

# The “New Abolitionism” and the Possibilities of Legislative Action: The New Hampshire Experience\*

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*Recently, the work of the abolitionist community has shifted from the courts to the legislatures. In this article, Professor Sarat examines the significance of what he calls the “new abolitionism” in the politics of legislation aimed at changing or ending the death penalty. The author describes the new abolitionism in detail and then examines its role in the May 2000 vote of the New Hampshire State Legislature to repeal the death penalty. The author concludes that the focus of the new abolitionism on the practical liabilities of our system of capital punishment makes it possible for legislators to oppose the death penalty while presenting themselves as guardians of widely shared values and the integrity and fairness of our legal institutions.*

## I. INTRODUCTION

Until recently, the work of the abolitionist community has been addressed primarily to courts rather than legislatures.<sup>1</sup> Courts, using the constitutional protections of the Eighth and Fourteenth Amendments, so abolitionists believed, provided the right venues for attacks, both broad and narrow, on capital punishment.<sup>2</sup> Thirty-five years ago, toward the end of the hey-day of the Warren Court and the era of sustained civil rights activism, a favorable judicial response to the abolitionist movement seemed quite possible.<sup>3</sup> And, indeed, in 1972 in *Furman v. Georgia*, the Supreme Court provided such a response, holding that the death penalty as then *applied* was unconstitutional.<sup>4</sup>

While the Court did not find that the death penalty was *per se*

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<sup>1</sup> See generally MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973) (indicating that action in the courts, based on constitutional challenges to the death penalty, was the best route to ending capital punishment).

<sup>2</sup> Writing about the prospects for abolition in the mid-1980s, Zimring and Hawkins argued that “the most likely path to change is through the Supreme Court, whose exercise of moral leadership is supported by a long historical tradition.” FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 155 (1986).

<sup>3</sup> See MELTSNER, *supra* note 1, at 310–16.

<sup>4</sup> 408 U.S. 238 (1972).

unconstitutional, there was a reasonable expectation that it might very well soon do so. As Philip Kurland wrote at the time:

One role of the Constitution is to help the nation to become "more civilized." A society with the aspirations that ours so often asserts cannot consistently with its goals, coldly and deliberately take the life of any human being no matter how reprehensible his past behavior . . . .

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In the *Furman v. Georgia* decision the inevitable came to pass.<sup>5</sup>

Jack Greenberg of the NAACP Legal Defense Fund expressed a similar understanding of the significance of *Furman* when he said, "[t]here will no longer be any more capital punishment in the United States."<sup>6</sup>

Then something unexpected happened. Whereas in other Western nations the abolition of the death penalty was followed by a downturn in public interest and support for capital punishment,<sup>7</sup> in the wake of *Furman* a dramatic pro-capital punishment backlash occurred. "State legislatures . . . quickly responded to the Court's decision, but instead of conducting a thorough reevaluation of the subject, they enacted whatever statutory revisions they perceived as correcting the constitutional flaws contained in pre-*Furman* capital laws."<sup>8</sup> Public reaction followed a similar pattern, "with a hostile response—all over the country."<sup>9</sup> Thus, four years after *Furman*'s limited abolition of capital punishment, the Court, in *Gregg v. Georgia*,<sup>10</sup> found that "it is now evident that a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction."<sup>11</sup> As a result, the Court held that "the punishment of death does not invariably violate the Constitution."<sup>12</sup>

From the mid-1970s until very recently, the political and legal climate for abolition of the death penalty became more and more hostile.<sup>13</sup> The Supreme Court moved rather methodically, if not in a linear fashion, to cut off all systemic "wholesale" challenges to the constitutionality of capital punishment.<sup>14</sup> And

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<sup>5</sup> Philip B. Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181, 296–97.

<sup>6</sup> MELTSNER, *supra* note 1, at 291.

<sup>7</sup> ZIMRING & HAWKINS, *supra* note 2, at 12–13.

<sup>8</sup> *Id.* at 41.

<sup>9</sup> *Id.* at 42.

<sup>10</sup> 428 U.S. 153 (1976).

<sup>11</sup> *Id.* at 179.

<sup>12</sup> *Id.* at 169.

<sup>13</sup> For a discussion of the implications of this hostile climate on lawyers defending capital defendants, see Robert Weisberg, *Who Defends Capital Defendants?*, 35 SANTA CLARA L. REV. 535 (1995).

<sup>14</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (refusing to invalidate the death penalty even in the face of statistical evidence of systemic racial disparities in the administration

public support for the death penalty rose to unprecedented levels, with support in the 70–75% range.<sup>15</sup> Abolition had meager support, and the abolition movement seemed virtually invisible.<sup>16</sup> As a result, politicians of every stripe did not want to be caught on the “wrong side” of the death penalty debate.<sup>17</sup> Finally, the political and public appetite for legally imposed death seemed almost insatiable;<sup>18</sup> where once an execution was the stuff of front page and television news coverage, today, except in unusual circumstances, execution has been routinized.<sup>19</sup>

If that were not enough, the courts, including the Supreme Court, grew impatient with the complex legal process that the Court itself constructed to insure fairness in the administration of the law’s ultimate penalty.<sup>20</sup> Thus, in an apparent effort to limit the reach of the Eighth Amendment as a source of protection for capital defendants, the Supreme Court gradually cut back on the availability of federal habeas corpus relief in death penalty cases.<sup>21</sup> Through decisions dealing with procedural default,<sup>22</sup> exhaustion,<sup>23</sup> and abuse of the writ through the filing of

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of capital punishment); cf. William Bowers, Research Note, *Capital Punishment and Contemporary Values: People’s Misgivings and the Court’s Misperceptions*, 27 LAW & SOC’Y REV. 157, 158 (1993) (“The Court’s ruling in *McCleskey* meant that the kind of evidence that would suffice to save McCleskey’s job could not save his life.”). See generally Anthony Amsterdam, In Favour of Mortis: *The Supreme Court and Capital Punishment*, HUM. RTS. Q., Winter 1987, at 14; Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 305–28 (describing the history of the Supreme Court’s “tortuous efforts to contain capital punishment within the rule of law”).

<sup>15</sup> For a discussion of the nature of public opinion about the death penalty, see Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171. See also Bowers, *supra* note 14, at 162.

<sup>16</sup> See Michael Oreskes, *The Political Stampede on Execution*, N.Y. TIMES, Apr. 4, 1990, at A16.

<sup>17</sup> One important example of how this fear of being tainted by the death penalty debate influences the behavior of politicians is provided by Marshall Frady’s discussion of former President Clinton’s 1992 campaign. Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105.

<sup>18</sup> Wendy Lesser argues that there is a “crucial connection between murder and theater—between death imposed on a human being by another human being, and dramatic spectacle.” WENDY LESSER, PICTURES AT AN EXECUTION 7 (1993).

<sup>19</sup> Susan Blaustein, *Witness to Another Execution: In Texas, Death Walks an Assembly Line*, HARPER’S MAGAZINE, May 1994, at 53.

<sup>20</sup> See Amsterdam, *supra* note 14, at 50–51. See generally Jack Greenberg, *The Capital Punishment System*, 91 YALE L.J. 908 (1982); Franklin Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7 (1992).

<sup>21</sup> The Court has long viewed itself as having the authority to alter the scope of federal habeas, even without new legislation. *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) (referring to the Court’s “historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged”).

<sup>22</sup> *Id.* at 86–87.

<sup>23</sup> *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (holding that “a district court must dismiss habeas petitions containing both unexhausted and exhausted claims”).

successive habeas petitions,<sup>24</sup> the Court made it increasingly difficult for federal courts to reach the merits of a defendant's habeas claims.

A decade ago, in the most significant of these cutbacks, the Court declared that defendants must generally base their habeas petitions on constitutional standards that existed at the time of the original state proceedings.<sup>25</sup> In a follow-up case, it held that if the federal law was unclear at that time, any "reasonable, good faith" interpretation of the federal law by the state courts immunizes the conviction and sentence from later habeas attack.<sup>26</sup> Even more recently, it extended the same principle to the method of application of the federal law to the facts of a particular case; if the state courts' method of application of the federal law was proper in view of the precedents that existed at that time, then federal habeas relief is unavailable (even if those precedents are later overruled or changed).<sup>27</sup>

These decisions have already made it much more difficult for a defendant who receives a death sentence to obtain federal habeas review of the merits of whatever decisions or rulings might have been made by the state judge during his capital trial.<sup>28</sup> So hostile have the courts become to extended litigation in capital cases that in one case where there had been repeated last minute requests for a stay of execution in several different courts, the Supreme Court, usurping the legal prerogatives of the lower courts, took the unprecedented step of ordering that no further stays be granted.<sup>29</sup> And, even new evidence of actual innocence has been found to be inadequate as the basis for challenging a death sentence.<sup>30</sup> For the current Supreme Court, "finality is more important than hearing every

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<sup>24</sup> *McCleskey v. Zant*, 499 U.S. 467, 494 (1991).

<sup>25</sup> *Teague v. Lane*, 489 U.S. 288, 299–310 (1989) (plurality opinion). The portion of Justice O'Connor's lead opinion in *Teague* referenced in the text garnered only three other votes, and thus is technically only a plurality opinion. However, in the subsequent case of *Penry v. Lynaugh*, 492 U.S. 302 (1989), Justice O'Connor picked up the additional vote of Justice White, *id.* at 306, 313–14, who had refused to join the relevant portion of her opinion in *Teague*. See *Teague*, 489 U.S. at 291, 299–316 (plurality opinion). Thus, the relevant portion of Justice O'Connor's opinion in *Teague* now represents the views of a majority of the Court.

<sup>26</sup> *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

<sup>27</sup> *Stringer v. Black*, 503 U.S. 222, 227–37 (1992).

<sup>28</sup> See Steven Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357, 363 (1990–1991); James Liebman, *More Than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 538–39 (1990–1991). See generally Steven Goldstein, *Expediting the Federal Habeas Corpus Review Process in Capital Cases: An Examination of Recent Proposals*, 19 CAP. U. L. REV. 599 (1990) (discussing various legislative proposals to restrict federal habeas).

<sup>29</sup> *Vasquez v. Harris*, 503 U.S. 1000 (1992); see also Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 YALE L.J. 205 (1992).

<sup>30</sup> *Herrera v. Collins*, 506 U.S. 390 (1993). In response to *Herrera*, Justice Blackmun charged the Court with coming "perilously close to simple murder." *Id.* at 466.

meritorious legal claim; there simply comes a point when legal proceedings must end and punishment must be imposed."<sup>31</sup> As Bowers argues, "[n]ow, 20 years after *Furman*, the current Court is adamant in its commitment" to maintaining capital punishment.<sup>32</sup>

Moreover, in 1996, Congress delivered a one-two punch directed against those who have tried to stop state killing. First, Congress enacted Title I of the Anti-Terrorism and Effective Death Penalty Act, which severely limited the reach of federal habeas corpus protections for those on death row by barring federal courts from reviewing state court judgments unless the state proceeding "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court."<sup>33</sup> Second, Congress de-funded post-conviction defender organizations, which provided legal representation for many of those contesting their death sentences.<sup>34</sup> The result is that the population on death row, and the number of executions, have increased dramatically.<sup>35</sup>

Recently, however, the political climate seems to have altered, if only modestly. While public opinion polls continue to register the support of the overwhelming majority of Americans for capital punishment, the June 12, 2000, issue of *Newsweek* reported that, "for the first time in a generation, the death penalty itself is in the dock—on the defensive at home and especially abroad for being too arbitrary and too prone to error."<sup>36</sup> About the same time, *The New York Times* proclaimed the coming of "the new death penalty politics" saying that "heightened public concern over the fallibility of the criminal justice system, [has caused] a dramatic shift in the nation's debate over capital punishment."<sup>37</sup>

Growing evidence of failures in the criminal justice system revealed by the increased availability of DNA testing has been particularly consequential in making this new situation possible.<sup>38</sup> Indeed since 1972, eighty-seven people

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<sup>31</sup> Evan Caminker & Erin Chernerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225, 226 (1992). "[T]he Court's desire to expedite the process of death . . . has now accrued a life of its own." *Id.* at 253. See generally Joseph Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L. REV. 817 (1993).

<sup>32</sup> Bowers, *supra* note 14, at 172.

<sup>33</sup> 28 U.S.C. § 2254 (Supp. V 1999).

<sup>34</sup> Harvey Berkman, *Costs Mount for Indigent Defense*, NAT. L.J., Aug. 7, 1995, at A18.

<sup>35</sup> There are now more than 3,000 people on death rows across the country, and more than 600 people have been executed since the reinstatement of capital punishment in *Gregg v. Georgia*, 428 U.S. 153 (1976). For a different perspective on the rate of increase in executions, see Samuel Gross, *The Romance of Revenge: Capital Punishment in America*, 13 STUD. L. POL. & SOC'Y 71, 92 (1993).

<sup>36</sup> Jonathan Alter, *The Death Penalty on Trial*, NEWSWEEK, June 12, 2000, at 24, 27.

<sup>37</sup> *The New Death Penalty Politics*, N.Y. TIMES, June 7, 2000, at A30.

<sup>38</sup> These developments are discussed in BARRY SCHECK ET AL., ACTUAL INNOCENCE (2000).

have been freed from death row because they were proved innocent after their trials and appeals were completed, an error rate of about one innocent person for every seven persons executed. This fact has made it possible for politicians seeking to remain in the mainstream to criticize capital punishment.

A remarkable moment in this new political climate occurred on January 31, 2000, when Governor George Ryan of Illinois, a long-time supporter of capital punishment, announced plans to block all executions in that state by granting stays before any scheduled lethal injections were administered. His act effectively imposed a moratorium on the death penalty, the first time this had been done in any state. Ryan said that he was convinced that the death penalty system in Illinois was "fraught with errors" and that it should be suspended until thoroughly investigated.<sup>39</sup> Subsequently, Governor Ryan stated that, until he could be given "a 100 percent guarantee" against mistaken convictions, he would authorize no more executions.<sup>40</sup>

Following Ryan's announcement, the United States Department of Justice initiated its own review "to determine whether the federal death penalty system unfairly discriminates against racial minorities."<sup>41</sup> Moreover, legislation has been introduced in Congress to lessen the chance of unfairness and deadly error by making DNA testing available to both state and federal inmates and by setting national standards to ensure that competent lawyers are appointed for capital defendants.<sup>42</sup> Other legislation would suspend all executions at the federal and state levels while a national blue ribbon commission reviews the administration of the death penalty.<sup>43</sup>

New and unexpected voices—including such prominent conservatives as the Reverend Pat Robertson and newspaper columnist George Will—have spoken out against what they see as inequality and racial discrimination in the administration of state killing and in favor of a moratorium. The National Committee to Prevent Wrongful Executions, whose members include death penalty supporters such as William S. Sessions, a former Texas judge and F.B.I. director in the Reagan and Bush administrations, has called for a reexamination of the process that leads to wrongful death sentences. And, if all this were not enough to signal the changed climate surrounding capital punishment, Republican Presidential candidate, and then Governor of Texas, George W. Bush granted his first stay of execution after more than five years in office and more than 130

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<sup>39</sup> Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

<sup>40</sup> Dirk Johnson, *No Executions in Illinois Until System Repaired*, N.Y. TIMES, May 21, 2000, at A20.

<sup>41</sup> *New Looks at the Death Penalty*, N.Y. TIMES, Feb. 19, 2000, at A14.

<sup>42</sup> The Innocence Protection Act of 2000, S. 2073, 106th Cong. §§ 102–03, 201 (2000). Senator Leahy of Vermont introduced the bill on February 10, 2000.

<sup>43</sup> The National Death Penalty Moratorium Act of 2000, S. 2463, 106th Cong. (2000). Senators Feingold and Levin introduced the bill on April 26, 2000.

people had been executed during his tenure. He did so in order to allow for DNA testing of evidence that linked a condemned man, Ricky McGinn, to the rape of his alleged victim. The news media were quick to note the symbolic significance of this gesture by contrasting it with one provided by Arkansas Governor Bill Clinton when, in January 1992, he interrupted his presidential campaign to return home to preside over the execution of Ricky Ray Rector, a mentally impaired black man convicted of killing a police officer.<sup>44</sup>

Despite these developments, we are still a long way from bringing an end to state killing, and the courts, now staffed by a generation of judges appointed by pro-death penalty politicians, do not seem disposed to take a leading role in that effort. Indeed those who push for judicial abolition have not themselves escaped condemnation. Rather than being respected as the guardians of important legal values rooted in the Fourteenth Amendment guarantee of due process of law, or the Eighth Amendment's prohibition of cruel and unusual punishment,<sup>45</sup> those lawyers are vilified as rogues who violate the canons of their profession by conducting an ideologically motivated guerilla war against capital punishment.<sup>46</sup> As the Supreme Court put it when it refused to grant a stay of execution to Robert Alton Harris:<sup>47</sup>

Harris seeks an equitable remedy. Equity must take into consideration the state's strong interest in proceeding with its judgment and Harris's obvious attempt at manipulation. This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process.<sup>48</sup>

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<sup>44</sup> See, e.g., Alter, *supra* note 36, at 28.

<sup>45</sup> This image is developed by Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513 (1988). As Mello argues:

The post-conviction process has become an integral part of the system of capital punishment. The post-conviction component of the system is necessary because it exposes injustices. . . . It is necessary to the integrity of a legal system that strives to tame the death penalty within the rule of law.

In turn, lawyers are essential to the integrity of the post-conviction process.

*Id.* at 606. See generally Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287 (1996).

<sup>46</sup> For a description of this campaign, see Eric Muller, Note, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 158 (1985). There is, of course, another side to this story. Death penalty lawyers still hold a place of relative honor in the bar. They are powerful reminders of the ideal of lawyer as champion of the downtrodden. I am grateful to David Wilkins for this argument.

<sup>47</sup> Harris was the first person executed in California in the post-*Furman* era. Caminker & Chemerinsky, *supra* note 31, at 225.

<sup>48</sup> *Gomez v. United States*, 503 U.S. 653, 654 (1992) (per curiam) (citation omitted). For an important response, see Charles M. Sevilla & Michael Laurence, *Thoughts on the Cause of*

Anthony Amsterdam notes that, in a series of cases extending back before the *Harris* case and continuing to today, courts have woven a "conspiracy myth," a myth of lawyers pursuing frivolous legal claims in last-minute petitions.<sup>49</sup> As Rehnquist put it in *Sawyer v. Whitley*:<sup>50</sup>

In the every day context of capital penalty proceedings, a federal district judge typically will be presented with a successive or abusive habeas petition a few days before, or even on the day of, a scheduled execution . . . .

. . . . We of course do not in the least condone, but instead condemn, any efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution.<sup>51</sup>

The conspiracy myth, Amsterdam contends, gives judges someone to be angry at, and allows them to deny the legal significance of the issues raised by lawyers fighting executions and to explain why so few executions were taking place.<sup>52</sup> It demonizes anti-death penalty lawyers and discredits abolitionism for being sympathetic to some of society's most despised persons.

As a result, abolitionists fighting in the courts find themselves engaged in what continues to look like a losing cause.<sup>53</sup> While they have the advantage of being able to invoke the formal rights and protections of liberal-legalism, courts seem as inhospitable as ever to them and their work.<sup>54</sup> To oppose the death penalty through the legal process in the United States at the turn of the twenty-first century is similar to fighting against apartheid in the courts of South Africa in the 1970s or litigating on behalf of Palestinian rights in the occupied territories in the 1980s.<sup>55</sup> In the face of a hostile judiciary, new strategies are evolving that

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*the Present Discontents: The Death Penalty Case of Robert Alton Harris*, 40 UCLA L. REV. 345 (1992).

<sup>49</sup> Anthony G. Amsterdam, *Selling Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS & CULTURE* 148, 158 (Austin Sarat ed., 1999) (noting that the "conspiracy myth" is one device that is "interwoven in the fabric of most of the Court's opinions vacating stays").

<sup>50</sup> 505 U.S. 333 (1992).

<sup>51</sup> *Id.* at 341 & n.7.

<sup>52</sup> Amsterdam, *supra* note 49, at 158.

<sup>53</sup> See Louis Bilonis, *Legitimizing Death*, 91 MICH. L. REV. 1643 (1993); see also Nancy Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 U. MO.-KAN. CITY L. REV. 55 (1990); Weisberg, *supra* note 13, at 539.

<sup>54</sup> Weisberg, *supra* note 13.

<sup>55</sup> See Richard Abel, *Speaking Law to Power*, in *CAUSE LAWYERING* 69 (Austin Sarat & Stuart Scheingold eds., 1998); see also Ronen Shamir, *Litigation As Consummatory Action: The Instrumental Paradigm Reconsidered*, 11 STUD. L. POL. & SOC'Y 41, 61 (1991) (arguing that even in conditions of oppression, petitioners turn to courts because they "are able, for the



have as their focus legislative action rather than judicial action.

To some this may seem surprising, but given the altered climate concerning the politics of capital punishment, legislators seem to have greater room for maneuvering than judges. They can respond more quickly than courts to new political realities, as legislators are unburdened by *stare decisis* and life tenure. While it is still far too early to know where legislative action in Congress or the states is going or will end up, it is not too early to think about how and why legislative action, whether substantial reform or outright abolition, might occur.

My purpose in this paper is to assess the significance of what I call the "new abolitionism" in the politics of legislation aimed at changing or ending the death penalty. In Part II, I describe the new abolitionism. In Part III, I take up the vote of the New Hampshire Legislature in May 2000 to repeal the death penalty—the first such legislative action in more than two decades.<sup>56</sup> While Governor Jeanne Shaheen subsequently vetoed this legislation, it provides a significant opportunity to assess the prospects for legislative action. In particular, I am interested in the role played by the new abolitionism in explaining why the New Hampshire Legislature came to its decision. In the conclusion, I assess the significance of the new abolitionism in the struggle against capital punishment.

## II. THE NEW ABOLITIONISM

In today's America, capital punishment remains a major front in the culture war. William Connolly rightly notes the following about state killing:

It mobilizes political divisions between one set of partisans, who seek to return to a fictive world in which the responsible individual, retributive punishment, the market economy, the sovereign state, and the nation coalesced, and another set, who seek to respond in more generous ways to new experiences of the cultural contingency of identity, the pluralization of culture, the problematical character of traditional conceptions of agency and responsibility, and the role of the state in a new world order.<sup>57</sup>

Connolly cites William Bennett's *The Devaluing of America: The Fight for Our Culture and Our Children* as an example of the way the embrace of state killing works in cultural contest.<sup>58</sup> In this book, Bennett summarizes an interview he performed on *Larry King Live*. During Bennett's appearance, a caller pressed

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first time, to express their grievances and to materialize their appeal for grace and abstract justice").

<sup>56</sup> Rachel M. Collins, *N.H. Senate OK's Death Penalty Ban*, BOSTON GLOBE, May 19, 2000, at A1.

<sup>57</sup> William E. Connolly, *The Will, Capital Punishment, and Cultural War*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 187, 200 (Austin Sarat ed., 1999).

<sup>58</sup> *Id.*

him as follows: "Why build prisons? . . . Get tough like (Saudi) Arabia. Behead the damned drug dealers. We're just too damned soft."<sup>59</sup> Bennett describes the subsequent exchange, beginning with his response to the caller:

"One of the things that I think is a problem is that we are not doing enough that is morally proportional to the nature of the offense. I mean, what the caller suggests is morally plausible. Legally, it's difficult."

I could see King's eyes light up. He asked for a clarification. "Behead?"

"Yeah. Morally, I don't have anything wrong with it," I said.

"You would behead . . ." King began again.

"Somebody selling drugs to a kid?" I said. "Morally I don't have any problem with that at all. I mean, ask most Americans if they saw somebody out on the streets selling drugs to their kid what they would feel morally justified in doing—tear them limb from limb. . . . What we need to do is find some constitutional and legally permissible way to do what this caller suggests, not literally to behead, but to make the punishment fit the crime. And the crime is horrible."<sup>60</sup>

Reading this exchange I feel the overwhelming gravitational force of an argument for state killing with its appeal to personal tragedy and the justifiable anger it evokes.<sup>61</sup> I am reminded of the moment when, during the second Presidential debate in 1988, Bernard Shaw asked Michael Dukakis if he would favor the death penalty for someone who raped and murdered his wife Kitty.<sup>62</sup> Dukakis answered: "No, I don't Bernard[,] and I think you know that I've opposed the death penalty during all of my life."<sup>63</sup> Dukakis then abruptly switched the topic to the war against drugs.<sup>64</sup> At the moment, I wished for a

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 200.

<sup>61</sup> Eric Zorn argues:

[P]roponents of the Death Penalty have successfully turned the very weakness of their position into its primary strength—that is to say that, with only emotion on their side, they have managed to make this an almost exclusively emotional issue. . . .

There needs to be thunder in the voices of the opposition; the arguments must be made louder and longer—they must be attacks, not defenses. It's absurd that those who oppose this extraordinary and useless practice are playing defense instead of offense.

Eric Zorn, *How to Win the Death Penalty Argument*, Address at the Illinois Coalition Against the Death Penalty (Nov. 1994), at <http://ericzorn.com/speeches/death> (last visited Aug. 15, 2001).

<sup>62</sup> PBS, *Debating Our Destiny: The Second 1988 Presidential Debate*, at <http://www.pbs.org/newshour/debatingourdestiny/88debates/2prez1.html> (last visited January 12, 2002).

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* ("[W]e have work to do in this nation. We have work to do to fight a real war, not a phony war, against drugs.").

different response, the same kind of response that one might have hoped Bennett would have given to his caller. It may have gone as follows:

Of course I would want anyone who did such a thing to someone I loved to be made to suffer. Indeed if I got my hands on him I'd tear him limb from limb. But the death penalty is something different. What my love and anger propels me to do is not what our government should do. It should help heal my pain, but also find ways to punish that do more than exact the most primitive kind of vengeance.

There is, of course, much more to the argument against state killing than this straightforward separation of private desire and public justice. Connolly comments on the Bennett exchange as follows:

The enunciations of "morally proportional," "morally plausible," and "feel morally justified" do much of their work. They invest intense feelings of outrage and vengeance in the blue-chip stock of morality, covertly debasing the latter until it becomes a container into which selective energies of revenge can be poured. . . .

. . . Public objections by liberals miss the point unless we are able to challenge the line of associations between morality, simplicity, revenge and death. Until we do, the agents of the culture war will succeed in using our opposition to associate us with moral softness toward murderers, drug dealers, welfare cheats, and pornographers.<sup>65</sup>

Increasingly, anti-death penalty activists have tried to shift the grounds of the debate about capital punishment to avoid these associations. Those who oppose state killing today often try to avoid bearing the political burden of explaining why heinous killers or mass murderers do not deserve to die. They insist that we ask not what it does for us, but what it does *to* us.<sup>66</sup> They want to turn the debate toward an examination of the cost of state killing to our law, our politics, our culture.

What I call the "new abolitionism" opposes state killing because it damages our democracy, legitimates vengeance, intensifies racial divisions, and distracts us from the challenges that the turn of the century poses for America. The death penalty promises simple solutions to complex problems and offers up moral simplicity in an increasingly morally ambiguous world.<sup>67</sup> The new abolitionism focuses on the injuries that state killing does to American political and legal institutions. It allows and encourages more nuanced views of moral responsibility

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<sup>65</sup> Connolly, *supra* note 57, at 200–01.

<sup>66</sup> See AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 247 (2001).

<sup>67</sup> See William Lyons & Stuart Scheingold, *The Politics of Crime and Punishment* 1 (1999) (unpublished manuscript, on file with author).

and political action, and offers new narrative possibilities in the conversation about state killing.

The abolitionism that I have in mind is, however, less new than it might seem. Glimpses of it can be found in the story of the Supreme Court's assessment of the constitutionality of capital punishment found first in *Furman*. In that assessment, opposition to state killing no longer takes the form of a frontal assault on the morality or constitutionality of state killing. Instead, arguments against the death penalty occur in the name of constitutional rights other than the Eighth Amendment, in particular due process and equal protection. Abolitionists today argue against the death penalty claiming that it has not been, and cannot be, administered in a manner that is compatible with our legal system's fundamental commitments to fair and equal treatment. The contours of the new abolitionism are seen most vividly in two places: an opinion by former Justice Harry Blackmun and a resolution by the American Bar Association.

### A. Constitutional Conundrum

In February 1994, Justice Harry Blackmun of the United States Supreme Court announced that "[f]rom this day forward I no longer shall tinker with the machinery of death."<sup>68</sup> This dramatic proclamation capped his evolution from long-time supporter of the death penalty to tinkerer with various procedural schemes and devices designed to rationalize death sentences to outright abolitionist. Twenty-two years before his abolitionist announcement, he dissented in *Furman*, refusing to join the majority of his colleagues in what he labeled the "legislative" act of finding execution, as then administered, cruel and unusual punishment.<sup>69</sup> Four years after *Furman*, he concurred with the judgment in *Gregg v. Georgia*,<sup>70</sup> which reinstated the death penalty in the United States.<sup>71</sup>

By the time of his abolitionist conversion, however, Blackmun had left a trail of judicial opinions moving gradually, but inexorably, away from this early embrace of death as a constitutionally legitimate punishment.<sup>72</sup> As a result, the denunciation of capital punishment that he offered in 1994 was as categorical as it was vivid—"I no longer shall tinker with the machinery of death."<sup>73</sup> It was most significant as a moment in the transformation of abolitionist politics, as an example of abolition as a kind of legal and political conservatism, and as an

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<sup>68</sup> *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

<sup>69</sup> *Furman v. Georgia*, 408 U.S. 238, 409-411 (1972) (Blackmun, J., dissenting).

<sup>70</sup> 428 U.S. 153, 227 (1976) (Blackmun, J., concurring).

<sup>71</sup> *Id.* at 206-07.

<sup>72</sup> See generally Randall Coyne, *Marking the Progress of a Humane Justice: Harry Blackmun's Death Penalty Epiphany*, 43 U. KAN. L. REV. 367 (1995); Jeffrey B. King, Comment, *Now Turn to the Left: The Changing Ideology of Justice Harry A. Blackmun*, 33 HOUS. L. REV. 277 (1996).

<sup>73</sup> *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting).

indicator of the anxiety that abolitionists seek to cultivate in the face of the increased popularity of state violence.

Harkening back to *Furman*, as if re-writing his opinion in that case, Blackmun focused on the procedures through which death sentences were decided.<sup>74</sup>

[D]espite the effort of the States and courts to devise legal formulas and procedural rules . . . the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. . . . Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.<sup>75</sup>

Two things stand out in Blackmun's argument. First, he acknowledges judicial efforts to purge death sentences of any taint of procedural irregularity. As he sees it, the main implication of *Furman* is that a death penalty is constitutional only if it *can be* administered in a manner compatible with the guarantees of due process and equal protection. Here, Blackmun moves the debate away from the question of whether capital punishment is cruel or whether it can be reconciled with society's evolving standards of decency. Second, Blackmun identified a constitutional conundrum in which consistency and individualization—the twin commands of the Supreme Court's post-*Furman* death penalty jurisprudence—could not be achieved simultaneously. As a result, Blackmun concluded that "the death penalty cannot be administered in accord with our Constitution."<sup>76</sup> His language is unequivocal; after more than twenty years of effort Blackmun says, in essence, "enough is enough."

The new abolitionism that Blackmun's opinion exemplifies presents itself as a reluctant abolitionism, one rooted in an acknowledgment of the damage that capital punishment does to central legal values and to the legitimacy of the law itself. It finds its home in an embrace, not a critique, of those values. Those who love the law, in Blackmun's view, must hate the death penalty for the damage that it does to the object of that love.

Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations

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<sup>74</sup> See generally Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

<sup>75</sup> *Callins*, 510 U.S. at 1144 (Blackmun, J., dissenting) (citations omitted).

<sup>76</sup> *Id.* at 1157.

ever can save the death penalty from its inherent constitutional deficiencies.<sup>77</sup>

In this admonition we again see Blackmun's categorical conclusion that nothing can "save" capital punishment, a conclusion spoken not only from within history, as a report of the result of an "experiment," but also from an Archimedean point in which the failure of the death penalty is "self-evident" and permanent.

### B. *Moratorium*

The new abolitionism has also been articulated in a resolution calling for a moratorium on state killing passed in February 1997 by the American Bar Association (ABA).<sup>78</sup> Taking us back to *Furman*'s condemnation of the death penalty as "then administered," the ABA resolution proclaimed that the death penalty as "currently administered" is incompatible with central values of our Constitution. Since *Furman*, the effort to produce a constitutionally acceptable death penalty has, in the view of the ABA, been to no avail. Thus, the ABA resolution recommended the following:

[T]he American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures . . . intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent people may be executed.<sup>79</sup>

The language of the ABA resolution, unlike Blackmun in *Callins*, seems conditional and contingent in its condemnation of death as a punishment. Even as it calls for a cessation of executions, it appears to hold out hope for a process of reform in which the death penalty can be brought within constitutionally acceptable norms. As if to leave little doubt of its intention, the ABA resolution concludes by stating that "the Association takes no position on the death penalty."<sup>80</sup>

Some might argue that the ABA recommendations, qualified as they seem to be, remain deeply invested in a sentimental narrative—that all we need to do is to stop victimizing those convicted criminals with poor counsel, the erosion of post-conviction protections, and racism, in order to purify state killing. But the ABA resolution, despite its explicit refusal to take a position on the ultimate question of the constitutionality of capital punishment, amounts to a call for the abolition, not

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<sup>77</sup> *Id.* at 1145.

<sup>78</sup> AMERICAN BAR ASSOCIATION, REPORT WITH RECOMMENDATIONS NO. 107 (1997), available at <http://www.abanet.org/irr/rec107.html>.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

merely the cessation, of capital punishment. It does the work of the new abolition without Blackmun's overt and categorical renunciation.

If one takes seriously the conclusions of the report accompanying the ABA's recommendation, then the largest association of lawyers in the country is asking us to save further damage to America by ending the death penalty. In so doing, the ABA provides a striking response to the continuing anxiety that attends the embrace of the state's ultimate violence. Just as rushing a fresh contingent of troops into a battle going badly may reinvigorate those grown weary in battle, even if ultimately it does not stem the tide, so too the ABA's action provides an important vehicle for thinking about the possibility of legislative action in the domain of capital punishment.

The ABA report provides three reasons for its call for a moratorium on executions, each a crucial component of the new abolitionism. The first reason is the failure of most states to guarantee competent counsel in capital cases. Because most states have no regular public defender systems, indigent capital defendants frequently are assigned a lawyer with no interest or experience in capital litigation.<sup>81</sup> The result is often incompetent defense lawyering, which has become all the more damaging in light of new rules requiring that defenses cannot be raised on appeal or in habeas proceedings if they are not raised, or if they are waived, at trial.<sup>82</sup> The ABA itself calls for the appointment of "two experienced attorneys at each stage of a capital case."<sup>83</sup> While, in theory, individual states could provide competent counsel in death cases, and while there is ample evidence to suggest the value of skilled lawyers in preventing the imposition of death sentences, the political climate in the United States as it touches on the crime problem suggests that there is, in fact, little prospect for a widespread embrace of the ABA's call for competent counsel.

The second basis for the ABA's recommended moratorium is the recent erosion in post-conviction protections for capital defendants. Although legal change is headed in the opposite direction, the ABA recommends the following:

[T]he federal courts should consider claims that were not properly raised in state court if the reason for the prisoner's default was counsel's ignorance or neglect[,] and . . . a prisoner should be permitted to file a second or successive federal petition if it raises a new claim that undermines confidence in his or her guilt or the appropriateness of the death sentence.<sup>84</sup>

Today, courts in the United States are prepared to accept that some innocent

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<sup>81</sup> Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, But for the Worst Lawyer*, 103 YALE L.J. 1835, 1841-42 (1994).

<sup>82</sup> See generally Ronald J. Tabak, *Capital Punishment*, 27 LOY. U. CHI. L.J. 524 (1996).

<sup>83</sup> AMERICAN BAR ASSOCIATION, *supra* note 78, at 6.

<sup>84</sup> *Id.* at 16-17.

people, or some defendants who do not deserve death, will be executed.<sup>85</sup> As Justice Rehnquist observed in *Herrera v. Collins*,<sup>86</sup> "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."<sup>87</sup>

And, for Rehnquist, what is true in the general run of criminal cases is also true in death cases. If a few errors are made, a few innocent lives taken, it is simply the price of a system that is able to execute anyone at all. In Rehnquist's view, finality in capital cases is more important than an extended, and extremely frustrating, quest for justice.<sup>88</sup> For him, and others like him, the apparent impotence of the state, its inability to turn death sentences into executions, is more threatening to its legitimacy than a few erroneous, undeserved deaths at the hands of the state. Here again, the ABA's request, namely a restoration of some of the previously available habeas remedies, is theoretically conceivable. Yet like efforts to improve the quality of defense counsel in capital cases, it is hardly a likely or near term possibility.

The third reason for the ABA's call for a moratorium is found in the "longstanding patterns of racial discrimination . . . in courts around the country,"<sup>89</sup> patterns of discrimination that have repeatedly been called to the attention of the judiciary and cited by anti-death penalty lawyers as reasons why the death penalty violates the Fourteenth Amendment guarantee of equal protection. The ABA report cites research showing that defendants are more likely to receive a death sentence if their victim is white rather than black,<sup>90</sup> and that in some jurisdictions African-Americans tend to receive the death penalty more so than white defendants.<sup>91</sup> The report calls for the development of "effective mechanisms" to eliminate racial prejudice in capital cases, yet it does not identify what such mechanisms should be.<sup>92</sup> Indeed, it is unclear whether there are any such mechanisms.

The pernicious effects of race in capital sentencing are a function of the persistence of racial prejudice throughout the society combined with the wide degree of discretion necessary to afford individualized justice in capital prosecutions and capital trials. Prosecutors with limited resources may be inclined to allocate resources to cases that attract the greatest public attention, which often

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<sup>85</sup> See generally IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (Michael L. Radelet et al. eds., 1992).

<sup>86</sup> 506 U.S. 390 (1993).

<sup>87</sup> *Id.* at 399 (quoting *Patterson v. New York*, 432 U.S. 197, 208 (1977)).

<sup>88</sup> *Id.* at 417.

<sup>89</sup> AMERICAN BAR ASSOCIATION, *supra* note 78, at 19.

<sup>90</sup> *Id.* See generally DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

<sup>91</sup> See generally SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCES (1989).

<sup>92</sup> AMERICAN BAR ASSOCIATION, *supra* note 78, at 19.



will mean cases where the victim was white and the assailant was black. Participants in the legal system—white or black—demonize young black males, seeing them as more deserving of death as a punishment because of their perceived dangerousness. These cultural effects are not remediable in the near term, not so long as we live in a killing state. As Blackmun noted in *Callins*:

[W]e may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system . . . .

. . . .  
 . . . [D]iscrimination and arbitrariness could not be purged from the administration of capital punishment without sacrificing the equally essential component of fairness—individualized sentencing.<sup>93</sup>

Like Blackmun, the ABA has embraced the new abolitionism, eschewing a direct address to state violence and relying instead on an indirect, though nonetheless devastating, critique. The ABA's embrace of the new abolitionism reveals a persistent, unalleviated anxiety about the state's ultimate form of violence, an anxious insistence that the state, though it comes into the world born of physical violence, or the violent disruptions of the existing order of things,<sup>94</sup> transcends the violence of its origins. For the ABA, as well as for Justice Blackmun, the rejection of the death penalty takes the form of an effort to prevent the erosion of the boundaries between state violence and its extra-legal counterpart.

The ABA, in effect, has legitimated the crucial complaints voiced in today's abolitionist movement without itself reaching an overtly abolitionist conclusion. By speaking in the name of civic idealism rather than partisan engagement, it provides symbolic capital to those on the front lines in the battle against state killing.<sup>95</sup> The ABA's action helped secure the political space in which those opposed to the death penalty might act.

### III. LEGISLATIVE ABOLITION: THE NEW HAMPSHIRE EXPERIENCE

New Hampshire is by no means typical of states whose laws authorize capital punishment. While it has had a death penalty for a long time, it has no one on death row and has executed only one person since 1930.<sup>96</sup> The state's death

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<sup>93</sup> *Callins*, 510 U.S. at 1154–55.

<sup>94</sup> See WALTER BENJAMIN, *REFLECTIONS: ESSAYS, APHORISMS AND AUTOBIOGRAPHICAL WRITING* 277 (Edmund Jephcott trans., Schocken Books 1986).

<sup>95</sup> See generally Austin Sarat, *State Transformation and the Struggle for Symbolic Capital: Cause Lawyers, the Organized Bar, and Capital Punishment in the United States*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* (Austin Sarat & Stuart Scheingold eds., 2001).

<sup>96</sup> Zimring and Hawkins suggest that a typical pattern in jurisdictions that abolish capital punishment involves "long periods between the last execution and official abolition." ZIMRING

penalty law is one of the nation's most restrictive, applying only to a short list of six crimes: murder of a law enforcement or corrections officer; murder for hire; murder during a rape or attempted rape, kidnapping or certain drug offenses; hiring someone to commit murder; and murder committed while already serving a sentence of life in prison.<sup>97</sup> In addition, New Hampshire has a low crime rate and a very small minority population.<sup>98</sup> Adding to this picture is its citizen legislature, twenty-four Senators<sup>99</sup> and four hundred members<sup>100</sup> of the House, each of whom is paid \$200 per year for their service.<sup>101</sup>

Yet the action taken by the New Hampshire State Legislature to abolish capital punishment was a significant moment in contemporary abolitionist politics.<sup>102</sup> With it, this conservative state joined Nebraska as the only state to vote to end the death penalty since *Gregg*.<sup>103</sup> With moratoria and abolition on the agenda of several other states, opponents of the death penalty greeted the vote in New Hampshire with great enthusiasm. As Richard Dieter, executive director of the Death Penalty Information Center, said:

This is a very significant move, maybe a bellwether of things to come, who knows? . . . For years, the direction has always been the other way—to add more crimes, to reduce the amount of time or to streamline the appeal process on death row . . . Maybe we won't see other states follow, but this signals a shift in thinking that is growing out there.<sup>104</sup>

A 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. My interest here, however, is more limited. I

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& HAWKINS, *supra* note 2, at 9.

<sup>97</sup> N.H. REV. STAT. ANN. § 630:1 (1996).

<sup>98</sup> Two percent of the population of New Hampshire are minorities. In 1996, there were 98 violent crimes per 100,000 inhabitants, 1.64 murders per 100,000 inhabitants (includes non-negligent manslaughter), and 3,070 total crimes per 100,000 inhabitants. Telephone interview with Patricia Swan, Uniform Crime Reporting Unit of the Criminal Records Unit, New Hampshire Department of Safety (Sept. 24, 2001).

<sup>99</sup> N.H. CONST. pt. 2, art. 25.

<sup>100</sup> *Id.* art. 9.

<sup>101</sup> *Id.* art. 15.

<sup>102</sup> The vote to abolish the death penalty in the House was 191-163; the vote in the Senate was 14-10. Collins, *supra* note 56, at A1.

<sup>103</sup> In both instances, abolition did not become law owing to a gubernatorial veto. Collins, *supra* note 56, at A19.

<sup>104</sup> Kevin Landrigan, *House Says No to Death Penalty*, THE TELEGRAPH ONLINE, Mar. 10, 2000, at [http://archive.nashuatelegraph.com/Daily\\_Sections/News/Archives/2000/march/stories/0310w-deathpenalty.htm](http://archive.nashuatelegraph.com/Daily_Sections/News/Archives/2000/march/stories/0310w-deathpenalty.htm) (last visited Aug. 17, 2001).

focus on the accounts given by state legislators concerning their votes on the death penalty bill for what those accounts reveal about their self-understandings and justifications, and, in particular, the salience of the new abolitionism to death penalty opponents.<sup>105</sup> In the accounts of those votes, elements of the new abolitionism seem to have played a key role, providing political cover and a new rationale, changing minds, and fundamentally altering the landscape on which opposition to capital punishment could be deployed.

### A. *Traditional Abolitionism*

In the United States, opposition to the death penalty traditionally has been expressed in several guises. Some have opposed the death penalty in the name of the sanctity of life.<sup>106</sup> Even the most heinous criminals, so this argument goes, are entitled to be treated with dignity.<sup>107</sup> In this view, there is nothing that anyone can do to forfeit their "right to have rights."<sup>108</sup> Others have emphasized the moral horror, the "evil," of the state willfully taking the lives of any of its citizens.<sup>109</sup> Still others believe that death as a punishment is always cruel and, as such, is incompatible with the Eighth Amendment prohibition of cruel and unusual punishment.<sup>110</sup>

Each of these arguments has been associated with, and is an expression of, humanist liberalism or political radicalism. Each represents a frontal assault on the simple and appealing retributivist rationale for capital punishment.<sup>111</sup> Each puts the opponents of the death penalty on the side of society's most despised and notorious criminals; to be against the death penalty one has had to defend the life of Timothy McVeigh, cop killers, and child murderers. Thus, it is not surprising that while traditional abolitionist arguments have been raised repeatedly in philosophical commentary, political debate, and legal cases, none has ever carried

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<sup>105</sup> During November and December 2000, the author conducted interviews with nineteen members of the New Hampshire State Legislature. These interviews varied in length from between forty-five minutes to over two hours. The sample was constructed by using a snowball technique in which respondents were asked to identify "the key people" in the debate about repeal of the death penalty. Because respondents were promised anonymity, I provide limited demographic or identifying data on each respondent.

<sup>106</sup> See generally ALBERT CAMUS, *REFLECTIONS ON THE GUILLOTINE* (Richard Howard trans., 1959).

<sup>107</sup> See generally HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* (1987).

<sup>108</sup> *Furman v. Georgia*, 408 U.S. 238, 274 n.15 (1972) (Brennan, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 102 (1957)).

<sup>109</sup> GEORGE KATEB, *THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE* 191–92 (1992).

<sup>110</sup> See generally BEDAU, *supra* note 107.

<sup>111</sup> For one example of the retributivist rationale, see WALTER BERNS, *FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY* (1979).

the day in the debate about capital punishment in the United States.

Nevertheless, many of the opponents of the death penalty in the New Hampshire state legislature based their opposition on these kind of traditional abolitionist arguments. Typical is one House member who explained her vote against the death penalty by saying:

I have spent my entire life being against the death penalty . . . and I don't think that the state in my name should be killing people who kill people. I just think that it is murdering someone who murders. And that kind of dynamic is not only immoral, it perpetuates violence rather than believing that everybody, even if they murder someone, has some goodness in them. So, for me, the moral issue is the biggest issue. . . . And, you know, I definitely feel that if you couldn't be somebody who could actually pull the switch . . . if you wouldn't personally be able to do that, then I don't think people should ask somebody else to do that.<sup>112</sup>

Here moral qualms and calculations of utility come together to fuel opposition.

This same combination of moral and utilitarian arguments characterized the following account given by a veteran House member. "This wasn't a particularly hard vote for me," he said.

For some I think it was a gut wrencher, but not for me. That the Speaker of the House said that this should be a "free vote" made it harder for some because they couldn't hide their vote under the banner of party loyalty. But I have very strong feelings about the death penalty. It is wrong, just plain wrong. First, no one is perfect enough to know who should die and when they should die. Only God knows. And, second, the way to value life is not to end life. Third, it is pretty clear that capital punishment doesn't deter anyone. That means that we don't save lives by executing someone. It is all then just a waste.<sup>113</sup>

A member of the state Senate echoed these traditional abolitionist sentiments.

The death penalty is wrong as a matter of common sense and in terms of my personal morality. It is not a deterrent. It doesn't save money. Teaching children that violence is a legitimate way to solve problems is just plain wrong. At a moral level, the death penalty seems to be more about vengeance than about justice. I don't think that we should set ourselves up to play God. You know, let he who is without sin cast the first stone. So I think we just do away with it. Here in New Hampshire we haven't executed anyone in more than a half-century, but it is still not right for our state to say it has the right to kill. And, make no mistake about it, the death penalty is cold blooded killing.<sup>114</sup>

Yet he went on to express skepticism about the "new abolitionism."

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<sup>112</sup> See *supra* note 105.

<sup>113</sup> See *supra* note 105.

<sup>114</sup> See *supra* note 105.

Today we hear a lot about problems with the way the death penalty is administered. Some people say we should get rid of it because it is unfair to poor people or minorities. You know, the argument about unequal justice. And there has been so much with DNA showing that innocent people have ended up on death row that now everyone is nervous, even here where we have a death penalty but never use it, that someone innocent might be executed. But so what? I mean, suppose that we gave poor people better lawyers and worked harder to end racial prejudice in the criminal justice system. Suppose we did DNA testing on everybody, then what? Would it then be alright to use capital punishment? I think that some of my colleagues, even those who voted to repeal our death penalty, still haven't crossed the moral threshold. Do they really want a new and improved form of capital punishment? Or do they think that even if it were reformed that it still should be abolished?<sup>115</sup>

From the perspective of this man and others among the most ardent traditional abolitionists in the New Hampshire legislature, the new abolitionism comes under suspicion because it is unclear whether it is really about abolition at all. As they see it, the new abolitionism lays out a program of reform that might actually strengthen capital punishment by ridding it of some of its most objectionable aspects. In their view, unless or until someone crosses the "moral threshold" to embrace traditional abolition, their opposition to the death penalty cannot be fully trusted.

### *B. Abolitionism Old and New*

Several New Hampshire legislators did not see this tension between traditional and new abolitionist positions. For them, the arguments of the new abolitionists strengthened their already existing abolitionist sentiments. As one Senator explained:

I was always sort of against the death penalty. Something about it didn't sit right with me. I'd been brought up in a very religious home and my parents they thought that mercy and forgiveness were key Christian values. I just believed it too, though I must say that when that police officer, Jeremy Charron, was killed, I thought what's his name, the killer, really didn't deserve to live. Or, you know, when they blow up a building in Oklahoma, it is pretty hard to stick with mercy and forgiveness. And, that is the Governor's strongest argument. So, I was torn. But when you think about all the injustice that is done in figuring out who gets the death penalty, it doesn't seem right. We aren't infallible, so who gets to choose who lives and who dies? That's why I decided to vote to get rid of the whole thing.<sup>116</sup>

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<sup>115</sup> See *supra* note 105.

<sup>116</sup> See *supra* note 105.

A member of the House told me the following:

I've heard so much lately about innocent people on death row. It really gets you wondering. I mean, I never really thought that the death penalty was morally okay, but I didn't really think I could put it in words in a really convincing way. But I paid particular attention to the hearings in the House. There was someone from Arizona, I think, who had been on death row for killing someone who someone else ended up admitting he'd killed. That and what happened in Illinois pretty much convinced me that what I'd been feeling all along was the right thing to feel.<sup>117</sup>

For another member of the House the new abolitionism also re-enforced her existing abolitionist sentiments. She said:

The death penalty is wrong, period. There are no two ways about it. But as wrong as it is it would be the worst to execute the innocent, wouldn't it? And why should someone get the death penalty because they can't afford O.J. Simpson's "dream team"? Here is where the morality and practicality of the thing come together.<sup>118</sup>

Finally, for some the split between morality and practicality was articulated as a matter of private belief versus political necessity. One supporter of abolition put it this way:

Being against the death penalty is really between me and my conscience. I mean, I don't see how the government killing people makes anything any better. It ain't right to kill, and it doesn't matter who does the killing. That's what I think. But that is just what I think and I'm not sure that I could convince anyone else who thought differently. But when it comes to issues having to do with the fairness of the way people get treated, then that's different. Everyone can relate to that. I can go out and explain that I'm against this state having the death penalty because of the real problems in the way it works. No one thinks that rich people should get different punishments just because they are rich. I don't mind giving speeches about that.<sup>119</sup>

From conscience to politics, for this traditional abolitionist, the new abolitionism provided political cover, a safe haven in which private morality gives way to shared values.

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<sup>117</sup> See *supra* note 105.

<sup>118</sup> See *supra* note 105.

<sup>119</sup> See *supra* note 105.

### C. *The New Abolitionism*

As important as the new abolitionism was in supplementing traditional abolitionist sentiments among some New Hampshire legislators, for a small, but crucial, number it seems to have been critical in moving people from support for the death penalty to outright opposition. As a result, it seems safe to say that without the new abolitionism, repeal would not have passed the New Hampshire legislature.<sup>120</sup> It turns out not just to have been important for some traditional opponents of the death penalty, but also to have been an important factor in changing minds and positions. As one Democratic Senator explained:

[M]y entire life I had supported the death penalty. But I changed my mind in the course of the legislative consideration of the repeal bill. The organizers of the bill did a tremendous job in terms of lining up speakers, credentials, law enforcement, prosecutors, people whose family members had been victims of murders. 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. And, it made me stop to think about where we try very hard to administer justice fairly, but invariably a death penalty case is going to be highly charged and very emotional. Therefore the critical examination of the public and the press could be slanted because of the nature of the crime and someone might just be innocent . . . . And, what finally persuaded me to vote against the death penalty was not that I thought it was wrong. As I said on the Senate floor, "[t]he death penalty is an appropriate sentence for somebody who commits a crime for which it can be applied." And 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.<sup>121</sup>

Another Senator noted:

There were compelling arguments made that there had been abuses in the use of the death penalty across the country. And that even though there is no evidence that the death penalty has been used in New Hampshire in a way that would indicate there are similar flaws, these concerns gave rise to a groundswell of effort to push for repeal. We have all had to face the fact that there are abuses of the death penalty and that there is the potential that innocent people could be executed and there is no way of undoing that. When you talk about cases like Timothy McVeigh who, you know, put together a few tons of explosives and intentionally drove them to Oklahoma City to blow up a building. Like lots of people I don't have a real problem with seeing Timothy McVeigh pay with his

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<sup>120</sup> It seems to have played an especially important role in the thinking of several key senators.

<sup>121</sup> See *supra* note 105.

life, but I don't want to see an innocent person executed in this state.<sup>122</sup>

A State Representative explained as follows:

What was really bothersome to me was the attempt by Congress to shorten the appeals process in death cases to almost eliminate habeas corpus. It's really disturbing because if you average out everyone who has ultimately been exonerated on death row, it takes about thirteen years and under the new rules many innocent people wouldn't be alive thirteen years after their death sentence. If Congress has its way these people will be executed in three to five years. You know, it is really a terrible thing to contemplate. In the end, I think that the reason to end the death penalty has as much to do with due process and fairness as anything.<sup>123</sup>

The prospect of executing the innocent was for these and other New Hampshire legislators a powerful force in justifying their vote. It provided a narrative in which fair play and mainstream American values could be said to be put at risk by capital punishment. Rejecting a Rehnquist-style cost-benefit calculation, several legislators suggested that the mere risk of executing the innocent was a kind of absolute moral horror with which they did not want to be even remotely associated.<sup>124</sup>

For others the aspect of the new abolitionism that was most telling was the focus on inequality rather than innocence. One of those who was converted to a position of opposition explained:

I do think that statistically the application of the death penalty seems to be weighted heavily against minorities. Now I never even thought of that before. I wouldn't consider New Hampshire to have the problems they have in New York or Texas. I do believe, however, that across the board, even if we had people who were up for the death penalty, it would probably fall into this category of socio-economic, low income. I don't think it is right that some people are more likely to be executed because of who they are or what kind of lawyers they have rather than what they did.<sup>125</sup>

Another said quite simply: "[t]here aren't too many rich people who end up on death row. It happens to be minorities, of which we don't have a lot, and poor people, and there are plenty of them in New Hampshire, who end up getting death sentences."<sup>126</sup>

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<sup>122</sup> See *supra* note 105.

<sup>123</sup> See *supra* note 105.

<sup>124</sup> The concern about innocence may be particularly strong among legislators because they are close "to the nexus between policy and practice, between 'the death penalty' as statute, and killing people as punishment." ZIMRING & HAWKINS, *supra* note 2, at 22.

<sup>125</sup> See *supra* note 105.

<sup>126</sup> See *supra* note 105.



Still another pointed to the significance of the moratorium in Illinois. "Look," he said:

I would never have been able to vote for this bill if it hadn't been for what happened in Illinois. If I did I would never be re-elected, but after all the press about Illinois, it is safe to say, "Wait a minute. I'm in favor of the death penalty, but I don't think we can actually use it." I'm a rock solid conservative from a solid conservative part of the state, but if a guy like Ryan can pull it off, I thought I could too. Conservatives like me sometimes have to make the hard calls. Voting for repeal was my version of Nixon going to China, but I came to see that you don't have to be a wild eyed radical to say that it is wrong to kill innocent people. It is great in theory, but I have little confidence anymore that anybody can really know if they've gotten it right.<sup>127</sup>

The new abolitionism that these legislators embrace finds its locus in neither liberal humanism nor radicalism, nor in the defense of the most indefensible among us. It is, instead, firmly rooted in the mainstream legal values of due process and equal protection and in a deep concern with what state killing does to American legal and political institutions. Many legislators in New Hampshire, like Justice Blackmun and the ABA, did not reject the death penalty because of its violence, argue against its appropriateness as a response to heinous criminals, or criticize its futility as a tool in the war against crime. Instead, they shifted the rhetorical grounds. In their view, the post-*Furman* effort to rationalize death sentences has utterly failed, and it has been replaced by a policy that favors execution while trimming away procedural protection for capital defendants. For them, this situation has only exacerbated the incompatibility of state killing and legality. As United States Senator Russ Feingold of Wisconsin noted:

At the end of 1999, as we enter a new millennium, our society is still far from fully just. The continued use of the death penalty demeans us. The death penalty is at odds with our best traditions . . . . And it's not just a matter of morality . . . [t]he continued viability of our justice system as a truly just system requires that we do so.<sup>128</sup>

For some New Hampshire legislators, as for Senator Feingold, Justice Blackmun, the ABA, Governor Ryan, and others, the rejection of the death penalty takes the form of an effort to prevent the erosion of the boundaries between state violence and its extra-legal counterpart. Here, we see the new abolitionism come alive as a political calculus. For these legislators, and others like them, the new abolitionism makes it possible to clothe opposition to capital punishment as a type of legal, if not political, conservatism.

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<sup>127</sup> See *supra* note 105.

<sup>128</sup> 145 CONG. REC. S14,566 (daily ed. Nov. 11, 1999) (statement of Sen. Feingold).

## IV. CONCLUSION

The New Hampshire experience suggests that the new abolitionism may provide an invitation to, and an agenda for, legislative action. It speaks to the political realities surrounding state killing by providing a new rhetoric for opponents of state killing. It is, of course, unclear whether that agenda will be, as some opponents of the death penalty worry, really just an agenda for reform rather than a path to outright abolition. What is clear is that it has allowed respectable people to retain their respectability while, at the same time, opposing state killing.

The new abolitionism provides an important contemporary avenue for engagement in the political struggle against capital punishment, allowing opponents to change the subject from the legitimacy of execution to the imperatives of due process, from the philosophical merits of killing the killers to the sociological question of the impact of state killing on our politics, law, and culture.<sup>129</sup> Blackmun's rhetoric enables opponents of state killing to respond to the overwhelming political consensus in favor of death as a punishment; they no longer have to take on that consensus frontally. They can say that the most important issue in the debate about capital punishment is one of fairness and not one of sympathy for murderers, concern for the law abiding and not for the criminal. They can say that we should not let our central democratic and legal values be eroded just so we can execute evildoers.

One can, abolitionists are now able to concede, believe in the retributive or deterrence-based rationalizations for the death penalty and still be against the death penalty; one can be as tough on crime as the next person yet still reject state killing. All that is required to generate opposition to execution is a commitment to democracy, the rule of law, and a mature engagement in responding to society's most severe social problems.

The new abolitionism, while speaking to some of the most pressing issues facing today's capital punishment system, recaptures the spirit of *Furman*. Yet while it calls us back to *Furman*'s critique of the practices of capital punishment and its doubts about whether those practices could be squared with the law's

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<sup>129</sup> Actions like that in the New Hampshire legislature:

reflect an important shift in public attitudes . . . . A quarter-century after the Supreme Court allowed reinstatement of the death penalty, vast numbers of people, including elected officials, are expressing doubt about how it is administered.

. . . .

Though questions about the death penalty previously focused on the morality of state-sanctioned killing, more attention is now being paid to the ability of government to administer the system fairly . . . and in a way that minimizes the risk of executing anyone innocent.

Sara Rimer, *Support for a Moratorium in Executions Gets Stronger*, N.Y. TIMES, Oct. 31, 2000, at A18.

requirements, it radicalizes *Furman* by reminding Americans of this country's continuing inability, now almost thirty years later, to get state killing right. It opens up new arenas for political action, new possibilities for democratic engagement in the effort to end state killing.

It reminds us of the argument of Justice Thurgood Marshall, who, when confronted with evidence of widespread public endorsement of capital punishment, argued as follows:

[W]hether 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.<sup>130</sup>

If they were given such information, Marshall believed, "the great mass of citizens would conclude . . . that the death penalty is immoral and therefore unconstitutional."<sup>131</sup> The new abolitionism, by focusing attention on the practical liabilities of the capital punishment system, makes it possible for legislators to oppose the death penalty and yet to see, and present, themselves as guardians of widely shared values and of the integrity and fairness of our legal institutions.

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<sup>130</sup> *Furman v. Georgia*, 408 U.S. 238, 361 (1972) (Marshall, J., concurring).

<sup>131</sup> *Id.* at 363.

