Unduly Harsh and Unworkably Rigid: The Death Penalty in North Carolina, 1910-1961

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ABSTRACT

SETH KOTCH: Unduly Harsh and Unworkably Rigid: The Death Penalty in North Carolina, 1910-1961
(Under the direction of W. Fitzhugh Brundage)

Some contemporary observers believe that southern states' prolific execution record can be traced back to a violent southern past. But an examination of concerns about the pain inflicted by the noose, the electric chair, and the gas chamber; of the complex influence of race on the death penalty process; of recommendations of mercy by jurors and governors' acts of executive clemency; and of the controversy that these issues raised reveals that the history of the death penalty in North Carolina, the South, and the nation, is much more nuanced.

Concerns about pain and its effects on an audience inspired lawmakers to try to make executions less painful and less visible. North Carolina became among the nation's first adopters of the electric chair and the gas chamber, but failed to dull public interest in executions and focused the conversation about the death penalty on methods rather than motivations. The racism of the Jim Crow South informed the death penalty, and North Carolina disproportionately executed African Americans, especially those who committed crimes against whites. However, all-white juries could show even African Americans accused of shocking crimes some leniency, applying a brutal logic that revealed the flexibility of the racial caste system. In an era when murder, rape, burglary, and arson carried mandatory death sentences, juries showed mercy by withholding guilty

verdicts, formally recommending life sentences, following a guilty verdict with petitions to the governor for clemency. North Carolinians knew that their death penalty was capricious, and they exploited it to introduce mercy into the process. All the while, some North Carolinians were trying to persuade their fellow citizens to reject death as punishment.

This dissertation invites a reconsideration of vengeance, justice, and race in one southern state. The death penalty's history in North Carolina is one of anxieties and ambivalence as much as racism and vengeance.

To Anne and Dan

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I am indebted to many people who helped me research and write this dissertation. My next major project is thanking each of them personally. Until then, I hope they will accept this message of gratitude for their patience, criticism, and support.

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LIST OF ABBREVIATIONS

NCC: North Carolina Collection, Wilson Library, University of North Carolina at Chapel Hill, Chapel Hill, NC.

NCSA: North Carolina State Archives, Raleigh, NC.

RNO: Raleigh News and Observer

PBL: Perkins/Bostock Library, Duke University, Durham, NC.

SBCPW: North Carolina State Board of Charities and Public Welfare

INTRODUCTION

The death penalty divides Americans into two hostile groups, equally emotional, equally uninformed, equally uninterested in listening to one another. Or so complain two academics in a recent article. "Arguments about the death penalty seem to skip past any sense of history or politics or jurisprudence," they wrote, "instead spilling forth stories that have little to do with anything resembling systematic evidence."[1] One hundred years earlier, another thinker voiced the same objection, lamenting the fact that the death penalty "is almost invariably discussed in the vague and spacious commonplaces of legal or religious phraseology, or of the serious or humorous newspaper press." The discussion is ruled, he concluded, by "wayward and uncoordinated impulses."[2]

Emotion, religion, and prejudice shape the argument about the death penalty, just as they have shaped death penalty policy and practice for much of the punishment's history. Americans make up their minds about execution by consulting their consciences and their scriptures, not experts with figures. Only very optimistic historians believe that their hours spent in archives will give them influence over people's beliefs, or lawmakers' actions, concerning death as punishment. But this very belief can be

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[1] Stephen John Hartnett and Daniel Mark Larson, "Moving Beyond the Rhetorics of Dignity and Depravity; or, Arguing about Capital Punishment," Rhetoric and Public Affairs, vol. 8, no. 3 (2005), 478.

[2] W.J. Roberts, "The Abolition of Capital Punishment," International Journal of Ethics, vol. 15, no. 3 (April 1905), 265 & 267.

inspiring—what one scholar calls "the liberating virtues of irrelevance."[3] Amid the din of competing voices on the death penalty, history can speak clearly in regard to an old argument about a very old punishment.

The post-1970s spate of often controversial executions which has made the United States the focus of international attention has been well documented. Journalists, lawyers, sociologists, criminologists, and historians have reflected on the push and pull between state legislatures and the United States Supreme Court; the caprice of the law and the men and women it endangers; the expense of the death penalty process; the role of race, youth, mental illness, and mental retardation; and the death penalty as "cultural truism," a result of the United States' unique position as the only western industrialized democracy that still uses death as punishment.[4]

Scholars writing on American exceptionalism have consulted the past for an explanation for the persistence of the death penalty in this country.[5] These explanations, which range from racial antipathy, to vigilante and populist traditions, to the political significance of crime and punishment, to high homicide rates, find their most salient expression in the American South. The South's reputation as a prolific executioner is well deserved. Texas has executed 422 people since 1976, followed by 102 in Virginia, 88 in Oklahoma, and 66 in Florida.[6] In trying to explain why southerners seem so committed to

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[3] Franklin E. Zimring, "On the Liberating Virtues of Irrelevance," Law & Society Review, vol. 27, no. 1 (1993), 9-17.

[4] Samuel R. Gross and Phoebe C. Ellsworth, "Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century," in Stephen P. Garvey, ed. Beyond Repair? America's Death Penalty (Durham, NC: Duke University Press, 2003), 20.

[5] Carol S. Steiker summarizes these explanations and their shortcomings in "Capital Punishment and American Exceptionalism," Oregon Law Review, vol. 81, no. 1 (2002), 97-131.

[6] Death Penalty Information Center. <http://deathpenaltyinfo.org/state/>.

the death penalty, some scholars have identified a southern subculture of violence, a compulsion that drives southerners to kill one another.

W.J. Cash wrote of the South as a frontier that bred men who "would knock hell out of whoever dare to cross" them, often another man with the same idea.[7] This was a cringing kind of honor, which rather than ennobling white southern men, forced them into a state of constant humiliation, in which the first insult became the last in a litany of imagined injury. A culture of honor encouraged answering these insults with violence. In a hierarchical society shaped by slavery, the culture of honor thrived, feeding on poverty, suffering, fatalism, and isolation.[8] Other scholars have suggested that evangelical Protestantism, "a religion of violence,"[9] nurtured aggression. Some have blamed the weather.[10] One scholar writes, simply, that "previous violence remains the single best known predictor of future violence."[11]

The southern subculture of violence offers a tempting explanation for contemporary execution patterns. Yet it ignores the fact that death penalty's southern identity is a post-1970s phenomenon. While the South as a region accounted for just over

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[7] W.J. Cash, The Mind of the South (New York: Vintage Books, 1991, orig. 1941), 43.

[8] Bertram Wyatt-Brown, Southern Honor: Ethics and Behavior in the Old South (New York: Oxford University Press, 1982); Elliott J. Gorn, "'Gouge and Bite, Pull Hair and Scratch': The Social Significance of Fighting in the Southern Backcounty," The American Historical Review, vol. 90, no. 1 (February 1985), 18-43.

[9] Donald G. Mathews, "The Southern Rite of Human Sacrifice: Lynching and Religion in the South, 1875-1940," The Journal of Southern Religion, vol. 3 (2000). Available online without pagination: <http://jsr.fsu.edu/mathews.htm>. See also Christopher G. Ellison, Jeffrey A. Burr, and Patricia L. McCall, "The Enduring Puzzle of Southern Homicide," Homicide Studies, vol. 7, no. 4 (November 2003), 326-352.

[10] Ellen G. Cohn, James Rotton, Amy G. Peterson, and Deborah B. Tarr, "Temperature, City Size, and the Southern Subculture of Violence: Support for Social Escape/Avoidance Theory," Journal of Applied Social Psychology, vol. 34, no. 8 (July 2006), 1652-1674.

[11] James W. Clarke, "Without Fear or Shame: Lynching, Capital Punishment, and the Subculture of Violence in the American South," British Journal of Political Science, vol. 28, no. 2 (2001), 274.

half of the nation's executions between the Civil War and the 1970s, that proportion has grown significantly since 1970.[12] Furthermore, America's most prolific executioners before the 1970s were not southern. Execution leaders for most of the twentieth century included New York (695 executions between 1890 and 1963), California (500 between 1893 and 1967), Pennsylvania (350 between 1915 and 1962), and Ohio (343 between 1885 and 1963). Moreover, states in the Deep South, such as Mississippi and Louisiana, executed many fewer people than Upper South states such as Virginia, Tennessee, and North Carolina.[13]

Across the United States, including in the South, between the early years of the twentieth century and the late 1960s the number of executions fell after peaking in the 1930s.[14] As late as 1970, a historian might have concluded that despite the legacies of slavery and violence in a state such as North Carolina, the era of the death penalty was over. As David Garland has argued, to accept that the use of the contemporary American death penalty springs directly from the traditions of the nineteenth century means overlooking the fact that for most of the twentieth century, the grip of those traditions appeared to be weakening.[15] The history of the death penalty in the twentieth century is one of rupture, not continuity.

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[12] Keith Harries and Derral Cheatwood, The Geography of Execution: The Capital Punishment Quagmire in America (Rowan and Littlefield, 1996), 29-31.

[13] William J. Bowers, with the assistance of Andrea Carr and Glenn L. Pierce, Executions in America (Lexington, MA: Lexington Books, 1974).

[14] Harries, 19. In North Carolina, executions spiked in 1947 but fell throughout the 1950s. North Carolina Department of Correction, "Persons Executed." <http://www.doc.state.nc.us/dop/deathpenalty/personsexecuted.htm>.

[15] David Garland, "Capital Punishment and American Culture," Punishment and Society, vol. 7, no. 4 (2005), 355.

It is also a history that complicates assumptions about southern violence. Southerners are a violent people, but the legend of southern bloodlust overshadows the issue's complexities.[16] Even the horrific torture lynchings of the 1890s were guided by "brutal logic:" mob members were more calculating than their crimes suggested.[17] As with lynchings, brutal logic guided the death penalty in North Carolina. Also as with lynchings, the death penalty in North Carolina was in decline, with notable exceptions, by the 1930s. And just as lynching did not become identified with the South until the end of the nineteenth century, the death penalty did not become identified with the South until near the end of the twentieth.[18]

This dissertation is not just an effort to challenge culturalist explanations for the character of the modern death penalty. It seeks to fill a gap in the historic record with a history of the death penalty in its middle age, after the era of public hangings and spectacle lynchings but before the United States Supreme Court became deeply involved in state executions. Scholars know more about lynching during this period than they do about the death penalty, an extreme exercise of government power that grew no less extreme after it has moved from the gallows at non to the lethal injection chamber in the early hours of the morning.

This dissertation seeks to address this lack of scholarship by focusing on the history of the death penalty in North Carolina between 1910 and 1961. It is a history of decisions. The first took place in 1910, when North Carolinians decided to electrocuted

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[16] For discussions both of the high homicide rates in southern states and on the intraregional variation in those rates, see Steven F. Messner, Robert D. Baller, and Matthew P. Zevenbergen, "The Legacy of Lynching and Southern Homicide," American Sociological Review, vol. 70, no. 4 (August 2005), 633-55.

[17] W. Fitzhugh Brundage, Lynching in the New South: Georgia and Virginia, 1880-1930 (University of Illinois Press, 1993), 49.

[18] Brundage, 3.

prisoners in a state prison rather than rely on sheriffs to hang them outdoors. The last, at least in this narrative, took place in 1961, when the state executed its final prisoner for more than two decades. In the interim, 362 men and women died in the electric chair and the gas chamber, each death the final event in a chain of decisions, from the solicitor's choice to pursue a grand jury indictment to the governor's decision to deny clemency. North Carolinians struggled with the death penalty process despite the existence, during most of this period, of mandatory death penalty statutes for first-degree murder, rape, first-degree burglary, and arson.

This dissertation is an effort to explain the terms of those decisions. It seeks to address the apparently peripheral issues, such as religion and emotion, that in fact guided the death penalty process as the death penalty moved from the gallows, to the electric chair, to the gas chamber. It argues that the exceptions, contingencies, and impulses not written into law—what some might call "wayward and uncoordinated impulses"—were at the heart of the death penalty process. The law enshrined the death penalty, and in the state's capital, Raleigh, lawmakers were loath to tamper with it. But inside and outside the courtroom, North Carolinians tinkered with the death penalty process, from conviction to execution, until they forced lawmakers to accommodate the law to their constituents' more merciful tendencies.

North Carolina is a good candidate for this study because first, it was a state where leaders considered themselves reformers, and sought to apply that spirit to the state's treatment of criminals. Second, although since the 1970s North Carolina has been among the nation's most prolific executioners, a habit it shares with its southern neighbors, the state that has not always been comfortable with its southern identity. For

much of the twentieth century, it was dominated by businessmen intent on industrialization and eager to abandon their agrarian roots. North Carolina's leaders tried to reconcile the state's past, marred by slavery and racial violence, with their aspirations, in part by updating an ancient punishment. North Carolinians wrestled with the death penalty and what it meant for the state's image until it dwindled out in the 1950s. North Carolinians continue to struggle with the issue. In November of 2008, the state Supreme Court began its stewardship of the next phase in the argument over pain and propriety in the death chamber when it heard arguments the role of doctors at lethal injections.[19]

The history of the death penalty in North Carolina began with a gift. Charles II presented the province of Carolina to eight friends in 1663, endowing them and their subordinates with the power to punish crime with imprisonment, dismemberment, or death. The grantees showed some restraint, if the written record can be believed: the first recorded legal execution in North Carolina did not take place until 1726, when a Native American man was hanged for murder.[20] Laws in British colonies such as Carolina were harsh, and vestiges of the British criminal code persisted into the nineteenth century. A criminal convicted of a misdemeanor (a term that took hold in the mid-eighteenth century) in a colonial Carolina court could face humiliation and torment in the stocks, a public whipping, mutilation, or dismemberment; those convicted of felonies risked land forfeiture or death.[21]

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[19] Estes Thompson, "NC Supreme Court Hears Case on Execution Doctors," RNO (Associated Press), 19 November 2008. <http://www.newsobserver.com/1565/story/1299400.html>.

[20] M. Watt Espy and John Ortiz Smykla, "Executions in the U.S., 1608-1987: The Espy File." Available at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=269>. Hereon cited as Espy File.

[21] Albert Coates, "Punishment for Crime in North Carolina," North Carolina Law Review, vol. 17, no. 2 (April 1939), p. 205; Donna J. Spindel, Crime and Society in North Carolina, 1663-1776 (Baton Rouge: Louisiana State University Press, 1989), 45.

The British codes were North Carolina's legal foundation, but slave owners' conflicting impulses to protect their slaves as chattel and inflict violence upon them drove its evolution. The percentage of slaves as a part of the population was lower in North Carolina than in any other southern colony, but slave ownership was an essential source of wealth and influence, and North Carolina's criminal codes in the colonial period existed to preserve the slave regime, in part by punishing slaves severely. By one estimate, between 1726 and 1772, North Carolina executed more than 100 slaves, a total that exceeded the number of white people executed in the colony's entire history.[22]

In 1715, colonial lawmakers created a separate slave court system that gave some white North Carolinians the right to kill convicted or runaway slaves. The law, which was renewed in 1741 as many white southerners trembled in the aftermath of South Carolina's bloody Stono Rebellion, directed the courts, on which sat only slave owners, to try slaves "guilty of any crime or offense."[23] The judges' role was only to select a punishment and to make sure it took place. Slave owners often preferred to exert their own authority, and did so with whippings, brandings, and other punishments.[24] But when a slave was accused of a particularly serious or troubling crime, owners needed a way to kill them without becoming murderers themselves. North Carolina was the last colony to

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[22] Stuart Banner, The Death Penalty: An American History (Cambridge, MA: Harvard University Press, 2002), 8-9; Spindel, 134. The Espy File, confirms only fifty-eight slave executions out of a total of ninety-two executions between 1726 and 1775. But the database available online is, according to Banner, incomplete and marred by errors that took place during coding and data entry (Banner, 313).

[23] Marvin L. Michael Kay and Lorin Lee Cary, Slavery in North Carolina, 1748-1775 (Chapel Hill: The University of North Carolina Press, 1995), 49-52.

[24] Daniel J. Flanigan, "Criminal Procedure in Slave Trials in the Antebellum South," The Journal of Southern History, Vol. 40, No. 4 (November 1974), 538-9.

do so, but its legislators did make killing a slave a felony in 1775—on the second offense.[25]

Slaves were often punished violently, but their monetary value gave them some protection. Historian Guion Griffis Johnson writes that North Carolina's slave code was "surprisingly liberal" because "the slave was property, the most valuable moveable property which a person … was likely to possess."[26] This leniency showed itself in the fact that slaves received trials at all and that a slave's owner could defend his slave in court; that in 1774 the General Assembly made it a crime to murder a slave, giving the perpetrator one year of imprisonment for the first offense but death for the second; and that as of 1816, slaves could not be tried for capital offenses without a grand jury indictment and could claim benefit of clergy in some cases, winning a milder punishment by proving that they could read. The extension of these rights to people considered property under the law was a remarkable contortion to attempt to resolve slaves' dual status as people and property, as well as to protect the interests of slave owners.[27]

If a slave could not be saved from the gallows, his or her owner often received compensation after the execution. In the decade before 1758, for instance, owners who lost slaves to execution received on average nearly £20 more in compensation than those who sold them. Slave executions, then, could have been profitable for slave owners; at

[25] Kay and Cary, 71.

[26] Johnson, Ante-bellum North Carolina, 498.

[27] Lawrence M. Friedman, Crime and Punishment in American History (New York: BasicBooks, 1993), 43. Psalm 51 was the traditional text: "Have mercy upon me, O God, according to thy loving-kindness; according to the multitude of thy tender mercies, blot out my transgressions." This psalm was known as the "neck verse."

least, one observer noted, "the planters suffer little or nothing by it."[28] The lower classes did. It was their job to fill the fund with taxes they paid on alcohol and at the polls. Slave owners enjoyed the fund until 1758, when the financial strain of the French and Indian War forced the colonial government to cap it. The number of castrations for capital crimes rose sharply.[29]

In the early nineteenth century, North Carolina continued to maintain capital codes, as did other southern colonies, written to protect elites' vast property holdings, an aim that differentiated southern law from its northern counterpart.[30] Northern colonies, influenced by Puritanism, modified English codes to harshly punish moral crimes but offer a degree of leniency toward those convicted of property crimes. Alexis de Tocqueville thought that the Connecticut Puritans were unlikely to execute criminals, noting in *Democracy in America* that "never was the death penalty more frequently prescribed by statute or more seldom enforced."[31] Tocqueville traveled the Northeast at a time when death penalty reform was peaking. There had been some motion toward softening capital codes before the 1800s. In the 1790s, Virginia followed Thomas Jefferson's warning that the death penalty removed able bodies from the workforce and

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[28] Kay and Cary, 88.

[29] *Ibid.*, 87-89; Kirsten Fischer, Suspect Relations: Sex, Race, and Resistance in Colonial North Carolina (Ithaca: Cornell University Press, 2002), 180-86; Marvin L. Michael Kay and Lorin Lee Cary, "'The Planters Suffer Little or Nothing': North Carolina Compensation for Executed Slaves, 1748-1772," Science and Society, vol. XL, no. 3 (Fall 1976), 306.

[30] Banner, 6-7.

[31] Alexis de Tocqueville, Democracy in America, Arthur Goldhammer, trans. (New York: The Library of America, 2004), 42.

joined Pennsylvania, Kentucky, New York, and New Jersey in banning it, except for murder. The change applied, significantly, only to whites.[32]

North Carolina's law as written, too, was harsher than the law in practice. In 1815, it listed at least twenty-eight capital crimes without benefit of clergy:

> Arson; burglary, whether or not goods were stolen; murder; highway robbery; accessories before the fact in each of these four crimes; treason; housebreaking in the day time and taking off goods to the amount of 20 shillings; bestiality or sodomy; dueling; bigamy; stealing slaves or aiding them to escape; stealing free Negroes from the State and selling them; voluntary return of slaves transported from the State by sentence of court; rebellion of slaves or conspiracy to incite insurrection; free persons joining a conspiracy or rebellion of slaves; concealing childbirth; breach of prison by a person committed for a felony; counterfeiting notes of the Bank of North America; and the second offenses of manslaughter; forgery; horse-stealing; maiming by putting out eyes or disabling the tongue; counterfeiting or knowingly passing counterfeited bills of credit, public certificates, or lottery tickets; robbery except in a dwelling house or near a highway; larceny from the person to an amount of twelve pence or upwards; too great duress of imprisonment on the part of a jailor; embezzling or vacating records in a court of judicature; and embezzlement by a servant more than eighteen years old of his master's goods to the value of $10 or upwards.[33]

The colony, and then the state, though, did not execute many people for property crimes. Most people, white and black, executed in colonial and antebellum North Carolina died for murder and rape.[34]

Concerned by this long list of capital crimes Governor William Miller told North Carolina lawmakers in 1815 that "the end of punishment is the prevention of crimes. If

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[32] Banner, 98-9.

[33] Johnson, Ante-bellum North Carolina, 646.

[34] Espy File.

that end can be attained by a system which substituted the reformation of the offender in place of frequent capital punishments, there certainly is room for a change. All history attests the fact, that the progress of correct principles is slow, and that they must finally make their way "'by patient and diligent enquiry, and by fair, candid, and liberal discussion.'"[35]

Change was indeed slow. As racism became increasingly entrenched in the slaveholding South, northern states monopolized efforts to reduce the severity of their capital codes. In the northeast and Midwest, a relatively robust abolition movement succeeded in eliminating or limiting the death penalty in the mid-nineteenth century. In 1837, Maine instituted a one-year waiting period between conviction and execution, touching off a trend that saw Vermont, New Hampshire, Massachusetts, and New York follow suit. In 1846, Michigan abolished the death penalty for murder, followed by Rhode Island and Wisconsin.[36] By 1860 no northern state punished anyone other than murderers and traitors with death.[37] At the time, North Carolina had reduced the length of its capital code, too, to seventeen crimes.

Shortly before the Civil War, some conscience-stricken North Carolinians, motivated in large part by their shame over "the bloodiest code of laws of any state in the Union," managed to push through some legal changes.[38] The state's revised criminal code of 1855 decapitalized a number of crimes, including daylight housebreaking, forgery, and

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[35] Quoted in Johnson, Ante-bellum North Carolina, 645.

[36] Banner, 134.

[37] David Brion Davis, "The Movement to Abolish Capital Punishment in America, 1787-1861," The American Historical Review, vol. 63, no. 1 (October 1957), 23-46; Banner, 131.

[38] Hillsboro Recorder, March 21, 1844. Quoted in Johnson, Ante-bellum North Carolina, 652.

burning public bridges. The crimes that remained capital on the eve of the Civil War were sins against the body (murder, rape, and stealing free blacks for sale as slaves), the soul (sodomy and bestiality), and property (arson, burglary, and slave-stealing).

Despite this move toward greater leniency, between the end of the Revolutionary War and the beginning of the Civil War, North Carolina hanged or burned at least 109 slaves for crimes such as murder, rape, and revolt. Eleven women were executed, just one of them white. Five of the black women executed were burned, a punishment reserved almost exclusively for enslaved women who killed their masters. The record does not indicate any slave executions during the Civil War; of the twenty-four men who died on the gallows during the war, twenty-two of them were deserters, all hanged on the same April day.[39]

Reformers' limited progress in antebellum North Carolina shows the relative lack of interest in crafting and applying a consistent ideology of punishment in the state. Instead, North Carolinians made judgments about individual cases based on their concerns about pain, cruelty, or reputation. In this way they slowly backed away from the bloody legacy of British common law, tinkering with it until they found a system that met their desire for local control and relatively clear consciences. From the bottom ranks of society, some citizens protested when they thought a local court had meted out an overly harsh sentence, such as in 1801, when Wake County residents petitioned the governor to intervene in the case of a black man sentenced to be hanged and burned.[40] At the top, elites such as Assemblyman Frederick Nash, who would become the state Supreme

[39] Espy File.

[40] Johnson, Ante-bellum North Carolina, 650.

Court's chief justice, condemned "the black catalogue of sanguinary punishments which disgrace our criminal code." In 1817, he pledged to work tirelessly to urge his colleagues to "rescue our common country from the foul reproach of being the last of her sister States in laying aside that sanguinary code which we inherited from our mother county."[41] He left the General Assembly the following year.

More than fifty years later, after the Civil War, North Carolina finally took steps toward laying aside its sanguinary code, principal among them the construction of a penitentiary. The Legislature made a number of passes at building a prison in the early nineteenth century, all of which failed. An 1801 effort to dig an underground prison fell apart. In 1816, the House and Senate disagreed over whether the penitentiary should be situated in Fayetteville or Raleigh, and compromised by building it in neither location. In 1827, the House allotted $100,000 for a 75-prisoner facility, but the Senate defeated the measure. The public joined the conversation in 1839, rejecting a prison plan by referendum, a vote they repeated in 1846. North Carolinians simply were not interested in erecting an expensive building intended to contain criminals, most of whom, they thought, were already quite well contained on the property where they lived and labored as slaves. Punishing slaves with imprisonment seemed like a waste of resources.[42]

Indeed, many North Carolinians believed that laboring for someone else, like the state, made men and women slaves. In the 1830s, when reform was sweeping the north and pressing southward, one North Carolina man thundered against the idea of a

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[41] *Ibid*., 651.

[42] Biennial Report of the State Prison Department, (1930-32), 7. Hereon cited as Prison Report. North Carolina Collection, Wilson Library, University of North Carolina at Chapel Hill, hereon NCC; Hilda Jane Zimmerman, "Penal System and Penal Reforms in the South Since the Civil War" (Ph.D. diss., University of North Carolina at Chapel Hill, 1947), 30.

penitentiary where white men might work for the benefit of the state. Turning reformers' language against them, he attacked this "horrid tyranny, which would disgrace the most barbarous and savage times." North Carolina, without a penitentiary, would be a "symbol of Christian humanity and benevolence … for, in my opinion, a free-born American sovereign to be placed in this degrading institution is far worse than death by any torture whatsoever."[43]

After the Civil War, the presence of 350,000 newly freed African-Americans changed some white North Carolinians' minds. And when the Reconstruction Act of 1867 forced southern states to rewrite their constitutions as a precondition to reentering the United States, North Carolina legislators mandated the construction of a penitentiary. After the governor found a site near Raleigh in 1869, the prison "'built itself,' so to speak."[44] In fact, convicts built it. Five hundred and thirty-three men, more than a quarter under twenty years old, arrived in January of 1870 and slept through the winter in a set of temporary cells they built themselves out of pine timbers. The prison would take fifteen years to complete. By 1872 the project was losing money, so the state began leasing most of its prisoners to private industries, keeping only the most dangerous criminals on site. It opened a farm, too, the first of its kind in the nation, where it grew tobacco. These measures slowed down construction considerably, but by December of 1884, murderers, rapists, arsonists, and burglars had constructed a "magnificent" prison that resembled a

[43] Greensboro Patriot, 21 February 1846, as quoted and discussed in Edward L. Ayers, Vengeance and Justice: Crime and Punishment in the 19th-Century American South (New York: Oxford University Press, 1984), 48-9.

[44] Fred A. Ols, "A History of the State's Prison," The Prison News, vol. 1, no. 2 (15 November 1926), p. 6.

castle.[45] Legislators hoped to imitate Auburn Prison in New York, a model already condemned as outmoded by the American Prison Association fourteen years earlier.[46]

The prison became a visible symbol of the approach to crime enshrined in the state's 1868 constitution, which declared that the object of punishment was "not only to satisfy justice but also to reform the offender and thus prevent crime." The constitution also directed the construction of Houses of Correction, or work houses, and Houses of Refuge for juveniles. It required that male and female prisoners in jails and elsewhere be held separately and obligated the Legislature find a way to educate "idiots and inebriates" and care for the deaf, blind, mute, and insane. It also created a State Board of Charities and Public Welfare, the first organization of its kind in the nation, to oversee these goals and institutions, bequeathing it authority to offer "suggestions" for improvement. The constitution limited capital punishment to murder, arson, burglary, and rape. In an impulse that would not be taken seriously for a century, the Committee on Punishments, Penal Institutions, and Public Charities had recommended that death be the punishment for murder only.[47] Thus the constitution enshrined a set of rehabilitative impulses toward petty criminals and the needy and purely punitive ones toward murderers, rapists, burglars, and arsonists.

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[45] Prison Report (1930-32), 7. NCC.

[46] Ols, p. 4-7; Zimmerman, 81-3; Charles K. Craven, "North Carolina's Prison System: A Chronological History Through 1950" (MA thesis, University of North Carolina at Chapel Hill, 1987), 14-42.

[47] The Constitution of the State of North Carolina, Article XI: Punishments, Penal Institutions, and Public Charities (Section 1, Punishments). < http://quod.lib.umich.edu/cgi/t/text/text-idx?c=moa;cc=moa;rgn=main;view=text;idno=AEY0617.0001.001>; "Report of the Committee on Punishments, Penal Institutions and Public Charities," Journal of the Constitutional Convention of the State of North Carolina at Its Session 1868, 292-3. <http://docsouth.unc.edu/nc/conv1868/conv1868.html>.

Members of the Board of Charities and Public Welfare embraced the letter of the constitution and the spirit of the reform movement, but they could only urge action, not make policy. In 1910, the Board declared its members' belief "that no person, no matter what his age or past record, should be assumed to be incapable of improvement," and a commitment to further that improvement with "religious and moral instruction, mental quickening, physical development, and … employment." The mentally disabled could at least be made comfortable. Trying to seize the long moment of optimism at the beginning of the century, the Board appealed on the part of the "feeble-minded": "They sit in utter neglect upon the door-steps of the County Homes. Their past, the future, empty nothingness, the present oft-times filth and physical discomfort, their rush-light intellects gradually going out."[48] Board members recommended a classification system for prisoners, the abolition of convict labor, funding for the construction of new institutions for juveniles, work toward indemnification of the wrongly convicted, indeterminate sentencing and a parole system, and other improvements in the lives of convicts.[49]

These recommendations reveal a desire to apply a rehabilitative style of punishment, but southerners continued to disagree about the purpose of incarceration. Southern thinkers sought to lay out a southern strategy for crime control and punishment, but the difference between the two seemed to vex them. G.W. Dyer, a Vanderbilt sociologist, mocked contemporary efforts to deal with crime at a conference in 1912. "In no department of human life and human study," he said, "is there a better example of

[48] Annual Report of the State Board of Charities and Public Welfare (Raleigh: The Board, 1911), 10. NCC. Hereon cited as SBCPW Report.

[49] SBCPW Report (1914), 7. NCC.

man's natural stupidity than in dealing with crime and crime control."[50] Dyer thought that the purpose of prisons was to protect society from criminals, to punish the criminal in order to deter others from crime, and to inspire reformation. Other speakers agreed, although one newspaper correspondent emphasized that reformation should be for the benefit of society, not the criminal.[51] Another added his hopes that "through the process of evolution" white Americans could build a "single-race nation" and thus eradicate crime, and the need for punishment, altogether.[52]

Until then, prison officials pursued a transformation in their inmates, and many seemed devoted to making the prison system a science-minded site for rehabilitating prisoners. In the early 1900s, convicts arriving at the penitentiary were stripped and washed and their physical characteristics, from their eye color to their shoe size, were recorded. Upon intake, policy directed that prisoners be confined for two days, where a variety of officials would "assure them of interest in their welfare; explain the object of the incarceration; urge upon them motives to reform; explain their duties as prisoners; read to them the prison regulations and perform such other acts as will serve to win the confidence of the convict and inspire them with hope for the future."[53] There was little such hope for capital criminals, who until 1910 mingled with the rest of the prison population in Raleigh before returning to their home counties for execution.

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[50] James McCulloch, ed., G.W. Dyer, "The Purpose of Imprisonment," The Call of the New South: Addresses Delivered at the Southern Sociological Congress, Nashville, Tennessee, May 7 to 10, 1912 (Westport, CT: Negro University Press, 1912), 89.

[51] McCulloch, ed., Tom Finty, "Prison Conditions in the South," The Call of the New South, 100.

[52] McCulloch, ed., William H. Samford, "Fundamental Inequalities of Administration of Laws," The Call of the New South, 129.

[53] Penitentiary Commission, "Rules and By-Laws for the Government and Discipline of the North Carolina Penitentiary During Its Management by the Commission" (Raleigh: M.S. Littlefield, 1869), 17. Documenting the American South, UNC-CH. < http://docsouth.unc.edu/nc/penitent/menu.html>.

Religious services took place at the State's Prison, the State Farm in Caledonia, and in prison camps around the state. In 1909, a library was constructed and held at least 500 books; white and black inmates could read there on alternate evenings. *The Prison News*, a newspaper published by inmates in the 1920s, told of religious revivals, performances, baseball games, and boxing matches. Inmates hosted a radio program on Saturday nights; as with other pursuits, the broadcasts were segregated, with white inmates going on the air one week and black inmates the next.[54] Superintendents and wardens urged legislators to institute a parole system, and in 1935 North Carolina became one of the first states in the nation to do so. Prisoners worked for about twelve hours a day, depending on the season, with "the pure air and bright sunlight of God's world all around them."[55]

These new approaches to incarceration were intended to replace a punishment system reliant on beatings and executions. They also were supposed to represent a move toward the kinds of high principles that had previously motivated northeastern reformers in constructing their own facilities, such as Auburn and Philadelphia's Walnut Street Jail. There is disagreement about whether the people behind these innovative northeastern prisons wanted to uplift criminals, make them useful, or just confine them. They isolated prisoners or forced them to work in total silence and administered brutal beatings for rule-breaking while claiming to seek transformation in their charges.[56] North Carolina's

[54] The inmates broadcast on WPTF, or "We Protect the Family," so named by the Durham Life Insurance Company that owned the Raleigh-based station.

[55] SBCPW Report, 1911, 23. NCC

[56] Scholarship on the history of the American prison includes: Michael Stephen Hindus, Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878 (Chapel Hill: University of North Carolina Press, 1980); Michael Meranze, Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760-1835 (Chapel Hill: University of North Carolina Press,

prison system followed the trend set by these northeastern models, managing to offset its lofty goals with horrific cruelty and neglect.[57]

This contradiction stemmed at least in part from the state constitution's directive that the prison system sustain itself, meaning that prisoners were working as much to fund their imprisonment as to improve themselves with honest labor. Even the reform-minded Board of Charities and Public Welfare admonished prison administrators not to stray from this goal: "It is for 'community service' that State and county institutions exist. They are the concrete forms of our ideas of economic welfare and are not created from charitable motives alone," the Board cautioned in a 1915 report.[58]

At state prison farms convicts raised and slaughtered livestock (hogs subsisted on prison trash), grew soybeans, wheat, alfalfa, clover, corn, and oats, as well as vegetables. They grew flowers in a large greenhouse and sold them to local florists; formed and fired bricks; and built cement culverts and sewers. At one point, the prison maintained a license tag plant, a mattress factory, a tailor shop, and a soap plant. Prisoners wove curtains and printed government documents in a print shop. Female prisoners, who were overwhelmingly black, made clothing, bedding, and towels for convicts and washed these articles when they became dirty. They also earned money by washing and repairing clothes for Confederate veterans at a nearby home. The prison even sold postcards.

1996); David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic, revised edition (New York: Aldine de Gruyter, 2002), David J. Rothman, Conscience and Convenience: The Asylum and Its Alternatives in Progressive America, rev. ed. (New York: Aldine de Gruyter, 2002), and Adam J. Hirsch, The Rise of the Penitentiary: Prisons and Punishment in Early America (New Haven: Yale University Press, 1992). Hirsch believes that Rothman underestimates acceptance of incarceration in the colonial period and misunderstands prison reformers' efforts.

[57] For a look at the brutality of northeastern prisons, see Heather Ann Thompson, "Blinded by a 'Barbaric' South: Prison Horrors, Inmate Abuse, and the Ironic History of Penal Reform in the Postwar United States," in Joseph Crespino and Matthew Lassiter, eds., The End of Southern History? (forthcoming, Oxford University Press).

[58] SBCPW Report, 1914 (Raleigh: 1915), 1. NCC.

Reflecting the importance attached to the prison system's self-sufficiency, superintendents described its economic health with more care as they described their inmate population. Executions often did not appear in prison reports; expenses always did.

Work camps, too, were intended to contribute substantially to this effort. Camp prisoners, often men who had committed minor crimes, labored in pine forests, in mines and quarries, or on farms. In the early twentieth century North Carolina maintained forty road camps around the state, each controlled by a county. One inspector described the satellite prisons as "forty wholly independent state prisons, under forty distinct managements, with forty different and distinct sets of rules and regulations, and over which there is absolutely no state supervision."[59] Life in road camps was hard, so much so that one prison Superintendent worried that the "unremitting toil and unendurable hardships" there would cause prisoners "to be worn out and buried within a few months, or, at the least, a few years."[60]

Jailers and camp guards used beatings, solitary confinement in the "dark cell," and whatever else they could think of as punishment. North Carolina retained flogging longer than most states, and without any guidelines on its use, the decision—or impulse—to beat a prisoner lay entirely with prison camp guards and their supervisors. Mistreatment of work camp prisoners horrified observers, from the Citizens' Committee of One Hundred which investigated jail conditions in the early 1920s, to North Carolinians who read about the brutality in their newspapers. Scandal erupted in 1935

[59] Prison Reports (1907-08), 12; "A Study of Prison Conditions in North Carolina," The Bulletin of the North Carolina State Board of Charities and Public Welfare, vol. 6, no. 1 (January-March 1923), 8. NCC.

[60] Prison Reports (1907-1908), 12. NCC.

when two black convicts discovered at a Mecklenburg County prison camp required amputation of their feet following a prolonged confinement.[61]

Those prisoners not living in the State's Prison or temporary work camps were confined in county jails, "dungeons" rife with "sickening odors," where the races and sexes freely mingled, often without adequate clothing or bedding and without much access to hygiene or food.[62] "Fortunately for our prisoners many of these buildings are seldom occupied," a State Board of Charities observed in 1912.[63] Jails, one historian speculated, held only those "who cared not to escape."[64]

Of 2,800 inmates in the prison system in the years 1911 and 1912, all but 75 worked on county roads, railroads, or farms; those 75 worked, or languished, within the walls of the State's Prison. This ratio persisted for decades. In 1928, only 305 of nearly 2,000 prisoners were held in the prison; in 1940, of 9,275 people convicted in North Carolina courts, 8,320 were sent to the roads. The commitment to using convicts' labor was so complete that in 1930, the Legislature gave control of the prison system to the State Highway and Public Works division.[65] And while the constitution forbade leasing convicts sentenced for serious crimes outside the prison, in 1926 the superintendent confessed that "it has long been the custom" to use physically fit convicts "regardless of

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[61] "Amputate Convicts' Feet; Rotted in Torture Cell," Raleigh News and Observer, 7 March 1935, p. 1. Hereafter cited as RNO.

[62] "A Study of Prison Conditions in North Carolina," 7-14. NCC.

[63] SBCPW Report, 1912, 21. NCC.

[64] Alan D. Watson, "County Fiscal Policy in Colonial North Carolina," The North Carolina Historical Review, vol. 55, no. 3 (July 1978), 286.

[65] Prison Reports (1927-28), 32. NCC; Table 1: Movement of Prisoners; Report of the Director of Prisons, Biennial Report of the State Highway and Public Works Commission for 1938-39 and 1939-40, 393. NCC.

their crimes." Those convicted murderers, rapists, attempted rapists, burglars, and arsonists not on death row had been laboring on the state's roads for years.[66]

Prison superintendents worried that the drive to make the prison self-sufficient was poisoning their efforts to reform criminals. In the early 1900s, Superintendent J.S. Mann confessed his doubts "that a term of imprisonment here can have any permanent reformatory effect upon the ordinary inmate. The association is vicious."[67] His successors echoed his anxiety for years, as poorly supervised camps and a poorly maintained prison piqued concern. In 1913 Governor W.W. Kitchin recommended vacating the prison altogether.[68]

The emphasis on convict labor continued well into the twentieth century. A 1950 report on the prison system, which listed a total of eighty-eight work camps, condemned convict labor and its control by the Highway Commission. North Carolina is "alone and wrong" in its approach to criminal punishment, the report said, and "virtually no effort is being made to rehabilitate prisoners under the present system." What the report said of the system in 1950 was true for the fifty years before that: "North Carolina is sacrificing long-range gains for short-range earnings by making the chief function of its Prison Department the maintenance of highways rather than the rehabilitation of as many offenders as possible."[69] Officials and others could only hope, as they did, that "as poor,

[66] Prison Reports (1924-25), 7. NCC.

[67] Prison Reports (1903-04), 9. NCC.

[68] "Biennial Message of W.W. Kitchin to the General Assembly," Public Documents of the State of North Carolina, Session 1913 (Raleigh: Edwards and Broughton, 1915), 5.

[69] "Osborne Association Survey Reports on North Carolina Prison System," (14 March 1950), W. Kerr Scott Papers, Box 68, North Carolina State Archives, Raleigh, NC. Hereon cited as NCSA.

perhaps, as North Carolina prison conditions have been, many of the prisoners have been better off while in prison."[70]

The death penalty, a glaring exception to a belief in criminality as a curable disease, undermined the growing attention to the connections between crime and other social pathologies, and a commitment, often religious, to redemption. The death penalty, severe and irreversible, was irreconcilable with these modern punishment principles, though it coexisted with them, and even flourished in their presence. It was mandatory for first-degree burglary and arson until 1941, and first-degree murder and rape until 1949. This rigidity, according to some North Carolinians, made the death penalty a "relic of barbarism" enshrined in and legitimized by a prison that seemed to exist primarily to confine death row prisoners until their executions.[71]

While the death penalty belied North Carolinians' inconsistent efforts to create a rehabilitative criminal justice system, it was not immune to cultural shifts. The heightened sentimentality of the late 1800s and early 1900s, the fascination with technology in the early twentieth century, and the growing concerns about race and justice at mid-century all made their marks. But the death penalty in North Carolina between 1910 and 1961 was not, despite its longevity, lashed to timeless cultural impulses. One characteristic it shared with the rest of the punishment apparatus in the state was that it proceeded along lines set by decisions made by people—prosecutors deciding which indictments to seek, members of grand and trial juries, judges, politicians crafting policy, governors granting or denying reprieves, all making choices for different

[70] Prison Reports (1929-30), 20. NCC.

[71] Nell Battle Lewis, "Incidentally," RNO, 3 February 1935, p. M3.

reasons. These reasons included concerns about suffering and spectacle, racial prejudice, the place of mercy, and the utility and morality of death as punishment.

This dissertation proceeds thematically. Chapter One describes North Carolinians' search for a painless method of execution, a quest that transformed the death penalty and its audience and eased the difficulty of witnessing and performing executions. It was a search that edged closer, but never close enough, to a clean way of killing criminals, and allowed questions of process to dominate the death penalty debate. Chapter Two addresses the role of race in the death penalty process. The death penalty was a weapon wielded to avenge white victims against black criminals, and awareness of its cynical use did as much to undermine its legitimacy as it did to reassure whites that the state was keeping the black population under control.

Chapter Three locates mercy in the death penalty story, explaining why some murderers wound up on death row and others never saw it. Finally, Chapter Four explores the controversy over the death penalty in the decades preceding today's shouting match; it was a controversy fully formed by the early 1900s, in which broad questions floated above disputes over individual cases. Each chapter is an effort to explore the death penalty's contingencies and inconsistencies in North Carolina, the push and pull between law, custom, and circumstance, and the ways in which, instead of standing as a symbol of the majesty of the law, the death penalty seemed, to many, to undermine it.

This paradox resulted in a tenuous commitment to a severe punishment. As the number of executions declined in North Carolina after the 1930s, the capital criminals who died in the electric chair or the gas chamber were more and more likely to be the friendless felons whose deaths aroused pity rather than a sense of satisfaction. Even in a

culture saturated with violence—motorists dying on a spreading network of roads, armed lawmen raiding moonshiners' stills, men fighting over women or with them, the daily aches of hard work and hunger—many North Carolinians, when they confronted the death penalty, turned away.

CHAPTER 1

"Without Howling, Without Squirming": Pain, Spectacle, and the Death Penalty

I. "The Black Figure on the Gallows": The End of Public Hangings

When Taylor Love's time came on a Friday morning in December of 1911, he hurried quietly into the death chamber and seated himself in the electric chair. A slender chain separated him from the twenty-six witnesses, who waited just a few feet away. Condemned for murdering his wife, Love prayed quietly as prison guards tightened the leather straps around him. Warden Thomas P. Sale pulled the switch, and Love was pronounced dead ninety seconds later. He died "calmly and without scene," but his quiet death bore a message. The night before his execution, he asked a minister to give his Bible and "a tender note of farewell" to his family. The note, obviously intended for a wider audience, warned young men to "avoid drink and bad women."[1] A reporter, observing that Love "was an intelligent looking negro," wrote, "no doubt his story is true that liquor had much to do with the crime. His end should be a warning to the pool-room loafing type of negro that is all too prevalent for the public good." He added, "It was all distressingly cold-blooded and methodical, this legal taking of human life, and yet it must be so."[2]

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[1] Southern lawmen and black leaders alike blamed liquor and drug use for black crime. See Booker T. Washington, "Negro Crime and Strong Drink," Journal of the American Institute of Criminal Law and Criminology, vol. 3, no. 3 (September 1912), 384-92.

[2] "Taylor Love Pays Death Penalty," RNO, 2 December 1911, p. 5.

Love's death realized many North Carolinians' hopes for electrocution, a method of execution that the state had adopted just a year earlier, replacing hanging. Love's piety showed that a private death chamber was no barrier to salvation, and that lethal punishment could lead to heavenly rewards. His note to his family not only demonstrated his rehabilitation, but also it emphasized execution's deterrent purpose. Most important, Love appeared to die painlessly, signifying the state of North Carolina's competence and compassion. Hundreds followed Love into the death chamber between his death and 1961, some quietly praying, others frenzied with fear. All of them were players in an old drama under revision by new technology as North Carolina searched for a way to kill criminals without appearing to harm them. On the gallows, display sent important messages. In the death chamber, the lack of display was the message.

Concerns about pain and spectacle, or how pain appeared to the public, was a major driving force in the history of the death penalty in North Carolina between 1910 and 1961. These concerns would seem to suggest that a deepening discomfort with the execution process in the state drove the death penalty underground. That discomfort, however, was for the most part limited to white elites, who worried about the effects of public, visibly painful hangings on the public and on the state's reputation. In 1910, they made execution in North Carolina part of a nationwide shift in the way the death penalty was applied. In doing so, they inaugurated a half-century of doubt that dominated the conversation about the death penalty as the death penalty process became less and less visible.

For much of the nineteenth century, pain lay at the heart of punishment as it lay at the heart of human existence, a varied, indescribable sensation that puzzled philosophers

and scientists. Even as anesthesia and other mechanisms of pain control spread after the Civil War, many Americans, from doctors to poets, insisted that pain offered the afflicted physical and moral regeneration. The American Medical Association cautioned that "anesthesia is death," and Emily Dickinson joined Ralph Waldo Emerson in celebrating pain as a spiritual tonic, warning, *Give balm to Giants/And they'll wilt/Like men.*[3] Pain was such an essential part of human existence that many Americans sought to control it by embracing it, and some considered trying to avoid pain cowardly and unnatural.[4] Pain, then, was a measure of personhood: American slave owners, whips in hand, thought that their black slaves felt little pain, a rationalization that would seem to discourage the use of the lash but which did the opposite. Slaves became the victims of their own coping strategy, which included teaching their children to endure pain and crying out during whippings only for "vexation" and not from pain.[5]

Some whites, then, saw sensitivity to pain as assurance of their racial pedigrees, but when pain strode the battlefields of the Civil War, white soldiers welcomed relief. Georgian Crawford Williamson Long had found, in the early 1840s, that inhaling sulfuric ether was "exhilarating," so much so that his discovery triggered a fad of "ether frolics," and he brought his expertise to the Confederate Army. Another southerner, William

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[3] A.K. Gardner, "Physical Decline of American Women," Knickerbocker, no. 55 (1860), 37; Thomas H. Johnson, ed., The Complete Poems of Emily Dickinson (Boston: Little, Brown, and Company, 1961), 115. Both quotations come from Thomas Dormandy, The Worst of Evils: The Fight Against Pain (New Haven, CT: Yale University Press, 2006), 283-4.

[4] Thomas Dormandy, The Worst of Evils: The Fight Against Pain (New Haven, CT: Yale University Press, 2006); Roselyne Rey, The History of Pain, Louise Elliot Wallace, J.A. Cadden, and S.W. Cadden, trans. (Cambridge, MA: Harvard University Press, 1995); Karl M. Dallenbach, "Pain: History and Present Status," The American Journal of Psychology, vol. 52, no. 3 (July 1939), 331-47.

[5] Interview with former slave Harry McMillan in John W. Blassingame, Slave Testimony: Two Centuries of Letters, Speeches, Interviews, and Autobiographies (Baton Rouge, LA: Louisiana State University Press, 1977), 383.

Thomas Green Morton, along with collaborators and rivals, introduced the inhalation of nitrous oxide, or laughing gas, as an effective anesthetic. When Morton died in 1868, a colleague inscribed his tombstone with the boast, "Since Whom, Science has Control of Pain."[6]

A craving for control that animated the search for freedom from pain, and increasingly directed the behavior of urban Americans, flourished among elite North Carolinians, where at the turn of the twentieth century white elites were primed for self-examination.[7] After the Civil War, these elites saw northeastern urbanites as models. As New South booster Henry Grady put it, North Carolinians wanted to "out Yankee the Yankee."[8] They set out to do so with their industries, pouring resources and energy into the textile mills, lumber yards, furniture factories, and tobacco fields that would define the state for generations. Soon, North Carolina gained a reputation for its citizens' energy and ambition. Their belief in business, paired with a "spirit of self-examination" and "belligerent inferiority" motivated a quest not just for progress, but for ways they could show it off.[9]

Minimizing pain and avoiding shame were significant components of this search. Seeing the dirty, suffering bodies around them, reformers attached moral meaning to their sense of revulsion. "Disgust," William Ian Miller writes, "makes beauty and ugliness a

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[6] Dormandy, 202-26. Quotation on 226.

[7] For a discussion of self-control in nineteenth-century urban America, see John F. Kasson, Rudeness and Civility: Manners in Nineteenth-Century Urban America (New York: Hill and Wang, 1990).

[8] Quoted in Milton Ready, The Tar Heel State: A History of North Carolina (Columbia, SC: University of South Carolina Press, 2005), 302.

[9] V.O. Key, Southern Politics (New York: Alfred A. Knopf, Inc., 1949), 205-215. Quotations from 208 and 207, respectively.

matter of morals."[10] Just as some reformers wanted to alleviate the pain of malnutrition and diseases such as pellagra and typhoid fever, others built new prisons, hospitals, and other institutions intended to heal their charges rather than inflict pain on them. It is no surprise, given the spirit of reform, that reformers soon turned to public executions in their drive to impose some order on the unruly spectacles.

For centuries, executions in North Carolina had been public events, and by the early 1700s, most prisoners died by hanging.[11] Executions were highly ritualized. In jail yards, outside courthouses, or in public squares, usually around mid-day, the condemned prisoner emerged from captivity, accompanied by clergymen and officers of the law. Standing on the gallows, the prisoner, almost always a man, might listen quietly to a sermon or address the crowd, telling of conversion, confession, and contrition. He had embraced God and expected to reach heaven; often, prisoners died protesting their innocence but welcoming death as newly baptized Christians.[12] The prisoner confessed his crime and his regret for a wasted life, lived in the company other criminals, debased women, and alcohol, and warned his peers away from his example. Thus the church, the state, and the stray joined in a mutually beneficial pact to affirm divine and profane justice and illustrate the consequences of criminality. Each participant vindicated the others. The condemned vouched for the possibilities of salvation and the righteousness of state-imposed justice before death; the clergymen, acting as "quasi-official apologists for the courts," sanctified the justice system and the wise use of force by the state, and

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[10] William Ian Miller, The Anatomy of Disgust (Cambridge, MA: Harvard University Press, 1997), 200.
[11] Espy File.

[12] J.A. Sharpe, "'Last Dying Speeches': Religion, Ideology, and Public Execution in Seventeenth-Century England," Past and Present, vol. 107, no. 1 (May 1985), 152-6.

offered the condemned salvation; and the state gave the church a pulpit and the condemned dignity and the chance to be remembered as more than a criminal and a failure.[13]

These rituals indicate the death penalty's significance, as long as executions were public, as a social institution that played an active and visible role in the lives of non-criminals. Execution was a complex exchange, and scholars have ascribed various meanings to its rituals, from the degradation of an outcast by an outraged community, to an expression of state power or the outraged conscience of a community, to the maintenance of the border at "an important point of contact between official ideas on law and order and the culture of the masses."[14] Public punishment might dramatize deviance and draw attention to the line which, drawn around a community, both encircles and excludes.[15] It might embody justice, punish criminals, and deter crime.[16] Whatever the significance of the public execution, "connections between the philosophy of punishment, penal policy, and actual penal practice are neither straightforward nor particularly close."[17] What is important is what North Carolinians intended their punishments to accomplish and whether they did so.

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[13] Daniel A. Cohen, "In Defense of the Gallows: Justifications of Capital Punishment in New England Execution Sermons, 1674-1825," American Quarterly, vol. 40, no. 2 (June 1988), 148.

[14] Sharpe, 162; Emile Durkheim, The Division of Labor in Society, George Simpson, trans. (New York: Macmillan, 1933); Michel Foucault, Alan Sheridan, trans., Discipline and Punish: The Birth of the Prison, 2nd ed. (New York: Vintage Books, 1995, orig. 1977).

[15] Kai T. Erikson, Wayward Puritans: A Study in the Sociology of Deviance (New York: John Wiley and Sons, Inc., 1966).

[16] Philip Smith, "Executing Executions: Aesthetics, Identity, and the Problematic Narratives of Capital Punishment Ritual," Theory and Society, vol. 25, no. 2 (April 1996), 241.

[17] R.A. Duff and David Garland, "Introduction: Thinking about Punishment," in R.A. Duff and David Garland, eds., A Reader on Punishment (New York: Oxford University Press, 1994), 17.

Even those intentions, however, are difficult to gauge, in part because the state had limited control over what happened on the gallows and even less control over how the audience interpreted those events. An execution that went off script could send observers the wrong messages, eroding faith in the state, evoking empathy for the condemned, or even inspiring acts of mimetic violence. The principle of deterrence depended on citizens acting rationally. If an execution aroused the passions of the citizenry, or was witnessed by particularly ungovernable or impressionable people, it risked provoking crime rather than preventing it. If an execution succeeded in conveying messages of civic power and piety, it might lend the condemned prisoner some of that power, too; if it did not, it might present state power as contestable.[18] The stakes were high in early twentieth-century North Carolina, especially if control over execution was "simultaneously an effort to control the perception and legitimacy of state-authorized killings and, by extension, the legitimacy of the entire criminal justice system."[19]

At the beginning of the twentieth century, North Carolina's leaders worried that public hangings were not only failing to deter crime but that they were exerting a corrupting influence on the lower classes. There was too often an imbalance of dignity: the morbid crowds had too little, and the condemned criminals had too much. The poise or suffering of the prisoner might inspire pity or respect, rather than condemnation, from the gathered crowd. After all, many Americans recently had believed not only that pain was a divine penalty for sin, but also that it provided "a redemptive opportunity to

[18] Timothy J. Kaufman-Osborn, From Noose to Needle: Capital Punishment and the Late Liberal State (Ann Arbor: University of Michigan Press, 2002), 162.

[19] Annulla Linders, "The Execution Spectacle and State Legitimacy: The Changing Nature of the American Execution Audience, 1833-1937," Law & Society Review, vol. 36, no. 3 (2002), 613.

transcend the world and the flesh by imitating the suffering Christ."[20] It was one thing to demonstrate through execution that a benevolent state suppressed its anger and offered its worst criminals a chance at absolution. (In North Carolina's case, more than absolution was available; some condemned men were offered an injection of morphine or a drink of liquor, the very substance many went to their deaths denouncing, to calm their nerves before their deaths.[21]) It was another to invite the crowd to choose Christ rather than Barabbas. If the audience's response to the condemned prisoner was unpredictable, so was its behavior, both during and after an execution. During the execution, crowds could be boisterous, since North Carolinians treated executions as social functions, where food and liquor were plentiful.[22] Afterwards, some elites worried, attendees might head home full of drink and inured to violence.

A century earlier, Pennsylvania reformer Benjamin Rush argued that that hangings, "far from preventing crimes by the terror they excited in the minds of spectators, are directly calculated to produce them."[23] Witnesses might develop a destructive "apathy to evil" as their "sensibility" declined. "What is worse than all," Rush concluded, "when the sentinel of our moral faculty is removed, there will be nothing to

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[20] Karen Halttunen, "Humanitarianism and the Pornography of Pain in Anglo-American Culture," The American Historical Review, vol. 100, no. 2 (April 1995), 304.

[21] "Two Suffer the Death Penalty," RNO, 21 August 1907, p. 1. The writer's tone indicates that the offer of morphine to convicted rapist James Rucker was a usual occurrence.

[22] "Capital Punishment," in William S. Powell, ed., The Encyclopedia of North Carolina (Chapel Hill: University of North Carolina Press, 2006), 177. See also N.C. Bartholomew, "N.C. Hangings Were Once 'Social Functions,'" Durham Morning Herald, 13 February 1949. Clipping File through 1975 (Capital Punishment), 41. NCC; Banner, 152.

[23] Benjamin Rush, Essays, Literary, Moral and Philosophical (Philadelphia: Thomas and William Bradford, 1806), 141. <http://books.google.com/books?id=xtUKAAAAIAAJ>

guard the mind from the inroads of every positive vice."[24] Edward Livingston, the jurist who drafted a penal code for Louisiana in the 1830s, agreed, worrying that seeing an execution could snowball into a "depravity more to be dreaded."[25]

Fears of this apathy to evil, known as brutalization,[26] reflected concern not only about the impressionability of the human mind, but about the violent potential of a certain kind of mind. To white southern elites, the problem lay especially with African Americans. The crowds that gathered at hangings were as disturbing for their racial composition as their unregulated behavior.[27] African Americans might absorb all sorts of counterproductive messages from executions, especially if the condemned chose to speak out with his last words. Such was the case with African-American prisoner Henry Bailey, who in 1906 mounted the gallows unassisted, dressed neatly in black, and addressed the crowd. "The drift of his remarks was the frequent injustice given in the trials of negroes and [he] said in his own case that had [his white victim] killed him there would never have been a hanging." Bailey died of strangulation twelve minutes after falling through the trap, but his final words doubtless reverberated through the largely African-American crowd.[28]

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[24] *Ibid.*, 143.

[25] Edward Livingston, "A System of Penal Law for the State of Louisiana" (Philadelphia: 1833), p. 27, quoted in Elizabeth Barnes, "Communicable Violence and the Problem of Capital Punishment in New England, 1830-1890," Modern Language Studies, vol. 30, no. 1 (Spring 2000), 7-26.

[26] Scholars continue to examine the subject. See William C. Bailey, "Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment," Criminology, vol. 36, no. 4 (1998), 711-733.

[27] Linders, 614-21. One example of a majority-black execution crowd: "Two Suffer the Death Penalty," RNO, 21 August 1907, p. 1.

[28] "Died on Gallows," RNO, 1 September 1906, p. 1.

Inspired by new concerns about the unwelcome and uncontrollable elements of public hangings, state governments throughout the United States began seeking to conceal public executions.[29] The first non-public execution in the nation took place in Pennsylvania in 1834. New York, New Jersey, and Massachusetts followed the next year. In North Carolina, in 1868, lawmakers passed An Act to Regulate Capital Executions "at the ends of justice, public morals, and the preservation of order."[30] The act directed that sheriffs perform hangings behind an enclosure, but most ignored the law for many years.[31]

When Ben Williams entered the enclosure behind the Wake County jail shortly after noon in December of 1906, for instance, "the waiting throng in the jail yard surged behind him like the crowd clamoring at the tent-gate of a circus," the *News and Observer* reported.

> Flattened against the fenced enclosure of the jail stood dense humanity still, full of eyes. They hang on buildings, packed motionless. They stood sharp-defined against the sky on telegraph poles, in trees. From them came a murmur that indicated their silence. It was a moment of the strange appeal of death to the living, the common spectacle which will ever find its audience. Unvoiced, but strong and sinister, there went forth from the black figure on the gallows to the brains of the watching crowd, the message,

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[29] Louis Masur, Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865 (New York: Oxford University Press, 1989), 44-62; 94-108.

[30] Ch. 443, Public Laws and Resolutions Passed by the General Assembly of the State of North Carolina at Its Session of 1909 (Raleigh: E.M. Uzzell and Company, 1909), 759. Hereon cited as Public Laws.

[31] John. G. Duncan, "Dongola Murder Led to Last Public Hanging in Pitt County," RNO, 11 June 1967. Clipping File through 1975 (Capital Punishment), 207-9. NCC. For other evidence of public executions in the late 1890s, see Seitz, 39-40; Bill East, "Man Recalls Hanging," Winston-Salem Journal, 20 April 1975. Clipping File through 1975 (Capital Punishment), 196. NCC. Between five and seven thousand attended a hanging in Pitt County in 1899.

the shudder, of mystery, of awe.[32]

The following year, a reporter reprimanded Durhamites who gathered for the city's first hanging. "Durham has run up against a new experience," he wrote. "It is a sordid thing, which she has escaped: a crass, primeval impulse … Durham is morbid, without knowing it."[33] Residents gathered despite ice and snow, milling around the jail hoping to catch a glimpse of the two condemned men.[34] As elsewhere in the South, the effort to make hangings private was erratic and uneven.[35]

The crowds that gathered in and outside of North Carolina's jail yards assembled to watch a lengthy strangulation rather than a quick death. Such was the case for John Hodges, who was not pronounced dead until thirty minutes after he fell through the trap. On the same day in Greensboro, condemned murderer Frank Bohannon died after thirteen minutes.[36] Incidents such as these motivated Attorney General Robert D. Gilmer to urge the Legislature in 1908 to execute criminals in the State's Prison rather than in county jail yards. Not only would such a change diminish the "mock heroism" of the condemned, Gilmer wrote, but it would also assure "a speedy death at the hands of persons familiar with the work, rather than a bungling execution at the hands of sheriffs who are totally

[32] "Nothing to Say on the Scaffold," RNO, 21 December 1906, p. 5.

[33] R.L. Gray, "Durham Agog Over First Hangings," RNO, 8 February 1907, p. 1.

[34] "Two Hanged on Same Gallows," RNO, 9 February 1907, p. 1.

[35] Michael Ayers Trotti, The Body in the Reservoir: Murder and Sensationalism in the South (Chapel Hill: University of North Carolina Press, 2008), 192.

[36] "Bohannon Dies at End of Rope," Greensboro Daily News, 9 February 1907, p. 2; "Two Hanged on Same Gallows," RNO, 9 February 1907, p. 1. See also "Negro Convicted of Rape Pays Penalty for His Crime," RNO, 4 March 1909, p. 1.

unfamiliar with hangings."[37] Bungled executions were frequent enough to inspire a growing tide of elite opposition to the practice in the second half of the nineteenth century. It was inconvenient for public revulsion at a torturous hanging to outweigh revulsion at the criminal and his crime. Electricity offered a solution.

II. "Death by Lighting": Execution by Electrocution

By the early twentieth century, electricity was in use as a therapy in hospitals, treating diverse ailments such as paralysis, gout, sciatica, and arthritis. But could people use it to kill? The answer had come in 1881, when a Buffalo man was electrocuted and died after staggering drunk into a terminal that powered the city's new street lights. A few years later, *Scientific American* suggested electrocution as a method of slaughtering cows, and the Buffalo Society for the Prevention of Cruelty to Animals (BSPCA) enlisted the help of Alfred Southwick, a dentist with a professional interest in pain management, to investigate electrocution as an effective way of dispatching stray animals. It was, so much so that New York's governor asked Southwick to chair a committee to investigate electricity's use on humans. Southwick and his colleagues wrote letters to medical professionals, who, offended by the suggestion that a physician might administer a lethal injection, overwhelmingly recommended electrocution. The Commission wrote also to Thomas Edison, a death penalty opponent who nevertheless recommended that New York use alternating current (AC), instead of direct current (DC).[38]

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[37] Biennial Report of the Attorney General of the State of North Carolina (1907-1908), 11. NCC. Hereon cited as Attorney General Report.

[38] Craig Brandon, The Electric Chair: An Unnatural American History (Jefferson, NC: McFarland and Company, Inc., 1999), 10-20, 51-63; Terry S. Reynolds and Theodore Bernstein, "Edison and 'the Chair,'" Technology and Society Magazine, vol. 1, issue 1 (March 1989), 12-20.

Alternating current, which was gaining popularity in the 1880s because of its cost effectiveness, appealed to cash-strapped prisons. Edison owned most of the country's DC transmitters and hoped that by associating AC with the electric chair, he could gain a competitive edge over his old employee and current competitor, Nicola Tesla, who developed AC, and his chief rival, George Westinghouse, who owned the patent on the technology. Seeking to protect his fortune, Edison waged a campaign for the lethal virtues of AC power, traveling the country killing animals, even after the Commission took his advice and recommended the use of AC power in its report. And he testified in court as to the ease of death by electrocution after a Westinghouse attorney filed a suit contending that the chair violated the Eighth Amendment's prohibition of cruel and unusual punishment. The case went to the Supreme Court, where Chief Justice Melville Fuller delivered the opinion rejecting the claim, finding that "it is within easy reach of electrical science at this day to so generate and apply … a current of electricity of such known and sufficient force as certainly to produce instantaneous, and therefore, painless, death."[39]

Electricity was all the more appealing having seized the popular imagination in the late nineteenth century, arousing fears and fascination. In 1890, Mark Twain published *A Connecticut Yankee in King Arthur's Court*, in which electricity appears as a weapon with the power to dehumanize its owner and its victim. In Twain's story, the time-traveling Hank Morgan uses "labor-saving" technologies he learned in an armaments factory to wage a war against the forces of barbarity in medieval England.

[39] Timothy S. Kearns, "The Chair, the Needle, and the Damage Done: What the Electric Chair and the Rebirth of the Method-of-Execution Challenge Could Mean for the Future of the Eighth Amendment," Cornell Journal of Law and Public Policy, vol. 15, no. 197 (2005-2006), 202. Quoting Brandon, who is quoting People ex rel. Kemmler v. Durston, 7 N.Y.S. 813, 818 (N.Y. Sup. Ct. 1889).

Under siege in an elaborate fortress, Morgan flips a switch, activating an electric fence and killing thousands of knights. His distance from the battlefield allows him to celebrate the lethal efficiency of his ambush.[40] By 1931, three versions of the book had been filmed.[41] By then, Americans would have been used to seeing advertisements for electric gadgets in newspapers and magazines, or walking under electric lights at night.[42]

As Twain was writing, a hodgepodge group of animal rights activists and inventors were clearing the way for the advent of the electric chair in the United States. The group's vision was realized by Edwin F. Davis, a journeyman engineer. Grateful governments in Massachusetts, Ohio, Wisconsin, and New York allowed him to execute more than three hundred criminals.[43] Alfred Southwick was in attendance at Auburn Prison, near Syracuse, New York—one of the penitentiaries lionized as a touchstone of reform—when, on August 6, 1890, Davis pulled the switch for the first time in the United States. As Southwick awaited murderer William Kemmler's execution, he declared, "There is the culmination of ten years' work and study. We live in a higher civilization from this day!"[44] The electrocution, however, set an unpleasant precedent: Kemmler did not die after the first current, and as the stench of burning flesh filled the

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[40] John F. Kasson, Civilizing the Machine: Technology and Republican Values in America (New York: Hill and Wang, 1999), 211-14.

[41] Internet Movie Database. < http://www.imdb.com/find?s=all&q=connecticut+yankee&x=0&y=0>.

[42] David Nye, Electrifying America: Social Meanings of a New Technology, 1880-1940 (Cambridge, MA: MIT Press, 1992), 144-6.

[43] Trina N. Seitz, "The Killing Chair: North Carolina's Experiment in Civility and the Execution of Allen Foster," The North Carolina Historical Review, vol. 81, no. 1 (January 2004), 43-4.

[44] Brandon, 177.

death chamber, Kemmler's body burst into flames.[45] George Westinghouse, who also watched, said that "'the job could have been done better with an axe.'"[46]

Kemmler's gruesome death did not dissuade other states from following New York's example. Ohio adopted the chair in 1896, Massachusetts in 1898, New Jersey in 1907 and Virginia in 1908, followed by North Carolina in 1910, and Kentucky, Arkansas, Indiana, Pennsylvania, and Nebraska by 1913. Electricity was exciting, a mysterious force that evoked visions of a bright future and mysterious past alike. North Carolina Governor Locke Craig celebrated electric power and illustrated its contradictions in his 1913 inaugural address. "Like the dervish in the Arabian tale, man has gotten hold of the casket with the mysterious juice that reveals to him the hidden treasures," he declared. "The genii, in whose keeping are the streaming forces of the universe, have whispered to him their secrets. The world is pulsing with the currents of newly discovered energy."[47]

Electricity promised vast industrial output and North Carolina would soon become a leading provider of electric power in the American South.[48] But for lawmakers concerned with executions, electricity's greatest potential lay in its power to kill painlessly, answering mounting concerns, inspired by and embodied in the Progressive movement of the 1900s and 1910s, that execution was unbefitting of a modern state.[49] A

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[45] *Ibid*.

[46] Ken Driggs, "A Current of Electricity Sufficient in Intensity to Cause Immediate Death: A Pre-Furman History of the Electric Chair," Stetson Law Review, vol. 22, no. 3 (Summer 1993), 1178.

[47] May F. Jones, ed., Memoirs and Speeches of Locke Craig, Governor of North Carolina—1913-1917: A History—Political and Otherwise from Scrapbooks and Old Manuscripts (Asheville, NC: Hackney and Moale Company, 1923), 130-1.

[48] Sydney Nathans, "The Quest for Progress: North Carolina, 1870-1920," in Joe A. Mobley, ed., The Way We Lived in North Carolina (Chapel Hill: The University of North Carolina Press, 2003), 387.

[49] Richard B. Dressner and Glenn C. Altschuler, "Sentiment and Statistics in the Progressive Era: The Debate on Capital Punishment in New York," New York History 56 (April 1975), 191-209, reprinted in

painless method of execution, lawmakers hoped, could both make the state appear humane and, at the same time, dehumanize the criminal, reducing the risk of empathy by severing the link between pain and personhood. Furthermore, some thought that "death by lightning" might restore, "through its very incomprehensibility and mystery," the deterrent effect of executions.[50] North Carolina would move toward accomplishing this dual purpose with the adoption of the electric chair and then, the gas chamber. This change could not have been possible without state control.

North Carolina, with many other states, had been creeping toward consolidation of its lethal punishment infrastructure for many years. Between the 1890s and the 1920s, state governments took increasing control over the power to execute. In 1890, local executions accounted for 87.3 percent of the total; in 1920, state-administered executions accounted for 88.3 percent of the total. Delocalization was central to the Progressive movement: it demonstrated a belief in the competence of a central government, and sought to nurture the better angels of the public spirit by removing from view one of the more unpleasant byproducts of maintaining order.[51]

The electric chair gave lawmakers further impetus to seize control over their state's death penalty system. Early efforts proved halting. In 1901, a bill "requiring the execution of all capital offenders to be private" earned a favorable report from the North Carolina General Assembly's Judiciary Committee, but appears to have gone nowhere.[52]

Kermit L. Hall, ed., Police, Prison, and Punishment: Major Historical Interpretations (New York: Garland Publishing, Inc., 1987), 249-67.

[50] Electricity as an Executioner," Scientific American, vol. 34, no. 2 (8 January 1876), p. 16.

[51] Bowers, 38.

[52] Journal of the Senate of the State of North Carolina at Its Session of 1901 (HB 694/SB 704).

In 1905, the General Assembly passed an act that allowed the Cumberland County Board of Commissioners to set the place of execution, indicating that on the local level, leaders were searching for appropriately private places to hold their executions.[53] Three years later, John Underwood of Cumberland County submitted a resolution in superior court in Fayetteville claiming that electrocution was more humane than hanging, and when he won a seat in the legislature, moved to change the state's method of execution.[54]

Finally, in 1909, a Goldsboro legislator introduced a bill "to establish a permanent place in the State Penitentiary at Raleigh for the execution of felons" and "to change the mode of execution so that the death sentence shall be by electricity, and to provide an appropriation therefore."[55] The appropriation may have made the difference for the perennially cash-strapped prison, and in 1909, North Carolina's lawmakers made their state the sixth in the nation to adopt the chair.[56] The act also directed that the prison warden or a deputy, as well as a physician and at least twelve reputable citizens, attend each execution. It threw open the doors to other visitors as well: the condemned's counsel was welcome, as were ministers and relatives of the condemned. The law did not make other provisions for attendance, though custom soon dictated that sheriffs distributed tickets to members of the injured community. Although it did not appear in the legislation, prison officials would usually execute criminals around 10:30 on Friday mornings.

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[53] Ch. 450, Public Laws (1905).

[54] Craven, 30-1.

[55] SB 37, Journal of the Senate of the State of North Carolina at Its Session of 1909.

[56] Ch. 443, Public Laws (1909).

The permanent death chamber was constructed on the first floor of the east wing of the main building of the State's Prison. "Scarcely as large as an average-sized living room in a well-appointed house," octagonal, and painted lime green, the room received meager light from six long windows.[57] There were two doors, one for prison officials and the convict, and another that opened onto the lawn at the front of the building through which spectators entered. Edwin Davis, the man who built New York's electric chair, also built North Carolina's. He worked so inefficiently that Governor W.W. Kitchin had to delay Morrison's execution four times, prompting some to protest that the delays amounted to cruel and unusual punishment.[58] But Davis eventually got the job done. He built the chair of oak and adorned it with leather straps to restrain the head, chest, arms, and legs.[59] Davis asked to perform the first electrocution himself. Warden Sale refused.

On March 18, 1910, at 10:15am, convicted rapist Walter Morrison left his cell in and walked toward the death chamber, passing the switchboard that controlled the current. The switchboard was a polished marble slab affixed with an ebony lever; pulling the lever released electricity, which traveled into the death chamber along two overhead wires. One of these wires connected to an "electro headhood," which Morrison would wear over a sponge, soaked with water to conduct the current. Another would drop to Morrison's right leg, where it would complete the electric circuit at his bare calf. Before he walked by, prison officials covered the switchboard with a wooden case should he try

[57] "Morrison Shocked to Death at Penitentiary," RNO, 19 March 1910, p. 1.
[58] Prison Reports (1909-1910), 7-15. NCC.

[59] "Today He Pays Penalty," RNO, 18 March 1910, p. 5.

to postpone his death with an attack on the machine, and to shield it from view so as not to upset him.[60]

Morrison's electrocution shared the rituals of contrition and benediction with the hangings that preceded it. Entering the death chamber, "crying and praying in low choking tones,"[61] Morrison, "a burly negro, 35 years old, over six feet in height, of a dark copper color"[62] with "nothing like as bad a countenance as one would expect to see in view of the fiendish crime of which he was convicted,"[63] wore a new brown suit, a denim shirt open at the neck, and new shoes. He clutched a crucifix, a gift from the priest who prayed frequently with Morrison, and had baptized him the previous afternoon in a bathtub in the prison basement.[64] The condemned man kept his eyes fixed on the crucifix, not looking up at the crowd of white spectators that sat on the other side of the metal chain. (A black preacher had applied for admission but arrived too late to attend.) "'Jesus please help me,'" Morrison prayed as guards strapped him into the chair, "'At last I mean to do what was right.'" He continued to pray, his attention focused on the crucifix, which he held between his knees, until Warden Thomas Sale threw the switch.[65]

The 1,800 volts immediately silenced Morrison's prayers, rendering his body rigid. But he offered a final benediction as he died. As the current flowed through Morrison's body, the arm holding the crucifix slowly rose, straining against the straps,

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[60] *Ibid*.

[61] "Morrison Shocked to Death at Penitentiary," p. 1.

[62] "Walter Morrison Pays Penalty for Crime," Charlotte Daily Observer, 19 March 1910, p. 8.

[63] "Morrison Shocked to Death at Penitentiary," p. 1.

[64] *Ibid.*

[65] "First Electrocution ends Walter Morrison's Life," RNO, 19 March 1910, p. 3.

and "until the current was withdrawn the Cross remained in this position."[66] Prison physicians listened to Morrison's heart after each round of electrocution and declared him dead after four shocks of about a minute each, "the usual resistance of a strong negro's body." The crucifix fell from Morrison's hand to the rubber mat beneath the chair, making no sound. The warden of the state's prison, Thomas P. Sale, would later note with Hank Morgan-like satisfaction, "The operation of the first electrocution was perfect, and I believe that death was almost instantaneous. The machine worked well and is entirely satisfactory."[67] None of the witnesses stayed to watch Morrison's body be taken from the chair. His family refused it, so "the usual disposition was made of it."[68] It was given to the State medical school, completing its transformation into a tool of the state.

The electrocution "went off without a hitch."[69] Making punishment apparently painless and somewhat private, as North Carolina appeared to have done with its new method, posed a difficult question for those who advocated execution as a deterrent. As Arthur Koestler observed in *Reflections on Hanging*, "if watching with one's own eyes the agony of a person being strangled on the gallows does not deter, it seems logical to assume that an unseen execution would deter even less."[70] Could the death penalty serve its purpose if it was not public and not painful? Soon, however, detailed, even florid,

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[66] *Ibid*.

[67] Prison Reports (1909-10), 15. NCC.

[68] *Ibid.*

[69] "Morrison Shocked to Death at Penitentiary," p. 1.

[70] Arthur Koestler, The Trail of the Dinosaur and Reflections on Hanging (Hutchinson & Co., 1970, orig. 1955), 212.

newspaper coverage of executions answered the concerns about publicity, and the force of the electric current answered concerns about pain.

Newspaper coverage meant that the death penalty remained basically public after its confinement in the State's Prison. Moreover, the number of people who read about executions in the *News and Observer* in the first half of the twentieth century was vastly larger than the total who attended public hangings. The paper, which enjoyed a steadily growing circulation, from close to 15,000 in 1910, to 50,000 in 1935, and nearly 120,000 at mid-century, played an important role in opening up the death penalty to the public.[71] The mediation of newspapers between the execution and most of its witnesses transformed the death penalty audience. Replacing the rabble that elbowed for room at the foot of the gallows, most of the execution audience in North Carolina after 1910 witnessed executions from their kitchen tables and living rooms. The published confessions, letters of regret, and recited warnings were more likely to make literate newspaper readers feel that executions served a purpose than to discourage potential capital criminals, most of whom were semi-literate at best and unlikely to be newspaper subscribers. Subscribers did not need to be warned against criminal behavior; they wanted to be sure that the government they trusted was dealing with criminals competently. The electric chair was a better tool than the noose for advertising the government as competent and humane.

Reporters sent to cover executions, however, may not have been the best messengers. The paper's capital reporter confessed that accounts of many executions were "notoriously overwritten" by "cub reporters, [who], turned loose on an

[71] Numbers taken from RNO front pages, 12 February 1911, 16 March 1935, 2 May 1953.

Figure

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On the day after its first use in 1910, the newly-arrived electric chair fascinated North Carolinians. The heavy leather straps, the black headpiece, and the chain

that separated it from witnesses are visible in this photograph. *Raleigh News and Observer, 19 March 1910*.

electrocution, reveled in the contortions and the smells."[72] Their attention to details, both gruesome and technical, is notable for two reasons. First, it demonstrated that whatever broad cultural shifts the concealment of executions seemed to indicate, the public still had a taste for blood. It was a taste that could, in the early 1900s, be satisfied by photographs as well as text, and editors took advantage of both media.[73] An appetite for gore, it seems, was acceptable among the right sort of people.

Advances in photography, which in the early twentieth century made pictures less expensive and easier to duplicate, threatened to make electrocutions as graphic as they were when they were seen only by first hand witnesses.[74] North Carolina's newspapers did not publish photographs of executions, if they existed. They did, however, publish many photographs of the electric chair and gas chamber, and some of condemned prisoners and their victims. These photographs mimicked at least one of the performative elements of public hangings, offering a final, dignified vision of men who led undignified lives. This presentation was evident in 1938, when the *News and Observer* published side-by-side full-length photographs of Waddell Hadley and Sylvester Outlaw, each dressed neatly in a suit and tie. A caption beneath the photograph noted, cruelly, that the two men were wearing the same suit, and that Hadley was wearing only one shoe.[75] The photographs of Hadley and Outlaw were among only a few of their kind to appear in the

[72] "Under the Dome," RNO, 18 January 1939, in Clippings File (Capital Punishment), p. 59. NCC.

[73] Trotti, 167-80.

[74] *Ibid*., 167-70.

[75] "Death Chamber's Latest Victims" (photograph), RNO, 30 April 1938, p. 11.

News and Observer, though many condemned men were photographed in this way in order to give their families a keepsake.[76]

The second implication of reporters' attention to detail was that while newspapers related familiar tropes of conversion, confession, and contrition, these rituals competed with the details of the electrocution process and its effects on human bodies. The focus on new processes and the shift in audience devalued rituals, which began to be upstaged by routines. It was the beginning of an important trend in lethal punishment in North Carolina and in the U.S., which historian Austin Sarat calls the reduction of execution to "a matter of mundane technique."[77] The turning of knobs, the lighting of bulbs, the fastening of straps, the wet sponge, the slit in the pant leg to attach the electrode—these routines replaced the grand rituals of public executions, as well as the larger questions about the death penalty they were intended to answer. North Carolinians wondered less whether or not the state should kill, but how. The success of Walter Morrison's execution appeared to have settled that question.

Following Morrison's execution, Warden Sale executed twenty-one men without incident. Reporters covering executions grew restless, and the number of witnesses dwindled, from a peak of forty-three in early 1911 to just twenty in 1914. A reporter complained that one 1912 execution was "perhaps the least [of all the executions so far] adapted to feature from the point of view of the chronicler of human events. There was no hitch or delay, was no pitiful loss of nerve, no fainting of spectator or imprecation of prisoner. It was a perfect execution with a big black man as victim, and Brad Bagley died

[76] "Condemned Men Request Photos," RNO, 8 May 1936, p. 18.

[77] Austin Sarat, When the State Kills: Capital Punishment and the American Condition, (Princeton, NJ: Princeton University Press, 2001), 66.

as much a man as he could."[78] With these successes, electrocutions appeared to earn the decorousness that hangings lacked: one man who refused to sit at George Wilkins's 1912 electrocution was asked to leave.[79]

But distress about pain reignited in 1916, during the state's first double execution, when confessed murderer Ed Walker and his accomplice, Jeff Dorsett, died one after the other in the electric chair. "Good bye," said Walker confidently as he entered the chamber and seated himself in the electric chair. "I am going to meet my God." Sale was known to "mope and worry" before executions, one journalist would later write. "He would have abolished the lash and the electric chair twenty-five years ago." But on this day the warden was in "unusually good spirits," joking with witnesses.[80]

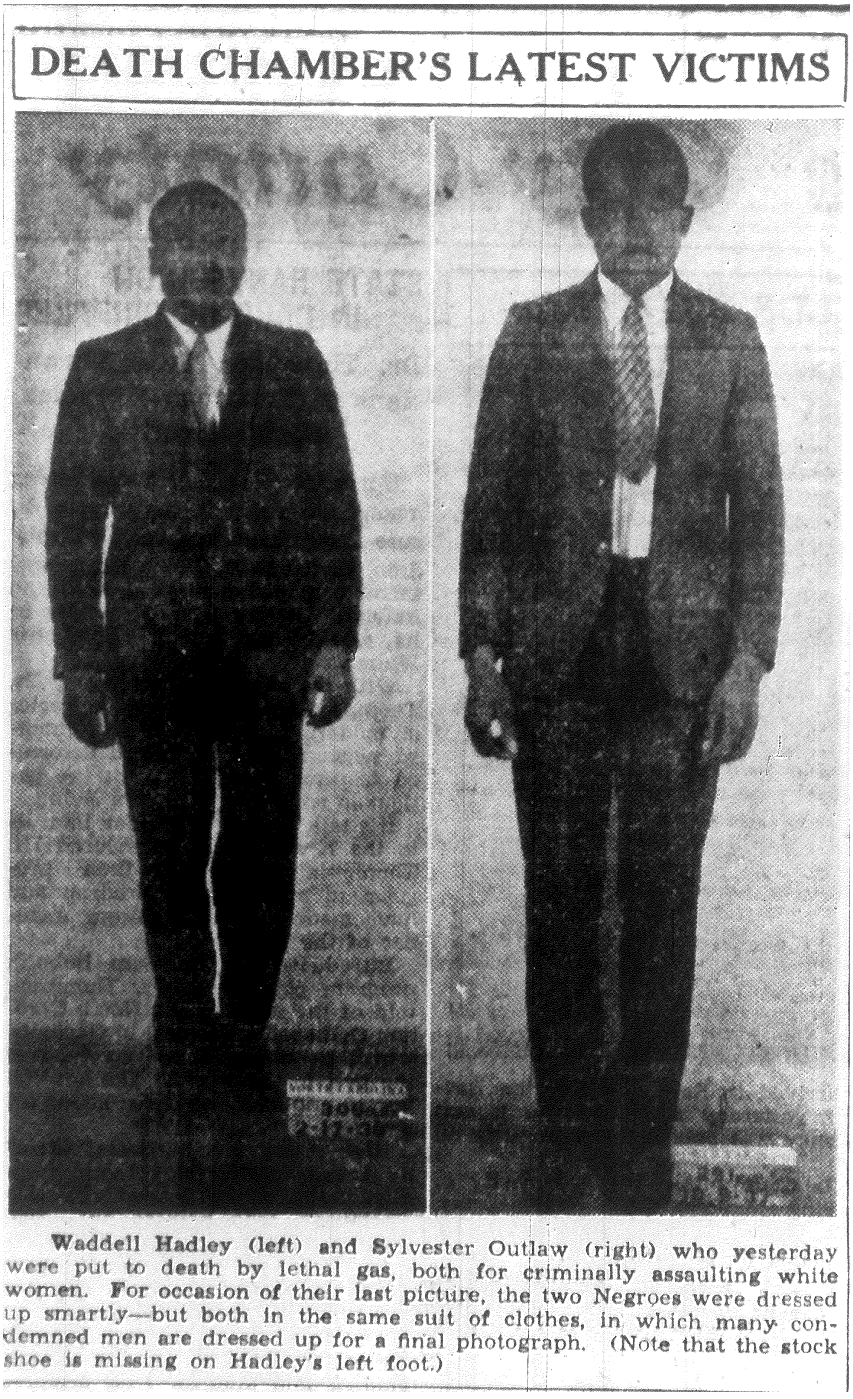
His mood soon changed. As Walker's body convulsed under the current of the first electric shock, the power suddenly failed. "My Lord," gasped Sale, "what's happened?" The current returned as suddenly as it had left, though, and after a second shock prison physicians declared Walker dead. Sale was shaken, and showed "signs of extreme nervousness" when he threw the switch on Dorsett. He then took twelve witnesses into his office, where they signed the two death certificates and watched as Sale fell forward "onto his face with a peculiar strangling noise in his throat," spilling the ink he was so carefully blotting. He never regained consciousness. Sale's death, and the implication that the grave task of presiding over executions took his life—his wife "had pleaded with him to turn over the duty of state executioner for the day"—revived the

[78] "Electrocution of Brad Bagley," RNO, 18 May 1912, p. 5.

[79] "George Wilkins Is Executed," RNO, 22 June 1912, p. 5.

[80] "Former Executioner in Critical Condition," Greensboro Daily News, 30 September 1929, p. 4.

Figure 2



Waddell Hadley and Sylvester Outlaw shared a suit to pose for these pre-execution photographs. *Raleigh News and Observer, 30 April 1938*.

conversation about the suffering caused by execution, and the discomfort of prisoners, witnesses, and prison officials.[81]

Sale's death dramatized the effect of witnessing or participating in an electrocution. The death chamber was small, dominated by the imposing electric chair, and seemed to accentuate the weather outside. In the winter, it was cold and damp. In the summer, it grew hot and stuffy. The colder months dulled the room's odor, but in the spring and summer, the heat made "the odor of burning flesh … a constant accompaniment" because the electrodes affixed at the leg and head scorched the skin.[82] In 1931, Bernice Matthews and J.W. Ballard, convicted and sentenced together for murder, were both burned by the electric current. Matthews, a teenager, nearly lost his ear, and when Ballard's head caught on fire Warden H.H. Honeycutt emptied a shaving mug over it.[83]

The prospect of dying in the electric chair was, for most prisoners, terrifying, and while some responded with mute horror, others struggled with prison guards or cried out in fear. With witnesses gathered just feet from the electric chair, there was little to disguise the distress of execution victims. Will Frazier's 1921 execution was not well-attended, but those who did show up were sickened, first by Frazier's shrieks, and then by the odor of burning flesh. "Not in all the grim history of the death chamber … have prison attendants been called upon to witness so harrowing a spectacle as did the negro present as he came shrieking out of death row," a reporter wrote. Blessedly for Frazier, he

[81] "Warden Sale Dies Suddenly at Desk in State Prison," RNO, 1 January 1916, p. 5.

[82] "Says Third Degree Sent Him Unjustly to Chair," RNO, 18 January 1936, p. 1.

[83] "Negroes Forfeit Lives for Labor Day Murder," RNO 12 December 1931, p. 12.

fainted soon after he was forced into the electric chair. Prison guards' hands shook as they secured the straps around Frazier's body, and even a death row veteran, accustomed to watching men pass his cell on the way to their deaths, "was cowed by the spectacle … his dark face an ashy gray." When smoke began to rise from Frazier's body, the spectators, "already shaken by the spectacle, turned sick."[84]

The smell and the spectacle disquieted even witnesses thirsty for revenge. North Carolinians had raged for Tom Gwyn's death; a mob of hundreds tried to lynch him for an assault on a white girl. But at his electrocution, when his scalp began to burn and his neck twisted his head into an unnatural angle, the crowd of about forty people grew uncomfortable: during the two minutes in which the prison physician listened for Gwyn's pulse, the witnesses "breathed in batches."[85] At the September 1922 executions of Angus Murphy and Jasper Thomas, members of the nervous, giggly crowd wondered in whispers whether the four women in attendance could endure the spectacle in the cramped, hot room, made more intense by "the odor of burned flesh" that "suffused the room." The women, as at any social occasion, had been escorted into the death chamber first, and the warden directed them to a prime viewing spot just four feet from the electric chair. They retained their poise during the electrocution, but after Thomas's body was "dumped" into a wicker basket, the spectators, mopping their faces, hurried out, "some of them sickened."[86] Electrocution was proving as unsettling as hanging.

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[84] "Shrieks of Negro Drown Death Roar, RNO, 28 May 1921, p. 3.

[85] "Tom Gwyn Dies in Electric Chair," RNO, 28 June 1919, p. 12.

[86] Negroes Who Assaulted White Woman Pay Penalty of Death," RNO, 16 September 1922, p. 1.

Figure 3

The News and Observer published a picture of the spilled ink on the death warrant State's Prison Warden Thomas P. Sale was signing when he collapsed at his desk. *Raleigh News and Observer, 15 January 1928*.

III. "The Usual Crowd": Audience Control and Spectacle Control

The vision of a human body in the power of the electric current, if not in pain, was immediate, obvious, and intense, taking place in front of viewers who could, if they wished, reach out and touch the dying prisoner.[87] Following these and other grisly episodes, officials adjusted procedures to minimize the impact of visible death on the execution audience, both by controlling the audience and by controlling what the audience saw. Little could be done about electrocution's effects on the human body, but prison officials could try to limit its impact on witnesses.

One significant step was hiring an executioner. After Warden Sale's death, executions resumed as scheduled under the direction of new warden Samuel J. Busbee. Then, in 1925, the General Assembly amended the law to allow the warden to designate someone other than himself to electrocute convicts, and to pay up to thirty-five dollars for the service.[88] The Board of the State's Prison chose to pay less, and on April 17, 1925, for the first time, an executioner received twenty-five dollars for throwing the switch on convicted murderer C.W. Stewart. The executioner missed the warden's first signal—the warden clicked together the ends of his stethoscope—but pulled the switch when nudged. A second man, Crap Thomas, "stout and jovial," received the same fee for killing Stewart's son next.[89]

Shunting the burden of execution onto an executioner may have eased the warden's conscience, but the burden had to rest somewhere. At least the *News and*

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[87] "Under the Dome," RNO, 18 January 1939, in Clippings File (Capital Punishment), p. 59. NCC. In this way, the experience was not "unsharable." See Elaine Scarry, The Body in Pain: The Making and Unmaking of the World (New York: Oxford University Press, 1985), 60.

[88] Ch. 23, Sec. 4660, Public Laws (1925).

[89] "Stewarts Go to Death in Chair at State's Prison," RNO, 18 April 1925, p. 1.

Observer assumed so. When Crap Thomas lay on his deathbed in 1929, his liver succumbing to the ravages of alcoholism, he declared himself "'a fool for ever taking the job.'" The *News and Observer* estimated that for every twenty-five dollars Thomas earned for each execution, he lost a year of his life. "He put out 16 lives," the paper noted, "and each of them took something of his own."[90] Thomas's decline did not dissuade the more than one hundred applicants for his position, including one who volunteered to perform the job free of charge, if he was able to select his subjects.[91]

In the absence of clear guidelines for visitors or legislative directions for the execution process, Warden Busbee sought both to maintain an atmosphere of dignity and to assert some control over the proceedings. In December of 1920, he reprimanded a, audience that "laughed and jabbered incoherent nonsense," and the crowd drew back from the chain that separated the electric chair from the visitors.[92] In 1923, one of Daniel Milton Nobles's attending ministers cautioned Busbee that he had drawn the chin strap too tight, earning a cold rebuke in return. Nobles died hard—reporters' term for a particularly difficult death—in front of more than eighty witnesses, his body changing color and, behind a screen of vapor, his chin and leg catching fire, the chair's helmet "crackling like a hickory fire." After the execution, Warden Busbee decided to reduce the number of witnesses. He announced that he would limit the crowd to thirty-six, would lock the prison gates at 9:00 that morning, and would bar people without tickets until after the end of the execution. Finally, Busbee said, he would ban women unaccompanied

[90] "Former Executioner in Critical Condition," Greensboro Daily News, 30 September 1929, p. 4.

[91] "Parson Would Turn Death Juice Upon N.C. Victims Free," Monroe Journal, 30 August 1929, p. 6.

[92] "Two More Pay Penalty of Death," RNO, 4 December 1920, p. 2.

by their husbands. In a measure of how state control limited the execution audience, the first woman to attend an electrocution had done so just two years earlier.[93]

Busbee admitted thirty-nine people the following day, but he had taken a significant step toward controlling the atmosphere on Friday mornings. At Nobles's execution, more than one hundred people had milled around just outside the death chamber, including a number of boys "in knee pants," who pulled themselves up to the death chamber's windows for a glimpse of the prisoner's final moments.[94] Busbee had been trying to keep youths away from executions. At the electrocution of John Goss, North Carolina State students kept a "discrete silence" when Busbee tried to ferret out minors.[95] This move would have excluded a good number of witnesses. As one observer noticed, "the business of killing has an attraction for youth," and the North Carolina State freshmen that Busbee tried to root out, obvious in their red caps, were frequent attendees.[96]

These procedural changes, signaling a desire to exert control by prison officials and a lack of self-control among witnesses, may have prompted the legislature in 1923 to seek to bar press coverage of executions. The bill made it before the Senate Judiciary Committee in late February, but after receiving a report "without prejudice"—the noncommittal review that often doomed measures—the bill was tabled in early March. Publicity would continue, as would efforts to limit the details that inevitably made it into the newspapers. Not long after the failure of the bill, though, the Legislature did manage

[93] "Woman Looks on as Negro Dies," RNO, 22 November 1921, p. 10.

[94] "Ed Dill Groans Between Shocks, RNO, 29 June 1923, p. 5.

[95] "John Goss Dies, Admitting Crime," RNO, 8 December 1923, p. 9.

[96] Smethurst, "Death Row Myth," p. 5.

to limit attendance somewhat. The new law limited the number of spectators "over and above privileged classes"—such as ministers, law enforcement officers, physicians, and members of the press—to six.[97] There is no indication that anyone paid attention to this new rule, though crowds never again approached the numbers of the early 1920s.

These policies helped reshape the on-site execution audience, allowing the same people to watch again and again. As one journalist noticed, "As one after another is led out of death row down the narrow hall-way to the end, the semi-circle of faces that greets them is curiously unchanged. The regular, seasoned, witnesses are strangely numerous."[98] Aaron Dupree died in 1919 before "the usual crowd;" the same crowd showed up for the electrocution of Ralph Connor the following year. In 1923, "it was the usual throng that snickered and joked as it waited and then fell silent when the spectacle of death was brought in before them."[99] This usual crowd was clannish enough to mock a newcomer who made the mistake of admitting that he was attending his first electrocution. When this rookie watched the warden lay a board studded with light bulbs across the arms of the electric chair and asked its purpose, another answered mockingly, "Ain't you never seen one before?"[100]

State control likely had a hand in whitening execution audiences, too; newspaper coverage of turn-of-the-century public hangings describe racially diverse, even black-dominated crowds, but witnesses at subsequent electrocutions, and later asphyxiations,

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[97] "Families Barred from Executions," RNO, 6 October 1925, p. 2.

[98] Frank Smethurst, "Death Row Myth Holds Men Are Not Executed," RNO, 23 November 1924, p. 5.

[99] "Negro Electrocuted for Killing Officer," RNO, 15 November 1918, p. 8; "Connor Goes to Death Weeping," RNO, 21 September 1920, p. 16; "John Goss Dies, Admitting Crime," RNO, 8 December 1923, p. 9.

[100] Smethurst, "Death Row Myth," p. 5.

were predominantly white.[101] With the exception of the African-American clergy, few African Americans who were not on their way to their deaths appeared at executions, so few that rumors grew in the black community that condemned people were not killed, but spirited away to work camps.[102] The first black reporter did not attend an execution until 1934.[103] That year, one *News and Observer* reporter noticed that two black men watched the execution of one of the three African Americans electrocuted on November 16, 1934. "Neither Negro displayed any emotion over seeing a member of their race electrocuted," the reporter observed.[104]

These efforts to restrict execution attendance affected the perception of state electrocution. If nothing else, they called into question the purpose of the death penalty. Surely, a swift and orderly execution would reassure witnesses as to the competence of the state and the dedication of its leaders to crime control. But the intent of these rituals was to mute the spectacle of execution, rather than amplify it. This accomplishment, to supporters of the death penalty, alienated punishment from the injured people many in North Carolina believed it was supposed to serve. In 1933, the General Assembly considered a bill that would return executions to the public, staging them in the county where the crime was committed, as had been done with county-controlled hangings. Columnist and reformer Nell Battle Lewis scolded the Legislature using a time-tested

[101] Reporters noted with interest when African Americans were in attendance at electrocutions and gassings, but had few opportunities to do so.

[102] Smethurst, "Death Row Myth," p. 5.

[103] "Death Row Poet Goes Mutely to His Doom," RNO, 22 September 1934, p. 12.

[104] "Sampson Killers Pay Penalty in Triple Execution," RNO, 17 November 1934, p. 1.

argument: "The public execution merely caters to the morbidity of its witnesses, and is a thoroughly demoralizing influence," she wrote.[105]

Efforts to control spectacle were not unique to North Carolina, but some southerners were less willing to divorce execution from vengeance and display. For instance, in 1911, in Jackson, Georgia, the Reverend William Turner, an African-American preacher, was hanged before an audience in an opera house for inciting a race riot.[106] In 1934, the Mississippi senate passed a law that would allow the father of a rape victim to personally hang three African Americans convicted of assaulting his daughter.[107]

In the mid-1920s, North Carolina had moved in the opposite direction by seeking to bar victims and their family members from the death chamber. According to one *News and Observer* article, the triggering factor was the appearance of a rape survivor at the execution of her assailant. In October of 1925, Governor Angus McLean told Warden J.H. Norman to refuse entrance to "all members of the families of injured parties," saying,

> The execution of a criminal is the most solemn thing in the administration of the law, representing the sovereignty of the people, and there should be nothing about an execution to indicate revenge. An execution ought not to be permitted to be looked on as an act of personal satisfaction for a wrong.[108]

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[105] Nell Battle Lewis, "Incidentally," RNO, 2 February 1935, p. M3.

[106] "Hanged in an Opera House," The New York Times, 15 December 1911, p. 1.

[107] "Mississippi House Gets Hanging Bill," Durham Morning Herald, 9 June 1934, p. 12.

[108] "Families Barred from Executions," p. 2.

But that was, of course, how many North Carolinians viewed executions, not as the dispassionate extraction of a debt to the state, as newspaper headlines sometimes phrased it, but as a mechanism for an injured party or a damaged community to heal itself with a sanctioned act of revenge. It was with this move, then, that the procedural steps of North Carolina's electrocutions broke most significantly with the state's past, reinventing the purpose of the death penalty for the twentieth century as a punishment performed by people but not for them.

Newspaper coverage sought to solve the paradox of private execution by presenting the death penalty as the payment of a debt to the state, not to a community or an individual. Will Hopkins "paid to the last tittle [sic] the price that the law requires for murder;"[109] after the electrocutions of condemned African-American teenagers J.W. Ballard and Bernice Matthews, the *News and Observer* reported that "the State had collected its debt in full"[110]; and McIver Burnett "paid" for his rape conviction "with the only currency that he had."[111] This kind of language, framing the state of North Carolina as the dispassionate executor of a debt, sought to depersonalize execution in the way that officials and reformers agreed was appropriate. But it was clear to anyone who read past the headline that death by electrocution was painful and protracted. The search continued.

[109] "Sampson Negro Squares Account," RNO, 22 March 1921, p. 16.

[110] "Negroes Forfeit Lives for Labor Day Murder," RNO, 12 December 1931, p. 12.

[111] "Woman Watches Assailant Executed at State Prison," RNO, 13 October 1922, p. 1.

IV. "A Whiff of Sweet Smelling Gas": Execution by Asphyxiation

In 1935, state representative Charles A. Peterson, a physician, introduced a bill to change North Carolina's method of execution from electrocution to asphyxiation by gas. While the bill made its way through the Legislature, Peterson attended the electrocution of Sidney Etheridge. Etheridge seemed determined to put on a show. A forty-four year-old white veteran of World War I, Etheridge sent a note to the warden shortly before his execution asking that he be given whiskey so he could toast the black cat that he had eaten a quarter century ago to seal a pact with Satan. He enclosed an image of the cat, cut from the Sunday comic "Polly and Her Pals," with the note. He declined to meet with a minister, declared that the devil would join him for his execution, protested his innocence, and refused to drink water before heading to the chair, a common practice for condemned prisoners hoping to increase the conductivity of their bodies.[112]

Warden H.H. Honeycutt had to stop the electrocution when, during a second shock, by this time raised to 2,000 volts, a "crackling of blue flame" ignited at the leg electrode. The leather strap that secured it had become wet, Honeycutt explained, which may have prevented the leg from burning at the point of contact. A third shock was not necessary, and Peterson told one journalist that electrocution was not as gruesome as he had expected—he had never seen one before. The fact that he introduced the legislation with only a "second hand" understanding of the spectacle of executions, convinced that lethal gas would be "more humane for witnesses," indicates the public discomfort with electrocutions as described in the press. Peterson was sure of the virtues of switching over to gas, and the *News and Observer* editorial board seemed to agree. The day after

[112] C.A. Upchurch, "Condemned Man Spurns Prayer on Death's Eve," RNO, 15 March 1935, p. 1; "Asking Whiskey, Etheridge Dies Without a Minister," RNO, 16 March 1935, p. 1.

Etheridge's disturbing death, it excoriated "modern North Carolina" as too close to "old times of devil worship and torture and cruelty."[113]

A successful transition to execution by asphyxiation in the western United States, boded well for North Carolina's own experiment. Gas was used for the first time in 1924, when Nevada executed a Chinese man for a gang murder. According to one witness, the prisoner, after a stern reprimand from the captain of the prison guards to "take it like a man," inhaled "a whiff of sweet smelling gas like unto the odor of bananas" and died instantly and without pain.[114] The warden of the Carson City prison would later call gas "by far the simplest and most humane method yet devised."[115] Arizona adopted it in 1931, and Colorado followed in 1933.[116] In 1935, Peterson aimed to make North Carolina the fourth state in the nation, and the first east of the Mississippi, to legally switch to gas. The Legislature had begun to consider replacing electrocution with asphyxiation late the previous year. North Carolinians, wrote one doctor, had "become tired of electrocuting and barbecuing their criminals."[117]

Peterson's bill passed the State House in early April of 1935, buoyed by its sponsor's medical credentials, testimony from a number of physicians and dentists, and the support of one journalist who declared electrocution "'the worst possible way to do

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[113] "Modern," Editorial, RNO, 13 March 1935, p. 4.

[114] William S. Boyle, "Lethal Gas," Commercial Law League Journal, vol. 30 (June 1925), 249. Witnesses could smell the gas but were not harmed.

[115] "White is Executed in Nevada by Gas," The New York Times, 3 June 1930, p. 40.

[116] "Executed in Lethal Chamber," The New York Times, 23 June 1934, p. 30.

[117] Quoted in Katrina Nanette Seitz, "The Transition of Methods of Execution in North Carolina: A Descriptive Social History of Two Time Periods, 1935 & 1983," Ph.D. diss., Sociology (Virginia Polytechnic Institute and State University, 2001), 106.

the worst possible thing' the state finds it necessary to do."[118] One supporter anticipated with satisfaction that gas executions would be "dignified," not "a big show like a circus." The vote also affirmed the fact that executions would continue in Raleigh, despite some sentiment to the contrary. One representative had sought to amend the bill by mandating the creation of a traveling gas chamber that, mounted on a truck, would stage executions in the counties where the crimes in question had occurred.[119] Another wanted to return to semi-private hangings in county jail yards. Another derided the suggestion of a "peripatetic, perambulatory death house," saying, "I don't think they have public executions in any civilized country in the world." He was almost right: the United States' last public execution would take place two years later. Both bills failed.[120]

Publicity seems to have taken center stage in the debate over the measure, but it was personality, not publicity, that eventually won the bill a unanimous vote in the State Senate on May 1, 1935.[121] The switch to gas was also hastened by the increasingly decrepit state of the electric chair. In late 1934, after four shocks over the course of six minutes were required to kill Rufus Satterfield, prison officials inspected the ancient electrical equipment, and handed over one of the chair's two generators to the highway department for repairs. One prisoner got a brief reprieve as a result.[122]

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[118] "Lethal Gas Gets O.K.; Parole System Studied," RNO, 27 March 1935, p. 1.

[119] Louisiana and Mississippi maintained this practice until the 1950s. Harries, 17.

[120] "House Votes for Lethal Gas, But Not Public Show," RNO, 4 April 1935, p. 1; H.B. 66, Public Laws (1935); "State Senators Refuse to Back House on Bonus," RNO, 19 January 1935, p. 1.

[121] "State Adopts Lethal Gas; To Junk Electric Chair," RNO, 2 May 1935, p. 1.

[122] "Generator Breaks Down; Whitfield Gets Reprieve," RNO, 18 January 1935, p. 1.

The chairman of the State Highway and Public Works Commission, which ran the prison, decided to simply build the chamber around the electric chair. Construction of the steel chamber, inset with an eight-foot observation window, began in October, 1935.[123] Once the chamber was complete, the state built a new chair that could be used for either electrocutions or gassings; eventually, the chamber held three chairs. Robert Dunlop's electrocution in January, 1936, offered witnesses their first look at the new chamber, scheduled for later that month. One journalist noticed that witnesses, watching the death through heavy glass windows, with steel walls replacing a metal chain, could no longer smell burning flesh, nor hear the condemned prisoner's last words.[124] It was a sanitized environment, still pregnant with risk, but cleaner and less atmospherically oppressive.

The movement toward gas execution came at a difficult time for the state's prison system. In March 1935, a legislative committee had begun a search for hidden graves in the North Carolina mountains, alleged to be the uneasy resting places of prison camp convicts tortured to death by guards.[125] At the same time, a former patient at the State Hospital for the Insane, in Raleigh, publicly described the abuse and neglect he witnessed there.[126] Also in March, two African-American convicts at a camp near Charlotte required the amputation of their feet after being forced to stand for hours on end, a customary punishment.[127] The *News and Observer* decried the "cruelty and complacency

[123] "Death Chair to Remain; Claims 2 Victims Today," RNO, 12 July 1935, p. 1; "Three Youths Die In Electric Chair," RNO, 5 October 1935, p. 1.

[124] "Says Third Degree Sent Him Unjustly to Chair," RNO, 18 January 1936, p. 1.

[125] "Modern," p. 4.

[126] "Charges of Mistreatment of Insane at Dix Hill," RNO, 17 March 1935, p. 2.

[127] "Amputate Convicts' Feet; Rotted in Torture Cell," RNO, 7 March 1935, p. 1.

of prison officials.[128] On Christmas Eve, two prison guards at a camp in Angier, NC, blackjacked a prisoner to death. In reprimanding the guards, the *News and Observer* wrote, "Such little men in the hands of what can only ironically be called the law can be made safe only by a society determined that its decency, its self respect, shall not be hazarded by the meanness and brutality of men who indulge their ugly humanity in the guise of an under the protection of the law."[129]

Gas was intended to assuage this kind of sentiment by mediating the uneasy relationship between people and punishment. The process itself added more distance between the executioner's hand and the condemned criminal. Instead of a switch sending electricity into the prisoner's body, a switch released capsules into a container of acid. These cyanide "eggs" would, according to early plans, drop into a jar of sulfuric acid suspended above the subject's head.[130] By the time of the first gas execution, North Carolinians had refined the process, avoiding the hazard of hanging a jar of acid above prisoners' heads. Instead, the cyanide capsules, wrapped in cotton, would drop into a box positioned beneath the chair, dissolving in a mixture of sulphuric acid and water to create a deadly gas. Prisoners, of course, had to inhale the gas themselves. Afterward, ammonia would be piped in to neutralize the gas, which then would be vented outside.[131] "All this takes approximately one to two minutes," boasted the prison warden.[132]

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[128] "Cruelty and Complacency," Editorial, RNO, 7 March 1935, p. 4. Transcribed as written.

[129] "Cold Weather and Cold Blood," Editorial, RNO, 29 December 1935, p. 4.

[130] "State Adopts Lethal Gas," p. 12.

[131] "Will Use Electricity in Executions by Gas," RNO, 1 August 1935, p. 20.

[132] H.H. Wilson to Lester Rose, 20 May 1946. Prison Department, Central (State) Prison, Box 45: Warden's Correspondence, 1946-1948, I-S. For more detail, see also H.H. Wilson to Lester Rose, 20 May 1946.

The *News and Observer* closely followed the approach the state's first gassing. On Tuesday, it reported that Commissioner of Paroles Edwin Gill had interviewed Allen Foster, an eighteen-year old African American sentenced to death for rape, and could find no reason to intervene in his impending execution.[133] On Wednesday, the paper revealed that Foster had been moved from a second-tier death row cell to one on the ground floor, where he ate and slept "just eight paces" from the death chamber. Foster, steadfastly denying his guilt, complained that "he 'never had a chanst'" and "pressed his flat nose flatter against the bars of his cell." He spoke at length with a reporter, complaining that he had been beaten by police, and insisting that knowing his death was imminent, he had no reason to lie about his innocence: "'If I had done it,' he said, 'I would say right now I done it, 'cause I know Friday's my day and I got to die then for something I never done. I know I ain't got a chanst, no matter what I tell, so I'd jus' go on and tell it if it was de trufe.'" He told the reporter that he had not seen his court-appointed lawyer long enough to learn his name.[134]

Death row was uneasy on Thursday night as Foster's final morning approached. "I stayed last night with the living dead," wrote *News and Observer* reporter John A. Parris, Jr., who visited death row without the knowledge of the prisoners there on the eve of the first gas execution. "The night was long," he wrote. "The tenseness of death hung over these men who are about to die. There was that feeling of something going to happen—something that couldn't be stopped. The lonesome wail of a train whistle outside in a world that seemed far away." Death row made for a mournful community.

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[133] "New Lethal Cell to Begin Career," RNO, 21 January 1936, p. 16.

[134] "First Gas Death Set for Friday," RNO, 22 January 1936, p. 9. The reporter transcribed his interview with Foster in dialect.

Prisoners sang hymns, and one of them, known as The Reverend, led them in prayer. "'You know your day is coming just the same as Brother Allen's," he said from his cell. "Brother Allen goes tomorrow and I wish there was something I could do for him that would help him but all I know is to pray.'" He prayed, and Foster prayed with him, to "a God he found yesterday," Parris wrote.[135]

Meanwhile, "every detail connected with the operation of the new method of execution in the State has been checked and rechecked." While Parris described Foster as composed, praying in a voice "steady and firm," companion coverage revealed Foster as "openly terrified." He told one reporter, "I feel mighty tough,'" but confessed that "'the soul can be ready, but the flesh ain't, and I'm worried.'" It was unclear whether the gas chamber would spare Foster's flesh. Prison officials gassed two dogs in preparation, and the animals howled as they died, though, one reporter noted, "they were killed quite dead." Prison officials hoped that "the first human victim will be killed without howling, without squirming." In a feat of revisionism, though, the same article noted that the twenty-six year-old electric chair had caused 160 "quick and apparently painless killings."[136] Gas, it was hoped, would accomplish the same, but even more efficiently.

That didn't happen: "First Lethal Gas Victim Dies in Torture as Witnesses Quail," bellowed the *News and Observer* headline. The failure was not for lack of cooperation from Foster. He entered the gas chamber wrapped in a blanket; he wore only underwear to prevent the deadly gas from lingering in folds of clothing and threatening prison staff during the disposal of his body. He threw off the blanket and sat down unassisted. When

[135] John A. Parris, Jr., "Death Row Upset on Execution Eve," RNO, 21 January 1936, p. 1.

[136] "Under the Dome," RNO, 21 January 1936, p. 1.

the ministers and prison guards had withdrawn from the chamber, and the door had been sealed, the executioner pulled the lever, releasing the cyanide capsules. Foster watched as gray fumes rose from beneath the chair, and when they reached his nostrils, he breathed them in, then out, then mouthed "Good bye" to the spectators. But "then he began to suffer. No man could look squarely into his eyes and fail to perceive that they were registering pain." For at least three minutes, Foster "suffered obviously and consciously" before he passed out, and it took another eight minutes before physicians confirmed that his heart had stopped. "This is just hell," said one witness who had seen more than fifty executions.[137]

The other spectators concurred, as did the medical professionals and prison officials in attendance. "We've got to shorten it or get rid of it entirely," said a Duplin County congressman. W.T. Bost, a journalist who witnessed 156 electrocutions, two hangings, and two lynchings, declared asphyxiation the worst death of all. The Wake County coroner agreed: "This was one of the most terrible and horrible things I ever looked at," he said. One prison guard confessed that the gassing had "got me," reminding him of when his father suffocated to death during an asthma attack. The story received national attention. The *New York Times* picked up an article by Virginius Dabney, the editor of the *Richmond Times-Dispatch*, who noted the "storm of indignation" that ensued when the gas chamber "failed to function in accordance with expectations." The only witness who thought the execution affirmed the efficacy of gas was Charles Peterson, the bill's sponsor.[138] One columnist mocked the legislature: "I shall hope

[137] "First Lethal Gas Victim Die in Torture as Witnesses Quail," RNO, 25 January 1936, p. 1.

[138] Virginius Dabney, "Use of Death Gas Stirs Carolinians," New York Times, 2 February 1936, p. E11.

prayerfully," he wrote, "for no more legislative brainstorms that push our State back toward barbarism."[139]

The head of the prison at once wired his colleagues in Colorado, sure that Foster's eleven-minute death was unusual. No, replied the Coloradans a few days later: eleven minutes is normal.[140] North Carolinians should have known. On the Monday morning following Foster's Friday execution, the *News and Observer* published a story claiming that scientific authorities agreed that electrocution was more humane. And worse, "the gas victim, whether or not he suffers any actual physical torture, such as would be produced by a burn, feels himself being slowly killed." In what may have been the first systematic study of gas execution, the nonprofit Social Service concluded that gas execution caused "internal asphyxia," a condition in which the body cannot absorb oxygen from the blood. Add to that the paralytic effect of the gas, preventing breathing, and the subject might slowly suffocate, the heart continuing to fruitlessly beat for as long as ten minutes after breathing stops. The best solution—more gas—would not be safe for the executioner and spectators, the report concluded. Electrocution, on the other hand, causes the almost immediate destruction of essential nerve centers, "horrible as the details may sound, electrocution is … beyond doubt the most humane method of executing criminals."[141]

The following months brought more evidence that electrocution was at least a faster, if not less painful, way of executing criminals. In February, a man died in the

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[139] C.A. Upchurch, Jr., "Death by Statute," RNO, 2 February 1936, p. O2.

[140] "Gas Death Time Here Was Normal," RNO, 30 January 1936, p. 1.

[141] "Slow Death Quite Usual in Gas Killings," RNO, 27 January 1936, p. 1.

electric chair on the same day that two others were executed with gas; the first had committed his crime before July 1, 1935, after which the law provided that capital criminals be killed with gas. After the four-minute electrocution, the two gassings that followed took more than eight minutes each. "Because of the dispatch with which it was accomplished and all its traces removed," the *News and Observer* reported, "electrocution spoke silently for itself in the minds of witnesses who, faced with the direct comparison of the two methods, were close to unanimity in preferring executions to asphyxiations."[142]

Lethal gas lacked the body-contorting force of electricity. Whereas contortions in the electric chair could be attributed to the force of the current, struggles in the gas chamber appeared to be entirely human-powered. Gas also gave witnesses a chance to see prisoners resisting death. While many prisoners doomed to the electric chair struggled with guards or showed visible signs of fear, once the electricity struck them, they were entirely in its thrall. Gas gave prisoners, and witnesses, an agonizing few seconds of breath-holding, a final sign that their lives meant something to them. Even those prisoners who willingly inhaled the gas, such as Foster, struggled visibly as they died. Electricity, a power harnessed and celebrated by the state of North Carolina, had given way to something less forceful, less effective, and apparently more painful.

Why did the state, in a quest for a painless death, switch to gas if experience suggested electrocution was more humane? One explanation may have been the force of Charles Peterson's personality. After his bill passed the General Assembly, the *News and Observer* noted that "observers generally concede that passage of the measure is due

[142] "Lethal Chamber Busy Two Hours Taking 3 Lives," RNO, 8 February 1936, p. 1.

largely to his personal popularity with his fellow members of the Legislature."[143] In an editorial, the paper scolded the legislature because it had let "good fellowship rather than good sense dictate the law," and suggested that if legislators were serious about reducing "legal death to the ultimate of painlessness," they might have given the issue some study.[144]

One Raleigh resident wondered why the state was even looking for a painless method of execution. "If capital punishment must be," he wrote, "then why not make it something to be dreaded and not make it an easy, instant, and painless manner of removing the victim from his place here upon the earth?"[145] Another letter writer agreed on the following day: "The State made a mistake when it abolished public hanging. … Did they expect [Foster] to be placed upon velvet and painlessly put to death?" wrote a Raleigh man. "Is it necessary to make death a painless dream to the felon? Death of a criminal must of necessity be mental torture and not one of pleasure."[146]

The legislature, which had unanimously supported the Peterson bill, was not going to reverse course, impugn their own judgment, or embarrass their popular colleague. And after painting a narrative of steady progress toward a perfectible execution system, rolling back to electrocution would be a symbolically potent and hard-to-explain retreat, not to mention an expensive and cumbersome one. Governor J.C.B. Ehringhaus posed the question to a journalist two days after Foster's death: "'Do you think that a Legislature which passed such a law without a dissenting vote would

[143] "State Adopts Lethal Gas," p. 1.

[144] "Barbarism Up-to-Date," Editorial, RNO, 25 January 1936, p. 4.

[145] W.G. Young, "Suggestion on Executions," Letter, RNO, 29 January 1936, p. 4.

[146] Colin G. Shaw, "Why the Raving?" Letter, RNO, 31 January 1936, p. 4.

completely reverse itself and repeal the law now?'" Ehringhaus, who did "not like to have the problem presented by North Carolina's new gas asphyxiations dropped on his shoulders," had no plans to doing anything about the situation, and announced that he would not consider a blanket commutation or reprieves for current death row inmates.[147]

Foster's death prompted a reexamination not just of execution methods but of the question of pain. Newspaper coverage of the execution prompted a flood of letters into the governor's office. One man declared his opposition to capital punishment in early February, not least because "of the pitiably brutal failure of the General Assembly in its recent search for a more humane way of killing those condemned to death."[148] A doctor recommended another change in method: "Few people ever kill themselves with hydrocyanic gas," he wrote. "The legislature might save a great deal of money and make these deaths more dream-like if they would [use] an old Model T Ford and hitch the exhaust to a small gas chamber. This would please some of these sympathizers who are always howling for protection and good care of the criminals."[149] Ehringhaus's secretary replied to one correspondent, "You of course understand that Governor Ehringhaus … had no power at all with reference to making this substitution."[150]

In the wake of the Foster execution, Vivien Pierce, the executive secretary of the American League to Abolish Capital Punishment, wrote a letter to death penalty opponent Nell Battle Lewis. She and Lewis had been corresponding for at least a year

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[147] "Under the Dome," RNO, 27 January 1936, p. 1.

[148] Roy M. Brown to J.C.B. Ehringhaus, 30 January 1935. Ehringhaus Papers, General Assembly, 1933-1937, Box 65: Capital Punishment, 1933-1936.

[149] Clifton F. West, MD, to J.C.B. Ehringhaus, 27 January 1936, Ehringhaus Papers, General Correspondence, 1933-1937, Box 155: Capital Punishment, 1934-1936. NCSA.

[150] J.C.B. Ehringhaus to Clifton F. West, 31 January 1936, *Ibid.*

when she wrote, "To tell the truth I am not much exercised over how the states choose to kill criminals. It is the same thing in the end. … The thing about it that sickens me is that civilized human beings should get together to debate and consider 'the most humane way' to kill their fellow human beings."[151] At least one North Carolina resident agreed. In mid-February of 1936, a man wrote to the *News and Observer* about the "upstir" about "the best way for the state to kill a human being. "It is just an event in the course of evolution," he wrote. "In a few years from now, capital punishment in any form will be frowned upon as a barbarity, just as we of today look back with horror at the burning of witches at the stake."[152]

But the search for a humane method of execution continued in North Carolina even as columnists and others railed against the practice and urged abolition. The *News and Observer* immediately looked into the constitutionality of gas, although it concluded that there was little basis to presume that the courts would find execution by lethal gas violated the Eighth Amendment. Part of the reason was that courts, in particular the Supreme Court of the United States, had consistently avoided passing judgment on execution. In 1879, the Court ruled that Utah's firing squad was constitutional, because the Eighth Amendment was written to bar punishments intended to inflict pain, not punishments intended to kill, regardless of how painful they were. Following William Kemmler's horrifying execution, the Supreme Court ruled that it was incumbent on state legislatures to act should their laws be found in violation, and incumbent upon state supreme courts to tell them so. It was unlikely that state courts would consider the

[151] Vivian Pierce to Nell Battle Lewis, 15 February 1936, Nell Battle Lewis Papers, Correspondence, 1931-1939. NCSA.

[152] N.B. White, "Sees End of Death Penalty," Letter, RNO, 15 February 1936, p. 4.

question, since it would involve a decision on the death penalty, not just on the method in question, a ruling that would require a long judicial reach.[153] The power to change capital punishment law, then, would remain in the hands of legislators, an arrangement that suited North Carolina's governors. As Governor Clyde Hoey's personal secretary reminded one petitioner in 1938, "It is true that a governor could flout the laws of his state and violate his own oath to uphold those laws" by commuting every death sentence, "but such action is not in accord with the Governor of North Carolina's conception of his duty."[154]

After Allen Foster's execution, condemned inmates were terrified of the prospect of being gassed. The ten men on death row who anxiously anticipated Ed Jenkins's execution, the second gassing in the state, believed that death by asphyxiation was "a hell we won't forget even in eternity." Jenkins himself remained stoic. "I've read about this lethal gas," he told one reporter. "Some claim it's painless, that you don't know nothing after you get the first whiff. I guess it's a little like ether; I took that four times."[155] Prison officials had concocted a new mixture of chemicals, and that failing, intended to blindfold Jenkins so his agony would be less apparent.

On January 31, 1936, Jenkins took his seat dressed in striped boxer shorts, and attendants did not force him to wear the blindfold when he declined it. According to physicians in attendance, he died within nine seconds of inhaling the gas, and that there

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[153] John A. Livingstone, "Doubted Courts Would Bar Gas," RNO, 25 January 1936, p. 1.

[154] Robert L. Thompson to Milo S. Gilbert, 12 July 1939, Clyde R. Hoey Papers, Subject Files: Executions, Box 65. NCSA.

[155] "Second Victim to Face Lethal Gas Death Today," RNO, 31 January 1936, p. 1.

was "no comparison" between his death and Foster's.[156] On the advice of colleagues in Colorado, prison officials used more acid and water to kill Jenkins, and had warmed the gas chamber before the execution to allow for better vaporization. It helped, too, physicians speculated, that Jenkins, who was obese, was not as physically fit as Foster. One prison official who watched the execution declared, "Lethal gas has come to stay in North Carolina."[157]

But the *News and Observer* insisted that "questions remain" in an editorial published on the day of Jenkins's death. Seeking to reframe the conversation, the editorial suggested that the pain of execution was not limited to the effects on the condemned and witnesses on the day of the execution: "Torture under capital punishment is certainly not limited to the few moments of the application of the lethal device employed." The long wait on death row amounted to a torment tantamount to "that so suave and so agonizing Chinese method of torturing men to death."[158] This argument was hardly convincing to most North Carolinians, who, if they cared for the welfare of doomed criminals, were interested more in their final, physical agonies than the psychological toll of a death sentence.

Meanwhile, electrocutions continued for those prisoners condemned before July 1, 1935. Henry Grier, distracting his escort to the death chamber with a request for a postcard, dashed up the stairs to the cell block's third tier and threw himself off. He was

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[156] George deRoulhac Hamilton, "Death Comes Quickly to Second Gas Victim," RNO, 1 February 1936, p. 1.

[157] *Ibid*. Officials attending to Foster's death used fifteen one-ounce pellets of potassium cyanide, dropped into a mixture of one quart of sulphuric acid and one quart of water. For Jenkins, they used three pints and acid and three quarts of water.

[158] "Questions Remain," Editorial, RNO, 1 February 1936, p. 4.

carried unconscious into the electric chair two hours later.[159] In November, after seven reprieves, "Country John" Pressley became the 170th, and supposedly final, condemned criminal to be electrocuted in the state.[160] On the day of Pressley's execution, executioner R.L. Bridges and Governor Ehringhaus agreed that electrocution was a quicker and easier method of execution. Bridges told a reporter that he liked the simplicity of gas: "I like it better because it means just throwing the switch one time, letting a cyanide pellet drop into a bucket of acid and that's all there is to it." He added, though, that he thought electrocution still the "easiest way for a man to die, though it's not exactly like rabbit hunting.'"[161] After Pressley's death, the twenty-six year-old electric chair was removed from the gas chamber—it had been one of three chairs in the red-tiled room—and place in a store room.[162]

Prison officials had to take the chair out of storage in the following year for James McNeill, whose death sentence in June of 1935 directed an electrocution. Witnesses "had an opportunity to form their own opinions about the comparative humaneness of two agents of capital punishment" at the double execution, the *News and Observer* reported. The paper noted that speed was the biggest difference between his death and that of Leroy McNeill (no relation), who was asphyxiated after James. "One McNeill Dies Quickly by Electricity; Another Slowly by Gas," read the headline.[163] The double execution revealed the kind of stalemate the debate over humane execution had reached.

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[159] A.T. Dill, Jr., "Suicide Leap by Murderer Ends with Death in Chair," RNO, 11 July 1936, p. 1.

[160] "Electric Chair Claims 2; May Be Its Last Victims," RNO, 5 September 1936, p. 12.

[161] A.T. Dill, Jr., "Electric Chair Discarded After Claiming 170 Lives," RNO, 14 November 1936, p. 1.

[162] "Gathering Dust," RNO, 21 November 1936, p. 12.

[163] "Two Negroes Pay Penalty in Contrasting Executions," RNO, 14 August 1937, p. 1.

It was demonstrably obvious that electrocution was a quicker, and apparently less painful, method of execution. It was equally clear that the state had cast its lot with gas.

The electric chair was retired in 1937, but the belief in its lethal power did not die. In 1938, Governor Clyde R. Hoey, who followed Ehringhaus into the governor's mansion, was still convinced that electrocution was a more humane method of execution than asphyxiation. "I have thought a great deal about the death penalty and the most humane method of enforcing it," he wrote in July. "I have had the matter investigated rather fully, and the preponderance of opinion seems to be that electrocution is much more humane than asphyxiation." Medical professionals had convinced him that "electrocution is instant and therefore the victim has no conscious pain or suffering for a short time as the gas is first inhaled." Hoey was joined in this position by State's Prison warden H.H. Honeycutt, who believed that "the gas chamber is horrible, Gas is so long and drawn out; electricity is over in a minute. I believe most of the men on death row would rather die by electricity than gas."[164] When the Associated Press picked up these comments in July 1938, Hoey received letters from around the country urging him to resume the search for a painless method of execution.

As the controversy continued, prison officials continued to police the borders of the death chamber, and continued to do so inconsistently. In 1948, a woman wrote to the prison requesting a pass to the execution of J.H. Breeze on behalf of her aunt, whose husband Breeze murdered. "My aunt says she doesn't think she will feel any better until the negro is dead," she wrote. "He thought he had killed her also. She said she had to see

[164] Clyde R. Hoey Papers, Subject Files: Executions, Box 65. NCSA. Reference to a San Jose Mercury Herald article from 7/4/38; "Capital Punishment Due for Legislative Overhaul," RNO, 5 July 1938, p. 14.

her husband dying for two hours and she knows she can stand to see this negro die."[165] Wilson replied, "It is our policy never to allow any of the relatives of the victim that were killed to witness the execution of the killer."[166] The woman's aunt would have to wait outside the death chamber to see the body trundle out in its wicker basket, rather than watching inside.[167]

Relatives did appear at gassings from time to time, though. Nephews of William Hodgin's victim watched his asphyxiation later that year, and in November, perhaps given a pass because of his father's status, the nineteen year-old son of a murdered sheriff watched his father's convicted killer die in the gas chamber. "'I didn't mind watching him die,' he told reporters.[168] Some family members, then, had their satisfaction. Others had a different kind. At one 1936 double execution, barred from watching the asphyxiation of Herman Allen, condemned for murdering their brother, two men watched convicted rapist Otis Harris die instead.[169]

In 1943, a state senator introduced yet another bill to reinstate electric chair. The bill received a cold reception from prison officials, who had become accustomed to gas. Both Warden Ralph McLean and executioner R.A. Bridges, then a fifteen-year veteran

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[165] Mrs. V.M. Green to H.H. Wilson, Prison Department, Central (State) Prison, Box 44: Warden's Correspondence, 1946-1948, A-H. NCSA.

[166] H.H. Wilson to Mrs. V.M. Green, 15 January 1948, Prison Department, Central (State) Prison, Box 44: Warden's Correspondence, 1946-1948, A-H. Transcribed as written. See also H.H. Wilson to Ralph J. Jones, 7 May 1947. Prison Department, Central (State) Prison, Box 45: Warden's Correspondence, 1946-1948, I-S. NCSA.

[167] "Widow of Negro's Victim Waits Near Death Chamber," RNO, 10 December 1927, p.1.

[168] "Old Man's Killer Executed by Gas," RNO, 18 July 1936, p. 12; "Son Sees Dad's Killer Die Protesting His Innocence," RNO, 21 November 1936, p. 12. See also "Negro Declines Breakfast on Morning of Execution," RNO, 30 October 1943, p. 9, and "Horne's Death Witnesses by Slain Wife's Brother," RNO, 20 June 1936, p. 12.

[169] "State Executes Slayer, Rapist," RNO, 31 October 1942, p. 7.

who had taken 119 lives, said that they would resign if the electric chair returned to Central Prison. Within a week, the Senate Judiciary Committee voted overwhelmingly to give the bill an unfavorable report. Testimony rehashed some of the old debate, with prison officials asserting that gas provided for a more natural style of death, and supporters of the bill arguing that electrocution offered a quicker one.[170] But the search had stopped. Despite the absence of convincing evidence that gas was a less painful agent of death than electricity, the Legislature remained in support the switch to gas.

Meanwhile, the mask had become a regular feature in electrocutions and gassings, but its use appears to have been inconsistent. Behind a mask, the prisoners' face could no longer communicate fear or pain. At the 1939 asphyxiation of King Solomon Stovall, a reporter observed that audience members were "unable to see facial contortions of the dying man, and witnesses said the mask made it easier to watch the execution."[171] The change was, at least briefly, almost too effective. A few months later, Warden H.H. Wilson was having a different problem—trying to scrounge up the number of official witnesses required by law to sign the death warrant after an execution. Wilson wondered if the mask "took the sensationalism out" of executions and made it difficult to generate interest.[172] The thrill of executions, what made them important to the public, appears to have been their unpredictability and the violence that prison officials and lawmakers tried to eliminate.

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[170] Frances Newsom, "Return of Electric Chair Advocated in Senate Bill," RNO, 12 January 1943, p. 1; "State Will Continue Use of Gas as Death Method," RNO, 20 January 1943, p. 14.

[171] "Granville Negro Executed Here," RNO, 21 January 1939, p. 12. The paper made mention of a mask being used at a 1921 execution, too. See "J.T. Harris Goes to His Death in Electric Chair without a Word," RNO, 21 October 1921, p. 1.

[172] "Witnesses Are Scarce for Negro's Execution," RNO, 10 June 1939, p. 1.

Newspapers, though, kept the embers of concern about gassing alive. In 1953, Charles Craven, a *News and Observer* reporter who attended many executions, opened his article about the execution of two condemned rapists by describing a fellow journalist's collapse:

> 'He ain't suffering no more …'
> 'He ain't dead.'
> 'He's dying, though.'
> A newspaperman fainted. He fell backwards, his head striking the floor. He fell in a hot patch of sunlight. Another newspaper man stopped watching the two men die and leaned over his fallen colleague. "Unbutton his collar." The guard unlocked the steel-barred door. They carried the newspaper man down the steps outside and he was able to stand on his feet in the shade on the sidewalk.
> 'It was hot,' he said.[173]

Craven made this episode the centerpiece of his article at least in part because the gassing itself was uneventful.

A series of such gassings, which drew equally muted newspaper coverage, and a declining death row population, appeared to dull calls for further technical reform. In the 1940s, reporters turned their attention to the increasing legal twists and turns taken by death row inmates, who, as the United States Supreme Court increasingly involved itself in the death penalty process, were more often appealing their sentences. Legislators had moved from tinkering with the machinery of death to tinkering with the law, debating bills that relaxed mandatory sentencing guidelines and considering the question of abolition. The crowds that gathered at executions thinned as well. Sensational cases drew interest, such as from the more than one thousand people milled around outside the prison

[173] Charles Craven, "Two Rapists Pay With Lives After Long Death Row Wait," RNO, 30 May 1953, p. 1.

during a 1949 gassing, but as legal challenges slowed the death penalty process, fewer executions took place, and those that did provoked less interest.[174]

A slight tweak in the delivery of the cyanide into the acid—in 1958, the prison began using a plastic bag of cyanide crystals, rather than separate cyanide capsules—received some attention from the press when it appeared to slow the diffusion of the gas, but North Carolinians had little opportunity to ponder the import of this change. After Michael Bass was executed for rape in 1958, the state held just one more asphyxiation. African-American farm worker Theodore Boykin died in 1961 for the rape and murder of a white woman; he took twenty minutes to die, one of the longest executions on record, but his death received little attention.[175] The most effective way to stem public interest in executions was to stop performing them.

V. "Are We Succeeding?": Meaning and Method

The focus on pain and procedure that dominated the use death penalty in North Carolina for decades posed a problem for the state. Muting and diluting the process of death—interposing masks and panes of glass between the condemned and his death, or between the public and the prisoner—also muted and diluted the messages of execution that historians and others have weighted with so much significance. Even before the advent of semi-private electrocutions and gassings, the meaning of executions was ambiguous. Afterwards, new rules and procedures muddied the waters further. Human

[174] "Gas Chamber Takes Life of Johnston Tobacconist," RNO, 29 January 1949, p. 1; "James Creech Executed for Wife's Murder," Asheville Citizen, 29 January 1949, p. 2. Newspapers reported that Creech was the first man with more than a high school education to be executed in the state, but George Keaton attended two terms at Tuskegee Institute before his 1934 execution: "Death Row Poet Goes Mutely to His Doom," RNO, 22 September 1934, p. 12.

[175] Roy Parker, Jr., "Duplin Man Dies in Gas Chamber," RNO, 28 October 1961, p. 1.

tinkering, and not the majesty of the state, dominated the story; human frailty, whether in the trembling hands of the executioner or the sobs of the condemned, drew the eye. Witnesses and newspaper readers were sickened, not ennobled or forewarned, or, in the absence of discomfort, the show was more often boring than instructive. As Angus Murphy and Jasper Thomas died in the electric chair, a reporter commented that "nowhere did one hear mention of the crime that brought the two negroes to this terrible thing. Uppermost was the tragedy of justice that had unfolded before their eyes."[176]

Were executions meaningless? Politicians insisted they were not about revenge. As interest waned, the confessions and conversions they elicited were more important to condemned prisoners than to anyone else, and their sometime featurelessness did not help the state's image either way. When done well, executions were blanched of substance, and when bungled, they made lawmakers and their agents look like fools. The idea of a debt that only the state could collect would not have been particularly rewarding to communities that as late as the 1940s, could still sometimes erupt into mob rages at the suspicion of criminal behavior by African Americans. State control had, significantly, removed executions from the counties where capital crimes took place, and made it more difficult for residents to participate in the response. The search for painlessness clashed with the belief in deterrence. After all, as the *News and Observer* opined, "if it is true that capital punishment serves as a warning and a deterrent … then the more terrible the torture the more effective the device. If we are using capital punishment to frighten men

[176] "Negroes Who Assaulted White Woman Pay Penalty of Death," RNO, 16 September 1922, p. 1.

away from crime," the editorial continued, "the more horrible thing with which we frighten the better."[177]

Private asphyxiation in the gas chamber, the paper suggested, had eroded the rationale for the death penalty. A 1936 editorial slammed the General Assembly for its attempt to make executions "pretty" or "edifying," rather than considering their meanings:

> The degree of pain is certainly not the only question involved in capital punishment. So serious a business as the taking of life deserves more from an enlightened people than carelessness and complacency. What are we as a people trying to do when we kill? Are we succeeding in doing that? Has capital punishment served in North Carolina to keep men from crime? Is there any truth in the charge once made that capital punishment in North Carolina is exclusively reserved for the black, the friendless and the poor? There are other questions, all of them serious ones. Are we as a people willing to think our way to answering them in terms of intelligence?[178]

The focus on pain and spectacle was a distraction, and making executions pretty was a way of avoiding these questions and allowing the death penalty to endure, which it did for more than twenty years after the *News and Observer* posed this question. The focus on painlessness and the partial invisibility it introduced to the death penalty process contributed to the death penalty's endurance. To continue executing criminals, it was essential that the revulsion at their crimes outweighed revulsion at their executions.

Not long after Allen Foster's horrifying 1936 death in the gas chamber, Frank Smethurst, a journalist and death penalty opponent, described North Carolina's changes in execution methods as "the public conscience … running away from immediate horror

[177] "Questions Remain," p. 4.

[178] "Barbarism Up-to-Date," Editorial, RNO, 25 January 1936, p. 4.

and hastening the certain day when, its resources of escape exhausted, it will find its release in the repudiation of the death penalty in any form."[179] Smethurst was not entirely right: the state had yet to see its peak in yearly executions, and until the early 1950s, the public continued to show plenty of interest. Furthermore, while by then the death penalty in North Carolina, signifying little and accomplishing nothing, had fallen into disuse, when it reemerged in the 1970s, it did so in a storm of debate about which method might be the least painful and least upsetting. Many North Carolinians, it seemed, were satisfied that the state should execute criminals. The remaining question was how.

[179] Frank Smethurst, "In My Opinion, " RNO, 1 February 1946, p. 4.

CHAPTER 2

"White Folks, Please Go on and Kill Me": Race and the Death Penalty

I. "That Is the Negro"

In the dark of the early morning of November 3, 1925, Buncombe County Sheriff E.M. Mitchell and his deputies collected a prisoner from a jail in Charlotte and drove him 131 miles to Asheville. Mitchell had already picked up another prisoner in Greensboro, and when he arrived in Asheville, he had covered about 350 miles. Two carloads of armed National Guardsmen met him and his prisoners outside the city limits, and escorted him into town. White Buncombe County residents had been waiting for the prisoners' arrival for hours, gathering at the courthouse early to find good seats; African Americans were keeping quiet and out of sight.[1] Members of the crowd craned their necks to catch sight of the two men as they entered the courtroom, but the presence of the National Guardsmen, carrying bayoneted rifles, kept them quiet.[2]

Judge A.M. Stack addressed the crowd. "I see no reason for anybody to get scared or excited or wrought up," he said, "the courts were created by the people and should have the confidence of the people. … If there are any to be tried, they will be given a fair trial." After this reassurance, Judge Stack ordered the courtroom emptied. Only those

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[1] "Negro Leaders Advise Race of Present Duties," Asheville Citizen, 2 November 1925, p. 1.

[2] "National Guard Is in Readiness if Need Arises," *Ibid.*

grand jury members and spectators who had been searched first could reenter. National Guardsmen confiscated only a pocketknife and a bottle of whiskey.[3]

Judge Stack's words resonated with the editors of the *Asheville Citizen*, who celebrated the court system as "a structure for the protection of the people—all the people—and so to this end its dispassionate courts protect both the public as a body and the humblest individual member of it."[4] The humble individuals in question were Alvin Mansel and Preston Neely, both African-American, both awaiting arraignment for raping white women. They needed protection because the previous September, furious whites had stormed the Asheville jail where Mansel was being held. As the mob gathered, Sheriff Mitchell and his deputies spirited Mansel away, concealing his location for months as he awaited trial. The mob laid siege to the jail, doing considerable damage.[5]

When a second white woman reported a sexual assault in late October, local and state officials worried about a second lynching attempt. Governor Angus McLean authorized a special term of the Buncombe County Superior Court, and within three weeks, both Mansel and Neely, the alleged second assailant, returned to Asheville for their trial. The trial would be the following day, and to further accelerate the proceedings, Judge Stack decided to hold night sessions. "In this matter," wrote one journalist, "the machinery of the court was speeded up."[6]

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[3] "Jurors Will Be Selected Today for the Trial of Alvin Mansel," Asheville Citizen, 3 November 1925, p. 1.

[4] "Even Handed Justice," Editorial, Asheville Citizen, 4 November 1925, p. 4.

[5] "Negro Goes on Trial Today for Attacking White Woman of City," Asheville Citizen, 2 November 1925, p. 1; "Asheville Mob Enters Jail in Quest of Negro Prisoner," RNO, 20 September 1925, p. 1; "Quiet Sunday at Buncombe Jail," RNO, 21 September 1925, p. 1; "Report of Mob Proves Mistake," RNO, 22 September 1925, p. 1.

[6] "Preston Neely to Go on Trial Today," Asheville Citizen, 6 November 1925, p. 1.

After a day of argument, Judge Stack told the jury he wanted a verdict the following morning. He told the jury, too, not to let race influence their verdict. "Banish from your minds the fact of whether the accused is white or black," he instructed. "You are not to be influenced by what public opinion may be. You, gentlemen of the jury, are not to consider the result of the verdict. You have nothing to do with that. You did not fix the penalty; the law does that."[7] The editorial board of the *Asheville Citizen* was optimistic: "The court's final judgment will be the most perfect expression of right possible for fallible mankind—we should accept it with confidence in its verity and its justice."[8] One observer, though, was skeptical: An African-American man was jailed for interrupting one witness's testimony by saying, "Now watch that white man go up there and swear to a [damned] lie."[9]

Nearly every aspect of Alvin Mansel's trial reflected the new standards that reformers had sought to impose on North Carolina's judicial system in the early twentieth century. For many years, from the slave courts of the antebellum era to the lynch law of the late nineteenth century, the state had two systems of justice, one for whites and one for African Americans. Now, in 1925, with a governor devoted to rooting out mob justice, a Superior Court judge determined to conduct a fair trial, and a jurors duly reminded of their duties, the state appeared poised to embrace the principles that found such eloquent expression in Judge Stack's charge. But on the morning of November 6, the jury returned a guilty verdict and Alvin Mansel was sentenced to death. The survivor

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[7] "Fate of Accused Negro Is in Hands of Jury," Asheville Citizen, 5 November 1925, p. 1.

[8] "Even Handed Justice," p. 4.

[9] "Negro's Remarks in Judge Stack's Court Land Him in Bastille," Asheville Citizen, 4 November 1925, p. 1.

had described her assailant as a thirty-five year-old light-skinned black man. Alvin Mansel was dark-skinned, and he was seventeen years old. He had been arraigned on Tuesday, tried on Wednesday, and sentenced to death on Thursday.

"I hope to meet you all in heaven," Mansel said. "I am not guilty, but the jury has come out, and said I was."[10] One of Mansel's attorneys asked Judge Stack what to do next, and the judge entered an appeal on Mansel's behalf. The process seemed to have accomplished everything for which it was intended. After the embarrassing attack on the jail months earlier, the trial had proceeded without incident. The defendant, though reviled by the Buncombe community, received on the surface what appeared to be a fair trial from able attorneys, who, despite their unfamiliarity with state law and limited preparation time, called a number of different witnesses on Mansel's behalf. The trial's speed dramatized both the smooth progress of the law and its responsiveness to community sentiment. A jury decided that Mansel had committed a heinous crime, and that he would be punished for it.

Preston Neely's trial began shortly after Sheriff Mitchell escorted Mansel from the courtroom. "Missus, I ain't the man," Neely had told the young white woman who identified him as her attacker. When Neely again used the word "missus" after his arrest, his accuser remembered that he had used the same word during the assault. She pointed at him across the courtroom: "That is the negro," she said.[11] But the jury disagreed; two days later, jurors voted for acquittal. As soon as they pronounced their unexpected verdict, a "tense atmosphere of feeling swept over the crowd." The prosecutor began

[10] "Preston Neely Goes on Trial; Alvin Mansel Sentenced to Die in the Chair," Asheville Citizen, 6 November 1925, p. 1.

[11] *Ibid*.

speaking to Judge Stack in loud tones about holding Neely for further investigation, and the judge declared that Neely would be returned to jail. As Judge Stack and the prosecutor discussed the details of Neely's continued imprisonment and other details of courtroom procedure, National Guardsmen surrounded Neely and escorted him from the courtroom. The crowd of spectators was agitated but confused, upset by the verdict but not sure whether the law would continue along their preferred course. It did not. The National Guard was not taking Neely back to jail; they escorted him home to South Carolina and set him free.[12]

Alvin Mansel spent a year waiting for the North Carolina Supreme Court to hear his appeal. In May of 1926, his attorneys presented their calculation that there was just a twenty-two minute window during which Mansel was not present at the sanitarium on the afternoon of the crime. He could not possibly have made the fifteen-minute walk to where the survivor was assaulted, let alone make the trip, commit the crime, and return to work. They laid out the survivor's various and differing descriptions of her assailant, and complained that the heavy National Guard presence influenced the jury:

> Under the circumstances, we respectfully submit that the prisoner did not have a fair trial; that it was impossible in the presence of armed Militia to remove the idea from the public generally, including the jury, that the court was simply protecting the defendant to the end not that he should have a fair trial, but, that the law should have its course and that the law should execute him instead of the mob. The whole atmosphere of the Court House spoke out and said: 'Let the law have him. It will do what ought to be done and let individuals stand back and let it have its way.'[13]

[12] "Preston Neely Goes on Trial," p. 1; "Preston Neely Is Acquitted and Rushed to South Carolina under Guard," Asheville Citizen, 9 November 1925, p. 1.

[13] Brief for the Defendant, State v. Mansel (1925), 7.

Their claim points to a fundamental question about this effort to prevent lynchings: Was it a genuine effort, using the threat of arms to ensure a fair trial? Or was it, as Mansel's counsel argued, simply an effort to keep order until the accused got what he deserved, a banner of fairness and impartiality concealing an agenda of racial subjugation?

The court denied Mansel's appeal, a decision which met with resistance from around the state. Four thousand people wrote to McLean urging commutation, including a number of prominent Buncombe County citizens. The will of the people, once expressed by a mob, now favored Mansel's freedom.[14] McLean listened, and commuted Mansel's sentence. He explained, "I believe firmly in the necessity of capital punishment and particularly in cases of rape, but I do not believe in the infliction of capital punishment even in the case of rape unless it appears that the prisoner … is guilty beyond a reasonable doubt. That is not only the correct principle of law but it is the only principle that satisfies the inner conscience." He added, "I can think of no act more serious than the commission of or the crime of rape except the taking of life of an innocent person either with or without due process of law."[15] Soon, Mansel's life sentence was reduced to a thirty-year term, and in October of 1930, he left prison on parole.[16]

Members of the mob that stormed the Asheville jail were treated more harshly. In February of 1926, McLean announced that the fifteen men who had been arrested would have to serve out their full sentences, which ranged from one to fifteen years on the roads

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[14] "Supreme Court Decides Alvin Mansel Must Die," Asheville Citizen, 28 May 1926, p. 1.

[15] Application for the Pardon of Alvin Mansel, in David Leroy, ed., Public Papers and Letters of Angus Wilton McLean, Governor or North Carolina, 1925-1929 (Raleigh: Presses of Edwards and Broughton, Company, 1931), 756.

[16] "Mansel, Alvin," Paroles for Capital Criminals, vol. 1; Hugo Adam Bedau and Michael L. Radelet, "Miscarriages of Justice in Potentially Capital Cases," Stanford Law Review, vol. 40, no. 1 (November 1987), 145-6.

and in the State's Prison. Six thousand people, including a number of lawmen and jurists, signed a petition asking for their release, and the men's wives complained to the paroles commissioner that their husbands' confinement would leave them destitute. McLean suggested that their absence created an opportunity for Asheville to show its generosity. "The prisoners sought to destroy the very process of government upon which they now rely," he said, adding, "No man can calculate the damage that may be done to the good name and fame of North Carolina by even one lynching, and the only way to suppress lynching is to let those who engage in it understand that they will be punished severely."[17] In this instance, McLean took a firm stand against lynching. He did so, however, in the context of a death penalty process that manifested white violence against African Americans.

The acquittal of Preston Neely, Mansel's path from a death sentence to freedom, and the conviction of the members of the mob reveal complex, and competing, visions of justice in 1920s North Carolina. First, every step of the death penalty process in the 1920s, from arrest to conviction, was influenced by the racial regime of the segregated South. African Americans were much more likely to receive a death sentence from the all-white juries that heard trials than were whites, and black men accused of raping white women were even more so. Second, the crime of rape dredged up the image of the black beast and the fear and rage with which many white southerners greeted him. Yet descriptions of Mansel and Neely, though always sure to identify their race, were notably free of the racist language that appeared in many articles about black criminals of all

[17] Brock Barkley, "McLean Refuses to be Moved by Appeals for Participants in Riot," Asheville Citizen, 11 February 1926, p. 2.

kinds. This language made criminality indelible on the black body at a time when many North Carolinians were surrendering the once-popular idea of a criminal type.

Third, juries, even those trying alleged rapists, could show surprising mercy, and proved willing to remain open to defendants' stories, months and years after a conviction. Even if a jury handed down a conviction, as in the case of Mansel, community members were sometimes willing to temper their anger with truth and extend mercy. A genuine sense of justice, or pity, may have been intruding into the racial theater of the courtroom, undermining the significance of the death penalty as a symbol of the white superiority as embodied in the power of the state. And finally, the cases of Mansel and Neely reveal something of North Carolinians' beliefs about the law, and their efforts to use it to meet the needs of their communities, perpetuate racial subjugation, and enforce their ideas of justice. The image of the law, and the law itself, were in conversation at these two trials, and remained so between 1910 and 1961, when North Carolinians wrestled with race and justice against the backdrop of their government's most severe punishment. Racism guided the death penalty, but its influence also undermined its legitimacy and contributed to making it the rare and random punishment it has been for much of its history.

II. "The Word 'Negro' Is Synonymous with Crime"

In 1937, the sociologist John Dollard visited Indianola, Mississippi, to study how African Americans and whites lived in what he believed was a typical southern town. He saw a bold racial line. On the white side, residents sipped lemonade on their screen porches, watching their children play on mown lawns, or read inside well-maintained homes. At night, whites stayed indoors or left for the movies in a car. On the other side of

the tracks, in "nigger-town," Dollard saw kerosene lamps burning in the windows of poorly-built houses, where residents sweated in the heat of a summer evening on their way back and forth from their outhouses. At night, African Americans took to the streets—just two of them paved—to meet one another, or maybe head down to "a particularly dark and dingy street" for a drink, a game of dice, or a tryst with a prostitute.[18] Dollard's vision was perhaps grim, and certainly limited, but the *Carolina Times*, an African-American newspaper published in Durham, a city with a substantial African-American middle class, concurred: "About all [most African Americans] have is life, and it is seldom that they can even call that their own."[19]

The racial caste system that dominated the American South, including North Carolina, for much of the twentieth century created limitless possibilities for criminality in the black community. Segregation laws, laws concerning vagrancy, public behavior, or interaction with police, labor laws and laws guiding the operation of the household put African Americans in constant risk of stepping over racial boundaries at once vivid, fluid, and codified in law. Added to this real risk, and compounding it, was whites' manipulation of African Americans' lives, lived, it appeared to many whites, in the moment before the commission of a crime. As sociologist Guy B. Johnson, wrote, whites frequently took advantage of assumptions about black criminality to protect themselves from the law, save their reputations, or win attention.[20] "Often times," concurred one black newspaper editor, "the Negro is blamed for crimes in which he has no interest."[21]

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[18] John Dollard, Caste and Class in a Southern Town, 2nd ed. (New York: Harper and Brothers, 1949, orig. 1937), 2-4.

[19] "Worthy of Commendation," Editorial, The Carolina Times (Durham), 14 April 1938, p. 4.

[20] Guy B. Johnson, "The Negro and Crime," Annals of the American Academy of Political and Social Science, vol. 217 (September 1941), 96.

At the same time, lives led in a legal twilight gave African Americans latitude in their misbehavior toward one another. "There are many, many crimes that are either ignored by the police or are never apprehended for one reason or another," complained one editorial in the Greensboro-based black newspaper *The Future Outlook*.[22] As Johnson argued, many law enforcement officers were as likely to leave African Americans to their own devices as they were to round them up and subject them to the dreaded third-degree. "'We can't attempt to control everything that goes on among the Negroes,'" Johnson writes of their attitude, "'As long as they keep their hell-raising to themselves and don't let it get too noticeable, we'd rather leave them alone.'"[23] Those African Americans unfortunate enough to enter the white-dominated legal system faced not just an assumption of criminality, but also mechanisms that through malice or neglect produced a legal validation of that assumption.

As a result, the legal system disproportionately punished African Americans who committed crimes against whites. Johnson argues that the racist caste system so distorted criminal statistics that they cannot provide an accurate picture of African Americans' relationship with the law in the early to mid-twentieth century. With few African-American lawyers defending capital criminals—the first court-appointed African-American lawyer served in 1937[24]—and few if any African-American jurors, the legal process was far from impartial. Johnson used superior court data from a six-year period

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[21] "A Sense of Justice," Editorial, The Future Outlook (Greensboro), 11 April 1942, p. 4.

[22] "Crime and Us," Editorial, The Future Outlook (Greensboro), 1 March 1942, p. 4.

[23] Johnson, "The Negro and Crime," 97.

[24] J.H. Malloy, "Lawyer C.J. Gates Is First of Race to Be Given Defense by Judge," The Carolina Times (Durham), 26 June 1937, p. 1.

to find that more than eighty percent of black murderers of whites were executed, compared with just sixty-five percent of black-on-black murderers.

Sociologist Harold Garfinkel bolstered Johnson's observations about race and crime with a survey of North Carolina jurors. Between 1930 and 1940, Garfinkel found that jurors approached homicide cases differently depending on the race of the offender and the victim, describing four summary reactions, one for each racial offender-victim scenario. African Americans who were accused of committing crimes against whites received the harshest treatment, with jurors acting on a compulsion not just to see that "Justice is done" but also to "get the nigger who is responsible for this." Juries trying African Americans who committed crimes against other African Americans felt no such compulsion, evaluating the defendant's character and weighing the consequences of acquittal and conviction. Jurors asked, "Murder? Another one? Who is the man? Where is he from? Whom did he kill? Are we going to try him or did he enter a plea?"[25]

These reactions by white jurors spring from a belief in African Americans as inherently criminal, but reveal that average white North Carolinians did not feel a need to punish that criminality unless it spilled over into the white world. This indifference deepened over the course of the legal process. In Garfinkel's findings, for example, more than ninety percent of African Americans arrested for murdering other African Americans were indicted for first-degree murder, more than any other offender-victim group. But as the trial proceeded, the chance that one African American charged with killing another would be sentenced to death steadily dwindled. Just over fifty percent indicted ended up being charged with first-degree murder, meaning that between the

[25] Harold Garfinkel, "Inter- and Intra-Racial Homicides," Social Forces vol. 27, no. 4 (May 1949), 376-7.

indictment and the trial, the prosecuting attorney accepted a plea or recommended a different charge. Ultimately, just three percent of those indicted were convicted of first-degree murder.[26]

Garfinkel's work exposes the attitudes that sent some murderers to the electric chair but others to chain gangs. It suggests a loose, personal system that coexisted with the dictates of the law, leaning on it at times, bending it at others, and sometimes discarding it altogether. Even this description may imply more order and rationality than existed. Some whites, when not exploiting it, were prone to ignore African-American criminality, not to mention the African-American community at large. As John Dollard writes, African Americans were "marked by a kind of 'second-handedness.'"[27] White officers sometimes arrested African American criminals, sometimes not; white juries sometimes convicted them, but sometimes they did not; white stakeholders in the legal process seemed sometimes to care about the idea of justice, but sometimes felt comfortable indulging their desire to inflict pain on African Americans.

Garfinkel did not use the word, but his study suggests that the administration of justice—in the form of a thirty-year stint in a work camp or the law's severest penalty—depended on a hunch, especially when African Americans were the defendants. Garfinkel argues there was a sacred element to defending white prerogatives in the courtroom when African Americans committed crimes against whites, whereas when they commit crimes against one another, "there is little sense of administering a sacred trust."[28] This lack of seriousness appears especially true in cases when African American men committed

[26] Garfinkel, 371.

[27] Dollard, 105.

[28] Garfinkel, 377.

crimes against one another. In those instances, juries and other participants in the legal process seemed to elevate the character of the defendant, gauging his or her reputation as the most important factor in the conviction process. Jurors decided whether or not they liked the defendant. If they didn't, he would die.

Such was the case for Taylor Love, an African-American man who murdered another African American and died in the electric chair in December of 1911. Love was executed because he had a "generally bad reputation," and his "previous bad record" ensured a "violent end to a violent life," the *News and Observer* explained.[29] Lewis Moody demonstrated his particularly bad character with a particularly brutal murder; Governor J. M. Broughton refused to commute his sentence because of the violence of the crime and Moody's cruelty in telling the victim's wife about it afterwards.[30] Fleet Jack Wall, executed in the spring of 1941, was "declared to be a bad character," and the *News and Observer* reprimanded him for "staring sullenly at the floor" as guards strapped him into the chair in the gas chamber.[31]

But the case of Fleet Jack Wall illustrates a more important factor than character for North Carolina's white juries. Wall had become convinced that his wife was unfaithful to him and had tried to kick her out of the home they shared. He drank, she didn't leave, and after he had finished his whiskey and moved on to rubbing alcohol, he killed her. Of the sixty-nine African Americans who were executed for killing other African Americans between 1910 and 1961, thirty-four of them died for murdering their

[29] "Taylor Love Pays Death Penalty," RNO, 2 December 1911, p. 5.

[30] "Negro Executed in Gas Chamber," RNO, 22 May 1943, p. 5.

[31] "State Executes Anson Murderer," RNO, 7 June 1941, p. 5. See also "Negro Electrocuted for Killing Another Negro," RNO, 28 May 1921, p. 3.

wives or girlfriends. Four were hired to kill their victims, five were guilty of brutal multiple murders (all of which included women), and twenty-six died for murdering other black men, either in particularly brutal fashion or in the course of committing another felony. So, at least thirty-nine of the sixty-nine African Americans arrested for murdering other African Americans, including Fleet Jack Wall, were convicted of killing women. Garfinkel's claim that white jurors shrugged at black homicide seems most accurate when describing the trials of African-American men who killed other African-American men.[32]

Garfinkel notes that only a fraction of the African Americans convicted of murdering other African Americans were convicted of first-degree murder, thus earning a mandatory death sentence. These murderers of women, then, were considered particularly abhorrent. The murder of a wife or girlfriend seems to have upset jurors' sensibilities, which according to Garfinkel, in the case of black-on-black murder, include a "lack of persuasion as to its specific criminality." Jurors trying African-American men for murdering African-American women seem to have been somewhat more convinced that their actions merited punishment, as in the case of white-on-white crime. African Americans who rejected the domestic strictures that policed their behaviors as effectively as the threat of white violence needed to be removed from the community. And black women who tried to build lives with black men deserved some degree of protection.

White law deemed that these destructive people die although their crimes did not directly damage the white community, and they were not alone. In 1918, Baxter Cain, an African-American man, found a substitute, another African-American man, for his shift as a night watchman at the Southern Public Utilities Company in Salisbury. He showed up later, shot his sub to death, and took seventy dollars from the company's safe. He used

[32] Race of condemned, race of victim, and crime gathered from newspaper reports.

some of the money to buy himself a new wooden leg, and one of the bills he used to buy the leg implicated him. Of the sixty-nine African Americans executed for murdering other African Americans, just twenty-six were convicted for the simple murder of other black men, from respected citizens to numbers-runners.

Although executions during this period substantiate Garfinkel's argument that character was key in determining punishment for intraracial crime, they also add a new dimension to his work; they show that in North Carolina courtrooms, white jurors had some sense of a commitment to punishing African Americans for crimes against other African Americans. Whether this sense of justice was genuine, perverted by white supremacy, or simply an effort to maintain an image, it was present. But this circumstance must be understood in the context of the racial character of the death penalty as a whole. While many white criminals were executed in North Carolina, not one died for a crime committed against a black person. Even in the early days of a state-run death penalty, North Carolinians understood that capital punishment was reserved for African Americans. James Allison knew it. In 1911, he slashed his own throat before being transported to death row, and again attempted suicide after he arrived, "saying he would not be the first white man electrocuted in North Carolina." He was: "First White Man Is Electrocuted," read the headline.[33]

One of the starkest examples of the prominence of racist imagery in execution coverage comes from one of the last public hangings in the state, that of Ben Williams in 1906. Williams was an African-American man sentenced to hang for murder. Hours before his hanging crowds gathered outside the enclosure in the back of the Wake County

[33] "First White Man Is Electrocuted," RNO, 25 February 1911, p. 7; "Death Today in the Electric Chair," RNO, 24 February 1914, p. 2.

jail, scaling trees and lining the tops of boxcars for a glimpse of the gallows. Williams laughed as he stood before the noose, the *News and Observer* reported, "so great was the power of his type's inconsequential nature." The reporter mused on Williams's smile:

> It took the prisoner from his place as a condemned murderer and placed him as a simple negro ready to run an errand, or take a kick or step aside and bow as one passed him by. It seemed a foolish thing, this circumstance of killing him, of ceremony, of prayer, and gallows and rope. It was an humble protest against the law. Then, when he hung, black-capped, tremulous with the habit of life, this broken-toothed smile returned to question the scene and to haunt justice with its humanity.[34]

This portrait of Williams not only reveals the deep-seated racism of the early 1900s, but also the complexities that this racism posed for the imposition of justice upon black men. Were they "inconsequential" creatures, childlike and without understanding of the severity of their crimes? If so, how could execution possibly be an adequate response to their crime? What is the point of the death penalty if the condemned was too much of an animal to appreciate it? Racism was at the core of the death penalty, and destroyed its rationale from the inside.

Ben Williams was just one of many African American men who became fodder for journalists peddling racist stereotypes. Doing so made executions a staging ground for perpetuation of the narrative of the African-American outsider, forced to the margins by his failure to grasp white mores. A number of the cheerful black men and boys who died in North Carolina were convicted of rape, revealing the degree to which fury about the crime could outweigh concerns about the insanity, mental deficits, or youth of the accused. The assumption of black criminality—reinforced by headlines the Southern

[34] "Nothing to Say on the Scaffold," RNO, 21 December 1906, p. 5.

Regional Council would later claim made "the word 'Negro' synonymous with crime"[35]—was such that white jurors were not willing to allow these black men and boys to define themselves in the trial as anyone other than a vicious criminal. Whether that criminality sprang from ignorance or malice—or, in Dollard's framework, "emotional instability" or "savagery"—did not matter.[36] African-American men were boys or beasts.

It did not help that many condemned prisoners were mentally ill or delirious with fear. Herbert Perry, convicted black rapist, laughed and smiled on his way to the electric chair.[37] Another convicted rapist, eighteen year-old Willie Williams, went to the chair "singing happily" in April 1918.[38] Eunice Martin, convicted of killing his estranged wife at a party in 1946, displayed a "vigorous smile" in the gas chamber, revealing two rows of gold teeth. The prison chaplain attempted to restore the gravity into the situation, reassuring one reporter that Martin was able to smile because he was right with God.[39] Ferdy Wiley, a sixteen year-old boy who died for rape in 1929, greeted his captor, who had traveled to Raleigh to watch him die. "'Hi, Mr. Claude.' These words, uttered in the

[35] Elliot M. Rudwick, "Race Labeling and the Press," Journal of Negro Education, vol. 31, no. 2 (Spring 1962), p. 177-81. Examples of headlines written about black prisoners include "Negro Pays Death Penalty at Prison," RNO, 26 September 1917, p. 5; "'Meet Me in Heaven, Boys,' Is Doomed Negro's Adieu," RNO, 14 February 1931, p. 12.; "Pitt Negro Dies in Gas Chamber," RNO, 14 November 1942. Examples of those about whites include "Charles E. Trull Dies for Murder," RNO, 4 September 1915, p. 5; "Both Cains Face Death Smilingly," RNO, 6 March 1920, p. 16; "Payne and Turner Study Bible, Preparing to Die," RNO, 1 July 1938, p. 1.

[36] Dollard, 269.

[37] "Negro Meets Death with Broad Grin," RNO, 26 May 1918, p. 10.

[38] "Asheville Negro Is Electrocuted," RNO, 27 April 1918, p. 1.

[39] "Murderer Goes to Death, Face Wreathed in Smile," RNO, 12 April 1947, p. 10.

greeting of a young darkey to a white man, were accompanied by … a flash of comfort."[40]

If many African Americans who died in the death chamber were boys, many, too, were beasts. As Dollard writes, whites "imputed animal characteristics" to blackness.[41] Convicted rapist John Goss "looked the part of the picture that 'mean nigger' conjures up," reported the *News and Observer*. "Short, squat, thick-bodied, and with the face of a gorilla. Even the eyes were muddy with the diffusion of the color of his skin." It was as if Goss's blackness had sullied the windows to his soul. After four shocks, an attendant pronounced that no life remained "in the black carcass," which was "dumped into a basket" to be taken to a local medical school for dissection. Condemned rapist Howard Craig, was a "gorilla-like negro" who "crept like a wild beast upon his innocent, unimagining victim." Craig, "a powerfully built African," died in the electric chair in December 1914 as the victim's father watched.[42] Ed Dill entered the death chamber "chanting a wildly incoherent incantation that must have echoed the savage death-madness of his tribal ancestors," reported the *News and Observer* as Dill in 1923.[43] Newspaper coverage of the execution of convicted rapist and murderer Theodore Boykin in 1952 transformed a "slender young Negro laborer" into a beast: "The fight-back

[40] Anthony J. McKelvin, "Terror-Stricken Negro Dies in Electric Chair," RNO, 29 June 1929, p. 3. See also "Lethal Chamber Busy Two Hours Taking 3 Lives," RNO, 8 February 1936, p. 1.

[41] Dollard, 70.

[42] "Howard Craig Pays Penalty," RNO, 5 December 1914, p. 2. See also "Two More Pay Penalty of Death," RNO, 4 December 1920, p. 2.

[43] "Ed Dill Groans Between Shocks, RNO, 29 June 1923, p. 5.

instinct of the trapped animal surged to a climax" after guards strapped Boykin into the chair in the gas chamber, wrote a *News and Observer* reporter.[44]

The bodies of African-American men, starting with their skin tone, were sources of fascination, fear, contempt, and envy for death row reporters. Burglar Henry Thomas Barden was of a "ginger-cake" color.[45] "Diminutive yellow" Jesse Brooks and "rotund brown" James Johnson were both electrocuted in March of 1934.[46] Fred Steele was "tawny, loquacious,"[47] while Leroy McNeill was a "tall, slender, and coal-black boy."[48] One reporter noted the poise of convicted murderer Dortch Waller, a forty-three year-old farmer, was as he sat himself in the electric chair in August of 1935. The 2,300 volts that shocked Waller to death "tugged at the life within the body which officials said was one of the finest ever sent to State's Prison." Indeed, Waller had a "splendid body."[49] A reporter who covered the execution of Hector Graham marveled at Graham's size. Praising Graham for his gallant fight for his life, newspaper coverage noted that "the big Negro's voice fairly boomed as he pronounced 'my salvation.'"[50] On the other hand, Andrew Jackson, a convicted rapist and career criminal who was electrocuted in 1920, was "a great, stupid, unlettered animal" who was executed "for the worst crime in the

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[44] Roy G. Brantley, "Lexington Killer-Rapist Dies in Gas Chamber for His Crime," RNO, 7 June 1952, p. 16.

[45] "Meet Me in Heaven, Boys' Is Doomed Negro's Adieu," RNO, 14 February 1931, p. 12.

[46] "Jesse Brooks Dies in Electric Chair," Durham Morning Herald, 17 March 1934, p. 1.

[47] "Two Negroes Die in Gas Chamber," RNO, 17 July 1937, p. 12.

[48] "How Robeson Negro Poison Murderer Met Death by Gas," Lumberton Robesonian, 16 August 1937, p. 4.

[49] "Chair Claims Two Victims; Deny Guilt to the End," RNO, 3 August 1935, p. 1.

[50] "Widow of Negro's Victim Waits Near Death Chamber," RNO, 10 December 1927, p. 1.

catalogue of evil, and his great hulking body was trundled away to do its first service to society in the hands of medical students."[51]

The bodies of executed criminals, white and black, ordinary and extraordinary, were treated in the same way as the bodies of anyone who died in state custody. If relatives claimed the body within twenty-four hours of death, the state provided $50 for transportation costs and burial expenses. If not, the prison gave the body to one of the medical schools in the area, which had worked out a sharing arrangement. At least twenty-five percent of condemned criminals' bodies, black and white, were dissected and studied after their executions.[52] So many bodies were going to state medical schools, in fact, that by the late 1920s, administrators were complaining that their institutions had become dumping grounds for convict corpses. In 1930, Attorney General Dennis G. Brummit informed Governor O. Max Gardner that embalming schools would accept bodies, too, but reminded him that the prison was responsible for cost of the burial of unwanted cadavers.[53] At least one capital criminal understood that his body was useful for more than dissection. In 1937, James McNeill, the last person to die in the electric chair, asked that his body be put on display in Dunn, NC, so that "the boys and girls back home can look me over and see what liquor and mean women will do for you." His request was granted—over 1,500 people saw his body in a funeral home before it was buried in a cemetery across the street from his home.[54]

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[51] "Long Battle with Law Brings Death," RNO, 6 November 1920, p. 10.

[52] From RNO reports.

[53] Dennis G. Brummitt, Attorney General Report (1928-30), 292. NCC.

[54] "Example," RNO, 14 August 1937, p. 1. Other bodies shipped off for dissection include those of Philip Mills in 1911, John Savage and Bunk Maske in 1916, Andrew Jackson in 1920, Hector Graham in 1927,

That men convicted of brutal crimes would be described as brutes would not be notable if not for the fact that white men were never depicted in the same way. Newspaper coverage of the executions of white criminals was attended by a good deal more sobriety and appreciation for the personhood of the condemned, revealing that the new ideas about crime, which imagined it as an environmental problem, applied only to whites. James Godwin, who died in the gas chamber at age twenty-one for a 1939 murder, received such coverage. Godwin was not a bad boy, the article argued. He was just brought down by circumstance. While intelligent, "bordering on genius," a Boy Scout and Sunday school class president, Godwin grew dissatisfied with his family's comfortable life and began running with "dissolute women," smoking marijuana, and drinking. He became a career criminal with a bit of swagger who predicted his execution and wooed a jailer's daughter from behind bars where he was serving a term for assaulting his grandfather. Less than a day after he convinced the woman to free him from jail, he committed the murder that would doom him. The article noted that he coolly smoked a cigarette as he made his way to the death chamber, and approvingly observed that "no trace of fear appeared in his clear, pale blue eyes."[55]

The previous year, two of North Carolina's most celebrated criminals were executed in the gas chamber for the murder of a highway patrolman. Bill Payne and John Washington "Wash" Turner were Depression-era desperadoes who thrilled newspaper readers with their escapades, including a daring escape from a prison camp in 1937. But on the eve of their executions, they were penitent and thoughtful. Payne, "a dark, slender

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Ben Goldston in 1931, James Johnson in 1934, Waddell Hadley and Wiley Brice in 1938, James Henderson in 1939, Melvin Wade in 1944, and Richard Horton and Lester Stanley in 1947.

[55] "Boy Who Led His Class Dies in Lethal Chamber," RNO, 23 September 1939, p. 14.

man of serious mien" who studied his Bible with horn-rimmed glasses, refused to talk about his decade-long crime spree for fear of hurting his mother. A friend of the victim chronicled Payne and Turner's criminal careers in a lengthy story on the day after their July 2, 1939, executions. The pair's escape from a prison camp made for "real excitement for any part of the country," he wrote, "It made a great news story for the semi-weekly I was working on."[56] More than 1,500 people sought tickets to the execution, and crowds gathered outside to watch the bodies being removed. Wiley Brice, "a hulking Negro" whose crime "has long since been forgotten," had the misfortune to die on the same day.[57]

The *News and Observer* remembered Rufus Satterfield, executed in 1934 for murdering his mistress's husband, was "a good soldier and a wonderful leader." Satterfield overcame a young life that "was no bed of roses," winning friends in school and settling down near Goldsboro, where he rented farmland, became active in a Baptist church, and raised two daughters. He fought in World War I and rose to the rank of sergeant. It was only Ruby Grice's "beautiful eyes" that led him astray.[58] Satterfield was one of four white men executed consecutively, the first time that had happened. In all these cases, white men fell into criminality by accident, or were overpowered by the temptations of bad women and strong drink. Of course, these apparently mitigating factors did not affect the decision of the juries that convicted them, but the tone of this newspaper coverage reveals how twentieth-century ideas about the influence of a poor

[56] "Execution of Penn's Slayers Witnessed by Roommate," RNO, 3 July 1938, p. 10.

[57] "Under the Dome," RNO, 2 July 1938, p. 1.

[58] "Goldsboro Man Will Die Today," RNO, 14 December 1934, p. 1.

education, poverty, and other environmental factors seemed in many cases to apply only to white offenders.

III. "I Ought to Kill You Right Here": Rape and Lynching

In 1977, the Supreme Court ruled that a death sentence for the rape of an adult woman violated the Eighth Amendment, because it constituted cruel and unusual punishment.[59] Before this ruling, scores of Americans were executed for first-degree rape; as late as the 1960s, rape was a capital crime in fifteen states, nearly all of them in the South, and the District of Columbia, and it was a federal capital felony as well. One study found that between 1930 and 1963, nearly ninety percent of those executed for rape in the region were black. North Carolina was a leader in executing black men for rape during this period, putting forty-one to death, compared to just four whites. Only Oklahoma, with sixty-eight such executions, and Georgia, where fifty-eight died, executed more people for rape.[60]

Execution for rape in North Carolina dramatized the death penalty's discriminatory use against African Americans and emphasized the importance of the race of the victim in sentencing and commutation decisions. Rape, especially the suggestion of an attack by a black man on a white woman, seized the imaginations of white southerners, many of whom understood interracial sexual contact as evidence of African Americans' assault on the white community.[61] A rape accusation by a white woman

[59] Coker v. State of Georgia, 433 U.S. 584 (1977).

[60] North Carolina Council on Human Relations, "Rape: Selective Execution Based on Race," p. 1. NCC.

[61] Brundage, 58-60.

against a black man might spark a lynching, but if it was resolved in the court room, the accused was unlikely to encounter a sympathetic jury. The African-American newspaper the *Carolinian* called a rape charge by a white woman against an African-American man the equivalent of an automatic death sentence.[62] This was certainly the case in 1929, when the jury trying Ed Dill, "confronted by a choice between the testimony of a woman against him, and a formidable alibi attested by many negroes and the brother-in-law of the alleged victim, believed the unsupported testimony of the woman."[63]

Between 1910 and 1961, North Carolina executed sixty-seven men for rape, almost 20 percent of the 356 people who were executed during this period. Nearly all of them were African Americans, and nearly all of them were convicted of attacking white women. One 1929 study found that between 1910 and 1929, rape accounted for nearly a quarter of criminal convictions of African-American men, versus just four percent for whites.[64]

The crime of rape dramatized the power of white women, and that of the white men who charged themselves with women's protection, over African-American men in North Carolina. In 1938, the *Carolina Times* complained after African-American Frank Blackwell was jailed following an accusation of rape by a white teenager: "It is plainly another case of a white woman's word being used instead of simple reasoning and thorough investigations on the part of those who have the strings of law and justice

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[62] "Toward Straight Thinking," Editorial, Raleigh Carolinian, 4 January 1947, p. 4.

[63] "Ed. Dill Groans Between Shocks, RNO, 29 June 1929, p. 5.

[64] State Board of Charities and Public Welfare, "Capital Punishment in North Carolina" (Raleigh: North Carolina State Board of Charities and Public Welfare, 1929), 21. NCC.

around their fingers."[65] But white women could not always control the aftermath of such an accusation. Just days before Blackwell's confinement, the *Times* had noted that a white woman was unsuccessfully trying to recant testimony she delivered against an African-American man condemned for burglarizing her home. "The same law that is quick to take a white woman's word when she condemns a Negro of such a crime should be equally as quick to take it when she attests to a Negro's innocence," the editor argued.[66]

There were very few exceptions to this rule of using the death penalty to punish African Americans' sexual assaults—or the suspicion thereof—on white women. Between 1910 and 1961, five African-American men died for raping other African Americans. Each of these exceptions demonstrated that jurors believed that only some African Americans, such as those with long criminal records or those who attacked children, deserved to die for raping other African Americans.[67] After one such execution in 1937, the *News and Observer* implied that the prisoner was executed for the sum of a lifetime of crime, including a sexual assault on his eleven year-old sister and a number of other women.[68]

White men could expect milder treatment. As one journalist wrote, "The best ticket a man [on death row] can hold is that of being a white man."[69] In the state's

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[65] "Orange County Sheriff Refuses to Release or Indict Man for Rape," The Carolina Times (Durham), 31 January 1938, p. 1.

[66] "A White Woman's Word," Editorial, The Carolina Times (Durham), 10 December 1938, p. 4.

[67] "Wayne Man Dies for Rape Charge," RNO, 25 May 1946, p 1.

[68] "Negro Going to Death for Attack upon Negress," RNO, 30 July 1937, p. 18.

[69] C.J. Parker, Jr., "The State's Death Lottery," RNO, 15 January 1928, p. 4.

history, no white man was ever executed for raping a black woman. John Dollard suggests that African-American women fell "into the category of unprotected women; their men, the usual protectors in a patriarchal society, are unable to shield them by virtue of the unchallengeable position of the white man."[70] Furthermore, every white man who died for rape—there were just five of them—was convicted of an attack on a child. The first white man to die for rape did so ten years after the state took charge of executions, and there was a nearly twenty-year gap between the second and third such executions, which took place in 1929 and 1947. North Carolina's black community bitterly complained about the state's failure to protect their women from white men, a passivity that "crucified justice on a cross of racial prejudice," and, they cautioned, bred in whites a dangerous disregard for the law.[71]

Even white men convicted of rape were the focus of vigorous efforts to remove them from death row; their black counterparts often died alone, with only their notoriety and a crowd of white spectators in attendance at their deaths. Smithfield native Churchill Godley was the first white man to die for rape in North Carolina. He was convicted of raping a nine year-old girl, yet his wife and friends made "heroic efforts" to save his life. The pressure they exerted spurred Governor T.W. Bickett, a former prosecutor, to give the case "'every possible consideration,'" and the *News and Observer* printed Bickett's explanation of his decision in full on the eve of Godley's execution. In response to

[70] Dollard, 145.

[71] "Attackers of Negro Women and the Law," Editorial, The Carolina Times (Durham), 15 April 1938, p. 4.

petitions from Johnson County and the urging of Godley's lawyer, Bickett granted Godley a thirty-day reprieve for a psychological evaluation the condemned man.[72]

Bickett himself traveled to Smithfield, where he spoke with Godley's victim to assure himself that her testimony had not been coached. He asked the girl if she would "'tell Jesus just exactly what you are telling me now.'" The girl replied in the affirmative, and Bickett decided not to intervene in Godley's execution. The exceptional attention that the governor gave to Godley's case, especially given Godley's partial confession, reveals the extra consideration afforded to white criminals, especially when convicted of committing a crime branded as black. Bickett agreed:

> A great many good men have besought me to commute [Godley's] sentence, and I want these men to put to their own conscience this question: if a negro had been accused of committing this identical crime, and had been convicted upon the identical testimony offered against Godley, would these men ask for executive interference in behalf of the negro. It is my opinion that they would not. Justice and mercy know no color line, and when the governor is called upon to exercise the highest and most solemn duties of his office he must measure out justice and mercy alike with an even hand, to white and black alike.[73]

Bickett sacrificed Godley on an altar to his vision of the law. Godley died in the electric chair a week later, angry and denying the existence of God.[74]

Three more white men were executed for rape between Godley and rapist Claude Shackelford, who died in the gas chamber on July 21, 1950. It appeared that Shackelford might not die for his crime. By 1950, North Carolina's mandatory death sentence for rape

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[72] "Churchill Godley Must Die Friday," RNO, 13 January 1920, p. 16.

[73] *Ibid*.

[74] "Godley Resentful Against Everyone," RNO, 20 January 1920, p. 9.

had been defanged: juries were empowered to issue a binding recommendation for life sentences for first-degree rapists. But Shackelford, who was the first man to die in North Carolina under a sentence imposed by a female judge, failed to win the jury's recommendation. Governor W. Kerr Scott maintained a careful vigil over Shackelford, granting him a reprieve in June, less than ten minutes before his execution, when he heard of the appearance of new evidence as to the condemned man's guilt. The ten year-old victim had signed a statement disavowing her testimony, but, it turned out, had been tricked. While she and her parents averred the truthfulness of her testimony, they also urged mercy for Shackelford. As one journalist noted, though, Shackelford's bad decisions doomed him. By choosing a wife less for loving companionship than for "sex angles" he had guaranteed a future "constructed in quicksand."[75] He died in the gas chamber.

If communities often seemed to unite to seek leniency for condemned white rapists, they united in anger against accused African Americans. Their fury sometimes led to mob violence, which was one part of the death penalty process. Observers at the time argued over the definition of lynching; a certain interpretation might help focus the efforts of the NAACP or preserve the reputation of a sheriff or a governor.[76] But many North Carolinians believed that lynching and execution were connected. Efforts to find a correlation between the number of lynchings and executions in North Carolina and elsewhere have been inconclusive;[77] instead, thriving together on a tradition of vengeance

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[75] Charles Craven, "State Finally Claims Life of Guilford County Rapist," RNO, 22 July 1950, p. 1.

[76] Christopher Waldrep, "War of Words: The Controversy over the Definition of Lynching, 1899-1940," Journal of Southern History, vol. 66, no. 1 (February 2000), 75-100.

[77] Charles David Phillips, "Relations among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889-1918," Law & Society Review, vol. 21, no. 3 (1987), 361-74; E.M. Beck,

and instinct, both lynching and the death penalty were violent forms of social control used by whites of all classes against African Americans.[78] Both were components of the legal system, violent expressions of community sentiment in conversation with one another.[79] Some crimes, and some purported criminals, deserved lethal punishment. Whether that response came from the government or the mob depended on circumstance.

Although for the first three decades of the twentieth century only Virginians and Missourians lynched fewer people than North Carolinians, North Carolina is not known for its lynching record.[80] The state avoided this reputation less by subduing the lynching spirit than by frustrating lynching attempts. Newspaper coverage and trial transcripts provide an incomplete picture of the lynching threat that suspected rapists faced, but from the early 1900s to the late 1930s, at least eleven of the twenty-five black men executed for attacks on white women evaded mobs before their arrest, or were saved from lynching by local law enforcement officers. One important difference between lynchings and executions in North Carolina was that executions took place when local law enforcement refused to cooperate with the mob; when they cooperated, someone was lynched.[81]

James L. Massey, and Stewart E. Tolnay, "The Gallows, the Mob, and the Vote: Lethal Sanctioning of Blacks in North Carolina and Georgia, 1882-1930," Law & Society Review, vol. 23, no. 2 (1989), 317-31.

[78] Stuart Banner, "Traces of Slavery: Race and the Death Penalty in Historical Perspective," in Charles J. Ogletree, Jr., and Austin Sarat, eds., From Lynch Mobs to the Killing State: Race and the Death Penalty in America (New York: New York University Press, 2006), 99-106; Charles J. Ogletree, Jr., "Black Man's Burden: Race and the Death Penalty in America," Oregon Law Review, vol. 81, no. 1 (2002), 18-23.

[79] Timothy V. Kaufman-Osborn, "Capital Punishment as Legal Lynching?" in Ogletree, Jr., and Sarat, 40.

[80] Commission for Interracial Cooperation, "Lynchings and What They Mean: General Findings of the Southern Commission on the Study of Lynching" (Atlanta: Southern Commission on the Study of Lynching, 1931), 25.

[81] Jacquelyn Dowd Hall observed that the amount of discretion given to local law officers amounted to vigilantism. Jacquelyn Dowd Hall, Revolt Against Chivalry: Jessie Daniel Ames and the Women's Campaign Against Lynching, rev. ed. (New York: Columbia University Press, 1993), 140-1.

Lynchings, performed as they sometimes were in cooperation with law officers, rather than signaling distrust of the judicial system, were a component of that system.[82] There was, according to one Superior Court judge, a right way and a wrong way to administer criminal justice.[83] North Carolina's governors were often vigilant in seeking to prevent lynchings, lynching was a crime in the state, and the press sought to position lynching as an attack against the state, not to mention a stain on its reputation. But lynchings, both those which were recorded as such and those classified as simple murder, remained a threat to black North Carolinians as late as 1947.[84]

Furious pursuits, hasty trials, and crowded executions illustrated the connection between mob action and courtroom justice. African-American criminal suspects were often pursued by posses that mingled lawmen and locals, sometimes deputized, who hunted fleeing men with dogs and guns. One suspect, Tom Bradshaw, collapsed and died as he fled a mob of men, led by baying dogs, through the pine forests near Bailey in early August of 1927. A coroner examined Bradshaw's body where it fell five hours after his death, the mob long gone and the $400 bounty for his capture unclaimed. A crowd of 200 gathered as the coroner made his examination, concluding that Bradshaw likely died from shock and exhaustion—and gunshot wounds. Some locals snapped pictures. "As to who shot him," one reporter wrote, "there was silence, a deep understanding silence, one

[82] Kaufman-Osborn, "Capital Punishment as Legal Lynching?" 33.

[83] Woodrow Price, "Negro Facing Life Term Confesses Role in Crime," RNO, 28 June 1947, p. 1.

[84] Mobs in Northampton County attempted two lynchings in the spring of that year following accusations of rape. The State Bureau of Investigation arrested seven men but failed to secure indictments. See, for example, "Probe Continues in Jackson Case," RNO, 31 May 1947, p. 1. One of the African-American men sought by the mob, Willie Cherry, was later executed.

might almost say a satisfied silence."[85] None of the witnesses who described the pursuit of Bradshaw could identify any of the other people who joined the chase, and none of them then carried weapons, although one produced an empty soda bottle. "At any rate," one reporter concluded, "there has been no lynching, or any unseeming [sic] violence, or any record of it entered in the annals of the county."[86]

When suspects were not killed, their trials, often during specially convened terms of court called to preclude further violence, moved with remarkable speed, exchanging a death sentence for good behavior and allowing members of the white community to congratulate themselves for letting the law take its course. "Courts in southern states," an editorial in the *Carolina Times* wryly observed in 1938, "are not always as careful as they might be when a Negro stands before them, for trial, especially when he is accused of rape."[87] A black man saved from white mobs by determined law enforcement officers or promises from governors could expect the mob to reappear at his trial, and again at his execution, blurring the line between mob and state execution. For instance, in 1911, rape suspect Norval Marshall pursued by a posse after an attack on a white woman. Captured on September 17, two days later Marshall was indicted, assigned counsel, tried, convicted, and sentenced to death. On October 27, after a one-week delay because prison superintendent J.J. Laughinghouse was out of town, he was electrocuted.[88]

Angry whites did not always target the right people. "Negro West in Swamp Surrounded by Posse," crowed the *News and Observer* in February of 1911, during an

[85] "Nash Negro Who Assaulted Girl Dies of Wounds," RNO, 3 August 1927, p. 1.

[86] Ben Dixon MacNeill, "Wounds, Fatigue Cause of Death," RNO, 6 August 1927, p. 1.

[87] "Legal Lynchings," Editorial, The Carolina Times (Durham), 12 March 1938, p. 4.

[88] "His Life Forfeit for a Foul Crime," RNO, 28 October 1911, p. 5.

intense manhunt for the slayer of a police officer.[89] The next day, the headline read, in smaller type: "Was Not Lewis West."[90] The unfortunate lookalike explained that he fled the posse because he was "'afraid of all them white folks with guns.'"[91] But mistaken identity did not always explain such acts of violence. In July of 1916, suspected rapist Will Black was rushed from Snow Hill, a tiny town in east-central North Carolina, to the State's Prison in Raleigh for safekeeping. In June, two militia companies returned him to Snow Hill for a trial, that at one hour and forty-five minutes, was likely shorter than his travel time. Three weeks later, Black was carried into the death chamber in Raleigh, where he died in the electric chair. But before Black's hurried trial and execution could proceed, a mob tracked down Black's father, hiding in a jail fifteen miles away, and lynched him.[92]

Tom Gwyn was charged with rape in April of 1919. Between forty and sixty men broke down the doors of the jail in Newton where Gwyn was being held, and frustrated by its the sturdy lock on the door to the cell Gwyn was sharing with some other prisoners, threatened to shoot the suspect through the bars. The jailer admitted the mob, but then persuaded its members of the risk of hitting the wrong man, and, somehow, that cell's combination lock was in fact opened only with a key. He offered to call the sheriff to retrieve it. So alerted, the sheriff called the town electrician, who turned on all the streetlights. Worried that they would be identified, the mob dispersed, but not before

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[89] "Negro West I Swamp Surrounded by Posse," RNO, 8 February 1911, p. 1.

[90] "Was Not Lewis West," RNO, 9 February 1911, p. 1.

[91] *Ibid*.

[92] "Will Black Dies in Electric Chair," RNO, 22 July 1916, p. 2.

defiantly firing their guns, waking up sleeping Main Streeters.[93] After the mob left the area, the county sheriff managed to get Gwyn out of jail and out of town, earning praise on a local editorial page.[94] "There has been a good deal of feeling in Hickory and this entire section, but men who realize both the seriousness of his crime and that of lynching were relieved that nothing has occurred to place another stain on the county," the *Hickory Daily Record* opined.[95]

A few days later, the paper reported that "there is no longer any doubt that [Gwyn] was the guilty brute" whose "beast-like hands had throttled" the neck of his victim.[96] Governor T.W. Bickett promised a speedy trial in order to stave off another lynching attempt, and the sheriff moved Gwyn more than once to keep his location secret. He also summoned police officers from across the county and deputized twenty-five soldiers to protect the defendant on the day of his trial. Gwyn was indicted in absentia, after which sheriff hustled him into the courtroom without alerting the thousands gathered outside. As soon as Gwyn entered, the trial jury was selected. Lawyers dispatched with their arguments within two hours, and at 3:10pm on May 26, the jury took the case into deliberations. At 3:20, they returned a guilty verdict. Gwyn was rushed to the State's Prison to await his execution.[97] Gwyn was executed on June 27th, forty days after his arrest.

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[93] "Mob Attempts to Lynch Negro Accused of Crime," Hickory Daily Record, 29 April 1919, p. 1; "How Newton Jailer Prevented Trouble," Hickory Daily Record, 29 April 1919, p. 1.

[94] "Let's Be Law-Abiding," Editorial, Hickory Daily Record, 30 April 1919, p. 2.

[95] "Negro Thought Girl Would Not Tell," Hickory Daily Record, 1 May 1919, p. 1.

[96] *Ibid*.

[97] "Gwin [sic] Is Sentenced to Die on June 27," Hickory Daily Record, 26 May 1919, p. 1; "Large Crowd at Newton for Trial," Hickory Daily Record, 26 May 1919, p. 1.

Such courtroom atmospheres often translated into similar scenes at the execution that followed. For instance, several hundred people gathered outside the prison on the morning of the electrocutions of Angus Murphy and Jasper Thomas; more than one thousand had requested tickets. When prison guards opened the gates, the ticketholders made for the death chamber "at a dead run." Seventy-two were admitted to watch Murphy's execution, and a different seventy-two swapped in for that of Thomas. As at a lynching, the crowd was nervous and excited, smoking and jostling one another for a good viewing spot. After Murphy's death, "it was insufferably hot and the odor of [Murphy's] burned flesh … suffused the room" as the second group of spectators filed in. The crowd outside watched until "the dead wagons had hauled away their grewsome [sic] loads, loitering about to talk about it, to remember this little thing, or that, which had somehow appealed to them."[98]

In her column the next morning, Nell Battle Lewis reprimanded North Carolinians for their morbid curiosity and noted the spectacle's similarity to a mass lynching. "The mob lynches, the State electrocutes," she wrote, "the group mind, expressing through public opinion, acts in both cases, merely with more decency and decorum in the latter, and with cleverer 'rationalization' of the deed. But the results are the same." Should we contact a Boosters Club, she asked, in order that in the future we can accommodate all those who wish to watch? Should we publish a list of guests on the society page? Lewis's sharp tongue reveals the clarity with which some North Carolinians viewed the use of the death penalty as an alternative to lynching.[99]

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[98] "Negroes Who Assaulted White Woman Pay Penalty of Death," RNO, 16 September 1922, p. 1.

[99] Nell Battle Lewis, "Incidentally," RNO, 17 September 1922, p. 6.

Later that year, sixteen year-old McIver Burnett was tried, sentenced, and convicted in less than an hour for the rape of Melissa McGhee, who watched his electrocution in October of 1923. She was among a crowd of eighty or ninety ticket holders who raced from the prison gates into the death chamber on the morning of the execution, disregarding the sign telling them to keep off the prison lawn. A number of women were escorted to good viewing positions. The crowd was so thick that when one of the women fainted, she did not fall to the floor. "'Well, did you enjoy it?'" someone asked McGee. "'I sure did,'" she replied.[100] Lee Washington, in a stretch of six weeks, was arrested, sentenced under heavy guard, and executed as his victim and her husband watched.[101] Arthur Montague was convicted of rape in a special term of court in the spring of 1925, a term called with such haste that it required violating rules that dictated which judges presided where, an infraction Montague's lawyers argued without success should invalidate their client's conviction. When the head of the school where Montague committed his crime found him sleeping off the previous night's whiskey in the dormitory bed of his victim, he told him, "You black son of a bitch I ought to kill you right here."[102] By the end of the year, Montague was dead.

While rape incited the fury of injured communities, the vast majority of convicted rapists faced prison sentences rather than execution or lynching. According to attorneys general reports to the legislature, between 1909 and 1938, 736 men were indicted for rape in North Carolina. In that same period, just thirty men were executed for rape, one of

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[100] "Woman Watches Assailant Executed at State Prison," RNO, 13 October 1922, p. 1.

[101] "Lee Washington Dies in Chair," RNO, 29 December 1923, p. 2; See also "Ed Dill Groans Between Shocks," RNO, 29 June 1929, p. 5.

[102] Brief for the Defendant, State v. Arthur Montague (1925), 15. NCSA.

them white. Seven hundred and six convicted rapists, then, were imprisoned in the State's Prison or in one of North Carolina's prison camps rather than face the mandatory death sentence for first-degree rape, or death at the hands of a mob. The attorneys general reports, plagued with poor organization and incomplete data, indicate that less than five percent of men indicted for rape in North Carolina were actually executed. Rape, as with other serious crimes, was never punished as severely as the law directed, custom demanded, or the mythology of the South suggested.[103]

Black men accused of rape, then, could be the beneficiaries of surprising mildness at the hands of the white North Carolinians. As violently as many white North Carolinians responded even to the suggestion of a black-on-white sexual assault, white jurors applied standards to white female victims that not only embraced the belief that African-American men were sexually predacious, but also expected white women, and the white men in their lives, to act accordingly. As Laura Lindquist Dorr found in her study of race, rape, and class in Virginia, white men enforced class lines as well as sexual prerogatives in rape cases, handing down verdicts that revealed that not all white women were in fact worthy of their protection. The much-discussed mythology of white womanhood applied only to white women considered worthy of mythologization.[104]

White women thought to be lascivious, or who placed themselves in danger by entering black neighborhoods at night, or they lived on familiar terms with African-American men, could not expect juries to forcefully punish those whom they accused of

[103] Data compiled from Attorneys General Reports. NCC. Each report covers a two year period.

[104] Laura Lindquist Dorr, White Women, Rape, and the Power of Race in Virginia, 1900-1960 (Chapel Hill: University of North Carolina Press, 2004). Deborah Miller Sommerville dethrones the rape myth in the Old South in "The Rape Myth in the Old South Reconsidered," The Journal of Southern History, vol. 61, no. 3 (August 1995), 481-518. Eric W. Rise does the same for Virginia at midcentury in Eric W. Rise, The Martinsville Seven: Rape, Race, and Capital Punishment (University Press of Virginia, 1995).

rape. The community-based, custom-driven policing that made segregation possible, that enabled lynching and protected lynch mobs, and that would seem to predict a legal remedy for a rape accusation if an illegal one was not possible, created a tenuous protection for black men who sexually assaulted white women who, in the judgment of their communities, invited the attack by violating their own rules of behavior.

This lack of regard for white women with bad reputations extended to the governor's office as well. Ruffin Fuller, convicted of rape in 1913, won a full pardon from Locke Craig because "the prosecutrix was a woman of bad character in the minds of many of the best people who know the facts."[105] In February 1947, Thomas Lewis was convicted of raping a white woman and sentenced to death. Just two days later, the judge who tried the case wrote to the paroles commissioner that the accuser, Willie Mae Johnson, had a lengthy criminal record, including convictions for drunkenness, vagrancy, and "immoral vagrancy," and that she "bore the general reputation … of being a prostitute and that her general reputation was bad for drunkenness and immorality."[106] Cherry commuted Lewis's sentence. Johnson had stepped from under the aegis of the white community by straying into the legal wilderness of the black world, and thus deserved the same protections against sexual violence most black women enjoyed at the time: none.

One of the most dramatic examples of the cruelty of the white male patriarchy and the unlikely mercy it inspired took place on May 3, 1947, when Governor R. Gregg

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[105] Reasons for Pardons, Commutations, and Reprieves, 1912-1917, Locke Craig Papers, G.O. 55, 136. See also the case of Ert Lance in Reasons for Pardons, Commutations, and Reprieves, 1912-1917, Locke Craig Papers, G.O. 55, 259, NCSA.

[106] Judge R. Hunt Parker to Hathaway Cross, 13 February 1947, R. Gregg Cherry Papers, Agencies, Commissions, Departments, and Institutions, 1945-1948: Paroles Commission, May 1945-December 1945, NCSA.

Cherry commuted the death sentences of four Robeson County African Americans convicted of raping a white woman. After the men spent a year on death row, Cherry directed life sentences for African Americans Calvin Covington, Granger Thompson, Stacy Powell, and Cliff Inman, convicted of raping Dorothy Frye in Lumberton in March of 1946. Mrs. Frye, though white, did not present a sympathetic character to racist whites: she had entered Lumberton's black section to buy liquor, and worse, her husband was a union organizer. She was gang-raped when her companion left her waiting in the car.

"After careful consideration," Cherry wrote in his commutation statement, "I am convinced that the death penalty is too severe in this case. I believe that the prosecutrix by her own misconduct and failure to observe a sense of propriety placed herself in such a situation as to create a temptation for the defendants to mistreat her and to make her an easy victim of their beastly lusts."[107] One petitioner had urged Cherry to decline the commutation, striking a chord of solidarity with Mrs. Frye: "Of course they won't bother your all women folks," he wrote, "it is us poor people that has to suffer from the hands of these mean negroes + if you all don't quit turning them out I don't know what will happen to us poor people."[108] Another angry man decried the decision:

> When I was a boy rape was a very rare crime. The man who committed it or even tried to commit it, was handled by the public who did not think it necessary to expose a delicate woman to the ordeal of testifying in court. … Our holier-than-thou admirers of the North complain bitterly than the Southern people lynch rapists, who are generally, alas, members of the colored race, a race that has never elevated itself sufficiently to respect womanhood. … Now we have another illustration of the weakening of our public sentiment of the protection of our women.

[107] "Cherry Commutes Terms of Four Robeson Rapists," RNO, 3 May 1947, p. 1.

[108] A.G. Crissman to R. Gregg Cherry, 25 May 1947, R. Gregg Cherry Papers, Agencies, Commissions, Departments, and Institutions, 1945-1948, Paroles Commission, May 1945-December 1949. NCSA.

He added that Frye's conduct and character should have mattered only in weighing the credibility of her testimony, not in handing down post-trial judgments.[109]

Cherry's decision received some support, though, including from the Interdenominational Ministers Alliance, which sent the governor a telegram from Winston-Salem gently disagreeing with Travis: "We recognize the fact that womanhood should be protected regardless of race, creed, or color to preserve our Christian civilization. However, we feel that the circumstances, background, and environmental conditions relating to this case should be considered before the extreme penalty is inflicted."[110]

IV. "The Sanctity of the Home": The Death Penalty for Burglary

Those executed for burglary in North Carolina between 1910 and 1961 were always black, their victims were always white, and the crimes which resulted in executions almost always carried the hint of interracial sexual violence. The connection between burglary and sexual threat was so strong that one condemned burglar won a commutation after Governor Locke Craig determined that there was "no element of rape in this case."[111] Lynchings, performed as they sometimes were in cooperation with law

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[109] John L. Travis to R. Gregg Cherry, 15 May 1947, R. Gregg Cherry Papers, Agencies, Commissions, Departments, and Institutions, 1945-1948, Paroles Commission, May 1945-December 1949. More examples of leniency for black men accused of raping white women include: J.G. Jackson, "Reasons for Pardons, Commutations, and Reprieves, 1912-1917," Locke Craig Papers, G.O. 55, 361; John Scales, in Reasons for Pardons, Commutations, and Reprieves, 1912-1917, G.O. 55, 419; and James Smith, in Death Sentences, 1926-1931, Box 40. NCSA.

[110] Interdenominational Ministers Alliance to R. Gregg Cherry, undated telegram, R. Gregg Cherry Papers, Agencies, Commissions, Departments, and Institutions, 1945-1948, Paroles Commission, May 1945-December 1949. NCSA.

[111] Reasons for Pardons, Commutations, and Reprieves, 1912-1917, Locke Craig Papers, G.O. 55, 371. NCSA.

officers, rather than signaling distrust of the judicial system, were a component of that system.[112] There was, according to one Superior Court judge, a right way and a wrong way to administer criminal justice.[113] North Carolina's governors were often vigilant in seeking to prevent lynchings, lynching was a crime in the state, and the press sought to position lynching as an attack against the state, not to mention a stain on its reputation. But lynchings, both those which were recorded as such and those classified as simple murder, remained a threat to black North Carolinians as late as 1947.[114]

The death penalty for burglary was widespread in the United States for many years, but by the mid-twentieth century, only Alabama, Delaware, and Kentucky joined North Carolina in maintaining its capital status.[115] Until 1941 in North Carolina, first-degree burglary carried a mandatory death sentence. Thereafter, jurors could recommend a life sentence after conviction. Relatively few burglars died in North Carolina between 1909 and 1961: just ten men were executed for the crime, including three after the legal change. Although execution for burglary was rare, it was symbolically significant.

There is an enduring belief that a capital burglary statute protected "the sanctity of the home," but only white homes, and the white women who lived in them, were

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[112] Kaufman-Osborn, "Capital Punishment as Legal Lynching?" 33.

[113] Woodrow Price, "Negro Facing Life Term Confesses Role in Crime," RNO, 28 June 1947, p. 1.

[114] Mobs in Northampton County attempted two lynchings in the spring of that year following accusations of rape. The State Bureau of Investigation arrested seven men but failed to secure indictments. See, for example, "Probe Continues in Jackson Case," RNO, 31 May 1947, p. 1. One of the African-American men sought by the mob, Willie Cherry, was later executed.

[115] Leonard D. Savtiz, "Capital Crimes as Defined in American Statutory Law," Journal of Criminal Law, Criminology and Police Science, vol. 46 (1955-56), 359.

sacred.[116] In most cases in North Carolina, burglary amounted to the capitalization of attempted rape or the suspicion thereof, giving communities the opportunity to punish a black man for sexual aggression toward a white woman, but leaving the white woman's virtue intact. *State v. Langford* gave solicitors and jurors considerable latitude by designating first-degree burglary as "the breaking and entering into the mansion house of another in the night time with the intent to commit some felony within the same, whether such intent be executed or not."[117] The latter portion of this definition allowed juries to guess at whether or not an indicted burglar intended to commit a crime worse than theft. It was the defendant's word against his accuser's.

Of the eleven men who were executed for burglary in North Carolina in the twentieth century, seven died for a crime that contained suggestions of a sexual attack. A burglary charge could save the victim from the pain of testifying about a rape, and sometimes burglary was thus used as a proxy, as in the case of Willie Cherry, executed in October of 1947. Cherry "shocked Eastern North Carolina" with his crime, and was indicted on two capital charges, the *News and Observer* noted, in a flush of modesty, without naming the second one.[118] Thirty years before, the newspaper showed even more restraint in reporting the execution of Lawrence Swinson, who died for burglary but had

[116] Rex Gore, "Facing Controversy: Struggling with Capital Punishment in North Carolina," a panel sponsored by the Southern Historical Collection and Wilson Library Special Collections, 5 February 2008.

[117] James S. Manning, Attorney General Report (1923-24), 316-18. NCC.

[118] James Whitfield, "Five Die in Gas Chamber to Set Record at Prison," RNO, 4 October 1947, p. 1.

"several counts" against him.[119] In 1917, Lee Perkins was discovered the bedroom of a young white woman. Two months later, he died in the electric chair.[120]

The 1939 case of Arthur Morris, known as the Grey Mouse and the Slippery Eel, is the most ambiguous. Governor Clyde Hoey, who stayed Morris's execution to perform an investigation of his case, was convinced that at least two of the many burglaries to which Morris confessed involved elements of attempted rape. Morris was also a hardened criminal, though, captured after escaping a fifty to eighty year term in a prison camp for a crime that netted him just twenty cents, and the governor opined that Morris was beyond rehabilitation. One of Morris's lawyers complained that his client was being punished for his life of crime, not the crime for which he was sentenced. "'It looks as if they are going to kill him for the crimes he hasn't even been indicted for—not those he confesses or those of which he has been convicted,'" he complained on the eve of Morris's death.[121] Hoey rejected Morris's counsel's final appeal and Morris died in the gas chamber in September, poised and prayerful. Morris's execution reveals not just the flexibility of capital statutes, but also the rigidity of court procedure: the judge at his trial had instructed the jury that their only options were a first-degree conviction or acquittal.[122]

In 1929, the *Monroe Journal* used inflammatory language to describe an attempted rape. A "brute negro" was carrying a twenty year-old minister's daughter, from her home when the flash of an electric light frightened him, and he fled. "The details of the black fiend's intrusion rival the horror of his unfulfilled crime in madness and the

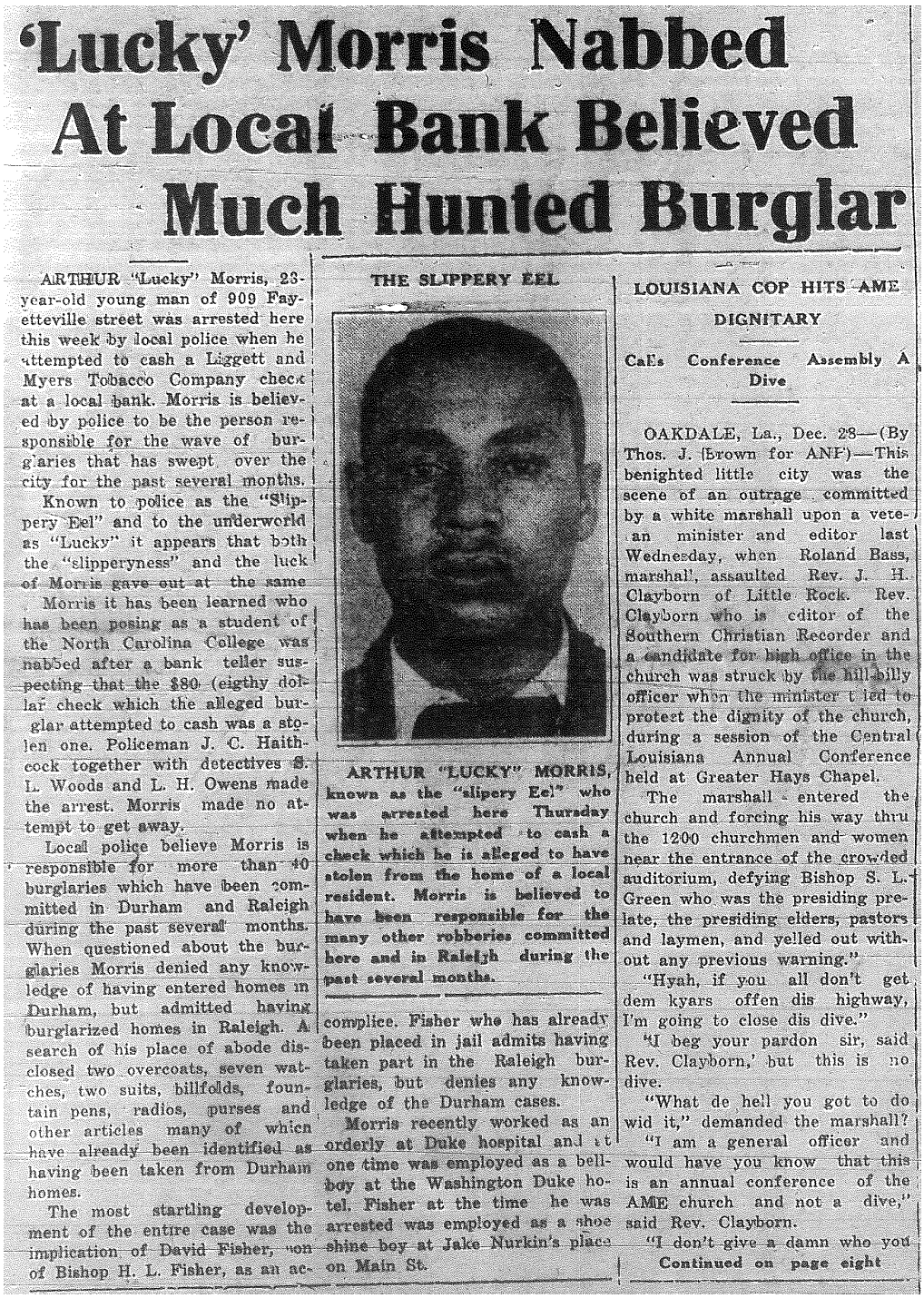
[119] "Pays Penalty for Burglary Crime," RNO, 8 July 1916, p. 8.

[120] "Lee Perkins Pays Death Penalty" RNO, 11 October 1917, p. 3.

[121] "Burglar to Die at Prison Today," RNO, 1 September 1939, p. 3.

[122] "'Grey Mouse' Sentenced to Die Here," RNO, 24 September 1938, p. 3.

Figure 4



'Lucky' Morris Nabbed At Local Bank Believed Much Hunted Burglar

ARTHUR "Lucky" Morris, 23-year-old young man of 909 Fayetteville street was arrested here this week by local police when he attempted to cash a Liggett and Myers Tobacco Company check at a local bank. Morris is believed by police to be the person responsible for the wave of burglaries that has swept over the city for the past several months.

Known to police as the "Slippery Eel" and to the underworld as "Lucky" it appears that both the "slipperyness" and the luck of Morris gave out at the same

Morris it has been learned who has been posing as a student of the North Carolina College was nabbed after a bank teller suspecting that the $80 (eigthy dollar check which the alleged burglar attempted to cash was a stolen one. Policeman J. C. Haithcock together with detectives S. L. Woods and L. H. Owens made the arrest. Morris made no attempt to get away.

Local police believe Morris is responsible for more than 40 burglaries which have been committed in Durham and Raleigh during the past several months. When questioned about the burglaries Morris denied any knowledge of having entered homes in Durham, but admitted having burglarized homes in Raleigh. A search of his place of abode disclosed two overcoats, seven watches, two suits, billfolds, fountain pens, radios, purses and other articles many of which have already been identified as having been taken from Durham homes.

The most startling development of the entire case was the implication of David Fisher, son of Bishop H. L. Fisher, as an accomplice. Fisher who has already been placed in jail admits having taken part in the Raleigh burglaries, but denies any knowledge of the Durham cases.

Morris recently worked as an orderly at Duke hospital and at one time was employed as a bell-boy at the Washington Duke hotel. Fisher at the time he was arrested was employed as a shoe shine boy at Jake Nurkin's place on Main St.

THE SLIPPERY EEL

ARTHUR "LUCKY" MORRIS, known as the "slipery Eel" who was arrested here Thursday when he attempted to cash a check which he is alleged to have stolen from the home of a local resident. Morris is believed to have been responsible for the many other robberies committed here and in Raleigh during the past several months.

LOUISIANA COP HITS AME DIGNITARY

CaEs Conference Assembly A Dive

OAKDALE, La., Dec. 28—(By Thos. J. Brown for ANF)—This benighted little city was the scene of an outrage committed by a white marshall upon a veteran minister and editor last Wednesday, when Roland Bass, marshal', assaulted Rev. J. H. Clayborn of Little Rock. Rev. Clayborn who is editor of the Southern Christian Recorder and a candidate for high office in the church was struck by the hill-billy officer when the minister t led to protect the dignity of the church, during a session of the Central Louisiana Annual Conference held at Greater Hays Chapel.

The marshall entered the church and forcing his way thru the 1200 churchmen and women near the entrance of the crowded auditorium, defying Bishop S. L. Green who was the presiding prelate, the presiding elders, pastors and laymen, and yelled out without any previous warning."

"Hyah, if you all don't get dem kyars offen dis highway, I'm going to close dis dive."

"I beg your pardon sir, said Rev. Clayborn,' but this is no dive.

"What de hell you got to do wid it," demanded the marshall?

"I am a general officer and would have you know that this is an annual conference of the AME church and not a dive," said Rev. Clayborn.

"I don't give a damn who you

Continued on page eight

Arthur Morris was executed for burglary in 1939. His crime netted him twenty cents. *Carolina Times, 1 January 1938*.

manner of his strange entrance and exit," which, according to the *Journal*, was "without the bounds even of devilish reason." The *Journal* described every detail of the attack and the moments that preceded it—the young woman waking to a dog's bark, peering outside in the moonlight, seeing nothing, and returning to bed. And then a "black body" appeared, a hand covered her mouth, and someone bound her in her bed sheet and dragged her from her home.

A light turned on, and the suspect fled, fearing discovery, and soon several hundred men had gathered for the hunt. They were armed, and angry, and flew about the area, responding to rumors of black fugitives in various parts of the county, scouring swamps and forests. Finally, after hours of hunting, members of the posse captured a suspicious man. His appearance—"black as midnight" … his shaven head "as sleek as his shining face"—did not exactly match the young woman's description, but his feet matched footprints outside her home. After keeping the suspect in his office for a few hours, the sheriff took him to Raleigh, explaining that he did not fear mob violence but that "'if the negro's innocent he must be protected, and if he's guilty it will be learned in the course of a fair trial.'"[123] The man, later identified as nineteen year-old Ernest Brumfield, was executed the following May.

The purple coverage of the burglary illustrates the hysterical response to black crime and the way in which crimes that seemed to reinforce white beliefs about black criminality were exploited to their fullest to strengthen that association. And the stronger that association, the more likely it became that whites would respond violently to black crime. Such was the case when Harvey Lawrence attempted a rape upon a woman in

[123] "Light Saves Miss Velma Preslar After Negro Carries Her Out of Her Home at Wingate Monday," Monroe Journal, 20 August 1929, p. 1.

Hertford County in April of 1930. He forced his way into Mary Railey's home as she tried to fight him off, beating her as she cried for help. Her aged husband eventually managed to rise from his bed and drive off Lawrence with his walking stick. Railey produced a hat she said Lawrence had worn during the attack—it was embroidered with his name—and the sheriff found Lawrence at his home with a sizeable knot on the back of his head.

A special term of court convened to try Lawrence, and while local authorities anticipated violence, they encountered none, perhaps because Lawrence was immediately transferred to Raleigh to await trial and twenty-eight National Guardsmen guarded him as the trial proceeded. In its appeal, Lawrence's defense argued that the presence of the armed soldiers created a "martial atmosphere" that undoubtedly swayed the jury to convict the defendant. "The populace here are evidently so satisfied of his guilt that they are ready to kill him here and now," the defense explained, before describing the jurors' mindset:

> He surely must be guilty of a capital offense, otherwise their demands could not be so pronounced. They want him killed; and if we do not find him guilty of a capital offense so that he may be legally executed, then we have made a gross miscarriage of justice, and the populace will hold us in contempt. To save our own reputations we must by our verdict take his life. Therefore we, for our verdict, find the accused guilty as charged, which finding carried with it a legal death sentence; and we have saved the State a lynching![124]

If true, the above calculation is not only a searing indictment of the operation of courts within North Carolina's racist caste system, but it also describes the remarkable contortions that white southerners performed to justify a regime of racial violence under

[124] "Brief for the Appellant, Defendant," State v. Harvey Lawrence (No. 90), Fall Term, 1930, p. 2.

the law. In order to preserve the law a jury must disregard it; it must sanction one kind of violence in order to prevent another. Jurors viewed the presence of the militia not as an effort to protect a defendant from an enraged mob, but as a testament to the wisdom of that mob. They believed that a "gross miscarriage of justice" would ensue if they failed to ignore the evidence of the case and hand down a guilty verdict lay bare the sickness that afflicted the legal system for much, if not all, of the twentieth century. The Supreme Court denied the appeal.

V. "Not So Much to Guide Society as to Comfort It"

By 1930, men such as Lawrence who were convicted by angry jurors in an angry courtroom were supposed to be protected by the Fourteenth Amendment. In 1923, the United States Supreme Court decided in *Moore v. Dempsey* that the Fourteenth Amendment protected the due process rights of defendants tried in state courts.[125] The Court signaled its willingness to intervene on behalf of African Americans who did not receive fair trials. Two years later, they did so, ruling in *Powell v. Alabama* that the African Americans known as the Scottsboro Boys had been denied their due process rights when they were assigned counsel just a day before their capital rape trial.[126] A number of cases that followed should have banned racial discrimination in jury selection (*Patton v. Mississippi*, 1947) and the use of coerced confessions (*Fikes v. Alabama*, 1957).

[125] Moore v. Dempsey, 261 U.S. 86 (1923).

[126] Powell v. Alabama, 287 U.S. 45 (1932).

These rulings were important steps toward enforcing equity in southern courts, but they failed to protect Lawrence. Nor did they protect many others, including Larry Newsome. Newsome went on trial for murder in Goldsboro in 1927, two days after the crime. He seemed doomed from the outset. No one appeared to doubt his guilt and in the midst of the trial, he was attacked by relatives and neighbors of the victim. The judge fired a pistol into the ceiling twice to break up the scrum, and held it pointed at the surging crowd as sheriffs deputies whisked Newsome out of the courtroom. Three hours later, Newsome was convicted and sentenced to death.[127] The *News and Observer* wrote of the trial that the law had been "meticulously observed."

The North Carolina Supreme Court granted Newsome a new trial on a technicality. The mob followed him to the new trial location, demanding of the new judge, "'Will you promise us if we don't kill him that he will be convicted and hanged?" He declined, but in the presence of a company of National Guardsmen, a new jury convicted him again. His appeal failed and he was executed in 1928. There was little doubt about his guilt, but he was widely believed to be "not fully developed mentally."[128] There was no investigation of his mental condition. The Supreme Court was sometimes willing to intervene in cases where due process was at risk. To do so, though, required motivated lawyers at the state level, not court-appointed attorneys who, as in the case of Newsome, to the jury and the courtroom crowd that they were not acting voluntarily.[129]

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[127] "Judge Grady, Pistol in Hand, Foils Attempt to Lynch Negro Murderer," RNO, 12 December 1927, p. 1.

[128] "Larry Newsome Dies at Prison," RNO, 29 September 1928, p. 1.

[129] "Governor Lauds Action of Grady in Foiling Mob," RNO, 13 December 1927, p. 1.

Governor Clyde Roark Hoey, who governed from 1937 to 1941, averred that justice was colorblind. Eleven of the twelve men executed in 1937 were black, Hoey conceded, but five of their victims were black, too. These executions, according to Hoey, "effectively disposes of the argument frequently made that Negroes are not punished by the extreme penalty for committing crimes against other Negroes."[130] After commuting the executions of seven African-American men that year, he argued that "the matter of race or color has not been the determining factor in the administration of justice."[131] Despite such disclaimers, sensitivity to the death penalty's focus on black targets heightened in the 1950s. In September of 1951, union leader Leon Strauss wrote to Governor W. Kerr Scott decrying the scheduled execution of convicted rapist Clyde Brown. Noting that Brown, an African American, was tried by an all-white jury, that the victim failed to make a positive identification, and that there was little evidence of rape, Strauss complained that the upcoming execution "represent[ed] another in the chain of incidents of legal lynching aimed at Negro-Americans."[132] Brown's case dragged on even after the Supreme Court ruled that there had been no error in his conviction, but Kerr eventually commuted Brown's sentence.

Even those political leaders most committed to reshaping the state's legal system could not avoid the fact that the death penalty spoke first about race, and second about crime. North Carolina executed 336 people between 1910 and 1961. Two hundred and seventy-two of those people, or eighty-one percent, were black. Eighty-one percent of the

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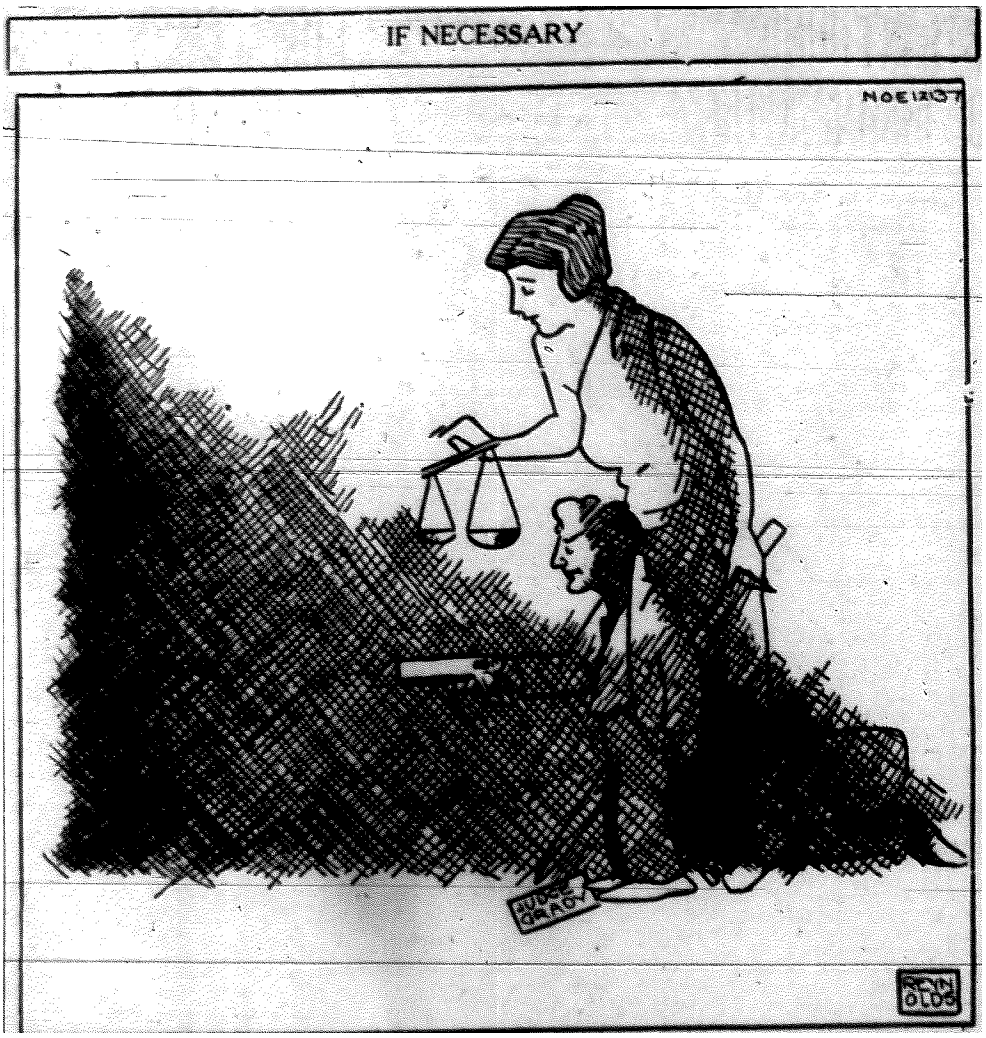
[130] "Executions and Commutations," in David Leroy Corbitt, ed., Addresses, Letters, and Papers of Clyde Roark Hoey (Charlotte, NC: Observer Printing House, Inc., 1944), 403.

[131] *Ibid.*, 403.

[132] Leon Strauss to W. Kerr Scott, W. Kerr Scott Papers, Subject Files 1951, Paroles and Commutations, Box 98. NCSA.

Figure 5



A cartoon warned that Lady Justice would be protected by force if necessary. Readers could have been forgiven for thinking that the cartooned warned criminals that if Lady Justice did not kill criminals, someone else would. *Raleigh News and Observer, 13 December 1927.*

time the state of North Carolina executed someone, it was sending racially charged messages instead of messages about justice, vengeance, or power. One of the most unsettling messages was that the execution of black men was a way of defining white civilization. It did so not by killing off blacks, or coercing them into staying on their side of the color line, but by demonstrating what some whites considered admirable restraint.

After Tom Gwyn was sentenced to death for rape shortly after his rescue from a mob in Newton in 1919 the *Hickory Daily Record* applauded the "public sentiment" that "condemned certain crimes with such vigor as to make it unsafe for the brute who merely attempts it." "This trial was much better than for several hundred men in this section to appeal to the law of the jungle," the editorial continued. "They have laws, which were written by white men and enforced by white men, and when white men disregard the cardinal or fundamental laws, they degenerate to the level of the criminal whose act they would punish. If there were no laws or officers to enforce them, then we could contemplate violence by mob." In other words mob law is the law of the jungle, the law of indelibly criminal African Americans. White law takes a different form, and will, whatever happens, respond to white demands. The *Record*: "The guilty will be punished if public sentiment is strong enough."[133]

This belief cut against official pronouncements on the subject. In his 1917 inaugural address, delivered a year after the *Record's* editorial, Governor T.W. Bickett declared of punishment, "Anything that savors of vindictiveness is indefensible in the

[133] "Law and Morality," Editorial, Hickory Daily Record, 27 June 1919, p. 2.

administration of law."[134] But the idea persisted. In 1936, the *Fayetteville Observer* noted in an editorial that in the twenty-two executions that took place that year, "The State … acted as proxy for the public which would have lynched them had there been no system of courts and punishments established."[135] The death penalty, then, set white and black North Carolina apart, both in form and function. In form, it represented the legal structures that gave shape to white society, and that many whites felt set them apart from naturally lawless African Americans, that lawlessness abetted by the black community's neglect by its white counterpart. In function, it lashed out at African Americans in a way that by the beginning of the twentieth century, a with lynching, white elites condemned. The death penalty was both the modern instrument of an ancient impulse and the symbol of white North Carolinians' ability to subvert that impulse. It was a celebration of restraint, an expression of anger, a gun, a rope, a muted mob.

But by emphasizing the significance of the death penalty, and the law in general, North Carolina's governors only underscored just how symbolic, if not self-deceiving and hypocritical, capital law really was and drew attention to its shortcomings. But as lawyer and thinker Thurmond Arnold suggested in the 1930s, in an irrational society, stuck in the habit of subjugating blacks, a symbol is exactly what people needed.[136] "People will never accept an institution which does not symbolize for them the simultaneously

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[134] Sanford Martin, comp., R.B. House, ed., Public Letters and Papers or Thomas Walter Bickett, Governor of North Carolina, 1917-1921 (Raleigh: Edwards and Broughton Printing Company, 1923).

[135] "Punish or Prevent," Editorial, reprinted in RNO, 18 December 1936, p. 4.

[136] Thurman Arnold, Symbols of Government (New York: Harbinger Books, 1962, orig. 1935), viii.

inconsistent notions to which they are at various times emotionally responsive," Arnold wrote.[137] The function of law "is not so much to guide society as to comfort it."[138]

The death penalty was dramatic enough, and infrequent enough, to function as a potent symbol of justice for powerful North Carolinians interested in cultivating the state's image. But it was more often a symbol of white frontier justice than of the dispassionate justice North Carolina's elites wanted it to be, a symbol of the power that white North Carolinians held over African Americans. Ernest Vincent knew it. Convicted of rape in Durham County in 1942, Vincent received a thirty-day reprieve, and eventually a commutation. When he got the news, he responded, "I have prayed the white folks would soften their hearts toward me."[139] Sometimes they did.

[137] Arnold, 10.

[138] *Ibid.*, 34.

[139] "Rapist Executed in Gas Chamber, RNO, 30 January 1943, p. 10.

CHAPTER 3

"I Cannot Allow This Boy to Be Executed": Mercy and the Death Penalty

I. "An Impossible Situation"

In March of 1945, in coastal New Hanover County, North Carolina, Ernest Brooks, Jr., was sentenced to death. Brooks, an African American, was convicted both of first-degree burglary and of rape, a rare double conviction that revealed the solicitor's determination to secure a death sentence: if jurors decided to convict Brooks of a lesser crime in either category, surely they would not do so in both. The survivor, Mrs. G.V. Parker, a white woman, gave credible testimony about a terrible crime. It was after midnight in mid-December, 1944. when Parker, then eight months pregnant and in bed with her seven year-old daughter, heard a key turn in her front door. She hoped her husband had come home from work early; instead, as she later testified, Brooks entered the room, threatening violence and demanding sex. As her daughter sobbed on the bed beside her, Brooks raped Parker.[1]

Parker reported the crime immediately after Brooks stumbled from her bedroom, holding his pants up with one hand and clutching his shoes in the other. Later in the week, trolling the "colored section" of town, she identified Brooks as he ducked behind a truck. Soon, sheriff's deputies had brought him to Parker's home, where he confessed to the rape. Although a group of white men gathered, growling threats, while Brooks sat

[1] State v. Ernest Brooks, Jr., North Carolina Supreme Court, Fall Term 1945, #582 New Hanover, Supreme Court Case Files (microfilm), 1940-1981, Fall Term 1945, NCSA.

handcuffed in the back of a police car, the trial in New Hanover's Superior Court proceeded without disruption, and Brooks was convicted and sentenced to death in the gas chamber. Brooks's lawyers raised some exceptions, arguing that Brooks's confession had been coerced, and that the jury's confusion—revealed by a lengthy pre-conviction question-and-answer session with an exasperated judge—should invalidate his sentence. The Supreme Court disagreed, however, and ruled that there had been no error in the Superior Court's decision. Brooks would die in the gas chamber.[2]

Ernest Brooks was fourteen at the time of the crime. The previous April, Governor R. Gregg Cherry had announced, in commuting the death sentence of a sixteen year-old convicted of murdering a police officer, that "I do not feel that the State of North Carolina should execute a child. We cannot hold him to the same degree of responsibility to which we hold an adult."[3] Cherry owed Brooks the same consideration, and he decided to spare his life. He did so with a statement that not only acknowledged Brooks's age without reference to his guilt, but also which scolded his fellow North Carolinians for creating an environment where a youth such as Brooks could commit such a "revolting" crime. Part of Brooks's delinquency, said Cherry, arose "from the neglect of the State and society in general to provide a better environment for growth into a useful citizen." With the recommendation of the Superior Court judge, Cherry commuted Brooks's sentence to life imprisonment.[4]

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[2] State v. Ernest Brooks, Jr., North Carolina Supreme Court, Fall Term 1945, #582 New Hanover, Supreme Court Case Files (microfilm), 1940-1981. NCSA.

[3] "Sentence of Young Slayer Commuted to Life Term," RNO, 24 April 1945, p. 2.

[4] "Governor Saves Boy from Death," RNO, 21 December 1945, p. 20.

Time magazine noted the rarity of Cherry's reprimand. "Rarer still," the issue read, "in North Carolina there was no outcry." On the contrary, letters of support poured into Cherry's office from across North Carolina and the nation. One Durham resident wrote that "to have executed [Brooks] would have been a blot upon the state's name," and that commutation would help preserve North Carolina's reputation as racially moderate. One Mississippi woman interpreted Cherry's action as a "courageous stand in the face of the lynching sentiment rampant in this part of the country." And another man praised Cherry for his effort to resolve "an impossible situation," an execution which would have harmed "both white and negro society."[5]

By the early 1900s, North Carolina's criminal legal system had developed to relative maturity. Counsel in capital cases, whether appointed by the court or hired by the defendant, while not always motivated to mount a respectable defense of their client, did at least often bring appeals to the North Carolina Supreme Court after a conviction. While the Supreme Court would not seek to assure access to counsel for indigent defendants until the 1960s, every person indicted for a capital crime in North Carolina was represented by attorneys in Superior Court, and at least by the 1930s, many of those attorneys were pressing vigorously for reversals or new trials on appeal. Their appeals were so sometimes strident, in fact, that some North Carolinians objected to the number of exceptions—potential reasons for granting a new trials—granted capital defendants.[6] Superior Court judges took their jobs seriously, issuing grave and detailed charges to

[5] Harvie Branscombe to R. Gregg Cherry, undated; Anne Wunderman to R. Gregg Cherry, undated telegram; Hugh Hunter to R. Gregg Cherry, 9 January 1946, in R. Gregg Cherry Papers—Agencies, Commissions, Departments, and Institutions, 1945-1948—Paroles Commission, May 1945-December 1949: Paroles Commission, NCSA.

[6] Robert D. Gilmer, Attorney General Report (1907-1908), 11. NCC.

their juries, and while the opening and closing statements of solicitors and defense attorneys do not appear in trial transcripts, there is little evidence to suggest that they amounted to appeals to prejudice or vengeance.[7]

Capital defendants and condemned prisoners, even African Americans, should have been able to expect a trial that respected their rights as persons. Furthermore, most capital defendants were not the helpless victims of a harsh system of justice, since most of them never saw death row, let alone the inside of the death chamber. Arsonists could attest to the degree that the state's capital sentencing laws—harsher than those in many other states because they dictated death for four crimes—were anything but strictly enforced. Prosecutors might seek an indictment on a lesser charge or a conviction on a lesser charge for a prisoner indicted for a capital crime; juries could hand down verdicts for second-degree charges in a first-degree trial, if the evidence was there; or, juries could refuse to convict altogether, seeking to avoid the taking of human life. And for those prisoners unlucky enough to receive mercy from neither the solicitor nor the jury, North Carolina's governor stood ready to intervene.

North Carolina's 1868 Constitution gave the governor exclusive authority over clemency, and it was a power often used, as in the case of Ernest Brooks, to spare the lives of condemned murderers, rapists, or burglars. North Carolina was not alone in giving this kind of power to its governor. While some states diluted clemency power by assigning it to a board, or preventing the governor from acting without outside consent,

[7] In 1942, the Supreme Court ruled in *Betts v. Brody* that the Constitution required legal representation only if a defendant could prove that he was victim of "special circumstances." *Gideon v. Wainwright* (1963) reversed this hedge by granting the indigent access to counsel in state capital trials. Of course, both rulings required state resources and energy that were not always available or forthcoming.

nearly half reserved it exclusively for their governors.[8] The legislature placed some restrictions on executive clemency, but only on those applying for it, who had to submit their request in writing and explain why they wanted consideration.[9] Executive clemency in capital cases made the governor the final gatekeeper between a prisoner and an error of justice. By at least 1911, after the state had taken control of executions, the state's governor had begun to reprieve death row inmates so he could examine their claims to life; that year, W.W. Kitchin gave condemned murderer Taylor Love a reprieve so his lawyer could prepare a petition for commutation.[10]

Pardons Commissioner Edwin Gill insisted in a 1935 report that his office did not exist to correct mistakes made by the Superior Court judge who handed down the original death sentence, nor to retry the facts of a capital case. Its only task, he wrote, was to look for new evidence that might exonerate the prisoner, or to discover mitigating circumstances. In their search for new evidence of innocence or factors that might inspire mercy, the commissioner and his investigators consulted the trial judge, the solicitor, and the arresting officers; they pored over the trial transcripts and the Supreme Court's response to the prisoner's appeal; sometimes, they held public hearings in the injured communities, and they considered petitions arguing for or against clemency.[11]

In short, they did indeed retry the prisoner, but without the mandatory sentencing laws, rigid requirements for submitting appeals, or other regulations intended to make the

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[8] Elkan Abramowitz and David Paget, "Executive Clemency in Capital Cases," New York University Law Review, 39 (1964), 141-2.

[9] G.S. 147-21.

[10] "Indian Murderer Pays the Penalty," RNO, 25 November 1911, p. 5.

[11] Edwin Gill, "Report of the Office of the Commissioner of Paroles, January 1, 1933-January 1, 1935," (Raleigh: The Commissioner, [1935?]), 8-13. Law Library stacks, UNC-CH.

capital trial and sentencing process an exercise in blind justice but which often instead made it an exercise in blindness. The backdoor process that allowed a group of bureaucrats to retry criminals undoubtedly not only spared the lives of many innocent people, but also sometimes reoriented the death penalty as an exercise in community justice, a posture ostensibly eliminated with the advent of state-controlled electrocutions.[12] Through the executive clemency process, paired with jury nullification before and after conviction, North Carolinians asserted that the death penalty was not an impartial, if violent, response to crime; it was a reaction against the criminal and subject to a "brutal logic."[13] If a criminal committed his crime while drunk, or if he was mentally handicapped, or very young; or if his victim was disreputable, or if it simply seemed excessive to execute someone for the crime in question, North Carolinians had an opportunity to intervene. They did not intervene as often as they might have, but this exercise in back-channel justice strengthened the bond between communities and punishment for crime at a time when the government was taking over the process.

Stuart Banner, who has written one of the most eloquent and wide-ranging histories on the subject, argues that capital sentencing in the eighteenth century was directly tied to community sentiment; in other words, whether or not someone convicted of a capital crime actually went to their death depended on what their neighbors thought of them. Local influence over capital sentencing and execution did not disappear in North

[12] William J. Bowers suggests that delocalization, which coincided with a rise in the number of capital appeals, resulted in the loss of community power to prescribe death. William J. Bowers, with Glenn L. Pierce and John F. McDevitt, Legal Homicide: Death as Punishment in America, 1864-1982 (Boston: Northeastern University Press, 1984), 63.

[13] Brundage, 49.

Carolina for much of the twentieth century.[14] But eventually, this flexible style of justice diluted the harshness of written law and forced its revision.

II. "Any Error on the Face of the Record": A Rigid Judiciary

As the state considered the creation of a Board of Pardons in 1913, editors at the *News and Observer* railed against the possibility. They explained in a January editorial that the reason the governor was so overburdened by requests for pardons was because governors around the nation had shouldered too much responsibility. It was a heavy burden because the chief executives were acting "as if the Governor was an appellate court, above the Supreme Court, and virtually bound to review all the cases which they are asked to take up, and this takes time." If governors had the courage to reject improper applications, criminals and their lawyers "would soon find out that the Governor is … not a judicial officer" and "the only hope for executive clemency would be in some after-discovered evidence or in some extraordinary condition."[15] But barring the development of some "extraordinary condition," judicial precedent and the letter of the law actually meant that the governor was indeed expected to act as a kind of judicial officer.

There were a number of reasons why the governor assumed this role. First, until 1941, North Carolina law set a mandatory death sentence for anyone convicted of first-degree burglary or arson; first-degree murder and rape retained mandatory death sentences until 1949. Second, sloppy or neglectful lawyers sometimes failed to "perfect," or file properly, condemned prisoners' appeals. Although precedent directed that North Carolina Supreme Court justices look for "any error on the face of the record" in capital

[14] Banner, 62.

[15] "Board of Pardons," Editorial, RNO, 19 January 1913, p. 4.

appeals, "as the life of the prisoner is involved," many appeals were dismissed because they were not properly filed, a task for which the often uneducated, even illiterate, defendants relied upon their court-appointed lawyers.[16] Such was the case with James Farmer and Albert Sanders, who held hands and "shouted loudly to Jesus" as they died in the gas chamber, side by side, in June 1947. The North Carolina Supreme Court was prepared to review their case—they were convicted in Johnston County for beating a young World War II veteran to death—but their lawyers failed to properly file their appeal.[17] The state Supreme Court's adherence to procedure, which doomed a number of people, was well-established: in 1801, the Court arrested judgment in a capital case because, as one justice later recalled, "the letter 'a' had been omitted from the word 'breast.'" This "deference to technical interpretation" made for an inflexible appeals process that tended to preserve lower court decisions, however flawed.[18] As one justice later wrote, "He who sleeps upon his rights may lose them."[19]

Third, as Commissioner of Pardons Edwin B. Bridges explained to Governor O. Max Gardner in 1929, North Carolina law provided for new trials upon discovery of new evidence in civil actions, but did not make the same allowance in criminal cases. This position was not uncommon. While some states, such as New York, created provisions for new trials in the late nineteenth century, as late as 1941, lawyers were decrying the statutory limits that denied condemned prisoners new trials in light of newly discovered

[16] State of North Carolina v. Floyd Stanley, 198 N.C. 308; 151 S.E. 621 (1930).

[17] Gordon M. Sears, "State Executes Johnston Youths," RNO, 7 June 1947, p. 10.

[18] William J. Adams, "Evolution of Law in North Carolina," The North Carolina Law Review, vol. 2, no. 3 (April 1924), 144-5.

[19] Decision of C.J. Stacy, State v. Herman Casey, 210 N.C. 620 (1931).

evidence.[20] In other words, someone who lost a suit against a carpenter who abandoned his half-built home without reason could sue the carpenter again if new evidence appeared proving his claim. But if a man made a deathbed confession to a crime for which another man awaited execution, or it became apparent only after a death sentence that angry jurors were intent on conviction, the courts would not grant a new trial. It was up to the governor to weigh the new evidence and decide whether to commute the condemned's sentence or pardon him altogether.[21]

The fourth factor that created the need for mercy was the law's murky stance on jury discretion, the privilege of juries to convict someone indicted on a first-degree charge of a lesser crime. In its effort to clarify its stance on the matter, the Supreme Court of North Carolina issued a series of conflicting rulings on the subject. In 1890, justices reprimanded a jury they believed had handed down a verdict of second-degree burglary when the evidence pointed to a first-degree crime. But a few years later, the Court reversed itself, letting stand a similar decision despite what it called the jury's "abuse" of discretion. This permissiveness stood for most of the twentieth century, although jurors passed down their verdicts based on the trial judge's charge, likely in ignorance of procedural precedent. And at least one judge told jurors that he would not accept a second-degree verdict for a prisoner indicted for a first-degree crime. In 1940, in a split decision, the Court upheld that judge's decision. So while jurors appeared to have some discretion, it was as likely as not that they were faced with the decision to acquit someone

[20] Hon. Frederic S. Berman and Lainie R. Fastman, "Newly Discovered Evidence—a Defendant's Chance for a New Trial," New York Law School Law Review, vol. 28 (1983-1984), 31.

[21] Edwin B. Bridges to O. Max Gardner, 21 February 1929. O. Max Gardner Papers, General Correspondence, 1929-33, Box 95, Parole Commission re: Outline of Work, 1929. NCSA.

they felt was guilty rather than condemn them although they believed him undeserving of death.[22]

Even when the Supreme Court hinted that it was open to flexibility in sentencing, Superior Court judges might close that door. For example, Huzy Jackson was convicted of rape in the Spring 1930 term of the Rowan County Superior Court. According to the defense's brief in their appeal to the Supreme Court, while the prosecutrix, as they called her, offered convincing evidence that she had in fact been raped, the perpetrator was not Jackson. In their appeal, the defense offered new testimony from Jackson's employer, who vouched for his whereabouts at the time of the attack, as well as emphasizing other exculpatory evidence that had arisen during the course of the trial. In its response, the Court cited precedent to deny a new trial based on new evidence: "It is the settled rule of practice with us, established by a long and uniform line of decision, that new trials will not be awarded by this court in criminal prosecutions for newly discovered evidence."[23] Nor would the Supreme Court review a Superior Court judge's decision to deny a motion for a new trial.

While this policy may seem cruel, it was rooted in the sensible desire to mark an end to the trial process. Anyone convicted of a serious crime would have every incentive to dig ceaselessly for new evidence, or create some, until they had left prison or been executed. But with Jackson, the Supreme Court of North Carolina tried to have it both ways, remanding his case back to Superior Court for judgment, asking that the judge reconsider Jackson's sentence and take into account the new evidence. But the Superior

[22] "Statutory Changes in N.C. in 1941," The North Carolina Law Review, vol. 19, no. 4 (June 1941), 476. Cases mentioned are State v. Fleming (107 NC 905, 909, 12 SE 131, 132 (1890), State v. Alston (113 NC 666, 18 SE 692 (1893)), and State v. Johnson (218 NC 604, 12 SE (2nd) 278 (1940)).

[23] State v. Huzy Jackson, alias Jimmy Cadoger, Alias Jimmy Cadozier, 199 N.C. 321 (1930).

Court judge sentenced him again to death in November, ruling out the new evidence and setting an execution date in January of 1931. When Jackson's appeal again failed before the state Supreme Court, the decision then fell into the hands of Governor O. Max Gardner, who eventually commuted Jackson's sentence to life imprisonment.[24] Jackson was paroled to South Carolina in 1943, thirteen years after his conviction, the beneficiary, then, of a stingy kind of justice—one that, its teeth sunk in, might release its grip just a bit in the face of incontrovertible evidence of innocence.[25]

The Supreme Court took slightly more assertive action in the case of Herman Casey. Casey was convicted, on mostly circumstantial evidence, of a brutal murder in Lenoir County in September of 1930. After Casey received a death sentence, and after his lawyers filed an appeal on his behalf, it came to light that at least two members of the jury had agreed before the trial to convict Casey and send him to the death chamber. Casey's lawyers secured affidavits from a number of Lenoir residents, including one who swore that a juror told him that "if [Casey] were turned loose they might as well throw away the electric chair and tear down the jail."[26] When they presented this new information in the next term of Superior Court, Judge W.A. Devin refused their motion for a retrial, noting that the Supreme Court would soon consider the case on appeal. When the Supreme Court denied that appeal, Casey's lawyers again asked for a new trial

[24] Prison Department, Central (State) Prison, Box 40: Death Sentences, 1926-1931, NCSA.

[25] "Huzzy Jackson" [sic}, Paroles for Capital Criminals (bound volume), vol. 7. State Agencies: Paroles Department, NCSA.

[26] Affidavit for the Defense, State v. Herman Casey, 210 N.C. 620 (1931).24 November 1930, NCSA.

from Judge Devin, who again refused them, saying he doubted that another trial would produce a different verdict.[27]

The Court took the opportunity to discuss the question of new evidence at length. Justice W.J. Brogden spoke forcefully on the issue, decrying the fact that "courts have power to rehear cases and to entertain motions for newly discovered evidence where a nickel's worth is property was concerned," but were "powerless and impotent where life is concerned." Furthermore, he added, "if the courts have power to hear in misdemeanors, but no power to hear in capital felonies, then it is manifest that criminal procedure is more concerned with the mote than the beam," or, the law gave more consideration to its own minutiae than to the people it was supposed to serve.[28] Justice Heriot Clarkson disagreed. Citing multiple precedents, he argued that the Constitution had provided for new trials in civil actions, and by not providing the same guarantee for criminal cases, had left that power to the governor. To support his claim that considering new evidence was "contrary to our well settled rule of practice and procedure," Clarkson noted that Rules of Practice of the Supreme Court of North Carolina, a volume edited by the sitting Chief Justice, made this point "in bold type," and added some capital letters to strengthen his argument: "NEWLY DISCOVERED EVIDENCE IS NOT CONSIDERED IN CRIMINAL CASES." Common law and the Constitution both directed that the governor assume this responsibility, Clarkson argued, and there was no reason for the court to take power "more efficiently performed by the Executive."[29] Casey's lawyers appealed again, and Casey was granted a new trial and eventually received a second-degree murder

[27] State v. Casey.

[28] J. Brogden, dissenting. State v. Casey.

[29] Clarkson, J., dissenting, State v. Casey.

verdict, and a sentence of twenty-five to thirty years in prison. *State v. Casey* provided precedent for Superior Courts judges, at their discretion, to grant new trials to capital prisoners seeking to avoid execution.[30]

Perhaps the most sensational example of the use of this precedent is the case of Charlie Phillips, a middle-aged white farmer condemned in 1946 for killing his wife. Phillips was sitting on death row when a suicide note appeared among his wife's effects. "I just came in from out behind the house, looking at the pretty sunshine and corn that grows down across the fields, for I knew it would be my last time," read the letter. "It will soon be time for Charlie to come to dinner and I want to take him by surprise."[31] The note appeared on the day of Phillips's execution, and Governor Cherry immediately granted him a stay. After a contentious hearing at which the solicitor produced a letter from FBI director J. Edgar Hoover disputing the authenticity of the note—rules established a vetting process for new evidence—Superior Court Judge W.H.S. Burgwyn granted Phillips a new trial.[32] He was again convicted, and his appeal to the Supreme Court of North Carolina failed, but he was commuted in March of 1948.[33] After a series of paroles and revocations thereof for bad behavior (Phillips was a violent drunk), his parole was finally terminated, making him a free man, in 1971.[34]

Even after the Casey ruling, North Carolina's courts were reluctant to hear new evidence in capital cases. For example, in 1944, lawyers for William Little, sentenced to

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[30] G.S. 15a-1415.

[31] Hoover Adams, "Suicide Letter May Save Life of Harnett Farmer," RNO, 14 May 1947, p. 1.

[32] Hoover Adams, "Phillips Gets New Trial on Wife-Slaying Charges," RNO, 22 May 1947, p. 1.

[33] State v. Charlie Phillips, 228 N.C. 595 (1948)

[34] "Charlie Philips," Paroles for Capital Criminals, vol. 10 (bound volume). State Agencies: Paroles Department, NCSA.

death for rape that year, presented Superior Court Judge Henry A. Grady, not a supporter of the death penalty, with a letter from a doctor attesting that the plaintiff had not actually been sexually assaulted. He also delivered letters from jurors stating that had they known the results of the medical examination, they would never have convicted Little.[35] But despite this indication that Little may not have been guilty, and that a jury might not have convicted him, Grady refused his request for a new trial. Little's appeal to the Supreme Court of North Carolina failed as well, when his lawyers neglected to perfect it.[36] He was executed in 1947, praying as he inhaled the lethal gas.[37]

III. The Mantle of Mercy: Gubernatorial Clemency

Resistance by the Supreme Court to accept new, potentially exonerating evidence on capital cases; lawyers who failed to follow through on appeals; mandatory sentencing laws; and uncertainty about jury discretion created a confusing legal environment where the governor was expected to step in to resolve cases rejected by the Supreme Court. In 1924, the *Concord Tribune* described the procedure that was well in place by then. In an editorial that complained of the long, oft-delayed path of the death penalty in the state, the paper described how a condemned man might appeal to the Supreme Court, wait months for consideration, receive a rejection, and then appeal to the governor. To give the condemned man "a square deal," the governor "cannot turn a deaf ear to the petition."[38]

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[35] "New Trial Asked on Rape Charges," RNO, 6 May 1947, p. 17.

[36] State v. Willie Little, Alias James Harrington, Alias Chicken, 227 N.C. 701 (1947).

[37] "Three Rapists Meet Death in Prison's Gas Chamber," RNO, 15 November 1946, p. 2.

[38] "This is Justice Checked," Editorial, Concord Tribune, reprinted in RNO, 24 November 1924, p. 7.

Indeed, North Carolina's governors took seriously the responsibility of evaluating clemency applications. Most such applications came from the relatives of prisoners with short sentences, men whose wives needed them to return home as breadwinners during tough times, or with sick relatives, or who were decent people who had been away from home for too long. But the applications on behalf of condemned criminals required the most careful attention. A condemned prisoner who had lost an appeal to the Supreme Court, or, as frequently happened, found his or her appeal dismissed because it was never perfected, saw in the governor a last resort. Family members and friends, residents of the county where the crime took place, lawyers, judges, and members of the jury might all write to the governor urging mercy. The governor weighed new evidence of guilt or innocence, the circumstances of the crime, the condition of the victim, the injury to the state and the community, and the mental and physical health of the prisoner.

By the beginning of the twentieth century, this responsibility had grown significantly more demanding as the powers of the governor grew with the size of the state's prison population. In 1910, the first year of state-run executions in North Carolina, the state prison system held 670 convicts; by 1925, that number had more than doubled; and by 1940, the total was approaching 9,000.[39] In 1925, responding to the increased demands on the governor's commutation power, the legislature gave the governor a Pardon Commissioner. In 1929, the Legislature replaced the independent Commissioner with the governor's executive counsel and gave him the salary of a Superior Court

[39] Calculated from data in Prison Reports, 1910-25.

judge.[40] By 1935, the Commissioner, now charged also with evaluating parole requests and investigating and preventing potential lynchings, had a full staff of investigators, who led the hunt for exculpatory evidence, held public hearings, and prepared reports for the governor.[41]

This process made the governor, as well as those who advised him, uniquely powerful figures in the death penalty process. The governor, if he wished, could make clemency decisions based solely on personal motives. For example, Marcus Edwards, after being condemned for the murder of his wife in 1918, gave all his property to his child. Governor T.W. Bickett admired this gesture, and said so when he commuted Edwards's sentence.[42] Governor Cameron Morrison granted Bob Benson a reprieve, adding two months to his life, so he could vacation with an easy mind.[43]

The decision of the governor, such as those made in Superior and Supreme Court decisions, was subject to public pressure, argument, evidence, and questions of fairness. But unlike court decisions, it was bound by neither precedent nor procedure, beholden to a sense of justice unencumbered by mandatory sentencing guidelines or narrow definitions of premeditation and insanity. Most importantly, the governor's decision was irreversible. The result was a more social style of justice, a nod to the community policing of an earlier time that belied the power's monarchical roots. It was also, as with

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[40] "A Survey of Statutory Changes in North Carolina," North Carolina Law Review, vol. 7, no. 4 (June 1929), 382.

[41] Albert Coates, "Punishment for Crime in North Carolina," North Carolina Law Review, vol. 17, no. 3 (April 1939), 211; Paul Knepper, North Carolina's Criminal Justice System (Durham, NC: Carolina Academic Press, 1999), 161-5.

[42] Prison Records Group, Paroles, William W. Kitchin to Thomas W. Bickett, Commutations, 1910-1919, 189.

[43] "Governor Paroles Guptons; Grants Respites to Three," RNO, 28 June 1923, p. 1.

so much of the death penalty apparatus, a late fix signaling the fragility of the death penalty process in North Carolina.

For those men and women who won executive clemency, however, their lives—lived out in the custody of the state, or, eventually, as free citizens—were much more than symbols. This was true, too, of the governors who made these decisions. Some scholars of the post-Furman death penalty in the United States, have called executive clemency, today still the sole authority of the governor in fourteen states, "tantalizingly humane." They explain that executive clemency is merciful—they cite instances of governors commuting death sentences as grand gestures on their way out of office, to avoid the execution of women, or simply because they did not believe in capital punishment. Though if North Carolina's governors opposed the death penalty, they rarely confessed to it.

Between 1910 and 1961, governors commuted a significant number of condemned prisoners for a variety of reasons. In one sample of twenty-nine beneficiaries of commutation, longtime Commissioner of Paroles Edwin Gill found that two people won commutations for extreme youth, three for mental deficiency, seven because the governor deemed that the prisoner had caused no serious injury, and seventeen because of "doubt as to guilt or degree of guilt." In other words, twenty-four of twenty-nine commutations were granted because of questions as to whether the severity of the crime for which a prisoner was convicted matched the severity of the sentence, or because the prisoner had not committed a crime at all.[44] The other explanations, such as youth, mental condition, and sex, demonstrate how the death penalty in North Carolina was intended to

[44] Edwin Gill, "Executive Clemency in Relation to Capital Punishment: A Report," 8. Nell Battle Lewis Papers: Social Welfare, NCSA.

punish the person and not the crime, and that a criminal act, however ghastly, was shorter-lived than the reputation of the criminal.[45]

Attributions of insanity, mental disability, or retardation frequently motivated people to recommend clemency, and frequently inspired governors to grant it; it was a factor in about thirty percent of all commutations between 1909 and 1953.[46] As Governor Angus McLean explained in 1926, "the State of North Carolina should under no circumstances take the life of one of its citizens who is not capable of understanding the consequences of his acts." The citizen in question was James Jeffreys, a "low type moron," who upon learning of his commutation, said, "'Ain't done nothing no how.'"[47]

After a commutation such as Jeffreys's, which acknowledged mental disability but did not confer the legal status of insanity, the criminal was likely to be confined in the State Hospital for the Dangerous Insane in Raleigh[48]; if they were black, they would be

[45] Commutation data for North Carolina's capital criminals is scattered, incomplete, and restricted by law. Governors issued formal statements with each commutation; sociologist Elmer Johnson used these statements in his 1957 study of commutation in the state, a detailed study and the only one of its kind. These statements, while sometimes published in part in newspapers, are scattered throughout governors' papers, those of the Parole Board, the Prison, or those of the two organizations that administered it, the State Highway and Public Works Commission and the State Board of Charities and Public Welfare. Prison records include heavy, moldering ledgers recording and rerecording commutations for capital and non-capital sentences; governors' papers include some reports the chief executives requested, or collections of scattered data. The "Death Cases" files from the Parole Board, which presumably include commutation investigators' reports and other information on capital prisoners whose sentences were under consideration, are inexplicably restricted by state law. Employees at the Department of Corrections and the Office of Research and Planning, while helpful, were unable to explain why these files were restricted and unable to grant access. This lack of information means that this discussion relies on Elmer Johnson's data, relatively small samples of years for which reliable numbers appear in attorneys general and prison reports, and newspaper coverage.

[46] Elmer H. Johnson, "Selective Factors in Capital Punishment," Social Forces, vol. 36, no. 2 (December 1957), 167 (Table 4).

[47] "McLean Spares Life of Negro," RNO, 3 February 1926, p. 8.

[48] John Koren, "Summaries of State Laws Relating to the Insane," (New York: National Committee for Mental Hygiene, 1917), 184.

sent to the segregated State Hospital for the Insane, later Cherry Hospital, in Goldsboro.[49] Institutions such as these hospitals had existed for decades. The first was established in Raleigh in 1856, and the separate facility for those deemed dangerous was at least intended to be built in 1898,[50] though it does not appear to have opened until the mid-1920s.[51] There, many inmates could expect castration or eugenic sterilization. North Carolina, led by the declaration "the feebleminded breed feebleminded [and] we pay the cost,"[52] was prolific in this area for many years.[53]

Commutation for mental incapacity could lead to a parole. For example, eighteen year-old condemned murderer William J. Dunheen, denied a new trial on appeal to the North Carolina Supreme Court, was set to die in December of 1945. But Governor Cherry extended reprieves as he and others studied the case. Finally, in May, Cherry was convinced by five psychologists that Dunheen was mentally ill. His brother had epilepsy, Cherry noted in a statement, and his father and two of his uncles had been confined in mental hospitals. Dunheen himself, though admitted to the army in July of 1943, had spent most of his time in uniform in the hospital, eventually receiving a medical discharge. Dunheen had committed a cold-blooded murder, shooting the object of his affection with a shotgun, reloading, and shooting again. The crime was horrible, Cherry said, but "I cannot, under the constitutional power given me, permit the execution of a

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[49] Biennial Report of the State Hospital at Goldsboro, July 1 1924 to June 30 1925 (Raleigh: Bynum Printing Company, 1926), 6. <http://docsouth.unc.edu/nc/goldsboro24/goldsboro24.html>.

[50] Koren, 181.

[51] Biennial Report of the State Hospital at Raleigh, July 1, 1924 to June 30, 1926 (Raleigh: Bynum Printing Company, 1926), 8. < http://docsouth.unc.edu/nc/raleigh24/raleigh24.html>.

[52] Biennial Report of the State Board of Charities and Public Welfare, December 1, 1920 to June 30, 1922 (Raleigh: The Board, 1922), 40a. NCC.

[53] Katherine Castles, "Quiet Eugenics: Sterilization in North Carolinas Institutions for the Mentally Retarded, 1945-1965, The Journal of Southern History, vol. 68, no. 4 (November 2002), 849-78.

mentally ill man. I am, therefore, asking the relatives and friends of the cruelly murdered young girl to be encompassed with the mantle of mercy and believe with the medical authorities and with me, that this youthful defendant is far from a normal human being in mental makeup."[54] Dunheen was eventually paroled in 1958.[55]

Sending mentally ill murderers and others to an institution rather than the death chamber aroused indignation in some quarters. After all, some reasoned, were not mentally ill criminals the least likely to be receptive to reformation? Would it not make more sense to execute them and spare the calculating murderer, who, while capable of planning a deadly crime might also be capable of planning a productive life? As *News and Observer* editors complained, "The law gives the breaks to the most dangerous criminals—the crazy ones."[56] It was a persuasive argument that struck at the heart of the death penalty's purpose: should it, like incarceration, remove a dangerous person from among those he or she threatens? Should it strike back, with finality, at a violent criminal? Should it be a dispassionate, yet lethal, response to a terrible crime? North Carolina's governors, and before them solicitors and juries, preferred to answer these questions on a case-by-case basis.

Youth, just as a diminished mental capacity, was understood to diminish culpability, long before the United States Supreme Court ruled that executing minors was unconstitutional.[57] The history of North Carolina and its legal ancestor, England,

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[54] "Commutation Announced for William J. Dunheen," RNO, 10 May 1945, p. 5.

[55] "William Joseph Dunheen," Paroles (bound volume), vol. 10. State Agencies: Paroles Department. NCSA.

[56] "Two Sides of Humanity," Editorial, RNO, 12 January 1926, p. 4.

[57] Roper v. Simmons, 543 U.S. 551 (2005).

appeared to make room for the execution of children. British common law, which, undisturbed, prescribed punishment for North Carolinians for many years, judged that only children under seven years of age should be absolved of responsibility for actions that would otherwise be considered criminal. Children between seven and fourteen could be held responsible, by execution, if the court deemed it appropriate, and a number of children, the youngest of which was ten years old, were executed in the United States before 1900. But by the early twentieth century, many states, including North Carolina, were beginning to treat youthful offenders differently than adults, seeking to protect their futures, and their bodies, with the creation of juvenile courts and the construction of juvenile detention facilities.[58] Giving children special consideration, however, did not prevent North Carolina from becoming a leader in executing teenagers. Between 1910 and 1961, the state electrocuted or gassed sixteen teenagers between the age of sixteen and eighteen.[59] It was the job of the governor to act as the final gatekeeper saving children from the death chamber.

In a 1957 study, sociologist Elmer Johnson found that the age of capital offenders provided a reason for commutation relatively infrequently, likely because other mechanisms kept young criminals off death row, but still appeared in as much as twenty percent of commutation statements between 1909 and 1954. Youth appeared most frequently as a reason for commutation later in this period. Marvin Matheson was one young African American who won back his life due to his youth in 1945. Convicted of

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[58] Victor L. Streib, "Death Penalty for Children: The American Experiences with Capital Punishment for Crimes Committed When Under Age Eighteen," Oklahoma Law Review, vol. 36, no. 3 (Winter 1983), 613-17.

[59] Streib, Death Penalty for Juveniles (Bloomington, IN: Indiana University Press, 1987), 202.

murdering the chief of police of Taylorsville, after a failed appeal to the North Carolina Supreme Court Matheson was scheduled to die on April 27. But a few days before his execution date, Matheson received a commutation. There was no new evidence, Governor Cherry admitted in his commutation statement, and Matheson's crime was "'terrible.'" But Matheson was only fifteen when he committed the crime, and Cherry did not "feel that the State of North Carolina should execute a child. … I cannot allow this boy to be executed."[60] Matheson was lucky to be fifteen. In 1946, Governor R. Gregg Cherry gave the lawyers of teenaged murderers Herman Matthews and Calvin Coolidge Williams extra time to dig up new evidence, extending the boys' wait on death row, but when the attorneys failed to find anything exculpatory, he allowed their asphyxiations to proceed. One reporter explained that while youth was an important factor for those whose cases appear before the Parole Commission, "of first importance are the facts of the case," and only youths under sixteen years of age could expect commutation.[61]

Very few young women made it far enough in the death penalty process to need a death sentence commuted. In fact the law punished women less frequently than men: a look at prison populations for any given year reveals many fewer women than men in the custody of the state. In 1916, the prison system, including the State's Prison and its various satellite work camps, held over 850 men but fewer than 50 women; ten years later, the male prison population had ballooned to more than 1,300, but the female population had grown by just one inmate; and in 1940, the male population was

[60] "Sentence of Young Slayer Commuted to Life Term," p. 2.

[61] "Youths Will Die at Prison Today," RNO, 13 December 1946, p. 3; James Whitfield, "Young Negroes Die for Murder," RNO, 14 December 1946, p. 10.

approaching 10,000, while the female population was 150.[62] The vast difference in the number of incarcerated men and women in North Carolina in the early part of the twentieth century does not just reflect the fact that the state's men behaved worse than its women. They did, but the deference given to women by local law enforcement officers and prosecutors likely kept many women out of the criminal justice system, denying the state a chance to incarcerate them.

This emphasis on punishing men extended to North Carolina's death penalty process. Of the 660 people admitted to death row between 1910 and 1961, just six were women, only one of them white. In a measure of the protection womanhood offered even to African Americans, four of these women eventually won commutation. While some men, such as rapists, were commuted because the governor and others believed that their victims were not chaste enough to deserve retribution, some female criminals won their lives because they were considered too ladylike to die in the death chamber. The bar for such consideration was set low.

Ida Ball Warren was one such criminal. In 1916, she received lavish attention because, in addition to being a white woman, and one with a taste for romance, she was the first woman in North Carolina sentenced to death under the state-run death penalty system. Alluring enough to attract two men at once, Warren resolved the ensuing quandary by enlisting her paramour to murder her husband.[63] That paramour, Samuel P. Christy later told law officers that Ball had entranced him: "'I became a perfect love slave to her,'" he said. "'I was in her power deeper than I really thought at the time, I

[62] Prison Reports, 1915-1916 (12), 1924-1926 (39), and 1938-1940 (393). NCC.

[63] Neil Morgan, "Woman and Husband Die in Gas Chamber at Prison," RNO, 2 January 1943, p. 11.

guess.'"[64] There seemed to be little question of Warren's guilt, despite her efforts to implicate Christy and portray herself as an innocent bystander, but the judge had difficulty giving Warren a death sentence. Speaking from the bench, he told the people in the crowded Winston-Salem courtroom that he wanted them "to realize something of the ordeal of the court being forced to pronounce the extreme penalty of the law upon a woman."[65]

After the North Carolina Supreme Court rejected Warren's appeal, it fell to Governor Locke Craig to decide whether to let Warren's sentence stand. Craig issued a lengthy statement explaining his decision in the context of its gravity. "When a petition for pardon or commutation is placed before the Governor he must act," Craig told the public. He then added additional layers of responsibility between himself and Warren's fate, adding, "He cannot avoid the responsibility. His action is the orderly process of the administration of justice, provided in the Constitution. His judgment is the final decree of the people and the law pronounced by the ultimate tribunal." But, he went on, "as the Governor of the State of North Carolina it is not my judgment that the majesty of the law demands that this woman, unworthy and blackened by sin though she be, shall be shrouded in the cerements of death, dragged along the fatal corridor and bound in the chair of death. … The killing of this woman would send a shiver through North Carolina."

[64] Manly Wade Wellman, Dead and Gone: Classic Crimes of North Carolina (Chapel Hill: University of North Carolina Press, 1980), 73.

[65] Wellman, 81.

He admitted that his decision "may arise from misconceived sentimentality," although he hoped that it "'[arose] from the deep and holy instincts of the race."[66] His instincts also told him that if he was going to commute Warren's sentence, he had to also commute the sentence of her murderous collaborator, Samuel Christy. Both she and Christy eventually won commutations to just over twenty years in prison.[67] Warren was guilty, and while she seduced the press, court testimony revealed her as less charming than she was ruthless. Her sex alone saved her from the electric chair.

The unlucky women who did not receive the same consideration as Warren were African-Americans Bessie Mae Williams and Rosana Phillips. Phillips followed her husband, Daniel, to the gas chamber in 1943 for the murder of the couple's landlord. The trial revealed that Daniel had killed the man with an axe; Rosana, in assisting with the disposal of the body, made herself culpable for equal responsibility. She might have won more pity from the jury had she not married Daniel after the murder and honeymooned with him on the victim's money. As the death date approached, the *News and Observer* reported that Rosana was hopeful for a commutation, certain that a reason for mercy would arise. When it did not come, parole officials hoped that in sending Rosana's husband Daniel into the gas chamber first, they might spur a confession that would exonerate Rosana and give the governor an excuse to commute her. But Daniel went to his death with only the customary prayers on his lips, and Rosana followed.[68] The following year, nineteen year-old Bessie Mae Williams died in the gas chamber for her

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[66] Prison Department, Central (State) Prison, William W. Kitchin to Thomas W. Bickett, Bound Volume GO 55: Reasons for Pardons and Commutations, Reprieves, 1912-1917, 457. NCSA.

[67] Prison Department, Central (State) Prison, Box 38: Death Sentences, 1910-1920. NCSA; "Ida Ball Warren," Editorial, RNO, 10 November 1926, 4.

[68] Neil Morgan, "Woman and Husband Die in Gas Chamber at Prison," RNO, 2 January 1943, p. 11.

confessed participation in the robbery and brutal murder of a Charlotte taxi driver. A female accomplice fourteen at the time of the murder, won a commutation from Governor J. Melville Broughton, but the governor explained that Allison's commutation was due wholly to her age, and Williams could not expect similar mercy.[69]

Ida Ball Warren's trial captivated North Carolinians in the early twentieth century, but it did not become the sensation that an arson trial did in 1931. On March 12, 1931, a gang of determined arsonists torched two residence halls at Samarcand Manor, a school for delinquent girls in Eagle's Nest, causing more than $100,000 worth of damage. Police charged sixteen suspects the following day. It did not matter that the suspects were adolescent girls; if convicted of arson, they would receive the death penalty. The trial touched off a statewide discussion of North Carolina's faltering effort at serving its neediest citizens and laid bare many residents' enduring distaste for poverty, especially when mingled with sex. *News and Observer* columnist Nell Battle Lewis put her new law degree to work for the first time defending the girls, using the opportunity to publicize the cruel corporal punishments they endured while in the state's care, and revealing her clients' sexual histories to illustrate their difficult childhoods. The press and the public vacillated between pity for the victims of rough treatment and revulsion against these depraved young women, who seemed to embody a dangerous new style of sexual, aggressive womanhood.[70]

The girls' behavior while awaiting trial heightened observers' anxieties. At the Robeson County jail, one group of girls destroyed their cells, tearing up their bunks and

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[69] "Three Executed in Gas Chamber," RNO, 30 December 1944, p. 10.

[70] Susan Cahn, "Spirited Youth or Fiends Incarnate: The Samarcand Arson Case and Female Adolescence in the American South," Journal of Women's History, vol. 9, no. 4 (Winter 1998), 152-181.

setting fires. Another, in jail in Carthage, torched their beds and attacked a firefighter called to quench the blaze. After being transferred to the Moore County jail, they set fire to it, too.[71] A week later, the girls were to be tried for first-degree arson, but a plea bargain spared their lives, as well as ensuring North Carolina did not sully its reputation. Far from death, the twelve girls convicted received sentences for their second-degree arson convictions ranging from eighteen months to five years. Like Ida Ball Warren, the Samarcand girls, though they embodied the kind of femininity that many white North Carolinians found distasteful, when facing execution, were treated with a deference they might not have enjoyed in any other circumstance.

The Samarcand girls received their mercy before their case came before their governor, saving him from having to reconsider their guilt. In a 1964 nationwide survey of clemency proceedings two scholars suggested that many governors were unwilling to consider the kind of evidence that might impugn the wisdom of the jury or the suitability of the court. The cost was too high: to consider facts that the jury had overlooked or misunderstood, to introduce evidence that had been suppressed, or to question the reliability of key witnesses risked questioning the legal system's integrity. "Clemency authorities," they wrote, "are not readily willing to substitute themselves for a jury of fact finders."[72] North Carolina's authorities certainly keenly felt that a reversal of a jury's decision might be interpreted as a vote of no confidence. For example, as he explained his commutation of the mentally ill teenager William Dunheen, Governor R. Gregg Cherry tried to preclude offense by praising the court's decision. "Those who had a part

[71] Annette Louise Bickford, "Imperial Modernity, National Identity, and Capital Punishment in the Samarcand Arson Case, 1931," Nations and Nationalism, vol. 13, no. 3 (2007), 440.

[72] Abramowitz and Paget, 160.

in the conviction and review are to be commended for their diligence," he wrote as he overturned the product of that diligence.[73]

However, Cherry, and the other chief executives who preceded and followed him, regularly reviewed and rereviewed evidence, testimony, and procedure. Cherry himself was not afraid of saying so when he thought the jury was in error. In 1946, he pointed out that "there appeared to be some misunderstanding" among jurors who convicted A.C. Wise of first-degree murder when he commuted Wise's sentence to life in prison. After all, the jurors had recommended mercy, a privilege jurors could exercise with first-degree burglary convictions in order to suggest life imprisonment rather than a death sentence. In murder and rape cases, jurors could convict a prisoner of a lesser charge but upon a first-degree conviction, could not get around the mandatory death sentence. After eleven jurors wrote to Cherry explaining their mistake, he decided to commute Wise's sentence. Anyway, Cherry added in his statement, there was doubt as to premeditation—Wise killed his lover when they fell to quarreling during a clandestine meeting in the forest. "The cause of their meeting saps the foundation of civilized society," Cherry wrote, but such a crime was not punishable by death.[74]

In 1918, Governor T.W. Bickett explained his commutation of convicted murderer Arthur Peeden, sentenced to death that summer for killing his best friend. Bickett saw two explanations for Peedin's crime: either he killed his friend for forty-five dollars, or killed him in a fit of anger. If Peedin killed his friend for the money, that was

[73] "Statement of Commutation: William Joseph Dunheen," 9 May 1945. R. Gregg Cherry Papers, Agencies, Commissions, Departments, and Institutions, 1945-1948, Paroles Commission, May 1945-December 1949: Paroles Commission, NCSA.

[74] "Governor Spares Guilford Slayer," RNO, 3 January 1946, p. 12.

evidence enough of his insanity, because no one in their right mind would kill their friend for just forty-five dollars. And Peedin's mother was known to be crazy, adding weight to the suggestion that Peedin was not in his right mind. If he killed his friend in a rage, the murder could not have been premeditated, a necessary condition for a first-degree conviction. Either way, Bickett decided, Peedin did not deserve death. He commuted the condemned man's sentence to life imprisonment in November, explaining that while he did not favor abolition of the death penalty, he thought "that it only ought to be imposed only when it clearly appears that the crime was cold-blooded, willful, and deliberate."[75] Peedin was paroled in 1943.[76]

A number of commuted prisoners won back their lives simply because the governor decided that they were not guilty, or not guilty to the degree that the jury had decided. Elmer Johnson saw evidence of this kind of commutation in as many as half of the statements released by governors.[77] Life imprisonment must have been cold comfort for these formerly condemned prisoners, but some won full pardons and were released two years after entering death row. One such prisoner Mason Wellman, a black man sentenced to death for raping a white woman in Iredell County in 1941, received a full pardon from Governor J. Melville Broughton in 1943, and on the afternoon of April 17, became the first man ever freed by the state of North Carolina after receiving a death sentence. It took an investigation by the Paroles Commission, undertaken over the course of three reprieves, and a hearing at which the prosecution and defense attorneys presented

[75] For another example of retrial-by-governor, see "Craig Reprieves First Prisoner," RNO, 21 January 1913, p. 10.

[76] "Arthur Peedin," Paroles for Capital Criminals (bound volume), vol. 7. State Agencies: Paroles Department, NCSA.

[77] Johnson, "Selective Factors in Capital Punishment," 167.

their cases to the Paroles Commissioner, to establish that Wellman was in another state at the time of the rape. As Broughton considered the case, one influential African-American suggested an execution would "be nothing but a legal lynching."[78] Broughton bristled at the suggestion, but the following year, making sure to reassure the voting public that this action was in no way a slur on the reputation of the rape survivor, he pardoned Wellman and set him free.[79]

Few innocent men received a pardon with their freedom, or freedom at all, such as Mason Wellman did, but a number were eventually paroled. If a former death row inmate served his time quietly, he might eventually see his sentence reduced to a period of years, and finally, receive parole. For example, in 1936, when he was twenty years old, Reed Coffey was sentenced to death for the murder of his uncle. As Coffey's death date approached, evidence of his innocence and his strenuous protests spurred the Paroles Commission to launch an investigation, which netted him a commutation about a year after his conviction. But while Paroles Commission investigators believed that Coffey was innocent, it was not until November of 1940, four years after his commutation, that Governor Clyde Hoey reduced Coffey's sentence to a term of twenty to thirty years. After fourteen and a half years, Coffey, a "nearly model prisoner," not to mention an apparently innocent man, finally earned a parole.[80]

Others received commutations because of doubts about the degree of their guilt. First-degree murder, for example, required premeditation and malice, hotly debated

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[78] C.C. Spaulding to J. Melville Broughton, 6 November 1942, in J. Melville Broughton Papers. Agencies, Commissions, Departments, and Institutions, 1941-1944. Box 61: Folder: Paroles Commission. NCSA.

[79] "Negro, Sentenced to Die, Now Is 'Free Man' Again," RNO, 17 April 1943, p. 1.

[80] "Man Who Once Faced Death Wins Parole," RNO, 23 January 1948, p. 11.

terms, but ones that excluded killings during fights, for example. Kenneth Taylor was an African-American man who killed a "woman of poor reputation" in a "house of bad character" during a quarrel. Governor Hoey commuted Taylor, rebuffing the jury's judgment by explaining that "I do think he killed under sudden impulse rather than in cold blood."[81] Gary Thompson, an African-American man sentenced to death for a 1935 burglary, won a commutation a few hours before his execution after Governor Ehringhaus was "'informed by officials and responsible citizens … that this crime involved no serious injury to either person or property.'"[82]

The governor's action in cases involving guilt and innocence may be the most obvious, but also the most surprising, use of executive power. The law bound juries to hand down guilty verdicts to female murderers or youthful rapists, and then bound judges to deliver death sentences that many people believed were excessive. In those cases, gubernatorial clemency acted as an essential safety valve for an inflexible, punitive legal system. But when a governor readdressed questions of guilt and innocence, he was acting even more forcefully against the structure of the criminal justice apparatus by rejecting the wisdom of the jury as well as the guidance they labored under. The governor was working within the confines of the law, which granted him total clemency power, and he sometimes reassessed guilt at the suggestion of a judge or participating attorney who suggested that jurors might not have understood the implications of their verdict. But their actions in revisiting questions of guilt dramatized the fragility of the death penalty process, and raised the troubling specters of those who died in North Carolina's death chamber protesting their innocence.

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[81] "Sentence Lifted on Negro Killer," RNO, 8 July 1938, p. 2.

[82] "Grant Clemency to Doomed Negro," RNO, 10 August 1935, p. 2.

Neither youth, nor mental condition, nor sex, nor innocence guaranteed that a governor would grant an appeal for mercy. Records from W. Kerr Scott's 1949 to 1953 term, more carefully kept than those of his predecessors, log the cases of those who did not receive mercy. Ernest Liles was executed for committing rape on November 22, 1950, just two days after his lawyer revealed new evidence that his accuser had not been raped; Covey Lamm, sentenced to die for murdering his wife in early March of 1950, died toward the end of that year despite what appeared to be a consensus that he was "unbalanced"; and while Judge Henry A. Grady told Governor Scott that he had no formal recommendation in the case of James Edward Lewis, condemned for murdering his wife, he added, "Here is a case where you and I can save the life of a miserable fool … I think we should do it."[83] Scott did nothing.

In 1920, Churchill Godley did not play the game well enough to earn a commutation from Governor Bickett. Godley was sentenced to death for raping a child in Smithfield the previous year, and following his sentence, friends and family made "heroic" efforts to save his life, arguing that the man was mentally unstable. But Godley himself said nothing on his own behalf for months after his conviction, and when he did, in a thirty-five page statement, he made no reference to the confession that helped secure a guilty verdict. Godley's lawyer argued that this inconsistency highlighted his client's compromised mental condition, but Bickett disagreed. He reasoned that if Godley was sane, he deserved to die for his crime and his long-delayed protest should be dismissed; if

[83] Case summary re: Liles, Ernest; Case Summary re: Lamm, Covey C; and Case Summary re: Lewis, James Edward, in Board of Paroles, Box 46: Death Case Summaries, 1948-1951, NCSA.

he was not sane, his effort to preserve his life should be disregarded and thus, he should be executed. Godley was executed in January of 1920.[84]

In 1927, J.A. Terry's murder conviction spurred a confrontation between Supreme Court justices and Terry's home community, demonstrating the power of the public voice in clemency proceedings. Terry, a white farmer from Guilford County, was nearing sixty years old when a number of Supreme Court justices, who had recently rejected Terry's motion for a new trial, wrote to Governor Bickett with their belief that Terry was "unbalanced." But Guilford County residents lined up against clemency. From them, Bickett learned that Terry was "a violent man with an ugly temper," and "the judgment of the entire community in which he lived is that the murder was due to a habit the prisoner had formed of giving way to impulses of anger and hate."[85] The community thus decided, Bickett rejected Terry's appeal for mercy and Terry died in the electric chair on November 9, 1927.

IV. "Quit Intervening in So Many": Mercy and Community Involvement

Executive clemency originated as a kingly power, making mercy as capricious as execution. Yet North Carolina's governors sometimes used clemency to set aside a flawed jury verdict, clemency decisions often did more to democratize the death penalty than it did to shore up gubernatorial prerogatives. Elmer Johnson found that appeals from "responsible officials," members of the jury, or community members figured in more than half of commutation statements between 1909 and 1954, an illustration of the enduring depth of community involvement in the death penalty process. A community's

[84] "Churchill Godley Must Die Friday," RNO, 13 January 1920, p. 16.

[85] "Governor Signs Death Warrant for First Time," RNO, 3 November 1927, p. 5.

silence could doom a convicted murderer, but recommendations by respected citizens and others were certain to win a condemned prisoner a close examination by the governor and his staff.[86] As Governor Angus McLean wrote in one commutation statement, "It is inconceivable that all of these citizens should speak with one voice in appealing to me for clemency if it were not for the fact that they earnestly believe the infliction of the death penalty would be a grave injustice under the circumstances of the case."[87]

While appeals for a condemned prisoner's life often arrived in the governor's mansion as letters, clemency hearings allowed communities to revisit capital crimes not far from where they took place. These hearings, whether the formal public gatherings held in injured communities, or informal gatherings in governors' offices, involved North Carolinians in the death penalty process at a time when a professionalizing law enforcement structure was increasingly alienating ordinary people from crime control mechanisms. Before 1910, North Carolinians could expect that a capital criminal would be hanged by their own sheriff, outside their own courthouse, or in the yard of the jail they passed every day on their way to work. With executions taking place in Raleigh, people in places such as faraway Asheville lost their connection to the capital criminal as soon as days after his crime. Newspaper coverage of the criminal's execution would sate curiosity, but was also a reminder of the way in which this most severe response to crime no longer appeared to rest in the hands of the injured community. One way to reassert that connection, to argue for the role of community judgment in punishment, was to petition the governor for or against clemency.

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[86] Johnson, "Selective Factors in Capital Punishment," 167. See "Negro Gets Commutation on Eve of Execution Day," RNO, 8 October 1943, p. 5.

[87] "Capital Punishment in North Carolina," 101. NCC.

Before the accelerating professionalization of the clemency process, North Carolinians might travel to Raleigh to meet the governor in person and state their arguments. Such was the case with Asheville residents interested in saving the life of James Allison. On the week of Allison's scheduled electrocution in 1911, Allison's attorneys and friends visited Governor W.W. Kitchin to appeal for his life, arguing that Allison, convicted of bludgeoning another man to death with a blacksmith's hammer, was "mentally weak"[88] and tended to "lose reason under excitement."[89] But the trial judge sent no recommendation for clemency, the jurors remained quiet, and Allison himself, thanking those who advocated on his behalf, said that he preferred death to a life sentence. When Kitchin announced that he would not spare Allison's life, Allison wrote, "I want to say to our good Christian governor that his final decision has satisfied me far more than a life sentence in prison, and for him not to worry over this, for I feel that he has done what he felt was right."[90]

North Carolinians appeared to feel that they had a real voice in whether death sentences were carried out. As a double execution slated for Good Friday in March of 1951 approached, a number of North Carolinians wrote to Governor W. Kerr Scott requesting a delay. "I believe this is an outrageous date to have an execution," huffed Bitsy Clem of Raleigh. Asking Scott to postpone the execution to "a more proper date," Clem added, "I, firmly believing that you are a Christian, know that this is a small favor

[88] "Working for Allison," RNO, 22 February 1911, p. 2.

[89] "Death Today in Electric Chair," RNO, 24 February 1911, p. 2.

[90] *Ibid.*

to ask one for the sake of Christianity."[91] Another petitioner made the same request. "It seems ironical that an execution should be set for this day," wrote Gerry Dickinson. "It certainly is not in keeping with the significance of the day or the week." He added his hope that Kerr would select "a more suitable time" for the double asphyxiation.[92]

One way in which some citizens tried to influence their governors was by complaining about the relative infrequency of executions. One 1949 resident ably summed up the many complaints about gubernatorial commutations in a letter to Governor W. Kerr Scott. The writer, in urging Scott to let stand the death sentence of wife-murderer James Creech, argued that clemency eroded support for courts and trampled on the rights of, and removed the protection of the law from, law-abiding North Carolinians:

> … we do feel that you are indebted to us as well as all other law abiding citizens in North Carolina, and that debt is this: Protect our daughters in married life by ridding the Governor's Mansion as the (scape goat center) for criminals, stop it from the Hobby (as the last four years seem to have been) for commuting, paroling, and pardoning criminals, and turning them back on society as almost unpunished murderers or other types of low violators. It is embarrassing and regrettable to feel that the time has come when a small citizen must speak out in defense of the rights granted us by the laws of our state, and in turn denied us to a great extent by the powers vested in our Governors, and which has been to our thinking overexercised during the last four years. If we cannot have a Governor who will stand pat on the execution of the law, and have more respect for our courts and quit intervening in so many (especially murder cases) we just as well close out court

[91] Bitsy Clem to W. Kerr Scott, 30 March 1951, W. Kerr Scott Papers, Subject Files, 1951, Box 98: Paroles and Commutations, Paroles: General and A-C. NCSA.

[92] Gerry Dickinson to W. Kerr Scott, 20 March 1951, W. Kerr Scott Papers, Subject Files, 1951, Box 98: Paroles and Commutations, Paroles: General and A-C. NCSA.

houses and quit spending our State's perfectly good money to convict criminals.[93]

Concern about the deleterious effects of commutation were not limited to law-abiding citizens. In 1944, Alex Harris, the forty-nine year-old tenant farmer executed for one of four murders he committed during a hold-up of a gas station, cautioned Governor Cherry against commuting him. "'I know I ought to pay the penalty,'" he told his chaplain. "'If I should come out of this with a commutation of sentence, and ten years from now the Governor would see fit to parole me, other people might think they could do the same thing and get away with it.'"[94]

Another source of worry was the effect of an increasingly formal clemency process on the path of punishment. Deliberations extended the time between conviction and execution, which even by the early years of the twentieth century was alarming North Carolina's judiciary. The justices of the Supreme Court, often blamed for the legal procedures that lengthened the legal process, themselves blamed a sluggish trial and appeal process for the state's relatively high homicide rate and the incidence of lynching. In 1914, in rejecting condemned murderer Jim Cameron's appeal, Chief Justice Walter C. Clark added a lengthy aside on behalf of "organized society," which must object to the "slow and cumbersome" path of justice that saw Cameron still alive eight months after receiving a death sentence. Clark complained that while the state had a death penalty, "the punishment [for murderers] is too often a moderate fine paid by the murderer, or his friends, to his counsel in the shape of the fee and a far heavier fine laid upon the

[93] L.H. Stephenson to W. Kerr Scott, 12 January 1949, W. Kerr Scott Papers, Subject File, 1949: Creech Case. NCSA. Letter transcribed as written.

[94] "Hoke Man Dies in Gas Chamber," RNO, 29 January 1944, p. 9.

taxpayers in the form of a long, tedious, and futile trial."[95] It would, of course, only get worse. As the legal process became more protracted, justices continued to call for clarification and clean-up. After Earl Neville was saved from a lynch mob by the governor's promise of a speedy trial, Clark warned that the governor risked reneging on his word by no fault of his own, due to the slow progress of Neville's appeal, sent on its meandering path "by the easy indifference of officials."[96]

Indifference was certainly a factor in the death penalty process, but the true culprit in slowing the application of the death penalty was sympathy. North Carolinians were often predisposed to pity capital criminals, or at least to extend them more consideration than the law dictated. They established a precedent of executing relatively few of those condemned to die in the very early years of state-run electrocution. In 1912, the warden of the State's Prison reported to the Legislature on the fates of the twenty-five men sentenced to death since the adoption of the electric chair in 1910. Two received new trials on appeal, one winning acquittal and the other a second-degree conviction; eleven were commuted; and twelve were executed.[97] For the first three decades of state-imposed death penalty in North Carolina, nearly as many prisoners were commuted as were executed. One Commissioner of Paroles reported that between 1910 and the end of that administration in January of 1937, 183 people had been executed, but 149 commuted.[98]

North Carolina's newspapers reprimanded state officials with weekend articles and cartoons. In 1928 one journalist laughed that the motto of death row should be,

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[95] State v. Jim Cameron, 166 N.C. 379 (1914).

[96] State v. Earl Neville, 174 N.C. 731 (1918)

[97] Prison Report (1911-1912), 12. NCC.

[98] Edwin Gill, "Executive Clemency in Relation to Capital Punishment: A Report." NCSA.

"While There Is Life There Is Hope," because when someone "takes up residence in the shadow of the electric chair, [he] holds a ticket in the strangest lottery known to man."[99] The following week the *News and Observer* published a cartoon of a scowling man emerging from shadow, a gun in his hand. "Chair?" he asks. "Bah!" Below the gun is a caption: "N.C., 1910-1926. Tried for Murder, 3,065. Executed, 63."[100]

Locke Craig commuted more people than he permitted to be executed, as did Cameron Morrison. With the exception of J.C.B. Ehringhaus, during whose administration fifty-nine men died in the electric chair and gas chamber and twenty-nine won commutations, most governors commuted nearly half of the condemned criminals whose cases they considered, and just a few years into the twentieth century, they were considering almost every capital conviction.[101] Before Ehringhaus took office, in fact, only about thirty percent of white murderers and rapists sent to death row would eventually die in the electric chair; African-American murderers and rapists were twenty percent more likely to be electrocuted. White burglars, though just three were sent to death row, were all commuted, as opposed to just sixty-four percent of African-American burglars.[102]

On top of the decent odds that death row prisoners would not in fact die, in the first half of the twentieth century the number of people admitted to prison for potentially capital crimes dwarfed the number of those condemned to death. According to the poorly kept records of the State's Prison, sixty-one first-degree murderers entered the prison

[99] Parker, Jr., "The State's Death Lottery," p. 4.

[100] "Why?" Cartoon, RNO, 22 January 1928, p. 4.

[101] Gill, "Executive Clemency in Relation to Capital Punishment."

[102] Johnson, "Selective Factors in Capital Punishment," 169.

system between 1909 and 1916, in addition to 121 burglars, at least 9 rapists, and eleven arsonists, amounting to a total of 202 potentially capital prisoners. During these years, twenty-nine people died in the electric chair. Similar statistics exist for other periods during which record-keepers chose to note the number of prisoners entering the system and differentiated between first-degree murderers and other killers. For example, in the year ending on 30 June, 1932, just one of sixteen men admitted to the prison system for a rape conviction received a sentence of more than five years; only one of thirty killers received more than five years. Between 1927 and 1930, forty-one arsonists were imprisoned, and not one died in the electric chair.[103] North Carolinians were finding ways around mandatory sentencing laws.

With help from Ehringhaus and an active execution season in the late 1940s, the percentage of executed capital criminals inched upward, but not so much that in 1941 the *News and Observer* could not claim that "the mandatory death sentence isn't mandatory."[104] The paper was right: executive clemency spared a large number of North Carolinians sentenced to death, transforming the death penalty into just one of a variety of responses to capital crime. At any given time, many of the inmates on death row could expect to be "let out into the yard," as the slang went, moved into the general population, and maybe even paroled.[105] And these were the unlucky men who were actually sent to death row after being convicted of a murder, a rape, or a burglary. Most people convicted of these crimes never received a death sentence because before the sentencing phase of

[103] Culled from Biennial Reports.

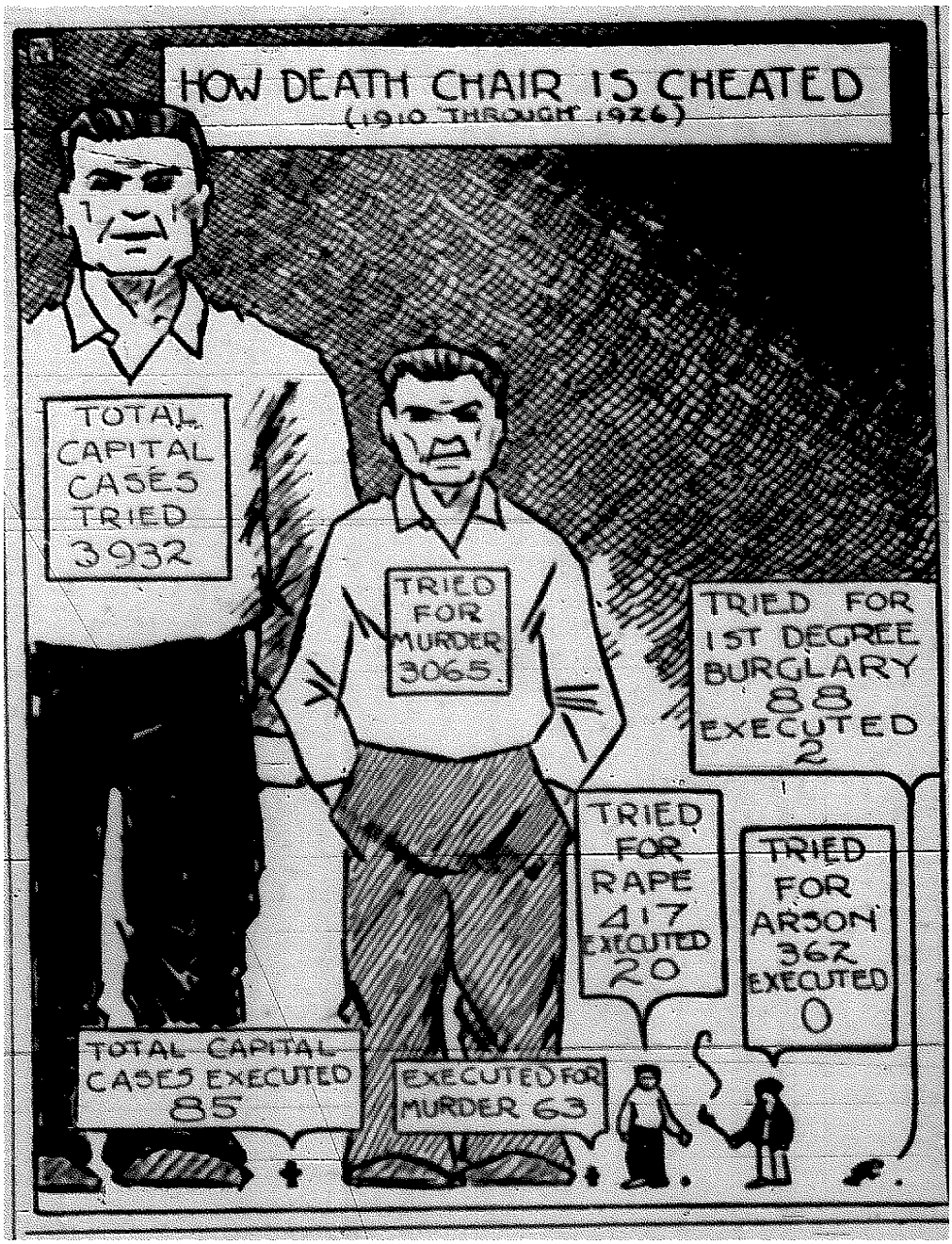
[104] "Passing the Buck on Death," Editorial, RNO, 10 February 1941, p. 2.

[105] Joseph L. Sullivan, "Criminal Slang," Law Student Helper 273 (1911), 274.

Figure 6

A 1928 cartoon points out that relatively few of the North Carolinians who stood trial for murder were executed. *Raleigh News and Observer, 22 January 1928*.

Figure 7



A 1928 cartoon illustrated concerns about the number of serious criminals who escaped execution. *Raleigh News and Observer*, *22 January 1928*.

the death penalty process, North Carolinians prevented the state's rigid laws from taking effect.

As early as 1924, the death penalty process in North Carolina was raising questions, such as, "Is murder less deadly than whooping cough?" So asked Frank Smethurst in a 1924 Sunday piece in the *News and Observer*. He noted that since 1910, when the state abolished public hangings, courts addressed 1,168 capital cases, but just 127 convicts entered death row. Of those 127 condemned men, only 67 were executed. According to Smethurst, someone indicted for a capital crime in North Carolina in the early years of the electric chair had between a five and six percent chance of being executed. As he wrote, these were odds that "would make a gambler blush."[106] According to North Carolina's attorneys general, who left behind an incomplete record of the capital cases they brought before Superior Courts, the number of such cases actually exceeded Smethurst's calculation, not including second-degree crimes. The attorneys general reported on capital cases in their yearly reports to the state legislature—reports in which they may have grouped all sex crimes under rape, inflating the number of capital cases on record, but also omitted some data and appeared to transpose numbers for certain crimes—recording 1,269 capital cases between 1909 and 1924, driving the odds of electrocution even further down.[107]

North Carolina's mandatory death sentence created a new kind of deterrent, not to criminals contemplating a burglary or a rape, but to solicitors charged with prosecuting them, juries charged with convicting them, and judges charged with sentencing them. It is

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[106] Frank Smethurst, "Has Capital Punishment Been a Failure in North Carolina?" RNO, 16 November 1924, p. X1.

[107] Compiled from Attorneys General Reports (1909-24). NCC.

not possible to count the number of acquittals resulting from discomfort with mandatory death sentences, but North Carolinians sensed that the laws prevented convictions. Echoing an ongoing national conversation among lawyers and academics, the *News and Observer* worried that jurors were giving "undue weight" to their doubts in capital cases because they refused to accept the responsibility for execution. The result was that guilty people went free.[108]

Acquittal was one way jurors, judges, and lawyers avoided mandatory sentences. Another path was trying to reverse their own decisions after they were made. It was a powerful sign of the confounding status of the law that with some frequency, the same people who sent someone to death row sought to bring them back, agreeing to use one law to skirt another, trusting that executive clemency could be used to get around mandatory sentences. These appeals represent a remarkable stage in the death penalty process: an after-the-fact effort at nullifying a verdict by the very people who produced it. Commissioner of Pardons Edwin B. Bridges explained the move in a 1929 letter to Governor O. Max Gardner: "Often Judges of the Superior Court, after giving more mature consideration to the sentence imposed on the prisoner," he wrote, "feel that sentence was too severe and recommend that the prisoner's sentence be reduced."[109]

Such was the case for George B. Plyler, the kind of man who did not seem to deserve special treatment. As Plyler testified in court in 1911, he had grown fearful of a neighbor, Carter Parks. Plyler had insulted Parks by murdering his brother-in-law, and

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[108] "Capital Punishment," Editorial, RNO, 28 September 1925, p. 4. See also Maynard Shipley, "Does Capital Punishment Prevent Convictions?" The American Law Review, vol. 43, no. 3 (May-June 1909), 321-334.

[109] Edwin B. Bridges to O. Max Gardner, 21 February 1929. O. Max Gardner Papers, General Correspondence, 1929-33, Box 95, Parole Commission re: Outline of Work, 1929. NCSA.

then, by trying to kill Parks himself. After this failed murder attempt, Plyler began to worry that Parks might seek revenge, and that he might not survive it—he was a small man, and had only one eye, Plyler offered three men a gallon of liquor each to kill Parks before Parks killed him. They accepted, and soon afterward, Plyler was arrested, tried, and sentenced to death. His dedication to self-preservation led him to implicate his hit men. It was this gesture of civic responsibility, coupled with urgent appeals for his life, which won him a letter of recommendation from his trial judge. Plyler was "properly convicted," Governor W.W. Kitchin wrote, but since the judge who tried him recommended clemency, he commuted Plyler's sentence.[110]

Judges did not always need to let the facts of the case "marinate" in their minds before forming a "more mature" opinion of the case. Sometimes, judges made decisions during capital trials that led them to strike a deal to ensure a convicted criminal would not die. The result was a bargain that saved a life and underscored that the symbolism of the death penalty did not require an actual execution. In 1942, for example, one superior court judge called solicitor Thomas Johnson into his chambers after the rape conviction. The judge told Johnson that he was setting aside the death sentence and reversing course, allowing Blue to plead to a lesser charge. Johnson resisted, telling the judge that "the publication of [Blue's] death sentence would have a very salutary effect in the community in which the prisoner lived." He convinced the judge to pronounce the death sentence, with the understanding that they would recommend life imprisonment in a follow-up letter to the governor. As Governor Broughton considered Blue's application for clemency, Johnson wrote to Commissioner of Paroles Edwin Gill. He had assured the

[110] "Plyler Escapes Electric Chair," RNO, 17 February 1911, p. 3.

judge that "there would be no difficulty," he wrote, and "naturally, if the Governor declines to follow our recommendation, I am left in a somewhat embarrassing situation."[111] Blue was not executed, and was paroled in 1958.[112]

These efforts on behalf of capital criminals constituted an informal recommendation of mercy at a time when the law did not formally allow juries this privilege. In 1923, for example, Governor Cameron Morrison considered commuting the death sentences of Eugene and Sidney Gupton, convicted of first-degree murder in Edgecombe County. Morrison explained that although the case was a "horrible one," he was reluctant to disregard the recommendation of the Superior Court judge, the prosecutors, and the trial jury that the brothers receive life imprisonment for their crime. The jury convicted them, but, whether out of ignorance of law or an understanding of practice, added a recommendation of mercy. The judge was bound to hand down a death sentence, but, he explained in a letter to Morrison, "'If I had had the power I should have shown some regard to the request of the jury.'" The judge was powerless, but Morrison was not: he commuted the Guptons' sentences.[113]

Alex Harlee won a commutation, and eventually an indeterminate prison sentence, after the trial judge, solicitor, and entire jury wrote to Governor Morrison recommending clemency. George Williams and brothers Fred and Frank Dove were sentenced to death for the 1922 murder of a rural mail carrier; records show that the three

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[111] Thomas L. Johnson to Edwin Gill, 31 January 1942, in J. Melville Broughton Papers. Agencies, Commissions, Departments, and Institutions, 1941-1944. Box 61: Folder: Paroles Commission, NCSA.

[112] "Walter Blue," Paroles for Capital Criminals, vol. 10 (bound volume), State Agency Records: Paroles, NCSA.

[113] "Governor Paroles Guptons; Grants Reprieves to Three," RNO, 28 June 1923, p. 1. Other examples include "Governor Spares Life of Carter," RNO, 2 December 1934, p. 1.

men were commuted in 1923, and denied parole two years later. But in 1929, seven years after another man confessed to the crime for which they were sentenced, they won full pardons "upon the strong recommendation of the trial judge, the trial solicitor, the arresting officers, the private prosecution, the prosecuting witness, a number of jurors and practically all the officials who heard the trial, who are of the opinion that the prisoners are entirely innocent of the crime for which they are charged."[114] The trial judge made a particularly strong push for clemency. "'I have prayed [for] the God of all truth, knowledge, and judgment, without whom nothing is true, or wise or just to direct me,'" he wrote. "Each of us, with Robert E. Lee, believes that 'duty is the sublimest word in the language.'"[115]

Despite the frequent success of these pushes for mercy, such efforts did not guarantee clemency. In 1937, before the law made such recommendations binding, jurors recommended mercy for nineteen year-old Robert Brown as they convicted him of first-degree murder. The governor declined to commute his sentence, revealing that the law's flexibility bent it in both directions.[116] The *Charlotte Observer* would have applauded Hoey's resolve. In 1924 the paper had condemned jurors' efforts on behalf of condemned criminals, worrying that that such post-conviction appeals meant "that the work of the court is nullified and public confidence in the courts is shaken." A juror's "good sense is

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[114] 27 April 1923 entry, Paroles for Capital Criminals, vol. 1 (bound volume), State Agency Records: Paroles, NCSA. Article on confession: "Willie Hardison Exonerates Others as He Goes to Chair," RNO, 28 April 1923, p. 12.

[115] "Commutations Go to Onslow Trio," RNO, 29 June 1923, p. 1. Other examples of post-conviction recommendations for commutations from trial participants appear in Cora Stegall, "Two Negroes Die in Gas Chamber," RNO, 23 June 1945, p. 2; "Governor Saves Bladen, Hertford Slayers," RNO, 27 December 1946, p. 22.

[116] "Governor Denies Plea for Mercy," RNO, 16 May 1937, p. 1. See also "Governor Spares Guilford Slayer," RNO, 3 January 1946, p. 12.

smothered under the froth of sentimentalism," the paper complained.[117] Days later, the *News and Observer* echoed this complaint, noting that "it may seem strange that men who would convict another man could turn right around and ask the Governor to aid the prisoner, but that happens many times."[118]

V. "After Nibbling at the Subject for Years": Codifying Mercy

Recommendations to the Governor were an essential way for judges and juries to skirt mandatory sentencing laws and apply a degree of practicality, or mercy, that the law did not allow. The *News and Observer's* editorial board believed that the practice highlighted the shortcomings of North Carolina's judicial system, and in a 1939 editorial, urged lawmakers to follow the examples of judges and juries and take a "practical approach … to the whole problem of capital punishment." Instead of relying on technicalities to free wrongly condemned prisoners, the editors reasoned, why not vest in judge and jury the kind of discretion only the governor could wield? The paper hoped that by doing so, the General Assembly might reverse "a prolific inspiration of cynical attitudes toward the whole judicial process."[119] Eventually, "after nibbling at the subject for years,"[120] the Legislature took this advice, essentially codifying the relative leniency that jurors and others had been extending to serious criminals for decades. First, in 1941, legislators voted to relax the state's mandatory sentencing laws, allowing juries to formally recommend mercy for first-degree burglars and convicted arsonists. According

[117] "How the Courts Are Hurt," Editorial, Charlotte Observer, 20 November 1924, p. 3.

[118] "This Is Justice Checked," RNO, 24 November 1924, p. 7.

[119] "Common Sense," Editorial, RNO, 7 January 1939, p. 4.

[120] "Under the Dome," RNO, 7 February 1941, p 8.

to the amended law, convicted arsonists and burglars "shall suffer death," but, "if the jury shall so recommend, the punishment shall be imprisonment for life."[121]

In 1949, the North Carolina Legislature amended the state's general statutes to make capital punishment in first-degree murder and rape cases discretionary as well. Legislators did so at the recommendation of the Special Commission for the Improvement of the Administration of Justice, a group led by North Carolina Supreme Court Justice Sam Ervin and Harold Shepherd, dean of the Duke University Law School. In its report, published in 1948, the Commission noted that North Carolina was among just four states with a mandatory death penalty and that "quite frequently, juries refuse to convict for rape or first degree murder because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence."[122] Instead, verdicts were being returned in harmony with a sense of justice that required ignoring the law.

The change meant that willful, premeditated killing, or a killing committed in the act of another felony, such as a robbery, remained punishable by death. But "provided, if at the time of rendering its verdict in open court, the jury shall so recommend," the punishment would be life in prison. The law directed the same for rape, burglary, and arson.[123] Of course, the law was just giving a procedural nod to what juries had been doing for decades. For example, in 1923, Judge Frank Daniels of Edgecombe Superior Court wrote to Governor Morrison, recommending a commutation for convicted

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[121] C.S. 4233 (burglary) and C.S. 4238 (arson), c. 215, from "Statutory Changes in North Carolina Law in 1941," North Carolina Law Review, vol. 19, no. 4 (June 1941), 444.

[122] "Report of the Special Commission for the Improvement of the Administration of Justice," Popular Government 13 (January 1948), 13.

[123] G.S. 14-17 (murder), G.S. 14-52 (burglary), G.S. 14-58 (arson), G.S. 14-21 (rape).

murderers Eugene and Sydney Gupton. "Dear Governor," he wrote, "The jury accompanied their verdict of guilty of murder in the first degree with a recommendation to the mercy of the court. Under this verdict, I could impose only the death sentence. If I had the power, I would have shown some regard to the request of the jury."[124] After 1949, judges such as Daniels would be able to do so, and juries, instead of recommending mercy for the governor after handing down a guilty verdict, could make a legally binding recommendation in the courtroom. One first-degree murderer wrote from a prison farm to "My Dearest Mr. Governor Scott" thanking him for "this new mercy law you all passed."[125]

The 1949 legal change left the jury "totally unconfined," to the point where after the ruling, the Supreme Court of North Carolina at least twice awarded new trials to defendants when the Court believed that the judge, in charging juries to look at "'facts and circumstances'" had improperly limited jury discretion.[126] Furthermore, judges could not explain to juries the implications of their decision to recommend mercy; the Supreme Court of North Carolina granted a new trial in the early 1950s because when, mid-deliberation, a juror asked the judge if the defendant might receive parole if given a life sentence, the judge said that he could not answer the question but failed to instruct the jury to put it out of their minds altogether.[127]

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[124] "Governor Paroles Guptons," p. 1.

[125] Joseph Millings to W. Kerr Scott, undated, W. Kerr Scott Papers, Subject File, 1949. NCSA.

[126] "A Survey of the Decisions of the North Carolina Supreme Court for the Spring and Fall Terms of 1953," North Carolina Law Review, vol. 32 (1954), 439.

[127] State v. Conner, 241 N.C. 468, 85 S.E.2d 584 (1955), as described in William E. Graham, Jr., "Criminal Law—Improper Court Response to Spontaneous Jury Inquiry as to Pardon and Parole Possibilities," North Carolina Law Review, vol. 33 (1955), 665.

In 1953, another law allowed those indicted for capital crimes to plead guilty, and if their plea was accepted, to receive a life sentence instead of the death penalty.[128] In concert with the discretion extended in the 1940s, this measure hastened the decline of the death penalty in North Carolina: between 1939 and 1948, about twenty people each year received death sentences (still a miniscule number compared to the number of potentially capital crimes), but between 1959 and 1968, just two per year received a death sentence.[129] As one journalist put it, "Laws providing for the offering of pleas in capital cases tend to decrease events of capital punishment."[130]

With these three measures, the Legislature sought to catch up to the will of the public. Even before the late 1940s, as the number of executions approached its peak before its steady decline, it was common knowledge that a death sentence was more of a recommendation than a fate inscribed in stone. By the 1940s, prosecutors were trying to secure convictions in capital cases by reassuring juries that a death sentence did not ensure a death. In an appeal to the Supreme Court, convicted murderer Clyde Little's defense attorney complained that the Solicitor had told the jury just that. The solicitors reassured members of the jury that as in all first-degree cases, "in this case, if the defendant were convicted, there would be an appeal to the Supreme Court, and that in the event the decision of the lower court should be affirmed, there would be an appeal to the Governor to commute the sentence of the prisoner; and that not more than sixty percent

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[128] G.S. 15-162.1.

[129] Clarence H. Patrick, "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," Wake Forest Intramural Law Review, vol. 6 (1970), 421-26. The decline in the number of death sentences was, strangely, accompanied by a slight decline in the number of life sentences, and a decline in the state's murder rate.

[130] Charles Craven, "A Flower Vase, a Fan, and Death," RNO, 14 July 1956, p. 16.

of prisoners convicted of capital offenses were ever executed."[131] Between 1957 and 1961, no more than three men waited on death row at any time. In 1961, the state executed its last prisoner for more than twenty years.

In 1973, the North Carolina Supreme Court considered the case of James Howard Waddell, sentenced to death for rape. Between Waddell's death sentence and his appeal, the United States Supreme Court had ruled in *Furman v. Georgia* that the death penalty as practiced in the states was too arbitrary to be constitutional. Waddell claimed that his death penalty, too, violated the Eighth Amendment's prohibition against cruel and unusual punishment. (Like other appellants, Waddell claimed his sentence also violated the Fourteenth Amendment, the federal court's doorway into state law.) The North Carolina Supreme Court sided with Waddell, and in doing so, paved the way for the State Legislature to cut off jury discretion and reinstate the mandatory death sentence.[132]

Even as it waded into the death penalty debate, the North Carolina Supreme Court insisted that the responsibility for creating and amending death penalty law lay with the legislature. Justice J. Frank Huskins justified the court's intervention by citing what he saw as a "constant intent by the people and their representatives to retain the death penalty for murder, arson, burglary, and rape." Huskins saw this intent in legislators' rejection of seventeen motions to limit capital punishment between 1961 and 1971. But this was a virtually execution-free decade when legislators may have felt safe shoring up the status quo, since it was clear that whatever the letter of the law, North Carolinians were not going to impose the death penalty. Furthermore, the retention of the death

[131] State v. Clyde Little, 228 NC 417, Fall Term 1947, in Charles M. Shaffer Papers, Box 5, Volume 227: Fall 1947, p. 139, SHC. See also the case of Howard Hawley in "Granville Negro Saved from Gas Chamber in Second Trial," RNO, 20 November 1948, p. 14.

[132] State of North Carolina v. James Howard Waddell, 282 N.C. 431 (1973).

penalty followed the 1949 law that allowed jury discretion in capital murder and rape cases, an apparent effort to rewrite the law so that North Carolina's juries might actually follow it. Finally, to claim that North Carolinians wanted to retain the death penalty for arson is not substantiated by the record, which shows no executions for that crime in the twentieth century.

Five years after Huskins wrote his opinion, the United States Supreme Court rejected mandatory sentencing laws for the same reasons Huskins supported them: juries, the Court ruled, were an essential connection between law and society, and their reluctance to convict in capital cases demonstrated that harsh laws were out of step with public sentiment. With the US Supreme Court's ruling in *Furman v. Georgia*, the Court struck down states' death penalty laws, ruling that they were arbitrary and random, so much so that they made execution both cruel and unusual. But for the first half of the twentieth century, the same set of compromises and back channels that made North Carolina's death penalty arbitrary and random also made it occasionally merciful.

Mercy made the death penalty possible; had the state's laws been applied as written, the death penalty would have been an even more severe punishment than it already was, and would have been intolerable to the public. This most severe punishment had to be moderated, nearly every step of the way, by people making decisions, acting as safeguards that the law did not provide. Once the rage that may have followed an abhorrent crime faded, in part because of the thickening tangle of judicial procedure intended to make punishment more fair, it was often replaced with a more clear-eyed vision of the crime and the criminal. At least, this vision was blurred in a different way. If this process failed, the governor waited to correct mistakes.

CHAPTER 4

"Epistles to the Heathens": The Death Penalty Controversy

I. "Specific Human Terms": The Daniels Cousins

Nearly fifty years before the controversy over the death penalty staggered into the twenty-first century, one writer complained about the persistence of the death penalty debate:

> The arguments for an against the death penalty have been analyzed, dissected, lacerated, mangled, and pulverized, in legislative halls, forums, churches, classrooms, newspapers, journals, and pamphlets, by lawmakers, orators, pamphleteers, and schoolboy debaters. It seems that everything that can be done to these arguments by all kinds of people in all kinds of places has already been done; and yet the controversy goes on.[1]

It is difficult to find an argument for or against execution, persuasive or facile, that was not presented or rebutted, preached or ignored one hundred years ago. Early in the twentieth century, the argument replaced execution itself as the most visible part of the death penalty process, and its path demonstrates the way in which even the most compelling case can falter for lack of organization. It also reveals a moribund discourse about a life-or-death question, a movement both inspired by and gummed up by religion, stunted by habit, and sustained by its own failures.

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[1] Robert G. Caldwell, "Why Is the Death Penalty Retained?" in Thorsten Sellin, ed., "Murder and the Penalty of Death," The Annals of the American Academy of Political and Social Science, vol. 284 (November 1952), 45.

By November of 1953, Bennie and Lloyd Ray Daniels had spent more than three years on death row after being sentenced to death for the brutal murder of a cab driver in 1949. They personified what death penalty opponents such as Pulitzer Prize-winning playwright Paul Green abhorred about execution. They were African-Americans, teenagers when they were convicted, allegedly subject to vicious beatings in order to produce the confessions that doomed them, illiterate and poor, uneducated and unemployed. The pair spent four years on death row as North Carolina's courts passed their case back and forth, with the North Carolina Supreme Court rebuffing their petitions four times, and activists pushed for their commutation.

The Daniels Cousins aroused as much public concern as had been seen on the issue to date. Green and others formed a Daniels Defense Committee, and concerned citizens sought to influence Governor William Umstead to use his commutation power. A Raleigh pastor told the governor in a letter that he was certain the cousins' competently written confessions were coerced, because they were basically illiterate.[2] A poet wrote a lengthy work on the subject, emphasizing the racial dimension of the opposition to the cousins' death sentences, an issue that while ever present, was rarely the core argument for opposition that it would later become. Green and others focused on the boys' youth, their coerced confessions, and their low status. They deserved pity, not punishment.

Awaiting death, Lloyd Ray issued a last statement. "In my closing statement I want to say, 'God be with you all until we meet again. I am saved but I do not want to

[2] David Andrews to William B. Umstead, 28 October 1953, Paul Green Papers, Series 5.3: Capital Punishment, Correspondence, 1947-54. SHC.

die.'"[3] His lawyer had hoped to save his life by highlighting constitutional issues. In the petitions to the Supreme Court that he managed to file on time, he argued that the cousins' confessions were extracted during a beating, and that the all-white Superior Court jury at their trial was unconstitutional. Lloyd Ray had wanted a more practical approach. He wrote bitterly to his mother on the night before his execution that his lawyer had focused too much on "my 'so-called confession' and discrimination," and not enough on the evidence of his innocence.[4] The next day, "the patient process of the law … was exhausted for Lloyd and Bennie Ray Daniels." The young men died side by side in the gas chamber. Bennie, despite a taste for soda and cake, which he ate for his last meal, remained slight during his stay on death row. Lloyd Ray had gained weight, and when his body was being taken from the gas chamber, the steel steps collapsed.[5]

The effort to save the lives of the Daniels Cousins is one example of the method of death penalty opposition that most North Carolinians chose throughout most of the twentieth century. In the absence of a coherent movement seeking to ban the death penalty outright, opposition remained a piecemeal process—concerned people wrote to powerful people about condemned people. It seemed to make sense to focus on individual cases. Petitioners could appeal directly to the public's sense of right and wrong, or its sense of pity, and a governor, free to extend mercy at will, might be more receptive to persuasion than the legislature. Focusing on individual injustices, too, eschewed uncomfortable issues such as racism and religion, avoiding insult to North Carolinians'

[3] "Last Statement of Lloyd Ray Daniels," 2 November 1953, in Paul Green Papers, Series 5.3, Capital Punishment, Notes. SHC.

[4] Lloyd Ray Daniels to Mother, 6 November 1953, in Paul Green Papers, Series 5.3, Capital Punishment, Notes. SHC.

[5] "Cousins Die in Gas Chamber for Killing Pitt Cab Driver," RNO, 7 November 1953, p. 1.

intelligence or beliefs by impugning the death penalty as a whole. Often, such petitions were successful, but success or failure in these individual cases brought the brief eruption of public pressure to a halt, and efforts to save lives never gained the momentum or focus that might have created a concerted movement.

Although there was substantial support for abolishing the death penalty in North Carolina over the course of the twentieth century among the state's elites—Progressive activists and their heirs, newspaper editors in cities, many religious leaders—a formal, organized abolition movement did not gain momentum in North Carolina until the 1960s. For most of the twentieth century, the movement against the death penalty was incoherent, underfunded, and unsuccessful. Looking back in 1961, activist Frances Cox complained about ineffective planning and a lack of coordination among abolition group. "The whole argument against capital punishment has suffered too much from generalization," she wrote. "It needs to be documented in specific human terms."[6] The movement would progress to this point, running through a variety of arguments against the death penalty before realizing, as Cox did, that forcing responsibility for execution on people who had grown accustomed to ignoring it might be the best way to bring it to an end.

Early American opposition to the death penalty was a product of the American Revolution: to some revolutionary thinkers, execution was the expression of the kind of monarchical power they wanted to banish.[7] Much of the rationale against the death

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[6] Frances Cox to Paul Green and others, 22 June 1961. Paul Green Papers, Series 5.3: Capital Punishment, Correspondence, 1947-54. SHC.

[7] Herbert H. Haines, Against Capital Punishment: The Anti-Death Penalty Movement in American 1972-1994 (New York: Oxford University Press, 1996), 8.

penalty during this period was inspired by Italian philosopher Cesare Beccaria, whose *Essay on Crimes and Punishment* appeared in English in the early 1770s. Beccaria believed that imprisonment was more effective at reducing crime than execution, in part because execution tended to model violence rather than prevent it. Using this argument, influential American intellectuals such as Benjamin Rush were able to push reform through their state governments. Rush managed to diminish the use of the death penalty in Pennsylvania, defining second-degree murder and paving the way for other states to do the same.[8]

Those engaged in the debate about of the death penalty in nineteenth- and early twentieth-century America attacked or defended the punishment using the theological, scientific, sentimental, and pragmatic arguments that would endure in the twentieth and twenty-first centuries. The argument was, as it continues to be, remarkably heated given the relative infrequency of the death penalty, and repetitive enough to make another detailed recital unhelpful. Opponents might cite Biblical proscriptions against killing and New Testament lessons about mercy; proponents could counter with the law of the Torah and Jesus' death on the cross. Turn-of-the-century enthusiasm for science and medicine drove many to view crime as a medical problem, not one for the gallows. Less science-minded were those who sought to dramatize the pain and anguish attending execution, whether in death itself or in the miserable lives of the condemned. And the utility of the death penalty as a deterrent was a source of lively debate.[9]

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[8] David Brion Davis, "The Movement to Abolish Capital Punishment in America, 1787-1861," The American Historical Review, vol. 63, no. 1 (October 1957), 26-7.

[9] For discussions of nineteenth and early twentieth-century arguments, see Richard B. Dressner and Glenn C. Altschuler, "Sentiment and Statistics in the Progressive Era: The Debate on Capital Punishment in New York," New York History 56 (April 1975), 191-209, as appearing in Kermit L. Hall, ed., Police, Prison, and Punishment: Major Historical Interpretations (New York: Garland Publishing, Inc.), 1987. 435-56;

One prominent contributor to the conversation in the Northeast and Midwest was Edward Livingston, the man responsible for the South's flirtation with abolition in the nineteenth century. Livingston arrived in Louisiana to start over after leaving the mayoralty of New York City in disgrace and debt. But he rebuilt his career in New Orleans, and there, after being elected to the U.S. House of Representatives, drafted a code of laws that would have abolished the death penalty. Livingston's principal concern was the risk of executing innocents, the only solution for which was banning execution altogether. Louisianans, however, were not interested, and by the time they considered his proposal, Livingston had left the state. His ambitions, which soon took him to Washington, D.C., may have limited his ability to persuade Louisianans, but his ideas, which he introduced on a national stage as well as in Louisiana, influenced lawmakers as far away as Maine, which limited executions in 1837.[10]

Maine was not alone. By the 1820s and 1830s, New England was beginning to catch up with Rush and Livingston, buoyed by literature and poetry that romanticized the criminal, dissected his final moments, and lamented the way in which hanging precluded the full bloom of guilt into repentance. Prominent clerical figures added their voices to the growing protest, which, in the 1830s and 1840s, was beginning to have some effect. Anti-capital punishment societies sprang up around the country, and state legislatures in New York, Massachusetts, and Ohio considered abolition. By mid-century, in a sort of compromise between pro- and anti-death penalty forces, fifteen states had made their

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David Brion Davis, "The Movement to Abolish Capital Punishment in America, 1787-1861," The American Historical Review, vol. 63, no. 1 (October 1957), 23-46.

[10] Philip English Mackey, "Edward Livingston and the Origins of the Movement to Abolish Capital Punishment in America," Louisiana History, vol. 16, no. 2 (Spring 1975), 146-57, as appearing in Kermit L. Hall, ed., Police, Prison, and Punishment: Major Historical Interpretations (New York: Garland Publishing, Inc., 1987), 435-56.

hangings private. Other states pressed ahead with banning the death penalty altogether, and between 1846 and 1897, six states, from Rhode Island to Colorado, had rejected the death penalty.[11]

These few victories, despite the disruption of the Civil War, gave reformers some momentum entering the twentieth century. The American League to Abolish Capital Punishment, founded in 1925, sought to transform state abolition groups into a national network, and while it largely failed, nine states (and Puerto Rico) abolished or restricted the death penalty between 1907 and 1930. But these successes were short-lived: only one of the states that abolished the death penalty during this period, Minnesota, kept it off the books, and between 1901 and 1939, eight states that had previously banned the death penalty restored it.[12]

The states that abolished the death penalty in the early twentieth century were a diverse group that included North Dakota, Washington, Arizona, and Tennessee. The only characteristic they had in common was a relatively small non-white population, which might help explain why they abolished the death penalty, embraced by whites to protect them from non-whites, but not why most of them reinstated it.[13] The small non-white population removed an obstacle to public outcry that might have followed abolition—whites did not feel threatened—and at the top, prominent citizens or powerful politicians worked for it, often with the support of the press. In Kansas, for example,

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[11] Davis, 31-43; John F. Galliher, Gregory Ray, and Brent Cook, "Abolition and Reinstatement of Capital Punishment during the Progressive Era and Early 20th Century," The Journal of Criminal Law and Criminology, vol. 83, no. 3 (Autumn 1992), 541-3.

[12] Hugo Adam Bedau, ed., The Death Penalty in America (Garden City, NY: Doubleday & Company, Inc., 1964), 12; Galliher et al., 541-2.

[13] David C. Nice, "The States and the Death Penalty," The Western Political Quarterly, vol. 45, no. 4 (December 1992), p. 1038; Galliher et al., 541.

Governor Edward W. Hoch explained that it was because of his insistence that the legislature abolished the death penalty in 1907. Closer to North Carolina, Tennessee's Duke Bowers, a wealthy retiree, pushed so hard for abolition in 1915 that the legislation that ended the death penalty bore his name.[14]

North Carolina seemed to be a good candidate for abolition. The state's leaders supported, or at least showed interest in, humanitarian reforms such as parole and the abolition of corporal punishment. In a broader sense, the state embraced social welfare programs, from public health initiatives, to the construction of mental health facilities, to juvenile prisons. Many elite North Carolinians also embraced temperance, which, however misguided, constituted a show of sympathy for an underclass struggling with urbanization.[15] The state's political leaders clung to convict leasing longer than in some southern states, but prisoner treatment became a cause for reformers, and the stripes and the lash were eliminated in the early years of the twentieth century.[16] North Carolina also boasted a number of socially prominent death penalty opponents who might have used their influence to force a ban. After all, one of the most significant changes in death penalty law between 1910 and 1961, the adoption of the gas chamber, resulted from the personal popularity of the lawmaker who saw it as a "pet project."[17]

The possibility of abolition, too, arose frequently enough to suggest that getting rid of the death penalty was not entirely out of the question. According to a 1938 *News*

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[14] Galliher et al., 556-7.

[15] Dewey Grantham, Southern Progressivism: The Reconciliation of Progress and Tradition (Knoxville, TN: The University of Tennessee Press, 1983), 173-77.

[16] Jane Zimmerman, "The Penal Reform Movements in the South during the Progressive Era, 1890-1917," The Journal of Southern History, vol. 17, no. 4 (November 1951), 462-92.

[17] "State Adopts Lethal Gas; To Junk Electric Chair," RNO, 2 May 1935, p. 1.

and Observer article, "nearly every session of the Legislation sees an attempt to change the status of capital punishment." Even so, the absence of these bills in the legislative record reveals that they rarely passed one, let alone both, houses of the North Carolina General Assembly.[18] One of the first of these attempts was introduced by the aptly named Senator Justice, who tried in 1917 to build support for removing the state's mandatory capital sentencing statutes and allowing juries to sentence capital criminals to life imprisonment.[19] The bill went nowhere. Two years later, Congressman W.O. Saunders championed an attempt to eliminate the death penalty altogether, winning support from some of his conservative colleagues who believed that death sentences led jurors to free dangerous criminals.[20] Saunders defended his bill in Biblical terms, warning against snuffing out God's creation, and asking, "What is the Christian thing to do?" The bill passed the House after Saunders agreed to a compromise between two legislators, one of whom favored total abolition, and another who wanted instead to return to "good, old-fashioned hanging," that would deter crime and lynch mobs.[21] The compromise, which abolished the death penalty for arson and burglary only, passed by a comfortable 80-18 margin.

The editorial board of the *News and Observer* was optimistic about the Saunders bill. On the day after it passed the House, an editorial appeared applauding the vote, which, the board wrote, "will commend itself to the most intelligent thought in the State." The move showed that "the trend away from capital punishment is making itself felt in

[18] "Capital Punishment Due for Legislative Overhaul," RNO, 5 July 1938, p. 14.

[19] "Gives Jury Say in Capital Cases as to Death or Life," RNO, 26 January 1917, p. 1.

[20] "Saunders Bill to Get Floor Hearing," RNO, 22 January 1919, p. 1.

[21] "Capital Punishment Argued in Lower House," RNO, 24 January 1919, p. 1.

this State. Eventually, capital punishment will be abolished in all the States." At the same time, the editorial conceded that "the average person will be pardoned for confessing to ignorance as to whether a State benefits from having capital punishment abolished."[22] And it was, of course, these average citizens, being average, who made up the majority and made their support for the death penalty felt in the state senate.

Debate was vigorous and the gallery was filled when state senators debated the measure, presenting varied arguments, many of them for retention. One created a vivid picture of an idyllic mountain home that required protection from a muscular punishment system. "When it comes to encouraging crime in North Carolina … I am not a Progressive," said another to applause. Another claimed the death penalty was a deterrent, another that it was ordained by God. "Let the murderers stop first," one senator declared. The bill's proponents were somewhat less evocative in their orations, which may be why the *News and Observer* declined to describe their arguments in detail. The debate concluded with two senators voicing their opposition "to breaking down … the ancient landmarks." When the debate ended, "the remains" of the bill "were laid to rest" at the Capitol by a vote of 17-26.[23]

The Saunders bill was one of many attempts in the Legislature to ban the death penalty; it is also the attempt that appeared to make it the farthest until the early 1940s, when the General Assembly relaxed the mandatory death sentence for arson and burglary. But these legislative efforts, though sometimes informed by an anti-death penalty movement, or pursued by legislators recruited by activists, often progressed only as far as the legislator who believed in them could push them. Anti-death penalty activists

[22] "Capital Punishment," Editorial, RNO, 25 January 1919, p. 1.

[23] "Capital Offenses Remain the Same," RNO, 5 February 1919, p. 1.

did not seek, in an organized, deliberate way, to craft and pass legislation until the 1960s. Until then, they combined advocacy for individual death row prisoners with persuasion, in hopes that convincing enough North Carolinians to oppose the death penalty would result in convincing legislative action. But opposition to the death penalty in principle, and opposition to the death penalty for an individual are two very different positions.

The history of anti-death penalty activism between 1910 and 1961 in North Carolina unfolds much like an argument on the subject, a back-and-forth that moves from moral and religious persuasion, to logic, to an effort to inspire empathy. Henry L. Canfield, a Universalist minister, emerged as one of the leading voices against the death penalty in the 1920s bearing an absolutist Christian message that sought to use his abhorrence for execution as a tool of persuasion. Nell Battle Lewis, who took up Canfield's mantle in the 1930s and 1940s, derided what she saw as the death penalty's uselessness and stupidity, a stupidity that reeked of barbarism. And Paul Green, who began decades of anti-death penalty work in the 1930s, personalized the punishment by using his storytelling skills to make condemned men characters in a too-familiar tragedy. Meanwhile, at the margins of the conversation, African-American voices sought to condemn the death penalty's unfairness to their community while distancing themselves from African-American criminals.

The debate rested more on personality than persuasion. When a condemned criminal's community spoke out for his life, drawing attention to the criminal as social being, he received special consideration that at least half the time resulted in a commutation. Those most prone to mercy were judges, jurors, and governors who confronted capital criminals face to face, and were unable to reduce these criminals' lives

to matters of principle. Just as the application of the death penalty rested on personhood, so too did the debate over its existence. Bills to abolish or change the death penalty were often personal projects; and the movement against the death penalty in twentieth-century North Carolina, far from an organized lobby or a grassroots network of concerned citizens, was powered by the intense energy of a few people who could see from top to bottom and did not like what they saw.

II. "Intelligent and Civilized Sentiments": Henry Canfield and Pious Protest

In 1925, one minister wrote to another suggesting that they "join hands with all those who desire to see this barbarous custom of capital punishment ended" in order to "bring the sentiment of this state to a focus and make an effort to produce some results."[24] The letter's recipient was Henry L. Canfield, who had two years earlier, evidently more quietly than he had hoped, founded the League to Abolish Capital Punishment. Canfield was a Ohio-born Universalist minister and omnivorous activist who found his way to North Carolina the early 1920s and right away began sermonizing and speaking in support of pacifism, reproductive control for women, and the development of African-American schools.

In 1923, Canfield and others had formed what one report called the League for the Abolition of Capital Punishment—over the next decade, press coverage called it by various names—a group devoted to the "abandonment" of the death penalty and other

[24] W.A. Stanbury to H.L. Canfield, 24 April 1925, in Henry Lee Canfield Papers, Box 1, Folder 2: 1925. SHC.

criminal justice reforms.[25] Progress was slow: three years later, they met in Greensboro to draft a constitution, and they did not elect leadership until 1928. Meanwhile, Canfield and his allies held meetings and gave talks, seeking to sway the public toward abolition, and to inspire the formation of similar groups, to develop "such pressure for the removal of the death chair from the paraphernalia of punishment as will make it impossible for a western legislator to withhold support from any bill looking to the dismantling of that engine of annihilation."[26] To achieve this goal, a committee would not only craft these arguments, but also would disseminate them with literature, and recruit speakers to spread the message to interested audiences around the state.[27] Members paid fifty cents in dues, to cover stationery and other costs.[28]

There are few existing records of the League's activities. They met once a year in the Guilford County Courthouse to make plans for the coming year. At one such meeting one of Canfield's colleagues attacked the death penalty as a moral failure that ignored those most in need. "In the field of moral delinquency," he said, "where we are supposed to exercise the greatest charity, is the very field where we perpetuate vindictiveness and savagery." Canfield hoped that rather than springing from a moral revolution, abolition of the death penalty might inspire one. A better way of punishing criminals would

[25] "League to End Executions," Greensboro Record, undated clipping, February 1923. Clipping File through 1975 (Capital Punishment), 4. NCC.

[26] "Plan Abolition of Death Chair," RNO, 1 July 1925, p. 13.

[27] Constitution and Bylaws, The Greensboro Society for the Abolition of Capital Punishment. Canfield Papers, Box 1, Folder 8: Miscellaneous and Undated. SHC.

[28] *Ibid.*

"gradually" encourage "intelligent and civilized sentiments in the public mind instead of nurturing man's all too prone tendency to be vindictive and cruel to his fellow man."[29]

A shortage of money stalled this effort, but Canfield spoke regularly against the death penalty. In the late 1920s, he delivered a series of lectures on a Greensboro radio station, including one that questioned the value of punishment itself. "What a sickening hodge-podge the State makes of administering its archaic, irrational, and inhuman laws relating to capital crime!" Canfield wrote to the *Daily News*. "It is expert in straining out the gnat and swallowing the camel." He added his suspicion that the presence of clergymen at executions only further reduced the chance of an already doubtful deterrent effect. Judge, jury, and executioner may suffer through the rest of their lives after the execution, he suggested, but many think that the men put to death enjoy the afterlife "under Divine favor, joyfully … gamboling in fields elysian."[30]

In 1926, the *Winston-Salem Journal* printed an editorial in which Canfield claimed that juries, reluctant to send criminals to their deaths, were choosing instead to set them free. "As civilization advances," he argued, "it becomes more and more difficult to get a conviction for first-degree murder."[31] The following year, Canfield advocated a legal change that would take three decades to accomplish: making the death sentence optional. But some supporters of the death penalty believed that jury discretion, expressed legally or by jurors who refused to commit, encouraged a distressing sentimentality that could be exploited by prisoners of means. "The greatest force working

[29] "Capital Punishment Medieval, Says Dr. Taylor in Speech Here," RNO, 16 May 1928, p. 5.

[30] H.L. Canfield to the Editor of the Greensboro Daily News, undated. In Canfield Papers, Box 1, Folder 11: Undated Sermons, Articles. SHC.

[31] Untitled clipping from the Wall Street Journal, 6 January 1926. Canfield Papers, Box 1, Folder 11: Undated Sermons, Articles. SHC.

for the abolition of the death penalty is the discrimination in its enforcement," a *Greensboro Daily News* editorial complained in 1927. "Those not in position to work up sentiment in their behalf, without influence sufficient to bear, are more likely to suffer the extreme penalty than those in a position to command powerful influence."[32]

By the mid-1930s, Canfield was on a relatively short list of North Carolinians who were dues-paying members of the American League to Abolish Capital Punishment, a New York-based organization that produced abolitionist literature. Throughout the 1930s, Canfield continued to write and speak on the issue, urging governors to support abolition. Though he stopped serving as president of the North Carolina organization, he managed to get talks and editorials printed in North Carolina papers on the death penalty and other subjects. His successor pushed an ambitious agenda, including an effort to run a statewide straw poll on the death penalty, which seems to have foundered.[33] In 1934, Canfield wrote to Governor Ehringhaus, asking him to commute the death sentences of all twenty-one people men on death row; Ehringhaus did not reply.[34]

Canfield often addressed the death penalty's ineffectiveness as a crime control tool, but his convictions sprang from his religious faith. Many North Carolinians shared that faith, though they were more likely to be Baptists than Universalists. "God is sending you a message through me," wrote Nomira Waller, a Durham woman, to Governor Ehringhaus in 1933. "These are not my words but His Words; not my thoughts but His Thoughts," she added in preface before launching into an eighteen-stanza poem that filled

[32] Greensboro Daily News, 15 January 1927. Clipping from Canfield Papers, Box 1, Folder 4: 1927-1928. SHC.

[33] "Move to Abolish Executions," RNO, 5 December 1933, p. 2.

[34] A.P. Emhart to J.C.B. Ehringhaus, 19 February 1936, in Ehringhaus Papers, Box 161, General Correspondence, 1933-37, NCSA.

five pages with anti-death penalty references from the Bible. Waller's poem lays out one of the Biblical conflicts that bedeviled religious North Carolinians as they weighed death as punishment: the law of Moses versus the teachings of Jesus. As Waller writes, so-called Mosaic law, spelled out in Exodus, appeared to demand lethal punishment.[35]

The phrase "an eye for an eye," often quoted by defenders of the death penalty in twentieth-century North Carolina, first appears in Exodus. God told Moses that when two people who are fighting injure a pregnant woman and "harm follows, then you shall give life for life, eye for eye, tooth for tooth, burn for burn, wound for wound, stripe for stripe."[36] The prescription arises again, more broadly, in Leviticus, when God tells Moses, "Anyone who kills a human being shall be put to death."[37] It returns in Deuteronomy alongside a vote of confidence for deterrence. Perjurers should be punished with the punishment their false testimony might have produced, God tells Moses. "The rest shall hear and be afraid, and a crime such as this shall never again be committed among you. Show no pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot."[38] And, of course, the Ten Commandments forbid killing.

But, as Waller pointed out, and many Christians believed, Jesus appeared to speak out against death as punishment a number of times. Waller sites Colossians, and Matthew 5:38, addresses vengeance directly. "You have heard that it was said, 'An eye for an eye, and a tooth for a tooth,'" Jesus said, according to Matthew. "But I say to you, do not

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[35] Nomira Waller to J.C.B. Ehringhaus, 9 August 1933, Ehringhaus Papers, Box 161: General Correspondence. NCSA. Text transcribed as written.

[36] Exodus 21:22, The Holy Bible, New Revised Standard Version.

[37] Leviticus 24:18-20.

[38] Deuteronomy 21:20-21.

resist an evildoer. But if anyone strikes you on the right cheek, turn the other also."[39] And John recorded that Jesus saved an adulterous woman from a mob, saying, "Let anyone among you who is without sin be the first to throw a stone at her."[40] However, some Christians interpret Jesus' death on the cross as a tacit condoning of the death penalty and of the government's power to impose it. If Jesus did not believe in the power of the state to execute criminals, he would not have reassured another condemned man who complained about his fate, saying, "Today, you will be with me in Paradise."[41] Paul explained in his letter to the Romans that state authorities wished only for good behavior from their citizens. "But if you do what is wrong," he added, "you should be afraid, for the authority does not bear the sword in vain! It is the servant of God to execute wrath on the wrongdoer."[42] North Carolina's preachers said as much to their congregations. In 1935, one minister told his congregation that "God has delegated to government the authority to execute the death penalty."[43] Or, as one man put it in a letter to the *News and Observer*, "And kings, and governors, and judges, and sheriffs, and policemen, and jails, and penitentiaries, and the gallows, and the electric chair are the agents through whom God punishes evildoers—even in the taking of human life."[44]

Indeed, God and the Bible offered much support for the death penalty, and a unassailable refuge for its supporters. So revealed a 1925 article entitled, "Bible Supports

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[39] Matthew 5:38-39.

[40] John 8:1-7.

[41] Luke 23: 39-43.

[42] Romans 13:1-4.

[43] "Describes Murder as Heinous Sin," Letter, RNO, 15 April 1935, p. 4.

[44] A.B. Crumpler, "Favors Capital Punishment," Letter, RNO, 15 May 1925, p. 2.

Death Penalty," which noted that one evangelist had cited the instruction, as given to Moses, that "Whoso sheddeth a man's blood by man shall his blood be shed." The evangelist said that he was aware of the impulse to do away with the death penalty, but that "the words he quoted from the Bible was sufficient defense to forestall any attempt to discontinue the extreme penalty."[45] It appeared so. One letter-writer, given two full columns in a 1925 edition of the *News and Observer*, asked, "I wonder if any of our humane citizens who make so much ado over, and raise such a vigorous protest against capital punishment will charge God with barbarism and cruelty." If the state kills itself by killing its citizens, he continued, "I would like to preach at her funeral; and my text would be: 'Blessed are the dead which die in the Lord.'"[46]

A decade later, a Presbyterian pastor wrote to Governor Ehringhaus, urging him to resist the push for abolition because a ban on the death penalty would violate "God's divine plan for the continuity of life, the sustenance of life, and the protection of life." He added, "Nothing short of the death penalty can meet the demands of justice."[47] This letter and the many others that appeared in the *News and Observer* and newspapers across that state reveal not only in the intractability of the religiously-inspired position on the death penalty—"I sometimes wonder what the Devil will do with so many in Hell," wrote one woman[48]—but also the commanding presence of religion in the private and public life of many North Carolinians in the early part of the twentieth century. Ehringhaus agreed. In response to a letter urging him to commute a condemned inmate's sentence, he wrote that

[45] "Bible Supports Death Penalty," RNO, 23 April 1925, p. 14.

[46] Crumpler, p. 2.

[47] Gilbreth L. Kerr to J.C.B. Ehringhaus, in Ehringhaus Papers, Box 161: General Correspondence, NCSA.

[48] Mrs. G.E. Weeks, "Capital Punishment," Letter, RNO, 22 January 1928, p. M8.

there was nothing he could do. "I did not make the law," he wrote. "The law of capital punishment even is as old as the Book from which we derive inspiration and hope of salvation."[49]

Canfield's argument, though amplified by the state's city papers, did not appear to persuade many North Carolinians to do away with the electric chair. His organization led a relatively quiet life until it expired, founding a tradition of largely ineffective advocacy organizations that sought to convince North Carolinians that the death penalty did not work. This reliance on logical persuasion, a strategy echoed by anti-death penalty activists for the remainder of the century, may have doomed his efforts. One high school student's letter to Canfield well expressed the situation for death penalty opponents in the state. The student had written Canfield to request materials to prepare an argument against the death penalty for a debate, and he had sent her some pamphlets and a book from the Greensboro public library. She wrote back after the debate, thanking Canfield. "The affirmative team won," she confessed, although the negative team put up a good argument. "There is victory in defeat."[50]

III. "Champion Idol-Smasher: Nell Battle Lewis in the 1920s and 1930s

Opponents of the death penalty never lacked for editorial support. With few exceptions. the press in North Carolina forcefully attacked the death penalty. In the front lines was Nell Battle Lewis, a columnist for the *News and Observer* who savaged the death penalty in her Sunday column, "Incidentally," for years. Lewis's columns were

[49] J.C.B. Ehringhaus to Alice Haughton James, 20 May 1933, in Ehringhaus Papers, Box 161: General Correspondence, NCSA.

[50] C.F. Hunt to H.L. Canfield, 20 December 1928. In Canfield Papers, Box 1, Folder 4: 1927-1928. SHC.

biting, sarcastic indictments of the death penalty and its supporters that made her voice the movement's style, but also its substance, for many years.

The scion of an influential North Carolina family which included three presidents of the University of North Carolina, Lewis graduated from Smith College before World War I, and frustrated that her education there did not challenge her enough, headed to the front after gradation. After the war, she returned to Raleigh and a career as a journalist: she began on the society pages, and soon she was not only publishing columns in the *News and Observer*, which were picked up by other North Carolina papers as well as *The Nation*, *The Baltimore Sun*, and *The American Mercury*. She ran for office, too, becoming her county's first female candidate for the General Assembly in 1928.[51] According to her editor and publisher, Josephus Daniels, she was the state's "champion idol-smasher and hell-raiser,"[52] and another admirer credited her for leading "the great Gulliver South"[53] out of backwardness.

She certainly tried. Beginning in 1921, Lewis used her column to address issues of social welfare and racial uplift, mock the Ku Klux Klan, and promote women's liberation in part by savaging the mythology of southern womanhood. Lewis also attacked the death penalty from every possible angle, anticipating, relating, even belaboring arguments that continue to circulate in public and private discussions today. Lewis did so in a format that seemed to struggle against itself, straining against the bonds of a Sunday column often juxtaposed with cartoons and diverting Sunday reading. While

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[51] "County Has First Woman Candidate," RNO, 12 February 1928, p. 1.

[52] Quoted in Darden Asbury Pyron, "Nell Battle Lewis (1893-1956) and the New Southern Woman," in James C. Cobb and Charles R. Wilson, eds., Perspectives on the American South, vol. 3 (New York: Gordon and Breach Science Publishers, 1985), 66.

[53] Cobb and Wilson, eds., 63.

she often addressed complex social issues, Lewis was as likely to gab about books and movies (in 1936 she declared "Swing-Time" and "Anthony Adverse" as among the best[54]), or even eggnog recipes and ghost stories, as she was about weighty social and political issues.[55]

Nell Battle Lewis's believed that the death penalty was barbaric, unbefitting of a Christian state, that it did not deter crime, and that it was used needlessly against a deeply dispossessed underclass. In short, she thought the death penalty was a stupid punishment. "Our infliction of capital punishment boils down to this," she wrote, "we kill these criminals because it's the simplest thing to do; because the revamping of our theory and practice of punishment requires high intelligence and considerable cerebration. So—why bother about it!"[56] The early adoption of the gas chamber, and prison officials' lack of understanding of how to properly use it, prompted Lewis to condemn the state, the first east of the Mississippi River to use gas, as "the dumbest commonwealth on the hither side of that storied stream."[57]

According to one biographer, Lewis cherished her role as "the village atheist" but she believed in the potential for a society that adhered to core Christian values and reserved special contempt for a Christian state that executed its criminals.[58] As she wrote, "An eye for an eye and a tooth for a tooth, and a life for a life is a law that, as I

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[54] Nell Battle Lewis, "Incidentally," RNO, 27 December 1936, p. M2.

[55] "Miss Lewis' Funeral Today," RNO, 28 November 1956, p. 1.

[56] Lewis, "Incidentally," RNO, 3 February 1935, p. M3.

[57] Lewis, "Incidentally," RNO, 2 February 1936, p. O2.

[58] Pyron, 66.

understand it, was superseded once and for all nineteen centuries ago."[59] In other words, Jesus had revised and updated Moses' law. "As Christians, we at least profess to believe" in the teachings of Jesus, she wrote in 1935. And "Jesus, first of all, was practical, and that what we now call idealism is in the end the only practical way of carrying on the affairs of men."[60] But if the New Testament seemed like a late revision, the Old Testament still offered abolitionist material. In 1939, shortly after the House Judiciary committee unfavorably reported a bill that would have returned the state's execution method to electrocution, Lewis mocked the search for a more humane method of killing criminals, writing, "The Ten Commandments have not been rescinded for the State of North Carolina."[61]

However well-schooled Lewis may have been in the scriptures, her Christianity was less bound up in scriptural interpretation than it was in her conviction that civilized state should not execute its citizens. This conviction held despite sensational capital cases such as that of Leopold and Loeb. She wrote that "even the murder done by those fiendishly perverted boys seems to me less savage" than the state attorney's call for a death sentence. Even if defense attorney Clarence Darrow was wrong to ask for mercy for the killers, she added, "if he did not represent the race at a higher level than that represented by [the prosecutor], then I do not know what civilization means."[62] Reading

[59] Lewis, "Incidentally," RNO, 7 September 1924, p. M2.

[60] Lewis, "Incidentally," RNO, 3 February 1935, p. M3.

[61] Lewis, "Incidentally," RNO, 22 January 1939, p. M2.

[62] Lewis, "Incidentally," RNO, 7 September 1924, p. M2.

reports of men dying in the electric chair, praying to God instead of appealing to politicians, she remarked, "We're a great crowd of Christians we are!"[63]

Lewis thought that a civilized state should apply the most modern methods of crime fighting and discard the old ones, including execution. And she knew its opposite, barbarity, when she saw it. She usually sought, in a clever balancing act, to shame North Carolinians without condescension: her gaze was often sidelong, rather than down her nose, and her acid tone and sarcasm could never be mistaken for stuffy preachiness. But she was sometimes directly and unapologetically patronizing; you cannot call a punishment barbaric without calling its supporters barbarians. Reacting to the rush for tickets to the execution of a condemned rapist in 1922, Lewis wrote that such "morbid curiosity" was "a product of the unenlightened public opinion which countenances the death penalty, and which is its real *raison d'être*. Such opinion is one of the most striking examples of the primitive character of the group mind." She did, however, join in the collective responsibility for executions when she added, "We are still barbarians, however civilized we may think of ourselves as individuals."[64]

She did not believe that one method or another made the death penalty more or less barbaric. When the gas chamber replaced the electric chair, she described a variety of medieval tortures before asking her readers, "Can't you imagine, when any of these earlier instruments of punishment were abolished, the great howl that went up from the die hards—the indignant wonderment at what the world was coming to, the ponderous apprehension that lawlessness would increase mightily. We are going to look and sound

[63] Lewis, "Incidentally," RNO, 3 February 1935, p. M3.

[64] Lewis, "Incidentally," RNO, 17 September 1922, p. 6.

just as foolish a few hundred years from now."[65] When state lawmakers tiptoed around the margins of the death penalty in 1935, replacing electricity with gas, she mocked the change mercilessly. "Oh, the wonders of modern science!" she wrote. "Lethal gas is more 'humane' than the electric chair, but both methods are equally lethal. … Oh, well, we grow softer in North Carolina. In the good old days we used to burn prisoners at the stake."[66]

Even if the death penalty was brutal and barbarous, its supporters could justify its use if it served a purpose: deterring crime. Deterrence was an appealing argument because a purposeful death penalty mitigates moral anxiety. If an execution can save lives, then it is justifiable, no matter how disquieting. In the early twentieth century, deterrence remained a popular justification for execution. In 1931, as Henry Barden sat on death row for first-degree burglary, the *Henderson Daily Dispatch* warned in a column that "the object lesson of his tragic end is the warning it should be to others." If you enter a home at night, the column warned, you "always run the risk of being caught just as Barden was, or worse still (or better?) killed on the spot."[67]

Lewis mocked those who argued that the death penalty deterred crime. Of course, the deterrence argument cut across Lewis's belief that crime was the result of mental or social sickness—if sick people committed capital crimes, they were unlikely to be deterred by example. The *Greensboro Daily News* picked up on this point in 1947, when it predicted with irony "a great drop" in capital offenses following the execution of five

[65] Lewis, "Incidentally," RNO, 22 November 1936, p. M2.

[66] Lewis, "Incidentally," RNO, 5 May 1935, p. O6.

[67] "Should Be a Warning," Editorial, Henderson Daily Dispatch, 9 January 1931, p. 4.

men in the gas chamber. These men were victims, the editorial argued, not just of the state's lethal punishment, but also of its "indifference" to their struggles with "ignorance, poverty, social maladjustment, miscegenation and the conflicts, emotional and physical, which derive therefrom … neglect, low educational, health, economic, and social standards."[68]

Some North Carolinians believed that the death penalty served as a different kind of deterrent by preventing lynchings. A vicious criminal will die one way or another, they thought, either at the hands of the state or the hands of the mob. The death penalty "is merely the State inflicting in an orderly fashion upon offenders a punishment similar in severity to the punishment which the public would inflict haphazardly were there no courts." The death penalty, then, is the expression of public rage, intended to forestall mob violence, but not part of a comprehensive crime control strategy. "Capital punishment does not prevent the crimes for which it is imposed," argued an editorial in the *Fayetteville Observer*, but "it does prevent mob disorders."[69]

After one 1919 capital rape conviction, the *Henderson Daily Dispatch* published an editorial lauding the death penalty as an essential alternative to lynching. Furthermore, the death penalty held the line between barbarism and civilization, the very line its detractors worried that it blurred. The people in Henderson, angry though they were after a disturbing crime, "have laws," the editorial read, "which were written by white men and enforced by white men, and when white men disregard the cardinal or fundamental laws, they degenerate to the level of the criminal whose act they would punish." The electric

[68] "Of Life and Death," Editorial, Greensboro Daily News, 8 October 1947, p. 6.

[69] "Carolina Comment: Punish or Prevent," Editorial, Fayetteville Observer, 18 December 1936, p. 4.

chair, in the estimation of the *Record*, was a tool that civilized both its administrators and its subjects.[70]

Whether or not the death penalty was barbarous or stupid was a matter of opinion. But it was not disputed that only lower-class and otherwise underprivileged North Carolinians ended up in the death chamber. Lewis hammered this point, and it resonated. Unlike arguments about barbarity, it did not tar as backwards anyone who tended towards support for the death penalty, an insult that might have rankled rural white North Carolinians. Unlike arguments about the death penalty's use against African Americans, it did not draw opposition and support for the punishment along racial lines. Unlike religious arguments, based in a document written in parables, the class issue was easily explained and easily illuminated. Lewis did so in a 1935 column when she wrote, "The people we kill are the people who can't save themselves, the ones who haven't money or influence; the ones, in general, who have come from the poorest sort of environment and who have the poorest sort of heredity."[71]

In 1923, Lewis described Thomas Mott Osborne's contribution to the North Carolina Conference for Social Service in words that might have described her own work. Discussing prison reform, Lewis wrote, Osborne "told a vivid human interest story … arresting not only because of the logic of the theory advanced, but chiefly because of its bulwark of fact. The point of view Mr. Osborne presented was that of the prisoner, the man behind the bars, sitting in surly judgment upon the society which has condemned

[70] "Law and Morality," Editorial, Henderson Daily Dispatch (Henderson, NC), 27 June 1919, p. 2.

[71] Lewis, "Incidentally," RNO, 3 February 1935, p. M3.

him."[72] Lewis was acutely interested in the point of view of the prisoner, an interest she nurtured as Director of Publicity for the State Board of Charities and Public Welfare. Not long after her departure, the Board published "Capital Punishment in North Carolina," a pamphlet that drew on research by the African-American director of the Division of Work Among Negroes. Though written in a sober government style, the book argued persuasively against the death penalty and served as the foundation for Lewis's future columns on the subject.

The first half of the book describes the history of North Carolina's death penalty, from the gruesome executions of the eighteenth century to the first electrocution in 1910, and reports damning statistics without judgment, describing the death row population as mostly African-American, illiterate, and unlucky. The second half of the book adds names, faces, and stories to this statistical picture, offering a rare personal dimension to a history studded with numbers. It describes, with pictures, twenty-six capital criminals and the lives that led them to death row. They are only a small sample of the nearly 200 people sent to death row between 1910 and 1929, but their life stories reveal a death row populated by the poor, the abused, the uneducated—an invisible underclass, with the court a conduit from the darkness of poverty to the darkness of death row. These men were "feeble-minded," "subnormal or retarded," "subnormal in general intelligence and decidedly psychopathic," or "high grade imbecile and epileptic."[73]

One young African-American man, Case J, showed up at a one-room school house from time to time near his home in South Carolina, but never received a consistent or formal

[72] Nell Battle Lewis, "The North Carolina Conference for Social Service," The Journal of Social Forces, vol. 1, no. 1 (1922-1923), 265.

[73] "Capital Punishment in North Carolina," 68, 116, 133, 143, respectively.

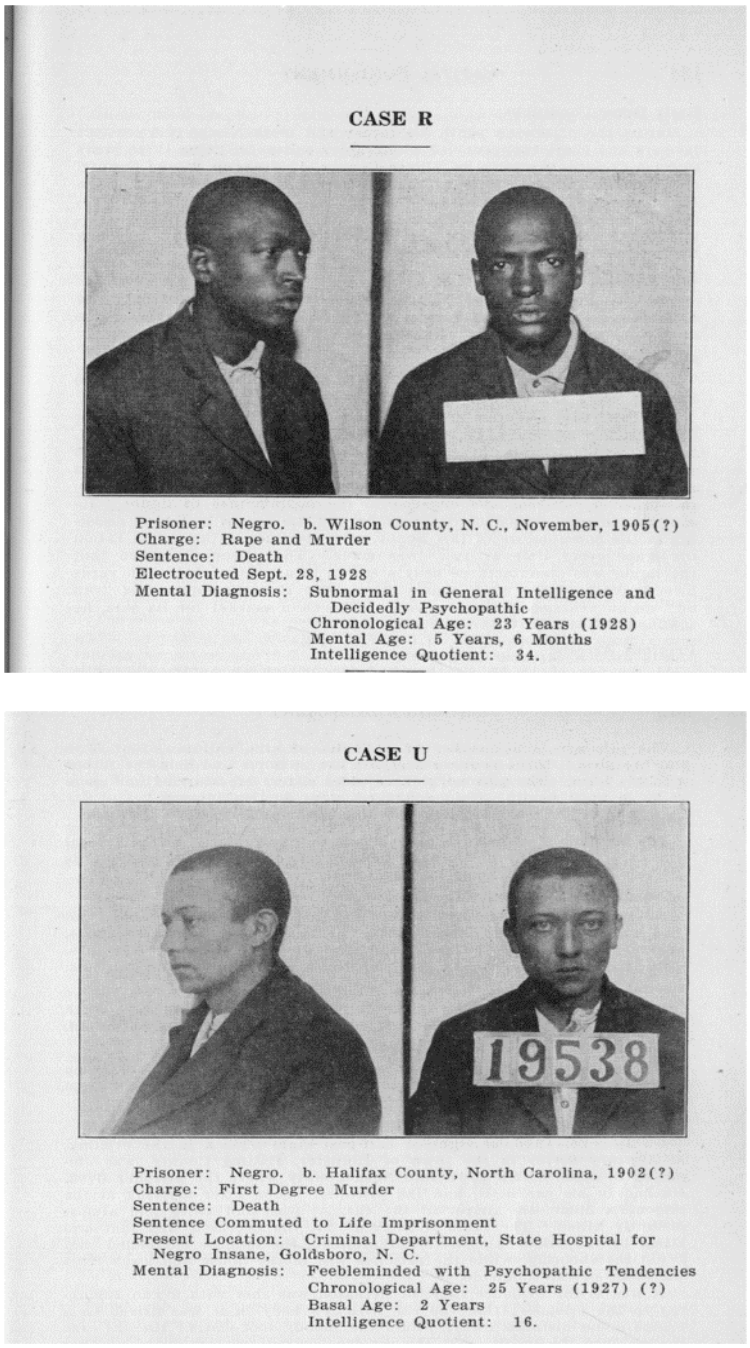
education. He learned to read and "do a little writing," and prison doctors, fond of the Binet-Simon Scale, assigned him a mental age of seven years. He followed farm work around the Carolinas, eventually ending up near Charlotte. He was at a fish fry there in 1927 when some sheriff's deputies raided the party. One of the deputies ended up dead, and J confessed the murder after a beating in a Charlotte jail.[74] Case D was a white man with blue eyes, salt-and-pepper hair, and a mustache. He was "easily influenced" and generally known as being of a "low mentality." His employer, a hosiery mill owner, had hired him and his family, but soon, finding them "of too low order to fit in," kicked them all out of town. According to his testimony, he helped dispose—in grisly fashion— of the body of someone killed by a hunting companion. But his friend was convicted of second-degree murder and he first. He was sentenced to death.[75]

The careful studies of these men reveal the way in which scientific and medical methods were creeping into crime control. But even as North Carolina strode forward in its examination of prisoners, and its apparent devotion to understanding them, it continued to execute the people science deemed irresponsible at best. The study dramatized the way in which the death penalty victimized those least capable of defending themselves; not all of the men and women on death row between 1909 and 1961 were mentally disabled, not all of them were uneducated wanderers, but Lewis's study dramatized a question that would increasingly dominate the death penalty controversy in North Carolina.

[74] "Capital Punishment in North Carolina," 108-12.

[75] "Capital Punishment in North Carolina," 75-9.

Figure 8



CASE R

Prisoner: Negro. b. Wilson County, N. C., November, 1905(?)
Charge: Rape and Murder
Sentence: Death
Electrocuted Sept. 28, 1928
Mental Diagnosis: Subnormal in General Intelligence and Decidedly Psychopathic
Chronological Age: 23 Years (1928)
Mental Age: 5 Years, 6 Months
Intelligence Quotient: 34.

CASE U

Prisoner: Negro. b. Halifax County, North Carolina, 1902(?)
Charge: First Degree Murder
Sentence: Death
Sentence Commuted to Life Imprisonment
Present Location: Criminal Department, State Hospital for Negro Insane, Goldsboro, N. C.
Mental Diagnosis: Feebleminded with Psychopathic Tendencies
Chronological Age: 25 Years (1927) (?)
Basal Age: 2 Years
Intelligence Quotient: 16.

In 1929, the North Carolina State Board of Charities and Public Welfare tried to put a human face on the death penalty by describing the lives and crimes of a number of men and boys sentenced to death in North Carolina. *State Board of Charities and Public Welfare, "Capital Punishment in North Carolina," 1929, NCC*.

It was this desire to force the responsibility for executions upon the citizens of the state that administered them less and less directly, that was at the core of Lewis's posture, and that of those who followed her. As she wrote in 1924, '"The State,' they say, does the killing. But we are the State. … It was a human being for whose unnecessary and barbarous death you and … I and everybody else in North Carolina are responsible. And may God forgive us for it!" Lewis was not the first to recognize that the death penalty was only embraceable in the abstract. Temperance advocate Charlotte Story Perkinson voiced her opinion on the matter in 1928, when she wrote, "No, the jurors do not want the blood of any man on their hands, no matter how guilty he is, the Governor doesn't want it, the wardens couldn't stand it," and people "shouldn't have the right to impose any such duty upon any human being."[76]

Lewis continued to emphasize the conclusions drawn by *Capital Punishment in North Carolina*, the "pitiful stories of the ignorant, the friendless, the underprivileged, and in very strong probability, the mentally defective and the psychopathic dying in North Carolina's electric chair, whose victims the General Assembly is too busy to consider," she wrote in 1935.[77] After 1929, Lewis used "Incidentally" to try to frame the death penalty as a punishment for the mentally compromised. By the mid-1930s, Lewis was "plucking again the familiar string on the old harp," as she put it, about punishment's sluggishness in catching up with the growing body of knowledge about the human mind.[78] "I don't believe I've ever summarized my position, she wrote in 1935. "it's

[76] Charlotte Story Perkinson, "Why I Do Not Believe in Capital Punishment," RNO, 26 February 1928, p. O3.

[77] Lewis, "Incidentally," RNO, 3 February 1935, p. M3.

[78] Lewis, "Incidentally," RNO, 29 January 1933, p. 8.

simply this: CRIME IS A SYMPTOM OF SICKNESS."[79] Her conviction eventually provoked a lengthy response from University of North Carolina historian H.M. Wagstaff, who wrote to Lewis in "an attempt to phrase my feelings about your most interesting column—which I always read."

> It is when Miss Lewis comes to the one thing she is most serious about does she peeve her readers. Here she loses all perspective and becomes maudlin. She is a crusader against social ills and has made up her mind that abolition of capital punishment is the Jerusalem that must be wrested from the hand of the infidel. … She regards capital punishment as an evil folkway that has survived without logic or reason. She backs up her thesis with the contention that crime is the fault of the state, traceable to neglect of this or that class, and the non-application of the right social cures.[80]

Wagstaff went on to deride the idea that neglect plays any role in warping the criminal mind, mocking the idea that "a John Dillinger, a Hauptmann, a Homer Van Meter, a Pretty Boy Floyd" might be the product of difficult childhoods. Instead, he wrote, these notorious criminals exploited the very sentimentality that Lewis displayed, and knowing that "society had become pudgy, tolerant of crime," they did what they wanted.[81]

Wagstaff accurately describes Lewis's posture, if not her attitude. She did see crime as a "psychiatric rather than a legal problem," a position she defended in this way:

> My opposition to the death penalty is much like the opposition I'd have to a doctor's killing his patient. … To kill the socially ill … is much too simple a way to deal with the complex problem of crime. It's something like the doctor saying: 'This man has smallpox; he is dangerous to others, so I'll kill him because that is the surest way of getting rid of him and keeping him from harming the rest.

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[79] Lewis, "Incidentally," RNO, 4 August 1935, p. M6.

[80] Lewis, "Incidentally," RNO, 9 February 1936, p. M2.

[81] *Ibid*.

She concluded that at a time when "Mr. Wagstaff and I are long since dust," crime would be the domain of the physician rather than the judge.[82] Between Wagstaff and Lewis, the argument was over, but the incompatibility in a belief in crime and illness and crime as side would endure.

Lewis was never optimistic that North Carolina's government would treat criminals as if they were sick, rather than evil. "I wish I thought that I would live to see the day," she wrote in 1937.[83] She had her moments of hopefulness, though. In 1936, after the botched asphyxiation of Allen Foster horrified people around the state, she predicted that their revulsion would "crystallize into a strong and active sentiment" for abolition.[84] Early in her career, she observed that though "much of the howling about North Carolina's 'Progress' is the veriest twaddle," an "honest, disinterested, and determined" opposition to the death penalty had arisen.[85] It had, but it never crystallized into an organized opposition with a strategy.

Elite opinion, at least, was on Lewis's side. Her newspaper, the *News and Observer*, frequently criticized the death penalty, and it was joined by papers such as the *Greensboro Daily News*, the *Asheville Citizen*, and the *Winston-Salem Journal*. As one *News and Observer* column said, the arguments to ban execution seemed persuasive, "and the strongest arguments which have been made for repeal … are that it would

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[82] *Ibid*.

[83] Lewis, "Incidentally," RNO, 31 January 1937, p. M2.

[84] Lewis, "Incidentally," RNO, 2 February 1936, p. O2.

[85] Lewis, "Incidentally," RNO, 24 January 1926, p. M2.

involve expense and trouble."[86] But even these liberal bastions wrestled with opposing the death penalty on principle, wondering what to do with people who committed their crimes in the thrall of mental illness. Their lack of potential for rehabilitation made them good candidates for what Paul Green would later call "pruning"—removing dangerous elements from society. The *News and Observer*, which frequently editorialized against the death penalty, published a column in 1935 arguing, "It is time that society began to realize that the crazy killer is a greater menace to its safety than the sane killer."[87] Years later, another column finished this thought: "If we are a people are going to kill men, the ones to destroy are those mental monsters who threaten the innocent with the vilest crime. Yet those are the very ones we save. … It would be more humane to destroy such creatures, not as a measure of vengeance, but as a matter of sanitation."[88] This was the kind of situation where "figuratively, society throws up its hands," wrote on columnist.[89]

If Lewis did not manage to convince her employers on the mental health issue, she also faced a relatively hostile audience to her support for abolition. Pollsters did not ask North Carolinians about the death penalty during Lewis lifetime, but Gallup polled nationally, and the results showed strong support for the death penalty, at least for murderers. A 1936 poll asking, "Do you believe in the death penalty for murder?" found

[86] "Torture Chamber," Editorial, RNO, 20 June 1941, p. 4.

[87] "Murders and Maniacs," Editorial, RNO, 9 September 1935, p. 4.

[88] "Preserving a Monster," Editorial, RNO, 30 June 1941, p. 4.

[89] Frank Smethurst, "In My Opinion," RNO, 16 November 1934, p. 4. See also "Preserving a Monster," p. 4; "Murdering Ignorant Negroes," Editorial, RNO, 5 April 1934, p. 4.

that sixty-one percent of Americans did.[90] The following year, a poll asking a similar question, but using the slightly more genteel term "capital punishment" instead of "death penalty," showed that sixty-five percent of Americans favored the death penalty for murder, and whether or not the condemned criminal was a woman did not significantly affect that support.[91] Pollsters, however, did not ask about alternatives to the death penalty, such as life without parole, until the mid-1960s. Nor did they, in these 1930s polls, allow those they polled to respond as undecided, or qualify their responses in any way, so there is a chance that the polls inflated the death penalty's support.[92]

Abolitionists' hopes reached a high point in the late 1930s, a few years after the publication of these polls. This moment may have been North Carolina's last chance for total abolition before laws allowing jury discretion sapped their strength by reducing the number of capital convictions. A columnist noted a growing number of people opposed to the death penalty "in principle."[93] Our congratulations for Mr. Roper!" wrote one North Carolinian after the congressman introduced an abolition bill in January 1939.[94] The bill quickly died, however.[95]

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[90] "Do you believe in the death penalty for murder?" Survey by Gallup Organization, December 1-December 6, 1936. Retrieved September 18, 2008 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. <http://www.ropercenter.uconn.edu/ipoll.html>.

[91] "Do you favor or oppose capital punishment for murder?" and "Do you favor or oppose capital punishment for women convicted of murder?" Survey by Gallup Organization, December 1-December 6, 1937. iPOLL Databank.

[92] Philip W. Harris, "Oversimplification and Error in Public Opinion Surveys on Capital Punishment," Justice Quarterly, vol. 3, issue 4 (1986), 429-55.

[93] Frank Smethurst, "In My Opinion," RNO, 7 April 1934, p. 4.

[94] "To Abolish Capital Punishment," Letter, RNO, 24 January 1939, p. 4.

[95] Journal of the House of the General Assembly of the State of North Carolina, Session 1939.

The failure of the Roper Bill, the last credible push to abolish the death penalty before its opponents found success in limiting it, revealed how little progress the anti-execution forces had made in convincing North Carolinians of their position. As he helped kill the bill in committee, one representative explained why he and others clung to the death penalty: "adherence to the old Mosaic law … the need to eliminate undesirables from society, and to retard crime by the example of death."[96] One letter-writer was baffled at the congressman's position. "We are supposedly not living under the Mosaic dispensation" she objected, life imprisonment removes criminals as effectively as death, and "does not our own staggering crime rate give positive proof before our very eyes that capital punishment does not prevent crime?"[97] Shortly after this letter appeared, a Salemburg man wrote to the paper praising it and calling for organization. "Let's organize," he wrote, "for without organization we cannot accomplish anything."[98] It was a sad comment on what abolitionists had been able to accomplish.

After 1931, when she suffered what appears to have been a nervous breakdown, Lewis took some time off and returned to the paper a changed woman, turning her sarcasm against her former allies. She died in 1956, when the death penalty was on the decline; a *News and Observer* paperboy found her body in her driveway. By then, she had abandoned most of her liberal positions, and her liberal friends, for aggressive anti-Communism, her skepticism for an interest in the occult, her bob and short skirts for

[96] "Under the Dome," RNO, 9 February 1939, p. 1.

[97] Mrs. S.F. Thompson, "Abolish Capital Punishment," Letter, RNO, 22 January 1939, p. 4.

[98] A.F. Gavin, "Reaction to Capital Punishment," Letter, RNO, 3 February 1939, p. 4.

more traditional attire.[99] The death penalty was one subject, though, that Lewis did not reverse course on, even as she grew more conservative. She may have moderated her position slightly in light of the fact that her decade of agitation had not yielded any results. In lieu of abolition, Lewis urged legislators to at least soften the application of the death penalty, allowing jurors to decide between life imprisonment and death as punishment and eliminating the death penalty for burglary and arson.[100] Her recommendations would eventually become law, but years after she had stopped arguing forcefully for them.

IV. "A Minority of One": Class and the Death Penalty

Lewis and even many North Carolinians who believed in the death penalty agreed that class often biased use of the death penalty. Outside of the reform enclaves in the Triangle (Raleigh, Durham, and Chapel Hill) and the Triad (Greensboro, Winston-Salem, and High Point), rural whites who may not have been concerned about African Americans' disproportionate presence on death row noticed that most of those executed were poor. Many African Americans were members of a racial and economic underclass—the *News and Observer*'s Jonathan Daniels wrote in an award-winning essay in 1948 that North Carolina's African Americans were "permanently poor"[101]—but many whites, too, were members of an economic underclass, and they bristled at the idea that they might face death for a murder a rich man could commit with impunity.

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[99] Pyron, 76-7; Susan Pearson, "Samarcand, Nell Battle Lewis, and the 1931 Arson Trial," Senior Honors Essay (History, University of North Carolina at Chapel Hill, 1989), 44-5.

[100] Lewis, "Incidentally," RNO, 28 August 1932, p. 11.

[101] Jonathan Daniels, "The Task of the South," RNO, 19 November 1948, sec. 4, p. 4.

If any issue could unite poor whites against the death penalty in the way that some elite whites had arrayed against it, it was the sense that they—as well as African Americans—were the victims of an unfair system. This sense of injustice had to do battle with the sense that the death penalty protected white people from black criminals, though, and it was a difficult battle to win. The power of racial animosity to prevent cross-racial political and social alliances is a common theme in history, especially in southern states with large African-American populations, such North Carolina. After African-American murderer Booker T. Anderson was granted parole in 1947, for example, one letter-writer worried that Governor Cherry would do the same for two African-American prisoners awaiting execution. "Of course they won't bother your [sic] all women folks," he wrote, but "it is us poor people that has to suffer from the hands of these mean negroes + if you all don't quit turning them out I don't know what will happen to us poor people."[102] Cherry declined to commute.[103]

Two capital cases that received lavish attention from the press illustrate death penalty opponents' argument that the electric chair and the gas chamber were reserved for members of the underclass. The first was that of W.B. Cole, a wealthy white mill owner who went on trial in 1925 for the murder of his daughter's boyfriend, to which he confessed. The case was a sensation. The volume of telegraph activity created by reporters filing stories on it necessitated a special arrangement with Western Union, and hotels in Rockingham were filled to capacity.[104] Onlookers brought bag lunches into the

[102] A.G. Crissman to R. Gregg Cherry, 25 May 1947, in R. Gregg Cherry Papers—Agencies, Commissions, Departments, and Institutions, 1945-1948—Paroles Commission, May 1945-December 1949, NCSA.

[103] Gordon M. Sears, "State Declines to Execute Johnston Youths," RNO, 7 June 1947, p. 10.

[104] Isaac London, "Stage Is All Set for Trial of W.B. Cole at Rockingham," RNO, 28 September 1925, p. 1.

courtroom so as not to lose their seats.[105] The stakes were clear, according to Jonathan Daniels, who covered the story for the newspaper his family owned, the *News and Observer*. "The trial has raised throughout North Carolina the question whether or not a rich man can be sent to his death in the State's Prison here. Cole is rich and will be defended by the ablest lawyers in the state," he wrote.[106] Of course, a high-profile case such as Cole's attracted ambitious prosecutors, too, among them Clyde Hoey, who would later become governor.

Daniels and his colleagues from around the region gave the Cole case front-page coverage. The *Rockingham Post-Dispatch* devoted nearly its entire paper to the trial for a week, transcribing the proceedings for its readers. The trial became only more captivating when, during an "intense moment," Cole testified that the decision to kill Ormond came to him during prayer. He knew then, he explained, that he must murder Ormond to protect his daughter's reputation. His defense, in addition to resting on the claim of temporary insanity, relied "on the grounds of this 'unwritten law' … which would justify a killing to hush slander,"[107] a very southern response indeed.[108]

After twenty-one hours of deliberation, the jury declared Cole not guilty of first-degree murder. When one observer thanked the jury, saying, "'Any of us would have done the same thing Mr. Cole did,'" one juror responded, "'Yes, yes, that's what we

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[105] Jonathan Daniels, "Bitterness Is Feature [on] First Day's Arguments to Jury in Cole Case," RNO, 8 October 1925, p. 1.

[106] Daniels, "Death Penalty Sought by State in Trial of Cole This Week in Rockingham Superior Court," RNO, 27 September 1925, p. M3.

[107] Daniels, "Cole Claims Vision in Prayer Stirred Him to Shoot Ormond; Thought He Had Right to Kill," RNO, 3 October 1925, p. 1.

[108] For a discussion of the historical roots of the necessity of defending female relatives' honor, see Wyatt-Brown, Southern Honor, 52-56.

decided.'" The presiding judge would later say that he thought the jury, "'a fine body of upright citizens, probably used the heart more than the head.'"[109] The verdict thrilled the "better people" of Rockingham, who "received it with rejoicing."

But the less wealthy and connected were upset. One Chapel Hill man warned that "whirlwinds and rebellions will be visited upon us through the power of [God's] mighty wrath," as a result of an unjust verdict.[110] A Burlington man wrote that the people of North Carolina were "indignantly shocked" at this "case of financial power overturning justice."[111] The verdict was "an outrage,"[112] a "travesty of law and order."[113] Some newspapers tried to reassure North Carolinians that they could trust their legal system, damning it with faint praise. "There has been a lot of talk that we might as well burn the courthouse down, and open the penitentiary and jail doors, but no such expression should be indulged in by intelligent people," read a column in the *New Bern Sun-Journal.* "Just because the church is full of hypocrites, the schools presided over by modernists … there is no reason why these institutions should be torn down."[114]

Court officials had feared violence in response to the verdict, but, according to Jonathan Daniels, those who believed Cole guilty were "moved more to cynicism at the courts than violence toward the defendant."[115] The voices of North Carolinians, both

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[109] "W.B. Cole Declared Sane and Is Set Free," Rockingham Post-Dispatch, 15 October 1925, p. 1.

[110] D.M. Castelloe, "Solemn Protest," Letter, RNO, 15 October 1925, p. 4.

[111] E. Millard Qualls, "What Price Justice," Letter, RNO, 16 October 1925, p. 4.

[112] G.W. Paschal, "The Cole Verdict," Letter, RNO, 16 October 1925, p. 4.

[113] "Why the Verdict?," Letter, RNO, 16 October 1925, p. 4.

[114] "Not Guilty (?)," Editorial, New Bern Sun-Journal, as appearing in RNO, 15 October 1925, p. 4.

[115] Daniels, "Union County Jury Finds Cole Not Guilty," RNO, 12 October 1925, p. 1.

members of the elite and ordinary citizens, vindicated Daniels's observation. This concern revealed itself throughout the early twentieth century. A few years after Cole went free, the State Board of Charities and Public Welfare dramatized the issue with their death row biographies in 1929. In 1934, a professor wrote to Governor Ehringhaus, complaining that the people on death row were "without exception poor, ignorant, feeble-minded, or Negro. That is the only class ever executed. Not one of those has ever had a normal opportunity due to our social wrongs and injustices." Ehringhaus bristled at the suggestion, replying, "I cannot agree with your suggestion that only the friendless class are ever executed." He noted that some friendless felons were released from death row as a result of public pressure. "We try to consider each case on its merits," he concluded.[116]

The second case that dramatized the class issue took place nearly twenty-five years later. Just as W.B. Cole had argued that he killed his victim under the temporary influence of insanity, tobacconist James Creech argued that he had been drinking heavily when he aimed a shotgun at his wife and, in his words, "blowed her brains out."[117] Creech, "a Mason and a Methodist"[118] had able defense, including future governor J. Melville Broughton, but lost his defense and his appeal, and in late January of 1949, was preparing to meet death in the gas chamber. As W. Kerr Scott considered commutation, letters flowed into his office. Henry A. Grady, a Superior Court judge who delivered

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[116] C.H. Hamlin to J.C.B. Ehringhaus, 21 February 1934, Ehringhaus Papers, Box 161: General Correspondence, 1933-37; J.C.B. Ehringhaus to C.H. Hamlin, 24 February 1934, January 1949, p. 4. NCSA.

[116] *Ibid.*

[117] State v. James Creech, No. 218, Supreme Court of North Carolina, 229 N.C. 662; 51 S.E.2d 348; 1949 Lexis 342.

[118] Jay Jenkins, "Gas Chamber Takes Life of Johnston Tobacconist," RNO, 29 January 1949, p. 1.

many death sentences in his twenty-six years on the bench, wrote to Scott urging him to let Creech's death sentence stand:

> It has been my observation that money and political influence have been able to save the lives of practically every person that I have sentenced to death. The poor Devil who had no money and no influence, walked the plank, and the general public said "well done." The many with money and influential friends got by with a life sentence, which in a few years, was reduced and he finally walked out, a free man. Such things have been disgusting to me. … I am not in favor of capital punishment; but it is the law, and the rich, the poor, the high, the low should all be measured by the same yard stick, and it seems that you now hold that stick, and that you are going to wield it safely and sanely.[119]

When Scott took Grady's advice and refused to commute Creech, he received an outpouring of support from North Carolinians who praised, for example, "the splendid way in which you have upheld the dignity of the law of God and man in this case."[120]

In 1949, the *Asheville Citizen* noted that Creech was "a minority of one," being the first person executed with more than a high school education. The *Citizen* was wrong—George Keaton, executed in 1934, spent two semesters at the Tuskegee Institute[121]—but it was correct to point out that "the rule of execution … usually applies to the uneducated, and even in some cases to what we suspect has been the moronic."[122] Like the *Citizen*, by the late 1940s, newspapers around the state had taken up Nell Battle Lewis's criticism of the death penalty's disproportionate use against the state's poorest

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[119] Henry A. Grady to W. Kerr Scott, 28 January 1949, W. Kerr Scott Papers, Subject File, 1949. NCSA. Emphasis his.

[120] J. Graham Spurrier to W. Kerr Scott, 15 February 1949. W. Kerr Scott Papers, Subject File, 1949. NCSA.

[121] "Death Row Poet Goes Mutely to His Doom," p. 12.

[122] "Murder in the Minority," Editorial, Asheville Citizen, 31 January 1949, p. 4.

citizens. In a 1947 editorial, the *Greensboro Daily News* urged its readers to "go over the list of criminals who have paid the death penalty in North Carolina and see how closely and sickeningly they conform to the pattern of neglect, of low educational, health, economic, and social standards."[123] It was an observation that indicted the state both for neglecting its neediest citizens, and for giving up on them once they showed signs of neglect.

It was also a wise strategy that set aside shaming, which causes resentment, and reasoning, which does not work. Abolitionists' best hope was showing North Carolinians something familiar in the life stories of these men, and there is some evidence that her argument got through, or, at least, that North Carolinians were increasingly upset that the death penalty targeted the poor and uneducated. In 1949, a woman who did not want to identify herself wrote to Governor W. Kerr Scott about Tom Wood, a man awaiting execution for murdering his wife. "One case I know of a man kills his wife (in Harnett County)," she wrote. "His father has money + he has fine, upstanding citizens for character witnesses, when he was tried they were all there everyone of them. Does he die? No of course not, he's Mrs. So + so he has nice friends and money. He gets off with a few years, (which he will probably never serve). But Wood, he was no money, he has no nice friends, clothes or anything just a hard working man who gets the book thrown at him (not the Bible either)."[124]

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[123] "Of Life and Death," Editorial, Greensboro Daily News, 8 October 1947, p. 6.

[124] Mrs. W.H. to W. Kerr Scott, W. Kerr Scott Papers, Subject Files, 1949, Paroles: General, A-K. NCSA. Transcribed as written.

V. "Something of a Squared Deal": Paul Green, Humanity, and Race

Playwright Paul Green was a natural to play the part of advocate for the underclass in the death penalty controversy. Nell Battle Lewis admired his work. She praised his play, *The Devil's Instrument,* as a work in which "North Carolina finds her voice."[125] Indeed, Green built a career on exhuming unheard voices of his state's residents, such as rural laborers and African Americans. His paired his keen ear with a soft heart, and his interest in the death penalty was sustained by his ability to empathize with death row prisoners. As Nell Battle Lewis started to lose focus on the issue in the mid-1930s, Green took up her mantle as the state's foremost opponent of the death penalty, exchanging her caustic tone for something softer. Though he embraced Lewis's belief that the death penalty was barbaric, Green pled for change rather than deriding stagnation, seeking to inspire abolition by giving life and personhood to condemned criminals, exhuming their voices as if they were characters in one of his plays. He found some success but ran into the same road blocks as his predecessors: preventing an execution was not the same as changing public opinion on the principle of lethal punishment.

Green grew up in rural North Carolina, attended the University of North Carolina in Chapel Hill, fought in World War I, and returned home to a long career as a playwright and activist.[126] He began his anti-death penalty activism in earnest in 1934. A member of the North Carolina Interracial Commission had written to him urging him to join a

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[125] Edwin Mims, The Advancing South: Stories of Progress and Reaction (Garden City, NJ: Doubleday, Page, and Company, 1926), 247.

[126] "Dramatic Arts," in William S. Powell, The Encyclopedia of North Carolina (Chapel Hill: University of North Carolina Press, 2006), 352-3.

clemency delegation planning a visit to the parole commissioner's office. Green was in Hollywood at the time, but replied with his approval, writing, "I think any steps you can take wiping out the disgrace of death cells overflowing with moaning, ignorant human beings will be an everlasting credit to us all."[127] He was not, however, an abolition absolutist like Henry Canfield or Nell Battle Lewis. In the mid-1930s, Green supported the death penalty in some instances; as he wrote, "I am not entirely against capital punishment as such," but "I am absolutely opposed to it as it is being carried out in North Carolina."[128]

Green had shown an interest in the human and racial elements of the death penalty in North Carolina and elsewhere. He decried the death sentences of the so-called Scottsboro Boys, eight African-American youths sentenced to death for rape in Alabama in 1931, and was particularly disdainful of those who saw the case in political rather than human terms. He wrote a scathing letter to Theodore Dreiser in 1932 reprimanding him for using "the bones of seven [sic] negro boys to hammer the drums of social revolution."[129]

In 1927, he won a Pulitzer Prize for *In Abraham's Bosom*, a play about an African-American tenant farmer who murdered his white landlord in a dispute over storing his crops and was sentenced to death in the electric chair. Seven years later, he joined a committee formed to lobby for the commutation of an African-American tenant farmer who, as in the play, murdered his white landlord in a dispute over storing his crops

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[127] Paul Green to A.P. Kephart, 5 May 1934, in Paul Green and Laurence G. Avery, A Southern Life: Letters of Paul Green, 1916-1981 (Chapel Hill: University of North Carolina Press, 1994), 232-3.

[128] *Ibid*.

[129] Paul Green to Theodore Dreiser (open letter), 11 April 1932, Green and Avery, 202.

and was sentenced to death in the electric chair. The man was Emmanuel "Spice" Bittings, who admitted to the murder, but insisted he did so to defend himself and his children. Doomed by his counsel's mishandling of evidence that he committed the murder in self-defense, Bittings found hope for life in the Bittings Defense Committee, which consisted of a number of elite North Carolinians, from a University of North Carolina professor, to a newspaper editor, to an influential businessman.

Bittings had an influential advocate in Green, who wrote to Governor Ehringhaus, urging commutation and asking for the condemned man "something of a squared deal."[130] Ehringhaus listened, and his paroles commissioner held four hearings to reevaluate Bittings's guilt. At the fourth, though, Bittings's wife and children testified that Bittings shot his victim in the back. Their testimony, which surprised and horrified Green, doomed Bittings, and he died in the electric chair later afterward.[131] The case may have been what transformed Green from someone who bemoaned the practice of the death penalty in North Carolina to someone who condemned its use altogether.

Green was not alone. Occasionally, North Carolina was the site of small bursts of visible protest against the death penalty. Unfortunately, one such protest dramatized the uncertain focus of the abolition movement more than it did objections about the death penalty. In 1953, David Andrews, a Methodist minister, met with Governor Umstead to request clemency for two convicted rapists. Rebuffed, he sent a note to Umstead telling the governor that he was going to wire the local papers about his "protest against all capital punishment in North Carolina" and as a "final plea" for executive clemency. He

[130]Paul Green to J.C.B. Ehringhaus, Green and Avery, 235.

[131] "Negro Who Tried Suicide Collapses in Death Chair," RNO, 29 September 1934, p. 1; State v. Emanuel Bittings, Alias Spice Bittings, 206 N.C. 798 (1934).

then sat down on the steps of the capitol, announcing that he would hold vigil for twenty-four hours, until the execution the following morning. The photograph that appeared on the front page of the *News and Observer* the following day was a powerful one—Andrews, just twenty-eight years old, sat with his back to the capitol, his legs crossed and a halo of sunshine on his high forehead. He would fast during his protest, he said, but would accept water if someone offered it; Andrews was confident there was a toilet in the capitol building. He was stoic about the effects that this "Gandhi-like fast" might have on his body—"'it certainly won't do me any good,'" he told a reporter.[132]

He protested just about long enough to get hungry. After seven hours, he announced he was leaving. He called the papers to let them know. "'I have thought this over and now feel I have made my own protest effectively,'" he said. "'I intend now to carry on an educational campaign and then see what can be done in the next Legislature to change the laws.'" Andrews's protest, designed to persuade Umstead to commute two death sentences, failed. This failure, colored by optimism, typifies the movement, which, especially by the 1950s, had endured its share of shortcomings. Direct protest abandoned, Andrews returned to his desk to write some letters.[133] Among Andrews's correspondents was Paul Green. Later that year, Green began work on a play about a young minister who struggles to balance his family obligations with his desire to plunge himself into anti-death penalty activism. The main character is an amalgam of Green and Andrews, a man whose "sensitive imagination pictures the whole misery of the thing."[134]

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[132] Charles Craven, "Young Pastor Protests Executions," RNO, 29 May 1953, p. 1.

[133] *Ibid.*

[134] Paul Green, "Work in Progress," 2 November 1953, no page number. In Paul Green Papers, Series 5.3: Capital Punishment, Capital Punishment: Notes, SHC.

Green's sensitivity and imagination finds rich expression in the letters that he collected from condemned prisoners. The collection, though it was never published, was Green's companion to *Capital Punishment in North Carolina*. The letters paint a vivid picture of the emotional life of death row inmates, some anxiously awaiting their final moments, others embracing God and the promise of eternity in heaven. Monroe Medlin wrote to his mother, telling her, "Well, Mom, this is the last letter I am writing you. Keep it auntil you die whitch I hope you will never die."[135] Gurney Herring told his children, "Your daddy died in the gas chamber. … So, children, please remember this—be good and think about the way your daddy died for being so disobedient to God's laws. Please mind your mother."[136] Most of these letters, though, were directed at the condemned prisoners' peers, echoing the professions of faith and salvation once delivered on the gallows. "So you see, friends," wrote Emmet Garner, "you may be in prison and shut off from the word but God is always near and want to help you."[137]

This emotionalism on behalf of killers and rapists bothered some North Carolinians. The seeds of a counter-movement for victims' rights appear in pro-death penalty arguments as early as the mid-1920s. Those who opposed the death penalty were often accused of a sentimentalism that was misplaced except when considering victims of capital crime and their families. In 1926, a Statesville resident wrote to the editor of the *Greensboro Daily News*, "The horror of the scene of the execution arouses such pity and

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[135] Monroe Medlin to Mom, no date, in Paul Green Papers, Series 5.3: Capital Punishment, Capital Punishment: Notes, SHC. Transcribed as written.

[136] Gurney Herring to Children, 24 May 1946, in Paul Green Papers, Series 5.3: Capital Punishment, Capital Punishment: Notes. SHC.

[137] Emmet Garner to Friends, undated, in Paul Green Papers, Series 5.3: Capital Punishment, Capital Punishment: Notes. SHC.

sympathy, the crime of the murderer and the righteous judgment of the law is forgotten." Opponents of the death penalty such as Nell Battle Lewis urged North Carolinians to attend an execution; if they did so, she was certain, they would turn against death as punishment. This letter-writer suggested the inverse: that "if those who oppose capital punishment could be at the scene of an intended murder armed and see the murderer about to dispatch his victim," they would kill the to-be criminal "with the approval of conscience and law."[138]

In an argument that anticipated the victims' rights movements of the 1960s, 1970s, and 1980s, one North Carolinian pointed out in a lengthy defense of the death penalty published in the *News and Observer* in 1925, that the sympathy for some recently executed criminals was misplaced. "What about the victims?" he asked. "Quiet, peaceable, law-abiding citizens, attending to their own legitimate affairs, shot to death by murderous hands without the opportunity to send any 'pitiful farewells' or to give any information to loved ones as to why they never returned."[139] Another letter-writer in 1939 complained that crime victims' "hurts are caused through no fault of their own and the sob-sisters don't care how much they suffer before they die."[140]

In addition to trying to inspire pity for condemned criminals, Green also frankly addressed the racial character of the death penalty, which he described as "the frightful business of murdering ignorant Negroes."[141] This belief revealed itself in his efforts to save the life of William Mason Wellman. Wellman was an African-American laborer

[138] "For Capital Punishment," Letter, Greensboro Daily News, 31 January 1926, p. B5.

[139] Crumpler, p. 2.

[140] W.A. Wasdon, "Think of the Victims," Letter, RNO, 2 January 1939, p. 4.

[141] "Murdering Ignorant Negroes," p. 4.

condemned for raping a white woman, though he insisted that he was at work in Virginia at the time of the crime. After Wellman's appeal was rejected by the North Carolina Supreme Court, Green led a delegation to Governor Broughton's office to ask for clemency. There, he was opposed by the prosecuting attorney. The next day, he wrote to the attorney in an effort to persuade him of Wellman's innocence. "It is a nightmare they have been through," he wrote of the survivor and her family. "We all share in their suffering and sorrow," but "the cause of justice and race relations throughout the South would … be bettered by an act of clemency." He closed with typical warmth: "I hope you'll give me a ring when you're down this way and we can get together for a meal."[142]

Broughton did extend clemency—according to one account, Wellman was seated in the gas chamber at the time[143]—and later pardoned Wellman, and his action drew out some racial bitterness.[144] A letter to Broughton bitterly accused him of racial pandering, revealing the way in which matters of crime and safety draw out racial antipathies. "All the people here know that this whole case was planned from the very beginning by the Negroes," wrote the anonymous critic.

> It appears that you are more interested in the Negroes than you are in justice. … If we women cannot get protection from the court we will see that our men give it to us. I would sign my name, but I am afraid that your office would let the Negroes have it, and they would perhaps attack my family. They seem to have full run of your office.[145]

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[142] Paul Green to E.M. Land, 18 November 1942, Green and Avery, 371-77.

[143] Hugo Adam Bedau and Michael L. Radelet, "Miscarriages of Justice in Potentially Capital Cases," Stanford Law Review, vol. 40, no. 1 (November 1987), 72.

[144] "Negro, Sentenced to Die, Now Is 'Free Man' Again," RNO, 17 April 1943, p. 1.

[145] Anonymous to J.M. Broughton, 31 March 1942, in Paul Green Papers, Series 5.3: Capital Punishment, Folder: Capital Punishment Notes, SHC.

Paul Green would have cringed at the letter's contents, but for all its viciousness, it is refreshingly direct. Years later, Marion Wright, a white lawyer and journalist who led an organized death penalty abolition movement in the late 1960s and 1970s, complained that "the race issue" was responsible for support for the death penalty, "though no one will openly admit that fact."[146] For that reason, Wright sought to keep his own anti-death penalty activism as the head of North Carolinians Against the Death Penalty separate from the civil rights movement.[147] But African Americans themselves understood the racial animus behind the administration of the death penalty. Whether or not they drew attention to the issue was another question.

African Americans had both incentives and disincentives to speak out against the death penalty. First, between 1910 and 1961, most African Americans in North Carolina were not voters.[148] Nor did they preside as judges or often sit on juries, and there were relatively few African-American lawyers in comparison to their white counterparts. Their impact, and the prominence of their voices, in the criminal justice system, was relatively limited. Second, influential African Americans, as represented by the newspapers they published and read, were much more concerned with uplifting their community as a whole than saving the life of a murderer or a rapist because of principled opposition to the death penalty. African-American newspapers such as the *Carolinian* in Raleigh, the *Carolina Times* in Durham, and the *Future Outlook* in Greensboro spoke out forcefully

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[146] Diary entry, 15 April 1967, p. 101, in Marion A. Wright Papers, Series 3: Death Penalty, Box 17 Folder 309: Death Penalty, Feb. 21-Apr. 20, 1967, SHC.

[147] Marion A. Wright to Harry Golden, 27 August 1967, Marion A. Wright Papers, Series 3: Death Penalty, Box 17, Folder 325: Death Penalty, Aug. 18-Apr. 31, 1967. SHC.

[148] Whites achieved near-total disfranchisement of African Americans by 1900. E.M. Beck, James L. Massey, and Stewart E. Tolnay, "The Gallows, the Mob, and the Vote: Lethal Sanctioning of Blacks in North Carolina and Georgia, 1882-1930," Law & Society Review, vol. 23, no. 2 (1989), 322-3.

on segregation in public facilities and schools, demanded the hiring of African-American policemen, railed against police brutality, celebrated African-American soldiers, educators, athletes, and clergymen, and condemned lynching.

Third, when they did speak out, they risked undermining the standing of the law-abiding African-American community at the expense of the life of one criminal. To address this problem, North Carolina's African-American newspapers couched their opposition to an unfairly imposed death penalty in strong anti-crime language, a technique that precluded blanket opposition to the death penalty. The editor of the *Carolinian*, for example, condemned rape "as one of the most detestable and inexcusable of all felonies. It agrees with the southern white man and any other man worth his salt in calling for severe treatment of every case of actual rape, but entirely regardless of the ramifications of racial lines."[149] The *Carolinian* made discriminatory rape convictions a focal point, reinforcing the case-by-case approach of death penalty opposition among activist African Americans.[150]

Black North Carolinians were aware of how public involvement by the National Association for the Advancement of Colored People (NAACP) in capital cases might threaten them. In 1918, for example, four Raleigh members wrote to acting secretary James Weldon Johnson to tell him about convicted rapist Earl Neville, who escaped two lynching attempts before receiving a death sentence after a hurried trial. "Extreme secrecy will be necessary as to agency," they concluded. "If you could send a discrete

[149] "Toward Straight Thinking," Editorial, Raleigh Carolinian, 4 January 1947, p. 4.

[150] For example, see "Asks Governor to Commute Sentence to Life, Raleigh Carolinian, 22 February 1947, p. 1; "Governor to Rescue Again," Editorial, Raleigh Carolinian,17 May 1947, p. 4; "Avoid Hysteria," Editorial, Raleigh Carolinian, 14 June 1947, p. 4; "'Miscarriage' Not Unexpected," Editorial, Raleigh Carolinian, 16 August 1947, p. 4. "Inviting More Trouble," Editorial, Raleigh Carolinian, 23 August 1947, p. 4.

white person here to investigate, the matter could be unraveled. We cannot do it. Any action on our part would prejudice the case and provoke bad blood."[151] As late as 1943, African-Americans in North Carolina were warning NAACP officials that having a black lawyer defend a black man accused of rape "would be suicide."[152]

Fourth, national support was limited. The NAACP was selective and pragmatic in its advocacy for African Americans facing execution or its push for punishment for whites who committed crimes against African Americans, and depended on branches in Durham, Raleigh, and elsewhere that were not always well-funded or well-organized. The national organization relied on the local branches for information they could not always provide, and local branches relied on the national organization for money it could not always provide. In 1939, Executive Secretary Walter White lamented having to decline assistance more than once because of a lack of money when he offered an Asheville NAACP member twenty-five dollars to fund an appeal.[153] When the Asheville contact asked for more, White declined, writing, "Negroes must realize … that justice like everything worthwhile costs money and time and sacrifice" and reprimanding North Carolina's African Americans for their paltry contributions to NAACP coffers.[154]

Communication with the national branch could be slow, and requests from North Carolinians of the national office's energies usually resulted only in the office exercising

[151] Standing Committee on Legal Reserve of the Raleigh Branch of the NAACP to James W. Johnson, 4 February 1918, in Papers of the NAACP, Part 12, 1913-1939, Series A: The South, Reel 18. PBL.

[152] William Jay Walker Jr. to Prentice Thomas, 27 January 1943, in Papers of the NAACP, Part 12: Selected Branch Files, 1913-1939, Series A, Reel 18. PBL.

[153] Walter White to W.R. Saxon, 6 November 1938, in Papers of the NAACP, Part 8: Discrimination in the Criminal Justice System, Series B, Reel 16. Perkins/Bostock Library, Duke University. Hereafter cited as PBL.

[154] Walter White to W.R. Saxon, 6 December 1938, in Papers of the NAACP, Part 8: Discrimination in the Criminal Justice System, Series B, Reel 16. PBL.

its policy of asking a local branch to take charge of the case. And as NAACP special counsel Charles Houston told the mother of a condemned man, the NAACP was "unable to take every case which is presented to us and our rules limit us to cases of persons who our investigation leads us to believe are persecuted on account of race or color."[155] Guilty persons could expect no help, whether or not their arrests and trials were marred by violence or misconduct.

These concerns and policies did not keep the NAACP out of North Carolina altogether. The national office offered legal advice, sent investigators to North Carolina a number of times, and telegrammed governors asking for commutations. In the 1940s Thurgood Marshall and others fought to prevent the extradition from Washington, D.C., of William Mason Wellman, who was sentenced to death in North Carolina but eventually pardoned. The organization also helped win a commutation and a pardon for condemned rapist Charlie Pugh. These two men were precisely the kind of sympathetic—and innocent—prisoners who could expect support from the NAACP.

Finally, there appears to have been little contact between white and African-American North Carolinians opposed to the death penalty. In the first half of the twentieth century, whites opposed the death penalty from a decidedly paternalistic position, and saw themselves as more persuasive advocates for African-American lives than African Americans themselves. Charlotte Story Perkinson provided an example when she lamented that the death penalty betrayed African Americans' need for white

[155] Charles H. Houston to Mattie B. Tate, 25 March 1936, in Papers of the NAACP, Part 12: Selected Branch Files, 1913-1939, Series A, Reel 18. PBL.

stewardship. She added that sterilization, which would cure African Americans of their habit of "promiscuous breeding," would preclude many executions.[156]

VI. "When Put to Them as Individuals": Personal Responsibility and the End of Executions

Unlike Perkinson, Paul Green sought to treat African Americans like persons. In doing so, and in focusing on their cases, he contributed to saving lives, but not to the grand mission, inaugurated decades earlier by Henry Canfield, of convincing the public that the death penalty was wrong in all cases. The lack of legislative success in abolishing the death penalty stemmed in part from a lack of faith that criminals given life sentences would actually remain in prison for the rest of their lives. One man wrote to the *News and Observer* to complain that "life imprisonment doesn't mean a thing. The man so sentenced will soon about out, and I don't remember seeing where anybody who had a sentence of life died in prison."[157]

Moreover, it grew from a crucial divide between principle and practice. North Carolinians understood the difference between supporting the death penalty in the abstract and handing down a death penalty from the jury box. North Carolinians were prepared for *de facto* abolition and activists like Green, Lewis, and Canfield deserve credit for making the reality of the death penalty unavoidable. The number of executions was on the decline after a high point in 1947, and after 1953, when the Legislature decided that indicted murderers and rapists could plead guilty in exchange for a life sentence, it dropped precipitously. No one was executed in 1954, and just one person was

[156] Perkinson, "Why I Do Not Believe in Capital Punishment," p. O3.

[157] Wasdon, p. 4.

executed in 1955, 1956, and 1957. After two more executions in 1958, none in 1959 and 1960, finally, in 1961, abolitionists appeared to get what they had been seeking: the end of executions in North Carolina. In October, Theodore Boykin became the 362nd person put to death by the state since Walter Morrison died in the electric chair in 1910.[158] Both men were African Americans, and both were executed for rape.

Executions ceased, though, not because activists persuaded a majority of North Carolinians that execution was ethically unacceptable, un-Christian, or foolish. Executions ceased because, as people had been observing for decades, it was much easier to support the death penalty when not in a position of actually inflicting it. In 1925, the *News and Observer* published an editorial that, acknowledging that the majority of citizens supported the death penalty for serious crimes, argued that "when it was put to them as individuals," jurors were reluctant "to say that a fellow man shall be electrocuted." As the editorial pointed out, "Many thousands who would oppose the repeal of the law will refuse to render a verdict that will carry it into effect."[159] The 1953 law put that reluctance into practice.

A 1938 opinion piece aptly illustrated the way in which responsibility floated at the margins of the death penalty process. Killing a murderer is wrong, wrote Walter A. Cotton, but if "I join eleven other person in a jury box, all of us basking under the pleasant fiction that we have formed no opinion about the case, and pronounce the same man guilty, all is well. For a brief time we are not individuals; we are the state." But Cotton did not think so. "The fallacy in all this is revealed vividly when we try to assign

[158] Roy Parker, Jr., "Duplin Man Dies in Gas Chamber," RNO, 28 October 1961, p. 1.

[159] "Capital Punishment," Editorial, RNO, 28 September 1925, p. 4.

to any one person the responsibility for condemning a man to death," he wrote. The prosecutor protests that he is just doing his job by making a strong case; the jurors blame mandatory sentences and the judge does the same: "all I can do is pronounce the sentence." The Supreme Court can examine only the record, and the governor, if he finds no new evidence, can do nothing but withhold clemency. So the circle goes round and round," Cotton complained. "Can we persuade ourselves into believing that we escape our individual responsibility by blaming the existence of capital punishment on society? Is society some abstraction, or is it not all of us grouped together?"[160]

It was. North Carolinians as a group continued to support the idea of death as punishment. In 1953, North Carolinians, like most Americans, continued to support the death penalty in principle. Gallup asked Americans that year if they favored the death penalty for murder, and not only that they were, but also that they favored it with little qualification. Sixty-four percent responded yes and just twenty-five percent no; others had no opinion or qualified their answer.[161] But by 1960, support had fallen to fifty-three percent, opposition had risen to thirty-six percent, and the number of undecided respondents had risen to eleven percent.[162] Support had softened nationally, but remained somewhat strong. In North Carolina, the impulse to reform remained weak. As novelist Doris Betts said shortly before Theodore Boykin's 1961 asphyxiation, "North Carolinians do not seem to be thinking much of future alternatives to the death penalty. We are a rural

[160] Walter A. Cotton, "Poison Gas against Electricity," RNO, 17 July 1938, p. M2.

[161] "Are You in Favor of the Death Penalty for Persons Convicted of Murder?" Survey by Gallup Organization, November 1-November 5, 1953. iPOLL Databank.

[162] "Are You in Favor of the Death Penalty for Persons Convicted of Murder?" Survey by Gallup Organization, March 2-March 7, 1960. iPOLL Databank.

state and a fundamentalist one, still suspicious of doctors with long names who can 'get anybody off by saying he's crazy, and offenders who are 'mollycoddled.'"[163]

Just as North Carolinians used jury discretion, legally sanctioned and not, and executive clemency as safety valves for a flawed death penalty process, so too they valued the persistence of the death penalty on the books as a safety valve for the misapplication of mercy. If executive clemency answered the question, "What if we condemn an innocent person?" the death penalty, in existence even after it ceased being used, answered the question, "What if we encounter a criminal so evil that we need to ensure his or her death?" North Carolinians wanted to preserve the death penalty for this reason, even after they found themselves using other punishments instead. In 1956, as the death penalty was, temporarily, waning, the *News and Observer* published an editorial arguing that "either this State should … make the death penalty the rule or it should stop making such punishment the rare and almost irrelevant exception." Years later, the state would make the death penalty the rule, but until forced by the Supreme Court, North Carolinians, after decades of lobbying, preferred for execution to be "rare and almost irrelevant."[164]

[163] Guy Munger, "Grim History of N.C. Executions," RNO, 4 March 1984, p. D1.

[164] "Relic of Barbarism," Editorial, RNO, 14 July 1956, p. 4.

CONCLUSION

"An Emotional Craving": The Death Penalty Returns to North Carolina

This story does not end in 1961. That year, the North Carolina House rejected a bill that would have abolished the death penalty except for repeat offenses.[1] Marion Wright and his allies, however, continued to press for a convincing legal rejection of the death penalty in North Carolina for the next decade. At its peak, North Carolinians Against the Death Penalty had about 200 members and friends in the labor and religious communities, but without a formal relationship with any other group or a reliable source of money.[2] Wright holed himself up at a hotel in Raleigh, pursued by its manager, who refused to give him a monthly rate. He used his own money to duplicate the pamphlets and fliers he delivered to lawmakers before votes on the abolition bills that regularly appeared before them in the 1960s, and sent out frequent appeals for money from friends and others. It must have been lonely work, but Wright entertained himself with a lively correspondence with fellow activist Elizabeth Wall.

Under Wright, NCADP relied on persuasion, both of the public and their representatives. His efforts got some bills to the floor of the General Assembly, but they failed to muster much support, in part because as the death penalty fell out of use and out

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[1] Roy Parker Jr., "Proposal May Be Step to Limit Capital Punishment," RNO, 26 August 1962. Clipping File through 1975 (Capital Punishment), 33. NCC.

[2] Marion Wright, interviewed by Harriet Quinn, 7 June 1978, 6. NCC.

of the news, interest in it waned.[3] Frustrated, Wright wrote in his diary that allowing the death penalty to linger, unused, was "like leaving a loaded gun around upon a theory that few children will get a hold of the gun anyhow."[4] He won some converts, including the State Baptist Convention and an "embarrassed" State Prisons Director, but legislators remained unconvinced.[5] In 1965, Wright wrote and distributed an essay entitled "Shall We Abolish Capital Punishment?" One skeptic dashed off a note to Wright: "Copies of this paper writing have been scattered all over the Legislative Building. I doubt that these copies have been read to any great extent."[6]

In light of the failure of a largely logical and statistical argument—abolition bills lost in 1965 and 1967, and would continue to fail every two years—Wright tried to return to Paul Green's strategy of framing the death penalty in emotional and racial terms. He found an African-American legislator who would sponsor an abolition bill, hoping "to dramatize the fact that racism is defeating all these bills."[7] But Wright could not entirely tear himself away from the idea that "the substantial body of respectable opinion in North Carolina which favors abolition"[8] was enough to garner votes in the General Assembly.

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[3] "Death Penalty Ban Bill Dies," RNO, 13 March 1963. Clipping File through 1975 (Capital Punishment), 47. NCC.

[4] Journal of Marion Wright, in Marion A. Wright Papers, Series 3: Death Penalty. Box 17, Folder 309: Feb. 21-Apr. 20, 1967. SHC.

[5] David Cooper, "Baptists Say No to Death Penalty," RNO, 15 November 1963. Clipping File through 1975 (Capital Punishment), 73. NCC; "Abolish Capital Punishment, Says State Prisons Director," RNO, 22 September 1966. Clipping File through 1975 (Capital Punishment), 68. NCC.

[6] Thomas White to M.A. Wright, in Marion A. Wright Papers, Series 3: Death Penalty. Box 16, Folder 302: Mar. 17-Apr. 5, 1965. SHC.

[7] "Death Penalty—Memorandum on Legislature, 29 January 1971, in Marion A. Wright Papers, Series 3: Death Penalty. Box 16, Folder 309: Feb. 21-Apr. 20, 1967. SHC.

[8] Journal of Marion Wright, in Marion A. Wright Papers, Series 3: Death Penalty. Box 17, Folder 309: Feb. 21-Apr. 20, 1967. SHC.

After the bill failed, Wright was still seeking to assembly a "disinterested and scientific body of North Carolinians" to issue a statement condemning the death penalty.[9] He convinced UNC sociologist Guy Johnson to update some academic studies on the death penalty from the 1950s, but Johnson gave up in early 1968, frustrated by incomplete records.[10]

By the end of the 1960s, influential political leaders, such as Governor Robert W. Scott, his lieutenant governor, and his attorney general, had gone on record against the death penalty; opposition was no longer politically dangerous.[11] But many congressmen remained unconvinced, and because North Carolina's General Assembly would not meet again until 1971, Wright turned his attention to the national picture, lobbying Senator Sam Ervin to support federal abolition. Ervin's response illustrates the persistence of death penalty support even among those who doubts its logic. The senator reasoned that if the death penalty were not a deterrent, then its opposite must be, a conclusion which dictated abandoning punishment for crime altogether. Furthermore, even if the death penalty did not deter, Ervin believed that "from a social point of view it would be better to err on the side of the victims of the crime. For the maintenance of law and order and the protection of society, I think we agree that they should be the object of main concern." Finally, Ervin added, "while I certainly condemn the use of capital punishment as a vehicle for vengeance, I do feel that it is very important as an act for the

[9] Marion A. Wright to Sneed High, in Marion A. Wright Papers, Series 3: Death Penalty. Box 17, Folder 346: Mar. 19-31, 1968. SHC.

[10] Guy Johnson to Marion A. Wright, in Marion A. Wright Papers, Series 3: Death Penalty. Box 17, Folder 318: Apr. 19-29, 1967. SHC.

[11] Undated clippings reprinted by North Carolinians Against the Death Penalty, 27 March 1969, in Marion A. Wright Papers, Series 3: Death Penalty, Box 20, Folder 364: March 19-31, 1969. SHC.

community's reprobation of certain crimes."[12] The death penalty had been whittled down to a symbol, but still an important one.

The death penalty's symbolic value was most important to politicians, who increasingly used it to demonstrate their commitment to punishing—if not reducing—crime. To death penalty opponents, the punishment in North Carolina and nationally had the misfortune of falling out of use at a time when many Americans, especially conservative whites, were uncomfortable with the social changes taking place around them. In 1969, him shortly after the abolition bill was tabled in the House of Representatives, one of Wright's allies told him that "repeal of the death penalty with the present climate of 'law and order' are simply not compatible goals for either the citizens of North Carolina or their representatives."[13] Instead, many representatives wished to reassure North Carolinians who feared becoming victims of crime that they were going to keep them safe. Support for the death penalty became an important symbol of that intent. As Elizabeth Wall told Marion Wright, congressmen "were afraid to have the uninformed masses of their constituents believe that they 'were on the side of the criminals and not the victims.'"[14]

It was imperative, then, that when the United States Supreme Court handed down its decision in *Furman v. Georgia* in 1972, North Carolina lawmakers respond. *Furman* invalidated death penalty statutes that provided for jury and judicial discretion, asserting

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[12] Sam J. Ervin to Marion A. Wright, in Marion A. Wright Papers, Series 3: Death Penalty. Box 17, Folder 318: Apr. 19-29, 1967. SHC.

[13] Ruth C. Wilson to Marion A. Wright, 29 April 1969, in Marion A. Wright Papers, Series 3: Death Penalty Box 20, Folder 363: March 1-18, 1969. SHC.

[14] Elizabeth Wall to Marion Wright, 6 July 1973, Marion A. Wright Papers, Series 3: Death Penalty. Box 20, Folder 396: Undated, 1971. SHC.

that jury discretion, the compromise North Carolinians had worked out over the previous decades of trial and error was, in fact, the source of the problem. The death penalty, it seemed, was over. Pastor and activist W.W. Finlator wrote to Marion Wright suggesting they "kill the fatted calf and have first rate music and dancing."[15] Wright, no longer NCDAP president, wrote back, cautiously optimistic. "You and I may not have done anything to cause the Court to change its mind, but, by gum we was thar when she changed."[16] *Furman v. Georgia* revived Wright's hopes for persuasion; the following year, he wrote to a colleague, "I do not think we can overdo putting the printed arguments against the death penalty in the hands of as many people as possible."[17]

Wright saw the need for North Carolina to abolish its now invalid statutes because the Court's divided ruling, in which every justice wrote a separate decision, did not mean that the death penalty *per se* was unconstitutional, only that it was unconstitutional as practiced. So ruled the North Carolina Supreme Court in 1973's *State v. Waddell*,[18] when it adopted an advisory role it had previously condemned and recommended that the legislature excise the discretionary parts of North Carolina capital law in order to leave behind a mandatory death penalty.[19] The legislature immediately moved to replace death with a life sentence for burglary and arson, while codifying a mandatory death penalty for

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[15] W.W. Finlator to Marion Wright, 6 July 1972, Marion A. Wright Papers, Series 3: Death Penalty. Box 20, Folder 396: Undated, 1971. SHC.

[16] Marion Wright to W.W. Finlator, 14 July 1972, Marion A. Wright Papers, Series 3: Death Penalty. Box 20, Folder 396: Undated, 1971. SHC.

[17] Marion Wright to Emmanuel Coutlakis, 25 March 1973, Marion A. Wright Papers, Series 3: Death Penalty. Box 21, Folder 400: Death Pen., 1973. SHC.

[18] State v. Waddell, 282 N.C. 431 (1973).

[19] David R. Frankstone, "Recent Developments in North Carolina Case Law," North Carolina Law Review, vol. 52, no. 4 (March 1974), 885-88.

murder and rape.[20] This move swelled the ranks of death row. By 1975, while public protest had reached historic proportions,[21] the state had the most condemned criminals in the nation,[22] sixty-five percent of them African-American[23] and nearly a quarter of them sent there by a single zealous prosecutor.[24] These death row inmates, though, were not being executed, as appeals, court rulings, and reversals shuttled people on and off of death row. When Anthony Carey received a death sentence for murder, he recalled, "it really shocked me, because I didn't know the death penalty was still in."[25]

Carey was lucky: although the North Carolina Supreme Court unanimously upheld the mandatory death penalty when it was challenged by a condemned rapist in *Woodson v. North Carolina*, the U.S. Supreme Court ruled otherwise on appeal, noting that, as they had done for decades, jurors would refuse to convict when faced with both doubts and a mandatory death sentence.[26] Mandatory sentencing provided a new avenue for jury discretion. In 1975, Carey and more than one hundred of his fellow prisoners were removed from death row and given life sentences. Soon thereafter, in *Gregg v.*

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[20] Law of April 8, 1974, ch. 1201, 1974 N.C. Sess. Laws, 2d Sess. 323 (rewriting N.C. Gen. Stat. 14-17 (first-degree murder), 14-21 (rape), 14-52 (first-degree burglary), and 14-58 (arson). Law cited in Joel M. Craig, "Comments: Capital Punishment in North Carolina: The Death Penalty Statute and the North Carolina Supreme Court," North Carolina Law Review, vol. 59, issue 5 (June 1981), 912; "South's Approach to Capital Punishment," RNO, 11 March 1973, p. 6.

[21] Pat Stith, "Police, Patrol Keep Close Eye on March," RNO, 5 July 1974. Clipping File through 1975 (Capital Punishment), 161. NCC.

[22] Tom Wicker, "The Wind in the Pines," New York Times, 26 December 1975, p. 31.

[23] Task Force on Criminal Justice, "North Carolina vs. Capital Punishment," Summer 1975. Clipping File through 1975 (Capital Punishment), 189. NCC.

[24] Richard Whittle, "Small N.C. District Is Giant on the Death Penalty," RNO, 22 December 1975. Clipping File through 1975 (Capital Punishment), 202-3. NCC.

[25] Wayne King, "Death Rows: 44 May Avoid Execution," New York Times, 30 December 1973, p. 19.

[26] Craig, 913.

Georgia, the U.S. Supreme Court approved less rigid death penalty laws in Georgia, Texas, and Florida, one modeled after recommendations in the 1962 Model Penal Code.

The ruling freed North Carolina lawmakers to adopt a procedure which required a separate sentencing phase of a capital defendant's trial: after a jury convicted a prisoner of first-degree murder—the new law decapitalized rape—it then considered a list of factors that might alleviate, or mitigate, the seriousness of a crime, and factors which might make one murder worse than another, known as aggravating circumstances. There are eleven aggravating factors which "should incline" a jury to recommend a death sentence, including whether the prisoner committed the crime while in the act of another serious crime, whether the victim was a law officer, or whether the crime was particularly cruel. The nine mitigating factors, those which should incline the jury to recommend a life sentence, include whether the defendant committed the felony could not understand the significance of his or her actions, whether the defendant was particularly young, or without a criminal record. The law, which codified the process of personal evaluation jurors had been using at least for decades, also provided for an automatic North Carolina Supreme Court review of death sentences.[27] The legislature passed it in 1977.

Execution was back in North Carolina, and with it, some observers thought, a new mood. "Judges and justices sense it. Prosecutors and defense lawyers sense it. Educators and ministers sense it. The public knows it and the majority probably approves of it," observed one journalist. "The mood is one of retribution—at once an emotional craving and an ancient legal concept recently given legal credence by the U.S. Supreme Court."[28]

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[27] Craig, 921-2.

[28] Swofford, p. B1.

It was also a newly minted political hot button issue: for decades, North Carolina's governors had avoided talking about the issue. In the 1980s, to win an election there and elsewhere required vocal support for the death penalty.[29] This new climate resulted, in 1984, in North Carolina's first execution in more than twenty years. Since 1977, North Carolina has executed forty-three people, as many as Georgia and fewer only than Florida, Virginia, and Texas. Of states that regularly execute criminals, just three (Florida, Texas, and Alabama) have more condemned prisoners than North Carolina, where today, 173 people sit on death row.[30]

Before North Carolina inaugurated its new death penalty era, the General Assembly passed a bill that allowed condemned criminals to choose whether they would die by lethal injection or asphyxiation with gas. Lethal injection was "basically the same procedure for making people well in hospitals," said the bill's sponsor.[31] James Hutchins chose to die this way in 1984, as did most of those who followed him into the death chamber, but Ricky Lee Sanderson chose gas in 1998. As his victim's father watched, Sanderson "turned beet red," straining against the leather straps that held him down and gasping in the deadly gas.[32] After Sanderson's death, the General Assembly voted to restrict the execution method to lethal injection only, and in 2000, the death chair was packed away and sent to the North Carolina Museum of History.

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[29] Marie Gottschalk, The Prison and the Gallows: The Politics of Mass Incarceration in America (Cambridge University Press, 2006), 115.

[30] Data from the Death Penalty Information Center. <http://deathpenaltyinfo.org/state/>.

[31] Ed Martin, "Drugs Would Quietly End Life of Condemned Prisoner, RNO, 12 January 1984, p. A17.

[32] Doug Clark, "Holliman's Death Penalty View Matters," News and Record (Greensboro, NC), 31 January 2007, p. A9.

North Carolina executed twenty-eight more men before controversy again forced the punishment to a halt. In 2007, North Carolina stopped executing criminals, this time more because of a standoff than a compromise. The North Carolina Medical Board had voted to punish physicians who participated in executions, arguing that doing so violates medical ethics. Doctors refused to participate, and prison officials sued to return them to the death chamber, unable to perform executions without a doctor present because the law requires them there to look out for signs of pain and suffering.[33] Before the North Carolina Supreme Court as of November 2008, and the subject of muted discussion by politicians, the death penalty has remained a present, though not urgent, political issue.[34]

In the past twenty-five years, the death penalty in North Carolina has already undergone the rise and fall that took fifty years to complete in the twentieth century, and it is unclear whether the state has reached the end of another cycle—with a particularly repugnant crime possibly sparking the return of execution—or the end of the punishment altogether. Bifurcated sentencing, by shifting the burden of a death sentence from one group of people to another, has made it somewhat easier to convict criminals of capital crimes; but in 2006, the state saw 539 murders and just 4 executions.[35] The numbers in 1910, the first year of state-controlled executions, were similar: 130 people indicted for first-degree murder appeared in North Carolina's superior courts, but just 5 of them were

[33] Sarah Avery, "Executions Pose Dilemma for Doctors; Medical Board Argues Law's Intent," RNO, 31 July 2008, p. B4; The Associated Press, "N.C. Medical Board Appeals Decision," RNO, 31 July 2008.

[34] "Ryan Teague Beckwith and Mark Johnson, "McCrory, Munger Debate; Perdue Sits Out," RNO, 25 September 2008, p. B13; Mark Johnson and Ryan Teague Beckwith, "Hopefuls Hone Their Positions; McCrory, Perdue, Differ in Degrees," RNO, 20 August 2008, p. B4.

[35] North Carolina State Board of Investigation Crime Statistics. <http://sbi2.jus.state.nc.us/crp/public/Default.htm>.

executed.[36] In North Carolina, the death penalty as a response to serious crime is, and has been, almost entirely symbolic; the only way to justify it appears to be avoiding its use.

North Carolina has twice repudiated the death penalty. Executions between 1910 and 1961 were often dramatic and horrifying, marking the tragic, violent ends to tragic, violent lives. Southern tradition would seem to have nurtured this kind of lethal theater, but North Carolinians themselves were not always comfortable with it. When mandatory sentencing bound execution and conviction together, North Carolinians often refused to convict criminals, or did so only with the promise that their conviction would not lead to a death. When the legislature relaxed these laws at midcentury, North Carolinians took advantage of this new leniency, and executions ceased.

Despite executions' dramatic power, the death penalty's lack of use was its most prominent feature between 1910 and 1961. The infrequency of executions reveals a degree of tolerance for serious crime. It was a tolerance that echoed the sympathy for violent lawbreakers in the nineteenth century; it also illustrated an accommodation between traditions of vengeance and traditions of leniency.[37] People in North Carolina did not tolerate serious crimes because they did not loathe them, or could not empathize with their victims. They tolerated them because inflexible laws were blind to the varieties of circumstance that differentiated one murder from another. Existing laws could not adequately respond to grief, pity, or doubt. And they were out of touch with the realities of a southern state home to many more criminals than could be punished. Sometimes North Carolinians exploited the limited reach of the law, such as when they demanded commutations for sympathetic prisoners. Sometimes they decried it, as when those

[36] Attorney General Report (1909-1910).

[37] Hindus, Prison and Plantation.

commutations went to undeserving criminals. Neither instance shored up faith in the government and its laws.

The mandatory death penalty was intended to preclude this erosion of faith, both between 1910 and 1949, and after *Furman*. It failed, in practice and under scrutiny by the United States Supreme Court. North Carolina's politicians failed to acknowledge their constituents' discomfort with the mandatory death penalty, forcing jurors to free murderers, less of a sin than executing innocent people, but enough of one to spur forceful political action. The absence of such action reveals a sense that, as one state senator put it in 1965, after four execution-free years: *de facto* abolition was "the best compromise of two extremes."[38]

This compromise, worked out between 1910 and 1961, is a strong rebuttal to culture-driven explanations for the use of the death penalty in North Carolina, the South, and the United States. North Carolina, a state that shared a racist, violent past with other southern states, let the death penalty fall out of use; the state's past did not make death as punishment particularly desirable to the state's residents or permanent in the state's law books. This trend was a national one: the number of executions in the United States declined steadily after reaching a peak in the late 1930s, with the exception of a postwar spike in the late 1940s. Some states continued to execute criminals after North Carolina stopped in 1961, but by 1968, executions were no longer taking place in the United States.[39]

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[38] R. Theodore Dent to Marion A. Wright, Marion A. Wright Papers, Series 3: Death Penalty. Box 16, Folder 362: Feb. 5-28, 1969. SHC.

[39] Hugo Adam Bedau, The Death Penalty in America: Current Controversies (New York: Oxford University Press, 1997), 10-11.

Between 1909 and 1961, criminal justice in North Carolina underwent many of the same changes that other functions of government did—professionalization and centralization gripped the state in the early decades of the twentieth century as North Carolinians built a modern economy and dealt with the results. But, the death penalty was too violent and too laden with emotion to be contained, even after the state government plucked it from the county courthouse. It remained the province of individual decision-makers, ironically, because rigid laws exerted such draconian control over the process that, in order to engage with it, North Carolinians had to ignore those laws and commit "pious perjuries" to keep certain people off death row.[40] As the North Carolina Supreme Court ruled in 1968, '"one of the most important functions any jury can perform' in exercising its discretion to choose 'between life imprisonment and capital punishment' is 'to maintain a link between contemporary community values and the penal system.'"[41]

One observer made the same point in 1924:

> If our legal machinery were so fearfully and perfectly exacting that invariably slayer must follow the slain into eternity … perhaps the punishment would be sufficiently deadly, sufficiently certain to deter crime. But as long as death penalties are imposed by human judges, the severity of the death penalty will thwart capital conviction more than it deters the commission of capital crimes.[42]

Caprice helped the death penalty occur less often, which made the idea of the punishment less disturbing to North Carolinians who supported the concept, which allowed the punishment to persist. It was a practical arrangement. The occasional man or woman who

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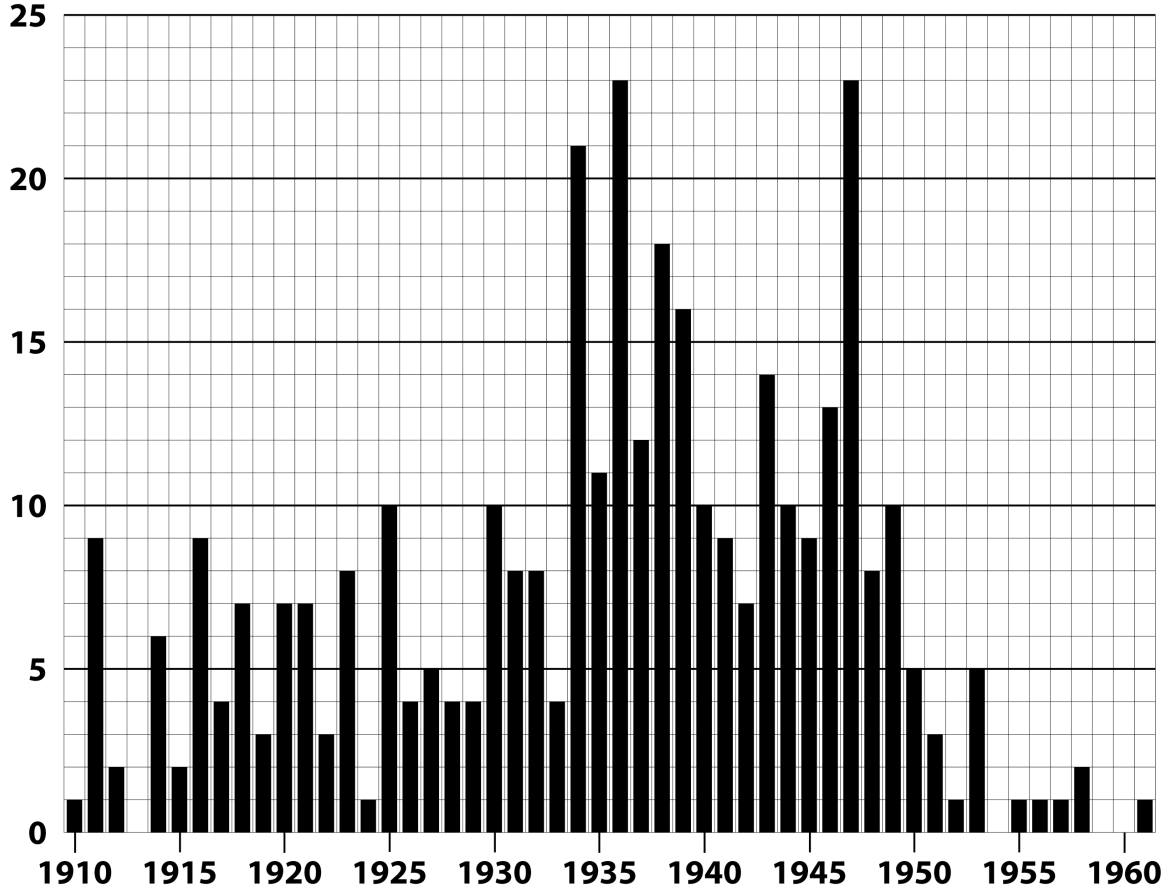
[40] Charles Phillips, Vacation Thoughts on Capital Punishments (London: James Ridgway, 1858), 24.

[41] Witherspoon v. Illinois, 391 U.S. 510 (1968).

[42] Frank Smethurst, "Has Capital Punishment Been a Failure in North Carolina?" RNO, 16 November 1924, p. X1.

died in the electric chair or the gas chamber was a symbol of custom and compromise, sacrificed to the idea that North Carolina needed lethal punishment for its worst criminals.

Appendix A
Executions in North Carolina, 1910-1961



Appendix B
Executions Under State Authority in North Carolina by Year, 1910-2008[43]

1910	1	**1920**	7	**1930**	10	**1940**	10	**1950**	5	**1960**	0	**1991**	1	**2001**	5
1911	9	**1921**	7	**1931**	8	**1941**	9	**1951**	3	**1961**	1	**1992**	1	**2002**	2
1912	2	**1922**	3	**1932**	8	**1942**	7	**1952**	1	**1961-1983**	0	**1993**	0	**2003**	7
1913	0	**1923**	8	**1933**	4	**1943**	14	**1953**	5	**1984**	2	**1994**	1	**2004**	4
1914	6	**1924**	1	**1934**	21	**1944**	10	**1954**	0	**1985**	0	**1995**	2	**2005**	5
1915	2	**1925**	10	**1935**	1	**1945**	9	**1955**	1	**1986**	1	**1996**	0	**2006**	4
1916	9	**1926**	4	**1936**	23	**1946**	13	**1956**	1	**1987**	0	**1997**	0	**2007**	0
1917	4	**1927**	5	**1937**	12	**1947**	23	**1957**	1	**1988**	0	**1998**	3	**2008**	0
1918	7	**1928**	4	**1938**	18	**1948**	8	**1958**	2	**1989**	0	**1999**	4		
1919	3	**1929**	4	**1939**	16	**1949**	10	**1959**	0	**1990**	0	**2000**	1		

[43] North Carolina Department of Correction. For a full record of who was executed when, as well as their races and the crimes for which they died, visit <http://www.doc.state.nc.us/dop/deathpenalty/personsexecuted.htm>. Spellings of names may be different than those appearing in newspaper accounts and court records.

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  - State Highway and Public Works Commission
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  - Thomas W. Bickett Papers
  - J. Melville Broughton Papers
  - R. Gregg Cherry
  - Locke Craig
  - J.C.B. Ehringhaus
  - Oliver Max Gardner
  - Robert B. Glenn
  - Luther H. Hodges
  - Clyde R. Hoey
  - William W. Kitchin
  - Angus W. McLean
  - Cameron Morrison
  - Terry Sanford
  - W. Kerr Scott
  - William B. Umstead
- State Agency Records
  - Prison Department, Central (State) Prison
  - State Agencies Papers: Paroles Department

Court Files
Superior Court Case Files
Supreme Court Case Files

Nell Battle Lewis Papers

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