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Austin Sarat

Charlotte Blackman

Elinor Scout Boynton

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After Abolition: Acquiescence, Backlash, and the Consequences of Ending the Death Penalty

AUSTIN SARAT, CHARLOTTE BLACKMAN, ELINOR SCOUT BOYNTON, KATHERINE CHEN, AND THEODORE PEREZ*

Introduction

The period from 2007 to 2019 was one of the most successful in the modern history of death penalty abolitionism.¹ In that time, ten states abolished capital punishment. Seven did so through the legislative process, while the other three ended the death penalty through a court decision.² In one of those states in Nebraska, legislative abolition was reversed by a referendum vote.³ Nebraska stands out as a vivid example of what scholars

* Austin D. Sarat is the Associate Dean of Faculty and William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College. A leader in the scholarship of death penalty, Professor Sarat has authored or edited over 90 books. He is the author of *The Death Penalty on the Ballot: American Democracy and the Fate of Capital Punishment* (2019), *Mercy on Trial: What It Means to Stop an Execution* (2005) and the co-author of *Gruesome Spectacles: Botched Executions and America's Death Penalty* (2014); Charlotte Blackman, Amherst College '20; Elinor Scout Boynton, Amherst College '20; Katherine Chen, Amherst College '19; Theodore Perez, Amherst College '20.

1. See generally Wayne A. Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium*, 100 MICH. L. REV. 1336, 1336-79 (2002); Gretchen Frazee, *How States Are Slowly Getting Rid of the Death Penalty*, PBS NEWS HOUR (Mar. 13, 2019), <https://www.pbs.org/newshour/nation/how-states-are-slowly-getting-rid-of-the-death-penalty>; STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (Harvard Univ. Press 2003).

2. *State by State*, DEATH PENALTY INFORMATION CENTER (2019), <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>. The states ending capital punishment after 2007 were: New York, New Jersey, New Mexico, Illinois, Connecticut, Maryland, Nebraska, Delaware, Washington, and New Hampshire.

3. AUSTIN SARAT, *THE DEATH PENALTY ON THE BALLOT: AMERICAN DEMOCRACY AND THE FATE OF CAPITAL PUNISHMENT* 86-87 (Cambridge Univ. Press 2019); see also Harry Bruinius, *In Nebraska Vote, Sign of Broader Conservative Backlash to Death Penalty*, CHRISTIAN SCIENCE MONITOR (May 28, 2015), <https://www.csmonitor.com/USA/Politics/2015/0528/In-Nebraska-vote-sign-of-broader-conservative-backlash-to-death-penalty>.

have labelled “backlash”: a strong political and legal reaction in opposition to a controversial decision.⁴

The Death Penalty and Backlash

Abolitionists had good reason to fear such a reaction given what happened several decades earlier in the wake of the United States Supreme Court’s 1972 decision in *Furman v. Georgia*,⁵ which declared the death penalty unconstitutional because of the arbitrary and discriminatory manner in which it was applied.⁶ At the time, some abolitionists thought *Furman* marked the end of the capital punishment in the United States.⁷ As Jack Greenberg of the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund (LDF) stated that “there will no longer be any more capital punishment in the United States.”⁸ Another commentator suggested that “[t]he Supreme Court decision outlawing the death penalty as it is now imposed leaves the door open for Congress or the states to write new laws that would be considered valid. “But the door isn’t open very much.”⁹

However, such predictions were quickly proven wrong.¹⁰ Maurice Chammah of the Marshall Project reports that “[t]he backlash to *Furman* was swift and furious, as state legislatures scrambled to rewrite their laws to satisfy the [C]ourt’s concern that the punishment was arbitrary.”¹¹ It was only a matter of days after the Court’s decision before five states

4. Michael Klarman describes what he believes to be the paradigmatic example of backlash in the reaction to *Brown v. Board of Education*. “Race,” Klarman argues, “became the decisive focus of southern politics, and massive resistance its dominant theme.” See generally Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 1 J. OF AM. HIST. 81, 81-118 (1994).

5. *Furman v. Georgia*, 408 U.S. 238, 239-40, 256-57 (1972).

6. Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1, 1-40 (1972).

7. See generally Hugo Adam Bedau, *The Case Against the Death Penalty*, Capital Punishment Project (American Civil Liberties Union, 1992); see also BANNER, *supra* note 1, at 231-66.

8. MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 215 (Quid Pro Books 2011).

9. Barry Schweid, *New Laws Unlikely on Death Penalty*, THE FREE LANCE-STAR (June 30, 1972), <https://news.google.com/newspapers?id=pAoQAAAAIIBAJ&sjid=2YoDAAAAIIBAJ&pg=3786,38609&hl=en>.

10. Banner, *supra* note 1, at 231-66.

11. Maurice Chammah, *The Odds of Overturning the Death Penalty*, THE MARSHALL PROJECT (Nov. 16, 2015), <https://www.themarshallproject.org/2015/11/16/the-odds-of-overturning-the-death-penalty>.

announced that they intended to reinstate the death penalty.¹² As renowned death-penalty scholars Carol S. Steiker and Jordan M. Steiker note, “The backlash in the early 1970s depended largely on the view that new energy and attention to the death penalty could rescue it from its manifest and manifold problems.”¹³ By May 1973, thirteen states had reinstated the death penalty and by 1976 that number increased to thirty-five.¹⁴

The adverse reaction to *Furman* was also reflected in public opinion. Three months before the decision, 42% of Americans said they were opposed to the death penalty. Four months after *Furman*, opposition to the death penalty had fallen to 32%.¹⁵ By 1976, death penalty support reached a twenty-five year high of 66%.¹⁶ Backlash against *Furman* culminated with the Supreme Court’s 1976 decision in *Gregg v. Georgia*, which held that capital punishment did not violate the 8th and 14th amendments in all circumstances.¹⁷

Of course, *Furman* was not the only mid-twentieth century Supreme Court decision to provoke backlash. To take another prominent example, there is substantial scholarly literature analyzing backlash after the 1973 *Roe v. Wade* decision,¹⁸ in which the Supreme Court held that the Constitution protected abortion rights. Examining public discourse following *Roe*, political science professor Vincent Vecera found that “the Court’s ruling in *Roe v. Wade* played a critical role in transforming how Americans think and talk about abortion.”¹⁹ Other scholars claim that *Roe* helped galvanize a previously dormant anti-abortion movement. Longtime Supreme Court reporter Linda Greenhouse and Yale legal historian Reva

12. Stuart Banner, *The Death Penalty’s Strange Career*, 26 WILSON Q. 70, 70-82 (2002).

13. Carol S. Steiker & Jordan M. Steiker, *Will the U.S. Finally End the Death Penalty?*, THE ATLANTIC (Mar. 15, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/gavin-newsoms-death-penalty-moratorium-may-stick/584977/>.

14. At the time of the *Furman* decision, 40 states had the death penalty on the books. That 35 of these 40 states restored capital punishment is indicative of the severity of the post-*Furman* backlash. Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 1-74 (2007).

15. PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 112 (Nathaniel Persily et al. eds., Oxford Univ. Press 2008).

16. Samuel R. Gross, *The Death Penalty, Public Opinion, and Politics in the United States*, 62 ST. LOUIS UNIV. L.J. 763, 763-79 (2018).

17. *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976). For an analysis of the period between *Furman* and *Gregg*, see EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* (W.W. Norton & Company 2015).

18. *Roe v. Wade*, 410 U.S. 113, 152, 177-78 (1973).

19. Vincent Vecera, *The Supreme Court and the Social Conception of Abortion*, 48 L. & SOC’Y REV. 345, 345 (2014).

Siegel note that “One effect of *Roe* was to mobilize a permanent constituency for criminalizing abortion.”²⁰ Additionally, after *Roe*, Congress passed the first limits on abortion funding,²¹ and many state legislatures enacted restrictions on abortion.²² These actions were taken despite general public support for *Roe*.²³

As the research discussed above suggests, backlash need not take the dramatic form that it did after *Furman*, *Roe*, or when Nebraska reinstated its death penalty. It can be registered in more nuanced ways through institutional actions, social movement activity, public opinion, agitation by opinion leaders and/or public discourse about an issue. Backlash can also manifest itself in the way an issue is reframed after a decision has been made. In a democracy, issues of political import are almost always being framed and reframed as “various political entrepreneurs [attempt] as best they can to affect the debate given changes in the stream of information coming in from forces beyond their control.”²⁴ What this suggests is that public backlash is often produced from the top-down by political leaders

20. Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions about Backlash*, 120 YALE L.J. 2028, 2072 (2011) (quoting Benjamin Wittes, *Letting Go of Roe*, THE ATLANTIC, 2005, at 48, 51); see Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, WASH. & LEE L. REV. 969, 969 (2014); Joe Phillips & Joseph Yi, *Debating Same-Sex Marriage: Lessons from Loving, Roe, and Reynolds*, 55 SOCIETY 25, 25-34 (2018). Ziegler, Phillips, and Yi contend that the *Roe* decision incited an increase in abortion opponents who had been silent beforehand.

21. As Dombink and Hillyard note, “Following *Roe*, a backlash in Congress led to the first set of limitations on abortion funding and the growth of a countermovement. The mobilization of single-issue voters and grassroots activists described by Luker and others represented the emergence of the Christian Right in American politics as we know it today.” JOHN DOMBRINK & DANIEL HILLYARD, *SIN NO MORE: FROM ABORTION TO STEM CELLS, UNDERSTANDING CRIME, LAW, AND MORALITY IN AMERICA* 69-70 (N.Y. Univ. Press 2007).

22. The statistics on abortion related bills introduced to Congress are as follows, 1972: 134 abortion-related bills, 4 enacted; 1973: 260 introduced, 39 enacted; 1974: 189 introduced, 19 enacted. After the decision in January 1973, we note the significant increase in bills introduced in 1973 and 1974 when compared to 1972, before the ruling. See Judith Blake, *The Supreme Court’s Abortion Decisions and Public Opinion in the United States*, 3 POPULATION & DEV. REV. 45, 45-62 (1977).

23. DOMBRINK & HILLYARD, *supra* note 21. According to Gallup, between April 1975 and May 2018 the percentage of people who believed abortions should be illegal in all circumstances never rose above 23%. A majority has always supported abortions in some or all circumstances. See *Abortion*, GALLUP (2018), <https://news.gallup.com/poll/1576/Abortion.aspx> (last visited Nov. 1, 2019).

24. FRANK R. BAUMGARTNER, SUZANNA DE BOEF & AMBER E. BOYDSTUN, *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* 14 (Cambridge Univ. Press 2008).

who seek to leverage public reactions for political gain.²⁵ It involves complex social, cultural, and political elements. In this way, debates surrounding the death penalty resemble other complicated issues in the United States.

The prospect of backlash, in any form, acts as a caution for politicians who might be tempted to push for the end of America's death penalty.²⁶ Politicians have lived in the shadow of the 1988 presidential campaign in which Republicans successfully turned Democratic presidential candidate Michael Dukakis' abolitionism into a crushing political liability.²⁷ For a long time, progressive politicians feared that opposition to capital punishment would lead to accusations that they were soft on crime.²⁸

Acquiescence

But, as powerful as backlash can be, the typical response to even hotly contested governmental decisions is acquiescence.²⁹ As Justice Brandeis famously observed,

“Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”³⁰

25. See generally STUART A. SCHIENGOLD, *THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY* (Longman 1984).

26. David Dagan, *Abolition and Backlash*, WASH. MONTHLY (2014), <https://washingtonthly.com/magazine/marchaprilmay-2014/abolition-and-backlash/> (last visited Sept. 25, 2019).

27. Doug Criss, *This is the 30 year old Willie Horton ad everyone is talking about today*, CNN (Nov. 1, 2018), <https://www.cnn.com/2018/11/01/politics/willie-horton-ad-1988-explainer-trnd/index.html>.

28. For a recent example of such an accusation, see Kimberle Guilfoyle, *Avoid the slippery slope of 'soft-on-crime' policies that progressives want*, THE HILL (Apr. 15, 2019), <https://thehill.com/opinion/criminal-justice/438452-avoid-the-slippery-slope-of-soft-on-crime-policies-that-progressives> (last visited Sept. 25, 2019).

29. See generally Katerina Linos and Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. OF LEGAL STUD. 223, 223-54 (2016); Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 THE REV. OF L. & ECON 715, 715-50 (2008); Katerina Linos & Kimberly Twist, *Controversial Supreme Court Decisions Change Public Opinion – In Part Because the Media Mostly Report on Them Uncritically*, WASH. POST (June 28, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/28/controversial-supreme-court-decisions-change-public-opinion-in-part-because-the-media-mostly-report-on-them-uncritically/?noredirect=on>.

30. *Olmstead v. United States*, 277 U.S. 438, 485 (1928); Carol S. Steiker, *Brandeis in Olmstead: Our Government Is the Potent, the Omnipresent Teacher*, 79 MISS. L.J. 145, 145-74 (2009).

Government actions reframe and reshape the social landscape and public perceptions. Whether immediately or after some period of time, opinion leaders, politicians, and the public generally fall in line. Thus, after *Roe*, the way people talked and thought about abortion changed. As Vecera observes, “following the Court’s articulation of a novel constitutional right, opinion elites should respond by ‘constitutionalizing’ their discourse”³¹

Other research suggests that public opinion ultimately follows the same pattern as public discourse, albeit not immediately. For example, in June 1954, directly following the ruling in *Brown v Board of Education*, 53% of the country approved of the Supreme Court’s decision. By 1961, that percentage increased to 63%, and in 1994, the fortieth anniversary of *Brown*, 87% of Americans approved of the Court’s decision.³² Such a change in public opinion occurs not just after judicial decisions, but often occurs after the passage of legislation.³³

Some scholarly literature has also examined factors that influence the level of acquiescence observed in a community. Professor Catherine Gross suggests that the perceived fairness of a decision and the extent to which relevant stake holders feel that they were involved are key to whether the people regard it as legitimate and feel like they should go along.³⁴ Consequently, acquiescence is more likely when people believe that their voices have been heard.³⁵

31. Vecera, *supra* note 19, at 370. By “opinion elites,” Vecera means people who write opinion pieces in newspapers. Additionally, by “constitutionalizing,” he means that more of those pieces defended the constitutionality of reproductive rights.

32. Joseph Carroll, *Race and Education 50 Years After Brown v. Board of Education*, GALLUP (May 14, 2004), <https://news.gallup.com/poll/11686/Race-Education-Years-After-Brown-Board-Education.aspx>.

33. For an analogous example, see Joseph Schuermeyer et al.’s research on marijuana legislation. Joseph Schuermeyer et al., *Temporal Trends in Marijuana Attitudes, Availability and Use in Colorado Compared to Non-Medical Marijuana States: 2003–11*, 140 DRUG AND ALCOHOL DEPENDENCE 145, 145-55 (2014). See also Julianna Pacheco’s work on gay rights which suggests an ultimate acquiescence of public opinion to whatever the law might be. See also Julianna Pacheco, *Dynamic Public Opinion and Policy Responsiveness in the American States* (Mar. 3, 2010) (unpublished Ph.D. dissertation, Pennsylvania State University) (on file with the Graduate School, Pennsylvania State University).

34. See generally Catherine Gross, *Community Perspectives of Wind Energy in Australia: The Application of a Justice and Community Fairness Framework to Increase Social Acceptance*, 35 ENERGY POL’Y 2727, 2727-36 (2007).

35. This is a key finding of the extensive literature on procedural justice. For example, Tyler observes, “Procedural justice judgments consistently emerge as the central judgment shaping people’s reactions to their experiences with legal authorities. As a consequence, the

The Consequences of Ending Capital Punishment: Three Examples

There has been little research on reactions to post-2007 abolition of the death penalty in American states.³⁶ However, studies of what happened after various European nations abolished capital punishment show the complexities of reactions to those decisions.³⁷ For example, major parties in the United Kingdom collaborated in ending the death penalty by an act of Parliament in 1965.³⁸ At the time the death penalty was abandoned, 65.5% of Britons wished to retain it. Over time, the public became even more invested in the return of England's death penalty. Four years after the end of capital punishment, the percentage of people who supported reinstatement far exceeded the percentage who supported retention in 1965.³⁹ Popular support for the death penalty only dipped below 50% in 2014.⁴⁰ Despite that support, no major party has made an effort to reinstate the practice of capital punishment since the 1990s.⁴¹

France became the last Western European nation to abolish its death penalty in 1981. Part of the reason France was late to end capital punishment among its European peers was the long reign of center-right parties in the French government. When President François Mitterrand and the left took over in 1981, a majority of the French population supported

police and courts can facilitate acceptance by engaging in strategies of process-based regulation—treating community residents in ways that lead them to feel that the police and courts exercise authority in fair ways.” Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME AND JUST. 238, 286 (2003).

36. For exceptions see generally Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation's "Evolving Standards of Decency"*, 15 MICH. J. OF RACE & L. 224, 224-65 (2009); SARAT, *supra* note 3.

37. Moshik Temkin, *The Great Divergence: The Death Penalty in the United States and the Failure of Abolition in Transatlantic Perspective*, (Harv. Kennedy Sch., Working Paper No. RWP15-037, 2015).

38. AUSTIN SARAT & JÜRGEN MARTSCHUKAT, *IS THE DEATH PENALTY DYING?: EUROPEAN AND AMERICAN PERSPECTIVES* 193 (Cambridge Univ. Press 2011); see generally ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* (Oxford Univ. Press 5th ed. 2015).

39. See generally ANDREW HAMMEL, *ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE* (Palgrave Macmillan 2010).

40. Caroline Davies, *Support for Death Penalty Falls in UK, Survey Finds*, THE GUARDIAN (Aug. 12, 2014) <https://www.theguardian.com/world/2014/aug/12/less-half-brito-nssupport-reintroduction-death-penalty-survey>.

41. Additionally, it should be noted that in the Parliament, as in most state legislatures, the representatives convened a commission and provided a detailed profile of facts on the death penalty before voting, which we posit might be why they felt compelled to vote against the interest of their constituents. See generally HAMMEL, *supra* note 35.

capital punishment.⁴² It was not until 1999 that more people opposed the reestablishment of the death penalty than supported it.⁴³ Since 1993, there have been five attempts to reinstate the death penalty in France, none of which were successful.⁴⁴

Finally, although the death penalty has been abolished *de facto* in Canada since December 1962, *de jure* abolition did not occur until 1976.⁴⁵ This was largely due to the Canadian public's strong support for capital punishment. Its supporters argued "that abolishing the death penalty would lead to substantial increases in criminal homicides[,] "in more killings of police officers by criminals[,] and maintained that abolition would be an undemocratic act that went against popular opinion."⁴⁶ In 1987, Canadian Prime Minister and Conservative Party leader Brian Mulroney fulfilled a campaign promise by introducing a resolution in the House of Commons to restore the death penalty. However, the measure failed by a margin of 148-127.⁴⁷

Our Research

Unlike the studies done on abolition in the United Kingdom, France, and Canada, which focus on abolition at the national level, our research focuses on the fate of the death penalty in American states. It concentrates on the post-2007 period and seeks to understand what happened after abolition of the death penalty in New Jersey, New Mexico, Illinois, and Maryland.⁴⁸ We examined newspaper coverage of capital punishment in

42. FRANKLIN E. ZIMRING, *CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (Oxford Univ. Press, 2004).

43. Sophie Guerrier & Maxime Fourmaintraux, *Peine de Mort: Le Long Chemin Vers l'abolition*, LE FIGARO, <http://grand-angle.lefigaro.fr/peine-de-mort-abolition-archives-histoire> (last visited Nov. 11, 2019).

44. *Id.*

45. On December 11, 1962, Canada carried out its last hanging, a double hanging of two murderers in Toronto. In 1967, Liberal Party Prime Minister Lester B. Pearson's Bill C-168 passed in the Canadian House of Commons, beginning a five-year moratorium on the death penalty. In 1976, the House adopted Bill C-84, which officially abolished the death penalty in Canada. Ezzat Fattah, *Canada's Successful Experience with the Abolition of the Death Penalty*, 25 *CANADIAN J. OF CRIMINOLOGY* 421, 423 (1983).

46. *Id.*

47. Ronald Sklar, *Canada Trusts Parliament, Not Polls, on Death Penalty*, L.A. TIMES (Oct. 20, 1987), <https://www.latimes.com/archives/la-xpm-1987-10-20-me-14606-story.html>.

48. New Jersey, New Mexico, Illinois, and Maryland were selected in order to enhance geographic diversity. We include one northeastern state, one mid-Atlantic state, one Midwestern state and one southwestern state. Each of these states abolished the death penalty through legislative action. Finally, none of them were among the most active death

each state to see how and when the framing of arguments for and against capital punishment changed after its abolition and whether the reframing of arguments offers evidence of backlash.

More specifically, we look to variations in the quantity and nature of arguments for and against abolition in the period surrounding a state's decision to abolish the death penalty.⁴⁹ By *argument*, we refer specifically to a statement published in one of a state's two top circulation newspapers that contains both a declaration of a stance (pro-abolition or anti-abolition) and a rationale to support that stance.

Categorization of Arguments for and Against Abolition

In the four states we studied, we identified thirty distinct types of arguments used to support or oppose abolition.

Arbitrariness

Arguments about arbitrariness focus on whether the death penalty is applied in a random way, that is, whether unexplained discrepancies exist in its application.

Example: "The Louisiana case teaches us that capital punishment is always pretty much a haphazard affair."⁵⁰

Class Bias

Unlike arbitrariness, bias arguments deal primarily with the existence of *systematic* partialities in death sentencing. Class bias either recognizes or rejects the notion that death sentences are distributed unevenly across members of different socioeconomic classes who commit the same crime. Statements about the equal or unequal access to adequate representation

penalty states at the time they abolished the death penalty.

49. We only consider statements containing a declaration of a stance to be instances of arguments because our aim is to examine changes in *normative* sentiment surrounding abolition. Statements lacking a stance do not have this normative force, and thus serve only as *positive* observations about the death penalty. For the same reason, we did not consider statements containing a declaration of an ambiguous and/or neutral stance to be instances of an argument. A pro-abolition stance is evidenced either by a declaration in favor of abolition or an announcement against the death penalty. For example, both the statements "I support abolition of the death penalty as a means to save money" and "I oppose the death penalty because it is overly-costly" are examples of pro-abolition arguments. Similarly, an anti-abolition stance is evidenced either by a declaration against abolition or an announcement supporting the death penalty. For example, both the statements "abolition of the death penalty will increase crime rates" and "retention of the death penalty keeps us safe" are examples of anti-abolition arguments.

50. *Fatally Flawed Law*, STAR LEDGER (Sept. 5, 2003).

throughout the trial process as a result of differing levels of wealth also fall into this category.

Example: “Almost all death-row inmates could not afford their own attorney at trial.”⁵¹

Constitutionality

This kind of argument makes claims about the constitutionality of capital punishment, usually under the Eighth Amendment’s prohibition against cruel and unusual punishment.⁵²

Example: “Hill argued that the method of execution in New Mexico constitutes cruel-and-unusual punishment.”⁵³

Corruption

This kind of argument points to deliberate acts of particular individuals that compromise the fairness of death penalty proceedings (e.g., the withholding of evidence by prosecutors).

Example: “The death penalty option has been abused so often by ambitious prosecutors anxious to put another notch on their belts as they prepare to run for higher office that they must be denied this punishment option—even for the obviously guilty.”⁵⁴

Deterrence

Deterrence arguments claim one or more of the following: 1) that the continued existence of the death penalty will prevent *potential* criminals from committing crimes; 2) that the continued existence of the death penalty will not prevent *potential* criminals from committing crimes; 3) that abolishing the death penalty will lead to an increase in crime; or 4) that abolishing the death penalty will not lead to such an increase.

Example: “I say keep the death penalty as it is a deterrent to violent crimes and violent criminals.”⁵⁵

51. Chrysa Wikstrom, *Letters to the Editor*, SANTA FE NEW MEXICAN (Feb. 17, 2011), at A11.

52. Arguments against the death penalty have also been brought under the Fourteenth Amendment’s guarantees of due process of law and equal protection.

53. Anne Constable, *Lethal-Injection Ruling Could Affect N.M.*, SANTA FE NEW MEXICAN (Feb. 26, 2006), at C1.

54. Joe Anderson, *Murder and the Death Penalty*, CHI. TRIB. (May 9, 2008), at 26.

55. Al Eisner, *Letters*, BALTIMORE SUN (Jan. 18, 2009), at B2.

Economy

Economic arguments focus on whether the resources allocated to the death penalty are worth its perceived benefits. Alternatively, they may make claims about whether an alternative punishment (e.g., life imprisonment without the possibility of parole) may be less costly or more beneficial.

Example: “O’Malley said capital cases cost three times as much to try as other homicide cases, and described the process as ‘wasting taxpayer dollars.’”⁵⁶

Frequency

Some people argue that the penalty is so rarely enforced that it ought to be eradicated entirely.

Example: “. . . the fact is that we have a penalty that is not enforced.”⁵⁷

Gender Bias

This argument either recognizes or rejects the notion that death sentences are distributed unevenly across members of different genders who commit the same crime.

Example: “. . . [The death penalty] is biased by gender: Male offenders are statistically more likely to be put to death than females who commit similar crimes.”⁵⁸

Geographic Bias

Geographic bias arguments recognize or reject the notion that death sentences are distributed unevenly across different regions for individuals who commit the same crime.

Example: “Who gets a sentence of life and who gets death is often a matter of . . . geography.”⁵⁹

Humanism

This argument focuses on the question of whether the practice of the death penalty is compatible with what are perceived to be fundamental

56. Earl Kelly, *O’Malley Joins NAACP in Call to End Death Penalty*, THE CAPITAL (Jan. 16, 2013).

57. John M. Shanagher, *Reader Forum: Sure Punishment*, STAR LEDGER (Nov. 30, 2007), at 22.

58. Leonard Pitts, *How Can We Allow Uncertainty to Lead to Execution?*, BALT. SUN (Oct. 27, 2008), at 6.

59. Editorial, *Abolish the Death Penalty: [Chicagoland Final Edition]*, CHI. TRIB. (Mar. 25, 2007).

human rights and/or essential values of civilized society. It is often used in reference to the inherent value of human life.

Example: “The death penalty is a clear indication of low human-rights standards.”⁶⁰

Innocence

Arguments focusing on innocence emphasize the risk of executing innocent people.

Example: “The execution of one innocent person is one too many, and we simply cannot take the risk.”⁶¹

Useful Tool for Law Enforcement

Some people support the death penalty because they think it is a useful tool for securing confessions and guilty pleas.

Example: “Arguing last week against a repeal, Rep. Jim Sacia, R-Pecatonica, said the mere threat of the death penalty can help police secure a confession.”⁶²

Legal Theory

This argument makes a claim about whether the authority to execute any person rests within the purview of our government and legal system, regardless of what the written law, such as the Constitution, might say.

Example: “A few years ago, I changed my view on the death penalty and now believe that the state has no right to kill, whether it be a despicable, incorrigible murderer or a totally innocent unborn baby.”⁶³

Length of Time It Takes to Complete a Death Case

This argument focuses on the typical length of time that death penalty cases require to reach a resolution.

Example: “If there is anything cruel and unusual about the death penalty, it is the never-ending litigation with its constant ups and downs.”⁶⁴

60. Rebecca Procter, *Letters to the Editor*, SANTA FE NEW MEXICAN (Feb. 8, 2011), at A13.

61. Opinion, Andrew Dallos, *Banning Death Penalty a Wise Move*, CHI. SUN-TIMES (Mar. 11, 2011), at 22.

62. *The Senate’s Turn*, CHI. TRIB. (Jan. 11, 2011).

63. Joseph Iwanski, *Reader Forum: Life Term Concerns*, STAR LEDGER (Dec. 24, 2007), at 14.

64. Frederick N. Rasmussen, *Dana Mark Levitz, retired Baltimore County Circuit*

Murder

Some supporters of abolition claim that the death penalty is a form of murder and that by practicing the death penalty, we as a society subject ourselves to a similar degree of moral degradation. By contrast, others argue that the death penalty is not a form of murder and practicing the death penalty does not implicate our society as one that *sanctions murder*.

Example: “Let us encourage our legislators to vote to finally abolish state-sanctioned murder in New Jersey.”⁶⁵

Nonspecific Discrimination

This is an umbrella category for arguments regarding the question of whether the death penalty process contains any type of discrimination. This classification was used in instances where the argument in question does not specify a common type of potential bias (e.g., racial, gender, class, or geographic).

Example: “Backers of the measure said the death penalty is discriminatory.”⁶⁶

Nonspecific Fallibility

This includes an umbrella category of arguments which focus on the legal system’s tendency to make unspecified mistakes.

Example: “Our legal system is clearly flawed, and mistakes get made.”⁶⁷

Nonspecific Lack of Justification

These pro-abolition arguments assert that no reason in favor of the death penalty is strong enough to justify the practice.

Example: “So where’s the logic in state-sanctioned executions? There isn’t any.”⁶⁸

Court judge, dies, BALT. SUN (Jan. 20, 2018), <https://www.baltimoresun.com/obituaries/bs-md-ob-judge-dana-levitz-20180118-story.html>.

65. Nancy Taiani, *Reader Forum: Many Victims*, STAR LEDGER (Nov. 30, 2007), at 22.

66. Dan Boyd, *A Death Penalty’s Final Hour? - Approval Sends Measure to Richardson for Decision*, ALBUQUERQUE J. (Mar. 14, 2009).

67. Leah Popp and Barak Wolff, *Letters to the Editor*, SANTA FE NEW MEXICAN (Feb. 10, 2009), at A.

68. Leonard Pitts, *Choosing Conscience Over Emotion in Illinois*, STAR LEDGER (Jan. 17, 2003), at 19.

Nonspecific Public Protection

This is an umbrella category for arguments concerning the capacity of the death penalty to protect the public from crime. In general, this argument does not specify whether the cause for concern are potential criminals ('deterrence') or already-convicted criminals ('repeat offense').

Example: "And if the death penalty, when appropriately applied, can save even one innocent victim, it will have been worth it."⁶⁹

Procedural Botch (in Execution)

This argument focuses on the risk of a failed or unexpectedly prolonged execution.

Example: "Foes of capital punishment seized on the execution to argue that the death penalty is cruel and unusual punishment, just as they did after two inmates' heads caught fire in Florida's electric chair in 1990 and 1997 and a condemned man suffered a severe nosebleed in 2000."⁷⁰

Proportionality

Proportionality asserts that punishment is justified when it balances the gravity of crime. Pro-abolition arguments suggest that the death penalty is too harsh in relation to any crime, whereas anti-abolition arguments claim the death penalty is the only appropriate punishment for certain heinous crimes.

Example: "We have no problem with imposing the death penalty on those unquestionably guilty of heinous crimes."⁷¹

Public Opinion

Arguments appealing to public opinion assert that the death penalty ought to be retained or abolished by highlighting public support for either of those alternatives.

Example: ". . . I am sure that most Americans are in favor of justice."⁷²

69. Marilyn Flax and Sharon Hazard-Johnson, *Your Views*, NEW JERSEY RECORD (May 8, 2007), at L6.

70. *Critics Say Murderer's Execution Was Botched; Florida Inmate Took 34 Minutes to Die*, THE RECORD (Dec. 15, 2006), at A4.

71. Martin O'Malley, *Our Say: Maryland Needs to End Its Death Penalty Impasse*, THE CAPITAL (Jan. 13, 2013) <https://www.capitalgazette.com/cg2-arc-df3834c6-fced-5ae9-a426-ad2c57f67f9c-20130113-story.html>.

72. Rev. Tom McLaughlin, *Reader Forum: Victims' Pain*, STAR LEDGER (Dec. 24, 2007), at 14.

Slippery Slope

Supporters of capital punishment sometimes argue that abolishing the death penalty would pave the way for changing ultimate punishments to the point where even the most severe sentences would be too lenient.

Example: “How long will it take before some group, with the ACLU’s eager help, decides that life in prison is almost as cruel as the death penalty? These people will make the argument that after 30 or 40 years, murderers are rehabilitated and it would be ‘cruel and unusual punishment’ to keep them locked up. We will have murderers in their 50s and 60s out looking for the people who testified against them.”⁷⁷

Standards of Decency

This argument makes a claim about whether the death penalty is compatible with modern standards of decency in civilized societies.

Example: “‘Civilized people don’t kill,’ said Barbara de Weever of Santa Fe after her audience with Richardson on Monday.”⁷⁸

Victims’ Families

Thinking about the families of murder victims plays a role in the way some people make arguments for and against abolition.

Example: “I think that when the defendant is executed, the family would feel justice is being served.”⁷⁹

Other

This catch-all category includes all arguments not included among the 29 distinct categories defined above.

Example: “Sister Helen said state-trained executioners have confided to her the psychological harm done to them by their participation in executions.”⁸⁰

Abolition in Action: The Stories of Four States

In this section, we track the role that the arguments listed above played in debates about and reactions to abolition in New Jersey, New

w.abqjournal.com/news/state/202325564746newsstate01-20-11.htm.

77. John F. Jernigan, *Reader Forum: Killers’ Blood Lust*, STAR LEDGER (Jan. 17, 2007), at 12.

78. Dan Boyd, *Thinking It Over*, ALBUQUERQUE J. (Mar. 17, 2009).

79. Ernest Tapia, *Letters to the Editor*, SANTA FE NEW MEXICAN (Mar. 8, 2009), at B.

80. Taiani, *supra* note 65.

Mexico, Illinois, and Maryland. Below we present brief overviews of each state's abolition story and then examine the frequency and nature of arguments about capital punishment before and after abolition.

New Jersey

Of the four states we studied, New Jersey was the first to repeal its death penalty which it did at the end of 2007.⁸¹ Indeed, it was the first state in the country to do so in the preceding forty-two years.⁸² While the state reinstated capital punishment in 1982, six years after *Gregg v. Georgia*, New Jersey did not execute anyone after 1963.⁸³

The first rumblings of a serious death penalty repeal effort during the ten-year period of our study began in early 2003 in response to Illinois Governor George Ryan's commutation of 167 death row inmates' sentences.⁸⁴ Governor Ryan's sweeping act was greeted with great enthusiasm by New Jersey abolitionists.⁸⁵ Their activity resulted in the passage of a bipartisan bill calling for a study of the death penalty in 2003.⁸⁶ That legislation, however, was vetoed by then-governor James McGreevey.⁸⁷

One year after Governor McGreevey's veto, a death row inmate named Robert Marshall was granted a new trial when a judge ruled that his original trial had been unfair.⁸⁸ Abolitionists championed the Marshall

81. Henry Weinstein, *N.J. on Verge of Repealing Death Penalty*, L.A. TIMES (Dec. 14, 2007), <https://www.latimes.com/archives/la-xpm-2007-dec-14-na-abolish14-story.html>; RAYMOND J. LESNIAK, *THE ROAD TO ABOLITION: HOW NEW JERSEY ABOLISHED THE DEATH PENALTY* 65 (Kean Univ. Press 2008).

82. Elise Young, *Slaying of N.J. Family Draws Calls to Bring Back Death Penalty*, BLOOMBERG (Dec. 5, 2018), <https://www.bloomberg.com/news/articles/2018-12-05/slaying-of-n-j-family-draws-calls-to-bring-back-death-penalty>.

83. *New Jersey Abolishes Death Penalty*, NPR (Dec. 17, 2007), <https://www.npr.org/templates/story/story.php?storyId=17314934>.

84. LESNIAK, *supra* note 81, at 12.

85. *Id.*

86. Barbara Fitzgerald, *Rethinking the Death Penalty*, N.Y. TIMES (Dec. 14, 2003), <https://www.nytimes.com/2003/12/14/nyregion/rethinking-the-death-penalty.html>; *see also* LARRY W. KOCH, COLIN WARK & JOHN F. GALLIHER, *THE DEATH OF THE AMERICAN DEATH PENALTY: STATES STILL LEADING THE WAY* 43 (Northeastern Univ. Press 2012).

87. Barbara Fitzgerald, *Rethinking the Death Penalty*, N.Y. TIMES (Dec. 14, 2003), <https://www.nytimes.com/2003/12/14/nyregion/rethinking-the-death-penalty.html>; *see also* LARRY W. KOCH, COLIN WARK & JOHN F. GALLIHER, *THE DEATH OF THE AMERICAN DEATH PENALTY: STATES STILL LEADING THE WAY* 43 (Northeastern Univ. Press 2012).

88. Leigh B. Bienen, *Not Wiser after 35 Years of Contemplating the Death Penalty*, 42 *STUD. IN L., POL. & SOC'Y* 91, 101 (2008).

case as a prime example of errors pervasive throughout the death penalty system. A few months later, Ocean County Prosecutor Thomas Kelaheer announced that he would no longer pursue capital punishment in Marshall's case, which further fanned the flames of abolition sentiment.⁸⁹ Death penalty opponents argued that if a killer as "particularly depraved" and "cold-blooded" as Marshall could not be executed, then no one deserved the death penalty.⁹⁰

Pro-abolition sentiment gained further momentum in 2005⁹¹ when, in December of that year, California executed Stanley Tookie Williams.⁹² His story was featured prominently in *The Star Ledger*, New Jersey's largest circulation newspaper. New Jersey abolitionists frequently invoked the Williams execution and the allegations of racism that surrounded it to punctuate their own arguments against the death penalty.⁹³

While the controversies surrounding the Marshall and Williams cases continued, a group called New Jerseyans for Alternatives to the Death Penalty released a report detailing what it found to be the exorbitant costs of maintaining the death penalty⁹⁴ and proposed a bill to replace it with life in prison without the possibility of parole.⁹⁵ However, allies in the legislature wanted to wait until known death penalty opponent Governor-elect Jon Corzine took office.⁹⁶

Meanwhile, Catholic organizations joined New Jersey's anti-death penalty activists and pushed both for the creation of a death penalty study commission and a moratorium on executions.⁹⁷ Their support was critical

89. *Id.*

90. Robert Schwaneberg, *Case Shows Cracks in Death Penalty System*, STAR LEDGER (May 14, 2006), at 35.

91. *See id.*

92. *Crips Co-Founder Williams Put to Death*, NPR (Dec. 13, 2005), <https://www.npr.org/templates/story/story.php?storyId=5050214>.

93. *See generally* Steve Lopez, *A Killer Isn't Alone in His Barbarism - Tookie's No Martyr but His Execution Can't Be Defended*, STAR LEDGER (Dec. 15, 2005), at 19; John M. Crisp, *Rethinking the Death Penalty*, THE RECORD (Feb. 16, 2006), at L11.

94. Mary E. Forsberg, *Money For Nothing? The Financial Cost of New Jersey's Death Penalty*, NEW JERSEYANS FOR ALTERNATIVES TO THE DEATH PENALTY (Nov. 2005), <http://www.njadp.org/forms/cost/MoneyforNothingNovember18.html> (last visited Nov. 1, 2019).

95. Jessica S. Henry, *New Jersey's Road to Abolition*, 29 THE JUST. SYS. J. 408, 408-22 (2007).

96. Lesniak, *supra* note 81, at 61.

97. Religious groups such as the U.S. Conference of Catholic Bishops proved to be an especially powerful force behind the death penalty repeal effort. Bishops were looking to persuade Catholic politicians to vote in accordance with their professed faith, which

in a state where 40% of the residents were Catholics. New Jerseyans for Alternatives to the Death Penalty supported this call for a study and a moratorium; Sister Helen Prejean, the nationally known opponent of capital punishment, visited New Jersey to lobby legislators.⁹⁸ The legislature responded favorably to the proposal for a commission, and in 2005 a thirteen member body was created to study the death penalty's costs and procedures.⁹⁹

In January 2007, the New Jersey Death Penalty Study Commission recommended the elimination of capital punishment by an 11-1 vote, a suggestion that Governor Corzine strongly supported.¹⁰⁰ The Commission made eight separate findings of fact: (1) the death penalty does not serve a legitimate penological interest; (2) the costs of the death penalty are greater than life without possibility of parole; (3) the death penalty is inconsistent with evolving standards of decency; (4) there is no invidious racial bias in the application of the death penalty in New Jersey; (5) abolition will eliminate the risk of disproportionality in sentencing; (6) the penological gain in executing a small number of guilty persons is not sufficiently compelling to justify the risk of an irreversible mistake; (7) life without possibility of parole ensures public safety and addresses other legitimate penological interests, including the interests of the families of murder victims; and (8) sufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims.¹⁰¹

Following the commission's report, legislation to end the death penalty began to move through the House and Senate. In May 2007, the Senate Judiciary Committee approved a bill sponsored by Senator Raymond Lesniak calling for replacing the death penalty with life imprisonment without the possibility of parole.¹⁰² After Senator Lesniak's bill passed both houses and easily earned Governor Corzine's signature, New Jersey became the first state to eliminate capital punishment through legislative means in the twenty-first century.¹⁰³

emphasized the sanctity of all life.

98. New Jerseyans for a Death Penalty Moratorium was another notable activist group.

99. *New Jersey Death Penalty Study Commission*, NEW JERSEY LEGISLATURE, https://www.njleg.state.nj.us/committees/njdeath_penalty.asp (last visited Aug. 18, 2019).

100. Henry, *supra* note 95, at 415.

101. See State of New Jersey, "New Jersey Death Penalty Study Commission Report," (January 2007), https://www.njleg.state.nj.us/committees/dpsc_final.pdf.

102. See *generally*, Lesniak, *supra* note 81.

103. The National Association for the Advancement of Colored People (NAACP) supported the death penalty repeal measure in 2007, although it did not play as big a role in New Jersey as it did in Maryland. Kirk Bloodworth was also a very active figure in the abolition movement, giving multiple speeches at universities and study commission panels.

The impact of New Jersey's abolition was "largely symbolic" since there had been no executions in the previous forty years.¹⁰⁴ Nonetheless, a year after abolition, Senator Lesniak called it "one of the most significant achievements of my life."¹⁰⁵ Three years after the repeal that achievement seemed to be put in jeopardy when Senators Robert Singer (R-Ocean) and Anthony Bucco (R-Sussex) introduced a bill to reinstate capital punishment following the murder of a Lakewood, New Jersey police officer, Chris Matlosz.¹⁰⁶ Their legislation called for death in cases where children or police officers were murdered, as well as when death results from a terrorist attack.¹⁰⁷ It had nine co-sponsors, but ultimately failed.¹⁰⁸

Death Penalty Arguments Before and After Abolition in New Jersey

We examined the arguments about the death penalty that appeared in the two largest circulation newspapers in New Jersey, *The Record* and *The Star Ledger*, over the five years preceding and five years following abolition. In that period, we identified 750 discrete arguments, 599 of which were published before the date of abolition, December 17, 2007, and 151 of which were published after that date. Overall, proponents of abolition were much more active in advancing their cause than were the

He was wrongly convicted of raping and murdering a child in 1985, and spent almost nine years in prison, two on death row, before DNA evidence exonerated him.

104. Henry, *supra* note 95.

105. Rudy Larini, *A Year Later, State Assesses Justice Without Death Penalty*, STAR LEDGER (Dec. 15, 2008), <https://www.atlanticphilanthropies.org/news/year-later-state-assesses-justice-without-death-penalty>.

106. Chris Megerian, *Lakewood Police Officer Chris Matlosz Shot to Death 'Execution-Style' While on Duty*, NJ.COM (Jan. 15, 2011), https://www.nj.com/news/2011/01/lakewood_police_office_chris_m.html.

107. *Death Penalty Debate Is Revived In N.J.*, YESHIVA WORLD NEWS (Apr. 2, 2011), <https://www.theyeshivaworld.com/news/headlines-breaking-stories/88715/death-penalty-debate-is-revived-in-n-j.html>.

108. Support for capital punishment remains high in New Jersey. Fifty-seven percent favored it in a 2015 Fairleigh Dickinson University PublicMind poll. Randy Bergmann, *Don't Resurrect New Jersey's Death Penalty*, ASBURY PARK PRESS, (Feb. 27, 2018), <https://www.app.com/story/opinion/editorials/2018/02/27/death-penalty-new-jersey/377331002/>; In 2018, Assemblymen Ronald Dancer and Ned Thomson and Sen. Robert Singer introduced legislation calling for the reinstatement of capital punishment. Bob Jordan, *NJ Death Penalty: These GOP Lawmakers Want to Bring It Back*, ASBURY PARK PRESS, (Feb. 27, 2018), <https://www.app.com/story/news/politics/new-jersey/2018/02/27/nj-death-penalty-these-gop-lawmakers-want-back/374409002/>; Travis Fredschun, *New Jersey Mansion Murders Spur Calls for State to Reinstate Death Penalty*, FOX NEWS (Dec. 9, 2018), <https://www.foxnews.com/us/new-jersey-mansion-murders-spur-calls-for-state-to-reinstate-death-penalty>.

death penalty’s supporters. Before abolition, there were 485 pro-abolition arguments and 114 anti-abolition ones; after abolition, these numbers dropped to 93 and 58 respectively (see TABLE 1).

TABLE 1 NEW JERSEY TOTAL ARGUMENTS

	Before Abolition	After Abolition	Total
For Abolition	485	93	578
Against Abolition	114	58	172
Total	599	151	750

The numbers of pro-abolition and anti-abolition arguments rose and fell in synchrony through this ten-year period. Five years prior to its abolition, the death penalty was a much less salient subject for New Jersey’s citizens than in the two years before that decision. After abolition, controversy abated quickly. As would be expected, both reached their highest points in the year just before the decision to end capital punishment occurred, with pro-abolition arguments numbering 171 and anti-abolition arguments numbering 47. After abolition, the numbers of arguments for both sides fell dramatically to less than 20 per year (see TABLE 2).

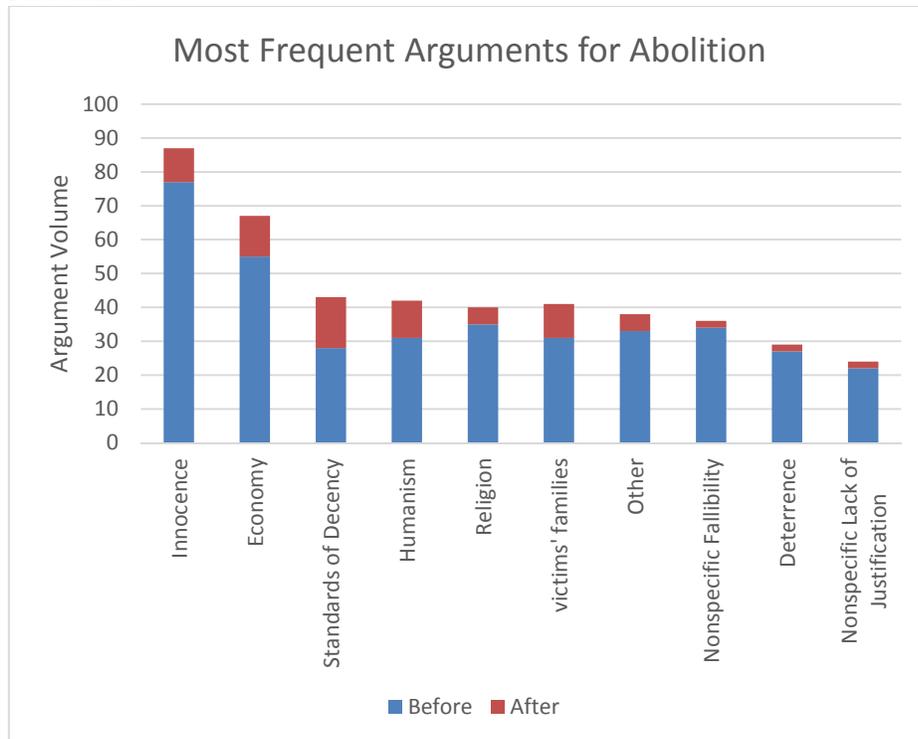
TABLE 2. New Jersey ARGUMENTS BY YEAR¹⁰⁹

	Y1 (12/16/ 2002- 12/17/ 2003)	Y2 (12/16/ 2003- 12/17/ 2004)	Y3 (12/16 /2004- 12/17/ 2005)	Y4 (12/15/ 2006- 12/17/ 2006)	Y5 (12/16/ 2006- 12/17/ 2007)	Y6 (12/16/ 2007- 12/17/ 2008)	Y7 (12/16/ 2008- 12/17/ 2009)	Y8 (12/16/ 2009- 12/17/ 2010)	Y9 (12/16/ 2010- 12/17/ 2011)	Y10 (12/16/ 2011- 12/17/ 2012)	Total
For	63	52	73	127	171	63	11	2	10	6	578
Against	23	8	14	22	47	37	8	1	6	6	172
Total	86	60	87	149	218	100	19	3	16	12	750

109. We denote years as Y1-Y10 meaning the first through tenth year of study. We choose to express our data this way, instead of by calendar year, because our ten-year span is defined as five years before the exact date of abolition, to five years after. This means that Y5, the last full year before abolition, ends one day before abolition date in each state. Because abolition did not take place on January 1st in any of our states, each year of study contains part of two calendar years.

Innocence arguments (77) were the most common arguments made in support of abolition in the period before it was accomplished. Arguments about the death penalty's economic costs were also frequently made (67) (see FIGURE 1). Both of these arguments exemplify what Sarat has called "the new abolitionism."¹¹⁰ New abolitionist arguments tend to be more pragmatic and less philosophical than traditional arguments against the death penalty. They focus on defects in the way the death penalty system works rather than the moral evil of execution. Innocence arguments experienced the most notable change in frequency from the pre-abolition period to the post-abolition period. This argument only appeared 10 times after abolition.

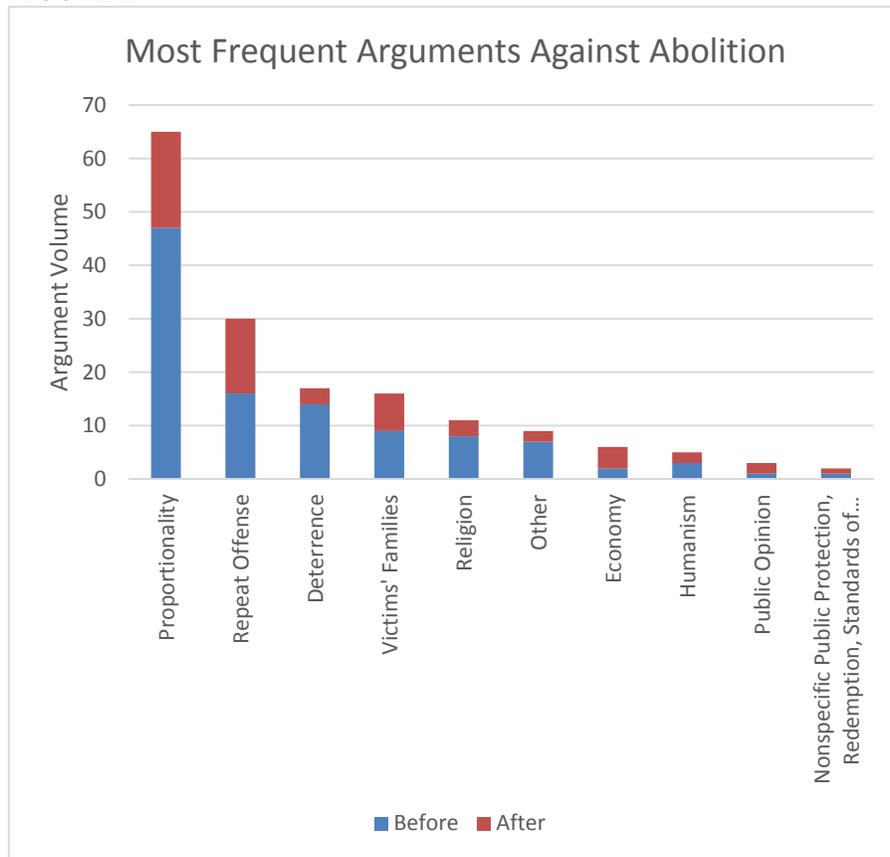
FIGURE 1



110. Austin Sarat, *The "New Abolitionism" and the Possibilities of Legislative Action: The New Hampshire Experience*, 63 OHIO ST. L.J. 343, 355 (2002).

Proportionality (47) was the most common pro-death penalty argument in the period before abolition. The next most frequent among pro-death penalty arguments was repeat offense, which only occurs 16 times. The fact of abolition did not alter the kinds of arguments made against ending the death penalty. Proportionality (18) and repeat offense (14) remained the most common arguments in favor of reinstating capital punishment after its abolition. (see FIGURE 2).

FIGURE 2



The debate about New Jersey’s death penalty had an odd quality to it. Indeed, to call it a debate may not be quite right. As consideration of whether to repeal capital punishment proceeded, abolitionists and supporters of the death penalty operated in different argumentative

universes. Both before and after abolition, they largely talked past each other instead of directly engaging arguments made by the other side.

Moreover, the rapid decrease in the total number of arguments about the death penalty following its abolition in both *The Record* and *The Star Ledger* suggests that New Jersey's repeal was mostly met with acquiescence. Unlike an increase in arguments against abolition or in favor of reinstatement that may be indicative of backlash, the number of pro-death penalty arguments did not rise relative to anti-death penalty arguments after abolition. This remained true even after the 2011 shooting of police officer Matlosz and the subsequent call for the death penalty's reinstatement.

New Mexico

At the time New Mexico abolished the death penalty in 2009,¹¹¹ 64% of New Mexicans supported replacing it with life in prison without the possibility of parole and restitution to victims' families.¹¹² The preceding years had witnessed three unsuccessful repeal efforts. In 2005, Representative Gail Beam (D-Albuquerque) introduced an abolition bill in the state legislature.¹¹³ His efforts were strongly supported by Catholic groups which generally played a prominent role in the campaign to end New Mexico's death penalty.¹¹⁴ Archbishop Michael J. Sheehan said at the time Beam introduced her bill, "ending the death penalty is one of the New Mexico Catholic Conference's top legislative priorities" and, with a few other bishops, he met with Governor Bill Richardson in an attempt to win his support for Representative Beam's repeal bill.¹¹⁵ While that bill was

111. *New Mexico Abolishes Death Penalty*, CBS NEWS (Mar. 18, 2009, 2:38 PM), <https://www.cbsnews.com/news/new-mexico-abolishes-death-penalty/>.

112. *Death Penalty Abolished in New Mexico - Governor Says Repeal Will Make the State Safer*, DEATH PENALTY INFORMATION CENTER, (Mar. 19, 2009), <https://deathpenaltyinfo.org/news/death-penalty-abolished-in-new-mexico-governor-says-repeal-will-make-the-state-safer>; Archdiocese of Balt., *New Mexico's Decision to Abolish Death Penalty Marked at Rome's Colosseum*, CATHOLIC REVIEW, (Jan. 19, 2012), <https://www.archbalt.org/new-mexicos-decision-to-abolish-death-penalty-marked-at-romes-colosseum/>.

113. The effort actually echoed a similar effort four years previous, where a death-penalty ban came within one vote of passing the Senate.

114. In addition to garnering notable religious support, the death penalty repeal effort in New Mexico also had the backing of many death-penalty activist groups, such as the New Mexico Coalition to Repeal the Death Penalty.

115. Steve Terrell, *Sheehan, Bishops Seek Support for Death Penalty Repeal*, SANTA FE NEW MEXICAN (Jan. 28, 2005), at A1.

adopted by the state's House of Representatives by a 38-31 margin, it died in a State Senate committee.¹¹⁶

Even if Representative Beam's repeal bill had been enacted in 2005, it was not clear that the governor would have signed it. Pundits predicted that doing so would be tantamount to a "political death warrant" for someone like Governor Richardson, who had national political ambitions.¹¹⁷ As one commentator observed, "Richardson was hardly an anti-death penalty crusader looking for any opportunity to abolish capital punishment. In fact, prior to 2009, Richardson was a 'strong supporter' of the death penalty. He voted in favor of capital punishment as a U.S. Congressman in 1994 and said he would have vetoed abolition legislation during his first term as governor, from 2003 to 2007."¹¹⁸

Although, in 2007, a similar bill was also derailed before even reaching the Senate floor,¹¹⁹ the abolition movement in New Mexico was reinvigorated after New Jersey's successful efforts to end the death penalty.¹²⁰ The abolition effort received vigorous support from Catholic groups. The U.S. Conference of Catholic Bishops issued a statement supporting abolition: "Pope Benedict XVI and his predecessor, Pope John Paul II, have called for the end to the use of the death penalty as a sign of greater respect for all human life."¹²¹ Representative Gail Chasey's repeal bill passed the House 40-28, with most Democrats voting for it and most Republicans against it.¹²² The New Mexico Senate concurred in early 2009.¹²³ Two days later, Governor Richardson signed the bill into law.¹²⁴

116. Death Penalty Study Guide, The League of Women Voters of New Mexico at 2 (2006), <https://www.lwvnm.org/deathpenalty/DeathPenalty.pdf>.

117. Steve Terrell, *Death-Penalty Debate Comes for the Governor*, SANTA FE NEW MEXICAN (Feb. 27, 2005), at A1.

118. Nicholas M. Parker, *The Road to Abolition: How Widespread Legislative Repeal of the Death Penalty in the States Could Catalyze a Nationwide Ban on Capital Punishment*, 5 LEGIS. AND POL'Y BRIEF 65, 86 (2013).

119. Press Release, Equal Justice Initiative, New Mexico Abolishes Death Penalty (March 18, 2009) (<https://eji.org/news/new-mexico-abolishes-death-penalty>) ("An online poll by the Albuquerque Journal showed today that 66% of some 5,300 respondents supported Richardson signing the bill.").

120. See Emily Louise Pryor, *Democrats and the Death Penalty: An Analysis of State Democratic Leaders' Death Penalty Platforms and Public Opinion*, DICKINSON SCHOLAR (May 18, 2014), at 28-33.

121. Steve Terrell, *Death Penalty Groups, Officials Look to Sway Richardson*, SANTA FE NEW MEXICAN (Mar. 17, 2009), at A1.

122. Steve Terrell, *House Votes Against Capital Punishment*, SANTA FE NEW MEXICAN (Feb. 12, 2009), at A6.

123. Dan Boyd, *Death Penalty Out?*, ALBUQUERQUE J. (Mar. 14, 2009), <https://w>

At the signing ceremony, Governor Richardson said, “Faced with the reality that our system for imposing the death penalty can never be perfect, my conscience compels me to replace the death penalty with a solution that keeps society safe.”¹²⁵

An editorial in the *Santa Fe New Mexican* “opined that repeal ‘isn’t really that big a deal’ given how infrequently the State employed the death penalty to begin with.”¹²⁶ Nevertheless, the abolition of capital punishment was met with more resistance than had been the case in New Jersey. Indeed, “talk of reversing the repeal began almost immediately in New Mexico—despite broad public support for abolition.”¹²⁷

Soon thereafter Governor Richardson signed the repeal bill, Bernalillo County Sheriff Darren White proposed restoring the death penalty through a ballot referendum.¹²⁸ This idea was supported by both the Santa Fe Police Chief, Eric Johnson, and the Santa Fe County Sheriff, Greg Solano, who claimed that the death penalty was a vital law enforcement tool as well as an effective deterrent.¹²⁹ However, the Santa Fe County District Attorney, Angela Pacheco, refused to support the referendum effort, which eventually failed.¹³⁰

Reflecting the often top-down nature of backlash, Republican Governor Susana Martinez launched a second reinstatement effort two years later. As the governor stated in her inaugural address:

“We should . . . send the message that some crimes deserve the ultimate punishment. When a monster rapes and murders a child or a criminal kills a police officer, the death

www.abqjournal.com/news/xgr/14114624xgr03-14-09.htm.

124. Oliver Burkeman, *New Mexico Bans Death Penalty*, THE GUARDIAN (Mar. 19, 2009), <https://www.theguardian.com/world/2009/mar/19/new-mexico-death-penalty-ban>.

125. Archdiocese of Balt., *New Mexico Repeals Death Penalty after Governor Changes His Mind*, CATHOLIC REVIEW (Jan. 19, 2012), <https://www.archbalt.org/new-mexico-repeals-death-penalty-after-governor-changes-his-mind/>; see generally Bill Richardson, *I Carried out the Death Penalty as a Governor. I Hope Others Put It to Rest*, WASH. POST (June 13, 2017), https://www.washingtonpost.com/posteverything/wp/2017/06/13/_tras-hed-2/.

126. Nicholas M. Parker, *The Road to Abolition: How Widespread Legislative Repeal of the Death Penalty in the States Could Catalyze a Nationwide Ban on Capital Punishment*, 5 LEGIS. AND POL’Y BRIEF 65, 87 (2013).

127. *Id.*

128. Jason Auslander, *Death Penalty, Police Back Plan to Reverse Ban*, SANTA FE NEW MEXICAN (Mar. 21, 2009), at C1.

129. *Id.*

130. *Id.*

penalty should be an option for the jury. That's why I am calling on the legislature to repeal the repeal and reinstate the death penalty."¹³¹

In letters to the editor of the *Santa Fe New Mexican*, citizens voiced their opposition to the governor's effort. One letter observed that "Gov. Susana Martinez's intention to reinstate the death penalty in New Mexico sounds more like a campaign speech than the comment of a governor facing huge budget problems."¹³² Another letter stated "the death penalty is a barbaric, counter-productive relic of ancient and medieval times. All modern, progressive countries have abolished it. The state of New Mexico abolished it. Gov. Susana Martinez must not attempt to bring it back!"¹³³ In the end, Governor Martinez's proposal also encountered fierce opposition and failed in a legislature controlled by Democrats.¹³⁴

Arguments About the Death Penalty in New Mexico Before and After Abolition

We examined arguments about the death penalty published in *The Albuquerque Journal* and *The Santa Fe New Mexican*, the state's highest circulation newspapers, over a ten-year period. There we found a total of 306 arguments starting in the five years leading to, and including the year of, the New Mexico's abolition of capital punishment and ending five years after abolition. Over the ten-year period of our study, 234 arguments supporting abolition appeared in *The Albuquerque Journal* and *The Santa Fe New Mexican* as did 72 arguments against doing so. Prior to abolition, there were 171 arguments for abolition and 49 against, while after abolition 63 arguments were made in support of that decision and 23 were offered in opposition (see TABLE 3).

131. Governor Susana Martinez, State of the State Address at the New Mexico House of Representatives (Jan. 18, 2011) (transcript at <https://www.koat.com/article/susana-martinez-s-full-state-of-the-state-speech/5035274>).

132. Rob Steiner, *Looking In: Letters to the Editor No Time to Rehash Death-Penalty Debate*, SANTA FE NEW MEXICAN (Jan. 25, 2011), at A10

133. Reuben Hersh, *Letters to the Editor: Preserve Repeal*, SANTA FE NEW MEXICAN (Feb. 8, 2011), at A13

134. For a discussion of subsequent efforts to restore New Mexico's death penalty see Lucy Schouten, *Why New Mexico Wants to Restore the Death Penalty*, CHRISTIAN SCIENCE MONITOR (Aug. 18, 2016), <https://www.csmonitor.com/USA/Justice/2016/0818/Why-New-Mexico-wants-to-restore-the-death-penalty>; Andrew Oxford, *Effort to Reinstate Death Penalty Dies Quickly*, N. M. POLITICAL REPORT (Feb. 3, 2018), <https://nmpoliticalreport.com/2018/0203/effort-to-reinstate-death-penalty-dies-quickly/>

TABLE 3 New Mexico Total Arguments

	Before Abolition	After Abolition	Total
For Abolition	171	63	234
Against Abolition	49	23	72
Total	220	86	306

The largest concentration of arguments (100) about New Mexico's death penalty appeared between 2004 and 2005, several years before abolition. After that period, arguments in the newspapers dropped to a low (11) in Y2, before climbing back up to 74 arguments the year the death penalty was abolished. Total arguments dropped to 29 in Y6 then spiked to 50 in Y7, when Governor Martinez proposed restoration of capital punishment. After the failure to reinstate capital punishment, arguments concerning the death penalty declined to 0 in the period between 2013 and 2014, suggesting that New Mexico's residents mostly accepted the decision to end the state's death penalty (see TABLE 4).

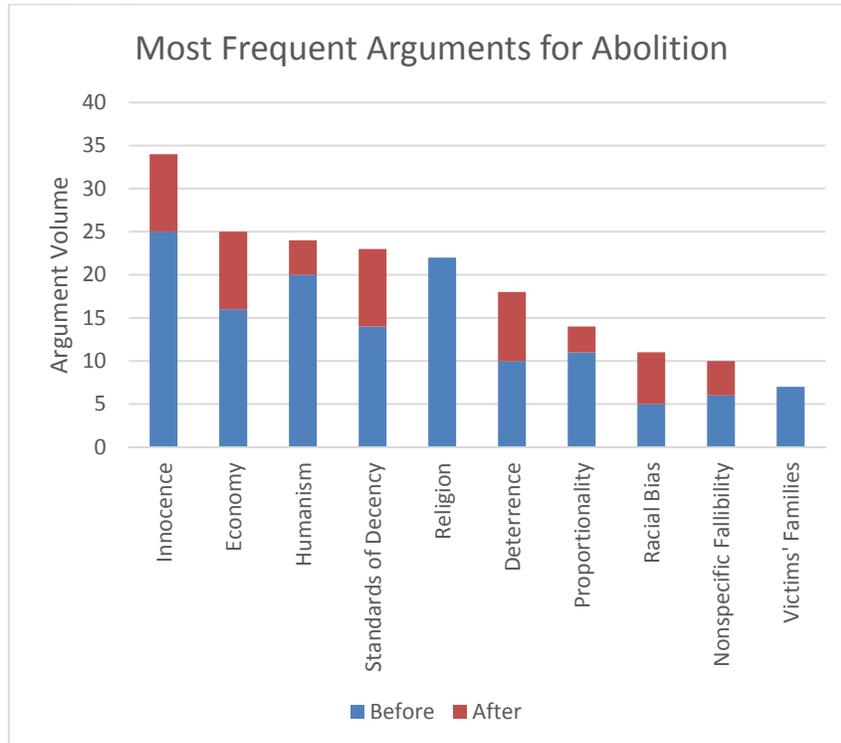
TABLE 4 New Mexico Argument by Year

	Y1 (3/8/2004-3/7/2005)	Y2 (3/8/2005-6)	Y3 (3/8/2006-7)	Y4 (3/8/2008)	Y5 (3/8/2009)	Y6 (3/8/2010)	Y7 (3/8/2011)	Y8 (3/8/2012)	Y9 (3/8/2013)	Y10 (3/8/2014)	Total
For	78	9	15	13	56	16	43	1	3	0	234
Against	22	2	3	4	18	13	7	3	0	0	72
Total	100	11	18	17	74	29	50	4	3	0	306

The most frequent arguments in favor of ending the death penalty made prior to abolition were innocence (25), religion (22), humanism (20), economy (16), standards of decency (14), and proportionality (11). Here, we see a greater mix of old and new abolitionist arguments than we found

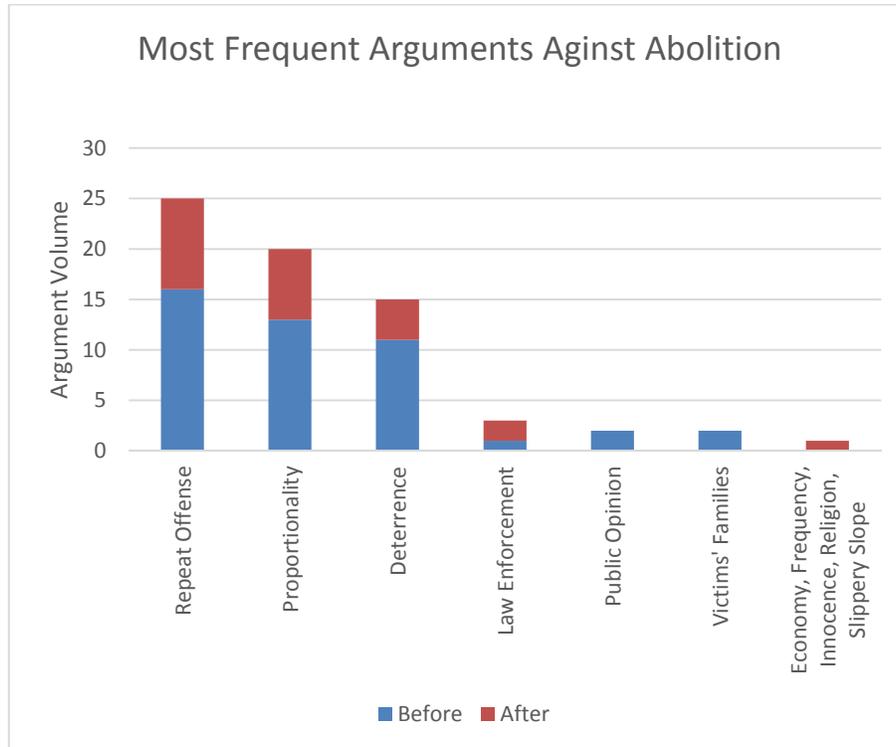
in New Jersey. After abolition, arguments supporting that decision were made less frequently, e.g. innocence (9), economy (9), standards of decency (9), deterrence (8), and racial bias (6). Overall in our ten-year period, the most frequent arguments for abolition were innocence (34), economy (25), humanism (24), standards of decency (23), and religion (22) (see FIGURE 3).

FIGURE 3



Before abolition, the most frequent pro-capital punishment arguments were repeat offense (16), proportionality (13), and deterrence (11). After abolition, the most frequent of such arguments continued to be repeat offense (9), proportionality (7), and deterrence (4). In the ten-year period surrounding abolition, repeat offense (25), proportionality (20), and deterrence (15) arguments were made more frequently than all other arguments opposing repeal of the death penalty (see FIGURE 4).

FIGURE 4



With the exception of the debate surrounding Governor Martinez's proposal to reinstate the death penalty, the decision to end it did not stir up much controversy or resistance from residents of New Mexico.

Illinois

While Illinois officially abolished its death penalty in 2011, after New Jersey and New Mexico, what happened in the lead up to its abolition was, as we suggested above, influential throughout the country.¹³⁵ Governor George Ryan's moratorium on executions in 2000 was especially

135. Henry Weinstein, *Move Will Intensify Debate on Executions*, L.A. TIMES (Jan. 12, 2003), <https://www.latimes.com/archives/la-xpm-2003-jan-12-na-death12-story.html>; Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions: Looking Beyond Innocence, Race, and Bad Lawyering in Death Penalty Cases*, 10 PSYCHOL. PUB. POL'Y & L. 577, 579 (2004).

important for abolition efforts in other states.¹³⁶ Three years after the moratorium, Governor Ryan commuted the sentences of everyone on that state's death row, remarking that the Illinois death penalty system was "haunted by the demon of error."¹³⁷ Governor Rod Blagojevich, Governor Ryan's successor, shared his predecessor's concern that an innocent person might be executed in Illinois¹³⁸ and continued the moratorium.¹³⁹

Between the moratorium and the 2011 vote on abolition, grassroots activists worked to raise public awareness about the death penalty and organized lobbying efforts for repeal.¹⁴⁰ In addition, *Chicago Tribune* reporters Steve Mills and Maurice Possley published a three-part story on the case of Carlos de Luna, who was executed in Texas for stabbing Wanda Lopez, a gas station clerk.¹⁴¹ During de Luna's trial and time on death row, he maintained his innocence and identified the man who he contended had actually committed the crime.¹⁴² Mills and Possley concluded that the evidence overwhelmingly pointed to that person, not de Luna, suggesting that an innocent person had been put to death.¹⁴³ Their story reinforced the narrative that had propelled Ryan's moratorium and clemency; the death penalty was a broken system.¹⁴⁴

136. *Id.*

137. The Associated Press, *Ex-governor convicted of Racketeering*, NBC NEWS (Apr. 17, 2009, 2:33 PM), http://www.nbcnews.com/id/12356536/ns/us_news-crime_and_courts/t/ex-governor-convicted-racketeering/#.XZ08qy2UXOQ

138. Hal Dardick, *Alvarez Expresses Reservations about Death Penalty: She Says Public Input, More Reforms Needed*, CHI. TRIB. (Feb. 16, 2008), <https://www.chicagotribune.com/news/ct-xpm-2008-02-16-0802150872-story.html>.

139. Ray Long and Monique Garcia, *Sources: Quinn to Ban Death Penalty: Governor Invites Sponsors to Signing of Historic Legislation*, CHI. TRIB. (Mar. 9, 2011), <https://www.chicagotribune.com/news/ct-xpm-2011-03-08-ct-met-quinn-death-penalty-0309-20110308-story.html>.

140. Examples include the Illinois Coalition to Abolish the Death Penalty and the Illinois Capital Punishment Reform Study Committee.

141. Steve Mills & Maurice Possley, *A Phantom, or the Killer?: A Prosecutor Said Carlos Hernandez Didn't Exist. But He Did, and His MO Fit the Crime. Series: Did One Man Die for Another Man's Crime? Tribune Investigation: Second of Three Parts*, CHI. TRIB. (June 26, 2006), <https://www.chicagotribune.com/news/ct-xpm-2006-06-26-0606260189-story.html>.

142. *Id.*

143. Loren King, *A Chaplain's Journey to the Other Side of a Debate*, CHI. TRIB. (May 9, 2008), <https://www.chicagotribune.com/news/ct-xpm-2008-05-09-0805070808-story.html>.

144. James S. Liebman, Jeffery Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1862-64 (2000); Ed Pilkington, *A Broken System': The Conservatives Against the Death Penalty*, THE GUARDIAN (Mar. 4, 2019), <https://www.theguardian.com/world/2019/mar/04/a-broken-syste>

The trial and execution of Troy Davis in Georgia also had a catalyzing effect on abolitionism in Illinois.¹⁴⁵ Davis was sentenced to death for a murder committed in 1989, where the only evidence against him was the testimony of nine eyewitnesses, seven of whom recanted their testimony by 2008.¹⁴⁶ While Davis' case garnered media attention and his execution was stayed on several occasions to allow for additional investigation, he was executed in 2011.¹⁴⁷

By January 2011, both the Illinois General Assembly¹⁴⁸ and Senate passed legislation repealing state's death penalty.¹⁴⁹ It remained unclear, however, if Governor Blagojevich's successor, Governor Pat Quinn, would sign the legislation.¹⁵⁰ Governor Quinn ambiguously stated that he would "follow [his] conscience."¹⁵¹ Proponents of capital punishment urged him to veto the repeal bill and called for a referendum to decide whether Illinois should retain the death penalty.¹⁵²

In the months before Governor Quinn signed the repeal bill, 12,000 Illinois residents sent letters to his office encouraging abolition, while only 700 sent letters in opposition.¹⁵³ In March 2011, Governor Quinn signed

m-the-conservatives-against-the-death-penalty.

145. Rob Warden, *How and Why Illinois Abolished the Death Penalty*, 30 LAW & INEQ. 245 (2012).

146. Leonard Pitts, *Zero Margin for Error*, CHI. TRIB. (Oct. 27, 2008), <https://www.chicagotribune.com/news/ct-xpm-2008-10-27-0810260172-story.html>.

147. Eric Zorn, *Change of Subject*, CHI. TRIB. (Sept. 25, 2011) https://www.washingtonpost.com/national/troy-davis-execution-sparks-anti-death-penalty-backlash-protests/2011/09/22/gIQAQawOoK_story.html; Elizabeth Flock, *Troy Davis Execution Sparks Anti-Death Penalty Backlash, Protests*, WASH. POST (Sept. 22, 2011), https://www.washingtonpost.com/national/troy-davis-execution-sparks-anti-death-penalty-backlash-protests/2011/09/22/gIQAQawOoK_story.html.

148. Ray Long & Todd Wilson, *House Votes to Repeal Illinois' Death Penalty: Historic Move Now Heads to State Senate, Where Its Fate Is Uncertain*, CHI. TRIB. (Jan. 7, 2011), <https://www.chicagotribune.com/news/ct-xpm-2011-01-06-ct-met-illinois-house-death-penalty-v20110106-story.html>.

149. Ray Long & John Byrne, *Quinn Refuses to be Pinned Down on Death Penalty*, CHI. TRIB. (Jan. 12, 2011), <https://www.chicagotribune.com/news/ct-xpm-2011-01-12-ct-met-illinois-death-penalty-0112-20110112-story.html>.

150. Anonymous, *Listen and Reflect ...*, CHI. TRIB. (Feb. 3, 2011), <https://www.chicagotribune.com/opinion/ct-xpm-2011-02-03-ct-edit-death-penalty-20110203-story.html>.

151. Ray Long & John Byrne, *Death Penalty up to Quinn*, CHI. TRIB. (Jan. 13, 2011), <https://www.chicagotribune.com/news/ct-xpm-2011-03-08-ct-met-quinn-death-penalty-0309-20110308-story.html>.

152. Patrick Yeagle, *Death Penalty Fight Not Over*, ILL. TIMES (Feb. 17, 2011), <https://illinoistimes.com/article-8361-death-penalty-fight-not-over.html>.

153. Dave McKinney, *Pleas to Quinn Come from Cardinal, World Leaders*, CHI. SUN-

the legislation and converted the sentences of the 15 men then on Illinois, death row to life in prison.¹⁵⁴ In so doing, Governor Quinn explained that it was impossible to create a system “that is free of all mistakes, free of all discrimination with respect to race or economic circumstance or geography.”¹⁵⁵

Very soon after abolition, Illinois lawmakers in both the Senate and the House drafted legislation to reinstate the death penalty in cases involving the murders of police officers, firefighters, prison guards, trial witnesses, repeat offenders, and murderers who used torture.¹⁵⁶ Representative Dennis Reboletti, one of the bill’s sponsors, argued that capital punishment should be available for the “worst of the worst.”¹⁵⁷ This legislation was approved in a House committee,¹⁵⁸ but was defeated on the House floor.¹⁵⁹ In the five years following that defeat, there were no other significant legislative efforts to reinstate the death penalty.¹⁶⁰

TIMES (Mar. 2, 2011).

154. Ray Long & Todd Wilson, *Illinois Bans Death Penalty*, CHI. TRIB. (Mar. 10, 2011); Warden, *supra* note 145, at 284.

155. Cheryl Corley & NPR Staff, *Illinois Abolishes the Death Penalty*, NPR (Mar. 9, 2011), <https://www.npr.org/2011/03/09/134394946/illinois-abolishes-death-penalty>.

156. Ray Long & Todd Wilson, *State Rep. Seeks To Reinstate Death Penalty*, CBS CHICAGO (Mar. 18, 2011), <https://chicago.cbslocal.com/2011/03/18/state-rep-seeks-to-reinstate-death-penalty/>.

157. Todd Wilson, *House Panel Approves Bill Reinstating Death Penalty*, CHI. TRIB. (Mar. 18, 2011), <https://www.chicagotribune.com/news/ct-xpm-2011-03-17-ct-met-house-committee-death-penalty-20110317-story.html>.

158. Todd Wilson, *Bill to Reinstate Illinois Death Penalty Heads to House Floor*, CHI. TRIB. (Mar. 17, 2011), <https://www.chicagotribune.com/news/ct-xpm-2011-03-17-ct-met-house-committee-death-penalty-20110317-story.html>.

159. Amanda Vinicky, *Death Row Dies in Ill.*, ST. LOUIS PUBLIC RADIO (July 1, 2001), <https://news.stlpublicradio.org/post/death-row-dies-ill#stream/0>.

160. In 2018 Illinois’s Republican Governor Bruce Rauner called for the reinstatement of the death penalty for mass murderers and people who kill law enforcement officers. Kim Geiger, Monique Garcia & Dan Hinkel, *Rauner Proposes Reinstating Death Penalty in Illinois, Which Outlawed It Earlier This Decade*, CHI. TRIB. (May 14, 2018), <https://www.chicagotribune.com/politics/ct-met-bruce-rauner-guns-bill-20180514-story.html>; *see also* Press Release, Chicago Council of Lawyers, Joint Statement Against Reinstatement of the Death Penalty in Illinois (May 22, 2018) (<https://chicagocouncil.org/joint-statement-against-reinstatement-of-the-death-penalty-in-illinois/>).

Arguments About the Death Penalty Before and After Abolition in Illinois

While there were fewer arguments about capital punishment in Illinois' two most widely circulated newspapers, the *Chicago Tribune* and the *Chicago Sun Times*, after abolition than there were before, the post-abolition decline in arguments was markedly less sharp than it was in New Jersey and New Mexico. In Illinois, 413 total arguments appeared in the newspapers before abolition and 287 appeared after, with most arguments during either time supporting repeal. Of the arguments reported before abolition, 310 called for the death penalty's end, and 103 opposed it; of the 287 arguments made after abolition, 233 supported that decision and 54 advocated reinstating capital punishment (see TABLE 5).

TABLE 5 Illinois Total Arguments

	Before Abolition	After Abolition	Total
For Abolition	310	233	543
Against Abolition	103	54	157
Total	413	287	700

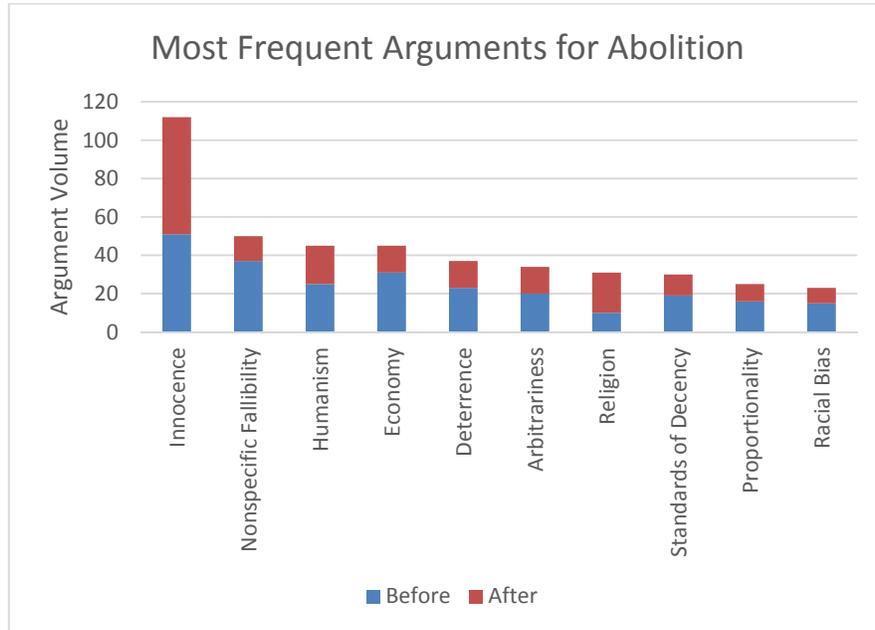
The most arguments appeared in the year leading up to abolition (152) in 2010 and the following year (123). (see TABLE 6).

TABLE 6 Illinois Arguments by Year

	Y1 (3/9 /20 06- 3/8/ 200 7)	Y2 (3/9 /20 07- 3/8/ 200 8)	Y3 (3/9 /20 08- 3/8/ 200 9)	Y4 (3/9 /20 09- 3/8/ 201 0)	Y5 (3/9 /20 10- 3/8/ 201 1)	Y6 (3/9 /20 11- 3/8/ 201 2)	Y7 (3/9 /20 12- 3/8/ 201 3)	Y8 (3/9 /20 13- 3/8/ 201 4)	Y9 (3/9 /20 14- 3/8/ 201 5)	Y1 0 (3/9 /20 15- 3/8/ 201 6)	Total
For	67	76	29	33	105	97	29	27	35	46	544
Against	16	19	3	13	47	26	8	6	7	11	156
Total	83	95	32	46	152	123	37	33	42	57	700

Again reflecting the importance of the new abolitionism in arguments against the death penalty, innocence arguments were the most commonly made in favor of ending the death penalty at any time during the ten-year period. Of the 310 pro-abolition arguments in the years before the death penalty was ended, 51 were innocence arguments. The second most frequent anti-death penalty argument was nonspecific fallibility (37), echoing Governor Ryan’s sentiments when he imposed the moratorium. The third most frequent anti-death penalty argument before abolition was economy (31). After abolition, the most frequent arguments supporting the repeal decision were innocence (61), religion (21), and humanism (20). Illinois is the only state of the four we studied in which the most common argument for abolition (innocence) *increased* after the death penalty was ended (see FIGURE 5).

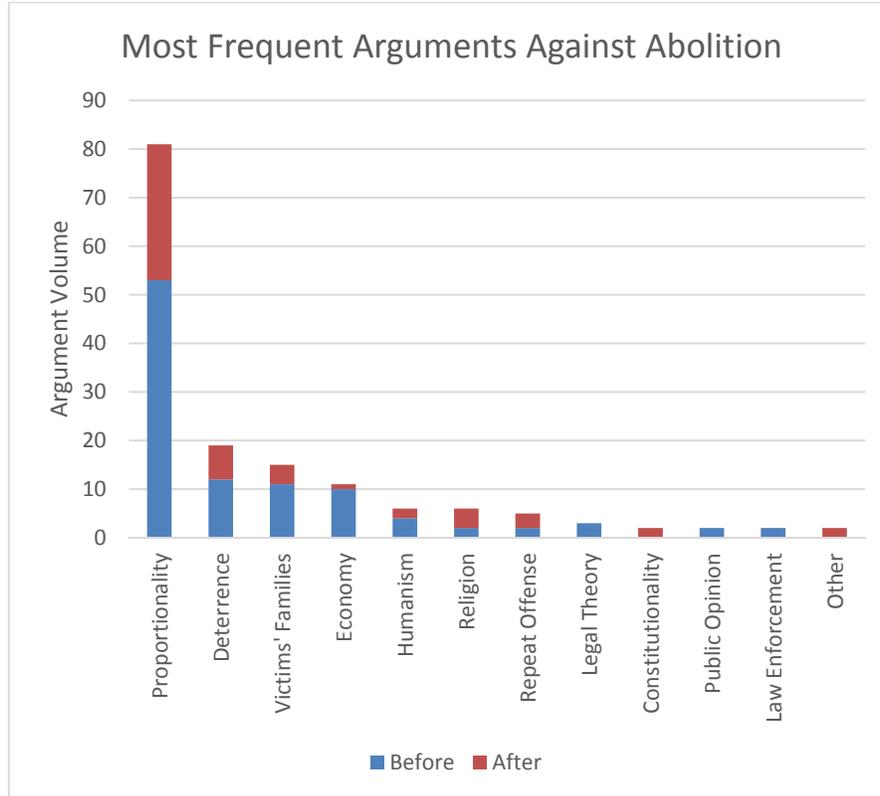
FIGURE 5



Proportionality arguments, emphasizing that the seriousness of the crime merited the punishment, were most frequently made for retaining the death penalty in the years prior to its abolition. Of the 103 arguments in support of the death penalty made before abolition, slightly more than half

(53) were proportionality arguments. Next were deterrence (12), victims' families (11), and economy (10). After abolition, the trends were consistent. Proportionality (28) occurred the most frequently, but all other argument types dropped to 7 or less occurrences. Overall in the ten-year period, the top three arguments were proportionality (81), deterrence (19), and victims' families (15) (see FIGURE 6).

FIGURE 6



Even though Illinois did not experience the same sharp drop in the frequency of death penalty arguments after abolition, as occurred in New Jersey and New Mexico, there is little evidence of backlash on the pages of Illinois's leading newspapers.

Maryland

Maryland ended its death penalty in 2013, two years after Illinois.¹⁶¹ At the time of abolition, a statewide moratorium was already in effect.¹⁶² Governor Parris N. Glendening first imposed a moratorium in 2002¹⁶³ to allow the University of Maryland to conduct a study of capital punishment.¹⁶⁴ The moratorium was lifted a year later when Republican Robert Ehrlich was inaugurated as Governor.

In 2006, another moratorium was put in place when the Maryland Court of Appeals ruled that executions could not continue until the legislature formulated “new regulations for lethal injection procedures” or passed a law “saying that such rules are not required.”¹⁶⁵ Following that decision, the recently elected Governor Martin O’Malley, an ardent death penalty opponent, failed to push an abolition bill through the state legislature.¹⁶⁶ Subsequently, Governor O’Malley ordered public safety officials to begin drafting new execution protocols. “I wish we would arrive at a point where we would repeal the death penalty,” Governor O’Malley said, “but I do not have the luxury in this job or the permission in this job only to enforce laws that I’m in favor of and that I agree with . . . [s]o, sadly, we’ll be moving forward with those protocols.”¹⁶⁷

Governor O’Malley succeeded in persuading the Maryland Legislature to create a commission to study state’s death penalty.¹⁶⁸ The commission was headed by former United States Attorney General

161. Ian Simpson, *Maryland Becomes Latest U.S. State to Abolish Death Penalty*, REUTERS (May 2, 2013), <https://www.reuters.com/article/us-usa-maryland-deathpenalty/maryland-becomes-latest-u-s-state-to-abolish-death-penalty-idUSBRE9410TQ20130502>.

162. Baltimore Sun Reporter, *Timeline: The death penalty in Maryland*, BALT. SUN (Nov. 13, 2008), <https://www.baltimoresun.com/maryland/bal-deathsideside1113-story.html>.

163. Bootie Cosgrove-Mather, *Maryland Death Penalty Moratorium*, CBS NEWS (May 9, 2002), <https://www.cbsnews.com/news/maryland-death-penalty-moratorium/>; David Stout, *Maryland Governor Declares Moratorium on Executions*, N.Y. TIMES (May 9, 2002), <https://www.nytimes.com/2002/05/09/national/maryland-governor-declares-moratorium-on-executions.html>.

164. See generally Raymond Paternoster et al., *An Empirical Analysis of Maryland’s Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction* (2003), https://www.aclumd.org/sites/default/files/field_documents/md_death_penalty_race_study.pdf.

165. Jennifer McMenamin & Laura Smitherman, *O’Malley OK’s Step Toward Executions*, BALT. SUN (May 23, 2008), at A1.

166. Baltimore Sun Reporter, *supra* note 162.

167. McMenamin & Smitherman, *supra* note 165 at A1.

168. *Maryland Commission on Capital Punishment, Key Testimony*, MD. CITIZENS AGAINST STATE EXECUTIONS (Sept. 5, 2008), <http://www.mdcase.org/MDCCommissiononCapitalPunishment>.

Benjamin R. Civiletti, who also opposed the death penalty, and was charged to consider a variety of issues, “including disparities in the application of the death penalty, the cost differential between litigating prolonged capital punishment cases and life imprisonment, and the impact of DNA evidence.”¹⁶⁹

During the commission’s deliberations, hundreds of people offered testimony for and against the death penalty.¹⁷⁰ The commission issued its final report in December 2008. That report concluded that Maryland’s capital punishment system was racially and geographically biased, very costly, and risked executing an innocent person.¹⁷¹ The report recommended abolition of capital punishment.¹⁷²

Following the commission’s findings and recommendation to repeal, Governor O’Malley again mounted an effort to end the death penalty.¹⁷³ Even though the Maryland Senate Judicial Proceedings Committee voted against bringing a repeal bill to the entire Senate in February 2009, this decision was quickly overridden by Senate President Thomas V. Mike Miller.¹⁷⁴ Senator Miller, an ally of Governor O’Malley, supported the governor’s calls for a “fair up or down vote” on abolition in the Maryland Senate.¹⁷⁵

Despite Senator Miller’s support, the Maryland Senate voted against ending capital punishment. Instead, the Senate amended the state’s criminal code limiting death penalty eligibility to cases in which there was DNA evidence, video evidence, or a videotaped confession.¹⁷⁶ The Maryland House of Delegates adopted this measure in late March 2009.¹⁷⁷

169. Laura Smitherman, *Civiletti Heads MD Panel on Death Penalty*, BALT. SUN (July 11, 2008), at B3.

170. Jennifer McMenamin, *First Death Penalty Hearing Held*, BALT. SUN (July 29, 2008), at B1.

171. Laura Smitherman & Gadi Dechter, *Repeal of Death Penalty Urged*, BALT. SUN (Nov. 13, 2008), at A1.

172. “*Maryland Commission Recommends Abolition of Death Penalty in Final Report*,” DEATH PENALTY INFORMATION CENTER (Dec. 12, 2008), <https://deathpenaltyinfo.org/news/maryland-commission-recommends-abolition-of-death-penalty-in-final-report>.

173. Julie Bykowicz, *O’Malley Vows to Work to End Death Penalty*, BALT. SUN (Jan. 16, 2009), <https://www.baltimoresun.com/politics/bal-session0116-story.html>.

174. Gadi Dechter, *Death Penalty Repeal May Go to Full Senate Despite Committee Vote*, BALT. SUN (Feb. 28, 2009), at A1.

175. Julie Bykowicz & Gadi Dechter, *Death Penalty Discussed*, BALT. SUN (Jan. 30, 2009), at A8.

176. Julie Bykowicz & Gadi Dechter, *Chaos in the Senate*, BALT. SUN (March 3, 2009), at A1.

177. Julie Bykowicz, *Death Penalty Reform Advances*, BALT. SUN (March 27, 2009), at A3.

Meanwhile, Maryland voters elected a new, much more liberal state legislature in 2010.¹⁷⁸ While O'Malley didn't immediately seek to end the death penalty, the changed makeup of the Maryland General Assembly and Senate laid the foundation for abolition to take place in 2013.

Abolitionists were supported by Ben Jealous, President of the NAACP.¹⁷⁹ Together with the Catholic Church, the NAACP took a leading role in lobbying and fundraising, effectively "turning the tide" on the death penalty.¹⁸⁰ In March 2013, these efforts paid off when Senate President Miller again brought a repeal bill to the Senate floor.¹⁸¹ This time the Maryland Senate¹⁸² and House of Delegates¹⁸³ voted to end capital punishment, and Governor O'Malley signed that legislation.¹⁸⁴

However, following the pattern in New Mexico and Illinois, soon after repeal Baltimore County State's Attorney Scott Schellenberger called for a referendum on abolition.¹⁸⁵ Mr. Schellenberger wanted "the people of Maryland to decide whether Maryland should have the death penalty."¹⁸⁶ This effort failed when its supporters failed to secure the 55,000 signatures needed to put it on the ballot.¹⁸⁷ After this failure, there was little activity surrounding capital punishment in the state legislature.¹⁸⁸ It was not until

178. *Inherently Inhumane*, BALT. SUN (Jan. 30, 2011), <https://www.baltimoresun.com/opinion/bs-xpm-2011-01-30-bs-ed-death-penalty-20110130-story.html>.

179. Michael Dresser, *NAACP to Step up Maryland Death Penalty Fight*, BALT. SUN (Nov. 20, 2012), <https://www.baltimoresun.com/politics/bs-md-naacp-death-20121128-story.html>.

180. Michael Dresser, *O'Malley to Lead Move to Repeal Death Penalty*, BALT. SUN (Jan. 15, 2013), at A2.

181. Michael Dresser, *"O'Malley to Lead Move to Repeal Death Penalty: Governor to Join NAACP Leaders at Annapolis Appearance Today,"* BALT. SUN (Jan. 15, 2013).

182. Michael Dresser, *Death Penalty Repeal Advances*, BALT. SUN (Mar. 7, 2013), at A1.

183. Michael Dresser, *Death Penalty Repeal Moves Forward*, BALT. SUN (Mar. 14, 2013), at A6.

184. Michael Dresser, *Death Penalty Repeal Signed: O'Malley-Backed Measure Makes Maryland the 18th State to End Executions*, BALT. SUN (May 3, 2013).

185. Michael Dresser, *Maryland Death Penalty Supporters Launch Petition Drive*, HUFFINGTON POST (Dec. 3, 2013), https://www.huffpost.com/entry/maryland-death-penalty-supporters_n_3209920; see generally AUSTIN SARAT, *THE DEATH PENALTY ON THE BALLOT: AMERICAN DEMOCRACY AND THE FATE OF CAPITAL PUNISHMENT* (Cambridge Univ. Press, 2019).

186. Michael Dresser, *A Bid to Keep Death Penalty*, BALT. SUN (May 4, 2013), at A1

187. Erin Cox, *Efforts to Restore Capital Punishment Fall Short*, BALT. SUN (June 1, 2013), <https://www.baltimoresun.com/politics/bs-md-death-penalty-signatures-20130531-story.html>.

188. But note that in 2017 a new effort was made to bring back the death penalty. Patt

early 2015, however, that lawyers representing the five men on Maryland's death row successfully argued that the state could not execute them¹⁸⁹ and O'Malley commuted each of their sentences.¹⁹⁰

Arguments About Abolition Before and After Repeal of the Death Penalty in Maryland

The Baltimore Sun and *The Capital*, the two most widely circulated newspapers in Maryland, published 502 arguments about the death penalty before abolition, and only 62 afterwards. Of the arguments made before abolition, 404 favored and 98 opposed abolishing Maryland's death penalty. After abolition, 39 of the 62 arguments found in these newspapers supported that decision. The remaining 23 called for reinstating the death penalty (see TABLE 7).

TABLE 7 Maryland Total Arguments

	Before Abolition	After Abolition	Total
For Abolition	404	39	443
Against Abolition	98	23	121
Total	502	62	564

In Maryland, the two years with the most arguments were 2008 to 2009 (235 arguments) and 2012 to 2013 (178 arguments), reflecting the period surrounding the creation of the commission, the release of its results, and Governor O'Malley's failed repeal attempt in January 2009. After that, the death penalty largely fell out of the public eye only to resurface in 2012 to 2013 when the state legislature again took up the question of whether to end it (see TABLE 8).

Warren, *Bill Introduced to Reinstate Death Penalty in Maryland*, CBS BALTIMORE (Feb. 21, 2017, 5:58 PM), <https://baltimore.cbslocal.com/2017/02/21/bill-introduced-to-reinstate-death-penalty-in-maryland-2/>.

189. Justin Fenton, *Announcement Gives Hope to Inmate, Pain to Family*, BALT. SUN, (Nov. 7, 2014), at A1.

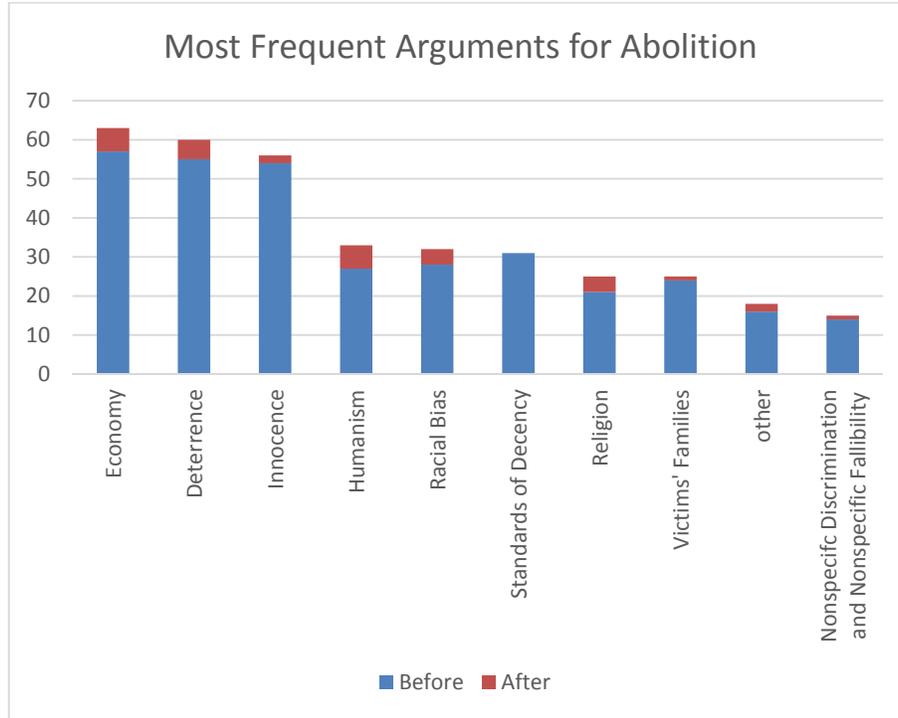
190. Michael Dresser & Erin Cox, *Death Row Is About to End*, BALT. SUN, (Jan. 1, 2015), at A1; see also Christopher Connelly, *O'Malley To Commute Death Sentences, Clear Maryland's Death Row*, WYPR (Dec. 31, 2014), <http://news.wypr.org/post/omalley-commute-death-sentences-clear-marylands-death-row#stream/0>.

TABLE 8 Maryland Arguments by Year

	Y1 (5/2/ 200 8- 5/1/ 200 9)	Y2 (5/2/ 200 9- 5/1/ 201 0)	Y3 (5/2/ 201 0- 5/1/ 201 1)	Y4 (5/2/ 201 1- 5/1/ 201 2)	Y5 (5/2/ 201 2- 5/1/ 201 3)	Y6 (5/2/ 201 3- 5/1/ 201 4)	Y7 (5/2/ 201 4- 5/1/ 201 5)	Y8 (5/2/ 201 5- 5/1/ 201 6)	Y9 (5/2/ 201 6- 5/1/ 201 7)	Y10 (5/2/ 201 7- 5/1/ 201 8)	Total
For	196	14	26	35	132	21	5	7	1	6	443
Against	39	2	5	6	46	11	9	0	2	1	121
Total	235	16	31	41	178	32	14	7	3	7	564

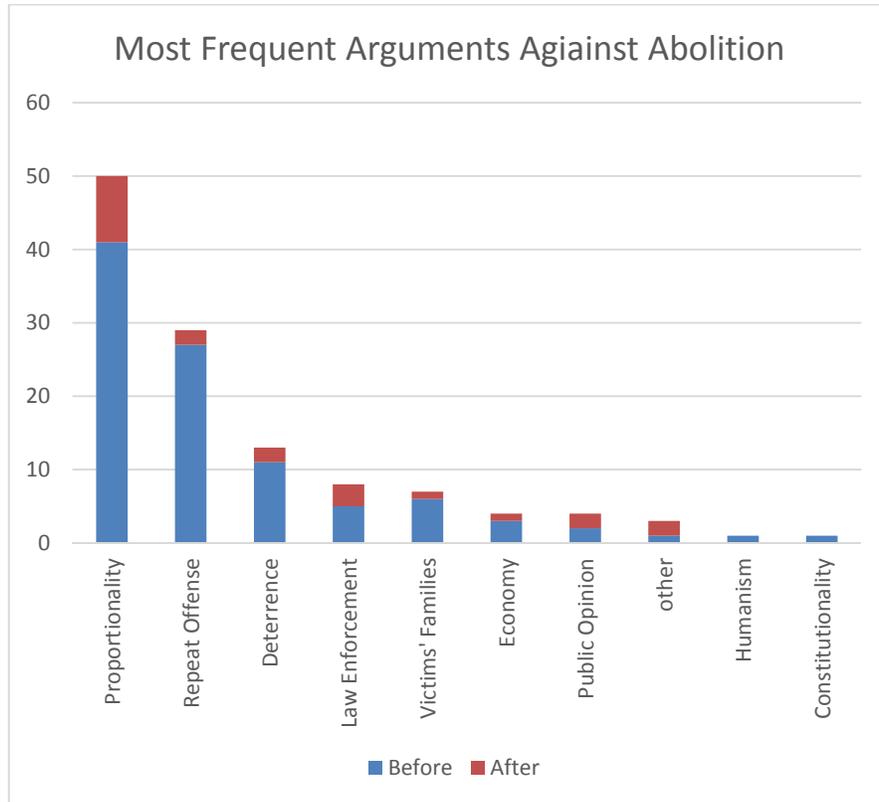
Overall in our ten-year period, the most frequent arguments made about the death penalty in Maryland were deterrence (73), economy (67), innocence (56), and proportionality (55). Unlike the pattern in the other three states in our study, in the years before abolition the most common pro-abolition arguments were economy (63), deterrence (60), and innocence (56). After abolition, the few arguments made in support of that decision were economy (6), humanism (6), and deterrence (5) (see FIGURE 7).

FIGURE 7



In the run up to abolition, the most common arguments against repeal were proportionality (41) and repeat offense (27). After repeal, the largest number of pro-death penalty arguments appearing in the newspapers still focused on proportionality (9). Overall, in the ten-year span of our study, proportionality arguments (50), repeat offense arguments (29), and deterrence arguments (13) were Maryland's most common pro-death penalty arguments (see FIGURE 8).

FIGURE 8



In Maryland, abolition was met with acquiescence. While there was considerable continuity in the type and relative frequency of the arguments made for abolition both before and after it was accomplished, arguments against abolition decreased quickly once that decision was made.

Conclusion

What we observed in New Jersey, namely that abolitionists and proponents of the death penalty operate in different argumentative universes, turns out to have been true in all of the states we studied. Looking at all of them reveals that the most frequent types of arguments used by abolitionists were about innocence and economy/cost. In contrast, death penalty supporters tended to focus on arguments about deservedness, particularly those about proportionality or repeat offenses.

Very rarely did either side seek to directly refute the arguments made by their opponents. As a result, neither abolitionists nor their opponents were likely to feel that they were heard or that their positions were genuinely understood.

Nonetheless, unlike the post-*Furman* period,¹⁹¹ since 2007 abolitionists New Jersey, New Mexico, Illinois and Maryland have succeeded in ending the death penalty without engendering significant or successful backlash. Several factors may explain this difference. First, the states we studied all abolished the death penalty through the political process. *Furman*, by contrast, was, a Supreme Court decision.¹⁹² Perhaps allowing people to come to a democratic decision is more sustainable than the Supreme Court weighing in on such a contentious issue. Political decisions on controversial issues may have greater legitimacy than judicial decisions.¹⁹³

This may be especially true when, as was the case in the four states we studied, abolition of the death penalty came after prolonged periods of investigation by study commissions, political back and forth, and sometimes moratoria imposed by a governor. Unlike the thunderbolt of a Supreme Court decision, political incrementalism allows for gradual adjustment and adaptation by both sides. In addition, decisions on such issues made at the state level may have greater legitimacy than decisions seemingly imposed by the national government.¹⁹⁴

Backlash also is most likely when political leaders get too far out in front of public opinion.¹⁹⁵ In all of the states we examined elected officials were cognizant of public opinion. They fashioned their own

191. See generally Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1 (2007); David Dagan, *Abolition and Backlash*, WASHINGTON MONTHLY (May 2014), <https://washingtonmonthly.com/magazine/marchaprilmay-2014/abolition-and-backlash/>.

192. Michael Klarman, Courts, Social Change, and Political Backlash, Philip A. Hart Memorial Lecture, (Mar. 31, 2011); Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 285 (2008).

193. Ralph Cavanagh & Austin Sarat, *Thinking about Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371 (1980); Steiker & Steiker, *supra* note 13.

194. See generally José Gomes André, *American Lessons: Legitimacy, Federalism and the Construction of a European Compound Polity*, 18 EUR. POL. AND SOC'Y; see generally KALYPSO NICOLAIDIS & ROBERT HOWSE, *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* (Oxford Univ. Press 1st ed. 2003).

195. Nicolas Yan, *The Court and the People*, HARV. POL. REVIEW (Feb. 7, 2017), <https://harvardpolitics.com/united-states/the-court-and-the-people/>.

political agendas and reelection campaigns with an eye to what their constituents would accept.

Backlash may turn into concerted political action when, as is the case in many American states, the people can reverse unpopular decisions through direct legislation.¹⁹⁶ This occurred in Nebraska in the aftermath of legislative abolition. As several Nebraska lawmakers noted right after the vote to end the death penalty, that decision went against the wishes of an overwhelming number of Nebraskans who believe the death penalty should be in place for those who commit the most heinous crimes.¹⁹⁷

In general, support for the death penalty across the United States has declined to the lowest level than it has been in many decades.¹⁹⁸ Today, as Carol and Jordan Steiker note:

The American death penalty is extraordinarily fragile, with death sentences and executions on the decline. Public support for the death penalty has diminished. The practice is increasingly marginalized around the world . . . Perhaps most important, the coalition against the death penalty is much broader now than in the early 1970s, when opponents focused primarily on discrimination and human rights. Today, conservatives of many stripes have their own concerns about the death penalty—particularly cost, but also consistency on the issue of the sanctity of life. The death penalty is not so clearly a left/right, progressive/conservative debate, which opens a space for further restriction and even abolition.¹⁹⁹

This fragility may help explain why, in the post-2007 period, abolition generally did not produce backlash.

In the United States, the thought of abolition today seems to be more troubling to political leaders and citizens than the act of abolition. While polls show that a bare majority still favors the death penalty, Americans may be more ready to accept abolition than they have ever

196. See generally SARAT, *supra* note 3.

197. Paul Hammel, *Supporters of Penalty Have Several Options to Consider*, OMAHA WORLD HERALD (May 28, 2015), https://www.omaha.com/eedition/sunrise/articles/supporters-of-penalt...tions-to-consider/article_060c14b2-4dac-5f20-9889-4e5d131fa29c.html.

198. See *Death Penalty*, Gallup Inc., <https://news.gallup.com/poll/1606/death-penalty.aspx> (last visited Oct. 12, 2019).

199. Steiker and Steiker, *supra* note 193; Alan Greenblatt, *Why the Death Penalty Has Lost Support from Both Parties*, GOVERNING (Apr. 16, 2019), <https://www.governing.com/topics/public-justice-safety/gov-death-penalty-states-new-hampshire.html>.

been.²⁰⁰ As a result, political leaders now have considerable room to maneuver and less to fear when they decide that they will “no longer tinker with the machinery of death.”²⁰¹

200. See Reid Wilson, *Red States Move to End Death Penalty*, THE HILL (Feb. 4, 2019), <https://thehill.com/homenews/state-watch/428361-red-states-move-to-end-death-penalty>; Lexington, *An Evolving Debate*, THE ECONOMIST (Feb. 8, 2013), <https://www.economist.com/lexingtons-notebook/2013/02/08/an-evolving-debate>.

201. *Callins v. Collins*, 510 U.S. 1141, 1144-45 (1994) (Bkacmun, J., dissenting); see John Wagner, *Democratic Presidential Hopefuls Rush to Affirm Opposition to Death Penalty after Justice Announces Plans to Resume Executions*, WASH. POST (July 25, 2019), https://www.washingtonpost.com/politics/democratic-presidential-hopefuls-rush-to-affirm-opposition-to-death-penalty-after-justice-announces-plans-to-resume-executions/2019/07/25/c246ca52-ae5e-11e9-bc5c-e73b603e7f38_story.html; Ron Elving, *How Democratic Candidates Have Wrestled with The Question Of The Death Penalty*, NPR, (July 29, 2019), <https://www.npr.org/2019/07/29/746366025/how-democratic-candidates-have-wrestled-with-the-question-of-the-death-penalty>.