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# CRIMINOLOGY

## ABOLITION AND REINSTATEMENT OF CAPITAL PUNISHMENT DURING THE PROGRESSIVE ERA AND EARLY 20TH CENTURY\*

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AND BRENT COOK\*\*\*

### ABSTRACT

Ten American states abolished the death penalty between 1897 and 1917, but by the end of the 1930s, eight of these states had reinstated capital punishment. Not surprisingly, many of these abolitionist states were relatively homogeneous. Information ranging from individual motivations and tactics to the economic trends and the demographic characteristics of an area were drawn on to analyze developments in each state. Existing records indicate that most of the initial abolition laws had the support of the state's governors or a major local daily newspaper. While abolition was associated with economic boom, reinstatement occurred during economic recession and depression. Along with such issues of social context, reinstatement was triggered by the threat of lynchings and political radicals, since abolition gave those outside of government a monopoly on lethal violence.

### I. INTRODUCTION

Historians generally agree that the Progressive Era encom-

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passed the first two decades of the twentieth century.<sup>1</sup> A growing fear of communists, foreigners and other minorities at the end of World War I brought the era to a close.<sup>2</sup> The most significant product of this short period was a long list of reform legislation designed to protect the public. New laws regulating business activities included anti-trust legislation,<sup>3</sup> the Pure Food and Drug Act, the first Workman's Compensation Act,<sup>4</sup> laws limiting the hours and conditions of employment for women and children, and minimum aid to dependent children.<sup>5</sup> Other Progressive Era legislation included female suffrage,<sup>6</sup> alcohol prohibition,<sup>7</sup> federal drug controls,<sup>8</sup> state juvenile codes,<sup>9</sup> and probation and parole statutes.<sup>10</sup>

A debate continues as to what forces pressed for these legislative reforms. While some view these laws as resulting from the demands of the urban working classes,<sup>11</sup> others have found that the middle classes were largely responsible for generating these reforms.<sup>12</sup> Still others contend that these reforms were elite-inspired and controlled.<sup>13</sup> Additional research notes the involvement of women,<sup>14</sup> journalists,<sup>15</sup> government bureaucrats<sup>16</sup> and intellectuals.<sup>17</sup>

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<sup>1</sup> GEORGE E. MOWRY, *THE PROGRESSIVE MOVEMENT 1900-1920: THE REFORM PERSUASION* (1958).

<sup>2</sup> ARTHUR S. LINK & WILLIAM B. CALTON, *AMERICAN EPOCH: A HISTORY OF THE UNITED STATES SINCE 1900*, VOL. I: *THE PROGRESSIVE ERA AND THE FIRST WORLD WAR 1900-1920* (4th ed. 1973).

<sup>3</sup> MOWRY, *supra* note 1; MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (4th ed. 1973).

<sup>4</sup> Thomas K. McCraw, *The Progressive Legacy*, in *THE PROGRESSIVE ERA 181-201* (Lewis L. Gould ed., 1974).

<sup>5</sup> MOWRY, *supra* note 1.

<sup>6</sup> McCraw, *supra* note 4.

<sup>7</sup> JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLICIES AND THE AMERICAN TEMPERANCE MOVEMENT* (1963).

<sup>8</sup> ALFRED R. LINDESMITH, *THE ADDICT AND THE LAW* (1965).

<sup>9</sup> ANTHONY M. PLATT, *THE CHILD SAVERS/THE INVENTION OF DELINQUENCY* (2d ed. 1977).

<sup>10</sup> DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980).

<sup>11</sup> Michael P. Rogin, *From Below*, in *THE PROGRESSIVE ERA 20-30* (Arthur Mann ed., 2d ed. 1975).

<sup>12</sup> George E. Mowry, *From Above*, in *THE PROGRESSIVE ERA 13-19* (Arthur Mann ed., 2d ed. 1975); *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (Richard Hofstadler ed., 1972).

<sup>13</sup> GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-16* (1963); Samuel P. Hays, *The Upper Class Takes the Lead in THE PROGRESSIVE ERA 79-93* (Arthur Mann ed., 2d ed. 1975).

<sup>14</sup> GUSFIELD, *supra* note 7; Paula Baker, *The Domestication of Politics: Women and American Political Society, 1780-1920*, in *WOMEN, THE STATE, AND WELFARE*, 55-91 (Linda Gordon ed., 1990).

<sup>15</sup> CHRISTOPHER LASCH, *THE NEW RADICALISM IN AMERICA [1889-1963]: THE INTELLECTUAL AS A SOCIAL TYPE* (1965); John Hagan & Jeffrey Leon, *Rediscovering Delinquency:*

Moreover, some view the Progressive Era as a period of significant and lasting accomplishments,<sup>18</sup> while others view the reforms as short-lived and insignificant.<sup>19</sup> Thus, while there is general agreement concerning the time period covered by the Progressive Era, there is comparatively little agreement regarding the sources of the period's legislative innovations or the significance of these reforms.

Progressive Era legislative reforms, especially those changes in criminal law, have attracted considerable attention. However, the Era's numerous death penalty laws largely have escaped analysis. The *Annals of the American Academy of Political and Social Science* published three short essays in 1952 on capital punishment abolition laws enacted during the Progressive Era. One page of this compilation reveals that the governor of Oregon supported a public referendum on abolition because of his objections to lethal retribution and difficulties in securing convictions in death penalty cases.<sup>20</sup> The abolition and reinstatement of the death penalty in Washington is covered in three pages.<sup>21</sup> Four pages are devoted to the abolition and the subsequent reinstatement process in Missouri.<sup>22</sup> Bedau<sup>23</sup> gathers even smaller scraps of information in a few sentences about the legislative processes in four states that reinstated capital punishment during this period (Washington, Colorado, Missouri and Oregon), but falls far short of collecting enough material necessary for a complete understanding of these events.

Moreover, an encyclopedic history of changing criminal penalties of the period, *Conscience and Convenience: The Asylum and its Alternatives in Progressive America*,<sup>24</sup> comprehensively addresses Progressive Era reforms in criminal law and philosophies of punishment, but omits the death penalty. According to Rothman, the reforms included "probation, parole, and the indeterminate sentence; the ju-

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*Social History, Political Ideology and the Sociology of Law*, 42 AM. SOC. REV. 587, 587-98 (1977); ROBERT M. CRUNDEN, *MINISTERS OF REFORM: THE PROGRESSIVES' ACHIEVEMENT IN AMERICAN CIVILIZATION 1889-1920* (1982).

<sup>16</sup> Lindesmith, *supra* note 8.

<sup>17</sup> CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* (1991).

<sup>18</sup> McCraw, *supra* note 4.

<sup>19</sup> KOLKO, *supra* note 13.

<sup>20</sup> Robert H. Dann, *Capital Punishment in Oregon*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 110, 110-14 (1952).

<sup>21</sup> Norman S. Hayner & Hohn R. Cranor, *The Death Penalty in Wahington State*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 101, 101-04 (1952).

<sup>22</sup> Ellen E. Guillot, *Abolition and Restoration of the Death Penalty in Missouri*, 284 ANNALS AM. ACAD. POL. SOC. SCI. 105, 105-09 (1952).

<sup>23</sup> HUGO A. BEDAU, *THE DEATH PENALTY IN AMERICA* (3d ed. 1982).

<sup>24</sup> ROTHMAN, *supra* note 10.

venile court and the outpatient clinic; and novel designs for the penitentiary, the reformatory, and the insane asylum."<sup>25</sup> Rothman does not address capital punishment changes, even though ten states abolished capital punishment between 1897-1917: Colorado (1897), Kansas (1907), Minnesota (1911), Washington (1913), Oregon (1914), South Dakota (1915), North Dakota (1915), Tennessee (1915), Arizona (1916) and Missouri (1917). Of these ten states, eight reinstated capital punishment between 1901-1939: Colorado (1901), Arizona (1918), Tennessee (1919), Missouri (1919), Washington (1919), Oregon (1920), Kansas (1935) and South Dakota (1939). Bedau, the dean of capital punishment researchers, noted that: "One is also more than curious to know what accounts for the reintroduction of the death penalty in several states no more than a few years after it had been abolished. Surprising though it may be . . . the full story has never been told."<sup>26</sup> Maintenance of these reforms would have helped keep the United States in step with the widespread abolition movement in Europe, instead of having laws consistent with nations such as South Africa and Iran.

#### A. THE SOCIAL CONTEXT OF CAPITAL PUNISHMENT

Those studying the social origins of law usually acknowledge the significance of the general social context of legislation.<sup>27</sup> More specific "focusing events,"<sup>28</sup> including crises or disasters, call attention to a given problem to be addressed by particular legislation. The objective of this study is to describe both the social structural context and the focusing events of these abolition and reinstatement laws during the first three decades of the twentieth century. Significant elements of the general social context of criminal laws include the economic and demographic makeup of the relevant political jurisdiction.<sup>29</sup> The death penalty has been traditionally administered in a racist fashion,<sup>30</sup> and states with the highest concentrations of non-white citizens have used the death penalty most frequently.<sup>31</sup> It therefore should come as no surprise that, whatever may be the

<sup>25</sup> *Id.* at 3.

<sup>26</sup> BEDAU, *supra* note 23, at 22.

<sup>27</sup> HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988); JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984).

<sup>28</sup> KINGDON, *supra* note 27.

<sup>29</sup> RICHARD A. BERK ET AL., *A MEASURE OF JUSTICE: AN EMPIRICAL STUDY OF CHANGES IN THE CALIFORNIA PENAL CODE, 1955-1971* (1977).

<sup>30</sup> WILLIAM J. BOWERS ET AL., *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982* (1984).

<sup>31</sup> U.S. Department of Justice, *Capital Punishment* (1973).

unique triggering events in the history of the death penalty in any particular state, most of these Progressive Era abolitionist states had very small non-white populations. Only two of the abolitionist states contained more than five percent minority citizens (Table 1). In general, the absence of minorities renders the states with homogeneous populations conducive to lenient or less severe criminal penalties.<sup>32</sup>

**Table 1. PERCENT OF NON-WHITES IN ABOLITIONIST STATES, 1897-1917.**

State	Year of Abolition	Percent Non-white*
Minnesota	1911	.7
North Dakota	1915	1.2
Colorado	1897	1.5
Oregon	1914	2.5
Washington	1913	2.6
Kansas	1907	3.1
South Dakota	1915	3.3
Missouri	1917	5.0
Arizona	1916	12.0
Tennessee	1915	21.0

\* Source: U.S. Bureau of the Census, 1900-1920.

The economic context also plays a critical role in the genesis of death penalty reforms. Most of these abolition laws were passed during the economic boom immediately preceding American entry into World War I.<sup>33</sup> Moreover, analysis of other time periods also shows that economic factors often influence death penalty policies. Rusche and Kirchheimer<sup>34</sup> have traced the development of punishment in Europe since the Middle Ages. They noted that while fines were a frequent punishment during the early Middle Ages, in the later Middle Ages fines were replaced by a harsh system relying heavily on capital punishment. Associated with these changes in penal practice were the deteriorating economic conditions from the early to late Middle Ages. The increasing inability of the poor to pay fines led to a search for alternative punishments. Rusche and Kirchheimer concluded that criminal punishment in any era must

<sup>32</sup> John F. Galliher & Linda Basilick, *Utah's Liberal Drug Laws: Structural Foundations and Triggering Events*, 26 SOC. PROBS. 284 (1979).

<sup>33</sup> THE PROGRESSIVE MOVEMENT: 1900-1915 (Richard Hofstadler ed., 1963); JOSEPH S. DAVIS, *THE WORLD BETWEEN THE WARS, 1919-1939: AN ECONOMIST'S VIEW* (1975).

<sup>34</sup> GEORGE RUSCHE & OTTO KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* (1939).

provide conditions that are worse than the lot of the poorest free people if such punishment is to serve as a deterrent.

During the eighteenth century the American colonies averaged approximately twelve capital offenses compared to more than 200 in England. The relatively low number of such statutory offenses in America was due to the scarcity of labor; that there were any such offenses at all was due to the scarcity of prison space.<sup>35</sup> More recently, Adamson<sup>36</sup> has noted the importance of economics in changes in United States' penal policy from the 1790s through the early twentieth century. He shows that during economic booms, the convict population was a resource to be exploited through such policies as a convict labor system, but during recessions, these same convicts became a threat that encouraged reliance on capital punishment. Correspondingly, not only were abolition bills passed during a period of economic boom, but most of these states that reinstated capital punishment did so during the economic recession following World War I or during the 1930s. This article will demonstrate that expressed humanitarian motivations of reform-minded legislators pressing for abolition of capital punishment are not necessarily inconsistent with a structural analysis of law, linking such legislation to the changing economic fortunes of a society.

#### B. STATEMENT OF THE PROBLEM AND DATA SOURCES

Census data and indicators of economic trends provide information on the social context. In addition to a search for the social context of legislation, our analysis includes idiosyncratic focusing events for specific laws. To learn more about the precise process of these legislative events, we drew on any existing records of legislative debate and public hearings, as well as any materials in the archives of individual state historical societies. These materials include the correspondence of governors and other elected officials, state agency reports and previously published materials dealing with capital punishment reform. We also reviewed every issue of a major daily newspaper in each state for one year prior to a particular bill's passage. We developed an initial narrative based on newspaper accounts and then supplemented and modified the initial sequence of events, as necessary, by drawing on the additional materials. Newspaper accounts were especially important because most young states were not able to develop mechanisms of generating detailed official

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<sup>35</sup> Louis Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 124 (1952).

<sup>36</sup> Christopher Adamson, *Toward a Marxian Penology: Captive Criminal Populations as Economic Threats and Resources*, 31 SOC. PROBS. 435 (1984).

records of the legislative process. This was especially true of sparsely populated states in the West and Great Plains. Nowhere is this better illustrated than in Arizona, which became a state in 1912 and by 1920 had a population of only 334,000. As a very new state, Arizona had neither sufficient time nor the tax base necessary to establish organizations that produced formal and detailed records of legislative deliberations.

We will deal with both the behavior of specific lawmakers, as well as the broad historical economic trends largely unrelated to any specific individual. These obvious demographic and economic patterns compel us to recognize different levels of analysis, which "cover a range from the individual to the world system with aggregates, groups, corporate social systems, organizations, communities, institutions, states, and societies somewhere in between."<sup>37</sup> Only by considering *both* "the interactions within the social system and the conditions under which the social system operates" can the sources of deviant behavior and its punishment be understood.<sup>38</sup>

While social scientists typically study either the origins of law or the consequences of law, in reality, "[t]he law itself is neither an end nor a beginning, but rather an intermediate stage in the political process."<sup>39</sup> Considering the pervasive legislative and legal maneuvering, Calabresi and Bobbitt ask:

Why do we move restlessly from one system which proves inadequate to another? The answer is, we have come to think, that a society may limit the destructive impact of tragic choices by choosing to mix approaches over time. Endangered values are reaffirmed. . . . More important, . . . the deep knowledge that change will come again carries with it the hope that values currently degraded will not for all that be abandoned.<sup>40</sup>

In addition to this juggling of values, once laws are created to resolve specific conflicts, they "not only create further conflicts, but also spotlight other contradictions which may have been dormant."<sup>41</sup> These new conflicts lead in turn to further resolutions. The most important of these conflicts involve issues of social context and are "those that derive from the economic and political structures of the times,"<sup>42</sup> including market conditions, profits and

<sup>37</sup> Pat Lauderdale et al., *Levels of Analysis, Theoretical Orientations and Degrees of Abstraction*, 21 AM. SOCIOLOGIST 32 (1990).

<sup>38</sup> *Id.* at 35.

<sup>39</sup> PAUL BURSTEIN, *DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL* 193 (1985).

<sup>40</sup> GUIDO CALABRESI & PHILIP BOBBIT, *TRAGIC CHOICES* 197 (1978).

<sup>41</sup> William J. Chambliss, *Contradictions and Conflict in Law Creation*, 2 RES. LAW & SOC. 8 (Steven Spitzer ed., 1979).

<sup>42</sup> *Id.* at 7.



the control of labor. It is through multiple levels of analysis that contradictory consequences of specific laws become apparent.

We will demonstrate that while abolition resolved certain conflicts, the legislation produced additional conflicts of its own. The conflicts were exacerbated by economic recession and set the stage for additional policy changes. This analysis should allow us both to understand more about the structural origins of modern death penalty laws and their abolition, and to add to our understanding of the sources and consequences of Progressive Era ideology.

Sample design is also of critical importance. Hagan<sup>43</sup> argues that since most research on the social origins of law has focused on isolated case studies, generalization is impossible. This reliance on isolated case studies in all probability has contributed to the long-term and unproductive dispute involving the conflict and consensus perspectives.<sup>44</sup> To avoid this problem, Galliher et al.<sup>45</sup> analyzed the origins of the entire set of eleven state marihuana decriminalization laws passed during the 1970s, the cessation of such legislation during the 1980s, and eventual moves to recriminalize this drug during the 1990s. Such a series of legislative events is also found in the abolition and reinstatement of the death penalty by several states during the early twentieth century.

## II. ABOLITION

### A. SUPPORT FROM GOVERNORS

#### 1. *Kansas*

There were fifty-seven murders mentioned in published articles in the *Topeka Daily Capital* in the year prior to death penalty abolition in 1907. According to one historical account, a total of nine persons had been executed under state law prior to 1907.<sup>46</sup> The first legal execution occurred in 1863 and the last in that century in 1870. Governor Edward W. Hoch signed the law abolishing capital punishment on January 30, 1907.<sup>47</sup>

Kansas passed a statute establishing a death penalty for first-degree murder in 1872. The statute required that the sentence be

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<sup>43</sup> John Hagan, *The Legislation of Crime and Delinquency: A Review of Theory, Method and Research*, 14 *LAW & SOC'Y REV.* 603 (1980).

<sup>44</sup> Chambliss, *supra* note 41; John F. Galliher & Allyn Waltzer, *The Puzzle of the Social Origins of the Marihuana Tax Act of 1937*, 24 *SOC. PROBS.* 367 (1977).

<sup>45</sup> John F. Galliher et al., *Searching for the Origins of the 1970s Marihuana Decriminalization Movement*, Presented at the Annual Meeting of the American Sociological Association in Atlanta, GA, August 1988.

<sup>46</sup> Louise Barry, *Legal Hangings in Kansas*, 18 *KAN. HIST. Q.* 279 (1950).

<sup>47</sup> 1907 Kan. Sess. Laws 188.

carried out "by hanging by the neck, at such time as the governor of the state for the time being may appoint, not less than one year from the time of conviction."<sup>48</sup> A former pardon attorney has observed:

For many years the Kansas death sentence was [an] anomalous formality because the statute provided that a person was taken to the Penitentiary and there confined at hard labor until the governor should sign his death warrant—which few governors did. Thus we had the death sentence as imposed by the court which everybody knew meant imprisonment for life.<sup>49</sup>

In fact, no governor had signed a death warrant under the provisions of this statute.<sup>50</sup>

Governor Hoch claimed that it was largely at his insistence that the 1907 legislature repealed the death penalty.<sup>51</sup> That year, he explained his position in a personal letter: "The fatal defect of the capital punishment theory is that it cheapens life instead of magnifying it as its votaries have believed. The criminal usually takes life hurriedly without much deliberation, but the law takes plenty of time and does it deliberately."<sup>52</sup> As early as 1905, the Governor had pledged to resign rather than to sign a death warrant against any prisoner. He said: "The hanging of a human being, whether it be legalized or not, is a relic of barbarism."<sup>53</sup> Apparently many Kansans agreed with the Governor, for prior to abolition the paper noted in a headline that it was "Hard to get Jury in Murder Case."<sup>54</sup> The article added: "After the regular panel was exhausted sixty new jurors were summoned without completing the jury. The sheriff is now summoning twenty five more men." This difficulty demonstrates that a large number of Kansans simply had no stomach for imposition of the death penalty.

## 2. Washington

Washington executed fourteen individuals between 1904-1910.<sup>55</sup> In the year immediately preceding abolition, eighteen murders occurred. The most dramatic account of a murder spawned the following headline: "Saloon Man Kills Two Peace Of-

<sup>48</sup> KAN. STAT. ANN. § 82 (1901).

<sup>49</sup> *Kansas Office of Director of Penal Institutions*, 1966 State Office Bldg., Topeka, KS (Rev. 1966).

<sup>50</sup> Barry, *supra* note 46.

<sup>51</sup> *Id.*

<sup>52</sup> Letter from Governor E. W. Hoch to Robinette Scheier, *Kansas State Historical Society* (Mar. 23, 1907).

<sup>53</sup> *Hoch Would Resign First*, KANSAS CITY STAR, Dec. 9, 1905, at 1.

<sup>54</sup> *Hard to Get Jury in Murder Case*, TOPEKA DAILY CAPITAL, Sept. 23, 1906, at 1.

<sup>55</sup> Daniel Evans, *Persons Executed at Washington State Penitentiary 1904-1963* (on file with the Washington State Historical Society).

ficers; Then Ends Own Life.”<sup>56</sup> Prior to abolition of the death penalty, the *Times* published editorials condemning violent crimes,<sup>57</sup> but the paper took no position on capital punishment: “Nor has human experience determined the issue absolutely. It is not definitely established that the abolition of capital punishment encourages murders—or that the continuance of the practice discourages them.”<sup>58</sup>

Later that year, it was reported by the press that four convicted murders had been executed on the same day in Oregon. This prompted the warden of the Washington state penitentiary to announce his opposition to the death penalty and to predict its eventual abolition in Washington.<sup>59</sup> Governor Lister’s records indicate that in December 1914, he became an honorary vice president of the Anti-Capital Punishment Society of America, just one of many such abolitionist organizations created during the Progressive Era.<sup>60</sup> Finally, the local paper reported: “The death penalty for murder in the state of Washington is a thing of the past. Governor Lister today signed H.B. 200, whereby it [the death penalty] is relegated to history.”<sup>61</sup>

### 3. South Dakota

According to the *Pierre Daily Capital-Journal*, from statehood in 1889 through 1915, 103 murders and five executions occurred in South Dakota.<sup>62</sup> The state executed one individual during the months preceding death penalty abolition in 1915—a black man was hanged for allegedly murdering a woman and her child.<sup>63</sup> Meanwhile, the press reported five murders during the year leading up to death penalty abolition. The most sensational of these was a double murder; the headline read: “Geddes Couple Murdered: Wealthy Man and His Stenographer Killed and Burned—Great Excitement Prevails.”<sup>64</sup> The article warned that “the feeling was so intense today that it is believed that if any well founded suspicion is developed

<sup>56</sup> *Saloon Man Kills Two Peace Officers; Then Ends Own Life*, SEATTLE TIMES, Aug. 25, 1912, at 1.

<sup>57</sup> *An Atrocious Crime*, SEATTLE TIMES, Oct. 10, 1912, at 4.

<sup>58</sup> *The Death Penalty*, SEATTLE TIMES, Oct. 14, 1912.

<sup>59</sup> *Warden Reed Opposed to Capital Punishment*, SEATTLE TIMES, Dec. 13, 1912, at 2.

<sup>60</sup> Filler, *supra* note 35.

<sup>61</sup> *Death Penalty Abolished*, SEATTLE TIMES, Mar. 22, 1913, at 3; 1913 Wash. Laws Ch. 167, H.B. 200, at 581.

<sup>62</sup> *Death Penalty is Abolished*, PIERRE DAILY CAPITAL-J., Feb. 1, 1915, at 1, 3.

<sup>63</sup> *Perkins Murderer Hung This Morning*, PIERRE DAILY CAPITAL-J., Dec. 4, 1913, at 1.

<sup>64</sup> *Geddes Couple Murdered: Wealthy Man and His Stenographer Killed and Burned—Great Excitement Prevails*, PIERRE DAILY CAPITAL-J., Apr. 18, 1914, at 1, 4.

as to the author of the crime, a lynching would follow."<sup>65</sup>

The state legislative records indicate that "Governor Byrne in his [1913] inaugural address recommended the abolition of the death penalty."<sup>66</sup> A legislator subsequently introduced an abolition bill in the state House of Representatives. In introducing the proposal, the lawmaker read "a paper in which he cited a large number of authorities"<sup>67</sup> who supported abolition and gave "statistics from different states regarding the matter of homicides."<sup>68</sup> In support of his argument, he provided statistical information on homicide occurrence in various cities with and without the death penalty. During the period 1901-1910, Milwaukee had 56 homicides without a death penalty, while among cities with capital punishment, 1659 homicides occurred in Chicago, 1249 in New York City, 328 in Cincinnati, and 283 in Boston. Another supporter of abolition reminded his colleagues "that the divine commandment 'Thou shalt not kill,' applied to everybody."<sup>69</sup> One lawmaker, however, cautioned that repealing the death penalty would "encourage mob law instead of legal punishment of crimes."<sup>70</sup> The abolition forces carried the day, as the South Dakota legislature passed the abolition bill by a vote of 63-24.

During this debate, the *Pierre Daily Capital-Journal* argued that abolition of the death penalty was "sentimentalism gone to seed. As a matter of fact, there is not sufficient killing of men who ought to be 'exterminated'."<sup>71</sup> The newspaper also editorialized that capital punishment provides a deterrent, "but the repeal of the death penalty is not a demand of society as a whole but rather in line with the effete eastern society organized for protection of Indian rights, which are well known in this part of the country to be simple jokes."<sup>72</sup> An abolition supporter countered that:

errors in conviction are only too likely in cases where public sentiment rules and the twelve men are only human. . . . The man with the money and a good lawyer was always able to get out better than the poor man with an attorney selected by the court. After a man was hanged . . . no evidence nor court order could bring him back, even though he was proven innocent.<sup>73</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> South Dakota Vertical File.

<sup>67</sup> *The Legislature Today*, PIERRE DAILY CAPITAL-J., Jan. 20, 1915, at 1.

<sup>68</sup> *Capital Punishment Contest*, PIERRE DAILY CAPITAL-J., Jan. 20, 1915, at 1, 4.

<sup>69</sup> *The Legislature Today*, *supra* note 67.

<sup>70</sup> *Id.*

<sup>71</sup> *Capital Punishment Contest*, *supra* note 68, at 1.

<sup>72</sup> *Id.* at 4.

<sup>73</sup> *Death Penalty is Abolished*, *supra* note 62, at 1.

Another abolition advocate said "he was not swayed by maudlin sympathy, but opposed a cowardly assassination by the state in a way that exterminates rather than reforms." Yet another supporter of abolition plead, "now is the time to strike from our limbs the last shackles of barbarism."<sup>74</sup> He also noted that the state had pardoned and released twenty-one murderers, and none of these had committed another crime.<sup>75</sup> On February 15, 1915, the governor signed the death penalty abolition legislation.<sup>76</sup>

#### 4. Oregon

Oregon executed twenty-four individuals from 1903-1914, averaging approximately two per year.<sup>77</sup> According to a report of a legislative lobbying group, in 1910 the Oregon superintendent of prisons reported that eighteen men had been executed in the state between 1903-1910, "the greatest number ever executed in any similar period in this state."<sup>78</sup> But this prison official added, "It does not appear that the increasing number of executions in this state has operated as a deterrent to the crime of homicide. . . . I am fully convinced that capital punishment should be abolished."<sup>79</sup> The next year, Governor Oswald West initiated the campaign to abolish capital punishment. Addressing the state legislature, the Governor reasoned, "[t]he desperate criminal, relying on the reluctance of the average juror and the caution of the court in the imposition of the capital sentence, is more willing to take a gambler's chance with death . . . than he would be to face the greater certainty of life spent behind bars."<sup>80</sup>

The *Portland Oregonian* reported thirty-six murders and one lynching in the year prior to abolition in 1914. An editorial condemned sympathy for accused criminals among public servants administering the law, accusing these officials of shirking their responsibilities to public safety.<sup>81</sup> Another editorial saw the death penalty as a deterrent because well-publicized executions "signified a triumph in part of law and order over an atrocious system. Their force as crime deterrents would have been largely lost by suppres-

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> 1915 S.D. LAWS 335.

<sup>77</sup> Hugo A. Bedau, *Capital Punishment in Oregon, 1903-1964*, 45 OR. L. REV. 1 (1965).

<sup>78</sup> Oregon Council to Abolish the Death Penalty, *The Abolition of the Death Penalty in Oregon, 1914*, at 1-2, May 14, 1964.

<sup>79</sup> *Id.* at 1.

<sup>80</sup> Dann, *supra* note 20.

<sup>81</sup> *Harry Thaw's Appeal*, PORTLAND OREGONIAN, Mar. 16, 1914.

sion of any important feature of the event.”<sup>82</sup> Commenting on a recent case, the *Oregonian* acknowledged that with expensive legal assistance, the wealthy were never executed, and conceded that Oregon sometimes executed innocent people.<sup>83</sup> Yet the newspaper also maintained: “That these things are facts does not in itself justify abolishment of the noose any more than it justifies abolishment of penitentiaries.”<sup>84</sup>

In 1912, Governor West postponed the executions of five murderers until after a referendum on the death penalty. The Governor reasoned: “he would cause all to be hanged at once, and thus make the people responsible for a gruesome and terrifying exhibition, unless the death penalty were to be abolished.”<sup>85</sup> The *Oregonian* reacted: “It is a shocking accusation for a Governor to make against his own people that they are murderers because they would enforce the law.”<sup>86</sup> An editorial criticized the Governor’s decision to force another referendum on the death penalty almost immediately after a resounding defeat of abolition in 1912.<sup>87</sup> The voters, however, abolished capital punishment by 157 votes in the 1914 referendum.<sup>88</sup> The Governor deferred two executions until after the referendum,<sup>89</sup> and following the vote he stated, “the old barbarous system of capital punishment has been abolished.”<sup>90</sup>

### 5. Arizona

Perhaps it should not be surprising that in this demographically heterogeneous state there were ten executions and fourteen murders mentioned in the *Tucson Citizen* during the year prior to abolition in 1916. In the *Citizen*, a short article noted that “within the last three weeks there have been eight executions for banditry and theft,” without mentioning any names of those executed.<sup>91</sup> The death penalty apparently was so common that its use did not merit mention of the names of the deceased. According to a state historical society report, between 1910-1916, Arizona executed only His-

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<sup>82</sup> *Guarding Sensibilities*, PORTLAND OREGONIAN, Apr. 21, 1914.

<sup>83</sup> *With a Murder's Money*, PORTLAND OREGONIAN, Dec. 22, 1914, at 6.

<sup>84</sup> *The Lesson*, PORTLAND OREGONIAN, Jan. 5, 1915, at 8.

<sup>85</sup> *Busybodies Once More*, PORTLAND OREGONIAN, Sept. 21, 1914.

<sup>86</sup> *Can a People Murder?*, PORTLAND OREGONIAN, Nov. 26, 1914, at 6.

<sup>87</sup> *Busybodies Once More*, *supra* note 85.

<sup>88</sup> *No More Hangings, Verdict of Voters*, PORTLAND OREGONIAN, Dec. 1, 1914, at 6.

<sup>89</sup> *2 Reprieves Possible*, PORTLAND OREGONIAN, Aug. 5, 1914, at 4; *Death Penalty Stayed*, PORTLAND OREGONIAN, Oct. 5, 1914, at 6.

<sup>90</sup> Dann, *supra* note 20.

<sup>91</sup> *Execution Squad Busy Now in Sonora*, TUCSON CITIZEN, Jan. 28, 1916, at 5.

panics.<sup>92</sup> An editorial in the *Arizona Republican* noted that many Hispanics indeed felt that the death penalty was unfairly applied to their people.<sup>93</sup>

The Governor led the fight against death penalty in Arizona. Governor Hunt was quoted as claiming that no executions would take place in the state as long as he was governor.<sup>94</sup> And indeed, he granted 105 pardons, commutations and reprieves in his first term, eighty-five during 1912-13 alone. Furthermore, “[o]n 22 December 1914, Hunt notified the leaders of the Chicago-based Anti-Capital Punishment Society of America that he would accept the presidency of their organization.”<sup>95</sup>

Prior to abolition, the Governor regularly awarded reprieves to condemned prisoners, actions that were rather unpopular at the time.<sup>96</sup> On March 12, 1912, Governor Hunt made the following remarks to the first legislature of the newly admitted state:

I subscribe, also, to the belief held by millions and yet increasing millions, that capital punishment is relic of barbarism; that the legalized taking of life is a straining of Christ’s law which has no place in modern civilization. I subscribe to the belief that the murderer may be punished through the medium of an awakened consciousness far more effectively than by breaking of his neck and hurling his soul into eternity; that a more fearful and effective example to others lies in the certainty of imprisonment than in the fleeting fear of death, a fear which temporarily has no place in the passion-heated or drunk-crazed brain. I therefore recommend the submission to the people of an amendment to the Constitution directed to the abolition of capital punishment.<sup>97</sup>

In 1913, the state legislature passed revisions of the penal code to restrict the Governor’s independent pardon and reprieve powers, creating instead an independent board of pardons and paroles. The Governor vetoed the legislation. All of the state’s newspapers except for the *Arizona Republican* criticized the Governor’s actions.<sup>98</sup> In the *Citizen*,<sup>99</sup> there was a short article on the efforts to begin a recall of Governor Hunt. Later a *Citizen* editorial explained its reasoning for opposing the re-election of the Governor:

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<sup>92</sup> *Executions in Arizona 1910-1965*, Arizona State Historical Society.

<sup>93</sup> David L. Abney, *Capital Punishment in Arizona, 1863-1963* 89 (1988) (unpublished M. Hist. thesis, Arizona State University).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 67.

<sup>96</sup> William L. Eaton, *The Death Penalty in Arizona (1864-1933)*, Arizona State Historical Society.

<sup>97</sup> *Id.* at 18.

<sup>98</sup> Abney, *supra* note 93, at 60.

<sup>99</sup> *The Move to Recall Governor Hunt*, TUCSON CITIZEN, Dec. 11, 1915, at 4.

[He] has not enforced the law but has broken it repeatedly; among other instances, note his action in cases of criminals legally sentenced to death . . . he has vetoed bill after bill, passed by both houses. . . . He has initiated and promoted a freak prison policy at enormous expense to the state and very real danger to civilized society.<sup>100</sup>

Capital punishment advocates defeated an initiative petition abolishing the death penalty in 1914; however, a similar petition succeeded in 1916. The 1916 referendum passed by a margin of only 152 votes—18,936 to 18,784.<sup>101</sup>

## B. SUPPORT OF THE PRESS AND PROMINENT CITIZENS

### 1. Colorado

In the first state to abolish capital punishment during the Progressive Era, the abolition bill not only engendered the support of the Governor but also gained the support of the press. The *Rocky Mountain Daily News* reported twelve murders and three executions during the year prior to abolition in 1897. The three executions were performed on the same day in 1896, and a long front-page newspaper account included drawings of each man and descriptions of how each conducted himself prior to and during his execution. The article reported that one man had to be partially carried to the death chamber where he was to be hanged:

The look of pleading that came into his eyes, the deathly pallor of his face and the utter helplessness of his entire body would have melted the heart of any man. . . . Once in the brilliantly lighted room it was with the greatest difficulty that [he] could stand. He was placed before the platform upon which to step means death, and was given a chance to say what few last words he might. Speak he could not.<sup>102</sup>

The article concluded that in his case, "He has paid the penalty for his rash act [of killing a police officer] many times over, for his suffering had been intense and continuous ever since the date he entered the cell from which fate decreed he should leave only to meet his doom."<sup>103</sup>

A March 1897 article in the *Daily News* predicted that the Governor would sign death penalty abolition legislation.<sup>104</sup> On March 24, 1897, the *Daily News* reported:

H.B. 74, abolishing capital punishment, passed in about two minutes. . . . The Bill provides for life imprisonment in all cases now sen-

<sup>100</sup> *Reasons Why*, TUCSON CITIZEN, Sept. 27, 1916, at 32.

<sup>101</sup> Bruce E. Babbit, *Arizona's Death Penalty*, Arizona State Historical Society.

<sup>102</sup> *Three Men Executed at Canon City*, ROCKY MOUNTAIN DAILY NEWS, June 27, 1896, at 1-2.

<sup>103</sup> *Id.*

<sup>104</sup> *Capital Punishment*, ROCKY MOUNTAIN DAILY NEWS, Mar. 28, 1897, at 4.



tenced to capital punishment. The idea seems to be among those whose sentiment has modified on this point that it will do no harm to pass this law and observe its effects for two years.<sup>105</sup>

The same article continues: "The most striking thing about the senate session yesterday was probably the passage in committee of the whole of the . . . bill abolishing capital punishment, without discussion and by a large majority." It became law on March 29, 1897.<sup>106</sup> Legislative records indicate that in his Biennial Message, Governor Alva Adams gave the new law his enthusiastic blessing. While there were twelve executions in the state between 1890-1896,<sup>107</sup> the Governor reported that of the twenty-five murderers condemned to die in the state penitentiary, thirteen had been reprieved and thus, the death penalty carried little deterrent effect. He opined: "Nothing is so appalling to a criminal as certainty of a life sentence, with no hope of pardon."<sup>108</sup>

## 2. Minnesota

Twenty-six hangings occurred in Minnesota from 1858-1911.<sup>109</sup> A particularly significant execution occurred after a gay man killed his former lover and that individual's mother. The State staged a hanging on February 13, 1906, but the rope was too long and the man ended up on the floor. "Three deputy sheriffs immediately ran to the platform, hauled on the rope, and held the unfortunate man's feet off the ground for the fourteen and a half minutes it took to choke him to death."<sup>110</sup> The press gave extensive coverage to this grisly ordeal in spite of a 1895 law prohibiting publication of accounts of executions. Minnesota prosecuted, convicted and fined the press for this coverage. Yet perhaps because of such reporting, this man was the last person executed in Minnesota.

The St. Paul newspaper reflected the local sentiment. The *St. Paul Dispatch* published thirty-five articles about separate murders, two death sentences and one life sentence during the year preceding abolition in 1911. An article, comparing St. Paul with other cities, downplayed area crime.<sup>111</sup> Later, another headlined, "Clean Week for Crime, Pinkerton Man Declares St. Paul Sets a Record—Few Ar-

<sup>105</sup> *Hanging To Be Stopped*, ROCKY MOUNTAIN DAILY NEWS, Mar. 24, 1897, at 5.

<sup>106</sup> 1897 Colo. Sess. Laws 135.

<sup>107</sup> BOWERS, *supra* note 30.

<sup>108</sup> Governor Alva Adams, Biennial Message, Colorado State Historical Society, at 24-25. (1899)

<sup>109</sup> Walter N. Trenerry, *Murder in Minnesota: A Collection of True Cases*, Minnesota Historical Society (1962).

<sup>110</sup> *Id.* at 163.

<sup>111</sup> *Sees Less Crime Here*, ST. PAUL DISPATCH, May 13, 1910, at 7.

rests and Still Fewer Accidents,"<sup>112</sup> in spite of being the site of the state fair and a large convention. A *St. Paul Dispatch* editorial referred to the lack of prosecution of the meat trusts and complained of discriminatory criminal enforcement.<sup>113</sup>

Moreover, an article titled "To Abolish Death Penalty" quoted a county attorney who complained:

I wish somebody would start agitating for the abolition of capital punishment in this state. . . . The law allowing the imposition of the death sentence upon conviction of murder makes it practically impossible for the state to obtain the right sort of jury, and after the jury is secured the chances of conviction, even with the strongest evidence, are at a minimum. There are many men, otherwise competent to serve as jurymen, who honestly have conscientious scruples against taking a life into their hands. There are many more men of high character who, deliberately or otherwise, seize upon the death penalty as an excuse from serving.<sup>114</sup>

In sum, one author's appraisal is probably accurate: "It is fairly safe to say that capital punishment was never really popular in the state."<sup>115</sup> Minnesota abolished the death penalty on April 22, 1911.<sup>116</sup>

### 3. Missouri

The *St. Louis Post-Dispatch* reported seventy-nine murders and three death sentences during the year prior to abolition in 1917. On October 23, 1916, the paper headlined "Six Murders Since August 20 Unsolved."<sup>117</sup> At the time, Missouri was undergoing a widespread reform of its prison system.<sup>118</sup> The Prison Reform League lobbied for the termination of the antiquated convict labor system,<sup>119</sup> and a local judge demanded separation of the juvenile court from the criminal court system.<sup>120</sup> A *Post-Dispatch* editorial noted that in many states there was movement away from capital punishment and concluded: "Michigan presents an example of consistent and long-continuing adherence to the principle that the taking of life under judicial order furnishes no safeguard not found in other

<sup>112</sup> *Clean Week for Crime, Pinkerton Man Declares St. Paul Sets a Record—Few Arrests and Still Fewer Accidents*, ST. PAUL DISPATCH, Sept. 9, 1910, at 16.

<sup>113</sup> *Why Not Punish All Criminals Alike?*, ST. PAUL DISPATCH, Apr. 1, 1910, at 10.

<sup>114</sup> *To Abolish Death Penalty*, ST. PAUL DISPATCH, Dec. 10, 1910, at 9.

<sup>115</sup> Trenerry, *supra* note 109, at vii.

<sup>116</sup> 1911 Minn. Laws at 572.

<sup>117</sup> *Six Murders Since August 20 Unsolved*, ST. LOUIS POST-DISPATCH, Oct. 23, 1916, at 1.

<sup>118</sup> Guillot, *supra* note 22.

<sup>119</sup> *Gardner Hears Women on Prison Reform*, ST. LOUIS POST-DISPATCH, Nov. 24, 1916 at 3; *Senator Cook's Prison Bill*, ST. LOUIS POST-DISPATCH, Jan. 22, 1917, at 10.

<sup>120</sup> *Judge Grimm and the Juvenile Court*, ST. LOUIS POST-DISPATCH, Dec. 7, 1916, at 16.

forms of punishment."<sup>121</sup>

Representative O.B. Whitaker, a prominent Christian leader, writer and college president, introduced an abolition proposal in the state legislature.<sup>122</sup> On introducing the legislation, Whitaker passionately defended abolition as a means of dealing with the congestion of courts, easing the selection of jurors and removing the real possibility of sentencing the innocent to death.<sup>123</sup> After indications by the Governor that he would sign the bill into law, the Missouri legislature overwhelmingly approved abolition legislation on April 13, 1917.<sup>124</sup> The *Post-Dispatch* editorialized:

The . . . bill abolishing the death penalty in Missouri was not passed reluctantly under the coercion of any public agitation or propaganda. In fact the approval of the measure was preceded by so little discussion in the Legislature as to come with surprise to very many Missourians. . . . What they have done is the more impressive because it is the deliberate expression of a slow-growing, mature conviction that the supreme penalty known to civilized law is not essential to the full protection of society. . . . Missouri is in good company in refusing longer to impose on its officials the repulsive duty of executing criminals. . . . Their experience shows that the substitution of life imprisonment does not increase the frequency of grave offenses.<sup>125</sup>

### C. NO OPPOSITION AND NO CONTROVERSY

#### 1. North Dakota

Between 1885-1905, North Dakota executed only eight persons.<sup>126</sup> During the year preceding abolition in 1915, the *Bismark Daily Tribune* reported ten murders. In three murder convictions, a local court imposed one death sentence, one life sentence and one fifteen-year sentence. In none of the newspaper stories is there any evidence of hysteria, perhaps because many of these crimes involved domestic disputes. During legislative debate on the abolition bill a citizen petition was read, which stated: "Whereas, the death penalty is barbarous, ineffective in checking crime, contrary to the dictates of humanity, and violates the sacredness of human life, we, the undersigned, protest against the infliction of the penalty and make this appeal for the abolishment of capital punishment."<sup>127</sup> The House

<sup>121</sup> *Death Penalty in Disfavor*, ST. LOUIS POST-DISPATCH, Feb. 24, 1917, at 4.

<sup>122</sup> Guillot, *supra* note 22.

<sup>123</sup> *Opposes Capital Punishment*, ST. CLAIR COUNTY DEMOCRAT, Mar. 15, 1917, at 1, 5.

<sup>124</sup> *Gardner Will Sign Bill Abolishing Death Penalty*, ST. LOUIS POST-DISPATCH, Mar. 19, 1917, at 1.

<sup>125</sup> *Missouri Abolishes Death Penalty*, ST. LOUIS POST-DISPATCH, Mar. 20, 1917, at 14.

<sup>126</sup> D.P. Gray, *Comment*, 54 NORTH DAKOTA HISTORY 39 (Fall 1987).

<sup>127</sup> *Death Penalty Opposed*, BISMARCK DAILY TRIB., Jan. 12, 1915, at 1.

of Representatives passed Bill No. 33 unanimously, while the final Senate vote was 28-12. The bill included an emergency clause, putting it into effect immediately to avoid the execution of a convicted man already scheduled to hang.

#### D. PROMINENT CITIZENS, PRO AND CON

##### 1. *Tennessee*

Tennessee was the only state outside the West and Midwest to abolish capital punishment for murder during this era and the only southern state ever to have done so. Between 1909-1912, nine executions occurred in Tennessee.<sup>128</sup> The *Nashville Tennessean* described forty-five murders and one convicted murderer sentenced to death during the year prior to abolition in 1915. At the time abolition legislation was being considered, a *Tennessean* article headline indicated that the legislature had passed the abolition bill only after "vigorous debate."<sup>129</sup>

Bill proponents argued that after testing abolition, subsequent legislatures could determine how abolition was actually working compared to capital punishment.<sup>130</sup> A paid advertisement published just prior to the debate asserted that "Capital Punishment is Murder!"<sup>131</sup> A state senator summed up his tentative support of the abolition bill as follows: "I yield to no man in my devotion to womanhood. I find in states where we have capital punishment we find more lynchings. . . . I do not believe this bill will encourage mob law. Yet I know when a black brute commits the unspeakable crime he was certain to be slain, law or no law."<sup>132</sup>

The most prominent supporter of the abolition drive was Duke C. Bowers, a retired grocery merchant from Memphis, who was at least partially motivated by cases of innocent defendants executed in Tennessee.<sup>133</sup> He was influential enough to receive the following endorsement from the Mayor of Memphis in a letter to Governor Thomas Rye:

Mr. Bowers has made a most heroic fight for this measure, at a great personal sacrifice of both time, energy and money . . . . That the bill is either good or bad is, of course, open to debate. At the same time, I

<sup>128</sup> BOWERS, *supra* note 30.

<sup>129</sup> *Bowers' Bill is Passed in Lower House*, NASHVILLE TENNESSEAN, Mar. 6, 1915, at 1, 2.

<sup>130</sup> 1915 Tenn. Laws 94.

<sup>131</sup> *Capital Punishment Is Murder!*, NASHVILLE TENNESSEAN, Jan. 18, 1915, at 2.

<sup>132</sup> *Recess is Urged by Governor in Message to Salons*, NASHVILLE TENNESSEAN, Mar. 27, 1915, at 2.

<sup>133</sup> Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

think you will agree that it is at least worthy of a fair trial and, if at the end of two years, it is found bad its repeal should be accomplished without difficulty.<sup>134</sup>

Duke Bowers was so influential that the legislation was titled the "Duke Bowers' Bill."

In this, the most heterogeneous of abolitionist states, the public debate was predictably the most intense. Records of the state historical society indicate that a Tennessee attorney wrote to the Governor opposing abolition: "My son John was murdered on October 1, 1914 by two negro tramps. . . . These negroes have been indicted and their case stands for trial May 4, 1915."<sup>135</sup> And a concerned citizen wrote to Governor Rye, pleading with him to veto the bill abolishing capital punishment. He focused on Tennessee counties on the Mississippi River "in which negroes are the thickest. . . . Now negroes fear nothing but death, and this law would increase the crimes of homicide among that race."<sup>136</sup> A Tennessee business leader agreed, citing problems in deterrence:

We have a large negro population in our state, many of them are ignorant and brutal. I honestly think that there are thousands of them that would commit murder for ten dollars if they thought they would not be hung or electrocuted. These people and some whites do not fear the penitentiary. I know instances where negroes have expressed a desire to go to the penitentiary where they were better off than on the outside.<sup>137</sup>

Several writers threatened white savagery. A county attorney argued in a letter to the Governor that this law would "only encourage mob law. . . . [M]obs will at least try and execute all the negroes hereafter guilty of, or perchance charged with, murder in the first degree. . . . I think nothing but a sickly sentiment calls for any such a law."<sup>138</sup> A Tennessee State Committee member insisted: "The population of our county is three-fourths colored, and if this bill should become law it would be almost impossible to suppress mobs in their efforts to punish colored criminals."<sup>139</sup> A local bank executive agreed: "But to abolish the death penalty here in the state

<sup>134</sup> Letter from E. H. Crump to Gov. Thomas Rye (Mar. 27, 1915) (on file with the Tennessee State Historical Society).

<sup>135</sup> Letter from Noble Smithson to Gov. Thomas Rye (Apr. 29, 1915) (on file with the Tennessee State Historical Society).

<sup>136</sup> Letter from D. J. Currie to Gov. Thomas Rye (Mar. 29, 1915) (on file with the Tennessee State Historical Society).

<sup>137</sup> Letter from John P. Williams to Gov. Thomas Rye (Apr. 7, 1915) (on file with the Tennessee State Historical Society).

<sup>138</sup> Letter from D. J. Caldwell to Gov. Thomas Rye (1915) (on file with the Tennessee State Historical Society).

<sup>139</sup> Letter from B.F. Murrell to Gov. Thomas Rye (Mar. 27, 1915) (on file with the Tennessee State Historical Society).

of Tennessee will cause men who are otherwise citizens who are the strictest for law enforcement [to be] law breakers."<sup>140</sup> An attorney stated that the bill would encourage "lynchings and murdering. With the large percent of colored . . . . The state legislature has simply let a false feeling of sentiment run away with their judgment."<sup>141</sup>

Although the media and law enforcement officers joined the opposition to abolition, the abolition bill became law early in 1915. Addressing the abolition proposal, an editorial from the *Somerville Falcon* warned: "Our people are as much opposed to violence as any people, but the very knowledge that there can be no legal execution will lead men to commit crimes for which civilized people will never submit."<sup>142</sup> Thirty-five Knoxville police officers signed a petition asking the governor to veto the bill.<sup>143</sup> However, the abolition bill passed the legislature and became law on March 27, 1915, after the Governor failed to veto the bill until after the deadline required by state law.<sup>144</sup> The new law abolished capital punishment for murder, but the death penalty was retained for rape and for murder committed by a prisoner serving a life sentence.<sup>145</sup>

#### E. SUMMARY OF ABOLITION

As might be expected in states with different population sizes and characteristics, the number of recorded murders during the year prior to abolition greatly vary, from seventy-nine in Missouri to five in South Dakota. There also were large variations in the number of executions in these states during the year prior to abolition, from ten in Arizona to none in North Dakota. Thus, neither frequency of murders nor executions were determining forces behind abolition.

Earlier research in Missouri<sup>146</sup> and Oregon<sup>147</sup> noted the difficulty in securing convictions in death penalty cases, while the data marshalled here indicates that Colorado, Kansas and Minnesota had similar problems. Moreover, in eight of these ten abolition states,

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<sup>140</sup> Letter from C.A. Ross to Gov. Thomas Rye (Mar. 8, 1915) (on file with the Tennessee State Historical Society).

<sup>141</sup> Letter from S. E. N. Moore to Gov. Thomas Rye (Mar. 27, 1915) (on file with the Tennessee State Historical Society).

<sup>142</sup> *Kill the Bowers Bill By All Means*, SOMERVILLE TENNESSEE FALCON, May 7, 1915.

<sup>143</sup> Letter from the Knoxville Police Department to Gov. Thomas Rye (Apr. 9, 1915) (on file with the Tennessee State Historical Society).

<sup>144</sup> 1915 Tenn. Pub. Acts 181.

<sup>145</sup> *Id.*

<sup>146</sup> Guillot, *supra* note 22.

<sup>147</sup> Dann, *supra* note 20.

either the Governor or the press, or both, supported abolition. In Colorado, abolition had the support of both the Governor and press, and it passed by "a large majority" and "in about two minutes." In five states, the Governor supported the cause, usually very forcefully. Several of these governors were acquainted with each other through their affiliation with the Anti-Capital Punishment Society of America. In Minnesota, the press supported abolition. In Tennessee, a local business leader worked alone without the support of the press or the Governor and appears to have been successful due to his prominence. And in North Dakota, no leaders seemed to actively support abolition, yet no one seemed to oppose it, and the abolition bill passed the state legislature, 80-0.

As with most of the other reforms enacted by Progressive Era legislation, it is difficult to interpret the significance of the bills to abolish the death penalty since eight of the ten abolition laws were promptly repealed. The best answer is that the abolition movement was at most a partial success, as Mann<sup>148</sup> has said was true of Progressive Era legislation in general.

Certainly, this movement was not a total failure. For example, it would be an oversimplification to say that abolition legislation, as Kolko has claimed for all Progressive Era reforms, was "Designed for and by Big Business."<sup>149</sup> While some Progressive Era bills may have been coercive of the general public (federal drug controls), or were not enforced in a way to protect the general public (antitrust laws), other legislation made an obvious and lasting change for the better in the lives of many ordinary working Americans (i.e., laws controlling working conditions and hours of employment, female suffrage).

Correspondingly, a class-conflict interpretation of death penalty abolition would not be entirely accurate. This legislation, supported by selected governors and the press, was ostensibly intended to help ordinary citizens, and only in the case of Tennessee do we find considerable elite opposition. On the other hand, while the personal motivations of legislative supporters were apparently humanitarian, the intensity of the abolition movement during an economic boom suggests a reluctance to execute American citizens when they could productively contribute to economic growth. And, like other Progressive Era reforms, enactment of death penalty abolition laws was concentrated during the economic boom years of

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<sup>148</sup> THE PROGRESSIVE ERA 202 (Arthur Mann ed., 1975).

<sup>149</sup> Gabriel Kolko, *Designed by and for Big Business*, in THE PROGRESSIVE ERA 63-75 (Arthur Mann ed., 1975).

1914-1917; however, this progression abruptly stopped upon U.S. entry into World War I.

Elites may be most concerned about workers' welfare when the workers are badly needed for a booming economy. To produce at optimum levels workers must be happy, healthy, drug-free and above all else, alive. So, at least in part, economic forces may have contributed to the Progressive Era abolition movement. Thus, the origins of these abolition laws demonstrate the importance of both the nature of individual support as well as the social context of this legislation.

### III. REINSTATEMENT

#### A. THE LEGACY OF LYNCHING

##### 1. Colorado

Colorado provided a foreshadowing of the transiency of abolition laws when the state reinstated capital punishment before any other states abolished the death penalty during the Progressive Era. With the passage of House Bill 71 on May 2, 1901, Colorado reinstated the death penalty after only four years of abolition. This measure became law without the Governor's approval.<sup>150</sup> At its inception, the abolition of the death penalty in Colorado was treated as a tentative change and an experiment. Immediately before abolition, it was remarked, "it will do no harm to pass this law [abolishing the death penalty] and observe its effects for two years."<sup>151</sup> Four years later, this experiment apparently had failed in the eyes of the legislature and the death penalty was reinstated.

Some have argued that several lynchings provoked Colorado's decision to reinstate the death penalty.<sup>152</sup> Bedau has written: "Colorado abolished the death penalty for a few years, but reinstated it in the face of what at the time seemed the threat of mob rule. In that state, public dissatisfaction with mere imprisonment . . . resulted in lynchings during the abolition years."<sup>153</sup> Indeed, during the time period studied—May 2, 1900, to May 2, 1901—two lynchings occurred. Both of these lynchings were covered extensively in the *Rocky Mountain Daily News* and aroused a great deal of pro-death penalty sentiment. In the first lynching, a "mulatto" who was accused of shooting his wife and killing two young girls at an orphan-

<sup>150</sup> H.R.J. Res. 71, 1901 Colo. Laws 64.

<sup>151</sup> *Hanging to be Stopped*, *supra* note 105.

<sup>152</sup> J.E. Cutler, *Capital Punishment and Lynching*, 29 ANNALS AM. ACAD. POL. & SOC. SCI. 182 (1907).

<sup>153</sup> BEDAU, *supra* note 23, at 10.



age was hanged by a mob before thousands.<sup>154</sup> The *News* described the lynching as having the approval of the community, as expressed through direct public participation or non-interference. Furthermore, the *News* editorialized that this lynching was proof that the death penalty should be restored in Colorado:

The people of Colorado and the next legislature might as well face the fact that in the absence of capital punishment, under the law it is inflicted through the angry mob violence whenever an especially atrocious crime is committed. . . . To prevent the recurrence of such horrors the death penalty should be restored in this state.<sup>155</sup>

There was also some concern with the effect that the lynching had on the state's image: "In the case of such crimes as those committed . . . a jury may be relied upon to fix the penalty at death, and the certainty that it will do so will stop the blackening of Colorado's fair name with lynchings."<sup>156</sup>

Only a few months later, another even more brutal lynching tainted Colorado's image. Preston Porter, a sixteen-year-old African-American charged by the local authorities with "outraging" and murdering a thirteen-year-old white girl, was burned at the stake before a large crowd in Limon.<sup>157</sup> Earlier, a reward of \$2200 was offered for the capture of Porter "dead or alive and preferably dead."<sup>158</sup> While the citizens of Limon had originally planned to avoid torture in favor of a respectable hanging,<sup>159</sup> stronger passions prevailed and Porter was burned at the stake by a mob. The victim's father was allowed to strike the first match.<sup>160</sup> Law enforcement officials never filed charges against any of the lynchers, even though none wore masks.<sup>161</sup> Had there been an investigation of the lynching, the *News* was confident there would have been no convictions: "If indictments could be procured at all which is very doubtful, the trial or trials certainly would produce no convictions, and it is not impossible that a Lincoln County jury would attach a vote of thanks to the mob."<sup>162</sup>

In the days that followed Porter's lynching, the *News* printed

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<sup>154</sup> *Hanged in Pueblo Before Thousands*, ROCKY MOUNTAIN DAILY NEWS, May 23, 1900, at 1.

<sup>155</sup> *Restore Capital Punishment*, ROCKY MOUNTAIN DAILY NEWS, May 24, 1900, at 4.

<sup>156</sup> *Id.*

<sup>157</sup> *Limon Lynching Told in Pictures*, ROCKY MOUNTAIN DAILY NEWS, Nov. 18, 1900, at 1.

<sup>158</sup> *Capture of Fiend is Reported*, ROCKY MOUNTAIN DAILY NEWS, Nov. 11, 1900, at 1.

<sup>159</sup> *Mob Much Disappointed*, ROCKY MOUNTAIN DAILY NEWS, Nov. 16, 1900, at 2.

<sup>160</sup> *Limon Lynching Told in Pictures*, *supra* note 157.

<sup>161</sup> *The Porter Lynching*, ROCKY MOUNTAIN DAILY NEWS, Nov. 26, 1900, at 1; *No Prosecution of Limon Lynchers*, ROCKY MOUNTAIN DAILY NEWS, Nov. 26, 1900, at 1.

<sup>162</sup> *Let it Drop out of Sight*, ROCKY MOUNTAIN DAILY NEWS, Nov. 23, 1900, at 4.

numerous opinions concerning lynching. A former lieutenant governor stated:

Capital punishment has been abolished in Colorado and the only resource left to an outraged citizenship is that which overtook Porter this afternoon at Limon. Lynch law may be objectionable to some sentimentalists, but there was little of sentiment or pity in Porter when he outraged and murdered Louise Frost.<sup>163</sup>

Similarly, a local pastor wrote: "In the first place, I think it was a mistake on the part of the state to change the law. There should be capital punishment for such crimes. It is largely the reason for the occurrence of lynchings of this sort."<sup>164</sup> In response to these lynchings, the *News* editorialized: "The mature opinion of the *News* is that the death penalty should be restored in this state."<sup>165</sup> According to the *News*, the chief justifications for the reinstatement bill were the Frost murder and subsequent Porter lynching.<sup>166</sup>

In the aftermath of Porter's crime, the citizens of Limon voted to have all "negroes of bad character" leave town.<sup>167</sup> If they would not voluntarily leave, they were to be "quietly escorted" across the border.<sup>168</sup> One local man explained:

Many of the men brought here by railroad companies are illiterate and brutal. They have many of them been guilty of crime. We have before us an awful example [Porter] and we cannot afford to take chances. Let them leave the country. There are enough white men to do the work.<sup>169</sup>

Clearly this comment reflects a populist, racist sentiment triggered by economic forces.

## 2. Arizona

Arizona reinstated the death penalty for first-degree murder on November 5, 1918. In a referendum initiated by the state legislature, 20,443 favored death penalty reinstatement and only 10,602 were opposed.<sup>170</sup> This 2-to-1 margin in favor of death penalty reinstatement was overwhelming compared to the 1916 abolition referendum victory, which passed by a total of only 152 votes.<sup>171</sup> The

<sup>163</sup> *Citizens Express Themselves on the Burning of Porter*, ROCKY MOUNTAIN DAILY NEWS, Nov. 17, 1900, at 7.

<sup>164</sup> *What Ministers Think of Torture of Porter*, ROCKY MOUNTAIN DAILY NEWS, Nov. 17, 1900, at 7.

<sup>165</sup> *The Death Penalty*, ROCKY MOUNTAIN DAILY NEWS, Jan. 27, 1901, at 16.

<sup>166</sup> *Mob Much Disappointed*, *supra* note 159, at 2.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

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

<sup>170</sup> ARIZ. REV. STAT. ANN. § 1 at 18.

<sup>171</sup> Eaton, *supra* note 96, at 48.

*Phoenix Arizona Republican* noted the less-than-overwhelming original support for the abolition cause:

There was no discussion of the bill except by those who were advocating its adoption. There was nowhere a voice raised against the abolition of the death penalty. While perhaps a large majority of the people were not really in favor of it, they were willing to give it a trial.<sup>172</sup>

On May 13, 1917, one event occurred that probably influenced turning the tide against abolition. It involved the lynching of a murderer/rapist, who allegedly boasted that the state could not execute him since it no longer had the death penalty. A coroner's jury ruled that the lynching was a "justifiable homicide."<sup>173</sup> While the lynching may have been legally justified, it was interpreted as an embarrassment to the state by the *Tucson Citizen*, which felt that the lynching could have been averted if capital punishment had remained in effect:

It matters not that [he] richly deserved the punishment meted out to him, the fact that there has been a lynching in Arizona, the first in a score of years, is bound to cast a blot on the fair name of the baby state. Governor Hunt and his followers always maintained that as long as Arizona tolerated legal execution, she had the blood of her citizens on her hands, and Governor Hunt did succeed for a number of years in preventing legal executions. Capital punishment was finally abolished and now we find Arizona with blood on her hands and those who took the life as a penalty for crime [are] beyond the pale of the law.<sup>174</sup>

Another significant case occurred on Christmas Eve 1917, when Louis Sundeen and several co-conspirators murdered a local business proprietor.<sup>175</sup> The *Citizen* reported that the men had "discussed the dangers which attended such an expedition and remarked that the worst that could happen to them was a sentence of life imprisonment."<sup>176</sup> Sundeen shuffle-danced while on the way to serve his sentence and made sarcastic remarks when he passed the murder scene in the custody of police officers.<sup>177</sup> Furthermore, Sundeen reportedly was merry the night before his sentencing, until sobered by the threat of a lynch mob. These events led the *Citizen* to conclude that "[t]here is but one answer to this question and this performance. It is capital punishment. Human life must be held more seriously in Arizona. The fear of life imprisonment has no effect on criminals like Sundeen who boasts of 'bumping them off

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<sup>172</sup> Abney, *supra* note 93, at 93.

<sup>173</sup> *Id.* at 96.

<sup>174</sup> Eaton, *supra* note 96, at 52.

<sup>175</sup> *Pastime Park Proprietor Slain; Four Arrested*, TUCSON CITIZEN, Dec. 25, 1917, at 1, 5.

<sup>176</sup> *Arizona's Mistake*, TUCSON CITIZEN, Jan. 13, 1918, at 5.

<sup>177</sup> *Id.*

every now and then'."178 The public's dissatisfaction with abolition of the death penalty in Arizona was not unpredictable since Governor Hunt "had persuaded the public to end the death penalty based on an absolute correlation between abolition and a lower crime rate."179

### 3. Tennessee

Tennessee ended a four-year abolition period on January 27, 1919, when the Governor signed Bill 106 reinstating the death penalty for murder.<sup>180</sup> The events surrounding abolition foreshadowed this reinstatement. As noted earlier, passage of the 1915 measure abolishing the death penalty was achieved only after Governor Rye signed his veto too late to prevent enactment.<sup>181</sup> And the Memphis Mayor suggested in a letter to the Governor that abolition of the death penalty was worthy of a fair trial and conceded that "if at the end of two years, it is found bad its repeal should be accomplished without difficulty."<sup>182</sup> Thus, abolition in Tennessee began as a tentative experiment, similar to abolition in Colorado and Arizona. Indeed, the abolition experiment was so tentative that the state had retained capital punishment for some crimes. During the year prior to reinstatement, there were four legal executions in the state, three rapists and one previously convicted murderer who killed a fellow inmate.

In addition to the legal executions in Tennessee, three lynchings occurred. All involved African-American victims, and together the lynchings built momentum for the reinstatement movement. The first lynching was of an African-American man who had allegedly killed three white men, shooting two of them in the back. He was burned at the stake in front of a crowd of more than 1500 people.<sup>183</sup> Prior to burning the alleged murderer, hot irons were applied to his body for ten minutes in an unsuccessful attempt to draw a confession from him. The second lynching victim was an African-American bootlegger who allegedly shot and killed a local white sheriff.<sup>184</sup> The accused man's body was dragged by a mob through the streets, hanged for over an hour and burned in front of a large

178 *Id.*

179 Abney, *supra* note 93, at 110.

180 1919 Tenn. Pub. Acts 5.

181 TENNESSEE SENATE J., at 94 (1915).

182 See *supra* note 134 and accompanying text.

183 *Negro Murderer is Burned at the Stake by Mob*, NASHVILLE TENNESSEAN, Feb. 13, 1918, at 1.

184 *Negro Slayer of Sheriff Hanged and Body Burned*, NASHVILLE TENNESSEAN, Apr. 23, 1918, at 1.

crowd. The final lynching reported prior to reinstatement was of another African-American man who was accused of raping a fifteen-year-old white girl.<sup>185</sup> He was shot and wounded by four white men who were present at the scene of the crime. He was then dragged back to the community and hanged and burned in front of sixty to seventy blacks forced to view the lynching.

These lynchings spawned community outrage. Several anti-lynching articles appeared in the *Tennessean* and concerned citizens formed a Law and Order League to combat lynching.<sup>186</sup> Significantly, racism and pragmatism often motivated anti-lynching crusaders. The *Tennessean* reported: "The lynching . . . yesterday, can but sow disunion among our people, undermine the morale of our negro troops, and lessen the effectiveness of our propaganda among the colored people for food production and conservation. It will, therefore, tend to prolong the war and increase the price in victory."<sup>187</sup> The paper also editorialized: "We are enlisting negroes in our armies by the hundred thousands and sending them to France to fight for us. The negroes furnish most of the labor for our farms and in our homes. We want them to stay in the South."<sup>188</sup> The Nashville Women's Suffrage Association endorsed the Law and Order League's stance against lynching in its charter: ". . . the negro race, being yet in a comparatively early stage of moral development, has a right to look to the white race for guidance and certainly for justice."<sup>189</sup>

#### 4. Missouri

Missouri reinstated the death penalty on July 8, 1919, when the Governor signed Senate Bill 2, ending a two-year period of abolition.<sup>190</sup> Guillot argues that several sensational crimes spawned pro-death penalty sentiment.<sup>191</sup> One case involved the alleged killing of a sheriff by a jailbreaker. This crime aroused public sentiment to such a degree that the perpetrator was lynched by a mob shortly after being sentenced to life imprisonment. Some alleged that the lynching was a "plotted commentary on the refusal of the legislators to restore capital punishment."<sup>192</sup>

<sup>185</sup> *Negro Rapist Killed and Burned by Mob*, NASHVILLE TENNESSEAN, May 21, 1918, at 2.

<sup>186</sup> *Prevention of Mob Violence Proposed*, NASHVILLE TENNESSEAN, Apr. 24, 1918, at 2.

<sup>187</sup> *Lynching Evil to be Fought*, NASHVILLE TENNESSEAN, Apr. 25, 1918, at 8.

<sup>188</sup> *Interest in Law and Order Keen*, NASHVILLE TENNESSEAN, Mar. 7, 1918, at 3.

<sup>189</sup> *Condemns Action of Estill Springs Mob*, NASHVILLE TENNESSEAN, Mar. 8, 1918, at 19.

<sup>190</sup> 1919 Mo. Laws 778.

<sup>191</sup> Guillot, *supra* note 22.

<sup>192</sup> *Should Capital Punishment be Restored?*, ST. LOUIS POST-DISPATCH, June 8, 1919, at 1B.

If so, the plan achieved its desired result. The state representative from the county where the lynching occurred circulated a pro-death penalty petition among his colleagues. Seventy-eight members of the House signed the petition, which was addressed to the Governor and urged "him to send a special message submitting to the legislature the question of restoring capital punishment" during an upcoming special session of the legislature. The petition stated that "in so doing that we will save the state of Missouri from the stigma of mob violence and reduce the number and viciousness of capital crimes."<sup>193</sup> Similarly, the St. Louis prosecutor argued, "I advocate return to the death penalty because I believe it in many cases would prevent mob violence."<sup>194</sup> The warden of the state penitentiary agreed.<sup>195</sup>

The other case mentioned by Guillot was a St. Louis robbery and murder. The city prosecutor's request for the Governor to consider death penalty reinstatement at the special session of the legislature was made the day following the robbery of a St. Louis bank and the killing of a police officer.<sup>196</sup> A telegram to the Governor read: "I respectfully request that in your call for a special session of the legislature you include for its consideration a recommendation that capital punishment be restored as punishment for various crimes as it previously existed. Numerous crimes of violence throughout the United States and in the city of St. Louis and the state of Missouri make this action imperative",<sup>197</sup> especially given what he saw as the "danger of the spread of Bolshevism."<sup>198</sup> Another facet of the bank robbery that fueled death penalty fervor was a statement made by the robbers after the crime:

We went downstairs and looked out a rear window. There were policemen in the yard, too, and we went in the basement. [One] reportedly said: "What'll we do?" I said: "It's a case of life or death. We can get a life sentence for robbery and we can't get more than a life sentence if we shoot a policeman or two. They can't hang us. It's against the law in this state. So, we'd better shoot our way out."<sup>199</sup>

The special session of the state legislature passed a reinstatement

<sup>193</sup> *78 of House Sign Plea for Death Penalty*, ST. LOUIS POST-DISPATCH, July 2, 1919, at 1.

<sup>194</sup> *Why M'Daniel Wants Return of Death Penalty*, ST. LOUIS POST-DISPATCH, Dec. 24, 1918, at 3.

<sup>195</sup> *No Lynching at Lamar if Mob Had Thought Punishment Adequate*, ST. LOUIS POST-DISPATCH, June 8, 1919, at 5B.

<sup>196</sup> *Policeman Wounded by Bank Robbers Dies; Two Men Confess*, ST. LOUIS POST-DISPATCH, June 13, 1919, at 1.

<sup>197</sup> *Id.*

<sup>198</sup> *Capital Punishment Only Deterrent of Certain Crimes Say Circuit Attorney and his Predecessor*, ST. LOUIS POST-DISPATCH, June 8, 1919, at 1B.

<sup>199</sup> *Policeman Wounded by Bank Robbers Dies; Two Men Confess*, *supra* note 196.

bill 19-1 in the Senate and 87-19 in the House of Representatives only two years after a large legislative majority had abolished capital punishment.<sup>200</sup>

In 1919, the *Post-Dispatch* declared a "crime wave" in St. Louis and discussed its causes and cures. The paper blamed the alleged crime wave on unemployment,<sup>201</sup> inadequacies of policing<sup>202</sup> and abuses of the parole system.<sup>203</sup> Unemployment was clearly a problem in post-war St. Louis. The Mayor estimated that there were 20,000 unemployed in St. Louis and urged soldiers not to return to St. Louis in search of jobs.<sup>204</sup> Several letters to the editor from disgruntled soldiers looking for work appeared in the newspaper.<sup>205</sup> In spite of these high crime rates and apparent public sentiment favoring the death penalty, the *Post-Dispatch* was consistently opposed,<sup>206</sup> as was its rival the *St. Louis Globe-Democrat*.<sup>207</sup>

During the early years of the twentieth century, lynching was a growing phenomenon attracting greater and greater concern among both citizens and lawmakers at the state and federal levels.<sup>208</sup> Abolition served to create a monopoly on lethal violence for those outside of government and rendered lynching more difficult to control. Ironically, the relatively feeble punishments available to the state seemed to make lynching more attractive as a deterrent to crime.

## B. ECONOMIC RECESSION AND THE FEAR OF RADICALS

### 1. Washington

Washington reinstated the death penalty on March 14, 1919, when Governor Louis Hart signed Senate Bill 256 marking the end to a six-year period of abolition.<sup>209</sup> Both houses of the Washington

<sup>200</sup> *Hanging Bill Passed; Goes to Governor*, ST. LOUIS STAR, July 8, 1919, at 1-2.

<sup>201</sup> *Unemployment*, ST. LOUIS POST-DISPATCH, Mar. 19, 1919, at 22.

<sup>202</sup> *Many Robberies Due to Police Inefficiency*, ST. LOUIS POST-DISPATCH, Mar. 17, 1919, at 7.

<sup>203</sup> *The Crime Wave*, ST. LOUIS POST-DISPATCH, Mar. 12, 1919, at 22.

<sup>204</sup> *Mayor Wants Men Out of Work to Go Home*, ST. LOUIS POST-DISPATCH, Mar. 23, 1919, at 12.

<sup>205</sup> *No Work for Many Returned Soldiers*, ST. LOUIS POST-DISPATCH, Feb. 2, 1919, at 7.

<sup>206</sup> *Defeat the Hanging Bill*, ST. LOUIS POST-DISPATCH, Feb. 13, 1919, at 24; *Fickleness in Penal Policy*, ST. LOUIS POST-DISPATCH, Nov. 7, 1919, at 18; *Unemployment*, ST. LOUIS POST-DISPATCH, Mar. 19, 1919, at 22.

<sup>207</sup> *The Punishment of Crime*, ST. LOUIS GLOBE-DEMOCRAT, July 5, 1919, at 10.

<sup>208</sup> CLAUDINE L. FERRELL, NIGHTMARE AND DREAM: ANTILYNCHING IN CONGRESS: 1917-1922 (1986).

<sup>209</sup> *Death Penalty Restored*, SEATTLE TIMES, Mar. 14, 1919, at 9; 1919 Wash. Laws 112.

legislature had strongly supported the reinstatement measure.<sup>210</sup> For the year prior to death penalty reinstatement in Washington, the *Seattle Times* recorded twelve murders. The victims included a police officer<sup>211</sup> and a prosperous executive,<sup>212</sup> undoubtedly contributing to momentum for reinstatement. Hayner and Cranor argue that the reinstatement movement was also fueled by the fear of a crime wave following World War I, and the murder of the Industrial Insurance Commissioner in the capitol building by a man who boasted that the State could do nothing to him but board him for the rest of his life.<sup>213</sup>

Indeed, these deterrence issues were of central concern. At a legislative hearing, a lawmaker reminded that, "History told that great wars always were followed by an epidemic of murders and that crimes of violence could be expected."<sup>214</sup> He recalled that "while the legislature was in session two years ago Industrial Commissioner E.W. Olson was murdered in his office in the capitol building."<sup>215</sup> This legislator also alleged that victims had been trailed into Washington by murderers taking advantage of the lack of capital punishment in the state.<sup>216</sup> He pleaded with his colleagues to take steps "no longer to encourage the murder industry in this state."<sup>217</sup> Another legislator, who was also a member of the clergy, drew applause by citing the biblical argument that those who kill should be killed: "I say there is law to crush and obliterate the foul monster who stalks to kill, . . . I will hark back to the good book of Genesis."<sup>218</sup>

Further, parallel to the economic problems occurring in Colorado, Tennessee and Missouri, unemployment and Industrial Workers of the World (I.W.W.) union agitation were problems in Washington. Six to seven thousand people were out of work in Seattle, and several thousand workers were on strike. An estimated 120,000 individuals were without means of support and thousands of sailors would be returning home soon.<sup>219</sup> The director of Washington's federal employment service was particularly concerned:

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<sup>210</sup> Hayner & Cranor, *supra* note 21; *Death Penalty is Voted by Senate*, SEATTLE TIMES, Mar. 8, 1919, at 5.

<sup>211</sup> *Slays Policeman; Has Record Here*, SEATTLE TIMES, Feb. 19, 1919, at 7.

<sup>212</sup> *Aged Oil Man Dies From Thugs Shot*, SEATTLE TIMES, Feb. 11, 1919, at 9.

<sup>213</sup> Hayner & Cranor, *supra* note 21.

<sup>214</sup> *Death Penalty is Voted by Senate*, *supra* note 210.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Death Penalty in State is Restored*, SEATTLE TIMES, Mar. 12, 1919, at 9.

<sup>219</sup> *Army of Jobless Swelling, He Says*, SEATTLE TIMES, Jan. 22, 1919, at 5.



“How to take care of 40,000 idle members and at the same time obtain jobs for the returning soldiers and sailors is the serious problem now faced. How to feed this army of unemployed once their money runs out is still another.”<sup>220</sup>

Beyond the threat of unemployment and poverty lay a deeper threat that was not unnoticed by the Mayor of Seattle:

The so-called sympathetic Seattle strike was an attempted revolution. That there was no violence does not alter the fact. . . . The intent, openly and covertly announced, was for the overthrow of the industrial system; here first, then everywhere. . . . True, there were no flashing guns, no bombs, no killings. Revolution, I repeat, doesn't need violence. The general strike, as practiced in Seattle, is of itself the weapon of revolution, all the more dangerous because quiet. To succeed, it must suspend everything; stop the entire life stream of a community. . . . That is to say, it puts the government out of operation. And that is all there is to revolt—no matter how achieved.<sup>221</sup>

Clearly the I.W.W. menace was not taken lightly by city officials. The mayor swore in 2400 special deputies and the federal government sent almost a thousand sailors and marines to the city. The generally peaceful strike ended with raids and arrests in Socialist party headquarters. Thirty-nine members of the I.W.W. were jailed as “ringleaders of anarchy.”<sup>222</sup>

## 2. Oregon

The 1914 Oregon abolition referendum had succeeded by a scant 157 votes, suggesting that future support for abolition would be tenuous at best. Indeed, Oregon ended its six-year period of death penalty abolition on May 21, 1920, when fifty-six percent of Oregon voters supported a constitutional amendment reinstating the death penalty.<sup>223</sup> This vote occurred after a special session of the legislature had decided that the capital punishment issue was of such a pressing nature that it warranted a statewide vote. The Governor spoke with urgency: “Since the adjournment of the regular session in 1919 a wave of crime has swept over the country. Oregon has suffered from this criminal blight, and during the past few months the commission of a number of cold-blooded and fiendish homicides has aroused our people to a demand for greater and more certain protection. . . .”<sup>224</sup> Apparently, the majority of Oregonians agreed.

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<sup>220</sup> *Id.*

<sup>221</sup> HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 370-71(1980).

<sup>222</sup> *Id.* at 370.

<sup>223</sup> 1920 Or. Laws 46.

<sup>224</sup> Dann, *supra* note 20, at 111.

One case which undoubtedly influenced some Oregon voters, occurred not in Oregon, but in nearby Centralia, Washington. It involved a shootout between American Legionnaires and local I.W.W. members, resulting in the death of four World War I veterans.<sup>225</sup> Although the cause of the deaths was uncertain, the union members were blamed and the Governor of Oregon endorsed the ultimate punishment: "I thank God the gallows tree still stands in the state of Washington."<sup>226</sup> Soon after these deaths, the Oregon American Legion endorsed the death penalty: "It is astonishing that so many people were misled five years ago by the foolish pleas of 'reformers' who sought to coax murderers not to murder by the assurance that the state would not hang them, but care for them all their lives, if they did murder."<sup>227</sup> The vast majority of the state prosecutors<sup>228</sup> and the Oregon Bar Association<sup>229</sup> supported reinstatement. Moreover, the state supreme court unanimously endorsed the death penalty while citing the Centralia murders.<sup>230</sup> During the debate on reinstatement, a lawmaker capitalized on the fear of the I.W.W., charging that, "Statistics also show that in those states where capital punishment has been abolished the I. W. W. are quick to gather."<sup>231</sup> In short, in view of the post-World War I economic recession and consequent I.W.W. activism, many felt abolition of the death penalty was a reform the state could ill afford.

Another influential case in shaping many Oregonians' opinions concerning capital punishment was the murder of prominent welfare worker Mrs. Eunice Freeman. The murderer, Clarence Johnson, beat Mrs. Freeman to death with a gas pipe and reported at his trial: "I don't believe I'd have done it if I thought there was any chance of my hanging for it."<sup>232</sup> When asked if he thought that the lack of a death penalty in Oregon was responsible for a number of murders, Johnson replied: "Yes, that's the reason so many of these stunts are being pulled off."<sup>233</sup> After being sentenced to life imprisonment, Johnson smiled and thanked the judge while loudly clapping his hands. The judge informed Johnson: "I wish I might put you on bread and water for the rest of your life—in fact, hanging

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<sup>225</sup> Bedau & Radelet, *supra* note 133.

<sup>226</sup> *Law of the Most*, PORTLAND OREGONIAN, Nov. 14, 1919, at 12.

<sup>227</sup> *Back to Justice*, PORTLAND OREGONIAN, Nov. 19, 1919, at 12.

<sup>228</sup> *State Prosecutors in Favor of Noose*, PORTLAND OREGONIAN, Nov. 30, 1919, at 14.

<sup>229</sup> *Bar Urges Return of Death Penalty*, PORTLAND OREGONIAN, Nov. 19, 1919, at 4.

<sup>230</sup> *Supreme Court in Favor of Hanging*, PORTLAND OREGONIAN, Nov. 27, 1919, at 7.

<sup>231</sup> *Capital Punishment Bill is Introduced*, PORTLAND OREGONIAN, Jan. 31, 1920, at 7.

<sup>232</sup> *Slayer Says Law Invited His Crime*, PORTLAND OREGONIAN, Oct. 22, 1919, at 1.

<sup>233</sup> *Id.*

is too good for you.”<sup>234</sup> According to the *Oregonian*, Johnson had sufficient cause to believe that he would be free again, considering that most life sentences lasted no longer than eight years.<sup>235</sup> This murder case particularly disturbed the prosecutor, who remarked:

There has been a distinct suspicion, in the past that other crimes would have been prevented had there been a fear of capital punishment to deter the criminal, but this is the first complete substantiation we have had. I firmly believe Johnson would not have resorted to murder had there been the shadow of a noose over his head.<sup>236</sup>

Many Oregonians obviously agreed with the prosecutor and felt that imprisonment was not a sufficient deterrent. Only the death penalty could adequately prevent heinous crimes. Similar to the concern with lynching, in both Washington and Oregon citizens became concerned about non-governmental actors, such as the I.W.W., monopolizing violence in the absence of capital punishment. In the minds of many, this situation gave radical dissenters an unfair and unwarranted advantage.

### C. REINSTATEMENT DURING THE GREAT DEPRESSION OF THE 1930s

#### 1. *Kansas*

Governor Alf Landon's 1935 signature on House Bill 10 reinstated the death penalty in Kansas, ending a twenty-eight-year period of abolition.<sup>237</sup> The state House of Representatives approved the bill by a margin of 85-26, while the state Senate passed the bill by a vote of 24-15.<sup>238</sup> Interestingly, Kansas rarely used the death penalty even when it was an option under state law. Prior to abolition in 1907, only nine persons were hanged under Kansas law. Moreover, all of these executions occurred between 1863-1870. And no executions occurred in Kansas for nine years after the death penalty was reinstated in 1935.<sup>239</sup>

According to Heim, the supporters of capital punishment in Kansas were primarily interested in reducing the number of violent crimes in the state. A state representative who introduced the death penalty measure stated that this punishment was necessary because of “the loss of lives in the state in the wave of crime.”<sup>240</sup> One grie-

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<sup>234</sup> *Johnson Sentenced to Serve Life Term*, PORTLAND OREGONIAN, Oct. 23, 1919, at 9.

<sup>235</sup> *Not Closed*, PORTLAND OREGONIAN, Nov. 29, 1919, at 8.

<sup>236</sup> *Slayer Says Law Invited His Crime*, *supra* note 232.

<sup>237</sup> 1935 Kan. Laws 234.

<sup>238</sup> Theodore Heim, *Capital Punishment in Kansas*, (On file with the State Historical Society of Kansas)(1966).

<sup>239</sup> Barry, *supra* note 46.

<sup>240</sup> Heim, *supra* note 238, at 1.

some slaying undoubtedly contributed to the movement to reinstate the death penalty. In this murder case, two wealthy farmers and a neighbor were the victims of a band of thieves. One farmer died of a gunshot wound and the two other individuals were reportedly "severely injured by having butcher knives thrust down their throats and being forced to stand disrobed in the cold night air for several hours."<sup>241</sup> According to some legislators this particular slaying and resulting threatened mob action together showed the need for death penalty reinstatement in Kansas. Even so, the *Daily Capital* consistently opposed capital punishment: "It will not accomplish any purpose and will be a more or less discreditable backward step for this state,"<sup>242</sup> and: "Better a hundred guilty should escape than one innocent man should suffer punishment."<sup>243</sup>

## 2. South Dakota

The Governor's signature on House Bill 30 reinstated the death penalty in South Dakota after twenty-four years of abolition.<sup>244</sup> This bill had easily passed in the House of Representatives 58-15<sup>245</sup> and in the Senate 27-8.<sup>246</sup> The success of the 1939 death penalty reinstatement is particularly curious. Prior to the abolition of capital punishment in 1915, the death penalty had been meted out only nine times,<sup>247</sup> and in the year preceding reinstatement there were only four in-state murders recorded in the *Capital-Journal*.

One of these murders, however, incited emotional support for death penalty reinstatement. The kidnapping/sex-slaying of seventeen-year-old Betty Schnaidt "was so hideous that it has resulted in a nearly unanimous demand for the legalization of capital punishment in South Dakota."<sup>248</sup> Upon Schnaidt's disappearance, almost 5,000 people formed a search party, and when this party discovered her lifeless, bound and gagged body, a reward of \$4,000 was offered for finding Schnaidt's slayer. The fact that Schnaidt's killer, Earl Young, was a jailbreaker from Pennsylvania with a long record of

<sup>241</sup> *Five Held, One Confesses in Reiter Slaying*, TOPEKA DAILY CAPITAL, Jan. 12, 1935, at 1.

<sup>242</sup> *Kansas and the Death Penalty*, TOPEKA DAILY CAPITAL, Jan. 18, 1935, at 6.

<sup>243</sup> *Cases of Capital Punishment*, TOPEKA DAILY CAPITAL, June 15, 1934, at 4.

<sup>244</sup> 1939 S.D. Laws 30; *Governor Signs Companion Bills*, PIERRE DAILY CAPITAL-J., Jan. 27, 1939, at 1.

<sup>245</sup> *Sponsors Expect Senate Passage, Executive Favor*, PIERRE DAILY CAPITAL-J., Jan. 21, 1939, at 1.

<sup>246</sup> *Floor, Galleries Packed as Hot Debate Marks Passage of First Death Penalty Law Since 1915*, PIERRE DAILY CAPITAL-J., Jan. 25, 1939, at 1.

<sup>247</sup> *Capital Punishment Carried Out Nine Times in South Dakota*, PIERRE DAILY CAPITAL-J., Feb. 5, 1938, at 2.

<sup>248</sup> *The Capital Punishment Issue*, PIERRE DAILY CAPITAL-J., Aug. 16, 1938, at 2.

prior offenses only added more fuel to the fire. *The Redfield Journal Observer* reported, "The kidnapping and murder of the girl at Sioux Falls again emphasizes the importance of watching out for the enemies of civilization."<sup>249</sup> Similarly, the *Potter County News* wrote, "There is little excuse for harboring the hardened type of criminal in penitentiaries at great expense to taxpayers only to be turned loose later to continue their dirty work."<sup>250</sup> One senator characterized gangsters and criminals as "yellow," stating that "they come to states where there is no capital punishment to perpetrate their crimes. They are afraid of the death penalty."<sup>251</sup>

The *Pierre Daily Capital-Journal* clearly pushed South Dakota towards reinstatement. The *Journal* published ten editorials concerning the death penalty during the year prior to reinstatement. Of these articles, seven specifically concerned the Schnaidt case. The paper ardently supported capital punishment: "The Governor and the legislature committed a crime against society when the old territorial capital punishment law was repealed . . . [so] vote against any constitutional officer or lawmaker candidate who is not favorable to reenactment of capital punishment law in this state."<sup>252</sup> The *Journal* asserted: "The picture of [the tattooed murderer] really suggests that cooking . . . is what his kind should receive, instead of a respectable hanging."<sup>253</sup> The *Journal* even published articles favoring lynching since the only lethal retaliation available was to those outside of government: "Lynching needs to be practiced more as in the days of the frontier building of our country."<sup>254</sup> "During the last 56 years the United States has had nearly 5,000 lynchings. If there were more lynchings the country would be better off."<sup>255</sup>

#### IV. CONCLUSION: REINSTATEMENT'S FOCUSING EVENTS AND SOCIAL CONTEXT

Zimring and Hawkins have argued that the recent experience in Europe demonstrates that public opposition to abolition generally wanes after a number of years without an actual execution.<sup>256</sup> Thus, the relatively rapid repeal of abolition laws in most of the states con-

<sup>249</sup> *Get Capital Punishment*, PIERRE DAILY CAPITAL-J., Aug. 4, 1938, at 2.

<sup>250</sup> *Capital Punishment*, PIERRE DAILY CAPITAL-J., Aug. 12, 1938, at 2.

<sup>251</sup> *Death Penalty Bill Ready for Executive O.K.*, PIERRE DAILY CAPITAL-J., Jan. 26, 1939, at 1.

<sup>252</sup> *Capital Punishment*, *supra* note 250.

<sup>253</sup> *Memory of Schnaidt Case*, PIERRE DAILY CAPITAL-J., Aug. 30, 1938, at 2.

<sup>254</sup> *Capital Punishment*, PIERRE DAILY CAPITAL-J., June 2, 1938, at 2.

<sup>255</sup> *Capital Punishment*, PIERRE DAILY CAPITAL-J., Aug. 15, 1938, at 2.

<sup>256</sup> FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* (1986).

sidered here robbed the abolition movement of what might have been a budding base of opposition to capital punishment in the United States. The position of the press concerning the death penalty was not a particularly crucial variable. The *St. Louis Post-Dispatch* and the *Topeka Daily Capital* were both strongly against death penalty reinstatement. The other newspapers ranged from ardently pro-death penalty (*Pierre Daily Capital-Journal*) to neutral (*Seattle Times*). As might be expected with such a large and diverse group of states, motivations for reinstatement varied somewhat from state to state. Those in a racially heterogeneous and relatively violent state, like Tennessee, could be expected to have had different motivations for reinstating the death penalty than a racially homogeneous state with a low rate of violent crime like South Dakota.

However, some significant patterns and several common themes and motivations for reinstating the death penalty did emerge. Statements made by non-repentant convicted murderers helped fuel death penalty reinstatement movements in Oregon, Washington, Missouri, Arizona and South Dakota. In each of these states, a convicted murderer publicly acknowledged that he might not have committed his crime had the threat of the death penalty existed. Some of these convicted killers even went so far as to smile and applaud while being sentenced to life imprisonment, and others bragged that the state would feed and care for them the rest of their lives. In some states, initial reluctance to abolish the death penalty foreshadowed reinstatement. This was clearly the case in Oregon, where abolition was approved by a margin of only 157 votes, and in Arizona, where the measure passed by a margin of only 152 votes. Some states even considered abolition an experiment. The death penalty could quickly be (and indeed was) reinstated if the "experiment" appeared to be failing.

Lynchings emerged as the most important common triggering event in reinstatement of the death penalty. Significantly, lynchings occurred in each of the four states with the shortest periods of death penalty abolition. Lynchings were usually committed by otherwise law-abiding citizens taking justice into their own hands. According to these individuals, if a legal death penalty did not exist as a deterrent, lynching was the only method of deterring criminals from committing heinous crimes. These lynchings often alerted officials that the public was unwilling to consistently support abolition. Ironically, belief that without capital punishment lynchings inevitably would occur caused many death penalty opponents to re-think their positions. To these individuals, the death penalty became the lesser of two evils. The resulting coalition of anti-lynching forces

with traditional death penalty advocates virtually guaranteed reinstatement.<sup>257</sup>

Economics also played an important role in reinstatement. The end of the death abolition movement coincided with the end of World War I and the start of the post-war economic depression.<sup>258</sup> With the exception of Colorado, reinstatement bills were passed during either the recession immediately following World War I or during the Great Depression of the 1930s. And in many of these states, including Colorado, there is clear evidence of economic forces at work in the reinstatement process. There were frequent complaints about the job shortages and the threat of unemployed workers. In addition, since lynchings are typically a consequence of declining economic fortunes,<sup>259</sup> economic forces indirectly caused reinstatement through the increased frequency of lynchings. One should also note that the states that did not reinstate capital punishment, North Dakota and Minnesota, had the smallest percentage of non-white populations. The three states with the largest minority populations (Tennessee, Arizona, Missouri) all quickly reinstated the death penalty. In other words, the threat of a large minority population influenced reinstatement, and this threat may have been exacerbated by the economic recession.

To understand the "tragic choices" inherent in jumping from one legal solution to another in attempting to affirm competing values, and parallel contradictions such as vigilante violence emerging out of abolition movements, one must "cover a range from the individual to the . . . states"<sup>260</sup> and integrate these levels into the analysis. Only by considering both "the interactions within the social system and the conditions under which the social system oper-

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<sup>257</sup> This is not to say that abolition actually caused anyone to be lynched, but rather, at most, that abolition provided a convenient rationalization for such lynchings. Studies have shown that lynchings occur whether or not capital punishment is in effect. See Cutler, *supra* note 152; Charles David Phillips, *Exploring Relations Among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889-1918*, 21 LAW & SOC. REV. 361-374 (1987); LOUIS P. MANSUR, RITES OF EXECUTION: CRIMINAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865 (1989). Mansur demonstrates how elites in the 1800s pressed the idea of moving executions from public to private places to help maintain public order. MANSUR, *supra*. The reactions to lynching were very similar. Lynchings, like public executions, were associated with disorder. Moreover, lynchings, like public executions, were widely felt to be disgraceful because they were public. In the final analysis, however, whether one considers lynching and its control, or the control of political radicals, abolition of the death penalty elevated such conflicts to issues of much greater concern than they had been earlier.

<sup>258</sup> DAVIS, *supra* note 33; PHILIP E. MACKEY, VOICES AGAINST DEATH (1976).

<sup>259</sup> E.M. Beck & Stewart E. Tolnay, *The Market for Cotton and the Lynching of Blacks, 1882-1930*, 55 AM. SOC. REV. 526 (1990).

<sup>260</sup> Lauderdale, *supra* note 37, at 32.

ates”<sup>261</sup> can one understand these patterns of punishment of criminal behavior. Neither individual motivations nor societal level data taken alone demonstrate the development of such contradictions. The significance of the motivations behind a particular legislative process can only be understood fully within the social context of that process. Society used the death penalty not only to oppress minorities and protect the majority, but also as a repressive response to depression-era conditions of social dislocation and economic turmoil.<sup>262</sup> In periods of political stability without the threats of crime or economic disruption, the elites opposed to capital punishment were in a position to prevail. But emergence of these threats and the resulting politicization of the death penalty overwhelmed the influence of elites pressing for abolition. Society could ignore the misgivings of moral entrepreneurs, including governors, when faced with the threats of lynchings and political radicals on the one hand, and economic depression on the other.

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<sup>261</sup> *Id.* at 35.

<sup>262</sup> BOWERS, *supra* note 30.