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**THE DEATH PENALTY IN DARK TIMES: WHAT CRISES
DO (OR DO NOT DO) TO CAPITAL PUNISHMENT**

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The COVID 19 pandemic temporarily stopped executions in the United States and played a part in a record low number of death sentences handed down in 2020. While many newspapers reported on the pandemic-related disruption of individual executions and court proceedings, little attention has been given to understanding whether other crises in American history have similarly disrupted the death penalty. This paper examines execution data from several major crises in American history—wars, economic downturns, and pandemics—to assess whether COVID-19’s disruption of the American death penalty represents an anomaly among pandemics and other crises. As we will show, the death penalty has shown remarkable resiliency. Through all manner of national disruptions, with the exception of the first months of the COVID-19 pandemic, America’s execution machinery has kept on running. This fact is one indication of this nation’s attachment to capital punishment.

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INTRODUCTION

On March 16th, 2020, the Texas Court of Appeals made headlines when it became the first court in the nation to postpone an execution due to the unfolding COVID-19 pandemic. It pushed the execution of John Hummel back for sixty days, citing “the enormous resources needed to address that emergency.”¹ Three days later, it granted a stay of execution to Tracy Beatty on the same grounds.² The State Department of Corrections had assured the court in both cases that carrying out the executions could be done safely. “[T]he death chamber at the state penitentiary,” the Department noted, “is isolated from the rest of the prison. ‘It is thoroughly cleaned, consistently and constantly,’” yet the judges were unpersuaded.³ Although the court turned aside all other aspects of the men’s appeals, the court issued stays in light of what it called “‘the current health crisis.’”⁴

Other states responded to the pandemic by making special accommodations to deal with the health needs of their death row populations, but several also followed Texas’s lead in putting executions on hold. By the end of 2020, a total of eleven executions had been delayed due to pandemic-related concerns and only seventeen people were put to death—the lowest annual number of executions since 1991.⁵

The United States was already on pace to execute fewer than thirty people for the sixth consecutive year when the coronavirus crisis erupted in mid-March, but the pandemic played a significant role in 2020’s low execution toll.⁶ The pandemic also played a part in the record low number of

¹ *In re Hummel*, No. WR-81, 578-02, 2020 WL 1268970, at *1 (Tex. Crim. App. Mar. 16, 2020).

² *In re Beatty*, No. WR-59, 939-04, 2020 WL 13229145, at *1 (Tex. Crim. App. Mar. 19, 2020).

³ Josiah Bates, *Texas Execution Stayed for 60 Days Over Coronavirus Concerns*, TIME (Mar. 17, 2020), <https://time.com/5804679/texas-execution-stayed-for-60-days-over-coronavirus-outbreak-concerns/> [<https://perma.cc/M97V-4CFP>].

⁴ *Id.*

⁵ For complete list of executions stayed originally scheduled for 2020, see *Stays of Execution in 2020*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/stays-of-execution-in-2020> [<https://perma.cc/93DQ-5MD4>] (last visited June 25, 2021). For annual execution tolls from 1991 to 2020, see *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976> [<https://perma.cc/72JY-Z6P2>] (last visited June 25, 2021).

⁶ *The Death Penalty in 2020: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 16, 2020), <https://reports.deathpenaltyinfo.org/year-end/YearEndReport2020.pdf> [<https://perma.cc/U6A8-JATZ>] [hereinafter *Report*].

death sentences (eighteen) handed down in 2020. Trials were stopped and put on hold due to the severe health risks associated with staging in-person hearings and proceedings.⁷ Notable death penalty cases that were delayed included the trials of accused Parkland shooter Nikolas Cruz⁸ and Justin Smith, who was accused of murdering a University of Kentucky student in 2015.⁹

While many newspapers reported on the pandemic-related disruption of individual executions and court proceedings,¹⁰ little attention has been given to understanding whether other crises in American history have similarly disrupted the death penalty. At the time that John Hummel's execution was delayed, the Death Penalty Information Center noted only two other instances when executions had been postponed in Texas due to national emergencies or natural disasters—once in wake of the September 11th attacks in 2001 and again in wake of Hurricane Harvey in 2017.¹¹ In a March 2020 article entitled “How Coronavirus is Disrupting the Death Penalty,” Keri Blackinger and Maurice Chammah argued that “natural events” rarely have led to the postponement of executions and other death penalty proceedings.¹² They, too, cite the 2017 Hurricane Harvey-motivated delay as a rare example

⁷ DPIC MID-YEAR REVIEW: *Pandemic and Continuing Historic Decline Produce Record-Low Death Penalty Use in First Half of 2020*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-special-reports/dpic-mid-year-review-pandemic-and-continuing-historic-decline-produce-record-low-death-penalty-use-in-first-half-of-2020> [https://perma.cc/Q3EX-ZBCR] (last visited June 25, 2021); *The Death Penalty in 2020: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 16, 2020) <https://reports.deathpenaltyinfo.org/year-end/YearEndReport2020.pdf> [https://perma.cc/YB39-EQUJ].

⁸ Curt Anderson, *Judge: Florida School Shooting Trial off Indefinitely*, AP NEWS (June 22, 2020), <https://apnews.com/article/virus-outbreak-fort-lauderdale-school-shootings-fl-state-wire-florida-b931a81d4fea58a46b387e95d4dafcea> [https://perma.cc/GPV2-USE3].

⁹ Jeremy Chisenhall, *UK Student Was Killed 5 Years Ago. Lexington Trial of Man Accused Delayed Again*, LEXINGTON HERALD-LEADER (June 24, 2020), <https://www.kentucky.com/news/local/crime/article243764777.html> [https://perma.cc/T6RJ-FFWZ].

¹⁰ Jess Bravin, *Prisoner Executions Are Put Off Because of Pandemic*, WALL ST. J. (Mar. 26, 2020), <https://www.wsj.com/articles/prisoner-executions-are-put-off-because-of-pandemic-11585177364>; Tom Jackman & Mark Berman, *Despite Recent Federal Flurry, Number of U.S. Executions Is Lowest Since 1991*, WASH. POST (Dec. 16, 2020), <https://www.washingtonpost.com/nation/2020/12/16/us-executions-decline/>; *Report, supra* note 6.

¹¹ *Texas Court Issues 60-Day Stay of Execution for John Hummel in Response to Coronavirus Crisis*, DEATH PENALTY INFO. CTR. (Mar. 17, 2020), <https://deathpenaltyinfo.org/news/texas-court-issues-60-day-stay-of-execution-for-john-hummel-in-response-to-coronavirus-crisis> [https://perma.cc/36HF-MX46].

¹² Keri Blakinger & Maurice Chammah, *How Coronavirus Is Disrupting the Death Penalty*, MARSHALL PROJ. (Mar. 24, 2020), <https://www.themarshallproject.org/2020/03/23/how-coronavirus-is-disrupting-the-death-penalty> [https://perma.cc/9WYV-UYMW].

of such a postponement.¹³ Finally, in a March 2020 op-ed entitled “Will Coronavirus Stop America from Carrying out Executions?,” Austin Sarat reviewed execution data from twentieth and twenty-first century pandemics in the United States and found that those disease outbreaks did not historically interrupt executions.¹⁴

In what follows, we examine execution data during several major crises in American history—wars, economic downturns, and pandemics—to assess whether COVID-19’s disruption of the American death penalty represents an anomaly among pandemics and other crises.¹⁵ Because such events fundamentally disrupt day-to-day life, redirecting attention and resources to their amelioration and resolution, the extent to which executions proceed as “normal” provides one measure of what we call the death penalty’s resiliency. Understanding that quality can also help measure the depth and strength of America’s attachment to capital punishment.

In Part II we discuss the meaning of crisis and the way that label has been deployed to identify, name, and understand disruptive events or conditions. Part III examines what happened to death sentences and executions during the nation’s wars, economic downturns, and disease outbreaks.¹⁶ As we will show, the death penalty has shown remarkable resiliency. Through all manner of national disruptions, with the exception of the first months of the COVID-19 pandemic, America’s execution machinery has kept on running. In Part IV, we discuss that fact’s significance as a measure of the support capital punishment has enjoyed throughout history.

I. WHAT IS A CRISIS?

Used today to describe virtually any “bad” situation, the term “crisis” seems to have lost much of its analytical might.¹⁷ Media commentators, politicians, and scholars of all stripes frequently invoke the term to generally

¹³ *Id.*

¹⁴ Austin Sarat, *Will Coronavirus Stop America from Carrying Out Executions?*, JUSTIA (Mar. 24, 2020), <https://verdict.justia.com/2020/03/24/will-coronavirus-stop-america-from-carrying-out-executions> [<https://perma.cc/8GRH-JNWB>].

¹⁵ For this article, we assess the effects of crises on the death penalty by analyzing execution data from the ESPY file. M. Watt Espy & John Ortiz Smykla, *Executions in the U.S. 1608–2002: The ESPY File: Executions by Date*, <https://files.deathpenaltyinfo.org/legacy/documents/ESPYyear.pdf> [<https://perma.cc/K2HV-KCH2>] [hereinafter *ESPY File*]; *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976> [<https://perma.cc/3TEP-79GK>] (last visited June 25, 2021).

¹⁶ We examine only the most important of America’s wars, economic downturns, and outbreaks of disease. A complete account is beyond the scope of our research.

¹⁷ Edgar Morin & Thierry C. Pauchant, *For a Crisiology*, *INDUS. & ENV’T CRISIS Q.* 5, 5 (1993).

describe difficult conditions in different domains of social, economic, and political life.

The Biden administration's stated commitment to solving the four "converging" crises of our time—the "COVID-19 crisis," the "economic crisis," the "climate crisis," and the "crisis of racism/racial inequities"—exemplifies the term's current function as a catchword for a wide range of undesirable phenomena. The media has also frequently applied the crisis label to problems that the COVID-19 outbreak has exacerbated. Journalists have been particularly attentive to its contribution to what are variously labelled the "education crisis,"¹⁸ "poverty crisis,"¹⁹ "hunger crisis,"²⁰ "opioid crisis,"²¹ and the "crisis for capitalism."²² Psychologists have pointed out COVID-19's impact in bringing about "mental health crises."²³ And finally, political scientists and constitutional scholars have described a pandemic-related "constitutional crisis"²⁴ and "crisis of democracy."²⁵

¹⁸ Ulrich Boser, Perpetual Baffour & Steph Vela, *A Look at the Education Crisis*, CTR. FOR AM. PROGRESS (Jan. 26, 2016), <https://www.americanprogress.org/issues/education-k-12/reports/2016/01/26/129547/a-look-at-the-education-crisis/> [<https://perma.cc/562C-NMQ5>]; Kathy Hirsh-Pasek et al., *COVID-19 Sparks an Overdue Discussion on Education Reform: An Optimistic Vision*, BROOKINGS (Jan. 4, 2021), <https://www.brookings.edu/blog/education-plus-development/2021/01/04/covid-19-sparks-an-overdue-discussion-on-education-reform-an-optimistic-vision/> [<https://perma.cc/7CRN-X7BJ>].

¹⁹ Dylan Matthews, *Joe Biden Is Taking Office Amid a Poverty Crisis*, VOX (Dec. 3, 2020), <https://www.vox.com/future-perfect/21582005/joe-biden-poverty-covid> [<https://perma.cc/V5KF-E2AH>].

²⁰ Siobhán O'Grady, *The Coronavirus Intensified a Hunger Crisis Last Year, But 2021 Could Be Worse*, WASH. POST (Jan. 6, 2021), <https://www.washingtonpost.com/world/2021/01/06/coronavirus-starvation-poverty-inequality-hunger-un/> [<https://perma.cc/5B5S-47RP>].

²¹ Abha Bhattarai, *Justice Department Sues Walmart, Alleging It Helped Fuel Opioid Crisis*, WASH. POST (Dec. 22, 2020), <https://www.washingtonpost.com/business/2020/12/22/walmart-opioid-crisis-lawsuit/> [<https://perma.cc/L9K5-DXNY>].

²² Douglas Webber, *Capitalism and the Coronavirus Crisis: The Coming Transformation(s)*, CONVERSATION, (Oct. 28, 2020), <http://theconversation.com/capitalism-and-the-coronavirus-crisis-the-coming-transformation-s-149027> [<https://perma.cc/E34M-K7WE>].

²³ American Psychological Association, *The National Mental Health Crisis*, Am. Psych. Ass'n (Jan. 1, 2021), <https://www.apa.org/monitor/2021/01/trends-national-crisis> [<https://perma.cc/RA5T-2WES>].

²⁴ Philip Rucker, Amy Gardner & Annie Linskey, *Trump's Escalating Attacks on Election Prompt Fears of a Constitutional Crisis*, WASH. POST (Sept. 24, 2020), https://www.washingtonpost.com/politics/trump-election-transition-crisis/2020/09/24/068d2286-fe79-11ea-8d05-9beaa91c71f_story.html [<https://perma.cc/E66Z-XYSY>]; Letters to the Editor, *The Constitutional Crisis Has Arrived*, WASH. POST (Jan. 5, 2021), https://www.washingtonpost.com/opinions/letters-to-the-editor/the-constitutional-crisis-has-arrived/2021/01/05/91b7c040-4eb1-11eb-a1f5-fdaf28cfca90_story.html [<https://perma.cc/7258-9DT8>].

²⁵ Farhad Manjoo, *I'm Doomsday Prepping for the End of Democracy*, N.Y. TIMES (Sept. 3, 2020), <https://www.nytimes.com/2020/09/03/opinion/im-doomsday-prepping-for-the-end-of-democracy.html> [<https://perma.cc/34JD-XLHP>].

But while the “crisis” label is currently very much in vogue, the term has not always been invoked so frequently. The term “crisis” originally comes from the Greek word “*krisis*,” meaning “decision,” and in Ancient Greece and throughout succeeding centuries, it was used to describe specific times when decisions had to be made between two stark, often life-deciding, alternatives in the medical, legal, theological, and political realms.²⁶ In the medical realm, doctors used the term “crisis/*krisis*” to signify the moment when they would decide whether their ailing patient would live or die.²⁷ In the legal realm, “crisis/*krisis*” referred to the judge’s final determination of a defendant’s guilt or innocence.²⁸ Similarly, in the theological realm, specifically in the Christian tradition, “crisis/*krisis*” referred to the coming “Last Judgment”—the day on which God would issue a final judgment of humanity, granting salvation to some and condemning others to eternal damnation.²⁹ And finally, in the political realm, “crisis/*krisis*” referred to what a politician decided that would determine the fate of the body politic.³⁰

Because “crisis” referred only to specific moments of decision, its use remained fairly limited until the seventeenth century, by which point the term had been incorporated into the Latin and then into the French, English and German languages.³¹ During that period, one of great instability in Europe, politicians, economists, and psychologists used “crisis” as a metaphor to describe the political, economic, and psychological consequences of such instability.³² In 1627, the English politician Benjamin Rudyerd called the fierce tensions between Parliament and the Crown ““the Chrysis of Parliaments; we shall know by this if Parliaments live or die.””³³ In seventeenth century France, the term was used first to describe psychological troubles and then towards the tail end of the century to describe economic hardship under Louis XIV.³⁴

“Crisis” became even more widely used during the eighteenth and nineteenth centuries to describe numerous economic downturns and political

²⁶ Nadia Urbinati, *Reflections on the Meaning of the ‘Crisis of Democracy,’* 3 DEMOCRATIC THEORY 6, 10 (2016); JANET ROITMAN, ANTI-CRISIS 3 (2014).

²⁷ Reinhart Koselleck, *Crisis*, 67 J. HIST. IDEAS 357, 360 (Michaela W. Richter trans. 2006); Melvin Rader, *Toward a Definition of Cultural Crisis*, 9 KENYON REV. 262, 269 (Spring 1947); JANET ROITMAN, ANTI-CRISIS 15–16 (2014); Michael Freeden, *Crisis? How Is That a Crisis?!*, 12 CONTRIBUTIONS TO HIST. CONCEPTS 12, 17 (2017).

²⁸ Koselleck, *supra* note 27, at 10.

²⁹ *Id.* at 359–60.

³⁰ *Id.* at 358–59. For another perspective on the “political” definition of crisis, see Urbinati, *supra* note 26, at 10–11. For an analysis of how crisis is defined according to certain political ideologies, see Freeden, *supra* note 27, at 22.

³¹ Koselleck, *supra* note 27, at 361–62.

³² *Id.* at 358.

³³ *Id.* at 362.

³⁴ *Id.* at 362.

conflicts. In *Émile*, a 1762 treatise on the nature of education and on the nature of man, Jean-Jacques Rousseau famously declared that “[w]e are approaching the crisis-state and the century of revolutions.”³⁵ A few years later, Thomas Paine published a pamphlet called *The Crisis* in which he argued that the America’s Revolutionary War was a “crisis” that would yield one of two results: democracy or tyranny.³⁶ In the nineteenth century, “crisis” played a prominent role in Karl Marx’s theory that all economic downturns were the product of a larger “capitalist crisis.”³⁷

During the nineteenth century, the application of the term “crisis” became more popular. It was used to describe the numerous economic downturns that plagued Europe throughout the nineteenth century.³⁸ Economists and economic historians continued to claim the term as their own in the early twentieth century.³⁹ One of them, French economist Francois Simiand, devised a quantitative model for determining what economic conditions constituted a “crisis.”⁴⁰ Additionally, in 1929—the first year of the Great Depression—French economic historians Lucien Febvre and Marc Bloch founded the journal *Annales* in which they published numerous articles on economic crises throughout history.⁴¹ The success of economic historians in claiming the term “crisis” as their own is reflected by the fact that the 1937 *Encyclopedia of the Social Sciences* defined “crisis” as a “grave and sudden disturbance upsetting the complex equilibrium between the supply and demand of goods, services, and capital.”⁴²

At the beginning of the twentieth century, scholars in other disciplines began to talk regularly about crises. By mid-century, in the immediate aftermath of World War II,⁴³ philosophers, social scientists, and historians wrote frequently about what they called the “crisis of western

³⁵ Randolph Starn, *Historians and ‘Crisis,’* 52 PAST & PRESENT 3, 6 (1971).

³⁶ Koselleck, *supra* note 27, at 374. For another interpretation of Paine’s use of “crisis,” see Starn, *supra* note 35, at 6.

³⁷ Koselleck, *supra* note 27, at 395; Starn, *supra* note 35, at 7. For an explanation of Marx’s theory of crisis, see Freedman, *supra* note 27, at 17–18. One Italian lexicographer in the 1860s voiced fierce opposition to these applications of “crisis” as a metaphor, but most other scholars seemed to embrace the term’s newfound uses.

³⁸ Koselleck, *supra* note 27, at 390–97; For more on Marx’s theory of crisis, see KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 155 (Friedrich Engels ed. Edward B. Aveling, Samuel Moore & Ernest Untermann trans. 1906); SIMON CLARKE, MARX’S THEORY OF CRISIS (1994).

³⁹ Starn, *supra* note 35, at 10.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 11.

⁴³ *Id.* at 12; *Crisis Continued*, 28 BLACKFRIARS 437, 437–40 (1947); G. V. Ferguson, *The Challenging World Crisis*, 2 INT’L J. 281, 281 (1947).

civilization.”⁴⁴ Throughout the ensuing decades, more and more scholars began drawing on the term crisis to describe difficult situations in their respective fields.

During the immediate postwar period, psychologist Erik Erikson developed his theory of an “identity crisis” to describe the distressing transition from childhood to adulthood.⁴⁵ In the 1960s, military strategist Herman Kahn offered a detailed theory of crisis in foreign policy,⁴⁶ and demographers began lamenting the ““crisis of overpopulation”” worldwide and the ““crisis of stagnancy”” in some European economies.⁴⁷ Yet even as scholars tried to define what constituted a crisis in their respective fields, the term’s widespread use rendered it a pliable term. So much so that the 1968 version of the *International Encyclopedia of Social Sciences* simply defined it as ““a lay term in search of scholarly meaning.””⁴⁸

In response to such concerns, some have attempted to create a more streamlined definition of crisis, drawing on quantitative data to define a crisis as an *especially* bad situation.⁴⁹ American political scientist Jeffrey R. Henig sheds light on this approach and its drawbacks in his analysis of widespread claims of an education crisis in the United States.⁵⁰ He argues that the quantitative approach to defining crisis does not necessarily yield a more rigorous definition of the term. If anything, he concludes that the quantitative approach has empowered more and more social scientists to attach the crisis label to an increasingly large numbers of “bad” phenomena with little consistency and precision. By the mid-twentieth century, crisis was used to describe many different kinds of suffering.

In his 1947 article, “Toward a Definition of Cultural Crisis,” American philosopher Melvin Rader criticized the equation of “crisis” with “suffering.” He argued that crisis should not “be identified with such evils as poverty, disease, and injustice.”⁵¹ He argued that the term should be reserved to describe a “grave disturbance of equilibrium.”⁵²

Almost three decades later, Edgar Morin published “For a Crisology.” In that article, which called for a new science of crisis, “disruption” and “disequilibrium” emerge as central elements of “crisology.” In the process of

⁴⁴ Starn, *supra* note 35, at 12; Harold J. Laski, *The Crisis in Our Civilization*, 26 FOREIGN AFFS. 36–51 (1947).

⁴⁵ Starn, *supra* note 35, at 13; ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968).

⁴⁶ Starn, *supra* note 35, at 13; *see* HERMAN KAHN & ANTHONY J. WIENER, *CRISIS AND ARMS CONTROL* (1962).

⁴⁷ Starn, *supra* note 35, at 14.

⁴⁸ *Id.* at 13.

⁴⁹ Freedman, *supra* note 27, at 13.

⁵⁰ JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* 27 (1994).

⁵¹ Rader, *supra* note 27, at 263.

⁵² *Id.* at 269.

describing “crisology,” Morin notes that crises are often triggered by some disruptive “event” like a poor harvest or an invasion,⁵³ suggesting that crisis is synonymous with the *results* of a disruptive event rather than the event itself.

“Disruption” and “disequilibrium” remain salient aspects in definitions of crisis. For example, in his 2002 article on constitutional crises, Keith Whittington asserts that they “represent a disruption of the existing equilibrium,”⁵⁴ such as “when a period of international peace is disrupted by a moment of heightened conflict, or when economic stability suddenly gives way to deep depression or uncontrolled inflation.”⁵⁵ By providing these specific examples of crisis scenarios, Whittington reinforces Morin’s view that crises are inextricably linked to sudden, disruptive events.⁵⁶

The event-based definition of crisis is useful in assessing the impact of “crisis” on the administration of the American death penalty. An event-based definition of crisis alerts us to the temporality of particular periods of disruption and directs us to consider sudden disruptions throughout American history such as the start of wars, severe economic downturns, and disease outbreaks. Each disturbs an existing social “equilibrium.” We can then identify the start and end of such disruptions⁵⁷ and see what happens to the death penalty when a crisis occurs.

⁵³ Morin & Pauchant, *supra* note 17, at 13.

⁵⁴ Keith E. Whittington, *Yet Another Constitutional Crisis*, 43 WM. & MARY L. REV. 2093, 2097 (2002).

⁵⁵ *Id.* at 2098.

⁵⁶ Some scholars argue that defining “crisis” as the product of some unexpected event’s disruption of “normality” is problematic because that definition legitimates many unacceptable social phenomena that define “normality.” It makes people think that a specific organization or that society as a whole is, by default, “acceptably managed,” when it is not. Thus, by linking crisis to sudden events, we risk downplaying or altogether erasing problematic social phenomena that do not emerge from sudden events. Yet while commentators can surely use an event-based definition of crisis to obscure pre-existing societal issues, an event-based definition of crisis and an acknowledgment of pre-existing problems are not necessarily mutually exclusive. Jan P. Rockett, *Definitions Are Not What They Seem*, 1 RISK MGMT. 37, 41 (1999).

⁵⁷ The start of a war occurs with a formal declaration of war. In the absence of a formal declaration or equivalent, we define the start of a war as the outbreak of hostilities. We define the end of a war as the date on which hostilities ended. The end of a war can come in a formal surrender, armistice, ceasefire, or peace treaty. We define the start of an economic crisis as the date on which a momentous event occurred that rocked the American economy, such as a stock market crash or major bank failure. We approximate the end of an economic crisis based on estimates of when the economy began to recover provided by sources such as the National Bureau of Economic Research and the Encyclopedia of American Studies. We define the start of disease outbreaks according to reputable estimates of when the first cases of the disease were reported in the United States provided by sources such as the Centers for Disease Control and Prevention and G.F. Pyle’s 1969 report on the spread of cholera in the

II. CRISIS AND THE DEATH PENALTY

Crises, by definition, produce alterations in the practices and/or administration of many institutions. They result in a redistribution of attention and resources and cause ripple effects which, depending on the severity of the crisis, touch areas of life far removed from the crisis' area of primary focus. But, in other parts of society, institutions demonstrate their resiliency and resistance to disruption and things may go on as before.

During wartime, recessions/depressions, and pandemics, the criminal justice system is often used to redirect social anxieties or to foster/react to moral panics by targeting dissenters or classes of so called "undesirables." We see the ramping up of prosecutions of protesters during wars,⁵⁸ of "vagrants" during economic downturns,⁵⁹ and of people who are branded threats to public health during national or localized disease outbreaks.⁶⁰ During these crises, the criminal justice system may also continue to target "ordinary" criminals.

Executions have largely followed a similar pattern. As we will show, while they have occasionally been directed during crises at particular groups and classes of persons, the vast majority of the executions that take place during wars, economic crises, and epidemics target the same "ordinary" criminals who would be executed at other times. The uninterrupted administration of these "normal" executions during crises provides valuable insight into the United States' attachment to the death penalty.

A. Wars

During wartime, the government often retools existing resources, infrastructure, and labor to serve the war effort. Factories begin to produce weapons. Schools transform into military barracks or combat training institutions. People leave their jobs to serve in the army, and women have often left behind childcare responsibilities to work in factories. Executions have similarly adopted a war-related purpose, specifically that of punishing people for engaging in "disloyal" behaviors.

nineteenth century in the United States. We rely on the same sources to determine when the disease no longer posed a significant threat and thus the outbreak came to an end. Specific start and end dates for each crisis are included in the body and/or footnotes throughout the article.

⁵⁸ DISSENT IN DANGEROUS TIMES 116 (Austin Sarat ed. 2005).

⁵⁹ RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 198 (2016).

⁶⁰ JOHN FABIAN WITT, AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19 18 (2020).

During the Revolutionary and Civil Wars, the military administered multiple mass executions to deter soldiers from engaging in mutiny and desertion.⁶¹ Confederate generals' execution of fifty-five soldiers for desertion at three different times serves as one of the most dramatic examples of this phenomenon.⁶² Civilians suspected of treason were also executed *en masse* during the Revolutionary and Civil Wars. George Washington ordered his army to kill numerous indigenous people for aiding the British,⁶³ and in October 1862, the height of Civil War, Texas put to death 36 non-slaveholders suspected of Union sympathies.⁶⁴

Wartime has frequently prompted the passage of legislation ostensibly re-tooling the death penalty to serve the war effort.⁶⁵ During the Revolutionary War, states such as Connecticut and New York passed resolutions mandating the death penalty for Loyalists convicted of treason,⁶⁶ resulting in hundreds of indictments.⁶⁷ However, the vast majority of treasonous Loyalists escaped execution, as governors and legislatures frequently granted pardons and as the convicted were allowed to enlist in the army to escape execution.⁶⁸

At the start of World War I and World War II, Congress passed legislation authorizing the death penalty for espionage.⁶⁹ However, no one was executed for that crime during World War I,⁷⁰ and only six German saboteurs implicated in a single spying plot were executed during World War II.⁷¹ In February of 1942, President Franklin Roosevelt also claimed authority

⁶¹ Paul H. Blackman & Vance McLaughlin, *Mass Legal Executions in America up to 1865*, 8 CRIME, HISTOIRE & SOCIÉTÉS / CRIME, HIST. & SOCIETIES 33, 44 (2004). Blackman and McLaughlin define a "mass execution" as one in which four or more people are being executed for the same crime after some type of trial.

⁶² *Id.* at 44.

⁶³ Mugambi Jouet, *Revolutionary Criminal Punishments: Treason, Mercy, and the American Revolution*, 61 AM. J. LEGAL HIST. 139, 166 (2021).

⁶⁴ Blackman & McLaughlin, *supra* note 61, at 45.

⁶⁵ James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AM. J. LEGAL HIST. 208, 213 (1974).

⁶⁶ Jouet, *supra* note 63, at 160; STEPHEN JOHN HARTNETT, EXECUTING DEMOCRACY: VOLUME ONE: CAPITAL PUNISHMENT & THE MAKING OF AMERICA, 1683–1807 87 (2010).

⁶⁷ Kettner, *supra* note 65, at 217.

⁶⁸ BRADLEY CHAPIN, THE AMERICAN LAW OF TREASON: REVOLUTIONARY AND EARLY NATIONAL ORIGINS 49–50 (1964).

⁶⁹ Timothy L. Ericson, *Building Our Own 'Iron Curtain': The Emergence of Secrecy in American Government*, 68 AM. ARCHIVIST 18, 32 (2005); *Espionage Act Violators Face Death Penalty: Long Sentences Also Provided by Law of 1917*, DAILY BOS. GLOB. (1928–1960) (Dec. 8, 1941), <http://ezproxy.amherst.edu/login?url=https%3A%2F%2Fsearch.proquest.com%2Fdocview%2F839346177%3Faccou> [https://perma.cc/74EY-NT2S].

⁷⁰ *ESPY File*, *supra* note 15, at 258–72.

⁷¹ *German Saboteurs Executed in Washington, D.C.*, HIST. (Aug. 8, 2019), <https://www.history.com/this-day-in-history/german-saboteurs-executed-in-washington> [https://perma.cc/S5KS-93L9].

to impose death sentences by court-martial under the articles of war.⁷² But of the more than one and a half million courts-martial during World War II, which made up one third of all criminal cases tried in the United States during the war, few resulted in death sentences.⁷³

The relatively low numbers of “targeted” executions during wartime belies their continued use as punishment for “ordinary” crimes such as murder and rape. In nearly every significant military conflict in American history, executions continued without modification or disruption. According to Carlton Larson, Pennsylvania jurors did not hesitate to sentence rapists and murderers to death during the Revolutionary War even though they hesitated to hand down death sentences to treasonous Loyalists.⁷⁴ Nationally, only 23 executions of the approximately⁷⁵ 196 administered during the Revolutionary War⁷⁶ targeted disloyal behaviors.⁷⁷ The other 173 involved persons convicted of murder, rape, robbery, counterfeiting, and arson. The use of the death penalty declined only slightly from its use in the pre-war years. The average number of executions during the war years (23) was 85.1% of the annual execution rate for the five years before the war (27).⁷⁸

⁷² *Death Penalty Restored to Army*, L.A. TIMES 1923–1995 (Feb. 7, 1942), <http://ezproxy.amherst.edu/login?url=https%3A%2F%2Fsearch.proquest.com%2Fdocview%2F165342338%3Faccount%2Fhttps://perma.cc/BY7C-J9RM>].

⁷³ UNITED STATES ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERALS CORPS, 1775–1975* 192 (1975).

⁷⁴ CARLTON F.W. LARSON, *THE TRIALS OF ALLEGIANCE: TREASON, JURIES, AND THE AMERICAN REVOLUTION* (2019).

⁷⁵ *ESPY File*, *supra* note 15. The ESPY file lists 6 executions in 1783 without a specified month.

⁷⁶ Since there was no formal declaration of war on either side, we define the start of the Revolutionary War as the outbreak of hostilities between the British and the colonists on April 19, 1775 at the Battles of Lexington and Concord. We define the end of the war as September 3, 1783 when Great Britain formally recognized the independence of the United States in the Treaty of Paris.

⁷⁷ *ESPY File*, *supra* note 15. “Disloyal behaviors” refer to treason, desertion, espionage, and guerilla activity.

⁷⁸ In calculating average annual executions, we summed the annual executions totals for the interval being discussed and divided by the number of years in that interval. Notably, the annual execution tolls used in these calculations are totals for a calendar year. Thus, when calculating average annual executions before or after crises that began or ended mid-year, we drew on the annual execution tolls for the full calendar year(s) before or after the crisis. When calculating average annual executions *during* crises that began and/or ended mid-year, we used the annual execution toll for the year(s) in which the crisis did not span the whole year. For example, in the case of the Revolutionary War, we used annual execution tolls for 1770-1774 to calculate the average annual executions for five years before the war, and we used annual executions tolls for 1775-1783 to calculate annual average executions for the war years even though the crisis did not span the entirety of 1775 or 1783. To calculate the average annual executions for five years after the war, we used annual execution totals for 1784-1788.

During the Civil War, from April 1861 to April 1865,⁷⁹ a similarly small fraction of executions targeted disloyalty. Of 261 executions, 48 targeted disloyal behaviors while the other 213 targeted “ordinary” crimes.⁸⁰ In Virginia, the site of 123 of the 384 “principal” Civil War battles,⁸¹ 31 people were executed during the war, and only one of them was executed for engaging in some type of war related crime.⁸²

The five years before the war saw more people put to death in the United States, 333, than during the five Civil War years, but fewer, 226, were executed in a comparable period after the war ended. Similarly, a couple of this nation’s other nineteenth century wars, namely, the War of 1812, and the Mexican-American War, did not significantly disrupt executions, though in each of those wars the annual average declined slightly.⁸³ And, in another nineteenth century war—the Spanish-American War—the annual average declined substantially from 164 for the five-year period preceding the war to 82 during the war years.

Twentieth century wars resulted in even fewer targeted executions than had occurred during the Revolutionary or Civil Wars, while executions of non-war related criminals continued uninterrupted. None of the 140 executions during the American involvement in World War I from April 1917 to November 1918⁸⁴ were for treason or disloyalty.⁸⁵ Yet there was a drop off in executions during the during the 19 months that the United States was fighting in the war. They fell from the annual average of 126 executions for the five years preceding and did not meet the annual average for the succeeding five years (112).

Only six of the 499 executions during World War II⁸⁶ involved people accused of treason or espionage, and all six of them were associated with the

⁷⁹ On April 15, 1861, President Abraham Lincoln formally responded to the attack on Fort Sumter by mobilizing 75,000 troops, signifying the start of the war. The war ended on April 9, 1865, when Robert E. Lee surrendered his Confederate army to Ulysses Grant at Appomattox.

⁸⁰ *ESPY File*, *supra* note 15, at 110–18.

⁸¹ CIVIL WAR SITES ADVISORY COMMISSION: REPORT ON THE NATION’S CIVIL WAR BATTLEFIELDS vi (1993).

⁸² *ESPY File*, *supra* note 15, at 111. On May 1st, 1962, Timothy Webster was executed in Virginia for espionage.

⁸³ The annual average for the War of 1812 (1812–1815) was 14 executions, and the annual average for the five years prior to the War of 1812 was 18. The annual average for the Mexican-American War (1846–1848) was 30 executions, and the annual average for the five years prior to the Mexican-American War was 33.

⁸⁴ Congress declared war on Germany on April 6, 1917, and Germany signed an armistice with the Allies on November 11, 1918.

⁸⁵ *ESPY File*, *supra* note 15, at 268–72.

⁸⁶ Congress declared war on Japan on December 8, 1941, one day after the attack on Pearl Harbor, and Japan surrendered on September 2, 1945.

same spying plot involving German saboteurs in February 1942.⁸⁷ The American military carried out an additional 141 executions during the war, all but one of them of soldiers who were convicted of rape or murder while on active duty.

The annual civilian execution rate during the war (129.8) was somewhat lower than the average number of executions in the preceding decade (164.8). Using a different measure, the ratio of executions per homicide, William Bowers argues that World War II, like the first world war, ushered in greater hesitancy to execute, citing declining execution rates in the North Central, Northeast, and Western regions of the United States.⁸⁸

In the North Central region, the execution rate (measured as executions per homicide) declined from 1.34 for the period from 1935–1939 to 0.74 for the period from 1940–1944.⁸⁹ Similarly, in the Northeast region, Bowers calculates that the execution rate for the same time period decreased from 2.98 to 2.66, and in the West, the execution rate decreased from 2.65 to 2.13.⁹⁰ Yet in the South, the execution rate increased from 1.69 to 1.72 from the period of 1935–1939 to 1940–1944.⁹¹ These findings highlight a well-known fact about America's death penalty, namely its regional variation and greater popularity in the south, a pattern that held up even as the United States mobilized a massive war effort against the Axis powers.

Julius and Ethel Rosenberg, who were accused of spying for the Soviet Union, were the only people executed for treason or espionage out of the 262 people put to death during the Korean War.⁹² There were on average 82 executions per year during the war years which was somewhat lower than the annual average of 129 executions that were carried out over the preceding decade.

During American military involvement in Vietnam, from August 1964–January 1973,⁹³ the number of executions dropped significantly. Only 13 people were executed during the hostilities, and all were executed during

⁸⁷ *German Saboteurs Executed in Washington, D.C.*, HIST., *supra* note 71.

⁸⁸ See WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982* 29 (1984) (“The execution rate is the number of executions in the specified five year interval divided by the number of homicides in *death penalty jurisdictions* for the five year interval ending one year earlier in a given region.”).

⁸⁹ *Id.* at 29.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Julius and Ethel Rosenberg Executed for Espionage*, HISTORY.COM, (June 17, 2020), <https://www.history.com/this-day-in-history/rosenbergs-executed> [<https://perma.cc/7VWT-WEN4>].

⁹³ On August 10, 1964, Congress passed the Gulf of Tonkin Resolution, liberating President Lyndon B. Johnson to send troops to Vietnam. On January 27, 1973, President Richard Nixon signed the Paris Peace Accords, formally concluding America's direct military involvement in Vietnam.

the war's first four years. This number was approximately 2% of the number executed in the decade leading up to the war (697).

However, the unusually low execution numbers during the Vietnam War ultimately had little to do with that conflict. In the years immediately prior to the war's start, the death penalty abolitionist movement gained significant momentum as large part of broader social movements that called attention to injustices, questioned American morality, and demanded significant reforms in the political system.⁹⁴ Reflecting the temper of the times, Hawaii, Alaska, Delaware, Michigan, Oregon, Iowa, New York, West Virginia, Vermont, and New Mexico abolished, or severely limited the scope of, the death penalty between 1957 and 1969.

Additionally, in 1966, a Gallup poll reported that only forty-two percent of Americans supported capital punishment, an all-time low.⁹⁵ Two years later, in 1968, the year of the infamous Tet Offensive,⁹⁶ an unofficial moratorium on executions began, and in 1972, the Supreme Court ruled in *Furman v. Georgia* that all existing death penalty statues were unconstitutional as written.⁹⁷

The Vietnam War contributed to an intense distrust of the government that made Americans increasingly uneasy about state-sanctioned killings.⁹⁸ But at the same time the number of executions declined, the number of death sentences increased. In 1965, 86 people were sentenced to death, but by 1969, the year that troops numbers peaked in Vietnam at 549,000,⁹⁹ 143 people were sentenced to death.¹⁰⁰

B. Economic Crises

Economic crises, like wars, consume the country's attention, but they do not generally result in a dramatic investment of resources and redeployment of manpower of the kind seen during wartime. Instead, they may lead to a decrease in what is available for "non-essential" activities and

⁹⁴ J. Robert Lilly, *Death Penalty Resistance in the US*, 41 HOW. J. CRIM. JUST., 326, 330–31 (2002).

⁹⁵ Sheherezade C. Malik & D. Paul Holdsworth, *A Survey of the History of the Death Penalty in the United States*, 49 UNIV. RICH. L. REV. 693, 701 (2015).

⁹⁶ *Vietnam War Timeline*, HISTORY.COM, (Feb. 26, 2020) <https://www.history.com/topics/vietnam-war/vietnam-war-timeline> [<https://perma.cc/HC5G-J5C2>].

⁹⁷ U.S. DEP'T JUST.: BUREAU OF JUST. STATS. CAPITAL PUNISHMENT 1979, NAT'L PRISONER STATS. (1980).

⁹⁸ Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. L. & CRIMINOLOGY 587,591 (2005).

⁹⁹ *Vietnam War Timeline*, *supra* note 96.

¹⁰⁰ U.S. DEP'T JUST. BUREAU JUST. STATS., HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984, (1986).

practices. In another sign of the death penalty's resilience, executions generally have continued uninterrupted during even the most severe economic contractions, consuming time, energy, and resources that could otherwise serve the economy's recovery.

Let's begin with the Depression, which began in October 1929 and continued until the start of World War II in Europe in September 1939.¹⁰¹ It decimated the American economy. At the lowest point of the crisis in 1933, the country's Gross Domestic Product (GDP) had declined by 30%, industrial production had fallen by 47%, and more than 20% of Americans were unemployed.¹⁰² The economic devastation left millions of Americans unable to provide for themselves and their families.¹⁰³ Yet executions continued. In fact, from October 1929 to September 1939, the United States carried out a total of 1,651 executions—the most in a single decade in US history¹⁰⁴—far surpassing the total of 1,252 that were carried out from 1919 to 1928.

Execution per homicide rates increased substantially: from 1930–1934, the Northeastern, North Central, Southern, and Western regions of the United States boasted execution rates of 1.97, 1.02, 1.38, and 2.24, and during the period of 1935–1939 those rates rose to 2.98, 1.32, 1.69, and 2.65, respectively,¹⁰⁵ even though the homicide rate plummeted after 1933.¹⁰⁶

The large numbers of executions administered in Oklahoma—one of the most devastated states in the Depression era—serve as an especially powerful testament to the country's attachment to the death penalty during the Depression. During that crisis, approximately 300,000 urban Oklahomans out of an urban population of around 800,000 lost their jobs.¹⁰⁷ The 1.5

¹⁰¹ The Great Depression began with a stock market crash on October 24, 1929 and approximately concluded when World War II began in Europe with Adolf Hitler's invasion of Poland on September 1, 1939.

¹⁰² *Great Depression: Economy*, ENCYCLOPEDIA BRITANNICA, (last visited June 5, 2021), <https://www.britannica.com/event/Great-Depression> [<https://perma.cc/93H9-6K5H>].

¹⁰³ Brian Black, *Great Depression*, ENCYCLOPEDIA AM. STUD. (2018), <http://eas-ref.press.jhu.edu/view?aid=260> [<https://perma.cc/38B5-MMQV>].

¹⁰⁴ *ESPY File*, *supra* note 15, at 309–62.

¹⁰⁵ Bowers, *supra* note 88, at 29.

¹⁰⁶ The homicide rate reached a peak of 9.7 homicides per 100,000 people in 1933 and decreased by 20 percent between 1934 and 1937. History.com Editors, *Crime in the Great Depression*, HIST. (Aug. 21, 2018), <https://www.history.com/topics/great-depression/crime-in-the-great-depression> [<https://perma.cc/AV4M-T9ZD>]; Barry Latzer, *Do Hard Times Spark More Crime?*, L.A. TIMES, (Jan. 24, 2014), <https://www.latimes.com/opinion/op-ed/la-oe-latzer-crime-economy-20140124-story.html> [<https://perma.cc/AEF7-8MNB>]. There is also some evidence that judges grew more punitive during the Great Depression. Leon Thomas Stern, *The Effect of the Depression on Prison Commitments and Sentences*, 31 J. CRIM. L. & CRIMINOLOGY, 696, 711 (1941).

¹⁰⁷ William H. Mullins, *Great Depression*, ENCYCLOPEDIA OKLA. HIST. & CULTURE (last visited June 15, 2021), <https://www.okhistory.org/publications/enc/entry.php?entry=GR014> [<https://perma.cc/VSB8-UTZK>].

million people living in rural Oklahoma also suffered, losing approximately 64 percent of their income.¹⁰⁸ Amidst this devastation, the state executed 35 men from 1929–1939, 14 of whom were executed in 1933, just as Oklahoma was emerging from an especially brutal winter when the economy had hit bottom.¹⁰⁹

The first of those 14 executions occurred during the height of that brutal winter on January 27, 1933.¹¹⁰ On that day, Ivory Covington, a Black man, was electrocuted for murdering his white employer.¹¹¹ Coverage of that event made the front page of a local Texas newspaper, the *Brownsville Herald*, surrounded by numerous other crime headlines, such as “Killer Turns Guns on Women,” “Woman’s Body Found Burning,” and “Negro Confesses Assaulting Child.” The front page also contained a few nods to the Depression, such as a poem about hunger and an update on the markets.¹¹²

No other economic crisis in American history yielded record-high numbers of executions. That said, it is notable that other economic crises, such as the Panics of 1819, 1873, and 1893, did not halt executions, even as these crises, like the Great Depression, similarly devastated the nation’s economic life.

During the Panic of 1819, which some scholars refer to as first economic depression in the country’s history,¹¹³ large numbers of business and factory closures produced mass unemployment. In some cities, as many as fifty percent of the population lost their jobs.¹¹⁴ While economic growth started to slow in the years prior to 1819, panic struck in January 1919 when the value of cotton dropped twenty-five percent in a single day.¹¹⁵ In that panic-filled month, the Governor of Massachusetts lamented that his state faced “times of peril and extreme pressure,”¹¹⁶ yet just a few weeks later, on February 10th, Massachusetts executed four white men for larceny in front

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *ESPY File*, *supra* note 15, at 326.

¹¹¹ *Negro Goes Calmly to Death*, *BROWNSVILLE HERALD* (Jan. 27, 1933), <https://chroniclingamerica.loc.gov/lccn/sn86063730/1933-01-27/ed-1/seq-1/> [<https://perma.cc/VP3J-ZFDM>].

¹¹² *Id.*

¹¹³ ANDREW H. BROWNING, *THE PANIC OF 1819: THE FIRST GREAT DEPRESSION* 8 (2019); MURRAY N. ROTHBARD, *THE PANIC OF 1819: REACTIONS AND POLICIES* vii (1962).

¹¹⁴ BROWNING, *supra* note 113, at 8. Due to the scarcity of data, current estimates of unemployment from the crisis range from hundreds to thousands to millions, but more detailed data from a couple of cities, such as Pittsburgh and Philadelphia, suggest that as much as fifty percent of the workforce was unemployed.

¹¹⁵ SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 207 (2005).

¹¹⁶ BROWNING, *supra* note 113, at 189.

of a “very large concourse of spectators,” according to the *Boston Reporter*.¹¹⁷

In the spring of 1819, New York businesses were failing practically every day¹¹⁸ and unemployment numbers were rapidly increasing¹¹⁹ such that almost half of New York City’s population was unemployed by October of 1819.¹²⁰ Nevertheless, on October 22, 1819, George Brown, a white sailor convicted of murdering his captain, was hung in front of a crowd of approximately 25,000 people.¹²¹ By the end of 1819, 29 people had been executed nationwide, and by the time the crisis abated towards the end of 1821,¹²² 111 people had been executed over the course of the crisis.¹²³ That was more than the 105 people who were put to death in the five years prior to the start of this economic downturn.

The Panics of 1873 and 1893, both of which decimated the American economy, also did not significantly disrupt the pace of executions. The Panic of 1873 began when Jay Cooke & Company, a major banking firm, declared bankruptcy on September 18th.¹²⁴ The panic led to a substantial decrease in industrial production and a dramatic increase in unemployment.¹²⁵ Three hundred banks ultimately collapsed,¹²⁶ and twenty-five percent of the workforce lost their jobs.¹²⁷ Nevertheless, approximately¹²⁸ 185 people were executed from September 1873 to the start of 1877, the year that industrial production began to recover.¹²⁹ That number exceeded the five-year total of

¹¹⁷ *Execution of the Pirates*, BOS. RECORDER Feb. 20, 1819.

¹¹⁸ BROWNING, *supra* note 113, at 271.

¹¹⁹ BROWNING, *supra* note 113, at 185.

¹²⁰ BROWNING, *supra* note 113, at 185. The *Register* reported 50,000 unemployed in New York City by October 1819, New York City had a population of 123,706 according to the 1820 census. United States Census Bureau, *Census for 1820*, U.S. CENSUS BUREAU (July 26, 2021), <https://www.census.gov/library/publications/1821/dec/1820a.html> [<https://perma.cc/4Q4Z-6SHA>].

¹²¹ *Execution*, N.Y. GAZETTE & GEN. ADVERTISER, Oct. 23, 1819.

¹²² Robert McNamara, *Financial Panics of the 19th Century*, THOUGHTCO, (Aug. 26, 2020) <https://www.thoughtco.com/financial-panics-of-the-19th-century-1774020> [<https://perma.cc/ANR3-RCKM>].

¹²³ *ESPY File*, *supra* note 15, at 57–60.

¹²⁴ Drew E. VandeCreek, *The Panic of 1873 and Its Aftermath: 1873–1876*, N. ILL. UNIV.: DIGIT. LIBR. (Aug. 4, 2021), <https://digital.lib.niu.edu/illinois/gildedage/chronological3> [<https://perma.cc/F7TQ-V5SM>].

¹²⁵ Roger E. Backhouse, *Business Cycles*, *ENCYCLOPEDIA AM. STUD.* (Aug. 23, 2018), <http://eas-ref.press.jhu.edu/view?aid=248> [<https://perma.cc/LU75-TTJL>].

¹²⁶ *Id.*

¹²⁷ Scott Reynolds Nelson, *The Real Great Depression*, *CHRON. HIGHER EDUC.*, (Oct. 17, 2008) <https://www.chronicle.com/article/the-real-great-depression/> [<https://perma.cc/W5EM-4TZ5>].

¹²⁸ In the *ESPY* file, there are three executions listed for 1873 without a specific month. *ESPY File*, *supra* note 15, at 129.

¹²⁹ Backhouse, *supra* note 125.

168 executions that occurred from 1868 to 1872. In the five years after the crisis subsided, executions increased to an average of 97 per year, up from an average of 60 per year during the crisis years.

On May 5, 1893, on the New York Stock Exchange a financial panic triggered the closure of five hundred banks and nearly sixteen thousand businesses by year's end.¹³⁰ Yet "Industrial Black Friday" had to compete with the execution of Carlyle Harris for New Yorkers' and the rest of the country's attention. Harris, a medical student, had been convicted of poisoning his wife, and the subsequent trial and execution received widespread, national media attention.¹³¹ Three days after Industrial Black Friday, New York executed him in Sing Sing Prison's electric chair, approximately thirty miles north of New York City. The next day, the *New York Herald* devoted an entire page to coverage of the execution while its coverage of the nascent economic crisis was limited to one article on page eight.¹³²

During the spring and summer of 1893, the nation's economic life slowed dramatically. As the *Commercial Financial Chronicle* noted, "[t]he month of August will long remain memorable" for "[n]ever before has there been such a sudden and striking cessation of industrial activity. Nor was any section of the country exempt from the paralysis."¹³³ Despite this paralysis, four men were executed during that same month. One of them, Frank Van Loon, was hung on August 4th in Ohio for the murder of Farmer Vandemark after the governor ignored Van Loon's claims of innocence and refused to grant him clemency.¹³⁴ A little less than a week after Van Loon's execution, Joseph Howell, a white man who was sentenced to death for murdering his cousin and her four children, was executed in Trenton, Missouri in front of a relatively small crowd of 200 people.¹³⁵ However, many others "were in the city to see the body and witness as much of the execution as possible," according to the *Kansas City Star*.¹³⁶

A little over a week after Howell's execution, William Jamison, a Black man convicted of murder, was hung in Quincy, Illinois. Four days after Jamison's August 18th execution, the *Daily Register-Gazette* of Rockford, Illinois reported that his trial, imprisonment, and execution cost the county

¹³⁰ Samuel Rezneck, *Unemployment, Unrest, and Relief in the United States during the Depression of 1893–97*, 61 *J. POL. ECON.* 324, 324 (1953).

¹³¹ *Promises a Sensation*, ABERDEEN DAILY NEWS, May 14, 1891; *Murder in the First Degree*, OMAHA WORLD-HERALD, May 14, 1891; *Harris Must Hang. Governor Denies the Application for Clemency*, OREGONIAN, May 5, 1893; *Carlyle Harris's Case*, TACOMA DAILY, May 5, 1893.

¹³² *Few Signs Now of Panic*, N.Y. HERALD, May 9, 1893.

¹³³ Rezneck, *supra* note 130, at 325.

¹³⁴ *He Died Game.*, PLAIN DEALER, Aug. 4, 1893.

¹³⁵ *Joseph Howell Hanged*, KANSAS CITY STAR, Aug. 4, 1893.

¹³⁶ *Id.*

approximately \$1,000, which amounts to about \$30,000 in today's dollars.¹³⁷ While the paper provided no additional commentary on this figure, it serves as a rare acknowledgment that even in economic crises many places in this country were nonetheless ready to spend substantial sums on the death penalty.

More than a century later, the United States experienced another economic crisis, the Great Recession of 2008–2009. On April 16, 2008, a few weeks after the 85-year-old brokerage firm Bear Stearns collapsed, global financial markets crashed. Several months later, on September 16, 2008, the United States government announced that it would spend \$85 billion dollars to bail out insurance company AIG in an effort to prevent further damage to the economy. That same day, Jack Alderman, a white man convicted of murdering his wife, was put to death by the state of Georgia even though Alderman, according to those seeking clemency on his behalf, had become a model prisoner and mentor during his 33-year stay on death row.¹³⁸

During the week of October 6, 2008, the Dow dropped 1,874 points – the largest weekly drop on record at the time. Nevertheless, just a few days later, on October 14th, the state of Ohio executed Richard Cooley for the 1986 murders of two college students. The execution went ahead even though his lawyers contended that, at 5-foot-7 and 267 pounds, Cooley was “morbidly obese” and that the medication he took for migraines would likely prevent the anesthetic used in the 3-drug cocktail from taking effect.¹³⁹

On March 9, 2009, the Dow reached its all-time Great Recession low of 6,547 points.¹⁴⁰ A day later, Robert Newland was put to death by the state of Georgia for a 1986 murder.¹⁴¹ Texas also executed James Martinez for gunning down his ex-girlfriend and her friend four hours after the Supreme Court rejected his attorneys' plea for a new trial in light of evidence that Martinez was home at the time of the crime.¹⁴²

¹³⁷ *Around the Great State*, DAILY REGISTER-GAZETTE, Aug. 22, 1893

¹³⁸ The Associated Press, *Man on Georgia's Death Row 33 Years Is Executed*, ACCESSWDUN (Sept. 16, 2008, 08:36 PM), <http://accesswdun.com/article/2008/9/213361> [<https://perma.cc/X4UM-AK8Z>].

¹³⁹ Bill Mears, *Inmate Executed after Supreme Court Rejects Obese Argument*, CNN (Oct. 14, 2008) <https://www.cnn.com/2008/CRIME/10/14/toofat.execution/> [<https://perma.cc/9EAG-FQC5>].

¹⁴⁰ *Great Recession Timeline*, HISTORY.COM (Apr. 3, 2020), <https://www.history.com/topics/21st-century/great-recession-timeline> [<https://perma.cc/QDQ5-VRYV>].

¹⁴¹ *Robert L. Newland*, CLARK COUNTY PROSECUTING ATTORNEY (last visited June 15, 2021), <http://www.clarkprosecutor.org/html/death/US/newland1155.htm> [<https://perma.cc/6752-TUL8>].

¹⁴² Michael Graczyk, *Man Convicted of Double Slayings Executed in Texas*, SAN DIEGO UNION-TRIB. (Mar. 10, 2009, 04:18 PM), <https://www.sandiegouniontribune.com/sdut-texas-execution-031009-2009mar10-story.html> [<https://perma.cc/5KBR-MJ73>].

From May 6, 2008 until June 2009, the official “end” of the Great Recession,¹⁴³ 12 states executed a total of 66 people,¹⁴⁴ higher than the annual average of 56 executions per year from 2003–2007 and the average of 41 annual executions from 2010–2014. These figures signal the continuing attachment to the death penalty in some parts of the country even as they suffered an economic catastrophe.

C. Epidemics/Pandemics

Like economic crises, epidemics of serious illness often disrupt daily life, and, like wars, they mobilize sectors of society to fight the crisis. Some of those disruptions, as was the case in the early stages of the COVID-19 outbreak, are legally mandated.¹⁴⁵ Yet even these kinds of crises have not derailed capital punishment. Executions continued even though they have consistently required witnesses and close contact for their administration.

During the series of yellow fever outbreaks from 1793–1805 and from 1817–1830,¹⁴⁶ the American death penalty continued. In the first series of outbreaks, 304 people were executed; in the second, the number was 506. In both crisis periods the average annual execution rate was higher than in the five-year periods immediately before and after.¹⁴⁷

The continuation of executions during nineteenth-century epidemics, such as the 1832, 1849, and 1866 cholera outbreaks and the 1878 yellow fever outbreak, remains notable given that they were conducted publicly, often attracting large crowds.¹⁴⁸ On June 11, 1832, cholera arrived in the state of

¹⁴³ *Business Cycle Dating Committee Announcement September 20, 2010*, NAT'L BUREAU ECON. RSCH. (Sept. 20, 2010), <https://www.nber.org/news/business-cycle-dating-committee-announcement-september-20-2010> [<https://perma.cc/JBU4-6DT4>].

¹⁴⁴ *Execution Database*, DEATH PENALTY INFO. CTR. (last visited June 15, 2021), <https://deathpenaltyinfo.org/executions/execution-database> [<https://perma.cc/2KYC-KYRE>].

¹⁴⁵ Witt, *supra* note 60, at 18.

¹⁴⁶ K. David Patterson, *Yellow Fever Epidemics and Mortality in the United States, 1693–1905*, 34 SOC. SCI. & MED. 855, 856 (1992) (listing all yellow fever epidemics in United States history because 1793–1805 and 1817–1830 represent two periods in which there was a yellow fever outbreak every year).

¹⁴⁷ In the series of yellow fever outbreaks from 1793–1805, the annual execution rate was 23. For the five years preceding 1793, it was 22, and for the 5 years succeeding 1805, it was 18. In the series of yellow fever outbreaks from 1817–1830, the annual execution rate was 36. For the five years preceding 1817, it was 16, and for the five years succeeding 1830, it was 31. The data is complicated by the fact that there were yellow fever outbreaks in a few years that fall within 5 years of these 2 outbreaks. These years are 1808, 1834, and 1835.

¹⁴⁸ See Annulla Linders, *The Execution Spectacle and State Legitimacy: The Changing Nature of the American Execution Audience, 1833–1937*, 36 L. & Soc'y Rev. 607, 620 (2002) (illustrating an episode in New York, 1875, where a crowd of several hundred people were present eager to witness the execution of three men).

New York and then spread to 17 other states by the end of the year.¹⁴⁹ In that same year, Elizabeth Freeman of New Jersey, Fanny and Renah Dawson of Virginia, and “Randolph” of Kentucky, all of whom were slaves, were executed in states that reported cholera cases.¹⁵⁰ In 1832, a total of 16 people were executed, a sharp drop from the 48 executions which were conducted in the previous year.

In late 1848, cholera struck again. The first cases of cholera were reported in New York City in early December, but it was not until the summer of 1849 that the outbreak reached lethal proportions.¹⁵¹ In the middle of that deadly summer, on July 20th, Irishman Matthew Wood was executed at New York City’s Tombs prison in front of approximately 120 people.¹⁵² The Board of Health reported that the day prior there were 31 new cases of cholera in the city, 17 of which resulted in death.¹⁵³

The day after Wood’s execution, Conrad Vinter, a white man convicted of murder, was executed in Baltimore, Maryland in front of a crowd of “at least twenty thousand persons.”¹⁵⁴ On the day of Vinter’s execution, the *Sun* reported 9 new cases of cholera and 8 deaths at the local almshouse.¹⁵⁵ By the end of 1849, cholera had spread to 14 states and a total of 18 people had been executed in states with reported cases of cholera, including Ohio, Alabama, New York, Maryland, Virginia, and Kentucky. Across the entire country 32 people were put to death. That number was higher than the year before the outbreak (26), but short of the 41 executions that would be carried out the year after.

While the third and final major wave of cholera hit New York City in early May 1866, the city continued to invite the public to executions. On August 17th, about three and a half months after the third wave arrived in New York,¹⁵⁶ Friery Bernard was executed at Tombs prison for stabbing his friend, Henry Lazarus. Approximately 300 people viewed the execution from within the prison gates, and many more tried to catch a glimpse of the proceedings: “From the street no glimmer of the horrible scene could by the

¹⁴⁹ G.F. Pyle, *The Diffusion of Cholera in the United States in the Nineteenth Century*, 1 GEOGRAPHICAL ANALYSIS 59, 61 (1969).

¹⁵⁰ *ESPY File*, *supra* note 15, at 72; G.F. Pyle, *supra* note 150, at 61–62 (Pyle’s work includes specific dates on which cholera arrived in certain cities (and therefore in certain states) throughout the country for the 1832, 1849, and 1866 cholera outbreaks. We drew on Pyle’s dates and the dates from the ESPY file to determine how many executions occurred in states that had reported cholera cases).

¹⁵¹ CHARLES E. ROSENBERG, *THE CHOLERA YEARS: THE UNITED STATES IN 1832, 1849, AND 1866*, 101–120 (1987).

¹⁵² *Execution of Matthew Wood*, NAT’L POLICE GAZETTE, July 28, 1849.

¹⁵³ *Board of Health*, COM. ADVERTISER, July 20, 1849.

¹⁵⁴ *Confession of Conrad Vinter*, BALT. SUN, VOL. XXV - NO. 56.J, July 21, 1849.

¹⁵⁵ *Id.*

¹⁵⁶ Pyle, *supra* note 150, at 71.

remotest possibility be obtained, and yet for hour after hour the heavy crowds remained. Every housetop in the vicinity, and every piazza, balcony, and window commanding a view of even the walls of the prison were thronged with people who hoped to behold no one knows what.”¹⁵⁷

On the day following Friery’s execution, the *New York Tribune* reported that “cholera seems fairly under the control of the health authorities.” However, the paper insisted that “the danger is not past”: “[w]e write only in the interest of health when we caution our readers not to abate their vigilance because the health of the city improves.”¹⁵⁸ By the end of 1866, the disease had spread to 17 other states and Washington, D.C., and a total of 15 people were executed in states with cholera, including Illinois, Ohio, Kentucky, Pennsylvania, Missouri, Maryland, California, and Virginia.¹⁵⁹

Public executions also continued uninterrupted during a yellow fever epidemic in the South in the summer and fall of 1878. The first case of yellow fever was reported in New Orleans to the Board of Health on July 14th,¹⁶⁰ and by August of 1878, over one thousand residents of New Orleans had contracted the disease.¹⁶¹ Throughout July and August, the fever spread to various other parts of Louisiana, preventing farmers from harvesting their crops.¹⁶² On July 29th, the *Price Current* reported the first cases of yellow fever in Donaldsville, LA,¹⁶³ and a little over two weeks later, the town executed Fourtan Banks, Aaron Carter, Wilson Childers, Octave Louve, and N.M. Peterson—all Black males—in front of 3,000 people.¹⁶⁴ The executions were the first administered in Donaldsville since 1856 when another five Black men, who were slaves at the time, were executed for murder.¹⁶⁵

Throughout the summer and fall of 1878, the fever spread rapidly throughout the South,¹⁶⁶ but public executions continued. On August 30th, Clint Anderson, a Black man convicted of rape, was executed in Little Rock, Arkansas after the governor refused to postpone it.¹⁶⁷ A little less than a week

¹⁵⁷ *The Execution of Bernard Friery*, N.Y TRIB., Aug. 18, 1866.

¹⁵⁸ *The Public Health*, N.Y TRIB., Aug. 18, 1866.

¹⁵⁹ Pyle, *supra* note 150, at 71.

¹⁶⁰ Mary Jane Duke Russell, *Yellow Fever in the Felicianas: The Epidemic of 1878 and Its Effects upon the Residents of These Rural Parishes*, LSU MASTERS' THESES 1, 36 (2005).

¹⁶¹ CHARLES ALLAN MCCOY, *DISEASED STATES: EPIDEMIC CONTROL IN BRITAIN AND THE UNITED STATES* 100 (2020).

¹⁶² G. W. McGinty, *The Yellow Fever Epidemic of 1878*, 21 SOUTHWESTERN SOC. SCI. Q. 227, 229 (1940).

¹⁶³ Russell, *supra* note 161, at 40.

¹⁶⁴ *Arrieux Avenged*, NEW ORLEANS TIMES, Aug. 15, 1878.

¹⁶⁵ *Id.*

¹⁶⁶ MCCOY, *supra* note 162, at 100; *Yellow Fever. Increasing Horrors of the Epidemic in the South. Large Increase in New Cases*, CINCINNATI DAILY GAZETTE, Aug. 28, 1878.

¹⁶⁷ *Arkansas: Hanged*, COLO. DAILY CHIEFTAIN, Aug. 31, 1878.

after Anderson's execution, George Howell, a 16-year-old Black male, was executed in front of a large crowd in Greeneville, Tennessee.¹⁶⁸ In early October, with the fever still raging, Mississippi put Rodney Green, another Black man, to death for murder in front of a crowd of 2,000 people,¹⁶⁹ notwithstanding the fact that a staggering 28 percent of yellow fever victims ultimately succumbed to the disease in the state.¹⁷⁰ In total, there were 107 executions in 1878 and the same number a year later, up from an annual average of 64 in the five years preceding the epidemic.

From the spring of 1918 through the summer of 1919,¹⁷¹ three waves of Spanish flu killed approximately 675,000 Americans.¹⁷² As the health crisis unfolded, state governments imposed quarantines and restrictions on other activities requiring close contact and gathering. Executions, however, continued, with a total of 126 administered over the course of the epidemic.

The second wave of the Spanish flu, which lasted from September through November 1918,¹⁷³ was its deadliest. In October alone, an estimated 195,000 Americans succumbed to the disease.¹⁷⁴ The severity of the second wave led municipalities nationwide to close public spaces, such as schools and movie theaters, and prohibit large gatherings.¹⁷⁵

Eighteen executions took place in the United States during this deadly second wave,¹⁷⁶ and 8 of those 18 executions occurred in Pennsylvania,¹⁷⁷ a

¹⁶⁸ 1878: *George Howell, family arbiter*, EXECUTED TODAY, (Sept. 5, 2018) <http://www.executedtoday.com/tag/1878/> [<https://perma.cc/3MXY-BT77>] (reprinting of *Execution of Howell*, MORRISTOWN GAZETTE, Sept. 11, 1878).

¹⁶⁹ *An Execution in Mississippi*, CINCINNATI DAILY GAZETTE, Oct. 5, 1878.

¹⁷⁰ DEANNE STEPHENS NUWER, *PLAGUE AMONG THE MAGNOLIAS: THE 1878 YELLOW FEVER EPIDEMIC IN MISSISSIPPI* (2009).

¹⁷¹ See *1918 Pandemic Influenza: Three Waves*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 11, 2018) [hereinafter *Three Waves*], <https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/three-waves.htm> [<https://perma.cc/J7KS-4QEW>] (explaining that the CDC estimates that the Spanish flu pandemic lasted from March 1918 through the summer of 1919. For the purpose of counting executions, we included all executions from the beginning of March 1918 to the end of August 1919).

¹⁷² *1918 Pandemic (H1N1 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 16, 2020), <http://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> [<https://perma.cc/GT97-LBA4>].

¹⁷³ *Three Waves*, *supra* note 172.

¹⁷⁴ *1918 Pandemic Influenza Historic Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 18, 2019), <http://www.cdc.gov/flu/pandemic-resources/1918-commemoration/pandemic-timeline-1918.htm> [<https://perma.cc/WCG3-ZFU9>].

¹⁷⁵ Dave Roos, *How U.S. Cities Tried to Halt the Spread of the 1918 Spanish Flu*, HISTORY.COM (Mar. 11, 2020), <https://www.history.com/news/spanish-flu-pandemic-response-cities> [<https://perma.cc/QF7Q-FCGB>].

¹⁷⁶ *ESPY File*, *supra* note 15, at 272.

¹⁷⁷ *Id.*

state home to nearly 10 percent of the nation's total flu deaths.¹⁷⁸ Tellingly, Pennsylvanian officials did not postpone executions even when the health crisis worsened after sentencing but before a scheduled execution. On September 14, 1918, the *Philadelphia Inquirer* reported that two Black men, Andrew Carey and Charles Kyler, would be executed during the week of October 14th in Dauphin County.¹⁷⁹ These executions proceeded as scheduled even though in early October, county officials closed public spaces and prohibited large public gatherings.¹⁸⁰

Following the 1918 Spanish flu pandemic, three other pandemics afflicted the United States prior to COVID-19: the 1957 H2N2 pandemic, the 1968 H3N2 pandemic, and the 2009 H1N1 or "swine flu" pandemic.¹⁸¹ The 1957 H2N2 outbreak, which claimed approximately 116,000 American lives, disrupted daily life. School closures¹⁸² occurred after the opening of schools in September contributed to a spike in H2N2 cases during the next month.¹⁸³ Despite the spike, 6 people were executed in the United States in October alone. California, which was suffering from a particularly intense flu outbreak at the time,¹⁸⁴ executed 2 of those 6. Both Foster Dement, who was executed in Los Angeles' San Quentin Prison on October 2nd, and Henry Simpson, who was executed 2 days later in Stanislaus, died by lethal gas.¹⁸⁵ All told, 119 people were put to death during 1957 and 1958,¹⁸⁶ which meant

¹⁷⁸ Mia Shetty & J.J. Ahern, *Penn and the 1918 Influenza Epidemic*, U. PA. ARCHIVES & RECS. CTR. (2018), <https://archives.upenn.edu/exhibits/penn-history/flu> [<https://perma.cc/Q3LN-GZMN>]. According to Shetty and Ahern, over 60,000 people died from the Spanish flu while the CDC estimates that 675,000 people died nationwide. See *1918 Pandemic (H1N1 Virus)*, *supra* note 173.

¹⁷⁹ *Dates for Four Electrocutions*, PHILA. INQUIRER, Sept. 14, 1918.

¹⁸⁰ Joe McClure, *Spanish Flu Pandemic in 1918 Took a Deadly Toll on Central Pennsylvania*, PATRIOT-NEWS (Mar. 28, 2020), <https://infoweb-newsbank-com.ezproxy.amherst.edu/apps/news/document-view?p=AWNB&docref=news/17A00AE2E93EAF70> [<https://perma.cc/H4C8-PE2P>].

¹⁸¹ *Past Pandemics*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 10, 2018), <http://www.cdc.gov/flu/pandemic-resources/basics/past-pandemics.html> [<https://perma.cc/T3QU-CCL5>].

¹⁸² *1957–1958 Pandemic (H2N2 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 2, 2019), <http://www.cdc.gov/flu/pandemic-resources/1957-1958-pandemic.html> [<https://perma.cc/5P69-ATLM>].

¹⁸³ D. A. Henderson et al., *Public Health and Medical Responses to the 1957–58 Influenza Pandemic*, 7 BIOSECURITY & BIOTERRORISM: BIODEFENSE STRATEGY, PRAC., & SCI. 265, 269 (2009).

¹⁸⁴ *Id.* at 267.

¹⁸⁵ United States Congress Senate Committee on the Judiciary Subcommittee on Criminal Laws and Procedures, *To Abolish the Death Penalty: Hearings, Ninetieth Congress, Second Session, on S. 1760... March 20, 21, and July 2, 1968* (U.S. Government Printing Office, 1970) (page 217); *Dement, Wife Killer, Dies in Gas Chamber*, L.A. TIMES, Oct. 3, 1957; *Simpson v. Teets*, 248 F.2d 465, 465 (9th Cir. 1957).

¹⁸⁶ ESPY File, *supra* note 15.

that the annual execution rate of 59.5 for those two years was slightly lower than the average annual total (74) for the five years before H2N2 became a health crisis in the United States.

No one was executed during the 1968 H3N2 pandemic because it marked the first year of a ten-year unofficial moratorium on executions triggered by ongoing litigation challenging the death penalty's constitutionality.¹⁸⁷ However, numerous people were executed during the 2009 H1N1 pandemic. The H1N1 virus, which emerged in April of 2009 and spread rapidly for about a year,¹⁸⁸ infected 60.8 million people, hospitalized 274,304 and killed 12,459 in the United States.¹⁸⁹ Despite the close contact required by lethal injection, 44 people were executed in 12 different states over the course of the epidemic.¹⁹⁰ All but 2 of them were executed via lethal injection.¹⁹¹

Importantly, several of these executions via lethal injection occurred during periods of peak flu activity. On May 8th, three days after a record number of flu-inspired school dismissals,¹⁹² Thomas Ivey, a 34-year-old Black male convicted of murdering a policeman after breaking out of jail, died by lethal injection in Orangeburg County, South Carolina.¹⁹³ Around mid-July, H1N1 cases began to decline, but by late August a second wave was sweeping across the United States.¹⁹⁴

On August 18th, John Marek, a 45-year-old white man, was executed in Broward County, Florida for murdering a widowed mother after he had spent 25 years on death row. Twenty-six witnesses were present at his execution, and, despite public health guidance, they sat "shoulder to shoulder

¹⁸⁷ Sarat, *supra* note 14.

¹⁸⁸ See generally *2009 H1N1 Flu Pandemic Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 8, 2019), <https://www.cdc.gov/flu/pandemic-resources/2009-pandemic-timeline.html> [<https://perma.cc/X2KZ-P4NK>].

¹⁸⁹ *2009 H1N1 Pandemic (H1N1pdm09 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 11, 2019), <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> [<https://perma.cc/5Z35-45LT>].

¹⁹⁰ *Id.* The CDC asserts that the 2009 H1N1 pandemic lasted from April 12, 2009, to April 10, 2010, in the United States. *Id.*

¹⁹¹ *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5BstartDate%5D=04%2F01%2F2009&filters%5BendDate%5D=04%2F01%2F2010> [<https://perma.cc/699Q-V949>] (filtering for 2009 and 2010 and counting from 4/1/2009 to 4/1/2010). There were two electrocutions over the course of the epidemic. *Id.*

¹⁹² *2009 H1N1 Flu Pandemic Timeline*, *supra* note 189.

¹⁹³ Ian Silver, *Thomas Treshawn Ivey Executed*, WCSC (May 24, 2009), <https://www.live5news.com/story/10334816/thomas-treshawn-ivey-executed/> [<https://perma.cc/9R7F-WQ5B>].

¹⁹⁴ *2009 H1N1 Flu Pandemic Timeline*, *supra* note 189.

on metal-frame chairs,” according to the *South Florida Sun Sentinel*.¹⁹⁵ A day after Marek’s execution, Jason Getsy, a 33-year-old white male, died by lethal injection in Lucasville, Ohio for his involvement in a murder-for-hire scheme.¹⁹⁶ As Getsy was being executed, he apologized to the families of the victims: “I am sorry,” he said. “It’s a little word, I know, but it is true.”¹⁹⁷

In late October 2009, H1N1 activity reached its highest levels with 48 of 50 states reporting significant numbers of cases.¹⁹⁸ Nonetheless, in late October, Mark McClain, a 42-year-old white male, died by lethal injection in Georgia almost 15 years after he murdered an Augusta pizza shop manager during a robbery.¹⁹⁹ A week after McClain’s execution, Reginald Blanton, a 28-year-old Black male, was put to death in Texas for a 2000 murder that Blanton maintained he did not commit.²⁰⁰

The number of executions carried out during the H1N1 crisis was slightly lower than the 5-year annual average (50) from 2004–2008 but higher than the annual average of 38 in the 5 years after H1N1.

CONCLUSION

During most of the United States’ wars, severe economic contractions, and epidemics/pandemics, the death penalty has proceeded without interruption and in some cases at an accelerated pace. Given that pattern, the disruption of executions during the early stages of the COVID-19 pandemic stands out as a striking exception. That disruption came at a time of declining support for the death penalty. A May 2020 Gallup poll revealed that a record-low 54% of U.S. adults believed that the death penalty is “morally acceptable.”²⁰¹

Importantly, however, even the COVID-19 pandemic did not completely halt executions. On May 19th, 2020, a little over 2 months after the Texas Court of Appeals postponed the execution of John Hummel,

¹⁹⁵ Tonya Alanez, *Execution Ends 25 Years on Death Row*, S. FLA. SUN-SENTINEL (Aug. 20, 2009), <https://www.sun-sentinel.com/news/fl-xpm-2009-08-20-0908190469-story.html> [https://perma.cc/L64L-9UT6].

¹⁹⁶ Peter Zicari, *Ohio Executes Jason Getsy, Triggerman in Murder for Hire*, CLEVELAND.COM (Mar. 27, 2019), https://www.cleveland.com/metro/2009/08/ohio_executes_jason_getsy_trig.html [https://perma.cc/FE3P-FFH7].

¹⁹⁷ *Id.*

¹⁹⁸ *2009 H1N1 Flu Pandemic Timeline*, *supra* note 189.

¹⁹⁹ Walter C. Jones, *McClain Executed for Augusta Murder*, AUGUSTA CHRON. (Oct. 21, 2009), at A01.

²⁰⁰ *Reginald Winthrop Blanton*, OFF. CLARK CTY. PROSECUTING ATT’Y, <http://www.clarkprosecutor.org/html/death/US/blanton1178.htm> [https://perma.cc/QTK6-JWJP].

²⁰¹ Megan Brenan, *Record-Low 54% in U.S. Say Death Penalty Morally Acceptable*, GALLUP (June 23, 2020), <https://news.gallup.com/poll/312929/record-low-say-death-penalty-morally-acceptable.aspx> [https://perma.cc/JPY3-QZV7].

Missouri executed 64-year-old Walter Barton, who was convicted of a 1991 murder of an 81-year-old woman. Barton was executed despite the close proximity of witnesses and staff at the site of the execution, and his attorney's insistence that the pandemic prevented him from safely preparing legal appeals and clemency petitions.²⁰² Billy Joe Wardlow, who was executed in Texas on July 8th, was the only other inmate executed at the state level until May 2021,²⁰³ but a few state-level capital trials and hearings resumed months before vaccines became widely available. Proceedings that were delayed at the beginning of the pandemic but resumed prior to widespread vaccine distribution included the trial of Dreion Dearing, who was accused of killing an Adams County deputy in Colorado in 2018,²⁰⁴ and the sentencing hearing of Paul Henry III, who was convicted of a double murder in Pennsylvania.²⁰⁵

Additionally, on July 14, 2020, the Trump administration ended the federal death penalty's 17-year hiatus with the execution of Daniel Lewis Lee.²⁰⁶ Lee was put to death even though the pandemic prevented the family of his victims from being present.²⁰⁷ In the following six months, President Trump's Department of Justice ordered more federal executions—13—than any other president in the 20th or 21st centuries.²⁰⁸ It did so in spite of the

²⁰² Jim Salter, *Missouri Carries out 1st US Execution Since Pandemic Began*, AP NEWS (May 19, 2020), <https://apnews.com/article/78ae7040d0fc20e6f3b32c371b2fa7fc> [<https://perma.cc/V44S-8N48>].

²⁰³ Jolie McCullough, *Texas Executes Billy Wardlow, Who Was 18 When He Killed a Man. Experts Argued That's Too Young for a Death Sentence.*, TEX. TRIB. (July 8, 2020), <https://www.texastribune.org/2020/07/08/texas-execution-billy-wardlow/> [<https://perma.cc/6YBC-5RE3>].

²⁰⁴ Sean Towle, *Trial Underway in Man Accused of Killing Adams County Deputy Heath Gumm*, DENVERCHANNEL (Sept. 28, 2020), <https://www.thedenverchannel.com/news/local-news/trial-underway-in-man-accused-of-killing-adams-county-deputy-heath-gumm> [<https://perma.cc/ZJA2-2TKA>]. See also Shelly Bradbury, *Adams County Death Penalty Trial Postponed Due to Coronavirus*, DENVER POST (Mar. 23, 2020), <https://www.denverpost.com/2020/03/23/dreion-dearing-death-penalty-trial-postponed-coronavirus/> [<https://perma.cc/76XR-JRA3>] (reporting that the trial was postponed as the pandemic grew in severity).

²⁰⁵ Dylan Segelbaum, *Sentencing Delay Frustrates Bereaved Brother – Coronavirus Interferes in York County Death Penalty Case*, YORK DAILY REC. (Mar. 30, 2020); *Capital Case Roundup—Death Penalty Court Decisions the Week of June 1, 2020*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/capital-case-roundup-death-penalty-court-decisions-the-week-of-june-1-2020> [<https://perma.cc/G8F2-ZZ7E>].

²⁰⁶ Ariane de Vogue et al., *Daniel Lewis Lee Executed after Supreme Court Clears the Way*, CNN, (July 14, 2020), <https://www.cnn.com/2020/07/14/politics/daniel-lewis-lee-supreme-court-rule-execution/index.html> [<https://perma.cc/M3Z7-9Y5K>].

²⁰⁷ *Id.*

²⁰⁸ *Report*, *supra* note 6, at 2; see also Madeline Carlisle, *Amid Large Scale Outbreak on Death Row, Trump Administration Continues an Unprecedented Week of Executions*, TIME (Jan. 14, 2021), <https://time.com/5928974/coronavirus-death-row-prisoners-executions->

fact that executions led to major virus outbreaks in the prisons where they were carried out.²⁰⁹

America's death penalty survived the COVID-19 crisis just as it survived every crisis in the past. Perhaps the COVID-19 pandemic's interruption of executions and trials was a byproduct of America's already weakening attachment to the death penalty. But it is, of course, not possible to know why, in any particular crisis, executions proceed or do not proceed. Since they were, and remain mostly a state responsibility, we would have to determine how state officials assessed the cost and benefits of carrying on with capital punishment as well as how they assessed the resource needs and/or risks associated with each crisis. But in the absence of that kind of information we can say that the death penalty has shown itself to be remarkably resilient during wars, economic downturns, and disease outbreaks. Neither COVID-19, nor any crisis that preceded it, has stopped the machinery of death from running.

trump/ [https://perma.cc/DH4R-NWCR] (“Between 50 and 125 people travel to Terre Haute for an execution, per court documents, including a 40-person execution team that doesn’t quarantine upon arrival. Yet 10 executions took place during the second half of 2020 as COVID-19 ravaged the U.S.”).

²⁰⁹ Hailey Fuchs, *Virus Hits Federal Death Row, Prompting Calls for Delays in Executions*, N.Y. TIMES (Dec. 21, 2020), https://www.nytimes.com/2020/12/21/us/politics/coronavirus-death-row-executions.html [https://perma.cc/AGG7-KVQH].

