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THE RHETORIC OF ABOLITION: CONTINUITY AND CHANGE IN THE STRUGGLE AGAINST AMERICA'S DEATH PENALTY, 1900–2010*

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This article seeks to understand when, how, and where the framing of arguments against capital punishment has changed. While others have focused exclusively on the national level, we studied the framing of abolitionist arguments in three American states: Connecticut, Kansas, and Texas. Each is located in a different region of the country, and each has its own distinctive death penalty history. We studied the framing of arguments against the death penalty from 1900 to 2010. Our study suggests that the rhetorical reframing of the campaign against capital punishment that has occurred at the national level has had deep resonance at the state level. Over the course of the 20th century in Connecticut, Kansas, and Texas, the focus on error and arbitrariness has assumed greater prominence among abolitionists. In each state, this change began to take hold in the late 1960s and 1970s and accelerated as the 20th century drew to its close. But, in each state, older frames persisted. Older arguments continued to occur with greater frequency than the new abolitionism.

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INTRODUCTION

Today the United States seems to be on the road to abolishing the death penalty. Support for capital punishment, which for the last quarter of the 20th century appeared firmly entrenched, is weakening.[1] Moreover, across the U.S., the number of death sentences has dropped from a high of 315 in 1994 to forty-nine in 2015.[2] Mirroring this trend, the number of executions peaked in 1999, and has been steadily declining over the past fifteen years, reaching a twenty-four year low in 2015.[3] While thirty-one states still retain the death penalty,[4] sixteen of those states and the federal government have not executed anyone in the past five years.[5]

There are, of course, many possible explanations for the changing situation of capital punishment. Relatively low rates of violent crime and the growth of life in prison without parole sentences are two such explanations.[6] However, if the American death penalty eventually does end, it will be in no small part because abolitionists altered their political and legal arguments and, in doing so, successfully reframed the death penalty debate.[7]

Communications scholar Robert Entman broadly defines the term "framing" as "any effort to influence public opinion through the formulation of messages."[8] Issues of political import in a democracy are almost always being framed "as various political entrepreneurs [attempt] as best they can to affect the debate given changes in the stream of information coming in from

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* We are grateful for the indispensable help provided by Amherst College's Missy Roser.

[1] Richard C. Dieter, *Changing Views on the Death Penalty in the United States*, DEATH PENALTY INFO. CTR., 1, 11–15 (Oct. 7, 2007), http://deathpenaltyinfo.org/files/pdf/Beijing07.pdf.

[2] *Death Sentences By Year: 1976–2015,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-sentences-year-1977-present (last visited June 8, 2017); *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Mar. 20, 2016);

[3] *Facts about the Death Penalty*, *supra* note 2.

[4] *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Mar. 20, 2016).

[5] *Jurisdictions With No Recent Executions*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/jurisdictions-no-recent-executions (last visited June 8, 2017).

[6] The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections*, THE SENTENCING PROJECT, 1, 8, http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf (last visited Mar. 6, 2017).

[7] Suzanna De Boef et al., *Strategic Framing and Cognitive Response to the Death Penalty*, 1, 1, http://www.unc.edu/~fbaum/articles/Strategic_Framing.pdf (last visited Mar. 6, 2017).

[8] BRIAN F. SCHAFFNER & PATRICK J. SELLERS, WINNING WITH WORDS: THE ORIGINS AND IMPACT OF POLITICAL FRAMING ix (2010).

forces beyond their control."[9] The framing of complex issues involves social, cultural, and political elements. In this way, debates surrounding the death penalty resemble other hot button issues in the United States.

The importance of framing in political contests is illustrated by the struggle for gay and lesbian rights. Teresa Godwin Phelps notes that an "unprecedented shift in the rhetoric used about gays and lesbians—the names they are called, the kinds of images and metaphors that describe them, the stories about them" paved the way for the Supreme Court's recognition of gay marriage in *Obergefell v. Hodges.*[10] A large reason for the change, Phelps argues, was "the strategic rhetorical choices made by gay activists and advocates."[11]

In the past half century, the framing of the death penalty debate has shifted and evolved dramatically. Perhaps the most important factor in this evolution has been wrongful convictions in death penalty cases. Since 1973 more than 150 people have been exonerated from death row.[12] Abolitionists have used the phenomenon of wrongful conviction to change the story about capital punishment and the public's understanding of what is at stake when the state kills.[13]

Professor Frank Baumgartner of the University of North Carolina at Chapel Hill and his colleagues examined this change in anti-death penalty rhetoric.[14] Focusing exclusively on the last part of the 20th century, they traced the emergence of what they called the "innocence frame" which "diverts attention away from theoretical and philosophical issues of morality to focus simply on the possibility of errors in the criminal justice system."[15] Furthermore, Baumgartner et al. noted the way in which "the process of 'framing,' defining an issue along a particular dimension (e.g., fairness and innocence) to the exclusion of alternate dimensions (e.g., morality, constitutionality, or cost)" completely shifted the grounds of debate.[16] They

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[9] FRANK R. BAUMGARTNER ET AL., THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE 14 (2008).

[10] Teresa Godwin Phelps, *The Evolving Rhetoric of Gay Rights Advocacy*, *in* RHETORICAL PROCESSES AND LEGAL JUDGMENTS: HOW LANGUAGE AND ARGUMENTS SHAPE STRUGGLES FOR RIGHTS AND POWER 82 (Austin Sarat ed., Cambridge U. Press 2016).

[11] *Id.*

[12] 159 as of May, 2017. *The Innocence List*, DEATH PENALTY INFO. CTR., (May 11, 2017), https://deathpenaltyinfo.org/innocence-list-those-freed-death-row.

[13] James D. Unnever & Francis T. Cullen, *Executing the Innocent and Support for Capital Punishment: Implications for Public Policy*, 4 CRIMINOLOGY AND PUB. POL'Y 3, 26 (2005).

[14] BAUMGARTNER ET AL., *supra* note 9, at 52.

[15] *Id.* at 9.

[16] *Id.* at 4.

argued that the innocence frame came to dominate public discussion of the death penalty beginning in the mid-1990s.[17]

Building on Baumgartner's work, Professor Austin Sarat of Amherst College argues that abolitionist rhetoric has so radically shifted that we are living in an era of what he calls "the new abolitionism," an era in which moral, philosophical, and pragmatic opposition to the death penalty has been, he claims, displaced in importance by rhetoric that highlights problems in the processes of guilt determination and sentencing.[18] "The campaign to abolish capital punishment," Sarat observes:

> no longer takes the form of a frontal assault on the morality or constitutionality of state killing. Instead, arguments against the death penalty occur in the name of constitutional rights other than the Eighth Amendment, in particular due process and equal protection. Abolitionists today argue against the death penalty claiming that it has not been, and cannot be, administered in a manner that is compatible with our legal system's fundamental commitments to fair and equal treatment.[19]

Sarat's argument underscores dramatic changes in the framing of abolitionist arguments against the death penalty.

A change of the kind that Sarat describes can also be seen in jurisprudential opposition to capital punishment over the past forty years.[20] The opinions of Supreme Court Justices William Brennan, Bryon White, Harry Blackmun, and Stephen Breyer, in high profile death penalty cases dating back to *Furman v. Georgia* in 1972, capture the evolution of anti-death penalty rhetoric.[21]

While Justice William Douglas's opinion in *Furman* gave voice to elements of what emerged later as the new abolitionism, Justice Brennan's *Furman* opinion drew heavily on a moral or philosophical interpretation of the Eighth Amendment.[22] Justice Brennan noted that the argument about the death penalty is, at its core, a battle that has "been waged on moral grounds."[23] "The country," he suggested, "has debated whether a society for

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[17] *Id.* at 9.

[18] Austin Sarat, *Recapturing the Spirit of* Furman: *The American Bar Association and the New Abolitionist Politics*, 61 L. & CONTEMP. PROBS. 5, 9–10 (1998).

[19] *Id.* at 9.

[20] *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2755–77 (2015) (Breyer, J., dissenting); Callins v. Collins, 510 U.S. 1141, 1157 (1994) (Blackmun, J., dissenting); Furman v. Georgia, 408 U.S. 238, 258–306 (1972) (Brennan, J., concurring); Furman, 408 U.S. at 310–14 (1972) (White, J., concurring).

[21] *See, e.g.*, Glossip, 135 S. Ct. at 2755–77 (Breyer, J., dissenting); Callins, 510 U.S. at 1157 (Blackmun, J., dissenting); Furman, 408 U.S. at 258–306 (Brennan, J., concurring); Furman, 408 U.S. at 310–14 (White, J., concurring).

[22] Furman, 408 U.S. at 296.

[23] *Id*.

which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death."[24] In Justice Brennan's view, capital punishment is cruel and unusual, and thus unconstitutional because "the deliberate extinguishment of human life by the State is uniquely degrading to human dignity."[25]

Justice White joined Justice Brennan in voting to strike down the death penalty, but he did so more on pragmatic than on moral grounds.[26] For Justice White, the problem with capital punishment was that it was "so seldom imposed" that it ceased to be "a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."[27] The death penalty amounted to the purposeless infliction of pain.[28] As Justice White put it:

> I accept the effectiveness of punishment generally and need not reject the death penalty as a more effective deterrent than a lesser punishment. But common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.[29]

More than two decades after *Furman*, Justice Blackmun turned his attention from the philosophical, moral, and pragmatic problems with capital punishment to procedural problems with what he labeled as "the machinery of death."[30] In his 1994 dissent in *Callins v. Collins*, Justice Blackmun argued that:

> no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies . . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.[31]

Although Justice Blackmun mentioned the "moral error" of the death penalty, he focused, to a much greater degree than either Justices Brennan or White, on defects in its administration, and he gave voice to a new abolitionist

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[24] *Id.*
[25] *Id.* at 291.
[26] *Id.* at 310–12.
[27] *Id.* at 311.
[28] *Id.* at 312.
[29] *Id.*
[30] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).
[31] *Id.* at 1145–46.

perspective.[32]

That perspective informed Justice Breyer's dissenting opinion in *Glossip v. Gross*, a 2015 case in which the Supreme Court approved the use of midazolam as a lethal injection drug.[33] Justice Breyer offered a wide-ranging account of possible constitutional problems with America's death penalty.[34] Justice Breyer cited three main defects: "(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose."[35] All three of Justice Breyer's reasons for opposing capital punishment highlighted faults in the administration of the death penalty.

The salience of new abolitionist rhetoric was also seen in the American Bar Association's (ABA) resolution in 1997 calling for a moratorium on capital punishment.[36] The ABA resolution said that the death penalty as "currently administered" was not compatible with central values in our Constitution.[37] Like Justices Blackmun and Breyer, the ABA embraced the new abolitionism, eschewing a direct address to state violence and relying instead on an indirect, though nonetheless devastating critique.[38] "This effort, while speaking to some of the most pressing issues facing today's capital punishment system, recaptures the spirit of *Furman*."[39] The ABA example suggests the relevance and usefulness of new abolitionist rationales in forums other than the Supreme Court.[40]

Our research seeks to understand when, how, and where the framing of arguments against capital punishment changed. We focus on politics and popular culture rather than jurisprudence and law. While others have focused exclusively on the national level, we studied the framing of abolitionist arguments in three American states: Connecticut, Kansas, and Texas.[41] Each

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[32] *Id.*

[33] *See generally* 135 S. Ct. 2726 (2015).

[34] *Id.* at 2756.

[35] *Id.*

[36] AMERICAN BAR ASSOCIATION, DEATH PENALTY MORATORIUM RESOLUTION (1997), http://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/moratorium-1997.html (last visited Mar. 6, 2017).

[37] *Id.*

[38] Sarat, *supra* note 18, at 27.

[39] *Id.*

[40] *Id.* at 9.

[41] In each state, we examined newspaper coverage of capital punishment, drawing on newspapers that have been digitized, with minimal gaps, back to 1900. Furthermore, each state had additional digitized records available on NewspaperArchives allowing articles found in the more prominent newspapers in each state to be supplemented by articles from regional newspapers. Every newspaper article was searched using a consistent system designed to

is located in a different region of the country, and each has its own distinctive death penalty history.[42]

Moreover, we extended the time period for the analysis of the rhetoric of abolition beyond the period previously studied by Baumgartner et al. and Sarat. We studied the framing of arguments against the death penalty from 1900 to 2010. In this analysis, we ask whether the development of the "new abolitionism" at the state level tracked national developments and whether it evolved in similar or different ways in three different death penalty jurisdictions.[43]

We begin with Texas, the long-time capital of America's death-belt.[44]

I. TEXAS

Texas has a long and storied death penalty history.[45] Throughout most of that history, executions were carried out in the locality in which the crime was committed or the criminal was captured.[46] Records dating back to before the founding of the Republic of Texas reveal that from 1819 until 1923 there were 394 legal executions in Texas, 390 by hanging and 4 by firing squad.[47] Of course, like all southern states during this period, there were also frequent extrajudicial lynchings, forms of private revenge for which records were not consistently kept.[48]

In May 1922, an outbreak of lynchings in central Texas led state

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capture any article that contained, in the body or in the title, the words "capital punishment" or "death penalty" in addition to, when possible, the words "abolition," "abolish," or "abolitionism." Lastly, in the course of our analysis, we drew upon legislative debates to contextualize and better understand the rhetoric found in the press.

[42] *See State Information*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state-information (last visited Mar. 6, 2017).

[43] Our research initially identified twenty-four unique arguments against the death penalty, which we eventually collapsed into three categories: (1) new abolitionism, (2) old abolitionism, and (3) pragmatic. New abolitionist arguments criticize capital punishment for failing in terms of equal protection and due process. In contrast, old abolitionist arguments focus on the alleged immorality of the death penalty, draw on philosophical or religious sources, and invite one to sympathize with the perpetrator of a crime rather than simply opposing state killing on procedural grounds. Pragmatic arguments include arguments relating the costs associated with capital punishment, potential alternatives to capital punishment, and the ability of capital punishment to deter crime.

[44] *See generally* Casey Tolan, *Texas Is No Longer America's Death Penalty Capital*, VICE (Dec. 15, 2016), https://www.vice.com/en_us/article/texas-is-no-longer-americas-death-penalty-capital.

[45] JAMES W. MARQUART ET AL., THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990 ix (1994).

[46] *Id.* at 12.

[47] *Id.*

[48] *Id.* at 5.

officials to consider policy changes to curb that unsanctioned violence.[49] The state decided to centralize all executions in the Huntsville prison and to adopt the electric chair in 1924.[50] Officials hoped that by removing the responsibility for executions from local authorities, and using a more advanced mode of execution, they could professionalize and further legitimize state killing.[51]

Texas's use of capital punishment continued unabated until 1964 when the state halted executions.[52] In 1982, six years after the Court's reinstatement of capital punishment in *Gregg v. Georgia*, the first person was put to death under Texas's updated sentencing statute.[53] Despite its slow post-*Gregg* start, the state quickly accelerated its use of the death penalty. By 1992, Texas led the nation with twelve executions since 1976.[54]

Looking back over the course of the last century reveals that the framing of anti-death penalty arguments in Texas has exhibited elements of both continuity and change. At the start of the 20th century, almost 67% of abolitionist arguments were made in philosophical, moral, and religious terms.[55] By the century's end, only about 40% of abolitionist arguments were framed in that way.[56]

Arguments about the high cost and/or lack of deterrence associated with capital punishment have remained a relatively constant feature of criticism of capital punishment in Texas.[57] At the start of the 20th century, about 25% of

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[49] *Id.* at 13.

[50] *Id.*

[51] *Id.* at ix.

[52] *Id.* at 107.

[53] *Id.* at 130.

[54] *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited Jun. 11, 2017).

[55] Our analysis was conducted on several of the major Texas newspapers in the 20th Century, including: DALLAS MORNING NEWS, GALVESTON DAILY NEWS, SAN ANTONIO EXPRESS AND NEWS, AMARILLO GLOBE TIMES, BAYTOWN SUN, ABELINE REPORTER NEWS, and BROWNSVILLE HERALD. This number was calculated by averaging the proportion of old abolitionist arguments in each decade between 1900 and 1940.

Note for all future statements of proportionality: in order to account for varying quantities of data over the decades, we averaged the proportions of the individual decades, rather than deriving the percentage from the total number of arguments made during the forty-year period. In this way, we give equal weight to each decade.

[56] This number was calculated by averaging the proportion of old abolitionist arguments in each decade between 1970 and 2010.

[57] Pragmatic arguments, those about cost and deterrence, have moved from 23% in the first four decades of the 20th Century to 20% between 1970 and 2010.

abolitionist arguments raised issues involving cost and/or deterrence.[58] A similar proportion did so at the start of this century.[59]

In contrast, arguments focused on the arbitrariness of the death penalty system, which are arguments that are consistent with the new abolitionism, have markedly increased in prominence since the 1960s.[60] Those focused specifically on the death penalty's unreliability (the innocence frame) have shown a similar increase from the 1980s to the present.[61] In the early decades of the 20th century, slightly more than 10% of abolitionist arguments in Texas criticized the death penalty's administration.[62] By the end of the century, arguments about defects in the death penalty's administration more than tripled in frequency from what was seen at the start of the last century.[63]

In Texas, new abolitionism emerged much earlier than one would surmise from Baumgartner et al.'s analysis.[64] In addition, though by the end of the 20th century new abolitionist rhetoric provided an important new tool in the struggle against the death penalty in that state, in terms of sheer frequency, abolitionists continued to rely more on moral, religious, and pragmatic arguments than on arguments about innocence and arbitrariness.[65]

Typical of the kind of moral and religious arguments found in Texas during the period of our study is one that appeared in February 1924 in the *Canton Herald*. When "life is taken," this early 20th century opponent of the death penalty said, "it is in direct refutation of one emphatic command which says 'thou shalt not kill.'"[66] Here, the language of command is deployed to criticize state killing. Here, citizens of Texas were called to attend to four words comprising the biblical enunciation "thou shalt not kill."

The vast majority of these moral and religious arguments against state

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[58] This number was calculated by averaging the proportion of pragmatic arguments in each decade between 1900 and 1940.

[59] This number was calculated by averaging the proportion of pragmatic arguments in each decade between 1970 and 2010.

[60] Of twenty-two total arguments made specifically referencing the "arbitrary" nature of the death penalty in our sample, nineteen were made after 1960.

[61] Of fifty-eight total arguments made specifically referencing executing the innocent in our sample, thirty-seven were made after 1980.

[62] This number was calculated by averaging the proportion of new abolitionist arguments in each decade between 1900 and 1940.

[63] Between 1970 and 2010, new abolitionist arguments were on average 39% of all arguments made against the death penalty. This number was calculated by averaging the proportion of new abolitionist arguments in each decade between 1970 and 2010.

[64] *See generally* BAUMGARTNER ET AL., *supra* note 9.

[65] In the last four decades of the sample, on average 39% of arguments were new abolitionist, while 61% were old abolitionist and pragmatic combined.

[66] *Capital Punishment*, CANTON HERALD, Feb. 15, 1924, at 6.

killing, not surprisingly, are Christian. Yet, these arguments are polarizing because they create a dichotomy between right and wrong. Thus, they call on the death penalty's supporters to admit the error of their ways by suggesting that they are sinners or are on the wrong side of a stark moral divide.[67]

Thus, in 1956, columnist Harry McCormick published an article in the *Dallas Morning News* in which he wrote

> As one who has witnessed 27 executions, most of them in Texas, [this writer] could never see it [as] other than a form of legalized murder on the part of the state. Of course, in a democratic society the state is you and I. . . . An execution is a deliberate act in which every Texan participates.[68]

Equating the death penalty with murder and its supporters with murderers, long a mainstay of traditional moral arguments against capital punishment, hardly seems a way to change hearts and minds. These arguments suggest that the death penalty is an insidious and corrupting force, a cancer that must be removed.

As we noted above, in contrast to the relative decline in the frequency of moral and religious arguments against the Texas death penalty, the number of pragmatic arguments remained steady.[69] During this period, arguments focused on the death penalty's failure as a deterrent were the most popular of these pragmatic arguments.[70]

Over the course of the century, those making deterrence arguments invariably cited statistics purporting to show that the death penalty did not, in fact, deter. For instance, in 1924, Texas State Representative T.K. Irwin remarked that he knew "from a study of the statistics in eight states in the union which have done away with capital punishment that major crimes have decreased in every one of them, and not one has returned to it."[71] Another deterrence argument, from sixty years later, uses a similar line of reasoning:

> A recent Associated Press poll found an overwhelming majority—84 percent—of Americans approve of the death penalty. Many view it as a deterrent to violent crime. Most available statistics don't bear out their view. Murder rates in death penalty states, such as Illinois and New Hampshire, differ little from non-death penalty states of similar populations and characteristics, such as Michigan and Vermont. In some instances, a decrease in homicides has followed abolition of the penalty. . . . And it is possible that the actual effect of a death sentence may be to incite rather than deter

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[67] *Id.*

[68] Harry McCormick, *Is Electric Chair Crime Deterrent?,* DALLAS MORNING NEWS, Nov. 18, 1956.

[69] See supra note 57.

[70] Out of 152 total pragmatic arguments made in our Texas sample, 100 were arguments about deterrence.

[71] *Author of Electrocution Bill Now Opposed to Capital Punishment*, GRAND PRAIRIE TEXAN, Feb. 15, 1924, at 1.

violence.[72]

Coinciding with Texas's *de facto* moratorium,[73] abolitionist rhetoric underwent a perceptible change with an increase in new abolitionist framing of anti-death penalty arguments. 78% of all new abolitionist arguments made between 1900 and 2010 were made after 1964.[74] The most common of these arguments highlighted the death penalty's systemic bias and arbitrariness as well as the dangers of executing an innocent person.[75]

We identified arguments pertaining to five dimensions of arbitrariness in death sentences: race, geographical location, socio-economic condition, gender, and educational level. Although each has its own characteristics, new abolitionists have incorporated some or all of these biases into more general arguments pertaining to disproportionality. One example of such an argument is found in an op-ed from the late 1960s:

> According to numbers kept between 1930 and 1965, 17 southern states registered 1,659 black executions to 636 white; 1,100 of the Negroes were killed in only 7 of the states. . . . Penologists agree that discrimination is a justifiable argument against capital punishment since it is well known that some states have tailored capital punishment to fit the black offender.[76]

As important as arguments about arbitrariness have been to recent efforts to end Texas's death penalty, even more important have been arguments about the unreliability of capital punishment and the risk of executing the innocent. From the late 1980s to the present, increasing attention to these problems has animated abolitionist rhetoric.[77] Typical is the following claim:

> An alarming number [of prisoners] are innocent of the crimes for which they were convicted. For even one man to be killed in the name of justice for crimes that he had nothing to do with is unacceptable. And for this to happen on a regular basis is a preposterous travesty of justice.[78]

Today, in Texas—as in the nation as a whole—the death penalty is in

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[72] Don Graff, *Death Penalty Reinstatement Results in Grim Statistics*, THE BAYTOWN SUN, Mar. 24, 1985, at 4-A.

[73] MARQUART ET AL., *supra* note 45, at 147–48.

[74] 163 out of 208 new abolitionist arguments within our sample were made between 1965 and 2010.

[75] Arguments about arbitrariness, bias towards certain groups, and innocence make up 113 out of the 163 (69%) new abolitionist arguments in our sample made between 1965 and 2010.

[76] Tom Tiede, *'I Have Never Seen a Person of Means Go to Chair,' Says Former Governor*, THE VICTORIA ADVOC., Aug. 15, 1967, at 4.

[77] *Id.*; *see also supra* note 61.

[78] Dale Dimitri, *The Death Penalty is Fatally Flawed*, TEXAS CITY SUN, Aug. 15, 1999, at 4A.

decline.[79] New death sentences in Texas have dropped nearly 80% since 1999 when they reached their peak of forty-eight. In 2015, juries condemned only three new individuals to death. This marked the lowest number of new death sentences since the U.S. Supreme Court upheld Texas's revised death penalty statute in 1976.[80] Furthermore, after reaching a high of forty executions in 2000, Texas executed only seven individuals in 2016.[81] Finally, there are 241 individuals on death row in Texas, the lowest that population has been since the late 1980s.[82]

It is, of course, not possible to determine how much of the changed situation in Texas may be properly attributed to abolitionist arguments. What we can state is that those arguments both resemble and depart from the framing of anti-death penalty arguments at the national level. In Texas, as elsewhere, during the last part of the 20th century, the new abolitionism assumed greater prominence. Yet moral, religious, and pragmatic arguments continued to play a major role in the movement to end the death penalty in that state.

II. CONNECTICUT

Connecticut has, not surprisingly, a very different death penalty history than Texas. Indeed in 2012, the Connecticut Legislature enacted Public Act No. 12-5, prospectively abolishing the death penalty.[83] With the passage of Public Act No. 12-5, Connecticut became the seventeenth state, and fifth state in the preceding five years, to end capital punishment.[84] Furthermore, Connecticut is one of only six states—the others being Illinois, Maryland, New Jersey, New Mexico, and Nebraska—to have recently abolished the death penalty through legislative action.[85]

Before 2012, Connecticut was one of only two states in New England, the other being New Hampshire, that retained the death penalty.[86] Moreover, Connecticut is the only New England state to execute anyone during the 20th

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[79] *Facts about the Death Penalty*, *supra* note 2.

[80] *Id.*

[81] *Number of Executions by State and Region Since 1976*, *supra* note 54.

[82] *Facts about the Death Penalty*, *supra* note 2.

[83] Act Revising the Penalty for Capital Felonies, S.B. 280, Pub. Act. 12-5, 2012 Conn. Gen. Assemb. (Conn. 2012), *available at* https://www.cga.ct.gov/2012/act/pa/pdf/2012PA-00005-R00SB-00280-PA.pdf (last visited June 6, 2017).

[84] Peter Applebome, *Death Penalty Repeal Goes to Connecticut Governor*, N.Y. TIMES, Apr. 11, 2012, http://nyti.ms/1ynKmgU.

[85] CNN Library, *Death Penalty Fast Facts*, CNN, (Jan. 29, 2017, 9:53 PM), http://www.cnn.com/2013/07/19/us/death-penalty-fast-facts/. Nebraska reinstated capital punishment as a result of a referendum in November 2016.

[86] *States With and Without the Death Penalty*, *supra* note 4.

century, putting to death Joseph Taborsky in 1960 and Michael Ross in 2005.[87] At the time of abolition, Connecticut had eleven inmates on death row, far more than New Hampshire, which sentenced only one person to death between 1994 and 2012.[88]

Three years after the Connecticut legislature's prospective abolition, the state's supreme court, in *State v. Santiago*, held that the death penalty in all its forms violated the state's constitution, thus preventing its application to inmates then on death row.[89] These legislative and judicial acts were motivated by contemporaneous societal and legal developments and, more fundamentally, they reflected the shift in abolitionist rhetoric that took place during the 20th century in America.[90]

Over the past century, individuals from across the political spectrum in Connecticut voiced grave concerns about the death penalty. They alleged that capital punishment was a relic of a more barbaric age, that the penalty was driven by revenge, that the risk of executing innocent people was too great, that the delays that plague the system were too long, and that the money spent on the death penalty could be used more effectively elsewhere.[91] These critics have included judges, prosecutors, legislators, social justice advocates, and the families of the murder victims.[92]

From 1900 to 2010, the framing of abolitionist arguments in Connecticut followed a pattern somewhat like Texas. While traditional philosophical, moral, and religious arguments against the death penalty were more prominent in Texas than in Connecticut at the start of the 20th century, in the latter state as in the former they declined, but were not entirely displaced by new abolitionist rhetoric.[93] At the start of the 20th century, approximately half of abolitionist arguments found in our Connecticut sample focused on questions of morality and religion.[94] By the end of the century, this number dropped slightly to about 45%.[95]

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[87] LAWRENCE B. GOODHEART, THE SOLEMN SENTENCE OF DEATH: CAPITAL PUNISHMENT IN CONNECTICUT 2 (2011).

[88] *States With and Without the Death Penalty*, *supra* note 4.

[89] 112 A.3d 1, 17 (Conn. 2015).

[90] *Id*.

[91] *New Voices*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/new-voices (last visited Feb. 21, 2016).

[92] *Id.*

[93] The average of the proportion of old abolitionist arguments from 1900 to 1940 was 50%, and from 1970 to 2010, it was 45%. The average of the proportion of new abolitionist arguments from 1900 to 1940 was 20%, and from 1970 to 2010, it was 32%.

[94] This number was calculated by averaging the proportion of old abolitionist arguments in each decade between 1900 and 1940.

[95] This number was calculated by averaging the proportion of old abolitionist

The seeming persistence of moral and religious arguments derives from a spike in old abolitionist arguments in 2005, the year of Michael Ross's execution.[96] The Ross execution interrupted a fifty-year-long moratorium on state killing in Connecticut and invited what Lawrence Goodheart, the preeminent scholar on Connecticut's death penalty, termed, "a wave of emotionalism."[97] Indeed, 2005 is the only year from 2000 to 2010 in which there were more old than new abolitionist arguments.[98]

In the early decades of the 20th century, 24% of abolitionist arguments criticized the death penalty's administration.[99] By the end of the century, arguments about defects in the death penalty's administration increased to 32% of Connecticut's anti-death penalty arguments.[100] This shift in the framing of the case for abolition in Connecticut is not as dramatic as the change in Texas, where new abolitionist arguments tripled in frequency. However, it is significant enough to support Baumgartner et al. and Sarat's claims concerning the increased importance of new abolitionist rhetoric during the second half of the 20th century.

The use of pragmatic arguments against capital punishment in Connecticut was consistent with what we found in Texas. At the start of the last century, about 30% of the abolitionist arguments in our sample raised issues involving cost, life without parole, and deterrence.[101] These pragmatic arguments declined in frequency to about 23% by the end of the century.[102] Furthermore, the deterrence argument again figured most prominently throughout the 20th century, accounting for 16% of the total number of arguments made against the death penalty in Connecticut.[103]

For example, in a 1925 editorial published in the *Bridgeport Telegram*,

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arguments in each decade between 1970 and 2010.

[96] 28% of all old abolitionist arguments documented in Connecticut from 1970 to 2010 occurred in 2005. The second highest rate of old abolitionist arguments in this period was 13% in 1987. *See generally Connecticut serial killer put to death*, CNN.COM LAW CENTER (May 13, 2005), http://www.cnn.com/2005/LAW/05/13/ross.execution.

[97] GOODHEART, *supra* note 87, at 319.

[98] In our sample, there were forty-seven documented old abolitionist arguments in 2005 and twenty-nine documented new abolitionist arguments.

[99] This number was calculated by averaging the proportion of new abolitionist arguments in each decade between 1900 and 1940.

[100] This number was calculated by averaging the proportion of new abolitionist arguments in each decade between 1970 and 2010.

[101] This number was calculated by averaging the proportion of pragmatic abolitionist arguments in each decade between 1900 and 1940.

[102] This number was calculated by averaging the proportion of pragmatic abolitionist arguments in each decade between 1970 and 2010.

[103] This number was calculated by dividing the total number of arguments documented by the total number deterrence specific arguments.

Lewes Lawes, then the warden at Sing Sing Prison in New York, utilized one such deterrence argument and advocated the replacement of capital punishment with life imprisonment without parole. He wrote, "[i]t has been so frequently said that capital punishment might deter if it were enforced. The fact remains that until the characteristics of mankind change, it can never be enforced."[104] He continued by noting that the homicide rate in the United States offered a "shameful contrast" to the rest of the civilized world.[105]

Forty-six years later, in 1971, Representative Irving J. Stolberg of New Haven used similar language to reject the argument of longtime death penalty supporter Governor Thomas J. Meskill that capital punishment serves as a deterrent to murder: "Capital punishment is not and has not been a deterrent to crime," Stolberg said, "[i]f anything, with well-publicized executions, the murder rate increases rather than decreases."[106]

Typical of the kind of moral, philosophical, or religious rhetoric that was used in Connecticut to oppose the death penalty during the period of our study was the fiery commentary offered by Connecticut journalist George Ross Wells in October 1935.[107] In that year, the Connecticut General Assembly passed legislation that replaced hanging with electrocution as the method of execution for those convicted of capital crimes.[108] In addition, the state hired a professional executioner to run its electric chair.[109] Electrocution was presented as a swifter, more humane form of execution.[110]

However, some rejected this view and argued that the legislation simply perpetuated what they called a barbaric system.[111] In his *Hartford Courant* editorial, Wells wrote: "Replacing hanging with electrocution is squirting perfume on a manure heap instead of clearing it away. We have simply substituted one brutal savagery for another."[112] "It is," he continued, "as savage as war and, with one as with the other, using scientific methods makes it not in the least less savage."[113]

Twenty years after Wells's argument, an article in the *Hartford Courant*

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[104] Lewis Lawes, *Capital Punishment Should Be Abolished*, BRIDGEPORT TELEGRAM, Aug. 8, 1925, at 12.

[105] *Id.*

[106] George Gudauskas, *Avcollie Amendment Fails of Passage*, NAUGATUCK DAILY NEWS, May 26, 1971, at 3.

[107] George Ross Wells, *Men and Manners*, HARTFORD COURANT, Oct. 11, 1935, at 11.

[108] GOODHEART, *supra* note 87, at 131.

[109] *Id*. at 166.

[110] *Id*.

[111] Wells, *supra* note 107*,* at 11.

[112] *Id*.

[113] *Id*.

entitled "Clergy of Three Faiths Criticize Defenders of Capital Punishment," catalogued opposition by the state's religious leaders. Rabbi Abraham J. Feldman pointed to "increasing humanitarianism" in expressing opposition to Connecticut's system of capital punishment.[114] He argued that "[w]e do not have the right to take a life . . . . Capital punishment is one of the vestiges of primitive savagery remaining with us."[115]

While this type of moralistic rhetoric decreased somewhat after the 1960s, it did not disappear. In 2005, Reverend Stephen J. Sidorak Jr., executive director of the Christian Conference of Connecticut, advocating for the replacement of capital punishment with life imprisonment without the possibility of parole, called for Connecticut to move beyond "archaic" practices. He wrote: "At the very least, both the governor and the General Assembly owe the people of this state a morally serious reconsideration of whether or not Connecticut should return to the archaic and barbaric practice of capital punishment."[116]

Like Texas, the framing of arguments against the death penalty in Connecticut continued to rely on a traditional moralistic framing, though in Connecticut overtly religious appeals played a much less prominent role. Yet while new abolitionist language did not fully displace old abolitionist rhetoric in Connecticut, it became more common toward the end of the century.

In 1973, Connecticut modified its death penalty laws to meet the standards articulated by the Supreme Court in *Furman.*[117] The revised statute limited the number of capital crimes and, in various ways, raised the bar that the state would have to clear to impose the death penalty.[118] Over the succeeding decades, the Connecticut legislature further reviewed and revised the state's death penalty statute, rendering the task of executing a person on death row more and more difficult.[119] At the same time, abolitionists focused their criticism on the administration of the death penalty with greater frequency. Arguments regarding regional disparity, racial disproportionality,

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[114] Roger Dove, *Clergy of Three Faiths Criticize Defenders of Capital Punishment*, HARTFORD COURANT, Mar. 3, 1955, at 1.

[115] *Id.* at 8.

[116] Frances Grandy Taylor, *A Stand Against Inhumanity*, HARTFORD COURANT, Jan. 13, 2005, at A6.

[117] *See* John Donohue, *Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation from 4686 Murders to One Execution*, DEATH PENALTY INFO. CTR. 1, 58–62 (Oct. 15, 2001), http://www.deathpenaltyinfo.org/documents/DonohueCTStudy.pdf.

[118] John Donohue, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637, 642 (2014).

[119] *See* Donohue, *supra* note 117, at 58–62.

innocence, delay, and infrequent executions played an enlarged role in Connecticut's death penalty debate.[120]

In the last quarter of the 20th century, in Connecticut as in Texas, the prospect of executing the innocent emerged as a formidable argument against the death penalty.[121] Rhetorical appeals to the "epistemological certainty of DNA evidence" had a profound effect on abolitionist discourse.[122] The cold rationality of science was added to emotionally charged narratives about the rights and wrongs of capital punishment.[123] As Sarat puts it, "the issue of innocence, more than any other factor, has changed the climate surrounding state killing . . . ."[124]

One example of this focus on innocence and error is provided by Connecticut Senator John M. Lupton, who addressed the Senate's Judiciary Committee in 1967 and advocated the abolition of the death penalty in the state:

> The taking of life is the only irrevocable step that is permitted under our American jurisprudence. All other actions under our marvelous constitutional law are, in one way or another, subject to review and, if necessary, rectification. Human frailty and error being what it is, let us pass this legislation and leave the irrevocable to the infallible.[125]

Forty-five years later, in 2012, Representative Terry Backer similarly argued: "As a government (we) have done things that haven't quite worked out the way we had hoped . . ., but we are always able to go back and fix those things. Unfortunately, when we are wrong in these cases, there is no way to put them back on track."[126]

The Connecticut legislature's decision to prospectively abolish capital punishment, although outside the time period of our study, is worth noting here. In 2012, opinions in the Connecticut legislature were divided on the

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[120] New abolitionist arguments represented 32% of arguments in Connecticut from 1970-2010 compared to 24% from 1900-1940.

[121] Arguments about arbitrariness, bias towards certain groups, and innocence make up 113 out of the 163 (69%) new abolitionist arguments in our sample made between 1965 and 2010.

[122] Simon A. Cole & Jay D. Aronson, *Blinded by Science on the Road to Abolition*?, *in* THE ROAD TO ABOLITION? THE FUTURE OF CAPITAL PUNISHMENT IN THE UNITED STATES, 46, 52 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009).

[123] *Id.* at 47.

[124] Austin Sarat, *Innocence, Error, and the "New Abolitionism": A Commentary*, 4 CRIMINOLOGY & PUB. POL'Y 45, 46 (2005).

[125] *Assembly Urged to Eliminate Death Penalty*, HARTFORD COURANT, Feb. 22, 1967, at 20.

[126] Daniela Altimari, *House Votes to Repeal Death Penalty*, HARTFORD COURANT, Apr. 12, 2012, http://articles.courant.com/2012-04-12/news/hc-death-penalty-house-vote-0412-20120411_1_death-penalty-capital-punishment-repeal-bill.

relevance of the innocence argument to its consideration of the death penalty. The state had only executed two men in the last sixty-five years and the guilt of both Ross and Taborsky was never in question.[127] As a result, during the 2012 debate in Connecticut's House of Representatives, Representative John Hetherington reminded his fellow legislators: "We have to remember that we are looking at the death penalty as it exists in Connecticut, as it is applied here."[128] He asserted that, while a number of people across the United States have been exonerated based upon post-conviction evidence, no one in Connecticut, at least in modern times, has been executed and later proven innocent.[129] Therefore, he insisted, "I don't think that that argument is a very strong one when you consider it in light of Connecticut's experience and the way the capital felony law is applied here."[130]

In addition to innocence, abolitionists have increasingly noted blatant geographic inconsistencies in calling the state's administration of death penalty into question.[131] Karen Goodrow, a lawyer who represented Michael Ross, commented that when she and her colleagues hear about a death eligible case in Connecticut, their first question is always: "Where did it happen?"[132] This is important, Goodrow explained, because the capital sentencing rate in places like Waterbury (a large Connecticut city) has been strikingly higher than in the rest of the state.[133] Around 33% of all death eligible cases received death sentences in Waterbury, while only 2.6% of the cases outside Waterbury received similar sentences.[134]

State legislators and judges also took note of geographic disparities, focusing on state to state differences. In the legislative debate over P.A. 12-5 in 2012, Representative Mike Lawlor noted:

> It's worth keeping in mind that in this part of the country, New Jersey doesn't have it. New York doesn't have it. Massachusetts doesn't have it. Rhode Island doesn't have it. Vermont doesn't have it. Maine doesn't have it. New Hampshire, in theory, has it.

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[127] GOODHEART, *supra* note 87, at 227.

[128] *Hearing on S.B. 280 Before H.R.*, 2012 Conn. Gen. Assemb. (Conn. Apr. 11, 2012), https://www.cga.ct.gov/2012/trn/H/2012HTR00411-R00-TRN.htm (last visited June 6, 2017).

[129] *Id.*

[130] *Id.*

[131] Lynne Tuohy, *Trying to Halt 'Ultimate Torture,'* HARTFORD COURANT, Oct. 24, 2004, http://articles.courant.com/2004-10-24/news/0410240811_1_death-penalty-penalty-hearing-death-row.

[132] *Id.*

[133] Donohue, *supra* note 118, at 650.

[134] *Id*.

> There's nobody on death row. There's not been a death penalty prosecution in recent decades. And that leaves Connecticut.[135]

Racial discrimination also has played an important role in the framing of Connecticut's death penalty debate. In 1973, an editorial in the *Hartford Courant* claimed that the Connecticut death penalty was "applied randomly at best and discriminatorily at worst. It violates equal protections of the laws because it is imposed almost exclusively against racial minorities and the poor."[136]

In 2009, Connecticut Representative Demetrios Giannaros pointed to the racially discriminatory way in which capital punishment has been administered in Connecticut: "There is evidence, clear evidence," he said, "that if the person who died is a white person, like me, the individual who commits the crime is more likely to face the death penalty than if the person who died was a black person or perhaps a Hispanic. This is a system that is disgraceful when it comes to fairness."[137]

The deliberations and decisions of both Connecticut's legislature and its Supreme Court in 2012 and 2015, respectively, reflected the rhetorical shift toward new abolitionism that altered that state's death penalty debate.[138] As in Texas, this rhetoric did not go uncontested, nor did it displace other ways of framing the argument against capital punishment. Striking is how much the pattern in Connecticut resembles Texas, where the new abolitionism emerged as a late 20th century refinement in the arsenal of arguments deployed against the death penalty.

III. KANSAS

The story of capital punishment in our third state, Kansas, reveals a reluctant and halting embrace of the death penalty. The Kansas death penalty, long a mainstay of its criminal justice system, was abolished in 1907 and remained off the books until 1935.[139] Although reinstated in 1935, Kansas's first execution in the 20th century took place in 1944.[140] Also, after the *Furman* moratorium was lifted in 1976, Kansas was slow to revive its death penalty, not bringing it back until 1994.[141] While capital punishment remains

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135 *Hearing on S.B. 280 Before H.R.*, *supra* note 128.

136 *An Official Act of Violence*, HARTFORD COURANT, Apr. 18, 1973, at 2.

137 Conn. General Assemb., *House Sess. Doc.*, May 13, 2009 (document on file with the authors).

138 *States With and Without the Death Penalty*, *supra* note 4.

139 *Kansas*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/kansas-1.

140 *Id.*

141 *Id.*

legal in Kansas, no one has been executed there since 1965.[142]

The broad outline of abolitionist arguments in Kansas is similar to what we observed in Texas and Connecticut. In the first decades of the 20th century, new abolitionist arguments represented only 13% of the arguments against capital punishment found in the newspapers we examined.[143] In the last years of our study, new abolitionism made up 32% of the arguments in our sample.[144] The moral and religious framing of anti- death penalty arguments, which is characteristic of what we called the old abolitionism, fell from 59% in the first four decades to 43% in the last several years.[145] Finally, pragmatic arguments against the death penalty (deterrence and cost) remained relatively constant, declining slightly from 28% at the start of the 20th century to 25% at its end.[146] As in Texas, many of the old abolitionist arguments made in Kansas have been religious. An example of this kind of argument can be found in a letter to the editor published in the *Lawrence Daily Journal-World* on November 18, 1961: "To believe that capital punishment is the will of God not only circumvents the major impact of the New Testament; it also makes us forget our responsibility to a penal system in which the increasingly obvious need is rehabilitation, not just punishment."[147]

For another religious objection to the death penalty, consider the argument of Governor E.W. Hoch, published by *The Sun* on February 2, 1906:

> [H]ow a Christian, one believing in the Bible, in immortality and in the preparedness necessary in this world for bliss in the next, and of the awful conditions of the lost throughout eternity, can believe in and consent to a theory that would plunge a human soul into eternity and into that immortality unprepared is beyond my comprehension.[148]

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[142] *Id.*

[143] Our analysis was conducted on several of the larger newspapers in Kansas during the 20th Century, including: THE WICHITA DAILY EAGLE, THE HUTCHINSON NEWS, THE TOPEKA DAILY CAPITAL, THE EMPORIA GAZETTE, KANSAS CITY STAR, THE IOLA REGISTER, THE SALINA JOURNAL, HAYS DAILY NEWS, LAWRENCE WORLD JOURNAL, GARDEN CITY TELEGRAM, ARKANSAS CITY DAILY TRAVELER, and THE OTTAWA HERALD. This number was calculated by averaging the proportions of new abolitionist arguments in each of the decades between 1900 and 1940.

[144] This number was calculated by averaging the proportions of new abolitionist arguments in each of the decades between 1970 and 2010.

[145] These numbers were calculated by average the proportions of old abolitionist arguments in the each of the decades between 1900 and 1940, and 1970 and 2010, respectively.

[146] These numbers were calculated by average the proportions of pragmatic arguments in the each of the decades between 1900 and 1940, and 1970 and 2010, respectively.

[147] Paul Davis, *The Odom Case*, LAWRENCE JOURNAL-WORLD, Nov. 18, 1961, at 4.

[148] *Capital Punishment*, THE SUN (KS), Feb. 2, 1906, at 4.

As noted above, pragmatic arguments against the death penalty have remained relatively constant throughout the past 110 years in Kansas.[149] One such argument is found in a February 1, 1901 edition of *The Kansas Semi-Capital*:

> There are a number of states which have abolished capital punishment and every Governor of these states is on record testifying that the abolishment of the death penalty has not resulted in an increase of capital crimes. The fact appears to be that the punishment has little or nothing to do with this prevention of capital crimes, these crimes being due to uncontrollable passion or depravity that the law cannot suppress.[150]

Another example of a pragmatic argument against the death penalty is found in a 1935 opinion piece published in *The Hutchinson News*:

> If every murder were immediately identified, promptly captured, speedily tried, invariably convicted and subjected to the sentence at once, the thought of hanging might be more disturbing to the criminal mind than that of serving a life in prison. Distressing statistics, however, show that not one murder in 100 in this country actually serves the maximum sentence that might be imposed for his crime. With 100 to 1 odds against experiencing it, no punishment however severe is going to seem very alarming to potential criminals. It is the inevitability of punishment and not the style of it that checks crime.[151]

Perhaps the most famous case in Kansas's death penalty history was the 1959 Clutter killings that inspired Truman Capote's book, *In Cold Blood.*[152] Richard Eugene Hickock and Perry Edward Smith broke into the home of Herb Clutter searching for money and slaughtered the entire family.[153] An important figure in this saga was Harrison Smith, the defense lawyer for Hickcok.[154] Unable to defend his client directly, Smith attacked both the efficacy and morality of the death penalty, saying it was "a miserable failure" and that it "makes a murderer of the state."[155]

In Kansas, as in Texas and Connecticut, the third frame of abolitionist argument, the new abolitionism, assumed greater prominence during the last

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[149] Pragmatic arguments declined from 28% at the start of the 20th Century to 25% at the end.

[150] *Capital Punishment out of Date*, KAN. SEMI-WEEKLY CAP., Feb. 1, 1901.

[151] *Death Penalty*, THE HUTCHINSON NEWS, Mar. 9, 1935, at 4.

[152] Richard Kreitner, *November 15, 1959: The Clutter Family Is Murdered in Holcomb, Kansas, Later the Subject of Truman Capote's 'In Cold Blood*,' THE NATION, NOV. 15, 2015, http://www.thenation.com/article/november-15-1959-the-clutter-family-is-murdered-in-holcomb-texas-later-the-subject-of-truman-capotes-in-cold-blood/.

[153] *Clutter Family Murders*, ROBINSON LIBRARY (Apr. 14, 2017), http://www.robinsonlibrary.com/social/pathology/criminology/crimes/clutter.htm.

[154] *State Presses for Death Penalty for Two in Clutter Murder Case*, HAYS DAILY NEWS, Mar. 29, 1960, at 1.

[155] *Id.*

part of the 20th century.[156] The style of new abolitionist arguments evolved as well. In the early decades of the 20th century, they were linked to moral and/or religious sentiments and arguments about deterrence. An example of this linkage can be found in an excerpt from a letter to the editor in *The Kansas City Star*, printed on August 7, 1915: "[m]any a man sentenced to life imprisonment has later been found innocent and freed. But what of your innocent man convicted and hanged? Hell will have no better offering for the murderer than for the executioner, and, in my opinion, the latter should have the worse punishment."[157]

Another example of this hybrid argument is found in an article from *The Hutchinson News* on April 26, 1921:

> I think capital punishment is wrong. I do not think it ever keeps a man from committing a crime. There is too great a chance for human judgment to err, and also too many mistakes made in administration, to let me think that it is ever absolutely right for the state to take the life of a citizen. I can understand why an individual kills, or why a mob executes, because they are frenzied with excitement, but for the people of the State, calmly and deliberately and without immediate provocation, to take the life of a man or woman seems to me to be more than a mistake.[158]

As new abolitionism became more prominent in the second half of the century, arguments about systemic failure began to stand on their own. Consider an excerpt from an April 4, 1960 comment in *The Lawrence Daily Journal-World*:

> Those actually put to death are most frequently the poor and the friendless. Of the 49 persons executed in the United States last year, 33 were Negroes. Some years ago a congressional committee reported that "as it is now applied the death penalty is nothing but an arbitrary discrimination against an occasional victim. It cannot even be said that it is reserved as a weapon of retributive justice for the most atrocious criminals. For it is not necessarily the most guilty who suffer it." This pattern has not changed.[159]

As in Texas and Connecticut, some new abolitionist arguments in Kansas focus on innocence, others on discrimination.[160] In 1990, the murder of a college student once again reignited the death penalty debate in Kansas.[161] In this context, abolitionists held firmly to a framing of their

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[156] 32% of arguments made in the decades between 1970 and 2010 were new abolitionist, as opposed to 13% in the decades between 1900 and 1940.

[157] *Speaking the Public Mind*, KAN. CITY STAR, Aug. 7, 1915.

[158] *Capital Punishment*, HUTCHINSON NEWS, Apr. 26, 1921, at 4.

[159] *State Should Not Kill*, LAWRENCE J.-WORLD, Apr. 4, 1960, at 4.

[160] Fifty-one out of 229 arguments made within our sample were about executing the innocent, while seventy-seven were about disproportionately executing certain groups.

[161] Gene Smith, *Murders Tell Stories of How System Failed*, TOPEKA CAPITAL-JOURNAL, Nov. 29, 1998, http://cjonline.com/stories/112998/kan_murderstories.shtml#.V2rBfJMrL-Z.

arguments that focused on defects in the administration of that state's death penalty. An example can be found in an opinion piece in *The Salina Journal*, dated May 22, 1990:

> For these reasons, the idea that only especially evil criminals are selected for execution is a joke. The ones who lose are poor, mentally impaired, black – and had lawyers who did not take the case seriously. The results are so unfair that half of all state death sentences have been set aside in recent years during the long process of federal habeas corpus.[162]

In 1994, soon after Kansas reinstated capital punishment,[163] abolitionists continued to criticize the death penalty's arbitrary administration. For example:

> How many states have executed wealthy whites? There are notorious cases, you see them on "Hard Copy" and "A Current Affair." Premeditated murder for hire. They are convicted, but they are never executed. Justice of the rope and the tree against poor minorities continues today, and as finite human beings we have not, despite our good intentions, found a way to keep it from happening. And if this state passes capital punishment, it will continue as it has in the other 36. We will not, we will not, execute wealthy whites.[164]

Like Texas and Connecticut, the story of efforts to abolish the death penalty in Kansas has elements of continuity and change. As in those two states, new abolitionist framing of the case against capital punishment became more prominent late in the 20th century. However, again it did not fully displace other arguments. Here, as elsewhere, abolitionist efforts drew on multiple sources in a shifting but layered array.[165]

CONCLUSION

Our study suggests that the rhetorical reframing of the campaign against capital punishment that has occurred at the national level has had deep resonance at the state level. Over the course of the 20th century in Texas, Connecticut, and Kansas, the focus on error and arbitrariness has assumed greater prominence among abolitionists. In each state, this change began to take hold in the late 1960s and 1970s and accelerated as the 20th century drew to its close. But, our findings complicate the pictures presented by Baumgartner et al. and Sarat since, in each state, older arguments persisted and continued to occur with greater frequency than the new abolitionism.

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[162] *America's Rage to Kill Puzzles Our Foreign Friends*, SALINA J., May 22, 1990, at 4.

[163] *Kansas*, *supra* note 139.

[164] *Death Penalty Takes Big Step Final House OK Is Likely*, THE WICHITA DAILY EAGLE, Feb. 11, 1994, at 1A.

[165] *Id.*

Across the country change is afoot as the death penalty slowly but steadily retreats.[166] Precisely how much of this change can be attributed to innovations in the rhetorical strategies of abolitionists we cannot say. But we can say that since the new abolitionism has come to prominence in places like Texas, Connecticut, and Kansas, the debate has changed.

Abolitionists now argue against capital punishment because of the risk of executing the innocent, the discriminatory way in which it is applied, or the fact of its geographic arbitrariness.[167] Some concede that the death penalty may, in some cases, be morally justified, or that, if it were used enough, it might deter. Instead of creating a stark moral divide or suggesting that support for the death penalty is irrational, abolitionists create common ground with those who support the death penalty, even as they invite supporters to see that, in day-to-day practice, capital punishment is incompatible with widely shared constitutional commitments. Only time will tell, of course, whether this rhetorical reframing will help lead the way to capital punishment's permanent demise.

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[166] *See, e.g.*, Baxter Oliphant, *Support for Death Penalty Lowest in More Than Four Decades*, PEW RES. CTR. (Sept. 29, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades//.

[167] *See supra* notes 43, 62, 63, 154.