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**ANOTHER PLACE BEYOND HERE: THE  
DEATH PENALTY MORATORIUM  
MOVEMENT IN THE UNITED STATES\***

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Those of us who go to the seashore have all seen the tide coming in. One wave goes so far and the other waves to the same distance. And then for some reason some overcharged wave goes further than the other waves have gone. The other waves follow and that is how the tide comes in. That is how reforms come . . . I believe that the wave is coming in further than the waves have come before.

— Sir Beverley Baxter, in a speech before the British Parliament<sup>1</sup>

INTRODUCTION

In 1996, in his book about the anti-death penalty movement in the United States, Professor Herbert Haines wrote

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\* The Article title, "Another Place Beyond Here," comes from *Over Yonder (Jonathan's Song)*, a song by Steve Earle that is about a death row inmate awaiting execution: "I'm going over yonder/ Where no ghost can follow me/ There's another place beyond here/ Where I'll be free I believe." STEVE EARLE, *Over Yonder (Jonathan's Song)*, on TRANSCENDENTAL BLUES (E Squared Records 2000).

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1. EUGENE B. BLOCK WHEN MEN PLAY GOD 146-47 (1983). Sir Baxter was discussing the movement to abolish the death penalty in Great Britain. *Id.*

that “[c]apital punishment is flourishing here.”<sup>2</sup> At the time he made that statement, few would have disagreed. Today—following the imposition of a moratorium on executions in Illinois and with a majority of Americans favoring such a moratorium<sup>3</sup>—one must wonder whether the statement is still true.

Although there is no indication that the death penalty in the United States is in the same danger of extinction as was perceived in the 1960s and early 1970s when the courts addressed the constitutionality of the death penalty, one would be hard pressed to describe the punishment as “flourishing” these days. There has been a substantial drop in support for the death penalty over the last decade.<sup>4</sup> States, cities, and commentators are talking about moratoriums<sup>5</sup>—and it is not just the “liberals,” but Republicans and conservatives who are attacking the death penalty. Politicians are also feeling the changes that have occurred between the early 1990s<sup>6</sup> and the turn of the century.<sup>7</sup>

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2. HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972–1994*, at 3 (1996).

3. See Claudia Kolker, *Death Penalty Moratorium Idea Attracts Even Conservatives; Concept Gains Favor Over Outright Abolition*, L.A. TIMES, Aug. 29, 2000, at A5. Although one poll shows that sixty-six percent of Americans favor capital punishment, another poll shows that sixty-three percent of Americans favor a moratorium on executions until fairness issues are addressed. *Id.*

4. Gallup polls have shown a drop in support for the death penalty from eighty percent in 1994 to sixty-five percent in 2000. Julie Cart, *Impending Execution Rends*, L.A. TIMES, Nov. 4, 2001, at A1.

5. In Professor Haines’ 1996 book, any reference to a “moratorium” on the death penalty is to the 1960s and 1970s, not today. See HAINES, *supra* note 2, at 14, 30–32, 35–37.

6. In 1992, William J. Clinton, a campaigning presidential candidate who was governor of a southern state, tried to help his political career by flying home to oversee the execution of a brain-damaged man. See Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105.

Over the following months [after the execution of Rickey Ray Rector], there were only occasional comments on Clinton’s decision to permit Rector’s execution, and they mostly came down to what the black political analyst Eddie Williams said at a press conference in October for his Joint Center for Political and Economic Studies: Clinton had ‘looked like he was strong on crime,’ and he had ‘persuasively to the Reagan Democrats indicated he was a different sort of Democrat.’ Others observed that the Rector execution had at least served as a conclusive preemptive strike against any possible assaults, like those about his attitude toward law and order which had beset him in 1980. Indeed, once Clinton’s campaign against Bush began, it came to be generally appreciated that his decision on Rector, as a California Democratic activist told the Houston Chronicle, ‘completely undermines’ the Bush campaign strategists’ ‘at-

In May 2000, the conservative New Hampshire legislature became the first state legislature to vote to abolish the death penalty since the United States Supreme Court, in *Gregg v. Georgia*,<sup>8</sup> upheld the constitutionality of the death penalty more than twenty-four years earlier.<sup>9</sup> Although New Hampshire's governor subsequently vetoed the bill,<sup>10</sup> the legislative vote reflected a growing abolitionist movement. In 1999, bills were introduced in twelve states to abolish the death penalty, compared to four states in 1998.<sup>11</sup> Up until the mid-1990s, states were more likely to adopt the death penalty than to abolish it, as Kansas reinstated the death penalty in 1994 and New York reinstated it in 1995.<sup>12</sup>

There is a growing popular distrust of the use of the death penalty that has been caused by an increasing awareness of the criminal justice system. Since 1981, the number of news stories about the death penalty has almost doubled every five years.<sup>13</sup> Popular culture has embraced the issue with such re-

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tempt to define Bill Clinton and Al Gore as out of touch with mainstream public and even mainstream Democrats.' New York's seasoned political impresario David Garth put it more simply: 'He had someone put to death who had only part of a brain. You can't find them any tougher than that.'

*Id.* at 132.

7. Only eight years after the execution of Rickey Ray Rector while Bill Clinton ran for office in 1992, George W. Bush, a campaigning presidential candidate who was governor of Texas, tried to help his political career by giving a reprieve for DNA testing for a man not unlike others who previously had been executed in that state. *Report: DNA Test Won't Save Inmate*, CHI. TRIB., July 13, 2000, at 12. The reprieve was the first one ever given by Governor Bush. *Id.* Around that same time, President Clinton himself gave a reprieve to a man on the federal death row. See Del Quentin Wilber, *President Postpones First Federal Execution Scheduled in 37 Years*, BALT. SUN, Aug. 3, 2000, at 3A. The execution was stayed to allow the Justice Department to develop commutation guidelines. *Id.*

8. 428 U.S. 153 (1976).

9. See *The New Death Penalty Politics*, N.Y. TIMES, June 7, 2000, at A30. The last state legislature to abolish the use of the death penalty was West Virginia in 1965. See WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, at 9 (1984).

10. See *The New Death Penalty Politics*, *supra* note 9, at A30. Governor Jeanne Shaheen is a Democrat. *Id.*

11. *A Gathering Momentum: Continuing Impacts of the American Bar Association Call for a Moratorium on Executions*, 2000 A.B.A. SEC. INDIV. RTS AND RESP. 9 [hereinafter *A Gathering Momentum*].

12. See Paul Haven, *Doubts Arise on Death Penalty*, BOSTON GLOBE, May 31, 1999, at A4.

13. A LEXIS search of the terms "capital punishment" and "death penalty" in the NEWS Library and the ALLNWS File showed a substantial increase every five years. For January 1, 1981 through December 31, 1985, there were 14,572

cent movies as *Dead Man Walking*, *Last Dance*, *True Crime*, and *The Green Mile*, and with television shows such as *The West Wing* and *The Practice*. In August 2000, one organization that tracks death penalty issues reported that at least one thousand grassroots organizations were advocating a moratorium on the use of the death penalty.<sup>14</sup>

The growing concern about the death penalty has, in large part, sprung from those closest to the capital punishment system. Several judges around the country have spoken out against the death penalty, including two United States Supreme Court Justices who twenty years earlier helped usher in the modern era of the death penalty.<sup>15</sup> Other judges have not ignored this trend. Recently, in *Weeks v. Snyder*,<sup>16</sup> Judge Sloviter of the United States Court of Appeals for the Third Circuit noted for the unanimous panel that the court was "not unaware of the controversy currently surrounding the imposition of the death penalty in this country."<sup>17</sup>

A recent major action by someone close to the system was Illinois Governor George Ryan's imposition of a moratorium on executions in his state,<sup>18</sup> a moratorium which itself had followed on the heels of Nebraska's attempt to impose a moratorium.<sup>19</sup> While no other state has yet imposed a similar moratorium, other states continue to consider that option and several

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news stories with those terms. For January 1, 1986 through December 31, 1990, there were 47,078 stories with those terms. For January 1, 1991 through December 31, 1995, there were 124,195 stories with those terms. For January 1, 1996 through December 31, 2000, there were 238,652 stories with those terms. [Search: ("capital punishment" or "death penalty") and date (on or bef \_) and date (on or aft \_).] Although some of the increase in the number of stories may be attributed to a growing number of news resources as well as a growing number of publications available on LEXIS, the drastic growth still reflects an increase in the number of stories about the death penalty that are available.

14. See Kolker, *supra* note 3, at A5; Paul Barton, *Efforts to Put Death Penalty on Hold Continue to Grow*, USA TODAY, July 6, 2000, at 5A. The information was reported by The Quixote Center, an "interfaith organization in Hyattsville, Md., that tracks death-penalty-related issues." *Id.*

15. The Justices were Justice Blackmun and Justice Powell. See *infra* Part II.B.

16. 219 F.3d 245 (3d Cir. 2000).

17. *Id.* at 261.

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

19. See *id.* (the Nebraska legislature had approved a moratorium bill, but the governor of that state vetoed the bill).

cities and organizations have voted for death penalty moratoriums.<sup>20</sup>

This Article examines the changing climate regarding the death penalty in the United States and compares it to similar law reform movements. Part I discusses the legal and historical developments surrounding the death penalty in the United States, including a brief overview of relevant United States Supreme Court cases.

Next, the Article discusses the current Death Penalty Moratorium Movement.<sup>21</sup> Part II identifies five major causes of the current Moratorium Movement: (1) Sister Helen Prejean writing *Dead Man Walking*<sup>22</sup> and its publication in 1993; (2) judges criticizing the capital punishment judicial process, beginning with Justice Blackmun in 1994; (3) the American Bar Association passing a resolution in 1997 favoring a moratorium on executions;<sup>23</sup> (4) new technology revealing innocent persons on death row; and (5) Illinois Governor Ryan imposing a moratorium on executions in his state in 2000. Part II also identifies seven other events that have contributed to the growth of the Moratorium Movement.

Part III then compares the current Death Penalty Moratorium Movement to similar movements. First, the 1960s Death Penalty Abolitionist Movement is examined, along with its litigation-based strategy. Then, Part III examines legislative abolition of the death penalty in several states during the mid-1800s and early 1900s, considering how social changes during those time periods prompted that legislation. Next, the death penalty abolition process in other countries is briefly discussed, focusing on other countries' ability to abolish the death penalty in spite of popular opinion favoring the punishment. Part III

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20. See *infra* Part II.E.

21. Another commentator has referred to the current state of affairs as "The New Abolitionism." See Austin Sarat, *The ABA's Proposed Moratorium on the Death Penalty: Recapturing the Spirit of Furman: The American Bar Association and the New Abolitionist Politics*, 61 LAW & CONTEMP. PROBS. 5, 9 (1998). I have chosen the term "Moratorium Movement" because many people in the movement do not believe that the death penalty needs to be abolished at this time but that there does need to be a moratorium on executions to study the death penalty further.

22. HELEN PREJEAN, C.S.J., *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993).

23. See Leslie A. Harris, *Report with Recommendations No. 107*, 1997 A.B.A. SEC. INDIVIDUAL RTS. & RESP. 1, available at <http://www.abanet.org/irr/rec107.html> (last visited Oct. 12, 2001).

concludes by addressing the anti-lynching campaigns of the early 1900s and the roles played by changing public opinion, movement leaders, and attempts to bring about change through legislation. Throughout Part III, the Article analyzes the similarities and differences among the movements to forecast where the current Moratorium Movement may lead. Finally, Part IV considers the strategy of the Moratorium Movement, and, relying upon lessons learned from history, identifies several factors necessary for the continued success of the Moratorium Movement.

## I. HISTORICAL OVERVIEW OF THE DEATH PENALTY ABOLITION MOVEMENT IN THE UNITED STATES

### A. *The Eighteenth Century: Early Years*

In the United States, people have been fighting against the death penalty since before the formation of the country. In colonial times, some settlements went against the English Crown's desire for more capital crimes by enacting only a few such laws.<sup>24</sup> After the Revolution, many Americans used their new freedoms and philosophies to question the right of a government to take life.<sup>25</sup> One of the most vocal early death penalty opponents was Dr. Benjamin Rush, a signer of the Declaration of Independence.<sup>26</sup> In 1794, largely due to the efforts of

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24. See CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, at xxv (1997) [hereinafter A DOCUMENTARY HISTORY].

25. See *id.*

26. See *id.* at 20. Dr. Rush declared that the death penalty is "an improper punishment for any crime" in his famous treatise, *An Enquiry into the Effects of Public Punishments Upon Criminals and Upon Society* (Philadelphia, Joseph James, 1787), reprinted in A DOCUMENTARY HISTORY, *supra* note 24, at 21, which was first delivered as a speech at Benjamin Franklin's home.

Benjamin Franklin probably was also opposed to the death penalty, and while their overall positions are unclear, Thomas Jefferson, John Jay and James Madison all sought to limit the use of the death penalty. See HAINES, *supra* note 2, at 197 n.4. It seems likely though, that Thomas Jefferson was against the death penalty, as he once stated that Cesare Beccaria "had satisfied the reasonable world of the unrightfulness and inefficiency of the punishment of crimes by death." ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH?: CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 27 (2000). George Washington, however, believed that the death penalty worked as a deterrent and preserved order. See LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865, at 58 (1989).

Dr. Rush and Pennsylvania Attorney General William Bradford, the state of Pennsylvania abolished the death penalty for all crimes except first-degree murder, and other states followed with similar reforms on their death penalty laws.<sup>27</sup>

Still, by the end of the eighteenth century, there had been at least 1,500 executions in America.<sup>28</sup> Most of these executions, per capita, were taking place in the South rather than in the North, and “[i]n both regions, the percentage of African-Americans executed was well out of proportion to their numbers in society.”<sup>29</sup>

*B. The Nineteenth Century: The First Major Victories and the Civil War*

The abolition movement gained momentum around the turn of the nineteenth century as the American Industrial Revolution prompted social reform and new attitudes. Further, in the early 1800s, a religious revival fueled the anti-death penalty cause as well as other humanitarian issues.<sup>30</sup> “By the 1830s, constituents were flooding state legislatures with petitions demanding an end to capital punishment.”<sup>31</sup> However, “the first great triumph of the abolition movement” did not occur until 1847, when Michigan abolished the death penalty, followed by Rhode Island in 1852, and Wisconsin in 1853.<sup>32</sup> These successes occurred during a social reform movement in the United States that questioned the law and the power of the state.<sup>33</sup> During this time, reformers also worked against super-

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27. See A DOCUMENTARY HISTORY, *supra* note 24, at 25.

28. LIFTON & MITCHELL, *supra* note 26, at 26.

29. *Id.*

30. See David Greenberg, *The Unkillable Death Penalty*, SLATE MAGAZINE, June 2, 2000, available at <http://slate.msn.com/?id=83569> (last visited Nov. 21, 2001).

31. *Id.*

32. THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 8 (1997) [hereinafter THE DEATH PENALTY IN AMERICA]. However, anti-death penalty activists were unsuccessful in changing the laws in Pennsylvania, New York, and Massachusetts. See MASUR, *supra* note 26, at 160. The death penalty abolitionist movement, which by the 1840s was especially active in Massachusetts, Ohio, New York, New Jersey, Pennsylvania, and Rhode Island, “was led variously by secular reformers and Quakers, Unitarians, and other liberal Christians.” THE DEATH PENALTY IN AMERICA, *supra*, at 7.

33. See ALLAN NEVINS & HENRY STEELE COMMAGER, A POCKET HISTORY OF THE UNITED STATES 147–49 (8th ed. 1986).

stitious beliefs, poverty, slavery, and the subjugation of women.<sup>34</sup> Perhaps not surprisingly, there was substantial overlap between the death penalty abolition movement and the slavery abolition movement,<sup>35</sup> and a large number of women participated in the death penalty abolition movement.<sup>36</sup>

Subsequently, due largely to distractions from other national issues, such as the Mexican War and growing concerns about slavery, the death penalty abolition movement lost momentum.<sup>37</sup> The approach of the Civil War further weakened anti-death penalty efforts.<sup>38</sup> During the war, any tragic aspects of the execution of criminals paled in comparison to the deaths of the heroes in the fields.<sup>39</sup> After the Civil War, the hanging of

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The reform movement of this middle period was, to an astonishing degree, the product of a philosophy—the philosophy of Transcendentalism. . . . It held that men must acknowledge a body of moral truths, that these truths were intuitive, subjective, and a priori, and thus that they *transcended* more sensational proof. Thus it instinctively—and logically—rejected all secular authority—the authority of the church or the Scriptures, of the state, or law, or convention—unless that authority could be squared with those truths which God had planted in the mind and heart of man.

*Id.* at 148.

34. *See id.* at 147–49.

35. LIFTON & MITCHELL, *supra* note 26, at 33.

Each, after all, had as its chief tenet the basic dignity of every human being. Slavery abolitionists were passionate social reformers and near-fundamentalists . . . and as such the only people prone to speak out early and absolutely about a particular evil. In the nineteenth century, it required similar people to take a stand against the death penalty as well.

*Id.*

36. *See id.* at 34.

37. *See* HAINES, *supra* note 2, at 9.

38. *See* MASUR, *supra* note 26, at 160. Still, anti-slavery activists, like Frederick Douglass, were often opponents of capital punishment. *See* WILLIAM S. McFEELY, *FREDERICK DOUGLASS* 189 (1991).

39. Marvin Bovee, a young activist, commented to a veteran, “I am quietly resting on my oars waiting for the American conflict to cease that I may resume my labors on penal reform. . . . It is useless to talk of saving life when we are killing by thousands. Can’t elevate mankind when government is debasing them.” MASUR, *supra* note 26, at 160.

The devastation that the Civil War brought to the anti-death penalty movement is highlighted by the fact that more soldiers were executed by Union authorities during the Civil War than by United States authorities in all other United States conflicts combined. ROBERT I. ALOTTA, *CIVIL WAR JUSTICE: UNION ARMY EXECUTIONS UNDER LINCOLN*, at ix (1989). The Union Army executed more than 275 men for military offenses. *Id.* Considering the small proportion of homicide defendants who are executed today as well as the racial concerns about today’s death penalty, one should note that it has been estimated that only 0.19



the conspirators who plotted the murder of President Abraham Lincoln and the widespread use of extra-judicial lynchings by vigilantes made it difficult for anti-death penalty activists to argue that the death penalty was not necessary.<sup>40</sup> Thus, for those opposed to the death penalty, the late nineteenth century did not live up to the promise of the earlier years of that century.

C. *The Early Twentieth Century: The Progressive Era and Two World Wars*

Little happened with respect to the death penalty in the United States after the Civil War until the Progressive Era, which is the label given to the time covering approximately 1896–1916.<sup>41</sup> During this time, the young country was facing new challenges from its population growth, such as industrial expansion beyond control, the end of visions of the U.S. as a farming democracy, an evolution from a rural homogeneous society to an urban heterogeneous society, and a growing division between the poor and the extremely wealthy.<sup>42</sup> Beginning with William Jennings Bryan's 1896 campaign for president, the Progressive Era "was marked by revolt and reform in almost every department of American life."<sup>43</sup> This time of social reform "benefited from the growing appeal of both 'scientific' corrections and a socially conscious form of Christianity."<sup>44</sup> During the Progressive Era, social reformers were concerned about government corruption and focused on areas such as poverty, housing, social injustice, corruption, and crime.<sup>45</sup> The main

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percent of the eighty thousand returned deserters were executed, and 54.31 percent of those executed were foreign-born or black. *Id.* at 187–88.

40. See MASUR, *supra* note 26, at 160–61. Supporters of the death penalty believed that use of the punishment would prevent vigilantes from taking the law into their own hands by the use of lynching. *Id.*

41. NEVINS & COMMAGER, *supra* note 33, at 288.

42. *Id.* at 287–90.

43. *Id.* at 288.

44. HAINES, *supra* note 2, at 9–10. Historians have noted that at times of great scientific achievement, people begin to question whether "social and cultural achievements [are] disappointing" and to re-examine social issues. NEVINS & COMMAGER, *supra* note 33, at 289.

45. NEVINS & COMMAGER, *supra* note 33, at 288–97. During this time, "[o]ld political leaders were ousted and new ones enlisted; political machinery was overhauled and modernized; political practices were subjected to critical scrutiny, and those which failed to square with the ideals of democracy were rejected." *Id.* at 288.

battleground for reforms were fought at the state level, because "the states were presumed to have jurisdiction over almost all matters of a social character."<sup>46</sup> This focus on attempts to control the government and to seek reform at the state level during the Progressive Era was true of death penalty reform efforts, when as a result of such efforts, ten states abolished the death penalty around the early 1900s.<sup>47</sup> In most of these states, death penalty abolition was led by reformer governors or an active press.<sup>48</sup>

The abolition tide, like the Progressive Era itself, however, did not last long. The years following America's entry into World War I and the later economic recession were not good ones for the anti-death penalty activists,<sup>49</sup> and all but two of those ten jurisdictions that had abolished the death penalty during the previous era brought back the death penalty.<sup>50</sup> The end of this abolition period was largely a result of factors that made society less open-minded to arguments made by progressive leaders for abolition. These factors included: economic recession, a fear that more lynchings would occur without the death penalty, and fears of a growing minority population.<sup>51</sup>

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46. *Id.* at 296.

47. See HAINES, *supra* note 2, at 10. The states were Arizona (1916), Colorado (1897), Kansas (1907), Minnesota (1911), Missouri (1917), North Dakota (1915), Oregon (1914), South Dakota (1915), Tennessee (1915), and Washington (1913). See THE DEATH PENALTY IN AMERICA, *supra* note 32, at 8. See generally John F. Galliger et al., *Criminology: Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 574-76 (1992).

48. Galliger et al., *supra* note 47, at 545-55.

49. "When America's entry into World War I fostered racism, nativism, suspicion, and fear that provided fertile soil for retentionist arguments, the abolition movement stalled out once again—as in the 1860s—a casualty of war." A DOCUMENTARY HISTORY, *supra* note 24, at 37.

50. See THE DEATH PENALTY IN AMERICA, *supra* note 32, at 9. "Race riots and labor violence in 1919 gave way to a perceived crime wave during the Prohibitionist 1920s, bringing calls for a crackdown." Greenburg, *supra* note 30.

51. See Galliger et al., *supra* note 47, at 574-76.

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. 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,

Subsequently, no other states abolished the death penalty until the late 1950s.<sup>52</sup>

Further, in the 1930s and 1940s, as another world war approached, the number of executions increased to the highest levels of the century, likely as a result of an increase in crime during the Great Depression and Prohibition.<sup>53</sup> Despite the defeats for the abolition movement during these years, however, two new trends inspired by the movement emerged during the first half of the twentieth century: a move toward humanizing the methods of executions and a move toward expanding the role of federal appellate courts in reviewing death sentences.<sup>54</sup> The death penalty abolition movement, however, would not regain its strength until after World War II.<sup>55</sup>

#### *D. The 1950s to 1970s: The Abolition Movement Turns to the Courts*

##### 1. Public Opinion Turns Against the Death Penalty

After World War II, during the 1950s through the 1970s, "the abolition movement was significantly revived and achieved some of its greatest successes."<sup>56</sup> Part of the revival occurred in reaction to popular outrage about the execution of the Rosenbergs as Soviet spies and California's execution of Caryl Chessman, who had received national attention for his writings.<sup>57</sup> From 1958–65, the death penalty was abolished, in order, in Delaware, Oregon, Iowa, and West Virginia.<sup>58</sup> Oregon's

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when faced with the threats of lynchings and political radicals on the one hand, and economic depression on the other.

*Id.* at 576.

52. See BOWERS, *supra* note 9, at 9. Delaware abolished the death penalty in 1958, though it reinstated the punishment in 1961. See *id.* Before they became states in 1960, the territories of Alaska and Hawaii abolished the death penalty in 1957. See *id.* at 10.

53. See THE DEATH PENALTY IN AMERICA, *supra* note 32, at 8–9.

54. See *id.* at 9–13. Additionally, the American League to Abolish Capital Punishment was founded in 1925, and that organization played an important role in keeping the death penalty abolitionist movement alive during the next four decades. See HAINES, *supra* note 2, at 10–11.

55. See THE DEATH PENALTY IN AMERICA, *supra* note 32, at 13.

56. See *id.*

57. See LIFTON & MITCHELL, *supra* note 26, at 38.

58. See THE DEATH PENALTY IN AMERICA, *supra* note 32, at 13. Also, before they became states in 1960, the territories of Alaska and Hawaii abolished the death penalty in 1957. See BOWERS, *supra* note 9, at 10.

abolition occurred through a public referendum that passed with more than sixty percent of the votes cast on the issue.<sup>59</sup> Abolition in that state occurred following the term of a governor who was outspoken against the death penalty,<sup>60</sup> a large political and public campaign (including ads by celebrities) against the death penalty,<sup>61</sup> and public attention on a sympathetic condemned female inmate.<sup>62</sup> In 1968, United States Attorney General Ramsey Clark asked Congress to abolish the federal death penalty.<sup>63</sup>

Across the country, popular opinion turned against the death penalty at this time, and in 1966, more people were against the death penalty than for it.<sup>64</sup> In 1968, the Supreme Court observed that death penalty supporters were a "distinct and dwindling minority."<sup>65</sup>

## 2. The Abolition Movement Uses a Litigation-Based Strategy and Wins a Victory in *Furman*

The successes were not limited to the state legislatures or public referendums. In 1963, in an otherwise insignificant dissenting opinion by Justice Arthur Goldberg from a denial of a petition for writ of certiorari in *Rudolph v. Alabama*,<sup>66</sup> three Supreme Court Justices signaled that the Court might be willing to hear arguments against the death penalty based upon the Eighth and Fourteenth Amendments.<sup>67</sup> Further, in re-

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59. See HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 162 (1987).

60. See *id.* at 156-57.

61. See *id.* at 159-63. "Probably at no other time and place in this century has there been so much organized, outspoken support on behalf of ending the death penalty as there was in Oregon in the fall of 1964." *Id.* at 161. On the other hand, the people in favor of retaining the death penalty in Oregon were unorganized. See *id.*

62. See *id.* at 162-63. "Throughout the early 1960s in Oregon, the controversy over capital punishment had been symbolized for many by Jeannace June Freeman, twenty, awaiting execution for the murder of another woman's children." *Id.* at 162. Newspaper articles against her execution helped create an atmosphere where few wanted her executed. See *id.* at 162-63.

63. EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* 98 (1998).

64. See *id.* at 17.

65. *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968).

66. 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of petition for writ of certiorari).

67. See *id.*; see also A DOCUMENTARY HISTORY, *supra* note 24, at 123-25.

sponse to Justice Goldberg's dissent and because of a growing concern about the unfair application of the death penalty, lawyers from the NAACP Legal Defense and Education Fund (LDF) began courtroom attacks on the death penalty based upon various constitutional grounds.<sup>68</sup> In 1966, the LDF mounted a direct assault on the death penalty in the courts, using a strategy that included three tactics: (1) challenging cases in the Supreme Court; (2) developing and using social science evidence in the courts; and (3) attempting to block all executions while the litigation was in progress.<sup>69</sup> The LDF's goal of achieving a judicial moratorium involved a nationwide effort to enlist and work with lawyers in various states.<sup>70</sup>

Also at this time, the courts began to examine the constitutionality of the death penalty, and the federal courts became more sensitive to capital defendants' post-conviction legal claims.<sup>71</sup> This attention of the courts contributed to a decline in the number of executions during the period of 1950–1976.<sup>72</sup> Whereas executions in the United States had reached a high-point of 199 in 1935, the number of executions declined to two in 1967,<sup>73</sup> followed by no executions from 1968–1976.<sup>74</sup> As in the early 1800s and early 1900s, the 1960s period of anti-death penalty successes occurred during a time of significant social activism, including the Civil Rights Movement, and scientific progress, namely, the initiation of travel into space. In 1968, Jack Greenberg, the director of the LDF litigation, declared

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68. See BOWERS, *supra* note 9, at 17; see also LAZARUS, *supra* note 63, at 89–90. “At the Legal Defense Fund itself, Goldberg’s published dissent catalyzed a long-standing concern about race bias in capital punishment into an entire new *Brown [v. Board of Education]*-style litigation campaign.” *Id.* at 89.

The abolitionism of the 1960s differed from earlier eras in that the main strategy was on litigation rather than political action. See HAINES, *supra* note 2, at 43. Therefore, “[t]raditional abolitionist arguments—for example, the failure of execution as a deterrent, the inhumanity of executions, the danger of fatal miscarriages of justice— . . . were recast as *constitutional* issues whose historical origins lay in the civil rights and civil liberties movements.” *Id.* at 44.

69. See BOWERS, *supra* note 9, at 16. Although the LDF’s initial strategy focused on the racial bias arguments against the death penalty, failures in the courts and ethical concerns for their clients compelled them to broaden the grounds for the court attacks on the death penalty. LAZARUS, *supra* note 63, at 96.

70. See BOWERS, *supra* note 9, at 16–17.

71. See *id.* at 13.

72. See *id.*

73. See *id.* at 25–26.

74. See THE DEATH PENALTY IN AMERICA, *supra* note 32, at 11.

that the legal strategy had accomplished a "de facto national abolition of the death penalty."<sup>75</sup>

In this litigation-based strategy, the lawyers used the Eighth and Fourteenth Amendments<sup>76</sup> to focus on the arbitrariness of the capital sentencing process.<sup>77</sup> The lawyers argued that the arbitrariness was a result of the complete discretion given to juries in capital cases at that time, a discretion that had developed after states rejected mandatory death penalties.<sup>78</sup> In 1971 in *McGautha v. California*,<sup>79</sup> the Supreme Court held that such a sentencing procedure did not violate the

75. LAZARUS, *supra* note 63, at 98.

76. U.S. CONST. amend. VIII; U.S. CONST. amend. XIV.

77. The development of the capital punishment jurisprudence in the United States began in 1791 with the adoption of the Eighth Amendment, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Because this Article only briefly covers that development, for further information see BOWERS, *supra* note 9, at 3-129, 171-92; THE DEATH PENALTY IN AMERICA, *supra* note 32, at 13-25; Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 618-30 (2000); Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 349-60 (1998).

78. At the time that the Eighth Amendment was adopted, all states followed the common law practice of making capital punishment the mandatory sentence for certain offenses. See *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (citing THE DEATH PENALTY IN AMERICA 5-6, 15, 27-28 (rev. ed. 1967)) (holding that North Carolina's mandatory death penalty system was unconstitutional).

Although the range of capital offenses in the American Colonies was quite limited in comparison to the more than 200 offenses then punishable by death in England, the Colonies at the time of the Revolution imposed death sentences on all persons convicted of any of a considerable number of crimes, typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and sodomy. As at common law, all homicides that were not involuntary, provoked, justified, or excused constituted murder and were automatically punished by death.

*Id.* (footnotes omitted).

However, under the harsh mandatory death penalty system, juries often ignored the law to find sympathetic but guilty defendants "not guilty." In response to that problem, states began giving capital juries discretion in sentencing, so that by 1963, the federal government and every state with capital jury sentencing gave juries the discretion to grant mercy to a capital defendant. See *id.* at 293; see also JEFFREY ABRAMSON, *WE THE JURY* 217 (1994). In 1846, only three states had discretionary death penalties. BOWERS, *supra* note 9, at 10. Between the Civil War and the beginning of the twentieth century, twenty jurisdictions moved from mandatory to discretionary capital punishment. *Id.* at 10-11. From the beginning of the twentieth century to World War II, eighteen states moved to discretionary capital punishment. *Id.* at 11. Between 1949 and 1963, the last seven capital punishment jurisdictions made the move. *Id.*

79. 402 U.S. 183 (1971).

due process clause of the Fourteenth Amendment—though the Court did not address the issue of whether the procedure violated the Eighth Amendment.<sup>80</sup>

The system of giving complete discretion to the sentencer came to an end the next year with *Furman v. Georgia*.<sup>81</sup> In that case, the Supreme Court held that imposition of the death penalty in the cases before it constituted “cruel and unusual punishment” under the Eighth and Fourteenth Amendments.<sup>82</sup> In effect, the Court’s decision prevented the execution of all of the death row prisoners in the United States at the time.<sup>83</sup> The 5–4 decision, however, had no clear consensus, with each Justice writing a separate opinion.<sup>84</sup> Although there was not a majority of Justices who stated that the death penalty would be unconstitutional in all circumstances, the opinions showed that a majority of the Justices were concerned about the arbitrariness of America’s capital punishment sentencing system.

### 3. The Death Penalty Returns and There is Another Shift in Popular Opinion

Some commentators thought that *Furman* marked the end of the death penalty in the United States, and the director of the NAACP Legal Defense Fund and Chief Justice Warren Burger agreed that capital punishment in the United States was a thing of the past.<sup>85</sup> However, many states responded to the decision by rewriting their death penalty statutes to either give guidance to sentencers by providing a list of aggravating factors or to provide for mandatory death sentences.<sup>86</sup> For example, in the general election of November 1972, Californians passed by a wide margin a proposition to restore the death penalty to that state.<sup>87</sup> By 1974, more than 150 inmates had

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80. *See id.* at 196.

81. 408 U.S. 238 (1972).

82. *Id.* at 239–40.

83. *See* FRANKLIN E. ZIMRING & GORDAN HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 37 (1986).

84. *See id.*

85. *See* Greenberg, *supra* note 30.

86. *See* BOWERS, *supra* note 9, at 174.

87. *See* BEDAU, *supra* note 59, at 155. Ten months earlier, the California Supreme Court had struck down that state’s death penalty statute. *See id.*

been sentenced to death in the United States under the new laws.<sup>88</sup>

The Supreme Court addressed the constitutionality of the new statutes in 1976. In *Gregg v. Georgia*,<sup>89</sup> *Jurek v. Texas*,<sup>90</sup> and *Proffitt v. Florida*,<sup>91</sup> the Court upheld systems that gave the sentencer some discretion with guidelines.<sup>92</sup> In order to sentence someone to death under these guided discretion schemes, the sentencer had to find statutory aggravating factors—such as the fact that a murder was committed for monetary gain—and consider those factors in light of any mitigating factors that argued for a life sentence.<sup>93</sup> At the same time, in *Woodson v. North Carolina*<sup>94</sup> and *Roberts v. Louisiana*,<sup>95</sup> the Court struck down statutes that provided for mandatory death sentences because they did not allow for consideration of the individual characteristics of a defendant. In sum, these cases in 1976 validated a capital sentencing scheme that required consideration of all mitigating factors about the individual defendant along with statutory aggravating factor guidelines.<sup>96</sup> Although there have been many cases after *Gregg* clarifying that individualized sentencing must allow consideration of all mitigating factors and that aggravating factors must provide clear guidelines and not be vague, such a system that constitutionally requires, in some form, consideration of both aggravating and mitigating circumstances is still in place today.<sup>97</sup>

The death penalty was clearly back in business when the Court upheld the new “guided” discretion death penalty statutes in *Gregg* in 1976. Although lawyers continued pursuing a court-based strategy, the last failure of the 1960s Death Pen-

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88. LAZARUS, *supra* note 63, at 113.

89. 428 U.S. 153 (1976).

90. 428 U.S. 262 (1976).

91. 428 U.S. 242 (1976).

92. See, e.g., *Gregg*, 428 U.S. at 169.

93. See, e.g., *id.* at 161. Texas capital sentencing hearings did not use a list of specific aggravating and mitigating factors, but in those hearings the judge gave jurors three questions that basically incorporated the consideration of such factors. See *Jurek*, 428 U.S. at 269.

94. 428 U.S. 280 (1976).

95. 428 U.S. 325 (1976).

96. See, e.g., Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 77, at 349–60.

97. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 427–28 (1980) (holding that aggravating factors must provide meaningful guidance to a sentencing jury); *Lockett v. Ohio*, 438 U.S. 586, 604–06 (1978) (holding that the Eighth and Fourteenth Amendments require individualized consideration of mitigating factors).



alty Abolition Movement's attempts to get the Supreme Court completely to strike down the death penalty occurred in 1987, when the Court held in *McCleskey v. Kemp*<sup>98</sup> that the Constitution was not violated by evidence that racial factors affect the capital punishment sentencing process.<sup>99</sup>

These litigation defeats were not the only losses for the abolition movement during this time, as popular support for the death penalty began to grow. Perhaps, the years of conflict in Vietnam had some effect, because, in the past wars tended to take the wind out of the sails of the anti-death penalty movement.<sup>100</sup> Regardless, the death penalty became a major issue in political campaigns, such as the campaign of Richard Nixon for president in 1968 and in the campaign of Ronald Reagan for governor of California in 1966.<sup>101</sup>

The shift was drastic. By 1974, national polls indicated that two-thirds of Americans favored the death penalty.<sup>102</sup> In November 1978, Oregon voters ended a fourteen-year period of abolition by restoring the death penalty.<sup>103</sup> One death penalty scholar has noted, "Beginning in the mid-1970s, probably no

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98. 481 U.S. 279 (1987) (holding that evidence of general racial discrimination in capital sentencing does not violate the Eighth and Fourteenth Amendments as long as the procedures themselves are fair).

99. See *id.* Arguably, because of the pervasiveness of racial discrimination throughout the capital punishment system, had the Supreme Court held that evidence of racial discrimination in capital cases establishes an Eighth Amendment violation, the death penalty itself would not have survived judicial scrutiny. As Professor Haines noted, "[O]ne Supreme Court decision, more than all the others, signaled the futility of continuing to place hope for abolishing the death penalty on the constitutional strategy that had once been so successful. That case was *McCleskey v. Kemp*." HAINES, *supra* note 2, at 76.

100. There does not appear to be any study of the relationship between the anti-death penalty movement and wars throughout our nation's history. It seems more than a coincidence, though, that troubled times for that movement have coincided with the various wars. Several years of a strong abolitionist movement, however, occurred during the conflict in Vietnam. Perhaps Vietnam did not have the same impact on the death penalty as previous wars because of its unpopularity and the strong anti-war movement.

101. See THE DEATH PENALTY IN AMERICA, *supra* note 32, at 17; EDMUND (PAT) BROWN, PUBLIC JUSTICE, PRIVATE MERCY 139 (1989). Note that Professor Bedau's book erroneously states that the Reagan campaign was in 1972 instead of 1966. See *id.*

102. See HAINES, *supra* note 2, at 45.

103. See BEDAU, *supra* note 59, at 156. Although that law was later declared unconstitutional, Oregon voters again restored the death penalty in 1984. See *id.* Oregon is the only state that has twice voted to abolish the death penalty. See *id.* at 155. It abolished the death penalty by a small margin on an initiative measure in 1914 and by a large majority on a referendum in 1964. See *id.* at 155-56.

other factor regarding the death penalty in America has been so prominent, important, and enduring as the popular support for capital punishment."<sup>104</sup> Commentators have suggested that the *Furman* decision actually helped create popular support for the death penalty because the decision fueled popular resentment of the federal government imposing its will on the states.<sup>105</sup> On January 17, 1977, the first post-*Furman* execution occurred when Gary Gilmore was executed by a firing squad in Utah,<sup>106</sup> and it was followed by a growing number of inmates executed throughout the country.<sup>107</sup>

*E. The 1980s to Today: Despair for the Movement  
Followed by a New Hope*

The death penalty continued to be a political issue in the 1980s and 1990s.<sup>108</sup> In 1997, one death penalty writer noted, "For several years it has been virtually impossible for any candidate for high elective office in the states—governor, attorney

104. THE DEATH PENALTY IN AMERICA, *supra* note 32, at 16.

105. See HAINES, *supra* note 2, at 45; see also Robert M. Bohm, *American Death Penalty Opinion: Past, Present, and Future*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 28–29 (James R. Acker et al. eds., 1998).

[B]etween March and November, 1972, approximately four months before and four months after the announcement of the *Furman* decision, support for the death penalty increased 7 percentage points and opposition dropped 10 percentage points. Although other factors may have had an effect, it appears that significant public discontent with the *Furman* decision was decisive.

*Id.* at 29.

106. See A DOCUMENTARY HISTORY, *supra* note 24, at 175; see also Gilmore v. Utah, 429 U.S. 1012 (1976).

107. See Tracy L. Snell, *Capital Punishment 2000*, BUREAU OF JUST. STAT. BULL., Dec. 2001, at 11, available at <http://blackstone.ojp.usdoj.gov/bjs/pub/pdf/cp00.pdf> (last visited Jan. 30, 2001).

108. See THE DEATH PENALTY IN AMERICA, *supra* note 32, at 18.

In the 1988 presidential campaign, Governor Michael Dukakis's opposition to the death penalty was effectively used against him by Vice President George Bush. In March of 1992, Governor Bill Clinton pointedly interrupted his campaign in New Hampshire seeking the Democratic nomination for the presidency so that he could return to Arkansas for the execution of Rickey Ray Rector, a convicted murderer whose brain was half destroyed by a gun-shot from his own hand. . . . The off-year elections in 1994 presented the spectacle of rival candidates for various public offices vying with each other over who would prosecute capital cases more vigorously, who would sign more death warrants, and who would champion the restoration or expansion of the death penalty.

*Id.*

general, appellate court judge—to appear hesitant over (much less opposed to) the death penalty.”<sup>109</sup> One of the most noteworthy examples of death penalty politics occurred in California in 1986 when Chief Justice Rose Bird and two other California Supreme Court justices were voted off the bench following a political campaign that focused on their votes in reversing death sentences.<sup>110</sup> More recently, in a 1996 retention election, Tennessee Supreme Court Justice Penny J. White was voted off the bench after a number of groups campaigned against her because of one decision in which she voted for a new death sentencing hearing for a defendant.<sup>111</sup>

Public support for the death penalty had effects beyond the various elections. Death penalty advocates who had been elected to office used their positions to expand the use of the death penalty.<sup>112</sup> At the same time, Justices appointed to the Supreme Court during these years made several rulings decreasing federal review of capital cases.<sup>113</sup> Similarly, in 1996,

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109. THE DEATH PENALTY IN AMERICA, *supra* note 32, at 18. One television spot “showed Texas candidate Mark White walking past portraits of inmates he had helped to execute while serving a previous term as governor. Andrew Young, the former civil rights activist and Atlanta mayor, reversed his longstanding opposition to capital punishment while pursuing the Democratic nomination for governor of Georgia.” HAINES, *supra* note 2, at 100.

110. See Maura Dolan, *Rose Bird's Quest for Obscurity*, L.A. TIMES, Nov. 15, 1995, at A1; Adam Pertman, *Judge's Obscurity After Vote a 'Tragedy'*, BOSTON GLOBE, May 19, 1996, at 2.

111. See John Gibeaut, *Taking Aim*, A.B.A. J., Nov. 1996, at 50, 51. Similarly, in 1994, Texans voted Judge Charles Campbell, a conservative former prosecutor, off the Court of Criminal Appeals and elected an obscure lawyer with ethics problems who promised to uphold more death sentences. Stuart Taylor, Jr., *The Politics of Hanging Judges*, LEGAL TIMES, Oct. 30, 1995, at 25. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

112. See Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 77, at 397–99; see, e.g., Tracy L. Snell, *Capital Punishment 1996*, BUREAU OF JUST. STAT. BULL., Dec. 1997, at 1, 2–4 (noting that in 1996, death penalty statutes were expanded in Florida, Indiana, Pennsylvania, South Carolina, Tennessee and Virginia); Tracy L. Snell, *Capital Punishment 1995*, BUREAU OF JUST. STAT. BULL., Dec. 1996, at 1, 2–4 (noting that in 1995, New York reinstated the death penalty, and death penalty statutes were expanded in Arkansas, Delaware, Illinois, Montana, Nevada, New Jersey, Oregon, Pennsylvania, South Dakota, and Tennessee).

113. See Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 77, at 434; see, e.g., *Teague v. Lane*, 489 U.S. 288 (1989) (limiting the ability of defendants to benefit from “new rules” of constitutional law in post-conviction review); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (holding that in habeas corpus proceed-

President Clinton signed into law the Antiterrorism and Effective Death Penalty Act, which was passed by Congress to limit federal review of capital cases.<sup>114</sup> Additional blows to the death penalty abolition movement occurred when Kansas reinstated the death penalty in 1994 and New York reinstated it in 1995.<sup>115</sup>

Despite the post-*Gregg* growth of support for the death penalty, the death penalty abolition movement continued. Soon after the *Gregg* decision, the National Coalition Against the Death Penalty, later renamed the National Coalition to Abolish the Death Penalty, was formed.<sup>116</sup> Other organizations that fought against the death penalty included Amnesty International, the American Civil Liberties Union, the Southern Poverty Law Center, and the NAACP Legal Defense Fund.<sup>117</sup> While the death penalty abolition movement remained relatively small through the 1980s and early 1990s, the movement's activities slowly increased.<sup>118</sup>

Then, a shift occurred around the mid-1990s. Even while there were some losses to the movement in the mid-1990s, such as the reinstatement of the death penalty in Kansas and New York, opposition to the death penalty began to grow during this time. One study found that in the United States, support for the death penalty declined about ten percent between 1993 and 1999,<sup>119</sup> and other studies have found a similar trend.<sup>120</sup> The

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ings, federal courts will not consider claims that were procedurally defaulted in state court unless the defendant can show "cause and prejudice").

114. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (codified as amended in scattered sections of 18 U.S.C.) (1996).

115. See Paul Haven, *Doubts Arise on Death Penalty*, BOSTON GLOBE, May 31, 1999, at A4.

116. See HAINES, *supra* note 2, at 61.

117. See *id.* at 59-69.

118. See *id.* at 148.

119. See Mark Gillespie, *Public Opinion Supports the Death Penalty*, GALLUP NEWS SERVICE, Feb. 24, 1999, at <http://www.gallup.com/poll/releases> (last visited Oct. 12, 2001).

120. See, e.g., Greg Lucas, *Poll Takes Snapshot of Californians' Views*, S.F. CHRON., Jan. 14, 2000, at A20, available at 2000 WL 6472849; Kathy Walt, *Death Penalty Support Plunges to a 30-year Low*, HOUSTON CHRON., Mar. 15, 1998, at A1 (noting that opposition to the death penalty grew from seven percent in 1994 to twenty-six percent in 1998). Another study found a twenty percent drop in support for the death penalty among California residents between 1990 and 2000. Henry Weinstein, *Support for Death Penalty Drops Sharply in State*, L.A. TIMES, Nov. 2, 2000, at A1.

rest of this Article examines this "Moratorium Movement" by looking to the past factors that triggered this decline in support for the death penalty, and to the future—where the current trend may go.

## II. RECENT DEVELOPMENTS IN THE UNITED STATES THAT HAVE LED TO THE GROWING MORATORIUM MOVEMENT

The recent shift in opinion regarding the death penalty has occurred over the last decade. In some ways, the current movement is not an "anti-death penalty" movement because a large portion of the movement's supporters are not against the death penalty *per se*. The modern movement is primarily concerned about certain aspects of the process of imposing the death penalty, not necessarily about the morality of killing convicted murderers. In fact, many in the modern movement only desire a moratorium on executions in order to attempt to fix the problems.

This Article, however, does not make a sharp distinction between those who absolutely oppose the death penalty on moral grounds and those who oppose the current death penalty on fairness grounds. For the moment, at least, the two contingents are allies. There have always been people opposed to the death penalty on different grounds—whether it be because of the process, the extra cost of executions, the brutality of certain execution methods, religious convictions, or other reasons. Although these groups may disagree on the goals at some point, their current goal is the same: to stop executions in the United States. The diverse members of the Moratorium Movement give added credibility to the death penalty abolition movement.

To understand the current situation, it is necessary to examine the unique events, beyond the bedrock death penalty abolitionist individuals and organizations, that have led to the growing Moratorium Movement.<sup>121</sup> There have been five major "events" that have created the current moratorium movement. In roughly chronological order, they are: (1) Sister Helen Prejean writing the best-selling book *Dead Man Walking*,<sup>122</sup> which was then made into a popular movie; (2) Justice Blackmun

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121. During this time, much has been done by the bedrock abolitionist community that includes religious and non-religious organizations. See, e.g., HAINES, *supra* note 2, at 73–116.

122. PREJEAN, *supra* note 22.

changing his position on the death penalty, followed by similar actions taken by other judges; (3) the American Bar Association passing a resolution favoring a moratorium on executions;<sup>123</sup> (4) the use of DNA evidence in capital cases to exonerate individuals on death row; and (5) Nebraska legislators considering a moratorium on executions and then Illinois Republican Governor Ryan imposing a moratorium on executions in Illinois, followed by considerations of moratoriums in other jurisdictions. Each of these events is connected to the others, so it is impossible to rank them by importance. The most recent event, Governor Ryan's imposition of a moratorium, has had the biggest impact nationwide, although it probably would have never occurred without the first four events.

Other significant "events" have added fuel to the moratorium movement: (6) media attention on individual cases, such as those of Mumia Abu-Jamal, Gary Graham and Karla Faye Tucker; (7) conservatives, politicians and other "mainstream" people speaking out in favor of a moratorium; (8) Governor George W. Bush of Texas, the state that executes at the fastest rate in the country, running for president; (9) organizations releasing studies about errors in capital cases and innocent persons sentenced to death; (10) economic growth and a decreasing crime rate; (11) states adding the sentencing option of life without the possibility of parole; and (12) growing international pressure to abolish the death penalty. Because, as discussed below, these seven events have had less impact than the first five events, they are addressed in a separate category.

A. *1993: Sister Helen Prejean's Dead Man Walking is Published*

Every year, there are many books written about the death penalty.<sup>124</sup> However, a book published in 1993, *Dead Man Walking*<sup>125</sup> by Sister Helen Prejean, stands out. The book was unique, not only because of its unusual author—a nun—but because it did not languish in obscurity. Instead, it went on to become a best-seller. Then, the book was made into a popular

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123. See Harris, *supra* note 23.

124. See, e.g., CHARLES W. TRICHE, III, THE CAPITAL PUNISHMENT DILEMMA, 1950-1977: A SUBJECT BIBLIOGRAPHY (1979) (listing numerous books discussing the death penalty).

125. PREJEAN, *supra* note 22.

movie in 1995, and Susan Sarandon, who portrayed Sister Prejean, won an Academy Award for Best Actress.<sup>126</sup> Most recently, in 2000, the book was made into an opera.<sup>127</sup>

In the book, Sister Prejean told the story of how she became involved with the death penalty when she began corresponding with a death row inmate.<sup>128</sup> The book documents how she became educated about the death penalty and came to know and counsel two men on Louisiana's death row, Patrick Sonnier and Robert Willie.<sup>129</sup> She wrote about the problems with the death penalty, and she also discussed the families of murder victims and how they struggled with their losses.<sup>130</sup>

Although there was some debate about the message of the movie,<sup>131</sup> both the movie and the book were significant because they inspired debate about the death penalty issue. Where

126. Lawrence Van Gelder, *Footlights*, N.Y. TIMES, March 12, 1998, at E1. Interestingly, at the beginning of an era of death penalty abolition in America in 1959, "Susan Hayward won an Academy Award for her portrayal of a condemned murderess in *I Want to Live*, based on the true story of Barbara Graham." LIFTON & MITCHELL, *supra* note 26, at 39.

127. Jan Breslauer, *A Troupe Intent on Creating American Operas and a Pair Unafraid of a Topical Subject Team for 'Dead Man Walking,'* L.A. TIMES, Oct. 1, 2000, at 5. The show was commissioned by the San Francisco Opera. *Id.*

128. *See generally*, PREJEAN, *supra* note 22.

129. *See id.* In the movie version of the book, some of the characteristics of the two real-life defendants are combined into one fictional defendant, Matthew Poncelet, played by Sean Penn. David Baron, *Acting on Faith*, TIMES-PICAYUNE (New Orleans), Jan. 19, 1996, at L20.

130. *See generally*, PREJEAN, *supra* note 22. In fact, the book ends with Lloyd LeBlanc, the father of one of the murder victims, struggling in his forgiveness for Patrick Sonnier, the man who killed Mr. LeBlanc's son, David. Sister Prejean recalls how Mr. LeBlanc arrived with sheriff's deputies in the cane field to identify his son, and he knelt by the body and prayed:

And when he came to the words: "Forgive us our trespasses as we forgive those who trespass against us," he had not halted or equivocated, and he said, "Whoever did this, I forgive them." But he acknowledges that it's a struggle to overcome the feelings of bitterness and revenge that well up, especially as he remembers David's birthday year by year and loses him all over again: David at twenty, David at twenty-five, David getting married, David standing at the back door with his little ones clustered around his knees, grown-up David, a man like himself, whom he will never know. Forgiveness is never going to be easy. Each day it must be prayed for and struggled for and won."

PREJEAN, *supra* note 22, at 244-45.

131. Millard Farmer, an attorney who represented the two defendants whom Sister Prejean wrote about, was critical of the movie as being pro-death penalty and likely to result in more executions, calling the movie, "More Dead Men Coming." Craig Pittman, *"Dead Man Walking" Brings Nun's Crusade to Screen*, STAR TRIBUNE (Minneapolis), Jan. 19, 1996, at 1E.

once many people accepted the punishment as the unquestionable "law," the book and movie raised questions about capital punishment. Also, perhaps because of the success of the book and movie, popular culture embraced the issue as one that would sell in subsequent movies and television shows. Thus, the death penalty debate continued to be out in the open, raising questions.

Sister Prejean's book ranks with a handful of other significant anti-death penalty books or essays. Cesare Beccaria's *Dei delitti e delle pene*, or *Of Crime and Punishments*,<sup>132</sup> which condemned capital punishment, was influential in France and throughout the world after its publication in 1764.<sup>133</sup> Other influential publications include Victor Hugo's *Le dernier jour d'un condamné* (*The last day of a condemned man*),<sup>134</sup> which helped re-open the death penalty debate in nineteenth century France,<sup>135</sup> and the 1957 book *Reflexions sur la peine Capitale* (*Reflections on Capital Punishment*),<sup>136</sup> a symposium by Arthur Koestler and Albert Camus.<sup>137</sup>

In the United States, on other topics, there have been similar landmark books, such as Upton Sinclair's *The Jungle*,<sup>138</sup> a novel that exposed life in Chicago's stockyards, and Rachel Carson's *Silent Spring*,<sup>139</sup> a book that raised the level of environmental concern in this country. One could argue that the Moratorium Movement has its source in the efforts of Sister Helen Prejean, her best-selling book, the movie, and her efforts in traveling around the country to talk to groups about the death penalty. In some ways, one might argue that *Dead Man Walking* is to the current death penalty abolition movement what Harriet Beecher Stowe's *Uncle Tom's Cabin*<sup>140</sup> was to the slavery abolition movement. When Abraham Lincoln met Ms.

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132. CESARE BECCARIA, *OF CRIMES AND PUNISHMENTS* (1996).

133. See *id.* at 52–61; Marvin E. Wolfgang, *Introduction to BECCARIA*, *supra* note 132.

134. VICTOR HUGO, *LE DERNIER JOUR D'UN CONDAMNÉ* (1829).

135. See Michel Forst, *The Abolition of the Death Penalty in France*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 105, 106 (1999).

136. ALBERT CAMUS AND ARTHUR KOESTLER, *REFLEXIONS SUR LA PEINE CAPITALE* (Paris: Calmann-Levy, 1957).

137. See *Reflections on the Guillotine*, in ALBERT CAMUS, *RESISTANCE, REBELLION, AND DEATH* 175 (1961); ARTHUR KOESTLER, *REFLECTIONS ON HANGING* (1999).

138. UPTON SINCLAIR, *THE JUNGLE* (1906).

139. RACHEL CARSEN, *SILENT SPRING* (1962).

140. HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (1852).



Stowe, he reportedly greeted her by saying, "So this is the little lady who made this big war?"<sup>141</sup> Similarly, one might argue that Sister Prejean started the Moratorium Movement.<sup>142</sup>

One of the main reasons that the *Dead Man Walking* book and movie were so important to the creation of the Moratorium Movement was because conservatives could not easily dismiss the works as liberal arguments against the death penalty. Although conservatives often dismiss anti-death penalty arguments because they believe that the reformers are not sufficiently concerned about the victims of violent crimes, both the book and the movie devoted substantial time to the victims' families.<sup>143</sup> Thus, the works attempted to show the issue and all of the complex human emotions that went with it in real life.<sup>144</sup> While one could disagree with Sister Prejean's conclusions about the death penalty, one could not dismiss the honesty of her book. Because of that honesty, because the book told a compelling story, and because the author began when she was ignorant about the death penalty and took the reader with her on the journey, the book succeeded commercially and made the death penalty a marketable issue for the media and for popular culture. The effects of Sister Prejean's works continue today as new movies, television shows, and other media focus on death penalty issues.

*B. 1994: Justice Blackmun and Retired Justice Powell  
Speak Out Against the Modern Capital Punishment  
System, and Other Judges Raise Concerns*

When the United States Supreme Court first addressed the Eighth Amendment challenges to the death penalty in 1972, Justice Brennan and Justice Marshall took the position that

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141. DAVID HERBERT DONALD, LINCOLN 542 (1995).

142. Sister Prejean helped create an organization called "Moratorium 2000" that is seeking an international moratorium on capital punishment. See *A Gathering Momentum*, *supra* note 11, at 25.

143. The book does not end with an execution, but with the father of one of the victims struggling to continue to forgive the murderer of his son. See PREJEAN, *supra* note 22, at 244–45.

144. For a further discussion about *Dead Man Walking*, as well as *The Green Mile*, see David R. Dow, *Fictional Documentaries and Truthful Fictions: The Death Penalty in Recent American Film*, 17 CONST. COMMENT. 511 (2000).

the death penalty itself was unconstitutional.<sup>145</sup> Throughout the rest of their terms—until Justice Brennan retired in July 1990 and Justice Marshall retired in June 1991,<sup>146</sup> they each continued to dissent in every subsequent case that upheld a death sentence.<sup>147</sup>

The main ground for Justice Brennan's and Justice Marshall's opposition to the death penalty was that the punishment was unnecessary and degraded human dignity.<sup>148</sup> In *Furman*, other Justices agreed that the death penalty was being imposed arbitrarily, but no other Justices joined them four years later in dissenting in *Gregg v. Georgia* when the Court upheld the new death penalty statutes.<sup>149</sup> Throughout the rest of their terms, no other Justice joined them in their complete opposition to the death penalty.

In the 1994 case of *Callins v. Collins*,<sup>150</sup> however, one of the Justices who had joined the majority in *Gregg* in upholding the

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145. See *Furman v. Georgia*, 408 U.S. 238, 305–06 (1972) (Brennan, J., concurring); *id.* at 358–60 (Marshall, J., concurring).

146. See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 970 (Kermit L. Hall ed., 1992).

147. See Jordan Steiker, *The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEX. L. REV. 1131, 1131–32 (1993). “Notwithstanding the Court's precedents, Justice Marshall voted to overturn every death sentence that came before the Court following the Court's approval of several capital punishment schemes in 1976.” *Id.* at 1132. “The U.S. Reports are filled with Justice Marshall's (and Justice Brennan's) familiar refrain: ‘Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, we would grant certiorari and vacate the death sentence in this case.’” *Id.* (quoting *Smith v. Hopper*, 436 U.S. 950, 950 (1978) (Brennan and Marshall, JJ., dissenting from denial of certiorari)).

Although rare, a judge taking a moral position in contrast to the law is not nonexistent in American history. For example, Judge Samuel Sewall of Massachusetts' highest court, authored an anti-slavery pamphlet entitled, “The Selling of Joseph: A Memorial” in 1700. See Gustav Niebuhr, *A Puritan Judge's Antislavery Voice*, N.Y. TIMES, June 24, 2000, at A12. At the time, slavery was still legal in Massachusetts. See *id.*

148. Justice Brennan concluded that the death penalty violated the Eighth Amendment because the punishment “does not comport with human dignity.” *Furman*, 408 U.S. at 270. In support of that conclusion, he found: (1) the death penalty is degrading to the dignity of human beings; (2) it is inflicted arbitrarily; (3) it is unacceptable to contemporary society; and (4) it is excessive, i.e., unnecessary. *Id.* at 305. Justice Marshall found that the death penalty violated the Eighth Amendment because: (1) it is excessive; and (2) “it is abhorrent to currently existing moral values.” *Id.* at 332–33.

149. 428 U.S. 153 (1976).

150. 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of petition for writ of certiorari).

death penalty and who had overseen the development of the new death penalty laws for more than twenty years, drastically changed his position.<sup>151</sup> In *Callins*, Justice Harry Blackmun announced: "From this day forward, I no longer shall tinker with the machinery of death,"<sup>152</sup> and then he dissented from every case affirming a death sentence until retiring later that term.<sup>153</sup> The reason for his newfound conclusion that "the death penalty experiment has failed"<sup>154</sup> was not based upon moral grounds,<sup>155</sup> but upon the unfairness of the sentencing and legal review process.

In *Callins*, Justice Blackmun noted that the post-*Furman* decisions did not adequately curb the arbitrariness and discrimination that were at issue in that case.<sup>156</sup> He concluded that *Furman's* constitutional requirement to eliminate arbi-

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151. Justice Blackmun's change in position between *Gregg* and *Callins* was drastic, but his growing frustration at the use of the death penalty can be seen in several cases leading up to *Callins*. In *Sawyer v. Whitley*, 505 U.S. 333 (1992) (Blackmun, J., concurring), Justice Blackmun criticized the Court's standards for habeas corpus review in capital cases, and noted his "ever-growing skepticism that, with each new decision from this Court constricting the ability of the federal courts to remedy constitutional errors, the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment." *Id.* at 351.

In another case, addressing the issue of whether "innocence" is an independent Eighth Amendment claim, Justice Blackmun wrote:

I have voiced disappointment over this Court's obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please. I have also expressed doubts about whether, in the absence of such restrictions, capital punishment remains constitutional at all. Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to simple murder.

*Herrera v. Collins*, 506 U.S. 390, 446 (1993) (Blackmun, J., dissenting) (citations omitted).

152. *Callins*, 510 U.S. at 1145.

153. See LAZARUS, *supra* note 63, at 509.

154. *Callins*, 510 U.S. at 1145.

155. Justice Blackmun did note that he did have moral objections to the death penalty. *Id.* at 1147. However, those objections were not the grounds for his decision in *Callins*. See *id.* at 1147-59.

156. See *id.* at 1148-59. "It seems that the decision whether a human being should live or die is so inherently subjective—rife with all of life's understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution." *Id.* at 1153.

trariness could not be reconciled with the *Lockett v. Ohio*<sup>157</sup> constitutional requirement that each defendant be considered as an individual. Therefore, the system could not work.<sup>158</sup> He also was concerned that the Court had "retreated from the field"<sup>159</sup> by limiting the power of federal courts to review death sentences.<sup>160</sup> He concluded by predicting that one day the death penalty will be abolished, stating that "[t]he path the Court has chosen lessens us all."<sup>161</sup>

Around the same time as the *Callins* decision, it was revealed that a former Supreme Court Justice also had changed his mind about the death penalty. Justice Lewis Powell—who, like Justice Blackmun, was a Nixon appointee, one of the *Furman* dissenters,<sup>162</sup> and one of the *Gregg* plurality<sup>163</sup>—told his biographer that he regretted upholding the death penalty.<sup>164</sup> Justice Powell's biographer wrote that "Justice Powell's experience taught him that the death penalty cannot be decently administered."<sup>165</sup>

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157. 438 U.S. 586, 608–09 (1978) (holding that it violates the constitution to limit the consideration of mitigating factors in a capital sentencing hearing). See also *Skipper v. South Carolina*, 476 U.S. 1 (1986) (holding that the exclusion of evidence that a defendant had adjusted well to incarceration violated the Eighth Amendment); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that it violated the Eighth Amendment for a judge to not give mitigating weight to a defendant's troubled youth).

158. See *Callins*, 510 U.S. at 1152–53.

159. *Id.* at 1156.

160. See *id.* at 1157–58.

161. *Id.* at 1159.

162. See *Furman v. Georgia*, 408 U.S. 238, 414 (1972) (Powell, J., dissenting).

163. See *Gregg v. Georgia*, 428 U.S. 153, 158 (1976).

164. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994) [hereinafter JEFFRIES, POWELL]; John C. Jeffries, Jr., *A Change of Mind that Came Too Late*, N.Y. TIMES, June 23, 1994, at A23 [hereinafter Jeffries, *Change of Mind*]. Specifically, Justice Powell stated that he regretted his vote in *McCleskey v. Kemp*, 481 U.S. 279 (1987) (upholding the constitutionality of the death penalty despite statistics showing a racial bias in the use of the punishment). See JEFFRIES, POWELL, *supra*.

165. See JEFFRIES, POWELL, *supra* note 164. The article states:

In truth, it was not a change of heart, but a change of mind—not an emotional conversion to the view that execution is never justified, but a reasoned interpretation of experience. Justice Powell's experience taught him that the death penalty cannot be decently administered. As actually enforced, capital punishment brings the law itself into dispute.

*Id.*

In 1985, in a memo to the Court about a capital case involving Willie Darden, Justice Powell reasserted his belief in the constitutionality of capital punishment,

The statements made by Justices Blackmun and Powell were significant because the Justices could not be dismissed as liberals who were always opposed to the death penalty. The truth was more complex. Although Justice Blackmun had evolved into one of the more liberal justices on the Court at the time he retired, Justice Powell was always somewhat right of center on the Court.<sup>166</sup> Both justices had been appointed by President Richard Nixon as part of his campaign pledge to change the liberal Warren Court,<sup>167</sup> and they were among the Justices who upheld the death penalty in *Gregg*. Perhaps more important were the grounds for their attacks on the death penalty.

Although Justice Blackmun did express moral reservations about the punishment, the reasons that both Justices now found the punishment unconstitutional were procedural. The death penalty system in the United States was unfair, discriminatory, and arbitrary. Although these attacks had been made on the death penalty before, they were often made as extraneous arguments by abolitionists who were morally opposed to the death penalty.<sup>168</sup> Here, Justice Blackmun's arguments carried significant weight because they were not tied to nebu-

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while at the same time questioning the justice system's handling of capital cases. "I have no doubt as to the constitutionality of capital punishment," he wrote, but, because of the delays caused by federal habeas, "I have grave doubts as to whether it now serves the purposes of deterrence and retribution, the principal purposes we identified in *Gregg*." LAZARUS, *supra* note 63, at 163 (quoting Letter of September 4, 1985, "85-5319 Darden v. Wainwright," Brennan Papers).

166. See, e.g., David Von Drehle, *Retired Justice Changes Stand on Death Penalty*, WASH. POST, June 10, 1994, at A1.

167. See, e.g., BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 13-18 (1981). As for Justice Blackmun, "Nixon found Blackmun's moderate conservatism perfect. . . . He had academic credentials, practical legal experience in the Middle West, and a predictable, solid body of opinions that demonstrated a levelheaded strict-constructionist philosophy." *Id.* at 97. "Powell was a political moderate." *Id.* at 189. Before his term on the Court, Justice Powell had served on President Johnson's Crime Commission and wrote in a minority report that the Warren Court had "swung the pendulum too far in affording rights which are abused and misused by criminals." LAZARUS, *supra* note 63, at 105.

168. The attacks by Justices Brennan and Marshall often focused on the unfair and discriminatory application of the death penalty, but it was always clear that they also would find the death penalty unconstitutional on moral grounds because the punishment violated "human dignity." See, e.g., *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

lous moral or philosophical grounds, but to more concrete concerns like fairness and due process.<sup>169</sup>

The conversions of the Justices received a fair amount of attention in the media, with Justice Blackmun's statements often being quoted. In fact, Justice Blackmun initially kept his planned repudiation of the death penalty from the other Justices, perhaps because his goal was not the hopeless task of persuading his colleagues, but to reach the rest of the world.<sup>170</sup> Still, perhaps his words eventually did have some influence on his colleagues. A number of years later, Justice Ruth Bader Ginsburg, who was serving her first term when Justice Blackmun wrote his *Callins* opinion, stated that she supported a moratorium on executions. In April 2001, in a lecture in Maryland, Justice Ruth Bader Ginsburg said she would be "glad to see" Maryland pass a moratorium bill, adding, "[p]eople who are well represented at trial do not get the death penalty."<sup>171</sup>

Then, in July 2001, Justice Sandra Day O'Connor publicly stated that there are "serious questions" about whether the death penalty is administered fairly.<sup>172</sup> In a speech before the Minnesota Women Lawyers association, she noted the possibility that innocent persons have been executed, adding that the

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169. One author noted the importance of Justice Blackmun's stance: Blackmun's brand of abolitionism describes an important contemporary avenue for engagement in the political struggle against capital punishment, providing abolitionists a position of political respectability while simultaneously allowing them to change the subject from the legitimacy of execution to the imperatives of due process. Blackmun's rhetoric enables opponents of capital punishment to respond to the overwhelming political consensus in favor of death as a punishment; they no longer have to take on that consensus frontally. They can say that the most important issue in the debate about capital punishment is one of fairness and not one of sympathy for murderers; they can position themselves as defenders of law itself, as legal conservatives.

Austin Sarat, *ABA's Proposed Moratorium: Recapturing the Spirit of Furman: The American Bar Association and the New Abolitionist Politics*, 61 LAW & CONTEMP. PROBS. 5, 12 (1998). Professor Sarat also discusses how the grounds for Justice Blackmun's attack on the death penalty originated from the attacks against the death penalty made by the defense lawyers who comprise the "death penalty bar." See *id.* at 12-13.

170. See LAZARUS, *supra* note 63, at 509. "Tellingly, he kept his plans secret from his colleagues. Here, as elsewhere, the idea of persuasion had long since disappeared and the liberals, wishing on the future, addressed themselves solely to the world beyond the Court." *Id.*

171. Anne Gearan, *Ginsburg Backs Ending Death Penalty*, AP ONLINE, Apr. 10, 2001, available at 2001 WL 18926396.

172. *O'Connor Questions Death Penalty*, N.Y. TIMES, July 4, 2001, at A9.

residents of Minnesota “must breathe a big sigh of relief every day” because that state does not have the death penalty.<sup>173</sup>

These Supreme Court Justices are not the only members of the bench to attack the death penalty. Perhaps following the lead of Justice Blackmun, several lower court judges—including several chief justices of states’ highest courts—began to speak out against the death penalty. Although these statements did not receive as much national attention as the statements by the Supreme Court Justices, the statements were perhaps more significant in the locales where the judges served. All of these statements were especially significant because the judges were credible persons who had intimate knowledge of the death penalty process in the United States. One might argue that, because these were respected jurists changing their minds about a system they were knowledgeable about, the actions by these judges should have been more significant than many of the events discussed in this Article that did receive more media attention.

Perhaps following the lead of Justice Blackmun, in 1998, the Chief Justice of the Florida Supreme Court began speaking out against the death penalty during his final six months on the bench.<sup>174</sup> Chief Justice Gerald Kogan, a former prosecutor who had been appointed to the court by a pro-death penalty governor, came to believe that the death penalty system was too cumbersome and took too much of the court’s time.<sup>175</sup> Chief Justice Kogan, who had tried capital cases as a prosecutor, was not morally opposed to the death penalty.<sup>176</sup> As a prosecutor and judge, he had been involved in about twelve hundred capital cases, but he noted, “There is always that doubt that lingers in your mind whether these people are innocent.”<sup>177</sup> At a press conference in Washington, D.C., about a death penalty bill, Kogan explained, “Knowing as I do the imperfections in our sys-

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173. *Id.*

174. Peter Wallsten, *Chief Justice Criticizes Death Penalty*, STUART NEWS/PORT ST. LUCIE NEWS (Fla.), Jan. 2, 1998, at A1.

175. *See id.* Chief Justice Kogan began speaking out against the death penalty after he dissented from a ruling upholding the use of the electric chair. *See id.*; *see also* Jones v. Butterworth, 701 So. 2d 76, 81 (Fla. 1997) (Kogan, J., dissenting).

176. *See* Wallsten, *supra* note 174.

177. Lesley Clark & Phil Long, *Florida’s Former Chief Justice Seeks to Bar Executions*, RECORD (Bergen Co., N.J.), Oct. 24, 1999, at A7.

tem, I know that we have, on occasions in the past, executed those people who are in fact innocent."<sup>178</sup>

Similarly, former Chief Judge of the North Carolina Supreme Court, James Exum, Jr., stated that the death penalty "cheapens the rest of us; it brutalizes the rest of us; and we become a more violent society."<sup>179</sup> Charles F. Baird, who served as a judge on the Texas Court of Criminal Appeals for eight years, spoke out against the death penalty by saying, "I saw cases where there were serious concerns as to the guilt or innocence . . . I saw cases where . . . lawyers were actually sleeping through portions of the trial."<sup>180</sup>

In *State v. Timmendequas*,<sup>181</sup> Justice Virginia Long of the Supreme Court of New Jersey called for a moratorium on the death penalty in that state.<sup>182</sup> In condemning the state's proportionality review system, she stated, "It is time for the members of this Court to accept that there is simply no meaningful way to distinguish between one grotesque murder and another for the purpose of determining why one defendant has been granted a life sentence and another is awaiting execution."<sup>183</sup>

Ohio Supreme Court Justice Paul E. Pfeifer, who co-wrote Ohio's death penalty law as the Republican chairman of the Ohio Senate Judiciary Committee in 1981, announced on February 17, 1999 that he questioned the effectiveness of the death penalty.<sup>184</sup> Noting that long time periods between sentencing and execution undermine any deterrence or retribution functions of the death penalty, Justice Pfeifer also said that he has

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178. Jacqueline Soteropoulos, *Ex-State Justice: Innocent Executed*, TAMPA TRIB. (Fla.), Feb. 12, 2000, at 1.

179. Bruce Mulkey, *Time for a Moratorium on Death Penalty?*, ASHEVILLE CITIZEN-TIMES (N.C.), July 8, 2000, at A6.

180. Frank Green, *Bipartisan Group Targets Wrongful Death Sentences*, RICHMOND TIMES DISPATCH (Va.), May 12, 2000, at A3. Another Texas judge, Senior State District Judge C.C. "Kit" Cooke recently criticized the death penalty and noted there are "deficiencies in the system," although he said the punishment is "appropriate in a limited number of cases." Anthony Spangler, *Judge Expresses Concerns About Fairness of Death Penalty*, FORT WORTH STAR-TELEGRAM, July 24, 2001, at 4.

181. 773 A.2d 18, 50 (N.J. 2001) (Long, J., dissenting).

182. *Id.* at 52.

183. *Id.*; see also *State v. Feaster*, 757 A.2d 266, 295-96 (N.J. 2000) (Long, J., dissenting) (arguing that no proportionality review can ensure that the death penalty is applied fairly).

184. Joe Hallett, *Death Penalty Isn't Effective, Law's Co-Author Now Believes*, COLUMBUS DISPATCH, Feb. 18, 1999, at 1A. Justice Pfeifer's announcement came days before Ohio's first execution since *Furman*. See *id.*



become sympathetic to arguments that the death penalty is immoral.<sup>185</sup> As Ohio prepared to execute Wilford Berry, whose sentence had been upheld by Justice Pfeifer, the justice stated, "I guess I've come to the conclusion the state would be better off without [the death penalty] and should impose a life sentence without the possibility of parole. . . . What is going to be the great benefit for the state when Wilford Berry dies?"<sup>186</sup> Although he said he will still vote to uphold death sentences in cases where warranted, he stated that "[k]nowing what I know now, my name wouldn't have been on" Ohio's death penalty statute.<sup>187</sup> Similarly, another Ohio judge, Cuyahoga County Common Pleas Judge Daniel Gaul recently denounced the death penalty to reporters a day after sentencing a man to death.<sup>188</sup>

Former Chief and current Justice Thomas Zlaket of the Arizona Supreme Court has stated his belief that the death penalty system does not work, but like Justice Pfeifer and Judge Gaul, he still follows the law in upholding death sentences.<sup>189</sup> His experience with the death penalty, however, led him to state, "I have the feeling that life and death is something for God to decide, not man."<sup>190</sup>

Chief Justice Moses Harrison of the Supreme Court of Illinois has opined that the death penalty system has so many problems that it violates the United States and Illinois Constitutions. In *People v. Bull*,<sup>191</sup> he voted to overturn a death sentence and wrote that "when a system is as prone to error as ours is, we should not be making irrevocable decisions about any human life."<sup>192</sup>

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185. *Id.*

186. T.C. Brown, *Repeal Death Penalty, Original Sponsor Urges*, PLAIN DEALER (Cleveland), Feb. 19, 1999, at 1A.

187. Hallet, *supra* note 184, at 1A.

188. Karl Turner, *Judge Orders Killer's Death, Decries Death Penalty*, PLAIN DEALER (Cleveland), Nov. 17, 2000, at 1A. Referring to his sentencing of Quisi Brown to death, Judge Gaul stated, among his criticisms of the death penalty, "I think when we evolve as a species, we won't do this anymore." *Id.*

189. Jenny Staletovich, *Justice Raising Voice to Bury Death Penalty*, PALM BEACH POST (Fla.), Jan. 19, 1998, at 1A.

190. Pamela Manson, *New Chief Justice Hopes to Eliminate 'Unhealthy' Tension*, ARIZ. REPUBLIC (Phoenix), Dec. 15, 1996, at B1.

191. 705 N.E.2d 824, 846-48 (Ill. 1999) (Harrison, J., dissenting).

192. *Id.* at 848; *see also* *People v. Enis*, 743 N.E.2d 1, 32 (Ill. 2000) (Harrison, C.J., dissenting).

Federal judges in the lower federal courts also have criticized the death penalty. In *Singleton v. Norris*,<sup>193</sup> Judge Gerald Heaney of the United States Court of Appeals for the Eighth Circuit joined the majority in upholding a death sentence, but he wrote a concurring opinion "to add my voice to those who oppose the death penalty as violative of the United States Constitution."<sup>194</sup> Although he stated that he was "compelled" to follow the law, he announced his own view after thirty years on the court "that this nation's administration of capital punishment is simply irrational, arbitrary, and unfair."<sup>195</sup> He concluded, "I am confident that no death penalty system can ever be administered in a rational and consistent manner."<sup>196</sup> Similarly, United States District Judge Michael Ponsor recently wrote that he would enforce the death penalty as law, but said that he believed that because of problems in the system it is inevitable that an innocent person will be executed.<sup>197</sup>

Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit is a conservative who supports the death penalty.<sup>198</sup> However, he has argued for limiting the death penalty and has stated: "We have constructed a machine that is extremely expensive, chokes our legal institutions, visits repeated trauma on victims' families and ultimately produces nothing

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193. 108 F.3d 872 (8th Cir. 1997).

194. *Id.* at 874 (Heaney, J., concurring).

195. *Id.* at 876. He explained:

At every stage, I believe the decision of who shall live and who shall die for his crime turns less on the nature of the offense and the incorrigibility of the offender and more on inappropriate and indefensible considerations: the political and personal inclinations of prosecutors; the defendant's wealth, race, and intellect; the race and economic status of the victim; the quality of the defendant's counsel; and the resources allocated to defense lawyers. Put simply, this country's unprincipled death penalty selection process is inconsistent with fundamental principles of due process.

*Id.* at 875.

196. *Id.* at 876.

197. Judge Michael Ponsor, *Life, Death and Uncertainty to the Judge in Charge, the Murder of Kristin Gilbert Offered an Unsettling Lesson—and Inescapable Conclusion—about the Ultimate Cost of the Death Penalty*, BOSTON GLOBE, July 8, 2001, at D2.

198. Terry Tang, *We Delude Ourselves About Barbarity of Death Penalty*, SEATTLE TIMES, Apr. 5, 1995, at B4.

like the benefits we would expect from an effective system of capital punishment. This is surely the worst of all worlds."<sup>199</sup>

Unlike Judge Robert S. Vance of the United States Court of Appeals for the Eleventh Circuit, who opposed the death penalty but affirmed a number of capital convictions,<sup>200</sup> some judges believed the United States' capital punishment system to be so flawed that they could no longer participate in that system. After Colorado changed its death penalty law to require judges instead of juries to sentence capital defendants, District Judge Michael Heydt resigned because he found the new law "manifestly unworkable."<sup>201</sup> In his letter of resignation, Judge Heydt wrote, "I do not wish to participate in a death penalty process unless I believe that it is one that I can live with not only as a judge but also as a human being."<sup>202</sup>

Additionally, Justice Robert Utter resigned from the Washington Supreme Court after twenty-three years on that court because of concerns about the death penalty.<sup>203</sup> Justice Utter stated that his work as a justice convinced him that the death penalty is unfairly applied to racial minorities and the poor.<sup>204</sup> Although as a prosecutor he sought the death penalty for some defendants,<sup>205</sup> Justice Utter began questioning the death penalty when he presided over a capital trial as a superior court judge more than thirty years before his resignation: "That was the beginning of my questioning whether any human being is

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199. Alex Kozinski & Sean Gallagher, *For an Honest Death Penalty*, N.Y. TIMES, March 8, 1995, at A21; see also Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1 (1995) (proposing that legislatures limit the number of people sentenced to death to a smaller number of the worst offenders).

200. LIFTON & MITCHELL, *supra* note 26, at 159-60.

201. Sue Lindsay, *Judge Resigns Over Death Penalty Law: Heydt, on Panel Picked to Rule in 1997 Slaying, Says System is Flawed, Statute 'Unworkable,'* ROCKY MOUNTAIN NEWS (Denver), Apr. 13, 1999, at 19A.

202. *Id.* Judge Heydt was concerned that under the new law, two of the panel judges who participate in the sentencing would not have attended the trial but would only review transcripts. See *id.*

203. Jim Simon et al., *Utter Quitting Supreme Court — Justice Says He Can't Be Party to State's Capital Punishment*, SEATTLE TIMES, Mar. 29, 1995, at A1. During his term on the court, Justice Utter dissented every time the court upheld a death sentence. See *id.*

204. *Id.*

205. See Patti Epler, *Utter Quits Supreme Court in Protest of Death Penalty*, NEWS TRIB. (Tacoma, Wash.), Mar. 30, 1995, at A1.

wise enough to decide who should die. Everything I've seen in the system since then has convinced me that we're not."<sup>206</sup>

These judges took an unpopular stand on an issue about which they had intimate knowledge, with some facing a guilty conscience about prior rulings and some sacrificing their careers to make a stand. One commentator has predicted that even more judges will develop doubts about capital punishment as they continue to recognize that the death penalty is not just a criminal policy issue but also a political issue.<sup>207</sup> Even if one does not agree with the position taken by these judges, one must admit that their stands were principled and would cause others to take a second look at the death penalty. For example, as noted below, Justices Blackmun and Powell would later be quoted by the American Bar Association when it called for a moratorium on executions in the United States. Thus, these voices would continue to energize the Moratorium Movement, perhaps making other judges less fearful of taking a stand against the death penalty.<sup>208</sup>

C. *1997: The American Bar Association Passes a Resolution Favoring a Moratorium on Executions*<sup>209</sup>

In 1997, the American Bar Association (ABA) adopted a resolution calling upon each death penalty jurisdiction to impose a moratorium on executions until that jurisdiction complied with ABA policies designed to "(1) ensure that death penalty cases are administered fairly and impartially, in accor-

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206. Simon et al., *supra* note 203, at A1.

207. Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 750-52 (2001).

208. For example, one Georgia attorney claimed that the Georgia Supreme Court is one vote short of instituting a "virtual moratorium" on the death penalty. Rebecca Schwartzman, *ABA Conference Brings Scrutiny to Ga.'s Capital Procedures*, FULTON COUNTY DAILY REP. (Ga.), Oct. 17, 2000. On the Georgia Supreme Court, "Chief Justice Robert Benham, Presiding Justice Norman S. Fletcher and Justice Leah Sears have shown consistent skepticism about the death penalty in their decisions." *Id.*

209. Harris, *supra* note 23. The ABA has issued two follow-up reports about the impact of the moratorium recommendation. See *A Gathering Momentum*, *supra* note 11, at 1; *Toward Greater Awareness: The American Bar Association for a Moratorium on Executions Gains Ground: A Summary of Moratorium Resolution Impacts from January 2000 through July 2001* (Aug. 2001), available at <http://www.abanet.org/irr/finalreport.doc> (last visited Oct. 25, 2001) [hereinafter *Toward Greater Awareness*].

dance with due process, and (2) minimize the risk that innocent persons may be executed.”<sup>210</sup> The resolution did not take a position on whether the death penalty should be abolished, but instead focused on four areas of concern in the implementation of the death penalty: (i) ensuring competency of defense counsel; (ii) ensuring the ability of the state and federal courts to review the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings; (iii) eliminating racial discrimination in capital cases; and (iv) preventing the execution of mentally retarded defendants and persons who were under the age of eighteen at the time of the crime.<sup>211</sup>

A report by the Chair of the ABA Section of Individual Rights and Responsibilities was submitted to the ABA along with the proposed resolution, elaborating on the four areas of concern.<sup>212</sup> The report discussed the same problems that previously had been expressed by Justice Blackmun and Justice Powell, and it cited those two justices.<sup>213</sup>

With respect to legal representation, the report cited several examples of errors made by capital defense attorneys, such as a case where counsel later admitted he was so dependent on drugs during trial that he did very little on the case.<sup>214</sup> On the process issue, the report cited several cases and the Anti-Terrorism and Effective Death Penalty Act that limited habeas corpus review of capital cases.<sup>215</sup> Regarding racial discrimination, the report explained that the Supreme Court rejected a constitutional challenge to racial discrimination in capital cases in *McCleskey v. Kemp*,<sup>216</sup> and then Congress failed to pass legislation to address the issue.<sup>217</sup> Finally, the report expressed concern that the Supreme Court had upheld the execution of

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210. See *A Gathering Momentum*, *supra* note 11, at 1.

211. *Id.*

212. See Harris, *supra* note 23, at 1.

213. See *id.* at 3, 13–14.

214. *Id.* at 8; see Young v. Zant, 727 F.2d 1489, 1492–93 (11th Cir. 1984); Young v. Kemp, No. 85-98-2-MAC (M.D. Ga. 1985) (attached as appendix to Young v. Kemp, 758 F.2d 514, 518 (11th Cir. 1985)); see also Frey v. Fulcomer, 974 F.2d 348 (3d Cir. 1992) (stating that defense counsel relied upon statute that had been declared unconstitutional); Romero v. Lynaugh, 884 F.2d 871 (5th Cir. 1989) (stating that defense counsel made a four-sentence closing argument saying the jury could do what it wanted to do).

215. See Harris, *supra* note 23, at 11–12.

216. 481 U.S. 279, 319 (1987).

217. See Harris, *supra* note 23, at 13–14.

the mentally retarded and juveniles, and several states still permitted those categories of defendants to be executed.<sup>218</sup>

The ABA resolution, like Justice Blackmun's dissent in *Callins*, received extensive media coverage. One professor wrote that the ABA resolution is "quite significant" because it "legitimizes arguments often dismissed as mere partisan attempts to erect 'technical' roadblocks on the path from death sentences to executions and lends important symbolic capital to death penalty opponents."<sup>219</sup>

Within two years after the passage of the resolution, the ABA reported that "the resolution has had a profound impact not only in refocusing public discussion of the operation of the death penalty, but also, and equally as important, in spawning grassroots efforts questioning the fairness of the death penalty as implemented in particular jurisdictions."<sup>220</sup> After the resolution was passed, courts, legislatures, and the media increased their discussion of the issues addressed in the resolution.<sup>221</sup> In more recent years, the ABA has made the moratorium goal a priority,<sup>222</sup> and ABA President Martha W. Barnett recently called for a moratorium on federal executions and asked lawyers to work for moratoriums in the states.<sup>223</sup>

Despite the significance of the ABA Moratorium Resolution, the rate of executions in the United States continued to climb in the next few years, and it did not appear that any state would follow the ABA's recommendation in the near future.<sup>224</sup> As recently as 1998, one commentator noted that "there is little immediate prospect that [the ABA's] recommended moratorium will come to pass."<sup>225</sup> In January 2000, the ABA reported that no United States jurisdiction had im-

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218. See *id.* at 14–15; see *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that it did not violate the Eighth Amendment to execute a mentally retarded defendant); *Sanford v. Kentucky*, 492 U.S. 361 (1989) (holding that it did not violate the Eighth Amendment to execute defendants who were sixteen and seventeen years old at the time of the crime).

219. Sarat, *supra* note 169, at 9.

220. *A Gathering Momentum*, *supra* note 11, at 2.

221. See *id.*

222. Tabak, *supra* note 207, at 744–45.

223. James Podgers, *A Break for Executions: New ABA President Calls for Push on Death Penalty Moratorium*, A.B.A. J., Sept. 2000, at 99.

224. See *A Gathering Momentum*, *supra* note 11, at 2.

225. Sarat, *supra* note 169, at 27–28.

posed a moratorium since it passed its 1997 resolution, but it noted that "developments toward that end are encouraging."<sup>226</sup>

By the time of the American Bar Association's death penalty conference in October 2000, ten state and local bar associations had adopted moratorium proposals or called for a review of the capital punishment system.<sup>227</sup> Over the next year, other bar associations would join that list.<sup>228</sup> The effects of the ABA's proposal were not limited to bar associations, because soon after the proposal, the moratorium landscape became even more encouraging with developments in Nebraska and Illinois. Further, the ABA's suggestion of a moratorium would gain momentum with the discovery of more errors in capital cases, as discussed in the next section.

*D. 1999–2000: Concern About Innocent Capital Defendants Grows Because New Technology, as well as Efforts by the Media and Public Interest Groups, Reveal Errors in Capital Cases*

Between 1973 and January 2002, states released ninety-nine prisoners from death row after new evidence indicated the prisoners were innocent.<sup>229</sup> In Illinois, for example, during the

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226. *A Gathering Momentum*, *supra* note 11, at 3.

227. Schwartzman, *supra* note 208. State and local bar organizations that passed death penalty moratorium resolutions between March 1997 and October 2000 are: the Chicago (Ill.) Council of Lawyers, the Pennsylvania State Bar Association, the Philadelphia (Pa.) Bar Association, the Connecticut Bar Association, the Charlottesville Albermarle Virginia Bar Association, the Virginia College of Criminal Defense Attorneys, the Louisiana State Bar Association, the New Jersey State Bar Association, the New York County Lawyers' Association, and the California Conference of Delegates. *See Toward Greater Awareness*, *supra* note 209, Appendix B. Also during that time, three other bar associations called for a review of the death penalty system: the Ohio State Bar Association, the Illinois State Bar Association, and the Washington State Bar Association. *See id.*

228. Other state and local bar associations that have passed death penalty moratorium resolutions are: the Boulder County (Colorado) Bar Association, the North Carolina Bar Association, the Colorado Bar Association, the New York State Bar Association, the Multnomah (Oregon) Bar Association, the Atlanta Bar Association, and the Virginia Trial Lawyers Association. *See Toward Greater Awareness*, *supra* note 209, Appendix B.

229. Death Penalty Information Center, *Innocence: Freed from Death Row*, at <http://www.deathpenaltyinfo.org/Innocentlist.html> (last visited Jan. 23, 2002); *see also Dead Man Walking Out*, *ECONOMIST*, June 10, 2000, at 21 (counting eighty-seven innocent persons released from death rows between 1973 and 2000). It should be noted, however, that because of the difficulties in actually proving someone is completely innocent, lists of innocent persons released from death row

first twenty-three years after the state reinstated capital punishment, thirteen condemned inmates were cleared of capital murder charges while only twelve inmates were executed.<sup>230</sup> Several of the inmates in Illinois were cleared though the work of Northwestern University journalism students working under Professor David Protesse.<sup>231</sup> One of those inmates had been two days away from his execution when he received a stay, and then he was later exonerated when the journalism students persuaded the real killer to confess.<sup>232</sup>

Another university has done similar work. The Innocence Project at Cardozo School of Law in New York, run by Barry Scheck and Peter Neufeld, has led to the release of at least sixty-five people from prison by using DNA evidence.<sup>233</sup> As of 2000, at least nine former death row inmates have been exonerated through the use of DNA testing.<sup>234</sup> Although the use of DNA evidence has shown a large number of errors in criminal cases, as of 2000, only two states—New York and Illinois—had laws providing inmates with access to the latest DNA tests.<sup>235</sup> By mid-2001, the number of states allowing post-conviction DNA testing grew to six.<sup>236</sup>

In November 1998, thirty of the people who are known to have been wrongly convicted and sentenced to death since 1972 gathered at the "National Conference on Wrongful Convictions

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have been criticized by some. One representative of a Texas-based victims' rights group argued that the list of innocent persons "is misleading because fewer than a third of the people on the list can be said to be factually innocent; the rest are categorized 'innocent' because a retrial or legal technicality voided their original conviction." John Aloysius Farrell, *Cry of "Innocent!" Trumps Moral Claim*, BOSTON GLOBE, Aug. 27, 2000, at F1.

230. Carl M. Cannon, *The Problem with the Chair: A Conservative Case Against Capital Punishment*, NAT'L REV., June 19, 2000, at 29.

231. See *id.* at 30.

232. Jeff Jacoby, *Supporters of Capital Punishment Can Cheer Gov. Ryan's Decision*, BOSTON GLOBE, Feb. 28, 2000, at A15.

233. *Dead Man Walking Out*, *supra* note 229, at 21. The lawyers recently published a book about their work. See DWYER ET AL., ACTUAL INNOCENCE (1999).

234. Jackie Hallifax, *Dead Inmate Cleared by DNA Tests*, WASH. POST, Dec. 15, 2000, at A16 (discussing DNA evidence that exonerated Frank Lee Smith, who died while on Florida's death row, where he had been for fourteen years).

235. See Jonathan Alter & Mark Miller, *A Life or Death Gamble*, NEWSWEEK, May 29, 2000, at 22.

236. See Christina Nuckols, *Gilmore Signs Bill Opening DNA Window*, VIRGINIAN-PILOT (Norfolk, Va.), May 3, 2001, at A1. The six states are California, Illinois, Maryland, New York, Texas and Virginia. *Id.*



and the Death Penalty" at Northwestern Law School.<sup>237</sup> The conference garnered national attention, and many of the wrongfully condemned appeared on such shows as *Nightline*.<sup>238</sup>

In November 1999, the *Chicago Tribune* ran a series entitled, "The Failure of the Death Penalty in Illinois."<sup>239</sup> The series addressed the problems that arose in cases in which innocent defendants were sentenced to death in that state.<sup>240</sup> The series "examined each of the state's nearly three hundred capital cases and found that these trials were routinely riddled with bias and error, including incompetent legal work by the defense lawyers, and that prosecutors relied on dubious jailhouse informants in about fifty of the cases."<sup>241</sup>

Further, an execution in the state of then-presidential candidate George W. Bush raised concerns about executing the innocent. In June 2000, Gary Graham was executed in Texas for the murder of Bobby Lambert.<sup>242</sup> The execution took place without physical evidence and based upon one questionable eyewitness who was contradicted by others.<sup>243</sup>

Although the United States Supreme Court in *Herrera v. Collins*<sup>244</sup> concluded that it had limited constitutional power to review claims of innocence, concerns about innocent capital defendants have not gone unheard elsewhere. In Congress, Democratic Senator Patrick J. Leahy and three Republican senators co-sponsored the Innocence Protection Act, a federal bill

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237. See *A Gathering Momentum*, *supra* note 11, at 23. One newspaper article claimed that the Moratorium Movement began with this conference. Henry Weinstein, *Death Penalty Moratorium Attracting Unlikely Adherents*, L.A. TIMES, Oct. 17, 2000, at A5.

238. *Nightline: Dead Men Talking* (ABC television broadcast, Nov. 18, 1998).

239. See *A Gathering Momentum*, *supra* note 11, at 7.

240. See *id.*

241. Cannon, *supra* note 230, at 30.

242. See Jonathan Alter, *A Reckoning on Death Row*, NEWSWEEK, July 3, 2000, at 31.

243. See *id.*

244. 506 U.S. 390, 400-05 (1993). In *Herrera*, several Justices indicated that, without a separate constitutional violation, it may not violate the Constitution to execute innocent inmates. For example, the Plurality noted, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.* at 400. In a concurring opinion, Justice Scalia stated: "There is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." *Id.* at 427-28 (Scalia, J., concurring).

that, if passed, would attempt to provide competent counsel to capital defendants and provide access to DNA testing for federal inmates.<sup>245</sup> The Act would encourage states to do the same.<sup>246</sup>

Concerns about executing the innocent have long been a part of the capital punishment debate,<sup>247</sup> but the above recent events and new DNA technology raised awareness about injustices in our current system.<sup>248</sup> Further, these recent events have been the keystone of the rising conservative support for a moratorium on executions. As a columnist in the conservative *National Review* recently wrote: "The right question to ask is not whether capital punishment is an appropriate—or a moral—response to murders. It is whether the government should be in the business of executing people convicted of murder knowing to a certainty that some of them are innocent."<sup>249</sup> As discussed in the next section, this concern about executing the innocent—and the work of the Northwestern University

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245. See Kim Cobb, *Doubts About Capital Punishment Growing; Fear of Executing Innocent Spurs Calls for Moratoriums*, HOUSTON CHRONICLE, June 12, 2000, at A1; Brooke A. Masters, *Executions Decrease for the 2nd Year*, WASH. POST, Sept. 6, 2001, at A01; Sean Scully, *Senators Seek Greater Safeguards in Capital Cases*, WASH. TIMES, June 8, 2000, at A6.

246. See Scully, *supra* note 245, at A6.

247. Concern about executing innocent persons "was expressed at least as early as the 1820s by reformer Edward Livingston, and throughout the nineteenth and twentieth centuries by such critics as Charles C. Burleigh, Horace Greeley, William Howells, and Sing-Sing warden Lewis Lawes, as well as by the American League to Abolish Capital Punishment." HAINES, *supra* note 2, at 87 (citation and footnote omitted).

248. For a further discussion of the impact of DNA testing on the Death Penalty Moratorium Movement, see Tabak, *supra* note 207, at 733–39.

249. Cannon, *supra* note 230, at 29. The author explained "that conservatives need to ignore their impulse that anything the liberal establishment approves of, they must oppose." *Id.* at 32.

Of course, not all columnists agree about the need for a moratorium. Another article from the *National Review*—this one by the chief policy counsel of the Washington Legal Foundation—disagreed with the argument about the innocent being executed:

For one thing, the innocence argument is just plain bogus. Innocent people are not being put to death. Can anyone guarantee that an innocent execution could never happen or that it has never happened? Of course not. But the death penalty is as close to a sure bet as you're going to get anywhere in the law. While imperfect, the system bends over backward to ensure the guilt of those executed, and people can be more certain about capital punishment than most else in life.

Robert Pambianco, *Alter Falters: When Debating Capital Punishment, Innocence Is Not the Issue*, NAT'L REV., July 3, 2000.

journalism students—would provide a conservative Republican governor with the political capital to follow the ABA's suggestion and impose a moratorium on executions.

*E. 2000: Republican Governor Ryan Imposes a Moratorium on Executions in Illinois, and Other Local Jurisdictions Pass Moratorium Resolutions*

The single event that established the Moratorium Movement as a significant movement occurred in 2000 when Illinois Governor George Ryan imposed a moratorium on executions in his state. Before that action in Illinois, however, Nebraska came close to being the first death penalty state to officially impose a moratorium on executions.

A few years after the ABA passed the moratorium resolution, the Nebraska Legislature became the first in the United States to vote for a moratorium since *Gregg* was decided.<sup>250</sup> In May 1999, the Nebraska legislature voted 27-21 for the bill, which would have imposed a two-year death penalty moratorium and required a study of the fairness of the capital punishment system.<sup>251</sup> The prime sponsor of the moratorium was Senator Kermit Brashear, a Republican who favors the death penalty but is concerned about the fairness of the legal process.<sup>252</sup> The victory for the moratorium movement was short-lived; a few days later Nebraska Governor Mike Johanns vetoed the proposed bill.<sup>253</sup> Still, the legislative vote had national importance by giving momentum to the Moratorium Movement.

Subsequently, the Nebraska legislature unanimously overrode the portion of the veto that dealt with the study of the death penalty.<sup>254</sup> The study examined each of the approximately fifteen hundred Nebraska criminal homicide cases since

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250. See Robynn Tysver, *Execution Suspension Approved; Senators Hand Johanns Life-and-Death Decision*, OMAHA WORLD-HERALD (Neb.), May 20, 1999, at 1.

251. *Id.*

252. Henry Weinstein, *Nebraska Governor Vetoes Moratorium on Executions; Legislation: He Rejects Plea from Pope, Saying the Measure Would Only Cause More Pain for Victims' Families. Legislature Sets Override Vote for Today*, L.A. TIMES, May 27, 1999, at A4.

253. See Robynn Tysver, *Moratorium Vetoed: Death Penalty Timeout is Poor Policy, Johanns Says*, OMAHA WORLD-HERALD (Neb.), May 26, 1999, at 1.

254. *A Gathering Momentum*, *supra* note 11, at 9.

1973 to determine whether in each case, race, gender, religious preference, or economic status of the victim or defendant played a role in the decision to seek a death sentence.<sup>255</sup> The study also examined the qualifications of defense counsel in those cases.<sup>256</sup>

The Nebraska study, released on August 1, 2001, did not clearly find racial bias in the system, but the study found "that criminals are nearly four times as likely to receive the death penalty if they murder someone who is relatively well-off financially instead of someone who is poor."<sup>257</sup> The author of the report, David Baldus, stated that the report showed inconsistencies in the twenty-seven post-*Furman* death sentences given in Nebraska but the inconsistency was less than in other states.<sup>258</sup>

While Nebraska was debating a death penalty moratorium, people in Illinois were becoming concerned about the large number of innocent defendants who had been released from death row in that state, as discussed in the previous section.<sup>259</sup> In March 1999, the Illinois House of Representatives passed a nonbinding moratorium bill.<sup>260</sup> Along with the legislature, the Illinois Supreme Court and governor began studies on the death penalty.<sup>261</sup>

Then, on January 31, 2000, Illinois's Republican Governor George Ryan ordered a moratorium on executions in that state and called for a special panel to study the state's death penalty system.<sup>262</sup> This action by Governor Ryan, although largely a result of the four events discussed above, probably is the most important event in the Moratorium Movement.<sup>263</sup> Governor

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255. *Id.*

256. *Id.*

257. Robynn Tysver, *Death Penalty Report Author Fires Back*, OMAHA WORLD-HERALD (Neb.), Aug. 8, 2001, at 1; see also Judith Graham, *Study: Nebraska is Fair in Giving Death Penalty*, CHI. TRIB., Aug. 2, 2001, at N11. The study also found that prosecutors in urban areas were more likely to seek the death penalty than prosecutors in suburban and rural areas. *Id.*

258. Tysver, *supra* note 257, at 1.

259. See *supra* Part II.D.

260. Weinstein, *supra* note 252, at A4.

261. See *id.*

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

263. See, e.g., William Claiborne and Paul Duggan, *Spotlight on Death Penalty; Illinois Ban Ignites a National Debate*, WASH. POST, June 18, 2000, at A1 ("When Gov. George Ryan (R) announced on Jan. 31 that he was imposing a moratorium on executions in Illinois, little did he know he was igniting a national debate on capital punishment unsurpassed in intensity since the United States

Ryan's action was especially significant because he was a Republican and—unlike actions such as Oregon Governor Robert D. Holmes' policy in the 1950s of commuting all death sentences<sup>264</sup> or liberal New Mexico Governor Toney Anaya's 1986 commutation of all five inmates on New Mexico's death row<sup>265</sup>—Governor Ryan's position was not based on a moral opposition to the death penalty but rather on concerns about systemic problems. Perhaps because of Governor Ryan's conservative credentials and because of an increasing awareness about the problems with the death penalty system, sixty-six percent of Illinois residents approved of his action to impose a moratorium.<sup>266</sup>

The Illinois moratorium energized the Moratorium Movement.<sup>267</sup> In addition to Illinois and Nebraska, by early 2000, there were at least fifteen other states that were considering abolition, a death penalty moratorium, or studying their death penalty laws.<sup>268</sup> By July 2001, "bills specifically calling for a

Supreme Court allowed reinstatement of the death penalty in 1976."); Alter & Miller, *supra* note 235, at 24 ("There are signs the climate may be changing. . . . The turning point may have come in January, when GOP Gov. George Ryan of Illinois imposed a moratorium on executions after 13 inmates—one of whom came within two days of being executed—were proved innocent.").

264. See BEDAU, *supra* note 59, at 129–30. After giving commutations to the three death sentences to come before him, Governor Holmes was defeated in his bid for reelection in 1958, and an anti-capital punishment referendum lost by a small margin. See *id.* at 157.

265. James Coates, *A Governor's Fit of Conscience Over An Unconscionable Crime*, CHI. TRIB., Dec. 7, 1986, at 3. Governor Anaya, who was already unpopular as his term was coming to an end, was criticized for his commutation decision. See *id.* Similarly, as Ohio Governor Richard Celeste was preparing to leave office in 1991, he commuted the sentences of eight death row inmates. Mary Beth Lane, *Celeste Commutes Eight Death Sentences*, PLAIN DEALER (Cleveland), Jan. 11, 1991, available at 1991 WL 4491953. Governor Celeste's commutations were upheld in *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369 (Ohio 1994). Perhaps because of the timing of these commutations or perhaps because these governors were Democrats, the actions were severely criticized and did not have the credibility that Governor Ryan's action has had, though it has also been criticized by some. See Lane, *supra*.

266. See John Harwood, *Bush May Be Hurt by Handling of Death-Penalty Issue*, WALL ST. J., Mar. 21, 2000, at A28.

267. See *Illinois Execution Ban May Spread; Death Penalty Foes Seek Wider Reforms*, CINCINNATI POST (Ohio), Feb. 2, 2000, at 2A.

268. These states included: Connecticut, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, and South Dakota. Richard Carelli, *Lawyers See Shift Against Death Penalty: ABA Takes No Position, But Wants to Ensure Safeguards and Legal Support for Defendants*, STAR-LEDGER (Newark, N.J.), Feb. 13, 2000, at 43. States that have started studies of whether the death penalty is

moratorium [were] introduced in 17 states, and legislation to address death penalty-related concerns raised in the ABA moratorium resolution [were] introduced in 37 of the 38 states that authorized capital punishment."<sup>269</sup>

At least two states came close to passing moratorium resolutions. In early 2001, the Nevada State Senate passed a bill requiring a two year moratorium on executions, but the bill died for the session in the Assembly Judiciary Committee during May 2001.<sup>270</sup> In early 2001, a moratorium bill almost passed in Maryland.<sup>271</sup>

Additionally, several organizations and communities have called for a moratorium on executions. Although these resolutions do not change the laws, they do put pressure on the state legislatures. From 1999 to 2001, in Virginia, several municipalities and organizations passed resolutions calling for a moratorium on executions.<sup>272</sup> Similarly, in the last few years, several communities in North Carolina have adopted moratorium resolutions.<sup>273</sup>

administered fairly include: Arizona, Illinois, Indiana, Nebraska and North Carolina. Henry Weinstein, *Death Penalty Moratorium Attracting Unlikely Adherents*, L.A. TIMES, Oct. 17, 2000, at A5. For example, a Maryland study is examining racial bias in the system and Indiana experts are reviewing that state's death penalty procedures. Claudia Kolker, *Death Penalty Moratorium Idea Attracts Even Conservatives*, L.A. TIMES, Aug. 29, 2000, at A5.

269. *Toward Greater Awareness*, *supra* note 209, at 5. For a more detailed listing of death penalty-related legislation in all states, see *id.* at Appendix D.

270. Ed Vogel, *Assembly Committee Rejects Two-Year Suspension of Death Penalty*, LAS VEGAS REV. J., May 17, 2001, at 1A.

271. *Toward Greater Awareness*, *supra* note 209, at 5.

272. The City Council of Charlottesville, the Charlottesville-Albemarle Bar Association, and the Virginia College of Criminal Defense Attorneys passed resolutions calling for a moratorium on executions. Frank Green, *Executions Moratorium Urged*, RICHMOND TIMES-DISPATCH (Va.), Feb. 2, 2000, at B4. Also in Virginia, in early 2001, the Lexington City Council and the Town Council of Blacksburg passed moratorium resolutions. Laurence Hammack and Tom Angleberger, *Blacksburg Signs On to Fight Death Penalty; Town Council to Urge Va. to Stop Executions*, ROANOKE TIMES & WORLD NEWS (Va.), Apr. 26, 2001, at A1. Thus, at least three localities have passed moratorium resolutions in Virginia, even though that state is second in the country behind Texas in the number of people executed since *Furman*. See *id.*

273. The North Carolina governments that have passed such resolutions include Orange County and the towns of Carrboro, Chapel Hill, Durham, and Greensboro. See *A Gathering Momentum*, *supra* note 11, at 24; see also Weinstein, *supra* note 268; *Death Penalty Math Seems Fuzzy*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 27, 2001, at B3. Additionally, the North Carolina Democratic Party passed a resolution at its state convention calling for a moratorium on capital punishment. Amy Gardner, *Democrats Call for Death-Penalty Pause*, NEWS & OBSERVER (Raleigh, N.C.), June 21, 2000, at A3.

A number of major cities have passed moratorium resolutions. On February 10, 2000, the Philadelphia City Council adopted a resolution asking the Pennsylvania legislature to pass a death penalty moratorium bill.<sup>274</sup> On March 20, 2000, the City of Atlanta adopted a resolution supporting a moratorium on executions.<sup>275</sup> Between January 2000 and January 2002, at least sixty local jurisdictions in at least eighteen states, including Baltimore and San Francisco, adopted resolutions in favor of a moratorium on executions.<sup>276</sup>

The moratorium trend was not limited to local governments. On January 31, 2001, exactly one year after Governor Ryan imposed the Illinois moratorium, Wisconsin Senator Russ Feingold introduced legislation in the United States Senate that would impose a moratorium on federal executions and urge states to impose their own moratoriums.<sup>277</sup>

Meanwhile, at the time the Illinois moratorium was announced, the head of the New Hampshire legislative committee considering a bill to abolish the death penalty in that state predicted the bill would die in committee.<sup>278</sup> However, perhaps because of the moratorium momentum inspired by the Illinois action, the bill got past the committee stage, and the New Hampshire legislature passed the bill to abolish the death penalty.<sup>279</sup> Although the governor of New Hampshire later vetoed the bill, it was the first legislative vote to abolish the death penalty since *Gregg v. Georgia* was decided in 1976.<sup>280</sup> In addition to the Illinois moratorium and the various studies, the New Hampshire vote illustrates the growing questions about

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274. See William Claiborne, *Philadelphia City Council Backs Halt of Executions*, WASH. POST, Feb. 11, 2000, at A02. The council voted 12-4 in favor of the moratorium resolution, making Philadelphia the eighth and largest municipality to vote for a moratorium. See *id.*

275. Schwartzman, *supra* note 208.

276. See *Toward Greater Awareness*, *supra* note 209, at App. B; Martin Dyckman, *Death Penalty Moratorium Has Victory*, ST. PETERSBURG TIMES, Jan. 13, 2002, at 3D.

277. Jill Zuckman, *Feingold Launches Bill to Halt Federal Death Penalty*, CHI. TRIB., Feb. 1, 2001, at N3. As of July 2001, resolution of the bill was still pending. David E. Rovella, *McVeigh is Gone, and Already Forgotten*, NAT'L LAW J., July 2, 2001, at A1.

278. See Associated Press, *5 States Consider Ban on Executions*, THE GAZETTE, Feb. 1, 2000, at A6.

279. See *The New Death Penalty Politics*, N.Y. TIMES, June 7, 2000, at A30.

280. See *id.*

the necessity and the fairness of the death penalty in the United States in the twenty-first century.<sup>281</sup>

*F. Other Significant Events Contribute to the Moratorium Movement*

As noted earlier, in addition to the five events discussed above, seven other events have added fuel to the Moratorium Movement: (1) media attention on individual cases, such as those of Mumia Abu-Jamal, Gary Graham and Karla Faye Tucker; (2) politicians and conservative commentators coming out in favor of a moratorium; (3) Governor George W. Bush of Texas, the state that executes at the fastest rate in the country, becoming the Republican presidential candidate; (4) studies regarding errors in capital cases and innocent persons sentenced to death; (5) a decrease in the nation's crime rate; (6) many states adding the alternative punishment of life without the possibility of parole; and (7) growing international pressure to abolish the death penalty.<sup>282</sup> These events are discussed below.

1. High-Profile Individual Capital Defendants  
Illustrate Problems with the Death Penalty

Uncontrollable events outside the political process may affect the death penalty abolition movement: "The cause of abolition, for example, might be advanced by a series of murder cases in which it is suspected that an innocent person has been hanged; or it might be set back by one or more particularly heinous murders that arouse fears and disgust in the community."<sup>283</sup> This statement, concerning the abolition movement in Great Britain, is equally true in the United States, where the

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281. Also, in August 2001, the American Psychological Association passed a resolution calling on all jurisdictions in the United States to impose a moratorium on executions. *The Death Penalty in the United States: American Psychological Association Resolution*, at <http://www.apa.org/pi/deathpenalty.html>, (last visited Jan. 24, 2002).

282. In order of importance to the Moratorium Movement, I would rank the last seven events in the order they are listed here; however, the ranking of these events is open to debate. There is a stronger argument that the first five events discussed earlier are clearly the most important.

283. JAMES B. CHRISTOPH, CAPITAL PUNISHMENT AND BRITISH POLITICS 175 (1962).



public's perception of the death penalty has often been linked to individual faces on death row.

In the 1960s, as the death penalty abolition movement grew, the face of death row was, to many Americans, Caryl Chessman, a condemned writer at San Quentin who made many people question the necessity of the death penalty.<sup>284</sup> Questions about Chessman's guilt of the then-capital crime of kidnapping and the fairness of his trial turned his execution into a rallying cry for death penalty opponents, while at the same time politicizing the issue of the death penalty.<sup>285</sup> In the 1980s and early 1990s, when the pro-death penalty forces were strong, the media focused on mass-murderers like Theodore ("Ted") Bundy. Today, much of the media attention on death row has focused on the cases of more sympathetic figures like Mumia Abu-Jamal, whose sentence of death in Pennsylvania created a national movement on his behalf.<sup>286</sup>

Another death row inmate who changed many people's perception about the death penalty was Karla Faye Tucker, who was executed in Texas in February 1998 despite evidence she had been rehabilitated, had become religious, and was a changed person.<sup>287</sup> Her execution received international attention, and as one person noted, "She put a human face on the inmates of death row."<sup>288</sup> As discussed throughout this Article, a significant feature of the Moratorium Movement is the inclusion of conservatives. The execution of the rehabilitated Ms.

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284. See David Lightman, *Bush Confronts Tough Call on Executions*, HARTFORD COURANT, June 2, 2000, at A1.

Spurred by cases like that of Caryl Chessman, who wrote books while awaiting the gas chamber and got eight stays of execution before being put to death in 1960, as well as legal rulings expanding the rights of defendants, the Gallup Poll found that in May 1966, only 42 percent favored the death penalty while 47 percent were opposed.

*Id.*

285. See Tony Perry, *Stories that Shaped the Century: From the Pages of the Los Angeles Times: Effects of Chessman's Execution in 1960 Live On*, L.A. TIMES, Nov. 12, 1999, at B4.

286. See *infra* note 532. On December 18, 2001, the United States District Court for the Eastern District of Pennsylvania ordered a new capital sentencing hearing in Mr. Jamal's case because the jury instructions regarding sentencing violated the constitution. *Mumia Abu-Jamal v. Horn*, No. CIV. A. 99-5089, 2001 WL 1609690, at 130-31 (E.D. Dec. 18, 2001). The court denied the other claims raised by Mr. Jamal's petition for a writ of habeas corpus. *Id.*

287. See Bruce Tomaso & Christy Hoppe, *Tucker Execution Case Expected to Have a Lasting Legacy*, DALLAS MORNING NEWS, Feb. 5, 1998, at 12A.

288. *Id.* (quoting a spokesperson for Amnesty International).

Tucker made religious conservatives question the necessity of the death penalty. Even Reverend Jerry Falwell, who supports the death penalty, argued that Ms. Tucker should not have been executed.<sup>289</sup> Following her execution, "the influential evangelical magazine *Christianity Today* reversed its historical support for capital punishment in an editorial that declared 'the death penalty has outlived its usefulness.'"<sup>290</sup>

More recently, Gary Graham was executed in Texas despite questions about his guilt.<sup>291</sup> The case received added attention because, as discussed below, the Governor of Texas was running for President of the United States. The face of Gary Graham came to represent the faces of the innocent who may have been wrongfully executed in modern times.

These defendants, like Caryl Chessman, have put a different face on the death penalty. In the 1970s, the capital punishment poster boy was the tough-guy persona of Gary Gilmore,<sup>292</sup> and in the 1980s and early 1990s it was the apparent "intelligent" evil of Ted Bundy<sup>293</sup> and the evil clown persona of John Wayne Gacy.<sup>294</sup> The late 1990s brought new faces that

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289. Larry Witham, *Faiths Vary Widely on Execution*, WASH. TIMES, Feb. 7, 1998, at B8. Although rare, Ms. Tucker was not the only recently condemned inmate to receive support from a conservative. In the late 1980s, conservative columnist James J. Kilpatrick opposed the scheduled execution of Joe Giarratano. See HAINES, *supra* note 2, at 129. Mr. Giarratano received clemency from Virginia Governor Douglas Wilder after an extensive public relations campaign by Mr. Giarratano's supporters. See *id.* The Giarratano case shows the importance of public support surrounding a sympathetic inmate. Evidence of Giarratano's innocence and redemption made people aware of the problems in Virginia's courts and likely affected support for the death penalty overall in Virginia. See *id.* at 130.

290. David Gibson, *Religions Rethinking the Death Penalty*, RECORD (Bergen Co., NJ), Aug. 8, 1999, at A01.

291. See Alter, *supra* note 242, at 31. Another side effect of the Gary Graham case was that the case inspired Susan Sarandon to contact Sister Helen Prejean, leading to the making of the movie version of *Dead Man Walking*. See Craig Pittman, "Dead Man Walking" Brings Nun's Crusade to Screen, STAR TRIBUNE (Minneapolis), Jan. 19, 1996, at E1. Thus, without the media focus on Gary Graham's case, there may never have been a movie version of *Dead Man Walking*.

292. See generally MIKAL GILMORE, SHOT IN THE HEART (1994).

293. See DAVID VON DREHLE, AMONG THE LOWEST OF THE DEAD: INSIDE DEATH ROW, 283-303, 345-73 (1995). "Bundy was such a powerful symbol that he lived beyond his physical death as a postmodern, suburban Lucifer. He became the quintessential killer in dozens of books, magazine articles, and newspaper stories." *Id.* at 372.

294. See, e.g., Philip R. Wiese, *Popcorn and Primetime vs. Protocol: An Examination of the Televised Execution Issue*, 23 OHIO N.U. L. REV. 257, 296 n.141 (1996) (noting the support for the May 10, 1994 execution of John Wayne Gacy).

made the public question who we were executing—or in the case of the innocent released from death row, the near-execution of the innocent. Some sympathetic defendants who had been executed prior to the late 1990s had received media coverage. Yet, few people probably remember the names of people like Roger Coleman, who was executed because his lawyers filed a petition one day late and waived his considerable issues of innocence.<sup>295</sup> Similarly, few probably remember Wilbert Evans, who was executed in 1990 as a “future danger” even though he had protected the lives of several hostages during a prison uprising led by other inmates.<sup>296</sup> The question remains whether Ms. Tucker and Mr. Graham, like Mr. Coleman and Mr. Evans, soon will be forgotten or whether their legacy will be more lasting.

By contrast, the execution of notorious unsympathetic defendants will have the opposite effect on the Moratorium Movement. For example, the June 11, 2001 execution of Timothy McVeigh, the “Oklahoma City Bomber,”<sup>297</sup> set back the Moratorium Movement. McVeigh’s was the first post-*Furman* federal execution, and it highlighted the horrible crime and

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295. See *Coleman v. Thompson*, 501 U.S. 722 (1991) (holding that issues were procedurally defaulted and the federal courts would not hear those issues in a petition for writ of habeas corpus because Coleman’s attorney filed his post-conviction appeal late). Interestingly, the Supreme Court’s opinion states that the petition was filed three days late, but the Court was counting weekend days when filings are not accepted in Virginia. See *id.* at 727; see also JOHN C. TUCKER, *MAY GOD HAVE MERCY: A TRUE STORY OF CRIME AND PUNISHMENT* 114–15 (1997).

Roger Coleman’s case was featured on *Larry King Live*, *Nightline*, *Good Morning America*, the *Today* show, and *PrimeTime Live*. *Id.* at 272, 288–89. Additionally, his case was featured in *Newsweek* and on the cover of *Time* magazine, and a book was written about his case. See *id.* at 273, 276–77.

Yet, perhaps partly because of the time that has passed, few people probably remember the case. His case never captured the public consciousness the way that Ted Bundy’s case did in the late 1980s or the way Karla Faye Tucker’s case did in the late 1990s.

296. See *Evans v. Muncy*, 498 U.S. 927, 927 (1990) (Marshall, J., dissenting). At Evans’ trial, the sentencing jury found the aggravating factor of “future dangerousness,” a finding that permitted the jury to sentence him to death. *Id.* Justice Marshall noted, “According to uncontested affidavits presented by guards taken hostage during the uprising, Evans took decisive steps to calm the riot, saving the lives of several hostages, and preventing the rape of one of the nurses.” *Id.* at 928; see also Kirchmeier, *Aggravating and Mitigating Circumstances*, *supra* note 77, at 372–74; Stuart Taylor, Jr., *We Will Kill You Anyway*, *AM. LAW.*, Dec. 1990, at 54.

297. Richard A. Serrano, *McVeigh Called Model Prisoner*, *L.A. TIMES*, Oct. 18, 2001, at A1.

large number of victims. Somewhat surprisingly, even the McVeigh case had some positive effects on the Moratorium Movement by promoting discussion of the death penalty and by highlighting some problems with the system. After the discovery that the government improperly withheld from Mr. McVeigh's lawyers more than 3,000 pages of FBI materials, several commentators and major newspapers were critical of the death penalty. For example, a *Washington Post* editorial noted: "[I]f this type of error could happen even in this case, which has been under the closest of public scrutiny since the moment the bomb went off, think what must happen in countless cases—particularly at the state level—in which nobody is watching carefully."<sup>298</sup>

While the execution of Mr. McVeigh probably damaged the Moratorium Movement somewhat, it does not appear to have seriously slowed down the movement. Although the overall effect of the McVeigh execution was to create a poster boy for the pro-death penalty movement, part of the legacy of the case must lie (1) in the problem that what initially appeared to be a perfect prosecution the government withheld documents; and (2) in the effects from some relatives of victims of the horrendous crime who became outspoken opponents of the death penalty and McVeigh's execution.<sup>299</sup> Thus, the examination of individual capital defendants continues to highlight problems with the death penalty and supply fuel to the Moratorium Movement.

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298. *Even in This Case*, WASH. POST, May 12, 2001, at A24. A *New York Times* editorial made a similar argument: "[T]his episode has exposed yet another imperfection in the justice system that calls into question this nation's reliance on the death penalty." *The F.B.I's Lost Files*, N.Y. TIMES, May 12, 2001, at A14. A *USA Today* editorial noted, "If the federal government can't prosecute a slam-dunk case without making potentially prejudicial mistakes, imagine what's happening in the states, where capital crimes are tried by less-skilled lawyers with fewer resources." *McVeigh Errors Raise Doubts About Other Capital Cases; Our View: FBI Blunders Spotlight How Often Death-Penalty Cases Are Flawed*, USA TODAY, May 16, 2001, at 14A.

299. See, e.g., Jeff Goodell, *Letting Go of McVeigh*, N.Y. TIMES MAG., May 13, 2001, at 40–44. The article discusses Rosemary Koelsch, Patrick Reeder, Bud Welch and Kathy Wilburn, who lost loved ones in the Oklahoma City bombing and who oppose the execution of Timothy McVeigh. See *id.*

## 2. Politicians, Conservatives and Others Begin to Speak Out Against the Death Penalty

In 1996 in *Against Capital Punishment*, Professor Haines advised, "If anti-death penalty activists are to begin chipping away at the increasingly entrenched practice of putting convicted murderers to death, . . . [t]hey must gain at least certain minimum levels of support and participation from sectors of American society that have heretofore either supported capital punishment or have been apathetic about it."<sup>300</sup> In a relatively short period of time, his recommendation has come true, as a common refrain at the beginning of recent editorials calling for a moratorium is something like: "I have been an outspoken supporter of the death penalty throughout my adult life."<sup>301</sup>

In addition to Reverend Jerry Falwell taking the position that Karla Faye Tucker should not be executed,<sup>302</sup> other unexpected voices raised concerns about the death penalty in recent years. Conservative journalists like George Will<sup>303</sup> and Bill O'Reilly<sup>304</sup> recently questioned the death penalty.<sup>305</sup> Also, Reverend Pat Robertson, a death penalty supporter, has advocated for a moratorium on executions.<sup>306</sup>

300. HAINES, *supra* note 2, at 158.

301. Sam D. Millsap, Jr., *Your Turn: Until the System is Fixed, Executions Must Stop*, EXPRESS-NEWS (San Antonio), June 29, 2000, at 5B.

302. Larry Witham, *Faiths Vary Widely on Execution*, WASH. TIMES, Feb. 7, 1998, at B8. Note, however, that despite Rev. Falwell's concern about the death penalty in that case, he has disagreed with other conservative Protestant figures who have called for a moratorium. See Frank Green, *Falwell Opposes a Moratorium*, RICHMOND TIMES-DISPATCH (Va.), Apr. 11, 2000, at B4.

303. In discussing a new book on the death penalty—Dwyer et al., *supra* note 233—George Will stated: "Conservatives, especially, should draw this lesson from the book: Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order." George F. Will, *Innocent on Death Row*, WASH. POST, Apr. 6, 2000, at A23.

304. See Bill O'Reilly, *Commentary: Worse Than the Death Penalty*, 2000 APBnews.com, June 8, 2000. Mr. O'Reilly argued that individuals convicted of serious crimes should be sent to work camps in Alaska, but "[t]he death penalty is not stopping the violence—it is only creating a huge mosaic of court appeals, non-stop litigation, and social injustice." *Id.* See Evan Thomas, *Life of O'Reilly*, NEWSWEEK, Feb. 12, 2001, at 29.

305. See Alter, *supra* note 242, at 31 ("Like most people, I'm a hard-liner on crime. . . . But nowadays I'm a moratorium man, cast adrift on the issue along with many other Americans.").

306. See Brooke A. Masters, *Pat Robertson Urges Moratorium on U.S. Executions*, WASH. POST, Apr. 8, 2000, at A1 (noting that Robertson said that "a moratorium would indeed be very appropriate"); *Robertson Backs Moratorium: Says Death Penalty Used Unfairly*, CHI. TRIB., Apr. 8, 2000, at N12. Pat Robert-

Similarly, in addition to the judges discussed above, politicians have spoken out against the death penalty, perhaps because they no longer fear the political repercussions once thought to accompany an opposition to the death penalty.<sup>307</sup> For example, as discussed above, several legislators in various states supported moratorium bills.<sup>308</sup> In Maryland, two prominent Baltimore political figures—Mayor Kurt L. Schmoke and Del. Howard P. Rawlings—took out an ad in the *Baltimore Sun* in May 2000 to urge Maryland Governor Parris N. Glendening to impose a moratorium on the death penalty in that state “[b]ecause of all the uncertainties revealed about the implementation of the death penalty.”<sup>309</sup> In Virginia, a conservative Republican in the state legislature who once supported a bill to resume public hangings, recently introduced a bill to abolish the death penalty.<sup>310</sup> In New Hampshire, state Rep. Loren Jean, a former deputy sheriff who had been in favor of the death penalty, co-sponsored a bill to repeal the death penalty in that state.<sup>311</sup>

Like Representative Jean, other current and former law enforcement officers have spoken out against the death pen-

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son previously had spoken out against the execution of Karla Faye Tucker. See Larry Witham, *Faiths Vary Widely on Execution*, WASH. TIMES, Feb. 7, 1998, at B8. Further, following Ms. Tucker's execution, “the influential evangelical magazine *Christianity Today* reversed its historical support for capital punishment in an editorial that declared ‘the death penalty has outlived its usefulness.’” Gibson, *supra* note 290, at A01.

307. “The public's hysteria over crime reached a peak during the 1988 election. The Republicans sensed that Michael Dukakis's opposition to the death penalty was a weakness, and George Bush, Sr., then vice-president, brought it up often in debates. The strategy worked.” *Dead Man Walking Out*, *supra* note 229, at 23. See generally Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995) (discussing the political pressure in capital cases); David Yepsen, *Democrats and Death Penalty*, DES MOINES REG., Feb. 10, 1997, at 7 (stating that the death penalty issue has been used in political campaigns to defeat those against the death penalty).

308. See *supra* Part II.E.

309. Thomas W. Waldron, *Rawlings, Schmoke Call for a Moratorium on State Executions; Noting ‘Uncertainties,’ They Appeal to Glendening*, BALT. SUN, May 18, 2000, at 2B.

310. Craig Timberg, *A Death Penalty Change of Heart; Va. Lawmakers to Weigh Legislation to Stop, Stall or Study the System*, WASH. POST, Jan. 28, 2001, at C1. Lawmaker Frank D. Hargrove Sr.'s change of heart was due largely to a change in Virginia law that created the option of a sentence of life without the possibility of parole. See *id.*

311. *National Briefs: N.H. House Deals Blow to Death Penalty*, NEW ORLEANS TIMES-PICAYUNE, Mar. 11, 2000, at A9.

alty. In February 2000, a group of twenty-five former and current Missouri law enforcement officials took a position against the death penalty and identified more effective alternatives to capital punishment.<sup>312</sup> Another coalition, The National Committee to Prevent Wrongful Executions, was formed in 2000 by judges, former prosecutors, and victims advocates.<sup>313</sup> The coalition is studying how to prevent the execution of the innocent and is examining proposals such as instituting a national moratorium or imposing standards for defense counsel.<sup>314</sup>

An important symbolic gesture for the Moratorium Movement occurred in Texas, the state with the most executions since *Gregg*, when the prison that houses that state's death row, the Terrell Unit, changed its name in July 2001.<sup>315</sup> Charles Terrell, a former chairman of the Texas Department of Criminal Justice, asked that his name be removed from death row because the association made him uncomfortable due to

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312. Ted Sickinger, *Coalition Opposes Executions*, KANSAS CITY STAR, Feb. 14, 2000, at B1. The coalition asserted, "The death penalty may fascinate the media and the public, but it is truly peripheral to law enforcement's efforts to make this society safer." *Id.* The Missouri coalition included former Missouri Governor Joseph P. Teasdale, former Missouri Attorney General and United States Senator Thomas Eagleton, former Kansas City Mayor Charles Wheeler, former judge of the Missouri Court of Appeals Anthony Nugent, and former Assistant Attorney General of Missouri Bruce Houdek. *Id.*

313. See Brooke A. Masters, *Reforms in System of Capital Punishment are Urged; An Unusual Coalition Joins the Debate Over "Many Problems" in Meting Out the Death Penalty*, WASH. POST, May 12, 2000, at A31.

314. See *id.* Although many of the committee members support the death penalty, they are concerned about problems in how the punishment is imposed. See *id.* In June 2000, Sam D. Millsap, Jr., a former district attorney from San Antonio, Texas, announced in an editorial that he was joining the National Committee in calling for a moratorium. See Millsap, *supra* note 301, at 5B. Mr. Millsap, who explained that he had been a supporter of the death penalty all of his adult life, concluded, "Our system in Texas is broken. Until it is fixed and we are satisfied that only the guilty can be put to death, there should be no more executions in Texas." *Id.*

Also, conservative Oklahoma Governor Frank Keating, a former FBI agent who supports the death penalty, recently stated that the standard for imposing the death penalty should be raised to require a jury to be convinced to a "moral certainty" that the defendant should die. *Death Penalty: Improving Fairness in Application*, TULSA WORLD, June 26, 2001, at 10. Around the same time, soon after leaving office as St. Louis' circuit attorney, Dee Joyce-Hayes spoke out against the death penalty because she believes it does not deter crime. See Elizabeth Holland, *Joyce-Hayes Criticizes Use of Death Penalty*, ST. LOUIS POST-DISPATCH, July, 30, 2001, at C1.

315. Ed Timms, *Terrell Unit is Renamed*, DALLAS MORNING NEWS, July 21, 2001, at 32A.

concerns with the way that capital punishment is administered.<sup>316</sup>

In New York, several prosecutors were critical of the state's decision to bring back the death penalty in 1995. Manhattan District Attorney Robert M. Morgenthau stated, "The death penalty will be a 'major impediment to law enforcement, because of the cost, time spent and diversion of resources' away from the prosecution of other crimes."<sup>317</sup> Bronx District Attorney Robert T. Johnson expressed concern that innocent persons would be executed and that race would be a factor in determining who was executed.<sup>318</sup> Brooklyn District Attorney Charles Hynes also opposes the death penalty, although he sought more death sentences during the first two years of New York's new statute than any other prosecutor.<sup>319</sup> Several other New York prosecutors—many of whom support the death penalty—expressed concern about the role of politics in the use of the death penalty, the added economic cost of prosecuting capital cases, and whether the death penalty is a deterrent.<sup>320</sup> Similarly, San Francisco's District Attorney, Terrence Hallinan, has refused to seek the death penalty.<sup>321</sup>

In November 2000, former President Jimmy Carter, who as governor had signed Georgia's post-*Furman* death penalty statute into law in 1973, issued a statement advocating for a moratorium on executions.<sup>322</sup> In his statement, he expressed concern about the executions of "poor, minority, and mentally deficient accused persons in America."<sup>323</sup>

Death penalty foes have not necessarily suffered in recent elections. In November 2000, former University of Nebraska

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316. *See id.*

317. *See* Daniel Wise, *Prosecutors Want Death Penalty; Qualms Voiced About Costs, Time, Training of Lawyers*, N.Y. L.J., March 3, 1995, at 1.

318. *See id.*

319. LIFTON & MITCHELL, *supra* note 26, at 119–20. Apparently, Hynes believes he still should enforce the law if the punishment remains on the books. *See id.* The decisions to seek death have been difficult for him, but he explained, "I will be in a better position to continue my opposition to the death penalty by prosecuting a death penalty case." *Id.* at 120.

320. *See* Wise, *supra* note 317, at 1. Some upstate New York prosecutors did support the death penalty, and Delaware County District Attorney Paul F. Eaton claimed that the majority of voters in his jurisdiction believed that convicted murderers "should be fried." *Id.*

321. Steve Mills & Maurice Possley, *Death Penalty Debate Slowly Shifts; Executions Continue But Face More Scrutiny*, CHI. TRIB., Jan. 31, 2001, at N1.

322. Weinstein, *supra* note 237, at A5.

323. *Id.*



football coach Tom Osborne, who strongly opposes the death penalty, was elected to the United States Congress with eighty-two percent of the vote from his district, which covers the western four-fifths of Nebraska.<sup>324</sup> The successes during the November 2000 elections were not limited to popular former college football coaches, as Massachusetts state Representative Harold P. Naughton Jr., a former prosecutor, was reelected for a fourth term even though he had recently switched from being in favor of the death penalty to being against it.<sup>325</sup>

Thus, people throughout the capital punishment system—executives, judges, law enforcement personnel, prosecutors, and legislators—have spoken out against the use of the death penalty in recent years. Similarly, in October 2000, Ed Leyva, a former member of the Arizona Board of Executive Clemency who had denied clemency to several death row inmates, stated that he became opposed to capital punishment when he finally realized that the death penalty does not deter crime and “[l]ife is precious.”<sup>326</sup>

During this same time, other high-profile individuals have added their voice to attacks on the death penalty, lending added credibility to the death penalty critics. For example, musicians and actors like Harry Belafonte,<sup>327</sup> Steve Earle,<sup>328</sup> Mike Farrell,<sup>329</sup> Danny Glover,<sup>330</sup> Kenny Rogers,<sup>331</sup> Michelle Shocked,<sup>332</sup> and Bruce Springsteen,<sup>333</sup> have been outspoken

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324. *The 2000 Elections: Congress*, N.Y. TIMES, Nov. 9, 2000, at B10. Although the vote was most likely an endorsement of Rep. Osborne's coaching skills rather than his death penalty position, the death penalty issue did not prevent him from winning such a large number of votes.

325. See Karen Nugent, *Death Penalty Foes Aid Rep*, TELEGRAM & GAZETTE (Worcester, MA), Dec. 18, 2000, at B1.

326. David Rosenfeld, *Ex-Member of Clemency Board Alters Death View*, TRIBUNE (Mesa, AZ.), Oct. 29, 2000, at A5.

327. See Hugh Aynesworth, *Spotlight Expected at Texas Execution*, WASH. TIMES, May 7, 2000, at C1.

328. See Robert Hilburn, *Beyond Artistry: Steve Earle's Inspirational Comeback from the Lost Years of Drug Addiction Yields a Rare Musical Intimacy and a Poetic Legacy*, L.A. TIMES, Aug. 5, 2000, at F1. Steve Earle “not only campaigns against capital punishment, but also corresponds with death row inmates.” *Id.*

329. See Nadine Brozan, *Chronicle*, N.Y. TIMES, Aug. 22, 1994, at B4.

330. See Aynesworth, *supra* note 327, at C1.

331. See *id.*

332. See Fred Shuster, *Musicians Join Voices Against Death Penalty*, DAILY NEWS OF L.A., Mar. 25, 1998, at L5.

333. See Scott Martelle, *The Faithful Report for Duty to the Boss*, L.A. TIMES, May 22, 2000, at B3. “Long identified with populist politics, Springsteen,

against the death penalty. Jesse Ventura, a former professional wrestler and the current governor of Minnesota, is also opposed to the death penalty.<sup>334</sup>

Even a corporation embraced the death penalty issue. In 2000, the clothing company Benetton featured death row inmates and presented information about the death penalty in an advertising campaign for its clothes.<sup>335</sup> Although the company had a reputation for running controversial ad campaigns and received a lot of criticism for its death row campaign,<sup>336</sup> it was significant that a major corporation would attempt to foster discussion about the death penalty.

Another important voice against the death penalty that has grown louder in recent years is the voice of families of murder victims. For example, a group of relatives of murder victims joined with relatives of death row inmates in Virginia in April 2000 to call for a moratorium on executions.<sup>337</sup> The organization Murder Victims Families for Reconciliation (MVFR), an abolitionist organization of the families of murder victims that was formed in the 1970s, continues to speak out against the death penalty.<sup>338</sup> Throughout the 1990s, MVFR sponsored

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during this tour, has focused on such issues as the death penalty, which he opposes, and affirmative action, which he supports." *Id.*

334. See Bonnie Gunn, *Candidates Vary in Stances on Death Penalty*, U. WIRE (St. Louis), Oct. 11, 2000. Minnesota does not have the death penalty. BEDAU, *supra* note 59, at 9.

335. Stephanie Simon, *Benetton Sued Over Death Row Visits*, L.A. TIMES, Feb. 24, 2000, at A5.

336. *Id.* The advertising campaign led to Sears canceling a contract with Benetton and to Missouri suing the clothier. *Id.*

337. See Bob Piazza, *Opposing the Death Penalty; Relatives of Victims Join Call for Moratorium*, RICHMOND TIMES-DISPATCH (Va.), April 30, 2000, at B6.

338. See HAINES, *supra* note 2, at 109.

Some [members of MFVR] believe that every human life is sacred and that no matter what crime a person may have committed, it is possible for him or her to reform, to change. Some have even forgiven the person who murdered their loved one. Some don't reach that point. For many, opposition to the death penalty arises out of a desire to focus on their loved ones and not on the criminals who took their lives. The question isn't whether or not a killer deserves to die; rather, it is, what are we willing to do to ourselves as a society to kill that person? The answer, for MVFR members, is that it is not worth executing innocent people, wasting millions of dollars, and accepting an inherently unfair judicial process, just to kill someone—just to become that which our society claims to abhor.

Thomas K. Lowenstein, *Against Executions: Some Families of Murder Victims Are Repudiating the Death Penalty*, AM. PROSPECT, Aug. 28, 2000, at 41.

the Journey of Hope, which consisted of events focusing on the death penalty, in various states.<sup>339</sup> Antoinette Bosco, a member whose son and daughter-in-law were murdered, recently wrote the book *Choosing Mercy: A Mother of Murder Victims Pleads to End the Death Penalty*.<sup>340</sup> MVFR, which acts as a support group for relatives of people who were killed by a person or by the state, has three thousand members.<sup>341</sup>

Thus, the openness of several politicians, bi-partisan concern about the death penalty, and voices from unlikely quarters have added credibility to the Moratorium Movement. Certainly the Moratorium Movement cannot hope to convert all politicians because some—like the Florida State Senator who interpreted the cross-shaped bloodstain on an executed inmate's shirt as a sign that God blessed Florida's execution policy<sup>342</sup>—will never be converted. Yet, these new voices for a moratorium have forced mainstream America to pay attention to the problems with the death penalty in a way that liberal activists never could.

3. National Politics Focus on the Death Penalty as Texas Governor George W. Bush Becomes the Republican Candidate for President of the United States and the Federal Government Begins to Schedule Executions

The front line of the death penalty debate has often been in Texas, the state with by far the most executions since *Furman*—more than 130 executions while George W. Bush was governor.<sup>343</sup> Thus, when the Republicans nominated Texas Governor George W. Bush for president in the 2000 presidential campaign, Texas's death penalty record was a minor liability for then-Governor Bush, in contrast to the liability of Mi-

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339. See HAINES, *supra* note 2, at 110.

340. ANTOINETTE BOSCO, *CHOOSING MERCY: A MOTHER OF MURDER VICTIMS PLEADS TO END THE DEATH PENALTY* (2001).

341. See LIFTON & MITCHELL, *supra* note 26, at 210.

342. See *id.* at 60. Florida State Senator Ginny Brown-Waite witnessed the execution of Alvin "Tiny" Davis, where the inmate screamed and blots of blood appeared on his shirt. See *id.* at 59–60. She thought the bloodstain resembled a cross and meant either that Mr. Davis had made his peace with God or that God blessed Florida's execution policy. See *id.*

343. See Andrew Miga, *Kerry Faults Bush For High Number of Executions in Texas*, BOSTON HERALD, July 6, 2000, at 1.

chael Dukakis's anti-death penalty stance during the 1988 presidential campaign. Although it never became a major issue in the 2000 campaign, George W. Bush's death penalty record was discussed in the media and executions in his state received extra attention. As Governor Bush was running for president, *The Wall Street Journal* reported that the "national shift in the politics of capital punishment" had the possibility of creating "unexpected complications" for Governor Bush's presidential campaign.<sup>344</sup>

The execution of Gary Graham in Texas, as discussed above, added additional scrutiny to Bush's record, as did the execution of the mentally retarded Oliver Cruz in August 2000.<sup>345</sup> Among others, Senator John F. Kerry, a former prosecutor and a death penalty opponent, criticized the governor's record on the death penalty.<sup>346</sup> Republicans became concerned that the Texas executions might hurt Bush's attempts to market himself as a "compassionate conservative."<sup>347</sup>

The death penalty issue arose throughout Governor Bush's campaign. For example, in July 2000, the media reported that "[o]ne of Gov. George W. Bush's campaign events unexpectedly turned into a debate over the death penalty . . . when a black minister raised questions about the governor's compassion . . . ."<sup>348</sup> The death penalty issue arose during the presidential debates, and many criticized Governor Bush for smiling and appearing happy as he discussed the prospects of executing two capital defendants.<sup>349</sup> A few weeks before the election, Governor Bush appeared on *The Late Show With David Letterman*, and the show's host grilled the candidate about the

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344. John Harwood, *Bush May Be Hurt by Handling of Death-Penalty Issue*, WALL ST. J., Mar. 21, 2000, at A28.

345. See *Two Killers Executed About a Half-Hour Apart*, FORT WORTH STAR-TELEGRAM, Aug. 10, 2000, at 6. The day before Cruz's execution, Governor Bush, on the campaign trail in California, erroneously stated that Texas was among the several states that banned the execution of the mentally retarded. *Id.* In fact, when Texas considered a bill the previous year to ban the execution of mentally retarded defendants, Governor Bush opposed it. *Id.*

346. *Id.*

347. *Id.*

348. Alison Mitchell, *Bush Defends the Death Penalty to a Religious Audience*, N.Y. TIMES, July 15, 2000, at A8.

349. Lars-Erik Nelson, *Bush Shows Perfect Execution*, DAILY NEWS (N.Y.), Oct. 12, 2000, at 4. The author of the article noted that he favored the death penalty, but "Bush's death-penalty smirk marred a presidential debate that was about as combative as a game of pat-a-cake for most of its 90 minutes." *Id.*

death penalty, asking him to justify the high number of executions in Texas.<sup>350</sup>

The rate of scheduled executions in Texas dropped dramatically as election day approached. After averaging three executions a month, there were only three executions scheduled in Texas for the final two months before the election.<sup>351</sup> Although the Bush camp explained the drop as a coincidence, some critics wondered if there were a connection between the rate and the upcoming election.<sup>352</sup> Whatever the reason, the change "helped the Bush campaign by lowering the volume on the death penalty debate."<sup>353</sup>

Although the main death penalty focus was on Governor Bush, Vice-President Gore also faced questions about the death penalty. During the campaign, the media posed hypothetical questions about the death penalty. Gore, however, managed to avoid the issue in flesh and blood terms due to an action by President Clinton. On August 5, 2000, Juan Raul Garza was scheduled to be the first federal prisoner executed since *Furman* was decided, but President Clinton stayed the execution until clemency procedures could be written, thereby effectively insulating Vice-President Gore from the issue during the campaign.<sup>354</sup> Without a pending execution to raise the issue, Vice-President Gore did not have to address criticisms of the federal death penalty, such as claims that the federal death penalty is applied in a racially biased manner.<sup>355</sup> Thus, Vice-President Gore did not have to confront directly the fact that three-fourths of the 175 death penalty cases approved by President Clinton's Justice Department were against minority defendants,<sup>356</sup> which had led Attorney General Janet Reno to

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350. Yvonne Abraham, "Late Show" No Joke for Bush, BOSTON GLOBE, Oct. 20, 2000, at A28.

351. Richard Willing, *Texas Executions Slowed Just Before Elections*, USA TODAY, Sept. 8, 2000, at 6A. Four executions were scheduled for the twenty-eight days after the election. *Id.*

352. *See id.*

353. *Id.*

354. *See* Michael J. Sniffen, *Clinton Delays Killers Sentence*, DAYTON DAILY NEWS, Aug. 3, 2000, at 4A.

355. Michael Isikoff, *Race, Death and the Feds*, NEWSWEEK, July 3, 2000, at 30. In July 2000, during the campaign, seventeen of the twenty-one federal death row inmates were black or Hispanic. *Id.*

356. *Id.*

order a review of the racial disparity in federal death penalty prosecutions.<sup>357</sup>

Ralph Nader, who received a small percentage of the vote, did oppose the death penalty, and concerns about capital punishment were raised more in the 2000 election than in other recent presidential elections, where all of the candidates favored the punishment and it had not been an issue at all.<sup>358</sup> However, because the two main party candidates for president were in favor of the death penalty, the campaign did not create a genuine national debate on capital punishment. In the end, the biggest impact of the election may have been to indirectly lengthen the lives of some inmates on the federal and Texas death rows.

In addition to Mr. Garza's brush with the executioner's needle in 2000, in early 2001 another federal death row inmate, Timothy McVeigh, indicated that he wanted to give up his appeals and be executed.<sup>359</sup> Thus, as President Bush entered office in January 2001, the nation neared what would be its first federal executions since *Furman*, as first Mr. McVeigh and then Mr. Garza were executed in June 2001.<sup>360</sup> While some in the Moratorium Movement may see President Bush's election as a blow to the movement, his election has raised some awareness about the issue. Further, despite the damage to the Moratorium Movement caused by the first federal executions in over thirty years, perhaps executions under the Republican former Texas governor will be seen as further actions by an extreme death penalty advocate and have less mainstream legitimacy than an execution under a less conservative Democratic president. Certainly, some people in foreign countries

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357. Jacqueline Soteropoulos, *Ex-State Justice: Innocent Executed*, TAMPA TRIB., Feb. 12, 2000, at 1. Subsequently, President Clinton gave Mr. Garza a six-month reprieve to give the Justice Department time to complete the study. Henry Weinstein & Eric Lichtblau, *Clinton Stays Execution for Racial Study; Bias: Reprieve for Mexican American Inmate Allows for Look at Disparities in Federal Capital Cases*, L.A. TIMES, Dec. 8, 2000, at A1.

358. See Bill Walsh, *Gore Camp Showing Irritation at Nader Shadowing Their Man*, PLAIN DEALER (Cleveland), Aug. 27, 2000, at 25A.

359. *McVeigh Execution Could Come as Early as May, Officials Say: Meeting Survivors' Needs Called Factor*, HOUSTON CHRON., Jan. 13, 2001, at 5.

360. Raymond Bonner, *U.S. Executes a Second Killer in a Week*, N.Y. TIMES, June 20, 2001, at A12.

saw the execution of Timothy McVeigh as an extension of President Bush's pro-death penalty actions in Texas.<sup>361</sup>

#### 4. Studies on the Death Penalty Reveal Problems with the Criminal Justice System

Just as social science and statistics played a central role in the NAACP Legal Defense Fund's strategy for the 1960s Abolition Movement,<sup>362</sup> new studies have been important in the Moratorium Movement. In 1992, Professor Michael L. Radelet, Professor Hugo Adam Bedau, and Constance E. Putnam published *In Spite of Innocence: The Ordeal of 400 Americans Wrongly Convicted of Crimes Punishable by Death*.<sup>363</sup> The book, which was a culmination of many years of work by the authors, discusses the stories of more than four hundred innocent Americans who were convicted of capital crimes.

As the Moratorium Movement emerged, other studies also revealed problems with the death penalty. In recent years, the Death Penalty Information Center issued several reports focusing on death penalty issues such as race, innocence, and the effects of politics.<sup>364</sup> A 2000 report from Columbia University studied the reversal rates in 4,578 capital cases, discovering that post-conviction and appellate "courts found serious, reversible error in nearly seven of every ten of the thousands of capital sentences that were fully reviewed" during the period from 1973–95.<sup>365</sup> The report, which was extensively covered by the media, evaluated the reversal rate in each state with capi-

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361. See, e.g., *The World's View of Executions*, N.Y. TIMES, June 13, 2001, at A32.

362. See BOWERS, *supra* note 9, at 16.

363. MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: IN SPITE OF INNOCENCE: THE ORDEAL OF 400 AMERICANS WRONGLY CONVICTED OF CRIMES PUNISHABLE BY DEATH* (1992).

364. The reports are available at <http://www.deathpenaltyinfo.org/rpts.html> (last visited Nov. 16, 2001). These reports include: *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.* (Oct. 12, 1999), *The Death Penalty in Black & White: Who Lives, Who Dies, Who Decides* (June 4, 1998), *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent* (July 15, 1997), and *Killing for Votes: The Dangers of Politicizing the Death Penalty Process* (Oct. 18, 1996).

365. See James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973–1995*, (June 12, 2000), available at <http://justice.policy.net/jreport> (last visited Nov. 16, 2001). An abridged version of the report is available in James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839 (2000).

tal punishment, concluding that “[c]apital trials produce so many mistakes that it takes three judicial inspections to catch them—leaving grave doubt whether we *do* catch them all.”<sup>366</sup>

In considering one of the main arguments used to justify the death penalty, deterrence, the *New York Times* reported in 2000 that government statistics do not show that homicide rates were any higher in the twelve states without the death penalty than in death penalty states.<sup>367</sup> “In a state-by-state analysis, *The Times* found that during the last 20 years, the homicide rate in states with the death penalty has been 48 percent to 101 percent higher than in states without the death penalty.”<sup>368</sup> Newspapers around the country discussed the survey.<sup>369</sup>

One report examined the use of the death penalty in the state with the most executions. *The Death Penalty in Texas: Due Process and Equal Justice or Rush to Execution, Regardless of Innocence*,<sup>370</sup> released by the Texas Civil Rights Project, reported on several problems with the Texas system, including problems in ensuring the competency of capital defense lawyers. For example, the report concluded that one-fourth of condemned inmates have been represented by attorneys who have been disciplined, disbarred, or suspended.<sup>371</sup> The report also noted that the national reversal rate for capital cases in state

366. *Id.*

367. Raymond Bonner & Ford Fessenden, *Absence of Executions: A Special Report*, N.Y. TIMES, Sept. 22, 2000, at A1.

368. *Id.* “Indeed, 10 of the 12 states without capital punishment have homicide rates below the national average, Federal Bureau of Investigation data shows, while half the states with the death penalty have homicide rates above the national average.” *Id.*

369. See, e.g., Raymond Bonner & Ford Fessenden, *States Without Death Penalty See Lower Rate of Homicides*, CHI. TRIB., Sept. 22, 2000, at N4; *Death Penalty States Don’t Have Fewer Killings, Study Shows*, MILWAUKEE J. SENTINEL, Sept. 22, 2000, at 3A.

370. Texas Civil Rights Project, *The Death Penalty in Texas: Due Process and Equal Justice or Rush to Execution, Regardless of Innocence: The Seventh Annual Report on the State of Human Rights in Texas* (September 2000). The report is available at <http://www.texascivilrightsproject.org/downloads/hrr/DeathPenaltyReport.pdf> (last visited Nov. 16, 2001).

371. James Harrington, *Panels Should Assure Texas Doesn’t Execute Innocent People*, DALLAS MORNING NEWS, Oct. 8, 2000, at 6J.



courts is sixty-six percent but it is only three percent in Texas.<sup>372</sup>

These reports and others are significant because they provide the statistics and facts that support the Moratorium Movement. Thus, they have played an important role in showing that the newly discovered innocent defendants were not an insignificant occurrence but rather were indicators of a larger system-wide problem.

### 5. The Economy Soars and Crime Rates Drop

In the late 1990s, the economy flourished in the United States and crime levels dropped to new lows.<sup>373</sup> Experts have generally concluded that a healthy economy decreases criminal activity because more people have jobs or stay in school and because the economy allows the government to spend more money on social programs that decrease crime.<sup>374</sup> The low crime rate then causes the public to become less concerned about crime and have less punitive attitudes than when crime levels were higher.<sup>375</sup> Others have noted that falling crime rates and "the 'prosperity effect' caused by Americans' increasing sense of material well-being" have contributed to the drop in support for the death penalty.<sup>376</sup> As shown from the history of the death penalty abolitionist movement, societal circumstances beyond the control of activists may have substantial effects on the popularity of the death penalty. This lesson is still

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372. *Id.* As a result of the report, the Texas Civil Rights Project asked Governor George W. Bush to request a moratorium on executions in Texas, which he refused to do. *See id.*

373. *A Muted Trumpet*, NEWSWEEK, Nov. 20, 2000, at 133.

The economy had endured just eight months of recession in the past 17 years, and they happened nearly a decade ago. Inflation was at bay. Unemployment was at a 30-year low. Stocks had more than trebled in value in the Clinton years, and by one industry estimate, half the country had a piece of the action. . . .

*Id.*

374. *See Violence on Rise Despite Dip in Crime Rate*, OTTAWA SUN, July 20, 2001, at 7.

375. The falling crime rate "has softened America's support for executions." *Dead Man Walking Out*, *supra* note 229, at 21. When crime appears to be widespread, people desire more serious punishments as a deterrent. Some studies, however, have only found a weak relationship between economic factors and crime. *See, e.g.*, ADRIAN RAINE, *THE PSYCHOPATHOLOGY OF CRIME* 279-82 (1993).

376. John Harwood, *Bush May Be Hurt by Handling of Death-Penalty Issues*, WALL ST. J., Mar. 21, 2000, at A28.

true today as attitudes toward criminals are affected by the economy and the nation's crime rates.

#### 6. Many States Add the Option of Life Without the Possibility of Parole

Popular support for the death penalty drops when people are given other punishment options such as "life without parole" (LWOP).<sup>377</sup> "According to Gallup, only 52% of Americans support the death penalty when offered the option of" LWOP.<sup>378</sup> A January 2000 ABCNEWS.com poll showed that support for the death penalty among Americans dropped from sixty-four percent to forty-eight percent when LWOP was added as a sentencing option.<sup>379</sup> Other studies in various states have shown that support for the death penalty drops below fifty percent when people are given the option of LWOP.<sup>380</sup>

The effects of LWOP sentences on public opinion is also shown through judges and juries. In Ohio, an eighty percent drop in death sentences since 1998 has been attributed to a 1996 law providing for the option of LWOP sentences in capital cases.<sup>381</sup> Further, in 1994 in *Simmons v. South Carolina*,<sup>382</sup> the Supreme Court held that at least in some cases, the consideration of the option of LWOP is so important in capital cases, that

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377. See, e.g., *Dead Man Walking Out*, *supra* note 229, at 22. Support for the death penalty also drops when people are given options involving restitution to victims, though states have not experimented with such options. See, e.g., Richard C. Dieter, *Sentencing for Life: Americans Embrace Alternatives to Death Penalty* (Death Penalty Information Center, April 1993).

378. *Dead Man Walking Out*, *supra* note 229, at 21. Poll results available at <http://www.gallup.com/poll/releases/pr000224.asp> (last visited Oct. 12, 2001).

379. See Dalia Sussman, *Split Decision on Death Penalty*, ABCNEWS.com, (Jan. 19, 2000), available at <http://more.abcnews.go.com/sections/politics/daily-news/poll000119.html> (last visited Oct. 12, 2001).

380. See Death Penalty Information Center, *Recent Poll Findings*, available at <http://www.deathpenaltyinfo.org/polls.html> (last visited Oct. 12, 2001) (stating that polls show drops in support for the death penalty in several states); see also Eric Zorn, *Prosecutors Deaf to Outcry Against Death Penalty*, CHI. TRIB., March 7, 2000, at N1 (noting that support for death penalty drops from fifty-eight percent to forty-three percent when life without parole is an option).

381. Dan Horn, *Ohio Death Sentences decline; No-Parole Option Contributes to 80% Drop Since 1998*, CINCINNATI ENQUIRER, Sept. 10, 2001, at A01.

382. 512 U.S. 154 (1994) (holding that due process requires that the sentencing jury be told that a capital defendant is not eligible for parole where the defendant's future dangerousness is raised and state law makes the defendant ineligible for parole).

the constitution requires that juries be told when a defendant has no chance for release.<sup>383</sup>

During the 1990s, death penalty states continued to add the option of LWOP, and the reassurance that violent offenders would not be released perhaps added to the erosion of popular support for the death penalty. Today, only three states do not have a sentence of life in prison without parole.<sup>384</sup> Thus, as people in the states that do have LWOP as an option become more informed that life can really mean "life" in prison, overall support for the death penalty has dropped because capital punishment is seen as unnecessary.<sup>385</sup>

### 7. International Pressure to Abolish the Death Penalty Increases

Although there were only a few abolitionist governments in 1945, by 1996, much more than half the countries in the world had abolished capital punishment *de facto* or *de jure*.<sup>386</sup> The long-range trend around the world continues to be toward abolition of the death penalty, as seven countries officially abol-

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383. *See id.*

384. The three states are Kansas, New Mexico, and Texas. *See Death Penalty Information Center: Life Without Parole*, at <http://www.deathpenaltyinfo.org/lwop.html> (last visited Aug. 27, 2001). Not surprisingly, the state with the most executions in modern times, Texas, does not give juries the option of life without parole. *See Alter, supra* note 242, at 31.

385. *See, e.g.,* Kathy Walt, *Death Penalty Support Plunges to a 30-Year Low*, HOUSTON CHRON., March 15, 1998, at A1 (noting that opposition to the death penalty in Texas grew from seven percent in 1994 to twenty-six percent in 1998).

386. *See* William A. Schabas, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 2, at 295 (2d ed. 1997). Countries that still have death penalty laws on the books but have not executed anyone for ten years or more are considered to have abolished the death penalty *de facto*, as opposed to countries that no longer have death penalty laws at all, abolishing the punishment *de jure*. *Id.* at 295 n.3. The trend of countries changing their law to abolish the death penalty is of relatively recent origin, dating from the adoption of the *Universal Declaration of Human Rights* on December 10, 1948. *See id.* at 295.

Of fifty-nine countries in the world that are abolitionist for all crimes, fifty-one have abolished the death penalty since 1948. Of fifteen that are abolitionist for ordinary crimes, thirteen have taken this step since 1948. Of thirty-four countries that are now deemed abolitionist *de facto*, all but one have conducted executions since 1948; in other words, this *de facto* abolition is a relatively recent development.

*Id.* (footnotes omitted).

ished the death penalty in the year 2000.<sup>387</sup> Since the United States reinstated the death penalty in 1976, more than seventy nations have abolished the death penalty.<sup>388</sup>

Some of the United States Supreme Court's early death penalty cases considered other countries' treatment of the death penalty in interpreting the Eighth Amendment,<sup>389</sup> but in later cases the Court omitted international law from its Eighth Amendment analysis.<sup>390</sup> Still, some recent capital cases have addressed international law issues. In *Breard v. Greene*,<sup>391</sup> the Supreme Court addressed the effects of the Vienna Convention on Consular Relations on the rights of capital defendants. In a dissent from denial of petitions for writ of certiorari in two combined cases in *Knight v. Florida*,<sup>392</sup> Justice Breyer looked to the laws from foreign courts to argue that excessive delays between conviction and execution are cruel and unusual punishment. A majority of Justices on the Supreme Court, however, have not given much weight to international activity in the capital punishment area.

In the public and political arena, in recent years, other countries have become more vocal in their criticism of the

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387. John L. Allen, Jr., *U.S. Allies See Death Penalty as Fascist Relic*, NAT'L CATHOLIC REP., Jan. 19, 2001, at 8. The countries that officially abolished the death penalty in 2000 are: Albania, Bermuda, Bulgaria, El Salvador, Ivory Coast, Turkmenistan, and Ukraine. *Id.* Also, the Philippines declared a temporary moratorium in 2000. *Id.*

388. Bruce Shapiro, *Dead Reckoning: A World Effort to Force an End to the U.S. Death Penalty is Gaining Strength*, THE NATION, Aug. 6, 2001, at 14.

389. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (considering the death penalty in other countries in holding that it violates the constitution to execute a defendant who was fifteen years old at the time of the crime); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (considering the death penalty in other countries in holding that it violates the constitution to execute a defendant for the crime of rape where no death resulted).

390. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (plurality holding that it does not violate the constitution to execute persons aged sixteen or seventeen at the time of the crime). "We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant." *Id.*

391. 523 U.S. 371 (1998).

392. 528 U.S. 990 (1999) (Breyer, J., dissenting from denial of certiorari). In his dissent, Justice Breyer stated, "A growing number of courts outside the United States—courts that accept or assume the lawfulness of the death penalty—have held that lengthy delay . . . renders ultimate execution inhuman, degrading, or unusually cruel." *Id.* at 995 (emphasis omitted). Justice Breyer looked to decisions from the high courts in India and Zimbabwe, the Privy Council in Jamaica, and the European Court of Human rights. See *id.* at 995-96.

United States' use of the death penalty, perhaps influencing politicians and the public, if not the courts. The United States' position on the death penalty has forced the federal government to attempt to ratify human rights treaties with reservations that are internationally unpopular.<sup>393</sup> In 1971, the United Nations adopted a resolution encouraging abolition of the death penalty, and the 1989 International Covenant on Civil and Political Rights calls for abolition.<sup>394</sup> At the end of 2000, United Nations Secretary-General Kofi Annan stated his support for a worldwide moratorium on executions when he accepted from Sister Prejean and others a moratorium petition signed by 3.2 million people.<sup>395</sup> One writer has noted that "international law is exercising considerable pressure on United States policy. Politicians and bureaucrats in Washington are intensely aware of their isolation internationally on this question."<sup>396</sup>

The abolition of the death penalty has become a special issue in Europe, where no major political party supports the death penalty.<sup>397</sup> All fifteen members of the European Union have banned capital punishment, and the accession of new members is conditioned in part on their abolition of the death penalty.<sup>398</sup> For the first time in history, in 1998, none of the forty member states of the Council of Europe executed anyone.<sup>399</sup> In June 2001, the Council of Europe's Human Rights Committee threatened to revoke the United States observer

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393. See Schabas, *supra* note 386, at 307.

394. Allen, *supra* note 387, at 8.

395. Dunstan Prial, *UN Receives Anti-Execution Petition*, AP Online, Dec. 18, 2000, available at 2000 WL 30834462.

396. Schabas, *supra* note 386, at 307. Interestingly, the United States is both behind and ahead of the rest of the world on this issue. Although most states in the United States lag behind the trend toward abolition, in 1846, Michigan became the first jurisdiction in the world to permanently abolish the death penalty. See *id.* at 5-6.

397. See T.R. Reid, *Many Europeans See Bush as Executioner Extraordinaire*, WASH. POST, Dec. 17, 2000, at A36.

398. See Felix Rohatyn, *The Shadow Over America*, NEWSWEEK, May 29, 2000, at 27.

399. See Daniel Tarschys, *Preface to THE DEATH PENALTY: ABOLITION IN EUROPE* 7. The Council of Europe is an organization of governments that aims, among other things, to protect human rights. *Council of Europe, An Overview*, at <http://www.coe.int> (visited Aug. 16, 2001). All fifteen European Union states are among the members of the Council of Europe. *Id.*

status unless the United States imposes a death penalty moratorium within two years.<sup>400</sup>

Further, individual countries in Europe and elsewhere have been critical of the U.S. death penalty. In 1999, Germany filed suit against the United States in the World Court regarding Arizona's execution of two German citizens.<sup>401</sup> Raymond Forni, the president of the French National Assembly, held a news conference in Pittsburgh in August 2000 to urge the United States to abolish the death penalty.<sup>402</sup> Meanwhile, to mark Governor Ryan's imposition of the moratorium in Illinois, Rome's ancient coliseum was lit up with golden light.<sup>403</sup> According to Mexican Foreign Minister Jorge Castaneda, the forty-five Mexican nationals on death rows in the United States are "an important strain on bilateral relations" between the two countries.<sup>404</sup>

At the least, other countries have had a direct impact on individual cases in the United States. In early 2001, in *Minister of Justice v. Burns*,<sup>405</sup> the Supreme Court of Canada, noting problems with the American death penalty and citing the 1997 ABA Report,<sup>406</sup> refused to extradite two defendants to the

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400. Shapiro, *supra* note 388, at 14.

401. Jerome Socolovsla, *Germany Opposes U.S. Death Penalty*, AP Online, 2000 WL 29040420, Nov. 13, 2000. The lawsuit arose because of U.S. authorities' failures to notify foreign detainees of consular rights as required by the 1963 Vienna Convention on Consular Relations. *Id.*

402. Anjali Sachdeva, *French Leader Says U.S. Should Abolish Death Penalty*, PITTSBURGH POST-GAZETTE, Aug. 29, 2000, at D-6. Forni stated, "I do not expect a miracle in the swaying of the opinions in the United States, but when we abolished the death penalty in 1981, sixty-four percent of the French population still supported the death penalty." *Id.* Additionally, the U.S. Ambassador to France recently wrote in *Newsweek* that "Europeans are extremely passionate about the issue. The death penalty is viewed as a violation of human rights." Rohatyn, *supra* note 398, at 27. Ambassador Rohatyn noted that he is often questioned about the death penalty in France, and that John Kornblu, the U.S. Ambassador to Germany, stated that "the death penalty is the single most recurring question there." *Id.*

403. See *Rome Honors Ryan's Execution Moratorium*, CHI. TRIB., Feb. 2, 2000, at 12. Further, plans were for the Coliseum's lights to be changed from white to gold for two days whenever a condemned person was spared execution. See *id.* Further, "[t]he Italian government has been the driving force behind the recent international abolitionist movement." Toni M. Fine, *Moratorium 2000: An International Dialogue Toward a Ban on Capital Punishment*, 30 COLUM. HUM. RTS. L. REV. 421, 427 (1999).

404. Shapiro, *supra* note 388, at 14.

405. No. 26129, 2001 S.C.C. 7, 2001 Can. Sup. Ct. LEXIS 9 (Can., Feb. 15, 2001).

406. *Id.* at 97-115.

United States without assurances that the death penalty would not be imposed. Similarly, other foreign countries have refused to extradite fugitives to the United States if there is a chance that the death penalty will be imposed.<sup>407</sup>

As more countries abandon the use of the death penalty, America's isolation on the issue will continue to have some impact on American attitudes about the punishment. Already, America's new president has been criticized throughout Europe because of his Texas execution history.<sup>408</sup> Further, if foreign countries begin to use economic pressure on states that use the death penalty, their influence might grow on this issue. Many Americans, however, see themselves as independent from the rest of the world, and the fact that the death penalty is usually a state issue instead of a federal issue makes it less susceptible to international pressure.<sup>409</sup> Although it is doubtful that international pressure will play a significant role in changing American's attitudes about the death penalty, it does carry some weight with the politicians who must deal with representatives from other countries. Thus, the international pressure has some influence with decision-makers in the United States.

*G. Conclusion: The Twelve Events, and Others, Create the Death Penalty Moratorium Movement*

These twelve factors gave new strength to the Death Penalty Abolition Movement and helped ignite the Moratorium Movement. Additional factors have contributed to the Moratorium Movement beyond the twelve highlighted in this Article.

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407. Shapiro, *supra* note 388, at 14.

408. Reid, *supra* note 397, at A36.

409. See Roger Hood, *Introduction—The Importance of Abolishing the Death Penalty*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 15–16 (Council of Europe 1999).

[S]tate governments seem isolated from, indifferent to, and apparently ignorant of international norms relating to the application of the death penalty. There have been many proven violations of the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. Further dialogue needs to be opened up with state governments, although the situation will remain difficult while the federal government refuses to withdraw its reservation to Article 6 of the International Covenant on Civil and Political Rights, which prohibits the execution of anyone whose crimes were committed when they were below the age of eighteen.

*Id.* (footnotes omitted).

For example, major contributors to the Death Penalty Abolition Movement have been anti-death penalty organizations, such as the National Coalition to Abolish the Death Penalty as well as local organizations. Throughout history, the work of various religious organizations has been important to the abolition movement.<sup>410</sup> Additionally, the work of capital defense lawyers in creating a record of injustices was essential to many of the twelve events, such as the criticism of the death penalty by judges and the Illinois moratorium. These additional forces maintained the foundation of the Death Penalty Abolition Movement throughout the years, but they did not, in themselves, create the Moratorium Movement. Although the work of the defense lawyers and the abolition activists kept the Death Penalty Abolition Movement alive in the post-*Gregg* years and led to the Moratorium Movement, such work occurred prior to the latest shift in death penalty opinions. It is only the addition of the twelve events discussed here that has given the movement new life and taken it to a higher level.

Ironically, recent actions taken by supporters of the death penalty to expand the death penalty also have helped build the foundation for many of the twelve events discussed here. For example, the zealotry of the pro-death politicians, prosecutors, and courts—resulting in more capital cases and less review of the cases due to Supreme Court decisions and the 1996 Anti-Terrorism and Death Penalty Reform Act<sup>411</sup>—provided the foundation for many of the new concerns about capital punishment. Also, inadequate funding for defense attorneys resulted in concerns about ineffective assistance of counsel.<sup>412</sup> These

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410. See, e.g., Hanna Rosin, *Religious Leaders Fight Death Penalty: Catholic-Jewish Campaign Aims to Change Minds*, SEATTLE TIMES, Dec. 6, 1999, at A7. For an example where a religious figure had a direct impact on one case, Pope John Paul II's personal pleas to Governor Mel Carnahan of Missouri were responsible for Darrell Mease's death sentence being commuted to life without parole in early 1999. Paul Sloca, *Gov. Grants Pope's Plea to Commute Execution*, BOSTON GLOBE, Jan. 29, 1999, at A3. A few months later, however, Governor Carnahan, who had been criticized for the commutation by his opponent for the Senate, permitted Roy Roberts to be executed. See Theotis Robinson Jr., *Comment: Death Is a Final Judgment, Despite Guilt*, KNOXVILLE NEWS-SENTINEL, Mar. 15, 1999, at A8.

411. *Dead Man Walking Out*, *supra* note 229, at 22. "By passing the 1996 Anti-Terrorism and Death Penalty Reform Act, Congress restricted the number of federal habeas corpus appeals, limited the total amount of time such appeals can take, and cut off funding for legal-aid centres in 20 states." *Id.*

412. See Alter, *supra* note 242, at 31. "The Chicago Tribune reported that in 43 of the 131 executions on Bush's watch—almost one third—inmates were repre-



aspects of the death penalty, however, have been present throughout the years and are not new developments in the Moratorium Movement. Nevertheless, the result of these forces did help maintain the foundation of the abolitionist movement.<sup>413</sup>

Each of the twelve events discussed above has built on that foundation to create the current Moratorium Movement, although reasonable minds might disagree about the importance of each event to that movement.<sup>414</sup> One may wonder how long the Moratorium Movement will last or where it will lead, but the United States got to this point because of a unique blend of certain events that has made the support for the death penalty the lowest it has been in the country in almost two decades. "Soon after the Illinois moratorium, a Gallup poll revealed that support for the death penalty in the United States had dropped to sixty-six percent—the lowest in 19 years."<sup>415</sup> At a minimum, the first five events have been essential to the current movement, and the other events have been important to varying de-

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sented by counsel publicly sanctioned for misconduct (sometimes in unrelated cases) by the state bar association." *Id.* See, e.g., Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679 (1990) (discussing poor representation of capital defendants and procedural bars to review of those cases); Jeffrey L. Kirchmeier, *Drinks, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996) (discussing examples of capital defense attorneys who were using alcohol or drugs during trial).

413. For example, although the AEDPA substantially limited habeas review of capital cases, the Supreme Court had been putting new limits on habeas review for many years. See, e.g., *McCleskey v. Zant*, 499 U.S. 467 (1991) (holding that federal courts will not consider a successive habeas corpus petition unless the defendant can show "cause" and "prejudice"); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (holding that when a capital defendant procedurally defaults an issue in state court, a federal habeas court will not address the issue unless the defendant can show "cause" and "prejudice").

414. One other event that coincides with the increase in the national concern about the death penalty is the decision by the State of New York to bring back the death penalty in that state in 1995. Arguably, the reinstitution of the death penalty in New York brought added national focus to the issue and galvanized significant abolitionist forces in that state. See A DOCUMENTARY HISTORY, *supra* note 24, at 289. Further, the new statute caused the *New York Times*, which is distributed nationally and has taken a position against the death penalty, to put added emphasis on its coverage of the death penalty. See *id.*

415. *Dead Man Walking Out*, *supra* note 229, at 21. There does appear to have been a substantial change in the popular support for the death penalty, but it should be noted that past polls regarding support for the death penalty have been attacked as unreliable because of the way the questions are asked. See, e.g., Bohm, *supra* note 105, at 27–44.

grees. The next section addresses how the Moratorium Movement, built upon the foundation of these twelve events, compares to some other significant social movements.

### III. A COMPARISON OF THE MORATORIUM MOVEMENT TO RELEVANT HISTORICAL REFORM MOVEMENTS

The Moratorium Movement has some similarities to other significant historical and legal events. One of the most important historical points of comparison is the 1960s Death Penalty Abolition Movement. Also, Great Britain's death penalty moratorium movement, other U.S. abolition periods, and the early twentieth-century U.S. anti-lynching campaign have some interesting points of comparison. Below, each of these historical movements are compared to the current Death Penalty Moratorium Movement and used to consider the future of the Moratorium Movement.

#### A. *A Comparison of the Moratorium Movement to the 1960s Death Penalty Abolition Movement: Lessons from Accomplishing a Goal*

The Moratorium Movement is similar to the 1960s Death Penalty Abolition Movement in its overall goal to stop the use of the death penalty, but the two movements also differ in substantial ways. As discussed above, the hope of the 1960s Movement rested mainly on getting the courts to find that the death penalty was unconstitutional.<sup>416</sup>

Although the 1960s Movement did not solely focus on the courts, the movement was controlled by lawyers whose main goal was a Supreme Court decision striking down the death penalty.<sup>417</sup> During that time, the previous abolitionist argu-

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416. See *supra* Part I.D.

417. HAINES, *supra* note 2, at 40.

The phase of abolitionist history that we have been examining was unique in that *political* strategies, aimed at legislative abolition at the state level, were relegated to the margins. For the first time, *lawyers* became the shock troops of the anti-death penalty movement. This transformation occurred, first, because political abolitionism had produced generally poor results. Reformers had succeeded in ridding a number of states of capital punishment over the years, but generally only for a short while . . . .

ments—such as those that the death penalty was inhumane or that the punishment allowed miscarriages of justice—were recast as arguments based on the Eighth and Fourteenth Amendments.<sup>418</sup>

As noted above, although the 1960s Movement's court strategy had some success with *Furman* in 1972, the *Furman* decision created a backlash and the Movement was practically destroyed when *Gregg* was decided four years later.<sup>419</sup> Professor Haines has argued that the decision by the leaders of the 1960s Death Penalty Abolition Movement to bypass public opinion and go directly to the courts "may have helped to bring the trend away from capital punishment to a premature end."<sup>420</sup>

The abolitionists were not prepared to react to the *Furman* backlash. As Professor Haines noted, the role of the lawyers in taking control of the movement during that time "contributed to the withering away of whatever was left of citizen-based, political abolitionism."<sup>421</sup> After *Furman*, however, the abolition movement realized that the lawyers could not end the death penalty without some lobbying and public education.<sup>422</sup> The last unsuccessful gasp of the 1960s Movement occurred in 1987 with the Supreme Court's decision in *McCleskey v. Kemp* that rejected the last broad court challenge to the death penalty.<sup>423</sup>

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The second and more important reason for the rise of the lawyers was the sea change in the federal judiciary that took place during the 1950s and the 1960s . . . .

Thus, a Supreme Court that was receptive to litigation based on broadened notions of civil rights and due process represented a window of opportunity for abolitionists, a chance to escape from the legislative treadmill of repeal and reinstatement on which they had been trapped since the dawn of the nation's history.

*Id.* at 40–41.

418. HAINES, *supra* note 2, at 44.

419. *See supra* Part I.D.

420. HAINES, *supra* note 2, at 44. Similarly, commentators have criticized the use of the courts as a means of promoting social change in other contexts. *See* Jonathan L. Entin, *Litigation, Political Mobilization, and Social Reform: Insights from Florida's Pre-Brown Civil Rights Era*, 52 FLA. L. REV. 497, 516–22 (2000) (discussing various views on whether litigation is an effective means of promoting reform).

421. HAINES, *supra* note 2, at 45. "It had been difficult enough to hold that kind of abolitionist organization together in any case, but the success of the litigators had made it seem that there was nothing left for them to do." *Id.*

422. *Id.* at 48.

423. *See McCleskey v. Kemp*, 481 U.S. 279 (1987).

The 1960s Movement achieved the goal of having the Supreme Court address the constitutionality of the death penalty. However, like the lesson learned from the old saying, "be careful what you ask for—you may get it," the result was not only disappointing to the Movement, it effectively destroyed it for a time.

Unlike the litigation model of the 1960s Death Penalty Abolition Movement, the Moratorium Movement rests its hopes more on politics and public opinion than on lawyers and courts. The work in the courts has been instrumental in bringing about the Moratorium Movement because that work is responsible for the statements of the judges against the death penalty, the innocent defendants being freed, and the revelation to the public of the problems in the system. Still, because of the Supreme Court decisions since *Gregg* that have upheld the death penalty, most of those involved in the Moratorium Movement must have little hope that the courts will fix the problems. In a recent decision, one federal judge noted the current controversies surrounding the death penalty, but conceded, "Whether this is an appropriate case for administration of the death penalty is a political question, not a judicial one."<sup>424</sup>

Therefore, the Moratorium Movement looks to leaders like Governor Ryan to issue a moratorium on executions and to legislators to change the laws. In many ways, Governor Ryan's moratorium is the *Furman* decision of the Moratorium Movement, as his action leaves many to wonder whether it is a watershed moment in the road to the abolition of the death penalty in the near future or just a temporary stay during some tinkering with the system, like the changes mandated by *Furman* before the death penalty machine was restarted.

The difference in strategy between the 1960s Movement and the Moratorium Movement is also important because the former had a clear end. The plan of the 1960s strategy was completed when the Supreme Court addressed the constitutionality of the death penalty in *Furman* and *Gregg*. Although the goal of abolishing the death penalty was not achieved, the

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424. *Weeks v. Snyder*, 219 F.3d 245, 261 (3d Cir. 2000). Judge Sloviter wrote for the unanimous court in making that comment and in denying the petitioner's petition for writ of habeas corpus. *Id.*

1960s Death Penalty Abolition Movement had no place left to go after the highest court in the land had resolved the issue.<sup>425</sup>

By contrast, the Moratorium Movement does not have a foreseeable end. The movement is broader and its attack is not limited to issues that can be easily resolved. However, the main focus of the Moratorium Movement is the concern about the execution of the innocent. If this concern continues to be the main focus of the Moratorium Movement and if states were to address this concern, then the movement would suffer a setback on a scale similar to that suffered by the 1960s Death Penalty Abolition Movement after *Gregg*.<sup>426</sup>

Assuming the Moratorium Movement continues to focus on innocence issues, the question is whether the innocence concern can be adequately addressed in the way that the constitutional procedural issues were addressed in the 1960s Death Penalty Abolition Movement. New DNA technology is responsible for the release of several innocent persons from prison, and much of the death penalty debate has focused on changing the law to allow new DNA evidence to be considered in capital cases. Currently, Congress is considering the Innocence Protection Act, which would provide funds for DNA testing.<sup>427</sup>

Although it is unlikely that new DNA laws will adequately address the problems, the issue of whether the system can be fixed is beyond the scope of this Article.<sup>428</sup> Justice Blackmun, as well as a number of commentators,<sup>429</sup> have argued that the

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425. Although there would be other broad attacks on the death penalty in the courts, such as in *McCleskey v. Kemp*, which held that evidence of racial discrimination in capital sentencing, by itself, does not amount to a violation of the Eighth and Fourteenth Amendments, the movement had to reassess its strategy.

426. See *infra* Part IV.B.2.

427. Susan Carpenter, "Oz" Soundtrack Fights Legal Injustice, L.A. TIMES, Jan. 9, 2001, at F9.

428. If more jurisdictions provide for DNA tests, such a move would not solve the problems. In numerous cases there is no DNA evidence, and innocent defendants in those cases will not benefit from DNA laws. Legislatures may address the concern about the innocent in other ways too, such as ensuring that all capital defendants are given adequate representation and resources. Yet, if several states conclude that minor tinkering with the system fixes the problems, and the public accepts that conclusion, it would severely damage the Moratorium Movement in the same way that *Gregg* damaged the court strategy of the 1960s Death Penalty Abolition Movement.

429. See, e.g., Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 77, at 453-59; Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 357 (1995); cf. David McCord, *Judging the Effectiveness of the Su-*

system was not fixed by *Furman* and *Gregg* and it cannot be fixed. For purposes of the Moratorium Movement, though, the question is not whether the system will actually be fixed but whether the public will perceive the problem to be fixed. If changes are enacted that appear to address the problem, as the procedural changes in *Gregg* appeared to address the problems at that time, then the Moratorium Movement will slow down or die until other concerns arise. Thus, to a large extent, the direction and life of the Moratorium Movement may depend on the results of the various studies about the death penalty and their suggestions for fixing the problems.<sup>430</sup>

In order to avoid a *Gregg*-type setback, the Moratorium Movement must expand its focus, instead of concentrating on one strategy like the 1960s Death Penalty Abolitionist Movement did. The effects of the Moratorium Movement's focus on innocence are discussed further in Part IV.<sup>431</sup> Next, the Article looks at lessons from other death penalty abolition periods in American history.

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*preme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545 (1997) (arguing that the current death penalty system serves the Court's fairness goals to some extent).

430. Perhaps the most important study is the one that will be released by the State of Illinois because of all of the attention on that state's moratorium. However, the first studies being released do not show great promise for fixing problems with America's death penalty system. Already, preliminary information from an Indiana study on the death penalty has been criticized for indicating that Indiana's system is adequate. Diana Penner, *Death Penalty Panel Eyes Feedback*, INDIANAPOLIS STAR, Nov. 8, 2000, at B01. The twenty-five members of Indiana's committee will not consider whether the death penalty should be abolished. *Id.* One death penalty abolitionist noted, "It looks like at this stage, they're trying to show that we in Indiana do a cleaner job with the death penalty." *Id.* Similarly, Virginia's recent legislative study has been criticized by both death penalty abolitionists and death penalty supporters. Tim McGlone, *Critics Riled After Closer Look at Death Penalty Study: Errors, Gaps Fill Report, Say Both Sides in Debate*, VIRGINIAN-PILOT (NORFOLK), Dec. 14, 2001, at B1. The Virginia yearlong study "concluded that race was not a factor in who gets a death sentence in Virginia, but that location is." *Id.*

431. See *infra* Part IV.B.2 for further discussion.

*B. Comparison of the Moratorium Movement with Similar Movements that Occurred in Individual States: Lessons About the Influence of Forces Outside the Movement*

If one looks to the history of death penalty abolition in the United States as a barometer for the Moratorium Movement, there is not a strong likelihood of permanent success in the near future. At one time or another, twenty-four United States jurisdictions have abolished the death penalty, yet many of those states, with changing attitudes or changing circumstances, reinstated the death penalty.<sup>432</sup>

Most abolition reinstatements occurred in the latter part of the nineteenth century and the early part of the twentieth century. The following states abolished the death penalty between 1872 and 1917, but they all reinstated the death penalty after several years: Iowa, Maine, Colorado, Kansas, Washington, Oregon, South Dakota, Tennessee, Arizona, and Missouri.<sup>433</sup> As discussed in Section II, many of these changes occurred during the Progressive Era in America and were tied to various social changes occurring at that time.

There has been little scholarly work on the reasons behind the changes in death penalty laws during the Progressive Era.<sup>434</sup> It has been noted, however, that during that time period, "states with homogeneous populations [were] conducive to lenient or less severe criminal penalties."<sup>435</sup> Further, abolition bills were passed during a period of economic boom, while most of the "states that reinstated capital punishment did so during the economic recession following World War I or during

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432. THE DEATH PENALTY IN AMERICA, *supra* note 32, at 9.

433. *Id.* Iowa abolished the death penalty in 1872 but reinstated it in 1878; Maine abolished the death penalty in 1876 and reinstated it in 1883; Colorado abolished the death penalty in 1897, but reinstated it in 1901; Kansas abolished the death penalty in 1907, but reinstated it in 1935; Washington abolished it in 1913, but reinstated it in 1919; Oregon abolished it in 1914, but reinstated it in 1920; South Dakota abolished it in 1915 but reinstated it in 1939; Tennessee abolished it in 1915 but reinstated it in 1919; Arizona abolished the death penalty in 1916, but reinstated it in 1918; Missouri abolished it in 1917, but reinstated it in 1919. *Id.* The abolition of the death penalty in Arizona and Tennessee retained that punishment for treason and rape, respectively. *Id.*

434. See John F. Galliger et al., *supra* note 47, at 539.

435. *Id.* at 542. "The death penalty has been traditionally administered in a racist fashion, and states with the highest concentrations of non-white citizens have used the death penalty most frequently." *Id.* at 541 (footnotes omitted).

the 1930s.<sup>436</sup> Finally, the abolition of the death penalty in many states—Kansas, Washington, South Dakota, Oregon, and Arizona—occurred with leadership from the governors of those states.<sup>437</sup> In other states—Colorado, Minnesota, and Missouri—abolition was supported by a vocal press.<sup>438</sup> Factors that led to reinstatement of the death penalty included concerns about lynchings, economic recession, and specific notorious crimes.<sup>439</sup>

Another abolition reinstatement trend recurred in the latter part of the twentieth century. Between 1958 and 1977, the following states abolished the death penalty but later reinstated the punishment: Delaware, Oregon, New York, Kansas, and South Dakota.<sup>440</sup> As discussed in Section II, some of these changes occurred as part of the 1960s Death Penalty Abolition Movement or in response to the changes brought on by *Furman*.

Yet, occasionally the abolition is long-lasting. Almost one hundred years after Iowa reinstated the death penalty, it abol-

436. *Id.* at 543.

[Christopher] Adamson 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.

*Id.* (citing Christopher Adamson, *Toward a Marxian Penology: Captive Criminal Populations as Economic Threats and Resources*, 31 SOC. PROBS. 435 (1984)).

Following the Progressive Era, in many of the states that reinstated the death penalty, 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, economic forces indirectly caused reinstatement through the increased frequency of lynchings.

Galliger, *supra* note 47, at 575.

437. *See id.* at 545–52.

438. *Id.* at 551–55.

439. *Id.* at 560–73.

440. Delaware abolished the death penalty in 1958 and reinstated it in 1961; Oregon abolished the death penalty again in 1964 but reinstated it in 1984; New York abolished the death penalty in 1969, but reinstated it in 1995; Kansas abolished the death penalty again in 1973 but reinstated it in 1994; South Dakota abolished the death penalty again in 1977 but reinstated it in 1979. *THE DEATH PENALTY IN AMERICA*, *supra* note 32, at 9 tbl.2-1. When New York abolished the death penalty for most crimes in 1969, it retained that punishment for killing a law officer on duty and for murder of a guard by a prisoner serving a life sentence. *Id.*



ished it again in 1965. Maine's 1883 reinstatement lasted only a few years, as it again abolished the death penalty in 1887. In addition to those two states, which remain abolitionist, ten other jurisdictions are without the death penalty today.<sup>441</sup> With some exceptions, the successful abolition movements occurred during the mid-1800s Reform Movement, the early 1900s Progressive Era and the 1960s Death Penalty Abolition Movement.

Thus, the important lessons from the individual acts of abolition are that the successes most often occurred during a time of social activism, social changes, active leadership by governors or a vocal press, economic good times, and dwindling support for the death penalty. Regarding the last factor, one key aspect of the Moratorium Movement is the effect of the twelve moratorium events in increasing public support for a moratorium. The Movement, therefore, must continue to seek public support if it wishes to be successful.

Although the Moratorium Movement is occurring during a period that coincides with a good economy, the Movement is not taking place during a time of strong social activism, as did the mid-1800s Reform Movement, the early 1900s Progressive Movement, and the 1960s Death Penalty Abolitionist Movement.<sup>442</sup> Admittedly, without the perspective of time, it is difficult to judge the social changes of one's own period.

The Death Penalty Moratorium Movement, however, is taking place at a time of change caused by new technology and widespread use of the Internet. The Reform Movement in the mid-1800s occurred during a time of technological changes that

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441. These states are: Michigan (1847 for all crimes but treason; 1963 for all crimes); Rhode Island (1852 for all crimes except murder of a guard by prisoner serving life); Wisconsin (1853); Minnesota (1911); North Dakota (1915); Alaska (1957); Hawaii (1957); Vermont (1965, except for killing a law officer and for a second murder offense; completely abolished in 1987); West Virginia (1965); and Massachusetts (1984). *States Without the Death Penalty*, Death Penalty Information Center, at <http://www.deathpenaltyinfo.org/nodp.html#vermont> (last visited Oct. 12, 2001); THE DEATH PENALTY IN AMERICA, *supra* note 32, at 9. Today, no crimes are punishable by death in any of those states. *See id.* at 36–38.

442. Although, as discussed in Section I, the earlier eras of death penalty abolition included strong social activism regarding the poor, such activism does not seem to be strong today. One commentator, writing about the "War on Poverty" of the 1960s recently noted, "Current discussions about the relationship between social movements and law reform take place in a less optimistic context than that of the 1960s." Stephen Loffredo, *Poverty Law and Community Activism: Notes From a Law School Clinic*, 150 U. PA. L. REV. 173, 179 (2001).

made the world seem smaller, such as the development and widespread use of the telegraph, first used in 1844, and the telephone, first used in 1876.<sup>443</sup> The Progressive Era abolition period grew out of a time where “[s]cience and machinery had outrun social science and political machinery.”<sup>444</sup> As that era coincided with the early years of manned flight, giving people a new perspective on the world, the 1960s Death Penalty Abolition Movement coincided with the beginning of the American space program, another important scientific change that provided a new societal perspective.<sup>445</sup>

Perhaps drastic scientific and technological changes give us new perspectives on ourselves and prompt Americans to question social issues such as the death penalty. Perhaps at times of great scientific and technological achievement we begin to question whether “social and cultural achievements [are] disappointing,”<sup>446</sup> causing us to re-examine our treatment of our fellow human beings. Even if that is not the case, the Internet likely has played an important role in the distribution of information about the death penalty. More directly, new DNA technology has led to discoveries of convictions of innocent defendants, causing citizens to question the validity of our criminal justice system and the death penalty.<sup>447</sup>

Another important lesson from the abolition movements in the various states is that the death penalty is mainly a state is-

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443. BILL BRYSON, *MADE IN AMERICA* 111–14 (1994). “It is almost impossible to conceive at this remove how the telegraph astonished and captivated the world. That news from remote places could be conveyed instantaneously to locations hundreds of miles away was as miraculous to Americans as it would be today if someone announced a way to teleport humans between continents. It was too miraculous for words.” *Id.* at 112.

444. NEVINS & COMMAGER, *supra* note 33, at 289.

445. Much has been said about the impact on our species created by the views of Earth from space, especially the impact of a December 1972 photograph of Earth taken by Apollo 17 astronaut Harrison Schmitt:

That single image [of Earth], along with shots of Earthrise as seen from the moon by the Apollo 8 crew, have profoundly affected the human psyche and visions of humanity’s relationship to the cosmos. The Apollo missions, Schmitt said, represented “the first time humans were in a position to photograph the whole earth.” That simple fact, and the resulting images, “started to shape humans’ understanding” of their place in space.

David L. Chandler, *Familiar Images Make False Impressions*, BOSTON GLOBE, June 19, 2001, at C1.

446. NEVINS & COMMAGER, *supra* note 33, at 289.

447. See *infra* Section II.D for further discussion.

sue in the United States, largely affected by local politics. The importance of the Moratorium Movement is the effects it has on individual states, not necessarily its national effects. Victories in the Moratorium Movement will be gauged by what happens in individual states. National successes and "events" are of little use unless they lead to the imposition of a moratorium in certain states. Unlike the 1960s Death Penalty Abolition Movement, which had the goal of a national abolition of the death penalty imposed by the federal courts, the Moratorium Movement's realistic goals can only be for victories to come one at a time from individual states.

Finally, like the time period of abolition in the various states, the Moratorium Movement's success is tied to societal events that are often beyond the control of abolitionists. Therefore, the Movement must continue to work for public support based on the "events" that occur, and its focus must remain on the goal of a state-by-state moratorium. The first state to impose a moratorium was Illinois, and it remains to be seen whether other states will follow. Next, the Article looks to examples of moratoria outside the United States.

C. *Comparison of the Moratorium Movement to the Abolition of Capital Punishment in Other Countries: Lessons Regarding the Role of Popular Opinion and Leadership*<sup>448</sup>

Thus far, this Article has focused on examples from United States history, but there are also lessons to be learned from other countries, especially concerning the role of popular opinion. Although popular support for the death penalty in the United States has eroded in recent years, a substantial portion

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448. Because of the large number of countries that have abolished the death penalty, a detailed comparison between the United States and all of those countries is beyond the scope of this Article. Further, for many countries, there may be little scholarship on their anti-death penalty activities. Instead, a few countries with close relations to the United States that abolished the death penalty against popular opinion are discussed to consider the issue of whether the Moratorium Movement may achieve successes against popular support. For an overview of the abolitionist movement throughout the world, see ROGER HOOD, *THE DEATH PENALTY* 7-55 (2d rev. & updated ed. 1996); see also Peter Hodgkinson, *Europe—A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies*, 26 OHIO N. U. L. REV. 625 (2000).

of the population still supports the death penalty.<sup>449</sup> Thus, one may wonder whether the Moratorium Movement can achieve success in spite of popular support for the death penalty. In considering this issue, it is helpful to look at other countries that have abolished the death penalty over popular support for the punishment.

When Great Britain's Parliament declared an experimental moratorium on executions in 1965, polls showed that seventy percent of the people supported the death penalty—and that support grew over the next year.<sup>450</sup> Similarly, a majority of the electorate in Canada supported the death penalty as the country systematically commuted all death sentences and eventually abolished the death penalty in 1976.<sup>451</sup> A majority of Canadians continued to support the death penalty when the country's legislature defeated a 1987 bill that would have started the process of restoring the death penalty.<sup>452</sup> Further, abolition of the death penalty occurred despite popular support for the punishment in France, Germany, and Austria.<sup>453</sup>

Great Britain is of particular relevance because that country initially imposed a temporary moratorium on the death penalty in 1965 as an experiment before permanently abolishing the punishment four years later.<sup>454</sup> As with the U.S. Death Penalty Moratorium Movement, the moratorium movement in Great Britain resulted from several events, such as media attention on certain capital defendants, including, like the Karla Faye Tucker case in Texas, the execution of a woman.<sup>455</sup> Great

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449. For example, Gallup polls have shown a drop in support for the death penalty from eighty percent in 1994 to sixty-five percent in 2000. Julie Cart, *Impending Execution Rends*, L.A. TIMES, Nov. 4, 2001, at A1.

450. HAINES, *supra* note 2, at 45.

451. *Id.*

452. *Id.*; Walter Stefaniuk, *Death Penalty in Canada*, TORONTO STAR, July 27, 1995, at A7. The bill to restore the death penalty in Canada was defeated on June 30, 1987 by a vote in the House of 148-127. *Id.*

453. Kristi Tumminello Prinzo, *The United States—"Capital" of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend is Towards Its Abolition*, 24 BROOK. J. INT'L L. 855, 887-89 (1999) (concluding that the only hope for death penalty abolition in the United States, albeit unlikely, would be from the legislative branch). Similarly, in Austria, all of the political parties oppose the death penalty even though a significant portion of the population favors it. See HOOD, *supra* note 446, at 214.

454. LIFTON & MITCHELL, *supra* note 26, at 39.

455. See JAMES B. CRISTOPH, *CAPITAL PUNISHMENT AND BRITISH POLITICS* 174-75 (1962).

Britain, like several other countries, remains abolitionist despite public support for the death penalty.<sup>456</sup>

Similarly, in France, abolition of the death penalty was accomplished despite public opinion polls that showed a majority of the French were in favor of capital punishment.<sup>457</sup> Abolition occurred in that country following international pressure, a "study group for abolition" in the National Assembly, efforts by Amnesty International, and declarations by politicians favoring abolition.<sup>458</sup> In May 1981, France elected François Mitterand, who opposed the death penalty, as President of the Republic.<sup>459</sup> Within a few months, under his leadership, France abolished the death penalty for all crimes on October 9, 1981.<sup>460</sup>

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It is doubtful that abolitionist feeling in the nation would have been strong enough to force reconsideration of the issue by Parliament in the mid-fifties had not the Bentley, Evans-Christie and Ellis murders taken place and achieved their particular notoriety. The reformers were not influential enough to make their own opportunities; to a large extent they had to rely upon chance occurrences before a suitably large public could be created on the issue.

*Id.* Derek Bentley's case aroused public sympathy because of his limited role in the 1952 murder (he was under arrest at the time his co-defendant committed the crime), his young age, and his mental deficiencies. *Id.* at 98–100. Timothy John Evans was executed after a trial where John Reginald Halliday Christie was the state's chief witness, although later evidence indicated that Christie may have committed the murder for which Evans was executed. *Id.* at 100–05. Ruth Ellis was sympathetic to the British public, because, like Karla Faye Tucker, she was a woman. *Id.* at 105–07.

456. Although the terminology of survey questions makes it difficult to compare public support for the death penalty in different countries, there does continue to be support for the death penalty in several abolitionist countries.

In Britain, the world headquarters of Amnesty International, opinion polls have shown that between two-thirds and three-quarters of the population favors the death penalty—about the same as in the United States. In Italy, which has led the international fight against capital punishment for much of the last decade, roughly half the population wants it reinstated. In France, clear majorities continued to back the death penalty long after it was abolished in 1981; only last year did a poll finally show that less than 50 percent wanted it restored. There is barely a country in Europe where the death penalty was abolished in response to public opinion rather than in spite of it.

Joshua Micah Marshall, *Death in Venice: Europe's Death-Penalty Elitism*, THE NEW REPUBLIC ONLINE, ¶ 5 (July 20, 2000), at <http://www.tnr.com/073100/marshall073100.html> (last visited Oct. 12, 2001).

457. A poll in September 1981, a month before France abolished the death penalty, indicated that sixty-two percent of the French were in favor of retaining the death penalty. Forst, *supra* note 135, at 113.

458. Forst, *supra* note 135, at 105, 110–14.

459. *Id.* at 113.

460. *Id.* at 114.

Arguably, the ability of other countries to abolish the death penalty despite public support for the punishment has little significance to the Moratorium Movement in the United States for two reasons. First, part of the unique consciousness of Americans is a romanticized history of cowboy justice, including movies and books that praise the frontier myth and vigilante justice.<sup>461</sup> Second, the history of the United States, and its current democratic political structure, emphasizes majority rule.<sup>462</sup> The exception to that rule is the Bill of Rights, which protects individual rights over laws passed by the majority. Possibly then, the only chance the United States had to abolish the death penalty over popular support was the Supreme Court's interpretation of the Eighth Amendment ban on cruel and unusual punishment. That strategy, as discussed above, was exhausted by the 1960s Death Penalty Abolition Movement and was eventually unsuccessful.<sup>463</sup>

Yet, it may be possible for the United States to abolish the death penalty despite these unique aspects of our country because perhaps these aspects are not so unique. First, American's perceptions of cowboy justice are not the only influences on popular thought, especially as changes in the world import more international influences.<sup>464</sup> Second, many other countries

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461. See generally GARRY WILLS, *JOHN WAYNE'S AMERICA* (1997). "Our basic myth is that of the frontier. Our hero is the frontiersman." *Id.* at 302. "The Western [story] can deal with the largest themes in American history . . . It explores the relations of people with the land, of the individual with the community, of vigilante law to settled courts." *Id.* at 313.

462. Others have noted this difference between the United States and other countries in this area. "Basically, then, Europe doesn't have the death penalty because its political systems are less democratic, or at least more insulated from populist impulses, than the U.S. government." Marshall, *supra* note 456. Mr. Marshall noted that because people tend to vote for parties, not individuals, in European parliamentary government systems, such systems are "much more resistant to political upstarts, outsiders, and the single-issue politics on which the death penalty thrives." *Id.*

463. A similar court strategy was successful, however, in South Africa, where following a 1989 moratorium on executions, the Constitutional Court of the Republic of South Africa held in 1995 that the death penalty violated the new Republic of South Africa Constitution. *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC) at ¶ 6, 95. The South African model, however, is distinguishable from the U.S. model because of the drastic changes that were occurring in South Africa at that time as the country was eliminating Apartheid and raising concerns about the previous use of the death penalty as a tool of oppression.

464. One might argue that the Western justice mentality in the United States may indicate that, culturally, the United States will be wedded to the death penalty for a long time. Such a cultural argument might be that the United

today share a commitment to democracy and majority rule. Political institutions in Great Britain, France, and Canada abolished the death penalty in those countries. Other countries have considered factors other than popular support—such as international pressure—in abolishing the death penalty or in imposing a moratorium on executions.<sup>465</sup> French presidential candidate François Mitterrand declared his opposition to the death penalty, despite opinion polls showing popular support for the death penalty, and was able to get elected and then to help lead his country toward abolition.<sup>466</sup> Also, states formerly under the influence of the Soviet Union moved toward abolition or a reduction in the use of the death penalty only after the advent of democracy in those states.<sup>467</sup>

Further, historically, like these countries, a number of United States jurisdictions have abolished the death penalty and remained abolitionist despite efforts to reintroduce the

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States' affinity for the death penalty is akin to the cultural embrace of the death penalty in countries like the states of the Middle East and North Africa, which, apart from Israel, continue strongly to embrace capital punishment. HOOD, *supra* note 448, at 23. Just as the Middle East is influenced by Islamic law's embrace of the death penalty, one might argue that various religious and cultural influences in the United States make it unlikely the death penalty will be abolished here. See, e.g., Hussein Esmaeili and Jeremy Gains, *Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials*, 28 DENV. J. INT'L L. & POL'Y 145, 162–65 (2000). However, many of the major religions in the United States are opposed to the death penalty, and the Western justice myths may not be strong enough to prevent abolition. Most Western states have a low execution rate, and the images of frontier hangings probably do not have a stronger grip on modern views of capital punishment than the French guillotine did on French views. See, e.g., DANIEL GEROULD, *GUILLOTINE: ITS LEGEND AND LORE* (1992).

465. For example, due in large part to pressure from the Parliamentary Assembly of the Council of Europe, Belgium, Italy, Moldova, and Spain abolished the death penalty for all crimes in the 1990s. Wohlwend, *The Efforts of the Parliamentary Assembly of the Council of Europe*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 55, 57. Also, a moratorium on executions in Russia was largely a result of international pressure. See Anatoly Pristavkin, *A Vast Place of Execution—The Death Penalty in Russia*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 129, 136.

466. Similarly, in Czechoslovakia, Federal President Vaclav Havel was active in leading his country to abolish the death penalty. JUDr. Robert Fico, *The Death Penalty in Slovakia*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 117, 122.

467. HOOD, *supra* note 448, at 16–23. For a discussion of international pressure to abolish the death penalty in Russia, see Khadine L. Ritter, *The Russian Death Penalty Dilemma: Square Pegs and Round Holes*, 32 CASE. W. RES. J. INT'L L. 129 (2000).

death penalty.<sup>468</sup> More recently in the United States: (1) the moratorium in Illinois was imposed by an elected official; (2) Nebraska legislators voted for a moratorium; and (3) New Hampshire legislators voted to abolish that state's death penalty. Perhaps the key to United States abolition is the emergence of anti-death penalty leaders like President Mitterand who choose to lead their countries on the issue instead of following public opinion polls. As noted in the previous section, a similar trend occurred during the Progressive Era in the United States when a number of governors led their states toward abolition of the death penalty.<sup>469</sup>

Still, the recent events in Illinois, Nebraska, and New Hampshire took place because of an erosion of popular support due to the Moratorium Movement activities discussed above. Such successes did not occur during the 1970s and 1980s when the death penalty was much more popular than now. Although the examples from other countries show that successes are possible despite popular opinion, continued erosion of the popular support for the death penalty is probably necessary for continued successes for the Moratorium Movement.<sup>470</sup> The next section continues the consideration of the role of leadership and returns to United States history to compare the Moratorium Movement to the Anti-Lynching Movement.

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468. See HOOD, *supra* note 448, at 47.

469. See John F. Galliher et al., *Criminology: Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 545-52 (1992).

470. HOOD, *supra* note 448, at 223.

A number of countries which have abolished the death penalty have done so partly as a result of the concerted organization of an influential and particularly well-informed body of opinion. This has often been mediated through the authoritative pronouncements of official Commissions of Inquiry, in so far as they have dispassionately reviewed the evidence.

*Id.*



*D. Parallels Between the Death Penalty Abolition Movement and the Anti-Lynching Campaigns: Lessons of Leadership and Achieving Success Without Hitting the Goal*

1. An Anti-Lynching Movement Develops

From 1892 to 1940, more than 3,000 people in the United States—approximately 2,600 of whom were African-American—were victims of lynch mobs.<sup>471</sup> In the early years of the United States, lynching was seen as a frontier punishment to protect social order, but by the end of the nineteenth century it was primarily a Southern phenomenon and a mechanism to protect white supremacy.<sup>472</sup> In the South, some justified lynching as necessary to “protect” white women from African-American men, and lynchings became a means of sending a message to African-American southerners and of keeping them from “political, social and economic equity.”<sup>473</sup>

While today it may seem odd that there had to be an anti-lynching movement, many Americans tolerated lynching and it took the work of several organizations to end the practice.<sup>474</sup> Two prominent African-Americans who worked in the 1890s to end lynching were Frederick Douglass and Ida B. Wells.<sup>475</sup> Subsequently, numerous African-American and white women worked toward that goal, as did the NAACP and several other prominent people like W.E.B. DuBois.<sup>476</sup> One of the main goals

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471. MARY JANE BROWN, *ERADICATING THIS EVIL: WOMEN IN THE AMERICAN ANTI-LYNCHING MOVEMENT 1892–1940*, at 3 (2000). “Between 1884 and 1899 well over 100 African Americans were lynched every year with peaks of 241 and 200 in 1892 and 1893.” *Id.* Of course, lynchings were prevalent before that time. After a lynching spree in Vicksburg, Virginia in 1838, Abraham Lincoln commented, “[D]ead men were seen literally dangling from the boughs of trees on every road side; and in numbers almost sufficient, to rival the native Spanish moss of the country, as a drapery of the forest.” Abraham Lincoln, *On the Perpetuation of Our Political Institutions*, Address before the Young Men’s Lyceum of Springfield, Illinois (Jan. 27 1838), in *THE POLITICAL THOUGHT OF ABRAHAM LINCOLN* at 11, 13 (Richard N. Current ed., 1967).

472. BROWN, *supra* note 471, at 3.

473. *Id.* at 3–4.

474. *Id.* at 4.

475. Patricia A. Schechter, *Unsettled Business: Ida B. Wells Against Lynching, or, How Antilynching Got Its Gender*, in *UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH* 292, 292–300 (W. Fitzhugh Brundage ed. 1997).

476. BROWN, *supra* note 471, at 4–6. “The value of W.E.B. DuBois’ work in the fight against lynching cannot be overstated. As editor of the *Crisis*, the offi-

of the Anti-Lynching Movement was to obtain a federal law against lynching. Although the Anti-Lynching Movement was ultimately unsuccessful in the goal of passing such a law, the movement succeeded in terms of education and reform efforts.<sup>477</sup> By 1939, anti-lynching efforts and changes in the South helped to limit the number of lynchings to just a few per year. Finally, in 1952, there were no lynchings.<sup>478</sup>

## 2. There are Several Historical Parallels Between Lynching and the Death Penalty

Several parallels exist between the use of lynching in the United States around the early twentieth century and the use of the death penalty around the end of that century.<sup>479</sup> The most obvious similarity between capital punishment and lynching is that both involve the killing of an individual for committing some type of crime, while the most obvious difference between the two is that the use of the death penalty is killing that is explicitly sanctioned by the government. That difference, however, is not as great as it may seem because, even though lynching was technically illegal, it was tolerated and often accepted among whites.<sup>480</sup> Another similarity is that the use of lynching was a "predominately American form of pun-

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cial newspaper of the NAACP, he publicized the crime of lynching and kept the black community informed about the progress of the anti-lynching movement." *Id.* at 6.

477. *Id.* at 14. "Although all efforts to achieve federal legislation failed, the drive for a federal law drew a spotlight of attention to the lynching problem that forced Americans to grapple with the problem that belonged to their country alone and put the substructure in place for a vigorous civil rights struggle." *Id.*

478. *Id.* Three lynchings occurred in 1939 and five occurred in 1940 as "double-digit numbers disappeared altogether from the statistics." *Id.*

479. One early link between lynching and the death penalty is that people in favor of the death penalty in the early twentieth century often argued that capital punishment was necessary to prevent lynchings. Galliher et al., *supra* note 47, at 574-75. Although studies have shown that lynchings occurred whether or not a state had capital punishment, in the early 1900s, "[l]ynchings emerged as the most important common triggering event in reinstatement of the death penalty." *Id.* at 574. In a recent book on the death penalty, the authors noted, "There has been an uneasy link between legal hangings and vigilantism in our history." LIFTON & MITCHELL, *supra* note 26, at 36.

480. ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950, at 14 (1980).

ishment,"<sup>481</sup> and America has also become more isolated in its use of the death penalty in recent years.

Other similarities exist. The fourteen states with one hundred or more lynchings in the United States from 1882–1968 are Mississippi, Georgia, Texas, Louisiana, Alabama, Arkansas, Florida, Tennessee, Kentucky, South Carolina, Missouri, Oklahoma, North Carolina, and Virginia.<sup>482</sup> Ten of those states make up the top ten states in legal executions since *Gregg*: Texas, Virginia, Missouri, Florida, Oklahoma, Georgia, Louisiana, South Carolina, Arkansas, Alabama.<sup>483</sup> Because lynching mainly occurred in one region of the country—the South—it has been argued that “the most powerful predictor of differential imposition of the death penalty is . . . not substantive law, but rather geographical region.”<sup>484</sup>

Throughout the early twentieth century, Americans primarily used lynching as a tool of racial prejudice against African Americans and other minorities.<sup>485</sup> From 1882 through 1968, 4,743 persons were known to have been lynched in the United States, and 3,446, or 72.7 percent of those lynching victims, were black.<sup>486</sup> Generally, African-Americans were much

481. BROWN, *supra* note 471, at 4.

482. The number of lynchings in each of these states during 1882–1968 are Mississippi (581), Georgia (531), Texas (493), Louisiana (391), Alabama (347), Arkansas (284), Florida (282), Tennessee (251), Kentucky (205), South Carolina (160), Missouri (122) and Oklahoma (122), North Carolina (101), and Virginia (100). ZANGRANDO, *supra* note 480, at 5 tbl.1.

483. The number of executions in those states since 1976 are: Texas (258); Virginia (83); Missouri (54); Florida (51); Oklahoma (48); Georgia (28); Louisiana (26); South Carolina (25); Arkansas (24); and Alabama (23). *Number of Executions by State Since 1976*, Death Penalty Information Center, at <http://www.deathpenaltyinfo.org/dpicreg.html> (Jan. 25, 2002).

484. FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 89 (1986). The reasons for the links between lynching and capital punishment are debatable and beyond the scope of this Article. Still, statistics show that “[a]s killings outside the law declined in the twentieth century South, the infliction of the death penalty by the courts increased. The hundred-a-year lynchings of the 1890s were matched by similar numbers of legal executions in the 1930s.” William S. McFeely, *A Legacy of Slavery and Lynching: The Death Penalty as a Tool of Social Control*, 21 CHAMPION 30, 31 (1997).

485. One commentator has asserted that “the failure of Congress to enact an anti-lynching statute during the Progressive Era was due in substantial part to a prevailing and intense cultural aversion to sexual relations between black men and white women.” Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J. L. & FEMINISM 31, 77-78 (1996).

486. ZANGRANDO, *supra* note 480, at 4. The use of lynching against minorities to maintain the social order was not limited to the southern United States but

more likely to be lynched for rape or attempted rape than whites were for those crimes.<sup>487</sup> Comparatively, when the death penalty was applied to the crime of rape, eighty-nine percent of those executed between 1930 and 1967 were African American.<sup>488</sup>

Of course, judicial executions are not directly a result of the blatant racism that many lynchings were. Yet, many commentators have discussed the fact that racism plays a large role in capital sentencing.<sup>489</sup> Race remains a factor in the selection of who is executed, though its main effects come from the race of the victim. Several studies have found that "[t]hose who kill white persons are considerably more likely to be sentenced to death than those who kill blacks, regardless of the race of the defendant."<sup>490</sup> In 1990, the United States General Accounting Office reviewed twenty-eight studies and found that "in 82 per cent of the studies, race of victim [white] was found to influence the likelihood of being charged with capital murder or receiving the death penalty."<sup>491</sup>

also occurred, for example, on the western frontier. See JAMES W. MARQUART ET AL., *THE ROPE, THE CHAIR, & THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990*, at 5 (1994).

487. See, e.g., GEORGE C. WRIGHT, *RACIAL VIOLENCE IN KENTUCKY 1865-1940: LYNCHINGS, MOB RULE, AND "LEGAL LYNCHINGS"* 100-01 (1990).

488. Wolfgang, *Racial Discrimination in the Death Sentence for Rape, in EXECUTIONS IN AMERICA* 110-20 (W. Bowers ed. 1974). In a study of 1,238 rape convictions, Professor Wolfgang concluded that race was the determining factor in the disparity in the imposition of the death penalty. *Id.*

489. See, e.g., *id.*; Stephen Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995).

490. Hood, *supra* note 448, at 169.

491. *Id.* at 172 (quoting *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, U.S. Gen. Accounting Office, GAO/GDD-90-57, at 6 (Feb. 1990)). The report noted that the conclusion "was remarkably consistent across data sets, states, data collection methods, and analytical techniques." *Id.* As noted in Part II.B, the Supreme Court rejected the use of such statistics as a constitutional argument in a broad attack on the death penalty in *McCleskey v. Kemp*, 481 U.S. 279, 297-99 (1987).

Further, it has been argued that the practice of lynching was not only a result of racism, but it was also used as a means of sexual oppression and control of women. JACQUELYN DOWD HALL, *REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING*, at xxi (rev. ed. 1993). Similarly, one might argue that today's use of the death penalty—primarily against male murderers and very rarely against female murderers—continues to perpetuate a notion of male chivalry. For example, more people were concerned about the execution of Karla Faye Tucker than of the execution of hundreds of men.

Another similarity is the effects of the economy on both lynching and the death penalty. Just as the popularity of the death penalty has been linked to the economy,<sup>492</sup> some have "claimed that high correlations existed between lynching rates in the South and indicators of economic performance such as the per acre value of cotton."<sup>493</sup> Advocates of such reasoning argue that poor economic conditions breed frustrations that are expressed in violence, and in the case of lynchings, that frustration was usually taken out against African-Americans.<sup>494</sup>

Finally, much of the debate about lynching in the early part of the twentieth century focused on whether the issue should be addressed by the states or the federal government. Presidents, such as William Howard Taft, preferred to leave the issue to the states,<sup>495</sup> and Congress never passed an anti-lynching law, despite efforts by reformers that led to House passage of anti-lynching measures on three occasions.<sup>496</sup> Simi-

492. See *supra* Part II.F.5.

493. W. FITZHUGH BRUNDAGE, *Introduction to UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH* 8 (1997).

494. *Id.*

495. See ZANGRANDO, *supra* note 480, at 15.

496. *Id.* at 19.

Throughout its quest for federal protections against mob violence, the NAACP faced a dilemma that has long confronted American reformers: the realities of a federal system that honors authority at the local, state, and national levels simultaneously. Abolitionists, suffragists, civil rights campaigners, labor union organizers, opponents of child labor, social welfare advocates, and proponents of the Equal Rights Amendment, to mention but a few, have all had to wrestle with the concept and practice of multiple jurisdictions. Realizing that local and state officials, and the white constituents to whom they answered, were not about to end mob rule, the Association sought a federal antilynching law. Time after time, opponents responded that lynching was murder, and murder was a matter for the states to resolve. Southern politicians and publicists, reformers among them, and constitutional conservatives elsewhere, evoked the image of states' rights to deflect NAACP efforts and to keep lynching beyond the reach of federal intervention. In the early decades of this century, such a tactic coincided with political expediency, sectional reconciliation, conventional wisdom, and the tenor of prevailing Supreme Court decisions.

*Id.* at 19–20.

When the NAACP's efforts to obtain a federal law against lynching failed in 1922, the organization de-emphasized the federal goal and concentrated on state reforms. See CLAUDINE L. FERRELL, *NIGHTMARE AND DREAM: ANTILYNCHING IN CONGRESS 1917–1922*, at 301 (1986). Similarly, the Moratorium Movement—born out of the failure of the NAACP to obtain a federal ban on executions from

larly, the states' response to *Furman* by enacting new death penalty statutes largely resulted from reaction to the federal court stepping on the toes of states' rights. Today, much of the debate surrounding the review of capital cases by federal courts centers on issues of states' rights and federalism,<sup>497</sup> including discussions of the effects of the Anti-Terrorism and Effective Death Penalty Act and several decisions by the Supreme Court that have limited federal review of state capital cases.

Thus, the use of the death penalty parallels the use of lynching regarding severity, its American nature, geographical influences, racial issues, economic influences, and federalism. One might argue that in some ways, legal executions replaced extralegal lynchings,<sup>498</sup> even if the use of legal protections prior to executions but not prior to lynchings makes such a conclusion debatable.<sup>499</sup> Judicial executions rose sharply during the 1930s in many southern states as the number of lynchings dropped.<sup>500</sup> One author concluded, "With the decline of lynching, many southern whites renounced the inhumanity of the mob, preferring instead to rely on the harsh justice of the state."<sup>501</sup> Similarly, authors of a book on the history of the death penalty in Texas recently noted "that the line between legal and illegal hangings was often razor-thin."<sup>502</sup>

The famous Scottsboro case illustrates a transitional link between lynching and capital punishment. In 1931, nine black youths were arrested in Alabama and charged with rape.<sup>503</sup> At

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the United States Supreme Court—has had much of its focus on state reform, such as the Illinois moratorium.

497. For example, the first sentence of the Court's opinion in *Coleman v. Thompson*, 501 U.S. 722 (1991), which held that the federal courts would not consider issues of innocence first raised in a state post-conviction petition that was filed late in the state court, was "This is a case about federalism." *Id.* at 726.

498. See W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930*, at 255 (1993).

499. See *id.* at 255-57. Professor Brundage noted, "There can be no doubt that proper trial procedure, rules of evidence, and adequate legal representation for defendants were absent in most trials involving blacks. Yet, the ritual of the courthouse was far different from the ritual of mob violence." *Id.* at 257.

500. *Id.* at 255.

501. *Id.* at 259. "Many keen observers of our society, including some in the legal profession, see a direct link between lynchings and the death penalty." WILLIAM S. MCFEELY, *Afterword in UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH* 318, 320 (1997).

502. MARQUART ET AL., *supra* note 486, at 2.

503. DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 3-6 (rev. ed. 1979).

another place or at an earlier time, they probably would have been lynched, but efforts of Governor Benjamin Meeks Miller and local officials kept the mobs away.<sup>504</sup> Still, in a mockery of a trial with questionable evidence, eight of the youths were sentenced to death.<sup>505</sup> It would take many years, mass movements, and the Supreme Court's decision in *Powell v. Alabama*<sup>506</sup> to save the lives of the Scottsboro defendants, who were probably innocent of the charges.<sup>507</sup> Thus, in many ways—the racial component, the southern locale, the lack of adequate trial procedures, issues regarding the role of the federal government, and the threat of death—the Scottsboro case illustrates the transition from lynching to providing a system of justice for capital defendants, although that system still retains many of the problems from the days of lynching.<sup>508</sup>

### 3. There are also Several Historical Parallels Between the Anti-Lynching Movement and the Death Penalty Moratorium Movement

In addition to the similarities between the “punishments,” there are similarities between the Anti-Lynching Movement and the Death Penalty Moratorium Movement. For example, the key voices of the Moratorium Movement come from unexpected quarters like conservatives and victims. In the early 1900s when many whites saw lynching as a necessary tool to protect women from being raped, it was women's groups who

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504. *Id.* at 7–10.

505. *Id.* at 48–49.

506. 287 U.S. 45 (1932) (holding that states must provide counsel in capital cases where the defendants are incapable of representing themselves).

507. See generally CARTER, *supra* note 503.

508. Further, lynching and the death penalty have been used in ways that improperly discriminate on factors besides race. Just as anti-Semitism could be the basis for a lynching in the past, bias based upon a person's sexual orientation probably led to at least one modern day death sentence. See Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 718–19 (1997) (discussing Leo Frank, a Jewish man who was lynched in an atmosphere of anti-Semitism for a rape and murder he did not commit); *State v. Grannis*, 900 P.2d 1, 6 (Ariz. 1995) (holding that using ownership of pornographic photographs of males as evidence to convict a male capital defendant was non-harmless prejudicial error); see also Rene Romo, *Ex-Convict Works to Rebuild Life After Spending Years on Death Row*, DENV. POST, May 22, 1998, at A32 (noting that on retrial, without the pornographic photos, the trial judge dismissed the murder charge against David Grannis due to insufficient evidence even before the defense presented witnesses).

helped lead the campaign against lynching. The Association of Southern Women for the Prevention of Lynching, directed by Jessie Daniel Ames, the Women's International League for Peace and Freedom, the Young Women's Christian Association (YWCA), and others were key participants in the anti-lynching movement.<sup>509</sup>

There were other common players in the anti-death penalty movement and the anti-lynching campaign. The NAACP<sup>510</sup> and religious organizations<sup>511</sup> have played important roles in both movements.

In her book on women in the American anti-lynching campaign, Mary Jane Brown wrote about the victory of the Anti-Lynching Movement in a summary that echoes the current Death Penalty Moratorium Movement:

The decline in lynching was the result of a convergence of events: in addition to the concerted efforts of the NAACP, the ASWPL [Association of Southern Women for the Prevention of Lynching] and other anti-lynching activists, social changes, such as radio, movies, and improved roads cut through the isolation of the rural South to erode folkways

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509. See BROWN, *supra* note 471, at 171-209; JACQUELYN DOWD HALL, *REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING* (rev. ed. 1993).

Undoubtedly, women in the anti-lynching movement had a resounding impact on the curtailment of mob violence that is not measurable simply by trying to assess what share of the dwindling victim numbers they can claim. From Ida B. Wells, who formulated the anti-lynching thesis and strategy for all future anti-lynching activists, to the women who battled against lynching in the 1930s, women were instrumental in uncovering and publicizing the crime and crystallizing the opinion of political leaders and, more importantly, of ordinary Americans. . . .

The ASWPL, in breaking the time-honored pact southern white women had with southern white men, nullified the accepted grounds for lynching. Adopting Wells' premise, they customized it . . . into a personal statement of disapprobation for lynching. The derision heaped upon June Walters in 1959 for opposing a lynching done in her behalf demonstrates how radical that stance was for white southern women thirty years earlier.

BROWN, *supra* note 471, at 325.

510. See generally ZANGRANDO, *supra* note 480.

511. W. FITZHUGH BRUNDAGE, *Introduction in UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH* 15 (1997). "Scholars have begun to chart the antilynching activities of national church bodies but have yet to describe how black ministers addressed extralegal violence in their sermons and fit it into their respective theologies." *Id.*



and allow new ideas to trickle in. The increase in brutality and the arousal of public outrage over notorious lynchings such as the Duck Hill, Mississippi and Marianna, Florida lynchings brought the weight of public opinion to bear on lynchers and communities that tolerated them; plus, the criticism directed from abroad at the United States brought changes in American tolerance of mob will.<sup>512</sup>

As discussed above, the Moratorium Movement has had a convergence of several key events similar to these key events of the anti-lynching movement, including high profile cases, international pressure,<sup>513</sup> and increased awareness through the media, Internet, and popular culture. However, an important event with no comparative event in the Moratorium Movement—a change in society's structure—contributed to the success of anti-lynching activists: New Deal programs that modernized the South's system of agriculture and revolutionized the Southern plantation system led to a decline in the socioeconomic roots of mob violence.<sup>514</sup> "For the first time, strong economic forces encouraged planters to adopt mechanical farming methods and wage labor and raise wage levels."<sup>515</sup> As a result, traditional methods of controlling labor, including mob violence, were replaced by more educated farming techniques.<sup>516</sup> According to one economist, due to the modernization of the rural economy in the South, "The economic underpinnings and

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512. BROWN, *supra* note 471, at 321–22.

513. "As lynching became a cause celebre among British reformers, white Americans found themselves cast in the uncomfortable role of unmanly savages in the eyes of the 'civilized' world." HALL, *supra* note 491, at xxxii–xxxiii.

514. See BRUNDAGE, *supra* note 498, at 249–52.

One of the jarring but unintended consequences of New Deal programs in the South was that the existing system of agriculture, especially the plantation system, was virtually revolutionized. It is hardly surprising that two distinctive features of the South, mob violence and an agricultural economy based on the tenant plantation, should pass away simultaneously. Planters had long resisted powerful forces at work on the archaic traditions of southern agriculture, but until the New Deal, few had either capital or compelling incentives to bring their farming and labor practices into line with those of the rest of the nation. As a result of New Deal agricultural programs . . . the southern economy lost many of its most exaggerated characteristics. For the first time, strong economic forces encouraged planters to adopt mechanical farming methods and wage labor and raise wage levels.

*Id.* at 249.

515. *Id.* at 249.

516. *Id.* at 250.

social glue that had kept the [southern] regional economy isolated were no longer present in 1940.”<sup>517</sup> Arguably, however, a comparative “event” in the Moratorium Movement is the growth of the Internet, which has lessened American isolation from international opinions.

The efforts of the anti-lynching organizations did not result in a complete success. Although the Anti-Lynching Movement changed society’s values and behavior, it did not change institutional structures.<sup>518</sup> “The antilynching bill did not pass, and no legal, constitutional, or structural changes occurred in relationships between the races.”<sup>519</sup> A later generation of civil rights workers would have to go beyond the NAACP’s strategy of education and legal reform “when they chose, instead, the path of non-violent, participatory, direct action that took them into the streets.”<sup>520</sup> These later efforts brought about changes that the NAACP’s earlier efforts did not accomplish.<sup>521</sup>

#### 4. The Moratorium Movement can Learn Lessons from the Anti-Lynching Movement

The Anti-Lynching Movement illustrates for similar movements the importance of public opinion, good leaders, and outside influences. The similarities between the anti-lynching campaign, with its successful aspects, and the Moratorium Movement show some promise for current reformers. The tactics of the anti-lynching organizations—such as education and international pressure—succeeded in changing attitudes about

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517. *Id.* at 251 (quoting GAVIN WRIGHT, *OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR* 236 (1986)).

518. *See* ZANGRANDO, *supra* note 480, at 215.

Social change is, at the very least, dependent on the interaction of three key variables: values, behavior, and institutional structure. The NAACP sought to alter all three. It affected values to the extent that it forced most whites to reassess the indifference or endorsement that they usually exhibited toward lynch mobs. . . . Under pressure from a national crusade and with the threat of federal intervention, southern whites did shift their behavior from the lynching bee to other means of control in a biracial setting. . . . Institutional arrangements remained the least malleable. The antilynching bill did not pass, and no legal, constitutional, or structural changes occurred in relationships between the races.

*Id.* at 214–15.

519. *Id.* at 215.

520. *Id.*

521. *See id.*

the practice of lynching. For example, "[d]uring the 1950s, lynchings became so extraordinary that each incident provoked national outrage."<sup>522</sup> As noted above, however, the anti-lynching organizations were never successful in the legal arena in enacting federal anti-lynching laws. Instead, their success came with a change of public opinion. Arguably, such a strategy was enough to curb the use of lynching in America and therefore could be enough to curb the use of the death penalty in America.

Yet, further successes in changing the law only occurred through the work of later civil rights workers who used direct tactics in the streets. Thus, one question is whether the current techniques of the Moratorium Movement can accomplish the legal goals it hopes to achieve or whether it will require more direct participatory action from activists. Certainly, there are death penalty protesters today, and the various "events" of the Moratorium Movement have helped increase their numbers. Still, they are far short of the type of organized efforts that brought about the civil rights changes. As Professor Haines has noted, "The absence of a street component has meant that anti-death penalty activism has been virtually invisible to the American public, and this invisibility has left the movement's image largely in the hands of its opponents and the press."<sup>523</sup>

Still, although that "street component" has grown somewhat in the last five years due to the twelve events discussed above, perhaps the Moratorium Movement does not need the numbers of the civil rights movement.<sup>524</sup> Already, it has

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522. BRUNDAGE, *supra* note 493, at 257.

523. HAINES, *supra* note 2, at 159. Organizations such as the National Coalition to Abolish the Death Penalty and Amnesty International have continued to consider adopting an official policy in favor of civil disobedience tactics in the anti-death penalty movement. *See id.* at 135.

524. *See id.* at 158–61.

A street component, however, implies more than just larger numbers of death penalty opponents. It implies participants with a different orientation, people who are ready, willing, and able to express their opposition to capital punishment in dramatic and highly visible ways. This does not necessarily imply committing civil disobedience. But it does mean public displays of vigorous opposition to execution as a criminal justice policy. The abolitionist cause may well profit from the emergence of different styles of activism that would complement, but not replace, the movement's current reliance on public education, lobbying, and legal work.

achieved success with the moratorium in Illinois and support from key persons—such as some conservatives and some victims' families. Further, as discussed above, successes in other countries have occurred through means that do not require a strong street presence. Thus, while it appears the strategies of the Moratorium Movement need to go beyond the education and legal focus of the anti-lynching movement, it can succeed without the organizational power of the civil rights movement, though more "street component" efforts would be helpful to aid the education process.

#### IV. LESSONS FOR THE FUTURE: WHAT PLACE BEYOND HERE?

##### *A. The Strength and the Future of the Moratorium Movement*

Despite the inherent difficulties in determining the causation of historical events, one must attempt to find the primary causes of the Moratorium Movement in order to understand the death penalty and the current movement in historical context. As historian Henry Steele Commager once wrote:

For though it is not given to us "to know the causes of things," we cannot conclude therefrom that history is chaos, or that it is wholly without meaning, any more than we can conclude of life itself that it is without meaning, for so to conclude would make thought itself irrelevant.<sup>525</sup>

Only by considering the causes of the Moratorium Movement, as this Article has done, can one evaluate the strength and the future of the movement.

The problems with the death penalty—including concerns about executing innocent defendants, racism in the system, and inadequate legal counsel—have been discussed for decades. Yet, the discussion led to no strong movement against the death penalty since the 1960s, and, in fact, led to broader death penalty statutes, limits on judicial review of capital cases, elimination of funding for qualified capital defense attorneys, a growing death row, and more executions. Suddenly in the late

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*Id.* at 159–60.

525. Henry Steele Commager, *The Defeat of the Confederacy: An Overview*, in *WHY THE NORTH WON THE CIVIL WAR* 13 (David Herbert Donald ed., 1996).

1990s and early 2000s, the problems are gaining attention. As discussed throughout this Article, the change in perspective is fueled by a number of events—including the twelve events discussed in Section II—that, in combination, have effected a change in society's attitude regarding the death penalty.

Even more difficult than explaining why the twenty-first century change in attitude occurred is predicting the future of the American Moratorium Movement. The Death Penalty Abolition Movement has struggled through successes and failures for more than 200 years. One may suggest that the events of the last five or so years have just created a blip in the continual changes in popular support for the death penalty in the United States. Yet, the recent changes amount to something more. The Moratorium Movement did not result from one or two events, but several events that are related to each other and have built upon each other, creating a snowball effect. Justice Blackmun's change on the death penalty inspired the ABA and other judges to call for a moratorium or an end to the death penalty. The ABA resolution and the work of people who proved the innocence of people on death row inspired Governor Ryan to impose a moratorium. Illinois's moratorium and Sister Prejean's work have resulted in more media exposure for the issue. The effects continue.

Further, approximately seven years separated the publication of *Dead Man Walking* and Governor Ryan's moratorium on executions in Illinois. The Moratorium Movement has been in place for a long enough time to indicate that it is not just a short-lived movement of a few events. Social change, short of a civil war or catastrophe, takes time. Thus far, the Moratorium Movement has continued to grow over a substantial period of time. Perhaps we will not know whether the Moratorium Movement will continue to progress until another ten years pass. History teaches us that the only constant is that things change.

After concluding that the Moratorium Movement has a substantial basis, one may next consider what factors the Movement needs to continue to evolve and grow. In looking to the lessons from the Anti-Lynching Movement and past death penalty abolition movements, there are several requirements for the continued success of the Moratorium Movement: (1) the country must not become distracted by a major national crisis; (2) although activists of the Moratorium Movement must con-

tinue to emphasize DNA-based innocence issues, they also must seek broad support and not be overly dependent upon one issue, one person, or one strategy; (3) the Moratorium Movement must continue to seek broad support from conservatives and victims' groups; and (4) the Moratorium Movement must continue to achieve popular support and cultivate leaders who will help broaden support for the Movement.

*B. Requirements for Continued Success of the Moratorium Movement*

1. There Must Be No Major National Distracting Forces

One of the reasons that prior death penalty abolition movements floundered was the coming of a war. The Mexican War, the Civil War, World War I, and the Vietnam War all contributed to the ending of promising abolition movements. Perhaps the only reason that World War II is not listed here is that the country was already distracted by the Great Depression, so there was not a strong anti-death penalty movement at that time. Therefore, the continuing growth of the Moratorium Movement depends, in large part, on whether or not a major long-term national event, such as a war or economic crisis, distracts the population from death penalty issues.

National events that do not last a long time probably would not destroy the Moratorium Movement, which has already survived a presidential impeachment<sup>526</sup> and a contested presidential election.<sup>527</sup> However, although it is too early to tell, the recent terrorist attacks of September 11, 2001 and the United States long-term response to those attacks, discussed later, could have an adverse impact on the Moratorium Movement.

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526. See H.R. Rep. No. 105-830 (1998) (report of the impeachment of William Jefferson Clinton).

527. See *Bush v. Gore*, 531 U.S. 98 (2000).

2. The Moratorium Movement Must Continue to Broaden its Arguments and Not Be Overly Dependent Upon One Issue, One Person, or One Strategy

a. *There are Weaknesses in the Moratorium Movement's Narrow Focus*

As the Moratorium Movement evolves beyond a birth stage into a mature movement, the Movement needs not just to continue to embrace innocence and DNA issues, but also to expand beyond those concerns. Key persons within the early emerging Moratorium Movement—such as Sister Helen Prejean in *Dead Man Walking* and Justice Blackmun in his *Callins* dissenting opinion—focused on a variety of problems with the death penalty. Yet, more recent criticisms—such as those made by many of the supporters of the Illinois moratorium—have narrowly focused on innocence issues. The 1960s Death Penalty Abolition Movement, in some ways, was destroyed by its narrow focus on the courts, and there are similar weaknesses in the Moratorium Movement's narrow focus.<sup>528</sup> The Movement's emphasis on innocence issues could damage the Movement if the general population were to believe that changes in the system will prevent the execution of innocent defendants.

Part of the foundation of the Moratorium Movement is the exploitation of the universal agreement that innocent persons should not be executed. If the states address the innocence concerns in a way that is perceived to address that problem, however, the Movement might lose much of its momentum. For example, it is possible that states will pass DNA laws that may be seen as "curing" any innocence problems. Such a perception by the public would be wrong, of course, because DNA evidence is not available in every case and innocent defendants without DNA evidence still may be executed. The public, though, may see the new laws as adequate protection.

Weaknesses in the Movement's focus on innocence issues have been highlighted by death penalty advocates who believe that the system works and who oppose moratoriums on executions. Death penalty advocates have been able to attack the innocence arguments and use DNA technology to their advan-

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528. See *supra* Part III.A.

tage in three ways. First, they have argued that the release of innocent people from death row does not show a problem with the system. They argue that the fact that so many innocent persons have been released from death row illustrates that the justice system works and that it does not need to be fixed.<sup>529</sup>

Second, death penalty advocates have used the DNA technology to confirm the guilt of some capital defendants, again supporting their argument that the system works. Recently, as execution dates approached for Ricky McGinn in Texas<sup>530</sup> and Derek Barnabei in Virginia,<sup>531</sup> their attorneys argued that the men were innocent. Each defendant received a stay of execution for DNA testing to be done, and the testing apparently verified the guilt of the men, who were subsequently executed. Thus, death penalty advocates could argue that the DNA evidence proved that the criminal justice system worked in those cases.

The third way that death penalty advocates have undermined the Moratorium Movement's innocence and DNA arguments is to exploit the difficulty in proving true innocence.<sup>532</sup>

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529. See, e.g., Jeff Jacoby, *Supporters of Capital Punishment Can Cheer Gov. Ryan's Decision*, BOSTON GLOBE, Feb. 28, 2000, at A15. "A prisoner on death row is far more likely to leave on his own two feet than in a box. This reflects the extraordinary level of due process with which we protect the most dangerous criminals in the land." *Id.* Yet, had science not developed the latest DNA tests, many of those inmates freed by those tests would still be on death row, if not executed by now. Also, there are the cases where there is no DNA evidence to show guilt or innocence.

530. See Stevenson Swanson, *Results From DNA Testing Keep Texan on Death Row*, CHI. TRIB., Aug. 16, 2000, at 4. Ricky McGinn was executed on September 27, 2000. *Texas Executes Man in Child's Death: Gov. Bush Granted Reprieve Until DNA Test Confirmed Guilt*, DETROIT NEWS, Sept. 28, 2000, at 5.

531. Matthew Dolan & Chris Grier, *Barnabei Executed: Norfolk Killer Put to Death with Injection After His Appeals Fail*, VIRGINIAN-PILOT (Norfolk, Va.), Sept. 15, 2000, at A1. Although Barnabei tried to raise the issue that the evidence was tampered with because it disappeared for days prior to the testing, he was executed on Sept. 14, 2000. *Id.*

532. A microcosm of the Moratorium Movement, highlighting the problem of focusing on innocence issues when absolute innocence is almost impossible to prove, is the movement surrounding Mumia Abu-Jamal. To a large extent, that movement has focused on the argument that Mumia Abu-Jamal is innocent. To the extent that movement concentrates solely on innocence, it may be doomed to failure. Although Mr. Abu-Jamal may be innocent, the current available evidence—Mr. Abu-Jamal and a handgun registered to him were found at the scene where a law enforcement officer was killed—makes many conservatives dismiss the activists' arguments. See Eric Zorn, *Cause Celebre's Silence Speaks Volumes on Killing*, CHI. TRIB., July 31, 2000, at 1.



Even in cases where DNA evidence tends to show that criminal defendants are innocent, death penalty advocates still are able to argue that the defendants are guilty as accomplices. For example, in 1993, DNA evidence showed that a semen stain at the scene of a rape-murder did not belong to Earl Washington, who had been sentenced to death in Virginia for the crime.<sup>533</sup> However, that evidence of innocence did not set Mr. Washington free. In 1994, Mr. Washington's sentence was reduced only to life imprisonment by then Governor L. Douglas Wilder, and Washington was not released because prosecutors argued that he could have been a second person at the crime.<sup>534</sup> Eventually, only after additional DNA testing exonerated Washington six years later was he finally pardoned for the crime.<sup>535</sup> Thus, the Washington case highlights the near impossible task of proving that capital defendants are absolutely innocent, which is another reason that the Moratorium Movement cannot rely exclusively upon innocence arguments.

In addition to the ways that death penalty advocates have been able to attack the innocence arguments, another problem with the innocence focus for some is that the focus legitimizes the death penalty. To the extent the Moratorium Movement's

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Mr. Abu-Jamal, however, has strong arguments regarding the unfairness of his trial, examples of racism in the system, and moral opposition to the use of the death penalty. Further, death penalty abolitionists could argue that the case illustrates the absurdity of destroying this person who has some value to society. To the extent the Abu-Jamal movement focuses on these aspects, which are easier to prove than actual innocence, there is hope that his movement will succeed in preventing the execution. One should note that both the Mumia Abu-Jamal movement and the Moratorium Movement's innocence arguments have been important to the growth of the Moratorium Movement.

It will be interesting to see how a recent decision in the case will affect the movements. On December 18, 2001, the United States District Court for the Eastern District of Pennsylvania ordered a new capital sentencing hearing in Mr. Jamal's case because the jury instructions regarding sentencing violated the constitution. *Mumia Abu-Jamal v. Horn*, No. CIV. A. 99-5089, 2001 WL 1609690, at 130-31 (E.D. Dec. 18, 2001). The court denied the other claims raised by Mr. Jamal's petition for a writ of habeas corpus. *Id.*

533. Brooke A. Masters, *Virginia Prisoner Puts Aside Hopes for Freedom*, WASH. POST, Sept. 24, 2000, at C01.

534. *Id.* Prosecutors maintained that there may have been a second attacker, though the victim's dying words indicated there was only one perpetrator. *Id.* The evidence against the borderline mentally retarded Washington was a confession that consisted of yes-and-no answers to questions by police. *Id.*

535. Tim McGlone, *Pardoned Prisoner to Stay Put a Bit Longer: Parole Process Should Have Begun 11 Years Ago*, VIRGINIAN-PILOT (Norfolk, Va.), Oct. 5, 2000, at A1.

goal is to fix the system so that the death penalty is fair, then such a goal teaches the lesson that the death penalty is a good thing to have, a conclusion with which many in the Moratorium Movement would not agree.

*b. The Moratorium Movement Should Use Three Strategies to Expand its Focus*

To address the over-reliance on innocence and DNA issues, the Moratorium Movement must follow three strategies. First, the Moratorium Movement must strengthen the innocence arguments. Because of the past reliance on innocence issues as a foundation of the Moratorium Movement, the Movement cannot abandon the issues and it must strengthen those arguments. The Movement must clarify that the innocence problems are part of systemic problems that cannot be cured by technology. One way to strengthen the innocence arguments is to stress that DNA tests will not protect all innocent defendants. If states are discovering among cases with DNA samples that innocent defendants have been sentenced to death, then innocent defendants probably are being sentenced to death in cases that do not have any DNA evidence.

The second strategy to address the over-reliance on innocence and DNA issues is for those in the Moratorium Movement to work harder to educate the public about other concerns beyond innocence. For the Moratorium Movement to survive tinkering with the system that might appear to solve some of the problems—as done during the post-*Gregg* years—the Movement needs to expand its emphasis beyond innocence issues.

For example, even if the innocence problems were fixed, there still remains the difficulty in distinguishing those murderers who deserve to be executed from those who do not. Only a small proportion of murderers are sentenced to death and executed. However, abolitionists have failed in making enough of an issue regarding the arbitrariness of the distinction.

In *Furman*, Justice Stewart wrote that the Constitution “cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed.”<sup>536</sup> After the Court decisions that followed

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536. *Furman v. Georgia*, 408 U.S. 238, 310 (Stewart, J., concurring).

in response to the work of the 1960s Abolition Movement, critics argue that the Court does tolerate such a system, though such criticism has sometimes been buried by innocence arguments in recent years. The current Moratorium Movement, therefore, must focus on getting the public to question whether it will tolerate a system with disparities in the selection of who spends life in prison and who is executed. Most recently, the June 2001 federal execution of Juan Raul Garza raised concerns about racial bias within the federal death penalty system because blacks and Hispanics make up about eighty percent of federal death row inmates.<sup>537</sup> Similarly, guilty inmates such as Caryl Chessman, Wilbert Evans, and Karla Faye Tucker have raised concerns among former death penalty supporters. Arguably, because of the difficulty in proving innocence, these types of inmates may have a greater impact than the execution of those with strong innocence claims, such as Roger Coleman or Gary Graham.<sup>538</sup>

Perhaps the Moratorium Movement has failed to focus on the death selection issue—i.e., which guilty defendants should be executed—because the public often seems to have less concern for such distinctions and little compassion for most guilty defendants. For the Moratorium Movement to be a success, however, the public will have to become more concerned about this aspect. Many of the biggest problems with the death penalty come from these distinctions, including problems such as racial discrimination, which was one of the issues that helped make the anti-lynching campaign a success. The anti-lynching campaign was not based overwhelmingly on innocence issues, but created a public outcry about the moral and racial aspects of lynching. Similarly, while innocence will remain a key concern of the Moratorium Movement, reformers must back up that concern with other issues. Such issues may not have the cache of innocence issues, but the Moratorium Movement must use the media attention to continue to educate the public on all of the problems with the death penalty.

The third strategy the Moratorium Movement should follow to address the over-reliance on innocence issues is to supplement the innocence and procedural arguments with moral

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537. Kevin Johnson, *In Wake of Execution, Bias Issue Resurfaces*, USA TODAY, June 20, 2001, at 3A.

538. See *supra* Part II.F.1 for a discussion of these capital defendants.

arguments, both about the morality of any killing and about the effects that executions have on society. Certainly, arguments that "the death penalty is immoral" are less likely to persuade than systemic arguments are, but the moral arguments against the death penalty are the foundation of opposition to the death penalty for many people. Polls show that about two-thirds of death penalty opponents are against the death penalty based on moral grounds.<sup>539</sup> Although it is more difficult to convert pro-death penalty people on this ground—especially if done by one who claims moral superiority to the listener, those who are converted on this ground are the strongest allies of the Movement and are not an insignificant number.

From Beccaria's concerns about the "barbarity" of the death penalty,<sup>540</sup> to Justice Brennan's concerns about "human dignity,"<sup>541</sup> to work by churches today, such arguments have grounded death penalty abolitionists with a moral force that elevates the importance of the issue. Although the morality arguments, by themselves, are not enough to persuade a majority of today's society, they provide a foundation that supports the Moratorium Movement as a whole, much as morality arguments provide the basis for death penalty concerns in many other countries and were an undercurrent throughout the Anti-Lynching Movement. Therefore, along with strengthening the innocence arguments and expanding the debate to increase the focus on other problems with the system, the Moratorium Movement should highlight its moral stance.

### 3. The Moratorium Movement Must Continue to Expand its Base by Seeking Support from Unexpected Voices

Another way to strengthen the Moratorium Movement is to continue to seek support from unexpected voices, such as conservatives. As discussed earlier, people who one might expect to ordinarily favor the death penalty, such as George Will, have given credibility to the Moratorium Movement with their criticisms of the death penalty. Also, the importance of the role of

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539. LIFTON & MITCHELL, *supra* note 26, at 219.

540. BECCARIA, *supra* note 132, at 58.

541. See, e.g., *Furman*, 408 U.S. at 270-86 (Brennan, J., concurring).

victims' groups should not be underestimated. They have one of the most credible voices in this area, and they are suited to take a larger role in the Moratorium Movement. As noted above, the lynched's perceived victims, women, played a key role in the anti-lynching campaigns in the early twentieth century. Similarly, the potential influence of MVFR in joining with the NAACP in the anti-death penalty movement is significant.

The unlikely activists often benefit from such movements. The women's movements that fought against lynching in the early 1900s were indirectly fighting against sexual oppression and the attempts of white males to control women.<sup>542</sup> Similarly, death penalty abolitionists argue that MVFR's work against the death penalty helps to honor the victims by focusing on their memory instead of vengeance.<sup>543</sup> Further, conservatives who now argue against the death penalty are supporting the conservative cause of limiting the power of government. Thus, the Moratorium Movement should be able to continue to draw support from these sources.

#### 4. The Moratorium Movement Must Stay Focused on the Goals of Achieving Popular Support and Creating New Leaders

More broadly, activists in the Moratorium Movement must continue to stay focused on educating the public about the death penalty and on gaining new leaders. Although experiences in other countries offer some hope for imposing a moratorium over majority support for the death penalty, as discussed earlier, the uniqueness of the democratic political system in the United States means that popular opinion will be more important here than it was in other countries.<sup>544</sup>

As in other countries, the Moratorium Movement will benefit if political leaders, such as Governor Ryan, continue to help educate the public. The importance of leaders can be seen

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542. See HALL, *supra* note 509, at xxi.

543. See, e.g., ANTOINETTE BOSCO, *supra* note 340, at 113. The mother whose son and daughter-in-law were murdered wrote: "Some would actually accuse me of not loving my children if I didn't want the murderer to get the same fate that he had dished out. My answer was that, on the contrary, I was honoring my murdered children by raising my voice against killing, all killing." *Id.*

544. See *supra* discussion Part III.C.

by the fact that if Nebraska and New Hampshire recently had different governors who would not have used their pro-death penalty vetoes, Nebraska would now have a moratorium on executions and New Hampshire would have abolished the death penalty. Considering, however, the substantial decline in lynchings throughout the early twentieth century even though "no president until Harry Truman in 1947 took a leadership role in the anti-lynching campaign,"<sup>545</sup> perhaps the Moratorium Movement can continue to achieve successes without a high level national political leader. Activists—such as Sister Helen Prejean in the Moratorium Movement and Jessie Daniel Ames in the Anti-Lynching Movement—are often able substitutes for strong political leadership.<sup>546</sup>

For the Moratorium Movement to continue to grow and to eventually fix or eliminate the death penalty, its goal must not just be to get a temporary majority of people to oppose the death penalty. The 1960s Death Penalty Abolition Movement succeeded in getting popular support for the death penalty below fifty percent, but it was ultimately unsuccessful in abolishing the death penalty or even maintaining that level of public opinion. Therefore, the Moratorium Movement must continue to educate the public in ways that make the dwindling popular support more meaningful and lasting than that of the 1960s. One way that the Moratorium Movement may continue to grow is to avoid events like the *Furman* and *Gregg* decisions, which created a backlash and ended the 1960s Death Penalty Abolition Movement after the objective of a Court-ordered abolition of the death penalty was lost. Although the Moratorium Movement may experience other successes similar to the executive action of the Illinois governor, such successes will only be lasting if the public backs them. The Moratorium Movement can gain such support with education and with additional leaders.

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545. CLAUDINE L. FERRELL, NIGHTMARE AND DREAM: ANTILYNCHING IN CONGRESS, 1917-1922, at 302 (1986).

546. Further, Rev. Jesse Jackson recently began to take a stronger leadership role among death penalty abolitionists, and he was arrested while protesting an execution in Oklahoma. Chuck Ervin & Brian Ford, *Jackson Among Nearly 40 Protesters Arrested*, TULSA WORLD, Jan. 11, 2001, at 1.

## CONCLUSION

The Death Penalty Moratorium Movement has gone beyond the creation stage and is on the threshold of a more mature stage. The events discussed above have created a movement that has potential to grow, especially if, as discussed: (1) there are no major national distracting forces; (2) the movement continues to broaden its arguments beyond the DNA and innocence arguments; (3) the movement continues to obtain support from unexpected voices; and (4) the movement stays focused on the goals of achieving lasting popular support and creating new leaders. If the death penalty system is not fixed and more people become educated about the system, the Moratorium Movement may transform into a strong Death Penalty Abolition Movement at some point.

The Moratorium Movement has occurred during a time of growing access to information due to technological changes. Perhaps Justice Marshall was correct when he wrote in *Gregg v. Georgia* that "American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and . . . if they were better informed they would consider it shocking, unjust, and unacceptable."<sup>547</sup> As the events of the Moratorium Movement have helped to educate the public, the weakening support for the death penalty is proving Justice Marshall's theory to be true.

The Moratorium Movement and the education from the Movement continue to spawn victories. Although as recently as August 1996, Arizona executed a mentally retarded inmate named Luis Mata,<sup>548</sup> in 2001 Arizona's governor signed legislation banning the execution of any more mentally retarded defendants.<sup>549</sup> Then, between June 2001 and August 2001, the

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547. 428 U.S. 153, 232 (1976) (Marshall, J., dissenting). See *Furman v. Georgia*, 408 U.S. 238, 360-69 (Marshall, J., concurring). In *Gregg*, Justice Marshall noted that a study "confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty." 428 U.S. at 232. See Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171 (1976).

548. David Cole, *The Measure of Our Humanity: It's Time the Law Stopped Executing the Mentally Retarded*, LEGAL TIMES (D.C.), May 19, 1997, at 27.

549. Emilie Lounsberry, *Americans Rethinking the Death Penalty: Wrongful Convictions, Quality of Defense Counsel, and the IQs of Defendants are Among the Concerns*, PHILADELPHIA INQUIRER, May 10, 2001, at A01.

governors of Florida, Connecticut, Missouri, and North Carolina signed into law similar bills that banned the execution of mentally retarded inmates.<sup>550</sup> More than a decade after upholding the constitutionality of the execution of the mentally retarded,<sup>551</sup> the Supreme Court on September 25, 2001 agreed to review the issue in *Atkins v. Virginia*.<sup>552</sup> Meanwhile, the Georgia Supreme Court held that execution in the electric chair is cruel and unusual punishment,<sup>553</sup> and the governors in Texas and Virginia signed laws giving capital defendants access to DNA testing.<sup>554</sup> In July 2001, after twenty years of supplying the chemicals used for lethal injections in Oklahoma, the McAlester Regional Health Center, pressured by Human Rights Watch, announced that it would no longer supply those chemicals and take part in "assisting the state in the implementation of the death penalty."<sup>555</sup> These are just some of the

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550. On June 12, 2001, President Bush's brother, Governor Jeb Bush, signed into law a bill banning the execution of the mentally retarded in Florida. *Jeb Bush Signs Bill Barring Executing the Retarded*, N.Y. TIMES, June 13, 2001, at A30. On July 2, 2001, Missouri Governor Bob Holden signed a mental retardation bill. Tim Hoover, *Missouri to Stop Executing Retarded; Holden Signs Bill Setting New Limits*, KAN. CITY STAR, July 3, 2001, at B1. On July 6, 2001, Connecticut Governor John Rowland signed a similar bill. *Capital Punishment: Three States Ban Execution of Retarded*, FACTS ON FILE WORLD NEWS DIG., Aug. 4, 2001, at 629B3. On August 5, 2001, North Carolina Governor Mike Easley signed a bill that made that state the eighteenth state to ban the execution of the mentally retarded. Stan Swofford, *State Law Could Affect McCarver Case; The State Asks the High Court to Dismiss the Appeal of a Condemned Murderer*, NEWS & REC. (Greensboro, N.C.), Aug. 7, 2001, at B3.

"[Other] states that have banned such executions are Arizona, Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, South Dakota, Tennessee and Washington." *Jeb Bush Signs Bill Barring Executing the Retarded*, *supra*. Recently, Texas Governor Rick Perry vetoed a bill that would have banned the execution of the mentally retarded. Christy Hoppe, *Governor Vetoes Ban on Executing Retarded: Critic Says Act Fuels Image That State is 'Bloodthirsty'*, DALLAS MORNING NEWS, June 18, 2001, at 1A.

551. In 1989, the Supreme Court upheld the constitutionality of the execution of the mentally retarded in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

552. 122 S.Ct. 24 (Sept. 25, 2001), *amended by* 122 S.Ct. 29 (Oct. 1, 2001). See Linda Greenhouse, *Supreme Court Roundup; Court Takes Case Testing the Limits of Vouchers Laws*, N.Y. TIMES, Sept. 26, 2001, at A1. The Virginia legislature, however, could make the case moot by joining the other states that have banned the execution of defendants with mental retardation.

553. See *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001) (holding that execution in the electric chair is cruel and unusual punishment under the Georgia state constitution).

554. Lounsberry, *supra* note 549.

555. Bob Doucette, *Hospital Stops Sale of Execution Drugs*, DAILY OKLAHOMAN, July 6, 2001, at 1A.



most recent substantial changes that are a direct result of the Moratorium Movement.

Of course, there will be setbacks for any reform movement, and there are some dark clouds on the horizon for the Moratorium Movement. As one author noted about the British moratorium movement: "[T]he prospect for change can be affected markedly by happenings outside the political process and by occurrences more or less uncontrollable by either the reformers or their opponents."<sup>556</sup> Governor Ryan is not running for a second term as governor of Illinois, and a successor might lift the moratorium in that state.<sup>557</sup> Further, on September 11, 2001 as this Article was being prepared for publication, terrorists hijacked several airplanes, destroyed the World Trade Center towers in New York City, damaged the Pentagon, and took thousands of lives. The United States is engaged in a "war on terrorism" and has launched attacks in Afghanistan.<sup>558</sup> As discussed in this Article, the Moratorium Movement has benefited from a long period of peace, sympathetic defendants, decreasing crime rates, and a strong economy. The lessons of history indicate that various events may also have adverse effects on reform. There may be a negative impact on the Moratorium Movement from a long-term war, the capture of unsympathetic defendants who were involved in this mass murder, and a possible downturn in the economy.<sup>559</sup> Within one week of the at-

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556. CHRISTOPH, *supra* note 283, at 174.

557. See Rick Pearson, *Ryan Won't Seek Second Term; No GOP Cakewalk Now*, CHI. TRIB., Aug. 9, 2001, at N1. On June 12, 2001, State Sen. Patrick O'Malley, a challenger for the office from Governor Ryan's party, kicked off his campaign by declaring that he would lift the moratorium. Ray Long & Douglas Holt, *O'Malley Already Out, Running for Governor; Death Penalty Freeze, Abortions Are On His Hit List*, CHI. TRIB., June 12, 2001, at D7. State Senate President James "Pate" Philip, a Republican like Ryan and O'Malley, previously complained about the moratorium by saying that Governor Ryan could not "pull the switch" because he was a "pansy." Laura S. Washington, *Ryan Stands Up for Compassion*, CHI. SUN-TIMES, May 21, 2001, at 35.

558. See Thom Shanker and Eric Schmitt, *A Nation Challenged: Ground War; G.I. Raid Struck Taliban Leader's Compound*, N.Y. TIMES, Oct. 21, 2001, 1A.

559. Additionally, if participants in the September 11 attack are captured outside the United States, international bans on extraditing individuals who will face the death penalty may have some effects on public opinion about the death penalty. See, e.g., Eric Lichtblau and Carol J. Williams, *Response to Terror; The Investigation*, L.A. TIMES, Oct. 24, 2001, at A1. Although there could be some adverse reactions to such extradition bans, our reliance on other governments in fighting terrorism may help to bring the United State's death penalty position closer to that of international standards.

tacks, the New York legislature responded by expanding the state's death penalty.<sup>560</sup> Similarly, in response to the terrorist attacks, several other state legislatures are considering expanding their death penalty statutes.<sup>561</sup>

The Moratorium Movement appears to be strong enough to survive through recent events, and people probably will not forget the problems with the death penalty that resulted in moratorium resolutions and a drop in executions.<sup>562</sup> Even after the terrorist attacks, Virginia elected a Lieutenant Governor who is against the death penalty,<sup>563</sup> and seven of the eight candidates for governor of Illinois said that if elected they would keep the moratorium on executions in that state.<sup>564</sup> Not long af-

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560. Ken Armstrong, *Laws Could Get Tougher on Criminals*, CHI. TRIB., Sept. 21, 2001, at 14N. In the wake of the attack on the World Trade Center buildings, only one New York state senator voted against the death penalty expansion, and the state Assembly passed the bill by a vote of 131-5. John Caher, *State Legislature Approves Tough Anti-Terrorism Laws*, N.Y. LAW J., Sept. 21, 2001, at 1. The *New York Law Journal* noted, "The Democratic Assembly had previously declined to consider the anti-terrorism package, but the political dynamics have quite obviously changed in the past several days." *Id.*

561. See, e.g., John Tyrangiel, *Terror in the Statehouse*, TIME MAGAZINE, Jan. 21, 2002, at 51 (noting that at least eight states have bills that would make certain acts of terrorism a capital offense even though terrorism is already a capital offense under federal law). In Virginia, after the September 11 attacks, the state legislature shifted from focusing on death penalty reform to death penalty expansion. Tim McGlone, *Death Penalty Reform Fades in Virginia*, VIRGINIAN-PILOT (NORFOLK), Jan. 9, 2002, at A5. Virginia Senator Ken Stolle, who had been considering supporting a death penalty moratorium, said that now he would not support a moratorium "in light of Osama bin Laden and people who fly planes into buildings." *Id.*

562. As of September 6, 2001, "this year marks the first time since the death penalty was restored in 1976 that executions have dropped significantly nationwide for two years in a row." Brooke A. Masters, *Executions Decrease For the 2nd Year*, WASH. POST, Sept. 6, 2001, at A01.

563. Joel Turner, *Democrat Tim Kaine Wins Lieutenant Governor*, ROANOKE TIMES & WORLD NEWS (Va.), Nov. 7, 2001, at A16. Also, New Mexico had its first post-Gregg execution on November 6, 2001, and that state's pro-death penalty governor began publicly questioning whether the death penalty is a good policy. Steve Terrell, *Three More Wait, But Executions Uncertain*, SANTA FE NEW MEXICAN (N.M.), Nov. 7, 2001, at A1. Currently, legislators in New Mexico are considering a bill to abolish the death penalty in that state. S.U. Mahesh, *Aragon Puts Death Penalty on Table*, ALBUQUERQUE J., Jan. 24, 2002, at A8. Gov. Gary Johnson said that "it's a probability" that he would consider abolishing the death penalty. *Id.*

564. Kevin McDermott, *7 of 8 Candidates for Governor Would Prolong Execution Freeze*, ST. LOUIS POST-DISPATCH, Oct. 29, 2001, at A1. Other positive news for the Moratorium Movement comes from a recent *Chicago Tribune* report that a majority of the members working on the soon to be released Illinois study have concluded that the death penalty should be abolished. See Steve Mills and

ter the attacks, New York City elected as mayor Republican Michael Bloomberg, who is against the death penalty and who hopes to show pro-death penalty Republican leaders the "errors of their ways" on the issue.<sup>565</sup>

Yet, history teaches that the future is unpredictable. In the end, perhaps the lasting legacy of the Moratorium Movement will not be widespread state moratoriums or an immediate abolition of the death penalty but the creation of a new generation of abolitionists. The moratorium bills, *Dead Man Walking*, innocent people on death row, and criticism of the death penalty are new stories being told throughout society. These stories are being heard by future decision-makers and will influence their views about the death penalty. Many of the members of today's Moratorium Movement likely were influenced by the things they heard and read about during the 1960s Death Penalty Abolition Movement. The Anti-Lynching Movement succeeded through education only after a generation had passed since the beginning of that movement. The Progressive activists failed in obtaining a nationwide abolition of the death penalty, but they changed some minds and laws, perhaps forever preventing some states from executing their citizens. Changes in laws and attitudes in other countries were not swift either.

The final lesson from history is that reform is a long-term process and success may come in unpredictable ways. Lynching was eradicated not by the desired goal of federal legislation, but by the education that occurred as a result of the failed attempt to pass federal legislation. Similarly, the success of the Moratorium Movement may not be an immediate nationwide moratorium on executions but something more indirect. Hollywood director and producer Norman Felton, a death penalty opponent whose daughter, son-in-law, and grandchild were murdered, noted that the fight against capital punishment will

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Christi Parsons, *Death Penalty Report Near; Panel Votes 8-5 to End Capital Punishment*, CHI. TRIB., Feb. 1, 2002, at L1. What role, if any, a commission vote to abolish the death penalty will play in the final report is unclear. See *id.* Also, the report will recommend numerous proposals to change the death penalty system. *Id.*

565. Michael Saul, *Bloomy to Meet with Cheney*, DAILY NEWS (N.Y.), Nov. 15, 2001, at 10. Unlike campaigns for state offices, the death penalty is not a big issue in campaigns for city offices. Still, the election may be significant if Mr. Bloomberg plays an active role in educating people on the issue.

take time: "We aren't going to change society overnight."<sup>566</sup> Perhaps the abolition of the death penalty will come from the 2050s Death Penalty Abolition Movement, which will have sprouted from the generation that learned about capital punishment from the current Moratorium Movement.

As the Death Penalty Moratorium Movement continues to educate the leaders of today and of the future, the reasonable progression is for more states to experiment by imposing moratoriums on executions to resolve whether the system can be fixed or whether American society is better off without a death penalty. Perhaps, as one famous attorney from the Progressive Era stated, "The time will come when all people will view with horror the light way in which society and its courts of law now take human life; and when that time comes, the way will be clear to devise some better method of dealing with poverty and ignorance and their frequent byproducts, which we call crime."<sup>567</sup> Although that prediction has yet to come true, the Moratorium Movement is changing the views of many people today and taking us to another place beyond here.

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566. Norman Felton, *The Quality of Mercy*, in *A PUNISHMENT IN SEARCH OF A CRIME* 63, 70 (Ian Gray & Moira Stanley eds., 1989).

567. Clarence Darrow, *The Futility of the Death Penalty*, in *VERDICTS OUT OF COURT* 225, 232 (Arthur Weinberg & Lila Weinberg eds., 1989). Similarly, Mr. Felton reasoned, "To keep a person alive and find out why he did the crime and then work towards helping change conditions . . . offers society a better chance in the future than capital punishment." Felton, *supra* note 566, at 70.