

Introduction

This book is concerned with the long-term trends in the use of capital punishment in the United States, and in areas that would become part of the United States, from the colonial period onward. The book focuses on four basic questions: How frequently has the death penalty been used, and how has the frequency of use changed? Where was the death penalty used most frequently? What were the offenses charged? What were the characteristics of the executed? As will become clear, the first two questions can be addressed more successfully than the third and fourth. All four, however, are fraught with serious ambiguities.

We also attempt in what follows to take lynching into account. Lynching was, of course, a criminal act whether carried out by vigilantes, Klansmen, or unorganized mobs, and as such it might be seen as being outside the purview of a book concerned with the legal use of the death penalty. The line between lynching and the legal use of the death penalty, however, was often far from clear. To distinguish between lynching, on the one hand, and a legal execution, on the other, of an African American following a hasty trial before a white jury, carried out under the watchful eye of a nascent lynch mob and explained as necessary to prevent a lynching, might seem a distinction without much in the way of meaningful difference.¹

How many such “legal lynchings” actually occurred will never be known. It is clear, however, that during the nineteenth and the earlier twentieth centuries lynching had the approval of many leading political figures and, at least in some areas of the nation, a sizable segment of the public. Lynching was treated as, and many probably believed it to be, a legitimate alternative to legal processes. These matters to the side, lynching claimed large numbers of victims and was, as a consequence, an important element in the context of the legal use of the death penalty. In some regions and time periods victims of lynching exceeded the number legally executed and effectively negated trends in the legal use of the death penalty.

The issues addressed in what follows are, we believe, of considerable intrinsic importance, although aside from the work of specialists they often are left unconsidered in studies of American social and political history. They also reflect, however, a number of broader and interrelated issues bearing upon the changing nature of national culture and institutions. Three of these issues were of particular importance in shaping the temporal and geographic change and variation in the incidence and nature of capital punishment.

One involves the characteristics and development of the institutions, laws, and practices governing criminal justice in the United States, which were themselves also reflections of the larger society. In his concluding chapter of the history of crime and punishment in the United States, Lawrence M. Friedman writes that

... the criminal justice "system" is not a system at all. This particular mirror of society is a jigsaw puzzle with a thousand tiny pieces. No one is really in charge. Legislatures make rules; police and detectives carry them out (more or less). Prosecutors prosecute; defense attorneys defend; judges and juries go their own way. So do prison officials. Everybody seems to have veto power over everybody else. Juries can frustrate judges and the police; the police can make nonsense out of the legislature; prison officials can undo the work of judges; prosecutors can ignore the police and the judges.²

The history of capital punishment well illustrates the point and, if anything, adds additional dimensions. If the notion of system implies a measure of uniformity—the same crimes, same legal procedures, same sentences, and same implementation of sentences—then the use of capital punishment has historically lacked systemic properties. The use of capital punishment has not only changed over time, its use also has varied from one area and jurisdiction to another and from one ethnic, racial, and social group to another. Variation is compounded when lynching is added to the context of the legal use of the death penalty. In these terms change and variation in the use of capital punishment provide an indication of the characteristics and patterns of development of the criminal justice system and, in some sense, of society more generally.

A second broad issue concerns the social biases characteristic of the United States and its various regions and jurisdictions. It will come as no surprise to learn that African Americans have been executed in disproportionate numbers during the history of the United States. Members of other ethnic and racial groups also were executed in disproportionate numbers. Apart from matters of race and ethnicity, it also will come as

no surprise that the large majority of those put to death, whatever their race or ethnicity, appear to have been of low economic status.

These disparities cannot be taken as no more than indications of a discriminatory law and criminal justice system. We know on other grounds that the historical law and criminal justice system was massively discriminatory and placed the poor at a disadvantage. The available evidence indicates, however, that violent and criminal behavior was not evenly distributed across the various groups that made up American society, and it is reasonable to believe that most of those put to death actually committed the offenses charged or were guilty of similar offenses. We also know that other and deeper social conflicts and tensions within American society both shaped the law and criminal justice system and played a major role in shaping individual behavior. Disparities in the use of capital punishment can be seen, then, as providing a crude indication of these deeper conflicts and tensions.

The history of capital punishment also reflects a third aspect of American history, the incidence and role of violence. This is not to assume that the historical incidence of capital punishment is a reliable and consistent indicator of the incidence of violence in America. The large majority of those executed were charged with violent offenses, usually some form of homicide often accompanied by other offenses. Thus it is reasonable to at least suspect that the frequent use of the death penalty tended to occur in areas marked by high levels of violence. Similarly, the weaker assumption that the incidence of capital punishment provides in any straightforward fashion a satisfactory indicator of the incidence of homicide or other capital crimes also is untenable. While a relation undoubtedly did exist, such an assumption is undermined by historical change in the definition of capital crime and by a wide variation in the incidence of capital punishment from one time period, jurisdiction, and ethnic, economic, and social group to another. These variations allow ample room for the intervention of other factors in addition to crime rates in determining the incidence of capital punishment.

The incidence of capital punishment is, however, a measure of one type of violence. Capital punishment is, after all, a form of violence, and the most extreme form that organized society can legally impose on its members. As such, one measure of the role and incidence of violence in the history of the nation is the frequency and the conditions under which capital punishment has been used to maintain social order, however social order has been defined and whatever has been presumed to be the relationship between punishment and the maintenance of order.

Although concerned with the long sweep of American history, this study is limited in a number of respects. The bulk of the investigation focuses on the years prior to 1945. During the years immediately

following, the use of capital punishment declined sharply—it was briefly discontinued in 1972 but resumed in 1977. The years after 1977 seem to constitute something of a different era in the use of the death penalty. The numbers put to death have not reached the levels of the pre-World War II years, and a degree of centralization of control over capital punishment has occurred largely through the intervention of the federal courts. Examination of the incidence of capital punishment and sentencing after 1977 indicates both persistence and change in trends and patterns characteristic of the years before 1945. These differences and elements of continuity have provoked considerable scholarly controversy centering in part on questions concerning whether, or in what degree, they reflect persistent systemic racial, ethnic, and class discrimination. We note these disagreements and touch upon some of their dimensions. We do not attempt to reconcile them.

Our examination of the history of capital punishment is primarily descriptive in nature. We trace and examine long-term trends and regional variations in the use of the death penalty, and we attempt to place these trends and variations in the broader context of American history. At various points, but particularly in concluding chapters, we note explanations sometimes offered for violence in American history as they seem to apply to capital punishment, and we suggest rather obvious factors that are clearly related to change in the use of the death penalty. Racial and ethnic discrimination and the relations between racial and ethnic groups more generally are clearly among these factors, as are differences in economic condition. Although difficult to demonstrate, change in the age structure of the national and regional populations was probably also a factor shaping the history of capital punishment.

We have found as well that trends and patterns characteristic of the history of capital punishment seem to parallel formulations developed by Norbert Elias. Elias describes a “civilizing process” characteristic of the development of societies that shaped manners, personal behavior, and the relations between social groups and also worked to control and regulate violence.³ These formulations, particularly as applied to punishment by David Garland, provide suggestive explanations for aspects of the history of capital punishment across the sweep of American history.⁴ We do not attempt, however, to demonstrate or weigh the precise relevance of these factors and possible explanations through rigorous causal or other analysis. Our primary goal is to trace and demonstrate trends and patterns in the use of capital punishment across the course of American history.

Similarly, we have not attempted to dramatize our examination of the use of the death penalty, although it would be easy to do so. Ample descriptions are found of gruesomely botched executions as well as those that were carried out with at least a measure of humanity and

dignity, although to combine deliberate infliction of death with notions of humanity and dignity may appear as something of an oxymoron. Many stories exist about trials that were no more than kangaroo courts, but also about trials that seem eminently fair. Similarly, abundant examples are found of crimes so horrid that execution hardly seems an adequate retribution. On the other hand, many examples of the use of the death penalty seem far out of proportion to the offenses committed if, indeed, an offense was actually committed. We have attempted, however, to minimize the use of anecdotes. The simple fact is that given the paucity of evidence, it is impossible to know which of the many available anecdotes could be seen as in any sense typical of the general practices of particular times and places. In our view, the selection of anecdotes inevitably provides a biased perspective. In our view as well whether capital punishment is supported or opposed, its history is in itself a sufficiently sad and tragic story and requires no embellishment or dramatization.

DATA SOURCES

As in the case of other forms of violence in the United States, an examination of long-term historical trends in the use of capital punishment has presented major obstacles. Historical information bearing upon the use of the death penalty has existed only in scattered and often fugitive form. Historical record keeping was imperfect, the decentralized nature of the nation meant that records also were decentralized, and records of the use of the death penalty, as other historical records, have been subject to the usual ravages of time. Even limited work in the relevant historical sources, moreover, sometimes gives the impression that during much of their history Americans were often indifferent to the use of capital punishment with the consequence that careful records of its occurrence were not always kept. Newspaper and other accounts of historical executions often treated them as being of only passing significance and, aside from an occasional spectacle, of limited and transitory interest. Characteristics of the executed that are important from a historical perspective were seemingly often of little interest to people at the time. These matters to the side, the nature of historical source material has been a major obstacle to the systematic investigation of the use of the death penalty.

To examine the history of capital punishment we have drawn upon several bodies of data. The most important of these was collected by M. Watt Espy. Indeed, it is due to Espy's work that it is possible at least to begin to address basic questions concerning the historical use of the death penalty. In 1970, working out of his home in Headland, Alabama, and on the basis of his personal financial resources, Espy

began the work of systematically identifying and collecting information on all legal executions in the United States, or in areas settled or occupied by Europeans that would become part of the United States. The magnitude of this task will be apparent. On the order of two thirds of all executions in American history were carried out at the local level. To identify and collect even limited information on these executions involved widely scattered and diverse sources, including a variety of local repositories, court and other governmental records, local and regional newspapers, and local histories, as well as other sources.

Espy subsequently moved the project to the University of Alabama, and by the mid-1980s he had compiled information on over 14,000 executions, beginning with the first European executed in Jamestown in 1608. Working at the University of Alabama with the assistance of Professor John Ortiz Smykla, and with support provided by the National Science Foundation and the University of Alabama Law Center, this segment of the collection was organized and converted to usable computer-readable form. This version was then supplied to the Inter-university Consortium for Political and Social Research (ICPSR) to be distributed for scholarly use. Corrections subsequently provided by Espy were then made, and a second version of the collection was released in 1992. Although information for particular cases and variables understandably is sometimes missing, the collection includes the ethnicity, sex, and age of the executed, the place of conviction and execution, the method of execution, and the offense charged, as well as limited additional information.⁵ The Espy project continued, and by March 1996, Espy had identified and collected information bearing upon well over 4,000 additional executions. Espy's project is ongoing, again being carried out in his home in Headland and on the basis of his own resources. There can be no doubt that his work will produce evidence and information about still additional executions.

In what follows we draw upon the 1992 revised computer-readable Espy file supplied by the ICPSR. Espy also has been kind enough to supply us with summary information bearing upon over 4,000 executions identified between 1985 and early 1996. We have combined this additional information with the 1992 revised ICPSR version of the collection. This combined data collection provides the primary basis for our examination of capital punishment.⁶ Data from executions after 1945 are from the Death Penalty Information Center.⁷

Characteristics of the combined Espy collection are discussed in greater detail in the Appendix of this book, which explores as well some of the strengths and weaknesses of the collection, and the characteristics of the collection are noted in the text and footnotes that follow as they relate to particular generalizations or categories of generalizations. The Appendix also describes work directed to assessing the reliability of the

collection. These include comparison with other and more limited compilations, with a variety of relevant secondary works, and a limited examination of original sources.

On the basis of this work we have developed considerable confidence in the collection as a source of a reasonably accurate view of the use of the death penalty in American history. As the Appendix indicates, it is likely, as would probably be expected, that the collection is relatively less complete for the earlier years and for the Southern and Border states. It is likely as well that in the future additional executions will be identified either by Espy or others, and it is virtually certain that the collection includes an unknown number of spurious cases. Even so, we believe that the collection provides a sound basis for an approximation of the ethnic, geographical, and temporal distribution of executions in American history. Our confidence is increased by the degree to which the patterns and relations identified through the examination of the collection conform to prior expectations. Information bearing upon the characteristics of the executed, the offenses charged, and the methods of execution is less complete, as we indicate. In these areas as well, however, the observed patterns are highly predictable, and our confidence in our findings is thereby increased.

To avoid possible confusion, we should note that we do not treat the Espy collection as a sample in either the dictionary or technical sense of that word. In the first place, the collection was not intended as a sample but is an effort to collect information on the total universe of legal executions carried out in American history. Because of the nature of historical sources and record keeping, that effort could not be entirely successful. However, the direction of biases characteristic of the collection is known or can be reasonably assumed, and the consequences estimated in at least general ways. One consequence of this approach is that we often treat small numbers as real values—as approximations of historical reality—not as only the possibly erroneous products of inadequate sampling.

Sources for examination of lynching and their characteristics also are discussed in greater detail in the Appendix. These sources present many of the same difficulties as sources for the study of capital punishment in even more serious ways. Sources of information are widely scattered, often in the form of local and regional newspaper accounts. The problem is compounded by the fact that lynching was a criminal act that usually did not result in official records, except on the rare occasions that perpetrators were the subjects of criminal action. As a consequence, nothing exists that approaches a complete list of lynchings or of the names and characteristics of victims. Here again, however, we have benefited from the work of others. Stewart E. Tolnay and E. M. Beck supplied data on lynching for ten Southern and, in our definition,

Border states for the years 1882–1930 that they used in their study *A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930*.⁸ For three additional Border and Southern states we have used compilations published by George C. Wright and W. Fitzhugh Brundage.⁹ For the rest of the nation, several older compilations, including the National Association for the Advancement of Colored People publication *Thirty Years of Lynching*, have been used.¹⁰ The characteristics and limitations of these sources also are discussed in an appendix. Richard Maxwell Brown, in *Strain of Violence: Historical Studies of American Violence and Vigilantism*, provides estimates of the numbers lynched by organized vigilante groups from 1767 through 1904.¹¹

In relating the incidence of executions and lynchings to population, we have used the extensive files of historical computer-readable data also drawn from U.S. Census reports related sources, maintained by the ICPSR.¹² In using these data, however, we also have drawn upon the corrections and additions at the state level to the original census reports provided by the *Historical Statistics of the United States*. We have also relied upon the *Historical Statistics* for estimates of the colonial population.¹³

All of the data sources that we have employed are imperfect, and all are marked by an error of one sort or another. We attempt to call attention to these imperfections as they may affect our interpretations and inferences. Suffice it to say here that the data sources provide an approximate view of the historical incidence of capital punishment. The degree of approximation varies from one time period and region of the nation to another, as does the possible type and magnitude of error. We believe, however, that what follows is a valid approximation of historical reality.

This book is, in short, based upon “secondary analysis,” that is, mostly upon data collected by others in some cases for purposes other than historical investigation. We have spent some time working in the relevant primary sources mainly for purposes of verification. We have come to recognize that the limitations of the data that we have used are in considerable measure a reflection of the primary sources and to appreciate the work of original data collectors.

Chapter 1

The Death Penalty in National Perspective

From the very beginning capital punishment has been an integral part of American history. The first execution of a European in what would become part of the United States was in Jamestown in 1608, only a few months after the colony was founded.¹ During the next twenty years only occasional executions took place. By mid-century, some fifty people had been executed. By the end of the seventeenth century, on the order of 300 European, African, and Native Americans had been put to death. One hundred years later, the number had grown to almost 3,000. While the number of executions steadily grew, the population grew at a more rapid rate. As a consequence, viewed in relation to population, the use of capital punishment actually declined. Even so, by the end of 1945, more than 17,000 people had been legally put to death.

This chapter examines the trends in the incidence, racial, ethnic, and gender distribution of executions in the continental United States, or what would become part of the continental United States, from 1608 through 1945. The incidence of capital punishment is examined both in terms of the actual number of executions and in relation to population. Both perspectives are, of course, valid and useful but for different purposes, and each provides support for different generalizations.

In recent years, as is well known, a disproportionate number of those put to death have been African Americans. This disproportion appeared early in American history. Beginning in the early eighteenth century, a majority of those executed in most years were of African descent, and the pattern persisted. African Americans, of course, never constituted a majority of the colonial or national population. When other racial and ethnic groups are combined with African Americans, whites appear as a distinct minority of those executed. The gender distribution

of capital punishment is considered only briefly later. In American history, the death penalty has been, very largely, a male monopoly.

FREQUENCY OF EXECUTION

During most of American history capital punishment has been characterized by a long-term rising trend. The shape of that trend from the early seventeenth century through 1945 is summarized in Figure 1.1. Viewed in detail, the incidence of capital punishment, particularly during the earlier years, fluctuated widely from one year to the next. To somewhat smooth out these fluctuations and to facilitate relating the number of executions to population at a later point, the figure gives the average number of executions per year for each ten-year period through 1945. For these purposes, each period is centered on the decennial census year and is defined as beginning with the year ending in six, as 1886, and closing with the next year ending in five, as 1895.²

Even when smoothed out in this fashion, the series is marked by rather wide fluctuations. Despite these fluctuations, the rising trend in the number of executions is clear. During the ten-year period from 1606 through 1615, the data collection records only two executions, both in Virginia. The number rose to an average of about six per year for the ten-year period from 1686 through 1695, and to approximately forty each year during the ten years centering on 1790. One hundred years later (1886 through 1895), an average of about 120 people were executed each year, roughly two per week. High points in the number of executions were reached during the twenty-year period from 1926 through 1945. Over 1,500 individuals, an average of almost three each week, were put to death during the years 1926 through 1935 and 1,491 during the next ten-year period. Thereafter, the incidence of executions declined.

Since we know that data collection is continuing, and that additional executions will be identified, it is reasonable to ponder the degree to which the trend in Figure 1.1 is a reflection of historical reality. It is certainly possible that some of the extreme fluctuations, particularly during the earlier years, may be indicative of executions that actually occurred but have not yet been identified. At later points we discuss other factors that also help account for some of these fluctuations. These include the Revolutionary War and the Civil War, both of which were accompanied by comparatively heavy use of the death penalty, and help account for two of the peaks in the time series in Figure 1.1.

A more serious question concerns the degree to which the trend in Figure 1.1 is the product of error in the form of executions that have not yet been identified rather than actual historical change. As discussed briefly in the Introduction and at greater length in the Appendix, it is

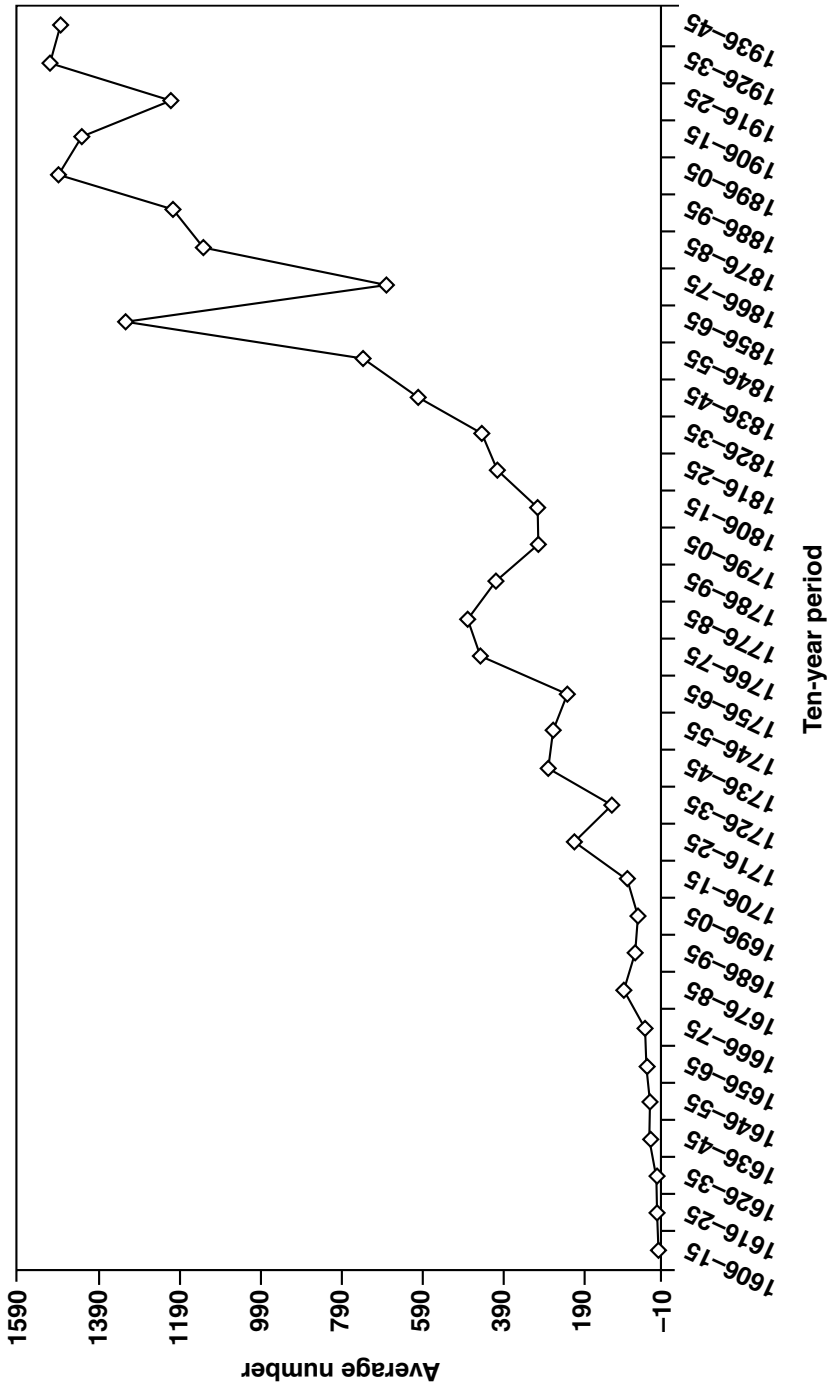


Figure 1.1 Average annual number of executions per year by ten-year period, 1606-1945

likely that identification of additional executions will disproportionately affect the series for earlier years and have less impact upon later years. Even if this assumption were valid, however, to eliminate the apparent rising trend it would be necessary to assume that the actual number of executions that occurred during the earlier years was in fact many times greater than the number that has been identified. Whether this is a reasonable assumption is a matter to be pondered. Our conclusion is, however, that the trend given in the figure is generally in accordance with historical reality, although it might be somewhat attenuated by the identification of additional executions in the future.³

Race and Ethnicity

It is clear that over the long sweep of American history, racial and ethnic disparity in the use of the death penalty has been of substantial magnitude. Table 1.1 gives the average number executed for five racial and ethnic categories and for those of unknown ethnicity summarized by ten-year periods, as in Figure 1.1.⁴ As can be seen, about half of those executed during the period were of African descent. As can also be seen, this discrepancy appeared in the early eighteenth century and continued thereafter except for the periods encompassing the Revolution, the War of 1812, and the Civil War, when the number of whites executed exceeded the number of African Americans. If the other ethnic groups are combined with African Americans, then the combined group constituted a clear majority from the early eighteenth century onward. Whites, of course, made up a majority of the national population during most of American history. They were only a minority of those legally put to death.

Most of those executed in American history were African American or white. Members of other ethnic and racial groups also were put to death, but in significantly smaller numbers. These executions tended to reflect patterns of national expansion and settlement. Comparatively large numbers of Native Americans were put to death during and following King Philip's War (1675–1676). The numbers declined thereafter but rose again in the nineteenth century to high levels during the last half of that period reflecting the penetration and settlement of the far West. The number of Hispanics put to death also rose in the nineteenth century and continued at comparatively high levels in the twentieth.⁵ Execution of Asians, usually Chinese, began in the late nineteenth century and continued in the following years. As will be seen in subsequent chapters, executions of members of all three of these ethnic groups followed predictable regional patterns.

Here again, it is reasonable to ask whether, or to what degree, the patterns that appear in Table 1.1 are the product of imperfections of the

Table 1.1. Annual number of executions by ten-year period and ethnic group, 1606–1945

	African American	White	Native American	Hispanic	Asian	Other	Unknown	Total
1606–15	0	2	0	0	0	0	0	2
1616–25	0	3	0	0	0	0	0	3
1626–35	0	4	0	0	0	0	0	4
1636–45	1	17	2	0	0	0	0	20
1646–55	0	23	0	0	0	0	0	23
1656–65	2	14	5	0	0	0	9	30
1666–75	2	17	10	0	0	0	6	35
1676–85	5	42	44	0	0	0	0	91
1686–95	9	38	5	0	0	0	10	62
1696–05	11	27	14	0	0	0	1	53
1706–15	56	13	14	0	0	0	2	85
1716–25	43	133	5	0	0	0	36	217
1726–35	55	47	10	0	0	0	8	120
1736–45	166	99	7	0	0	0	5	277
1746–55	145	104	1	0	0	0	15	265
1756–65	123	92	5	0	0	0	12	232
1766–75	236	174	6	0	0	0	31	447
1776–85	156	274	5	1	0	0	45	481
1786–95	193	150	4	1	0	0	61	409
1796–05	225	63	4	1	1	0	9	303
1806–15	122	161	11	1	0	0	10	305
1816–25	212	159	20	2	0	0	13	406
1826–35	250	147	15	20	0	0	13	445
1836–45	342	206	25	6	1	0	22	602

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Table 1.1. (Continued)

	African American	White	Native American	Hispanic	Asian	Other	Unknown	Total
1846-55	434	235	27	17	0	0	25	738
1856-65	528	682	52	12	3	0	47	1,324
1866-75	299	249	28	19	3	0	84	682
1876-85	543	408	53	21	13	1	94	1,133
1886-95	637	394	50	21	11	0	91	1,204
1896-05	834	474	27	36	12	0	108	1,491
1906-15	811	510	8	23	12	0	68	1,432
1916-25	584	530	4	46	14	1	34	1,213
1926-35	727	701	6	31	19	1	26	1,511
1936-45	766	641	7	27	10	0	34	1,485
Total	8,517	6,833	474	285	99	3	919	17,130
Percent	49.72	39.89	2.77	1.66	0.58	0.02	5.36	100.00

available data rather than reflections of historical reality. As can be seen, the number whose ethnicity is unknown is sometimes troublesomely large. It is impossible to know the ethnicity of these individuals, but it is possible to ponder on the basis of assumption how the distribution of capital punishment between these ethnic groups would appear if the ethnicity of these individuals were known.

If it were assumed, for example, that all of those given in the table as being of unknown ethnicity were actually white, probably an extreme assumption, then whites would still appear as a minority of those put to death. Those classified nonwhite would still constitute a majority of those executed both in terms of the total number during the entire period and during most ten-year periods after the late seventeenth century. African Americans would still constitute the largest ethnic group among the executed, again both in total numbers across the period and during most ten-year periods. The margin of difference between whites and other groups taken individually or in combination would be narrower, but whites would remain in the minority. Various other assumptions of different degrees of plausibility also could be made. These would not undermine, however, the basic pattern characteristic of the table. Groups classified nonwhite have been more frequently executed in American history. Whites have been in a minority, despite their majority status in the national population.

Gender

We have information on gender for approximately three fourths of the known executions prior to 1945. The large majority of these individuals were male, and less than 3% were women. Although the number of women executed tended to increase until the late nineteenth century, women constituted a declining percentage of those put to death. Of those executed during the seventeenth century for whom information on gender is available, thirty-nine were women. In the eighteenth century the number rose to ninety-eight and to 178 in the nineteenth. In the twentieth century prior to 1945 only twenty-eight women were executed. For each century women constituted, respectively, approximately 25%, 7%, 3% and less than 1% of the total number put to death.

The available evidence suggests that the ethnic distribution of the women put to death was characterized by, if anything, a more pronounced racial disparity than the total group of those executed. Of all women executed, some 57% were African Americans as compared to about 35% white. About 6% were of unknown ethnicity, and 2% were members of other ethnic groups. If more complete information was available, then it is unlikely that these ethnic disparities would be much changed. It seems unlikely as well that more complete information would

show that women constituted a significantly larger proportion of the total number of people put to death.

RATES OF EXECUTION

The number of individuals executed is of considerable historical interest. The data series summarized in Figure 1.1 indicated that prior to the mid-twentieth century the death penalty was used with increasing frequency and became an increasingly prominent fact of national life. From one perspective, that increase is as would be expected. All other things the same, as the population increased it might be expected that the number executed would also increase, unless there was some change in the factors governing the imposition of the death penalty, the change in the rates of capital crimes, or some combination of the two. It also is the case that if increased reliance was placed upon the death penalty as a means to cope with crime and violence, then it could be expected that the rate of executions in relation to population, not simply the number of executions, would increase.

This is not the pattern that appears. Figure 1.2 gives the average number of executions per 100,000 population for each decade from the early seventeenth century through 1945.⁶ In estimating the number of executions for this calculation, the same procedure was used as in preparing Figure 1.1. That is, the average number of executions per year was calculated for each ten-year period, and the averages were then divided by the national population as estimated or enumerated at the end of each decade to extract the rate of execution per 100,000 population. Calculations for the years before 1790 are based upon estimates of the colonial population at each decade. Those for 1790 and after are based upon the decennial censuses of the United States.⁷ The population figures used in the figure are for the white and African American populations.⁸ Other population groups were not consistently enumerated until the late nineteenth century and in some cases even later.

As figure 1.2 indicates, the rate of executions in relation to population is marked by historical decline rather than increase.⁹ As Figure 1.1 indicated, only a small number of executions are recorded as occurring in the seventeenth century. While the number of executions grew prior to independence, it remained small in comparison to later years. In this sense it is accurate to say that the colonists made relatively little use of the death penalty.¹⁰ Because of the very small population during these years, however, this small number of executions translates into very high execution rates. The two executions during the years 1606–1615 translate into a rate of approximately 5.7 persons per 1,000 population, or approximately 57.1 per 100,000. The rate of executions quickly declined to an average of approximately 13.0 per 100,000 in

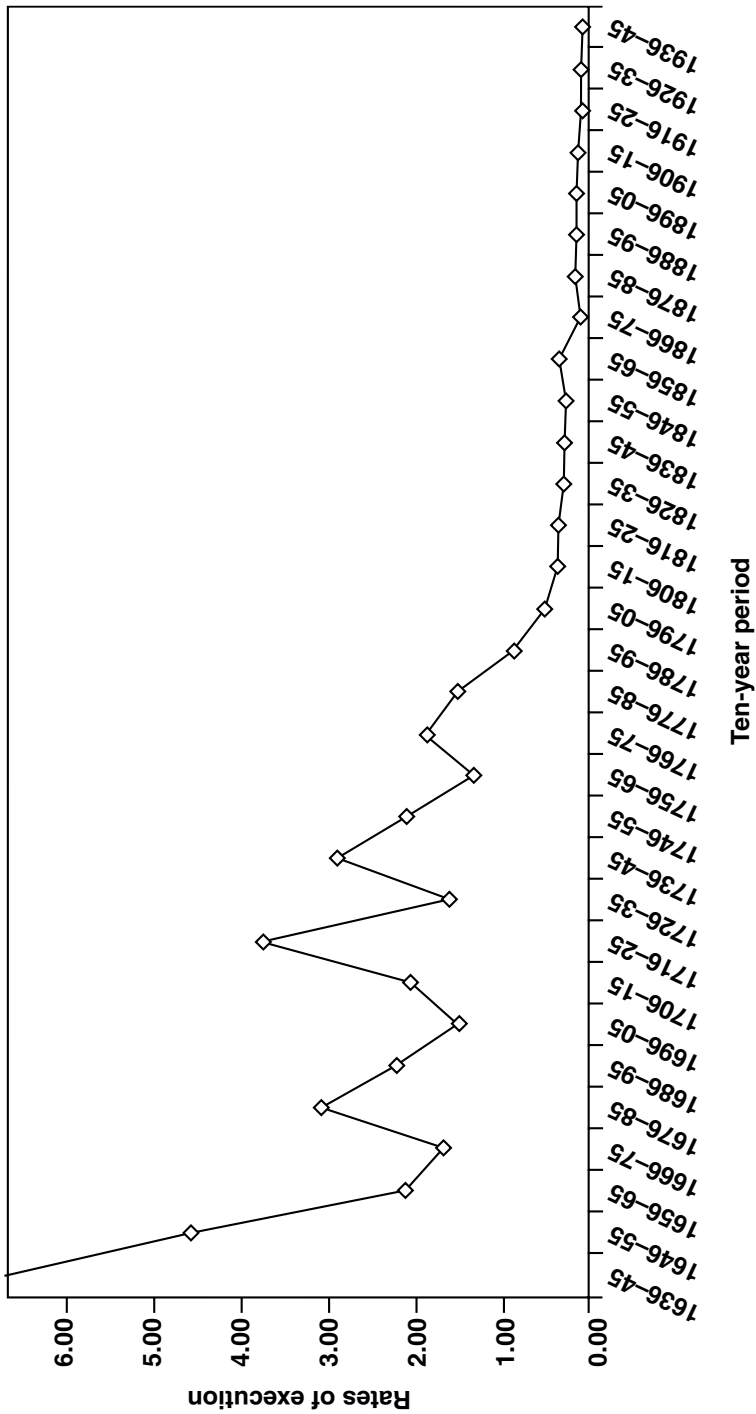


Figure 1.2 Average annual rates of execution of African American and white per 100,000 population combined by ten-year period, 1636-1945

the following ten-year period, and succeeding years were marked by further decline. As examples, in the ten-year period, from 1686 through 1695, the average rate of executions remained at approximately 2.2 per 100,000. During the years 1756 through 1765, the average rate was 1.4 per 100,000. This compares with an average rate of approximately 0.12 per 100,000 during the years 1926 through 1935, a high point in the total number of executions. Viewed in relation to population, the colonies appeared to have made considerable use of the death penalty, at least when compared to later periods in American history.

The series given in Figure 1.2 is marked, particularly in the seventeenth and eighteenth centuries, by sharp fluctuations from one ten-year period to the next. The trend, however, is downward. In the seventeenth and eighteenth centuries, the trend was irregular and marked by sharp surges, especially in the periods 1676 through 1685 (to a little over three per 100,000), 1716 through 1725 (to about 3.7), 1736 through 1745 (to approximately three per 100,000), and 1766 through 1785 (to slightly less than two per 100,000). Some of these surges are explicable in terms of unusual events discussed in the following chapter. In the later years of the century the rate began a long-term and relatively regular decline that carried over into the nineteenth and twentieth centuries. In the nineteenth century the rate was consistently below .4 per 100,000 and below .2 per 100,000 in the twentieth. Based upon the sheer numbers of executions, in short it is accurate to say that the use of the death penalty increased from the early seventeenth century through the 1930s. Viewed in relation to population, however, the use of the death penalty appears to have declined rather steadily.

Once again, it will be obvious that the trend displayed in Figure 1.2 is marked by bias related to at least two sources. It is likely, as discussed earlier, that the number of executions is underreported, particularly for the earlier years. At the same time, the population data used in constructing Figure 1.2 almost certainly underreport the actual African American and white populations. The estimates for the colonial period, it is likely, underestimate both the African American and white populations, although the underestimate is probably more serious in the case of African Americans in the seventeenth century.¹¹ It is very likely that the census enumerations also involve undercounts of magnitudes on the order of 10% or more for the early years. The censuses became progressively more accurate for later years, although even the most recent censuses are thought to involve undercounts.¹²

It will be recognized that these two sources of bias have opposite effects on the series displayed in Figure 1.2, and that they also affect calculation of rates for other purposes. Obviously, to the degree the number of executions is undercounted, the rate of execution is deflated below the actual values. To the degree that population is underesti-

mated, the rate of executions is inflated above actual values. There are no grounds, however, for assuming that the two sources of bias cancel each other out, although they do work in opposite directions. At the same time, there also are no grounds for believing that the downward trend in the average yearly rate of executions can be accounted for solely as a consequence of the biases or other inaccuracies characteristic of the available data. To eliminate the trend shown in the figure, it would be necessary to assume very large, and probably unlikely, undercounts of the population or executions, or a combination of both.

It appears, then, that the rate of executions in relation to population has diminished rather consistently, and by a considerable magnitude over time. To illustrate the point, if the rate of executions per 100,000 population for the years 1786 through 1795 (.81) had persisted, then an average of almost 1,000 people would have been executed each year during the period 1926–1935 rather than the actual average of approximately 152 per year. It is unlikely that a decline of this magnitude in the annual average number of executions can be explained by incomplete data or other configurations of data error.

These elements of bias also affect in unknown ways execution rates calculated for racial and ethnic groups. Execution rates for African Americans and whites taken separately are given in Figure 1.3.¹³ As indicated earlier, rates for other groups cannot be calculated because of lack of population data. As can be seen, after the seventeenth century the execution rates for both groups tended to decline. The decline in white rates, however, began earlier and is more precipitous than the decline in the rates for African Americans. The African American rates also tend to be more volatile and marked by more and wider fluctuations. Particularly for the earlier years, this characteristic is in part a product of the smaller African American population. The very high figure for the period 1636–1645, for example, reflects the execution of a single African slave in 1641. The colonial population of African descent is estimated as being less than 600 in 1640.

What is striking about the figure is the marked disparity between the African American and white rates. Beginning early in the seventeenth century, African American rates of execution have been, with a single exception, consistently higher than the rates for whites. The drop in white rates compared to the rates for African Americans also is apparent. By the mid-seventeenth century white rates had dropped below four per 100,000 and to below one per 100,000 by the middle of the following century. Before the end of the nineteenth century they had fallen below .1 per 100,000 and remained essentially stable at these levels. In contrast, African American rates did not fall consistently below one until late in the nineteenth century, and they never fell below .56 per 100,000.

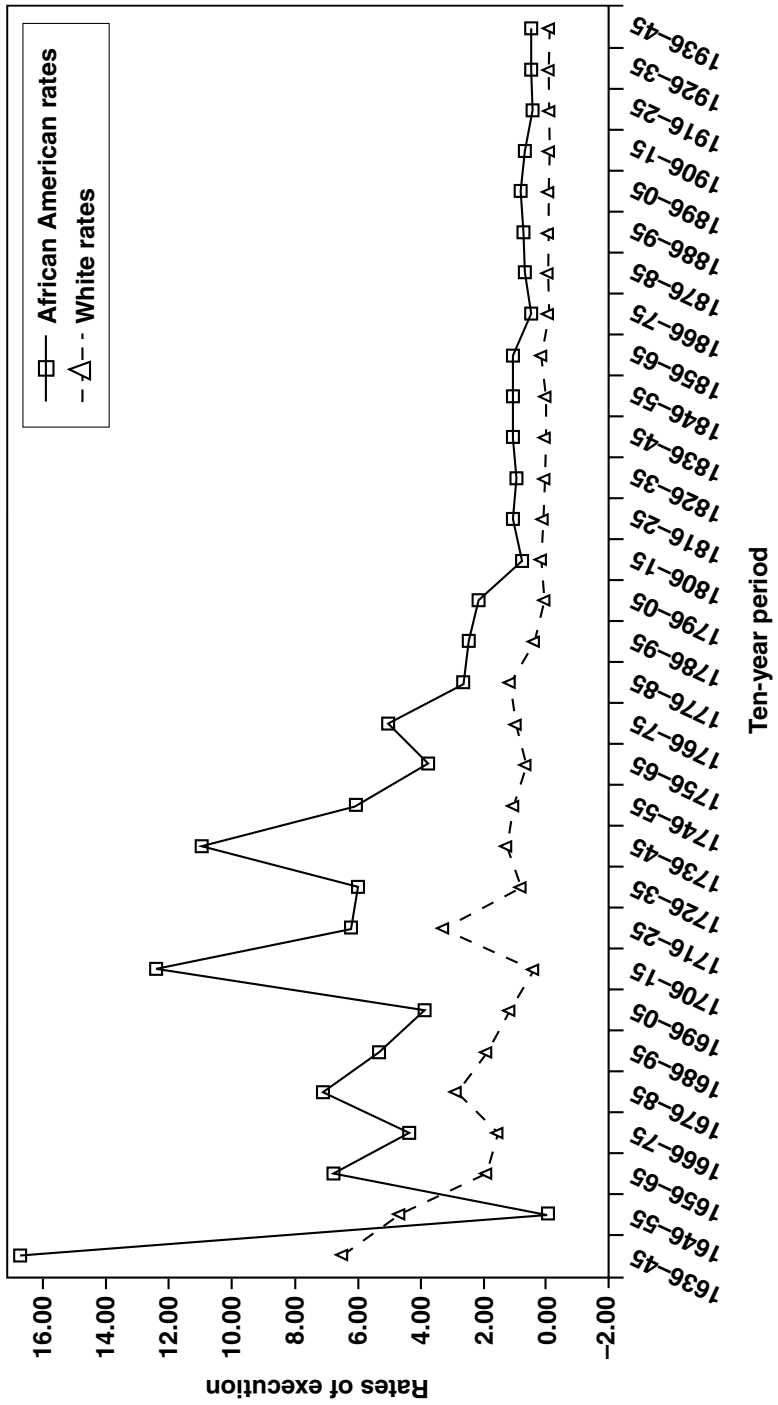


Figure 1.3 Average annual rates of execution of African American and white per 100,000 population by ten-year period, 1636-1945

The differences between the two groups shown in Figure 1.3 are of very considerable magnitude. The point can be made more clearly by looking at the ratio of African American to white average rates of execution in Figure 1.4.¹⁴ As will be recognized, a ratio above 1.0 indicates that African American rates were higher than white rates, and a value below 1.0 indicates that African American rates were lower. The ratio of African American to white execution rates tended to rise across the entire period, although the series is quite irregular. In the eighteenth century the ratio rarely exceeded 6.0. That is, the African Americans were rarely executed at rates more than six times that of whites. In the nineteenth century and the first half of the twentieth, the ratio was usually above 8.0. During the last decade (1935–1945) of the period, the ratio of African American to white rates of execution was over 10.0.¹⁵ Put differently, from the early nineteenth century through the mid-twentieth African American rates of execution were, on average, nearly nine times that of whites.

Viewed in relation to population, use of capital punishment declined during the course of American history for both African Americans and whites. It is probable that the rate at which other ethnic groups were put to death also declined, but that can be only a matter of speculation, since information about population is unavailable for these groups. The comparative pattern of change in rates of execution for African Americans and whites, however, was more than a matter of simple decline. From the mid-sixteenth century onward, the rate in relation to population at which African Americans were put to death almost consistently exceeded that of whites. While rates of execution declined for both groups, the discrepancy between the groups increased. In the twentieth century the difference between the groups was greater than it had been in the eighteenth.

CAPITAL OFFENSES

The number of offenses defined as capital was smaller in the North American colonies than in England at the time. Even so, a lengthy list of offenses in the various colonies could result in execution, and the list was certainly longer than it would become in later years. Beginning as early as the latter seventeenth century, capital punishment was increasingly restricted to offenses that involved the death of a victim. The death penalty was never restricted exclusively to lethal offenses. Various other crimes remained subject to execution, but by the 1940s the number was relatively small, and in practice executions for these offenses were rare.

This process of redefinition, both in *de jure* and *de facto* terms, can be observed behaviorally by examining the offenses that led to

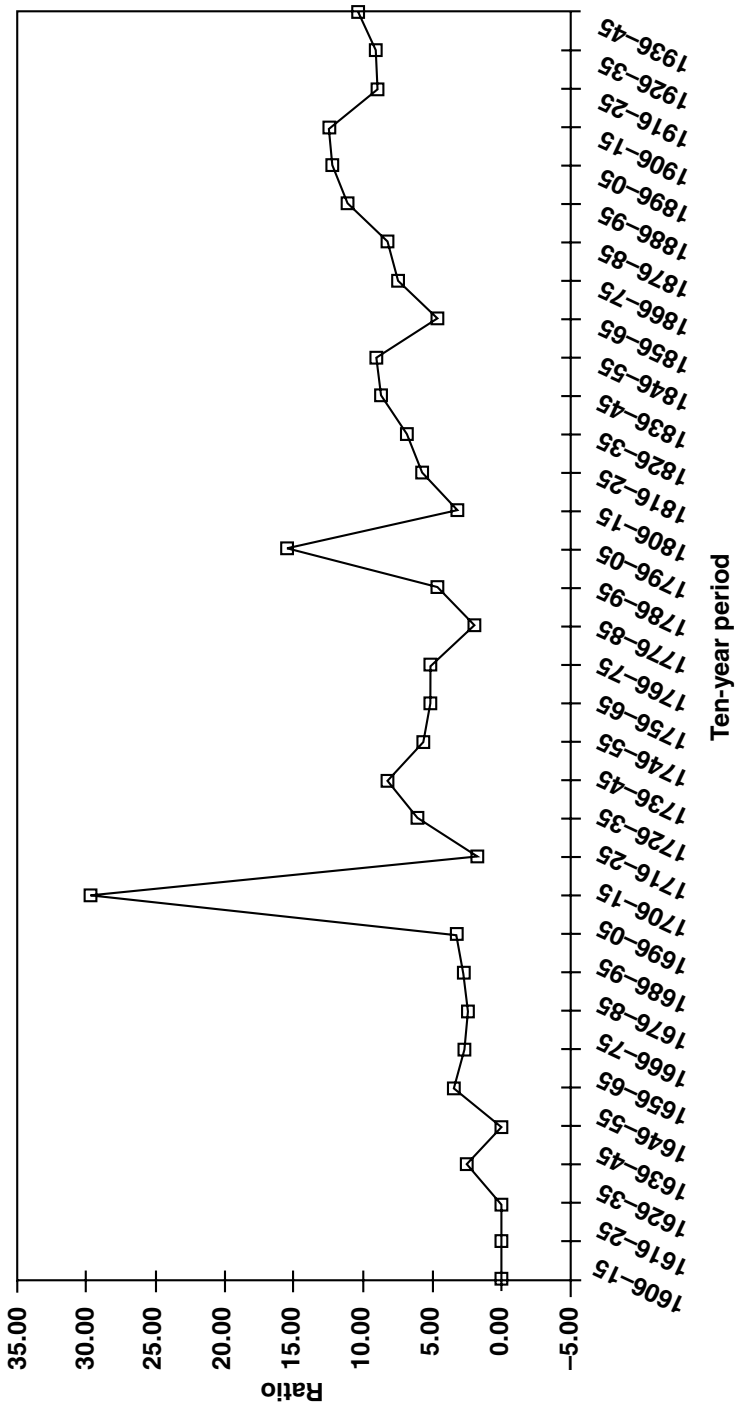


Figure 1.4 Ratio of African American to white rates of execution, 1606-1945

execution. That examination will be imperfect. Information is available on the offenses charged for approximately 75% of known executions from the beginning of the colonial period through 1945. The precise number of executions for offenses that did not involve a death cannot be established. It is possible, however, to establish the approximate minimum number that were put to death for such offenses.

In the colonial and revolutionary period, only about half of all known executions were for offenses that involved the death of a victim. The rest were for a variety of other offenses with various forms of theft and robbery, including forgery and counterfeiting, which constituted the largest category—about three out of ten executions. In the years that followed, lethal offenses accounted for an increasing proportion of all executions. During the period 1786 through the end of the Civil War approximately seven out of ten executions were for offenses that involved a death. The proportion rose to nine out of every ten executions during the period 1866–1945. (The other offenses that led to execution are discussed in somewhat greater detail in following chapters.)

Change in the crimes that led to execution can be seen more clearly in Figure 1.5, which provides for known executions of African Americans and whites the percentages that did not involve the death of the victim. For the seventeenth and eighteenth centuries the series is quite irregular, and no clear trends are apparent. During the following years, in contrast, the percentage of executions for nonlethal offenses declined steadily and relatively consistently for both groups. After the Civil War, however, the percentage of African Americans executed for nonlethal offenses gradually increased, and in the ten-year period, 1936–1945, it reached levels not seen since the early nineteenth century. The white percentage of nonlethal offenses also increased, but the increase was substantially less than that for African Americans and limited to the period 1926–1945.

Beginning in the late eighteenth century the series takes on a clear bias for African Americans. The percentage of African Americans executed for nonlethal crimes was consistently higher than the percentage of whites. For both groups the percentage executed for lethal crimes increased across the nineteenth and twentieth centuries, but the percentage was consistently higher for whites than for African Americans. Although the differences persisted, they were smaller after the Civil War than in earlier years. While capital crime was redefined, the consequences were, in practice, usually more beneficial to whites than African Americans.

While execution for most nonlethal offenses either declined or was discontinued prior to 1945, rape, attempted rape, and rape with other offenses such as burglary or robbery were exceptions.¹⁶ Here again, executions for these offenses were marked by a clear ethnic bias. After

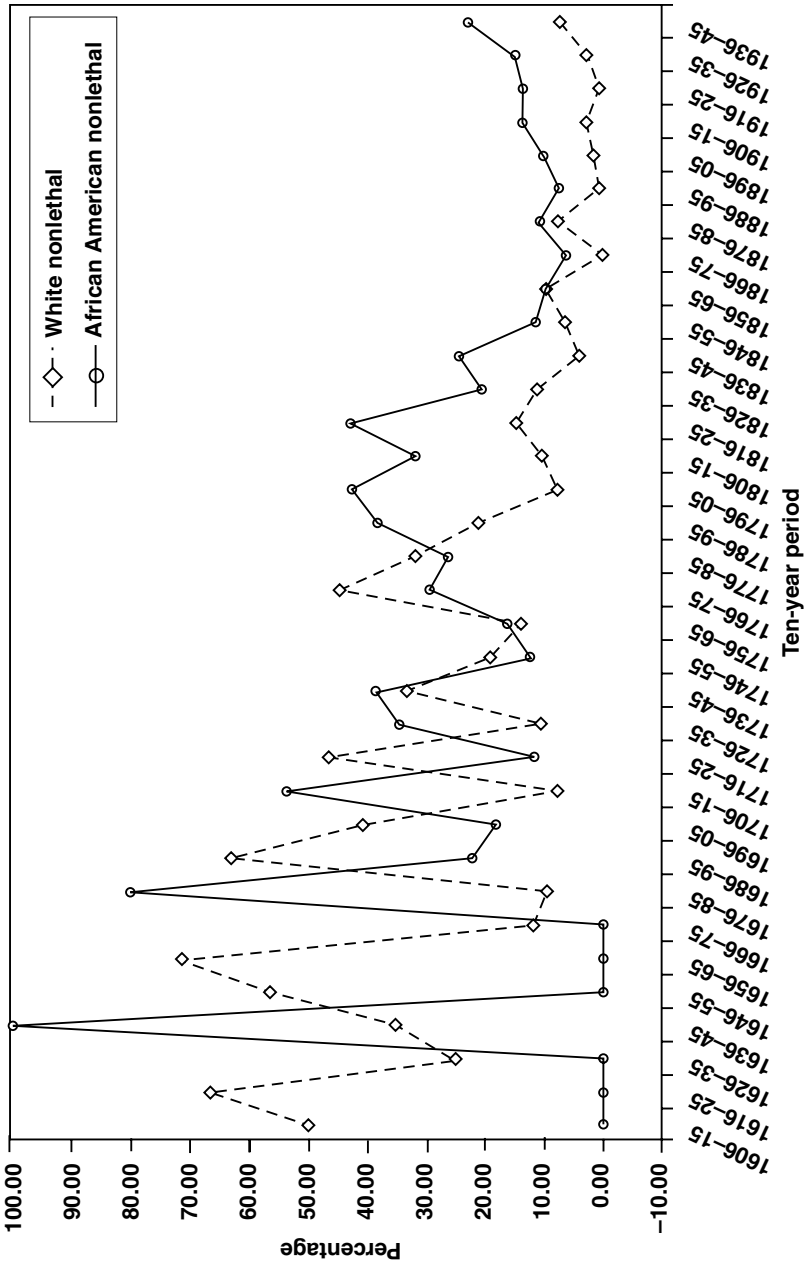


Figure 1.5 African American to white executions for known nonlethal crimes as a percentage of total executions, 1606-1945

the seventeenth century the percentage of African Americans put to death for rape was consistently greater, often many times greater, than that of whites.¹⁷ Moreover, in the decades of the late nineteenth century, the percentage of African Americans executed for rape increased.¹⁸ Most of the increase in the number of African Americans executed for non-lethal offenses was due to the increase in the number put to death for rape. The number of whites executed for rape also increased in the early twentieth century, but the numbers were far smaller than for African Americans. The offenses for which other ethnic groups were executed underwent little change. The large majority of these groups, around 90%, were executed for crimes that involved the death of a victim. Native Americans and Hispanics were sometimes executed for rape, but the number was small.

From the seventeenth century through the 1930s the United States made increasing use of the death penalty, however, this did not increase as rapidly as the national population, and the rate of execution in relation to population declined. Neither trend was entirely consistent, but their presence is unmistakable. Capital crime was redefined particularly from the latter eighteenth century onward. The number of offenses that carried the death penalty was progressively reduced, and execution was increasingly restricted, although never exclusively, to offenses that involved the death of a victim. This progressive redefinition of capital crime helps explain, at least in a direct sense, the decline in the rate of execution in relation to population. From the early eighteenth century onward, the use of capital punishment was characterized by clear racial disparity. Although a majority of the national population, whites constituted a minority of those put to death. The rate of capital punishment for whites declined earlier and to lower levels than the rate for African Americans, and the disparity between African American and whites tended to increase. While capital crime was redefined for both groups, the redefinition tended to be more meaningful for whites than for African Americans.

A complete explanation for the gap between the number and rate of African American executions as compared to white executions is not available. A racially discriminatory legal system and pervasive racial prejudice within white society were certainly part of the explanation, as we discuss more fully at various points later. The legal system also placed the poor at a disadvantage, which impacted more heavily upon African Americans, who were disproportionately poor. Research concerned with the years since 1945 indicates that rates of violent crime are higher among African Americans than among whites. If the same pattern prevailed in earlier years, it would also help explain the interracial gap in numbers and rates of execution. The hypothesis that historical crime rates were higher among African Americans than whites is in

some degree self-confirming. In a number of areas of the nation, particularly the South and the Border regions, many more crimes carried the death penalty if committed by African Americans than if committed by whites. African Americans also resisted slavery and white domination by slave rebellions and during and after slavery by individual and other forms of group action. To the degree that resistance was violent, execution could be the result, which also worked to inflate the number and rate of African American executions.

These issues to the side, it is certainly possible that in the past other forms of violent offenses were committed more frequently by African Americans than by whites. Unfortunately, these possibilities cannot be tested. Systematic and reliable data on historical crime rates do not exist. It is possible—even likely—that all of these as well as other factors, and their interaction, contributed to the historical gap between African American and white execution rates. We have no way to distinguish between and assign relative importance to these various possibilities. We do know, however, that racial discrimination and prejudice were part of the story.