldization provides a better understanding of capital punishment's legitimation because we can see that it has legitimated other spheres of society as well. In short, McDonaldization illuminates the connectivity of capital punishment to other areas of neoliberal society.

The state that capital punishment is in is the result of rationalization, with the lion's share coming from the Supreme Court (Steiker & Steiker, 2016). The Court has taken it upon itself to be at the forefront of capital punishment litigation, and has heard many cases and handed down numerous decisions that have created an ever-expanding web of regulatory jurisprudence around it. As Steiker and Steiker (2014) discuss, most of the decisions that have come from the Court in the modern era have been concerned with highly technical matters, and have thereby narrowed the grounds on which arguments can be put forth to challenge capital punishment's legitimacy (such as *McCleskey v. Kemp*). The result has been that capital punishment appears to be highly regulated by Court jurisprudence that has been "extraordinarily searching" (Steiker & Steiker, 2014, p. 84). However, in reality this is not the case, as capital punishment is plagued by many issues, some of which I explored in the last chapter, which are the result of rationalization or deference by the Court.

This does not mean, however, that the Court has done nothing that has had any effect on capital punishment. As I mentioned, the death penalty has become heavily process-oriented and Mcdonaldized, and this is clearly, for the most part, the result of Court decisions. When I say process-oriented, I mean that the conduct of actors following abstract rules and regulations has become more important than the substantive issues that plague the system. Recall the case of *McCleskey v. Zant*, when the Court ruled against a claim raised by McCleskey that brought up important fundamental issues in his case because he had failed to put the claim forth during his first appeal. Being so process-oriented, rationalization often neglects to address substantive underlying issues within systems, and mainly is concerned with surface issues. Such is the case with the Supreme Court, which does not see problems as endemic to capital punishment, but rather as abnormalities existing in individual cases which can be fixed by narrow rationalization. This is much in line with neoliberal logic in that it focuses completely on the individual level, echoing Thatcher's sentiment that "there is no such thing is society." The implication is that any issues that exist can be remedied in a kind of non-social vacuum.

Two cases in particular demonstrate how important and ingrained the process is in regards to capital punishment. The first is *Atkins v. Virginia*, wherein the Court decided that it is unconstitutional to execute the intellectually disabled, yet left it up to the states to implement their own rationalized standards for measuring intellectual disability (Bohm, 2012). As was discussed earlier, this has resulted in varying standards across states, and, hence, irrational outcomes. The second case, *Moore v. Texas*, arose

because of this variation, and sought to impose rationality on the irrationality which was the result of *Atkins*. In *Moore*, the Court struck down Texas' guidelines for determining intellectual disability, as it was not based on any accepted scientific standard (Wolf, 2017). Here, we can clearly see that rationalization often results in irrationalities, as was discussed in Chapter 4. This is the dialectic of rationalization. It should be noted that this tension existed before neoliberalism and was inherent in classical liberalism as well, as shown by Horkheimer and Adorno (2002).

Moreover, we see the belief by the Court that the way to solve problems is more rationalization, and narrow rationalization at that. *Moore* does not implement one standard across all states, but rather focuses in narrowly on Texas' standard. We can expect this type of fix in a McDonaldized system, as McDonaldization itself is obviously a product of rationalization (Ritzer, 2013). Thus, a system born of rationalization (which modern capital punishment is) will inevitably privilege formally rational thought as a proper way of fixing irrationalities, the irony being that said irrationalities which pop up in McDonaldized systems often result from rationalization. Thus, it is accurate to say that *Moore* was a "fix" for *Atkins* though only a partial or surface fix, as the Court's desire for rationalization exists along with, but to lesser degree, a tendency to grant deference to states. This is also in keeping with neoliberal theory, which seeks to pull back from excessive government regulation. Both avenues, centralized rationality and deference to localism, are pursued as a means of legitimation of capital punishment as an institution and of the Court's authority generally.

If we think of the Court as governing in the case of *Atkins*, then it would seem that it was governing itself in *Moore*. It is these two cases which demonstrate perfectly the current state of capital punishment in America. The Court, through rationalization inherently needing to be bolstered by more rationalization, has become thoroughly engaged in "the conduct of conduct" (Garland, 1997, p. 194). Put another way, the Court's increasingly technical and "fixing" jurisprudence is an example of "the governmentalization of government", or "reflexive government" (Dean, 2010, p. 205). The underlying dialectic of this process is the tension between rationality and irrationality, the latter of which often creates the perceived need for more of the former.

Dean (2010) characterizes "the governmentalization of government (p. 205) as follows: "the state…is today meeting, being partially displaced by, reinscribed and recoded within another trajectory whereby the mechanisms of government themselves are subject to problematization, scrutiny and reformation" (p. 223). This definition reveals something about the government of government, in that it is, as Dean (2010) says, partial. In one way, reflexive government might appear to us as more of the same. I say this because reflexive government entails greater formal rationality (and *ipso facto* irrationality), and a further entrenchment of the sanctity of the process, i.e. form over substance. However, once again this is partial, as reflexive government manifests as a higher tier of government which seeks to hold government accountable to itself. It is a new area, where government is "monitored and prudently managed" (Dean, 2010, p. 194) by government. To think of it in terms of McDonaldization, instead of simply

predictability, we might see an attempt to predict how much predictability can be expected, to calculate calculability, to ascertain the efficacy of efficiency, or to exercise control over mechanisms of control.

A neoliberal analysis of the current state of American capital punishment allows one to logically consider what the future will hold for the institution. It is here where the concept of reflexive government is most relevant to my analysis. Dean (2010) talks of reflexive government as a form of governmentality that is still coming into being, and is doing so during the era of neoliberalism. This is evidenced in the previous quotation from his work, where he says that the current form of government is "being partially displaced" (Dean, 2010, p. 205). The implication of this is that we can expect reflexive government to continue on its path forward. Essentially, reflexive government, i.e. "government that entails a reduplication of the objectives of government upon itself" (Dean, 2010, p. 192), is where neoliberalism is heading.

My theorization implies that this is what we can expect for the future of capital punishment. If we think of reflexivity as a continuum, capital punishment will become more and more reflexive, and will become subject to increasing governmentalization. As Dean (2010) notes, "Foucault suggested that liberal and social forms of governance be understood as features on the trajectory of the governmentalization of the state" (p. 223). In other words, classical liberalism brought a certain degree of governmentality to the state, neoliberalism has brought more, and reflexive government will then bring more as well. Knowing the history of capital punishment in America, we can broadly perceive this same trend.

For the larger part of the premodern era, the Court stayed out of capital punishment affairs. However, as I pointed out in chapter 3, the Court began towards the later years of the era to play the part of liberal nobles, and subjected capital punishment to humanistic regulatory reforms. Then, in the neoliberal era (which coincides with the modern era of capital punishment) the Court has been much more ambitious in its efforts to regulate the death penalty, and has bestowed upon it a vast, technical web of jurisprudence that has served to thoroughly governmentalize it. And, since neoliberalism is giving way to reflexive government, we can expect capital punishment to be shaped by this new form of governmentality as it has been by the previous types. Governmentalization will need to be governed.

That capital punishment will be shaped by reflexive government can be reasonably hypothesized based on the previously mentioned dialectic; that of the inherent tension between rationality and irrationality. It is best to think of rationality, or formal rationality, as hegemonic. I mean this in the sense that it has the ability to become so ingrained that it morphs into common sense, and other ways of thinking are not even considered, or are seen as not measuring up to rationality's standards. Horkheimer and Adorno (2002) point out the hegemonic nature of rationality; "No matter what myths are invoked against it, by being used as arguments they are made to acknowledge the very principle of corrosive rationality of which enlightenment stands accused" (p. 4). This quotation reveals "corrosive rationality" (or formal rationality) as an artifact of the Enlightenment. This rationality has persisted and expanded since then and dominates the world today (McDonaldization). According to Feldman (1991), Max

Weber himself believed that formal rationality would continue to spread throughout the world. Thus, from what has been written about it previously, we can expect rationalization to continue to seep into new areas, as well as tighten its grip where it already exists, such as capital punishment.

Also, the dialectic shows that rationality has an ability to reproduce itself. A constant of rationalization is its function to produce irrationalities (Ritzer, 2013). This can cause somewhat of a crisis of legitimacy for whatever system the irrationality occurs in, with a degree of variation based on the perceived severity of harm caused by the irrationality. However, as I have mentioned previously, the fix within a rationalized system to any irrationality is more rationalization to shore up legitimacy in response to "crises." This new rationality will then afford fresh legitimacy (in the form of renewed faith in rationality) to the system, as it promises to correct the issue. We have already noticed this in the case of *Moore v. Texas*, which "fixed" an irrationality that sprang from *Atkins v. Virginia*. In the cases of *Atkins* and *Moore*, jurisprudence was stacked on top of prior jurisprudence, and it is precisely this which we can expect to continue in the future of capital punishment. As Garland (1990) discusses, as long as fundamental issues are avoided and the focus is put on technical matters, an institution will continue to persist and justify its failures. *Moore*, as well as other cases such as both *McCleskey v. Kemp* and *McCleskey v. Zant*, show that rationalization does not address substantive problems, but is content to deal with those technical matters. If any irrationality within the death penalty is to be addressed with more rationality (as it must be in order for the institution to persist as it does now), then it becomes apparent that capital punishment

will continue on to become increasingly more reflexive, process-oriented, and McDonaldized.

Like any study, mine has limitations. One is that this analysis is quite broad, which I knew and planned for going in. Where I focus on jurisprudence, I do so almost exclusively in terms of the United States Supreme Court. However, there are numerous cases at the lower court levels, such as the state supreme courts or appellate courts, which have had a great impact on how capital punishment operates. Another limitation of this analysis is that I do not address in-depth the history of racism and lynching embedded within American capital punishment. While I do mention it in chapter 3, I do not develop its significance in relation to neoliberalism. Race has played and continues to play a crucial role in American capital punishment, and it is certainly a drawback that I have not written more about it in this work. Also, the effects of populism and local politics on the death penalty are not explored here, and considering that they both operate outside of McDonaldization, and encourage deference granting, it would be prudent to address what part they play in regards to capital punishment. Any future research which seeks to add to or build upon my analysis would surely want to consider these limitations.

Future research might also want to examine two areas which would serve to build upon my analysis. First, whereas I am examining the effect of certain aspects of culture on capital punishment, others could seek to understand the effect that the modern form of capital punishment has on culture. Broadly, it is not so insightful to say that capital punishment has a cultural effect, as it is quite obvious that culture shapes

practice and practice shapes culture (Garland, 1990). However, a specific analysis that seeks to demonstrate how capital punishment shapes cultural perceptions of criminality, crime control, and punishment in general, would be quite insightful, and would meaningfully add to our current understanding of American capital punishment. Secondly, more research is warranted concerning how desensitization results from McDonaldization or rationalization in general. It would seem *a priori* that, over time, as rationalization inevitably leads to irrationality, people become desensitized to the harmful aspects of McDonaldization and rationality. Rationalization is cumulative, and as it continues to be employed (often to fix irrationalities), it would seem that people come to expect it, and thus the irrationalities that accompany it. An in-depth analysis of this effect would add greatly to the current understanding of McDonaldization and rationalization, specifically in how they legitimate institutions.

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