

Should Abolitionists Support Legislative “Reform” of the Death Penalty?

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I. INTRODUCTION

For the first time in several decades, across the United States, we stand at a moment of critical appraisal of our practice of capital punishment. Suddenly, in the past few years, concern and caution about the use of the death penalty have moved from the fringes to the center of public discourse—in universities, in the media, and perhaps most significantly in the federal and state legislatures.

Signs of this sea-change are all around us: from Republican Governor George Ryan’s moratorium on executions in Illinois following the exoneration of more than a dozen death-row inmates in his state,¹ to New Hampshire’s attempted repeal of its own death penalty statute (a repeal passed by the legislature but vetoed by Democratic Governor Jeanne Shaheen),² to substantial dips in public support for capital punishment nationwide as measured by polling data.³ The experience of Massachusetts, one of the twelve abolitionist states in which reinstatement of capital punishment is regularly sought, is emblematic of both the suddenness and the extent of the shift in public attitudes: in the last legislative session three and a half years ago, the death penalty came within one vote of reinstatement,⁴ whereas the most recent effort in March of 2001 failed by the wide

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¹ See Ken Armstrong & Steve Mills, *Ryan: ‘Until I Can Be Sure’; Illinois Is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at N1.

² See *N.H. Governor Vetoes Bill to Repeal the Death Penalty*, CHI. TRIB., May 20, 2000, at N3.

³ See Gallup Poll News Service, *Gallup Poll Topics: A-Z Death Penalty*, http://www.gallup.com/poll/indicators/indeath_pen.asp (last updated June 10, 2001). In May 2001, a Gallup poll revealed that public support for the death penalty had fallen to its lowest level in nineteen years. As of May 2001, support for the death penalty had dropped fifteen percentage points from its high in 1994 to a level of 65%. In addition, the same poll revealed that, when those polled were given the alternative of life imprisonment without possibility of parole, their support for the death penalty dropped to 52%, down from 61% in 1997. In a February 2001 Gallup poll, 57% of those polled said they favored a moratorium on the death penalty in all states with capital punishment schemes similar to the one currently in effect in Illinois.

⁴ Actually, the Massachusetts House briefly passed a bill approving reinstatement, but one state representative changed his mind and his vote soon thereafter, apparently as a result of the outcome of the Louise Woodward trial. See Adrian Walker & Doris Sue Wong, *No Death Penalty, By One Vote*, BOSTON GLOBE, Nov. 7, 1997, at A1.

margin of 92-60 in the Massachusetts House.⁵

Even more commonly, in state legislative committees, bills to “reform” death penalty procedures proliferate on drafting tables, offering everything from mandatory DNA preservation and testing, to improved representation in capital cases, to limitations on the execution of juveniles and persons with mental retardation.⁶ Other reforms include Ohio’s proposal to replace the existing “beyond a reasonable doubt” standard with a “beyond any doubt” standard in capital cases, Indiana’s proposal to limit judicial overrides of non-death verdicts, North Carolina’s proposal to allow trial judges to block the state from seeking the death penalty if a judge determines that race was the primary reason prosecutors sought the death penalty, and several states’ proposals to add life without possibility of parole as a third alternative to death and life with possibility of parole.⁷ In addition, many states have proposed extensive studies of the death penalty, with some states calling for a moratorium on executions until results from such studies can be evaluated.⁸

As committed abolitionists ourselves, we see cause for celebration in these developments. But as students of past movements for abolition in the United States, we see some cause for concern as well. To state our concern in perhaps the most provocative way, we worry that reforming our current practices of capital punishment may be analogous to replacing the electric chair with lethal injection; the reformed practice is unquestionably better (fairer, more humane) than the one rejected, but the choice to reform also carries the distinct possibility that it will normalize the underlying practice and avert the very critical gaze that gave rise to the reforming impulse, thus delaying, or even permanently preventing, full-scale abolition of capital punishment.

In our past work,⁹ we have argued that such a normalizing effect was the

⁵ See Erin C. McVeigh, *Death Penalty Bill Soundly Defeated*, BOSTON GLOBE, Mar. 13, 2001, at B4.

⁶ See generally Death Penalty Information Center, *Changes in the Death Penalty Around the U.S. 2000–2001* (July 1, 2001), at <http://www.deathpenaltyinfo.org/Changes.html>. In Ohio, H.B. 101 would prohibit the death penalty unless the defendant is convicted of aggravated murder beyond any doubt and the aggravating circumstances are found to outweigh any mitigating factors beyond any doubt. *Id.* In Indiana, H.B. 1679 would prohibit judges from overriding juries to impose a death sentence without a unanimous jury recommendation. *Id.* It passed out of the Courts and Criminal Code Committee in the House by a 7-6 vote. In North Carolina, the Racial Justice Act (H.B. 140, S.B. 171) would prohibit the imposition of the death penalty based on race and would require a judge to determine whether race was the primary reason prosecutors decided to seek the death penalty against a defendant. *Id.* Also in North Carolina, S.B. 172 calls for a moratorium on executions while a study of the fairness of capital punishment is completed. *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

result of our one previous reforming moment—the attempt to abolish or reform capital punishment through litigation that was spear-headed by the NAACP Legal Defense Fund in the 1960s and early 1970s. The abolitionist litigators achieved their goal temporarily in 1972 with the Supreme Court's decision in *Furman v. Georgia*¹⁰ striking down state capital punishment schemes as impermissibly arbitrary. What was thought at the time to be abolition, however, turned out to be only a moratorium. Four years later in 1976, the Supreme Court chose the path of regulation rather than abolition with its decisions in *Gregg v. Georgia*¹¹ and four companion cases, holding that the Eighth Amendment imposed various procedural requirements on the death penalty's administration but permitted its continued use. Over the last twenty-five years, the Court has elaborated on this reformist vision of constitutional regulation of capital punishment.

We assessed the Court's reformist project on its own terms, asking whether the Court achieved the goals explicit or implicit in *Furman* and the 1976 foundational cases. Our assessment was not a positive one. Although the reformist approach spawned an extraordinarily intricate and detailed capital punishment jurisprudence, the resulting doctrines were in practical terms largely unresponsive to the underlying concerns for fairness and heightened reliability that had first led to the constitutional regulation of the death penalty. We described contemporary capital punishment law as the worst of all possible worlds. Its sheer complexity led to numerous reversals of death sentences and thus imposed substantial costs on state criminal justice systems. On closer inspection, however, the complexity concealed the minimalist nature of the Court's reforms, which tolerated, if not invited, the inequalities and capriciousness characteristic of the pre-*Furman* era.

We also argued that, apart from its failure on its own terms, the Supreme Court's reformist regulation of capital punishment might well have carried an additional unanticipated cost. Whereas abolitionists initially sought judicial regulation of the death penalty as at least a first step towards abolition, judicial reform actually may have helped to stabilize the death penalty as a social practice. We argued that the appearance of intensive regulation of state death penalty practices, notwithstanding its virtual absence, played a role in legitimizing the practice of capital punishment in the eyes of actors both within and outside the criminal justice system, and we pointed to some objective indicators—such as the dramatic decline in the use of executive clemency in the post-*Furman* era¹²—as

¹⁰ 408 U.S. 238 (1972).

¹¹ 428 U.S. 153 (1976).

¹² See Michael Korengold et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 350 (1996) (documenting that between 1960 and 1970, 261 people were executed and 204 people were granted clemency, while between 1985 and 1995, 281 people were executed and only 20 people were granted clemency); Michael Radelet & Barbara Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 304 (1993) (concluding that the decline in the use of clemency

support for this thesis.

Today, perhaps not surprisingly,¹³ we find ourselves in a moment not dissimilar to the one that immediately preceded *Furman* and its progeny. A confluence of events has worked to undermine the appearance of extensive, effective judicial reform of the death penalty. In response to the Oklahoma City bombing, Congress quite visibly limited the scope of federal collateral review of state criminal convictions, promising in the title of the act a more “effective death penalty” through lessened judicial interference.¹⁴ At the same time, post-trial investigations revealed numerous death-sentenced inmates in Illinois and elsewhere who were in fact innocent, or very likely innocent, of the underlying capital offenses with which they had been charged.¹⁵ As a result, the popular critical scrutiny of contemporary death penalty practices that virtually disappeared during the two-decade period of judicial reform following *Furman* has dramatically reappeared. Not surprisingly, given the quite different character of the current Supreme Court from the Warren Court of the 1960s, much of the critical energy is now directed toward executive and primarily legislative reform rather than judicial reform.¹⁶

powers has exacerbated the capriciousness of the death penalty that *Furman* sought to mitigate and demonstrates the failure of state executives to ensure that only the most blameworthy and irredeemable defendants are executed).

¹³ Indeed, we predicted something like this latest swing of the pendulum in an earlier essay:

As the most visible signs of contemporary regulation are withdrawn, actors within the criminal justice system will no longer be able to indulge the comforting presumption that their decisions and actions are rendered less significant or meaningful by “extensive” checks elsewhere established. And if the numbers of those sentenced to death and executed climb, the general public might revisit the fairness and reliability issues surrounding state death penalty practices that first surfaced three decades ago. . . . Just as there is irony in the stabilization of the death penalty by its reformers, so would there be irony if the success of death penalty proponents were to lead a new generation to re-examine the justice of the death penalty.

Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 71 (James R. Acker et al. eds., 1998).

¹⁴ See Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, §104, 1996 U.S.C.A.A.N. (110 Stat.) 1218-19 (codified in 28 U.S.C. § 2254 (1996)) (limiting the availability of habeas corpus review of state criminal convictions).

¹⁵ See Ken Armstrong & Steve Mills, *Death Row Justice Derailed: Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harshes Punishment Into Its Least Credible*, CHI. TRIB., Nov. 14, 1999, at C1. This was the first article in a five-part investigative report entitled *The Failure of the Death Penalty in Illinois* that appeared in the Chicago Tribune from November 14, 1999 to November 18, 1999. The series examined and found serious flaws in the 285 death-penalty cases in Illinois since capital punishment was reinstated in that state in 1977.

¹⁶ The Supreme Court is attempting to re-enter the picture by granting certiorari in cases involving death-sentenced inmates with mental retardation. Its first grant, in *McCarver v. North*

Our central question is whether the dynamic of legitimation we observed and described in the context of judicial reform is of equal concern in the context of legislative reform. Although reform through legislation differs in some important respects from reform through constitutional adjudication, we believe that legislative reform poses some of the same problems of legitimation that were realized through judicial reform. On the one hand, reformers might well believe that the reforms they urge—such as more DNA testing in capital cases, better capital defense representation, or the categorical exclusion of juveniles or the mentally retarded from the ambit of capital punishment, to name just a few of the currently proposed reforms—will make the administration of the death penalty fairer, more reliable, or simply narrower in scope, and therefore unquestionably good in and of itself. On the other hand, the experience we have observed and described with judicial reform of capital punishment suggests that such reforms may also have the effect of dissipating critical scrutiny of death penalty practices by making participants in, and observers of, those practices more comfortable than they ought to be, or at least more comfortable than they otherwise would be, with the underlying practice of capital punishment.

Hence, we arrive at the question that forms the title of this paper: “Should abolitionists support legislative reform of the death penalty?” Of course, abolitionists are of many stripes: some base their opposition on religious or moral grounds, others base their opposition on the impossibility of structuring sufficiently fair and reliable administration of capital punishment in our current society and our extant criminal justice system, and yet others base their opposition simply on the lack of necessity for the death penalty, given the lack of compelling proof that it serves as a viable deterrent. Abolitionists from these three general camps, or abolitionists with other, more particular concerns, might well have different responses to the array of potential legislative reforms currently on the table. And yet, any person who continues to believe that the practice of capital punishment should be abandoned even if the proposed reforms are implemented must at least consider the possible legitimating effect of such reforms.

II. LEGITIMATION AND ENTRENCHMENT

A vast social and political literature attempts to understand the relation between popular attitudes about social institutions and the stability of such institutions. What beliefs, for example, contribute to law-abidingness? What sorts of ideologies help stabilize societies that are beset with inequality? How are those ideologies “produced” or “transmitted”? Our project focuses more modestly on particular beliefs about a particular institution. What views does the public

Carolina, 532 U.S. 941 (2001), resulted in the case being dismissed as moot after the state legislature passed a law prohibiting the execution of persons with mental retardation. The Court simultaneously granted certiorari in *Atkins v. Virginia*, 122 S. Ct. 24 (2001) for argument and decision during the October 2001 Term.

entertain about the accuracy and fairness of the death penalty, and how does the “law,” in the form of legislative decisionmaking, contribute to those views?

Public attitudes about the death penalty undoubtedly affect its continued viability. The last moment of significant public disquiet concerning the death penalty, in the late 1960s, brought us close to judicial abolition as the Court sought to gauge “evolving standards of decency.”¹⁷ With this in mind, we attempt to assess the effect of legislative reforms on public attitudes by looking at two possible dynamics, legitimation and entrenchment.

There are at least two ways, we argue, in which legislative reform of the death penalty could legitimate the practice of capital punishment. The first is virtually identical to the kind of legitimation we described as a by-product of judicial reform of the death penalty—that is, some reforms may do very little to change the underlying practice but may offer the appearance of much greater procedural regularity than they actually produce, thus inducing a false or exaggerated belief in the fairness of the entire system of capital punishment. This sense of legitimation borrows from the social theories of Max Weber and Antonio Gramsci and differs from the other, perhaps more commonly used, senses of the verb “to legitimate.” The dictionary’s two primary definitions of legitimation do not (necessarily) involve the inducement of false or exaggerated belief. Rather, they refer, respectively, to the formal process of authorization (as in “the Supreme Court legitimated an act of Congress by upholding it against constitutional challenge”)¹⁸ or to the dynamic of actually providing true legitimacy (as in “the Supreme Court’s documentation of coercive police interrogation techniques legitimated its conclusion that Miranda warnings were necessary to prevent involuntary confessions”).¹⁹ Weber’s idea of legitimation, unlike these formal and normative conceptions, focuses on an individual’s (or a group’s) experience or belief in the normative legitimacy of a social phenomenon, such as a set of relationships, a form of organization, or an ongoing custom or practice, whatever might “really” be the case.²⁰

Popular support for the death penalty depends crucially on the perception that those sentenced to death and executed are in fact guilty of the underlying offense. Historically, concerns about this sort of accuracy have loomed large in several nations’ movements to abolish the death penalty. In England, for example, high-profile cases involving wrongful executions were at the center of the debates leading to abolition by Parliament. In this country as well, the possibility of executing innocents seems to arouse the greatest opposition to the death penalty. The new “moment” in American death penalty politics is commonly traced back to the discovery of erroneous convictions in Illinois, and polling data reflects the

¹⁷ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion).

¹⁸ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1291 (1986) (first definition).

¹⁹ *Id.* (second definition).

²⁰ This was Weber’s own description of his special sense of legitimation. See MAX WEBER, *BASIC CONCEPTS IN SOCIOLOGY* 72–73 (H.P. Secher trans., 1962).

priority of this concern in shaping public attitudes toward the death penalty.

Not surprisingly, many of the proposed reforms are designed to reduce the possibility of executing the innocent. These reforms risk legitimating in the Weberian sense, because they might foster an unjustified confidence in our ability to avoid such errors. Take, for example, the proposal to raise the burden of proof in a capital case from “beyond a reasonable doubt” to “beyond any doubt.” While it is true that standards of proof can and do matter throughout the law, it is also literally true that no verdict is “beyond any doubt,” especially when, as Ohio’s proposal would have it, that standard would apply to the ultimate question whether aggravating factors outweigh mitigating factors. This new standard of review might in fact encourage a level of care not already present in capital deliberations, but more likely it will be proclaimed by supporters of the death penalty as significant insurance against error (and indeed might chill later decisionmakers from fairly second-guessing the jury’s conclusions).

Another potentially legitimating reform, and perhaps currently the most popular proposal nationwide, concerns DNA testing. It goes without saying that prosecutors should not destroy (and should be required to maintain and test) potentially exculpatory physical evidence in capital cases. But this reform is of extremely limited applicability, because actual innocence will be provable based on the presence of DNA at the crime scene for few capital crimes (apart from those involving rape, and not even all of those). However, the proponents of DNA reforms and the general public seem to overestimate wildly the extent of the safety net such reforms can provide against wrongful convictions. More generally, DNA evidence at most will establish an offender’s guilt or innocence but often will tell us little about whether a particular defendant should receive the death penalty. Like the “beyond all doubt” reform, DNA preservation and testing reforms send a message of certainty that does not correspond to the actual reliability they can plausibly secure.

Other reforms might legitimate because they are precisely intended to quell public criticism while preserving the objectionable practice that the reform purports to address. In Texas, for example, prosecutors were highly influential in shaping legislation that would have exempted persons with mental retardation from the death penalty. Under the proposed law, the determination of whether an offender has mental retardation would not be made before trial or by a judge, but by the jury after it has concluded that the defendant should be put to death.²¹ The transparent goals of this proposal were to ensure that the factual question of whether an offender is mentally retarded would be clouded by the jury’s moral outrage toward the crime and to encourage a form of jury nullification. At the same time, the message to the public at large would have been that Texas does not allow for the execution of persons with mental retardation, even if, as a

²¹ Christy Hoppe, *Texas Governor Vetoes Ban on Executing Retarded*, DALLAS MORNING NEWS, June 18, 2001, at 1A.

practical matter, such persons would not have been protected.²²

The second form of legitimation, which was implicated to a lesser degree by judicial reform, is the legitimation inherent in every kind of incremental change. That is, even when reform does not induce a false or exaggerated belief in the progress being made, it will always induce at least some satisfaction in the real improvements achieved, and thus, will make people more comfortable than they otherwise would be with the underlying practice, thereby dissipating continued scrutiny of the death penalty and energy toward abolition. This effect might better be called “entrenchment” rather than “legitimation.” Noting entrenchment effects is a familiar leftist critique of all plans for incremental reform, particularly in the legal academy where the “legal process” school is often pitted against the school of “critical legal theory” in such debates. Versions of this concern have been raised in many other contexts, such as the racial equality, feminist, and labor rights movements, to name just a few.

In other words, to ask whether abolitionists should support legislative reform of the death penalty is to ask whether any real improvement that might be achieved in the fairness, reliability, humanity, or scope of our system of capital punishment outweighs the potential legitimating or entrenching effect of such reforms. We thus mean to raise the very real fear that reform of capital punishment and its abolition do not lie along the same track; rather, we worry that reform may actually lead us away from abolition, toward a future where the death penalty remains a stable and accepted part of our criminal justice system.

While we feel that it is critically important to voice this fear and at least raise the question whether abolitionists should support legislative reform of the death penalty, we find it difficult, and not even particularly helpful, to try to answer this question absolutely in the abstract. After all, any answer must depend on precisely what is on the table in the way of reform. Only then can the potential for real change be weighed against the likelihood of legitimation and entrenchment. Thus, our more particular project, in addition to simply raising the possibility that reform might be the enemy of abolition, is to try to assess whether all reforms are created equal in terms of their likely legitimating or entrenching effect. We suspect that they are not, and we propose that it is a worthwhile project for abolitionists to look for and to worry about the possible legitimating effects of particular reforms and also to try to identify reforms that might counter entrenchment by creating continued opportunities for critical scrutiny of capital punishment.

²² *Id.* After the legislature passed the prosecutors’ bill, the Texas Governor vetoed it on the ground that the law was unnecessary and that persons with mental retardation had adequate protection under existing law.

III. COUNTERING LEGITIMATION AND ENTRENCHMENT: MODES OF REFORM

As noted above, further work in sociological theory and empirical research on how public perceptions of legitimacy (or illegitimacy) are created and sustained would be of substantial relevance to our project. However, quite apart from the abstractions and generalizations of theory, our project also calls for careful study of particulars. Abolitionists could and should engage in nuanced, case-by-case analysis of the legitimating or entrenching potential of each proposed legislative reform to each of the various state and federal capital schemes currently in use. This sort of analysis will no doubt be informed both by the particular locale in which the reform is being proposed (that is, its particular concerns and politics) and by the precise reform being advanced. The promotion of this sort of analysis plausibly could be, by itself, the normative, “bottom-line” answer to the question we pose in our title. However, we also seek to identify categories of reforms that seem to hold the promise of countering or reducing the legitimating or entrenching potential of the reformist project as a whole. We believe that there are at least three general categories that, for different reasons, seem to hold such promise.

The first general category of non-entrenching reform is one that we call *institution-building* reform. As all would-be reformers of anything know, organization is everything. Organizations permit specialization of function within the organization, growth and learning over time, and the ability to leverage small numbers and meager resources into disproportionate political impact. While death-penalty abolitionists tend to be intensely committed, they also tend to form a rather diffuse collection of otherwise distinct and even disparate individuals and organizations—ranging from religious groups, to human rights advocates, to criminal justice insiders. Reforms creating new institutions that might serve as focal points for abolitionist activity would be the kind of reforms that keep on reforming by creating the means to channel present and future abolitionist energy and information.

Of course, the creation of new institutions does not itself actually *do* anything to counter the potentially legitimating effects of reform: it does not challenge any erroneous assumptions that might emerge from the reformation process, and it does not necessarily disseminate information or touch the public directly. Rather, new institutions are vehicles for whatever form of abolitionist work the institution is best suited to do, whether it be public education, information gathering, lobbying, litigation, etc. The word “vehicle” is particularly apt here, because it has two primary synonyms, which have two slightly different meanings, both of which we mean to capture here. The first primary synonym for vehicle is “carrier,” as in “an agent of transmission.”²³ Institutions provide the means to

²³ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1307 (1985).

carry or transmit information and ideas. Because the effects of legitimation and entrenchment are at the level of perception, institutions are crucial to the task of countering those effects by their ability to serve as effective transmitters of alternative ways of thinking. The second primary synonym for vehicle is “conveyance” as in “motor vehicle.”²⁴ This sort of vehicle moves from place to place. What we mean to capture by our use of the word is not movement through space but rather movement through time. Institutions that are created today will still exist tomorrow or next year or maybe even ten or twenty years from now, and thus they are one important way to invest in the future. Because reforming capital punishment schemes today may well lead to reduced interest in abolition tomorrow (or next year), it is important to “convey” some of today’s abolitionist energy to the future through the creation of new institutions.

There is a very real opportunity for this kind of institution-building reform in the present death penalty context because of the almost universal acknowledgment of the problem of inadequate capital defense counsel. The substantial and even shocking documentation of the incompetence, indifference, or both, of many capital defense lawyers²⁵ has led to a variety of proposals aimed at raising the minimum level of legal assistance provided in such cases. Reforms currently being considered include raising salary caps for appointed counsel, promulgating minimum competency tests, requiring minimum levels of prior experience, requiring double chairing of capital trials, and establishing public defender or specialized capital defender offices.²⁶ Of these possible reforms, the creation of specialized capital defender organizations has the institution-building component that will intensify and magnify, rather than dissipate and diffuse, abolitionist energy and activity. The lawyers who will be drawn to full-time, minimally-compensated indigent capital defense work will be largely abolitionist in their orientation and will likely see their role as collectors and disseminators of abolitionist information and ideas as well as courtroom advocates for their clients. Whether or not specialized capital defense organizations are the best way to improve attorney competence—and the answer to this question might well vary with the possible alternatives in a given locale—abolitionists should support the creation of such organizations because of their unique capacity to counter the legitimation and entrenchment effects of death penalty reform.²⁷

²⁴ *Id.*

²⁵ See generally Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783; Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L. J. 1835 (1994).

²⁶ See Death Penalty Information Center, *supra* note 6.

²⁷ These hopes for specialized defender offices are based on more than mere speculation: the federally funded Resource Centers played exactly such a role before they were de-funded in 1995, and Bryan Stephenson’s Equal Justice Initiative in Alabama, which does a great deal of capital litigation in a state without any public defense organization, currently plays a similar

Of course, there are risks involved in creating new abolitionist institutions, particularly institutions that provide capital defense services. In addition to being an example of a capital defender service engaging in energetic abolitionist activity, the federally-funded capital Resource Centers are also a cautionary tale. Their de-funding came about precisely because they were viewed as *too* abolitionist, and thus, capital defendants lost important litigation services in addition to the more generally felt loss of an expert locus of abolitionist activity. During the congressional de-funding process in 1995, South Carolina Attorney General Charlie Condon captured the spirit of the ultimately successful opposition to the public funding of the Resource Centers, saying, “[T]hese lawyers have become lobbyists whose only goal is to stop executions at any cost.”²⁸

Even if abolitionist activity does not eventually destroy public support for a capital defender organization, the linking of abolitionist activity and legal representation may undermine both activities. As lawyers, capital defenders may feel conflicted about taking any energy away from their clients’ often urgent cases and thus, may not be able to undertake longer-term abolitionist projects that would have no immediate impact for their current clients. And as abolitionists, capital defenders may have little credibility, given that their clients clearly stand to gain directly from abolition—a disability not faced by religious or human rights organizations doing abolitionist work. Despite these caveats, which future builders and leaders of any such new institutions would do well to heed, we believe that institution-building—and, in particular, the building of specialized capital defender institutions—seems like a particularly promising avenue of counter-legitimation and entrenchment.

The second type of non-entrenching reform we call *sunshine* reform, or more simply, data collection and dissemination. The collection of information that is not available now, or only partially available, in our criminal justice system does not in itself reform the current system; rather, it is specifically geared to the future. In the death penalty context, there was a largely unsuccessful legislative move to prohibit disparate racial impacts in the distribution of capital sentencing in the wake of the Supreme Court’s decision in *McCleskey v. Kemp*,²⁹ which rejected constitutional challenges to the use of capital punishment despite statistical evidence demonstrating a correlation between the race of victims and defendants (but mostly victims) and the likelihood of a death sentence.³⁰ Only the state of Kentucky actually passed any sort of “Racial Justice Act,” despite many concerns raised by the data reviewed in *McCleskey* and collected since. More recent studies have also begun to show that the race of jurors also plays a large role in predicting

role, performing grass-roots advocacy and information dissemination in addition to providing litigation services.

²⁸ Lis Wiehl, *A Program for Death-Row Appeals is Facing Elimination*, N.Y. TIMES, Aug. 11, 1995, at B16.

²⁹ 481 U.S. 279 (1987).

³⁰ *Id.* at 279–82.

capital verdicts.³¹ Data collection in this context may well set the stage for further reform or abolition of capital punishment. In particular, collecting data on the race of jurors seated and struck in capital trials, even in the absence of a *Batson*³² or *McCullum*³³ challenge would add significant information that is currently unavailable in the criminal justice system regarding the racial composition of capital juries. Similarly, collecting information on the race of defendants and their victims in all cases eligible for a capital indictment would provide a fuller picture than the one that is currently accessible. In addition to requiring the recording of information that currently exists but is hard to access, new recording requirements could actually create new information, such as requiring individual prosecutors to give reasons for bringing, or declining to bring, a capital case. Requiring the collection or the production of these kinds of information sets the stage for future challenges to the use of capital punishment by giving future reformers some way of measuring the success of current reforms. Moreover, sunshine reforms work powerfully in conjunction with institution-building reforms because the new institutions have the interest, the personnel, and the dissemination power to use the information collected to generate and to focus critical scrutiny on continuing problems in the administration of capital punishment.

Sunshine reforms will tend to counter the legitimating or entrenching effects of reform only if the information brought to light in fact reveals continued problems with the administration of capital punishment. It is possible that some reforms really will make the system much better than it used to be and will render it “good enough” for most people to accept without outrage. For example, a recent study of the capital justice process in the state of Nebraska revealed no statistically significant effect of the race of either the defendant or the victim on the death sentencing or execution rate in the 177 homicide cases studied.³⁴ The lead editorial in the *Omaha World-Herald* blared: “Nebraska is Acquitted,”³⁵ despite the fact that the study showed a strong connection between the socio-economic status of the victim and the defendant’s chance of execution, as well as substantial geographic disparities within the state in charging practices. Moreover, in times like the present of heightened concern over capital punishment, it is possible that the public may be under- as opposed to over-estimating the reliability of the capital process. For example, it is our hunch that some, perhaps many, members of the public would be surprised to learn that none of the many capital defendants who have been exonerated by DNA evidence were actually

³¹ See William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001).

³² *Batson v. Kentucky*, 476 U.S. 79 (1986).

³³ *Georgia v. McCollum*, 505 U.S. 42 (1992).

³⁴ See Leslie Reed, *Death-Penalty System Called Fair; Study Finds Race Doesn’t Play Significant Role in Sentencing*, OMAHA WORLD-HERALD, Aug. 2, 2001, at 1.

³⁵ See *Nebraska is Acquitted*, OMAHA WORLD-HERALD, Aug. 2, 2001, at 18.

executed. (The hunt for the scientifically proven “executed innocent” continues.) Thus, sunshine reforms carry their own risks of legitimating and entrenching.

Our nomination of sunshine reforms for the short list of counter-legitimizing reforms is driven by our pessimistic, but informed, prediction that the gravest problems afflicting our capital justice process—racial discrimination (conscious and unconscious), class bias, inadequate criminal defense counsel, and prosecutorial and/or judicial misconduct—will not easily be eliminated, or even substantially mitigated, in most venues. If we are right, then sunshine is crucial to the abolitionist project, as another recent news story illustrates. Less than a week after the Nebraska report was carried on the front page of the Omaha World-Herald, the Seattle Post-Intelligencer ran its own front-page story on the failure of capital defense in the state of Washington, *despite* the fact that a commission of the Washington state legislature has been screening lawyers for use in capital cases since 1988.³⁶ The creation of the screening committee might easily have quieted concerns about capital defense in the state. However, the actual perusal of facts about capital defense lawyers in the state—notably that nearly a fifth of capital defendants in Washington state in the last two decades were represented by court-appointed lawyers who had been disbarred, or were later disbarred, suspended, or criminally prosecuted—can work to counter the complacency that the 1988 reform might have produced.

The third category of non-entrenching reform we call *sunset* provisions, provisions that call for the evaluation of the success of proposed reforms after a period of time. Such reforms may take the form of classic sunset provisions, which require that a particular reform expire after a given period of time unless it is affirmatively renewed. This strong sort of sunset provision may often be undesirable in the death penalty context, because even modest reforms can require Herculean efforts and split-second timing that would be impossible to reproduce three, five, or seven years later. This strong sort of sunset provision should be used only for reforms that seem to have a strong likelihood of legitimation, such as the Texas plan to have a capital defendant’s claim of mental retardation decided by the sentencing jury after they have concluded that death is the appropriate punishment. A weaker type of sunset provision would require that the effectiveness of a particular reform be studied, that public hearings be held, or simply that collected data be publicly reported at a date certain in the future. This kind of reform prevents people, in the public and the legislature alike, from considering a problem fixed and moving on. Rather, it creates a specific moment in the future for further scrutiny and reflection.³⁷

³⁶ See Lisa Olsen, *Capital Defense on the Cheap*, THE SEATTLE POST-INTELLIGENCER, Aug. 8, 2001, at A1.

³⁷ Note that such a reconsideration would have been helpful in the context of state proportionality review, which was touted by the Supreme Court in *Gregg* as an important feature of the reformed Georgia statute. *Gregg v. Georgia*, 428 U.S. 153, 204–06 (1976). Experience with, and study of, state proportionality review has shown it to be largely ineffectual

This trio of anti-legitimizing reforms might not reform capital punishment in and of themselves; rather, they plant the seeds for future reform or abolition and, thus, are goals on which reformers need to spend some of their precious political and material resources, even as they pursue other, more direct means of reforming the worst aspects of our system of capital punishment.

IV. CRITIQUES

In addition to useful debate about whether our three nominees for counter-legitimizing reforms are as promising as we suggest, there are a number of more global critiques one could make to the arguments advanced above. We can identify five major ones. First, one could question the descriptive premise, both of our earlier work on judicial reform and of this essay on legislative reform, that reform of either kind has had or is likely to have a significant legitimating or entrenching impact. On the judicial front, we argued that the constitutional regulation of capital punishment played a significant role in entrenching the death penalty over the last three decades. One could argue instead that this entrenchment was due entirely to crime rates because as crime rates, especially homicide rates, rose precipitously in the 1970s and 1980s, support for the death penalty rose as well. After crime rates, including homicide rates, fell precipitously in the 1990s, support for the death penalty also fell. The lowest support recorded in the last century for capital punishment was in 1966 and the highest was in 1994.³⁸ The crime rates story is not a perfect fit (because crime rates were rising before 1966 and falling before 1994), but after allowing for some lag-time, the relevance of crime rates to support for capital punishment seems plausible.

Crime rates, however, do not tell the entire story. If crime rates were all that drove public attitudes about capital punishment, then one would expect to see both a tighter fit, time-wise, and some suggestion by the public themselves about the source of the change in views. But, as we noted above, people who oppose the death penalty almost always point to the problems of unreliability and the possible execution of the innocent, concerns that are more likely to be accounted for by legitimization effects than by crime rates. We do not mean to suggest in a reductionist fashion that legitimization is the whole story; rather, we mean only to argue that legitimization and entrenchment are a significant part of the story of public attitudes about capital punishment, albeit a part hard to isolate or quantify.

A second global critique might attack a different premise of our project. Our

as practiced, but there has never been an opportunity in the litigation context to develop this point effectively. See Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Court After Gregg: Only "The Appearance of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 133 (1996) ("After the United States Supreme Court held in *Pulley v. Harris* that proportionality review was not mandated by federal constitutional principles, the majority of state high courts reduced proportionality review to a perfunctory exercise.") (citations omitted).

³⁸ See Gallup Poll News Service, *supra* note 3.

general argument that we should attend to legitimating and entrenching effects of death penalty reform is premised on the idea that abolition is possible in the foreseeable future. If one thought that complete abolition of capital punishment is not now and, in the absence of profound political change, never will be a realistic possibility in the United States, the legitimating and entrenching effects of reform would be of only academic interest. Under these circumstances, it simply would not be a question whether abolitionists should support legislative reform of capital punishment. Rather, the only question would be *which* reforms to support, and that question would be answered without reference to the problems of legitimation and entrenchment. Our premise that abolition is possible, and more possible now than at any other time since *Furman*, is untestable, but it receives some small support from the growing discomfort our country is facing as the rest of the Western industrialized world both abjures the death penalty and puts pressure on the United States to either abandon the practice or forego its leadership role in areas such as human rights.³⁹

Third, a related critique accepts that legitimation and entrenchment are real possibilities and that they might actually delay or prevent the achievement of a readily-achievable abolition but states that it is simply a moral imperative to limit the death penalty (to save lives) when we can, and thus, all political capital must be spent in this way. This tends to be the critique offered most frequently from the capital defense bar, which works case-by-case in the trenches. They are abolitionists, but they are steadfastly averse to making conscious choices in favor of long-term strategy over present cases and lives. Our answer to the capital defense bar is that, as advocates for individual clients, they must never trade a client's interest toward some future, greater gain. But as abolitionists, they must have a long-term strategy that allocates some resources toward current cases and some toward larger goals. The fact that life is at stake does not (or should not) change this calculus.

From the entirely opposite direction, people on the far left might argue that we should abandon the reforming process entirely and indeed, actively oppose it because of its legitimating and entrenching potential. The only way to eliminate the death penalty, the argument would go, is to let it decline as much as possible. Let the children, those with mental retardation, and even the innocent, be executed and then finally, we will have a real chance of abolishing the death penalty. From this familiar, far left position of hoping that crisis will inspire revolution, the answer to the question: "Should abolitionists support legislative reform of the death penalty?" would be a resounding "NO." We need not discuss the familiar, tangled debate on the morality of crisis politics to reject this critique,

³⁹ See, e.g., Karen DeYoung, *Amnesty Criticizes U.S. Record on Rights*, THE WASHINGTON POST, May 31, 2001, at A22 (noting that the head of the U.S. chapter of Amnesty International chided the U.S. for "'abdica[ing] its duty' to lead the world in promoting human rights").

because it simply is not practical in the context of the politics of death-penalty reform. The impetus for, and success of, legislative reform of capital punishment generally comes from, and will continue to come from, *supporters* of capital punishment who seek to reform the practice in order to preserve it. Opposition to any kind of reform from individuals on the far left would be transparently political and wholly unavailing.

Finally, a different sort of critique from the left might claim that we do not take our legitimization argument far enough or seriously enough. If we actually achieved the ultimate goal that we set for ourselves, the wholesale abolition of capital punishment, we would only legitimate the *rest* of our diseased and discriminatory criminal justice system. Capital punishment is the only thing that keeps public attention focused on the abuses of our criminal justice process; eliminate the death penalty and the problems of incompetent lawyers, disparate racial impact, and the convictions of the innocent will sink from public view and concern. This last critique is both the strongest and the weakest. It is powerfully true that the death penalty focuses public scrutiny on our deeply flawed criminal justice system, and that it will be harder to get people to notice or care about injustice in the system without the dramatic fear of the execution of the innocent. However, the most common response of those concerned by problems in the capital trial and sentencing process is *not* to propose across-the-board reforms of the process as whole, but rather to target capital cases, often at the expense of non-capital cases. Moreover, even if some of the reforms brought about by concern over capital cases help to promote criminal justice in non-capital cases as well, the price of tolerating executions is simply too high. There are other ways of promoting reform of the criminal justice process to which abolitionists, or at least some of them, would turn if the death penalty were abolished.