

# Social Movement Lessons from the US Anti-Death Penalty Movement

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## Abstract

This report aims to assess (1) the extent to which the anti-death penalty movement in the United States, especially from 1966-2015, can be said to have successfully achieved its goals, (2) what factors caused the various successes and failures of this movement, and (3) what these findings suggest about how modern social movements should strategize. The analysis highlights the farmed animal movement as an illustrative example of the strategic implications for a variety of movements. Key findings of this report include that a narrow focus on legal strategies can discourage the growth of a grassroots movement that may be more effective in the longer term and that legislative change is possible without public support.

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# Introduction

The US anti-death penalty movement (ADPM) argues that the execution of criminals is immoral or otherwise undesirable. Its advocates therefore support, at least in part, an expansion of the moral circle to encompass convicted criminals, in the sense that they would share the right-to-life of non-convicts. Although there are important differences between the ADPM and farmed animal movement, there is a fundamental similarity between them: Advocates from both movements believe that the sentient beings they seek to protect are granted insufficient consideration, protection, or rights and that it is worth investing time and resources into securing more consideration, protection, or rights for them. Other features that affect the ADPM's comparability with the farmed animal movement are listed [below](#), but overall it seems that we can glean some strategic insight from the ADPM suitable for effective animal advocacy—that is, evidence on which animal advocacy strategies are most effective.<sup>1</sup>

As with Sentience Institute's case study of the US anti-abortion movement, *this report makes no attempt to evaluate the goals of either movement. This report is exclusively about the strategy of social movements, and while we will discuss goals insofar as they are relevant to strategic discussion, we deliberately avoid any moral assessment.*<sup>2</sup>

This report provides a condensed history of the US ADPM with a focus on the 1960s to the present. For comparison, ADPMs in other countries are also considered briefly. After providing this history, the report draws tentative conclusions about which strategies seemed to be most effective for the ADPM and suggests potential implications for social movement strategy. The focus of this report is on strategic insights for the farmed animal movement, but some insights may be useful for other movements as well.

The focus on the US ADPM, rather than on ADPMs in other countries or the broader US prisoners' rights movement (which includes other goals of prisoner benefit, e.g. better living conditions), was principally due to the greater availability of research and evidence from sociologists, legal scholars, historians, and political scientists. However, compared to the US focus of SI's case study of the anti-abortion movement,<sup>3</sup> it seemed especially worthwhile to incorporate at least some international comparison on the US ADPM, given that the

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<sup>1</sup> For a list and summary of such questions, see "Summary of Evidence for Foundational Questions in Effective Animal Advocacy," Sentience Institute, last updated June 21, 2018, <https://www.sentienceinstitute.org/foundational-questions-summaries>.

For discussion of the extent to which the farmed animal movement can learn from history, see Jamie Harris, "What can the farmed animal movement learn from history?" (May 2019), <https://www.sentienceinstitute.org/blog/what-can-the-farmed-animal-movement-learn-from-history>.

<sup>2</sup> Jamie Harris, "Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion>.

<sup>3</sup> Jamie Harris, "Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion> focused exclusively on the US anti-abortion movement, noting that "[m]uch activity and research of the effective animal advocacy community has focused on the US. This concentration of resources is at least partially justified by the strategic importance of the US as a country with a large number of animals in factory farmed conditions and substantial social, political, and economic influence over the rest of the world. Given the research gaps in our understanding of effective animal advocacy in the US, it also seems reasonable to focus on coming to stronger conclusions for the optimal movement strategy in that context, before seeking to test whether those conclusions hold in other contexts."

US has retained the death penalty while 105 other countries have abolished its use.<sup>4</sup> Europe is an especially important comparator because, since the 1970s, around half of the countries that have abolished capital punishment for all crimes have been European countries.<sup>5</sup>

This report was mainly undertaken as exploratory analysis rather than being designed to test explicit hypotheses regarding strategic effectiveness. Nevertheless, the author hoped that the report would provide evidence for or against the claims regarding effective strategy made in SI's previous two social movement case studies<sup>6</sup> and would provide strategic insight into the foundational questions in effective animal advocacy.<sup>7</sup> As was the case at the start of the author's research into the US anti-abortion movement, the author believed that the US ADPM had mostly failed at achieving its goals and therefore that this report would provide evidence that, on average, the tactics used by the US ADPM should be avoided by the farmed animal movement.

In several other ways, this report borrows much of the methodology and framing of SI's previous two social movement case studies.

This report uses the terms capital punishment and death penalty interchangeably, although sometimes it is necessary to distinguish between those sentenced to death and those who are actually executed. Likewise, unless otherwise specified, the terms convict, criminal, and prisoner are used interchangeably, since these groups almost completely overlap in the context of this report. This usage is not intended to deny that some criminals are never convicted or that some prisoners have been wrongly convicted. Unless otherwise specified, the term ADPM is used to encompass both advocates of the total abolition of capital punishment and advocates of a national or statewide moratorium (suspension) on executions, even though some advocates of a moratorium may not support a permanent ban. De jure (legally enforced) abolition is sometimes distinguished from de facto abolition, where executions have ceased in practice but have not been legally banned. The term "grassroots" is used to refer to elements of the movement that include non-professionals, where broad participation is encouraged, and where there is low central control.

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<sup>4</sup> "European Convention on Human Rights," European Court of Human Rights, accessed June 26, 2019, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) and the spreadsheet "Cumulative total of countries that have abolished the death penalty." By comparison, there is a less clear contrast between the US and Europe on the availability of abortion; see, for example, "National laws" in "Abortion law," Wikipedia, last accessed November 5, 2019, [https://en.wikipedia.org/wiki/Abortion\\_law#National\\_laws](https://en.wikipedia.org/wiki/Abortion_law#National_laws).

<sup>5</sup> Dongwook Kim, "International Non-Governmental Organizations and the Abolition of the Death Penalty," *European Journal of International Relations* 22, no. 3 (2016), 4, figure 1.

<sup>6</sup> Jamie Harris, "Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion> and Kelly Witwicki, "Social Movement Lessons From the British Antislavery Movement: Focused on Applications to the Movement Against Animal Farming" (December 2017), <https://www.sentienceinstitute.org/british-antislavery>.

<sup>7</sup> "Summary of Evidence for Foundational Questions in Effective Animal Advocacy," Sentience Institute, last updated June 21, 2018, <https://www.sentienceinstitute.org/foundational-questions-summaries>.

## Summary of Key Implications

A single historical case study does not provide strong evidence for any general claim on social change strategy; the value of these case studies comes from providing insight into a large number of important questions.<sup>8</sup> This section lists a number of strategic claims supported by the evidence in this report:

- Highly salient judicial changes may provide momentum to opposition groups.
- After controversial Supreme Court rulings, public opinion may move away from the preferences implied by those decisions.
- Social movements should proactively ensure that professionalization and shifts towards legal strategies do not discourage the growth of grassroots efforts (e.g. broad participation, non-professional, decentralized) that may be more effective longer-term.
- Legislative change is surprisingly tractable without public support, though public opinion has a significant effect.
- It is probably easier to introduce and implement unpopular laws if voters in the state do not have ready access to ballot initiatives or referenda.
- Once influential international bodies adopt a value, they may exert pressure on institutions in other parts of the world to adopt the same value.
- Abolition of a practice seems likely to encourage public opinion to gradually turn against that practice.
- Where eliminating a practice is intractable, it may be possible to suspend the practice pending substantial improvements or further research. However, the practice may be subsequently resumed without being substantially challenged.
- Social movements can collaborate to challenge institutions, though collaboration may be temporary or unreliable.
- Social change may be more likely to occur if credible professional groups advocate for change before broader participation and pressure is encouraged.
- As people become more aware of a topic, aggregate attitudes may shift, but polarization may also occur, and legislative change may become less tractable.
- Messaging that includes supplementary arguments attracts broader support. When using supplementary arguments, advocates should focus on issues that seem unlikely to be fixed without abolition of the targeted institution to minimize the risk that they will backfire in the long term.
- The changing tone of media coverage can have significant effects on public opinion.
- Publicizing opinion poll findings that are more favorable to reform of an institution further encourages support for reform.

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<sup>8</sup> For a summary of the pros and cons of different sources of evidence, see the section “Social movements vs. EAA randomized controlled trials (RCTs) vs. intuition/speculation/anecdotes vs. external findings” of “Summary of Evidence for Foundational Questions in Effective Animal Advocacy,” Sentience Institute, last updated June 21, 2018, <https://www.sentienceinstitute.org/foundational-questions-summaries>.

For a more detailed discussion of the value of individual historical case studies as a form of evidence, see Jamie Harris, “What can the farmed animal movement learn from history?” (May 2019), <https://www.sentienceinstitute.org/blog/what-can-the-farmed-animal-movement-learn-from-history>.

# A Condensed Chronological History of the US Anti-Death Penalty Movement

This condensed history of the US ADPM is not intended to imply causal relationships between listed events, unless such relationships are stated explicitly. For example, if a sentence referring to a campaign by a state anti-death penalty organization is followed by a sentence about a referendum in that state, the campaign should not be assumed to have substantially influenced the referendum results. Causation is discussed more explicitly in the section on “[Strategic Implications](#).” The current section of the report is not intended to present a comprehensive narrative; it condenses the history into events and processes that have strategic implications for modern social movements. There are slight deviations from chronological order for clarity.

## Early History of the ADPM

A small number of pre-modern rulers abolished the death penalty temporarily. Otherwise, the death penalty was a common practice for punishing criminals in most of the world for millennia.<sup>9</sup>

The 1689 English Bill of Rights declared that “cruell and unusuall Punishments” ought not to be inflicted.<sup>10</sup> Tuscany abolished the death penalty in 1786, as did Austria in 1787, except for in cases of revolt against the state.<sup>11</sup> The US Bill of Rights (created 1789), prohibited the infliction of “cruel and unusual punishments” in the Eighth Amendment.<sup>12</sup> Many of the Founding Fathers of the US and early US presidents expressed concerns about the use of the death penalty, seeking to avoid its use if possible. Dr. Rush, one of the signers of the Declaration of Independence, called for the death penalty’s total abolition.<sup>13</sup> Partly as a result of Rush’s advocacy, petitions to abolish the death penalty were introduced in several states in the late 18<sup>th</sup> century, and

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<sup>9</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 199 notes that, “[i]n the first century A.D., the Buddhist King of Lanka, Amandagamani, abolished the death penalty during his reign, with successive kings following suit. In 724 A.D., Japan’s Emperor Shomu, a devout Buddhist, also forbade executions—as did some early Buddhist rulers in India. In 818 A.D., Japanese Emperor Saga also outlawed the death penalty, effectively abolishing it for the next 300 years, while Emperor Taizong of Tang barred executions in China, leading to an execution-free period there between 747 and 759 A.D. Empress Elizabeth Petrovna (1709-1761) also decreed the suspension of executions in Russia for a short period of time in the 1750s, though the death penalty itself was not formally repealed. In Western Europe, William the Conqueror abolished the death penalty in 1066, though he did so only because he preferred mutilations of the body, such as castration, to executions.” On pages 215-20, Bessler illustrates how common these practices were in other contexts.

<sup>10</sup> “Bill of Rights [1688],” The National Archives, accessed June 27, 2019, <https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>.

<sup>11</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 200-1.

<sup>12</sup> “The Constitution of the United States,” accessed June 28, 2019, <https://constitutionus.com/>. John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 257 notes that “In 1791, when the Eighth Amendment was ratified, five state constitutions already prohibited ‘cruel or unusual punishments’ and two others prohibited merely ‘cruel’ punishments. The Eighth Amendment, however, was directly based on the Virginia Declaration of Rights, authored by George Mason, which prohibited ‘cruel and unusual punishments.’”

<sup>13</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 226-32 and 261-4 and Jeffrey L. Kirchmeier, *Imprisoned by the Past: Warren McCleskey, Race, and the American Death Penalty* (New York: Oxford University Press, 2015), 47-50.

several states restricted the death penalty to first degree murder, or murder and treason.<sup>14</sup> Sociologist Herbert Haines claims that, “[a]fter the [American] Revolution, the debate over capital punishment became more visible. Abolitionism was almost indistinguishable from the prison reform movement at this stage. Thus, some of the vocal critics of executions were associated with such groups as the Philadelphia Society for Alleviating the Miseries of Public Prisons.”<sup>15</sup>

In the early to mid-1800s, a religious revival contributed to advocacy against the death penalty in the US. Citizens petitioned state governments to abolish it.<sup>16</sup> In 1814, Ohio became the seventh state to limit capital punishment to those convicted of murder and treason only; the previous six states had done so between 1794 and 1812, a period during which other northern states actually increased the number of capital crimes. However, between the 1820s and the 1850s, several states reduced the number of capital crimes and none increased it; by the time of the Civil War, no northern states had capital punishment for crimes other than murder and treason.<sup>17</sup> Additionally, by 1849, 15 states restricted executions to prison settings, away from public view.<sup>18</sup> This period saw the use of public reports, petitions, speeches, magazines, and various anti-death penalty legislative propositions at the state level. Local advocacy groups were formed, such as the New York State Society for the Abolition of Capital Punishment, and a committee of 30 women in Pennsylvania, whose petition gained nearly 12,000 signatures.<sup>19</sup> It seems that most anti-death penalty advocacy came from educated elites in this period,<sup>20</sup> though in one instance in the late 1840s, 80% of people in a capital case jury

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<sup>14</sup> Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States* (New York: Routledge, 2016), 8.

<sup>15</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 7. Haines provides no clear examples for this claim and no citation.

Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009) has further detail on suggestions for legislative change. This detail has not been included here because it seems less relevant and comparable to the modern farmed animal movement.

<sup>16</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 7.

<sup>17</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 131. On page 135, Banner suggests that, by the time of the Civil War, “[t]he abolitionists’ biggest success was in abolishing capital punishment for crimes other than murder. In 1800 capital punishment had been common throughout the North for rape, robbery, burglary, and arson; by 1860 it was gone.” On page 143, Banner adds that, “[b]y the time of the Civil War the North had been through decades of debate over capital punishment. The South had not. Three northern states had abolished the death penalty completely, and the rest had confined it to murder and treason. In the South capital punishment still existed on paper for a wide range of crimes committed by whites and still existed in practice for an even wider range committed by blacks.”

<sup>18</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 9. Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States* (New York: Routledge, 2016), 10 describes the chronology of this.

<sup>19</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 132-3.

<sup>20</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 11 argues that “the main actors” were “members of the educated elite on both sides of the Atlantic.” Several examples are cited, such as legislators in New York and Germany, as well as the novelist Victor Hugo.

On pages 55- 60, on the 18th century, Hammel also describes the anti-death penalty writings of Cesare Beccaria, Voltaire, and Joseph von Sonnenfels. Hammel argues that, “[t]he work of these men stands for the proposition that defining the principles of criminal justice and procedure is properly the domain of intellectual elites, be they philosophers or trained jurists. Indeed, the late 18th and early 19th centuries saw the emergence of a privileged class of Enlightenment thinkers and reformers who traveled from court to court, advising rulers who were eager to rule



pool were dismissed due to their opposition to the death penalty.<sup>21</sup> Several prominent opponents of slavery, including William Lloyd Garrison, Wendell Phillips, Frederick Douglass, and Horace Greeley, also opposed the death penalty.<sup>22</sup>

In 1846, Michigan banned the death penalty; abolition has been maintained there to the time of writing, despite numerous polls in the late-20th century finding majority support for its reinstatement.<sup>23</sup> Rhode Island (1852) and Wisconsin (1853), also banned the death penalty.<sup>24</sup> Though claiming that “debate in Michigan was no different from that anywhere else,” legal historian Stuart Banner notes that these three states “were relatively egalitarian states in which the conservative Protestant denominations were not very large, and states with populations small enough to permit focused abolitionist groups to have some influence.”<sup>25</sup> Maine also required the governor to pass a separate order to confirm a death sentence, which, according to sociologist Herbert Haines, “had the effect of abolishing executions de facto.”<sup>26</sup> Haines attributes these successes to several factors, including “a general climate of reform in the handling of people on society’s margins.”<sup>27</sup> In

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according to the principles of benevolent despotism... Beccaria, like other reformers, became the object of a sort of bidding war between Empress Catherine of Russia and the Habsburg Empire.”

Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States* (New York: Routledge, 2016), 9 lists the poets John Greenleaf Whittier and Walt Whitman, as well as Horace Greeley, the influential founder and editor of *The New York Tribune* as opponents of the death penalty. Bohm adds that, “[w]hereas in 1800, public hangings were mostly solemn events regularly attended by members of all social classes and touted as having important educational value, by mid-century, members of the upper classes were staying away from them because in their minds they had become tasteless, shocking, rowdy, sometimes dangerous, carnival-like spectacles. This view, however, may have been more a matter of perception than reality, as eyewitness accounts suggested that decorum at public executions had not changed that much. In any event, the elite began to view those who attended executions as contemptible ‘rabble out for a good time’ and concluded that any educational value that public hangings once had was being lost on the less respectable crowd.”

<sup>21</sup> Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States* (New York: Routledge, 2016), 9.

<sup>22</sup> Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States* (New York: Routledge, 2016), 9 and Jeffrey L. Kirchmeier, *Imprisoned by the Past: Warren McCleskey, Race, and the American Death Penalty* (New York: Oxford University Press, 2015), 51.

<sup>23</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 11 and 14-15.

<sup>24</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 134.

<sup>25</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 134. Banner adds that if Michigan “had any relevant distinguishing features” from states that did not abolish the death penalty, “they were a relatively small political and economic elite and a correspondingly egalitarian distribution of wealth and power, and a relatively small number of citizens who were members of the more conservative religious denominations, which may have created conditions conducive to reform of all kinds by virtue of the absence of powerful interests favoring the status quo. The state’s small population allowed a determined minority pushing reform to have a greater impact.” No citations are provided for any of these claims.

Jeffrey L. Kirchmeier, *Imprisoned by the Past: Warren McCleskey, Race, and the American Death Penalty* (New York: Oxford University Press, 2015), 51 also notes that, “the efforts to abolish the death penalty in Michigan were not especially unusual” and that, “[p]rior to Michigan’s abolition, other eastern states — such as New York, Massachusetts, and Pennsylvania — had come close to abolition.”

<sup>26</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 8. Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 134 adds that, “Maine did not execute a single person between 1837 and 1863.”

<sup>27</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 8. Haines adds that, “[t]he Jacksonian era witnessed not only serious consideration of

addition to these reforms in northern states, all southern states abolished the death penalty for some crimes when they were committed by whites.<sup>28</sup> However, Banner argues that, “[m]uch of the debate that took place in the North simply did not occur in the South because of the perceived need to discipline a captive workforce,” i.e. maintain control of slaves.<sup>29</sup>

Banner summarizes this period as seeing “a consistent string of failures” for the ADPM. “Year after year, in state after state, they had been unable to convince legislatures to repeal the death penalty completely.” For example, in Massachusetts, House committees recommended abolition in 1835, 1836, and 1837, and joint committees of both legislative houses voted in favor of abolition in 1851 and 1854. Nevertheless, abolition was not signed into law there.<sup>30</sup> In New Hampshire, nearly two-thirds of voters rejected a referendum on abolition in 1844.<sup>31</sup> Banner attributes these failures to the lack of focus of anti-death penalty advocacy; advocates often also pushed for wider reform to improve criminals’ wellbeing and for seemingly unrelated

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proposals to abandon the gallows, but also calls for radical change in the treatment of the poor, the orphaned, the mentally ill, and the criminal. Another contributing factor was a growing faith not just in the *desirability* of reforming deviants of all stripes, but in the *capacity* of enlightened individuals to do so successfully. Likewise, the middle-class preference for ‘internal restraints and private punishments’ continued to evolve. All these currents lent strength to anti-death penalty forces in the 1830s and 1840s.”

<sup>28</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 139 notes that “[b]y the Civil War every southern state punished whites with something other than death for at least some crimes that had been capital in 1790.” On pages 140-1, Banner notes that the “list of capital crimes” was “far shorter” for southern whites than for southern blacks. For example, “[i]n Texas slaves but not whites were subjected to capital punishment for insurrection, arson, and—if the victim was white—attempted murder, rape, attempted rape, robbery, attempted robbery, and assault with a deadly weapon. Free blacks were subject to capital punishment for all these offenses plus that of kidnapping a white woman. In Virginia slaves were liable to be executed for any offense for which free people would get a prison term of three years or more.”

<sup>29</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 137. On pages 139-40 Banner adds that, “most of the northern debate over eliminating capital punishment was completely absent from the South. No committee of any antebellum southern state legislature recommended complete abolition. The issue was never part of any legislative agenda. Public debates on the subject were not held; societies devoted to abolishing the death penalty were not formed; the pages of magazines and newspapers were not filled with articles taking one side or the other. Many of the laws and practices abandoned by the northern states in the first half of the nineteenth century were retained in the South.”

<sup>30</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 135 and 133.

<sup>31</sup> David Brion Davis, *From Homicide to Slavery: Studies in American Culture* (New York: Oxford University Press, 1988), 36.

issues.<sup>32</sup> However, Bohm argues that, “[b]etween 1800 and 1850, American death penalty abolitionists helped change public sentiment about public executions, especially among many northern-state social elites.”<sup>33</sup>

The Mexican War (1846-8) and the American Civil War (1861-5) seem to have damaged the ADPM, or at least halted some of its work temporarily.<sup>34</sup> Legal scholar Jeffrey L. Kirchmeier summarizes that, “[a]fter the Civil War, the hanging of the conspirators who plotted the murder of President Abraham Lincoln and the widespread use of extra-judicial lynchings by vigilantes made it difficult for anti-death penalty activists to argue that the death penalty was not necessary.”<sup>35</sup> Echoing Banner’s criticism of the ADPM in the first half of the 19th century, Haines argues that the simultaneous focus of the reformers on multiple controversial causes, including capital punishment, prison reform, and antislavery advocacy, may explain why “external events siphoned off much of the momentum and resources that had fueled their efforts against hanging.”<sup>36</sup>

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<sup>32</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 135-7. For example, Banner notes that “[i]n 1821, when Elisha Bates of Ohio founded an anti-capital punishment magazine called *The Moral Advocate*, the death penalty was only part of its charter, which encompassed ‘war, dueling, capital punishments, and prison discipline’... Such a scattering of interests weakened even the most successful of the antebellum anti-capital punishment periodicals, *The Hangman*, founded by Charles Spear in Boston in 1845. When it began, the weekly journal was devoted to nothing but showing ‘the entire inutility of the gallows.’ A year later, however, *The Hangman* changed its name to *The Prisoners’ Friend*. As Spear explained, ‘We intend to enter on a still wider, though not a more important question, that of the Proper Treatment of the Criminal,’ and ‘to point out also the Causes, Effects and Prevention of Crime.’”

On page 137, Banner adds that “Some of the movement’s leaders were better known for other causes. An anti-death penalty meeting in Rochester, New York, was led by Susan B. Anthony [a feminist] and Frederick Douglass [an advocate of the abolition of slavery].”

Though claiming on page 137 that, “public opinion in most northern states [was] still running in favor of death as a punishment for murder,” Banner provides no details or citations on this claim.

<sup>33</sup> Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States* (New York: Routledge, 2016), 9. See footnote 20 for details.

<sup>34</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 232-3 notes that, “[t]he onset of the Civil War delayed the progress of America’s abolition movement, with abolition efforts, led by Wisconsin state legislator Marvin Bovee, not resuming until after the war. Bovee even delayed the publication of his anti-death penalty manifesto until 1869, saying that to have presented such a work during the Civil War ‘would have been ‘ill-timed,’ to say the least.”

Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 8 summarizes that “due largely to distractions from other national issues, such as the Mexican War and growing concerns about slavery, the death penalty abolition movement lost momentum.”

<sup>35</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 8-9.

<sup>36</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 9.

## 1872-1936: Sporadic, temporary legislative success

The *Wilkerson v. Utah* (1878) and *In Re Kemmler* (1890) Supreme Court rulings found death by firing squad and electrocution to not violate the Eighth Amendment.<sup>37</sup> In each case, the convict himself made an appeal against the specific method of execution, rather than against capital punishment as an institution.<sup>38</sup>

In 1887, Maine permanently abolished the death penalty, having previously abolished then reinstated it. Both Iowa (abolished 1872, reinstated 1878) and Colorado (abolished 1897, reinstated 1901) temporarily abolished the death penalty. The short-term effects of well-publicized crimes and executions may have encouraged these legislative changes.<sup>39</sup> In 1889, a Minnesota law required that executions take place before sunrise and prohibited newspapers from reporting details of the executions<sup>40</sup>; the United Kingdom had already stopped carrying out executions in public by this point.<sup>41</sup> Opposition to capital punishment in Minnesota had reflected objections to the execution of a “woman or girl,” moral objections to state-sanctioned killing, views on the ineffectiveness of capital punishment as a deterrent, and practical arguments about the quality of jurors.<sup>42</sup> Minnesota had temporarily introduced a de facto moratorium on executions from 1868-85.<sup>43</sup> The primary motivation for the 1889 law seems to have been to reduce the perceived corrupting and degrading influences on society of public executions.<sup>44</sup> Explicit abolition legislation was passed in the House of Representatives in Minnesota in 1893, but this was rejected by a Senate committee. Several subsequent bills failed.<sup>45</sup>

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<sup>37</sup> David M. Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America* (Lawrence, KS: University Press of Kansas, 2010), 127.

<sup>38</sup> *Ibid.*, 19-20.

<sup>39</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 79 notes that, “Iowa abolished the death penalty in 1872 but reinstated it in 1878; Maine abolished the death penalty in 1876 and reinstated it in 1883; Colorado abolished the death penalty in 1897, but reinstated it in 1901.”

Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 220-1 notes that, “[i]n both Iowa and Maine public opinion had been divided for decades. The Iowa legislature voted on abolishing capital punishment sixteen times between 1851 and 1878, and the losing side never registered fewer than one-third of the votes. Executions in Maine had long been rare; indeed there were none at all from 1837 to 1863. In both states, well-publicized cases involving sympathetic defendants had the short-run effect of tipping a majority of the legislature toward abolition. And in both, high-profile crimes a few years later tipped opinion back in favor of the death penalty. Iowa became the first state ever to *restore* capital punishment in 1878, after only six years of abolition. Maine restored the death penalty in 1883 and then abolished it again in 1887.”

<sup>40</sup> John D. Bessler, “The Midnight Assassination Law and Minnesota’s Anti-Death Penalty Movement, 1849-1911,” *William Mitchell Law Review* 22 (1996), 581.

<sup>41</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 220.

<sup>42</sup> John D. Bessler, “The Midnight Assassination Law and Minnesota’s Anti-Death Penalty Movement, 1849-1911,” *William Mitchell Law Review* 22 (1996), 589 and 604-5.

<sup>43</sup> John D. Bessler, “The Midnight Assassination Law and Minnesota’s Anti-Death Penalty Movement, 1849-1911,” *William Mitchell Law Review* 22 (1996), 589 and 603-14.

<sup>44</sup> John D. Bessler, “The Midnight Assassination Law and Minnesota’s Anti-Death Penalty Movement, 1849-1911,” *William Mitchell Law Review* 22 (1996), 589 and 624-8.

<sup>45</sup> John D. Bessler, “The Midnight Assassination Law and Minnesota’s Anti-Death Penalty Movement, 1849-1911,” *William Mitchell Law Review* 22 (1996), 589 and 677-99.

From the late 19th century until the mid-20th century, many states replaced hanging with the electric chair or gas chamber as their principal methods of execution,<sup>46</sup> apparently due to concerns about the suffering of the executed criminals.<sup>47</sup>

Haines characterizes anti-death penalty activism at the turn of the century as “based primarily at the state and local level”; several local groups were formed, such as The Anti-Death Penalty League in Massachusetts in 1897.<sup>48</sup> Opposition came “not so much from religious leaders, as it had in the nineteenth century, but from judges, prosecutors, and the police.”<sup>49</sup>

As Kirchmeier summarizes, in the early 20th century, a period known as the Progressive Era, “social reformers were concerned about government corruption and focused on areas such as poverty, housing, social injustice, corruption, and crime. The main battleground for reforms were fought at the state level.”<sup>50</sup> In 1911, legislation finally successfully abolished the death penalty in Minnesota.<sup>51</sup> It has never been reinstated, although there were bills to restore the death penalty there each year for 14 years.<sup>52</sup>

Eight other states abolished the death penalty entirely in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries but subsequently

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<sup>46</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 169 notes that, “[b]etween 1888 and 1913 fifteen states adopted the electric chair as their means of execution. By 1950 eleven more states plus the District of Columbia had followed. Another new device, the gas chamber, was first adopted by Nevada in 1921 and then by ten other states by 1955. Hanging had been the universal American method of execution in the late nineteenth century, but by the middle of the twentieth only a handful of states retained the gallows.”

<sup>47</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 169 summarizes that “[t]he cause of the transformation was an intensified public focus on the suffering of those who were executed.” The rest of the chapter, “Technological cures,” pages 169-207, includes evidence that officials sought to change execution methods due to these concerns, as well as quotes from horrified newspaper reporters on the apparent suffering involved in some hangings. Page 179 even includes a summary of debate between doctors as to the quickest and most painless form of execution.

<sup>48</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 10. Haines adds that, “[t]here was little national coordination through most of this period, although the Chicago-based Anti-Capital Punishment Society of America and the Committee on Capital Punishment of the National Committee on Prisons became active during the second decade of the twentieth century.”

<sup>49</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 10. No citations are provided for these claims, so this is presumably Haines’ impression from looking at some of the available evidence. Haines summarizes the claims of the opposition as being “that the deterrent effect of the death penalty was unique among punishments, and that abolition would subject the nation to an unprecedented onslaught of violent crime. Some also argued that the elimination of *legal* executions would simply invite an increase in lynching, and that crime-prone immigrant and black populations could only be held in check by the terror of the hangman’s noose.”

<sup>50</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 9-10.

<sup>51</sup> John D. Bessler, “The Midnight Assassination Law and Minnesota’s Anti-Death Penalty Movement, 1849-1911,” *William Mitchell Law Review* 22 (1996), 589 and 677-99. Bessler notes that some former opponents supported the 1911 bill and quotes a contemporary account that claimed that the proponent of the bill made “one of the most eloquent anti-death penalty speeches ever given in the House chamber,” but otherwise does not describe any notable events or changes in framing that caused this shift in support. Bessler also mentions “the willingness of the Board of Pardons to curtail the use of its pardoning power” as a factor, though the timing of this development is unclear. In the absence of any such specific evidence, it seems likely that indirect and long-term factors specific to the Progressive Era but not to Minnesota encouraged the shift.

<sup>52</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 222.

reversed the change.<sup>53</sup> Many other states came close to abolition.<sup>54</sup> Several long-term factors probably help explain why some states abolished the death penalty during this period while others did not, including the size of the non-white populations<sup>55</sup> and a longer-term lack of support for abolition in Kansas, Minnesota, and North Dakota.<sup>56</sup>

The newspaper accounts cited by sociologists John F. Galliher, Gregory Ray, and Brent Cook (1992) show several frequent features of the abolition efforts at this time. State governors seem to have taken an active, independent role in abolishing the death penalty in several states, including Kansas, Washington, Oregon, Arizona, and Colorado. In two states, the governor was the president of a local anti-death penalty organization. Only in Tennessee does there seem to have been active opposition by the governor. In Colorado and Minnesota, the newspapers themselves seem to have been advocates of abolition or provided unfavorable coverage of executions. Prison officials advocated abolition in Washington and Oregon, seemingly before governors or legislators took action, though some officials opposed abolition in Tennessee.<sup>57</sup> In Oregon and Arizona, abolition was introduced through referendums with very narrow margins, with votes that were split 100,552-100,395 and 18,936-18,784, respectively.<sup>58</sup> A newspaper headline from Tennessee claimed that the legislature had passed the abolition bill there only after “vigorous debate.” However, South Dakota passed a bill by 63 votes to 24 and North Dakota’s bill abolishing the death penalty for murder passed the House of Representatives unanimously. Arguments used by the ADPM at this time included the “barbarism” of capital punishment and its ineffectiveness as a deterrent.<sup>59</sup>

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<sup>53</sup> John F. Galliher, Gregory Ray, and Brent Cook, “Abolition and Reinstatement of Capital Punishment during the Progressive Era and Early 20th Century,” *Journal of Criminal Law and Criminology* 83 (1992), 541.

Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 79 notes that, “Iowa abolished the death penalty in 1872 but reinstated it in 1878; Maine abolished the death penalty in 1876 and reinstated it in 1883; Colorado abolished the death penalty in 1897, but reinstated it in 1901; Kansas abolished the death penalty in 1907, but reinstated it in 1935; Washington abolished it in 1913, but reinstated it in 1919; Oregon abolished it in 1914, but reinstated it in 1920; South Dakota abolished it in 1915 but reinstated it in 1939; Tennessee abolished it in 1915 but reinstated it in 1919; Arizona abolished the death penalty in 1916, but reinstated it in 1918; Missouri abolished it in 1917, but reinstated it in 1919. The abolition of the death penalty in Arizona and Tennessee retained that punishment for treason and rape, respectively.”

Here, North Dakota is not counted as one of these eight; North Dakota abolished the death penalty for all except two crimes, which lasted until 1973, when it was abolished for these crimes too (“North Dakota,” Death Penalty Information Center, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/north-dakota>).

<sup>54</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 222 notes that, “[a] bill ending capital punishment was passed by both houses of the Illinois legislature in 1918 but was vetoed by the governor. Similar bills were passed by the Vermont House of Representatives in 1902, the Illinois House of Representatives in 1909, the California Assembly in 1911, the New Hampshire Assembly and the New Jersey Senate in 1915, and the Pennsylvania Senate in 1917, but in each case the other house of the legislature rejected the bill.” Banner lists many other bills that were discussed but rejected in that period, with nearly annual frequency in some states, including Massachusetts and New York.

<sup>55</sup> John F. Galliher, Gregory Ray, and Brent Cook, “Abolition and Reinstatement of Capital Punishment during the Progressive Era and Early 20th Century,” *Journal of Criminal Law and Criminology* 83 (1992), 541-2.

<sup>56</sup> John F. Galliher, Gregory Ray, and Brent Cook, “Abolition and Reinstatement of Capital Punishment during the Progressive Era and Early 20th Century,” *Journal of Criminal Law and Criminology* 83 (1992), 545-58.

<sup>57</sup> John F. Galliher, Gregory Ray, and Brent Cook, “Abolition and Reinstatement of Capital Punishment during the Progressive Era and Early 20th Century,” *Journal of Criminal Law and Criminology* 83 (1992), 545-60.

<sup>58</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 222.

<sup>59</sup> John F. Galliher, Gregory Ray, and Brent Cook, “Abolition and Reinstatement of Capital Punishment during the Progressive Era and Early 20th Century,” *Journal of Criminal Law and Criminology* 83 (1992), 545-60.

Factors encouraging the reinstatement of the death penalty in some states after the Progressive Era were the economic downturn that followed the prosperity of the early 20th century, the occurrence of notable crimes or an overall increase in the crime rate, the occurrence of lynchings in response to these crimes, panic about the threat of revolution, and the claims in four states of individual murderers that they would not have committed their crimes if the death penalty had existed.<sup>60</sup> By comparison, officials in Minnesota responded harshly to lynchings, which may have helped to maintain abolition there.<sup>61</sup> Reinstatement occurred through a referendum in Arizona, with a much wider majority than the referendum that had led to abolition. Elsewhere, reinstatement was supported by legislators, newspapers, and in Oregon, the state Bar Association.<sup>62</sup> Some people in Colorado, Arizona, and Tennessee seem to have been indifferent to abolition when it was first proposed, and the legislation seems to have been viewed as an experiment; when abolition seemed to cause adverse effects (that is, increased lynching or crime), reversal came within a few years.<sup>63</sup>

The total number of executions in the US declined from 161 in 1912 and 133 in 1913 down to 99 in 1914 and 65 in 1919, which was the lowest ever number of executions per capita on record to date. This decline was temporary, however; the total rose back to “the 140s” by 1921 and peaked at 199 in 1935.<sup>64</sup>

In 1925, the American League to Abolish Capital Punishment (ALACP) was founded. Its executive committee comprised three prison wardens, a psychiatrist, and three academics. The ALACP distributed articles and pamphlets, and its leaders gave speeches. The ALACP provided support for legislative campaigns for abolition in “at least 11 states, providing testimony and mailing tens of thousands of pieces of literature a year.” It also established a committee to research deterrence and racial discrimination in capital sentencing. The ADPM’s legislative efforts failed between the 1920s and 1940s, however.<sup>65</sup> Activism similar to the

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<sup>60</sup> John F. Galliher, Gregory Ray, and Brent Cook, “Abolition and Reinstatement of Capital Punishment during the Progressive Era and Early 20th Century,” *Journal of Criminal Law and Criminology* 83 (1992), 542-3 and 560-76 discusses all of these reasons except for the threat of revolution, which is discussed in Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States* (New York: Routledge, 2016), 15-6.

<sup>61</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 96. They note, for example, that, “[w]hen three innocent black men were lynched by an angry mob in 1920 after being accused of raping a young white female, community leaders in Duluth were uniformly outraged and authorities vowed to punish the lynchers to the fullest extent of the law. Lynching was seen as a central symbol of the violence and bigotry of Southern culture. Local leaders all agreed that such vigilantism was contrary to local traditions. Governor Burnquist immediately called in the state’s national guard to restore order. Mob leaders were quickly located, apprehended, tried, convicted, and sentenced to prison.”

<sup>62</sup> John F. Galliher, Gregory Ray, and Brent Cook, “Abolition and Reinstatement of Capital Punishment during the Progressive Era and Early 20th Century,” *Journal of Criminal Law and Criminology* 83 (1992), 560-76.

<sup>63</sup> John F. Galliher, Gregory Ray, and Brent Cook, “Abolition and Reinstatement of Capital Punishment during the Progressive Era and Early 20th Century,” *Journal of Criminal Law and Criminology* 83 (1992), 560-5. For example, in Colorado, the *Daily News* wrote that, “[t]he idea seems to be among those whose sentiment has modified on this point that it will do no harm to pass this law and observe its effects for two years.” The Phoenix Arizona Republican noted that, “[t]here was no discussion of the bill except by those who were advocating its adoption. . . . While perhaps a large majority of the people were not really in favor of it, they were willing to give it a trial.” The Memphis mayor wrote to the governor of Tennessee that, “if at the end of two years, it is found bad its repeal should be accomplished without difficulty.”

<sup>64</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 223. See also the spreadsheet “[Death penalty by year](#)” for statistics from 1930.

<sup>65</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 10-11, citing an ALACP 1929 bulletin.

ALACP's was developing in the UK at this time.<sup>66</sup> At the same time as the ALACP's activism, celebrities like Henry Ford publicized their opposition to the death penalty,<sup>67</sup> as did some prison officials.<sup>68</sup>

In 1936, the last US public execution took place — 68 years after the last in the United Kingdom.<sup>69</sup>

## 1936-1966: Declining execution rates

From the late 1930s, a sharp decline in rates of executions began. This continued until the late 1960s, when no executions were taking place.<sup>70</sup> Though the fall in executions began initially in northern states such as Illinois and New Jersey,<sup>71</sup> the change was sharpest in the South, where the death penalty had been used most frequently.<sup>72</sup>

Figure 1: Number of executions per year, 1931-2019.<sup>73</sup>

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In contrast, Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 220 claims that the ALACP was formed in New York in 1900.

<sup>66</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 96-7 notes that the National Council for the Abolition of the Death Penalty (not to be confused with the later US organization with the same acronym of NCADP) was formed in 1925 and in 1921, the Howard League for Penal Reform was formed from two separate organizations. The (British) NCADP provided evidence to a 1929 Parliamentary select committee on capital punishment, though 21 of the committee's 31 witnesses, including officials in the penal system, favored the retention of capital punishment. The Labour Party had adopted abolition on their election plank in 1923. In 1938, the House of Commons had already voted in support of a non-binding motion, "That this House would welcome legislation by which the death penalty should be abolished in time of peace for an experimental period of five years."

<sup>67</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 223-4 notes that, "[t]he message was amplified by the ever-increasing number of celebrities, and near-celebrities with a legitimate claim to expertise, joining the cause. In the former category were people like William Randolph Hearst, who in 1926 wrote an anti-death penalty editorial that appeared in twenty-three of his newspapers and as a pamphlet. Henry Ford declared his opposition to capital punishment in an article in the popular magazine *Collier's*. 'I wouldn't mind giving a man a licking,' Ford affirmed, 'but I wouldn't want to kill him.' Clarence Darrow spent much of the last two decades of his life speaking against the death penalty and writing against it in popular magazines. In the 1930s Darrow became president of the American League to Abolish Capital Punishment. Fame attracted press coverage. A speech by Darrow, reported in several local newspapers, was worth hundreds of speeches by ordinary lawyers."

<sup>68</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 224-5 lists several examples, such as the chaplains of New York's Sing Sing prison, Jacob Katz and John McCaffery, as well as the wardens there, Thomas Mott Osborne and Lewis Lawes.

<sup>69</sup> John D. Bessler, "Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement," *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 220.

<sup>70</sup> See the spreadsheet "[Death penalty by year](#)."

<sup>71</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 227.

<sup>72</sup> Corinna Barrett Lain, "Furman Fundamentals," *Washington Law Review* 82, no. 1 (2007), 25 notes that, "[f]rom 1935 to 1969, Southern states conducted more executions than all other regions of the United States combined; in the 1950s and 1960s, they accounted for nearly two-thirds of all executions." However, "[b]etween 1940 and 1960, Southern executions fell by fifty percent, eclipsing the more gradual descent then underway in the rest of the nation."

<sup>73</sup> See the spreadsheet "[Death penalty by year](#)."





Trends that began in the 19th century or early 20th century that may have encouraged the beginnings of this decline include:

- The development from the late 19th century onwards of scientific and social scientific theories that crime was caused by heredity and environmental factors, rather than chosen freely by the criminal.<sup>74</sup>
- Increased awareness of executions that were controversial due to the youth or possible innocence of the executed, or due to concerns about racial motivations.<sup>75</sup>
- The increase in empirical evidence that challenged the claim that the death penalty was a more effective deterrent than its alternatives.<sup>76</sup>
- The decline in the early- to mid-twentieth century of income inequality,<sup>77</sup> which is correlated with death penalty support.<sup>78</sup>

More substantial factors that seem likely to have contributed to the decline in executions include:

- The growing international trend towards abolition.<sup>79</sup>

<sup>74</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 209-14

<sup>75</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 225-6 lists several examples, such as Gerald Chapman in Connecticut and Nicola Sacco and Bartolomeo Vanzetti in Massachusetts.

<sup>76</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 216-9.

<sup>77</sup> "Economic inequality in the USA," The Chartbook of Economic Inequality, accessed August 12, 2019, <https://www.chartbookofeconomicinequality.com/inequality-by-country/usa/> shows that inequality was falling in these decades, though the trend began to reverse at some point between 1950 and 1981, depending on the outcome measure used.

<sup>78</sup> David Jacobs and Stephanie L. Kent, "The determinants of executions since 1951: How politics, protests, public opinion, and social divisions shape capital punishment," *Social Problems* 54, no. 3 (2007), 308 find that income inequality (measured through the Gini index) is significantly positively correlated with support for the death penalty.

<sup>79</sup> Corinna Barrett Lain, "Furman Fundamentals," *Washington Law Review* 82, no. 1 (2007), 26-7 notes that, "[t]he 1960s saw a global movement towards the abolition of capital punishment; between 1960 and 1970, the number of countries

- Declines in the use of mandatory death sentences and the number of capital offenses<sup>80</sup> as well as increasing restrictions on the use of the death penalty at the state level.<sup>81</sup>
- The growing number of newspapers and religious organizations that were publicly criticizing the death penalty,<sup>82</sup> as well as advocacy from the ALACP and others.<sup>83</sup> Due partly to these factors, the attitudes of juries (and hence the public) may have been changing, with juries becoming less willing to impose death sentences.<sup>84</sup> Another trend that suggests that there was increasing concern about the death penalty in the first half of the 20th century is the increasing time delays between the imposition of death sentences and the execution of the convict.<sup>85</sup> From the mid-1950s, Gallup poll results show

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abolishing the death penalty more than doubled. By 1968, more than seventy nations had formally rejected capital punishment, including almost all of Western Europe. Countries most like the United States had either abolished the death penalty by that time or at least begun the process. Great Britain temporarily suspended the death penalty in 1965, abandoning it permanently in 1969. Canada imposed a five-year moratorium in 1967, the same year that Australia saw its last execution. New Zealand had abolished the death penalty back in 1961. By the late 1960s, the United States had become an outlier among Western democracies in retaining the death penalty. Abolition was a world-wide phenomenon, and as *Time Magazine* observed in 1968, America was lagging behind.” On pages 27-8, evidence is provided that this damaged the US’ foreign relations. See also the spreadsheet “[Cumulative total of countries that have abolished the death penalty.](#)”

<sup>80</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 24 notes that, “[i]n colonial days, a lack of facilities and manpower for long-term incarceration required punishments that could be carried out swiftly — fines, mutilations, and for serious felonies, death. Over time, juries maneuvered around the law’s harshness by refusing to convict those they wanted to spare, and the law responded by formally recognizing the discretion in capital sentencing that jurors were already exercising in practice. By the turn of the twentieth century, twenty states had moved from mandatory to discretionary death penalty statutes. By 1950, that number had nearly doubled. By the 1960s, mandatory death penalty provisions were virtually nonexistent; a few were still on the books for rare, narrowly defined crimes but they sat largely in desuetude, forgotten relics of a bygone era. Concomitant with this trend, state legislatures also gradually reduced the list of offenses punishable by death. Once available for burglary, sodomy, arson and other serious felonies, capital punishment in the twentieth century became increasingly narrowly prescribed. Between 1930 and 1967, when the moratorium began, ninety-nine percent of all executions were for just two offenses, murder and rape, with murder alone accounting for eighty-seven percent.”

<sup>81</sup> See the paragraph beginning “In 1957, Hawaii...” below.

<sup>82</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 32 notes that, “[t]he nation’s most prominent newspapers—the *New York Times*, *Washington Post*, *Los Angeles Times*, and *Philadelphia Inquirer*, among others—all voiced opposition to capital punishment during this time, as did elite organizations like the American Judicature Society, the American Correctional Association, and the National Council on Crime and Delinquency. By the close of the 1960s, most major Protestant denominations officially opposed the death penalty as well, including the Methodist, Lutheran, Episcopal, and Presbyterian Churches... Of the dozen amici to file briefs in *Furman*, only one—the State of Indiana—defended capital punishment; every other amicus urged the Supreme Court to abolish it.”

<sup>83</sup> See the paragraph beginning “In 1925, the American League...” above.

<sup>84</sup> The turn towards discretionary sentencing (see footnote 80) is indirect evidence of this trend. Additionally, Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 21 notes that, “[f]rom 1936-1937, the number of murders and non-negligent manslaughters was 7894... In 1960, by comparison, that number was 9136. In the last half of the 1960s, the number of murders and non-negligent manslaughters skyrocketed. In 1966, that number was 10,920; in 1967, it was 12,090; in 1968, it was 13,650; in 1969, it was 14,590; and in 1970, it was 15,810.” Given this, the other factors listed do not seem likely to be sufficient to explain the large drop in rates of execution. In the absence of other explanatory factors, changing attitudes of juries seems the simplest and most likely explanation.

<sup>85</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 216 notes that, “in Texas, where the norm of a speedy execution was well entrenched, the mean time between arrival on death row and execution rose from one and one-half months in the 1930s to five months in the late 1950s. By 1959 delays between sentencing and execution throughout the nation ranged from sixty-five days to nine years, with most falling between seven and twenty-four months. These were spans of time that would have been unimaginable in the first half of the nineteenth century.”

decreasing public support for capital punishment.<sup>86</sup> Execution rates in France also seem to have declined as public support declined there.<sup>87</sup>

- The “criminal procedure revolution” implemented by Chief Justice Warren’s Supreme Court, from 1961 onwards, sparked by the *Mapp v. Ohio* ruling. Though not focused specifically on the death penalty, these procedural changes presented death row inmates with the opportunity to litigate and postpone their executions.<sup>88</sup> Banner notes that, by the 1960s, “the annual number of death sentences regularly exceeded the number of executions by a hundred or more... Clearly events *after* sentencing were more important than sentencing itself in causing the execution rate to decline.”<sup>89</sup> Commutation of sentences seems to have already declined by the 1960s, so Banner attributes the continued drop in executions after this point to the much increased number of appeals to higher courts from condemned criminals.<sup>90</sup> Legal scholars Carol S. Steiker and Jordan M. Steiker argue, however, that in the long term, these procedural changes may have encouraged a public perception and narrative that criminal procedure was over-regulated, increasing resistance to more substantial reforms to ensure better protections for criminals.<sup>91</sup>

<sup>86</sup> “Death Penalty,” Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>.

<sup>87</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 135 notes that, “the French population, like its German and American counterparts, gradually turned against capital punishment as the 1960s progressed, dropping to 33% support in 1969, after the exit of Charles de Gaulle from the French political stage. As in the United States, though, dwindling public support for capital punishment in the 1960s did not end in its final renunciation, only in its increasingly sparing use... throughout the 1960s and 1970s, executions were rare events in France (averaging less than one per year), and were outnumbered by pardons.”

<sup>88</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 21.

<sup>89</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 245.

<sup>90</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 246, notes that “[b]efore the middle of the twentieth century criminal appeals were unusual. In the 1960s, however, the appeals rate skyrocketed. (I am using the word ‘appeals’ here in a nontechnical sense, to include all the methods by which courts can review criminal convictions and sentences. Strictly speaking, an appeal is just one of them.) Criminal cases represented 14-17 percent of the business of state supreme courts between 1945 and 1960, but 28 percent in 1965 and 1970. Appealed convictions of murder, the crime most likely to carry a death sentence, were 1.7 percent of the caseload in 1935-40 but 6 percent by 1965. Annual petitions for a writ of habeas corpus, the vehicle by which state prisoners can ask federal courts to review their convictions, nearly quadrupled between 1952 and 1963. Part of the increase can be attributed to the increasing crime rate... But much of the increase in the volume of appeals was the result of Supreme Court decisions in the 1950s and early 1960s that made it procedurally easier to appeal. Another set of Supreme Court decisions gave convicted criminals additional constitutional grounds upon which to base an appeal. By 1965-1970 nearly half the criminal appeals before state supreme courts involved constitutional issues. Only a quarter of criminal appeals had involved claimed violations of the constitution in 1955-60.”

Banner adds on pages 246-7 that “[m]any condemned prisoners who appealed got their convictions reversed — an average of 43 per year between 1961 and 1970, or more than a third of those who had been sentenced to death and more than twice as many as those whose sentences were commuted. Many more on death row were able to stay alive by continuing to litigate. The cumulative population of death rows around the country began to mount, as each freshly condemned prisoner joined those whose appeals were still in progress. The death row population doubled between 1955 and 1961 and doubled again between 1961 and 1969. Each passing year saw a lengthening of the time a person spent on death row before his conviction was reversed, from a median of 17 months in 1962 to 41 months in 1967.”

<sup>91</sup> Carol S. Steiker and Jordan M. Steiker, “Lessons for Law Reform from the American Experiment with Capital Punishment,” *Southern California Law Review* 87 (2013-14), 766 argue that “[a]s the underlying ‘substance’ of American criminal law became increasingly punitive—with longer sentences for virtually all offenses, less opportunities for parole (including the advent of life-without-possibility-of-parole sentences), harsh recidivist provisions, and the general abandonment of ‘rehabilitation’ as an aspiration of American prisons—the narrative of American criminal justice continued to focus on the leniency of American criminal procedure. Media portrayals in film and television of offenders escaping punishment because the constable blundered seemed to triumph over the reality that the American prison

- The increased support and mobilization for movements that advocated some form of expansion of the moral circle in the 1950s and 1960s, such as those addressing civil rights and poverty.<sup>92</sup> Herbert Haines speculates that the death penalty continued to decline in the post-war period because, “as practiced, many people found it to be glaringly inconsistent with the ascendant ideas of the times,” which included wider mass social movement participation and momentum for civil rights.<sup>93</sup> Some advocates explicitly connected civil rights and death penalty issues.<sup>94</sup>
- Haines summarizes that, “Philip Mackey speculates that the lingering shock of the Holocaust may have been partly responsible” for continued decline.<sup>95</sup>
- According to Banner, “[t]he murder rate had dropped slightly, but not enough to make this big a difference” to the execution rate.<sup>96</sup>
- From the late 1960s, litigators were systematically challenging the use of the death penalty.<sup>97</sup>

Internationally, interest in abolition of the death penalty seems to have grown in the wake of the Second World War, partly in relation to an increased interest in enforcing human rights more broadly.<sup>98</sup> Eleanor

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population was growing exponentially. At the same time, the seemingly vast procedural ‘rights’ recognized during the Warren Court revolution were undercut both by judicially crafted ‘exceptions’ to their reach and by the underlying reality that the combination of harsh punishments and overclogged dockets ensured that most criminal defendants would waive their procedural protections to secure plea bargains. The constitutionalization of American criminal procedure, like the constitutionalization of the death penalty, managed to shift attention away from the growing harshness of American criminal punishments to the complicated, costly, and time-consuming procedural mechanisms surrounding their enforcement. The fact that in both contexts the procedures have accomplished little in terms of preventing arbitrary, excessive, or discriminatory punishment ultimately matters less than the fact (or perception) that the federal courts are understood to be keeping a watchful eye over police and prosecutors.”

For more discussion of the possibly negative long-term effects of death penalty regulation, see the strategic implication below beginning “There is some evidence that procedural reforms...”

<sup>92</sup> Corinna Barrett Lain, “*Furman Fundamentals*,” *Washington Law Review* 82, no. 1 (2007), 28.

<sup>93</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 161.

<sup>94</sup> Jeffrey L. Kirchmeier, *Imprisoned by the Past: Warren McCleskey, Race, and the American Death Penalty* (New York: Oxford University Press, 2015), 72 notes that, “[a]fter some debate among civil rights leaders, they eventually connected capital punishment to the country’s racial issues. Martin Luther King Jr. recognized the link between capital punishment and civil rights. He opposed the death penalty for the way it had been used against African Americans, but he also opposed it on practical and religious grounds.” Kirchmeier provides quotes as evidence. See also the section on “1966-72” below for the role of the NAACP LDF and ACLU, two civil rights groups.

<sup>95</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 10, citing Philip English Mackey, *Voices Against Death: American Opposition to Capital Punishment, 1787-1975* (New York: Burt Franklin, 1976), xiii.

<sup>96</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 227, referring to the start of the fall from the 1930s.

<sup>97</sup> See the section on “1966-72: Litigation and temporary legal success” below.

<sup>98</sup> William A. Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Grotius Publications, 1993), 288 summarizes that, “[o]utrage at the abuses of the death penalty during the Second World War, particularly with respect to civilian populations, led to the recognition of the ‘right to life’ as a normative objective, a ‘common standard of achievement for all peoples and nations.’ Hitherto, the right to life had appeared in some national constitutions, but almost always with its inevitable appendage, capital punishment. When the United States *Constitution* stated that no person ‘shall be deprived of life... without due process of law,’ it legitimized the death penalty, subject to certain controls. But the *Universal Declaration of Human Rights*, adopted in 1948, and its contemporary in the Inter-American regional system, the *American Declaration of the Rights and Duties of Man*, let the right to life stand alone, unblemished by its fatal exception.”

Roosevelt may have sought to remove references to the death penalty in the Universal Declaration of Human Rights, which was adopted in by the UN in 1948. Roosevelt noted in the drafting committee that there was a “movement underway in some states to wipe out the death penalty completely.”<sup>99</sup>

In 1948, Caryl Chessman was sentenced to death for kidnapping with bodily harm. In the following years, he launched several appeals, acting as his own attorney, and wrote several books. His case brought international appeals for mercy from well-known figures such as Alduous Huxley.<sup>100</sup> Haines notes that when Chessman was put to death, “angry mobs attacked US embassies in several countries.”<sup>101</sup> The sentencing to death of Julius and Ethel Rosenberg, who spied for the USSR, in 1950, also provoked international protests.<sup>102</sup> Barbara Graham claimed to be innocent but was executed in 1955; a book and Hollywood film were made about the case.<sup>103</sup>

In the 1950s and 1960s, there seems to have been an increased focus on reform of the criminal system among the educated elite in both Europe and the US, including on restriction or abolition of the death penalty in some European countries.<sup>104</sup> In the same two decades, US religious organizations representing both mainline

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On pages 27-8, Schabas adds that, “[a]s far back as 1942, U.S. State Department officials had given consideration to an international bill of rights as part of their scheme for the post-war united nations organization... The preliminary meetings for the organization of the United Nations were held in late 1944 at Dumbarton Oaks. The Dumbarton Oaks Proposals only set out the goals of the United Nations Organization and did not venture into the specific human rights that would be addressed. The phrase they employed was: ‘promote respect for human rights and fundamental freedoms.’” Schabas notes on pages 33-45 that various individuals and NGOs, including the “Comite Permanente de Relaciones Espiritualistas” and a Soviet delegate to the Drafting Committee, argued that the UN should not signify approval of the death penalty, but that debate ensued as to whether the UDHR should explicitly forbid capital punishment. Schabas concludes that “article 3 of the *Universal Declaration* is indeed abolitionist in outlook. By its silence on the matter of the death penalty, it envisages its abolition and, at the same time, admits its existence as a necessary evil, a relatively fine line which in hindsight appears to have been rather astutely drawn.”

Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 63-66 suggests that the heavy use of capital punishment — both by the Nazis and to execute Nazis in the aftermath of the War — contributed to support among German legislators for abolition. The death penalty was abolished in 1949 there.

<sup>99</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 246.

For a detailed chronicling of the development of international norms, laws, and treaties against capital punishment, see William A. Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Grotius Publications, 1993).

<sup>100</sup> “A Strange Meeting In Prison,” *Life* (February 22, 1960), 30 and David L. Ulin, “Caryl Chessman’s infamous death row case is revisited” (September 19, 2006), <https://www.latimes.com/archives/la-xpm-2006-sep-19-et-book19-story.html>.

<sup>101</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 13.

<sup>102</sup> Lori Clune, “Great Importance World-Wide: Presidential Decision-Making and the Executions of Julius and Ethel Rosenberg,” *American Communist History* 10, no. 3 (2011), 271-3.

<sup>103</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 13.

<sup>104</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 12-3 summarizes that, “[t]he worldwide decrease in violent crime that prevailed from the 1950s to the mid-1960s saw outright opposition to capital punishment gradually increase in popularity as a social cause among U.S. and European elites... Germany abolished capital punishment once and for all in its 1949 post-war Basic Law... In Great Britain, the Royal Commission on Capital Punishment, which issued its report in 1953, held back from advocating outright abolition of capital punishment, but did recommend significant limits on its applicability, which were realized in

and evangelical Protestantism put out official statements criticizing capital punishment.<sup>105</sup> Intellectuals including Albert Camus and Arthur Koestler added to this criticism, as did politicians, including the governor of Ohio.<sup>106</sup>

From 1950, the National Association for the Advancement of Colored People Legal Defense Fund (hereafter LDF) defended African Americans in several capital punishment cases. The LDF was a growing, well-resourced group<sup>107</sup> that had contributed to favorable decisions in landmark Supreme Court rulings on African American civil rights, such as *Brown v. Board of Education* (1954).<sup>108</sup>

From the 1950s, conservative governors and law enforcement officials in the South began to frame civil rights activism as “criminal” and challenging “law and order,” calling for the arrest of activists who were portrayed as “street mobs” and “lawbreakers.”<sup>109</sup>

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the Homicide Act of 1957. The 1960s saw an accelerating trend toward abolitionist sentiment among European and American elites, which often manifested itself as just one aspect of a bold program to completely reform criminal justice and reorient it to the exclusive goal of rehabilitating offenders with the help of the latest psychological insights. Throughout the 1960s, professors from German-speaking countries produced competing proposals for the reform of Germany’s Penal Code, which stimulated a broad reform movement culminating in groundbreaking revisions to the Code. In England, Baroness Wootton and other reformers argued tirelessly for the rehabilitation of criminal offenders, and both Conservative and Labour governments drafted wide-ranging White Papers advocating comprehensive reform of criminal justice and corrections. In the United States, the President’s Commission on Law Enforcement and the Administration of Justice, commissioned by President Lyndon B. Johnson, issued a 1967 report setting out a comprehensive program for modernizing the criminal justice system and building up programs of reform and rehabilitation. England, for its part, finally passed a law establishing a five-year moratorium on capital punishment in 1965, which was made permanent in 1969. For all this ferment among the educated elite — Members of Parliament; prominent panelists on government commissions; professors of law, criminology, and sociology; and writers — the general public in all four countries [the US, UK, France, and Germany] remained staunchly in favor of retaining capital punishment until the mid-1960s, and sometimes beyond.”

<sup>105</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 241.

<sup>106</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 240-1.

<sup>107</sup> Eric L. Muller, “The Legal Defense Fund’s Capital Punishment Campaign: The Distorting Influence of Death,” *Yale Law & Policy Review* 4, no. 1 (1985), 160 notes that, “[w]hen the Legal Defense Fund was created, it consisted of one man, Thurgood Marshall, and a budget no larger than his salary and expenses. The LDF’s budget in those early years barely topped \$10,000. By the early 1960s, the Fund had expanded to a corps of five full-time lawyers and a budget exceeding \$500,000. Marshall’s tenure as Director-Counsel lasted until his appointment to the Second Circuit Court of Appeals in 1961, at which time Jack Greenberg stepped in. The Legal Defense Fund has now blossomed into a New York office, a Washington, D.C. office, field offices in four southern states, and a full-time legal staff of twenty-three attorneys. This full-time staff, however, does not fully describe the real reach of the Fund [citing Michael Meltsner, and LDF attorney]: ‘some four hundred cooperating attorneys, many of them intimately involved in LDF affairs, are located nationwide. In addition, associated with the Fund are social scientists, educators, commercial lawyers, law professors, foundation executives, corporation and government administrators, community workers, a Mexican-American legal defense fund, a law reform unit that specializes in cases involving discrimination against the poor, and a scholarship program’... by the late 1960s, the Fund was establishing itself as one of America’s giants in the civil rights field—all on the goodwill of private contributors.”

<sup>108</sup> See, for example, Eric L. Muller, “The Legal Defense Fund’s Capital Punishment Campaign: The Distorting Influence of Death,” *Yale Law & Policy Review* 4, no. 1 (1985), 173.

<sup>109</sup> Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004), 47. They add that in 1966, Richard Nixon “[b]lamed civil rights leaders for the problems of crime and violence, arguing that ‘the deterioration of respect for the rule of law can be traced directly to the spread of the corrosive doctrine that every citizen possesses an inherent right to decide for himself which laws to obey and when to disobey them.’” They argue on page 49 that, “[t]here is no evidence that these early claims-making activities were a response to a demonstrable increase in public concern about crime. Opinion poll data show that other concerns—especially civil rights and the Vietnam War—were of far more concern to most Americans.”

In 1953, the Royal Commission on Capital Punishment noted that the death penalty was used for few crimes in the UK and that, “the real issue is now whether capital punishment should be retained or abolished.” Haines believes that this encouraged abolition efforts in both the UK (which abolished the death penalty in 1969) and the US.<sup>110</sup> Reform efforts and proposals for a moratorium in the UK also seem to have encouraged Canada<sup>111</sup> and New Zealand’s<sup>112</sup> ADPMs.

New state-level abolitionist organizations were formed in the late 1950s, some of which were tied to the ALACP.<sup>113</sup>

In 1957, Hawaii banned the death penalty; it was the first state to do so since 1916.<sup>114</sup> Alaska (1957), West Virginia (1965), and Iowa (1965) also subsequently banned the death penalty.<sup>115</sup> In 1963, Michigan, which had

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<sup>110</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 13.

<sup>111</sup> C. H. S. Jayewardene, *The Penalty of Death: The Canadian Experiment* (Lexington, MA: Lexington Books, 1977), 1 notes that “[a] five-year moratorium on the penalty of death, except for the murder of a police officer or a prison official acting in the course of duty, came into effect [in Canada] on December 29, 1967. This moratorium could be looked on as the culmination of an abolitionist movement that originated in 1946. The movement apparently received its impetus from the proposal in the United Kingdom to abolish capital punishment for a trial period of five years. Although the history of the movement against capital punishment in Canada does not parallel that in the United Kingdom, what happened there had an effect on what happened here, and when it was proposed to abolish capital punishment in the United Kingdom, it was thought that a similar move would be made in Canada. In preparation for this move the Financial Post published the opinion of prominent Canadians on the question [in 1964]. The majority favoured the retention of the penalty,” though “[t]here were some who favoured abolition.”

<sup>112</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), 58 notes that capital punishment for murder “was reinstated by [New Zealand’s] government of the National Party following an election pledge in 1951... In 1961, on a free vote, a sufficient number of National Party MPs, apparently influenced by the report of the British Royal Commission on Capital Punishment, joined with Labour members to abolish capital punishment for murder.”

<sup>113</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 12. Haines notes on pages 12-13 that, “[m]any of these, such as the California-based Citizens Against Legalized Murder, the Ohio Committee to Abolish Capital Punishment, and the New Jersey Council to Abolish Capital Punishment, were at least loosely affiliated with the ALACP. Others were independent, including California’s People Against Capital Punishment, the New York Committee to Abolish Capital Punishment, the Oregon Council to Abolish the Death Penalty, and the National Committee to Abolish the Federal Death Penalty.”

<sup>114</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 22-3.

John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 147 note that, “[i]n 1954, Hawaiians finally witnessed the emergence of a territorial government elected by universal suffrage... among the first acts of Hawaii’s new government was the abolition of capital punishment.” The rest of the chapter, pages 147-68, presents colonization and racial and class struggles as the primary factors affecting the death penalty in Hawaii.

<sup>115</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 124-5 notes that, “Alaska’s territorial legislature passed house bill 99 abolishing capital punishment in 1957, two years before statehood. According to the memory of the junior cosponsor of HB 99, capital punishment was not a central issue for most legislators of the time. Other information supports that observation. Not one official or unofficial document concerning HB 99 could be located in Juneau’s state libraries and archives... Victor Fischer, a veteran of both Alaska houses, gave Warren Taylor, the bill’s prime sponsor, the majority of the credit for ending capital punishment in Alaska. As chair of the House Judiciary Committee, Representative Taylor was able to move the bill through that committee on a split vote (two yeas, two nays, and one abstention). During the day and a half debate preceding the full house vote on HB 99, Taylor gave—what Fischer called—the most psychologically moving and convincing speech he had ever heard... The fact that seventeen years

abolished capital punishment for all crimes except treason through legislation in 1846, amended its constitution to prevent subsequent legislation from reintroducing capital punishment and to formally abolish capital punishment for treason.<sup>116</sup> Though they subsequently reintroduced it, Delaware (banned 1958, reinstated 1961),<sup>117</sup> Oregon (banned 1964, reinstated 1978),<sup>118</sup> and New York (banned 1969, reinstated de jure but not de facto in 1995)<sup>119</sup> also banned the death penalty in this period, in Oregon's case through a referendum with 60% of the vote.<sup>120</sup> Kirchmeier summarizes that public opinion in Oregon had been influenced by "a governor who was outspoken against the death penalty, a large political and public campaign (including ads by celebrities) against the death penalty, and public attention on a sympathetic condemned

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passed before a legislator attempted to resurrect the death penalty suggests that capital punishment was not a burning controversy during the early years of statehood." On pages 142-6 they conclude that several long-term factors that seem to help explain the success of abolition in other states did not apply in Alaska. Instead, the "unique political and economic history," "[p]olitically powerful minority populations," "sparsely populated landmass," and "[l]imited state resources" help to explain its success.

They note on page 175-7 that the Democrats gained new influence in the Iowa legislature in the mid-1960s and secured the governorship. An Iowa poll found that 57% opposed the death penalty. The legislature voted to abolish the death penalty in 1965; though there were both supporters and opponents from both parties, there was a clear partisan divide, with Democratic support for the bill being important. On pages 187-9 they list other factors that may have contributed, such as the state having the second lowest murder rate of any state.

They note on page 192 that, "[i]n 1965, West Virginia abolished capital punishment.. The initial house vote on HB 517 was eighty-two in favor and fourteen opposed." On pages 201-5 they note the importance of several long-term factors in encouraging and maintaining abolition, including "[l]ow levels of violent crime, population stability, and homogeneity." Additionally, they note that the committee system in West Virginia's legislature is "built strictly on political patronage rather than seniority as in many U.S. states... senators and delegates are not willing to spend the political capital necessary to attempt to override committee leadership. Moreover, West Virginia has no provision for a citizen initiative or statewide referendum... The experiences in West Virginia and other abolitionist states also reflect the fact that bureaucrats typically support the status quo no matter what that status quo represents."

<sup>116</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 22 and "Michigan," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/michigan>.

<sup>117</sup> "Delaware," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/delaware>.

<sup>118</sup> "Oregon," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/oregon>.

<sup>119</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 80.

<sup>120</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 11-12.



female inmate.”<sup>121</sup> Vermont (1965) and New Mexico (1969) also introduced partial bans.<sup>122</sup> Many other states considered legislation at this time.<sup>123</sup>

In 1958, two public opinion polls in France found only 39% and 33% support for capital punishment, compared to 50% and 58% opposition. However, after two convicts undergoing life imprisonment murdered a warder and a nurse in their prison, a poll in 1972 found 53% support compared to 39% opposition. President George Pompidou had earlier reprieved six prisoners but did not reprieve these two men, who were executed that year.<sup>124</sup>

In 1962, the American Law Institute (ALI) created its Model Penal Code, which contained recommendations for rationalizing capital punishment administration at the state level; the recommendations contrasted with contemporary state practice but did not advocate abolition.<sup>125</sup>

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<sup>121</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 11-12.

<sup>122</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 48. On page 22, Lain notes that Vermont and New York’s bans retained capital punishment for “extraordinary crimes such as murder by a life prisoner” and that “New Mexico similarly chose limited abolition in 1969.”

John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 224 notes that, “[b]etween 1630 and 1970, only twenty-six people were executed in the state... In addition, since 1900, only eight prisoners have been put to death. Thus, the pattern of delay found in Rhode Island is similarly found in Vermont. Vermont became an abolition state through legislative inaction. As of this writing, the state assembly has not passed a new death penalty statute since 1972, when its existing law was rendered constitutionally questionable by the United States Supreme Court. This inattention is undoubtedly facilitated by Vermont’s very low murder rates, and as in Rhode Island, its small, homogenous population and small geographic territory.”

<sup>123</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 244 notes that, “in February 1965 twenty state legislatures were considering bills to abolish capital punishment.”

“Tennessee,” Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/tennessee> notes that “[i]n 1965, Tennessee’s Senate voted to repeal the death penalty and repeal only lost in the House by one vote.” Afterwards, “Governor Frank Clement commuted the sentences of everyone on Tennessee’s death row.”

<sup>124</sup> Michel Forst, “The Abolition of the Death Penalty in France,” in *The Death Penalty in Europe* (Strasbourg: Council of Europe Publishing, 1999), 108-9. On pages 111-6, the article describes how abolition legislation was proposed several times but ignored or rejected. In 1981, Francois Mitterand was elected president after announcing his opposition to the death penalty. He subsequently commuted a death sentence. A poll in 1981 showed 62% support for the continued use of the death penalty. Nevertheless, the Chamber (the lower house of the legislature) voted for abolition by 369 votes to 113 in September that year. The Senate approved it by 160 votes to 126. The law entered into force the following day and the six French convicts sentenced to death were reprieved. After three years, an opinion poll found 49% support for this abolition, compared to 46% who regretted the abolition. However, Forst does not cite the polls themselves or the wording used, so it is unclear whether these changed figures represent genuine changes in public opinion. Other recent polls are cited, with support and opposition being split close to 50% each, though Forst claims that “abolitionists are still in the minority” in France.

Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 180 cites opinion polls between 1978 and 2006 attributed to the same source (“TNS/Sofres, 2006”), which presumably used consistent wording. These polls show a drop in support from 62% in 1981 to 50% in 1982, which rose back to a peak of 65% by 1985. Thereafter, support declined to 42% in 2006.

<sup>125</sup> Carol S. Steiker and Jordan M. Steiker, “Lessons for Law Reform from the American Experiment with Capital Punishment,” *Southern California Law Review* 87 (2013-14), 770-1. On page 771 they note that the Model Penal Code “recommended limiting the reach of the death penalty to certain aggravated offenses, embraced proportionality limits on

In 1964, the book *The Death Penalty in America* by Hugo Adam Bedau, a committed anti-death penalty advocate, was published.<sup>126</sup> In 1965, the American Civil Liberties Union (ACLU) issued a statement against the death penalty.<sup>127</sup> That same year, Attorney General Ramsey Clark wrote a letter to Congress saying that the Department of Justice favored the abolition of the death penalty<sup>128</sup>; he appears to have opposed the death penalty for both moral and practical reasons.<sup>129</sup>

In 1965, Vermont and New York limited the death penalty to fewer crimes.<sup>130</sup>

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its use, provided for bifurcated guilt/punishment proceedings, and enumerated relevant mitigating circumstances. But this strength was also a weakness. The absence of any state efforts to improve the death penalty suggested a middle course between the stark choices of maintaining the status quo and abolition. When the Court was confronted with the overwhelming legislative response to Furman, it chose that middle course: constitutional regulation.”

<sup>126</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 233-4.

<sup>127</sup> Corinna Barrett Lain, “Furman Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 20.

Michael Meltsner, “Litigating Against the Death Penalty: The Strategy Behind Furman,” *The Yale Law Journal* 82, no. 6 (1973), 1125-7 seems to suggest that the ACLU had been involved in representing death row inmates before this point, though the precise chronology is unclear from the paper.

Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (New York: Random House, 1973), 55 notes that, “[u]ntil 1965, the official position of even the American Civil Liberties Union was that capital punishment did not present ‘a civil liberties issue.’ In that year the Union’s Board of Directors—after prodding from New York University law professor Norman Dorsen, University of Pennsylvania law professor Caleb Foote, and Gerald Gottlieb—for the first time authorized ACLU lawyers to enter cases where it was claimed that the death penalty had been imposed on the basis of race or class, ‘provided that a factual study had been made which seems to justify this conclusion.’”

However, the author has not seen further detail on why the ACLU decided to begin committing to advocacy against the death penalty. Additionally, Eric L. Muller, “The Legal Defense Fund’s Capital Punishment Campaign: The Distorting Influence of Death,” *Yale Law and Policy Review* 4, no. 1 (1985), 164, though focusing on a different issue, shows that Meltsner’s testimony is not always accurate. Meltsner suggested he personally decided the LDF’s moratorium campaign over a lunch break, but Muller notes that this particular claim “was also, in the words of Jack Greenberg [head of LDF], ‘total nonsense.’ In fact, the Legal Defense Fund had a history of representing death row inmates which began at least fifteen years before Meltsner’s lunch meeting. Throughout that time period, LDF attorneys frequently debated the possibility of attacking the constitutionality of the death penalty on racial grounds.”

<sup>128</sup> Corinna Barrett Lain, “Furman Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 33.

<sup>129</sup> In a subsequent statement to the Senate Judiciary Committee (“Statement by Attorney General Ramsey Clark,” Department of Justice (July 2, 1968), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-02-1968.pdf>), Clark wrote that “[a] humane and generous concern for every individual, for his safety, his health and his fulfillment, will do more to soothe the savage heart than the fear of state-inflicted death... Our history shows the death penalty has been unjustly imposed, innocents have been killed by the state, effective rehabilitation has been impaired, judicial administration has suffered, crime has not been deterred. Society pays a heavy price for the penalty of death it imposes.”

<sup>130</sup> Jeffrey L. Kirchmeier, *Imprisoned by the Past: Warren McCleskey, Race, and the American Death Penalty* (New York: Oxford University Press, 2015), 74.

## 1966-72: Litigation and temporary legal success through *Furman v. Georgia*

In 1961, two law review articles suggested that litigators might be able to show the death penalty to be inconsistent with contemporary standards of decency,<sup>131</sup> which would conflict with the Eighth Amendment, as interpreted by Chief Justice Earl Warren in the 1958 Supreme Court *Trop v. Dulles* ruling.<sup>132</sup> In a dissenting opinion on the 1963 *Rudolph v. Alabama* case, three Supreme Court Justices suggested that the Court could be willing to hear arguments against the death penalty in future cases.<sup>133</sup> Justice Goldberg had previously circulated a memorandum against capital punishment to the rest of the Supreme Court; on the request of Justice Warren, he did not publish it. However, in an interview, Goldberg's clerk said that he "sent copies of the dissenting opinion to every lawyer in America who [he] knew."<sup>134</sup>

Presumably encouraged by these signals of the death penalty's legal vulnerability, the LDF began a litigation campaign in 1966 to force a moratorium on capital punishment.<sup>135</sup> Although initially intending to focus on African Americans convicted of rape, their involvement subsequently grew to encompass all those given a death sentence, regardless of race. Legal scholar Eric L. Muller explains this shift as having been a result of the campaigning and legal logic of the LDF combined with a sense of ethical duty to protect all convicts equally, without discrimination by race.<sup>136</sup> Kirchmeier summarizes the LDF's three tactics as, "(1) challenging cases in the Supreme Court; (2) developing and using social science evidence in the courts; and (3) attempting to block all executions while the litigation was in progress. The LDF's goal of achieving a judicial moratorium involved a nationwide effort to enlist and work with lawyers in various states."<sup>137</sup> The LDF argued that

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<sup>131</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 26.

<sup>132</sup> "*Trop v. Dulles*," US Supreme Court (1958), <https://supreme.justia.com/cases/federal/us/356/86/>. Warren wrote that, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

<sup>133</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 12

<sup>134</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 26-7. Haines concludes that "[t]he Goldberg dissent was, then, an intentional signal."

<sup>135</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 13.

<sup>136</sup> Eric L. Muller, "The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death," *Yale Law & Policy Review* 4, no. 1 (1985), 168-70.

<sup>137</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 13.

On the use of social science evidence, Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 27-8 describes several efforts, including hiring students "from the law Students Civil Rights Research Council to travel throughout the South during the summer of 1965, collecting data on rape cases from court records.. Marvin Wolfgang, head of criminology... at the University of Pennsylvania, oversaw the data analysis."

On the use of other lawyers, Haines notes on page 31 that a "recent graduate of Harvard Law School, Jack Himmelstein, was hired as the coordinator of the campaign. Himmelstein set about organizing a national network to serve as its vehicle. The network consisted of cooperating attorneys, interested academics, leaders of existing abolitionist groups, journalistic allies, and sympathetic corrections officials. Their responsibilities were to share information, provide ammunition for the lawyers' arguments, and, most importantly, to keep the New York headquarters informed of any impending execution dates in their areas so that petitions for stays could be filed in time. The cooperating attorneys around the country who were allied with the LDF were usually unfamiliar with the organization's carefully devised strategy and were not experts on defending death-sentenced clients... To assist them in preventing any executions from

“death is different” and that, consequently, juries needed to be given precise standards on when to pass sentence.<sup>138</sup> In 1967, the ACLU joined the LDF in its litigation campaign.<sup>139</sup> A few leading death penalty abolitionists did provide information to the LDF and ACLU,<sup>140</sup> but both of these groups were predominantly civil rights groups that diverted resources from their other campaigns.<sup>141</sup>

Nineteen sixty-six was the only year in which Gallup polls found that a higher percentage (47%) of the US public were opposed to the death penalty for murder than supported it (42%). In 1967, support rose back up to 54% but then sunk back down to 51% and 49% in 1969 and 1971, respectively.<sup>142</sup> The temporary spike in support in 1967 may have been caused by, “extensive publicity surrounding the convictions of Albert DeSalvo (a.k.a. ‘the Boston Strangler’) and Richard Speck (who had murdered eight student nurses in Chicago) just before polling began.”<sup>143</sup> Crime rates were also rising,<sup>144</sup> which seems likely to have encouraged public support for the death penalty.<sup>145</sup> Crime was also an important political issue; Richard Nixon used a “law and order” campaign in the 1968 election.<sup>146</sup> Nevertheless, Gallup polls showed lower support for capital punishment in 1956-72 than any polls since 1972 have done.<sup>147</sup>

A committee for the US Senate seems to have considered federal abolition legislation, though the bill never progressed beyond the committee stage.<sup>148</sup>

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occurring in the United States, Himmelstein distributed ‘last-aid kits’ — a bound packet of habeas corpus petitions, applications for stays of execution, legal briefs laying out an array of constitutional issues, and other materials. With a kit in hand, even inexperienced lawyers could go to court and make sophisticated claims for a stay of execution.”

<sup>138</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 29. These ideas were to become crucial to the Supreme Court’s practice in the wake of the *Gregg v. Georgia*.

<sup>139</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 20.

<sup>140</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 42. For example, Haines notes that Hugo Bedau, the director of ALACP who had been involved in legislative campaigns in Oregon and New Jersey, and Doug Lyons, the director of a group called Citizens Against Legalized Murder, worked with the LDF and ACLU.

<sup>141</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 43 notes that, “[t]he Legal Defense Fund’s major expense during this period was empirical research on various aspects of death sentencing. To facilitate such research, the organization diverted money from its general fund” and “utilized a foundation grant that was intended more generally for indigent defense.”

<sup>142</sup> “Death Penalty,” Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>.

<sup>143</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 36.

<sup>144</sup> See footnote 84.

<sup>145</sup> For example, Joseph H. Rankin, “Changing attitudes toward capital punishment,” *Social Forces* 58, no. 1 (1979), 199, analyzing survey evidence from the 1970s, concluded that “the greater the concern with halting the rising crime rate, the greater the support for capital punishment.”

<sup>146</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 35 notes that, “[b]y 1968, crime dominated the public consciousness and political landscape. That year, Richard Nixon won the presidency on a ‘law and order’ campaign, while Congress enacted the most extensive anti-crime legislation in history... Over the next three years, Congress would enact two new death penalty statutes.” On page 38, Lain notes that, “Nixon refrained from commenting on the issue, although his new Attorney General had stated that Nixon was ‘not opposed to capital punishment.’”

<sup>147</sup> “Death Penalty,” Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>. By comparison, polls in 1937 and 1953 found 60% and 68% support respectively. Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 36 adds that Harris Polls found 48% support for the death penalty in 1969 and 47% support in 1970.

<sup>148</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 35 notes that, “the Johnson Administration’s bill to abolish the death penalty never made it out of committee. Over the next three years, Congress

From 1968 to 1977, no executions were carried out.<sup>149</sup> State politicians and attorneys general were increasingly speaking out against the death penalty, including the governor of Arkansas commuting the sentences of all 15 individuals on death row in the state.<sup>150</sup> In 1968, Attorney General Ramsey Clark asked Congress to abolish the federal death penalty.<sup>151</sup> Haines summarizes that, “[b]y 1971, nine states had abolished the death penalty, four more had no one on death row, and anti-death penalty bills had reached the floor of state legislatures in California and Massachusetts, as well as the U.S. House of Representatives.”<sup>152</sup>

In 1968, the Supreme Court rulings of *United States v. Jackson* and *Witherspoon v. Illinois* regulated capital trials; the former ensured that judges rather than juries retained the right to impose death sentences, and the latter limited the state’s ability to exclude conscientious objectors to the death penalty from juries.<sup>153</sup> In 1970, the Fourth Circuit court ruled in *Ralph v. Warden* that the death penalty for rape violated the Eighth Amendment if lives were not endangered.<sup>154</sup> However, in 1971, the Supreme Court ruled in *McGautha v. California* that the lack of “definitive standards” for the use of the death penalty did not violate the Constitution.<sup>155</sup>

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would enact two new death penalty statutes instead.” The author has not seen any other articles or books mention “the Johnson Administration’s bill to abolish the death penalty.” “Capital Punishment,” Committee on the Judiciary (1972), [http://moses.law.umn.edu/darrow/documents/Hearings\\_Capital\\_Punishment\\_92nd\\_congress\\_1972.pdf](http://moses.law.umn.edu/darrow/documents/Hearings_Capital_Punishment_92nd_congress_1972.pdf), 18 notes that, “no hearings on the subject [of suspending or abolishing the death penalty] appear to have been conducted on the House side since... May 1960,” which leaves open the possibility that such a bill was considered in a Senate committee.

<sup>149</sup> See the spreadsheet “[Death penalty by year](#).”

<sup>150</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 34 notes that, “[i]n North Carolina, where one would expect to see strong political support for capital punishment, the governor made so many public comments against the death penalty that clemency petitions routinely referenced them. In Ohio, the governor even hired convicted murderers to prove that rehabilitation was possible. Whether following public opinion or leading it, politicians in the 1960s were beginning to reach the same conclusion *Furman* would in 1972.”

On page 38, Lain adds that, “[i]n December 1970, the lame-duck Governor of Arkansas made history when he commuted the death sentences of all fifteen people then on death row, encouraging other state governors to ‘hasten the elimination of barbarism as a tool of American justice.’ In January 1971, Pennsylvania’s outgoing Attorney General ordered the state’s electric chair to be dismantled, calling the death penalty a ‘disgusting indecency’ and the electric chair a ‘cruel instrument of public vengeance.’ The state’s new Governor pledged that there would be no executions while he was chief executive and had the execution room converted into a psychologist’s office.”

<sup>151</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 12. See also footnote 129.

<sup>152</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 37.

Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 24 notes that “In 1972, forty states had at least one death penalty statute on the books. As a measure of support for capital punishment, however, that number was deceptive. Five of the forty states had death penalty statutes so limited that they were almost never applicable, and another six had death penalty statutes that were generally applicable but almost never put to use.”

<sup>153</sup> Carol S. Steiker and Jordan M. Steiker, “Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,” *Harvard Law Review* 109, no. 2 (December 1995), 361.

<sup>154</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 36.

<sup>155</sup> “*McGautha v. California*,” US Supreme Court (May 3, 1971), <https://supreme.justia.com/cases/federal/us/402/183/>. This ruling seems to conflict somewhat with the later ruling of *Furman v. Georgia*; Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 17 writes that, “[t]he ink on *McGautha* was barely dry when certiorari in *Furman* was granted two months later. It was simply unthinkable that the Court would turn its back on a case of such recent vintage, until it did.”

There were 13 votes on whether to reintroduce capital punishment held in the UK's Parliament between 1969 (the year of abolition) and 1994, but all were defeated. Shortly before abolition there, a 1969 poll found that 85% of respondents were in favor of retaining the death penalty. Legislators in Germany had also proposed the reinstatement of the death penalty in the 1950s and 1960s but had failed, despite majority public support.<sup>156</sup>

By the end of 1970, the number of convicts on death row in the US had risen to over 600, up from 435 in 1967, due at least in part to the LDF's litigation to prevent their execution.<sup>157</sup>

On February 17, 1972, the California Supreme Court ruled in *The People of the State of California v. Robert Page Anderson* that the death penalty violated Section 6 of the California Constitution, which stated that “cruel or unusual punishments” should not be inflicted. The justices considered whether the punishment was proportionate or excessive (i.e. “unusual”) and whether capital punishment was cruel by “contemporary standards” or not. There was also some consideration of whether vengeance was a suitable justification for punishment and whether capital punishment was an effective deterrent.<sup>158</sup> National Gallup polls conducted in October 29 to November 2, 1971 and March 3 to March 5, 1972 found that 49% and 50%, respectively, of the US supported the death penalty for a person convicted of murder.<sup>159</sup> This suggests that the *Anderson* decision either slightly increased public national support for capital punishment or had no effect.<sup>160</sup>

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<sup>156</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 13-4. Hammel adds on page 66 that an opinion poll from 1949 found support for capital punishment among 77% of Germans and the first legislative motion to reinstate it was in that same year. Hammel suggests on pages 63-66 that the heavy use of capital punishment — both by the Nazis and to execute Nazis in the aftermath of the War — contributed to support among legislators for abolition. Hammel argues on pages 73-4 that, subsequently, pro-death penalty legislators may have been hesitant to challenge the 1949 Basic Law which had included abolition of the death penalty.

<sup>157</sup> The specific claim of 600 convicts on death row by the end of 1970 is cited by Carol S. Steiker and Jordan M. Steiker, “Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,” *Harvard Law Review* 109, no. 2 (December 1995), 410. “Size of Death Row by Year,” Death Penalty Information Center, accessed July 9, 2019, <https://deathpenaltyinfo.org/death-row/overview/size-of-death-row-by-year> notes that there were 631 prisoners on death row in 1970, compared to 517 in 1968.

However, Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 252-3 argues that this was not primarily due to the LDF: “By 1967, when the moratorium strategy began, the death row population had been rising for over a decade. There were 125 condemned prisoners awaiting execution when the Justice Department counted them in 1955, a figure not far different from what it had been in the late nineteenth century. In 1967 there were 435. The death row population continued to grow in later years, reaching 620 in 1972, and much of that growth can be attributed to the LDF's efforts, but the greater part of the logjam predated the LDF's involvement in any significant degree of capital litigation.” For the details of the earlier origins of this “logjam,” see footnote 90. Banner argues that, “the real achievement of Amsterdam and the LDF lawyers was to get the arguments against the constitutionality of the death penalty before the Supreme Court in a context in which they would be taken seriously... Even in this respect, however, the LDF was following on the heels of others.”

<sup>158</sup> “*People v. Anderson*,” Supreme Court of California (February, 1972), <https://scocal.stanford.edu/opinion/people-v-anderson-22750>.

<sup>159</sup> “Death Penalty,” Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>.

<sup>160</sup> There is no consistent pattern in polling in the previous years, with support at 45%, 42%, 54%, and 51% in the previous polls from 1965, 1966, 1967, and 1969 (“Death Penalty,” Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>). 1966 seems to have marked the start of a gradual upwards trend from 42% support up to a peak of 80% in 1994. However, it is possible that the 1967 result was an aberration (see the paragraph beginning “Nineteen sixty-six was the only year...” above) and that public support was still trending downwards at this time. This argument is made by Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review*

Though Congress had passed two death penalty statutes in 1971,<sup>161</sup> the House Judiciary Committee considered proposals for a two-year moratorium on federal executions in 1972, as well as proposals for abolition.<sup>162</sup> The chairman explicitly highlighted that, “[t]he importance of the measures under consideration [lay] in the fact that the U.S. Supreme Court” was considering the constitutionality of the death penalty.<sup>163</sup> In the absence of information about the subsequent fate of these bills,<sup>164</sup> it seems likely that they were dropped at the committee stage.

On June 29, 1972, the US Supreme Court ruled in *Furman v. Georgia* (hereafter, *Furman*) that the carrying out of the death penalty for two convicts in Georgia constituted “cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” However, the judgement was made by a slim five-to-four majority, and all of the justices submitted separate opinions, having been unable to agree on a rationale for the decision.<sup>165</sup> Two justices concluded that the death penalty was always “cruel and unusual,” but three concluded that the death penalty was only cruel and unusual as practiced at the time, with arbitrary

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82, no. 1 (2007), 19-40. Insofar as we believe that public support for capital punishment was trending downwards at this time, the similar results in these two polls suggest (in the absence of other identifiable factors that may have reversed the ongoing trend) that the *Anderson* decision slightly increased public support for capital punishment. Of course, it is possible that some other factor I have not identified accounts for the reversal of the trend in public opinion. A further limitation to this evidence is that surveys usually have a margin of error of 1% or more. The decrease in support between the 1969 and 1971 polls was only 2%, so the trend towards decreasing support for capital punishment was not strong at this time, if indeed it existed at all.

<sup>161</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 39.

<sup>162</sup> “Capital Punishment,” Committee on the Judiciary (1972), [http://moses.law.umn.edu/darrow/documents/Hearings\\_Capital\\_Punishment\\_92nd\\_congress\\_1972.pdf](http://moses.law.umn.edu/darrow/documents/Hearings_Capital_Punishment_92nd_congress_1972.pdf), 1.

<sup>163</sup> “Capital Punishment,” Committee on the Judiciary (1972), [http://moses.law.umn.edu/darrow/documents/Hearings\\_Capital\\_Punishment\\_92nd\\_congress\\_1972.pdf](http://moses.law.umn.edu/darrow/documents/Hearings_Capital_Punishment_92nd_congress_1972.pdf), 18.

<sup>164</sup> Several searches into <https://www.congress.gov/> using the terminology for the bills from “Capital Punishment,” Committee on the Judiciary (1972), [http://moses.law.umn.edu/darrow/documents/Hearings\\_Capital\\_Punishment\\_92nd\\_congress\\_1972.pdf](http://moses.law.umn.edu/darrow/documents/Hearings_Capital_Punishment_92nd_congress_1972.pdf) — “H.R. 8414, H.R. 8483, H.R. 9486 to suspend the death penalty for two years” — returned no relevant results. The author has not seen these bills mentioned in any books or articles that he has read other than Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 39, though it is possible that this was due to his skim reading, rather than because the books and articles genuinely did not mention the bills.

Lain claims that the bill’s “outlook (at least in the House) was thought to be good,” citing “Bill to Seek Stay of Executions,” *New York Times* (May 15, 1971), 14. However, the only evidence in the original article that supports this claim is the vague comment that, “[c]hances for passage of the bill in the House were regarded as good because of Mr. Celler’s chairmanship of the Judiciary Committee, but it was uncertain whether the bill would gather enough support in the Senate.”

Lain adds that, “[o]ne might question this prediction given the fact that Congress had just passed two death-penalty statutes the year before... But it is difficult to know how much weight to give those statutes. Both were in response to highly salient political events—Bobby Kennedy’s assassination in one case, a courthouse bombing where Black Panther H. Rap Brown was supposed to stand trial in the other—and had little more than symbolic significance. Despite a wide array of death penalty statutes at the federal level, only one federal prisoner was executed after the 1950s, and the number of federal inmates on death row during this time never exceeded two.”

<sup>165</sup> “*Furman v. Georgia*,” US Supreme Court (June 1972), [https://www.law.cornell.edu/supremecourt/text/408/238#ZC-408\\_US\\_238n14](https://www.law.cornell.edu/supremecourt/text/408/238#ZC-408_US_238n14). See also Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 260-3 for a summary of their views.

sentencing.<sup>166</sup> In previous years, the LDF and other lawyers challenging the death penalty had focused on the arbitrariness of death sentencing,<sup>167</sup> so these litigation efforts seem likely to have been influential in the decision.<sup>168</sup> The decision may also have been influenced by trends in judicial activism, the standardization of criminal procedure, the Court's efforts to minimize the effects of racism, and changes in public opinion.<sup>169</sup> The effect of the ruling was to nullify most capital punishment laws that existed at the time in the country.<sup>170</sup> Before,<sup>171</sup> during,<sup>172</sup> and shortly after<sup>173</sup> the *Furman* case, various involved actors and external commentators predicted the imminent abolition of capital punishment.

<sup>166</sup> Barry Schweid, "New laws unlikely on death penalty," *The Free Lance-Star* (June 30, 1972), <https://news.google.com/newspapers?id=pAoQAAAAIABJ&sjid=2YoDAAAAIABJ&pg=3786,38609&hl=en>.

John D. Bessler, "Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement," *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 237 notes that Justices Marshall and Brennan "relentlessly contended that the death penalty is unconstitutional per se." Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 261-3 also describes the opinions of the justices and makes the discrepancy between them clear.

<sup>167</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 14. Kirchmeier adds that, "[t]he lawyers argued that the arbitrariness was a result of the complete discretion given to juries in capital cases at that time, a discretion that had developed after states rejected mandatory death penalties."

<sup>168</sup> For discussion of this possibility, see the strategic implication "Exceptional legal arguments by advocates may have some influence on major court cases" below.

<sup>169</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 264-5. On public opinion, see the strategic implication beginning "The opinions of the public..." below.

Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004), 40 includes a table for Supreme Court decisions "Striking Down Federal Statutes on Constitutional Grounds." By this metric, the "late Warren Court" (1963-1969) and "Burger Court" (1969-1986), with an annual average of 2.29 and 1.88 respectively, were more activist than any previous courts except the "Hughes Court, pre-switch in time" (1930-1936) which had an annual average of 2.00. By comparison, the Roosevelt Court (1937-1953), Early Warren Court (1954-1962), early Rehnquist Court (1986-1994), and late Rehnquist Court (1995-2003) had annual averages of 0.18, 0.78, 0.78 and 3.67 each. The table on page 41 for "Decisions Striking Down State and Local Statutes on Constitutional Grounds" shows that Late Warren Court and Burger Court scored most highly of all on this metric, with annual averages of 16.13 and 18.18, compared to 9.29, 6.35, 8.11, 10.63, and 4.78 for the other 5 Court time periods.

<sup>170</sup> "*Furman v. Georgia*," US Supreme Court (June 1972), [https://www.law.cornell.edu/supremecourt/text/408/238#ZC-408\\_US\\_238n14](https://www.law.cornell.edu/supremecourt/text/408/238#ZC-408_US_238n14) Justice Blackmun wrote that "Not only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided."

<sup>171</sup> Corinna Barrett Lain, "*Furman* Fundamentals," *Washington Law Review* 82, no. 1 (2007), 41-2 notes that "*Time* magazine twice wrote about 'The Dying Death Penalty' in 1967, and U.S. News & World Report (among others) reported increasing abolitionist sentiment as late as 1971." Footnote 234 on page 41 lists various other authors providing further evidence for this characterization.

<sup>172</sup> Carol S. Steiker and Jordan M. Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment," *Harvard Law Review* 109, no. 2 (December 1995), 363. Justice White wrote that capital punishment "has for all practical purposes run its course." Corinna Barrett Lain, "*Furman* Fundamentals," *Washington Law Review* 82, no. 1 (2007), 42 notes that, "[w]hile *Furman* was pending, supporters of capital punishment lamented the 'mounting zeal for abolition' and the likelihood of its success," citing Donald A. Zoll, "A Wistful Goodbye to Capital Punishment," *National Law Review* 23 (Dec. 3, 1971), 1351 and 1354.

<sup>173</sup> Carol S. Steiker and Jordan M. Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment," *Harvard Law Review* 109, no. 2 (December 1995), 363 notes that "Michael Meltsner, one of the Legal Defense Fund (LDF) lawyers involved in the *Furman* litigation, introduced his book chronicling the *Furman* case either naively or strategically — as a celebration of the Fund lawyers who led the Court to 'abolish' the death penalty and thus 'right a deeply felt, historic wrong.'" Corinna Barrett Lain, "*Furman* Fundamentals," *Washington*



## 1972-86: Backlash, legal reversal through *Gregg v. Georgia*, and the ADPM's initial shift towards public-facing advocacy

There is anecdotal evidence of outrage at the *Furman* decision among politicians and officials.<sup>174</sup> Legal scholar Corinna Barrett Lain notes that, “[w]ithin a day of the decision, legislators in five states had announced their intent to enact new death penalty legislation and seventeen congressmen had joined in sponsoring a constitutional amendment to reinstate the death penalty.”<sup>175</sup> In 1972 and 1973, *The New York Times*’ coverage of the death penalty was unusually frequent (around 120 and 90 articles respectively compared to around 40 and 25 in the two previous years) and unusually supportive of the death penalty (around 5 and 35 more supportive than hostile articles compared to roughly even coverage in the previous two years).<sup>176</sup> These changes do not seem to have occurred to the same extent in magazine coverage.<sup>177</sup>

On November 7, 1972, California reintroduced the death penalty, overturning the *People v. Anderson* decision from earlier that year. This was achieved with 67.5% support through the Proposition 17 ballot initiative.<sup>178</sup> The *Furman* ruling seems to have led to some complacency among activists, funders, and politicians who otherwise might have been more determined in their efforts to defeat the California ballot initiative.<sup>179</sup>

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*Law Review* 82, no. 1 (2007), 45 adds that Chief Justice Burger predicted that “[t]here will never be another execution in this country.”

<sup>174</sup> Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (New York: Random House, 1973), 290 noted that, “Lester Maddox, Georgia’s lieutenant governor, called the decision ‘A license for anarchy, rape, murder’... Atlanta Police Chief John Inman deplored the loss of a ‘definite deterrent to major crimes.’ Ken Brown, an official of the California Correctional Officers Association, lost no time urging a national drive to amend the Constitution. ‘We’re in a kind of state of shock,’ said Brown. Jere Beasley, Alabama’s lieutenant governor, said with disgust: ‘A majority of this nation’s highest court has lost contact with the real world.’ A disappointed Memphis police chief, Bill Price, predicted that people who ‘hesitated to pull the trigger before just might go ahead and do it now.’”

<sup>175</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 47.

<sup>176</sup> Frank E. Dardis, Frank R. Baumgartner, Amber E. Boydston, Suzanna De Boef, and Fuyuan Shen, “Media Framing of Capital Punishment and its Impact on Individuals’ Cognitive Responses,” *Mass Communication & Society* 11, no. 2 (2008), 122-4. In 1972, the coverage focused unusually on constitutional issues, though this had returned to usual levels by 1973.

<sup>177</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 127 notes that the authors “validated our use of the *New York Times* as a proxy for national media coverage in two ways: first, by comparing the *Times* to the *Readers’ Guide to Periodical Literature*, second, by comparing the *Times* to available data from nine other major U.S. newspapers archived by Lexis-Nexis. We began by taking a count of the death penalty articles listed in the *Readers’ Guide*, which catalogues all articles published in nearly 400 general interest magazines.” Page 128 shows that the “net tone of *Readers’ Guide* coverage” was between -5 and +1 for every year between 1960 and 1983 except for 1965; 1972 and the surrounding years were all very close to 0. The “number of stories on capital punishment in the *Readers’ Guide*” was below 40 for every year until 1994, though coverage seems to have risen from about 5 in 1970 to about 20 in 1972 and the following 2 years before falling back to around 10 for 2 years and then jumping to 30 or so in 1976 and 1977.

<sup>178</sup> “California Proposition 17, Death Penalty in the California Constitution (1972),” Ballotpedia, accessed June 28, 2019, [https://ballotpedia.org/California\\_Proposition\\_17,\\_Death\\_Penalty\\_in\\_the\\_California\\_Constitution\\_\(1972\)](https://ballotpedia.org/California_Proposition_17,_Death_Penalty_in_the_California_Constitution_(1972)).

<sup>179</sup> Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (New York: Random House, 1973), 306-7 notes that, prior to the *Furman* ruling, Anthony Amsterdam of the LDF had scheduled a meeting on the upcoming California initiative but that, “[w]hen *Furman* was announced on June 29, most of the invitees called to ask whether the meeting would still be held as scheduled.” At the meeting, however, “[s]peaker after speaker states the same theme: ironically, for several reasons, *Furman* would make defeat of the referendum difficult if not impossible. Persons who had been prepared to contribute money for a campaign against the measure had already concluded that with the battle almost won with *Furman*, they had better uses for their cash. Political leaders who had taken the abolitionist side in a matter of

Gallup polls conducted on March 3-5, 1972 and November 10-13, 1972 (shortly before and after the *Furman* ruling) show an increase from 50% to 57% support for the death penalty for a person convicted of murder.<sup>180</sup> From this point public support for the death penalty continued to rise until 1994, when it peaked at 80%.<sup>181</sup>

The influence of rising crime rates on this trend is unclear. Mismatches in the chronology of changes in these two variables suggest that the increasing crime rate was not the only cause of changing public opinion.<sup>182</sup> The small rises in self-reported fear of crime in this period suggest that increased crime rates are unlikely to have caused an increase in the public's support for punitive treatment of convicts.<sup>183</sup> A paper by Timothy R. Johnson and Andrew D. Martin compares public opinion data from the General Social Survey before and after three key capital punishment cases; there is a significant difference in aggregate public opinion after the *Furman* ruling but not after the other two rulings.<sup>184</sup> Another paper models the determinants of support for the death penalty; though it controls for seven other factors, all four models find that the dummy variable for

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conscience when life was at stake would now withdraw to noncommittal postures, in the belief that life was no longer at stake."

<sup>180</sup> "Death Penalty," Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>. This increase in support was not, however, as large as the increase in support from 42% to 54% in 1966 to 1967.

<sup>181</sup> "Death Penalty," Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>. See also footnote 160.

<sup>182</sup> Corinna Barrett Lain, "Furman Fundamentals," *Washington Law Review* 82, no. 1 (2007), 49-50 argues that, "[f]irst, crime rates had risen before *Furman* as well, with little to no effect on death penalty support. Second, the crime rate actually dropped in 1976, while support for the death penalty skyrocketed. Finally, crime had begun to occupy the public consciousness as early as 1966, when pollsters named it the nation's second most important domestic problem and President Johnson issued a special message to Congress on the topic. That same year, however, marked the lowest level of death penalty support in recorded history, with death penalty opponents outnumbering its supporters." Nevertheless, these comparisons are not very informative if crime rates have a lagged effect on death penalty support. On page 73, Lain concludes that, "[i]n fairness, perhaps rising crime rates would have led to the return of strong death penalty support anyway. But they had not had that effect before *Furman*, so perhaps not. We will never know whether *Furman* merely hastened the return of the death penalty's popularity or brought it about entirely."

However, making the case for a position that they subsequently challenge, Carol S. Steiker and Jordan M. Steiker, "Should Abolitionists Support Legislative 'Reform' of the Death Penalty?" *Ohio State Law Journal* 63 (2002), 430 note that, "[o]ne could argue instead that this entrenchment [of support for the death penalty] was due entirely to crime rates because as crime rates, especially homicide rates, rose precipitously in the 1970s and 1980s, support for the death penalty rose as well. After crime rates, including homicide rates, fell precipitously in the 1990s, support for the death penalty also fell. The lowest support recorded in the last century for capital punishment was in 1966 and the highest was in 1994. The crime rates story is not a perfect fit (because crime rates were rising before 1966 and falling before 1994), but after allowing for some lag-time, the relevance of crime rates to support for capital punishment seems plausible."

<sup>183</sup> Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004), 105-6 shows that survey results for the "percent of Americans afraid to walk alone at night within a mile of their homes" peaked at just under 50%, compared to low points of around 30% in 1967 and 2001. The percentage of Americans who feel unsafe in their homes at night actually fell from a peak of 20% in 1975 to under 10% by 2000.

On page 116 they argue explicitly that the argument that, "the frequency of homicide creates a more generalized fear of crime and thus fuels support for tough criminal justice policies" is challenged by "other bits of evidence... inconsistent with this argument. First, levels of fear have been fairly stable compared to the homicide rate. Second, fear of crime does not necessarily lead to punitiveness, and those who are not personally fearful are often among the most punitive. Finally, killers make up only a tiny percentage of officially sanctioned criminals. It appears, then, that high rates of homicide play a small and indirect role in the generation of popular support for get-tough crime policies."

<sup>184</sup> Timothy R. Johnson and Andrew D. Martin, "The Public's Conditional Response to Supreme Court Decisions," *American Political Science Review* 92, no. 2 (June 1998), 299-309.

the period between the *Furman* ruling and the 1976 *Gregg v. Georgia* ruling (which clarified that the death penalty could comply with the Constitution<sup>185</sup>) is significant, suggesting that *Furman* increased support for the death penalty. However, this paper also found that the murder rate and income inequality (which also began to rise at around this time<sup>186</sup>) were significantly associated with public support for the death penalty and with the number of executions.<sup>187</sup>

At least one scholar has concluded that increasing violent crime rates were the most important factor in driving increases in support for capital punishment,<sup>188</sup> and there is evidence of increasingly punitive attitudes towards criminals more generally at this time.<sup>189</sup> It also seems plausible that the increase in pro-death penalty legislation in the period after *Furman* (see below) contributed to a social norm of high support for the death penalty.

Figure 2: Public opinion on the death penalty, as measured by Gallup polls, 1937-2018,<sup>190</sup> with lines to mark on the dates of the *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976) rulings.

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<sup>185</sup> See the paragraph beginning “In 1976, the US Supreme Court...” below.

<sup>186</sup> “Economic inequality in the USA,” The Chartbook of Economic Inequality, accessed August 12, 2019, <https://www.chartbookofeconomicinequality.com/inequality-by-country/usa/> shows that inequality began to rise at some point between 1950 and 1981, depending on the outcome measure used.

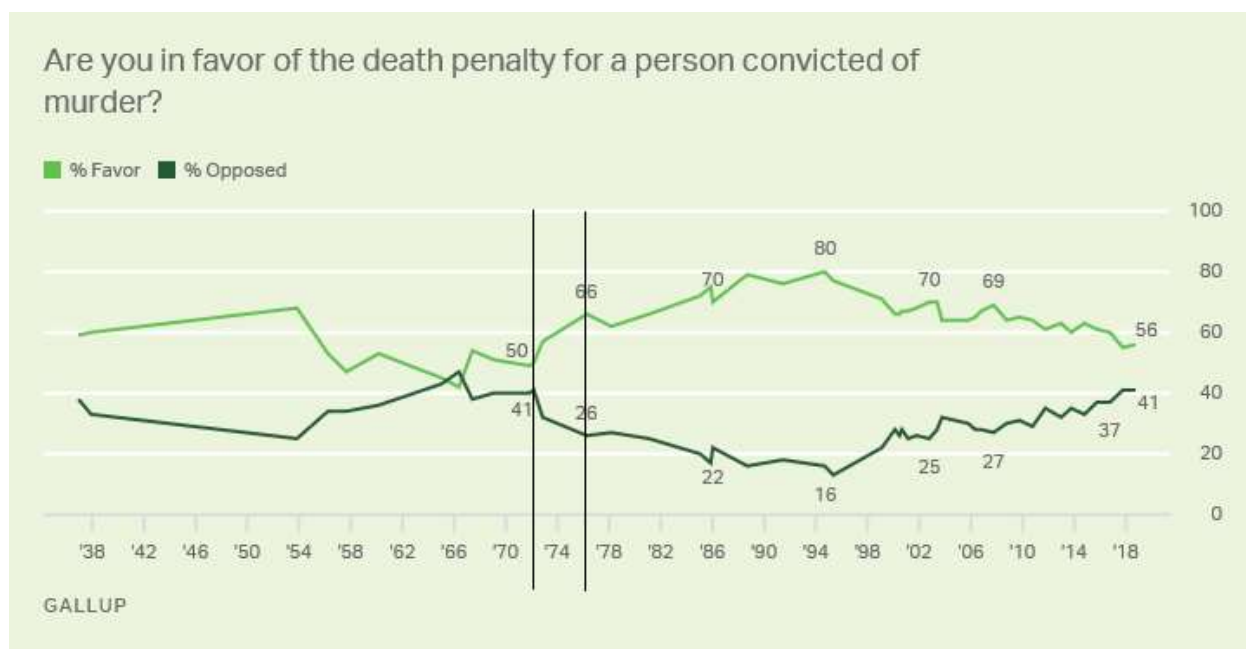
<sup>187</sup> David Jacobs and Stephanie L. Kent, “The Determinants of Executions Since 1951: How Politics, Protests, Public Opinion, and Social Divisions Shape Capital Punishment,” *Social Problems* 54, no. 3 (2007), 308. The R<sup>2</sup> varies from .303 to .531 for the models of public support and from .477 to .849 for the models of the numbers of executions. The paper also found that the percentage of the population that was nonwhite was positively correlated with support for the death penalty but not with the number of executions.

For another analysis finding significant effects of murder rates on support for the death penalty, see the strategic implication “The changing tone of media coverage can have significant effects on public opinion.”

<sup>188</sup> Joseph H. Rankin, “Changing attitudes toward capital punishment,” *Social Forces* 58, no. 1 (1979), 207 summarizes argues that F.B.I. data on violent crime rates explains the increased support for capital punishment from 1966: “A rather strong, positive, nonlinear relation between support for capital punishment and the violent crime rate was revealed... The increasing public support for the death penalty began sometime between 1966 and 1969, about three years after relatively large increases in the official violent crime rate (F.B.I.). Law and order and crime in the streets were campaign issues in the 1968 elections, creating an atmosphere which sensitized the American public to the crime problem.” However, apart from a temporary jump between the 1966 and 1967 polls, support for the death penalty did not actually begin to consistently increase until after 1971 (see footnote 160).

<sup>189</sup> Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004), 111 notes that, “[n]ational surveys also indicate a sharp increase, albeit concentrated in the late 1960s and early 1970s, in the percentage of Americans critical of their local courts. In 1965, 48.9% of respondents expressed the view that the courts in their area ‘do not deal harshly enough’ with criminals. By 1969, that percentage had increased to nearly 75%, and between 1976 and 1995, approximately 80% of respondents expressed this view. In 1994, the same year 52% of Americans identified crime as the nation’s most important problem, a record 85% also reported that the courts were not harsh enough. Since then, however, the percentage of Americans complaining about the lenience has declined, dropping to 68% in 2000.”

<sup>190</sup> “Death Penalty,” Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>.



In December, 1972, Florida signed new legislation restoring the death penalty there.<sup>191</sup> Ninety-seven percent of the National Association of Attorneys General voted in favor of asking Congress and the state legislatures to introduce new death penalty legislation.<sup>192</sup> By 1976, 35 states and the federal government had redrafted laws to enable the use of capital punishment in a manner that complied with the *Furman* ruling.<sup>193</sup> New Mexico, having abolished capital punishment in 1969, reinstated it in 1973.<sup>194</sup> Oregon and Michigan, both of which had banned capital punishment (in Michigan's case, 127 years previously) sought to maintain their authority to use the death penalty, though their bills failed.<sup>195</sup> After 121 years of near abolition, Rhode Island's legislature passed a capital punishment law in 1973 for prisoners who committed murder.<sup>196</sup> Nevertheless, the legislative backlash seems to have occurred mostly in states that had used capital punishment frequently before *Furman*.<sup>197</sup> One strategy to remove arbitrariness and comply with *Furman* was to make capital

<sup>191</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 45.

<sup>192</sup> Corinna Barrett Lain, "Furman Fundamentals," *Washington Law Review* 82, no. 1 (2007), 47.

<sup>193</sup> Carol S. Steiker and Jordan M. Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment," *Harvard Law Review* 109, no. 2 (December 1995), 410, citing Raymond Paternoster, *Capital Punishment in America* (Lanham, Maryland: Lexington books, 1991), 59.

Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 14 similarly notes that "within two years" of the *Furman* decision, "28 states had adopted new death penalty statutes."

<sup>194</sup> Corinna Barrett Lain, "Furman Fundamentals," *Washington Law Review* 82, no. 1 (2007), 48.

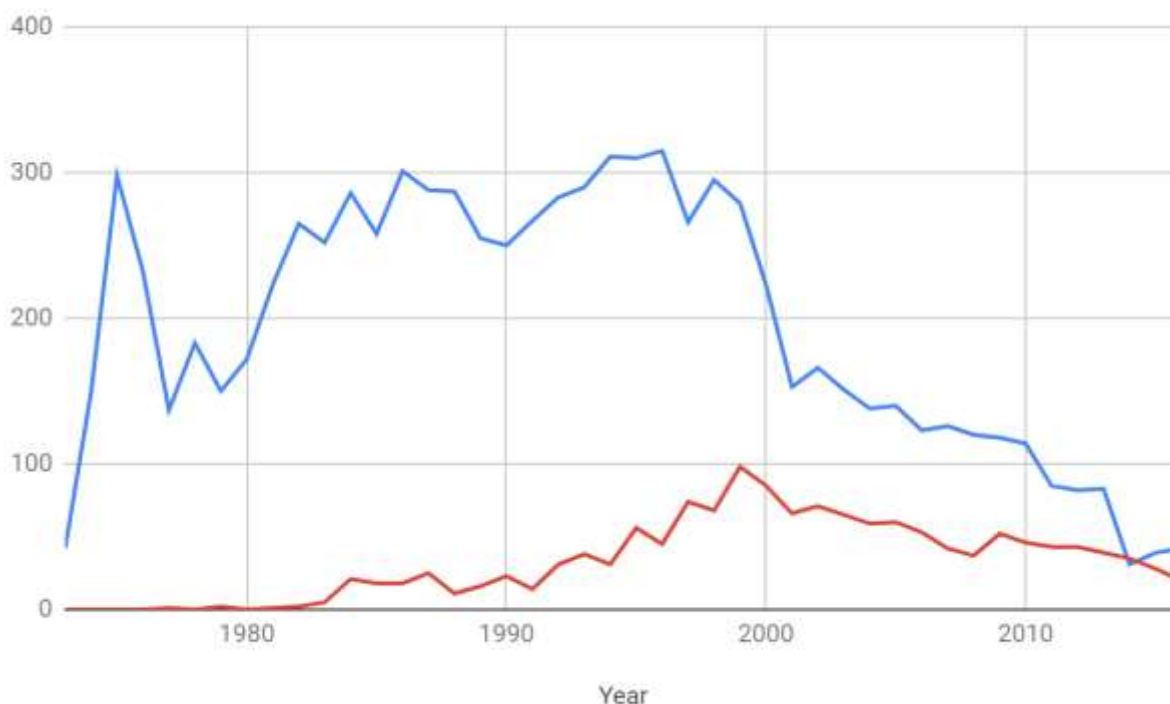
<sup>195</sup> Stephen F. Smith, "The Supreme Court and the Politics of Death," *Virginia Law Review* 94, no. 2 (April 2008), 289. Corinna Barrett Lain, "Furman Fundamentals," *Washington Law Review* 82, no. 1 (2007), 48.

<sup>196</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 222-3 and "Rhode Island," Death Penalty Information Center, accessed November 28, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/rhode-island>. Capital punishment had still been legal in the state for those who committed murder while serving a life sentence.

<sup>197</sup> Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (New York: Cambridge University Press, 1986), 42 note that, "[t]hose states that were abolitionist by legislation prior to *Furman* remained

punishment mandatory for some crimes. This practice was very rare until *Furman*, only having been in use in Massachusetts for combined rape and murder and in Rhode Island and New York for murder while in prison.<sup>198</sup> Sixteen states enacted mandatory death penalty laws after *Furman*.<sup>199</sup>

Figure 3: Death sentences (blue) and executions (red) per year, 1973-2016.<sup>200</sup>



Resistance to *Furman* was especially strong in the South, including among politicians and law enforcement officers.<sup>201</sup> Opponents of *Furman* may have learned from the experience of the *Brown v. Board of Education*

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abolitionist with Oregon as the one exception. Nor did any substantial change of policy occur in those states that had special and very restrictive death penalty provisions. For example, New York, where the public is subject to the same passion about the death penalty as in other states, and which has some of the highest crime rates in the country, currently does not employ it. Nor does Massachusetts, despite a referendum vote in favor of the death penalty and the passage of a bill in the legislature that the governor vetoed.” The following page shows that, in 1986, a similar number of states had the death penalty as had had it before *Furman*.

<sup>198</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 46 and 200. Haines does not specify that these were the only examples, but he describes the practice as having “virtually vanished” and cites these as counterexamples in a footnote.

<sup>199</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 46. However, there was a growing trend for mandatory sentencing at this time that extended beyond the death penalty, with all US states passing at least one mandatory sentencing law between 1975 and 1985, according to Judith Greene, “Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 7.

<sup>200</sup> See the spreadsheet “[Death penalty by year](#).”

<sup>201</sup> Carol S. Steiker and Jordan M. Steiker, “Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,” *Harvard Law Review* 109, no. 2 (December 1995), 406-7. See footnote 174 for quotes that illustrate this opposition.

(1954) desegregation ruling that resistance to implementation, including via litigation and redrafted legislation, could prevent a legal ruling from having practical effect, at least temporarily.<sup>202</sup>

Scholars and pundits describe the 1960s and 1970s as the period when the Republican Party used a “Southern Strategy” to win votes from southern white voters by indirectly appealing to racism.<sup>203</sup> Criminal justice issues were an important part of this indirect discrimination, given racial disparities in crime and punishment,<sup>204</sup> and given that “law-and-order” politics were posed as an alternative to illegal civil rights direct action, as in 1968 Republican presidential candidate Richard Nixon’s television advert campaign that promised to defend “decent citizens” from street crime and civil rights protests.<sup>205</sup> Recent survey evidence suggests that racial prejudice affects attitudes towards capital punishment,<sup>206</sup> so it seems plausible that the messaging and

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Christopher Mooney and Mei-Hsien Lee, “The Influence of Values on Consensus and Contentious Morality Policy: U.S. Death Penalty Reform, 1956–1982,” *Journal of Politics* 62, no. 1 (2000), 223–39 found in “a discrete-time, non-repeating event approach to event history analysis... estimating logit models on pooled cross-sectional data” that a dummy variable for the Southern states was a statistically significant predictor of whether a state reinstated capital punishment in 1972–82, but not a significant predictor of whether it abolished capital punishment in 1952–71.

<sup>202</sup> Carol S. Steiker and Jordan M. Steiker, “Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,” *Harvard Law Review* 109, no. 2 (December 1995), 405–7.

<sup>203</sup> See the references in “Further reading” in “Southern strategy,” Wikipedia, last edited August 1, 2019, [https://en.wikipedia.org/wiki/Southern\\_strategy#Further\\_reading](https://en.wikipedia.org/wiki/Southern_strategy#Further_reading).

<sup>204</sup> Carol S. Steiker and Jordan M. Steiker, “Lessons for Law Reform from the American Experiment with Capital Punishment,” *Southern California Law Review* 87 (2013–14), 746 summarize that, “[c]riminal justice issues proved to be a powerful component of the Southern Strategy, not least because of the ways in which concerns about crime dovetailed with resentments and fears about race. Within the realm of criminal justice issues, the death penalty was one of extremely high salience everywhere, as it worked as effective shorthand for ‘tough on crime’ politics. In the South, with its long-held fears of black-on-white violence and especially rape, the death penalty offered a particularly potent rallying cry for politicians to use to marshal support. The power of the death penalty as a political issue in the years following *Furman* is striking at all levels of government.”

<sup>205</sup> Daniel S. Chard, “Rallying for Repression: Police Terror, ‘Law-and-Order’ Politics, and the Decline of Maine’s Prisoners’ Rights Movement,” *The Sixties* 5, no. 1 (2012), 50 summarizes that “[l]aw-and-order politics entered the mainstream of American political discourse with Barry Goldwater’s failed 1964 presidential bid. In his attempt to defeat Democratic candidate Lyndon B. Johnson, Goldwater capitalized on white Americans’ fears that rising crime rates and civil rights activists’ illegal direct action tactics were leading to a chaotic society governed by ‘the license of the mob and the jungle.’ Four years later, after an unprecedented spike in urban rioting, massive student-led anti-war protests, and still growing crime rates, Republican Richard Milhous Nixon rode a wave of heightened fear to narrowly defeat Democratic candidate Herbert Humphrey with a campaign centered on a promise to deliver ‘law-and-order’ to a nation fraught with social strife. In artfully produced television ads, Nixon’s steady voice, cast over haunting music and graphic images of urban riots and militant youth protests, promised to defend ‘decent citizens’ from the threat of ‘domestic violence’ posed by street criminals and leftist radicals. Nixon’s speeches and television ads conflated radical protest with street crime, and fueled a cultural discourse that interpreted both as products of Kennedy and Johnson era liberalism and an inadequate US criminal justice system. Like Goldwater, Nixon deliberately employed racially coded law-and-order rhetoric in order to appeal to urban whites fearful of increased crime rates and the perceived excesses of the black liberation struggle. As special counsel to the President, John Ehrlichman, explained of his boss’s strategy, ‘that subliminal appeal to the anti-black voter was always present in Nixon’s statements and speeches.’”

See also the paragraph beginning “From the 1950s, conservative governors...” above. Further detail is provided in Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks, CA: Sage Publications, 2004), 52–6.

<sup>206</sup> Lawrence D. Bobo and Devon Johnson, “A Taste for Punishment: Black and White Americans’ Views on the Death Penalty and the War on Drugs,” *Du Bois Review: Social Science Research on Race* 1, no. 1 (2004), 151–80 found results in “a series of survey-based experiments and large, nationally representative samples of White and African American respondents” that “confirm large Black-White differences in opinion with Blacks consistently less punitive than Whites. These differences are substantially a result of beliefs about the extent of racial bias in the criminal justice system.”

mobilization of the Southern Strategy encouraged support for the death penalty. This may have been especially so in the South, where resistance to *Furman* was the strongest.<sup>207</sup>

By the early 1990s, there was a common, yet minority, perception that racial prejudice motivated the law-and-order agenda of politicians; a Gallup poll found that over half of surveyed African Americans and one-third of surveyed whites believed this.<sup>208</sup> The Supreme Court's recent changes to criminal procedures<sup>209</sup> may also have made the ruling more vulnerable to backlash from those who sought harsh policies for criminals.<sup>210</sup> By comparison, rising crime rates in the UK in the 1950s do not seem to have been mobilized for a pro-death penalty or tough-on-crime political position,<sup>211</sup> and political polarization on capital punishment may have decreased there at that time.<sup>212</sup>

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Additionally, "racial prejudice is a consistently large influence on White public opinion and a weaker, but sometimes important influence among Blacks as well."

<sup>207</sup> See footnote 204.

<sup>208</sup> Sandra J. Jones, *Coalition Building in the Anti-death Penalty Movement: Privileged Morality, Race Realities* (Lanham, MD: Lexington Books, 2010), 115.

<sup>209</sup> See the bullet point beginning "The 'criminal procedure revolution'..." above.

<sup>210</sup> Carol S. Steiker and Jordan M. Steiker, "Lessons for Law Reform from the American Experiment with Capital Punishment," *Southern California Law Review* 87 (2013-14), 747 summarize that, "the Court's controversial criminal procedure revolution, in which it extended the right to counsel for indigent defendants in *Gideon v. Wainwright* in 1963, required the (in)famous *Miranda* warnings in 1966, and incorporated the right to trial by jury to apply to the states in *Duncan v. Louisiana* in 1968, among other decisions. Thus, at the time of *Furman*, the Court had already engendered significant backlash from the law enforcement community and from 'tough on crime' politicians, a wave of organized resistance that helped to give *Furman's* backlash the momentum of a running start."

<sup>211</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 108 summarizes that one factor that was "crucial for setting the stage for abolition in England... was the surprisingly non-rancorous nature of the debate on criminal justice policy in England in the late 1950s and 1960s. Despite growing prosperity, crime rose steadily throughout the late 1950s, and became a pressing issue for the Conservative governments of Anthony Eden (who retired in 1957 in the wake of the Suez Crisis) and Harold MacMillan, who governed until 1964. Responding to concern about crime, both Conservative and Labour governments, in the late 1950s and early 1960s, prepared White Papers proposing a sweeping modernization of English criminal justice. Reflecting the approach to crime control which David Garland (1984) has called 'penal welfarism,' English technocrats and civil servants analyzed penal law as one of a series of state interventions in social life designed to address the needs of socially vulnerable populations and support the reintegration of marginalized groups. This approach necessarily entails a view of crime less as a partisan battlefield and more as a social problem in need of humane and well-researched counter-strategies. Thus, it was a Conservative government that published, in 1959, a landmark White Paper called *Penal Practice in a Changing Society*, which proposed sweeping changes to the British criminal justice system, including the establishment of a center of criminology to study the root causes of crime, expanding and modernizing the prison system with an emphasis on rehabilitation, developing alternative sentencing practices to keep young offenders out of prison, streamlining the criminal adjudication process, modernizing psychiatric and psychological care in prisons, and building up prison after-care programs to ease former prisoners' transition into society. Regardless of the tone of the debate in broader society, the bureaucratic elite of post-war Britain valued a 'modern' approach to crime and punishment. MacMillan's Conservative government continued to issue White Papers along similar lines until its ouster in the 1964 general elections. Broadly similar policies were pursued by MacMillan's Labour successors."

<sup>212</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 108 notes that, "[o]ne recent estimate suggests that in the decade after 1957, the proportion of abolitionists within Conservative ranks doubled from one-eighth of all MPs to one-quarter." On page 168, Hammel adds that, "Conservative Party leader Ted Heath's openly abolitionist views lent decisive impulses to the abolition movement in the late 1960s by giving hesitant Tories cover to vote against the views of their constituents." Nevertheless, at various points in the chapter, Hammel describes the Labour Party as more strongly anti-death penalty than the Conservative Party. On page 187, Hammel also notes that whether or not to keep capital punishment "became an issue of conscience which was felt to be appropriate for 'free votes' (Great Britain)."

In the face of the backlash among legislators and the public, the LDF sought better empirical research to encourage continued judicial restrictions on capital punishment.<sup>213</sup> After discussion with the LDF, the ACLU agreed to take responsibility for the legislative efforts of the ADPM, but until 1978, the directors of the ACLU's Capital Punishment Project (CPP) were volunteers. At the state level, ACLU affiliates were involved in legislative campaigns in California, Kansas, New Jersey, and Vermont, using tactics including letter-writing and telephone campaigns, community meetings, and lobbying. However, one of the CPP directors wrote in a letter to ACLU leadership that, "[b]ecause the death penalty project is not as current as 'Privacy' or as dramatic as 'Rights of Children,' the smaller overworked affiliates are forced to make decisions and many of our project's activities have lost-out." They added that many members felt "that this is one project that can slide until the issue is before the Supreme Court again."<sup>214</sup>

The North Dakota legislature had already abolished the death penalty in 1915 for all crimes except treason and murder committed by an inmate already serving a life sentence. These last remaining capital crimes were removed in 1973.<sup>215</sup>

In 1975, the Washington state legislature abolished the death penalty, though new mandatory death sentencing laws were reinstated in the same year through Initiative 316,<sup>216</sup> which had 69% public approval.<sup>217</sup> The new law was found unconstitutional by the Washington Supreme Court, though the legislature introduced a law to comply with constitutional requirements in 1981.<sup>218</sup>

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<sup>213</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 48 notes that, "[t]he biggest obstacle facing the research effort [to support legislative and legal efforts in 1972-6] was a lack of funding. With the sole exception of Marvin Wolfgang's LDF-financed investigation of rape sentencing, no study of capital punishment in the United States had ever received monetary support. In early 1973, Bedau secured a \$32,000 grant from the Russell Sage Foundation to coordinate the development of a research agenda, and over the next six months, he and sociologist Elliot Currie met with over 100 invited academics at research centers across the nation. Attempts during 1973 and 1974 to secure additional funding for a five-year, \$150,000 capital punishment research project were unsuccessful. Nevertheless, 25 research ideas were developed. Only two of these were funded and under way by mid-1974, but other studies were initiated after the Sage project folded."

<sup>214</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 50.

<sup>215</sup> "North Dakota," Death Penalty Information Center, accessed October 21, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/north-dakota>.

Justice Dale V. Sandstrom, "Four Capital Murder Trials Since the Last Execution in 1905" (September 7, 2006) <https://www.ndcourts.gov/about-us/history/four-capital-murder-trials-since-the-last-execution-in-1905> notes that, "[t]he last man sentenced to death by hanging was spared in 1915 when the North Dakota legislature retroactively abolished the death penalty for most cases." Sandstrom adds that, "[t]he 1973 legislature, as part of North Dakota's new criminal code, abolished the death penalty for all state crimes, effective July 1, 1975."

<sup>216</sup> "Washington," Death Penalty Information Center, accessed October 21, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/washington>.

<sup>217</sup> "Washington Mandatory Death Penalty for Aggravated Murder, Initiative 316 (1975)," Ballotpedia, accessed October 21, 2019, [https://ballotpedia.org/Washington\\_Mandatory\\_Death\\_Penalty\\_for\\_Aggravated\\_Murder,\\_Initiative\\_316\\_\(1975\)](https://ballotpedia.org/Washington_Mandatory_Death_Penalty_for_Aggravated_Murder,_Initiative_316_(1975)).

<sup>218</sup> "Washington," Death Penalty Information Center, accessed October 21, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/washington>.



In 1976, after a period of systematically commuting all death sentences, the Canadian Parliament abolished death sentences. In 1987, a bill to move towards restoring capital punishment was rejected despite majority public support for the practice.<sup>219</sup>

In 1976, the US Supreme Court considered five cases, collectively abbreviated as *Gregg v. Georgia* (hereafter, *Gregg*), where the defendants sought a ruling that the death penalty was always “cruel and unusual.” On July 2 of that year, the court upheld the death penalty in these cases by seven-to-two, defining “cruel” punishment as punishment that is “so totally without penological justification that it results in the gratuitous infliction of suffering.”<sup>220</sup> The judgement noted that the concerns of arbitrary imposition expressed previously in *Furman* could be addressed through “carefully drafted statute,” which would mean that the death penalty could then be applied in a constitutionally acceptable manner. The passage of state legislation in response to *People v. Anderson* (California’s ruling against the death penalty) and *Furman* (the federal Supreme Court’s ruling against the death penalty) seems to have been important in the decision.<sup>221</sup> On the accusation that the death penalty was an ineffective deterrent, the Supreme Court concluded that, “there is no convincing empirical evidence either supporting or refuting this view.”<sup>222</sup> Two Supreme Court judgements issued on the same day as the *Gregg* ruling clarified that capital punishment could be constitutional but that mandatory capital punishment could not.<sup>223</sup>

Following these judgements, Gallup polls found a temporary decrease in support for the death penalty for murder, falling from 66% support in April 1976 to 62% support in March 1978.<sup>224</sup> However, a paper by Timothy R. Johnson and Andrew D. Martin found no significant difference in public support before and after the *Gregg* decision, as measured through the General Social Survey.<sup>225</sup>

In 1976 and 1977, *The New York Times*’ coverage of the death penalty was unusually frequent (around 180 and 190 articles compared to around 50 in the previous year) and very slightly more critical of the death penalty

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<sup>219</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 45.

<sup>220</sup> “*Gregg v. Georgia*,” US Supreme Court (July 2, 1976), <https://caselaw.findlaw.com/us-supreme-court/428/153.html>, cited in John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 240.

<sup>221</sup> “*Gregg v. Georgia*,” US Supreme Court (July 2, 1976), <https://caselaw.findlaw.com/us-supreme-court/428/153.html>. They noted that, “[l]egislative measures adopted by the people’s chosen representatives weigh heavily in ascertaining contemporary standards of decency.”

<sup>222</sup> “*Gregg v. Georgia*,” US Supreme Court (July 2, 1976), <https://caselaw.findlaw.com/us-supreme-court/428/153.html>.

<sup>223</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 240 summarizes that, “[t]hrough mandatory death penalty laws were struck down that same day in cases originating in Louisiana and North Carolina, *Gregg* and two other simultaneously issued rulings, *Jurek v. Texas* and *Proffitt v. Florida*, upheld capital punishment statutes that guided, or channeled, sentencing discretion.”

<sup>224</sup> “Death Penalty,” Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>. However, following this, the rise in support continued. In January to February 1981, support had risen back to 66% and support continued to trend upwards to a peak of 80% support in September 1994.

<sup>225</sup> Timothy R. Johnson and Andrew D. Martin, “The Public’s Conditional Response to Supreme Court Decisions,” *American Political Science Review* 92, no. 2 (June 1998), 299-309.

than in surrounding years.<sup>226</sup> These changes in the *New York Times*' coverage were not matched closely by magazine coverage of the death penalty, however.<sup>227</sup>

From 1976-82, five of the six executed convicts were white, and four of the six chose not to appeal their death sentences. These two unusual features of the first few executions after *Gregg* may have allayed concerns about the return of capital punishment.<sup>228</sup> Nevertheless, *Gregg* seems to have sparked resistance from the ADPM. The National Coalition Against the Death Penalty (NCADP, later renamed the National Coalition to Abolish the Death Penalty) was formed in 1976. The NCADP brought credibility to the ADPM from its professional and religious affiliate organizations, pressured governors to veto death penalty bills, and encouraged grassroots mobilization via the clergy but had limited funding and influence until the mid-1980s.<sup>229</sup> The group Southern Coalition on Jails and Prisons organized protests against the death penalty on Christmas Eve 1976, and on the weekend after the first post-*Gregg* execution (of Gary Gilmore in 1977) outside prisons, statehouses, and governors' mansions. During Easter 1977, the group gathered between

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<sup>226</sup> Frank E. Dardis, Frank R. Baumgartner, Amber E. Boydston, Suzanna De Boef, and Fuyuan Shen, "Media Framing of Capital Punishment and its Impact on Individuals' Cognitive Responses," *Mass Communication & Society* 11, no. 2 (2008), 122-4.

<sup>227</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 127 notes that the authors "validated our use of the *New York Times* as a proxy for national media coverage in two ways: first, by comparing the *Times* to the *Readers' Guide to Periodical Literature*, second, by comparing the *Times* to available data from nine other major U.S. newspapers archived by Lexis-Nexis. We began by taking a count of the death penalty articles listed in the *Readers' Guide*, which catalogues all articles published in nearly 400 general interest magazines." Page 128 shows that the "net tone of *Readers' Guide* coverage" dropped from 0 "Pro-Stories Minus Anti-Stories" in 1964 to around -12. In 1966 and 1977, the number appears to be only slightly below 0 (perhaps 1 and 2), which is much more typical; the number was between -5 and +1 for every year between 1960 and 1983 except for 1965. 1965 also saw a spike in total coverage to around 20 stories; in 1966 this fell to around 10.

<sup>228</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 59.

<sup>229</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 62 notes that, "NCADP was intended to fill much the same role as the defunct American League to Abolish Capital Punishment: to serve as a national voice of the abolitionist community — at least those who were not litigators — and to stimulate and coordinate anti-death penalty activities on the part of its affiliates. The coalition took a very long time to achieve organizational viability. For the first five years of its existence, the NCDAP was virtually a one-person affair, operating from Henry Schwarzschild's [an ACLU employee and the main organizer of the NCADP] desk at the ACLU headquarters in New York. The coalition did not acquire its first 'office' until 1983, when the American Friends Service Committee provided a desk at its Philadelphia headquarters. The NCDAP had virtually no money in those years; major contributions for 1981 totaled only \$9,200. Its organizational affiliates numbered around 50 from 1977 to 1979, and there were 40 state coalitions in place in 1979. Most of these state coalitions, however, existed mostly on paper, with no office, no paid staff, and minimal funding."

Organizational affiliates included "the U.S. Catholic Conference, the United Methodist and United Presbyterian churches, the National Urban League, the National Council on Crime and Delinquency, and the American Orthopsychiatric Association."

On page 69, Haines describes Schwarzschild as also being the most important individual in the ACLU's Capital Punishment Project from 1977-90, which provided "public education" and "policy advocacy," including testifying in hearings, engaging with radio and television audiences, and making "as many as 150 speeches a year."

1,000 and 3,000 protestors at the Atlanta state capitol. The group had Christian origins, and the protests were vigils with prayers.<sup>230</sup>

Similar protests and vigils continued through the 1970s. Haines notes that until the mid-1980s, “abolitionists refused to let a convict be put to death without their being there to bear witness,” though they were “often outnumbered by boisterous pro-death penalty demonstrators on hand to celebrate the imminent demise of a convicted murderer.”<sup>231</sup> Some activists also held direct action sit-ins against governmental targets and used publicity stunts such as dumping fake execution victims on a public building’s steps and performing street theater.<sup>232</sup> Despite some internal disagreement, Amnesty International USA (AIUSA) also adopted an increased focus on the death penalty, holding a major news conference at the UN headquarters in New York in 1979 and having 100 local groups with death penalty coordinators by June 1980.<sup>233</sup> Amnesty International had been formed in 1961; it had initially focused on securing the release of political prisoners through letter-writing and pressuring law enforcement agencies and governments but had already become active in the European ADPM.<sup>234</sup> Haines characterizes public-facing “political abolitionism” in the late 1970s and early 1980s as “weak and ill formed”; the movement remained “lawyer-dominated.”<sup>235</sup>

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<sup>230</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 59-60. The initial protests occurred in 9 separate states. The Atlanta protests were supported by smaller demonstrations in “Philadelphia and other cities.”

<sup>231</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 60. After this, Haines claims that, “activists shifted attention from witnessing to finding attorneys to handle the appeals of the growing list of inmates facing execution dates.”

<sup>232</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 60, notes that, “[a]s the 1979 execution of John Spenkelink approached in Florida, several PAX [People Against Executions] activists, along with Spenkelink’s mother Lois, chained themselves to the fence around Governor Bob Graham’s home and briefly occupied his office in hopes of being arrested. Graham refused to have the protestors arrested, but their action achieved a good deal of publicity anyway. The same year, PAX organized an event in Washington, D.C., called ‘Florida Day.’ Mock executions were held near the Supreme Court building, and 25 of the nearly 200 participants were arrested when the ‘bodies’ were dumped on the building’s steps. PAX protesters attempted to disrupt Governor Graham’s speech renominating President Jimmy Carter at the 1980 Democratic National convention. During the speech, Lois Spenkelink stood in front of demonstrators in black robes and hoods who hoisted a large banner reading ‘Governor Graham killed my son.’ The group also held a sit-in at the Georgia governor’s office, demonstrated against the execution of Robert Sullivan in 1983, and performed abolitionist street theater in San Francisco.”

<sup>233</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 65-70.

<sup>234</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 63-4. Haines notes that its tactics included letter writing campaigns, information distribution, and engagement with the media. In 1971, AI requested the United Nations and Council of Europe “make all possible efforts” to eliminate capital punishment globally and in 1977, it organized a global conference against the death penalty in Stockholm, with 200 delegates from 50 nations. AI brought international pressure to bear on US death penalty cases. Pala Cooper had her sentence commuted after one such campaign, involving a petition signed by over a million Italians and a call for mercy from the Pope.

Akira Iriye, Petra Goedde, and William I. Hitchcock, *The Human Rights Revolution: An International History* (Oxford: Oxford University Press, 2012), 9 note that Amnesty International “showed a marked preference for cases with sensationalist potential because they promised greater publicity.”

<sup>235</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 71-2. Such claims are difficult to assess without information about the revenues of different groups and the expenditures on different tactics.

A working paper by undergraduate student Marnie Lowe “coded instances of published [anti-death penalty] movement speech in *The New York Times* and *Los Angeles Times* for the frames they feature... from 1965 to 2014.” By Lowe’s categorization, the second chronological era analyzed, 1976-85, saw an increase in the use of “moral” (as opposed to “instrumental”) arguments by legal advocates as the primary frame quoted in newspaper articles. The rise was to 75%, up from 41% in the 1965-75 era; use by activists and anti-death penalty movement sympathizers remained similar. In contrast, by 1993, legal advocates had ceased to use moral framings entirely. In Lowe’s categorization, focus on discrimination, arbitrariness, innocence, and errors are classified as “instrumental,” rather than “moral” framings.<sup>236</sup>

From 1977 to 1999, most executions occurred in the South, which may have been due to the higher homicide rates and to differences in how states provided defense lawyers,<sup>237</sup> as well as longer-term cultural and political factors.<sup>238</sup>

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<sup>236</sup> Marnie Lowe, “Resonance, Radicalism, and the Death Penalty: A Framing Analysis of the Anti-Death Penalty Movement, 1965-2014” (April 2018), <https://escholarship.org/content/qt9sg5t66n/qt9sg5t66n.pdf>. On pages 11-12, Lowe explains that this was based on “a population of articles, which either a) were written by an ADP movement participant or b) featured the perspective of an ADP movement participant. I considered all speakers who affirmatively advanced an ADP position as movement participants, given that their willingness to have their views published in the newspaper provided a minimum threshold of engagement with the issue. Furthermore, I did not include articles featuring vague references to the views of death penalty opponents; rather, I selected only those articles that contained either a direct quote or a clear reference to a specific statement made by a movement participant... Following this rationale, I also excluded the speech of politicians and judges.” Lowe “opted to review a five-percent sample of the results, sorted by ‘Relevance’ to ensure I would capture the most relevant discourse in my review... From this population, I then selected a systematic random sample stratified by era, which aimed to yield a representative set of documents and allow me to generalize about the ADP movement as a whole. Specifically, I first sorted the population within a given era by publication date. Within that population, I then sampled articles at an interval that would yield at least thirty articles, distributed proportionally by publication date. Repeated across each of the five eras, this process yielded a final sample size of 154 documents.” On page 13, Lowe explains that they coded by “three main types of movement participants: activists, who affiliate with movement groups or otherwise deliberately engage in policy debates and legislative efforts toward reform or abolition; advocates, who litigate on behalf of the capital clients they represent; and sympathizers, who lack official affiliation with movement groups but affirmatively oppose the death penalty.

On 14, Lowe notes that they “sorted these frames into categories, and then further classified the categories into two larger clusters, instrumental or moral. Instrumental frames refer to the group of frames that contain objections to the death penalty based on its effects, including problems with its procedures, applications, and material costs. Frames included in the moral cluster, by contrast, invoke both secular and religious concerns about the fundamental nature of capital punishment and its violation of humanity, dignity, or civilized values. While many of the frames implicate both moral and instrumental reasoning, I conceive the key difference to be the inherence of the moral objection, compared to the solvability of the instrumental objection... For each article, I coded both the primary frame the movement participant used, as well as other frames present within their discourse.”

The categorization by era revolves around Supreme Court decisions. Changes in categorization could substantially affect the results. Other limitations are listed on page 16. The appendix on page 38 provides a table that clarifies the frame classification system used.

<sup>237</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 278-9. Banner notes that, “[o]f the 598 executions conducted between 1977 and 1999, all but a handful took place in the South. Texas was the leader, with 199, followed at some distance by Virginia (73), Florida (44), Missouri (41), Louisiana (25), South Carolina (24), Georgia (23), Arkansas (21), Alabama (19), Arizona (19), Oklahoma (19), and North Carolina (15). The leader among the northern states was Illinois, with only 12.”

<sup>238</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 17 note that “[s]cholars and activists often refer to the swath of currently active death penalty states in the American South as the ‘death belt,’ a play on the term ‘Bible Belt’ that is used to describe essentially the same region. The distinctive Southern embrace of capital punishment is in large part a product of the South’s historical

In 1977, the *Coker v. Georgia* Supreme Court ruling found that imposing the death penalty for the rape of an adult woman was a “grossly disproportionate and excessive punishment.”<sup>239</sup> From 1977 onwards, various other Supreme Court rulings restricted the types of cases for which capital punishment was eligible for use.<sup>240</sup> For example, *Godfrey v. Georgia* (1980) prohibited death sentences based on vaguely defined aggravating

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practice of chattel slavery and of slavery’s enduring racial legacy long after the end of the Civil War. One of the strongest predictors of a state’s propensity to conduct executions today is its history of lynch mob activity more than a century ago. Given this connection, it is no surprise that the current map of active death penalty states is predominantly a map of the former Confederacy; not a single state from that region is among the twenty-nine states that either have abolished capital punishment or have conducted no more than three executions since 1976.”

On page 20 they summarize that, “[t]he racial resonances of the death penalty extended well beyond the era of Reconstruction. Franklin Zimring, who documented the connection between executions today and lynchings at the turn of the twentieth century, hypothesized that executions appeal to contemporary Southerners because of the South’s long tradition of vigilante values, of which lynchings were the most dramatic manifestation. Sociologist David Garland offered a broader, complementary account of the contemporary meanings of capital punishment in the South: ‘Support for the death penalty [in the South in the late twentieth century] became a marker of respect for states’ rights and traditional authority; a respectable (that is to say, not openly racist) means of asserting that the civil rights movement had gone too far; and a vehicle for Southern resentment about interference by Northern liberals.’”

On page 119 they note that, between 1977 and 2015, “[o]ver a quarter of executions conducted outside of the South and its borders (55 out of 201) involved ‘volunteers’—defendants who had given up their appeals. In contrast, only about 7 percent (83) of the 1,209 executions conducted in the twelve leading Southern and border executing states involved volunteers. The enormous disparity in executions between symbolic and executing states is not traceable to significant differences in death-sentencing rates.” On pages 119-53 they explain the importance of issues such as access to effective legal counsel in determining execution rates.

See also footnotes 29 and 72 and the paragraphs beginning “Resistance to *Furman* was especially strong...” and “In the 1960s and 1970s, the Republican Party...” in the section on “A Condensed Chronological History of the US Anti-Death Penalty Movement” above.

<sup>239</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 275.

<sup>240</sup> Carol S. Steiker and Jordan M. Steiker, “Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,” *Harvard Law Review* 109, no. 2 (December 1995), 371-2 summarize these efforts as focusing on ensuring that, “the death penalty is reserved for the most deserving defendants,” which was “reflected in [the Supreme Court’s] proportionality decisions as well as in the requirement that states narrow death-eligibility through the use of ‘aggravating’ circumstances or their functional equivalent. The equality and fairness concerns of *Furman* are addressed by doctrines focusing on the related effort to channel sentencer discretion at all stages of the decisionmaking process. The Court’s insistence on ‘individualized’ sentencing is matched by a series of doctrines concerning a defendant’s right to present and have considered mitigating evidence that may call for a sentence less than death. The remainder of the Court’s death penalty decisions collectively define the requirement of ‘heightened reliability’ in capital proceedings (including, among other things, the selection of the capital jury, the cognizability of ‘innocence’ claims, and the permissibility of certain kinds of prosecutorial argument).” On pages 372-401, they describe the details of these four areas of regulation, including their limitations.

Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 56 lists several less important judgements passed in 1977-82.

circumstances,<sup>241</sup> *Ford v. Wainwright* (1986) prohibited the use of capital punishment on the insane,<sup>242</sup> and *Thompson v. Oklahoma* (1988) prohibited execution of those aged fifteen or younger.<sup>243</sup>

Having voted against the death penalty in 1914 and 1964, the people of Oregon voted to reinstate it in November 1978 and in 1984 (after the 1978 law was declared unconstitutional) through referenda.<sup>244</sup> In 1979, the Supreme Court of Rhode Island declared that the capital punishment law that had been introduced in the state after *Furman* constituted cruel and unusual punishment.<sup>245</sup> No one was ever executed under the post-*Furman* law. Indeed, no one has been executed in the state since 1845, and in 1984, the legislature removed the death penalty from the state's penal code.<sup>246</sup>

From 1982 onwards, several studies began to show that capital punishment was more expensive than alternatives.<sup>247</sup> Until the results of such studies became widely known, pro-death penalty advocates seem to have used cost arguments to their advantage.<sup>248</sup>

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<sup>241</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 56.

<sup>242</sup> John D. Bessler, "Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement," *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 274.

<sup>243</sup> David M. Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America* (Lawrence, KS: University Press of Kansas, 2010), 128.

<sup>244</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 17.

<sup>245</sup> Charles S. Lanier, "The Death Penalty in the Northeast," *Criminal Justice Policy Review* 10, no. 1 (1999), 18. Lanier notes that, "[j]oining in the legislative scramble in response to *Furman*, Rhode Island rid its statute of any discretionary provisions when it re-authorized mandatory capital punishment for specified offenses. Several years later, though, the High Court declared in *Woodson v. North Carolina* (1976) that the mandatory imposition of the death penalty was unconstitutional. Predicating their response on the U.S. Supreme Court ruling in *Woodson*, the Supreme Court of Rhode Island held in 1979 'that the present death-penalty... amounts to cruel and unusual punishment and thus violates the Eighth Amendment to the United States Constitution' (*State v. Cline*). A recent attempt to restore the death penalty in Rhode Island was defeated in the Spring of 1996."

<sup>246</sup> "Rhode Island," Death Penalty Information Center, accessed October 21, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/rhode-island>.

<sup>247</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 83-4 notes that, "it soon became apparent that capital punishment was no longer a bargain. A study by the New York State Defenders Association [in 1982] was among the first to show why this is so... The results of the study revealed that whereas the execution itself might be inexpensive, the costs of delivering an inmate to the execution chamber would not be... the cost of a death penalty *trial alone* — nearly \$1.5 million — would exceed the cost of sentencing the same defendant to prison for the rest of his or her life — \$602,000."

Jolie McLaughlin, "The Price of Justice: Interest-Convergence, Cost, and the Anti-Death Penalty Movement," *Northwestern University Law Review* 108, no. 2 (2013), 689 notes that, "[a]round the turn of the twenty-first century, research conducted by newspaper reporters and academics in various states began to reveal the high costs of the modern death penalty system. For example, in 1988, *The Miami Herald* reported that the cost of the death penalty in Florida was \$3.2 million per execution compared to \$600,000 for life imprisonment. Similarly, *The Dallas Morning News* reported in 1992 that the trials and appeals of a capital case alone cost Texas \$2.3 million per case on average, which was approximately three times the cost of imprisoning someone for forty years. In 1993, a report by professors at Duke University found that the death penalty cost North Carolina \$2.16 million more per execution than murder cases with the sentence of life imprisonment."

<sup>248</sup> Jolie McLaughlin, "The Price of Justice: Interest-Convergence, Cost, and the Anti-Death Penalty Movement," *Northwestern University Law Review* 108, no. 2 (2013), 688-9 notes that in *Furman*, Justice Marshall had noted that, "there can be no doubt that it costs more to execute a man than to keep him in prison for life," but in 1983, one death penalty supporter, Ernest van den Haag, had asserted the opposite.

In 1983, the Supreme Court ceased consistently ruling in favor of criminals sentenced to death. From 1976-83, the Court had ruled in favor of 14 of the 15 appeals for death-sentenced criminals that had been fully argued in the Court. In 1983-4, however, the Court allowed a variety of loosening of the restrictions on capital punishment, such as seeming to permit inconsistent application of the death penalty in *Pulley v. Harris* (1984).<sup>249</sup> In 1983 and 1984, *The New York Times*' coverage of the death penalty may have been unusually frequent relative to the years that directly preceded and followed.<sup>250</sup>

In 1983, the Council of Europe (CoE) added Protocol No. 6 to the European Convention on Human Rights, which abolished the death penalty, except "in respect of acts committed in time of war or of imminent threat of war."<sup>251</sup>

In the same year, the first of many innocence projects — university groups led by attorneys and professors of law or journalism that made use of student volunteers to expose errors in death sentencing — was set up in Princeton, New Jersey. By 2006 the group, Centurion Ministries, had helped to exonerate 14 convicts, predominantly from life sentences or death sentences.<sup>252</sup>

Massachusetts abolished capital punishment in 1984. Abolition was driven by a Massachusetts Supreme Judicial Court decision in spite of the *Gregg* decision and an amendment to the state's constitution approved by voters two years before that noted, "[n]o provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death."<sup>253</sup> Previous political efforts had led to the passage in 1951 of a sentencing law that allowed juries to recommend that life imprisonment be imposed instead of the death penalty, but abolition legislation had failed on multiple occasions, despite anti-death penalty lobbying and the report of a state-appointed commission which had encouraged abolition. The state's voters had also

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Though not citing these claims, Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 83 notes that, "[s]upporters of capital punishment are often heard to say that one of its many advantages is its cheapness... At one time, the financial advantage of executing criminals was self-evident."

<sup>249</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 74-6 lists 6 decisions that loosened restrictions in these two years and more in the remainder of the 1980s.

<sup>250</sup> Frank E. Dardis, Frank R. Baumgartner, Amber E. Boydston, Suzanna De Boef, and Fuyuan Shen, "Media framing of capital punishment and its impact on individuals' cognitive responses," *Mass Communication & Society* 11, no. 2 (2008), 122-4 note that there were around 130 and 150 articles in 1983 and 1984 respectively compared to around 80 and 75 in the two previous years. There were around 30 more hostile than supportive articles in 1983 and around 25 more supportive than hostile articles in 1984, compared to roughly even coverage in the previous two years.

<sup>251</sup> "European Convention on Human Rights," European Court of Human Rights, accessed June 26, 2019, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>252</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 57.

<sup>253</sup> Alan Rogers, "Success-At Long Last: The Abolition of the Death Penalty in Massachusetts, 1928-1984," *Boston College Third World Law Journal* 22, no. 2 (2002), 350-3.

John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 221 note that, "[i]n 1984, another capital punishment law was passed by the [state] legislature and signed by the governor, only to be found unconstitutional—the third time within a decade."

rejected abolition in a referendum in 1968.<sup>254</sup> A pro-death penalty Republican governor failed to push death penalty bills through the state legislature in 1994 and 1995, so he attempted to introduce similar proposals through a ballot initiative. However, the specifics of the Massachusetts Constitution prevented the use of ballot initiatives to reinstate capital punishment.<sup>255</sup> In 1998, state legislators rejected reinstatement legislation by a single vote<sup>256</sup> despite a poll the previous year finding 74% public support for the death penalty for those who murdered a child.<sup>257</sup> Anti-death penalty advocacy by the Pope and by Massachusetts Catholic bishops helped to encourage legislators to reject death penalty legislation again in 1999.<sup>258</sup>

From the mid-1980s, the number of annual exonerations from death row seems to have begun to gradually increase, albeit with high variation between years: Between 1973 and 1985, there were between zero and four exonerations per year (mean 1.8), which increased to between one and thirteen in 1994-2006 (mean 5.3). By March 2007, the cumulative total of exonerations since 1973 was 123.<sup>259</sup>

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<sup>254</sup> Alan Rogers, "Success-At Long Last: The Abolition of the Death Penalty in Massachusetts, 1928-1984," *Boston College Third World Law Journal* 22, no. 2 (2002), 281-353. In Massachusetts, no executions had taken place since 1947. This was partly due to refusals by governors to carry out court-ordered death sentences and partly due to the alternative sentencing law that was passed in 1951 following advocacy from the Massachusetts Council Against the Death Penalty (MCADP).

The MCADP had focused on lobbying legislators, appearing annually before the Joint House-Senate Judiciary Committee, despite the advice of the ALACP to focus on campaigning for a referendum. Rogers adds that, "[t]hese annual appeals urged lawmakers to enact a bill abolishing the death penalty, a law permitting jurors to recommend mercy, and a resolution establishing a commission to study capital punishment. The second prong of the MCADP's strategy focused on specific capital cases to illustrate to legislators and to fix public attention on the glaring imperfections of murder investigations and capital procedure. Of course, Ehrmann also wanted to bring as many people as possible into the abolition campaign, but she was interested chiefly in recruiting political, religious, and civic leaders, men and women whose names flanked the MCADP's letterhead. Third, Ehrmann brought pressure to bear on sitting governors not to sign execution orders." At other points on pages 285-313, Rogers notes that the MCADP's tactics included maintaining connections with individual politicians, including the state's governors, letter-writing campaigns to legislators, and inviting Boston's mayor to become vice-chairman of the MCADP.

In 1957, the legislature appointed a commission to study capital punishment in the state. The commission concluded that the risk of executing innocents was too high to justify the use of capital punishment in the state, but the House rejected an abolition bill that followed the commission's report. Following the election in 1962 of a Democratic governor who publicly opposed the death penalty, another abolition bill was debated; the MCADP had competed with the Massachusetts Police Chiefs' Association in their lobbying efforts. In 1968, a referendum was held on the issue, encouraged by the governor at the time; 49% voted in favor of retaining the death penalty, 31% voted against it, and 20% left their ballot blank. The legislature's efforts to reinstate mandatory death sentencing after *Gregg* were blocked by the governor's veto in 1973 and the Supreme Judicial Court's *Commonwealth v. O'Neal* ruling in 1975.

<sup>255</sup> Alan Rogers, *Murder and the Death Penalty in Massachusetts* (Amherst, MA: University of Massachusetts Press, 2008), 398-9. Rogers explains on page 399 that, "Attorney General Harshbarger spoiled [governor William F.] Weld's plan. He ruled against placing the proposal on the ballot because Article 48 of the Massachusetts Constitution limits the kinds of law citizens can enact through the ballot process. Specifically, Article 48 prohibits any proposal relating to the court's powers... After Weld was reelected, his commitment to the ballot initiative evaporated."

<sup>256</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 221.

<sup>257</sup> Alan Rogers, *Murder and the Death Penalty in Massachusetts* (Amherst, MA: University of Massachusetts Press, 2008), 400.

<sup>258</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 221.

<sup>259</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydstun, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 41. On pages 42-3, they note that the rise of DNA testing does



## 1986-97: Peak support for the death penalty, some setbacks, some successes, and the beginnings of the ADPM's shift towards messages and asks with broader appeal

Kirchmeier summarizes that in 1986, “Chief Justice Rose Bird and two other California Supreme Court justices were voted off the bench following a political campaign that focused on their votes on reversing death sentences.” Similarly, “in a 1996 retention election, Tennessee Supreme Court Justice Penny J. White was voted off the bench after a number of groups campaigned against her because of one decision in which she voted for a new death sentencing hearing for a defendant.”<sup>260</sup> These examples may be indicative of a wider trend of public support for the death penalty encouraging a more pro-death penalty attitude among elected judges. Looking at state Supreme Courts, political scientists Paul Brace and Brent D. Boyea (2008) found that public opinion has no direct effect on the likelihood that the Courts reverse a capital punishment ruling unless the justices are directly elected; if the justices are elected, the level of public support for the death penalty has nearly twice as much of an effect as the justices’ own political ideology.<sup>261</sup>

In 1986, the *Ford v. Wainwright* Supreme Court ruling prevented the use of capital punishment on the “insane.”<sup>262</sup> In the same year, the American Bar Association set up its Death Penalty Representation Project.<sup>263</sup>

According to Lowe’s content analysis of *The New York Times* and *Los Angeles Times* articles, 1986-1992 saw a downward shift in the use of “categorically wrong” arguments as the primary frame of the ADPM’s quoted or written statements to 27% from 43%. During the same period, there was a temporary increase in “wrong at the edges” framing (up to 13% from 3%) and other moral frames (3%). The years 1986-92 saw the use of moral framings drop substantially by activists (down to 28% from 42%) and legal advocates (down to 60% from 73%); the overall use of moral framings was sustained by an increase in use by movement “sympathizers,” Lowe’s category for individuals who “lack official affiliation with movement groups but affirmatively oppose the death penalty.”<sup>264</sup>

In 1986, Charles Fulwood, the new director of Amnesty International USA’s (AIUSA) death penalty program, conducted a survey to explore aspects of the death penalty that were most unpopular in Florida. Fulwood’s aim was to exploit these concerns to gradually reduce the popularity of the death penalty through targeted

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not fully explain the rise in exonerations. Between 1992 and 2002, there were similar numbers of exonerations due to DNA testing and to other reasons.

<sup>260</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 19.

<sup>261</sup> Paul Brace and Brent D. Boyea, “State Public Opinion, the Death Penalty, and the Practice of Electing Judges,” *American Journal of Political Science* 52, no. 2 (2008), 360-72.

<sup>262</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 274.

<sup>263</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 243.

<sup>264</sup> See footnote 236. Analyzed by year, a divergence in the use of moral and instrumental frames begins earlier, in around 1980, though Lowe only provides a yearly count of uses of frame types, rather than considering the percentage of times that a moral argument was the primary frame.

messaging.<sup>265</sup> The survey found that fewer than half of respondents supported the execution of convicts under 18, people guilty of unpremeditated murders of family members or friends, people with histories of mental illness, or the intellectually disabled. Fulwood stated in a 1992 interview that he decided to “focus on doubt, rather than feeling like you had to convince somebody to be against the death penalty all the time — although we always said, you know, that we are fundamentally opposed to this as a matter of policy, because this is a human rights violation.”<sup>266</sup> Within a few years, there were some legislative victories restricting the application of the death penalty to exclude members of some of these groups. Haines wrote in 1996:

Thirteen states and the federal system have set 18 as the age threshold for death sentencing. Despite widespread public support for the exemption of juvenile offenders, however, no state has taken action to raise its existing statutory age limit. ‘MR bills’ have fared somewhat better. In 1991, a year in which activists devoted a great deal of effort to achieving statutory provisions prohibiting the execution of mentally retarded convicts, such bills failed to pass in 15 of the 16 states where they were introduced. But eight states had enacted them by June 1993. The list grew to ten by mid-1995.<sup>267</sup>

Fulwood also reduced AIUSA’s emphasis on responding to announcements of execution dates with letters requesting clemency; this freed up resources to focus on proactive outreach attacking the broader institution of capital punishment, such as via the media.<sup>268</sup> Shortly afterwards, The Death Penalty Information Center was set up by a public relations firm with “links” to the ADPM to seek better press coverage.<sup>269</sup> This occurred alongside political campaigning by the NCADP in 1992<sup>270</sup> and other anti-death penalty advocates’

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<sup>265</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 92-3. The poll found 84% support for the death penalty but three-quarters of respondents “believed death sentences were applied arbitrarily, and nearly half saw capital punishment as racially discriminatory, biased against the poor, and no more than a short-term solution to more fundamental problems of the criminal justice system.” There was also lower support when people were presented with the alternative of life without parole.

<sup>266</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 93-4. Haines also notes that there was resistance to this strategy in AI’s London headquarters and among other US abolitionists who favored clear and absolute opposition to the death penalty in any form, but that the NCADP and ACLU came to accept the strategy.

<sup>267</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 96.

<sup>268</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 92-3 and 96-8.

<sup>269</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 98-9. Haines notes that, “[t]he DPIC’s annual budget was approximately \$200,000, a substantial sum in comparison to abolitionist organizations.”

<sup>270</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 100-1 notes that the NCADP initiated a campaign to show that candidates were manipulating the death penalty issue. They were able to encourage one Illinois candidate, Carol Moseley Braun, to reassert her opposition to capital punishment, though many Democrats supported the death penalty in the 1994 elections.

efforts to dissuade attorneys from seeking death sentences.<sup>271</sup> Haines argues that these developments represented a shift in the ADPM from reactive tactics to more proactive tactics.<sup>272</sup>

In the 1987 *McCleskey v. Kemp* ruling, the Supreme Court accepted that there was “a discrepancy that appears to correlate with race” but noted that unequal outcomes across races “are an inevitable part of our criminal justice system.”<sup>273</sup> *McCleskey*’s case was rejected five-to-four and Justice Lewis Powell later expressed regret at having voted against it.<sup>274</sup> The decreased willingness of the Supreme Court to proactively make decisions with substantial policy implications may have contributed to this decision.<sup>275</sup> Legal scholar John D. Bessler argues that the rejections in *Gregg* and *McCleskey* “forced death penalty opponents to open new fronts,” noting that, “death penalty foes have begun appealing directly to the American public.”<sup>276</sup> Other scholars have also seen the *McCleskey* case as a watershed moment, symbolizing a decreased interest of the Court in regulating the death penalty.<sup>277</sup> Indeed, legal scholars responded critically to the decision, though this may reflect their general anti-death penalty sentiment rather than the specifics of the case.<sup>278</sup>

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<sup>271</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 101-2. For example, in one case in Oklahoma, activists tried to forestall capital charges against a 16-year-old male charged for murder.

<sup>272</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 96-102.

<sup>273</sup> Cited in John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 241.

<sup>274</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 242.

<sup>275</sup> See footnote 169. Additionally, Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 174-5 argue that, “the Court was confronted with evidence that the Georgia capital system—even with its post-*Furman* safeguards—was plagued by the influence of race. In rejecting the Eighth Amendment challenge, the Court seemed to disavow any authority to recognize one rule in the death penalty context and another for all other punishments... the court worried that ‘if [it] accepted *McCleskey*’s claim that racial bias has impermissibly tainted the capital sentencing decision, [it] could soon be faced with similar claims as to other types of penalty.’”

<sup>276</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 242.

Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 78-9, making a similar point to Bessler, quotes attorney David Bruck, as suggesting that, “[a]fter *McCleskey*, the fight returns to where it was during the years when abolition was gaining ground rather than receding... In our legislatures, our churches, and our labor, professional and community organizations.”

<sup>277</sup> Robert A. Burt, “Disorder in the court: The death penalty and the constitution,” *Michigan Law Review* 85, no. 8 (1987), 1741 summarized that, “[f]or twenty years, the Court has struggled to determine the constitutional status of capital punishment. Broadly speaking, there have been three distinct phases in this effort: the first, beginning in 1968, when the Court announced substantial doubts about the constitutional validity of the death penalty; the second, beginning in 1976, when the Court attempted to appease those doubts by rationalizing and routinizing the administration of the penalty; and the third, beginning in 1983 and culminating this Term in *McCleskey*, when the Court proclaimed the end of its doubts and correspondingly signaled its intention to turn away from any continuing scrutiny of the enterprise.”

<sup>278</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 221 suggests that, “most American law professors are likely death penalty skeptics, although precise numbers are hard to by. The overall tone of commentary on capital punishment in American law journals is critical... A search for law journal articles in the Westlaw online database with the word *McCleskey* in the title yields 27 results. Aside from short articles merely summarizing the decision, almost all of the articles are critical of the Supreme Court decision, and many propose legislative remedies for the problem of racial discrimination in capital sentencing.”

In 1987 in Kansas, new emphasis by anti-death penalty advocates on the costs of implementing the death penalty may have helped to persuade the Kansas Senate to reject a death penalty reinstatement bill by 22 votes to 18.<sup>279</sup> The cost argument may have been influential in Alaska and Minnesota in the following years as well.<sup>280</sup>

Although the additional procedural requirements after *Furman* and *Gregg* had made the concern of executed innocents seem less plausible, studies from 1987 began to emphasize this risk again.<sup>281</sup> Several convicts were discovered to be innocent after coming close to execution in 1989-93.<sup>282</sup>

In 1988, Congress increased the number of offenses for which capital punishment could be used.<sup>283</sup> In the presidential election campaign of that year, Democratic nominee Michael Dukakis opposed the death penalty and was criticized by the Republican campaign of George H. W. Bush for his liberal views on the treatment of convicts, including his support for a prison furlough system while governor of Massachusetts.<sup>284</sup>

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<sup>279</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 86-7 notes that, “[t]estimony against an ill-fated 1986 bill, for example, characterized capital punishment as morally wrong, of no deterrent value, and unfair to minorities. But with the state in the midst of a fiscal crisis that had brought \$60 million in across-the board state budget reductions and significant cuts in human services and health care, the leaders of the Kansas Coalition Against the Death Penalty met with other activists at the NCADP’s November 1986 conference in New Orleans and were persuaded to build their case largely on the question of whether Kansans were willing to foot the bill.” Several researchers — Jonathan Gradess of the New York State Defenders Association and the NCADP, David Gottlieb of the University of Kansas School of Law, and the Legislative Research Department — provided high cost estimates for reinstating the death penalty. On the Kansas Senate, Haines notes that, “[t]he 22-18 outcome came about because six lawmakers who had been expected to support the measure unexpectedly changed their votes... One of those who switched positions cited [cost issues] as the major factor in his change of heart. Others cited moral qualms about the death penalty and the fear that an innocent person might someday be executed... The argument changed the terms of the discussion, allowed the ADP forces to take the initiative, and gave some lawmakers — those who had misgivings about the death penalty but were afraid to go public with those misgivings for fear of incurring the wrath of their constituents and the governor — a new and more acceptable language with which to justify their vote.”

<sup>280</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 87 claims that, “Alaska rejected the death penalty on the basis of the costs of creating a death row, and cost was also a major factor in Minnesota when Governor Carlsen opposed its reinstatement in 1991.” No further detail is provided; the citations are two AIUSA monthly death penalty mailings in 1991 and a telephone interview with Jonathan Gradess of the New York State Defenders Association and the NCADP on November 23, 1992.

<sup>281</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 87-8 notes that in 1987, researchers Hugo Bedau and Michael Radelet identified one execution of a potentially innocent convict since 1976 and a 1992 study by the same authors suggested that 66 erroneous death sentences had been passed in 1985-91, though no additional erroneous executions had occurred.

James S. Liebman, “New Death Penalty Debate: What’s DNA Got to Do with It,” *Columbia Human Rights Law Review* 33 (2001), 527 sees “the publication in early 2000 of Barry Scheck, Peter Neufeld, and Jim Dwyer’s book, *Actual Innocence*” as the second most important development (after the conference on innocence in Chicago, discussed below) in encouraging focus on innocence in the ADPM.

<sup>282</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 88-90 describes the cases of Randall Dale Adams, James Richardson, Clarence Brandley, and Gary Graham.

<sup>283</sup> Stephen F. Smith, “The Supreme Court and the Politics of Death,” *Virginia Law Review* 94, no. 2 (April 2008), 296 notes that, “in 1988 Congress added death as a possible penalty for so-called ‘drug kingpins.’”

<sup>284</sup> David Oshinsky, “What Became of The Democrats?” *The New York Times* (October 20, 1991), <https://www.nytimes.com/1991/10/20/books/what-became-of-the-democrats.html>.

The Supreme Court rulings in *Murray v. Giaratano* (1989), *Teague v. Lane* (1989), and *Coleman v. Thompson* (1991) reduced the ability of those on death row to use legal defenses such as *habeas corpus*.<sup>285</sup>

A 1990 publication listed 34 national organizations and 147 state or local groups that were involved in the ADPM, either as their sole focus or as one of several causes. An additional 20 national religious organizations were listed as having official policies against the death penalty.<sup>286</sup> By 1991, the NCADP had \$221,487 in revenue, having grown over the previous few years, and AIUSA continued to increase its budget for death penalty work.<sup>287</sup> Nevertheless, the movement seems to have been underfunded at both the national and state levels.<sup>288</sup>

Justice Brennan and Justice Marshall — the only two Supreme Court Justices to consistently oppose every judgement upholding the death sentence — retired in July 1990 and June 1991, respectively.<sup>289</sup>

During the 1992 presidential election campaign, Democratic candidate Bill Clinton “talked tough” on crime issues and emphasized that he had enforced the death penalty as governor of Arkansas. Clinton’s attitude contrasted with that of the previous Democratic nominee, Michael Dukakis.<sup>290</sup>

After the murder of a member of the congressional staff of a US senator in Washington D.C., the senator called for a referendum to reinstate capital punishment in D.C. The referendum was opposed by religious leaders and a variety of activists. The referendum was rejected by 68% of voters. In D.C., 80 of the 118

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<sup>285</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 292-3.

<sup>286</sup> National Coalition to Abolish the Death Penalty, *The 1991 Abolitionist’s Directory* (Washington D.C.: National Coalition to Abolish the Death Penalty, 1990), cited in Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 15. Haines adds on the national organizations that, “[s]ome of these organizations, such as the National Coalition to Abolish the Death Penalty and Law Enforcement Against Death, are dedicated exclusively to the abolition of capital punishment. Many others include [anti-death penalty] work as only one of many goals. These include the American Civil Liberties Union, the Fellowship of Reconciliation, and the National Council on Crime and Delinquency.”

<sup>287</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 79-80 notes that the AIUSA’s funding for the death penalty program grew from \$31,475 in 1982-3 to about \$70,000 in 1987-8, with AIUSA devoting “approximately 18% of its Action Unit budget to the death penalty by 1989.” The NCDAP’s funding grew from around \$47,000 in each of 1986 and 1987 to \$73,556 in 1988 and \$137,038 in 1989.

<sup>288</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 81-2 describes Henry Schwarzschild, the main organizer of the NCADP, who was employed by the ACLU, as lacking “even a secretary to handle routine correspondence throughout most of his tenure.” The ACLU leadership consulted other abolitionists “about the best contribution the ACLU could make..., given its limited resources.” Haines adds on page 82 that, “[a]mong the NCADP’s affiliates are a number of state coalitions. But only a handful of these — in particular, coalitions in California, Massachusetts, New York, and Illinois — have substantial resources. Death Penalty Focus of California, itself a coalition, had a budget of over \$141,750 in 1992, up from about \$70,000 in 1990. New Yorkers Against the Death Penalty managed to raise over \$100,000 in grants by the same year, and an anti-death penalty political action committee was established there... Indeed, the movement’s ‘grassroots deficit’ is one of its major impediments.”

<sup>289</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 26.

<sup>290</sup> Judith Greene, “Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act,” in Cyrus Tata and Neil Hutton (eds.) *Sentencing and Society: International Perspectives* (Hampshire, UK: Ashgate Publishing Limited, 2002), 20.

executed had been black and the majority of the voters who rejected the referendum were African Americans. Similar methods of organizing — “block parties, motorcades, and public forums” — were used again to successfully prevent death penalty legislation in 1997.<sup>291</sup>

In 1993, the Roman Catholic sister Helen Prejean published the book *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*. The book attracted a great deal of attention and enhanced the credibility of the ADPM. Sister Prejean showed empathy for the victims of crime, making it hard for conservatives to dismiss her arguments.<sup>292</sup>

Lowe’s research based on *The New York Times* and *Los Angeles Times* articles shows a decline in the use of moral arguments as the primary frame in the ADPM’s public-facing statements during the 1993 to 2003 era to 37% from around 43% during the first three eras (1965 to 1992). Use of moral framings by legal advocates quoted in the sample of articles fell from 60% to 0%.<sup>293</sup>

In 1994, Justice Harry Blackmun — who had dissented from the majority decision in *Furman* to invalidate capital punishment and advocated mandatory death penalty use in *Gregg v. Georgia* — shifted towards opposition to the death penalty. In his dissent to the *Callins v. Collins* case, he renounced the court’s efforts “to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor.”<sup>294</sup> Unlike Justices Brennan and Marshall, his opposition to capital punishment was based upon the unfairness of sentencing.<sup>295</sup> After his retirement, Justice Lewis F. Powell also changed his mind about his former decisions to uphold the death penalty.<sup>296</sup> Since they were Nixon appointees and had previously upheld the death penalty, their views could not be easily dismissed by conservatives.<sup>297</sup>

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<sup>291</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *American without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 206-7.

<sup>292</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 242 and Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 22-5. For a fuller discussion, see the strategic implication “A book by an impartial and credible author could become highly influential” below.

<sup>293</sup> See footnote 236.

<sup>294</sup> Cited in John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 242.

<sup>295</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 27. Kirchmeier points out that Blackmun noted in *Callins v. Collins* that he did have moral objections but he did not base his decision on those views. Kirchmeier adds on pages 27-8 that Blackmun “concluded that *Furman*’s constitutional requirement to eliminate arbitrariness could not be reconciled with the *Lockett v. Ohio* constitutional requirement that each defendant be considered as an individual. Therefore, the system could not work.”

<sup>296</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 28 cites a *New York Times* article: “In truth, it was not a change of heart, but a change of mind—not an emotional conversion to the view that execution is never justified, but a reasoned interpretation of experience. Justice Powell’s experience taught him that the death penalty cannot be decently administered. As actually enforced, capital punishment brings the law itself into disrepute.”

<sup>297</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 29.

Subsequently, Supreme Court Justices Ruth Bader Ginsburg, Sandra Day O'Connor, and John Paul Stevens have expressed concerns with the death penalty,<sup>298</sup> as have many judges in lower courts.<sup>299</sup>

Nineteen ninety-four saw the peak of support for the use of the death penalty for murder; support subsequently fell from this peak of 80% down to 56% in 2018.<sup>300</sup> In the late 1990s the US economy flourished<sup>301</sup> and crime levels fell (see Figure 4), which may have encouraged more tolerance for convicts.<sup>302</sup> Indeed, support for punitive treatment of convicts seems to have declined more widely.<sup>303</sup> GDP per capita had been increasing in the US for decades, so this seems unlikely to have been a major factor in the change in public opinion.<sup>304</sup> Violent crime rates seem to have begun to decline at a nearly identical time point to the decline in support for capital punishment; the overall rate of change is different, though visual inspection suggests that even some of the temporary upticks in the two trends may be related to each other:

Figure 4: Violent crime rates and support for the death penalty.<sup>305</sup>

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<sup>298</sup> John D. Bessler, "Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement," *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 244 summarizes that "Justice Ruth Bader Ginsburg expressed her support for a moratorium on executions in April 2001, saying that she has 'yet to see a death penalty case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented at trial'... In July of that same year, Justice Sandra Day O'Connor—in a speech in Minnesota—said there are 'serious questions' about whether the death penalty is administered fairly. O'Connor added that Minnesotans 'must breathe a big sigh of relief every day' because the state no longer has capital punishment... Justice John Paul Stevens also has noted that the 'recent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent.'"

A fuller account of Justice Stevens' change of mind is provided on Carol S. Steiker and Jordan M. Steiker, "Lessons for Law Reform from the American Experiment with Capital Punishment," *Southern California Law Review* 87 (2013-14), 772-3.

<sup>299</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 31-6.

<sup>300</sup> "Death Penalty," Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>. "Civil Liberties," National Opinion Research Center's General Social Survey, accessed June 28, 2019, <https://gssdataexplorer.norc.umd.edu/trends/Civil%20Liberties> shows a similar result, with a peak of 75% in 1994. Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 20, footnote 120 cites other polls showing a decline in support in the late 1990s, including two from California.

<sup>301</sup> See, for example, "The Roaring Nineties," Joseph Stiglitz (October 2002), <https://www.theatlantic.com/magazine/archive/2002/10/the-roaring-nineties/302604/>.

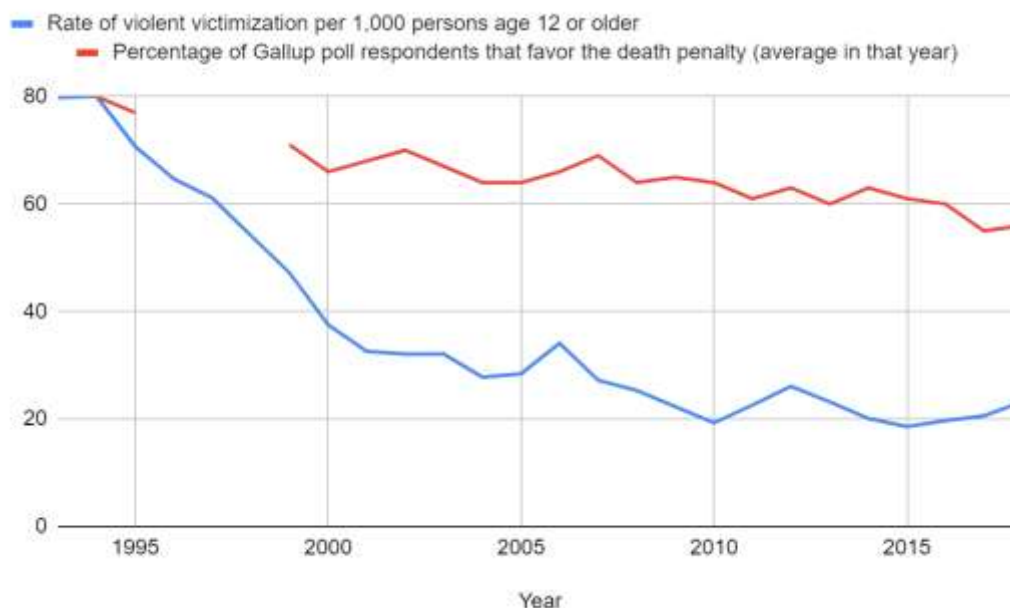
<sup>302</sup> This seems more plausible given that fluctuations in abolition and reinstatement in the Progressive Era and shortly afterwards seem to have been encouraged by economic trends — see the paragraph beginning "Factors encouraging the reinstatement..." above.

<sup>303</sup> See footnote 189.

<sup>304</sup> "GDP per capita (current US\$) - United States," World Bank, accessed October 24, 2019, [https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?cid=GPD\\_31&locations=US](https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?cid=GPD_31&locations=US).

<sup>305</sup> The data for the rate of violent victimization per 1,000 persons age 12 or older is from appendix table 5 in Rachel E. Morgan and Barbara A. Oudekerk, "Criminal Victimization, 2018" (September 2019), <https://www.bjs.gov/content/pub/pdf/cv18.pdf>, 27. This lists the source as "Bureau of Justice Statistics, National Crime Victimization Survey, 1993-2018." They note that, "[e]stimates for 2006 should not be compared to other years. See Criminal Victimization, 2007 (NCJ 224390, BJS web, December 2008) for more information on changes to the 2006 National Crime Victimization Survey."

The public opinion data is from "Death Penalty," Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>.



Other factors that could plausibly have played a role in the decline of support for capital punishment include:

- The publication of Helen Prejean’s *Dead Man Walking*.<sup>306</sup> However, this had occurred in 1993 and the General Social Survey found an increase in support in 1994 when compared to 1993.<sup>307</sup>
- The newfound opposition to the death penalty of Harry Blackmun and other Supreme Court justices,<sup>308</sup> though it seems unlikely that judicial opinions would be highly influential on public opinion.<sup>309</sup>

<sup>306</sup> See the paragraph beginning “In 1993, the Roman Catholic sister...” above.

<sup>307</sup> “Favor or oppose death penalty for murder,” National Opinion Research Center, accessed October 24, 2019, <https://gssdataexplorer.norc.umd.edu/trends/Civil%20Liberties?measure=cappun>.

So Gallup polls were conducted on the support for capital punishment for murder in 1992 or 1993 (“Death Penalty,” Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>).

<sup>308</sup> See the paragraph beginning “In 1994, Justice Harry Blackmun...” above.

<sup>309</sup> See, for example, Gerald N. Rosenberg, “Romancing the Court,” *Boston University Law Review* 89 (2009), 563-79, who argues that awareness of judicial opinions is low and that “elites are seldom if ever motivated or inspired to act by the language of judicial opinions,” as opposed to their substance. However, Rosenberg’s ideas contrast with those of other scholars, such as Lani Guinier, “Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence-Courting the People Demosprudence and the Law/Politics Divide,” *Boston University Law Review* 89 (2009), 539-61.



- The increasing and more critical newspaper coverage of the death penalty in 1996-2000,<sup>310</sup> including from a prolific group of journalists in Austin, Texas in the year 2000.<sup>311</sup> These changes in coverage could have been related to the increasing emphasis on innocence in capital punishment discussion.<sup>312</sup>
- A number of other highly salient events related to crime and the death penalty.<sup>313</sup>

<sup>310</sup> Frank E. Dardis, Frank R. Baumgartner, Amber E. Boydston, Suzanna De Boef, and Fuyuan Shen, "Media Framing of Capital Punishment and its Impact on Individuals' Cognitive Responses," *Mass Communication & Society* 11, no. 2 (2008), 122-4 found that in 1996, there were around 30 *New York Times* articles about capital punishment, which increased to around 235 in 2000 before falling to between about 125 and 150 in the following three years. The number of articles critical to the death penalty subtracted from those favorable to the death penalty was around -5 in 1996, -105 in 2000, -90 in 2001, and -60 in 2002.

<sup>311</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 134 note that, "[a]nother speculation regarding the increased media coverage of 2000 has been that a small number of journalists, stuck in Austin while covering George W. Bush's presidential campaign, were responsible for the majority of articles. In fact, the eight journalists with the greatest number of stories published together combined for fifty-seven, or about 20 percent, of the articles that year. Besides 57 articles written by the eight journalists with the most common bylines, there were 21 Associated Press stories, 14 editorials, 6 Reuters stories, and 137 stories written by 125 different authors/sources (this includes op-eds). In sum, the articles that appeared in the paper were written by a variety of sources, not a single journalist or small group of them on a campaign to publicize this issue. It was a large and collective event."

Despite this argument, 20% of articles on a particular topic in a specific year seems like a substantial proportion, which may well have sparked increased interest among other papers. This doesn't seem likely to have contributed substantially to the fall in public support for the death penalty, however, given that public support was actually higher in 2002.

<sup>312</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 132. Their argument seems plausible, given the increase in overall coverage, hostility to the death penalty within that coverage, and explicit discussion of innocence. However, these changes could potentially have been driven by some other factor. On pages 132-3, they describe a detailed analysis of *New York Times* articles and conclude that "the surge in attention to the death penalty in 2000" was not "the work of a few dogged journalists" focusing on the presidential election campaign, since there is not "prominent mention either of the campaign in general, of individual politicians, or of particular death penalty cases over which George W. Bush had presided," with the coverage instead centering "around the concept of innocence: DNA testing, the possibility of executing the wrongly accused, and the death penalty moratorium declared by pro-death penalty Illinois governor George Ryan."

They note that their "review of all the articles published in 2000 shows that Texas did, in fact, receive substantial death penalty media coverage in 2000, with close to 50 percent of articles mentioning Texas. However, many articles in fact made reference to more than one state, with references to Texas constituting only about 30 percent of the total references to all states. (This amount is approximately the same percentage as Texas contributes to the national rate of death sentences.) Although Governor George W. Bush was mentioned in approximately 36 percent of the articles in 200, only 12 percent of the articles made reference to the electoral contest. In contrast, then-Illinois governor George Ryan was mentioned in approximately 16 percent of the articles, and the state of Illinois was referenced in about 20 percent of them. These findings suggest that coverage of the death penalty in Texas was framed around particular fairness, humanistic, and legal issues that emerged in particular cases rather than Bush and his bid for the presidency. Indeed, about 50 percent of all death penalty articles in 2000 made reference to one or more specific death penalty cases."

This analysis seems to fairly convincingly rule out the political events of the year 2000 as the main spark for the increase in coverage plus the increases in hostility to the death penalty and discussion of innocence in that coverage in the year 2000 specifically. However, each of these trends began before that year. Declines in violent crime, the publication of Helen Prejean's *Dead Man Walking*, increased opposition to the death penalty among Supreme Court justices, and the efforts of a small group of journalists in Austin may all have encouraged these trends.

<sup>313</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008) include in multiple regression analysis variables that represent "[t]he bombing of the federal building in Oklahoma City on April 19, 1995," "the January 30, 2000, declaration by

In 1994, Kansas reinstated the death penalty.<sup>314</sup> In the same year, the New York Republican candidate for governor won the election with a pledge to reinstate the death penalty.<sup>315</sup> Also in 1994, politicians in Arkansas, Delaware, Illinois, Montana, Nevada, New Jersey, Oregon, Pennsylvania, South Dakota, and Tennessee expanded death penalty statutes in their respective states.<sup>316</sup> Between 1995 and 2006, over 20 state legislatures added new factors that made criminals eligible for the death penalty.<sup>317</sup>

In 1994, Congress increased the number of offenses for which capital punishment could be used.<sup>318</sup> In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act, which made the use of *habeas corpus* actions to protect convicts on death row more difficult.<sup>319</sup> Congress also reduced funding for organizations that provided legal advocacy for convicts, including convicts contesting their death sentences.<sup>320</sup> The 1994 and 1996 acts were signed into law by President Clinton, a Democrat, and advertised as successes in his 1996 reelection campaign.<sup>321</sup>

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Illinois governor George Ryan of a moratorium on executions in Illinois,” “the September 11, 2001, terrorist acts,” “the 100th exonerated of a death row prisoner on April 8, 2002,” “the beginning of the killing spree of the so-called D.C. snipers on September 9, 2002,” “and the January 11, 2003, blanket grant of clemency given all death row prisoners in Illinois. However, their analysis found no significant “[s]hort-run (change in) opinion” for the combined measure of these events. On page 189 they note that, “[w]hen each event was entered into the model separately... only Governor Ryan’s grant of clemency to all death row prisoners in the first quarter of 2003, just before leaving office, is significant ( $p = 0.09$ )... We should remember, though, that these events are themselves covered through the media and may have an indirect effect through net tone.”

<sup>314</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 20.

Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 85 explains that, “[l]ike other states Kansas’s death penalty had been voided by the Supreme Court in 1972. But unlike most states, Kansas did not reinstate capital punishment in the aftermath of *Furman v. Georgia*. Death penalty bills were passed by the legislature in 1979, 1980, 1981, and 1985. Each year, though, they were vetoed by Governor John Carlin, a democrat who opposed capital punishment.” Though Republican Mike Hayden replaced Carlin in 1987, Kansas legislators rejected death penalty reinstatement bills in 1987 and 1989.”

<sup>315</sup> Stephen F. Smith, “The Supreme Court and the Politics of Death,” *Virginia Law Review* 94, no. 2 (April 2008), 318-9.

<sup>316</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 19.

<sup>317</sup> Jeffrey L. Kirchmeier, “Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States,” *Pepperdine Law Review* 34 (2006), 11-15. Kirchmeier notes that this trend continued even while states began to introduce moratoriums from around 1999 and various other forms of restrictions on the death penalty were implemented, such as “preventing the execution of mentally retarded defendants.” On pages 27-33, Kirchmeier argues that the increases in death penalty applicability were caused by “terrorist attacks that occurred on September 11, 2001,” school shootings, “a growing societal and political concern for the protection of children,” and several other social and political trends only indirectly related to capital punishment.

<sup>318</sup> Stephen F. Smith, “The Supreme Court and the Politics of Death,” *Virginia Law Review* 94, no. 2 (April 2008), 296 notes that, “Congress passed the Federal Death Penalty Act of 1994, which authorized capital punishment for more than fifty preexisting federal crimes that had been subject to lesser punishments, including kidnapping and carjacking.” Referring to this and the earlier statute of 1988, Smith notes that, “[a]lthough, in each case, Congress was addressing activities that were already serious federal crimes, the death penalty had enough political salience as a signal of “toughness” to lead Congress to deem it worthwhile to revisit them.”

<sup>319</sup> Stephen F. Smith, “The Supreme Court and the Politics of Death,” *Virginia Law Review* 94, no. 2 (April 2008), 301.

<sup>320</sup> Austin Sarat, “The New Abolitionism and the Possibilities of Legislative Action: The New Hampshire Experience,” *Ohio State Law Journal* 63 (2002), 347.

<sup>321</sup> Stephen F. Smith, “The Supreme Court and the Politics of Death,” *Virginia Law Review* 94, no. 2 (April 2008), 318.

By the mid-1990s, the Council of Europe had made the commitment to abolishing the death penalty except in times of war a condition for new countries to join.<sup>322</sup>

A paper by political scientists Frank E. Dardis, Frank R. Baumgartner, Amber E. Boydston, Suzanna De Boef, and Fuyuan Shen quantified articles in *The New York Times* by “innocence,” “constitutionality,” “morality,” or “other” frames; it found that from 1996, there was a rapid increase in the number of NYT articles on capital punishment (rising to nearly 250 in 2000, higher than the previous peak in 1977), the hostility of the articles towards capital punishment, and the proportion of articles that used an innocence frame.<sup>323</sup> Three of the same authors — Baumgartner, De Boef, and Boydston — found in their book that there was also an increase in hostility, coverage, and usage of the innocence frame in magazine articles.<sup>324</sup> Their analysis of other newspapers suggests that there was a rise in innocence framings from around 1998.<sup>325</sup> They argue that the surge in media attention to the death penalty was due to “a larger social cascade surrounding the new innocence frame.”<sup>326</sup>

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Stuart Banner, “The Death Penalty’s Strange Career,” *The Wilson Quarterly* 26, no. 2 (2002), 74 adds that “in the midst of the 1992 campaign, Governor Bill Clinton made it a point to return to Arkansas to sign the death warrant for Ricky Rector, a brain-damaged inmate so oblivious to his fate that he planned to save the dessert from his last meal to eat after his execution.

<sup>322</sup> Anthony McGann and Wayne Sandholtz, “Patterns of Death Penalty Abolition, 1960–2005: Domestic and International Factors,” *International Studies Quarterly* 56, no. 2 (2012), 278.

<sup>323</sup> Frank E. Dardis, Frank R. Baumgartner, Amber E. Boydston, Suzanna De Boef, and Fuyuan Shen, “Media framing of capital punishment and its impact on individuals’ cognitive responses,” *Mass Communication & Society* 11, no. 2 (2008), 115–40.

Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 71 summarize that, “[t]he innocence frame gained momentum in the late 1990s and had saturated the death penalty debate by 2000. National attention and activity surrounding the innocence frame did not go from zero to saturation gradually, but explosively. On page 91, they add that, “the Innocence Protection Act, signed in both houses of a Republican-controlled Congress and signed into law by President Bush in 2004, is proof enough that the innocence frame has taken hold.”

<sup>324</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 127 notes that the authors “validated our use of the *New York Times* as a proxy for national media coverage in two ways: first, by comparing the *Times* to the *Readers’ Guide to Periodical Literature*, second, by comparing the *Times* to available data from nine other major U.S. newspapers archived by Lexis-Nexis. We began by taking a count of the death penalty articles listed in the *Readers’ Guide*, which catalogues all articles published in nearly 400 general interest magazines.” Page 128 shows that the “net tone of *Readers’ Guide* coverage” was between -5 and +1 for every year between 1960 and 1983 except for 1965. After 1986, the coverage became more critical, reaching a low of -39 in 2000, though 1998 and 2004 were very close to 0. The number of stories on capital punishment in the *Readers’ Guide* was below 40 for every year until 1994; from that year on, it varied between about 18 and about 105, with the peak being reached in 2000. On page 134, they provide data on the use of the innocence frame in the *Readers’ Guide*.

<sup>325</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 129 note that they “employed Lexis-Nexis Academic Universe to count the number of death penalty articles appearing in each of the following sources: *Boston Globe*, *Chicago Sun-Times*, *Denver Post*, *Houston Chronicle*, *Los Angeles Times*, *Miami Herald*, *New York Times*, *Pittsburgh Post-Gazette*, *Seattle Times*, and *Washington Post*. Pages 129–31 show that the average number of “articles employing the innocence frame — specifically, stories including reference to wrongful conviction, exoneration, or DNA evidence” in these papers (excluding *The New York Times*, which is the focus of other analyses in the chapter) increased in a similar manner to *The New York Times*, albeit less dramatically. On page 134, they note that the attention given to the innocence frame by *The New York Times* correlates with the attention given to the innocence frame by the other newspapers at about 0.9. The correlation is also clearly visible in the provided figure.

<sup>326</sup> See footnote 312.

## 1997-present: Growth of the moratorium movement and sporadic legislative success

Since the 1960s, United Nations institutions such as the Human Rights Committee had recommended that nations with the death penalty consider implementing moratoriums. Suggested resolutions by the UN General Assembly in 1994 and 1999 called again for an international moratorium on capital punishment, though a resolution was not passed until 2007. This non-binding resolution asked UN member states to increasingly restrict the death penalty while ensuring that international standards were met.<sup>327</sup>

In 1997, the American Bar Association (ABA) passed a resolution calling for a national moratorium on executions until state legislation complied with the ABA's guidelines.<sup>328</sup> This brought media attention and non-partisan credibility to the anti-death penalty cause.<sup>329</sup> Two years subsequently, the ABA claimed that their resolution "had a profound impact... in spawning grassroots efforts questioning the fairness of the death penalty as implemented in particular jurisdictions."<sup>330</sup> In October, 2000, the ABA ran a conference on the death penalty.<sup>331</sup> In September 2001, the ABA set up its Death Penalty Moratorium Implementation Project, which encouraged state governments and other bar associations to press for moratoriums on capital punishment.<sup>332</sup> In 2017, the ABA noted that, "[a]t least ninety-nine local jurisdictions; many dozens of organizations; and thirty-six national, state, local, and specialty bar associations have passed resolutions supporting moratoriums in their jurisdictions."<sup>333</sup>

In 1998, the National Conference on Wrongful Convictions and the Death Penalty was held in Chicago. It was organized by Lawrence Marshall, a law professor at the Northwestern University. According to a contemporary news article, the conference was attended "by more than 1,000 lawyers, law students, professors and death penalty opponents" and included "28 of the 73 men and 2 women who [had] been

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<sup>327</sup> Peter Hodgkinson, Seema Kandelia, and Lina Gyllensten, "Capital Punishment: A Review and Critique of Abolition Strategies," in Jon Yorke (ed.) *Against the Death Penalty: International Initiatives and Implications* (Farnham, UK: Ashgate Publishing, 2008), 258.

<sup>328</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 36. These guidelines were designed to "(1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed." Kirchmeier notes that, "[t]he resolution did not take a position on whether the death penalty should be abolished, but instead focused on four areas of concern in the implementation of the death penalty: (i) ensuring competency of defense counsel; (ii) ensuring the ability of the state and federal courts to review the merits of constitutional claims in state postconviction and federal habeas corpus proceedings; (iii) eliminating racial discrimination in capital cases; and (iv) preventing the execution of mentally retarded defendants and persons who were under the age of eighteen at the time of the crime."

<sup>329</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 38.

<sup>330</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 38.

<sup>331</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 39.

<sup>332</sup> John D. Bessler, "Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement," *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 243.

<sup>333</sup> Deborah T. Fleischaker, "The Continuing Need for a Nationwide Moratorium on Executions" (June 30, 2017), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol31\\_2004/winter2004/irr\\_hr\\_winter04\\_pausing/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol31_2004/winter2004/irr_hr_winter04_pausing/).

released from death rows across the country since 1972.”<sup>334</sup> Marshall subsequently claimed that the conference made wrongful convictions into a key talking point in the movement.<sup>335</sup>

In 1998, four states introduced bills to abolish the death penalty. Twelve states introduced bills in 1999.<sup>336</sup> The ABA notes that by July 2001, “bills specifically calling for a moratorium [were] introduced in 17 states, and legislation to address death penalty-related concerns raised in the ABA moratorium resolution [were] introduced in 37 of the 38 states that authorized capital punishment.”<sup>337</sup> In 2001, Nevada and Maryland nearly passed bills for moratoriums.<sup>338</sup> Additionally, local organizations and communities passed resolutions calling for moratoriums.<sup>339</sup>

The death of gay student Matthew Shepard prompted some members of the LGBTQ community to voice support for the death penalty.<sup>340</sup> Nevertheless, other members of the LGBTQ community have opposed the death penalty for a number of reasons, including concerns about homophobic discrimination in sentencing,<sup>341</sup> and at least 11 groups publicly announced their opposition to the death penalty during Shepard’s murder prosecution.<sup>342</sup> LGBTQ groups have subsequently engaged in some anti-death penalty advocacy. For example, the group Queer to the Left used a letter-writing campaign to encourage the commutation of the sentences of all death row inmates in Illinois in 2002 and a press conference and newspaper ad to mobilize the LGBTQ community on the issue.<sup>343</sup>

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<sup>334</sup> Don Terry, “Survivors Make the Case Against Death Row” (November 16, 1998), <https://www.nytimes.com/1998/11/16/us/survivors-make-the-case-against-death-row.html>. Terry describes the conference as “part reunion, part strategy session and part pep rally to energize [the anti-death penalty] movement.”

<sup>335</sup> Jolie McLaughlin, “The price of justice: Interest-convergence, cost, and the anti-death penalty movement,” *Northwestern University Law Review* 108, no. 2 (2013), 691, citing Marshall in footnote 119. This interpretation contrasts somewhat with the description by Don Terry, “Survivors Make the Case Against Death Row” (November 16, 1998), <https://www.nytimes.com/1998/11/16/us/survivors-make-the-case-against-death-row.html> of the conference as “a chilling flesh-and-blood reminder of the greatest fear of opponents and supporters of the death penalty.”

<sup>336</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 3.

<sup>337</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 45-6, citing “Toward Greater Awareness: The American Bar Association for a Moratorium on Executions Gains Ground: A Summary of Moratorium Resolution Impacts from January 2000 through July 2001,” American Bar Association (August 2001), previously at <http://www.abanet.org/irr/finalreport.doc> but no longer accessible.

<sup>338</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 46.

<sup>339</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 46-7.

<sup>340</sup> Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011), 152 notes that the activist group Queer Watch feared that, “heated emotions surrounding Shepard’s killing... have driven some gay people to seek revenge, rather than justice.” The authors note that “the conservative gay Log Cabin Republicans (LCR) hailed the decision [to bring capital charges against Shepard’s accused killers], arguing that a death sentence in these cases was necessary to insure that ‘gay Americans receive full justice under the laws of this country, without exception.’”

<sup>341</sup> Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011), 79-81.

<sup>342</sup> Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011), 152-3.

<sup>343</sup> Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011), 153-4.

In 1999, Nebraska's legislature voted for a moratorium on the death penalty, but the governor, Mike Johanns, vetoed the bill.<sup>344</sup> Though it did not override the veto on moratorium legislation, the legislature unanimously overrode Johanns' veto of funding for a study on the fairness of the death penalty in Nebraska.<sup>345</sup>

The Illinois House of Representatives passed a nonbinding moratorium bill in 1999.<sup>346</sup> In 2000, the Republican Governor, George Ryan, imposed a statewide moratorium on executions and subsequently granted clemency to all prisoners on Illinois' death row.<sup>347</sup> Kirchmeier believes that this was "not based on a moral opposition to the death penalty but rather on concerns about systemic problems."<sup>348</sup> These concerns had been encouraged by publicity and advocacy around recent exonerations and executions of convicts whose guilt was in question, especially by the *Chicago Tribune* newspaper and the law professor Lawrence Marshall.<sup>349</sup> Ryan justified his decision by stating that, "[o]ur capital system is haunted by the demon of error—error in determining guilt, and error in determining who among the guilty deserves to die."<sup>350</sup> In a poll, 66% of Illinois residents supported his moratorium decision.<sup>351</sup>

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<sup>344</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 43.

<sup>345</sup> "Nebraska," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska>.

<sup>346</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 44.

<sup>347</sup> John D. Bessler, "Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement," *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 243 summarizes that, "[s]ince the death penalty's reinstatement in Illinois, twelve executions had been carried out but a larger number of condemned inmates, thirteen, had been exonerated... Ryan later cleared Illinois's death row, commuting more than 160 death sentences to life-without-parole terms and releasing four men—Madison Hobley, Stanley Howard, Aaron Patterson, and LeRoy Orange—from death row altogether. Those men were released on grounds of innocence and for what Governor Ryan called "manifest injustice" due to police brutality and coerced confessions."

<sup>348</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 45.

<sup>349</sup> Rob Warden, "How and Why Illinois Abolished the Death Penalty," *Law and Inequality* 30 (2012), 245-86.

Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 64 add that, "[a]t the same time that the Northwestern innocence projects were taking root, the city of Chicago suffered one of the worst scandals in its history with the revelation that Chicago police commander Jon Burge and several of his subordinates had routinely tortured prisoners, using methods ranging from electric shock to Russian roulette to obtain false murder confessions that in some cases led to capital convictions and death sentences. It was on this wave of innocence project activism and police scandal that conservative governor George Ryan came to reconsider his position on the death penalty."

Rob Warden, "How and Why Illinois Abolished the Death Penalty," *Law and Inequality* 30 (2012), 264-5 attributes various steps of the process of granting clemency to the convicts on death row to "a group of Illinois death penalty lawyers attending a conference in Virginia," "the Center on Wrongful Convictions and the MacArthur Justice Center at the University of Chicago Law School," and a questioner at "a death penalty conference in Oregon." From the information in the article, however, it seems likely that Ryan was already interested in the idea; encouragement to issue blanket clemency was also met with advocacy against this suggestion.

<sup>350</sup> Bradley R. Hall, "From William Henry Furman to Anthony Porter: The Changing Face of the Death Penalty Debate," *Journal of Criminal Law and Criminology* 95, no. 2 (2005), 371.

<sup>351</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 45. Rob Warden, "How and Why Illinois Abolished the Death Penalty," *Law and Inequality* 30 (2012), 263-4 notes that "A Roper Starch Worldwide poll found that 70% of Illinoisans approved of the moratorium and that there was strong support for reforms long championed by the Center on

Two months after the moratorium, Ryan used an executive order to create a Commission on Capital Punishment to “study and review the administration of the capital punishment process in Illinois.” A study the commission conducted, published in its 2002 report, found that the death penalty was being applied arbitrarily and discriminatorily. The report recommended various procedural changes to reduce these problems.<sup>352</sup>

Ryan’s successor, Rod Blagojevich, was a Democrat who had campaigned in favor of the death penalty. However, Blagojevich avoided ending the moratorium.<sup>353</sup> In 2010, the Democratic candidate Pat Quinn was elected governor after declaring he supported the death penalty if applied “carefully and fairly.” Nevertheless, Quinn signed abolition legislation in 2011,<sup>354</sup> following increased lobbying and advocacy from several Illinois anti-death penalty groups and Democratic legislators, the final report of a state-sponsored committee, and a law review article by a senior law lecturer at Northwestern University School of Law.<sup>355</sup> Chicago anti-death penalty advocate Rob Warden argues that this outcome depended on the gubernatorial election results that year.<sup>356</sup>

In 2000, New Hampshire’s Congress voted to abolish the death penalty, but the Democratic governor vetoed the bill.<sup>357</sup> Some anti-death penalty legislators in New Hampshire seem to have emphasized moral arguments, but at least some legislators were persuaded to support abolition because of concerns about procedural errors

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Wrongful Convictions.” This poll is cited as being unpublished but attributed to the year 2000. On page 276, Warden notes that a poll, “which was conducted by Lake Research Partners, of Washington, D.C., found that more than sixty percent of registered voters preferred sentences of life without parole over death.” This is not unusual, however; see the strategic implication beginning “Publicizing opinion poll findings...” in the section on “Messaging.”

<sup>352</sup> Rob Warden, “How and Why Illinois Abolished the Death Penalty,” *Law and Inequality* 30 (2012), 264 and 266-7. The order added that this was “to determine why that process has failed in the past, resulting imposition of death sentences upon innocent people.”

<sup>353</sup> Rob Warden, “How and Why Illinois Abolished the Death Penalty,” *Law and Inequality* 30 (2012), 271-2.

<sup>354</sup> John Schwartz and Emma G. Fitzsimmons, “Illinois Governor Signs Capital Punishment Ban” (March 9, 2011), <https://www.nytimes.com/2011/03/10/us/10illinois.html>. Quinn justified his decision by noting that “our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment.”

<sup>355</sup> Rob Warden, “How and Why Illinois Abolished the Death Penalty,” *Law and Inequality* 30 (2012), 276-84. On pages 281-2, however, Warden provides quotes from Quinn suggesting that he was undecided on capital punishment and was a populist; hence, he likely formerly supported capital punishment for pragmatic reasons.

<sup>356</sup> Rob Warden, “How and Why Illinois Abolished the Death Penalty,” *Law and Inequality* 30 (2012), 275-6 writes that there were “two Illinois elections that, had the outcome of either been different, would have derailed abolition. The first was the February 2010 Republican primary election in which an archconservative state senator, Bill Brady, narrowly defeated a reputed moderate colleague, Kirk Dillard. The second was the November 2010 general election in which Quinn narrowly won a full term over Brady. Had Dillard defeated Brady in the primary, he probably would have won the general election as well and, if given the opportunity, would have vetoed abolition. Likewise, had Brady won the general election, he undoubtedly would have vetoed abolition as well.”

<sup>357</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 243.

Referring to this vote, Austin Sarat, “The New Abolitionism and the Possibilities of Legislative Action: The New Hampshire Experience,” *Ohio State Law Journal* 63 (2002), 360 summarizes that, “full explanation of why New Hampshire voted for repeal would have to make reference to a range of factors, including the role of the Catholic Church, effective mobilization by local activists, the largely ‘symbolic’ nature of the vote in a state where the death penalty plays so small a role, and a backlash against Governor Shaheen’s efforts, in 1997, to expand the list of crimes for which the death penalty could be applied.”

and the risk of executing innocents.<sup>358</sup> A 2008 poll in the state indicated 57% support for the death penalty in cases of police killing.<sup>359</sup> Bills were passed by the legislature but vetoed by two different Republican governors in 2009 and 2018. In 2019, the New Hampshire Senate and House of Representatives each secured by a margin of a single vote the two-thirds majorities needed to override the governor's veto of another abolition bill.<sup>360</sup>

In Arizona in 2000, the state's Attorney General created the Capital Case Commission to study the death penalty in Arizona;<sup>361</sup> its proposed reforms died in committee the following year.<sup>362</sup> Following a botched execution in 2014, Arizona's Department of Corrections announced a moratorium on executions.<sup>363</sup> A federal judge also demanded a moratorium; no executions have been carried out since then.<sup>364</sup>

In August 2000, The Quixote Center claimed that there were over one thousand grassroots organizations advocating a moratorium on the use of the death penalty.<sup>365</sup> However, a 2009 study located only 105 groups; the methods used should have identified larger non-profits but will have omitted some smaller, local groups.<sup>366</sup> Haines had previously characterized state level anti-death penalty organizations as often existing

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<sup>358</sup> Austin Sarat, "The New Abolitionism and the Possibilities of Legislative Action: The New Hampshire Experience," *Ohio State Law Journal* 63 (2002), 362 quotes interviews with several legislators. One legislator's justification for their views included the comment that, "I don't think that the state in my name should be killing people who kill people." By comparison, another said that, "my entire life I had supported the death penalty. But I changed my mind in the course of the legislative consideration of the repeal bill... I was particularly moved by the testimony of a gentleman who had actually been on death row, but through some DNA testing it was found that he was not the person who committed the crime... what finally persuaded me to vote the way I did, after going through this very long struggle, was that you know an innocent person could die." No quantitative content analysis of the interview data was reported by Sarat.

<sup>359</sup> "NH poll: support for death penalty in cop killing," Associated Press (September 2008), <https://www.seacoastonline.com/article/20080928/news/80928009>.

<sup>360</sup> "New Hampshire abolishes death penalty after state senate overrides governor," *The Guardian* (May 30, 2019), <https://www.theguardian.com/us-news/2019/may/30/new-hampshire-death-penalty-abolished-state-senate-governor>.

<sup>361</sup> "Arizona," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/arizona>.

<sup>362</sup> "Capital Case Commission Interim Report," Office of the Attorney General, State of Arizona, accessed November 1, 2019, <https://files.deathpenaltyinfo.org/legacy/documents/IntRpt.PDF>, 13. The report notes that, "Commission members made clear that capital defense at the trial stage in rural Arizona needed assistance because of the difficulty recruiting public defenders in the rural counties and the issue of adequate compensation for lawyers coming from urban areas to do capital defense work in rural areas. At that meeting the Commission approved an amendment to the draft bill to include both a trial defender for rural Arizona and a PCR defender for all of Arizona."

<sup>363</sup> "Arizona halts executions after Joseph Wood case," British Broadcasting Corporation (25 July, 2014), <https://www.bbc.co.uk/news/world-us-canada-28444667>.

<sup>364</sup> "Arizona," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/arizona>.

<sup>365</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 4, citing Claudia Kohler, "Death Penalty Moratorium Idea Attracts Even Conservatives" (August 29, 2000), <https://www.latimes.com/archives/la-xpm-2000-aug-29-mn-11924-story.html>. That article simply states that, "[i]n the seven months since Ryan's announcement, about 500 moratorium groups have sprouted up nationwide, bringing the total to more than 1,000, according to the Quixote Center, a Maryland anti-death penalty group." The methodology used for this claim is unclear and it may simply represent an informal estimate, rather than an accurate count.

<sup>366</sup> Devashree Gupta, "The Power of Incremental Outcomes: How Small Victories and Defeats Affect Social Movement Organizations," *Mobilization: An International Quarterly* 14, no. 4 (December 2009), 417-32. Gupta "first searched for relevant groups in three national databases: the Guidestar directory of registered nonprofit organizations, the National Center for Charitable Statistics (NCCS), a program of the Center on Nonprofits and Philanthropy at the Urban Institute,



“primarily on paper”<sup>367</sup>; this feature of the ADPM may help to explain the discrepancy between the study and The Quixote Center’s claim.

During the 2000 presidential election campaign, Republican candidate George H. W. Bush and Democratic candidate Al Gore may both have tried to downplay and avoid the capital punishment issue.<sup>368</sup> Both Gore and Bush supported the death penalty, though a third-party candidate, Ralph Nader, opposed it.<sup>369</sup> Bush won the election.<sup>370</sup>

In 2000-2001, several states proposed legislation to reduce arbitrariness in capital punishment and reduce the number of cases where it could be used.<sup>371</sup>

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and the Encyclopedia of Associations... In each database, I ran keyword searches for nonprofits using the terms ‘death penalty,’ ‘capital punishment,’ and ‘execution.’ In addition, I ran a parallel search in the NCCS database for all groups with an NTEE activity code of R60, which is assigned to tax-exempt entities that work on civil liberties, including death penalty issues. After discarding all duplicates, I filtered the results of these searches in two ways: first, I excluded all organizations that did not have to file an IRS 990 form for any year in the given eleven-year window. This step excludes many of the smaller organizations in the population, but since this study focuses on the impact that outcomes have on public financial support, the lack of 990 forms imposes an absolute and unavoidable threshold for inclusion. Second, I handchecked all remaining groups to verify that they did, in fact, have ADP activism as a core activity, using information contained in their 990 forms as well as on their websites. If there was any ambiguity about a group’s programmatic focus, I chose to exclude it.... However, this sample... systematically under-represents groups with small overall revenues and is also biased towards more institutionalized organizations that rely primarily on conventional tactics as opposed to less formal or more contentious groups.”

Gupta summarizes that, “[t]he groups are geographically diverse, located in 45 states, plus the District of Columbia. Some are single-issue groups focusing solely on capital punishment issues, while others take on ADP activism as part of a menu of other justice or human rights concerns. Some ADP groups are small and local, while others have a national or even international presence. Financially, they range from groups with less than \$1,000 in total revenue per year to groups with annual revenues of over \$80 million, and expenditures ranging from less than \$250 to over \$50 million.”

<sup>367</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 152. In support of this characterization, Haines cites interviews with three anti-death penalty advocates.

<sup>368</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 61. In the two months preceding the election, the average number of scheduled executions in Texas, where Bush was governor, was half that of previous months (1.5 instead of 3), though this may have been coincidence. Additionally, “On August 5, 2000, Juan Raul Garza was scheduled to be the first federal prisoner executed since *Furman* was decided, but President Clinton stayed the execution until clemency procedures could be written, thereby effectively insulating Vice-President Gore from the issue during the campaign.”

<sup>369</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 62.

<sup>370</sup> “Electoral College Box Scores 2000-2016,” National Archives and Records Administration, US Electoral College, accessed October 22, 2019, <https://www.archives.gov/federal-register/electoral-college/scores2.html>.

<sup>371</sup> Carol S. Steiker and Jordan M. Steiker, “Should Abolitionists Support Legislative ‘Reform’ of the Death Penalty?” *Ohio State Law Journal* 63 (2002), 418 summarizes that, “bills to ‘reform’ death penalty procedures proliferate on drafting tables, offering everything from mandatory DNA preservation and testing, to improved representation in capital cases, to limitations on the execution of juveniles and persons with mental retardation. Other reforms include Ohio’s proposal to replace the existing ‘beyond a reasonable doubt’ standard with a ‘beyond any doubt’ standard in capital cases, Indiana’s proposal to limit judicial overrides of non-death verdicts, North Carolina’s proposal to allow trial judges to block the state from seeking the death penalty if a judge determines that race was the primary reason prosecutors sought the death penalty, and several states’ proposals to add life without possibility of parole as a third alternative to death and life with possibility of parole. In addition, many states have proposed extensive studies of the death penalty, with some states calling for a moratorium on executions until results from such studies can be evaluated.”

A survey conducted in 2001 (which emphasized that, in several instances, criminals sentenced to be executed had been released based on new evidence or DNA testing) found that 73.9% of respondents expressed support for suspending the death penalty “until its fairness is studied.”<sup>372</sup>

In the Massachusetts legislature, reinstatement of the death penalty was rejected by one vote in 1997 and by 32 votes in 2001.<sup>373</sup> Maine also rejected a bill to reinstate the death penalty in 2001.<sup>374</sup> Referring to the Maine and Massachusetts votes, legal scholar James Liebman notes that, “[f]or the first legislative session in literally decades, only two legislative or ballot initiatives to reinstate capital punishment in a non-death penalty state came to a vote.”<sup>375</sup>

Around the turn of the 21st century, several Republican politicians and death penalty supporters began to publicly advocate for a moratorium on capital punishment.<sup>376</sup> Some groups representing families of murder victims did the same.<sup>377</sup>

Several studies of the early 21st century have found evidence that a large number of individuals have been wrongfully given the death sentence.<sup>378</sup> These findings may have influenced the views of institutional

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<sup>372</sup> Francis T. Cullen, James D. Unnever, Kristie R. Blevins, Jennifer A. Pealer, Shannon A. Santana, Bonnie S. Fisher, and Brandon K. Applegate, “The Myth of Public Support for Capital Punishment,” in Jane L. Wood and Theresa A. Gannon (eds.) *Public Opinion and Criminal Justice* (Cullompton, UK, Willan Publishing, 2009), 79 and 86. The question wording was: “In several instances, criminals sentenced to be executed have been released based on new evidence or DNA testing. Based on this information, would you favor suspending the death penalty — not executing anyone for a limited period of time — until its fairness is studied?” In response to this, 73.9% said “yes” and 26.1% said “no.” The authors note that, “[o]f the eligible respondents, 349 surveys were returned, a response rate of 40 per cent. Of these, 329 surveys were usable.” The survey was drawn from “a simple random sample of 1,000 phone and non-phone households, drawn from America’s 50 states and the District of Columbia.”

The survey also asked a couple of other questions which forced respondents to choose between two quite specific answers, which would not have captured all possible views. For example, 69.1% selected the option “Temporarily suspend the death penalty until we can make sure that only guilty people are executed” as being “right,” as opposed to “Keep executing convicted murderers because it is unlikely that any innocent people are really on Death Row.”

<sup>373</sup> Carol S. Steiker and Jordan M. Steiker, “Should Abolitionists Support Legislative ‘Reform’ of the Death Penalty?” *Ohio State Law Journal* 63 (2002), 417-8.

<sup>374</sup> James S. Liebman, “New Death Penalty Debate: What’s DNA Got to Do with It,” *Columbia Human Rights Law Review* 33 (2001), 532.

<sup>375</sup> James S. Liebman, “New Death Penalty Debate: What’s DNA Got to Do with It,” *Columbia Human Rights Law Review* 33 (2001), 532.

<sup>376</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 53-8. Kirchmeier notes, for example, that, “[i]n Virginia, a conservative Republican in the state legislature who once supported a bill to resume public hangings, recently introduced a bill to abolish the death penalty. In New Hampshire, state Rep. Loren Jean, a former deputy sheriff who had been in favor of the death penalty, co-sponsored a bill to repeal the death penalty in that state.”

<sup>377</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 58-9.

<sup>378</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 224 summarizes that, “The Innocence Project reports that there have been 220 post-conviction DNA exonerations in the United States and that 17 of the 220 people exonerated served time on death row... One national study, of death sentences imposed from 1973 to 1995, also found an extraordinarily high reversal rate in capital cases. Of the capital judgments that were reversed and retried, eighty-two percent of them resulted in a sentence less than death or no sentence whatsoever. Seven percent of the reversals led to “not guilty” determinations on retrial... One study found that from 1989 to 2003 there were 205 exonerations of defendants convicted of murder.”

decision-makers. For example, Justice John Paul Stevens noted that the “recent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent.”<sup>379</sup>

From 2002, several Supreme Court rulings substantially reduced the number and types of cases in which the death penalty could be applied<sup>380</sup>:

- *Atkins v. Virginia* in 2002, prohibiting the use of capital punishment on people with intellectual disabilities, overruling the 1989 *Penry v. Lynaugh* decision.<sup>381</sup>
- *Ring v. Arizona* in 2002, prohibiting sentencing judges from finding aggravating circumstances that would enable the imposition of the death penalty; this could only be done by a jury.<sup>382</sup> This overruled the 1990 *Walton v. Arizona* decision.<sup>383</sup>
- *Roper v. Simmons* in 2005, prohibiting the use of capital punishment on people under the age of eighteen, overruling the 1989 *Stanford v. Kentucky* decision.<sup>384</sup>

<sup>379</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 224.

<sup>380</sup> Scott E. Sundby, “The true legacy of *Atkins* and *Roper*: The Unreliability Principle, mentally ill defendants, and the death penalty’s unraveling,” *William and Mary Bill of Rights Journal* 23 (2014), 487-528 argues that, in *Atkins* and *Roper*, “the Court went one step beyond its usual two-step analysis of assessing whether imposing the death penalty violated ‘evolving standards of decency.’ This extra step looked at why even though intellectual disability and youth were powerful mitigators, juries were not able to reliably use them in their decisionmaking. The Court thus articulated expressly for the first time what this Article calls the ‘unreliability principle’: if too great a risk exists that constitutionally protected mitigation cannot be reliably assessed, the unreliability means that the death penalty cannot be constitutionally imposed. In recognizing the unreliability principle, the Court has called into serious question the death penalty for other offenders to whom the principle applies, such as mentally ill defendants. And, unlike with the ‘evolving standards’ analysis, the unreliability principle does not depend on whether a national consensus exists against the practice.” This principle “has profound implications for the death penalty, and if taken to its logical endpoint calls into question the Court’s core premise since *Furman v. Georgia*, that by providing individualized consideration of a defendant and his crime, the death penalty decision will be free of arbitrariness.”

Carol S. Steiker and Jordan M. Steiker, “Lessons for Law Reform from the American Experiment with Capital Punishment,” *Southern California Law Review* 87 (2013-14), 759-67 distinguish between “procedural” and “substantive” reform, arguing that “procedural regulation left the death penalty stronger and less vulnerable to substantive attack” but that making substantive exemptions for juveniles and individuals with “mental retardation” is more likely to lead to abolition. They argue that, “[i]n crafting proportionality limits, the Court has developed a methodology conducive to judicial abolition—a methodology that privileges professional and elite opinion as well as actual sentencing practices, in contrast to previous cases which relied almost exclusively on the ‘consensus’ reflected in prevailing state statutes.”

<sup>381</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 274-5. Carol S. Steiker, “Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty,” *New York University Law Review* 77, no. 6 (December 200), 1476 notes that “*Atkins* overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989), which was authored by Justice O’Connor and joined by Justice Kennedy, both of whom were members of the *Atkins* majority.”

<sup>382</sup> “*Ring v. Arizona*,” Oyez, accessed October 18, 2019, <https://www.oyez.org/cases/2001/01-488>.

<sup>383</sup> Carol S. Steiker, “Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty,” *New York University Law Review* 77, no. 6 (December 200), 1476 notes that “*Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990), which was authored by Justice White (who no longer sits on the Court) and joined by Justices Scalia and Kennedy, both of whom were members of the *Ring* majority.”

<sup>384</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 275.

- *Kennedy v. Louisiana* in 2008, prohibiting the use of capital punishment for the rape of a child or any other non-homicidal individual crime.<sup>385</sup>

In some of these cases, the Supreme Court made reference to international opinion and treaties.<sup>386</sup> In 2002, the Council of Europe added Protocol No. 13 to the ECHR, which sought to “take the final step in order to abolish the death penalty in all circumstances.”<sup>387</sup> This removed the exception allowing the use of the death penalty in times of war.

In 2002, the governor of Maryland declared a moratorium on executions, though this was lifted by his successor.<sup>388</sup>

Lowe’s research shows a continuation of the decline in the use of moral arguments as the primary framing of discussion in the ADPM’s public-facing statements. Moral arguments fell to 21% in the 2004 to 2014 era, down from 37% in the 1993-2003 era. The study also found that, “[t]he average number of distinct frames used per sampled article... rose between these eras by approximately 60%, meaning that movement participants more often opted to reference several [anti-death penalty] frames when describing the issue, rather than focusing on a single message.<sup>389</sup> Newspapers were increasingly focusing on innocence at this time.<sup>390</sup>

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<sup>385</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 276.

<sup>386</sup> Sangmin Bae, *When The State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (New York: State University of New York Press, 2007), 90 notes that, “[i]n *Atkins v. Virginia*, in June 2002, the Supreme Court held that the execution of any individual with mental retardation violated the Eighth Amendment’s prohibition on cruel and unusual punishment, referring not only to the number of U.S. states that had abolished the death penalty for the mentally retarded, but also to international opinion on the matter. The Court’s opinion made specific reference to the *amicus curiae* brief filed by the European Union supporting such a ban. In March 2005, when the Supreme Court ruled that imposing the death penalty on convicted murderers who were younger than eighteen at the time of their crimes was unconstitutional, international opinion seemed to contribute even more forcefully to that decision. In the Court’s majority opinion in *Roper v. Simmons*, Justice Anthony Kennedy wrote, ‘It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime,’ adding that there was an emerging national consensus against juvenile execution. The Court further noted that the execution of juvenile offenders violated several international treaties, including the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. The Court also pointed out that the UN Convention on the Rights of the Child, which prohibits the juvenile death penalty, has been ratified by every country except Somalia and the United States. In a dissent, Justice Anthonin Scalia rejected the Court’s use of international law to confirm its finding of a national consensus, stating that “acknowledgement’ of foreign approval has no place in the legal opinion of this Court.’ He wrote: ‘The court thus proclaims itself sole arbiter of our nation’s moral standards.’ This opinion was shared by many others around the nation.”

<sup>387</sup> “European Convention on Human Rights,” European Court of Human Rights, accessed June 26, 2019, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>388</sup> “Maryland,” Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/maryland>.

<sup>389</sup> See footnote 236.

<sup>390</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 97 note that in the years 1973-91, there were, on average, 3 exonerations per year and 3 newspaper articles “from major papers” per exoneree. In 1992-8, this rose to an average of 4 exonerations and 33 stories per exoneree. In 1999-2005, this rose further to 7 and 40, respectively.

See also the paragraph beginning “A paper by political scientists...” above.

In 2004, President Bush signed into law the Justice for All Act, which included the Innocence Protection Act; this allowed federal prisoners to apply for DNA testing and provided \$25 million to help states pay for DNA testing for convicts.<sup>391</sup>

In 2005, the United States Conference of Catholic Bishops issued a statement “calling for an end to the use of the death penalty.”<sup>392</sup> This development may have helped abolition efforts in New Jersey and New Mexico; 44% of New Jersey’s population and about one-third of New Mexico’s population were Catholic.<sup>393</sup> Although the Church had historically supported the use of the death penalty, over the course of the 20th century, some Catholic leaders had become increasingly critical of it.<sup>394</sup>

New York’s reintroduced death penalty legislation was difficult to implement, and support for the death penalty there dropped from 47% in 1994 to 34% in 2005, according to polling by *The New York Times*.<sup>395</sup> The *People v. LaValle* decision in the Court of Appeals of New York ruled that the state’s death penalty statute violated New York’s constitution.<sup>396</sup> This led to de facto abolition of the death penalty, which was confirmed by legislation in 2007 that changed the last remaining capital crime to imprisonment for life. There have been no executions in New York since 1963.<sup>397</sup> This victory for the ADPM seems to have been less celebrated than the subsequent legislative abolition of capital punishment in New Jersey.<sup>398</sup>

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<sup>391</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 92-3.

<sup>392</sup> “A Culture of Life and the Penalty of Death,” United States Conference of Catholic Bishops (December 2005), <http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/upload/penaltyofdeath.pdf>.

<sup>393</sup> Thomas Banchoff, “Human Rights, the Catholic Church, and the Death Penalty in the United States,” in Thomas F. Banchoff and Robert Wuthnow (eds.) *Religion and the Global Politics of Human Rights* (Oxford: Oxford University Press, 2011), 301-3.

<sup>394</sup> Thomas Banchoff, “Human Rights, the Catholic Church, and the Death Penalty in the United States,” in Thomas F. Banchoff and Robert Wuthnow (eds.) *Religion and the Global Politics of Human Rights* (Oxford: Oxford University Press, 2011), 285-314.

<sup>395</sup> Stephen F. Smith, “The Supreme Court and the Politics of Death,” *Virginia Law Review* 94, no. 2 (April 2008), 318-9.

<sup>396</sup> “*People v. LaValle*,” Court of Appeals of New York (June 24, 2004), <https://caselaw.findlaw.com/ny-court-of-appeals/1230015.html>.

<sup>397</sup> “New York,” Death Penalty Information Center, accessed October 16, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-york> notes that, “[i]n 2004, that statute was declared unconstitutional by the New York Court of Appeals, and in 2007 the last remaining death sentence was reduced to life, leaving New York with a vacant death row and no viable death penalty laws. In 2008 Governor David Paterson issued an executive order requiring the removal of all execution equipment from state facilities.”

<sup>398</sup> For example, Robert J. Martin, “Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute,” *University of Toledo Law Review* 41 (2009), 71 notes that, “Helen Prejean, author of the book ‘Dead Man Walking’... issued a ringing endorsement of New Jersey’s legislative action: ‘There’s no place on Earth I would rather be... The word will travel around the globe that there is a state in the United States of America that was the first to show that life is stronger than death, love is greater than hatred, and that compassion is stronger than the need for revenge.’ As Sister Prejean predicted, word of the repeal of New Jersey’s death penalty did indeed travel around the globe. As a sign of international recognition and approval, the ancient Coliseum in Rome was lit for 24 hours on December 19, 2007 in celebration of New Jersey’s historic action.” [emphasis added]

In January 2006, New Jersey's acting governor signed into law a statute that created a death penalty study commission and imposed a moratorium on executions.<sup>399</sup> This had been the explicit demand of the group New Jerseyans for a Death Penalty Moratorium (NJDPM, later New Jerseyans for Alternatives to the Death Penalty or NJADP).<sup>400</sup> This followed several attempts since 2001 to pass similar legislation, which had been vetoed by the previous governor<sup>401</sup>; increases in Democratic control of the legislature and the election of a new governor who supported a moratorium may have been important in facilitating subsequent success.<sup>402</sup> New Jersey had unusually low support and usage of the death penalty for decades,<sup>403</sup> although polls in 2002, 2005, and 2007 each found majority opposition to the abolition of the death penalty there.<sup>404</sup>

The staff of NJDPM initially worked from their homes without requiring dues from NJDPM's members, hosted hundreds of events, and lobbied legislators through visits, letters, emails, and attendance at functions and meetings. New Jersey's ADPM engaged in a grassroots public education campaign to support legislative work and avoided confrontation and mass protest.<sup>405</sup> In addition to these grassroots efforts, NJDPM secured support from lawyers and experienced lobbyists, and commissioned polls that identified a decline in support for the death penalty in New Jersey.<sup>406</sup> A lawsuit was introduced to challenge the state's death penalty

<sup>399</sup> Andy Hoover and Ken Cunningham, "Framing, Persuasion, Messaging, and Messengers: How the Death Penalty Abolition Movement Succeeded in New Jersey," *Humanity & Society* 38, no. 4 (2014), 446.

<sup>400</sup> Robert J. Martin, "Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute," *University of Toledo Law Review* 41 (2009), 26 notes that, "[a]s for its specific legislative agenda, NJDPM concentrated on bringing about a legislatively enacted moratorium on executions in conjunction with a study commission that would provide cover for politicians reluctant to being perceived as 'soft on crime.'" On pages 41-3, Martin notes that the legislature appeared to respond favorably to NJDPM/NJADP's lobbying efforts.

<sup>401</sup> Charles S. Lanier and James R. Acker, "Capital punishment, the moratorium movement, and empirical questions: Looking beyond innocence, race, and bad lawyering in death penalty cases," *Psychology, Public Policy, and Law* 10, no. 4 (2004), 577-617.

<sup>402</sup> Robert J. Martin, "Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute," *University of Toledo Law Review* 41 (2009), 38-40.

<sup>403</sup> Stephen F. Smith, "The Supreme Court and the Politics of Death," *Virginia Law Review* 94, no. 2 (April 2008), 298 note that, "[e]ven during the nationwide stampede to reinstate the death penalty after *Furman*, New Jersey was very slow to act. Dozens of states had reenacted their capital punishment laws by 1975... New Jersey, however, did not follow suit until 1982—and, even then, has never executed anyone sentenced to death in the post-*Furman* era... The last execution in the state took place in 1963. When New Jersey abolished the death penalty in 2007, only eight people were on death row statewide... In light of these facts, New Jersey's move does not represent a trend away from capital punishment but rather a confirmation of what has been obvious for decades—namely, that New Jersey is out of the execution business."

<sup>404</sup> Kevin H. Wozniak, "Analyzing Legislative Abolition of the Death Penalty: A Preliminary Case Study of New Jersey," accessed August 12, 2019, <https://www.american.edu/spa/publicpurpose/upload/analyzing-legislative-abolition-of-the-death-penalty.pdf>, 16. The 2002 and 2004 polls found 60% and 61% support for the death penalty for convicted murderers, respectively. Asking instead whether the respondents favored eliminating the death penalty in New Jersey, the 2007 poll found that 53% opposed this and only 39% supported it. There was greater support for life without parole than for the death penalty as the sentence for murder, but the 2007 poll also asked: "If death penalty were abolished for most murders, would you support keeping it for the most violent cases like serial & child killers?" and found 78% support.

<sup>405</sup> Andy Hoover and Ken Cunningham, "Framing, persuasion, messaging, and messengers: How the death penalty abolition movement succeeded in New Jersey," *Humanity & Society* 38, no. 4 (2014), 446. They add that, "[n]otably missing from the campaign were flashy, attention-grabbing public actions. No one did sit-ins at the governor's office. There were no rallies on the capitol steps. No one was arrested. Instead, the abolitionists very methodically, pragmatically, and effectively framed their issue with the people and legislators of New Jersey."

<sup>406</sup> Robert J. Martin, "Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute," *University of Toledo Law Review* 41 (2009), 23 notes that, "NJDPM secured ongoing legal and lobbying assistance from one of New Jersey's largest law firms, Gibbons P.C. It also drew upon the services of several 'Trenton insiders' [Trenton is the capital of New Jersey] who had long-standing relationships with members of the executive and

procedures with the intention of encouraging a moratorium; this succeeded in causing a temporary suspension of executions from 2004 and forcing the New Jersey Department of Corrections to participate in a public hearing.<sup>407</sup> The litigation and legislation strategies may have complemented each other by encouraging institutional inertia in revising death penalty regulations, which may have made abolition seem to be the best solution to the state's death penalty concerns.<sup>408</sup>

NJDPM's strategy of focusing on a moratorium risked a continuation of the status quo. The legislation that was passed only called for the moratorium to last for a maximum of 20 months; the subsequent fate of the death penalty in New Jersey was at least partly dependent on the findings of the state's newly appointed Death Penalty Study Commission.<sup>409</sup> Nevertheless, the Commission's report was damning.<sup>410</sup> After lobbying

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legislative branches. Consequently, it had now acquired the resources to become a viable and on-going state-wide adversary coalition."

On page 40, Martin notes that, "NJDPM released the results of a new public opinion survey it had commissioned in May 2005 indicating that 'nearly half of all New Jersey residents [47%] prefer life in prison without the possibility of parole as the penalty for murder, with only one third choosing capital punishment.'"

<sup>407</sup> Robert J. Martin, "Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute," *University of Toledo Law Review* 41 (2009), 33-4 notes that, "what came to be known as 'Kevin's lawsuit' was ultimately crafted to raise a whole series of regulatory and constitutional issues, 'filed in a 'lengthy, lengthy brief' that challenged the specific steps and measures that the NJDoC [New Jersey Department of Corrections] had promulgated... Finally, after more than two years of protracted litigation, NJDPM was able to achieve a monumental court victory on February 20, 2004. In a 'dramatically worded decision' written by Judge Sylvia Pressler, a three-judge panel of the Superior Court Appellate Division (temporarily) halted executions in New Jersey, ruling that the medical knowledge on which they were based was fundamentally inadequate. The court also found that NJDoC's ban on media televising of executions required justification, otherwise it might infringe on First Amendment constitutional rights. Judge Pressler referred to the regulations adopted to govern executions by the NJDoC as 'arbitrary' and 'unreasonable' and only 'conceptually' constitutional."

On page 36, Martin adds that "the NJDoC was forced to extend the sixty-day comment period and thereafter hold a public hearing, which was scheduled on February 5, 2005."

<sup>408</sup> Robert J. Martin, "Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute," *University of Toledo Law Review* 41 (2009), 37 suggests that, "NJDoC's reluctance to adopt revised regulations after February 2005 must have been predicated to some extent on the fact that the State Legislature appeared poised to enact its own moratorium or, alternatively, to enact a statute abolishing the death penalty. In either case, such an enactment would then have obviated the necessity for any departmental regulations regarding the complex issues surrounding implementation of carrying out a death sentence. Thus the policy of 'wait-and-see' by NJDoC's ultimately proved advantageous on its part, since it never was forced to resolve such problems after the Legislature adopted a moratorium and then a repeal of the Death Penalty shortly thereafter... At the same time that NJADP was on the verge of winning the lawsuit that secured a judicially mandated moratorium of the death penalty, it also decided to conduct another vigorous campaign to achieve its goals through legislation."

<sup>409</sup> Robert J. Martin, "Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute," *University of Toledo Law Review* 41 (2009), 42 and 44.

<sup>410</sup> See Robert J. Martin, "Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute," *University of Toledo Law Review* 41 (2009), 49 for the conclusions. On pages 51-2, Martin notes that one academic criticized the report harshly and received support from some legislators, but that the report "was well received by the media and many lawmakers."

from both proponents and opponents of abolition and debate within the legislature that crossed party boundaries,<sup>411</sup> the New Jersey state legislature abolished the death penalty in 2007.<sup>412</sup>

Subsequently, New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Delaware (2016), Washington (2018), and New Hampshire (2019) abolished the death penalty.<sup>413</sup> Other states have come close to abolition through legislation, such as Colorado and Kansas.<sup>414</sup> A poll taken in New Mexico before abolition legislation passed indicates that there was majority public support for replacement of the death penalty there, although the question wording may be misleading.<sup>415</sup> The abolition decisions in New Mexico, Illinois, Connecticut, Maryland, and especially New Jersey seem likely to have been substantially influenced by cost arguments. Such arguments were consciously emphasized by the NJDPM in New Jersey and the report of the state-sponsored commission.<sup>416</sup> New Jersey, New Mexico, Illinois, and Connecticut all had high budget

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<sup>411</sup> Robert J. Martin, “Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute,” *University of Toledo Law Review* 41 (2009), 52-71. On page 57, Martin notes that, “Senator Cardinale and I [both of who were Republican senators], who happened to sit next to one another as members of the committee, were hard-pressed to remain cordial as we vehemently expounded opposing viewpoints.”

<sup>412</sup> See footnote 403.

<sup>413</sup> “State by State,” Death Penalty Information Center, accessed October 16, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/>.

<sup>414</sup> “Colorado,” Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/colorado> notes that, “[i]n 2009, the Colorado House of Representatives passed a death penalty abolition bill by a 33-32 vote. The bill failed in the state Senate by a 17-18 vote.”

“Kansas,” Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/kansas> notes that, “[i]n 2010, the Kansas Senate was one vote short of voting to replace the death penalty with life without the possibility of parole for the crime of aggravated murder.”

“Montana,” Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/montana> notes that, “[b]ills to abolish the death penalty passed the Montana Senate in 2009 and 2011, but were defeated in the state House Judiciary committee each time.”

<sup>415</sup> Jolie McLaughlin, “The price of justice: Interest-convergence, cost, and the anti-death penalty movement,” *Northwestern University Law Review* 108, no. 2 (2013), 698 notes that, “[a] 2008 statewide poll confirmed that the majority of New Mexico residents—64%—supported replacing the death penalty with life in prison without parole and allocating the saved resources to services for victims’ families.” The poll is cited as being “on file with author.” If the poll wording suggested that “saved resources” would be allocated “to services for victims’ families,” presumably the results of the poll were substantially biased compared to usual polling questions. In polls elsewhere, including New Jersey, which had majority opposition to the abolition of the death penalty (see footnote 404), a majority of the population has preferred life imprisonment without parole to the death penalty for murder — see the strategic implication beginning “Publicizing opinion poll findings...” in the section on “Messaging.”

<sup>416</sup> Jolie McLaughlin, “The price of justice: Interest-convergence, cost, and the anti-death penalty movement,” *Northwestern University Law Review* 108, no. 2 (2013), 692-3 notes that, “[i]n 1999, anti-death penalty activists Lorry Post and Celeste Fitzgerald established New Jerseyans for Alternatives to the Death Penalty (NJADP). Rather than focusing their lobbying efforts on moral and religious arguments, Fitzgerald and NJADP emphasized the costs of the death penalty, wrongful executions, and the fact that New Jersey had not executed anyone in forty years. Specifically, NJADP commissioned a fiscal study of the state’s death penalty system, which found that abolishing the death penalty would save New Jersey more than \$11 million each year. According to Fitzgerald, by focusing on the costs of capital cases, NJADP was able to ‘attract [support from] people who thought the death penalty was simply another waste of time and money’... Partly as a result of the lobbying efforts of the NJADP, in 2006 the New Jersey legislature selected a state-sponsored Death Penalty Study Commission to examine the effectiveness of the state’s death penalty policy. The Commission held hearings and heard from New Jersey residents on both sides of the debate. Testimonies provided evidence about the significant costs of the death penalty, as well as polls showing that only 36% of New Jersey residents preferred the death penalty to life imprisonment without the possibility of parole. In addition to relying on savings estimates from various New Jersey state agencies, the Commission considered cost studies conducted by other states. In



deficits when they abolished the death penalty.<sup>417</sup> However, there is not consensus among New Jersey activists that this was the most effective messaging frame used in the campaigns.<sup>418</sup> There is less evidence that increased emphasis on cost arguments was encouraged by local advocates in New Mexico, Illinois, Connecticut, and Maryland,<sup>419</sup> but there is some reason to believe that it was influential in encouraging abolition in those states.<sup>420</sup>

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its 2007 report, the Commission recommended that the New Jersey legislature abolish the death penalty in the state. It found that capital punishment in New Jersey did not ‘rationally serve a legitimate penological intent,’ and that ‘[t]he costs of the death penalty are greater than the costs of life in prison without parole.’”

Robert J. Martin, “Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute,” *University of Toledo Law Review* 41 (2009), 25-8, who was a senator in New Jersey at the time, agrees that NJDPM/NJADP emphasized various pragmatic arguments and implies that this was important, though does not present evidence that the use of these arguments were more effective than the alternatives might have been.

<sup>417</sup> Jolie McLaughlin, “The price of justice: Interest-convergence, cost, and the anti-death penalty movement,” *Northwestern University Law Review* 108, no. 2 (2013), 694 and 709. On page 694, McLaughlin notes that, “in 2007 New Jersey was one of only a handful of states facing a structural deficit. Indeed, New Jersey’s per capita debt burden at the time was the third highest in the nation. Accordingly, in February 2007 Governor Corzine warned that the state legislature would have to make some ‘tough choices’ in order to mitigate ‘the avalanche of growing fixed costs that hang over the state.’”

<sup>418</sup> Andy Hoover and Ken Cunningham, “Framing, Persuasion, Messaging, and Messengers: How the Death Penalty Abolition Movement Succeeded in New Jersey” *Humanity & Society* 38, no. 4 (2014), 453-4. Of the 7 interviewed activists, only 4 “recognized the impact of the high financial costs of using capital Punishment.” By comparison, all 7 mentioned the reframing of the effects of capital punishment on the victims’ families, 6 mentioned innocence frames, 6 mentioned moral arguments, 4 mentioned emphasizing law enforcement voices, 4 mentioned the discussion of life without parole as an alternative to capital punishment, 3 mentioned the use of data to describe the arbitrary use of capital punishment, and 3 emphasized that knowledge about the death penalty had grown in the past few decades. It is unclear whether they were asked specifically about these issues or brought them up spontaneously in response to open-ended questions. When asked about message frames that were discarded as ineffective, “[t]hree participants mentioned as ineffective the issue frame that the trend in the rest of the world is toward abolition (the international argument), and three participants mentioned the moral frame. Frames raised once during the interviews as ineffective included focusing on the plight of death row prisoners, the costs of the death penalty, the use of the words “abolition” or “abolish,” and the inactive death penalty.”

<sup>419</sup> Jolie McLaughlin, “The price of justice: Interest-convergence, cost, and the anti-death penalty movement,” *Northwestern University Law Review* 108, no. 2 (2013), 696-704. For example, on page 696, McLaughlin notes that, “[w]hen the effort to abolish New Mexico’s death penalty began in 1997, advocates attempted to introduce the cost argument into the death penalty debate. At the time, however, there was very little information available about the costs of New Mexico’s death penalty system. Thus, anti-death penalty advocates did not focus on costs as a central part of their campaign until several years later... [T]he State Bar’s Task Force on the Administration of the Death Penalty in New Mexico published a report in 2004 outlining the reasons for the high costs of capital cases. Around the same time, then New Mexico Supreme Court Justice Bosson estimated that the cost of a capital case in New Mexico was six times higher than noncapital murder cases. The cost argument in New Mexico was also strengthened by cost studies from other states, such as North Carolina, which found that capital punishment cost more than life imprisonment.”

<sup>420</sup> Jolie McLaughlin, “The price of justice: Interest-convergence, cost, and the anti-death penalty movement,” *Northwestern University Law Review* 108, no. 2 (2013), 697 notes that, “[a]lthough few legislators mentioned cost when they publicly spoke in support of repeal, state legislators were well aware of the cost implications of the bill by the time they cast their votes in 2009. For instance, David Keys, a professor of criminology at New Mexico State University, testified before the Senate Judiciary Committee and told the panel that a single execution in New Mexico cost the state between \$2.75 and \$5 million. Viki Harrison, the former Executive Director of NM Repeal, believes that state policymakers considered cost as a factor in casting their votes, even if they did not say so explicitly.” For descriptions of the role of the cost argument in encouraging abolition in the other states, see pages 698-704.

Delaware and Washington are excluded from this list solely because at the time that McLaughlin was writing, they had not yet abolished capital punishment and the author has not seen other evidence on the importance of this factor in those locations.

The governor of Tennessee introduced an executive moratorium for 90 days in 2007 while the lethal injection protocol was examined. A study committee was also created; structural changes were recommended, but abolition was not.<sup>421</sup>

In 2007, some members of the ALI sought a stronger stance against the death penalty. The ALI commissioned legal scholars Carol Steiker and Jordan Steiker to conduct a study on whether the death penalty was meeting the requirements of the Constitution. This study helped to encourage the ALI to withdraw the capital punishment section of its Model Penal Code in 2009,<sup>422</sup> though it chose not to take a position for or against abolition.<sup>423</sup>

In 2007, the Committee of Ministers of the Council of Europe announced the creation of a “European Day against the Death Penalty” which is held annually on 10 October.<sup>424</sup> In December 2007, the UN General Assembly passed a resolution that member states still using capital punishment should “establish a moratorium on executions with a view to abolishing the death penalty.”<sup>425</sup> The US was one of 54 nation states that voted against this resolution.<sup>426</sup>

The 2008 *Baze v. Rees* Supreme Court decision reaffirmed the constitutionality of capital punishment<sup>427</sup> but emphasized that the best available execution methods should be used where possible.<sup>428</sup> The case revolved

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<sup>421</sup> “Tennessee,” Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/tennessee>.

<sup>422</sup> “Steiker Study Inspires Withdrawal of Death Penalty Section from Model Penal Code,” Harvard Law Today (January 7, 2010), <https://today.law.harvard.edu/steiker-study-inspires-withdrawal-of-death-penalty-section-from-model-penal-code/>.

<sup>423</sup> Carol S. Steiker and Jordan M. Steiker, “Lessons for Law Reform from the American Experiment with Capital Punishment,” *Southern California Law Review* 87 (2013-14), 774-5.

<sup>424</sup> “10 October - European Day against Death Penalty,” Council of Europe, accessed June 26, 2019, <https://www.coe.int/en/web/portal/10-october-against-death-penalty>.

<sup>425</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 248.

<sup>426</sup> “General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty,” United Nations (18 December, 2007), <https://www.un.org/press/en/2007/ga10678.doc.htm>. This press release describes an “intense two-day debate... with a number of delegations arguing that the death penalty was not illegal under international human rights legislation and that it was the sovereign right of each and every State to determine its own judicial system.” No specific comment from the representative of the United States is described.

For US responses to earlier UN calls to restrict Capital Punishment, see “International Perspectives on the Death Penalty: A Costly Isolation for the U.S.,” Death Penalty Information Center (October 1, 1999), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/international-perspectives-on-the-death-penalty-a-costly-isolation-for-the-u-s>.

<sup>427</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 279 and 286-7.

<sup>428</sup> “*Baze v. Rees*,” Oyez, accessed October 23, 2019, <https://www.oyez.org/cases/2007/07-5439> summarizes that, “[i]n a 7-2 decision with four concurrences and a dissent, the Court held that Kentucky’s lethal injection scheme did not violate the Eighth Amendment. Noting that the inmates had conceded the ‘humane nature’ of the procedure when performed correctly, the divided Court inmates had failed to prove that incorrect administration of the drugs would amount to cruel and unusual punishment. However, the Court also suggested that a state may violate the ban on cruel and unusual punishment if it continues to use a method without sufficient justification in the face of superior alternative procedures. Chief Justice John G. Roberts, Jr. announced the judgment and issued an opinion joined by Justices

around the use of lethal injections; following this ruling and related litigation, some states have slowed their use of executions and sought alternatives, while others have not changed their practices significantly.<sup>429</sup>

In 2009, Arkansas created the Arkansas Legislative Task Force on Criminal Justice to determine if there was judicial discrimination in the handling of felonies. The Task Force identified insufficient information gathering in some areas. After a 2012 court ruling finding the state's capital punishment law unconstitutional, a new law was introduced and upheld in the courts.<sup>430</sup>

A 2010 campaign by the UK group Reprieve targeted a Danish company and a British company supplying drugs to the US for lethal injection; by November of the same year, the UK had banned the export of these drugs. Subsequently, after media and stockholder pressure encouraged by Reprieve, the Danish company halted sales of a drug used in lethal injections. When Hospira, a manufacturer of sodium thiopental, which is used in lethal injections, sought to move production to a plant in Italy, Reprieve alerted the media, which encouraged Italian officials to threaten sanctions on Hospira if it did not cease production.<sup>431</sup> In 2011, the EU banned the export of eight drugs used in lethal injections. An Indian company also ceased selling these drugs to the US, apparently having been influenced by international pressure.<sup>432</sup>

Seemingly beginning in 2011, pressure on drug suppliers within the US succeeded in causing halts in supply and delays to executions.<sup>433</sup> In 2011, the only US manufacturer of sodium thiopental announced that it would

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Anthony Kennedy and Samuel A. Alito. Justice John Paul Stevens wrote a separate concurring opinion supporting the judgment but for the first time stated his opposition to the death penalty.”

<sup>429</sup> Carol S. Steiker and Jordan M. Steiker, “Lessons for Law Reform from the American Experiment with Capital Punishment,” *Southern California Law Review* 87 (2013-14), 758-9 summarize that, “concerns surrounding lethal injection protocols have slowed executions substantially in some jurisdictions, while other jurisdictions have continued to execute without significant interruption. Texas, Oklahoma, and Virginia carried out executions within weeks of the Court’s decision, while many other states are still mired in lethal injection litigation. Again, the difference in reactions has less to do with the content of federal regulation (which is actually quite minimal) than with the legal and cultural norms within the different jurisdictions as well as the surrounding politics. In some states, demanding administrative laws make it cumbersome to alter execution protocols, whereas in other states, the autonomy of prison officials to ‘adapt’ to drug shortages or potential protocol problems is the norm. States also differ in the extent to which legislative and executive officials have sought to study protocol alternatives, with some states seeking quick resolution to facilitate executions and others moving much more slowly. The experience with lethal injection litigation provides a window into the ways regulation is filtered through layers of culture, law, and politics; those layers give actors with qualms about the death penalty the means of avoiding executions, and allow those deeply committed to the death penalty to express their support.”

<sup>430</sup> “Arkansas,” Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/arkansas>.

<sup>431</sup> Mary D. Fan, “The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy,” *Boston University Law Review* 95, no. 2 (March 2015), 439.

<sup>432</sup> Mary D. Fan, “The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy,” *Boston University Law Review* 95, no. 2 (March 2015), 439-41. Nathan Koppel, “Indian Firm to Stop Selling Execution Drug to Prisons” (April 7, 2011), <https://www.wsj.com/articles/SB10001424052748704013604576246813390152424> quotes Navneet Verma, the managing director of Kayem Pharmaceutical Pvt. Ltd. company: “We appreciate the global concerns about the death penalty and particularly the concerns of the human-rights community... I decided voluntarily not to sell a single vial of thiopental for use in lethal injections.”

<sup>433</sup> Mary D. Fan, “The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy,” *Boston University Law Review* 95, no. 2 (March 2015), 429, footnote 6 lists three news articles attesting to this from 2011 to 2013. On page 447, Fan claims that, “[s]uppliers whose identities are revealed have halted sales due to threats, hate mail, constant press inquiries, and lawsuits” and cites two further news articles. Fan does not count or quantify the number of US suppliers ceasing to sell drugs for lethal injections after pressure.

stop producing the drug.<sup>434</sup> However, no state has ceased executions indefinitely due to lack of supply of the drug.<sup>435</sup> Between 2007 and 2013, seven states introduced laws to protect the identity of lethal injection drug suppliers.<sup>436</sup> Legal challenges have subsequently been made against the non-disclosure of drug sources and the non-disclosure of execution protocols.<sup>437</sup>

The governors of Oregon (2011), Colorado (2013), and Pennsylvania (2015) introduced moratoriums in those states, which are still operational at the time of writing.<sup>438</sup>

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<sup>434</sup> Mary D. Fan, “The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy,” *Boston University Law Review* 95, no. 2 (March 2015), 439.

<sup>435</sup> Mary D. Fan, “The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy,” *Boston University Law Review* 95, no. 2 (March 2015), 457.

<sup>436</sup> Mary D. Fan, “The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy,” *Boston University Law Review* 95, no. 2 (March 2015), 447-8, table 1.

<sup>437</sup> Mary D. Fan, “The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy,” *Boston University Law Review* 95, no. 2 (March 2015), 448-56.

<sup>438</sup> “Oregon,” Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/oregon> notes that, “[o]n November 22, 2011, Governor John Kitzhaber declared a moratorium on executions, saying ‘I refuse to be a part of this compromised and inequitable system any longer; and I will not allow further executions while I am Governor.’ Both of Oregon’s post-*Furman* executions happened during Kitzhaber’s first administration as governor. Both inmates dropped their appeals and ‘volunteered’ for execution. Of those two executions, Kitzhaber said, ‘I was torn between my personal convictions about the morality of capital punishment and my oath to uphold the Oregon constitution. They were the most agonizing and difficult decisions I have made as Governor and I have revisited and questioned them over and over again during the past 14 years.’ Saying ‘[t]here needs to be a broader discussion about fixing the system,’ Governor Kate Brown announced on February 18, 2015, that she would continue the state’s moratorium on executions. Brown said ‘[u]ntil that discussion, I will be upholding the moratorium imposed by Gov. Kitzhaber.’”

“Colorado,” Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/colorado> notes that, “Nathan Dunlap who was condemned for shooting and killing four people at a Chuck E. Cheese restaurant. On May 22, 2013, Governor John Hickenlooper issued an Executive Order granting an indefinite stay of execution to Dunlap, who was facing execution that August. The governor’s statement accompanying this reprieve said ‘If the State of Colorado is going to undertake the responsibility of executing a human being, the system must operate flawlessly. Colorado’s system for capital punishment is not flawless.’ The governor underscored that his decision to grant a reprieve, which has been construed as a moratorium on executions in the state, was because of larger objections to the death penalty, and that he was not granting clemency to Dunlap.”

“Pennsylvania,” Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/pennsylvania> notes that, “[o]n February 13, 2015, Governor Tom Wolf announced a moratorium on executions, citing concerns about innocence, racial bias, and the death penalty’s effects on victims’ families. Governor Wolf indicated that the moratorium would be implemented by granting reprieves to each death row prisoner who did not receive a stay of execution from the courts.”

California voters have passed several pro-death penalty initiatives in the state since 1972.<sup>439</sup> In a 2012 referendum, Californians voted against repeal of the death penalty with a 52% majority.<sup>440</sup> In 2014, a federal judge ruled that California's use of the death penalty violated the Eighth Amendment of the US Constitution,<sup>441</sup> but the ruling was overturned the following year.<sup>442</sup> In 2016, California voters again rejected an abolition referendum with a 53% majority<sup>443</sup> and approved another referendum to speed up the implementation of the death penalty.<sup>444</sup> Nevertheless, in 2019, Democratic Governor Gavin Newsom used an executive order to introduce a moratorium on the death penalty.<sup>445</sup>

In 2014, the Democratic governor of Washington announced a moratorium on capital punishment in the state, citing concerns about "[e]qual justice under the law" and "flaws in the system."<sup>446</sup> In 2016, he was reelected by a slightly higher majority than in 2012 (54.2% compared to 51.4%).<sup>447</sup> Citing arbitrariness in application, the state's Supreme Court declared in a 2018 ruling that capital punishment as practiced in Washington contravened the state's constitution but explicitly stated that a "carefully drafted statute" could comply with the constitution.<sup>448</sup>

A 2014 botched execution in Oklahoma encouraged a moratorium to be introduced on capital punishment in the state.<sup>449</sup> In 2015, the US Supreme Court rejected a claim by Oklahoma death row inmates that the state's

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<sup>439</sup> "California," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/california> notes that, in 1972, "California voters pass Proposition 17, an initiative that amends the California Constitution to provide that the death penalty is not cruel or unusual punishment." In 1978, "California voters pass the Briggs Initiative which creates California's current death penalty statute, adding 16 more special circumstances, for a total of 28 death-eligible crimes." In 1990, "[v]oters pass two additional initiatives, adding 5 more special circumstances, for a total of 33 death-eligible crimes." In 1996, "[v]oters pass two initiatives that add 3 additional special circumstances, bringing the total to 36 death-eligible crimes." In 2000, "[t]wo voter initiatives add another 3 special circumstances to California's death penalty law, for a total of 39 death-eligible crimes."

<sup>440</sup> "California Proposition 34, the End the Death Penalty Initiative (2012)," Ballotpedia, accessed November 29, 2019, [https://ballotpedia.org/California\\_Proposition\\_34,\\_the\\_End\\_the\\_Death\\_Penalty\\_Initiative\\_\(2012\)](https://ballotpedia.org/California_Proposition_34,_the_End_the_Death_Penalty_Initiative_(2012)).

<sup>441</sup> Josh Sanburn, "California Judge Rules Death Penalty Unconstitutional" (July 16, 2014), <https://time.com/2994922/california-death-penalty-unconstitutional/>.

<sup>442</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 1.

<sup>443</sup> "California Proposition 62, Repeal of the Death Penalty (2016)," Ballotpedia, accessed November 29, 2019, [https://ballotpedia.org/California\\_Proposition\\_62,\\_Repeal\\_of\\_the\\_Death\\_Penalty\\_\(2016\)](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)).

<sup>444</sup> "California Proposition 66, Death Penalty Procedures (2016)," Ballotpedia, accessed November 29, 2019, [https://ballotpedia.org/California\\_Proposition\\_66,\\_Death\\_Penalty\\_Procedures\\_\(2016\)](https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016)).

<sup>445</sup> Scott Shafer and Marisa Lagos, "Gov. Gavin Newsom Suspends Death Penalty In California" (March 12, 2019), <https://www.npr.org/2019/03/12/702873258/gov-gavin-newsom-suspends-death-penalty-in-california>.

<sup>446</sup> Jaime Smith, "Gov. Jay Inslee announces capital punishment moratorium" (February 11, 2014), <https://www.governor.wa.gov/news-media/gov-jay-inslee-announces-capital-punishment-moratorium>. Inslee added: "I don't question their guilt or the gravity of their crimes. They get no mercy from me."

<sup>447</sup> "Washington gubernatorial election, 2012," Ballotpedia, accessed October 23, 2019, [https://ballotpedia.org/Washington\\_gubernatorial\\_election,\\_2012](https://ballotpedia.org/Washington_gubernatorial_election,_2012) and "Washington gubernatorial election, 2016," Ballotpedia, accessed October 23, 2019, [https://ballotpedia.org/Washington\\_gubernatorial\\_election,\\_2016](https://ballotpedia.org/Washington_gubernatorial_election,_2016).

<sup>448</sup> Kirk Johnson, "Washington State Supreme Court Deems Death Penalty Unconstitutional" (October 11, 2018), <https://www.nytimes.com/2018/10/11/us/death-penalty-ruling-washington-state.html>.

<sup>449</sup> Josh Sanburn, "The Future of the Death Penalty Will Be Decided in These 3 States" (November 8, 2016), <https://time.com/4561649/death-penalty-referendum-california-nebraska/> and Debra Goldschmidt, "Oklahoma commission recommends extending death penalty moratorium" (April 25, 2017), <https://edition.cnn.com/2017/04/25/health/oklahoma-commission-recommends-death-penalty-moratorium/index.html>.

use of the lethal injection violated the Eighth Amendment.<sup>450</sup> In 2016, 66% of voters supported a referendum that guaranteed the state's power to use capital punishment.<sup>451</sup> From March 2018, the moratorium seems to have effectively come to an end.<sup>452</sup>

In 2015, the Republican-dominated Nebraska legislature voted to abolish the death penalty, overriding the veto of the Republican governor Pete Ricketts by 30 votes to 19.<sup>453</sup> This was followed by a petition to reinstate the death penalty. Despite legal challenges,<sup>454</sup> in November 2016, a referendum was held on the issue; 61% of voters favored retaining capital punishment, overriding the 2015 vote.<sup>455</sup>

Abolition legislation was rejected in Delaware's House of Representatives in 2015, but in the following year the Delaware Supreme Court ruled the existing laws for capital punishment to be unconstitutional.<sup>456</sup>

## The Extent of the Success of the US Anti-Death Penalty Movement

### Changes to execution rates

Internationally, execution rates are not as high as they have been in the past. For example, Amnesty International notes that, "[a]t least 690 executions were known to have taken place globally in 2018... This figure represents the lowest number of executions that Amnesty International has recorded in the past

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<sup>450</sup> "*Glossip v. Gross*," US Supreme Court, accessed July 12, 2019, <https://www.scotusblog.com/case-files/cases/glossip-v-gross/>.

<sup>451</sup> "Oklahoma Death Penalty, State Question 776 (2016)," Ballotpedia, accessed July 7, 2019, [https://ballotpedia.org/Oklahoma\\_Death\\_Penalty,\\_State\\_Question\\_776\\_\(2016\)](https://ballotpedia.org/Oklahoma_Death_Penalty,_State_Question_776_(2016)).

<sup>452</sup> This claim is uncited in "Capital punishment in Oklahoma," Wikipedia, last edited May 26, 2019, [https://en.wikipedia.org/wiki/Capital\\_punishment\\_in\\_Oklahoma](https://en.wikipedia.org/wiki/Capital_punishment_in_Oklahoma), though Sean Murphy, "Oklahoma officials plan to use nitrogen for executions" (March 14, 2018), <https://apnews.com/1a87d4e2015446088a49dc41728b4dba/Oklahoma-officials-plan-to-use-nitrogen-for-executions> notes that, "[a]fter trying unsuccessfully for months to obtain lethal injection drugs, Oklahoma officials said Wednesday they plan to use nitrogen gas to execute inmates once the state resumes using the death penalty." Presumably this is the announcement that the Wikipedia article takes as indicating the end of the moratorium.

"Death Row," State of Oklahoma Department of Corrections, accessed November 29, 2019, <http://doc.ok.gov/death-row> is ambiguous; the link to their "Execution Policy" has been removed, with a note added that "This policy has been suspended until it is updated to be consistent with proposed practices." Otherwise, no mention is made of an ongoing moratorium and the page refers to "[t]he current death penalty law," which was "enacted in 1977." The link to the state's "Execution Statistics" shows that the last execution was carried out in 2015.

<sup>453</sup> Julie Bosman, "Nebraska Bans Death Penalty, Defying a Veto" (May 27, 2015), <https://www.nytimes.com/2015/05/28/us/nebraska-abolishes-death-penalty.html>.

<sup>454</sup> [https://journalstar.com/news/local/911/judge-dismisses-suit-challenging-death-penalty-question-going-to-voters/article\\_523c2890-a691-5c2d-96f9-446edbb0a33c.html](https://journalstar.com/news/local/911/judge-dismisses-suit-challenging-death-penalty-question-going-to-voters/article_523c2890-a691-5c2d-96f9-446edbb0a33c.html)

<sup>455</sup> "Nebraska Death Penalty Repeal, Referendum 426 (2016)," Ballotpedia, accessed November 29, 2019, [https://ballotpedia.org/Nebraska\\_Death\\_Penalty\\_Repeal,\\_Referendum\\_426\\_\(2016\)](https://ballotpedia.org/Nebraska_Death_Penalty_Repeal,_Referendum_426_(2016)).

<sup>456</sup> "Delaware," Death Penalty Information Center, accessed October 21, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/delaware>. The page does not mention subsequent legislation, though presumably new legislation could be introduced which would comply with the restrictions imposed by the court.

decade.”<sup>457</sup> Though they rose after *Furman*, both death sentences and executions have fallen since the late 1990s in the US.<sup>458</sup> Once the number of death sentences imposed began to decline around the turn of the 21<sup>st</sup> century, the rate of decline was more rapid than the rate at which the death penalty was being abolished internationally, in proportion to the value in 2000.<sup>459</sup>

## Legislative and legal changes

The death penalty has been abolished in 21 US states as well as the District of Columbia and Puerto Rico.<sup>460</sup> The number of nation states that have abolished the death penalty and maintained that abolition has risen to 105.<sup>461</sup> For comparison, since the 1970s, around half of countries that have abolished capital punishment for all crimes have been European countries<sup>462</sup>; South and Central America also have a long history of abolition, with several abolitions in the 19<sup>th</sup> century.<sup>463</sup> The number of countries or US states that have abolished capital punishment is a somewhat misleading metric of success, given that some states have retained capital punishment laws but performed negligible numbers of executions.<sup>464</sup> The increase in the number of countries that have formally abolished the death penalty has been accompanied by an increase in the number of states that are abolitionist de facto, and decreases in the enforcement of capital punishment.<sup>465</sup>

## Acceptance and inclusion

Various politicians have taken positions for and against the death penalty, from Clinton’s pro-death penalty actions<sup>466</sup> to George Ryan’s imposition of a moratorium in Illinois.<sup>467</sup> Despite this politicization and some

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<sup>457</sup> “Death Sentences and Executions, 2018,” Amnesty International (2019), <https://www.amnesty.org/download/Documents/ACT5098702019ENGLISH.PDF>. No data is provided on previous decades.

<sup>458</sup> See the spreadsheet “[Death penalty by year](#).”

<sup>459</sup> See the tab “Trend compared to US sentences” in the spreadsheet “[Cumulative total of states that have abolished the death penalty](#).”

<sup>460</sup> “Facts about the Death Penalty,” Death Penalty Information Center, last updated May 31, 2019, <https://files.deathpenaltyinfo.org/legacy/documents/FactSheet.pdf>.

<sup>461</sup> See the spreadsheet “[Cumulative total of states that have abolished the death penalty](#).”

<sup>462</sup> Dongwook Kim, “International Non-Governmental Organizations and the Abolition of the Death Penalty,” *European Journal of International Relations* 22, no. 3 (2016), 4, figure 1.

<sup>463</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), 70 note that “Venezuela, Costa Rica, and Brazil, which had already abolished capital punishment by the end of the nineteenth century, were followed soon afterwards by Ecuador, Uruguay, Colombia, Argentina, Panama, and most of the Mexican states.” They list several other South American countries that have subsequently abolished capital punishment.

<sup>464</sup> See the spreadsheet “[Execution numbers in abolitionist and non-abolitionist states](#).” Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 17 notes that there are “twenty-nine states that either have abolished capital punishment or have conducted no more than three executions since 1976.”

<sup>465</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), 17-22.

<sup>466</sup> See the paragraph beginning “In 1994, Congress increased...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>467</sup> See the paragraph beginning “The Illinois House of Representatives...” and the following paragraph in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

political polarization over the issue,<sup>468</sup> the ADPM's organizations and goals do not seem to have been formally recognized by either party.

## Changes to public opinion

Gallup polls found that the US public's support for the death penalty for murder fell from 68% in 1953 (when regular polling began) to 42% in 1966. After this point, support rose to a peak of 80% in 1994 before falling back to 56% in 2018 (see figure 2 above).<sup>469</sup> Results from similarly worded poll questions by the National Opinion Research Center's General Social Survey (GSS) reveal a similar trend.<sup>470</sup> Additional questions by Gallup have addressed capital punishment in the 21st century; some of these have shown an increase in opposition in this period.<sup>471</sup> However, different question framings lead to differences in apparent levels of support for the death penalty.<sup>472</sup>

An index created by Baumgartner, De Boef, and Boydston (2008) combined the results of 292 surveys on the death penalty; this index shows much lower volatility in public opinion on the death penalty.<sup>473</sup> If this index is

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<sup>468</sup> See the bullet point beginning "A study from 2002 found..." in "Features of the US Anti-Death Penalty Movement" below.

<sup>469</sup> "Death Penalty," Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>. Although these broad trends seem clear, the curves are not smooth. 1966 was the only year in which a higher percentage (47%) were opposed to the death penalty for murder than supported it (42%).

<sup>470</sup> "Civil Liberties," National Opinion Research Center's General Social Survey, accessed June 28, 2019, <https://gssdataexplorer.norc.umd.edu/trends/Civil%20Liberties>.

<sup>471</sup> "Death Penalty," Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>. Notably, 29% said that the death penalty is imposed "too often" in 2018, compared to 21% in 2001. The percentage believing that the death penalty was morally wrong increased from 27% to 35%, 2001 to 2019.

<sup>472</sup> See the strategic implication beginning "Publicizing opinion poll findings..." below.

<sup>473</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 180 summarize that "[s]hifts in public opinion were not massive... the index ranges from about 60, down to just above 50, then up to the high 60s."

Although only Gallup polls and the General Social Survey have used the same question wordings repeatedly for long periods of time, the authors combine the results from 292 surveys about death penalty opinion; they exclude questions not asking directly about an individuals' support for the death penalty, state samples, and "any question wordings that were used only once." They use "a mathematical formula first developed by Professor Jim Stimson in his analysis of the 'public mood' to create a single indicator from so many different series... The idea here is that if underlying public sentiments toward the death penalty are changing over time, this will be reflected, at different levels, in each survey question, no matter what exact question wording is used. Thus, we use the information from each data series to build a single measure of Americans' support for the death penalty."

On pages 177 they explain that they "cannot compare the answers from question A with those from question B. But we can construct a full set of comparable time series in the *degree of change* in the responses over time, in response to the *same question* when posed by the *same survey house*. If we rescale each series to some baseline, then for each year for which data are available, we can see whether, compared with the baseline, support was higher or lower, and by how much... With change ratios in opinions in hand, we can compute a simple weighted average of the change ratios in each time period."

This new index correlates highly with the most commonly analyzed Gallup poll wording ( $r = 0.96$ ) as well as a second Gallup poll question ( $r = 0.86$ ) and the General Social Survey ( $r = 0.92$ ). The results suggest slightly lower overall support and a less volatile change in public opinion. However, they note on pages 178-9 that, "by combining so many questions, and taking all their values as compared with some baseline year, the actual values of our index are determined largely by which baseline we choose and what combinations of question wordings happened to be available in the Roper survey data archive... we caution the reader not to make too much out of the absolute levels of our index of public opinion



understood to be a more reliable indicator of change than the Gallup poll results (or the results of any other individual poll), then any evidence of positive or negative effects on public opinion from analyses that do not use this index — including in the preceding “[condensed chronological history](#)” in this report — should be understood to be relatively weaker than it otherwise seems.

It is possible that long-term or indirect factors, most notably changing crime rates, could account for some of the change in public opinion.<sup>474</sup> Increasing crime may have encouraged pro-death penalty attitudes from the late 1960s, though it is possible that the *Furman* ruling, combined with anti-death penalty political mobilization and tough-on-crime rhetoric, played a more important role.<sup>475</sup> Public support for the death penalty appears to have declined from 1994, and in this instance it seems clearer that a change (in this case, a decline) in the crime rate was influential.<sup>476</sup> The more one thinks that crime rates were the primary determinant of changes in public opinion on the death penalty, the less weight one should place upon the evidence from the ADPM that certain advocacy tactics (such as writing widely publicized books or securing radical, controversial judicial change through litigation) have been effective or counterproductive in changing public opinion; instead, one should infer that these tactics have little effect.

European support for the death penalty has remained high despite widespread abolition. Support seems to have declined notably in some countries, however.<sup>477</sup>

## Changes in the importance and salience of the issue

Legal scholar Jeffrey L. Kirchmeier noted in 2002 that, in the US, “[s]ince 1981, the number of news stories about the death penalty has almost doubled every five years”; Kirchmeier’s search identified 238,652 stories in 1996-2000.<sup>478</sup> There appears to have been a general upward trend in *The New York Times*’ coverage of the

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(e.g., 67 percent in 1997, 58 percent in 2005) but to focus instead on the direction and speed of its movement over time.”

<sup>474</sup> James Alan Fox, Michael L. Radelet, and Julie L. Bonsteel, “Death Penalty Opinion in the Post-*Furman* Years,” *New York University Review of Law and Social Change* 18 (1990), 499-516 suggest factors not discussed elsewhere in this report that may have influenced public opinion. On pages 509-10, they note that, “[r]ecent changes in the manner in which crime is covered by electronic media are noteworthy. With the advent of the live Mini-cam, a television station, with just minutes’ notice, can be ‘live on the scene’ to show the horrible aftermath of a violent occurrence. Advances in technology may have dramatically strengthened the impact of crime stories on the average television viewer... Another significant media change over recent years that is partly responsible for the public’s changing perception of crime is the media’s personification of murder. In the early 1970s, a person’s concept of a murderer may have been rather vague... Increased support for the death penalty, therefore, may be more of a reflection of desire for the execution of Ted Bundy and other celebrity criminals than for the execution of more typical and obscure condemned inmates.” On page 512, they add that, “over time, Americans have been increasingly reminded through media reports that our prisons frequently release persons whom they would rather not have walking the streets, regardless of whether they personally feel at risk.”

<sup>475</sup> See the paragraph beginning “Gallup polls conducted...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>476</sup> See the paragraph beginning “Nineteen ninety-four saw the peak of support...” as well as figure 4 and the subsequent paragraph in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>477</sup> See the strategic implication below, “Abolition of a practice seems likely to encourage public opinion to gradually turn against that practice.”

<sup>478</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 3. The footnote explains that “A LEXIS search of the terms ‘capital punishment’ and ‘death penalty’ in the NEWS Library and the ALLNEWS File showed a substantial increase every five years. For January 1, 1981 through December 31, 1985, there were 14,572 news stories with those terms. For January 1, 1986 through December 31, 1990, there were 47,078 stories with those terms. For January 1, 1991 through

death penalty (see Figure 5 below).<sup>479</sup> Kirchmeier also notes that, “[p]opular culture has embraced the issue with such recent movies as *Dead Man Walking*, *Last Dance*, *True Crime*, and *The Green Mile*, and with television shows such as *The West Wing* and *The Practice*.”<sup>480</sup> Particular frames of discussion about capital punishment have also varied in salience.<sup>481</sup>

## Provider availability

Campaigns by non-profit groups and activists from 2010 have successfully reduced the supply of lethal injection drugs available to US states carrying out executions, including via legislation in the UK and EU.<sup>482</sup>

## Organizational resources

In the 20<sup>th</sup> century, the US ADPM struggled to find funding, used resources intended for other causes, and relied on volunteers.<sup>483</sup> Funding of the US ADPM seems to have increased in the 21st century, though some

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December 31, 1995, there were 124,195 stories with those terms. For January 1, 1996 through December 31, 2000, there were 238,652 stories with those terms. [Search: (“capital punishment” or “death penalty”) and date (on or bef \_) and date (on or aft \_).] Although some of the increase in the number of stories may be attributed to a growing number of news resources as well as a growing number of publications available on LEXIS, the drastic growth still reflects an increase in the number of stories about the death penalty that are available.”

<sup>479</sup> Frank E. Dardis, Frank R. Baumgartner, Amber E. Boydston, Suzanna De Boef, and Fuyuan Shen, “Media framing of capital punishment and its impact on individuals’ cognitive responses,” *Mass Communication & Society* 11, no. 2 (2008), 122.

<sup>480</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 3-4.

<sup>481</sup> See Marnie Lowe, “Resonance, Radicalism, and the Death Penalty: A Framing Analysis of the Anti-Death Penalty Movement, 1965-2014” (April 2018), <https://escholarship.org/content/qt9sg5t66n/qt9sg5t66n.pdf> and the strategic implication beginning “A small number of thoughtful actors...” below.

<sup>482</sup> See the paragraphs beginning “A 2010 campaign by the UK group Reprieve...” and “Seemingly beginning in 2011...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>483</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 43 notes that, “[t]he Legal Defense Fund’s major expense during this period was empirical research on various aspects of death sentencing. To facilitate such research, the organization diverted money from its general fund” and “utilized a foundation grant that was intended more generally for indigent defense, and relied heavily on the cheap labor of law students and on volunteers. The LDF was also able to accomplish a great deal through its heavy reliance on ‘cooperating attorneys,’ who it directed but did not have to pay.”

On page 150, Haines presents anecdotal evidence of the weaknesses of the movements finances, noting that “Hugo Bedau doubts that as much as \$1 million was being spent in 1992 to combat capital punishment in the United States. Despite ending 1993 in the black and feeling generally good about its financial picture, the NCADP staff was still seeking donations of office equipment and even paper!”

See also see footnotes 269 and 229 and the paragraph beginning “A 1990 publication listed 34...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

of the most well-known organizations still only have annual budgets of a few million dollars.<sup>484</sup> There are at least 100 nonprofits involved in the ADPM.<sup>485</sup>

## Features of the US Anti-Death Penalty Movement

### Intended beneficiaries of the movement

- Criminals are excluded from humanity's moral circle in the sense that they are denied rights afforded to other humans such as the right to liberty and, in some countries, the right to life. Criminals are usually individuals who have previously been included within the moral circle but have been excluded from it as a result of their convictions.
- The number of direct intended beneficiaries of the ADPM is much smaller than the number of direct intended beneficiaries of other social movements.<sup>486</sup>
- The stories of individual criminals may substantially affect public opinion, legislation, and social movement mobilization. Kirchmeier suggests that cases like those of Caryl Chessman and "sympathetic figures like Mumia Abu-Jamal" brings momentum to the ADPM, but that media focus on "mass-murderers like Theodore ("Ted") Bundy" has the opposite effect.<sup>487</sup> This effect seems to have been influential at many timepoints<sup>488</sup> and in many places.<sup>489</sup>

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<sup>484</sup> Colleen Eren, "The Right Anti-Death Penalty Movement?" *New Politics* 15, no. 2 (2015), 2 notes that "several key [anti-death penalty organizations] in the 2000s have been able to move away from relying only on volunteers and to increase their resources through grants given by foundations such as Atlantic Philanthropies, JEHT Foundation, and George Soros' Open Society Institute to hire full-time paid staff to strategize, organize, and lobby. For example, public records show that in 2013, the National Coalition to Abolish the Death Penalty had \$1.3 million in revenue, with its executive director garnering \$136,000 in compensation. Death Penalty Focus, located in California, in 2012 reported \$1.2 million in revenue. The same year, Equal Justice USA reported net assets of \$2.3 million."

Devashree Gupta, "The Power of Incremental Outcomes: How Small Victories and Defeats Affect Social Movement Organizations," *Mobilization: An International Quarterly* 14, no. 4 (December 2009), 421 notes that one group that at least partly focuses on anti-death penalty advocacy had a revenue of \$80 million in 2007. Unfortunately, the group is not named, nor are the totals or averages for revenue from the 105 identified groups. For the methodology of how groups were located and their revenues analyzed, see footnote 366.

<sup>485</sup> See the paragraph beginning "In August 2000..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>486</sup> From 1973 to 2015, 8,536 people were sentenced to death in the US and 1,422 were executed (see the spreadsheet "[Death penalty by year](https://www.sentienceinstitute.org/us-factory-farming-estimates)"). This compares to 44,523,781 abortions over the same period and 2.26 billion land animals alive in the US in 2017 (Jacy Reese, "US Factory Farming Estimates," last edited April 11, 2019, <https://www.sentienceinstitute.org/us-factory-farming-estimates>).

<sup>487</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 49-52. Jeffrey L. Kirchmeier, *Imprisoned by the Past: Warren McCleskey, Race, and the American Death Penalty* (New York: Oxford University Press, 2015), 43-118 describes various other influential and high-profile cases and the effects that they may have had on public opinion, as part of the narrative of the "American Death Penalty History."

<sup>488</sup> See footnote 53.

<sup>489</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 106 notes, for example, that one British peer said in parliament that, "a poll in October, 1953 (just after the Christie case [a serial killer, whose actions had led to a possibly innocent man to be hanged several years earlier]), showed 73 per cent in favour of the death penalty; another in July, 1955 (just after the execution of Ruth Ellis [whose "youth and attractiveness, coupled with the emotional turbulence in her personal life that drove her to her crime, ensured a media frenzy"]), showed only 50 per cent in favour and 37 per cent against." See also the paragraph beginning

- Some legal challenges have been brought at the instigation of convicts themselves.<sup>490</sup> However, the Death Penalty Information Center notes that, “Alabama is the only state whose anti-death penalty organization (Project Hope to Abolish the Death Penalty) was founded by death row inmates.”<sup>491</sup>

## Institution<sup>492</sup>

- At times, annual execution rates have fallen to zero or close to zero in some areas of the US<sup>493</sup> despite high rates elsewhere.<sup>494</sup> Only a tiny proportion of murderers are actually executed.<sup>495</sup> Criminals are sentenced to death in only a minority of local counties, even within states that support the death penalty.<sup>496</sup> The infrequent and sporadic use of capital punishment seems to be an important feature affecting comparability with other movements. For example, it may help to explain why

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“In 1958, two public opinion polls in France...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>490</sup> See, for example, the paragraph beginning “In 1948, Caryl Chessman...” in the section on “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>491</sup> “Alabama,” Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/alabama>.

<sup>492</sup> For a more detailed (but concise) discussion of the features of the death penalty in America, see “The Death Penalty in America” in Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008).

<sup>493</sup> See discussion of Kansas, Minnesota, and North Dakota in John F. Galliher, Gregory Ray, and Brent Cook, “Abolition and reinstatement of capital punishment during the progressive era and early 20th century,” *Journal of Criminal Law and Criminology* 83 (1992), 545-56 and the spreadsheet “[Death penalty by year](#).”

<sup>494</sup> See the spreadsheet “[Execution numbers in abolitionist and non-abolitionist states](#).”

<sup>495</sup> David M. Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America* (Lawrence, KS: University Press of Kansas, 2010), 40 notes that, “in the years between 1977 and 1989, the nation recorded 267,000 homicides. More than 200,000 arrests were made in these cases, of which about half either plea bargained or were found guilty at trial. Thirty-three hundred of these defendants received the death penalty, but only 120 were executed. Put simply the chances that a murderer would die for his crime were less than one in 2,000, an absurdly low figure in a country where most people claimed to support capital punishment.”

<sup>496</sup> James S. Liebman and Peter Clarke, “Minority Practice, Majority’s Burden: The Death Penalty Today,” *Ohio State Journal of Criminal Law* 9, no. 1 (2011), 264 note that, between 1973 and 1995, “thirty-four states sentenced at least one person to death, yet fully 60% of the counties in those States did not impose a single sentence of death over the twenty-three year period despite an estimated 332,000 homicides and 120,000 murder convictions occurring there during that time. Even in Texas, nearly 60% of its counties did not impose a single death sentence in the period. Not only have many counties de facto abolished the death penalty, but many others have employed it only sparingly—once or twice a decade. Fairfax County, Virginia, for example, with a population of nearly one million, imposed only five death sentences between 1973 and 1995. Conversely, a relatively small number of counties account for an extraordinary proportion of the nation’s death verdicts. During the same period, Seminole County, Georgia, had the same number of death sentences as Virginia’s Fairfax County but had a population more than 100 times smaller. Similarly, Hillsborough County (Tampa), Florida, with about the same population as Fairfax, imposed over thirteen times more death sentences (sixty-seven). More than half of the death sentences imposed nationwide over the twenty-three-year Broken System study period originated in only sixty-six, or 2%, of the nation’s 3143 counties, parishes, and boroughs. Sixteen percent of the nation’s counties (510 out of 3143) accounted for 90% of its death verdicts in the period.”

Relatedly, Lee Kovarsky, “Muscle Memory and the Local Concentration of Capital Punishment,” *Duke Law Journal* 66, no. 2 (November 2016), 259-330 also concludes that, “(1) capital sentencing is concentrating dramatically; (2) executions are concentrating more gradually; and (3) both trends persist within most capitally active states.”

outright abolition of the institution is frequently considered and has sometimes been implemented without substantial incremental reform beforehand.<sup>497</sup>

- Capital punishment is now more expensive than alternative punishments in the US, although this was not widely known until the 1980s.<sup>498</sup> The ability to commute death sentences to life imprisonment provides a ready alternative.<sup>499</sup>
- There are large racial disparities in capital punishment. For example, in 2006, African Americans comprised 12% of the US population but 42% of those under a death sentence.<sup>500</sup>
- Capital punishment is more entrenched in the South than elsewhere in the US, potentially due to historical cultural and political factors such as the South's greater use of slavery in previous centuries, the subsequent use of lynching to maintain a racial hierarchy, stronger vigilante values, and stronger attachment to states' rights.<sup>501</sup>
- Research highlights a number of other features that appear to be associated with higher use of the death penalty in particular areas in the US, including stronger conservative and religious leanings,<sup>502</sup>

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<sup>497</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 13 notes that, “[w]hen one examines the paths taken by the 54 nations that first abolished the death penalty either for ordinary crime in peacetime or for all crimes since the end of 1988, one finds that by the end of June 2009, 51 of them (94 per cent) had abolished it for all crimes completely and another three countries solely for murder and other ordinary crimes. Forty-three of the 51 had gone straight from retaining the death penalty to complete abolition, without first abolishing it for ‘ordinary’ crimes only. In other words, 84 per cent moved straight from retention of the death penalty for murder and sometimes other ‘ordinary’ crimes as well as military crimes and crimes against the state to complete abolition ‘in one go.’”

<sup>498</sup> See the paragraph beginning “From 1982 onwards...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>499</sup> Dalia Sussman, “Death vs Life in Prison: A Split Decision,” ABCNews.com (January 19, 2019), <https://abcnews.go.com/images/pdf/796a25DeathPenalty.pdf> found in a poll that 64% supported the death penalty for people convicted of murder but that “when they’re asked which punishment they prefer, death or life without parole, support for the death penalty plunges, from 64 percent to 48 percent.” Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (July 2006), 66 cites two other polls showing support for the death penalty at around 50% when respondents are given the option of life without parole imprisonment.

<sup>500</sup> Jane Wood, “Why public opinion of the criminal justice system is important,” in Jane L. Wood and Theresa A. Gannon (eds.) *Public Opinion and Criminal Justice* (Cullompton, UK, Willan Publishing, 2009), 87.

David M. Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America* (Lawrence, KS: University Press of Kansas, 2010), 30 notes that, “[i]n 1960, African Americans constituted 11 percent of the nation’s population, 40 percent of its prison population, 51 percent of its death row inmates, and 62 percent of those who were executed.”

<sup>501</sup> See footnote 238.

<sup>502</sup> James S. Liebman and Peter Clarke, “Minority Practice, Majority’s Burden: The Death Penalty Today,” *Ohio State Journal of Criminal Law* 9, no. 1 (2011), 269.

higher rates of homicide against white people relative to black people,<sup>503</sup> and lower willingness to pay for law enforcement institutions.<sup>504</sup>

- Internationally, cultural factors, structural factors, and other indirect, long-term factors influence the tractability of advocacy in different nations. Islam, or more specifically Sharia law, seems to increase attachment to capital punishment.<sup>505</sup> Local acceptance and interaction with international human rights norms seems intuitively likely to affect tractability of anti-death penalty advocacy. However, in

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<sup>503</sup> James S. Liebman and Peter Clarke, “Minority Practice, Majority’s Burden: The Death Penalty Today,” *Ohio State Journal of Criminal Law* 9, no. 1 (2011), 269-70 note that “communities with high rates of capital error—which are strongly correlated with high death-sentencing rates—are ones where influential citizens feel they are under particular threat from crime. Interestingly, neither crime nor homicide rates themselves predict high reversal rates and the high death-sentencing rates that go with them. What is predictive, however, is a high rate of homicide victimization of white residents relative to the rate of homicides affecting black residents. While in virtually all communities, the homicide rate experienced by African-American citizens is greater than that experienced by whites, in heavy death-sentencing communities that disparity is smaller. Other things equal, the smaller the disparity is between white and black homicide victimization, the higher the death-sentencing rate is. Heavy use of the death penalty thus seems to occur when the worst effects of crime have spilled over from poor and minority neighborhoods and are particularly salient to parts of the community that we can predict will have greater influence over local law enforcement, prosecution, and judicial officials.”

Relatedly, on page 270-1, they note that usage of the death penalty was correlated with “proximity to a large population of either African-American citizens or citizens receiving government welfare support.” There was an interaction effect between these factors: “In communities where both conditions are present—a large African-American community nearby and a high rate of white homicide victimization relative to black homicide victimization—the death-sentencing rate is higher than one would expect by simply summing the effect of each of those factors by itself.”

<sup>504</sup> James S. Liebman and Peter Clarke, “Minority Practice, Majority’s Burden: The Death Penalty Today,” *Ohio State Journal of Criminal Law* 9, no. 1 (2011), 274 notes that, “[h]olding other factors constant at their average value, jurisdictions with the highest capital-error rates have seven times higher capital-sentencing rates than jurisdictions with the lowest capital error rates; are seven times less likely to capture, convict and incarcerate criminals for serious crimes committed there; and spend a third as much on their criminal courts.”

On page 276, they add that, “[t]his suggests a preference for a single act of state ‘execution’ over a lifetime of state efforts to securely incarcerate a murderer. And researchers have consistently identified this preference as a distinguishing feature of jurors most prone to impose the death penalty.” They cite six different research items in support of this claim.

<sup>505</sup> Anthony McGann and Wayne Sandholtz, “Patterns of Death Penalty Abolition, 1960–2005: Domestic and International Factors,” *International Studies Quarterly* 56, no. 2 (2012), 282 include a model for “before 1960” which suggests that the predominance of Islam seems to have discouraged abolition. In the 1960 to 2005 model, Islam had no significant effect, though the sign was negative. By comparison, the predominance of Catholicism in a country and the transition away from communism encouraged abolition, whereas the predominance of Protestantism and GDP per capita each had no significant effect.

Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), 86 note that, “Saudi Arabia and Yemen are the only countries in [the Middle East and North Africa] to apply Islamic law in its entirety. Other countries, such as Morocco, have a penal code that is neither based on Islamic law nor significantly influenced by it, and therefore Shari’ā is not an impediment to abolition in Morocco. However, Shari’ā does have a pervasive influence in several other countries, most notably Iran. For example, ‘legally, the death penalty for consensual same-sex sexual conduct between adults is possible in Afghanistan, Brunei Darussalam, Iran, Mauritania, some norther states of Nigeria, Pakistan, Saudia Arabia, the southern region of Somalia, Sudan and Yemen, due in part to the application of Islamic Shari’ā law. Furthermore, the influence of Shari’ā law is spreading. In October 2013, the Sultanate of Brunei introduced a new Shari’ā-based Penal Code, parts of which came into force on 1 May 2014. It includes death by stoning for sodomy and adultery, as well as amputation for thieves, and flogging for abortion and alcohol consumption for Muslims convicted of such ‘offences.’” The following page summarizes some of the legal implications of Islamic theology.

Asia, political structure may be a better predictor of the usage of capital punishment than cultural factors.<sup>506</sup> Indeed, how democratic a country is seems to be an important factor internationally.<sup>507</sup>

- Support for harsh punishments, including capital punishment, is an easy way for politicians to signal the strength of their opposition to crime, which almost everybody is opposed to.<sup>508</sup>

## Advocacy

- Although there has been some grassroots anti-death penalty activism,<sup>509</sup> protests and direct action seem to have played little role in the movement; education, litigation, and lobbying seem to have been greater priorities.<sup>510</sup> Though the group People Against Executions was temporarily active in the period after *Gregg*, Haines summarized (in 1996) that, “as infrequent as it has always been in the ADPM, civil disobedience virtually disappeared from the movement’s tactical repertoire after the

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<sup>506</sup> Franklin E. Zimring, “State Execution: Is Asia Different and Why?” in R. Hood and S. Deva (eds.) *Confronting Capital Punishment in Asia* (2012), 13 notes that, “[a] plurality of Asian jurisdictions—12 out of 29—retain a death penalty on their statute books and have conducted at least one execution in the decade prior to 2012. Nine of the 29 jurisdictions have formally abolished capital punishment and eight other places have been moved from ‘retentionist’ to ‘de facto abolition’ because of protracted non-execution or, as in the case of Mongolia, announcing a permanent moratorium... The PRC is alone in making execution a more than one-in-a-million proposition with a rate per million population of executions more than five times the magnitude of any other Asian nation.”

Zimring argues on pages 16-7 that, “[t]he extraordinary variation to be found across Asia in death penalty policy is a possible complication that will undermine most attempts to seek out any simple ‘Asian difference’ in death penalty policy,” such as the argument of Lee Kuan Yew that, “[t]he basic difference” in the Asian approach to capital punishment “springs from our traditional Asian value system which places the interests of the community over and above that of the individual.” However, Zimring claims that, “[t]here is little in the way of specific empirical evidence of this Asian vs. European difference in the Lee Kuan Yew analysis.”

Zimring argues on page 18 that “‘Political and Governmental Structure,’ does an almost perfect job of predicting which states execute most often in modern Asia. The nations in Asia that have high execution rates are all authoritarian governments with very few limits on state power, communist governments such as the PRC, Vietnam, and probably North Korea, together with the right-wing authoritarian regime in Singapore. When formerly authoritarian regimes liberalize into pluralist democracies, their governments transition from high levels of executions to no executions (South Korea) or very few (Taiwan). There are only two exceptions to a perfect fit between authoritarian government and state execution. Myanmar has not pushed its contested but highly authoritarian regime into execution activity, and Japan, a one-party but functioning developed democracy, has continued a small but steady execution policy.”

<sup>507</sup> See the strategic implication below on “It is probably easier to introduce and implement unpopular laws if voters in the state do not have ready access to ballot initiatives or referenda.”

<sup>508</sup> Stephen B. Bright and Patrick J. Keenan, “Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases,” *Boston University Law Review* 75 (1995), 769-71 make this argument.

<sup>509</sup> See the paragraphs beginning “From 1976-82, five of the six executed...” and “In August 2000, The Quixote Center...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>510</sup> This is the author’s impression from the various works included in this report. See, for example, the articles that describe activism in Illinois, New Jersey, and elsewhere, such as Rob Warden, “How and Why Illinois Abolished the Death Penalty,” *Law and Inequality* 30 (2012), 245-86 and footnote 405. However, this claim is not based on any sort of systematic evaluation of program spending by nonprofit groups.

mid-1980s.”<sup>511</sup> Haines argued that the ADPM had “no ‘radical flank’ that employs disruptive or violent tactics to harass the criminal justice system.”<sup>512</sup>

- Given that the death penalty has not been carried out by individual people since the decline of lynching, the ADPM has also lacked organizations or advocacy that focuses on individual behavioral change, which could plausibly be an important component of the “ecology” of successful social movements.<sup>513</sup>
- The US ADPM does not seem to be well-funded.<sup>514</sup> Low funding presumably makes it especially challenging to achieve social change in the US. It may indicate a general lack of impetus that would make social movement success unlikely, even if the advocates used highly effective strategy, and may require advocates to take different routes to social change than those available to movements with a more natural, stronger social impetus.
- Anecdotal evidence suggests that there is determination among anti-death penalty advocates, at least in the 21st century, to place only limited emphasis on moral arguments.<sup>515</sup>
- Some (perhaps most) African American activists in the ADPM feel that not enough attention is given to racial issues in anti-death penalty advocacy.<sup>516</sup>
- At times, the ADPM has used messaging that directly encourages antagonism towards the intended beneficiaries of the movement by framing life imprisonment without parole as an alternative punishment that is preferable because it is more punitive.<sup>517</sup>

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<sup>511</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 130. Haines adds that there have been “only a handful of instances of civil disobedience specifically related to the issue since 1980. Three of these occurred in 1985.” These were various protests against executions which resulted in under 300 arrests.

<sup>512</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 15. On page 134, Haines quotes Leigh Dingerson of the NCADP saying that, “[w]hat this movement needs — and has had at various times, but what it desperately needs now — is the radical fringe!”

<sup>513</sup> For a discussion of “social movement ecology,” see Paul Engler, Sophie Lasoff, and Carlos Saavedra, “Funding Social Movements: How Mass Protest Makes an Impact” (January 2019; first published May 2018), <https://ayni.institute/fundingmovements/>, 11-22.

<sup>514</sup> See the section on “Organizational resources” above.

<sup>515</sup> Andy Hoover and Ken Cunningham, “Framing, Persuasion, Messaging, and Messengers: How the Death Penalty Abolition Movement Succeeded in New Jersey” *Humanity & Society* 38, no. 4 (2014), 446 notes that, “[s]ix of the seven participants felt there was a role for moral arguments against the death penalty. Some people feel it is simply wrong to kill as punishment, but the caveat expressed by several stakeholders is that the moral argument has to be used with an audience with which it will resonate.” On page 462, they add that “[t]hree participants mentioned as ineffective... the moral frame.” They quote one interview: “We never, ever talked about how horrible it is for the prisoners on death row. We never, ever talked about their suffering except in the name of, ‘Hey, life without parole is worse.’ We really never talked about how terrible it is to be the family of someone on death row or in that whole situation unless it was in the context of an exoneration ... We didn’t talk in any way that would make us appear to be sympathetic to murderers.”

<sup>516</sup> Sandra J. Jones, *Coalition Building in the Anti-death Penalty Movement: Privileged Morality, Race Realities* (Lanham, MD: Lexington Books, 2010), 18-19 notes that 40 activists “were asked whether they feel that the movement places too much, not enough, or just the right amount of emphasis on the subject of race as it relates to the death penalty. While all twenty of the black activists replied that there is ‘not enough’ emphasis on race, only six of the white activists (30 percent) gave a similar response. A majority of the white activists expressed either that they feel the movement gives ‘just the right amount’ (40 percent) or ‘too much’ (30 percent) emphasis on race when its participants argue against the death penalty.” The African American activists explained this neglect through a strategic decision of white activists to avoid racial arguments since they are not expected to be as influential, or because white activists are just uncomfortable with dialogue focused on race. Jones interviewed 40 activists from the NCADP but did not attempt to make the sample representative of the movement.

<sup>517</sup> See the section on “Capital punishment and life sentences” in Marie Gottschalk, “Sentenced to life: Penal reform and the most severe sanctions,” *Annual Review of Law and Social Science* 9 (2013), 373-5.



- The ADPM seems to have little demographic diversity,<sup>518</sup> despite lower levels of support for the death penalty among people of color than among whites.<sup>519</sup>

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<sup>518</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 103 claims that the movement's ranks "have been filled mostly by middle-class white people with professional backgrounds and liberal politics." Haines cites a death penalty researcher and activist from Massachusetts who lamented that the activists in that state were white, middle-class, religious, and "real old."

On pages 111-3, Haines draws attention to several efforts to increase the diversity of the movement, such as diversity workshops by the NCADP. There were also efforts to forge links with the civil rights movement, such as AIUSA's hiring of Charles Fulwood, an African American with a background in the civil rights movement, and AIUSA's efforts to seek support from civil rights groups over the *McCleskey* ruling which refused to accept statistical evidence of bias in capital sentencing as evidence of bias in individual cases. On pages 113-6, Haines lays out some hypotheses for why people of color have not become very involved in the movement, such as the more pressing issues of oppression that those communities face, as well as the higher number of people of color who are victims of violent crime.

Sandra J. Jones, *Coalition Building in the Anti-death Penalty Movement: Privileged Morality, Race Realities* (Lanham, MD: Lexington Books, 2010), 5-6 interviewed 40 activists from the NCADP. Jones notes that "[t]here were so few Latinos affiliated with NCADP in the mainstream anti-death penalty movement when I began my research that I did not include them in my initial sample. While they remain a tiny fraction of the various racial and ethnic groups found within the movement, the number of Latino activists has grown in recent years... In the months leading to the publication of this book, therefore, I sought to include within my sample the views of nine prominent Latino activists who are affiliated with NCADP. The presence of Asian Americans and Native Americans in the mainstream movement is virtually nonexistent... As a result, I did not include anyone from those racial groups in my sample of activists that I interviewed. The small number of activists in the movement from these two groups is likely the result of not only their relatively small percentage of the U.S. population (approximately 5 percent Asian American and 1 percent Native American), but also their small proportion of the inmates found on our nation's death rows. Combined, these two groups constitute only 2 percent of death row inmates."

On pages 9-10, Jones summarizes that the interviews "reveal that the racial politics operating within U.S. society have penetrated the anti-death penalty movement. The lack of racial diversity found within the movement is largely due to the complexities that arise from these political arrangements... [T]he manner in which activists react to or utilize information about race largely determines who becomes mobilized."

<sup>519</sup> Sandra J. Jones, *Coalition Building in the Anti-death Penalty Movement: Privileged Morality, Race Realities* (Lanham, MD: Lexington Books, 2010), 8 summarizes that, "in August 2007, a poll conducted by the Pew Forum on Religion & Public Life found that while a majority (68 percent) of whites support the death penalty, a minority (40 percent) of blacks demonstrate such support... A recent survey found comparable percentages of blacks (51 percent) and Latinos (47 percent) that oppose the death penalty. Less than half of each group goes so far as to convey their support for the death penalty, with slightly more Latinos (48 percent) than blacks (40 percent) endorsing this form of punishment. While a greater percentage of Latinos than blacks are found to support the death penalty, both groups are significantly less likely than whites (68 percent) to favor the death penalty."

On page 26, Jones adds that among the interviewees in her own study (20 black, 20 white), "most of them, including all of the blacks and white women, find the racial composition to be overwhelmingly white and in need of greater racial diversity. Half of the white men interviewed, however, indicate that they are satisfied with the racial composition of the movement."

On pages 28-33, Jones describes several reasons identified by the interviewees for how the movement does not attract people of color, including that a lack of diversity is self-perpetuating because people of color who join the movement feel isolated, or that the movement is unintentionally exclusionary by emphasizing particular types of discourse. On page 44-54, Jones outlines several external factors that may explain why people of color are underrepresented in the movement, including that they have "too much on their plate already," a "sense of powerlessness within the black community," that many African Americans continue to support the death penalty, and that there is still a lack of knowledge about the death penalty.

- Although anti-death penalty advocates have been criticized for being unsympathetic to the suffering of the families of murder victims,<sup>520</sup> some victims' family members have been active in the ADPM; Haines lists 11 such activists, one of who (Marietta Jaeger) set up the organization Murder Victims' Families for Reconciliation.<sup>521</sup>
- Some anti-death penalty advocates encourage stronger links with the civil rights, anti-abortion, and gun control movements, though other advocates do not prioritize the development of these links.<sup>522</sup>
- Haines characterizes the anti-death penalty movement as having "remarkably little infighting," perhaps "because of its relatively small size." Nevertheless, Haines cites several areas of debate, such as whether to use incremental or absolute strategies.<sup>523</sup> Sociologist Sandra Jones has found evidence from interviews with activists of disagreement within the ADPM on the effectiveness of vigils and of civil disobedience.<sup>524</sup> Jones also finds evidence of disagreement over the extent to which the movement should prioritize lobbying and insider strategies or building up a grassroots movement.<sup>525</sup>
- Technological change seems to have facilitated advocacy against the death penalty, such as through the development of DNA testing for guilt.<sup>526</sup> The changes from hanging towards electrocution and

<sup>520</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 106 claims that, "[n]early everyone who has ever spoken out for the abolition of capital punishment has encountered some version of the same response: 'All right, but how would *you* feel if someone in *your* family were brutally murdered?'" In a footnote, Haines adds that "[b]ased on his contacts with a number of victims' groups, Kentucky attorney Kevin McNally estimates that the proportion of survivors favoring the death penalty are about the same as in the population at large."

<sup>521</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 107-9.

<sup>522</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 143-7.

<sup>523</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 118. On the incremental strategy debate, see footnote 266 and the accompanying text. Haines describes several other debates on pages 118-47, such as the proper roles of litigation and public-facing advocacy, the extent to which the personalities of convicts should be emphasized (as opposed to focusing on the generic morality of executing humans), whether direct action should be used, whether life imprisonment without parole should be offered as an alternative to capital punishment or not, and the extent to which the anti-death penalty movement should seek collaboration with other movements.

<sup>524</sup> Sandra J. Jones, *Coalition Building in the Anti-death Penalty Movement: Privileged Morality, Race Realities* (Lanham, MD: Lexington Books, 2010), 151-6 found hostility to one tactic or the other among several interviewees. For example, "Mark... a white man in his mid-thirties who heads up one of the anti-death penalty organizations" in Delaware said that some people "seem like they are junkies for execution night vigils... Some of us refer to them as 'candle clutchers.' They are certainly not abolitionists. We call them passive abolitionists, also known as pro-death penalty... If you're passive about the death penalty, but you don't do anything to shut it down or are unwilling to do anything controversial, our attitude is basically that it does just as much to keep the death penalty going as people who are avidly pro-death penalty." At least two other interviewees shared some of these sentiments. Included quotes from interviewees who preferred vigils to disobedience were somewhat critical of the latter strategy: "They like to brag about getting arrested, but that's not the goal. If their goal is getting arrested, then they're doing a good job. If it's public education, I'm not so sure that's what they're doing. When I was involved, we went for more one-day conferences and we did things in a quiet way." An interviewee from the Coalition Against State Executions spoke of the Campaign to End the Death Penalty: "We'll organize the vigils and one of the reasons we do that is that we don't want the Campaign organizing the vigils because we feel like if they organize it, then it will be aggressive, hostile, and confrontational and we don't want them to be like that.. Sometimes it's hard because we want silence and they want to have chanting."

<sup>525</sup> Sandra J. Jones, *Coalition Building in the Anti-death Penalty Movement: Privileged Morality, Race Realities* (Lanham, MD: Lexington Books, 2010). Concerns including that the use of protest tactics "alienates mainstream people" or concerns for inaction and that the grassroots activism is "where it [political change] happens."

<sup>526</sup> Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," *University of Colorado Law Review* 73, no. 1 (2002), 82 summarizes that, "the Internet likely has played an important

gas chambers<sup>527</sup> and then towards lethal injection<sup>528</sup> have been motivated at least in part by concern for the suffering of the executed.

- Throughout the late 20th century, the Methodist, Lutheran, Episcopal, and Presbyterian churches and leading Reform Jewish organizations have supported the abolition of the death penalty, but the Southern Baptist Convention and several evangelical organizations have opposed abolition. The Catholic Church has become increasingly hostile towards the death penalty.<sup>529</sup> Campaigners in New Jersey in 2007 found support for their advocacy among Christians.<sup>530</sup> Nevertheless, in general, US religious organizations have not been highly proactive in challenging the death penalty.<sup>531</sup>

## Society

- A study that asked participants to rate 30 different entities by the “moral standing” that they deserved found that “villains” (murderers, terrorists, and child molesters) were deemed by participants to deserve less moral standing than “low-sentience animals” (chickens, fish, and bees), with mean scores of 1.77 and 2.64 respectively on a scale from 0 to 9. Indeed, they were deemed to deserve less moral standing than non-sentient “environmental targets” (3.53) or plants (2.52).<sup>532</sup>

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role in the distribution of information about the death penalty. More directly, new DNA technology has led to discoveries of convictions of innocent defendants, causing citizens to question the validity of our criminal justice system and the death penalty.”

<sup>527</sup> See footnote 47.

<sup>528</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 296-7 notes that Oklahoma and Texas adopted lethal injection from 1977 before other states followed. Banner suggests that the reasons for this shift were that the pre-*Furman* equipment was old and damaged in many states, that lethal injections were cheap, and that they were “ordinarily painless and clean.”

Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (New York: Cambridge University Press, 1986), 122 argue that proponents of capital punishment after *Furman* “were striving to find a method of capital punishment that is acceptable to modern sensibilities, while its opponents hoped to show that the notion of modern methods of execution is a contradiction in terms. In this view, the real vice of electric chairs and gas chambers is not so much that they inflict pain as that they are visible anachronisms. Both sides of the controversy hoped, for different reasons, that lethal injections would bring executions into the twentieth century.”

<sup>529</sup> Thomas Banchoff, “Human Rights, the Catholic Church, and the Death Penalty in the United States,” in Thomas F. Banchoff and Robert Wuthnow (eds.) *Religion and the Global Politics of Human Rights* (Oxford: Oxford University Press, 2011), 285-314.

<sup>530</sup> Andy Hoover and Ken Cunningham, “Framing, Persuasion, Messaging, and Messengers: How the Death Penalty Abolition Movement Succeeded in New Jersey,” *Humanity & Society* 38, no. 4 (2014), 459 notes that several activists mentioned that churches and anti-abortion groups were sources of support to the anti-death penalty movement in New Jersey.

See also Thomas Banchoff, “Human Rights, the Catholic Church, and the Death Penalty in the United States,” in Thomas F. Banchoff and Robert Wuthnow (eds.) *Religion and the Global Politics of Human Rights* (Oxford: Oxford University Press, 2011), 301-3.

<sup>531</sup> See the strategic implication below, “Formal alignment with the leadership of religious groups may not translate into substantial support from those leaders or from community members.”

<sup>532</sup> Daniel Crimston, Paul G. Bain, Matthew J. Hornsey, and Brock Bastian, “Moral expansiveness: Examining variability in the extension of the moral world,” *Journal of Personality and Social Psychology* 111, no. 4 (2016), 636-53. In this “moral expansiveness scale” (MES), a score of 9 meant that all three example entities were deemed to be part of the “inner circle,” whereas a score of 0 meant that all 3 example entities were deemed to be “outside the moral boundary.” The authors explain that, “[i]n the MES, participants indicate the relative moral standing of a wide range of entities by placing them within four defined boundaries... The four boundaries of morality are graded (inner circle = 3, outer circle = 2,

- Support for capital punishment may be especially difficult to change, since desires for revenge seem to be common across cultures.<sup>533</sup>
- A study from 2002 found that there was significantly greater support for the death penalty among whites, men, and southerners but that age had no effect on levels of support.<sup>534</sup> Summarizing findings from Gallup polls between 1936 and 1986, criminal justice scholar Robert M. Bohm writes that, “whites, wealthier people, males, Republicans, and Westerners tended to support the death penalty more than blacks, poorer people, females, Democrats, and Southerners.”<sup>535</sup> Looking at General Social Survey data around several key Supreme Court rulings, another study found evidence that men, whites, and Republicans were more supportive of the death penalty. The evidence of higher support for the death penalty among Republicans and conservatives seems especially strong.<sup>536</sup>

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fringes = 1, outside = 0), and an aggregate score is calculated to reflect the expansiveness of an individual’s moral world... 30 entities were included spanning 10 categories... Three entities were included in each of these categories.”

<sup>533</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 25-39 argues that, as summarized on page 2, there is “research from various disciplines showing a strong cross-cultural tendency for people to seek revenge against those who have violently victimized them, and to experience vicarious satisfaction when the state exacts harsh punishment in the name of the people. This impulse is not shared to an equal extent by all members of any given society, and is channeled in different ways by different cultures. It is there, however, and it is universal, as shown by the considerable popularity of capital punishment in many different cultural contexts.”

<sup>534</sup> David Niven, “Bolstering an Illusory Majority: The Effects of the Media’s Portrayal of Death Penalty Support,” *Social Science Quarterly* 83, no. 3 (2002), 680.

Jane Wood, “Why public opinion of the criminal justice system is important,” in Jane L. Wood and Theresa A. Gannon (eds.) *Public Opinion and Criminal Justice* (Cullompton, UK: Willan Publishing, 2009), 88 add that, “[i]n multivariate analyses, ‘being white’ is positively and significantly related to support for capital punishment. This ‘racial divide’ persists even when a range of factors known to predict death penalty attitudes is systematically controlled (Cochran and Chamlin 2006; Unnever and Cullen 2007a).” Several other studies are cited that show disparities between African Americans and whites.

<sup>535</sup> Robert M. Bohm, “American Death Penalty Opinion: Past, Present, and Future,” in James R. Acker, Robert M. Bohm, and Charles S. Lanier (eds.) *America’s Experiment with Capital Punishment* (Durham, NC: Carolina Academic Press, 1998), 30. In the 1994 Gallup poll, most of these differences were of around 10%, such as 74% support for the death penalty among females and 84% support among males.

<sup>536</sup> John K. Cochran, Denise Paquette Boots, and Mitchell B. Chamlin, “Political identity and support for capital punishment: A test of attribution theory,” *Journal of Crime and Justice* 29, no. 1 (2006), 45-79 summarizes that, “[s]tudies of public support for capital punishment have consistently observed modest relationships between both political ideology and party affiliation and support for the death penalty; conservatives and Republicans are more inclined to support capital punishment than are liberals and Democrats. This relationship has endured over time and space as well as across a myriad of research designs.” The research cited in support of this claim on page 46 is R. M. Bohm, “American Death Penalty Opinion, 1936-1986: A Critical Examination of the Gallup Polls,” in R. M. Bohm (ed.), *The Death Penalty in America: Current Research* (Cincinnati, OH: Anderson, 1991) and R. M. Bohm, “American Death Penalty Opinion: Past, Present, and Future,” in R. Acker, R. M. Bohm, and C. S. Lanier (eds.), *America’s Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Durham, NC: Carolina Academic Press, 1998).

In their own analysis of “survey data obtained from jurors summoned to service,” they also find that “political conservatives are more likely to support the death penalty for both adults and juveniles ( $r = .139$  and  $.121$ , respectively). Similarly, political party affiliation is also associated with death penalty attitudes such that Republicans are significantly more inclined to support capital punishment for both adults and juveniles than are Democrats ( $r = .172$  and  $.184$ , respectively).” They also find that support for the death penalty is correlated with “a dispositional attribution style which stresses the individual responsibility, deservedness, and moral culpability of criminal offender.”

Additionally, David Jacobs and Stephanie L. Kent, “The Determinants of Executions Since 1951: How Politics, Protests, Public Opinion, and Social Divisions Shape Capital Punishment,” *Social Problems* 54, no. 3 (2007), 308-10 found that the proportion of state governors that were Republican was significantly positively correlated with public support for the

In one paper there was also some evidence that Jewish people and people with lower levels of education were more supportive of the death penalty.<sup>537</sup> Survey evidence suggests that racial prejudice is associated with support for capital punishment.<sup>538</sup> Authoritarianism is also a predictor of support for the death penalty.<sup>539</sup> An individual's punitiveness, authoritarianism, fundamentalism, and their nation's homicide rate were found to predict death penalty support in a study with participants from outside the US.<sup>540</sup>

- Several long-term, indirect factors affect public opinion towards capital punishment, the number of executions, and whether or not a state abolishes the death penalty, including the murder rate, the percentage of the population that is nonwhite, and economic inequality.<sup>541</sup> Involvement in wars may also affect views on the death penalty.<sup>542</sup>

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death penalty but was only correlated with the number of executions in some of the models used. Whether the president was Republican or not was significantly correlated with the number of executions but not with public support for the death penalty.

<sup>537</sup> Timothy R. Johnson and Andrew D. Martin, "The public's conditional response to Supreme Court decisions," *American Political Science Review* 92, no. 2 (1998), 299-309.

<sup>538</sup> See footnote 206.

<sup>539</sup> Steven Stack, "Authoritarianism and support for the death penalty: A multivariate analysis," *Sociological Focus* 36, no. 4 (2003), 333-52.

<sup>540</sup> Steven Stack, "Public Opinion on the Death Penalty," *International Criminal Justice Review* 14, no. 1 (2004), 69-98.

<sup>541</sup> David Jacobs and Stephanie L. Kent, "The Determinants of Executions Since 1951: How Politics, Protests, Public Opinion, and Social Divisions Shape Capital Punishment," *Social Problems* 54, no. 3 (2007), 297-318.

John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 208-12, after considering murder rates by state and unemployment rates by state demonstrate that neither of these indirect factors is sufficient to explain the abolition of the death penalty in some states but not others. On page 217 they add that, "[c]ontrary to the claims that abolition can be expected in states with the least mobile populations, our case studies include all variety of mobility patterns, from the extreme stability of Iowa and West Virginia to the great mobility found in Alaska and Hawaii. On the other hand, the nine case studies discussed support our assertion that executions and population diversity are strongly associated. The tendency to execute racial and ethnic minorities characterizes the execution histories of the abolitionist states. When Maine, Alaska, Hawaii, North Dakota, Minnesota, Wisconsin, West Virginia, and Michigan performed executions, racial and ethnic minorities were the victims of choice. These case studies demonstrate a close association between death penalty abolition and demographic shifts.

David Jacobs and Jason T. Carmichael, "The political sociology of the death penalty: A pooled time-series analysis," *American Sociological Review* (2002), 109-31 found that, "[a]fter controlling for social disorganization, region, period, and violent crime, panel analyses suggest that minority presence and economic inequality enhance the likelihood of a legal death penalty. Conservative values and Republican strength in the legislature have equivalent effects."

See also the paragraph beginning "From the late 1930s..." and subsequent bullet point lists, the paragraph beginning "Gallup polls conducted...", and the paragraph beginning "In December, 1972, Florida signed..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>542</sup> Jeffrey L. Kirchmeier, *Imprisoned by the Past: Warren McCleskey, Race, and the American Death Penalty* (New York: Oxford University Press, 2015), 44 notes that, "some historians have noted that opposition to the death penalty drops during periods of war. When soldiers are dying on the battlefield, society members care less about the lives of criminals. Even though the carnage of war has often weakened the public's outrage against capital punishment, some of the greatest death penalty abolition periods have coincided roughly with American involvement in unpopular wars. One possible explanation is that unpopular wars motivate some in the public to take action on social issues. So, abolition movements showed some success during the early years of the Vietnam War, during the Iraq War, and during a period around World War I. The wars, of course, do not dictate abolition movements, but wars and other large events affect society and people's views on social issues. Similarly, economic hard times and other societal events may result in less concern for convicted criminals." It seems fair to characterize the periods of the Vietnam War (1955-75) and Iraq War (2003-11) as

- Debates around the death penalty and criminal justice issues are sometimes seen as predominantly simple morality issues,<sup>543</sup> though they sometimes involve technical issues such as cost.<sup>544</sup>
- One method of social movement mobilization is to create organizations or framings that tap into “latent constituencies”: groups with pre-existing beliefs and attitudes well-matched to those of the social movement.<sup>545</sup> Given the racial disparities in capital punishment,<sup>546</sup> ethnic minority groups may form latent constituencies for the ADPM; 28% of the respondents to the 2010 US census reported their race as being something other than white (including 13% black or African American).<sup>547</sup>

## Differing outcomes in the United States and Europe

Given the contrast between the current abolition of capital punishment in most of Europe and its retention in much of the US,<sup>548</sup> it is tempting to identify differences in tactics of the advocates in these areas and to infer that these variations contributed substantially to the different legislative outcomes. However, there are a variety of long-term, indirect factors that may explain the majority of the difference.

Carol S. Steiker summarized ten of the most prevalent theories that explain the US’ capital punishment “exceptionalism”:

1. Homicide rates,
2. Public opinion,

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having higher interest in abolition than other periods of recent US history, though there is little evidence that this interest was substantially influenced by the wars themselves. Any changes during the period of World War I (1914-8) seem more attributable to ongoing trends related to the Progressive Era than to the war itself.

See also the paragraph beginning “The Mexican War (1846-8)...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>543</sup> See, for example, Mona Lynch, “Capital Punishment as Moral Imperative: Pro-Death-Penalty Discourse on the Internet,” *Punishment & Society* 4, no. 2 (2002), 213-36 and Christopher Mooney and Mei-Hsien Lee, “The Influence of Values on Consensus and Contentious Morality Policy: U.S. Death Penalty Reform, 1956–1982,” *Journal of Politics* 62, no. 1 (2000), 223–39.

<sup>544</sup> See, for example, the paragraphs beginning “From 1988 onwards...”, “In 2007, New Jersey abolished...”, and “In 2011, several conservatives...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

Frank E. Dardis, Frank R. Baumgartner, Amber E. Boydston, Suzanna De Boef, and Fuyuan Shen, “Media framing of capital punishment and its impact on individuals’ cognitive responses,” *Mass Communication & Society* 11, no. 2 (2008), 124 note that, in their analysis of *New York Times* articles from 1960 to 2003, “issues of constitutionality were the single most common theme in coverage over most of this period; more than 1,300 articles mentioned discussions of this type, with peaks coming in 1972, 1976, and the years following that, in the mid- to late 1980s, and finally in the early 21st century as the constitutionality of capital punishment for juveniles and the mentally handicapped became important controversies (see Figure 4). Morality frames have been less prominent over time, with 574 stories focusing on these. Discussion of morality has been prominent since 1972, especially from 1972 to 1978 when the constitutionality of the entire death penalty was hotly debated. Since then, moral issues have never completely disappeared from the media agenda, but they have been significantly less prevalent.”

<sup>545</sup> John H. Evans, “Polarization in Abortion Attitudes in U.S. Religious Traditions, 1972–1998,” *Sociological Forum* 17, no. 3 (September 2002), 398-9 characterizes this as the assumption of social movement scholars, and cites David A. Snow, E. Burke Rochford, Steven K. Worden, and Robert D. Benford, “Frame Alignment Processes, Micromobilization, and Movement Participation,” *American Sociological Review* 51 (1986), 464–481.

<sup>546</sup> See the paragraph above beginning “There are large racial disparities...”

<sup>547</sup> Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, “Overview of Race and Hispanic Origin: 2010,” *2010 Census Briefs* (March 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

<sup>548</sup> See the section above on “The Extent of the Success of the US Anti-Death Penalty Movement.”

3. Salience of crime as a political issue,
4. Populism,
5. Criminal justice populism,
6. Federalism,
7. Southern exceptionalism,
8. European exceptionalism,
9. American cultural exceptionalism, and
10. Historical contingency.<sup>549</sup>

Of course, the relative importance of these factors has been debated. Hammel describes a debate between “culturalists” and “anti-exceptionalists.” The former “see the United States as having an exceptional culture that stresses individual personal responsibility, recognizes stark black-and-white moral absolutes, downplays ‘societal’ explanation for crime, and is relatively unconcerned about the racial and class bias that affect its justice system.” Anti-exceptionalists reject these arguments and focus on other issues, such as structural factors like federalism and direct public involvement in criminal justice policy.<sup>550</sup>

Although accepting that cultural and structural differences help to explain the particular form and geography of capital punishment in the US, legal scholars Steiker and Steiker (2016) argue that they do not explain why the US has failed to abolish the death penalty. Instead, they argue that the US was, “on a similar trajectory to our Western European peers, with the same trends of restricting the crimes for which it could be imposed, moving executions behind prison walls, humanizing execution methods, and limiting its overall use... [T]he American death penalty came perilously close to extinction, to the point that it is contingent not only that the U.S. did not abolish, but that it did not abolish at a slightly earlier point than much of Europe. Claims of exceptionalism rooted in deep cultural or political differences suggest, wrongly, that American retention of the death penalty was somehow fated.”<sup>551</sup>

This report does not attempt to thoroughly evaluate the relative importance of long-term, indirect factors, contingency, and the actions of the ADPM in causing the differing outcomes between the US and Europe. However, the less confident one is that the decisions of the US ADPM have led to its relative failure and the decisions of the European ADPM have led to its relative success, the less confident one should be that other social movements should aspire to emulate the features of the European ADPM and distance themselves from the features of the US ADPM.

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<sup>549</sup> Carol S. Steiker, “Capital Punishment and American Exceptionalism,” *Oregon Law Review* 81 (2002), 97.

<sup>550</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 191.

<sup>551</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 73-4.

# Strategic Implications

## Institutional Reform

### The Causes of Judicial Change

- **The opinions of the public and their elected representatives are important determinants of judicial decision-making, perhaps especially in death penalty cases.**

Thomas R. Marshall (1989) found that, from 1934 to 1986, 142 Supreme Court opinions have directly mentioned “public opinion” and of these mentions, “criminal process — trials, prisoners, trial rights” cases made up 35%, “dissent — political, free speech, religious” made up 18%, and “[c]ivil rights, race” made up only 4%.<sup>552</sup>

Public opinion seems to have been important in decision-making on the constitutionality of capital punishment, perhaps especially given the wording of the phrase “cruel and unusual” in the US Constitution (and “cruel or unusual” in the California Constitution). In 1972, the California Supreme Court noted that, “[w]ere the standards of another age the constitutional measure of ‘cruelty’ today, whipping, branding, pillorying, severing or nailing ears, and boring of the tongue, all of which were once practiced as forms of punishment in this country, might escape constitutional proscription, but none today would argue that they are not ‘cruel’ punishments.”<sup>553</sup> *Furman* was passed at a low point in public support for the death penalty; this and falling execution rates suggested to people at the time that capital punishment was likely to dwindle out anyway.<sup>554</sup> Steiker and Steiker summarize that, “[a]ccording to Evan Mandery’s behind-the-scenes account of the *Furman* decision, it was this apparent surge of public opinion against the death penalty that moved Stewart to agree with White to make up the *Furman* bare majority, and that would also move Stewart years later to express anger at how wrong the expert reports about the trajectory of public opinion had turned out to be.”<sup>555</sup>

In contrast, the Supreme Court explicitly justified the *Gregg* ruling by noting that, “it is now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary

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<sup>552</sup> Thomas R. Marshall, *Public opinion and the Supreme Court* (London: Unwin Hyman, 1989), 31-5. The methods of counting Supreme Court mentions of public opinion are unclear. For some specific issues, Marshall cites individual cases, though presumably he did not read through every case to conduct this analysis. This count does not include close synonyms such as “the prevailing sentiment.”

<sup>553</sup> “*People v. Anderson*,” Supreme Court of California (February, 1972), <https://scocal.stanford.edu/opinion/people-v-anderson-22750>.

<sup>554</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 7-45 makes this argument in depth. On the declining execution and sentencing rates, see the spreadsheet “[Death penalty by year](#).” On the declining support, see the section on “Changes to public opinion.” See also the bullet point list beginning “More substantial factors that seem...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement” for other factors that made the extra-legal context conducive to a ruling against capital punishment.

<sup>555</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 220, citing Evan Mandery, *A Wild Justice: The Death and Resurrection of Capital Punishment in America* (New York: W. W. Norton, 2013), 235.



criminal sanction.”<sup>556</sup> Given that the ruling seemed to tolerate arbitrariness in executions (the principal concern in the *Furman* ruling), the increasing public support for the death penalty and backlash against *Furman* among legislators were probably important determinants of the reversal.<sup>557</sup> Legislation at the state and national levels as well as public reactions seem to have been important factors influencing subsequent Supreme Court decisions on the death penalty, such as *Roper v. Simmons* (2005).<sup>558</sup> Of the 142 Supreme Court mentions of public opinion identified by Thomas Marshall (1989), 8% specifically cited polls, 39% used indirect indicators such as statutes, and 70% used “normative, theoretical, or abstract (non-empirical) discussions.”<sup>559</sup> Even among some of the dissenters in the *Furman* ruling, there was an acceptance that various indirect indicators of current public attitudes were important determining features. Disagreement seems to have revolved around how attitudes should be measured and acted upon; Justices Powell and Rehnquist emphasized the importance of deference to the decisions of Congress and state legislative bodies, while Chief Justice Warren Burger emphasized the importance of deference to the decisions of juries.<sup>560</sup>

However, the Justices have, at times, explicitly rejected the importance of public opinion in their decision-making, such as Justice Brennan’s comment in *Furman* that the right to be free of cruel and unusual

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<sup>556</sup> Cited in Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 56. For evidence in support of this characterization, see the first few paragraphs in the section on “1972-86: Backlash, legal reversal through *Gregg v. Georgia*, and the ADPM’s initial shift towards public-facing advocacy” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>557</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 57-64. On page 64, Lain concludes that, “[i]ronically, in both *Furman* and *Gregg*, the litigant with the law on its side lost. In *Furman*, nearly every shred of constitutional law available weighed against the NAACP, but it won anyway. In *Gregg*, the abolitionists finally had doctrine on their side, but they still suffered defeat. In both cases, broader socio-political context played an integral role in the result.”

See also footnote 221.

Carol S. Steiker and Jordan M. Steiker, “Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,” *Harvard Law Review* 109, no. 2 (December 1995), 404-12 argue, however, that the legislative backlash may have encouraged reversal by creating too great a challenge to the Court’s institutional legitimacy.

<sup>558</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 277-8 notes that, “[i]n its rulings, the Supreme Court often starts by looking at how many states either prohibit or permit a particular punishment. When *Atkins* was decided in 2002, the Court noted that thirty states, including twelve abolitionist ones, prohibited the death penalty for mentally retarded offenders, whereas only twenty states permitted that punishment. When *Roper* was handed down in 2005, the Court observed that thirty states prohibited the death penalty for juveniles, whereas only twenty states authorized such a sentence. In *Enmund*, the Court also emphasized that only eight jurisdictions authorized a death sentence solely for participation in a robbery during which an accomplice committed a murder. And in *Kennedy* the Court emphasized that “it is of significance that, in forty five jurisdictions, petitioner could not be executed for child rape of any kind”—a number that “surpasses the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* that prohibited the death penalty under the circumstances those cases considered.” Counting states is not the only mechanism used: “in *Atkins*, after noting that fifteen states had recently barred the execution of the mentally retarded, the Court held that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.” The frequency the punishment is actually used is also considered.

Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 91-3 also note the influence of legislation on the *Roper* decision.

<sup>559</sup> Thomas R. Marshall, *Public opinion and the Supreme Court* (London: Unwin Hyman, 1989), 31-5.

<sup>560</sup> For a summary of the judges justifications in the case, see John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 235-40.

punishments “may not be submitted to vote; [it] depend[s] on the outcome of no elections.”<sup>561</sup> Only 21% of the Court’s mentions of public opinion identified by Thomas Marshall (1989) explicitly argued that law and policy should reflect evolving public opinion, while 19% argued that public opinion is a threat to rights and should be restrained.<sup>562</sup> Even where public opinion was used as a guide, the results of opinion polling were not necessarily directly translated into judicial outcomes: The California Supreme Court noted that, because capital punishment was “a process which is far removed from the experience of those responding,” public opinion polls were not “helpful in determining whether capital punishment would be acceptable to an informed public were it evenhandedly applied to a substantial proportion of the persons potentially subject to execution.”<sup>563</sup> In *Furman*, Justice Thurgood Marshall argued that, “whether or not a punishment is cruel and unusual depends, not on whether its mere mention ‘shocks the conscience and sense of justice of the people,’ but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust and unacceptable... Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice.”<sup>564</sup>

A paper by political scientists Paul Brace and Brent D. Boyea (2008) found that the effect of public support for the death penalty on the likelihood that state supreme courts would reverse death penalty impositions from lower courts was statistically insignificant overall. However, in states that elected their Supreme Court justices, “going from least to most public support for the death penalty produces a 13.2% reduction in the likelihood of a reversal vote.” They show in multivariate regression analysis that, “[i]n states where supreme court judges face election, and where these judges must render capital punishment decisions, stronger public support for the death penalty produces significantly more conservative judges and... these conservative judges are more likely to uphold capital convictions.”<sup>565</sup> Indeed, political campaigns that explicitly focused on

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<sup>561</sup> Cited in Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 6. Brennan added that, “[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”

<sup>562</sup> Thomas R. Marshall, *Public opinion and the Supreme Court* (London: Unwin Hyman, 1989), 31-5.

<sup>563</sup> “*People v. Anderson*,” Supreme Court of California (February, 1972), <https://scocal.stanford.edu/opinion/people-v-anderson-22750>. They added that, “[p]ublic acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency. But public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants... Although death penalty statutes do remain on the books of many jurisdictions, and public opinion polls show opinion to be divided as to capital punishment as an abstract proposition, the infrequency of its actual application suggests that among those persons called upon to actually impose or carry out the death penalty it is being repudiated with ever increasing frequency... The steady decrease in the number of executions from a high of 199 in 1935 to 2 in 1967, in spite of a growing population and notwithstanding the statutory sanction of the death penalty, persuasively demonstrates that capital punishment is unacceptable to society today. The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.”

<sup>564</sup> “*Furman v. Georgia*,” US Supreme Court (June 1972), [https://www.law.cornell.edu/supremecourt/text/408/238#ZC-408\\_US\\_238n14](https://www.law.cornell.edu/supremecourt/text/408/238#ZC-408_US_238n14). For a summary of the judges’ justifications in the case, see John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 235-40.

<sup>565</sup> Paul Brace and Brent D. Boyea, “State Public Opinion, the Death Penalty, and the Practice of Electing Judges,” *American Journal of Political Science* 52, no. 2 (2008), 360-72. The model also found that several other variables had

death penalty issues have led to the removal of justices who have challenged the death penalty or the election of justices who have unambiguously supported its use.<sup>566</sup>

- **The changing composition and views of the Supreme Court could substantially influence legal outcomes, though change may be slow.**

In 1970, the LDF appealed the Eighth Circuit's ruling in the *Maxwell v. Bishop* case, expecting a narrow victory in the Supreme Court. However, as the case was pending, Justice Abraham Fortas unexpectedly resigned, and Chief Justice Earl Warren retired. Since one of the replacements, Harry Blackmun, had taken part in the Eighth Circuit ruling and was disqualified from voting again, the Supreme Court ruling reached a four-to-four deadlock.<sup>567</sup> Haines adds in a footnote that, "in 1968 the justices had secretly voted six to three to strike down the Arkansas death penalty. But Justice Harlan changed his mind, and the arrival of Warren Burger changed the likely outcome to five to four to uphold."<sup>568</sup> This episode clearly shows that the outcome of key rulings hangs in the balance of the appointment decisions of presidents and confirmation by the Senate (two of Nixon's nominees were rejected<sup>569</sup>). If the issue at stake in these rulings is an important factor in the justices' appointment, then the president's views hold great importance. Otherwise, luck (in the sense of factors outside the control of most social change actors) seems likely to be a crucial factor.

The partially conflicting findings of *McGautha v. California* in 1971 (where the Supreme Court rejected the claim that discretion in the imposition of the death penalty violated the Constitution) and *Furman* in 1972 (where the Court majority agreed that the arbitrariness involved in contemporary application of the death penalty was unconstitutional<sup>570</sup>) are not explicable in terms of changing Supreme Court composition. Hugo Black and John Harlan left the Court in September 1971, having voted in favor of the *McGautha v. California* ruling. Their replacements, Lewis Powell and William Rehnquist, both voted against *Furman*; that is, they voted in the same way Black and Harlan likely would have.<sup>571</sup> However, the changed composition of the court

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significant effects; "going from the most to least conservative judge ideology produces a 7.7% lower likelihood of a reversal vote" and the presence of pro-capital punishment groups in a state reduced the likelihood of reversals by 5.2%.

<sup>566</sup> Stephen B. Bright and Patrick J. Keenan, "Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases," *Boston University Law Review* 75 (1995), 760-5 describe examples from California, Texas, and Mississippi.

<sup>567</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 34.

<sup>568</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 199.

<sup>569</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 34.

<sup>570</sup> Corinna Barrett Lain, "Furman Fundamentals," *Washington Law Review* 82, no. 1 (2007), 14.

<sup>571</sup> Corinna Barrett Lain, "Furman Fundamentals," *Washington Law Review* 82, no. 1 (2007), 18 notes the conflict between the meanings of the two rulings and asks why the change occurred. On page 44, Lain notes that, "Furman's majority consisted of McGautha's three dissenters and Justices Stewart and White, who switched sides." On the appointment and leaving dates, see "Justices 1789 to Present," US Supreme Court, accessed October 25, 2019, [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx).

Lee Epstein and Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (Chapel Hill: University of North Carolina Press, 1992) summarize on page xiv their argument that, "[t]he Court's composition—its ideological makeup—can set the stage for legal change, but it does not always provide the best explanation for it. Rather, we found that 'the law,' as legal actors frame it, matters, and it matters dearly." This interpretation is based on a case

may have contributed to the fragility of the *Furman* decision and the backlash it encouraged. *Furman* was decided by a narrow five-to-four majority, and the four opponents of the ruling were the four Justices appointed by President Nixon, who supported capital punishment.<sup>572</sup> The change between *Furman* and *Gregg* is partially accounted for by changing composition, as the liberal Justice Douglas was replaced by Justice Stevens, who legal scholar Corinna Barrett Lain characterizes as, “a moderately conservative Ford appointee.” However, the majority in *Gregg* was seven-to-two, with Justices Stewart and White (who had supported both the pro-death penalty *McGautha* and anti-death penalty *Furman* rulings) switching back to voting to defend the constitutionality of the death penalty in *Gregg*.<sup>573</sup>

Sentience Institute’s research on the prisoners’ rights and anti-abortion movements as well as the political science and legal scholarship on the Supreme Court has also found evidence of the importance of the Court’s composition in affecting whether or not it drives social change.<sup>574</sup>

- **Exceptional legal arguments by talented advocates may have some influence on major court cases.**

Banner suggests that Anthony Amsterdam, who argued the LDF’s perspective in the *Furman* case, successfully persuaded Justices White and Stewart “to change their minds” in *Furman*, compared to their votes on the *McGautha v. California* case the previous year.<sup>575</sup> Lain and Haines provide contemporary evidence that Amsterdam was seen as an impressive legal advocate.<sup>576</sup> However, Lain argues that Amsterdam’s talents alone

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study of the death penalty, especially the apparent reversal of *Furman* in *Gregg*, and a case study of abortion, especially the apparent reversal of *Roe v. Wade* (1973) in *Webster v. Reproductive Health Services* (1989).

<sup>572</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 51.

<sup>573</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 62.

<sup>574</sup> See:

The strategic implication beginning “Securing judicial change indirectly...” in Jamie Harris, “Social Movement Lessons From the US Anti-Abortion Movement” (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion>,

Jamie Harris, “Social Movement Lessons From the US Prisoners’ Rights Movement” (forthcoming), and

The findings relating to “I2” — “Does public opinion indirectly positively influence the Supreme Court’s decisions by electing presidents and Senators who appoint justices who then vote in line with public opinion?” — in Jamie Harris, “Is the US Supreme Court a Driver of Social Change or Driven by it? A Literature Review” (November 27, 2019), <https://www.sentienceinstitute.org/scotus>.

<sup>575</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 265-6 notes that, “[a] year before, in *McGautha*, White and Stewart had refused to hold that the Fourteenth Amendment’s due process clause, a provision specifically about court procedures, required some means of guiding the jury’s discretion to impose the death penalty. But in *Furman* they agreed that such standards were a constitutional requirement and were even willing to locate the requirement in the Eighth Amendment, a provision that says nothing about procedure. The most likely explanation is the simplest: that Amsterdam persuaded them to change their minds.”

<sup>576</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 44-45 notes that, “Anthony Amsterdam, who argued *Furman* for the NAACP, was legendary for his exceptional advocacy skills. In fact, Justice White would later claim that Amsterdam’s argument in *Furman* was among the best he had ever heard.”

Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 31-2 notes that, “[h]e is regarded with awe, even by his legal adversaries. Stories have circulated for years about the way he repeatedly astounded judges with his detailed knowledge of case law and with the creativity of his written and oral arguments... At the age of 26, Amsterdam joined the faculty at the University of Pennsylvania... [T]wo Miami attorneys loosely affiliated with the ACLU and LDF departed from the case-by-case approach that

cannot explain the Supreme Court's change of mind, since Amsterdam had failed to persuade them in the past.<sup>577</sup> Changing public opinion also likely contributed to the justices' change of mind.<sup>578</sup>

In 1975, Solicitor General Robert Bork was permitted to argue that the Supreme Court should overrule *Furman*, which seems likely to have been influential in the *Gregg* ruling, though perhaps more because of his position as Solicitor General than because of his personal talents.<sup>579</sup>

- **The Supreme Court may be less willing to proactively protect or enhance rights when it expects that it will not be able to enforce its rulings.**

Steiker and Steiker argue that “the absence of workable remedies contributed to the failures to protect capital defendants... in the first century following the Reconstruction Amendments” and when the Court refused “to grant relief of any kind in response to post-*Furman* studies showing continuing race discrimination in the modern era of the death penalty.”<sup>580</sup> In these two periods, when it seemed less likely that the Supreme Court would be able to enforce rulings that protected convicts sentenced to death, it refused to make such rulings.

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dominated death row law at the time and brought suit against the state of Florida on behalf of all its [50] condemned prisoners... Amsterdam became involved, and a federal judge surprised almost everyone by responding with a temporary stay for all the state's death-sentenced inmates.”

<sup>577</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 45 notes that, “[e]ven this explanation, however, is not fully persuasive. Amsterdam did not argue *McGautha*, but he did argue several other death penalty cases before the Court during this time and was largely unsuccessful in those, despite the extremely favorable factual context in which the claims were presented.” Lain adds in a footnote that, “[t]he best example is *Boykin v. Alabama*, where Amsterdam argued that the death penalty for robbery (at least in the absence of aggravating circumstances) violated the Eighth Amendment.”

<sup>578</sup> See the strategic implication above beginning “The opinions of the public...”

<sup>579</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 62-3 notes that, “[a]s in *Furman*, legal advocacy probably also influenced *Gregg*'s result, albeit in a different way. The federal government had stayed out of the litigation in *Furman*, but in *Gregg* it filed a lengthy amicus brief asking the Court to overrule *Furman* and sent Solicitor General Robert Bork to argue on its behalf. Like Amsterdam, Bork was a worthy adversary in the courtroom, but more important was the fact that the government's position carried great weight. On such a highly controversial issue, it is hard to imagine the Justices not at least giving serious consideration to the position of the nation's chief executive. Indeed, aside from its refusal to formally overrule *Furman*, the Justices in *Gregg* did just as Bork had asked, upholding the guided discretion statutes while striking those that made the death penalty mandatory.”

Wider research has identified the importance of the Solicitor General in Supreme Court decision-making. See, for example:

Michael A. Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton: Princeton University Press, 2011),

Paul M. Collins Jr., “Friends of the court: Examining the influence of amicus curiae participation in US Supreme Court litigation,” *Law and Society Review* 38, no. 4 (2004), 807-32, and

Joseph D. Kearney and Thomas W. Merrill, “The influence of amicus curiae briefs on the Supreme Court,” *University of Pennsylvania Law Review* 148, no. 3 (2000), 743-855.

<sup>580</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 236. The reference to the Court's refusal “to grant relief of any kind” is presumably in reference to the *McCleskey* (1987) ruling. *McCleskey* is discussed explicitly on pages 238-41. On page 236, they add that, “[t]hese denials of relief find striking parallels in the Court's approach to voting rights issues in roughly the same eras. The Court's concerns about the limits of its remedial power caused it to step aside when blacks challenged their disenfranchisement in the early twentieth century, despite a clear constitutional imperative protecting their right to vote in the Fifteenth

- **If radical legal change at the federal level fails, victories at the state level may still be tractable.**

After *Gregg* and *McCleskey*, national abolition through the Supreme Court seemed less tractable.<sup>581</sup> The ADPM seems to have subsequently shifted towards legislative strategies at the state level, which have achieved some more concrete and (so far, at least) lasting victories.<sup>582</sup> Similarly, the US anti-abortion movement transitioned away from efforts to ban abortions outright at the federal level towards incremental legislation at the state-level, which seems to be successful at restricting the availability of abortions.<sup>583</sup>

## The Effects of Judicial Change

- **Court rulings can encourage social change.**

Despite the legislative backlash that it provoked (see below), *Furman* likely contributed to the low execution rates in the years following the decision despite rising levels of crime<sup>584</sup>; there were only 6 executions in 1972-82, compared to 98 in 1999 alone (the post-*Furman* peak).<sup>585</sup> Massachusetts abolished the death penalty by judicial interpretation of its state constitution,<sup>586</sup> and subsequent rulings in New York and New Jersey led to de facto moratoriums on the death penalty which were then shored up through legislation.<sup>587</sup>

Of course, litigation might fail to produce the desired results, and Supreme Court rulings can be hostile to a movement's goals, as demonstrated by the *Gregg* (1976) and *McCleskey* (1987) rulings.<sup>588</sup> Given this, the backlash to *Furman*,<sup>589</sup> and the withering of the grassroots element of the ADPM,<sup>590</sup> the litigation strategy pursued by the ADPM seems not to have been a cost-effective method of securing progress towards its goals.

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Amendment. When the Court subsequently entered the political thicket in the early 1960s and undertook constitutional regulation of states' election practices, it protected important constitutional values where clear procedural remedies were at hand. But when faced with ubiquitous problems of partisan vote dilution, which implicate similar concerns about fairness and potential legislative abuse, the Court declined to intervene because of inadequate remedial tools."

<sup>581</sup> See the paragraph beginning "In the 1987 *McCleskey v. Kemp* ruling..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>582</sup> See the section on "1997-present: Growth of the moratorium movement and sporadic legislative success." For discussion of the lack of focus on legislative work before this point, see the strategic implication below beginning "Social movements should proactively..."

<sup>583</sup> See the sections on "Summary of shift in tactics" and "Legislative and legal changes" in Jamie Harris, Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion#summary-of-shifts-in-tactics>.

<sup>584</sup> See footnotes 182 and 188.

<sup>585</sup> See the spreadsheet "[Death penalty by year](#)."

<sup>586</sup> Alan Rogers, "Success-At Long Last: The Abolition of the Death Penalty in Massachusetts, 1928-1984," *Boston College Third World Law Journal* 22, no. 2 (2002), 284.

<sup>587</sup> See the paragraphs beginning "The staff of NJDPM...", "NJDPM's strategy...", and "New York's reintroduced death penalty..." in the section on "Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>588</sup> See the paragraphs beginning "In 1976, the US Supreme Court..." and "In the 1987 *McCleskey v. Kemp* ruling..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>589</sup> See the strategic implications beginning "Highly salient judicial changes..." and "After controversial Supreme Court rulings" below.

<sup>590</sup> See the strategic implication beginning "Social movements should proactively..." below.

- **Highly salient judicial changes may provide momentum to opposition groups.**

There is evidence that, after *Furman*, there was a backlash among some of the institutional actors that had direct influence over capital punishment in the US:

- Following the ruling, there was outrage among legislators and hostile news coverage.<sup>591</sup>
- There was a dramatic spike in death sentences in the years directly following *Furman*. Considered by decade, the trend towards decreased numbers of executions appears to have temporarily reversed in the 1980s to 2000s, before execution rates began declining again in the 2010s.<sup>592</sup>
- In the fifteen years before *Furman*, Hawaii, Alaska, West Virginia, Iowa, Michigan, Delaware, Oregon, and New York had banned the death penalty.<sup>593</sup> In the fifteen years after *Furman*, only North Dakota and Massachusetts banned the death penalty.<sup>594</sup> By 1976, 35 states and the federal government had redrafted laws to enable the use of capital punishment in a manner that complied with the *Furman* ruling.<sup>595</sup>
- After *Furman*, governors became more reluctant to commute death sentences.<sup>596</sup>
- Legal scholar Stephen Smith notes that before *Furman*, prosecutors were responsible for proving guilt, while juries decided on whether to impose the death penalty. However, after *Furman*, the redrafted state laws “typically require prosecutors to put the death penalty in play by charging and proving legislatively specified factors that render defendants eligible for, and deserving of, death.”<sup>597</sup>

Comparably, the *Gregg* ruling seems to have spurred mobilization in the ADPM.<sup>598</sup> From other social movements, including the anti-abortion movement, there is additional evidence of legislative backlash against judicial rulings. The extent to which those rulings were responsible for any apparent backlash has sometimes been disputed.<sup>599</sup>

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<sup>591</sup> See the paragraph beginning “There is anecdotal evidence...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>592</sup> See the spreadsheet “[Death penalty by year](#).”

<sup>593</sup> See the paragraph beginning “In 1957, Hawaii banned the death penalty...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.” Vermont became “abolitionist” with the *Furman* ruling, since it did not ever reinstate capital punishment (see footnote 122).

<sup>594</sup> See the paragraphs beginning “The North Dakota legislature...” and “Massachusetts has been unable...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>595</sup> See footnote 193.

<sup>596</sup> Stephen F. Smith, “The Supreme Court and the Politics of Death,” *Virginia Law Review* 94, no. 2 (April 2008), 291, citing Hugo Adam Bedau, “The decline of executive clemency in capital cases,” *New York University Review of Law and Social Change* 18 (1990), 255. Smith notes that in the 1990s, only 3 convicts received clemency nationwide, compared to “close to three thousand death sentences handed down, and sixty to eighty executions carried out nationally each year.”

<sup>597</sup> Stephen F. Smith, “The Supreme Court and the Politics of Death,” *Virginia Law Review* 94, no. 2 (April 2008), 290.

<sup>598</sup> See the paragraph beginning “From 1976-82, five of the six executed...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>599</sup> The strategic implication “Highly salient judicial changes may provide momentum to opposition groups” in Jamie Harris, “Social Movement Lessons From the US Anti-Abortion Movement” (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion> shows that in 1973, the passage of *Roe v. Wade* seems to have encouraged anti-abortion mobilization, though the backlash was not substantial enough to secure a reversal of the decision. As an example of a paper arguing that *Roe v. Wade* may not have played much of a role in encouraging the apparent “backlash,” see Linda Greenhouse and Reva Siegel, “Before (and after) *Roe v. Wade*: New questions about backlash,” *Yale Law Journal* 120 (2010), 2028-87.

See the findings relating to “E3” — “Do Supreme Court decisions cause a social movement or legislative backlash?” — in Jamie Harris, “Is the US Supreme Court a Driver of Social Change or Driven by it? A Literature Review” (November

However, some factors specific to the *Furman* ruling may have encouraged the backlash against that ruling. As Lain suggests, “capital punishment was a matter traditionally considered to be a state prerogative”<sup>600</sup> and “the fractured nature of the Court’s decision” undermined its credibility.<sup>601</sup> The ruling provided a symbol that could be used as part of the Republicans’ Southern Strategy<sup>602</sup>; if legislative backlash to Supreme Court rulings is not inevitable, it may be more likely if the rulings play into existing political narratives.

Historian Stuart Banner challenges the evidence that *Furman* generated a backlash, noting that, “[i]n the history of the death penalty, periods of abolition have always been followed by periods of sharp diminution in the strength of the abolitionist movement.” Banner adds that the relative stability in the number of states that authorized capital punishment for the rest of the century “suggests that the swing back to the death penalty would have taken place eventually, with or without *Furman*.”<sup>603</sup>

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27, 2019), <https://www.sentienceinstitute.org/scotus>. For example, Thomas M. Keck, “Beyond backlash: Assessing the impact of judicial decisions on LGBT rights,” *Law and Society Review* 43, no. 1 (2009), 167 notes that, “45 states have banned the recognition of [same-sex marriage], with 27 of those states enshrining the ban in their state constitutions.” Keck notes on page 161 that between the *Baehr v. Lewin* (1993) decision in Hawaii and the *Baker v. State of Vermont* (1999) decision in Vermont, there were successful “[a]nti-gay initiatives in Cincinnati, OH; Tampa, FL; Lewiston, ME, and 16 localities in OR (1993); Alachua City, FL; Austin, TX; Springfield, MO; and 10 localities in OR (1994); ME (1998),” as well as anti-same-sex marriage constitutional amendments in Hawaii and Alaska. There were also failed anti-gay initiatives in “ID, OR (1994); ME and West Palm Beach, FL (1995); Ypsilanti, MI (1998); Spokane, WA (1999).” Nevertheless, Keck argues in the article that other scholars have exaggerated the evidence of backlash against legal progress for gay rights.

Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (July 2006), 75 notes that, “commentators have criticized the use of the courts as a means of promoting social change in other contexts.” Kirchmeier cites Jonathan L. Entin, “Litigation, Political Mobilization, and Social Reform: Insights from Florida’s Pre-Brown Civil Rights Era,” *Florida Law Review* 52, no. 497 (2000), 516–22 and summarizes that article as “discussing various views on whether litigation is an effective means of promoting reform.”

<sup>600</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 53–4.

<sup>601</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 49–53. Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 74–6 make a similar argument.

<sup>602</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 220 note that, “[t]he continuing Southern resistance to school integration likely helped to fuel anger toward the LDF’s parallel constitutional litigation targeting capital punishment... Not only was the *Furman* decision heralded by a hated messenger, but the litigation also had a barely submerged subtext of racial equality.” They add on pages 221–2 that, “[t]he Republican Party, prior to *Furman*, had already begun to deploy its so-called Southern Strategy of attempting to convince white Southern Democrats who were conservative on social issues to switch party affiliation... in the death penalty context, backlash did not just spontaneously occur; rather the flames of resistance were fanned by political actors who found in *Furman*’s flaws a campaign gift.”

<sup>603</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 268. Banner also claims that the polling data did not change much “for the rest of the century,” but the author of this report disagrees with this summary of the poll results (see the section on “Changes to public opinion”). The evidence of backlash also seems too substantial to be explained away as part of the natural cycle of a social movement.

These interpretations are informed by the much greater stability in both the polling data on support for liberal abortion laws and in the number of states (zero) that banned abortion after *Roe v. Wade* in the rest of the 20th century. See “The Extent of the Success of the Anti-Abortion Movement in US” in Jamie Harris, “Social Movement Lessons from the US Anti-Abortion Movement” (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion#the-extent-of-the-success-of-the-anti-abortion-movement-in-us>.



- **A focus among the judiciary on supplementary arguments may increase the chances of backlash against major legal change.**

One of many differences between the European ADPM and the US ADPM<sup>604</sup> is that European elites seemed to oppose the death penalty primarily for moral reasons,<sup>605</sup> whereas *Furman* only received majority support among the Supreme Court Justices because of procedural concerns.<sup>606</sup> This difference may partly explain why there was a substantial backlash against *Furman*<sup>607</sup> but insufficient backlash against European regulation to prevent continued progress towards full abolition in Europe.<sup>608</sup>

- **After controversial Supreme Court rulings, public opinion may move away from the preferences implied by those decisions.**

After *Furman*, public support for capital punishment rose; this was likely caused, at least in part, by the ruling itself,<sup>609</sup> which was hostile to capital punishment.<sup>610</sup> However, this response does not seem to be typical for the majority of Supreme Court rulings,<sup>611</sup> and it may be that the backlash in public opinion only occurred because *Furman* interacted with other relevant factors. For example, the *Furman* ruling may have served an important symbolic role that was encouraged by the Republican Party's "Southern Strategy."<sup>612</sup> This strategy may have, in turn, encouraged support for capital punishment. Even if a backlash in public opinion occurs, it may only be temporary, and there is a comparable risk of (temporary) public opinion backlash for other forms of sudden radical change, such as through legislation.<sup>613</sup>

- **There is some evidence that procedural reforms may legitimate an institution by making it seem more humane than is the case in practice. However, the same reforms may cause substantial practical difficulties, which contribute to the decline of the institution.**

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<sup>604</sup> See the sections on "Differing outcomes in the United States and Europe" and "The Causes of Legislative Change."

<sup>605</sup> This is the impression given in Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), for example, with elites becoming gradually persuaded of the moral case against the death penalty (see the strategic implication below: "The writings of academics and intellectuals may be effective for influencing educated elites").

<sup>606</sup> See the paragraph beginning "On June 29, 1972, the US Supreme Court..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>607</sup> See the strategic implication above, "Highly salient judicial changes may provide momentum to opposition groups."

<sup>608</sup> See the section "Legislative and legal changes."

<sup>609</sup> See the paragraph beginning "Gallup polls conducted..." in the section on "A Condensed Chronological History of the US Anti-Death Penalty Movement." See also footnote 160. Combined, the *Furman* and *Anderson* decisions could have increased public support for capital punishment by around 10%. The temporary dip in support for the death penalty in the 1978 Gallup poll (in the wake of the *Gregg* decision, see "Death Penalty," Gallup, accessed June 28, 2019, <https://news.gallup.com/poll/1606/death-penalty.aspx>), at a time when support was otherwise increasing is further weak evidence that legal rulings cause a temporary backlash.

<sup>610</sup> See the paragraph beginning "On June 29, 1972, the US Supreme Court..."

<sup>611</sup> See the findings relating to "E1" — "Do Supreme Court decisions positively influence public opinion?" — in Jamie Harris, "Is the US Supreme Court a Driver of Social Change or Driven by it? A Literature Review" (November 27, 2019), <https://www.sentienceinstitute.org/scotus>.

<sup>612</sup> See the paragraph beginning "In the 1960s and 1970s, the Republican Party..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>613</sup> See the strategic implication below on "Abolition of a practice seems likely to encourage public opinion to gradually turn against that practice."

In the aftermath of the *Gregg* decision, various Supreme Court rulings have regulated the administration of capital punishment in a manner that Steiker and Steiker describe as “complex, arcane, and minutely detailed” yet ineffective at reducing capital sentencing. The result is that “[v]irtually no one thinks that the constitutional regulation of capital punishment has been a success.”<sup>614</sup> The Supreme Court’s involvement may have legitimated and encouraged the imposition of death sentences in the lower courts by assuaging anxiety and the sense of responsibility for the decision.<sup>615</sup> Certainly, the number of death sentences increased after the *Furman* ruling,<sup>616</sup> and Steiker and Steiker’s legitimation theory is one plausible explanation for this. However, the sharpest rise in death sentences seems to have occurred shortly after *Furman* (which was understood by many at the time to effectively constitute an abolition of the death penalty<sup>617</sup>) rather than after procedural rulings such as *Coker v. Georgia* (1977) and *Ford v. Wainwright* (1986).<sup>618</sup>

Comparably, successful litigation for improvement in prisoners’ conditions seems to have encouraged federal regulation of prisons as well as the creation of new corrections departments and prisons<sup>619</sup>; it is possible that this has somewhat entrenched and legitimized the system of mass incarceration.

It is also possible that the Supreme Court’s rulings have legitimated the use of capital punishment in wider popular perception because, in Steiker and Steiker’s words, “the elaborateness of the Court’s death penalty

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<sup>614</sup> Carol S. Steiker and Jordan M. Steiker, “Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,” *Harvard Law Review* 109, no. 2 (December 1995), 359, 357, and 371. See the paragraph beginning “In 1977, the *Coker v. Georgia* ruling...” in the section on “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>615</sup> Carol S. Steiker and Jordan M. Steiker, “Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,” *Harvard Law Review* 109, no. 2 (December 1995), 433-4, citing Robert Weisberg, *Deregulating Death*, *Supreme Court Review* (1983), 305 and 309 and David C. Baldus, George Woodworth, and Charles A. Pulaski Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (Boston, MA: Northeastern University Press, 1990), 419, notes that “Weisberg powerfully, if anecdotally, illustrates this point by comparing jury instructions and closing arguments in capital sentencing hearings before and after the innovations of *Furman* and *Gregg*. Whereas pre-*Furman* jury instructions ‘aggressively reinforced the notion that the jury could not look to the law for any relief from the moral question of the death sentence,’ post-*Furman* instructions and prosecutorial arguments urge capital jurors to ‘realize that their apparently painful choice is no choice at all — that the law is making it for them’ through a form of ‘legal arithmetic’ that tallies aggravating and mitigating circumstances. Weisberg’s impressionistic account is bolstered by the empirical work of the Baldus group, whose study of sentencing patterns in Georgia reveals a higher per capita sentencing rate after the Supreme Court’s ‘reform’ of capital sentencing schemes.”

<sup>616</sup> See the spreadsheet “[Death penalty by year](#).”

<sup>617</sup> See footnotes 171, 172, and 173.

<sup>618</sup> On the procedural rulings, see the paragraph beginning “In 1977, the *Coker v. Georgia* ruling...” in the section “A Condensed Chronological History of the US Anti-Death Penalty Movement.” On the number of sentences, see the spreadsheet “[Death penalty by year](#).” Interestingly, the data shows small spikes in the number of death sentences passed in 1978, 1986, and 2002, which could plausibly be explained by *Coker v. Georgia* (1977), *Ford v. Wainwright* (1986), and *Atkins v. Virginia* (2002).

<sup>619</sup> See Jamie Harris, “Social Movement Lessons From the US Prisoners’ Rights Movement” (forthcoming). Likewise, Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 230-6 argue that, “[a] similar legitimating effect can be observed in the Court’s constitutional regulation of police practices under the Fourth, Fifth, and Sixth Amendments. Each of these amendments has been construed to impose constitutional limits on police investigative practices—such as the Fourth Amendment’s requirement of judicial warrants or probable cause for most police searches or seizures, the Fifth Amendment’s requirement of *Miranda* warnings before police custodial interrogations, and the Sixth Amendment’s limits on police elicitation of incriminating statements from defendants after a formal charging decision.” But these restrictions were then loosened under the “Burger and Rehnquist Courts,” which “has produced a legitimating effect with regard to the general public similar to the one we observed with regard to capital punishment.”

jurisprudence fuels the public's impression that any death sentences that are imposed and finally upheld are the product of a rigorous — indeed, too rigorous — system of constraints.”<sup>620</sup>

Steiker and Steiker also suggest that the regulation of capital punishment has encouraged the specialized training of lawyers to defend those facing death sentences, thereby causing difficulties for the death penalty's implementation,<sup>621</sup> and encouraged the expectation of continued improvement of the institution.<sup>622</sup> In their more recent book, they conclude that, “over time, constitutional regulation, again unintentionally, contributed to the marked destabilization and diminution of the American death penalty, sowing the seeds for a likely categorical constitutional abolition.”<sup>623</sup> Though the chain of events that may have caused regulation to substantially challenge capital punishment is not clearly established by Steiker and Steiker, their hypothesis seems plausible: regulation may have “led to the creation of permanent institutional structures, including capital defender organizations, intricate and lengthy capital trials, and multiple tiers of judicial review,” which may in turn have made the passage of death sentences and their actual implementation through executions more difficult.<sup>624</sup>

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<sup>620</sup> Carol S. Steiker and Jordan M. Steiker, “Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,” *Harvard Law Review* 109, no. 2 (December 1995), 436. They do not provide empirical evidence in support of this hypothesis.

<sup>621</sup> Carol S. Steiker and Jordan M. Steiker, “Lessons for Law Reform from the American Experiment with Capital Punishment,” *Southern California Law Review* 87 (2013-14), 768 and 70 argue that “the experience with *Furman* and *Gregg*, by constitutionalizing state capital practices, generated a demand for ‘death penalty lawyers’ who would litigate these cases at trial and in postconviction... In some respects, the ‘moratorium’ strategy of the 1960s has become institutionalized and permanent, with hundreds (instead of dozens) of capital lawyers seeking to invoke whatever procedural claims are available to extend the lives of their clients.”

On page 784, they summarize that, “[r]egulation has generated new and lasting institutions necessary to the enterprise (particularly specialists in the capital defense field), which in turn have imposed substantial costs on the capital system and created a feedback loop calling for additional regulatory restrictions.

<sup>622</sup> Carol S. Steiker and Jordan M. Steiker, “Lessons for Law Reform from the American Experiment with Capital Punishment,” *Southern California Law Review* 87 (2013-14), 784 argue that, “the presence of regulation has raised expectations for the rationality of the practice at the same time that it has facilitated a new, and newly troubling, arbitrariness regarding executions as opposed to sentences.”

On pages 768-9, they add that “[t]hrough the Court had not directly required such intensive trial-phase efforts, the new state statutory schemes triggered by *Furman* highlighted the importance of mitigation, and the growing cadre of death penalty lawyers and related specialists began to focus on the newly required ‘punishment phase’ in bifurcated trials... In 1989, the American Bar Association (‘ABA’) promulgated detailed standards for the appointment and performance of counsel in capital cases, and those standards reflected the new and higher expectations regarding mitigation; the fast-moving nature of the standard of care is reflected in the ABA’s decision to promulgate revised, more demanding standards just fourteen years later in 2003. Ultimately, the Court changed course and, beginning in 2000, the Court referred to the ABA standards in a trio of cases reversing death sentences based on inadequate mitigation investigations.”

<sup>623</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 4.

<sup>624</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 194-5. They add that, “[s]ome of the pressures are fiscal: the skyrocketing costs associated with the death penalty have become perhaps the central threat to its continued viability. Apart from costs, though, regulation has turned the extended delays that were part of the moratorium strategy in the 1960s into a permanent and irreversible feature of the capital justice system. Executions are no longer the ordinary or even expected result of death sentences in many jurisdictions, and despite being relatively undemanding, constitutional regulation has contributed mightily to that result. The failure of states to consummate death sentences with executions is an existential threat to retention. Two of the other primary causes of the present fragility—widespread concern about wrongful convictions and the introduction

- **Important judicial rulings, whether favorable or not, seem likely to increase issue salience, at least temporarily.**

Several temporary spikes in *The New York Times*' coverage of the death penalty (see figure 5 below) seem to be related to particularly important judicial rulings, such as *Furman* (1972), *Gregg* (1976), *Coker v. Georgia* (1977), and various rulings that loosened the restrictions on capital punishment in 1983-4.<sup>625</sup> However, the spike in 1977 could be partly or wholly due to South Dakota's abolition of the death penalty<sup>626</sup> and the spike in 1990 is surprising, given that there were significant Supreme Court rulings in 1989 and 1991 but not 1990.<sup>627</sup> By comparison, some important political developments at the state level, such as events in Washington in 1975,<sup>628</sup> do not seem to have caused substantial spikes in coverage, although the spike in 1999 was presumably related to the events in Nebraska and Illinois in that year.<sup>629</sup> However, no content analysis to check what proportion of news items mention these important events has been attempted.

Figure 5: Number of stories on capital punishment in *The New York Times*, 1960–2003.<sup>630</sup>

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of life without parole as the default alternative punishment to death—are by-products of the newly regulated environment.”

As an example of this process, they note on pages 196-8 that, “[t]he range of organizations supporting capital trial efforts exploded in the decades following the 1976 cases.” They provide examples of several nonprofits, such as the Equal Justice Initiative and add that, prior to *Furman*, “[s]tates did not have capital defender offices or capital resource centers, law schools did not house capital punishment clinics, and there were no nonprofit organizations devoted primarily to improving capital lawyering or providing direct representation in capital cases.” They do not explain why they believe that such changes stemmed from post-*Furman* regulation, though this seems like a plausible explanation.

They likewise argue on page 198 that, “[t]he emergence of institutional structures supporting the defense mission in capital trials is directly responsible for numerous changes to capital trial practice. Capital trial lawyers are advised to seek extensive resources, including funding for investigators and a wide range of experts, such as forensic experts for guilt-innocence phase issues like ballistics or DNA evaluation, psychiatric experts for mental health and competency issues, and psychological experts for intellectual disability evaluation.” Other examples are given, but specific Court decisions that encouraged these changes are not cited.

<sup>625</sup> See the paragraph beginning “In 1983, the Supreme Court...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

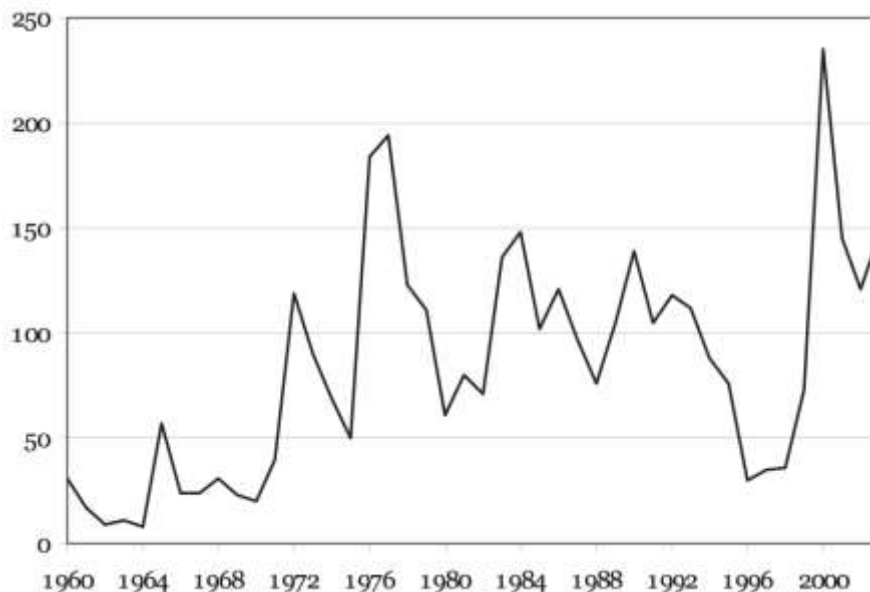
<sup>626</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 80.

<sup>627</sup> See the paragraph beginning “The Supreme Court rulings in *Murray*...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>628</sup> See the paragraph beginning “In 1975, the Washington...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>629</sup> See the paragraphs beginning “In 1999, Nebraska’s legislature...” and “The Illinois House of Representatives...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>630</sup> Frank E. Dardis, Frank R. Baumgartner, Amber E. Boydstun, Suzanna De Boef, and Fuyuan Shen, “Media framing of capital punishment and its impact on individuals’ cognitive responses,” *Mass Communication & Society* 11, no. 2 (2008), 122.



The histories of other social movements provide further evidence that litigation can draw public attention to an issue.<sup>631</sup>

### The Causes of Legislative Change

- **Legislative change is surprisingly tractable without public support, though public opinion has a significant effect.**

Public opinion can influence legislation.<sup>632</sup> Political scientists Christopher Z. Mooney and Mei-Hsien Lee suggest that politicians are incentivized to be especially sensitive to public opinion on any “morality issue” because such issues are interesting and easily understood, and that the incentives are especially strong when the balance of public support is closer to a 50-50 split. Their event history analysis finds that public support for the death penalty was a significant predictor of variation in whether a state abolished capital punishment

<sup>631</sup> See Jamie Harris, “Social Movement Lessons From the US Prisoners’ Rights Movement” (forthcoming) and the section on “Salience and indirect effects” in Jamie Harris, “Is the US Supreme Court a Driver of Social Change or Driven by it? A Literature Review” (November 27, 2019), <https://www.sentienceinstitute.org/scotus#salience-and-indirect-effects>.

<sup>632</sup> Jane Wood, “Why public opinion of the criminal justice system is important,” in Jane L. Wood and Theresa A. Gannon (eds.) *Public Opinion and Criminal Justice* (Cullompton, UK, Willan Publishing, 2009), 34 summarizes that, “[p]ublic opinion regarding a political policy sets the ‘boundaries of political permission’ [citing D. Yankelovich, *Coming to Public Judgement: Making Democracy Work in a Complex World* (Syracuse, NY: Syracuse University Press, 1991)], that is the limits of borders within which the public will support or tolerate a policy. In the USA public opinion has apparently driven a multitude of domestic policies such as term limits, tax cuts and a patients Bill of Rights. In the USA justice system public opinion instigated laws such as Megan’s law, ‘three strikes’ laws, the Brady Bill and the assault weapon ban. In the UK the Labour government has placed an emphasis on ‘evidence-based’ policy formation and uses focus groups, the People’s Panel, citizens’ juries and opinion surveys to gauge public opinion before forming new policies. As a result, in both the UK and USA significant policy changes have been attributed to the influence of public opinion. Public opinion also seems to have influenced the more operational side of the criminal justice system.”

in 1952-71 but not of whether a state reinstated capital punishment in 1972-82; public opinion was more closely split in the earlier period.<sup>633</sup>

Stephen Smith (2008) argues that, in the US, state and national politicians have been incentivized to expand the use of capital punishment due to majority support for its use. Similarly, politicians are incentivized to redirect funding in a way that makes delivering the death penalty easier.<sup>634</sup> Since most are elected, prosecutors<sup>635</sup> and judges<sup>636</sup> are subject to similar incentives. Public opinion can also encourage governors to permit death penalty legislation that they might otherwise prefer to veto.<sup>637</sup> Smith's article has been criticized as relying on "isolated anecdotal information" to support its claims,<sup>638</sup> and a poll conducted in 1999 in New York found some evidence that voters will not always support politicians who express support for harsher punishments.<sup>639</sup> Nevertheless, these incentives may still have had some effect in encouraging capital punishment.

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<sup>633</sup> Christopher Mooney and Mei-Hsien Lee, "The Influence of Values on Consensus and Contentious Morality Policy: U.S. Death Penalty Reform, 1956–1982," *Journal of Politics* 62, no. 1 (2000), 223-39. In contrast, a measure of party activist liberalism was a statistically significant predictor of whether a state reinstated capital punishment in 1972-82, but not a significant predictor of whether it abolished capital punishment in 1952-72.

On page 234, the authors comment that, "[t]his is not to say that majority opinion was ignored; indeed, over two-thirds of the states reestablished the death penalty after *Furman*. But it does suggest that *variation* in mass values did not significantly affect whether or not a state reformed its law and when it reformed it."

<sup>634</sup> Stephen F. Smith, "The Supreme Court and the Politics of Death," *Virginia Law Review* 94, no. 2 (April 2008), 295-7 and 302-7.

<sup>635</sup> Stephen F. Smith, "The Supreme Court and the Politics of Death," *Virginia Law Review* 94, no. 2 (April 2008), 308-17.

<sup>636</sup> Stephen F. Smith, "The Supreme Court and the Politics of Death," *Virginia Law Review* 94, no. 2 (April 2008), 328-33. Smith argues that the "high drama" of capital cases may also play an important role in making the risk of ejection from office greater for judges.

Additionally, Melinda Gann Hall, "Electoral politics and strategic voting in state supreme courts," *The Journal of Politics* 54, no. 2 (1992), 427-46 use probit models to estimate "the effects of several types of electoral forces on death penalty votes from 1983 through 1988 in four southern state supreme courts." They find that "[i]nstead of public policy goals driving judicial decisions, basic self-interest may also be an important consideration to the state supreme court justice when rendering decisions" — they find that "single-member districts, beginning at the end of a term, prior representational service, narrow vote margins and experience in seeking reelection encourage minority justices to be attentive to their constituencies by voting in accordance with constituent opinion."

<sup>637</sup> Robert M. Bohm, "American Death Penalty Opinion: Past, Present, and Future," in James R. Acker, Robert M. Bohm, and Charles S. Lanier (eds.) *America's Experiment with Capital Punishment* (Durham, NC: Carolina Academic Press, 1998), 26 argues this point: "few governors are willing to ignore what they perceive are their constituents' preferences. Also, as is the case with other politicians today, support of capital punishment generally defines for his or her constituents much of a governor's political agenda—at least the part that concerns crime."

<sup>638</sup> Paul G. Cassell and Joshua K. Marquis, "What's Wrong with Democracy: A Critique of the Supreme Court and the Politics of Death," *Virginia Law Review in Brief* 94, no. 65 (September 2008), 71. On pages 67-8 they criticize Smith's claims on political incentives, noting that, in Virginia in 2005, "Attorney General Jerry Gilgore attempted to use Kaine's personal opposition to capital punishment as a political club. The attempt backfired badly. Voters who are considered overwhelmingly in favor of the death penalty had no problem electing a Governor whose personal convictions ran counter to the majority of the electorate." In support of this, they cite a newspaper article that the author was unable to access, so the evidence for this interpretation of events is unclear. Elsewhere in their article, Cassell and Marquis criticize various pieces of evidence used by Smith and provide counter-examples. However, Smith's argument seems intuitively likely and the Virginia case may simply suggest that voters did not prioritize the issue highly.

<sup>639</sup> Julian V. Roberts, "Public Opinion and Mandatory Sentencing: A Review of International Findings," *Criminal Justice and Behavior* 30, no. 4 (2003), 498-9 summarizes that, "[t]he survey tied electoral intentions directly to the policy of reducing sentence severity and increasing judicial discretion. Respondents were asked, 'If your state legislator were to

Of course, the implementation of legislation by elected officials is only indirectly related to public opinion, so change can occur without public support.<sup>640</sup> Educated elites may be exposed to different information sources than the general public is exposed to, such as broadsheet newspapers rather than tabloid newspapers, and this may encourage rifts between the opinions of the educated elite and the general public.<sup>641</sup> If different polities engage differently with public opinion, then a similar divergence between elite and public opinion may be translated into substantially different legislation.<sup>642</sup>

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vote in favor of a bill to reduce some sentences and judges were given greater discretion to decide appropriate penalties, would this make you much more likely, somewhat more likely, somewhat less likely, or much less likely to vote for him or her, or would it make no difference? (p. 1)' Only one quarter of the sample responded that they would be less likely to vote for such a candidate. Slightly more than half stated that they would be more likely to vote for him or her, and one fifth of the sample stated that it would make no difference (Zogby International, 1999)... another question on the same survey found that approximately two thirds of the sample (64%) rejected the view that 'anyone who votes for reducing prison terms for nonviolent drug offenders is 'soft on drugs.'"

<sup>640</sup> New Jersey abolished the death penalty in 2007, despite polls in 2002, 2005, and 2007 each finding majority opposition to the abolition of the death penalty there (see the paragraph beginning "In January 2006, New Jersey's..." and the two following paragraphs in "A Condensed Chronological History of the US Anti-Death Penalty Movement"). In New Hampshire, the legislature passed an abolition bill one year after a poll indicated majority support for capital punishment and by 2019, secured the two-thirds majorities needed to override the governor's veto (see the paragraph beginning "In 2000, New Hampshire's Congress..." in the section on "A Condensed Chronological History of the US Anti-Death Penalty Movement").

John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 14-5 shows that opinion polls have regularly found majority support for capital punishment in Michigan, but the authors note on page 17 that "Michigan is unique in that most of the state's political, economic, and religious leaders generally oppose the death penalty."

For discussion of this issue more generally, see, for example, Alan D. Monroe, "Public opinion and public policy, 1980-1993," *Public Opinion Quarterly* 62, no. 1 (1998). For discussion of European opinion polling, see the strategic implication "Abolition of a practice seems likely to encourage public opinion to gradually turn against that practice" below.

<sup>641</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 16-9.

<sup>642</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 16 summarizes a key argument of the book, that the European "institutional filter between those cultural attitudes and actual, on-the-ground policy... insulates the process of penal policy formation from the public's will, whereas the American filter permits, and even requires, criminal justice policy to be acutely responsive to public opinion." On page 19, Hammel characterizes European criminal justice policy making as coming from the ideas that "(1) criminal legislation should be the exclusive province of well-educated experts; and (2) the common man — while he has a right to enlightened penal legislation that balances security with humanity — has no right to assist in shaping it... The European process for drafting a criminal code is expert-driven, and involves little or no input from the general public." Pages 19-24 provide some detail on the policy-making process in Germany and Europe more widely. Pages 48-9 describe some reasons to expect that more educated individuals might approach issues (such as capital punishment) differently to the general public.

A recurring theme in the book is the willingness of European legislators to accept that their own views differ from those of the general public and to make law in accordance with their own views. For example, Hammel notes on pages 66-70 that "Dr. Thomas Dehler of the Free Democratic Party, an attorney who [in 1949] the Justice Minister in the Christian Democrat-Free Democrat coalition government" gave an important anti-death penalty speech which endorsed "the 'Burkean trusteeship' model of political representation," where "reason, informed by morality, finds its fullest expression during parliamentary deliberation." Quotes from the speech, which "garnered stormy applause from the left, and was praised as an impressive success by a leading broadsheet," included phrases such as: "I do not care about the 'people's conviction,' that is, the opinion on the man on the street, when the question on the table is of the highest political and legal order." Hammel suggests that the context was important, in that "the constituents represented by the parliamentarians to whom Dehler spoke had recently demonstrated their allegiance to one of the most brutal and sinister

Various long-term and indirect factors also affect death penalty legislation in US states, reducing the influence of public opinion.<sup>643</sup> In 1936, only one state's public support for the death penalty was below 50% (Wisconsin, with 49% support), and in 1990-2, no state had lower than 61% support. Nevertheless, 5 and 12 states, respectively, had no (or very limited) capital punishment laws at those two points in time.<sup>644</sup>

Outside of the US, many countries have abolished capital punishment in spite of majority public support for its use<sup>645</sup> and variations in levels of public opinion do little to explain variation in capital punishment between Asian countries.<sup>646</sup>

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dictatorships in human history.” On page 83, Hammel notes that Criminal Law Commission only had one member who “argued at length that public opinion should be a principal factor in the Commission’s deliberations” on how to revise the Penal Code, though “Skott, the tired judge assigned the task of delivering the principal speech on reintroduction, merely suggested that the legislature could not ‘ignore’ the consistent and strong post-war majorities in favor of capital punishment.” Likewise, British Member of Parliament Sydney Silverman argued against the Home Secretary that MPs “are not delegates; we are not bound to ascertain exactly what a numerical majority of our constituents would wish and then to act accordingly without using our moral judgement. Edmund Burke long ago destroyed any such theory... Our business is to act accordingly to our consciences, honestly looking at the facts and coming to as right a judgement as we may.” Of course, a collection of quotes from individual legislators does not make a conclusive case that this attitude was more prominent in Europe than the US.

<sup>643</sup> Barbara Norrander, “The multi-layered impact of public opinion on capital punishment implementation in the American states,” *Political Research Quarterly* 53, no. 4 (2000), 771-93 found in path analysis using OLS regression that past execution rates and political culture (combining southern or nonsouthern states with moralistic or nonmoralistic culture; the variable construction is unclear) were significantly correlated with current sentencing rates. However, “[g]iven the vast variations in execution rates among states with capital punishment laws, the number of years capital punishment statutes have existed in a state has no direct influence on current sentencing rates” and there is no “direct relationship between past and current public opinion. Rather, continuity in public opinion across time comes through its relationship with past policy.”

Christopher Mooney and Mei-Hsien Lee, “The Influence of Values on Consensus and Contentious Morality Policy: U.S. Death Penalty Reform, 1956–1982,” *Journal of Politics* 62, no. 1 (2000), 223-39 found that public opinion was a significant predictor of state-level death penalty legislation in the pre-*Furman* era but that party activist liberalism was a stronger, significant predictor in the post-*Furman* era.

<sup>644</sup> Barbara Norrander, “The multi-layered impact of public opinion on capital punishment implementation in the American states,” *Political Research Quarterly* 53, no. 4 (2000), 771-93. The data comes from a 1936 Gallup poll and the 1990 and 1992 ANES Senate Election studies surveys, which were “designed to contain representative samples of each state.”

<sup>645</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (July 2006), 84 notes that, “[w]hen Great Britain’s Parliament declared an experimental moratorium on executions in 1965, polls showed that seventy percent of the people supported the death penalty—and that support grew over the next year. Similarly, a majority of the electorate in Canada supported the death penalty as the country systematically commuted all death sentences and eventually abolished the death penalty in 1976. A majority of Canadians continued to support the death penalty when the country’s legislature defeated a 1987 bill that would have started the process of restoring the death penalty. Further, abolition of the death penalty occurred despite popular support for the punishment in France, Germany, and Austria.”

Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 45 adds that “[s]imilar patterns have been noted in New Zealand, which staged its last hanging in 1957.”

For further discussion of European opinion polling, see the strategic implication “Abolition of a practice seems likely to encourage public opinion to gradually turn against that practice” below.

<sup>646</sup> Franklin E. Zimring, “State Execution: Is Asia Different and Why?” in R. Hood and S. Deva (eds.) *Confronting Capital Punishment in Asia* (2012), 19-20, looking at various surveys in Asian countries between 1986 and 2010, notes that, “[a]



- **It is probably easier to introduce and implement unpopular laws if voters in the state do not have ready access to ballot initiatives or referenda.**

Ballot initiatives enable the public to vote directly on an issue if a sufficient number of signatures are obtained on a petition to put the issue to a vote; referenda are also public votes but can only be implemented in response to decisions taken by the legislature.<sup>647</sup> Voters in 4 of the 12 US states that have abolished the death penalty since 1972 had easy access to ballot initiatives or referenda (see table 1 below).<sup>648</sup> Given that only 26 out of 50 states allow for initiatives or veto referenda,<sup>649</sup> and not all of these 26 states allow voters easy access to them,<sup>650</sup> this does not present clear evidence that access to initiatives or referenda is an important factor.

Table 1: The access of voters to ballot initiatives and referenda in states that have abolished the death penalty since *Furman v. Georgia* (1972).

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majority of citizens favour the death penalty in all the surveys and there is no close link between national policy and the extent of public support—with no discernable difference in public support in zero execution Hong Kong and South Korea as opposed to the then 7,000 execution PRC... Because the death penalty appears not to be important to citizens, governments are free to choose their death penalty policy even in the Democratic states like Taiwan, South Korea, and the Philippines.” See footnote 506 for discussion of other factors that may matter.

<sup>647</sup> “Ballot initiative,” Ballotpedia, accessed October 29, 2019, [https://ballotpedia.org/Ballot\\_initiative](https://ballotpedia.org/Ballot_initiative) and “Referendum,” Ballotpedia, accessed October 29, 2019, <https://ballotpedia.org/Referendum>.

<sup>648</sup> Here, “easy access” is defined here as requiring the signatures of around 5% or fewer of registered voters to add to the ballot.

“Laws governing the initiative process in California,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/Laws\\_governing\\_the\\_initiative\\_process\\_in\\_California](https://ballotpedia.org/Laws_governing_the_initiative_process_in_California) shows that in California, initiated state statutes and veto referenda need 5 percent of the votes cast for governor, which equates to fewer than 4% of registered voters.

“Laws governing the referendum process in Maryland,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/Laws\\_governing\\_the\\_referendum\\_process\\_in\\_Maryland](https://ballotpedia.org/Laws_governing_the_referendum_process_in_Maryland) notes that, “[i]n Maryland, the number of signatures needed to place a referendum on the ballot is equal to 3 percent of the total number of votes cast for the governor in the preceding election.”

“Laws governing the initiative process in Massachusetts,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/Laws\\_governing\\_the\\_initiative\\_process\\_in\\_Massachusetts](https://ballotpedia.org/Laws_governing_the_initiative_process_in_Massachusetts) explains that, “[f]or an amendment or statute, submitted signatures must equal 3 percent of votes cast for governor in the most recent gubernatorial election, excluding blanks... For a veto referendum, signatures must equal 1.5 percent of the total votes cast for governor in the most recent gubernatorial election.”

“Laws governing the initiative process in North Dakota,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/Laws\\_governing\\_the\\_initiative\\_process\\_in\\_North\\_Dakota](https://ballotpedia.org/Laws_governing_the_initiative_process_in_North_Dakota) explains that, “[f]or statutes and veto referendums, the number of signatures required is 2 percent of the population. For constitutional amendments, it is 4 percent of the population. For recall, signatures must equal 25 percent of the votes cast for that particular office in the last election. Officials in Congress are exempt from recall. A signer’s name must be legibly printed on a petition and the signer’s zip code must be included.”

<sup>649</sup> “Laws governing ballot measures,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/Laws\\_governing\\_ballot\\_measures](https://ballotpedia.org/Laws_governing_ballot_measures).

<sup>650</sup> For example, “Laws governing the referendum process in New Mexico,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/Laws\\_governing\\_the\\_referendum\\_process\\_in\\_New\\_Mexico](https://ballotpedia.org/Laws_governing_the_referendum_process_in_New_Mexico) notes that, “[i]n New Mexico, the number of signatures needed to place a veto referendum on the ballot is equal to 10 percent of the total number of votes cast in the previous general election.”

State	Date abolished	Method of abolition	Ballot initiatives allowed?	Veto referendums allowed?
New Hampshire <sup>651</sup>	2019	Legislation	No	No
Washington <sup>652</sup>	2018	Court ruling	Yes	Yes (irrelevant for a court ruling)
Delaware <sup>653</sup>	2016	Court ruling	No	No
Maryland <sup>654</sup>	2013	Legislation	No	Yes
Connecticut <sup>655</sup>	2012	Legislation	No	No
Illinois <sup>656</sup>	2011	Legislation	Advisory	No

<sup>651</sup> “History of direct democracy in New Hampshire,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/History\\_of\\_direct\\_democracy\\_in\\_New\\_Hampshire](https://ballotpedia.org/History_of_direct_democracy_in_New_Hampshire) indicates that New Hampshire has never had state-wide initiatives or referenda.

<sup>652</sup> “Laws governing the initiative process in Washington,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/Laws\\_governing\\_the\\_initiative\\_process\\_in\\_Washington](https://ballotpedia.org/Laws_governing_the_initiative_process_in_Washington) notes that “[c]itizens of Washington may initiate legislation as either a direct or indirect state statute. In Washington, citizens also have the power to repeal legislation via veto referendum. Citizens may not initiate constitutional amendments... Initiatives to the People require signatures equal to eight (8) percent of the votes cast for the office of governor in the last election. Initiatives to the Legislature also require signatures equal to eight (8) percent of the votes cast for the office of governor in the last election. Veto referendum petitions require signatures equal to four (4) percent of the votes cast for the office of governor.”

Although note specifying any veto referenda, the section on “1948 to present initiatives” in “History of Initiative & Referendum in Washington,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/History\\_of\\_Initiative\\_%26\\_Referendum\\_in\\_Washington](https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Washington) notes that Washington voters have successfully implemented legislation through initiatives several times, including legalizing same-sex marriage and legalizing recreational marijuana in 2012.

<sup>653</sup> “History of direct democracy in Delaware,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/History\\_of\\_direct\\_democracy\\_in\\_Delaware](https://ballotpedia.org/History_of_direct_democracy_in_Delaware) indicates that Delaware has never had initiatives or referenda, although the legislature put one statewide ballot question on the ballot in 1984.

<sup>654</sup> “History of Initiative & Referendum in Maryland,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/History\\_of\\_Initiative\\_%26\\_Referendum\\_in\\_Maryland](https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Maryland) notes that “Maryland does have citizen-initiated veto referenda, but does not have citizen initiatives”; the page shows that Maryland has never had citizen initiatives. It also notes that the state has successfully vetoed legislation in the past, though other referenda have approved legislation.

<sup>655</sup> “History of direct democracy in Connecticut,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/History\\_of\\_direct\\_democracy\\_in\\_Connecticut](https://ballotpedia.org/History_of_direct_democracy_in_Connecticut) indicates that Connecticut has never had state-wide ballot initiatives.

<sup>656</sup> “Laws governing the initiative process in Illinois,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/Laws\\_governing\\_the\\_initiative\\_process\\_in\\_Illinois](https://ballotpedia.org/Laws_governing_the_initiative_process_in_Illinois) notes that, “[c]itizens of Illinois may only initiate constitutional amendments. Citizens may not initiate state statutes or veto referendums.”

“History of Initiative & Referendum in Illinois,” Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/History\\_of\\_Initiative\\_%26\\_Referendum\\_in\\_Illinois](https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Illinois) explains that, “[t]he state legislature, seeking to defuse the I&R agitation without giving voters any real lawmaking power, passed a ‘Public Opinion Law’ in 1901, which allowed citizens to petition to put non-binding, advisory questions on state or city ballots. It restricted this initiative power further by setting the signature requirement at 10 percent of registered voters for statewide measures, and a nearly impossible 25 percent for local measures... In 1980, the first and only ‘binding’ initiative appeared on Illinois’s ballot.”

			constitutional amendments only, which are difficult in practice	
New Mexico <sup>657</sup>	2009	Legislation	No	Yes (difficult in practice)
New Jersey <sup>658</sup>	2007	Court ruling, then legislation	No	No
New York <sup>659</sup>	2007	Court ruling, then legislation	No	No
Massachusetts <sup>660</sup>	1984	Court ruling	Yes (but not for capital punishment)	Yes (irrelevant for a court ruling)
Rhode Island <sup>661</sup>	1984	Court ruling, then legislation	No	No
North Dakota <sup>662</sup>	1973	Legislation	Yes	Yes

However, abolition in Massachusetts came via a court ruling, and the specifics of the state's constitution prevented a ballot initiative being used to overturn this,<sup>663</sup> while Washington's recent abolition still seems

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<sup>657</sup> "History of Initiative & Referendum in New Mexico," Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/History\\_of\\_Initiative\\_%26\\_Referendum\\_in\\_New\\_Mexico](https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_New_Mexico) note that New Mexico has referenda since 1910 but has never had initiatives.

Though the "List of New Mexico ballot measures," Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/List\\_of\\_New\\_Mexico\\_ballot\\_measures](https://ballotpedia.org/List_of_New_Mexico_ballot_measures) claims that New Mexico ballot measures include legislatively referred constitutional amendments, legislatively referred state statutes, and veto referenda, looking through the actual list of ballot measures that have been considered between 1990 and 2019, all of them have been categorized as legislatively referred state statutes, legislatively-referred constitutional amendments, or bond issues. That is, no veto referenda have ever actually occurred in this period.

See also footnote 650.

<sup>658</sup> "History of direct democracy in New Jersey," Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/History\\_of\\_direct\\_democracy\\_in\\_New\\_Jersey](https://ballotpedia.org/History_of_direct_democracy_in_New_Jersey), indicates that New Jersey has never had state-wide ballot initiatives.

<sup>659</sup> "History of direct democracy in New York," Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/History\\_of\\_direct\\_democracy\\_in\\_New\\_York](https://ballotpedia.org/History_of_direct_democracy_in_New_York), indicates that New York has never had state-wide ballot initiatives.

<sup>660</sup> "History of Initiative & Referendum in Massachusetts," Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/History\\_of\\_Initiative\\_%26\\_Referendum\\_in\\_Massachusetts](https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Massachusetts) indicates that Massachusetts has had initiatives and referendums since 1917. See, however, footnote 255.

<sup>661</sup> "History of direct democracy in Rhode Island," Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/History\\_of\\_direct\\_democracy\\_in\\_Rhode\\_Island](https://ballotpedia.org/History_of_direct_democracy_in_Rhode_Island), indicates that Rhode Island has never had ballot initiatives.

<sup>662</sup> "History of Initiative & Referendum in North Dakota," Ballotpedia, accessed October 16, 2019, [https://ballotpedia.org/History\\_of\\_Initiative\\_%26\\_Referendum\\_in\\_North\\_Dakota](https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_North_Dakota) indicates that North Dakota has had initiatives and referendums since 1914.

<sup>663</sup> See the paragraph beginning "in Massachusetts has been unable..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

vulnerable to reversal.<sup>664</sup> Additionally, voters in Washington in 1975,<sup>665</sup> California in 2012-16 (via three separate referenda),<sup>666</sup> Oklahoma in 2016,<sup>667</sup> and Nebraska in 2016<sup>668</sup> have used referenda or initiatives to fend off challenges to death penalty from court rulings or legislation. By comparison, initiatives and referenda were widely used at the state level to resist gay rights, especially same-sex marriage, in the late 20th century.<sup>669</sup>

Referenda in European countries tend to be at the instigation of the legislature rather than when demanded by the people, though there are exceptions in some countries, especially Switzerland.<sup>670</sup> The lower access to

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<sup>664</sup> However, “Washington,” Death Penalty Information Center, accessed October 21, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/washington> notes that, “[o]n October 11, 2018, in *State v. Gregory*, the Washington Supreme Court declared the state’s death penalty statute unconstitutional, saying that it was applied in an arbitrary and racially discriminatory manner.” Presumably closer regulation and new statutes could reintroduce the death penalty, similarly to how many states were able to introduce new legislation to comply with the requirements of the *Furman* ruling.

<sup>665</sup> See the paragraph beginning “In 1975, the Washington...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>666</sup> See the paragraph beginning “In 2012, California voted...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>667</sup> See the paragraph beginning “A 2014 botched execution...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>668</sup> See the paragraph beginning “In 2015, the Republican-dominated Nebraska...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>669</sup> See footnote 599.

<sup>670</sup> Bruno Kaufmann and M. Dane Waters (eds.) *Direct Democracy in Europe: A Comprehensive Reference Guide to the Initiative and Referendum Process in Europe* (Durham, NC: Carolina Academic Press, 2004), 3 notes that, “[b]etween 1981 and 1990 there were only 200 [national referendums], of which 76 were in Switzerland. Between 1991 and 2003, 497 recorded countrywide referendums took place: 83 in the Americas, 54 in Africa, 30 in Asia, and 30 in Oceania. The vast majority took place in Europe: 301, of which 135 were in Switzerland alone... There are two main reasons for this clear trend toward more referendums: first, the democratic revolutions in Eastern Europe led to no less than 27 new constitutions, the majority of which were approved by popular referendum; and second, the accelerated integration process within the European Union has launched a direct-democratic wave with transnational consequences.”

However, on page 4, they evaluate the availability of initiatives and referendums [I&R] in “the European Convention (15 EU member states and 13 candidate states) and the four EFTA member states (Iceland, Norway, Liechtenstein and Switzerland).” They asked: “1. Do I&R institutions and practices exist at the national level? 2. Are there I&R institutions which can be launched by the citizens themselves, such as the popular initiative and the facultative referendum? 3. Are there provisions for obligatory referendums, such as are used in Denmark and Ireland for European questions? In only two instances, (Liechtenstein and Switzerland) was it possible to answer all three questions in the affirmative. There were three countries (Italy, Slovenia, and Latvia) in which citizens can initiative national referendums independently of parliament or the government, as well as four countries which have obligatory referendums (Ireland, Denmark, Lithuania, and Slovakia). In all the other countries examined, parliament and/or the government/the president have powers which can prevent popular referendums).

Given that this book is 15 years old, the situation may have changed somewhat. For example, Richard Youngs, “Getting Europe’s Direct Democracy Right” (November 15, 2018), <https://carnegieeurope.eu/2018/11/15/getting-europe-s-direct-democracy-right-pub-77750> summarizes that, “Finland introduced enhanced citizens’ initiative provisions at the national level in 2012 and the municipal level in 2015, and Denmark followed suit by creating a similar tool in early 2018; these are widely used in both countries. The current Czech government is reforming the country’s restrictive provisions to make it easier for citizens to trigger national referenda. Similar changes have been made in 2018 in Austria to foster greater use of citizens’ instruments – which, apart from petitions, include randomly selected ‘wisdom councils’ at a local level.”

direct democracy in Europe may help to explain the success of legislative abolition of the death penalty there.<sup>671</sup>

Anthony McGann and Wayne Sandholtz (2012) argue that, “both single-member district plurality (first-past-the-post) elections and presidential systems have a winner-take-all dynamic that leads to more plebiscitarian decision making” than systems with proportional representation (PR), which requires the negotiation of coalitions.<sup>672</sup> Their models, incorporating a number of control variables, tested for the effects of PR and presidential systems. Though they use probit regression, which is nonlinear, they generate simulations that suggest, “a PR parliamentary democracy with a median income had a more than 60% probability of abolishing the death penalty before 1960,” compared to 17% probability for a presidential democracy and 0% for a “winner-takes-all parliamentary democracy.” Between 1960 and 2005, variables for PR parliamentary democracy and signature of European Convention on Human Rights’ anti-death penalty Protocol No. 6 were significantly positively associated with “the hazard rate for abolition.” By comparison, variables for presidential democracy and winner-take-all parliamentary democracy had no significant association (though the association had positive sign) with the probability of abolition.<sup>673</sup> Though not directly testing the importance of ballot initiatives and referenda, these findings likewise suggest that easy access to mechanisms that encourage legislators to take account of voters’ current political preferences decreases the chances that unpopular policies will be enacted and maintained. Other political commentators have likewise argued that Europe’s widespread abolition of the death penalty depended on resistance to “populist impulses.”<sup>674</sup>

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<sup>671</sup> On the success of abolition in Europe, see Dongwook Kim, “International Non-Governmental Organizations and the Abolition of the Death Penalty,” *European Journal of International Relations* 22, no. 3 (2016), 4, figure 1.

<sup>672</sup> Anthony McGann and Wayne Sandholtz, “Patterns of Death Penalty Abolition, 1960–2005: Domestic and International Factors,” *International Studies Quarterly* 56, no. 2 (2012), 279. They also note that, “Presidential systems are typically associated with constitutional checks and balances and separation of powers that require more than a simple majority to change the law,” which “may provide yet additional obstacles for abolition.”

Sangmin Bae, *When The State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (New York: State University of New York Press, 2007), 105 likewise suggests that, “[t]he separation of powers system of the United States is less resistant to raw public opinion than European parliamentary governments. In parliamentary systems, people tend to vote for parties, which have more ideological variety, rather than for individuals. As a result, parties are less influenced by every reaction of the electorate, so that raw public opinion does not necessarily translate into legislative action. U.S. candidates are less insulated from populist impulses, and this feature of the U.S. political structure allows popular support for capital punishment to translate more easily and more directly into public policy.”

<sup>673</sup> Anthony McGann and Wayne Sandholtz, “Patterns of death penalty abolition, 1960–2005: Domestic and international factors,” *International Studies Quarterly* 56, no. 2 (2012), 282. Their models also suggest that the predominance of Catholicism in a country and the transition away from communism encouraged abolition, whereas the predominance of Protestantism and GDP per capita each had no significant effect. In the pre-1960 model, the predominance of Islam seems to have discouraged abolition. In the 1960 to 2005 model, Islam had no significant effect, though the sign was negative. They performed several robustness checks which also suggested that PR parliamentary democracy and membership of international conventions were significant predictors of abolition.

<sup>674</sup> For example, Joshua Micah Marshall, “Europe’s death-penalty elitism: Death in Venice” (July 2000), <http://mcadams.posc.mu.edu/blog/TNR%20Online%20%20Death%20in%20Venice.htm> argues that, “[i]n countries like Britain and France, so long as elite opinion remains sufficiently united (which, in the case of the death penalty, it has), public support cannot easily translate into legislative action. Since American candidates are largely independent and self-selected, they serve as a much more direct conduit between raw public opinion and actual political action. Basically, then, Europe doesn’t have the death penalty because its political systems are less democratic, or at least more insulated from populist impulses, than the U.S. government. And elites know it. Referring to France, a recent article in the *UNESCO Courier* noted that ‘action by courageous political leaders has been needed to overcome local public opinion that has remained mostly in favour of the death penalty.’ When a 1997 poll showed that 49 percent of Swedes wanted the death penalty reinstated, the country’s justice minister told a reporter: ‘They don’t really want the death penalty; they

Legal scholar Andrew Hammel similarly argues that the relative centralization of European judicial and political institutions and their insulation against popular opinion and interference, especially on criminal justice policy, may help to explain the continued abolition of the death penalty there.<sup>675</sup>

Of course, ballot initiatives or referenda may fail at various stages of the process. In 1992, a referendum to reinstate the death penalty was rejected in Washington D.C. by 68% of voters.<sup>676</sup> Michigan rejected a referendum to reinstate the death penalty by 100,000 votes in 1931, and efforts to reestablish capital punishment through referenda in 1974, 1976, 1979, 1982, and 1984 failed to gather enough valid signatures.<sup>677</sup> Given that the state seems to have had majority support for the death penalty in the late 20th century,<sup>678</sup> these

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are objecting to the increasing violence. I see this as a call to politicians and the justice system to do more.’ An American attorney general—or any American politician, for that matter—could never get away with such condescension toward the public, at least not for attribution.”

Similarly, Antony Blinken, a senior adviser to President Clinton for European affairs, cited in Paul G. Cassell and Joshua K. Marquis, “What’s Wrong with Democracy: A Critique of the Supreme Court and the Politics of Death,” *Virginia Law Review in Brief* 94, no. 65 (September 2008), 65-74, claimed that, “Europeans support capital punishment in numbers similar to Americans... [but t]heir voice will be ignored because the European Union requires aspiring members to prohibit capital punishment.”

<sup>675</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 170-8 and 208-17. Hammel summarizes on page 217 that, “European voters can exercise only gradual influence over the broad outlines of criminal justice policy, by voting for different political parties. However, because mainstream parties largely agree on the outlines of criminal justice policy, a change in power at the top will have little effect on day-to-day policy implementation. European voters have no power to replace lower level actors in the criminal justice bureaucracy, such as judges, district attorneys, or probation officers. Unlike voters in many American states, they cannot use referenda to pass criminal laws. They certainly do not have the power to dictate to judges how to interpret the law; this power would violate conceptions of judicial independence that are elemental to the understanding of law in civil-law nations.”

Sangmin Bae, *When The State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (New York: State University of New York Press, 2007), 101-5 makes some similar points, summarizing that, “[t]wo major features of American political organization make the death penalty less receptive to international standards and more responsive to domestic populist impulse: federalism and electoral politics.” Bae argues, for example, that the US “is the only country that gives full criminal legislative power to individual federal units... the state-level domination of execution policy has inhibited the United State from joining the global trend toward abolition.” The assumption behind the assertion of a causal relationship here is presumably that state-level institutions have less engagement with the international community and are less susceptible to such pressures. On “electoral politics,” Bae adds that, “[f]ar more public officials, including police chiefs and prosecutors, are directly elected in the United States than in Europe.”

<sup>676</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 206-7.

<sup>677</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 23 and 25.

“Laws governing the initiative process in Michigan,” Ballotpedia, accessed December 2, 2019, [https://ballotpedia.org/Laws\\_governing\\_the\\_initiative\\_process\\_in\\_Michigan](https://ballotpedia.org/Laws_governing_the_initiative_process_in_Michigan) notes that, “[t]he following are the requirements for the types of citizen-initiated measures in Michigan: \*initiated constitutional amendment (ICA): 10 percent of the votes cast for governor, \*initiated state statute (ISS): 8 percent of the votes cast for governor, \*veto referendum (VR): 5 percent of the votes cast for governor.”

<sup>678</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 212-3.

referenda may have succeeded if sufficient signatures had been gathered. Maine legislators rejected several opportunities to refer death penalty reinstatement to voters.<sup>679</sup>

- **Country-by-country variation in ADPM success may be strongly influenced by the overall politics of a country on the left-right spectrum, but there are also correlations between success and low polarization and success and centralized government.**

Studies frequently find that Republicans and conservatives are more supportive of the death penalty in the US.<sup>680</sup> The relative electoral success of Democrats and Republicans has sometimes been important in determining whether the death penalty was abolished or not at the state level.<sup>681</sup> The US generally seems more right-wing than Western Europe and has lower support for liberal causes such as abortion rights, environmentalism, and acceptance of homosexuality.<sup>682</sup> This presumably discouraged receptivity to the ADPM in the US.

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<sup>679</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 53-79.

<sup>680</sup> See the bullet point beginning “A study from 2002 found...” in “Features of the US Anti-Death Penalty Movement.”

<sup>681</sup> See, for example, the paragraph beginning “In January 2006, New Jersey’s...” and the two following paragraphs in “A Condensed Chronological History of the US Anti-Death Penalty Movement” and footnote 356.

<sup>682</sup> See, for example:

Points three to five in Laura Silver, “Where Americans and Europeans agree – and differ – in the values they see as important” (October 16, 2019), <https://www.pewresearch.org/fact-tank/2019/10/16/where-americans-and-europeans-agree-and-differ-in-the-values-they-see-as-important/>,

“The Global Divide on Homosexuality,” Pew Research Center (June 4, 2013), <https://www.pewresearch.org/global/2013/06/04/the-global-divide-on-homosexuality/>,

Ariana Monique Salazar and Kelsey Jo Starr, “In the U.S. and Europe, women are about as likely as men to favor legal abortion” (December 14, 2018), <https://www.pewresearch.org/fact-tank/2018/12/14/in-the-u-s-and-europe-women-are-about-as-likely-as-men-to-favor-legal-abortion/>, and

Moirá Fagan and Christine Huang, “A look at how people around the world view climate change” (April 18, 2019), <https://www.pewresearch.org/fact-tank/2019/04/18/a-look-at-how-people-around-the-world-view-climate-change/>.

Canada,<sup>683</sup> France,<sup>684</sup> New Zealand,<sup>685</sup> and the UK<sup>686</sup> seem likely to have had slightly less political polarization than the US and have allowed politicians to vote as they liked on capital punishment debates without toeing their party's line. However, the capital punishment debate in Canada, France, New Zealand, and the UK was arguably not much less polarized than the debate in the US, and there are many factors that may help to explain the differences in outcomes between the US and these countries,<sup>687</sup> so this is very weak evidence that polarization should be avoided. In France and the UK, decreasing polarization seems to have occurred shortly before abolition, which lends some credibility to the claim that this factor was influential.<sup>688</sup>

If political support for a policy becomes confined to fringe parties, this may also contribute to an erosion of public support for that policy.<sup>689</sup>

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<sup>683</sup> C. H. S. Jayewardene, *The Penalty of Death: The Canadian Experiment* (Lexington, MA: Lexington Books, 1977), 5-6 argues that the passage of the moratorium under the Liberal Party rather than the Conservative Party was more the result of circumstances and the unplanned chronology of events than of intentional party policy. Jayewardene notes on pages 75-6 that, "[w]henver governments in Canada have introduced legislation to amend the criminal code in respect to the penalty of death, members of Parliament have been allowed a free vote," rather than needing to tow a party line.

<sup>684</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 168 notes that, "the presence of [Charles de Gaulle, a French politician not strongly associated with either the political left or the right] on the political scene — and of political parties so closely linked to his personality that they are still often called 'Gaullist' — sent French politics along a different path from some of its Continental neighbors. Nevertheless, the 1970s saw many prominent center-right politicians such as Valéry Giscard d'Estaing, Jacques Chirac, and Alain Peyrefitte declare their personal opposition to capital punishment, although they did not wish to take responsibility for its ultimate abolition. And in fact, executions became increasingly sporadic in France, and were limited to those who had been convicted of especially serious murders."

Hammel notes on pages 141-3 that, although the abolition of the death penalty was promised by a socialist presidential candidate, the vote in the National Assembly was held as a free vote and still won by a margin of 333 to 117, followed by a vote of 160 to 126 in the Senate.

Hammel notes on page 144 that, "[b]y the mid-1980s, reintroduction of the guillotine had the support only of a minority of the center-right deputies. They were, nevertheless, active — 1984 saw the introduction of largely symbolic bills in the French parliament to reintroduce capital punishment for crimes against minors and for the killing of police officers and security officials. And, of course, on the far-right flank of French politics, Jean-Marie Le Pen advocated tirelessly for the return of the death penalty."

<sup>685</sup> See footnote 112.

<sup>686</sup> See footnote 212.

<sup>687</sup> See the section on "Differing outcomes in the United States and Europe" above.

<sup>688</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 168-9. However, substantial progress towards abolition had already been made in the UK, before the apparent increase in Conservative support in the 1960s; see, for example, footnote 66.

<sup>689</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 170-1 notes that while support for capital punishment among mainstream parties has declined in Germany, the UK, and France, far-right parties such as the Le Front National, British National party, and *Deutsche Volksunion* have continued to support it. On page 171, Hammel argues that "the vocal support of right-wing parties for the return of the executioner helps to marginalize support for the issue overall. Of the millions of voters who say, in the abstract, that they might like to see the executioner return, only a fraction are so committed to this view that they will vote for a right-wing fringe party whose other policies they reject. Eventually, active support for the death penalty begins to be tainted by being primarily associated with right-wing demagogues, further undermining its appeal as a political motivating tool. This identification of capital punishment with the fringe right also spurs the increasing identification of opposition to capital punishment with progressive values. To borrow terminology from Pierre Bourdieu, opposition to capital punishment becomes one of the marks of 'distinction' that persons use to signal their membership in the social elite."



- **It may be easier to introduce and implement unpopular laws under centralized political systems.**

Germany, the UK, and France all have greater centralized control of national legislation than is the case in the US; this may also help to explain the abolition of the death penalty in those European countries but not in the US.<sup>690</sup>

- **Lobbying and effective mobilization of legislators may be crucial for ensuring that favorable legislation is passed without major delays.**

In New Jersey, abolition legislation had failed or been shelved a number of times. At one point, legislation was delayed until after an upcoming general election. At another time, the bill was sent through a second committee stage, breaking with convention. Throughout this process, interest groups and stakeholders lobbied legislators thoroughly.<sup>691</sup> Given that the bill that eventually abolished capital punishment in New Jersey passed through the Budget and Appropriations Committee by a single vote in December 2007, former Republican New Jersey senator Robert J. Martin argues that:

In retrospect, it appears that the public and behind scenes political maneuvering of [Democratic] Senator Lesniak—as both prime sponsor and Committee member—proved crucial in assuring that the bill was not derailed by the Committee... Senator Lesniak privately assured that enough Democratic committee members would at least vote the bill out of committee, even though some might choose to reserve the right not to support it when it was voted on by the full Senate. Publicly, Senator Lesniak delivered another inspirational address as the lead witness (as first prime sponsor) on the bill.<sup>692</sup>

The main Senate vote was likewise passed with the minimum number of favorable votes required. Martin and Lesniak had communicated to count the number of anticipated favorable votes<sup>693</sup>; presumably, if they had believed that they would have had insufficient support, they would have deprioritized pushing for the legislation to be taken forwards. Nevertheless, the counterfactuals are unclear. Interest groups and legislators

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Though this argument is plausible, it has little direct empirical support. This is one of several factors that might help to explain the decline in public support for capital punishment in Germany, the UK, and France in the late 20th and early 21st centuries (see pages 178-86).

<sup>690</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 169-70.

“For the role of centralization in nuclear power, see J. Mohorcich, “What can nuclear power teach us about the institutional adoption of clean meat?” (November 28, 2017), <https://www.sentienceinstitute.org/nuclear-power-clean-meat>.

<sup>691</sup> Robert J. Martin, “Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute,” *University of Toledo Law Review* 41 (2009), 52-71.

<sup>692</sup> Robert J. Martin, “Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute,” *University of Toledo Law Review* 41 (2009), 63.

<sup>693</sup> Robert J. Martin, “Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute,” *University of Toledo Law Review* 41 (2009), 66.

had been pushing anti-death penalty legislation in New Jersey for years,<sup>694</sup> so failure of the legislation (at the committee stage or subsequently) may only have delayed abolition by a few months or years.

Some abolitionist states have had large numbers of bills to reinstate the death penalty in times of high public support.<sup>695</sup> It seems likely that more proactive pro-death penalty lobbying efforts would have increased the chances that proposed legislation would have been successful, especially given that many bills simply died in the committee stage,<sup>696</sup> but also because delays could push the bill into a time period without sufficient public support.

By comparison, there is little evidence that direct action tactics were effective at encouraging beneficial legislative outcomes for the US ADPM.<sup>697</sup> However, the movement seems to have used these tactics infrequently,<sup>698</sup> and the US ADPM has not been highly successful overall.<sup>699</sup> Given that some social movements that had a substantial focus on direct action tactics seem to have been fairly successful,<sup>700</sup> the failure of the US ADPM could be interpreted as further evidence that the use of direct action tactics is correlated with success. This case study therefore provides only highly ambiguous evidence on the effectiveness of direct action tactics.

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<sup>694</sup> See the paragraph beginning “In January 2006, New Jersey’s...” and the two following paragraphs in the section on “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>695</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 25 note, for example, that, “between 1846 and 1985 there were sixty-two legislative and four petition attempts to reinstate the death penalty [in Michigan]. The amount of legislative activity had increased during the 1960s and 1970s. From 1973 to 1986 there was a nearly continuous effort to reinstate the death penalty through initiative petitions.” On pages 14-15, they note that polls found support for capital punishment as high as 77%.

<sup>696</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 37 note, for example, that, “[s]ince 1973, at least one death penalty bill has been introduced in every session of the Wisconsin legislature. From 1973 through 1990, twenty-four death penalty bills were introduced in the assembly or in the senate. All twenty-four of those bills died in committee.” They note on page 82 that, “[n]ewspaper accounts and legislative records reveal that only three notable legislative efforts in 1913, 1921, and 1923 to reinstate capital punishment have taken place since Minnesota abolished capital punishment during the Progressive Era. Since 1923, death penalty bills either have died in a house or senate committee or have been returned to their author.”

They note on page 192 that, “[i]n 1955, an abolitionist bill passed the West Virginia house of delegates on a fifty-four to forty-four vote. In 1957, 1959, and 1963, similar bills were introduced in the house. All three house bills died in committee.” On page 194 they add that, “[c]apital punishment [reinstatement] bills were introduced in the senate in 1969 and annually from 1971 to 1988. Of the twenty-four death penalty statutes introduced during this period, only two passed the senate... Of the fifty-two house bills introduced between 1973 and year-end 1988, only the one in 1979 passed... The three bills approved in their house of origin died in the judiciary committee of West Virginia’s other legislative body.”

<sup>697</sup> For the only concrete example of direct action ADPM tactics encountered by the author, see footnote 232. Of course, if these tactics do encourage legislative change, it is likely to be through more indirect, hard-to-measure mechanisms, so even if they were as cost-effective as lobbying, one would expect there to be less evidence of impact per unit of resources expended by the movement on these tactics.

<sup>698</sup> See the bullet point beginning “Although there has been some grassroots...” in “Features of the US Anti-Death Penalty Movement.”

<sup>699</sup> See “The Extent of the Success of the US Anti-Death Penalty Movement.”

<sup>700</sup> See, for example, Mark Engler and Paul Engler, *This Is An Uprising: How Nonviolent Revolt Is Shaping the Twenty-first Century* (New York: Nation Books, 2017).

- **Institutional change on a particular social issue can be encouraged by growing momentum for change on related, partly overlapping issues, or by increasing the association of these issues with each other.**

Support for death penalty abolition in international institutions seems to have been tied to support for human rights more broadly.<sup>701</sup> Additionally, the increased support and mobilization for movements that advocated some form of moral circle expansion in the early 19<sup>th</sup> century, the Progressive era, and the 1950s and 1960s, such as those addressing civil rights and poverty, may have contributed to the restrictions on the death penalty and decline in executions.<sup>702</sup> Indeed, one paper found that a measure of civil rights protests was significantly negatively correlated with public support for the death penalty and the number of executions in the US.<sup>703</sup> The *Furman* ruling may also have been encouraged by a general trend towards progressive judicial activism at that time.<sup>704</sup>

Intuitively, it seems more tractable for advocates to increase the association of the issues that they focus on with related, partly overlapping issues than to focus on driving the progress of those related issues themselves, though the history of the US ADPM does not offer direct evidence for the claim that this has been cost-effective in the past.

- **Once influential international bodies adopt a value, they may exert pressure on institutions in other parts of the world to adopt the same value.**

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<sup>701</sup> Anthony McGann and Wayne Sandholtz, “Patterns of death penalty abolition, 1960–2005: Domestic and international factors,” *International Studies Quarterly* 56, no. 2 (2012), 276.

Democracies are much more likely to abolish the death penalty than autocratic regimes, which may be related to their interest in human rights. On page 278 McGann and Sandholtz summarize previous research: “in a cross-sectional analysis of 140 countries, [Rick Ruddell and Martin G. Urbina, “Minority Threat and Punishment: A Cross-National Analysis,” *Justice Quarterly* 21, no. 4 (2004), 922] find that ‘democratic countries are more likely to have abolished capital punishment.’ [Eric Neumayer, “Death Penalty: The Political Foundations of the Global Trend Towards Abolition,” *Human Rights Review* 9, no. 2 (2008), 241–68] confirms that finding using time series data covering 1950–2002.”

Christian Behrmann and Jon Yorke, “The European Union and the Abolition of the Death Penalty,” *Pace International Law Review Online Companion* 4, no. 1 (2013), 4 argues that, “[t]he EU has developed human rights standards to frame abolitionism in the promotion of the protection of the right to life, the enhancement of human dignity, the prohibition against cruel and inhuman punishment, the necessity of ensuring effective representation, fair trials and appeals provisions, and the opportunity of a final commutation of sentence. These standards are now considered as providing an absolute abolitionist position, which was affirmed by the Council of the European Union in its 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy.”

<sup>702</sup> Corinna Barrett Lain, “*Furman* Fundamentals,” *Washington Law Review* 82, no. 1 (2007), 28 notes this point with regards to movements focusing on civil rights and poverty in the 1950s and 1960s. See also footnote 27 and the first few paragraphs of the section on “1872–1936: Sporadic, temporary legislative success.”

<sup>703</sup> David Jacobs and Stephanie L. Kent, “The Determinants of Executions Since 1951: How Politics, Protests, Public Opinion, and Social Divisions Shape Capital Punishment,” *Social Problems* 54, no. 3 (2007), 308–10. The  $R^2$  varies from .303 to .531 for the models of public support and from .477 to .849 for the models of the numbers of executions.

On page 304 they explain that “Civil rights protests are assessed with counts (Jenkins and Eckert 1986) extended by J. Craig Jenkins to 1998. Less contentious events such as meetings, litigation, press conferences, and rallies, as well as protests, are included because acts that enhanced sympathy for blacks (Turner 1969) should explain executions with a one-year lag.”

<sup>704</sup> See footnote 169.

In the wake of the Second World War, international organizations and treaties adopted an increased focus on the “right to life,” including restriction or abolition of the death penalty, as part of an increased emphasis on the promotion of human rights.<sup>705</sup> Since that time, several international treaties have called for the abolition of capital punishment.<sup>706</sup> The European Union (EU) may have initially been reluctant to dictate whether its member states could or could not use capital punishment.<sup>707</sup> However, perhaps encouraged by the increased number of abolitions within its member states, pressure from members of the European Parliament, and the example set by Amnesty International’s public advocacy, the institutions of the EU seem to have decided that pressuring member states to abolish the death penalty was desirable.<sup>708</sup>

Although national governments have a choice regarding whether to end capital punishment, the growing number of countries that have chosen to do so<sup>709</sup> seem likely to have been encouraged by a mixture of institutional pressure from the UN, EU, and Council of Europe (CoE), diplomatic efforts from abolitionist countries, and pressure from international and local NGOs.<sup>710</sup>

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<sup>705</sup> See footnote 98.

<sup>706</sup> Sangmin Bae, *When The State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (New York: State University of New York Press, 2007), 2-5 lists and describes “The Second Optional Protocol to the International Covenant on Civil and Political Rights,” “Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,” “Protocol No. 13 to the European Convention on Human Rights,” and “The Protocol to the American Convention on Human Rights to Abolish the Death Penalty” as calling for the abolition of capital punishment.

<sup>707</sup> Christian Behrmann and Jon Yorke, “The European Union and the Abolition of the Death Penalty,” *Pace International Law Review Online Companion* 4, no. 1 (2013), 6 quote the reply of the Council of the EU in 1980 to a member of the European Parliament: “[t]he Council does not consider that the passage of the preamble to the Treaty establishing the EEC referred to by the Honourable Member contains an invitation to harmonize legislation on the death penalty.”

They add that, “in 1986 it was asked in the Council whether the EEC Treaty, Article 4(1) ensured that, [a]bolition of the death penalty and possible restoration of it do not fall within the Community’s competence.’ The answer given by President Jacques Delors on behalf of the [European] Commission was: ‘the matter in question [on the death penalty] does not come within [the Community’s] jurisdiction and it is therefore unable to supply the information requested. It can, however, inform the Honourable Member that Parliament has examined the matter in question on a number of occasions in the past. It has no doubt that he will be able to obtain all the necessary references to the information he seeks from the relevant departments of Parliament’s General Secretariat.”

<sup>708</sup> Christian Behrmann and Jon Yorke, “The European Union and the Abolition of the Death Penalty,” *Pace International Law Review Online Companion* 4, no. 1 (2013), 6-13.

<sup>709</sup> See the spreadsheet “[Cumulative total of countries that have abolished the death penalty.](#)”

<sup>710</sup> Anthony McGann and Wayne Sandholtz, “Patterns of death penalty abolition, 1960–2005: Domestic and international factors,” *International Studies Quarterly* 56, no. 2 (2012), 275. On pages 276-7, they explain the “transnational activist” and “world society” models through which this process might occur. Key international NGOs are Amnesty International and Human Rights Watch, both of which belong to the World Coalition Against the Death Penalty.

Sangmin Bae, *When The State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (New York: State University of New York Press, 2007), 6-12 summarizes theories in the existing literature of why countries do or don’t comply with international norms.

On December 16, 1966, the UN adopted the International Covenant on Civil and Political Rights (ICCPR), which came into force from March 23, 1976. Article 6 stipulates that, “[n]o one shall be arbitrarily deprived of his life” (“International Covenant on Civil and Political Rights,” United Nations, accessed June 25, 2019, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>). However, the UN has only taken a strong position against the death penalty more recently than the CoE. Robert Toscano, “The United Nations and the Abolition of the Death Penalty,” in *The Death Penalty in Europe* (Strasbourg: Council of Europe Publishing, 1999), 95 notes that, “[o]n 3 April 1997, the Commission on Human Rights approved Resolution 1997/12, (“Question of the Death Penalty”), presented by Italy with 45 other countries co-sponsoring: votes in favour were 27, with 11 against and 14

A number of observational analyses suggest that international political institutions and international NGOs have significant effects on whether countries abolish the death penalty:

- Eric Neumayer (2008) found evidence that, “[d]emocracy, democratization, international political pressure on retentionist countries and peer group effects in relatively abolitionist regions all raise the likelihood of abolition.”<sup>711</sup>
- Matthew D. Mathias (2013) found evidence that increases in emphasis on human rights by international political institutions and increases in the number of human rights international NGOs were significantly positively associated with the chance that a country would abolish the death penalty.<sup>712</sup>
- Dongwook Kim (2015) found evidence that, “human rights international non-governmental organizations’ local engagement has strongly significant positive relationships with complete abolition” in a country.<sup>713</sup>

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abstentions... The text of the resolution combines an unabashedly abolitionist goal with a moderate, gradualist approach. It calls upon all states to abide by the existing international norms regulating and limiting the application of the death penalty; it also ‘calls upon all states that have not yet abolished the death penalty progressively to restrict the number of offences for which the death penalty may be imposed’; and finally it ‘calls upon the same states to consider suspending execution, with a view to completely abolishing the death penalty.’”

<sup>711</sup> Eric Neumayer, “Death Penalty: The Political Foundations of the Global Trend Towards Abolition,” *Human Rights Review* 9, no. 2 (2008), 241-68. Neumayer adds that, “[t]here is also a partisan effect as abolition becomes more likely if the chief executive’s party is left-wing oriented. Cultural, social and economic determinants receive only limited support. The global trend toward abolition will go on if democracy continues to spread around the world and abolitionist countries stand by their commitment to press for abolition all over the world.”

Relatedly, Sangmin Bae, *When The State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (New York: State University of New York Press, 2007), 12 notes that, “70 percent of countries categorized as ‘free’ according to the standards defined by Freedom House have signed one of the three protocols abolishing capital punishment, whereas only 30 percent of the countries labeled ‘partly free or not free’ have done so,” citing Bertil Dunér and Hannah Geurtsen, “The Death Penalty and War,” *The International Journal of Human Rights* 6, no. 4 (2002), 1-28.

<sup>712</sup> Matthew D. Mathias, “The Sacralization of the Individual: Human Rights and the Abolition of the Death Penalty,” *American Journal of Sociology* 118, no. 5 (2013), 1246-1283 summarizes that, “[t]he main finding in three separate models on full, ordinary, and de facto cumulative measures of abolition show that the global sacralization of the individual, measured as the institutionalization of the human rights regime, represents a significant driver of states’ abolition. Countries’ predominant religion is also found to significantly affect the probability of abolition: predominantly Catholic nation-states are most likely to abolish the death penalty, and predominantly Muslim nation-states are least likely to abolish. These findings provide evidence for world cultural factors that structure the abolition trend globally.” Mathias explains on page 1265 that the “Global institutionalization of the sacrality of the individual” is measured through the cumulative number of human rights international nongovernmental organizations (HRINGOs) and “the number of global human rights documents in existence for each year.”

Mathias explains the results on page 1267: “holding the other covariates constant, a yearly increase of 10 HRINGOs or human rights documents leads to a 3% increase in the hazard of complete abolition. Following this procedure reveals that an increase in 10 HRINGOs or human rights documents leads to a 2% increase in the hazard of abolition in models 2 and 3 respectively. As figure 3 demonstrates, the global sum of HRINGOs and human rights documents greatly increases throughout the period, from 856 in 1972 to over 2,117 in 2001, an increase of 1,261 over the period. Clearly, this explosion of human rights in the 20th century had an immense impact on nation-states’ likelihood of abolition in all three forms.”

<sup>713</sup> Dongwook Kim, “International Non-Governmental Organizations and the Abolition of the Death Penalty,” *European Journal of International Relations* 22, no. 3 (2016), 596-621. The analysis controlled for “regime type, regional demonstration effects, the Council of Europe, and other rival factors.” The finding “is highly robust against control variable bias, endogeneity bias, omitted variable bias, model dependence, and the alternative operationalization of control variables and the dependent variable.”

- Similarly to Mathias (2013), Stefanie Neumeier and Wayne Sandholtz (2019) found evidence that, “[e]ach increase of one in the number of country-specific INGO [international non-governmental organization] hits increases the likelihood of abolition” in a country “by about twenty to twenty-five percent.” They also found that, “there is a strong, positive effect of Western Europe and Eastern and Central European regions on the likelihood of abolition,” which they interpret as evidence of the effects of the CoE and EU.<sup>714</sup>

Sangmin Bae’s case studies of three countries that were “outliers” in their region suggest that international pressure was crucial in the abolition of the death penalty in the Ukraine, played some role (through Amnesty International) in encouraging a moratorium in South Korea, but played little role in abolition in South Africa.<sup>715</sup> Neumeier and Sandholtz’s short case study of South Africa places more emphasis on pressure from

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On pages 10-13, looking at the Philippines as a case study, Kim argues that international NGOs erode public support for the death penalty by using a new framing of the issue (presenting it as a human rights violation), by mobilizing their local members, and through legislative lobbying. Though the actions of NGOs in the Philippines are described, no evidence is presented that these actions played an important role in causing the changes that occurred.

Kim explains on page 14 that, in the model, “[t]he independent variable of interest, Human Rights INGOs, represents human rights INGOs’ anti-death penalty activism through local engagement. It is the natural log of the number of how many human rights INGOs network with local NGOs and activists in a state in a given year through a grassroots membership base. The log specification allows for decreasing marginal effects and corrects skewedness. To compute this variable, I create new data from the Yearbook of International Organizations published by the Union of International Associations from 1948 to 2009 (Union of International Associations, various years). I include only human rights INGOs, that is, those INGOs that have a local membership base in at least three different states and pursue the human rights recognized in the Universal Declaration of Human Rights, the ICCPR, and the International Covenant on Economic, Social and Cultural Rights as their organizational aim.”

Kim notes on pages 17-8 that this variable had a significant effect on the abolition of the death penalty for all crimes in all four tested models; an increase by one standard deviation from the mean resulted in an increase in the predicted hazard rate of abolition of 124%. Variables to represent political change, regional abolition, and the Council of Europe all had significant positive effects. Variables to represent state power and ethnic fractionalization had significant negative effects.

<sup>714</sup> Stefanie Neumeier and Wayne Sandholtz, “The Transnational Legal Ordering of the Death Penalty,” *UC Irvine Journal of International, Transnational, and Comparative Law* 4 (2019), 149. On page 144, they explain that they “utilize a technique—Cox proportional hazard models—that allows us to estimate the extent to which various domestic and international factors affect (a) the likelihood that a country will abolish the death penalty and, if it does, (b) how long it takes to do so. The period covered by our analyses begins in 1960 and ends in 2012: the models include at least 150 countries.” On page 146, they explain that they use “two measures of the effects of INGO pressure and persuasion on national abolition. One is a count of the number of occurrences of death penalty phrases in INGO documents regarding a specific country in a given year. This is a measure of the attention INGOs have devoted to the death penalty for that state. The second measure counts the global number of death penalty references in INGO documents, both country-specific texts and general texts, in a given year... Our INGO document variables are meant to capture, in broad terms, the overall level of INGO attention to death penalty issues.”

<sup>715</sup> Sangmin Bae, *When The State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (New York: State University of New York Press, 2007), 13 explains that, “I examine four countries: Ukraine, South Africa, South Korea, and the United States. The first three either abolished the death penalty relatively recently or have a moratorium on executions. These countries ban the death penalty for different political reasons and through different political processes, which capture theoretically significant pathways of norm compliance. At the same time, the three countries’ policy changes regarding the death penalty are outlier cases in each region. Ukraine, South Africa, and South Korea attempted to comply with the international norm when many other Asian and African countries and former Eastern Block countries were still hesitant to do so.”

the UN and from Amnesty International. International pressure is also seen as important in abolition in Lithuania. In contrast, Belarus, which has not abolished capital punishment, is described as lacking “several of the factors that are associated with abolition: democratic government, robust INGO activity, the incentive of membership in the EU and the COE, and independent courts.” Similarly, “thus far Japan has successfully resisted demands for abolition. Like in Belarus, NGOs do not have the ability to operate at full effect and face a variety of regulations and restrictions in Japan.”<sup>716</sup>

These analyses form part of a wider scholarly debate about the importance of various factors in predicting whether a country abolishes the death penalty or not.<sup>717</sup> They are supplemented by the impressions of experts. For example, criminologist Roger Hood (2009) argued that the debate on capital punishment in China “has moved from a defensive posture to one which is willing to embrace to a degree the human rights objections to capital punishment that have been created by a ‘new dynamic’ rooted in international human rights instruments and conventions, and promoted by abolitionist countries in Europe.”<sup>718</sup>

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Bae concludes on pages 39-40 that, “[n]ongovernmental organizations and human rights pressure groups, weakly organized and mainly ignored by the government, have had little influence, if any, in empowering the norm against the death penalty in politics and society. The key to understanding death penalty reform in Ukraine lies in the combination of the adamant role of the Council of Europe in attempting to build a death-penalty-free zone in Europe and Ukraine’s strategic will to be integrated with the regional community. The Ukrainian institutional setting, autonomous and insulated from society, made it easier for political elites to bargain with international and domestic agents in abolishing capital punishment... In Ukraine’s case, an ongoing series of monitoring sessions and peer-group persuasion helped the Ukrainian leaders acquire and improve a new understanding of the death penalty system. Perhaps most important, however, the learning/socialization process became more effective because of the material incentives involved. Had either of the two crucial elements—the continuing threats of expulsion from the Council of Europe and the efficiency of the persuasion process—been missing, Ukraine would have taken much longer to abolish the death penalty.”

On pages 41-61, discussing South Africa, Bae emphasizes the role of international organizations less. However, on page 60, Bae summarizes that, “[t]hose involved with [South Africa’s] movement to end state-sanctioned killings acknowledged that the death penalty violated the norm upholding such fundamental rights as the right to life, the right to equality, the right to dignity and the protection against cruel, inhuman, or degrading treatment or punishment.”

Bae notes on page 70 that, “[u]ntil the late 1980s, the death penalty was not the subject of national debate, nor did anti-death penalty activism exist... the first Korean anti-death penalty organization was formed in April 1989. It was not a coincidence that the abolitionist movement emerged in the same year that the United Nations General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty,” though no evidence is provided that there was a causal link between these two events. Bae summarizes on page 73 that, “[i]t was not until the late 1990s that the death penalty became a subject of public debates and the abolitionist cause started to gain public attention. The anti-death penalty movement gained strength through the leading roles of three actors: the religious community, Amnesty International and its Korean branch, and legislators.” On page 81, Bae presents the lack of a “conspicuous” role of Korea’s human rights organizations in the South Korean ADPM as one of several reasons why South Korea has implemented a moratorium but has not abolished the death penalty.

<sup>716</sup> Stefanie Neumeier and Wayne Sandholtz, “The Transnational Legal Ordering of the Death Penalty,” *UC Irvine Journal of International, Transnational, and Comparative Law* 4 (2019), 151-7.

<sup>717</sup> Dongwook Kim, “International Non-Governmental Organizations and the Abolition of the Death Penalty,” *European Journal of International Relations* 22, no. 3 (2016), 5 summarizes that, “[s]cholars have offered several explanations for why governments choose complete abolition. These existing explanations can be categorized into two groups. The first group of theories, often put forth by sociologists and criminologists, concentrates on non-political (i.e. socio-economic, religious, and cultural) factors as driving the abolition process. The second group of theories, recently and mainly advanced by International Relations scholars, puts more emphasis on political factors.”

<sup>718</sup> Roger Hood, “Abolition of the death penalty: China in world perspective,” *City University of Hong Kong Law Review* 1 (2009), 1-21. On page 1, Hood notes that, “[s]ince the late 1990s the European Union (EU) has been engaged with China in dialogues, seminars and projects aimed to create and then develop a debate that would be conducive to the

The CoE was formed in 1949 in order to “unite Europe around the shared principles of the rule of law, respect for human rights and pluralist democracy.”<sup>719</sup> Membership of the CoE has grown from 10 states in 1949 to 47 in 2019.<sup>720</sup> European organizations have conducted various forms of advocacy against the death penalty, including:

- All members of the European Union (EU) have abolished capital punishment and a commitment to abolishing the death penalty became an important criterion affecting the ability of countries to join the CoE.<sup>721</sup> There is evidence that the signing of the European Convention on Human Rights, which contains anti-death penalty protocols, had significant effects on the likelihood of abolition between the years 1960 and 2005.<sup>722</sup>

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abolition of the death penalty in China.” Hood explains on pages 1-2 the evidence for this interpretation: “I have been fortunate to have participated in at least a dozen meetings since 1999 where reform of the death penalty in China has been discussed. This article, therefore, reflects my own perception of how the debate has developed over the last decade.”

Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), 22-40 argue that the factors encouraging “the New Wave of Abolition” since 1989 were, “(a) The emergence of the human rights perspective... (b) The developments of international treaties committed to abolition... (c) Mounting political pressure [again referring to international institutions]... (d) A full supporting cast [referring to international anti-death penalty and human rights NGOs]... (e) The strategy of non-cooperation” of abolitionist countries with retentionist countries, again referring substantially to international institutions.

<sup>719</sup> “Brochure - Death is not justice,” Council of Europe, accessed June 26, 2019, <https://edoc.coe.int/en/online-resources/6605-brochure-death-is-not-justice.html>.

<sup>720</sup> “Brochure - Death is not justice,” Council of Europe, accessed June 26, 2019, <https://edoc.coe.int/en/online-resources/6605-brochure-death-is-not-justice.html>.

<sup>721</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (July 2006), 69.

Anthony McGann and Wayne Sandholtz, “Patterns of death penalty abolition, 1960–2005: Domestic and international factors,” *International Studies Quarterly* 56, no. 2 (2012), 278 adds that, “[t]he COE and the EU exercised considerable influence because the transition states were eager to consolidate their fledgling democracies and market economies by joining these key European institutions. With respect to the COE, some newly independent states abolished the death penalty before joining; it is difficult to assess the extent to which anticipation of COE membership figured among the motivations for abolition. In other cases, the Parliamentary Assembly of the Council of Europe (PACE) played an active role in pushing for abolition. The Parliamentary Assembly did not make death penalty abolition an explicit requirement for the early applicants, like Hungary in 1990 or Estonia and Lithuania in 1993. It did, however, attach ‘great importance to the commitment expressed by the Lithuanian authorities to sign and ratify the European Convention on Human Rights,’” which contained the anti-death penalty Protocol No. 6, and “the opinion on the Estonian application contained similar language. By the mid-1990s, the COE had made signature and ratification of Protocol No. 6 to the ECHR a condition of joining.” Latvia, Macedonia, Armenia, Georgia, and Yugoslavia, Moldova, Albania, Ukraine, Croatia, and Russia committed to ratifying the Protocol within one to three years of joining the CoE.

Dongwook Kim, “International Non-Governmental Organizations and the Abolition of the Death Penalty,” *European Journal of International Relations* 22, no. 3 (2016), 8 summarizes that, “[t]he most common explanation highlighting the abolitionist role of international actors appears to have concentrated on the Council of Europe. [A. Fijalkowski, “European Policy on the Death Penalty,” in A. Sarat and J. Martschukat (eds.) *Is the Death Penalty Dying? European and American Perspectives* (New York: Cambridge University Press, 2011), 268-291] and [E. Girling, “European Identity and the Mission Against the Death Penalty in the United States,” in A. Sarat and C. Boulanger (eds.) *The Cultural Lives of Capital Punishment: Comparative Perspectives* (Stanford, CA: Stanford University Press, 2005), 112-128] claim that since 1980, the Council of Europe has constructed death penalty abolition as an essence of collective identity as a civilized, human rights-respecting Europe.”

<sup>722</sup> See the paragraph beginning “Anthony McGann and Wayne Sandholtz (2012) argue...” above.



- In 2011, the EU banned the export of eight drugs used in lethal injections, seemingly spurred into action by the campaign of the UK group Reprieve.<sup>723</sup> Before this, the governments in Austria and Germany warned companies in their countries not to sell the drug to the US for executions,<sup>724</sup> and the EU already had regulation in place that prohibited the export of goods that “have no practical use other than for the purpose of capital punishment.”<sup>725</sup>
- The EU advocates for abolition in countries outside Europe through communications aimed directly at governments.<sup>726</sup> It also seeks to encourage public debate on the death penalty in other countries, such as by organizing seminars.<sup>727</sup>
- According to one article, “[t]he EU has given out more than 3.5 million euros (\$4.8 million) [from 2009 to 2013] to seven groups for efforts to combat the death penalty in the United States.”<sup>728</sup> It has also spent substantial sums of money to support abolition efforts in other countries.<sup>729</sup>

<sup>723</sup> Mary D. Fan, “The supply-side attack on lethal injection and the rise of execution secrecy,” *Boston University Law Review* 95, no. 2 (March 2015), 439-41.

<sup>724</sup> Raymond Bonner, “Drug Company in Cross Hairs of Death Penalty Opponents” (March 30, 2011), <https://www.nytimes.com/2011/03/31/world/europe/31iht-letter31.html>. This claim was made by “a spokeswoman for Reprieve, Katherine O’Shea.”

<sup>725</sup> Christian Behrmann and Jon Yorke, “The European Union and the Abolition of the Death Penalty,” *Pace International Law Review Online Companion* 4, no. 1 (2013), 65. See pages 64-71 for discussion of related regulations.

<sup>726</sup> Christian Behrmann and Jon Yorke, “The European Union and the Abolition of the Death Penalty,” *Pace International Law Review Online Companion* 4, no. 1 (2013), 14-15 notes that, “[s]ince 1986, the region has debated promoting abolition as a global initiative. The Parliament’s first resolution concerning a third country outside of the region was the 1989 condemnation of the application of the death penalty for political prisoners in Chile. In 1991, there was another resolution presented to Brazil urging it not to reinstate the death penalty. In 1994, the Parliament shifted its focus to Africa, and denounced the death sentences imposed in Egypt and Algeria. Additional resolutions had been passed against the extension of the death penalty in El Salvador, the Philippines, and Iran. Further attempts were then made to prevent the death sentence of Tenzin Delek Rinpoche in Tibet. Two resolutions were adopted condemning the death penalty practices of the United States in 1990 and 1992, and in 1995, two further resolutions were passed, one against the reintroduction of the death penalty in the State of New York, and the second in the specific case of Mumia Abu-Jamal. From 1995 onwards, corpuses of resolutions have denounced both US state and federal government application of the death penalty.” Further details are provided on pages 25-32.

<sup>727</sup> Christian Behrmann and Jon Yorke, “The European Union and the Abolition of the Death Penalty,” *Pace International Law Review Online Companion* 4, no. 1 (2013), 32-3.

<sup>728</sup> Lachlan Markay, “European Union Financing Efforts to End Death Penalty in U.S.” (October 30, 2013), <https://freebeacon.com/issues/european-union-financing-efforts-to-end-death-penalty-in-u-s/>.

Christian Behrmann and Jon Yorke, “The European Union and the Abolition of the Death Penalty,” *Pace International Law Review Online Companion* 4, no. 1 (2013), 75 note that, “[o]f the 16 projects currently funded under the [European Instrument for Democracy and Human Rights], five have their activities in the USA.” These include the Death Penalty Information Center and Witness to Innocence.

<sup>729</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 248-9 notes that the EU has spent “substantial sums of money” to push for the abolition of the death penalty in China.

Christian Behrmann and Jon Yorke, “The European Union and the Abolition of the Death Penalty,” *Pace International Law Review Online Companion* 4, no. 1 (2013), 72-3 note that, “[t]he EU funding for civil society organizations is channeled through the European Instrument for Democracy and Human Rights (hereinafter, “EIDHR”), which makes the EU the largest donor in this area worldwide... Overall, and beyond its support to abolitionist activities, under the EIDHR alone in 2007-2010, 1200 grants were made in 140 countries for over € 331 million. Abolition of the death penalty is one of the thematic priorities for assistance under the EIDHR. Since 2000, it has funded around 50 projects worldwide (including in the USA), with an overall budget of more than € 23 million. Funded activities include awareness-raising, monitoring of conditions of implementation of the death penalty and the application of minimum international

- The CoE has publicly advocated for the international rejection of the death penalty through the “European Day against the Death Penalty,” public announcements, speaking at conferences, videos, leaflets, and mass media campaigns in collaboration with national governments and NGOs.<sup>730</sup>
- The EU has acted as *amicus curiae* to the US Supreme Court, advocating abolition of the death penalty.<sup>731</sup>
- John D. Bessler notes that in the 21st century, “Canada, England, Italy and France have actually refused to extradite people to the United States in the absence of assurances that the death penalty would not be sought.”<sup>732</sup> Since 1989, European human rights law has restricted extradition to states where the individual may be executed.<sup>733</sup>

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standards, legal reform to limit the use of or abolish the death penalty, as well as the provision of legal assistance in cases of particular concern and the promotion of the Second Optional Protocol (or similar regional instruments).”

<sup>730</sup> “Joint Declaration by the European Union High Representative for Foreign Affairs and Security Policy, and the Secretary General of the Council of Europe on the European and World Day against the Death Penalty, 10 October 2018,” Council of Europe, accessed June 26, 2019, <https://rm.coe.int/joint-declaration-by-the-european-union-high-representative-for-foreign-affairs-and-security-policy/16808e49c6> and “Second European Day against the Death Penalty, Council of Europe,” Council of Europe, accessed June 26, 2019, <https://youtu.be/KsA5ZjDC7IY>, and “Death penalty,” Council of Europe, accessed June 26, 2019 <https://edoc.coe.int/en/176-death-penalty>.

On mass media campaigns, “Death penalty,” Council of Europe, accessed June 26, 2019 <https://edoc.coe.int/en/176-death-penalty> notes that, “the Parliamentary Assembly through its reports and recommendations and by organising and participating in conferences attempted to publicise the arguments for abolition and put pressure on member states to honour the commitments they had freely entered into in order to join the Council of Europe. Parallel with these high profile events, the Council of Europe began to sponsor and co-operate with national authorities and NGOs in developing public awareness campaigns on the abolition of the death penalty.”

<sup>731</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 248-9.

Christian Behrmann and Jon Yorke, “The European Union and the Abolition of the Death Penalty,” *Pace International Law Review Online Companion* 4, no. 1 (2013), 35-56 discuss how *amicus curiae* briefs from the EU influenced discussion in the *Atkins v. Virginia* and *Roper v. Simmons* cases and conclude that the EU’s *amicus* briefs “can provide analysis, the means to test the legitimacy of state practice, and reveal the extent of global norms.” There is little evidence in the article that such *amicus* briefs have played a substantial role in securing anti-death penalty rulings, however.

<sup>732</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 253-4. In a footnote, Bessler adds that, “France actually refused to cooperate in the Zacarias Moussaoui terrorism investigation—thus hindering U.S. law enforcement efforts—once the U.S. decided to seek Moussaoui’s execution.” Bessler also notes that Paraguay, Germany and Mexico filed actions with the International Court of Justice to due to the US’ failure to notify arrested citizens from those countries that they had the right to legal assistance.

Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (July 2006), 70 summarizes that, “[i]n 1999, Germany filed suit against the United States in the World Court regarding Arizona’s execution of two German citizens. Raymond Forni, the president of the French National Assembly, held a news conference in Pittsburgh in August 2000 to urge the United States to abolish the death penalty. Meanwhile, to mark Governor Ryan’s imposition of the moratorium in Illinois, Rome’s ancient coliseum was lit up with golden light. According to Mexican Foreign Minister Jorge Castaneda, the forty-five Mexican nationals on death rows in the United States are ‘an important strain on bilateral relations’ between the two countries.”

<sup>733</sup> Christian Behrmann and Jon Yorke, “The European Union and the Abolition of the Death Penalty,” *Pace International Law Review Online Companion* 4, no. 1 (2013), 62-4.

Nevertheless, many forms of currently existing international advocacy against the death penalty did not exist until the 1960s or later,<sup>734</sup> so its importance in encouraging abolition should not be overstated; many countries had abolished the death penalty well before this.<sup>735</sup> The US in particular is not highly susceptible to international pressure on this issue.<sup>736</sup> The Supreme Court has, at times, explicitly rejected arguments based on practices in other countries when interpreting the Eighth Amendment,<sup>737</sup> although Kirchmeier cites four cases where the Justices have given some weight to international opinion and interpretations.<sup>738</sup> Additionally, debate and legal decisions often happen at the state level, rather than the national level.<sup>739</sup>

- **It is probably easier to abolish a practice through legislation if that practice is not in regular use.**

Of the 12 states that have abolished the death penalty since *Furman*, 7 had not executed anyone in the 10 years before abolition, and the other 5 had executed only one or two convicts. By comparison, 5 states that retain the death penalty and all 4 states that are currently under gubernatorial moratoriums did not execute anyone between the years of 2008 and 2018. During the same period, 9 states executed five or fewer convicts

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<sup>734</sup> Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (New York: Cambridge University Press, 1986), 20.

For example, it was not until 1983 that the Council of Europe (CoE) added Protocol No. 6 to the ECHR, which abolished the death penalty, except “in respect of acts committed in time of war or of imminent threat of war” (“European Convention on Human Rights,” European Court of Human Rights, accessed June 26, 2019, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)).

<sup>735</sup> See the spreadsheet “[Cumulative total of states that have abolished the death penalty](#).”

<sup>736</sup> Several scholars have written about this topic in some detail. See, for example:

Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (July 2006), 1-116,

Michael Ignatieff (ed.) *American Exceptionalism and Human Rights* (Princeton, NJ: Princeton University Press, 2009),

Carol S. Steiker, “Capital Punishment and American Exceptionalism,” *Oregon Law Review* 81 (2002), 97-130, and

Nora V. Demleitner, “The Death Penalty in the United States: Following the European Lead,” *Oregon Law Review* 81 (2002), 131-59.

<sup>737</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (July 2006), 68 summarizes that, “*Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989)” was a “plurality holding that it does not violate the constitution to execute persons aged sixteen or seventeen at the time of the crime,” noting that, “[w]e emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici... that the sentencing practices of other countries are relevant.”

<sup>738</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (July 2006), 68. The cases are *Coker v. Georgia* (1977), *Thompson v. Oklahoma* (1988), *Beard v. Greene* (1998), and *Knight v. Florida* (1999). Additionally, Sandra Babcock, “The Global Debate on the Death Penalty,” *Human Rights* 34 (2007), 18 provides some evidence that international judicial practice influenced *Roper v. Simmons* (2005), *Wilkerson v. Utah* (1879) and *Trop v. Dulles* (1958). On page 19, Babcock notes that the Supreme Court cited an amicus curiae brief submitted by the EU in the *Atkins v. Virginia* (2002) decision. See also footnote 386.

<sup>739</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (July 2006), 71 makes this point. Of course, an obvious demonstration of this is that some states ban the death penalty entirely, while others use it.

but have retained the death penalty, and 11 states have executed more than five.<sup>740</sup> In the US in the post-*Furman* period, then, having low numbers of recent executions seems to be a necessary but not sufficient condition for abolition of the death penalty. However, internationally, only 39% of the 54 countries that abolished the death penalty between 1989 and 2010 had not executed anyone for 10 years or more.<sup>741</sup> Additionally, during the period before *Furman*, the relationship between the total number of executions in a state and whether the state had abolished capital punishment or not is less clear.<sup>742</sup>

- **Where advocacy for abolition of a practice fails, or has not yet succeeded, that advocacy may still encourage the practice to be restricted.**

In the 18th and 19th centuries, reforms of capital punishment seem to have occurred despite the emphasis of various public intellectuals on abolition, rather than reform.<sup>743</sup> Despite the preference of international

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<sup>740</sup> See the spreadsheet “[Execution numbers in abolitionist and non-abolitionist states](#).” Illinois, Massachusetts, New Hampshire, New Jersey, New York, North Dakota, and Rhode Island had not executed anyone in the ten years before abolition, while Connecticut (1), Delaware (2), Maryland (2), New Mexico (1), and Washington (1) had executed one or two convicts. California, Colorado, Oregon, and Pennsylvania didn’t have any executions between 2008 and 2018 and are currently under gubernatorial moratoriums. Kansas, Montana, Nevada, North Carolina, and Wyoming haven’t abolished capital punishment but didn’t have any executions between 2008 and 2018. Arkansas (4), Idaho (2), Indiana (1), Kentucky (1), Louisiana (1), Nebraska (1), South Dakota (3), Tennessee (5), and Utah (1) haven’t abolished the death penalty but had 5 or fewer executions between 2008 and 2018. Alabama (25), Arizona (14), Florida (33), Georgia (32), Mississippi (13), Missouri (22), Ohio (30), Oklahoma (26), South Carolina (6), Texas (153), and Virginia (15) haven’t abolished the death and executed more than 5 convicts between 2008 and 2018. The other 9 states (Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Vermont, West Virginia, and Wisconsin) have not had working death penalty statutes since *Furman* or before.

<sup>741</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 14 notes that, “[y]et in the last 20 years, only a minority, 21 (39 per cent) of the 54 countries that *first* abolished the death penalty since the beginning of 1989 (including the three that abolished it for ordinary crimes only) had been through a 10-year abolitionist *de facto* stage. The majority moved much faster to remove capital punishment by law. For example, Turkmenistan abolished capital punishment in 1999, just two years after the last execution; South Africa in 1995 just four years after. Thus, the pattern of a long drawn-out process leading to abolition was not observed in well over half of those countries that have embraced abolition in the last 20 years.”

<sup>742</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *American without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 209 note that, “the move toward abolition does not fit well into a moral evolution model. Abolitionist states vary widely in their historical use of capital punishment. West Virginia, for example, has officially executed 155 persons. During the 1950s, five years before its legislature abolished capital punishment, West Virginia ranked seventeenth among executing U.S. states, hardly a cultural tradition of abolition. Thus, a combination of economic factors, demographic shifts, and cultural traditions more realistically fit the data.” Nevertheless, West Virginia seems to be an exception, since the other states all had much lower numbers of executions.

<sup>743</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 12 summarizes that, “public intellectuals such as Benjamin Rush in the U.S., Victor Hugo in France and Jeremy Bentham and Samuel Romilly in England generally advocated outright abolition, or something very close to it. They also wrote punishment-reform polemics stressing the dignity of the offender and decrying the brutality or inutility of existing punishment regimes. These idealistic appeals gradually influenced the bureaucratic/policy elite, although rarely to the point of winning them over to the most radical proposals. However, renowned intellectuals’ calls for complete abolition of capital punishment ‘moved the goalposts’ of what sort of reforms it was acceptable to advocate in public. Thus, on both sides of the Atlantic, the 19th century saw progressive moves in three areas: (1) restricting capital punishment to only the most serious crimes; (2) transforming executions from public spectacles with a strong religious component into private, legalized ceremonies within prison walls; and (3) introducing execution techniques believed by policy-makers to be more humane. The dynamic unfolded roughly as follows: reformers would call for the outright abolition of capital punishment as a symbol of humanity and moral progress. Bureaucratic/policy elites — eager to don the mantle of moral progress, but unable or unwilling to abolish executions entirely — met the

institutions for the abolition of capital punishment,<sup>744</sup> some countries have taken smaller steps to restrict the death penalty.<sup>745</sup>

## The Effects of Legislative Change

- **Abolition of a practice seems likely to encourage public opinion to gradually turn against that practice.**

Franklin E. Zimring and Gordon Hawkins (1986) note the results from two public opinion polls from the Federal Republic of Germany in 1948 and 1980; the percentage in favor of capital punishment was 74% and 26%, respectively, though the polls' question wordings varied. Abolition occurred in Germany in 1949, shortly after the first poll.<sup>746</sup>

Zimring and Hawkins argue that when no major negative consequences arise from abolition, public opinion gradually turns against capital punishment.<sup>747</sup> Public opinion in Germany did not seem to turn substantially against the death penalty until after 1964.<sup>748</sup> It seems unlikely that legislative abolition would have had little to no effect on opinion for 15 years before suddenly having a dramatic impact.<sup>749</sup> Nevertheless, Zimring and Hawkins cite Italy, Belgium, the Netherlands, Denmark, Norway, and Sweden as other examples of countries

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reformers halfway by 'civilizing' the legal and physical procedures surrounding capital punishment. This pattern largely prevailed until after World War II."

<sup>744</sup> See footnote 706.

<sup>745</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 14 notes that, "[w]here abolition has not yet been achieved, there has been a movement, in line with Article 6(2) of the ICCPR, to restrict the number of crimes for which the penalty is death, to make it discretionary rather than mandatory (the latest country in the process of doing so being Barbados), and generally to restrict the number of people actually executed. Let me take two examples where there has yet to be a moratorium. The new Belarus Criminal Code of 1999 provides for death penalty for 15 fewer offences (in 14 rather than 29 articles) than the Code of 1960, and it can now only be imposed 'when it is dictated by special aggravating circumstances as well as an exceptional danger posed by the offender.' Vietnam reduced the number of offences for which the death penalty can be imposed from 44 to 29 in 1999 and plans are in place to revise the Penal Code to reduce the number to 12, excluding economic crimes. China has yet to take this legislative leap."

<sup>746</sup> Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (New York: Cambridge University Press, 1986), 13.

<sup>747</sup> Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (New York: Cambridge University Press, 1986), 13-14 argue that, "[t]he symbolic character of death penalty legislation probably explains the strong support for the punishment after abolition, which diminishes until, after several years, opposition dominates public opinion. Because the death penalty symbolizes governmental willingness to employ ultimate power against those who threaten collective moral order, when a government relinquishes that power much of the public believes that society will be incapable of protecting itself. In reality, the death penalty is about as relevant to controlling violent crime as rain-dancing is to controlling the weather. So long as rain dances continue to be performed, as they have been since time immemorial, the belief that they have some influence on rainfall cannot be tested. When they cease to be performed, and the amount of precipitation remains unchanged in the subsequent years, the ritual's influence dissipates. Similarly, as time passes after abolition and increases in violent crime do not materialize, the felt necessity of the capital sanction diminishes gradually."

<sup>748</sup> Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (New York: Cambridge University Press, 1986), 14.

<sup>749</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 179 includes subsequent data from opinion polls that shows that the downward trend continued until support for the death penalty reached 15% in 2009, though the decline was not smooth; if abolition contributed to this decline, other factors seem likely to have been influential as well.

that abolished capital punishment long ago and now also have low public support for it, despite there being “no examples of [national] abolition occurring at a time when public opinion supported the measure.”<sup>750</sup> Criminologists Roger Hood and Carolyn Hoyle list New Zealand, Australia, and Finland as further examples.<sup>751</sup>

Of course, factors other than abolition could explain the fall in support for capital punishment in these countries, though some research has found significant effects of abolition after controlling for multiple exogenous factors. Kelley and Braithwaite (1990) analyzed survey responses by 3,012 Australians: They controlled for 18 other socioeconomic predictors of death penalty support and estimated that abolition within an Australian state reduces public support for the death penalty in that state from 66% to 61% over the course of 30 years but has no effect on overall preferences for punitive treatment of convicts.<sup>752</sup> Steven Stack (2004) analyzed survey data from 17,725 respondents in 17 nations: Controlling for demographic variables, individuals’ punitiveness, confidence in the courts, religious fundamentalism, belief in free will, and their nation’s homicide rate, Stack found through logistic regression that, “[p]ersons residing in a retentionist state are fully 2.88 times as likely to support the death penalty as persons residing in an abolitionist nation... each year of abolition lowered the odds of an individual’s death penalty support by 46 percent.”<sup>753</sup>

Though not conducting formal statistical analysis, a group of researchers commented that “Zimring and Hawkins’s conclusion that popular support for abolition inevitably increases with the passage of a few years is

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<sup>750</sup> Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (New York: Cambridge University Press, 1986), 22. They argue that, “public opinion does change slowly over time. In 1962 the Council of Europe reported in relation to Italy, Belgium, the Netherlands, Denmark, Norway, and Sweden that ‘there seems to be no question of capital punishment nowadays in any of those countries.’ In Sweden, the most recent public opinion poll revealed that twenty-eight percent of the respondents were for capital punishment, which the press described as an extraordinarily high proportion in favor of an ‘outmoded punishment.’ In Norway a poll found seventy percent opposed the death penalty, fifteen percent favored, and fifteen percent had no opinion. In none of these countries had there been any public clamor for reintroducing the death penalty, or any significant struggle between those in favor and those against it. This is the common pattern in countries that have not executed for decades, and it is difficult to believe that it represents a political compromise. A more plausible conclusion would be that when a country has been abolitionist in practice for a number of years, controversy tends to end.”

<sup>751</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), 465-6. They also note that surveys have found young people tend to be less supportive of capital punishment in several countries, though since this does not appear to be specific to abolitionist countries, it does not seem to provide evidence that a lack of exposure to capital punishment reduces public support.

<sup>752</sup> Jonathan Kelley and John Braithwaite, “Public opinion and the death penalty in Australia,” *Justice Quarterly* 7, no. 3 (1990), 529-63. They list several limitations of their methodology but note on page 551 that, “[t]he elite leadership conclusion is buttressed, nevertheless, by the parallel analysis with support for stiffer sentences as the dependent variable (from Equation 2A). Abolishing capital punishment has absolutely no effect on support for stiffer sentences for criminals (Table 5, Line 19, Column 3). In this case a nonfinding strengthens a finding: if the elite leadership theory is right, then abolition of the death penalty should affect public support for the death penalty but not for other kinds of punishment on which the elite do not show leadership. On the other hand, if differences between states on the death penalty are an artifact of other differences (unknown and unmeasured in our model), we would expect to see similar apparent effects on the sentencing measure.”

<sup>753</sup> Steven Stack, “Public Opinion on the Death Penalty,” *International Criminal Justice Review* 14, no. 1 (2004), 69-98. On page 81, Stack explains that, “[s]upport of the death penalty is first measured by the item ‘People convicted of murder should be subject to the death penalty’ (1 = strongly disagree through 5 = strongly agree). This item is similar to the measure of death penalty support in the American General Social Survey (GSS): ‘Do you favor or oppose the death penalty for a person convicted of murder?’... The present study follows most previous research on death penalty support and measures death penalty support as a binary variable (0 or 1). Support for the death penalty (coded as 1) was measured by a response of ‘strongly agree’ or ‘mildly agree.’”

inconsistent with [US] opinion polls showing that attitudes concerning capital punishment differ little, if at all, between the residents of abolitionist and death penalty states. For example, after more than 150 years of abolition, most in Michigan still appear ready to reinstate capital punishment.”<sup>754</sup> They did, however, find anecdotal evidence that longer periods of abolition in some states may have encouraged a decrease in the importance that voters in those states attached to death penalty issues.<sup>755</sup>

Of course, random variation and short-term factors<sup>756</sup> may mean that total levels of support vary substantially from year to year. Although public support for capital punishment in the UK has been gradually falling,<sup>757</sup> there was some initial fluctuation in levels of support shortly after abolition.<sup>758</sup> The trends in France<sup>759</sup> and Canada<sup>760</sup> show some similarities to the UK. In other cases, abolition may appear initially to have little effect

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<sup>754</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 212-3. They note, however, that, “[a]mong the states studied here [Michigan, West Virginia, Alaska, Maine, Wisconsin, Minnesota, Iowa, North Dakota, and Hawaii, i.e. the US states that had abolished capital punishment through legislative action before 1972 and maintained it until 2002], it is impossible to specify accurately the state of public opinion at the time of abolition. All available evidence suggests that the majority of citizens living in abolitionist states at the end of the twentieth century would verbally support the notion of reinstating capital punishment.”

<sup>755</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 213 summarize that, “Zimring and Hawkins might well be correct in their assumption of growing popular support for abolition. If public opinion polls in abolitionist states accurately reflect support for the death penalty, it is reasonable to assume that significant numbers of politicians would use capital punishment as their ticket to political success. However, numerous interviews during the course of this study concluded that ‘you cannot win on capital punishment in this state.’ How can this be true? There are two interconnected answers for this apparent contradiction. First, residents in abolitionist states have an opinion on capital punishment, but that opinion has little to do with their everyday lives. Under these circumstances, people vote for legislators and governors based on economic and other interests rather than on a candidate’s death penalty position (for example, as in Wisconsin, North Dakota, and Minnesota). Second, those in abolitionist states tend to be abstractly supportive but practically opposed to the death penalty. In recent years, pro-death penalty legislators in Maine and Michigan, for example, have attempted to reestablish capital punishment by way of a referendum. Both efforts failed to get the necessary number of signatures to put the issue on the ballot.”

<sup>756</sup> For example, Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 180-4 hypothesizes that critical coverage of George Bush’s executions in the European media may have contributed to continued declines in public opinion. See also the bullet point beginning “The stories of individual criminals...” in the section on “Features of the US Anti-Death Penalty Movement.”

<sup>757</sup> “Support for the death penalty falls below 50% for first time,” British Social Attitudes, accessed November 11, 2019, <https://www.bsa.natcen.ac.uk/media-centre/archived-press-releases/bsa-32-support-for-death-penalty.aspx> notes that, “NatCen’s annual survey of the public’s view on political and social issues shows only 48% of people now back the death penalty for ‘some crimes’, down from 54% in 2013. Support for the death penalty stood at 74% in 1986, and then fell during the 1990s to 59% by 1998. The previous low of 52% was recorded in 2001.”

<sup>758</sup> Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (New York: Cambridge University Press, 1986), 40 note that, in the UK, “the percentage favoring the death penalty increased from seventy percent in February 1965, prior to suspension of the penalty for an experimental period, to seventy-six percent in 1966, the year after suspension. Yet by 1970, the year after abolition was made permanent by resolutions of both Houses of Parliament, support for the death penalty had fallen to sixty-one percent.”

<sup>759</sup> See footnote 124.

<sup>760</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 232-3 notes that, “[t]he periodic waves of public anger caused by notorious serial killers such as Clifford Olson and Karla Homolka drive occasional spikes in support for capital punishment, but in Canada, as in many European countries, the early 2000s appear to have seen a noticeable drop in support.”

on public attitudes; Hammel comments that public support for capital punishment in Mexico was “largely unaffected” by abolition in 1929.<sup>761</sup>

Several scholars of capital punishment argue that elites can change public opinion by adopting values themselves, implementing policy change in line with those values, and then waiting for the public to converge on this preference.<sup>762</sup> The plausibility of these claims is dependent upon the confidence that one has in the evidence that public support for a practice diminishes after the abolition of that practice.

The history of nuclear power likewise suggests that, even if there is a temporary backlash to legislative changes to a practice, in the long term this effect is likely outweighed by the positive effects that familiarity has on attitudes.<sup>763</sup> It is also possible that bureaucrats and legislators become accustomed to particular laws once they are passed and become unwilling to overturn them<sup>764</sup>; abolition of a practice may generally be difficult to reverse, regardless of public opinion.

<sup>761</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 233.

<sup>762</sup> For example, Sangmin Bae, *When The State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (New York: State University of New York Press, 2007), 122 presents a figure for “Causal Mechanisms of Norm Adoption”: “Political Leadership (internal/external)” leads to a “Centralized Decision-Making Process” or to a “Moment of Opportunity”: Radical Political Transformation,” which leads in turn to “Norm Adoption.”

Steven Pinker, “Emotion, Reason and Moral Progress” (November 7, 2012), [https://www.youtube.com/watch?time\\_continue=985&v=hgGEKBSOeEY](https://www.youtube.com/watch?time_continue=985&v=hgGEKBSOeEY) describes the process of a “Norm cascade,” referring to Andrew Hammel (presumably Hammel’s book, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010)) as providing evidence for this process: “1. Intense controversy, with majority favoring capital punishment; 2. Elites, influenced by rational arguments, defy popular opinion, push through abolition; 3. Nothing terrible happens; 4. People and press get bored; 5. Politicians realize issue is no longer a vote-getter; 6. Political inertia: No one wants to reopen the issue; 7. People get used to it, favor the status quo; 8. Alternative becomes unthinkable *except*... 9. Among radical fringe groups, whose extremism only cements popular consensus.” This mostly seems a fair representation of Hammel’s claims, though some of these steps are working hypotheses, without substantial empirical support in Hammel’s book (see, for example, footnote 689). Additionally, step 5 is slightly misleading in that capital punishment was not necessarily seen to be a “vote-getter” in Germany, the UK, and France, and in that differing structural factors mean that capital punishment would likely continue to be a “vote-getter” in the US, even after abolition.

<sup>763</sup> J. Mohorich, “What can nuclear power teach us about the institutional adoption of clean meat?” (November 28, 2017), <https://www.sentienceinstitute.org/nuclear-power-clean-meat> summarizes that, “[i]n general, it appears that the top-down decision to build French nuclear electricity capability did not provoke a fatal backlash among the French public. True, the Messmer Plan inspired protest, and anti-nuclear groups grew up in France as they did in other countries experimenting with nuclear power at the time. However, public opinion toward nuclear in non-nuclear countries remained far frostier than in countries with nuclear power programs. If there was a backlash effect, it appears to have been outweighed by a familiarity effect of some kind.”

<sup>764</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 203 summarize that, “[t]he experiences in West Virginia and other abolitionist states also reflect the fact that bureaucrats typically support the status quo no matter what that status quo represents... Politicians and other leaders of government are generally oriented toward the past and are strong supporters of tradition. Whatever the idiosyncratic origins of death penalty abolition in a given state, once executions are abolished, those in positions of political and organizational power tend to give it their support. The leadership in West Virginia’s Democratic and Republican parties are unwilling to cede to the other a monopoly on the moral premise that capital punishment contradicts the sanctity of human life.”

Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 12 summarize that Ken Shepsle “explained how the institutional design of politics, especially the powers of important gatekeepers such as committee chairs in Congress,



- **Where eliminating a practice is intractable, it may be possible to suspend the practice pending substantial improvements or further research. However, the practice may be subsequently resumed without being substantially challenged.**

Public support is higher for a moratorium on capital punishment than an outright ban; legal scholar Jeffrey L. Kirchmeier notes that, “[a]lthough one poll shows that sixty-six percent of Americans favor capital punishment, another poll shows that sixty-three percent of Americans favor a moratorium on executions until fairness issues are addressed.”<sup>765</sup> According to Kirchmeier, the “prime sponsor” of Nebraska’s 1999 moratorium bill “was Senator Kermit Brashear, a Republican who favors the death penalty but is concerned about the fairness of the legal process.”<sup>766</sup> Several states and countries have introduced moratoriums on capital punishment that have been succeeded by measures that effectively abolished capital punishment entirely, including Illinois,<sup>767</sup> New Jersey,<sup>768</sup> Washington,<sup>769</sup> the United Kingdom,<sup>770</sup> Canada,<sup>771</sup> South

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induce or create stability in public politics, especially the powers of important gatekeepers such as committee chairs in Congress, induce or create stability in public policy outcomes even if the underlying issues about which political debate occurs are highly complex and multidimensional... most policies (including the death penalty) are quite stable most of the time’ we do not see ‘cycles’ very much in practice. The structure of the U.S. judicial system, with its adherence to rules of precedence and accumulated case law, induces great stability in judicial outcomes in a similar manner; indeed the concept of *stare decisis* is designed to do exactly that. But stability need not be permanent. Occasionally, in fact, we see important instances in which policies flip from one seemingly stable equilibrium to another.”

<sup>765</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 2. Unfortunately, the cited article was inaccessible, so the precise wording of these polls is unclear.

<sup>766</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 43.

<sup>767</sup> See the paragraph beginning “The Illinois House of Representatives...” and the following two paragraphs in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>768</sup> See the paragraph beginning “The staff of NJDPM...” and the following paragraph in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>769</sup> See paragraph beginning “In 1914, the Democratic governor of Washington...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>770</sup> Here, a moratorium was introduced in 1965, followed by abolition in 1969. Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (July 2006), 84.

<sup>771</sup> “Capital punishment in Canada,” CBC News (March 16, 2009), <https://www.cbc.ca/news/canada/capital-punishment-in-canada-1.795391> notes that, “[i]n 1967, a moratorium was placed on the death penalty. But it was not until 1976 that Canada formally abolished the death penalty from the Criminal Code, when the House of Commons narrowly passed Bill C-84.”

Africa,<sup>772</sup> Russia,<sup>773</sup> Kyrgyzstan, Kazakhstan, and Tajikistan.<sup>774</sup> California, Colorado, Oregon, and Pennsylvania are currently under moratoriums introduced by the state governors.<sup>775</sup>

Of course, other states have failed to introduce moratoriums. For example, Alabama has had moratorium bills introduced into its Senate each year for ten years and into its House of Representatives each year for five

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<sup>772</sup> Sangmin Bae, *When The State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (New York: State University of New York Press, 2007), 48 notes that, “[t]he almost unbroken upward trend in the annual number of executions during the 1980s, which reached at least one hundred a year, changed in 1989: ‘only’ fifty-three people were executed, and it was the last year of executions in South Africa. The dramatic reduction in executions in 1989 was to a large extent due to presidential reprieves, which numbered sixty-six that year. In his speech to parliament on February 2, 1990, President de Klerk announced that in response to ‘the intensive discussion [of the death penalty] in the recent months,’ the law regarding the death penalty would be revised to limit its imposition to extreme cases, to allow the establishment of a special committee to investigate the death penalty, and to allow an automatic right of appeal for those sentenced to death. President de Klerk added that ‘all executions have been suspended and no executions will take place until parliament has taken a final decision on the new proposal.’” Bae notes on pages 49-50 that, though de Klerk announced his intention to revoke the moratorium, “[t]his announcement met with strong criticism... President de Klerk succumbed to the pressure and soon announced that the moratorium would remain in effect.” Bae explains on page 53 that the newly appointed Constitutional Court of the new democratic regime in South Africa “unanimously held the death penalty to be unconstitutional.”

<sup>773</sup> Anatoly Pristavkin, “A Vast Place of Execution — the Death Penalty in Russia,” in *The Death Penalty in Europe* (Strasbourg: Council of Europe Publishing, 1999), 129-30 notes that Russia was admitted to the Council of Europe in February 1996. However, the Presidential Pardons Committee passed information to the CoE that 53 executions were carried out in Russia in the first half of 1996. As a result, the CoE’s Parliamentary Assembly warned Russia that it would “‘take all necessary steps to ensure compliance with commitments entered into,’ including refusal to recognise the credentials of the Russian delegation.” Pristavkin adds on page 136 that, “[s]ince August 1996, even though there is no law banning the death penalty in Russia, not a single prisoner has been shot in our country. Upon [the initiative of the Presidential Pardons Committee], which was supported by the President, there is a tacit moratorium as a result of which we no longer deal with capital cases.” This was despite polls finding 40% support for “public executions” among respondents from “Moscow and St Petersburg (the two most enlightened major cities)” and 58% support in the population as a whole.”

“Russian court extends moratorium on death penalty,” Reuters” (November 19, 2009), <https://www.reuters.com/article/idUSLJ330478> summarizes that, “Russia’s Constitutional Court on Thursday effectively abolished the death penalty, extending indefinitely a 13-year-old moratorium on capital punishment. Russia has not executed a criminal since 1996, though a myriad of contradictory legal decisions have helped stoke a heated debate about whether to return the punishment for especially barbarous crimes.”

<sup>774</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), 66-8.

<sup>775</sup> On Colorado, Oregon, and Pennsylvania, see footnote 438. On California, see Scott Shafer and Marisa Lagos, “Gov. Gavin Newsom Suspends Death Penalty In California” (March 12, 2019), <https://www.npr.org/2019/03/12/702873258/gov-gavin-newsom-suspends-death-penalty-in-california>.

years without any passing.<sup>776</sup> Oklahoma,<sup>777</sup> Maryland,<sup>778</sup> and Tennessee<sup>779</sup> introduced moratoriums on capital punishment which were subsequently revoked (though Tennessee's moratorium was intentionally only for 90 days). Additionally, the litigation campaign by the LDF and ACLU from 1966 onwards led to a *de facto* moratorium on executions, which was then given legal weight by the 1972 *Furman* ruling.<sup>780</sup> The ruling was understood by many as signifying the practical end of the death penalty in the US<sup>781</sup> but failed to lead to outright abolition. Other nations have introduced moratoriums that have broken down.<sup>782</sup> The risk of reversal is not limited to moratoriums, however:

- Several countries have abolished the death penalty, reinstated it, and then abolished it again.<sup>783</sup>

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<sup>776</sup> "Alabama," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/alabama>.

"Mississippi," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/mississippi> notes that, "[i]n 2011, a bill was introduced to impose a moratorium on executions. The bill did not pass the state legislature."

<sup>777</sup> See the paragraph beginning "A 2014 botched execution..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>778</sup> "Maryland," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/maryland>. However, Maryland did subsequently abolish capital punishment via legislation in 2013.

<sup>779</sup> See the paragraph beginning "The governor of Tennessee" in the section on "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>780</sup> See the section "1966-72: Litigation and temporary legal success through *Furman v. Georgia*" in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>781</sup> See footnotes 171, 172, and 173.

<sup>782</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), 65 notes that, "[f]ollowing its independence from the former Soviet Union in 1990, the number of capital offences [in the Eurasian country of Georgia] was reduced and a moratorium on executions established. This broke down in 1994 in the face of a spate of murders—which rose from 270 in 1990 to 878 in 1993—and other acts of lawlessness. Executions were resumed in 1995, but, with stability restored, in 1997 President Shevardnaze commuted all death sentences and capital punishment was abolished."

On page 81, Hood and Hoyle add that, "[f]ollowing the invasion and overthrow of Saddam Hussein's regime, which had made very extensive use of the death penalty, both judicial and extrajudicial, the temporary moratorium imposed [in Iraq] in March 2003 ended when the death penalty was reinstated by the newly elected Iraqi Parliament in October 2005."

It is possible that a similar situation occurred in many other countries. The author has not attempted any systematic research into the histories of capital punishment in each country.

<sup>783</sup> Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (New York: Cambridge University Press, 1986), 9 note that, "New Zealand abolished capital punishment in 1941, restored it in 1950, and abolished it again in 1962. Italy abolished it in 1890, restored it in 1931, and again abolished it in 1944. Switzerland abolished it in 1874, restored it in ten out of fifteen cantons in 1879, and finally abolished it in 1942. In the years immediately following World War II several formerly enemy-occupied European countries, which had not performed an execution for civil crimes for over half a century (for example, the Netherlands, Norway, and Denmark), executed a number of collaborators and then returned to a nonexecution policy."

Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), 70 notes that, "Argentina and Brazil reintroduced and then again abolished the death penalty."

Sangmin Bae, *When The State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (New York: State University of New York Press, 2007), 118 interprets this information in a more optimistic light: "only four countries in the world have reinstated the death penalty after abolition. This must mean that even when the majority of people in a given country favors the death penalty, abolition is accepted."

- Many of the legislative abolitions in the Progressive Era were subsequently reversed.<sup>784</sup>
- Between 1994 and 2015, 11 countries that had not executed anyone for 10 years or more resumed executions.<sup>785</sup>
- **Research groups and reports commissioned by governments seem likely to encourage further institutional reform.**

The ADPM has combined the creation of research commissions with proposals for moratoriums on capital punishment, pending the results of the research. The creation of these research groups has often been associated with progress towards abolition:

- The creation of a research commission was combined with a moratorium on executions in Illinois,<sup>786</sup> New Jersey,<sup>787</sup> and South Africa<sup>788</sup>; each of these moratoriums was followed up with full abolition. Nebraska attempted to do the same, but the legislature only successfully overrode the governor's veto for the commissioning of research, so a moratorium was not implemented.<sup>789</sup>
- In Pennsylvania, legislation was passed to begin studying capital punishment in the state, and the governor has subsequently introduced a moratorium.<sup>790</sup>
- New Mexico's abolition may have been encouraged by reports from the State Bar's Task Force on the Administration of the Death Penalty in New Mexico and the Fiscal Impact Reports for proposed abolition bills.<sup>791</sup>

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<sup>784</sup> See the paragraph beginning "Eight other states..." in the section on "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>785</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), 20-1 notes that, "a 10-year period of no executions is not always an indication of progress towards abolition... Since 1994, 11 countries that appeared to be abolitionist *de facto* resumed executions—although none on a regular basis—thereby returning to the retentionist camp (Bahamas, Bahrain, Burundi, Chad, Comoros, Gambia, Guinea, Guatemala, St Kitts and Nevis, Trinidad and Tobago, and Qatar). Of these, only Burundi has subsequently abolished the death penalty, but once more there have been no executions for at least 10 years in six of the remaining 10 countries."

They add that, "in some American states executions have taken place after very long periods of abeyance. For example, as the new millennium got under way, both Tennessee and New Mexico resumed executions after 40 and 41 years, respectively; in 2005, Connecticut executed a person just four days short of 45 years since the last execution' and, in 2007, South Dakota carried out its first execution for 60 years... It is notable that soon afterwards both New Mexico and Connecticut abolished the death penalty."

<sup>786</sup> See the paragraph beginning "The Illinois House of Representatives..." and the following two paragraphs in the section on "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>787</sup> See the paragraph beginning "In January 2006, New Jersey's..." and the two following paragraphs in the section on "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>788</sup> See footnote 772.

<sup>789</sup> "Nebraska," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska>.

<sup>790</sup> "Pennsylvania," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/pennsylvania> notes that, "[i]n 2011, the state legislature passed SR 6, initiating a study of the death penalty in Pennsylvania. The study is currently underway... On February 13, 2015, Governor Tom Wolf announced a moratorium on executions, citing concerns about innocence, racial bias, and the death penalty's effects on victims' families."

<sup>791</sup> Jolie McLaughlin, "The price of justice: Interest-convergence, cost, and the anti-death penalty movement," *Northwestern University Law Review* 108, no. 2 (2013), 696-7.

- Likewise, the UK's Royal Commission on Capital Punishment was somewhat critical of the death penalty in 1953<sup>792</sup>; this was followed (with a substantial time delay) by a suspension of capital punishment in 1965 and its abolition in 1969.<sup>793</sup>
- Canada's commission was unusual in that it recommended the retention of the death penalty.<sup>794</sup> Nevertheless, the publication of the report seems to have been accompanied by an increase in proposals for legislation to abolish capital punishment and an increase in commutations of death sentences to life imprisonment,<sup>795</sup> with a legislative moratorium being subsequently implemented as a compromise.<sup>796</sup>
- A commission in Germany created after abolition voted not to recommend the reimposition of the death penalty by 19 votes to 4.<sup>797</sup>
- Amnesty International seem to have viewed the establishment of a research commission as important to US federal abolition efforts.<sup>798</sup>

<sup>792</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 13.

<sup>793</sup> Corinna Barrett Lain, "Furman Fundamentals," *Washington Law Review* 82, no. 1 (2007), 26-7.

<sup>794</sup> C. H. S. Jayewardene, *The Penalty of Death: The Canadian Experiment* (Lexington, MA: Lexington Books, 1977), 1-2 notes that, in 1950 and 1953, one member of the House proposed abolition bills. The second bill was withdrawn "on the suggestion of the Minister of Justice, Hon. Stuart S. Garson, who pointed out that the matter was being dealt with by a special committee working to revise the existing criminal law and produce a consolidated Criminal Code. The special committee produced its revision but as far as capital punishment was concerned, its recommendation was that the question should be studied by a Royal Commission or a Joint Committee of the House and Senate... Most commissions on capital punishment, the world over, have recommended abolition, although the recommendations have seldom been acted on. The Joint Committee of the House and Senate was an exception in this respect. It recommended the retention of capital punishment as the mandatory punishment for murder, the retention of capital punishment for treason and piracy, no change in the definition of murder, no degrees of murder, no special provisions for women, the abolition of capital punishment for offenders under eighteen years and its restricted use for offenders under twenty-one" and more. "These recommendations were made because of rejection of the main argument against the penalty of death—that it does not possess any special deterrent power—and the acceptance of other subsidiary ones," such as "the execution of children" and "errors of judgment leading to the execution of the innocent."

<sup>795</sup> C. H. S. Jayewardene, *The Penalty of Death: The Canadian Experiment* (Lexington, MA: Lexington Books, 1977), 3-4 notes that the Joint Committee "completed its work in 1956." Despite failed efforts to implement an official moratorium, "the Royal Prerogative of Mercy was used with increasing generosity resulting in a decreasing number of executions and several questions on commutation asked in Parliament. With the publication of the Report of the Joint Committee, bills to amend the Criminal Code and abolish the penalty of death were introduced." Jayewardene then describes a series of proposals, debates, rejections, and further proposals. By 1964, no bill had been passed, "[y]et in 1963 and 1964 no one was executed: all sentences of death were commuted to life imprisonment with the exercise of the Royal Prerogative of Mercy."

<sup>796</sup> C. H. S. Jayewardene, *The Penalty of Death: The Canadian Experiment* (Lexington, MA: Lexington Books, 1977), 5 notes that an abolition bill was rejected in 1966 but a bill in 1967 was amended "to limit the abolition, first to certain forms of murder—retaining it for the murder of peace officers acting in the course of duty—and second to an experimental period of five years... the bill passed 114 voting for and 87 against." See footnote 814 on subsequent abolition in Canada.

<sup>797</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 71-80. On page 71, Hammel notes that, "the Criminal Law Commission met regularly from 1954 to 1959, and was charged with updating Germany's Penal Code, which had remained largely unchanged since its passage in 1871... The Commission finally presented the federal government with its final draft in 1960."

<sup>798</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 71 notes that, "[t]he other major effort by AI to contest capital punishment in the United States during the first part of the reinstatement era was its call for the appointment of a presidential commission on the death penalty, similar to the British Royal Commission and a Canadian parliamentary committee, both of which issued reports during the 1950s... According to Tony Dunbar, who at the time was AIUSA's southern states coordinator, such a commission would be instrumental in stimulating national discussion of the issue in a forum other

- The ALI withdrew its Model Penal Code in 2009 after the findings of a study it had commissioned.<sup>799</sup>

Of course, these associations do not provide strong evidence that the research commissions themselves were effective in encouraging abolition; it may simply be that research commissions were established where there was already substantial momentum towards abolition. Additionally, Arizona, Arkansas, and Tennessee's research commissions do not appear to have led directly to further progress.<sup>800</sup> In Massachusetts, the House rejected an abolition bill that followed the report by a commission that had been appointed jointly by the House and the Senate to research capital punishment in the state.<sup>801</sup>

Nevertheless, it seems plausible that legislators will be more open to the idea of making a commitment to radical institutional change that is conditional upon further research rather than making an unconditional, absolute commitment. In addition to the persuasive power that such research may have, the findings may offer politicians an excuse to distance themselves from views that they have previously espoused without seeming hypocritical. By comparison, proposed legislation relating to farmed animals could set a preliminary timeframe for the abolition of particular farming practices with a commitment to revisit the timeframe in the light of the findings of an appointed research commission.<sup>802</sup>

- **It seems possible that the successful implementation of some legislation may decrease the longer-term chances of success for a social movement.**

At least some advocates in Colorado, Arizona, and Tennessee seem to have framed the abolition of the death penalty in those states in the early 20th century as temporary experiments. When those experiments appeared to fail, the legislation was reversed.<sup>803</sup> Presumably the failure of these experiments reduced subsequent willingness to remove the death penalty. Indeed, none of those three states have subsequently abolished capital punishment.<sup>804</sup>

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than the courts and in spawning 'an objective body of information' to guide the ensuing debate." But Carter ignored the request and AIUSA gave up when Regan took over in case it was filled with death penalty supporters.

<sup>799</sup> "Steiker Study Inspires Withdrawal of Death Penalty Section from Model Penal Code," Harvard Law Today (January 7, 2010), <https://today.law.harvard.edu/steiker-study-inspires-withdrawal-of-death-penalty-section-from-model-penal-code/>.

<sup>800</sup> See the paragraphs beginning "In Arizona in 2000...", "In 2009, Arkansas created...", and "The governor of Tennessee" in the section on "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>801</sup> Alan Rogers, "Success-At Long Last: The Abolition of the Death Penalty in Massachusetts, 1928-1984," *Boston College Third World Law Journal* 22, no. 2 (2002), 317-23.

<sup>802</sup> The research commission could be tasked with researching the animal welfare conditions and environmental impacts of animal agriculture in a particular area. Alternatively, it could look into possible mechanisms to minimize disruption to the economy and wellbeing of the inhabitants of the area, such as suitable methods to incentivize and support farmers to transition into other forms of farming.

<sup>803</sup> See the paragraph beginning "Factors encouraging the reinstatement..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>804</sup> "State by State," Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/> and the links on that page.

Initiatives or referenda have been used to reject legislative efforts to abolish capital punishment in Washington in 1975,<sup>805</sup> California in 2012-16,<sup>806</sup> and Nebraska in 2016.<sup>807</sup> Though the long-term effects of these decisions are unclear,<sup>808</sup> it seems likely that legislative and popular rejections of reform efforts would halt or delay subsequent efforts.

Haines argues that reforms in the mid-nineteenth century may have reduced the demand for further reform but provides no evidence for this specific claim.<sup>809</sup> Likewise, legal scholars Steiker and Steiker raise the concern that legislative reform of the death penalty may have legitimated and encouraged the imposition of death sentences in a similar manner to judicial reforms,<sup>810</sup> but they provide little evidence that this has occurred.<sup>811</sup>

The successful abolition of the death penalty in several states despite earlier legislation that restricted the death penalty provides weak evidence that, if incremental legislation generates complacency, that complacency is minimal. For example, New Hampshire banned the death penalty for juvenile offenders in 2005, then, in 2019, abolished the death penalty entirely, suggesting there was no prohibitive rise in complacency during those 14 years. Before abolishing the death penalty in 2013, Maryland restricted the death penalty in 1987, 1989, and 2013 and was temporarily under a moratorium from 2002, suggesting no prohibitive rise during those interludes. However, legislation for abolition in Colorado and Kansas was narrowly rejected in 2009 and 2010, despite those two states having previously banned the execution of

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<sup>805</sup> See the paragraph beginning “In 1975, the Washington...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>806</sup> See the paragraph beginning “In 2012, California voted...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>807</sup> See the paragraph beginning “In 2015, the Republican-dominated Nebraska...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>808</sup> In Washington, the governor’s moratorium and a subsequent court order have introduced de facto abolition (see the paragraph beginning “In 2014, the Democratic governor of Washington...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement”). The state’s governor and highest court seem likely to be less susceptible to popular pressures than state legislatures, so this is not strong evidence that the 1975 referendum did not slow reform, especially given the 39 year gap between these events.

<sup>809</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 9 summarizes that “[t]he few truly active reformers of this period [the Civil War] struggled, with some success, for the elimination of laws that made execution mandatory on conviction for murder. Some reformers assumed that this would lead rapidly to total abolition. But like the demise of public executions [in the 1830s to 1850s], the introduction of judicial discretion in capital cases seems to have robbed abolitionists of one of their most potent arguments; namely, that mandatory capital punishment led juries to acquit the guilty in order to avoid being a part of official killings.”

<sup>810</sup> Carol S. Steiker and Jordan M. Steiker, “Should Abolitionists Support Legislative ‘Reform’ of the Death Penalty?” *Ohio State Law Journal* 63 (2002), 417-32.

<sup>811</sup> Carol S. Steiker and Jordan M. Steiker, “Should Abolitionists Support Legislative ‘Reform’ of the Death Penalty?” *Ohio State Law Journal* 63 (2002), 428 notes one anecdotal example of how successful reform might encourage complacency: “It is possible that some reforms really will make the system much better than it used to be and will render it ‘good enough’ for most people to accept without outrage. For example, a recent study of the capital justice process in the state of Nebraska revealed no statistically significant effect of the race of either the defendant or the victim on the death sentencing or execution rate in the 177 homicide cases studied. The lead editorial in the Omaha World-Herald blared: ‘Nebraska is Acquitted,’ despite the fact that the study showed a strong connection between the socioeconomic status of the victim and the defendant’s chance of execution, as well as substantial geographic disparities within the state in charging practices.”

intellectually disabled convicts. Though the counterfactual cannot be assessed, it is at least possible that complacency generated by the earlier reforms caused the abolition legislation to fail.<sup>812</sup>

Unlike the US,<sup>813</sup> England continued to use hanging for executions until the abolition of the death penalty in 1969, as did Canada until its last execution in 1962, and France continued to use the guillotine until the death

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<sup>812</sup> “New Hampshire,” Death Penalty Information Center, accessed November 1, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-hampshire>. Both times, this came from the state legislature rather than courts. The Death Penalty Information Center notes that “New Hampshire still retains a narrow death penalty statute, which only applies in six specific circumstances,” but that New Hampshire does not currently have a death chamber.”

“Maryland,” Death Penalty Information Center, accessed November 4, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/maryland> notes that, “[i]n 1987, Maryland passed a law that prohibited juveniles from being sentenced to death and provided the option of life without parole for cases involving capital crimes. In 1989, the state passed a provision banning the execution of intellectually disabled individuals. In 2002, Governor Parris Glendening declared a moratorium on executions. The moratorium was lifted by his successor, Governor Robert Ehrlich. In 2009, after nearly passing abolition legislation, Maryland instituted the tightest death penalty restrictions in the country. The law limits capital cases to those with biological or DNA evidence of guilt, a videotaped confession, or a videotape linking the defendant to a homicide. Maryland’s legislature passed a death penalty repeal bill in March, 2013. The bill was signed by Governor Martin O’Malley on May 2, 2013.”

For two other states, incremental reforms occurred several decades previously. “New Mexico,” Death Penalty Information Center, accessed November 4, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-mexico> notes that, “New Mexico has excluded juveniles from execution since 1975,” long before its abolition in 2009. “New York,” Death Penalty Information Center, accessed November 4, 2019, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-york> notes that, “[i]n 1967, a compromise law was passed allowing for a very limited death penalty... From 1978 until 1994, measures repeatedly passed both houses of New York’s state legislature that would have expanded or reinstated the death penalty, only to be vetoed by governors Hugh Carey and Mario Cuomo. In 1995 newly-elected Governor George Pataki fulfilled a campaign promise and signed legislation reinstating the death penalty in New York, designating lethal injection as the new method of execution. In 2004, that statute was declared unconstitutional by the New York Court of Appeals, and in 2007 the last remaining death sentence was reduced to life, leaving New York with a vacant death row and no viable death penalty laws. In 2008 Governor David Paterson issued an executive order requiring the removal of all execution equipment from state facilities.”

Other than these four states, the Death Penalty Information Center pages for individual states (see <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/>) that have abolished the death penalty since *Furman* do not show that incremental restrictions on the death penalty were introduced in those states. Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 112 note that, in 2001, Arizona plus “Florida, Connecticut, Missouri, and North Carolina signed into law similar bills that banned the execution of mentally retarded inmates.” Other “states that have banned such executions are Arizona, Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, South Dakota, Tennessee and Washington.” Several of these states (Connecticut, Maryland, New Mexico, New York, and Washington) had subsequently banned the death penalty, while Colorado and Kansas came close (see footnote 414). The author of this report has not checked other sources to see if similar restrictions were introduced in those states and the Death Penalty Information Center and Kirchmeier’s coverage of restrictions such as prohibitions on the executions of juveniles or intellectually disabled individuals is incomplete.

<sup>813</sup> See the paragraph beginning “From the late 19th century...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”



penalty was abolished in 1981.<sup>814</sup> Many other countries have skipped some of the incremental steps that other countries have taken but have nevertheless abolished capital punishment.<sup>815</sup>

- **Social movements should avoid incremental tactics that have a high risk of backfiring and protecting the targeted institution.**

Legal scholars Steiker and Steiker note that:

When the ALI [American Law Institute] embarked on the MPC [Model Penal Code], its advisory committee voted overwhelmingly to recommend the abolition of capital punishment. But the ALI's council and membership concluded that the MPC could be more influential if the organization remained agnostic about retention of the death penalty and instead focused on ways to improve the administration of the death penalty in those jurisdictions that retained it. Nonetheless, states essentially ignored the reforms embodied in the MPC approach over the next decade, until the Court's condemnation of standardless discretion in *Furman* left states searching for new capital statutes that would satisfy the confusing Court mandate. Then, the death penalty provisions of the MPC served as a blueprint for many of the new statutes, and when the Court upheld the guided discretion statutes in 1976, it highlighted the similarities between the new statutory schemes and the MPC approach. The work of the ALI appeared to contribute to the Court's decision to uphold three of the new statutes and to permit narrowed use of the death penalty going forward. In this respect, the MPC provisions not only offered guidance for 'improving' the American death penalty, but they also were instrumental in saving it from constitutional abolition.<sup>816</sup>

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<sup>814</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 14 discusses England and France.

"Death Penalty in Canada," Amnesty International, accessed October 30, 2019, <https://www.amnesty.ca/our-work/issues/death-penalty-support-abolition/death-penalty-canada> notes that "Canada has been a fully abolitionist country since the 10th of December 1998. On that date all remaining references to the death penalty were removed from the National Defence Act – the only section of law that since 1976 still provided for execution under the law. Despite that, that last executions in Canada were made under the Criminal Code, in 1962 when Ronald Turpin and Arthur Lucas were both hanged at Toronto's Don Jail... Since 1867, all civilian executions in Canada were conducted by hanging (military executions were traditionally by shooting), though there were some experiments in variations of hanging methods in 1890 the traditional long drop was the standard until abolition of the death penalty for ordinary crimes in 1976."

However, Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 86-7 notes that, in Britain, as in France and Germany, "the death penalty was progressively narrowed in very similar stages: in the 19th century, torturous methods of execution were outlawed, the scope of the death penalty was narrowed, capital punishment was moved within prison walls, and the number of annual executions showed a general overall downward trend."

<sup>815</sup> See footnotes 497 and 785.

<sup>816</sup> Carol S. Steiker and Jordan M. Steiker, "Lessons for Law Reform from the American Experiment with Capital Punishment," *Southern California Law Review* 87 (2013-14), 773-5. In support of this, they cite later editions of the MPC and the citations in several Supreme Court decisions. The date of the withdrawal of the MPC is unclear, but seems to have been in the 21st century.

Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 13 notes that the ALI committee vote in favor of recommend abolition by state legislatures was 18 in favor, 2 against.

The ALI commissioned reports into capital punishment by known advocates of abolition shortly before its policy changes in 1962<sup>817</sup> and 2009,<sup>818</sup> suggesting that the ALI was interested in fundamentally challenging capital punishment and that the decision not to advocate explicitly for abolition was, at both points, motivated by strategic considerations. It is possible that the states would have managed to reform their capital punishment statutes anyway and that some sort of middle path between abolition and contemporary practice would have been formed regardless whether the MPC had been created. However, it seems likely that the ALI's MPC sped up capital punishment's recovery after *Furman* and provided it with greater credibility.

- **Social movements should proactively ensure that professionalization and shifts towards legal strategies do not discourage the growth of grassroots efforts (e.g. broad participation, non-professional, decentralized) that may be more effective longer-term.**

Haines argues that, “[t]he rise of litigators to a dominant position in the movement” in the 1960s and early 1970s “had contributed to the withering away of whatever was left of citizen-based, political abolitionism.” In support of this, Haines cites interviews with two anti-death penalty activists, Hugo Bedau, the director of ALACP who had been involved in legislative campaigns in Oregon and New Jersey, and Henry Schwarzschild, who apparently opposed the ACLU's suggestion to create “an ACLU Capital Punishment Information Project” because the death penalty was already “withering away” and feared that a “new public campaign” could “unleash a massive backlash.”<sup>819</sup> Substantial resources may have been used in the LDF's campaign.<sup>820</sup> Legislative efforts in California seem to have been deprioritized in the wake of *Furman*<sup>821</sup> and legislative campaigns remained a low priority even as widespread legislative backlash occurred.<sup>822</sup> The *Furman* ruling did not hold that capital punishment was inherently unconstitutional<sup>823</sup> and so should not have necessarily prohibited further legislative restrictions on the death penalty.

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<sup>817</sup> Jolie McLaughlin, “The price of justice: Interest-convergence, cost, and the anti-death penalty movement,” *Northwestern University Law Review* 108, no. 2 (2013), 685 adds that, “[b]efore creating the MPC, the ALI commissioned Thorsten Sellin—a renowned criminologist at the University of Pennsylvania, as well as a board member of the ALACP [American League to Abolish Capital Punishment]—to produce a major research report addressing capital punishment. Sellin's research focused on main issues within the death penalty debate at the time, including deterrence, proportionality, and racial discrimination. Despite Sellin's findings that capital punishment had no deterrent effect on homicide rates, however, the ALI decided not to recommend abolition.”

<sup>818</sup> See the paragraph beginning “In 2007, some members...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>819</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 44-5 and 200. No detail is provided on the interview with Bedau.

<sup>820</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2009), 251 quotes the “later” reflection of the executive director of the ACLU's New York branch: “If resources comparable to those the LDF invested in litigation had been made available for a state legislative campaign... a good many states might have been persuaded to repeal their death penalty laws.” Additionally, Banner notes that the LDF received “a timely grant from the Ford Foundation.” See also footnote 107.

<sup>821</sup> See footnote 179.

<sup>822</sup> See the paragraph beginning “In the face of the backlash...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>823</sup> See the paragraph beginning “On June 29, 1972, the US Supreme Court...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

Though it is difficult to assess the counterfactual, if the ADPM had invested more of its resources in building a strong legislative and grassroots movement, it may have been better placed to minimize the negative effects of the legislative backlash to *Furman*.

In contrast to the development of the pre-*Furman* ADPM, the group New Jerseyans for a Death Penalty Moratorium used a litigation strategy alongside its legislative and grassroots efforts; the litigation encouraged a de facto moratorium on executions, which was subsequently confirmed by the legislature.<sup>824</sup> In Germany, the UK, and France abolition was achieved through legislation, though key legislators were supported or advised by legal experts.<sup>825</sup>

The history of the US prisoners' rights movement provides further evidence that social movements based heavily on litigation strategies are fragile.<sup>826</sup>

## Disruption to companies

- **Disruptive tactics may be effective at reducing the supply of targeted services but may have unintended negative effects.**

Activists' pressure on suppliers of the drugs used for lethal injections seems to have successfully disrupted the supply of these drugs.<sup>827</sup> However, these tactics seem to have also had some counterproductive effects:

- Seven states introduced laws to protect the identity of lethal injection drug suppliers in 2007-13,<sup>828</sup> although some of these laws may have been introduced before activist pressure on drug suppliers began.<sup>829</sup> Governments seem likely to be less closely partnered with companies that supply animal

<sup>824</sup> See the paragraph beginning "In January 2006, New Jersey's..." and the two following paragraphs in the section on "Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>825</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 164 notes that, "[i]n Great Britain, [Labour MP] Sydney Silverman was the undisputed leader of the abolition movement from the 1940s onward, and at his side were prominent and successful barristers such as Gerald Gardiner and Reginald Paget. In Germany, Thomas Dehler was the person most directly responsible for the maintenance of 1949's precarious constitutional ban on capital punishment, but renowned law professors such as Gustav Radbruch lent their support to the struggle. Also prominent were social-democratic jurists such as Carlo Schmid, (a lawyer with a doctoral title) who split his energies between serving as a regional chairman of the Social Democratic Party and as a professor of public law at the University of Tübingen; and Friedrich Wilhelm Wagner, who moved from legal practice into political opposition and ended his legal career as the Vice President of the Federal Constitutional Court. In France, Robert Badinter [an anti-death penalty litigator-turned-Minister for Justice] coordinated the final push for abolition with François Mitterand, and worked closely with other prominent advocates and politicians of a progressive cast. Badinter was in turn deeply influenced by Marc Ancel, a renowned French professor of comparative law. Ancel, commissioned by the Council of Europe, wrote an influential report on the death penalty in Europe in 1962, and elaborated the 'social defence' theory of criminal law, in which the protection of human rights took precedence over the 'defence of society.'"

<sup>826</sup> See Jamie Harris, "Social Movement Lessons From the US Prisoners' Rights Movement" (forthcoming).

<sup>827</sup> See the paragraphs beginning "A 2010 campaign by the UK group Reprieve..." and "Seemingly beginning in 2011..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>828</sup> Mary D. Fan, "The supply-side attack on lethal injection and the rise of execution secrecy," *Boston University Law Review* 95, no. 2 (March 2015), 447-8, table 1.

<sup>829</sup> Mary D. Fan, "The supply-side attack on lethal injection and the rise of execution secrecy," *Boston University Law Review* 95, no. 2 (March 2015), 427-60 doesn't mention any such pressure campaigns in the US before 2011. However, on page 447-8, Fan notes that Missouri, Arkansas, and Louisiana introduced supplier secrecy laws in 2007, 2009, and 2010 respectively.

products, so equivalent campaigns in the farmed animal movement may provoke less of a regulatory backlash.

- With no access to sodium thiopental, states have turned to other drugs that may have caused more suffering to those being executed.<sup>830</sup> The focus on nondisclosure of suppliers may also distract attention from the issue of last minute disclosure of the method of execution, which may cause anxiety the convict.<sup>831</sup> This suggests that supply-side interventions can have indirect effects that increase suffering.
- **Companies are more likely to succumb to pressure to stop selling a particular product type if it makes up only a small proportion of their profit margins.**

The Danish company Lundbeck halted sales of pentobarbital, a drug used in lethal injections after pressure from the UK campaign group Reprieve;<sup>832</sup> a spokesperson noted that sales of pentobarbital in the US made up less than 1% of Lundbeck's revenues.<sup>833</sup> In contrast, the small company Dream Pharma, run by one man and selling only three drugs, seems to have ignored Reprieve's campaign until the UK government banned the export of drugs for use in lethal injection.<sup>834</sup> This situation parallels the struggles over marketization of emergency contraception in the US, which were resolved through the setting up of a small, single-product company.<sup>835</sup>

## Movement Composition

- **Social movements can collaborate to challenge institutions, though collaboration may be temporary or unreliable.**

The LDF worked harder on anti-death penalty litigation than might have been expected, given that capital punishment was only partly a racial issue.<sup>836</sup> Likewise, the ACLU's involvement in capital punishment went

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<sup>830</sup> Mary D. Fan, "The supply-side attack on lethal injection and the rise of execution secrecy," *Boston University Law Review* 95, no. 2 (March 2015), 441-4.

<sup>831</sup> Mary D. Fan, "The supply-side attack on lethal injection and the rise of execution secrecy," *Boston University Law Review* 95, no. 2 (March 2015), 459.

<sup>832</sup> Mary D. Fan, "The supply-side attack on lethal injection and the rise of execution secrecy," *Boston University Law Review* 95, no. 2 (March 2015), 439.

<sup>833</sup> Raymond Bonner, "Drug Company in Cross Hairs of Death Penalty Opponents" (March 30, 2011), <https://www.nytimes.com/2011/03/31/world/europe/31iht-letter31.html>.

<sup>834</sup> Mary D. Fan, "The supply-side attack on lethal injection and the rise of execution secrecy," *Boston University Law Review* 95, no. 2 (March 2015), 439-40 does not mention that Dream Pharma agreed to stop selling its products and the author has not seen any other evidence to suggest this.

Owen Bowcott, "London firm supplied drugs for US executions" (January 6, 2011), <https://www.theguardian.com/world/2011/jan/06/london-firm-supplied-drugs-us-executions> and Raymond Bonner, "Drug Company in Cross Hairs of Death Penalty Opponents" (March 30, 2011), <https://www.nytimes.com/2011/03/31/world/europe/31iht-letter31.html> show the managing director of Dream Pharma as refusing to comment to journalists on the issue, suggesting that he was able to ignore pressure.

<sup>835</sup> See the strategic implication beginning "Boycotts of specific companies across their entire product range..." in Jamie Harris, "Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion#consumer-action-and-individual-behavioral-change>.

<sup>836</sup> John D. Bessler, "Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement," *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 235 cites Justice Thomas' concurring opinion in

beyond its usual focus on “defensive” litigation. Haines also characterizes the ACLU mandate as having “no unambiguous grounds for including execution.”<sup>837</sup> Even though the long-term effects of *Furman* were plausibly damaging to the ADPM, the securing of a Supreme Court ruling in the direction that the LDF and ACLU intended (that is, towards greater restriction of the death penalty) provides an example of where actors with differing motives have been able to work together to substantially challenge an institution.

Additionally, the group Queer to the Left campaigned for commutation of the sentences of all death row inmates in Illinois in 2002<sup>838</sup> and there has been substantial overlap between the prisoners’ rights movement and the ADPM at times.<sup>839</sup> Haines notes that, “the National Coalition to Abolish the Death Penalty was built on the foundation of a coalition that had originally been formed to seek amnesty for Vietnam War draft resisters. Religious groups were especially well represented within this predecessor coalition.”<sup>840</sup> One study also found that “multi-issue groups are predicted to have 90 percent more public donations than groups with a single-issue agenda.”<sup>841</sup>

Nevertheless, multi-issue groups may give advocacy on specific issues low priority, even at crucial times, as seemed to be the case with the ACLU during the legislative backlash after *Furman*.<sup>842</sup> Likewise, Banner and Haines have argued that the breadth of focus of reformers in the 19th century contributed to the

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*Graham v. Collins* (1993): “The unquestionable importance of race in *Furman* is reflected in the fact that three of the original four petitioners in the *Furman* cases were represented by the NAACP Legal Defense and Educational Fund, Inc. This representation was part of a concerted ‘national litigative campaign against the constitutionality of the death penalty’ waged by a small number of ambitious lawyers and academics on the Fund’s behalf. Although their efforts began rather modestly, assisting indigent black defendants in isolated criminal cases—usually rape cases—where racial discrimination was suspected, the lawyers at the Fund ultimately devised and implemented (not without some prompting from this Court) an all-out strategy of litigation against the death penalty.”

Eric L. Muller, “The Legal Defense Fund’s Capital Punishment Campaign: The Distorting Influence of Death,” *Yale Law & Policy Review* 4, no. 1 (1985), 159 writes that, “[t]he logic of first attacking the most extreme manifestation of racism in the criminal justice system, and then of extending that attack to the death penalty itself, propelled the [NAACP’s Legal Defence Fund] through its exhausting decade-long effort. Yet this logic also involved the LDF in a costly campaign for a small group of defendants, many of whom were not only whites, but whites culled from the most racist segment of society.” On pages 158-70 and 184-7, Muller describes the views and decisions of the organization that made such deep involvement in this campaign possible. On pages 170-84, Muller argues that the campaign was a poor use of resources from the perspective of the LDF for achieving its own goals and maintaining its organizational strength.

<sup>837</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 25 summarizes that the ACLU usually “sought to prevent encroachments on constitutional rights rather than actively seeking their expansion,” citing Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (New York: Random House, 1973), 4.

<sup>838</sup> Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011), 153-4.

<sup>839</sup> For example, see the paragraph beginning “The 1689 English Bill of Rights...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>840</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 20.

<sup>841</sup> Devashree Gupta, “The Power of Incremental Outcomes: How Small Victories and Defeats Affect Social Movement Organizations,” *Mobilization: An International Quarterly* 14, no. 4 (December 2009), 426. However, the model only predicts 42% of the variance between anti-death penalty groups’ donations, provides no insight into the causes of this difference, and does not measure the proportion of a group’s resources that are spent directly on anti-death penalty advocacy.

<sup>842</sup> See the paragraph beginning “In the face of the backlash...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

ineffectiveness and fragility of the ADPM.<sup>843</sup> More recently, the ADPM has struggled to secure active support from civil rights advocates.<sup>844</sup>

This highly collaborative approach may be more common, and more inevitable, in movements like the ADPM where the size of the movement (e.g. full-time advocates, funding of organizations) is low relative to the public salience.

- **Formal alignment with the leadership of religious groups may not translate into substantial support from those leaders or from community members**

Although national religious groups have had official policies in opposition to the death penalty<sup>845</sup> and some religious groups were formal affiliates of the NCADP,<sup>846</sup> Henry Schwarzschild, the NCADP's main organizer, lamented in 1983 that, "[t]he churches as a group have been very disappointing on this issue. While they have been generally supportive, they have not made a vigorous commitment, either in terms of staff, program or money. And they have certainly not exercised any sustained or visible moral force on what is essentially a moral issue."<sup>847</sup>

Citing several surveys, Haines adds that:

Expressed support for capital punishment among self-identified Protestants has roughly equaled that of the population as a whole [from 1974 to 1996], and Catholic support has tended to exceed the national average slightly through the late 1980s. When the Presbyterian Church USA surveyed its congregations, it found that roughly three out of every four of their pastors favored abolition of the death penalty, but that more than three-fourths of the *members* of their churches supported its retention. They had never before uncovered a wider split on any social or religious issue. In this and other denominations, the problem seemed to be that supportive clergy were often reluctant to address the issue of capital punishment in more than a passing way or to try to press their congregations into action for fear of alienating them.

This indifference to the ADPM among religious leaders suggests that proactive outreach to religious organizations may not be cost-effective. This contrasts with the history of the anti-abortion movement, which received substantial financial and organizational support from the Catholic Church despite the mixed

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<sup>843</sup> See the paragraph beginning "Banner summarizes this period..." and the subsequent paragraph in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>844</sup> See footnote 518.

<sup>845</sup> See the point beginning "Throughout the late 20th century..." in the section on "Features of the US Anti-Death Penalty Movement."

<sup>846</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 104. On page 62, Haines notes that NCADP organizational affiliates included "the U.S. Catholic Conference, the United Methodist and United Presbyterian churches, the National Urban League, the National Council on Crime and Delinquency, and the American Orthopsychiatric Association."

<sup>847</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 104, citing a memorandum from Henry Schwarzschild to Ira Glasser, October 7, 1983.

attitudes regarding abortion among the Catholic population.<sup>848</sup> The substantially lower public support for abortions on demand than for the death penalty may be an important factor in explaining this difference.<sup>849</sup> Different issues may have inherently different levels of appeal to religious communities, where some can easily inspire advocacy and commitment while others compel only a moderate, verbal support.

- **Positive involvement from those who are widely understood to be the victims of a social movement may be useful for gaining interest and sympathy from the public.**

The ADPM has some involvement from the families of murder victims.<sup>850</sup> In 1992, Murder Victims' Families for Reconciliation organized the "Journey of Hope", involving 17 days of activities, such as marches, rallies, concerts, film showings, and planting trees. The event only had about 300 participants but was covered, according to Haines, in "more than 60 newspaper articles and 30 broadcast interviews. It was even credited by an Indiana public defender with helping to avoid death sentences in three capital trials that were taking place that summer."<sup>851</sup> If other advocates seem considerate of these victims, their efforts may also gain wider recognition and support than they otherwise would; this may help to explain why sister Helen Prejean's advocacy was well-received.<sup>852</sup>

- **Issues that have substantially differing levels of support among different political parties will not necessarily split into entrenched, polarized, party agendas.**

Despite some evidence of party polarization,<sup>853</sup> the Republicans and Democrats do not seem to have developed entrenched, polarized, party agendas, or, at least, major political figures have sometimes deviated from the longer-term norms in their party. For example, Democratic president Bill Clinton made a display of his support for capital punishment and supported pro-death penalty legislation,<sup>854</sup> George Ryan, the Republican governor of Illinois, imposed a moratorium on executions then granted clemency to all prisoners on death row in the state,<sup>855</sup> and abolition in New Jersey was secured by a mixture of Democratic and Republican legislators.<sup>856</sup> This situation contrasts somewhat with the greater polarization on abortion issues that developed over the course of the 1970s and 1980s.<sup>857</sup>

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<sup>848</sup> See the strategic implication beginning "Close alignment with the leadership..." in Jamie Harris, "Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion#movement-composition>.

<sup>849</sup> See the sections on "Changes to public opinion" in this report and in Jamie Harris, "Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion#changes-to-public-opinion>.

<sup>850</sup> See the bullet point beginning "Although anti-death penalty advocates..." in "Features of the US Anti-Death Penalty Movement."

<sup>851</sup> Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 110.

<sup>852</sup> See the strategic implication below, "A book by an impartial and credible author could become highly influential."

<sup>853</sup> See the paragraph beginning "Studies frequently find..." above.

<sup>854</sup> See the paragraphs beginning "During the 1992 presidential election campaign..." and "In 1994, Congress increased..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>855</sup> See the paragraph beginning "The Illinois House of Representatives..." and the following paragraph in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>856</sup> See footnote 411.

<sup>857</sup> See the strategic implication "Political parties are more willing than expected to modify their stance on controversial issues, even in a direction that seems contrary to the views of their existing supporter base" in Jamie Harris, "Social Movement Lessons From the US Anti-Abortion Movement" (November 26, 2019),

- **Social change may be more likely to occur if credible professional groups advocate for change before broader participation and pressure is encouraged.**

From the 1930s, popular support for capital punishment began to decline in the US,<sup>858</sup> and by the late 1950s, the US ADPM was building momentum through state legislative campaigns to abolish capital punishment.<sup>859</sup> Subsequently, from 1966, with the arrival of the LDF's moratorium campaign, legislative efforts seem to have died down.<sup>860</sup> Although the moratorium campaign culminated in the *Furman* ruling, this temporary victory did not last and may have caused long-term damage.<sup>861</sup>

In contrast, the initial impetus of the moratorium campaign of the 1990s was first driven by European political institutions, the American Bar Association, and Supreme Court justices,<sup>862</sup> the efforts of which have subsequently been supplemented by grassroots initiatives.<sup>863</sup> Though the long-term results of this campaign are unclear, it is winning some incremental victories<sup>864</sup> that seem likely to provide a basis for a more sustainable challenge to the death penalty.

These characterizations of the US ADPM in the 1950s to 1970s as first grassroots-driven, then professionally-driven, and of the US ADPM in the 1990s to present as first professionally-driven, then grassroots-supported, are both simplifications. Arguably, the efforts at legislative reform in the 1950s and 1960s were not much less professionally-driven than the subsequent litigation efforts,<sup>865</sup> and Amnesty International USA had already begun some grassroots work in the 1980s.<sup>866</sup> If this characterization is understood to be broadly accurate, however, it provides weak evidence that advocacy will be more effective when it is driven initially by professional groups and only subsequently supported by grassroots advocacy. Supporting grassroots efforts may not be needed at all; legal scholar Andrew Hammel has shown that abolition of the death penalty in Germany, the UK, and France was driven by educated elites, such as writers, legislators, and litigators.<sup>867</sup>

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<https://www.sentienceinstitute.org/anti-abortion#movement-composition>. There may have been individual exceptions, but there have not been any comparably high-profile or influential defections from the dominant party position on abortion to those on capital punishment. Republican president Gerald Ford supported abortion rights (see footnote 170 in the above report), but that was before substantial polarization on the issue.

<sup>858</sup> See the section "1936-1966: Declining execution rates."

<sup>859</sup> See the paragraph beginning "In 1957, Hawaii banned the death penalty..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>860</sup> See the strategic implication above beginning "Social movements should proactively..."

<sup>861</sup> See the section "1972-86: Backlash, legal reversal through *Gregg v. Georgia*, and the ADPM's initial shift towards public-facing advocacy."

<sup>862</sup> See the paragraphs beginning "In 1994, Justice Harry Blackmun...", "Since the 1960s...", and "In 1997, the American Bar Association..." in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>863</sup> See, for example, the paragraphs beginning "In August 2000..." and "In January 2006, New Jersey's..." and the two following paragraphs in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>864</sup> See the section "1997-present: Growth of the moratorium movement and sporadic legislative success."

<sup>865</sup> See the paragraph beginning "In 1957, Hawaii banned the death penalty..." and subsequent two paragraphs in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>866</sup> See the paragraph beginning "In 1986, Charles Fulwood..." and subsequent paragraph in "A Condensed Chronological History of the US Anti-Death Penalty Movement."

<sup>867</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 2-3 summarizes a key argument of the book, that in each of Germany, France, and the UK, the idea of modern movements "calling for the complete abolition of capital punishment for all crimes committed by civilians during peacetime... emerged in the late 18th century, was developed and expanded in the 19th century, and finally



## Timing

- **Whether the use of disruptive strategies should be prioritized over slower, lower-risk strategies depends on ongoing social trends.**

In the 1950s to 1970s, execution rates and public support for capital punishment were decreasing, but these trends were temporarily reversed. This was likely partly because of the *Furman* ruling, which in turn was likely partly encouraged by the litigation strategy of the LDF and ACLU.<sup>868</sup> Given this and evidence that low numbers of executions may be a necessary but not sufficient condition for abolition of the death penalty,<sup>869</sup> delays in the use of litigation tactics may have improved the chances of abolition. If the ADPM had invested more of its resources in building a strong legislative and grassroots movement and invested fewer resources in litigation, then radical judicial change may not have occurred as early. Perhaps a similar effect could have been achieved if the ADPM had focused more on absolute ethical arguments, rather than supplementary arguments such as arbitrariness.<sup>870</sup>

These timing considerations seem likely to be specific to the context of the US ADPM. A generalization for other movements is that if current social trends are weakening an institution, slow and low-risk advocacy strategies (such as using tactics that develop a strong grassroots support base) seem preferable to disruptive but risky strategies (such as using litigation to force unpopular, radical, legal change). If current social trends are strengthening an institution, then disruptive, risky strategies seem preferable to slow, low-risk strategies.

- **The interaction of particular social movement strategies with wider hard-to-influence factors affects the chances of a movement's success.**

Legal scholars Steiker and Steiker (2016) argue that, counterfactually, slight changes in the course of events may have caused permanent abolition:

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prevailed in the middle-to-late 20th century. The specific historical context leading to abolition differed from nation to nation,” but “[t]he idea of total abolition was pioneered by public intellectuals and philosophers, and then gradually gained in popularity among the educated upper classes, especially the liberal professions. Once support for the abolition of capital punishment reached a ‘critical mass’ among the educated elite, legislative proposals to abolish capital punishment were tabled, generally by lawmakers in a national assembly. In fact, the final phases of all three abolition movements were managed largely by individual lawmakers: Thomas Dehler in Germany, Sydney Silverman in Great Britain, and Robert Badinter in France. In all three countries, perhaps the chief obstacle to abolition was public support for capital punishment. These abolition movements prevailed not by changing public opinion, but rather by shielding the capital punishment issue from the vagaries of the public mood and stiffening the spines of legislators who privately disdained the death penalty but feared a public backlash if they voted to abolish it.”

For example, on page 141-3, Hammel describes how, despite growing public support for the death penalty, presidential candidate François Mitterrand promised to abolish the death penalty if he was elected. Upon his election, Mitterrand appointed an anti-death penalty litigator, Robert Badinter, as Justice Minister. The National Assembly was given a free vote on the issue; the result was 333 votes for abolition compared to 117 against, though the result was narrower in the Senate (160 to 126).

<sup>868</sup> See the section “1972-86: Backlash, legal reversal through *Gregg v. Georgia*, and the ADPM’s initial shift towards public-facing advocacy.”

<sup>869</sup> See the strategic implication “It is probably easier to abolish a practice through legislation if that practice is not in regular use” above.

<sup>870</sup> See the strategic implications beginning “Messaging that includes supplementary arguments...” and “Moral arguments...” below.

- If the Supreme Court had taken interest in capital punishment’s constitutionality “between 1963 and 1968, when Earl Warren was still chief justice and before Nixon was elected president,” the ruling might have been less fractured, taken place in a more favorable national political context, and positioned the US “at the forefront of the wave of abolition that swept Europe in the 1970s through the 1990s.”<sup>871</sup> There is indeed evidence that unanimity in Supreme Court rulings discourages backlash, though this evidence is not strong, and the effect may not be substantial.<sup>872</sup>
- The court might have also produced a more unanimous ruling if Democratic candidate Hubert Humphrey had won the 1968 election instead of Richard Nixon.<sup>873</sup>
- If the ruling in *Furman* had not invalidated the existing death penalty statutes, there may have been no backlash, and the death penalty may have “continued to wither.” There may also have been less judicial regulation of the death penalty generally.<sup>874</sup>

In addition to Steiker and Steiker’s arguments, a number of more indirect or implausible changes in the course of history may also have led to the abolition of the death penalty.<sup>875</sup>

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<sup>871</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 74-6. On the role of Warren, they note that Chief Justice Warren “made his opposition to capital punishment clear, announcing upon his retirement that he found the death penalty ‘repulsive.’”

On the political context, they explain that, “Southern states protesting judicial abolition of the death penalty would have had less traction in the mid-to-late 1960s, coming on the heels of ugly and violent resistance to the Civil Rights Movement. By 1972, the controversy over busing and President Nixon’s successful politicization of criminal justice issues intensified the backlash in ways that likely would have been avoided a half decade earlier.”

Had the US been “at the forefront,” it “would have received (or at least assigned itself) credit for being a leader in this human rights revolution, a position that might have made backsliding more unattractive, just as it has been in Europe.”

<sup>872</sup> See the findings relating to “EM6” — “Does unanimity or near unanimity among the justices’ votes in Supreme Court decisions maximize the positive effects of a Supreme Court decision or minimize its negative effects?” — in Jamie Harris, “Is the US Supreme Court a Driver of Social Change or Driven by it? A Literature Review” (November 27, 2019), <https://www.sentienceinstitute.org/scotus>.

<sup>873</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 75-6.

<sup>874</sup> Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge, MA: Belknap Press, 2016), 76-7. They add that, “[i]t is also possible that the death penalty would not have become as much of an issue of states’ rights and the kind of masthead symbol for law-and-order politics or shibboleth in the culture wars that it became when it was so strongly linked with the liberal wing of the Supreme Court—the same Court that had imposed *Brown*, *Miranda*, and *Roe v. Wade*.”

<sup>875</sup> Examples include:

- If fewer states had initiatives, vetoes, or referendums, then US legislators might have been less influenced by public opinion and more willing to abolish the death penalty.
- If economic downturn had not occurred towards the end of the Progressive Era, the legislative victories of the ADPM during that period might have been preserved.
- Likewise, if fewer violent crimes had occurred (or been reported), then there might have been less of a swing back towards support for capital punishment among legislators and voters at the end of the Progressive Era.
- If the ADPM had substantially more funding or larger numbers of committed supporters, it might have been more able to push for legislative victories and/or resist the backlash after *Furman*.
- If the majority of the public opposed the death penalty, there would have been a clearer case for permanent abolition by the judiciary and/or legislators.

## Messaging

- **Publicizing opinion poll findings that are more favorable to reform of an institution further encourages support for reform.**

A paper by social scientist David Niven notes that media coverage of public opinion on the death penalty often rests on the question wording used by Gallup: “Are you in favor of the death penalty for persons convicted of murder?” However, other surveys have found much lower support when questions also offer alternative punishments for murder, such as life without parole.<sup>876</sup> Of the 4,190 media articles identified by Niven that were published between May 1, 1996 and April 30, 2001 and referenced polls on capital punishment, only 7.5% mentioned popular support for life without parole or life without parole plus restitution. In an experiment where 564 participants were randomized to receive a typical media article, an article focusing on the popularity of life without parole plus restitution, or a control article, the participants who read the life without parole plus restitution article had significantly lower support for the death penalty and significantly greater optimism that the death penalty would decrease.<sup>877</sup>

Table 2: Results from David Niven’s experiment.<sup>878</sup>

	Death Penalty Popular (Condition 1)	LWOP+R Alternative (Condition 2)	Control (Condition 3)
% support the death penalty against convicted murderers (n = 285)	85	62*	81
% support the death penalty against convicted murderers over LWOP+R alternative (n = 279)	53	43*	51
% friend would be willing to discuss opposition to death penalty (n = 564)	26*	53*	37
Number of states that will have the death penalty in 20 years (mean response) (n = 564)	45	26+	42

\*Difference from control group statistically significant (chi-square  $p$  value < 0.01).

+Difference from control group statistically significant (T-test  $p$  value < 0.01).

Four of the seven New Jersey activists interviewed for one article expressed the belief that emphasizing the prospect of life without parole as an alternative to capital punishment had encouraged success in that state in the 2000s.<sup>879</sup> New Jerseyans for a Death Penalty Moratorium had also commissioned polls that identified a

<sup>876</sup> David Niven, “Bolstering an Illusory Majority: The Effects of the Media’s Portrayal of Death Penalty Support,” *Social Science Quarterly* 83, no. 3 (2002), 671-5. See also footnote 499.

<sup>877</sup> David Niven, “Bolstering an Illusory Majority: The Effects of the Media’s Portrayal of Death Penalty Support,” *Social Science Quarterly* 83, no. 3 (2002), 675-83. Of the respondents, 54% were from Florida, and 90% lived in a state with the death penalty.

<sup>878</sup> David Niven, “Bolstering an Illusory Majority: The Effects of the Media’s Portrayal of Death Penalty Support,” *Social Science Quarterly* 83, no. 3 (2002), 675-83.

<sup>879</sup> Andy Hoover and Ken Cunningham, “Framing, Persuasion, Messaging, and Messengers: How the Death Penalty Abolition Movement Succeeded in New Jersey,” *Humanity & Society* 38, no. 4 (2014), 453. It is unclear whether they were asked specifically about this issue or brought it up spontaneously in response to open-ended questions.

decline in support for the death penalty in New Jersey.<sup>880</sup> Before abolition legislation was signed in 2011, advocates in Illinois publicized the results of a poll that found over 60% of voters preferred life without parole to the death sentence.<sup>881</sup>

- **A book by an impartial and credible author could become highly influential.**

In 1993, the Roman Catholic sister Helen Prejean published the book *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*. The book attracted attention and credibility for the anti-death penalty cause:

- The book “became an instant *New York Times* bestseller,”<sup>882</sup> despite many other books being published on the topic and having low circulations.<sup>883</sup>
- The book was made into a film that won an Academy Award. It was also made into an opera.<sup>884</sup>
- The book sold 30,000 copies before its release and approximately 300,000 after its release.<sup>885</sup>
- Prejean was one of the representatives who handed a petition for a worldwide moratorium on the death penalty to UN Secretary-General Kofi Annan in 2000; 3.2 million people had signed it.<sup>886</sup>
- In 1998, 1999, 2000, and 2001, Helen Prejean was nominated for the Nobel Peace Prize.<sup>887</sup>

Factors that may help to explain the success of the book include:

- Prejean seemed concerned about victims’ families. Kirchmeier notes that, “[a]lthough conservatives often dismiss anti-death penalty arguments because they believe that the reformers are not sufficiently concerned about the victims of violent crimes, both the book and the movie devoted substantial time to the victims’ families. Thus, the works attempted to show the issue and all of the complex human emotions that went with it in real life.”<sup>888</sup>

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As an example of how this information was used, see “Quinnipiac Poll Finds Majority of New Jerseyans Favor Life Without Parole Over The Death Penalty,” New Jerseyans for Alternatives to the Death Penalty (January 24, 2007), [http://www.njadb.org/forms/uploads/newsup.2007-01-26\\_10:52:30.7561.html](http://www.njadb.org/forms/uploads/newsup.2007-01-26_10:52:30.7561.html), despite other polls finding higher support for the death penalty (see footnote 404).

<sup>880</sup> Robert J. Martin, “Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute,” *University of Toledo Law Review* 41 (2009), 24.

<sup>881</sup> Rob Warden, “How and Why Illinois Abolished the Death Penalty,” *Law and Inequality* 30 (2012), 276.

<sup>882</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 242.

<sup>883</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 22-3.

<sup>884</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 22-3. Kirchmeier notes that the film was criticized by at least one lawyer as seeming to be in favor of the death penalty, but argues that the increased publicity to the issue was beneficial.

<sup>885</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 22-4.

<sup>886</sup> Dunstan Prial, “UN Receives Anti-Execution Petition” (December 18, 2019), <http://www.crimelinx.com/unpetit.html>.

<sup>887</sup> John D. Bessler, “Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement,” *Northwestern Journal of Law & Social Policy* 4, no. 2 (2009), 242.

<sup>888</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 25.

- Prejean appeared to come from an honest, impartial perspective.<sup>889</sup>
- Prejean travelled around the US giving talks about the death penalty.<sup>890</sup>
- **As people become more aware of a topic, aggregate attitudes may shift, but polarization may also occur, and legislative change may become less tractable.**

A study conducted in 1976 in the US and another study conducted in 1981 in Canada (neither country was executing criminals at the time the study was conducted there) found evidence that as knowledge of the death penalty increased, opinions became more hostile towards the death penalty.<sup>891</sup> Another study found low knowledge of the death penalty among students; after being taught about the death penalty for 40 hours by Robert M. Bohm or his colleagues and asked to read *The Death Penalty in America* (1982), written by Hugo Adam Bedau (an anti-death penalty activist), these students reported more opposition to the death penalty, at least in most of the tests.<sup>892</sup> One study found in Northern Carolina found that its respondents “were generally

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<sup>889</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 25 argues that, “[w]hile one could disagree with Sister Prejean’s conclusions about the death penalty, one could not dismiss the honesty of her book. Because of that honesty, because the book told a compelling story, and because the author began when she was ignorant about the death penalty and took the reader with her on the journey, the book succeeded commercially and made the death penalty a marketable issue for the media and for popular culture.”

<sup>890</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (2002), 24.

<sup>891</sup> Robert M. Bohm, “American Death Penalty Opinion: Past, Present, and Future,” in James R. Acker, Robert M. Bohm, and Charles S. Lanier (eds.) *America’s Experiment with Capital Punishment* (Durham, NC: Carolina Academic Press, 1998), 35 summarizes that, “[i]n the study by Sarat and Vidmar (1976), the experimental conditions involved reading two 1500 word essays that described ‘scientific and other information’ about the death penalty... On the pretest, 62 percent of the (181 randomly selected adult) experimental subjects favored the death penalty, 27 percent opposed it, and 10 percent were undecided. On the posttest, 42 percent favored the death penalty, 38 percent opposed it, and 21 percent were undecided.... The study by Vidmar and Dittenhoffer (1981) improved the validity of the experimental manipulation in Sarat and Vidmar (1976) by increasing the opportunity for subjects to assimilate information about the death penalty. In the study by Vidmar and Dittenhoffer (1981), subjects were asked to read a 3500 word essay on the death penalty (emphasizing the Canadian experience), and a series of eight articles. The articles contained representative material on the death penalty intended to augment the essay.” Participants were also given the opportunity to discuss their findings with each other. “On the pretest, 48 percent of the experimental subjects favored the death penalty, 33 percent were opposed to it, and 19 percent were undecided. On the posttest [after two weeks], 24 percent were in favor, 71 percent were opposed, and 5 percent were undecided.” However, this experiment only included “21 nonrandomly selected students (18 in the control group).”

On page 32, Bohm notes that a third study from 1983 “only examined opinions and knowledge about the death penalty. It did not examine whether knowledge about the death penalty would change opinions.”

<sup>892</sup> Robert M. Bohm, “American Death Penalty Opinion: Past, Present, and Future,” in James R. Acker, Robert M. Bohm, and Charles S. Lanier (eds.) *America’s Experiment with Capital Punishment* (Durham, NC: Carolina Academic Press, 1998), 37-40. The classes took place between the years 1985 and 1989. When asked whether they favored the death penalty for “some people convicted of first-degree murder,” 28% of “less informed subjects [that is, students who had not yet received the additional classes] opposed the death penalty,” compared to 49% of “more informed subjects.” One of the “concrete” questions asked was: “If asked to do it, could you pull the lever that would result in the death of an individual convicted of first-degree murder?” This was the only question that saw little difference between less and more informed subjects, with 47.2% and 49.6% respectively answering that they could not do it. However, the wording of this question seems to introduce some irrelevant questions that limit the usefulness of this finding; did they interpret “could” to mean physical capability? And upon what authority were they being instructed to do this? Although Bohm reports these results as mixed, the author interprets this as evidence that the increase in information did lead to increased hostility to the death penalty. A semester’s worth of content on the topic seems unlikely to have represented an impartial

ignorant on factual issues related to the death penalty, and indicated that if their factual beliefs (in deterrence) were incorrect, their attitude would not be influenced.”<sup>893</sup> Three other studies measured students’ views before and after classes on the death penalty, and two of these found significant changes in attitudes.<sup>894</sup> A 2002 poll found that 55% of a panel selected randomly from the Bulgarian population supported capital punishment before deliberation but just 34% supported it after deliberation.<sup>895</sup>

Some of these studies suggest that opinion on the death penalty can be changed by increasing knowledge of the topic. However, there are several limitations to these findings<sup>896</sup>:

- Other studies failed to find such an effect.
- Opposition to the death penalty became a majority position in only some of the tests that revealed changes in attitude toward the death penalty.

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increase in the students’ knowledge, given that Bohm (who conducted the study) seems to be critical of the death penalty and given that Bedau’s book was assigned as required reading.

<sup>893</sup> Phoebe C. Ellsworth and Lee Ross, “Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists,” *Crime and Delinquency* 29, no. 1 (1983), 116-69. The authors add that, “[w]hen asked about their reasons for favoring or opposing the death penalty, respondents tended to endorse all reasons consistent with their attitudes, indicating that the attitude does not stem from a set of reasoned beliefs, but may be an undifferentiated, emotional reflection of one’s ideological self-image.”

<sup>894</sup> Eric Lambert and Alan Clarke, “The Impact of Information on an Individual’s Support of the Death Penalty: A Partial Test of the Marshall Hypothesis among College Students,” *Criminal Justice Policy Review* 12, no. 3 (2001), 215-234 summarize that, “survey results from 730 students at a Michigan university were used. Students read one of three essays; one focusing on death penalty deterrence research, another on the chances of sentencing an innocent person to death, and the third on the general reasons for punishing offenders (i.e., the control essay).” In the innocence essay treatment group, support for the death penalty fell from 59.2% to 47.8%. In the deterrence essay group, support fell from 63.3 to 53.5%. Though the abstract claims that, “[t]here was no statistically significant reduction in support for the death penalty among the deterrence and control essay groups,” page 224 notes that “for the deterrence group, there is a statistically significant reduction in support for capital punishment after reading the deterrence essay (before mean = 3.39, after mean = 3.81,  $t = -8.37$ ,  $p \leq 0.001$ ).”

On page 218 they add that, “[i]n another study of 38 students in a death penalty course (i.e., the experimental group) and 68 students in an introduction to criminal justice course (i.e., the control group), Wright et al. (1995) found that there was a slight decrease among the experimental group in terms of support for the death penalty. Nevertheless, the change was not statistically significant.”

They also add that “[t]he greatest support for the Marshall hypothesis is found in a study of 23 criminal justice students in a special topics course on the death penalty (Sandys, 1995). Opposition to the death penalty increased from 30% to 65% by the end of the class. The greatest changes were observed after the presentation of course material covering incapacitation costs and miscarriages of justice, including the execution of the innocent.” The original paper (Marla Sandys, “Attitudinal Change Among Students in a Capital Punishment Class: It May be Possible,” *American Journal of Criminal Justice* 20, no. 1 (1995), 37-55) refers to these changes as “highly significant.”

<sup>895</sup> “The First National Deliberative Poll in East Europe: Fighting Crime in Bulgaria,” Center for Deliberative Democracy (2002), summarized in Anthony McGann and Wayne Sandholtz, “Patterns of death penalty abolition, 1960–2005: Domestic and international factors,” *International Studies Quarterly* 56, no. 2 (2012), 279.

<sup>896</sup> Reflecting similar concerns to those listed here, Carol S. Steiker, “The Marshall Hypothesis Revisited” *Howard Law Journal* 52 (2008), 530-6.

- Bohm's study found that opinions measured two to three years' following the intervention "had rebounded to near their initial pretest positions."<sup>897</sup>
- The studies required participants to read, listen to, or discuss a large amount of material, which means changing opinions in this manner is likely to be highly costly.
- Bohm's study and possibly some of the others seemed to emphasize an anti-death penalty perspective. It is unclear whether attitudes would have changed to a similar degree if the information provided was more heavily weighted towards pro-death penalty arguments.

Desires for harsh punishment of offenders may be ingrained in human nature, so this may be an especially intractable issue for public education campaigns.<sup>898</sup> However, there are a number of findings from wider research in psychology, behavioral economics, and political science that also suggest that opinions are unlikely to change solely based on new information.<sup>899</sup>

Carol Steiker has argued that the success of the innocence frame in building opposition to capital punishment (discussed below) and the gradual conversion of Justices Powell, Blackmun, and Stevens to anti-death penalty views as indirect evidence that increases in knowledge about capital punishment in turn increase opposition to capital punishment.<sup>900</sup>

A study in 1979 provided undergraduate students with a mixture of information on the death penalty and found that opinions became more polarized rather than consistently more hostile towards the death penalty.<sup>901</sup> A subsequent study asked about the death penalty, the death penalty for minors specifically, and

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<sup>897</sup> Robert M. Bohm, "American Death Penalty Opinion: Past, Present, and Future," in James R. Acker, Robert M. Bohm, and Charles S. Lanier (eds.) *America's Experiment with Capital Punishment* (Durham, NC: Carolina Academic Press, 1998), 40. Bohm also summarizes that "results of the follow-up study do not appear to be a function of a loss of knowledge, the irrelevancy of the death penalty class, or the influence of the instructor."

Robert M. Bohm and Brenda L. Vogel, "More Than Ten Years After: The Long-Term Stability of Informed Death Penalty Opinions," *Journal of Criminal Justice* 32, no. 4 (2004), 307-27 adds that, "[a]fter more than ten years, the data revealed small increases in support of the death penalty from the first follow-up period." In fact, there was greater support for the death penalty for all people convicted of first-degree murder at twelve years' follow-up than in the initial pre-test, though the study used a longitudinal design, so it is unclear whether this "rebound" was related to the intervention or not.

<sup>898</sup> See footnote 533.

<sup>899</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 43-8 notes several examples, such as George Lakoff, *Thinking Points* (New York: Straus and Giroux, 2006), who apparently "recently argued, years of study simply do not show 'that hard facts will persuade voters, that voters are 'rational,' [or that] they vote in their self-interest and on the issues.'" See also "Individual vs. institutional interventions and messaging" in "Summary of Evidence for Foundational Questions in Effective Animal Advocacy," Sentience Institute, last edited June 21, 2018, <https://www.sentienceinstitute.org/foundational-questions-summaries#individual-vs.-institutional-interventions-and-messaging>.

<sup>900</sup> Carol S. Steiker, "The Marshall Hypothesis Revisited" *Howard Law Journal* 52 (2008), 536-53. On the Justices' change of mind, several quotes are provided that show that their views were changed at least in part because of their increased understanding of the failings of capital punishment.

<sup>901</sup> Summarized in Robert M. Bohm, "American Death Penalty Opinion: Past, Present, and Future," in James R. Acker, Robert M. Bohm, and Charles S. Lanier (eds.) *America's Experiment with Capital Punishment* (Durham, NC: Carolina Academic Press, 1998), 34. The footnote explains that, "Lord et al. (1979: 2100) presented 24 proponents and 24 opponents of the death penalty (all subjects were undergraduate students) 'first with the results and then with procedural details, critiques, and rebuttals for two studies dealing with the deterrent efficacy of the death penalty—one study confirming their initial beliefs and one study disconfirming their initial beliefs.'"

five unrelated social issues. The authors concluded that, “arguments incompatible with prior beliefs are scrutinized longer, subjected to more extensive refutational analyses, and consequently are judged to be weaker than arguments compatible with prior beliefs.”<sup>902</sup> Additionally, Bohm’s study (conducted in 1985-9) found some evidence of polarization after receipt of the information and that, “it may be more difficult for subjects to change their positions if they have to publicly announce their death penalty opinions.”<sup>903</sup> These findings suggest that as the salience and public knowledge of a topic increases, the overall tractability of changing attitudes in a particular direction decreases; this is also a finding of the political science literature on attitude change following from Supreme Court rulings.<sup>904</sup>

A single legislator seems to have been influential in pushing abolition through Alaska’s legislature in 1957, at a time when other legislators were fairly indifferent to the issue.<sup>905</sup> Subsequently, capital punishment issues seem to have increased in salience among Alaskan legislators, but multiple efforts to reinstate the death penalty failed in committee stages.<sup>906</sup> Similarly, there were repeated rejections of legislative attempts to reinstate the death penalty in Michigan, despite majority public support for the death penalty in the state and increasing salience of death penalty debates at the national level.<sup>907</sup> Comparing Alaska in 1957 to Michigan and to Alaska at later time points suggests that individual legislators may be able to have more influence (and therefore that legislative change through the lobbying of a small number of legislators may be more tractable) in contexts in which the salience of an issue is low and other legislators are not yet committed to particular positions. Relatedly, there is some evidence that abolition was only successfully implemented in some states during the Progressive Era because of indifference and uncertainty among the public and legislators.<sup>908</sup>

- **Messaging that includes supplementary arguments attracts broader support. When using supplementary arguments, advocates should focus on issues that seem unlikely to be fixed without abolition of the targeted institution to minimize the risk that they will backfire in the long term.**

<sup>902</sup> Kari Edwards and Edward E. Smith, “A Disconfirmation Bias in the Evaluation of Arguments,” *Journal of Personality and Social Psychology* 71, no. 1 (1996), 5-24.

<sup>903</sup> Robert M. Bohm, “American Death Penalty Opinion: Past, Present, and Future,” in James R. Acker, Robert M. Bohm, and Charles S. Lanier (eds.) *America’s Experiment with Capital Punishment* (Durham, NC: Carolina Academic Press, 1998), 40. Bohm also summarizes that, “results of the follow-up study do not appear to be a function of a loss of knowledge, the irrelevancy of the death penalty class, or the influence of the instructor.”

<sup>904</sup> See the findings relating to “EM3” — “Does higher pre-decision issue salience decrease the effects of a Supreme Court decision on public opinion?” — in Jamie Harris, “Is the US Supreme Court a Driver of Social Change or Driven by it? A Literature Review” (November 27, 2019), <https://www.sentienceinstitute.org/scotus>.

<sup>905</sup> See footnote 115.

<sup>906</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 126-42 describes various legislative efforts between 1973 and 1994. For example, on page 139, they note that, “Alaska’s death penalty regained its intensity during the 1993-94 legislative session. Several death penalty articles, editorials, and letters were published in the *Daily News*... At the beginning of the 1993-94 legislative session hopes were high among Alaska’s death penalty advocates that the death penalty would soon be a legal reality. Surveys suggested that 75 percent of Alaskans favored capital punishment for first-degree murderers.” However, on page 140 they note that the bills died in the Senate Judiciary Committee and House Finance Committee.

<sup>907</sup> See footnote 695. On the increasing salience, see, for example, figure 5 above.

<sup>908</sup> See the paragraph beginning “Factors encouraging the reinstatement...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”



Attorney Jolie McLaughlin argues that there was “interest-convergence” on the issue of the cost of the death penalty among legislators and anti-death penalty advocates after “a deliberate effort by anti-death penalty advocates throughout the country to bring economic arguments to the public’s attention.” McLaughlin sees this as one reason that the ADPM began “gaining speed,” as demonstrated through the legislative changes in New Jersey and elsewhere from 2007.<sup>909</sup> The cost argument may have been influential in Kansas in 1987, Alaska in 1991, and Minnesota in 1991.<sup>910</sup> If animal-free food technology becomes cheaper than conventional animal products, then this evidence suggests that the use of the cost argument could be a powerful messaging tool for animal advocates.

It is also possible that from the late 1990s, the increased discussion in the media regarding the innocence of convicted felons sentenced to death has contributed to the declining support for capital punishment,<sup>911</sup> though a number of other factors may help explain this trend.<sup>912</sup> One experiment found weak evidence that arguments focusing on the innocence of some of those sentenced to death resonate more with those who read such arguments than moral arguments about the death penalty.<sup>913</sup> Another experiment found that there was a significant decrease in support for capital punishment among an intervention group that read an essay about the chances of sentencing an innocent, though there was also a significant decrease among an intervention group that read an essay about deterrence research.<sup>914</sup> Bohm concluded that after students were taught about the death penalty for 40 hours, “when opinions about the death penalty do change, it is most likely because of administrative reasons such as racial discrimination or executing innocent people.”<sup>915</sup> A poll from 2007 found that 87% of respondents reported that they believed there was at least “some chance” that

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<sup>909</sup> Jolie McLaughlin, “The price of justice: Interest-convergence, cost, and the anti-death penalty movement,” *Northwestern University Law Review* 108, no. 2 (2013), 675-710. On the legislative change and detail on the importance of cost arguments, see the paragraph beginning “In 2007, New Jersey...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>910</sup> See the paragraph beginning “In 1987 in Kansas...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>911</sup> Frank E. Dardis, Frank R. Baumgartner, Amber E. Boydston, Suzanna De Boef, and Fuyuan Shen, “Media framing of capital punishment and its impact on individuals’ cognitive responses,” *Mass Communication & Society* 11, no. 2 (2008), 115-40. Likewise, Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008) asserts that, “[p]ublic opinion is shifting because of the rise of a new frame,” focusing on innocence: “A ‘tipping point’ has been reached where changes in public understanding have begun to induce further changes in policy, which in turn reinforce those same changes in public understanding... Beginning in the mid-1970s, a self-reinforcing process generated greater and greater acceptability of the death penalty for almost thirty years as Americans became more and more accustomed to capital punishment. Then a new cascade began in the 1990s, following a similar process but with opposite results: The new focus on innocence has generated public doubt, official caution, powerful individual stories of exoneration, and fewer death sentences, all in a self-perpetuating cycle.”

<sup>912</sup> See the paragraph beginning “Nineteen ninety-four saw the peak of support...” and subsequent paragraph in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

<sup>913</sup> Frank E. Dardis, Frank R. Baumgartner, Amber E. Boydston, Suzanna De Boef, and Fuyuan Shen, “Media framing of capital punishment and its impact on individuals’ cognitive responses,” *Mass Communication & Society* 11, no. 2 (2008), 126-32. The differences were insignificant but the experiment had a small sample size and may have been underpowered to detect such differences. The experiment also used an unusual measure of message effectiveness by asking the student participants to list their thoughts on the death penalty and assessing whether their first thought reflected the arguments portrayed in the article that they received.

<sup>914</sup> See the information about Lambert and Clarke (2001) in footnote 894.

<sup>915</sup> Robert M. Bohm, “American Death Penalty Opinion: Past, Present, and Future,” in James R. Acker, Robert M. Bohm, and Charles S. Lanier (eds.) *America’s Experiment with Capital Punishment* (Durham, NC: Carolina Academic Press, 1998), 40.

an innocent person had been executed “over the past 15 years or so”; 55% of these respondents also reported that this had “affected” their views on the death penalty.<sup>916</sup> Stephen Smith notes that, “[f]rom 1977 to 2002, eighty percent of all clemency grants in capital cases nationwide were based on questions of legal or factual error”<sup>917</sup>; these supplementary arguments may therefore be more persuasive (or at least more politically convenient) to legislators than ethical arguments. Political scientists Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston (2008) have argued that the persuasiveness of the innocence frame may have encouraged other anti-death penalty arguments to be discussed in the media as well.<sup>918</sup>

There is some evidence against the claim that the inclusion of supplementary arguments has made the ADPM’s messaging more effective. In three separate experiments, Lawrence D. Bobo and Devon Johnson (2004) randomized participants to either receive or not receive a short statement about the disproportionate number of black people on death row, the higher sentencing rates when a victim is white, and the number of innocent people who have been sentenced to death. None of these three manipulations had a significant effect on participants’ support for the death penalty (though the last had a *p* value of 0.06).<sup>919</sup>

Lowe’s analysis of the ADPM’s public-facing statements in newspapers suggests that changes in the use of instrumental arguments did not have a substantial effect on public support for the death penalty. Lowe finds that there was a divergence between the use of moral and instrumental frames around 1980.<sup>920</sup> This change occurred after the rapid increase in public support for the death penalty had begun in 1972,<sup>921</sup> and the distance between the use of moral and instrumental frames remained similar as public support declined again in the mid-1990s.<sup>922</sup> Kirchmeier summarizes that, “[p]olls show that about two-thirds of death penalty opponents are against the death penalty based on moral grounds.” This suggests that moral arguments may

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<sup>916</sup> Richard C. Dieter, “A Crisis of Confidence: Americans’ Doubts about the Death Penalty” (June 2007), <https://files.deathpenaltyinfo.org/documents/pdf/A-Crisis-of-Confidence.f1560295689.pdf>. In the same survey, of those who said that they had supported but now oppose the death penalty, 62% selected “[e]vidence that innocent people are sometimes sentenced to death” as having “contributed the most to [their] change in opinion.” The other two options were selected by only 9% and 12% of respondents, though the three options were not an exhaustive list of possible reasons for opinion change.

<sup>917</sup> Stephen F. Smith, “The Supreme Court and the Politics of Death,” *Virginia Law Review* 94, no. 2 (April 2008), 325, citing Elizabeth Rapaport, “Straight Is the Gate: Capital Clemency in the United States from *Gregg* to *Atkins*,” *New Mexico Law Review* 33 (2003), 353–55.

<sup>918</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 139 summarize various plausible theoretical reasons for why innocence framing may be highly influential. However, the author could not see any notable empirical evidence in this chapter (pages 136–65) that the rise of the innocence frame had indeed caused a rise in the use of other framing types, rather than merely being associated with them.

<sup>919</sup> Lawrence D. Bobo and Devon Johnson, “A Taste for Punishment: Black and White Americans’ Views on the Death Penalty and the War on Drugs,” *Du Bois Review: Social Science Research on Race* 1, no. 1 (2004), 158–66.

<sup>920</sup> Marnie Lowe, “Resonance, Radicalism, and the Death Penalty: A Framing Analysis of the Anti-Death Penalty Movement, 1965–2014” (April 2018), <https://escholarship.org/content/qt9sg5t66n/qt9sg5t66n.pdf>, 28. See footnote 236 for a description of the methodology used.

<sup>921</sup> See footnote 160.

<sup>922</sup> See the paragraph beginning “Nineteen ninety-four saw the peak of support...” in “A Condensed Chronological History of the US Anti-Death Penalty Movement.”

have greater weight among the public overall, though it does not mean that moral arguments are more effective at changing people's beliefs.<sup>923</sup>

Additionally, an emphasis on concerns about the procedures of an institution rather than its fundamental character suggests that if these concerns are sufficiently dealt with then there is no need for the abolition of the institution. Arguments for a moratorium or abolition of the death penalty that focus on the innocence of some convicts tacitly accept the legitimacy of the death penalty for guilty persons and could backfire if technological improvements (such as in DNA testing) make it easier to more confidently establish guilt and innocence.<sup>924</sup> Pro-death penalty legislators have coopted the language of concern about innocence in their efforts to expand the death penalty.<sup>925</sup> A focus on improving fairness in the procedures of death sentencing and execution could similarly legitimize the use of capital punishment.<sup>926</sup>

- **Moral arguments are important for activist mobilization.**

Sociologist Sandra Jones interviewed 49 activists affiliated with the NCADP and found that 80% of interviewees “expressed moral outrage about our nation’s use of the death penalty” when asked about the factors that mobilized them to participate in the movement.<sup>927</sup> Other motivations were less universal. For example, 50% of the interviewed African American activists but only 10% of the interviewed white activists identified “concerns with racial disparities as driving their activism.”<sup>928</sup>

- **A small number of thoughtful actors can play a role in promoting particular frames of discussion of a topic.**

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<sup>923</sup> Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (July 2006), 108, citing Robert Jay Lifton and Greg Mitchell, *Who Owns Death? Capital Punishment, the American Conscience, and the End of Executions* (New York: William Morrow, 2000), 219.

<sup>924</sup> For discussion of this point, see Jeffrey L. Kirchmeier, “Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,” *University of Colorado Law Review* 73, no. 1 (July 2006), 103-8.

<sup>925</sup> Bradley R. Hall, “From William Henry Furman to Anthony Porter: The Changing Face of the Death Penalty Debate,” *Journal of Criminal Law and Criminology* 95, no. 2 (2005), 373 notes that, “[i]n Massachusetts, for example, Governor Mitt Romney established a commission to study ways in which that state could reintroduce the death penalty while ensuring accuracy. And in Michigan, home to the oldest ban on capital punishment in the English-speaking world, legislators have pushed for an amendment to the state constitution that would allow the death penalty in cases where the defendant's guilt can be proven to ‘a moral certainty.’”

<sup>926</sup> See the strategic implication beginning “There is some evidence that procedural reforms...”

<sup>927</sup> Sandra J. Jones, *Coalition Building in the Anti-death Penalty Movement: Privileged Morality, Race Realities* (Lanham, MD: Lexington Books, 2010), 86. Jones adds that, “[o]f the thirty-three activists who indicated that they participate in the movement against the death penalty out of moral concerns, thirteen are white, thirteen are black, and seven are Latino,” out of 20 white, 20 black, and 9 Latino activists interviewed.” There would seem to be little to no racial difference, therefore, between how strongly the activists are driven by moral outrage,” although “[u]pon closer examination of these various expressions of moral concerns, slight differences were noted between the ways that black versus white activists framed their notion of an immoral death penalty,” such as 35% of black interviewees and only 15% of white interviewees basing their moral outrage on their religious beliefs.

<sup>928</sup> Sandra J. Jones, *Coalition Building in the Anti-death Penalty Movement: Privileged Morality, Race Realities* (Lanham, MD: Lexington Books, 2010), 87. On page 90, Jones adds that 35% of white interviewees, 65% of black interviewees, and 22% of Latino interviewees “indicated that it was some personal experience that led them to the anti-death penalty movement.”

Baumgartner, De Boef, and Boydston (2008) note that there was a gradual rise in exonerations and in DNA testing and yet a sudden spike in “attention to the concept of innocence.” They see a number of factors as contributing to “a mutually reinforcing process” and “cascade of social change... due not to any single factor but to the combination of many”<sup>929</sup>:

The innocence frame, as we understand it, began to take shape in academic research and volunteer activism that, although noteworthy, went all but unnoticed. Meanwhile, through the concerted efforts of pivotal scholar activists such as David Protess, Rob Warden, and Lawrence Marshall, the innocence frame came to penetrate a key state — Illinois. Some of the first organizations that would come to be known as innocence projects took root here, and provided the momentum for the cascade of redefinition that would not stop at the state lines. In addition to organized educational efforts, this cascade was fueled by the Chicago police torture and abuse scandal still tormenting Illinois in the late 1990s and an unlikely governor who had no particular interest in issues of innocence before becoming concerned about problems under his watch but who nevertheless became the national symbol for changing social understanding of the debate. These changes in Illinois provoked a surge of national attention to wrongful conviction, not only by the public but also by Congress and even former Texas governor George W. Bush. Finally, the innocence frame is undoubtedly responsible, at least in part, for landmark decisions restricting the death penalty offered by a decidedly conservative Supreme Court.<sup>930</sup>

These researchers argue that the creation of “innocence projects” in universities by attorneys and professors of law or journalism that make use of student volunteers was possibly the element “that has had the greatest impact on the rise of the innocence frame social cascade,” because the identification of errors in the system by unpaid students may have been more persuasive to the public than the successes of professional attorneys.<sup>931</sup>

Changes encouraged by advocates may also lead to substantial changes that permit frame realignment. For example, the wave of international abolitions of capital punishment since 1989<sup>932</sup> that has been encouraged by

<sup>929</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 49-50. See also footnote 390.

<sup>930</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 55. On pages 57-95, they provide a detailed “chronology of innocence,” with a large number of events and developments relevant to the increasing focus on innocence in discussion of capital punishment. The chronology is divided into topics, such as separating developments in the federal government from the growth of the movement among activists. These chronologies start as early as 1968 and continue until 2006. The chronologies focus on smaller developments than the condensed chronology in this report.

<sup>931</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 63. Additionally, on page 101 they summarize that, “[w]hat began as a set of isolated hands-on journalism and law school projects with some support from legal foundations and individual activists blossomed in the 1990s to be a national movement generating more and more examples of errors of justice. This was a most unlikely social movement and indeed was more focused within a certain community of activists and student legal clinics than within a broad community of activists, as in the civil rights movement for example. There were no national protests, no mass demonstrations (though there were a few small ones in individual states). What began in the 1980s with these campus-based projects blossomed after some initial success into a national movement in the 1990s.”

<sup>932</sup> See the spreadsheet “[Cumulative total of countries that have abolished the death penalty.](#)”

European abolitionist institutions<sup>933</sup> has permitted a move away from acceptance that each nation has a sovereign right to decide its capital punishment laws and towards the notion that the death penalty violates “universally accepted human rights.”<sup>934</sup>

- **The changing tone of media coverage can have significant effects on public opinion.**

Baumgartner, De Boef, and Boydston (2008) conducted multiple regression to analyze the correlates of changes in public opinion on the death penalty in the years 1976 to 2006. Their dependent variable was an index that combined the results of 292 public opinion surveys.<sup>935</sup> They found that both the number of homicides (regression coefficient = 3.4,  $p < 0.001$ ) and a measure of the “net tone” of *The New York Times*’ coverage of the death penalty (regression coefficient = 0.15,  $p < 0.05$ ) — the “number of pro- minus the number of anti-death penalty” stories — had significant effects on the “[l]ong run (equilibrium) opinion,” but not on public opinion in the short-run, i.e. the same quarter of the year in which the change occurred.<sup>936</sup> They conclude from this analysis that, “[a]cross the range of the data... we see comparable effects on the change in equilibrium levels of net support for the death penalty due to net tone and to homicides, about eight percentage points in each case.”<sup>937</sup> Using similar methods, they also found that the rate of death sentencing passed down by juries was “almost four times more responsive to net tone than to homicides.”<sup>938</sup> While this

<sup>933</sup> See the strategic implication above, “Once influential international bodies adopt a value, they may exert pressure on institutions in other parts of the world to adopt the same value.”

<sup>934</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), 16-7. The rights that they refer to are “the right not to be arbitrarily deprived of life and the right not to be subjected to a cruel, inhuman, or degrading treatment or punishment.”

<sup>935</sup> See footnote 473. For this analysis, they used quarterly data, rather than annual data.

<sup>936</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 188 with “net tone” defined on page 117. The R-squared value is 0.446. In their analysis of the “[s]hort-run (change in) opinion,” they include a measure for six notable events (see footnote 313), but this is not significant, and is not included in the analysis of the “[l]ong-run (equilibrium) opinion” — the analysis for which the number of homicides and the net tone were found to be significant. In their model, it takes 20 quarters (i.e. 5 years) for the long-run impact measured by the regression coefficients to be fully realized.

<sup>937</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 191-2. They note on page 191 that, “there was one period — the second quarter of 1990 — in which there were sixteen more pro- than anti-death penalty stories in the *New York Times*. Similarly, in the second quarter of 2001, there were forty-three more anti- than pro-death penalty stories. So there is quite a lot of movement; net tone, in fact, ranged from +16 to -43, or a swing of almost sixty points. Based on the estimates reported in Table 6.1, we can calculate the equilibrium or expected value of public opinion for each case, holding the number of homicides constant at 5,000, its approximate mean quarterly value over the full period (homicides numbered nearly 6,000 in 1990 and dipped below 4,000 in 2001). The equilibrium value of public opinion given sixteen pro-death penalty stories and 5,000 homicides is given by the long-run equation in column I, substituting values of net tone and homicides into the equation:  $8.95 + (0.149 \times 16) + (3.41 \times 5) = 28.38$ , for a net a pro-death penalty opinion heavily in favor of capital punishment. Compare this with the equilibrium value of opinion associated with a net tone of -43 assuming the same 5,000 homicides. Now the equilibrium level of opinion is given by  $8.95 + (0.149 \times -43) + (3.41 \times 5) = 19.59$ . In just over a decade, the equilibrium value of public opinion shifted by 8.79 percentage points. Although in both periods death penalty supporters outnumber opponents, the public opinion altered dramatically. These are strong effects indeed.” A similar calculation is conducted for homicides.

<sup>938</sup> Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge University Press: New York, 2008), 200-15. On page 198 they suggest that the larger effects of net tone on sentencing rates are because “[c]hange comes quicker when the question moves from the theoretical to the individual, and there is reason to expect that the innocence frame would have its greatest impact here. Many could truthfully say they support the death penalty in response to a generically worded survey question, but not impose it in a case before them because of doubts about the perfection of the system.” On page 201 they conclude that the results

is correlational analysis, it is some evidence of a causal relationship and is supported by general impressions of the timeline.

Legal scholar Andrew Hammel hypothesizes that critical coverage of George Bush's executions in the European media may have contributed to continued declines in public support for capital punishment there,<sup>939</sup> though this is just one of multiple plausible explanations for the decline. Other scholars have hypothesized that the media contributed to increases in public support for capital punishment in the late-twentieth century.<sup>940</sup>

- **The writings of academics and intellectuals may be effective for influencing educated elites.**

Given that educated elites such as legislators and litigators seem to have driven progress towards abolition in Europe,<sup>941</sup> the anecdotal evidence suggesting that European elites were influenced by the writings of academics and intellectuals<sup>942</sup> seems important. However, these writings were only one of several contributing factors to the changing opinions of European elites on capital punishment. Other factors included:

- The increasing pressure from European institutions to abolish the death penalty.<sup>943</sup>
- The rising costs of capital punishment as the expectations of the strength of the evidence of guilt required to put a convict to death rose.<sup>944</sup>
- The media's framing of debate.<sup>945</sup>

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“provide strong support for the social cascade model. With more pro-death penalty media coverage come more death sentences; and with more popular support for the death penalty come more death sentences as well.”

<sup>939</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 180-4. On page 185, Hammel concludes that, “[t]his seems as likely as any other factor to have contributed to a lasting drop in support for capital punishment in many Western European countries, on the order of 15-20% in public opinion polls.” However, the drops in public support for capital punishment during Bush' presidency (2001-2009) seem less substantial than drops in the previous few years in both France and Germany.

<sup>940</sup> See footnote 474.

<sup>941</sup> See footnote 867.

<sup>942</sup> Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Basingstoke, UK: Palgrave Macmillan, 2010), 162 summarizes an interpretation expounded at various points in the book: “It is, of course, impossible to track precisely the growth in abolitionist sentiment among European elites. The manner of transmission, however, is clear. A prominent intellectual, academic or write (Hugo, Thackray, Mittermaier, and many lesser lights) penned a compelling presentation of the abolitionist program, inspiring discussion of the subject in educated circles. A solid minority of elite members committed to the cause of complete abolition would gradually build. These abolitionists formed organizations devoted to advancing the cause, thus creating a more or less permanent focus for the abolitionist viewpoint and ensuring the continuous production of abolitionist polemics and analyses. One consistent theme of abolitionist discourse, as we have seen, is claiming the high ground of ‘progressive,’ ‘civilized,’ and ‘humane’ values. Opposition to the death penalty thus gradually established itself as one of the signature issues by which social progressives recognized one another. Nowhere was this trend more firmly established than among the liberal professions, and among those, the lawyers. The death penalty is regulated within the legal system, and many of the arguments against capital punishment are well tailored to the logical, rationalistic style of analysis taught in all law schools.”

<sup>943</sup> See the strategic implication “Once influential international bodies adopt a value, they may exert pressure on institutions in other parts of the world to adopt the same value.”

<sup>944</sup> This is an assumption of the author. For discussion of this trend in the American case, see, for example, Peter A. Collins and Aliza Kaplan, “The death penalty is getting more and more expensive. Is it worth it?” last updated October 28, 2019, <https://theconversation.com/the-death-penalty-is-getting-more-and-more-expensive-is-it-worth-it-74294>.

<sup>945</sup> John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), 216, after reviewing state-level case studies, conclude that,

## Potential Items for Further Study

How did the ADPM develop in other nations? Was it more or less successful than the US ADPM? What effects did the strategic factors considered here have in those countries? Although this report has briefly considered other countries, it has done so mostly with reference to comparative or quantitative works and to Canada, France, Germany, and the UK specifically; more thorough case studies of countries beyond the US could be informative.

How does the history of the ADPM compare to the history of movements to improve the rights and wellbeing of convicts in other contexts? Sentience Institute intends to publish a shorter, additional case study focusing on this question.

To better understand the effects of abolition on public support for capital punishment, it would be helpful to compare public opinion at fixed intervals before and after abolition for all abolitionist countries where sufficient public opinion data can be identified. It would also be helpful to compare the trends of public opinion in countries that have abolished capital punishment with those that have retained it.

A content analysis of the news coverage of the death penalty could more confidently establish or reject the hypotheses listed in the “[Strategic Implications](#)” section on the causes of increased issue salience.

Many of the potential items for further study of the anti-abortion movement suggested in Sentience Institute’s previous report<sup>946</sup> could be adapted as items for further study of the US ADPM. For example:

- A more detailed analysis of the legal history of the US ADPM could provide more actionable insights for the judicial strategy of advocates seeking to secure rights for animals, such as through legal personhood.

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“[a]bsent the *Des Moines Register* and the *Charleston Gazette*, Iowa and West Virginia would likely be death penalty states,” though they provide little substantial evidence to support this claim.

On pages 170-1 they explain that, “[t]here were sixteen votes on the death penalty in the Iowa legislature between 1851 and 1878. In 1872, the *Des Moines Register* launched a campaign against capital punishment, arguing it was both ‘uncivilized and impossible to enforce.’ That year the death penalty was abolished by a margin of fifty-four to twenty-one in the Iowa house and thirty-one to fourteen in the Iowa Senate.” Following lynchings, however, the death penalty was reinstated in 1878. They describe on pages 175-8 the *Register’s* favorable coverage of Democratic Governor Harold Hughes’ efforts to abolish the death penalty. This is not clear evidence that the *Register* had much effect on the passage of legislation in Iowa, however.

Likewise, they provide evidence on pages 193-202 that the *Charleston Gazette* was always “adamantly opposed to capital punishment,” but provide no substantial evidence for the claim that, “[t]his powerful newspaper was a force in the abolition of the death penalty and, more recently, a force in its maintenance,” beyond a quote from the chief counsel to the House Judiciary Committee: “politicians fear the *Gazette*—by far the best newspaper in the state.”

On pages 20-3, the authors provide a number of other examples of where anti-death penalty media coverage may have contributed to the maintenance of abolition in certain states. For example, after describing the negative portrayals of death penalty supporters among the press in Michigan, they provide evidence that, “very few Michigan legislators actively support capital punishment bills” and suggest that this is because of the “negative connotations” emphasized by the press.

<sup>946</sup> Jamie Harris, “Social Movement Lessons From the US Anti-Abortion Movement” (November 26, 2019), <https://www.sentienceinstitute.org/anti-abortion>.

- Interviews with anti-death penalty advocates and their opponents or surveys of the current US population could lead to further insights and provide evidence on questions more specifically tailored to the interests of the farmed animal movement.
- A systematic check through the annual reports of all identifiable anti-death penalty organizations could be informative, if they are accessible.
- Are there important contributions in the historical and social scientific literature on the US ADPM that I have not included here?

Many of the strategic implications from this report could be further analyzed in the context of other social movements. For example:

- Has legislation that was contrary to public opinion at the time of its implementation encouraged a shift in public opinion and prioritization in the long-term?
- Have professionalization and shifts towards legal strategies caused problems for other movements?
- Has the tactic of suspending a practice while awaiting further research been effective in other contexts?
- Do procedural reforms of the practices and institutions targeted by other social movements seem to have legitimated those practices or institutions by making them seem more humane than is the case in practice?

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