

Veering Off the Abolitionist Path in America: The Influence of the Ambiguously Written Constitution

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Abstract

In the 21st century, capital punishment in the United States stands as a peculiar institution. Despite widespread international movements for its abolition, and widespread expert agreement on its ills, the death penalty still persists in the United States. America remains the only country in the Western world to retain the death penalty today. We use it frequently, executing approximately 52 people per year, a rate comparable to both Saudi Arabia and Yemen. The question of why the United States still retains the death penalty has been the subject of debate for decades. Countless historical explanations have been posited, ranging from the religious to the political, from the racial, to the legal. The historical analysis of modern social institutions is important -- they help us understand why and how such institutions came to be normatively accepted and persistent in the world today. In this paper I will set out to examine why the United States retained the death penalty despite its initial suspension in 1972 by the Supreme Court under *Furman v. Georgia*. In doing so I will relate the narratives of two countries, the United States and the United Kingdom, and their experience with abolition in the post-World War II era.

Introduction

“For centuries the death penalty, often accompanied by barbarous refinements, has been trying to hold crime in check; yet crime persists.”

Albert Camus, *Resistance, Rebellion, and Death*¹

In the 21st century, capital punishment in the United States stands as a peculiar institution. Despite widespread international movements for its abolition, the death penalty still persists in the United States. America remains the only country in the Western world to retain the death penalty. We use it frequently, executing approximately fifty-two people per year, a rate comparable to that of Saudi Arabia and Yemen.²

The question of why the United States still retains the death penalty has been the subject of debate for decades. Countless historical explanations have been posited, ranging from the religious³ to the political,⁴ from the

racial⁵ to the legal.⁶ The historical analysis of modern social institutions is important -- they help us understand why and how such institutions came to be normatively accepted and persistent in the world.

In this paper I will set out to examine why the United States retained the death penalty despite its initial suspension in 1972 by the Supreme Court under *Furman v. Georgia*. In doing so I will relate the narratives of two countries, the United States and the United Kingdom, and their experience with abolition in the post-World War II era.

Part I will detail the American narrative. I will capture the main abolitionist movement in the United States, which occurred between 1960 and 1976.

Part II will detail the British narrative. The major modern British abolitionist movement occurred slightly earlier than its American counterpart, from 1948 to 1969.

Part III will examine some potential explanations for the trajectories of these narratives. In doing so I will weigh the evidence for the impact of entrepreneurial political elite and public opinion, on the trajectory of abolition in both of these countries. Both explanations have very commonly been proposed and analyzed. The international comparison, moreover, will tease out parallels and/or contradictions to delineate what aspects of the American narrative can be explained with each.

Part IV will examine the impact of the textual, written Constitution of the United States in the persistence of the death penalty and will compare it to that of the British experience. The United States and the United Kingdom differ in terms of their approaches to constitutionality. The American Constitution is codified. Codified constitutions are written and contain textual provisions that are binding on all state institutions and practices. The United Kingdom, on the other hand, has no formal written constitution -- it is "uncodified." Instead of a single document, the English constitution is derived from a number of sources, including the laws passed by Parliament and from precedents established by judicial decisions. As a result, Parliament is not answerable to a 'higher law;' rather it can "make or unmake any law on any subject whatsoever."⁷ More importantly for this analysis, capital punishment in England was not understood through any ambiguous normative standard that derived from an authoritative text. This is not the case in America, where the Constitution, specifically the Eighth Amendment, provided such a standard with which to judge capital punishment.

From compiling these explanations together, I will conclude that although the influence of elite policy entrepreneurs and public opinion can, together, explain: (1) the initial movements for the abolition of capital punishment; and (2) why capital punishment became a prominent issue for British and American governments, it cannot adequately explain why America reneged on its abolition of the death penalty.

I will also conclude that there is a tenable case to be made of the influence of the ambiguously written Constitution in veering the United States off its abolitionist path and pushing the country towards a reinstatement. I will show that the reasons for this phenomenon were twofold. First, the incorporation of the Eighth Amendment into the capital punishment debate diverted time and attention away from the discussion on the efficacy of capital punishment itself, a debate that the abolitionists in England showed could be won with objective data. Second, the shift of the debate to the meaning of “cruel and unusual punishments” moved the discussion away from social scientific searches for measurable behavior patterns towards interpretive searches for the best understanding of normative concepts.

Part I: The American Narrative

1960s and Prior: The Declining American Death Penalty

The American 1960s were marked with strong movements towards civil and political rights, increased application of the social sciences to public policy, and a renewed interest in humanitarian public policies. In the wake of the Second World War, an increasing number of American politicians became concerned with preserving the “sanctity of human life” in both the political and legal realms.⁸ The attitude of the sixties was visibly present in its treatment of the death penalty. Throughout the decade, capital punishment met not only challenges to its legal codification, but also waned in frequency as a practice used by law enforcement, establishing two strong and identifiable paths towards abolition.

The first path edged towards the de jure abolition of capital punishment in the United States. Even in the earliest part of the decade, opponents attacked American capital punishment “on several fronts” with an unprecedented furor.⁹ Members of Congress introduced bills to end particular mandatory capital punishment statutes, and other members introduced bills that banned capital punishment in its entirety.

Movements also occurred on grassroots levels. Churches and religious groups put pressure on both state and federal governments to change existing death penalty statutes.¹⁰ Elite opinion had begun to move away from supporting the death penalty, and even public support of the death penalty, which had always been relatively strong, fell to its weakest points in this decade.¹¹ While in 1953, 70 percent of the public supported capital punishment, by 1966 that figure was down to 42 percent.¹²

Within various state legislatures around the country, the death penalty lost even more battles. While Congress refused to ban the use of capital punishment, nine states (Alaska, Delaware, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, and West Virginia) completely and explicitly abolished capital punishment by 1967.¹³¹⁴¹⁵

In some of these cases, state legislatures were the actors that orchestrated the end of their states' practices of capital punishment. In 1963, for instance, the Michigan legislature amended its state constitution to prevent any possible attempts to reinstate the death penalty.¹⁶ Movements in other states were driven at the level of the citizenry. Oregon abolished the death penalty in 1964 by way of a public referendum, which passed with a large majority.¹⁷

The second abolitionist path was towards a de facto abolition of capital punishment, emerging as law enforcement officials sought and applied the death penalty less often. For even though forty-one states still had capital punishment on the books by the end of the 1960s, the frequency with which executions were carried out was dropping drastically, and the practice as a whole was becoming increasingly rare in the United States. Kansas, for example, ended up observing a de facto moratorium on capital punishment in the early sixties, because its Republican governor "just [didn't] like killing people."¹⁸ Judges, prosecutors, and juries were all more reluctant to impose the death penalty than in the past, preferring to dole out life sentences instead.¹⁹ It appeared that even without significant abolitionist activity or grand legislative actions, the death penalty was falling out of favor throughout the country.²¹

The data illustrate this trend. In 1960, fifty-seven people were executed in total across the United States. This was down enormously from the earlier years of the twentieth century, in which as many as nearly 200 people were executed annually. As the sixties wore on, the frequency of executions fell even further: in 1963, twenty-one individuals were executed, in 1964, fifteen individuals were executed, and in 1965, the number executed had fallen to only seven. By 1968, a de facto moratorium on capital punishment was in effect in the United States, and no persons were executed for the rest of the decade.²²

The 1960s Legislative Debates over the Death Penalty

As capital punishment came under increasing fire during the 1960s, members of the 86th, 87th, and 89th Congresses introduced several bills that were either partial steps towards or complete plans for its abolition. Although few of these proposals were ultimately enacted, they do provide valuable insight into the frame of the debates that occurred in the federal legislatures of the sixties regarding capital punishment. These debates reveal a strong focus on two points of interest: deterrence and morality.

The major federal bills regarding capital punishment are enumerated as follows, in chronological order. In 1960, Representative Abraham Multer (D-NY) introduced H.R. 870, a bill to ban all capital punishment on the federal level.²³ In 1962, Senator Wayne Morse (R-OR) attempted twice to amend H.R. 5143 to prevent all executions in the District of Columbia.²⁴ In 1966, Senator

Philip Hart (D-MI) introduced a bill in the Senate (S. 3646), joined by nine other senators, abolishing the death penalty for all federal crimes.²⁵ Also in 1966, Representative Robert Kastenmeier (D-WI) introduced a bill to abolish the death penalty in its totality, under “all laws of the United States.”²⁶²⁷

The leading concern in discussing these bills, as Representative Multer pointed out in his testimony before the House Judiciary Committee in support of H.R. 870, was “whether we can justify the death penalty on the ground that it prevents or deters crime.”²⁸ As bills, amendments, and arguments were levied against or for capital punishment, each side stressed the issue of deterrence. Concerning H.R. 870, Representative Multer immediately submitted into the record the results of Great Britain’s 1953 Royal Commission on Capital Punishment, which could find no link between the death penalty and murder rates.²⁹ Senator Hart, when introducing S. 3646 in the Senate, focused the debate on what he called the “key question” -- whether or not “the death penalty deter[s] and prevent[s] similar crimes in the future.” He then published six statements of penologists, professors, and police officers, all testifying that it did not.³⁰

Senator Morse similarly called upon a wealth of expert articles and testimony to justify what he viewed as the first of his main points regarding the death penalty, deterrence. He declared that:

“It is pretty well established by a great many research studies, and pretty well established in the authoritative writings of many of our criminologists and penologists, that many people labor under the misconception that capital punishment is an effective deterrent to crime. The research studies do not bear that out [...].”³¹

Senator Morse “assure[d] everyone” that he would “urge that criminologists and penologists be called in to testify” on the issue of deterrence. In the meantime, he placed in the record two articles explicitly to “demonstrate how capital punishment has failed to deter crime.”³²

But arguments over deterrence were not solely the concern of the death penalty abolitionists. The second concern that the congressmen consistently identified was the issue of morality. These arguments claimed either that the death penalty is wrong because ‘thou shalt not kill,’ or that the death penalty is legitimate because of ‘eye-for-an-eye’ principles of justice. Representative Multer argued, “There is a moral question involved in the justice of capital punishment” because “innocent men have been executed” and “life is sacred.”³³ He explained, “Only God with his infinite wisdom and charity should wield that awful power [to execute].”³⁴ Senator Morse similarly argued, “The taking of life is the prerogative of God, and not of men.”³⁵ In the same speech, Morse summarized his points against the death penalty:

“First, I consider it to be immoral. Second, I do not consider it to be an effective deterrent to crime. Third, I think the time has come when we ought to set a good example of high civilization and make clear that we no longer resort to the eye-for-an-eye [...] jungle law.”³⁶

The Involvement of the Courts

Up until the end of the 1960s, the courts had nothing to say about the constitutionality of the death penalty itself. Not only had the death penalty been widely accepted throughout the nation’s history, its constitutionality per se had never been formally challenged in any court.³⁷ In fact, the practice had been in wide use at the time the Constitution was written and implemented, and few people, if any, thought that the Constitution had any sort of implicit or explicit goal of abolishing capital punishment.³⁸ Illustrative of this general understanding, neither litigants, nor the press, nor public interest groups had ever focused on the constitutionality of capital punishment itself in any substantial manner.³⁹ Even the American Civil Liberties Union did not, at the time, consider capital punishment to be a civil rights issue.⁴⁰ But as the transformative sixties continued, and as the Warren Court gave a friendlier ear to minority-held and liberal ideas, it appeared that the Court might finally be poised to wrestle with the issue of capital punishment on constitutional grounds.⁴¹

The first steps toward court involvement regarding the constitutionality of the death penalty came not in the forms of amicus briefs or arguments from litigants or interest groups, but came instead from the ‘top-down’ -- from constitutional experts and a particularly interested Supreme Court Justice. In 1961, attorney Gerald Gottlieb published a prominent article in the *University of Southern California Law Review* contending that the American death penalty was of questionable constitutionality, specifically crafting his argument under the Eighth Amendment.⁴² Gottlieb was not concerned whether or not capital punishment deterred crime. Rather, he argued that the death penalty had become unconstitutional because of the “changed standards of decent conduct” in modern times.⁴³ He linked these standards to the Eighth Amendment and its dynamic ban on “cruel and unusual punishments” by way of *Trop v. Dulles*,⁴⁴ a case in which the Supreme Court held that the meaning of the Eighth Amendment was not very precise, and therefore “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁴⁵ Gottlieb’s novel argument helped set the legal stage for the courts to address the question of capital punishment outside of the domain of the legislature, and within the domain of the Constitution.

Two years later, Supreme Court Justice Arthur Goldberg circulated a memorandum to the other eight Justices on the Supreme Court regarding six capital cases for which certiorari petitions were pending.⁴⁶ Justice Goldberg

specifically discussed the constitutionality of the death penalty and the possible arguments with which the practice could be challenged.⁴⁷ This type of memorandum was unusual for a Supreme Court Justice, and surprising to many on the Court, including Justice William Brennan, who observed, “in not one of the six cases had any party directly challenged the validity of capital punishment under the Eighth Amendment.”⁴⁸

Despite Justice Goldberg’s efforts, the six cases were not granted certiorari. This still gave him an opportunity to publish a dissenting opinion against the denial of certiorari, which he did for *Rudolph v. Alabama*⁴⁹. He suggested that the Court “should have heard the case to consider whether the Constitution permitted the imposition of death on a convicted rapist who has neither taken nor endangered human life.”⁵⁰ Goldberg also made reference to *Trop v. Dulles* in the same manner as had Gottlieb two years prior, similarly asking whether or not the “imposition of the death penalty [...] violate[s] ‘evolving standards of decency that mark the progress of [our] maturing society,’”⁵¹ giving more credence to the possible link between the Eighth Amendment and capital punishment.

The dissenting opinion of Justice Goldberg awakened a strong interest in bringing the issue of capital punishment into the realm of litigation. Michael Meltsner, the assistant counsel to the NAACP Legal Defense Fund in the 1960s, wrote that before Goldberg’s dissent, “no one seriously considered making the enormous effort that would be required” to challenge the constitutionality of capital punishment.⁵² But although interest in challenging capital punishment in the courts had just been awakened, it was quickly and cleverly put into action. The NAACP’s Legal Defense Fund (often referred to as ‘The Fund’), joined in the late 1960s by the ACLU, was the leading group behind this effort.

By the mid-sixties, the movement for anti-capital punishment litigation had “gained impressive momentum.”⁵³ Courts on both federal and state levels rendered decisions of one kind or another regarding capital punishment statutes. Until 1972, the Supreme Court frequently modified the procedures and methods by which capital punishment could be carried out in the United States.

In 1968 the Supreme Court rendered the first blow to capital punishment, delivered in their opinion of *Witherspoon v. Illinois*.⁵⁴ Prosecutors at the time could reject potential jury members because of their conscientious qualms about capital punishment, and in the case of William C. Witherspoon, the prosecution had used this justification to dismiss half of the potential jury pool. The Supreme Court ruled that such a practice gave an unfair bias to the prosecution and deprived the defendant of the right to an impartial jury.⁵⁵ While *Witherspoon* did not address capital punishment on the grounds of the Eighth Amendment, it did create a significant hurdle for prosecutors intent on seeking the death penalty in their cases. And because

of the significant blow to capital punishment Witherspoon was thought to represent, the decision announced to potential litigants that the Supreme Court held a favorable attitude toward criticisms of capital punishment.

Fund attorneys were relentless in attempting to get the Court to rule on the constitutional arguments they were advancing. In *Boykin v. Alabama*,⁵⁶ the attorneys argued that the infrequent, arbitrary, and discriminatory use of the death penalty as a punishment for robbery was “cruel and unusual” per the Eighth Amendment.⁵⁷ The Court, however, skipped over these arguments and remanded the case back to the state trial court on the ground that Boykin’s guilty pleas had not been entered properly (there was no record the Boykin had made them “voluntarily and understandingly”).⁵⁸

The next year, Fund lawyers made another attempt in *Maxwell v. Bishop*,⁵⁹ challenging the practice of a unitary capital trial, in which a jury will rule on guilt and punishment simultaneously. The Court again ignored the constitutional arguments levied by the Fund lawyers and sent the case back to a state trial court on the ground that Witherspoon had been violated (Maxwell had been sentenced by a jury that prosecutors had filtered out so that it did not contain citizens who were wary of capital punishment).⁶⁰

In 1972, the Supreme Court heard the case of *Furman v. Georgia*⁶¹ and finally addressed the constitutional arguments presented by the Fund lawyers. The attorneys levied several arguments, both targeting capital punishment per se and Georgia’s capital punishment statute in particular. In the attorneys’ most heavy-hitting argument, they claimed that the “death penalty, as administered in the second half of the twentieth century, [is] inconsistent with evolving standards of decency.”⁶² Drawing upon *Trop v. Dulles*, the attorneys hoped to convince the Supreme Court Justices that capital punishment had become a violation of the Eighth Amendment to the Constitution.

But in contemplating these issues the Supreme Court found itself very divided. By the time its decision was handed down, there was no majority opinion in the case. Instead, each Justice had written his own opinion. There were five concurring opinions, written by Justices Brennan, Douglas, Marshall, Stewart, and White, and four dissenting opinions, written by Justices Burger, Blackmun, Powell, and Rehnquist.⁶³

The concurring Justices agreed that the death penalty statutes presented before the Court were “arbitrary and capricious” and therefore in violation of the Eighth Amendment’s prohibition on “cruel and unusual punishment.”⁶⁴ Even so, there were large points of disagreement among these Justices. Only Justice Brennan and Justice Marshall regarded capital punishment per se as unconstitutional. The other three, Justices Douglas, Stewart, and White, limited their objections to the way in which capital punishment was meted out under Georgia’s death penalty statute (for reasons that also applied to thirty-nine other capital punishment statutes in the

United States). Together, the Justices believed that Georgia's statute, under which Furman was being tried, could and would lead to arbitrary sentencing. They identified jury discretion as the problem: because the law gave the jury too much power in deciding whether or not to execute a defendant, the law thereby allowed jurors' prejudices to impact sentencing decisions.⁶⁵ This meant that executions were decided "wantonly and freakishly."⁶⁶

Despite these differing opinions, Furman effectively rendered capital punishment, as it then existed under forty U.S. Federal and State laws, unconstitutional. The positions of Douglas, Stewart, and White, however, made it clear that the Supreme Court did not believe that capital punishment itself was unconstitutional. Rather, the methods by which it was meted out at the time made it unconstitutional.

Unsurprisingly, several states took the next few years to rewrite their death penalty statutes in efforts to meet the criticisms levied by Douglas, Stewart, and White. In 1976, several of these laws came before the Supreme Court in a slew of cases: *Gregg v. Georgia*⁶⁷, *Jurek v. Texas*,⁶⁸ *Proffitt v. Florida*,⁶⁹ *Woodson v. North Carolina*,⁷⁰ and *Roberts v. Louisiana*.⁷¹ These cases were consolidated into *Gregg* and decided on July 2, 1976, just four years after the Furman decision .

In a 7-2 decision the Court upheld death penalty statutes that gave juries "guided discretion" for invoking the death penalty, finding these versions of capital punishment not to be unconstitutionally arbitrary.⁷² The opinion of the 1976 Court also noted that capital punishment itself did not violate the Eighth Amendment, citing the "marked indication of society's endorsement of the death penalty, [...] [in] the legislative response to Furman."⁷³ Paying close attention to public opinion polls, the *Gregg* decisions reinstated capital punishment, effectively ending the moratorium imposed by Furman.⁷⁴

Executions resumed on January 17, 1977, when a Utah firing squad shot and killed Gary Gilmore, a convicted killer who had requested execution by that means.⁷⁵

The 1970s Legislative Debates over the Death Penalty

The unexpected voice of the Supreme Court regarding the constitutionality of capital punishment toward the end of the 1960s and into the 1970s reverberated in the debates of the 91st, 92nd, and 93rd Congresses. While the 1960s saw a relatively large number of debates over the issue compared to other periods of American history, the frequency of such debate in the 1970s dwarfed even those. Legislators campaigning against capital punishment scrambled to formally suspend the death penalty, worrying that the de facto and unstable judicial moratorium could easily fall apart, resulting in an extraordinary bloodbath. Legislators campaigning to protect capital punishment scrambled to pass laws that they believed would stand

up against the Court's judicial review. Each side recognized the importance standards of decency" point towards the "repudiation of automatic death sentences."⁸⁹ The Court ruled that the various legislatures that passed these new statutes had effectively remedied the capriciousness found in earlier applications of the death penalty and had avoided problems under the Eighth Amendment.⁹⁰ In later decisions, the Court returned to the constitutionality of specific methods and practices with which capital punishment was meted out, rather than reconsidering the constitutionality of the punishment itself.

The 1960s trend toward abolition did not only reverse in the realm of the federal courts after the Gregg decisions. By the late 1970s, public opinion was swinging evermore strongly in favor of the death penalty, and the frequency with which it was challenged in both the state legislatures and Congress fell drastically.⁹¹ Juries and judges both became much more willing to sentence defendants to death, evidenced by the explosion of the number of people on death row after the moratorium was lifted. By the end of the twentieth century, the frequency of executions had returned to levels reminiscent of the early 1950s, and death row was over ten times larger than it had been in the early sixties.⁹²

Part II: The English Narrative

The 1940s: Ambiguity in the Debate

By the 1940s, capital punishment had been in widespread use for centuries in the United Kingdom. But from the early 1800s to the late 1920s, there was a steady march to curb both its frequency and its severity.⁹³ While these slow movements accomplished some feats, including a decrease in the number of crimes punishable by death and the end of all public executions, it was not until the late 1940s that efforts for complete abolition of the death penalty began to be taken seriously in government. After World War II, as the nation "felt sickened by [...] wholesale slaughter" and the "holocaust of Nazi Germany"⁹⁴, the British Parliament began to consider the possibility of abolishing the death penalty from all future use. These sentiments created a prime opportunity for Parliament to begin serious debate over the abolition of capital punishment in the 1940s. But in all of these debates, information was sparse, and opposing arguments frequently cited contradictory facts, especially in regards to the efficacy of the practice.

As it existed at the time, the "punishment for murder prescribed by English law was [...] the punishment of death."⁹⁵ Capital punishments for murder were largely mandatory in nature -- judges had no power with which to discriminate in doling out capital punishments in certain murder cases over others. And although by the twentieth century murder was the only crime for which the death penalty was exercised in practice, there were still on average 12 persons executed per year in Britain.⁹⁶

The laws of murder, however, came under fire in the years directly after the War's end early 1945.⁹⁷ In May of that year, the Labour Party won an unprecedented victory in national elections, and for the first time in British history the democratic-socialist party held a large majority of seats in the House of Commons.⁹⁸ With a party known to be favorable towards the lessening of penal severity in a position of substantial power, the Howard League began a significant "propagandistic" assault upon the British death penalty.⁹⁹ The Howard League, amalgamated from two earlier penal reform interest groups in 1921, was an influential "insider" organization in British politics.¹⁰⁰ Its members were largely middle-class and wealthy professionals and it "functioned as a small, well-connected, London-based elite" organization.¹⁰¹ The Howard League held it partly to be their mission to publish and disseminate informational pamphlets urging the electorate to move towards abolition.¹⁰²

But alongside their goal of educating public opinion on the moral ills of the death penalty, the group worked hard to urge members of Parliament to take action in London. Coming before the House of Commons in 1947 was the Criminal Justice Bill,¹⁰³ introduced by Home Secretary Chuter-Ede and aimed at humanizing the British penal processes.¹⁰⁴ The Howard League urged "that the Criminal Justice Bill [of 1947] should include a clause abolishing the death penalty" and they received support from 190 members of Parliament in response to their efforts.¹⁰⁵

When the 1947 Criminal Justice Bill was read in the House of Commons, it stimulated an unprecedented flood of debate regarding the abolition of capital punishment.¹⁰⁶ Sydney Silverman and Reginald Paget, two members of the Labour Party who vehemently criticized the death penalty, made the strongest speeches. Silverman emphasized the need for a strong movement against capital punishment to emanate from the House of Commons.¹⁰⁷ He believed the House of Commons to be a true representation of the educated opinion of the British people and argued that the people themselves should ultimately decide the fate of the death penalty.¹⁰⁸ Silverman expressly noted that little dependence should be placed upon judges, who, he rhetorically exclaimed, "have always been demonstrably and completely wrong."¹⁰⁹ Silverman believed the House of Commons, as opposed to all other components of British politics, provided a good "cross-section of the mind of the community."¹¹⁰

Paget crystallized his arguments in two ways: he first criticized the nature of capital punishment as a primitive act of retribution and second noted that there is "really only one question" of capital punishment: deterrence.¹¹¹ Paget was also concerned by the power of government to take away the life of an individual: "Let the dictators have their gallows and their axes, their firing squads and their lethal chambers. The citizens of a free democracy did not have to shelter under the shadow of the gallows tree."¹¹²

The Howard League declared on the first page of its journal in 1948 that the extended debates over capital punishment during the readings of the Criminal Justice Bill were the “beginning of the end” of the death penalty in Britain.¹¹³ Not only did the debates legitimize the issue of abolition in Parliament, but they also spread interest within the general public. The *Times*, for instance, took up the topic beginning in the late 1940s. In a leading editorial in November 1947, the newspaper asked whether “the death penalty deter[s] more effectively than other punishment,” and answered its own question, stating, “nowhere has abolition led to an increase in crime.”¹¹⁴ The *Times*, as a whole, conveyed an air of support for the abolitionist side and would continue to do so throughout the coming decades.

The next year, in March of 1948, Sydney Silverman sponsored an amendment to the Criminal Justice Bill to put a *de jure* moratorium on the British death penalty for a period of five years. Debates once again centered on the principles on which capital punishment was based and the efficacy of the practice as a deterrent against crime. Silverman reiterated Paget’s remarks from the previous debate, arguing that the retributive principle of punishment was fundamentally wrong and that it was the duty of Parliament to raise the standards of human conduct after the horrors seen in World War II.¹¹⁵ While Silverman opened the debate by characterizing the death penalty as “revolting” and “barbarous,” opponents like Sir John Anderson emphasized their faith in the efficacy of the death penalty.¹¹⁶ Anderson noted that to his own knowledge, he could not think of anyone who had been wrongly executed.¹¹⁷

The clause passed the House of Commons by a vote of 245 to 222 and was added to the Criminal Justice Bill, which itself also passed, and so on June 1 and 2, the issue of abolition was put before the House of Lords.¹¹⁸ The House of Lords was not nearly as favorable towards the idea of abolition as the House of Commons, and this soon became apparent in debate. The “great bulk of speeches delivered” on the bill were in favor of the retention of the death penalty.¹¹⁹ Nevertheless, debate was extensive, lasting for two days.¹²⁰

While a handful of members supported the clause, the vast majority of Lords stood against its passage. Viscount Templewood, standing in favor of the clause, cited Sweden and Switzerland as empirical examples of governments that had shown that murderers could be reformed and did not need to be killed to be deterred from killing again.¹²¹ The Lord Archbishop Canterbury, on the other hand, criticized the evidence from other countries, noting, “nobody can say how far any individual is deterred by that warning [of death].”¹²² Lord Pethick-Lawrence recognized the same, but used this as platform for supporting the clause, noting, “quite [...] frankly, I say that if it were proved to me conclusively, [...] that the abolition of capital punishment would lead to an increase in the murder rate, I would not stand for its

abolition."¹²³ Lord Roche, basing his opinion "on [his] experience," argued that in practice, the death penalty was only applied to those who society truly needed to execute, and the rest he believed had been reprieved.¹²⁴ Although Viscount Templewood was very vocal throughout the debate, offering frequent commentary against the retentionists' arguments, the House of Lords rejected the abolitionist clause by an overwhelming 181 to 28.¹²⁵

The question of public opinion took on a larger role during and after the 1948 debates in the House of Commons. Although there was little data on the topic at the time, there was "some indication that the nation as a whole did not support the suspension of capital punishment" as voted by the House of Commons.¹²⁶ Letters written in to *The Times*, for instance, were overwhelmingly retentionist. The very notion of public opinion, however, was debated heatedly in Parliament in the context of abolition. While Silverman had argued that the question of abolition should not be left up to judges, he also noted that the whims of the general, uneducated, and ignorant public should not be decisive on abolition. Viscount Templewood made similar remarks, arguing that the opinions of the general public were inevitably ignorant about the proper issues in debate over abolition.¹²⁷ Viscount Samuel pointed out that the large majority in favor of abolition in the House of Commons was probably even larger than had been recorded, as ministers in favor of abolition had been compelled to abstain.¹²⁸ He believed that the extreme divergence between the public and the House of Commons was evidence that the true opinion of the 'public' was wholly misinformed on the issue of capital punishment. Viscount Templewood agreed, noting that if Parliament had relied upon public opinion in the past when restricting the death penalty, it would have found that public opinion was always against the "expert" views of Parliament.¹²⁹ Whether or not to take into account the opinion of the public, and who exactly constituted 'the public,' were issues not resolved by the end of the 1940s.

As the debate over the abolitionist measure unfolded, it became clear that the British politicians were severely lacking in objective information about capital punishment. Many members of Parliament resorted to their own experiences or hearsay anecdotes to support their arguments, and many of them cited bits of information that clearly contradicted each other. There was, at the time, a general lack of "basic information on the actual effects of capital punishment."¹³⁰ Criminal statistics were virtually unknown, foreign experience was difficult to obtain or relate back to English terms, and prior Royal Commission reports were much like the arguments of reformers: collections of Biblically based, morality-fueled opinions on the "evils of the death penalty."¹³¹ In an effort to remedy this lack of information, Home Secretary Chuter Ede announced a Royal Commission in 1949 to empirically study the question of limiting the death penalty in Great Britain.¹³²

The 1950s: A Royal Commission and Shifts in the National Atmosphere

In the 1950s capital punishment developed into a major issue in British politics. The reasons for this were threefold. First, the 1953 report published by the Royal Commission on Capital Punishment, which distinguished itself from prior commissions by relying on the social sciences and solid facts, rather than mere conjecture, identified several shortcomings of the death penalty.¹³³ Second, the Fifties in England were marred by high-profile capital cases that resulted in executions largely thought by the public to be miscarriages of justice. Third, eager abolitionist members of Parliament, supported whole-heartedly by the Howard League and armed with the evidence of the Royal Commission, took advantage of the wavering atmosphere over capital punishment. These three forces led to two major legislative developments: the introduction of the Death Penalty (Abolition) Bill of 1956 and the compromise that resulted from its failure, the Homicide Bill of 1957.¹³⁴

The Royal Commission on Capital Punishment finished their investigation by 1953. After hearing the testimony of 118 witnesses and producing a report that exceeded five hundred pages, the Commission officially recommended a series of modifications to the practice of capital punishment. These included giving discretion to juries over when to impose the death penalty, as well as replacing the current method of execution, hanging, with lethal injection.¹³⁵ From Europe, the Commission listened “almost exclusively to experts -- criminologists, prison officials, judges, doctors, [and] criminal law professors.”¹³⁶

Witnesses testifying in front of the Commission gave facts and opinions that were centered on the deterrent value of the death penalty. Sir Frank Newsam, permanent undersecretary at the Home Office, testified that in his experience, the average murderer was not of irredeemably bad character, and did not especially need to be deterred from ever committing a crime again by imposing death.¹³⁷

The Chief Constables’ Association of England and Wales and the Police Federation disagreed, however, believing capital punishment to be a deterrent, especially to those who were violent, and a group of chaplains agreed. Nevertheless, testimony in support of deterrence of the death penalty was largely limited to opinion rather than scientific fact.¹³⁸

The Howard League, on the other hand, submitted a memorandum analyzing the empirical effects of abolition on other countries. It showed that there was no evidence that abolition did not result in an increase in murder, nor that the restoration of the death penalty had ever resulted in a decrease.¹³⁹

While the Commission did not ultimately recommend abolition, the Commission did marshal together “an impressive array of evidence against the death penalty” that supported “significant doubts about its deterrence.”¹⁴⁰ After wading through mounds of statistical evidence, the

report stated that the uniquely deterrent force of the death penalty was likely “exaggerated,” and that it is “important [...] not to base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty.”¹⁴¹

While the British movement against capital punishment was always “basically a humanitarian campaign,” at this point it had become “modern and scientific,” relying on sociology and psychology to scrutinize the efficacy and legitimacy of capital punishment in the United Kingdom.¹⁴² This gave abolitionists a strong new leg on which to stand. Although they had classically been limited to “moral and humanitarian bases” of arguments in the earlier decade, they could now “prove objectively and scientifically that the abolition of capital punishment would be advantageous to the nation.”¹⁴³

While the Commission was holding its sessions on capital punishment, three very controversial, and very public, capital cases were held and tried by the Government.¹⁴⁴ The first of these three was the trial of Timothy Evans. Evans was accused in 1950 of murdering his wife and daughter and was subsequently convicted and sentenced to death. During the course of his trial, Evans had accused John Christie, his upstairs neighbor, of being responsible for the two murders. Evans was hanged in March of that year. Three years after Evans’ trial, Christie was discovered to be a serial killer, responsible for murdering several women at his property, including his own wife, consequently raising serious doubt about Evans’ conviction.¹⁴⁵

The second of these cases was the trial of Derek Bentley in 1952. Bentley, a nineteen-year-old boy, was accused and convicted of the murder of Police Constable Sidney Miles, who was shot and killed during a burglary attempt carried out by Bentley and his accomplice Christopher Craig. Bentley was sentenced to death despite the fact that Craig had been the one to actually shoot PC Miles and despite the fact that Bentley had been in police custody at the time of the killing.¹⁴⁶ Craig did not receive the death penalty, as he was only sixteen years old and therefore underage. During the course of the investigation, a psychiatrist had also concluded that Bentley appeared to be borderline retarded.¹⁴⁷

The third case to spark public interest in abolition was the trial of Ruth Ellis in 1955. 28-year-old Ellis was executed for the murder of her unfaithful lover, David Blakely, having shot him with four bullets outside a pub on Easter Sunday, and thereby committing what other countries would have deemed a crime passionel.¹⁴⁸ Ellis was the last woman executed in Britain and one of the few women to be subjected to the penalty in all of twentieth century England. While there was no doubt regarding Ellis’ guilt, there was doubt about her state of mind and doubt about the appropriateness of her sentence, especially given the commonplace of reprieves at the time.¹⁴⁹

The public’s reaction to these three cases was both large and vociferous. All three had been generally perceived to be “miscarriages

of justice.”¹⁵⁰ In the weeks before Bentley was executed, his case became a “cause célèbre” amongst the British people. In stark contrast to England’s older public executions, on the night before the Bentley execution, over three hundred people gathered to protest his sentence.¹⁵¹ In support of granting reprieve to Ellis, numerous petitions were submitted to the Home Office, some containing thousands of signatures. She garnered a great deal of sympathy because of her young age, her children, the impulsive and passionate nature of the murder she committed, and the fact that she was an attractive blonde woman.¹⁵² Evans’ case saw the most backlash, although it only occurred posthumously. The likelihood of his innocence prompted even Parliament to mention the issue and criticize the Home Office in the mid-1950s.¹⁵³

By 1956, there was increasing pressure from the public, from the release of the report by the Royal Commission, and from various abolitionists in Parliament, for a new debate on capital punishment. The abolition of the death penalty had “developed into a leading issue on the British scene,” and in that summer, the House of Commons debated and voted on the Death Penalty (Abolition) Bill, introduced by Sydney Silverman the year prior.¹⁵⁴

The Howard League and the National Campaign for the Abolition of Capital Punishment helped link the public’s newfound interest in capital punishment with the dealings of Parliament. The groups were well suited for this. The Howard League was an organization that “enjoyed a close working relationship with the Home Office.”¹⁵⁵ The NCACP was partly founded by Silverman himself, and assisted in the abolitionist effort by initiating an “intensive drive for abolition” in the same year.¹⁵⁶ The NCACP organization soon had over 20,000 members.¹⁵⁷

The NCACP was led by Gerland Gardiner, a prominent barrister, and Victor Gollancz, a publisher and charismatic activist.¹⁵⁸ It was the occupation of the latter that allowed the NCACP to substantially affect the public atmosphere surrounding capital punishment. Alongside public meetings in many important cities in Britain, the organization published several pieces of literature, spurring public interest in abolition, based on both emotional and scientific appeals.¹⁵⁹

The mass of literature included Gollancz’ own *Capital Punishment: The Heart of the Matter* and Arthur Koestler’s *Reflections on Hanging*. Both works were passionate polemics against capital punishment that based themselves on moral arguments. As Gollancz succinctly stated in his work: “Capital punishment is wrong and that is all there is to it.”¹⁶⁰ Koestler similarly focused on the art of polemic, but also wrote detailed the experience of other abolitionist countries, as well as delving into the emotional and personal aspects of a series of murders in Britain, all in an effort to disprove the alleged deterrence of the death penalty.¹⁶¹ The NCACP also connected abolitionist members of Parliament with the public, allowing both Sydney Silverman and Reginald Paget the ability to publish pamphlets as part of the

NCACP's efforts. Their works included *Hanged and Innocent?*, a short book identifying several miscarriages of justice in the practice of the death penalty, including the execution of Timothy Evans.

Debate on the Abolition Bill did not ignore the rapid changes in public interest, although Parliament was unsure how to deal with it. While Montgomery Hyde noted that public opinion was changing in support of abolition,¹⁶² Sir Robert Grimston argued that the public had been exposed to misleading propaganda.¹⁶³ By 1956, 45 percent of the public disapproved of a trial suspension of capital punishment -- 24 percentage points lower than recent years past.¹⁶⁴

Nevertheless, debate over Silverman's bill did not see any new arguments that had not already been mentioned in the Parliamentary discourse. Abolitionists continued to argue that capital punishment was not uniquely a deterrent, while retentionists saw it as necessary to keep homicide rates low.¹⁶⁵ The abolitionists in Commons were victorious again, with a vote of 286 to 262.¹⁶⁶

The Bill was then passed along to the House of Lords, where debate opened on July 9. While several Lords voiced their opinions in favor of abolition (in fact "nearly twice as large as had been expected"),¹⁶⁷ the bill was "thoroughly trounced" with a vote of 238 to 95.¹⁶⁸ At the center of the Lords debate was whether capital punishment was a uniquely effective deterrent, greater than life imprisonment.¹⁶⁹ While Viscount Templewood cited the Royal Commission's inability to find sufficient evidence of such a notion, MPs like the Lord Chancellor Viscount Kilmuir¹⁷⁰ and Viscount Malvern¹⁷¹ expressed their wholehearted opinion that capital punishment served as a deterring force in the United Kingdom.

Although the Government and the House of Lords stood strong against abolition, they could not ignore the constant pressure arising out of the House of Commons on the subject. The Cabinet was faced with a dilemma: it did not favor the complete abolition of capital punishment, but it recognized that there was a large demand from Commons for the practice to be reformed. The Cabinet wrestled with the question of deterrence. While they admitted that many other countries had abolished capital punishment without effect, they did not see Britain as civilized enough to deal with its abolition. The Cabinet was certain that Britain, as a unique society, would see a disastrous rise in homicide rates if capital punishment were done away with.¹⁷²

A compromise seemed on the horizon, and it came in the form of the 1957 Homicide Bill, introduced by Home Secretary Lloyd George in November of 1956. The Home Secretary had personally recommended that capital punishment not be abolished¹⁷³ and the Government justified the bill's support by noting, "public opinion desired a compromise and did not want total abolition."¹⁷⁴ The bill, however, did not modify the death penalty

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total abolition.¹⁷⁴ The bill, however, did not modify the death penalty per se. Rather, it modified the law of murder. It sought, amongst other pursuits, to amend the law by creating categories of capital and non-capital murders.¹⁷⁵ The Government, exploiting its majority in the House of Lords, passed the bill quickly through committee without amendment, and through the Lords unaltered. The Homicide Bill became law in March.¹⁷⁶

The 1960s: Culmination

The movement towards abolition, meanwhile, quickened its pace as it became readily apparent that the Homicide Bill of 1957 was illogical and flawed. More members of Parliament disregarded public opinion, of which a majority still favored retention, in the 1960s, and by the government, though hardline retentionists still relied on it heavily. By the time Sydney Silverman introduced a new abolition bill in 1965, nearly all obstacles for the abolitionists were gone, paving the road for the final riddance of the death penalty in Britain. And while the Parliamentary debates in the 1960s regarding the abolition of capital punishment offered few new arguments that differed from those in the 1940s and 1950s, the debate did become even more centralized on the issue of deterrence.

By the beginning of the decade, the 1957 Homicide Bill was proving to be a disaster. Ironically, the failure of the bill, which was meant by the Government as a concession to abolitionists, strengthened the case against the death penalty. Its underlying reasoning was that some murders required the death penalty while others did not, a move that the Royal Commission had explicitly warned against.¹⁷⁷ While, for instance, a farmer who shot his wife would be executed, a farmer who had bludgeoned his wife to death with a shotgun would not. While a thief who accidentally killed a person when startled would be hanged, a man who thoughtfully carried out a plan to poison would not.¹⁷⁸

Many abolitionists were against the bill from its inception. Hugh Klare, general secretary of the Howard League, thought the bill to be “illogical.”¹⁷⁹ Ironically, abolitionists were assisted by the bill’s consequences, especially in regard to the issue of deterrence. After the bill was passed, the proportion of capital murders increased while the proportion of non-capital murders decreased, the exact opposite of what proponents of the death penalty as a deterrent predicted.¹⁸⁰

Even the Government, in its own inter-office communications, recognized that “there [was] a growing recognition that the Homicide Act of 1957 was a mistake” but that “this cannot be said publicly until the Government is prepared to propose an alternative.”¹⁸¹ Richard Butler, Secretary of State for the Home Office, stated in a memorandum that because of the Homicide Bill he was “under considerable pressure to do something about capital punishment” and expected “increasing criticism of [his]

decisions in individual cases, and increasing Parliamentary pressure for debates about them."¹⁸²

This pressure was a result of the religious and political elites turning against the death penalty in Britain. In the space less than of a decade, the Church of England had completely reversed its attitude towards capital punishment -- a "complete revolution."¹⁸³ Some members of the clergy, like the Reverend F. P. Coleman, even made motions in Parliament against the death penalty. Bishop Mortimer of Exeter pressed the House of Lords for abolition. Many clergymen also started giving speeches against the morality of capital punishment. As the religious elite turned against the death penalty, many of their followers did as well.¹⁸⁴

The public outcry over the recent controversial capital cases had not left Britain's conscience. While the majority of the British public still supported the institution of capital punishment, by about a three-to-one ratio, that support had fallen substantially from previous years.¹⁸⁵ The cases had damaged the public image of the practice. Almost all those who had "recently made up their mind against capital punishment" said that a "major factor" in their decision were "recent hanging cases."¹⁸⁶ In the elite and educated circles especially, the cases had served as another nail in the coffin of the death penalty.

By 1965, abolition seemed inevitable, and in the November of that year, despite public opinion and a rising crime rate, the political elite passed the Murder Act.¹⁸⁷ It suspended the death penalty in Britain for a period of five years.¹⁸⁸ Even the Government, who in the 1950s had held steadfast against abolition, by 1964 saw abolition as inevitable.¹⁸⁹

The debates of the political elite, continuing in Parliament, mirrored the culmination of the various forces that emerged against the death penalty in the 1950s. Often citing the results of the prior Royal Commission, members of Parliament focused heavily on the issue of deterrence. Yet although there were significantly fewer members defending capital punishment, the debate still lasted for two days.

Sydney Silverman stood center stage once again, chastising the failure of the 1957 Homicide Act, and stressing the irrelevance of public opinion polls, which still showed a large majority against the abolition of the death penalty.¹⁹⁰ Both Houses significantly devalued the question of public opinion. As Silverman asserted: "we do not govern ourselves in this country by referendum."¹⁹¹ It was readily apparent that Parliament would weight polling data much less than had been considered in the late 1940s.

After Silverman's speech, the retentionists in both Commons and in Lords spoke overwhelmingly about deterrence. Lord Molson tried to delegitimize the statistics disproving the deterrence of the death penalty, arguing, "If I were subjected to a great temptation to commit murder, the knowledge that the penalty was death would be a great help in resisting

that temptation.¹⁹² Lord Chuter-Ede retorted that it is “most unusual for any crime of murder to have been long premeditated,” and thus such knowledge would not be an efficient deterrent.¹⁹³ The Earl of Haddington cited the results of the Royal Commission to support the illegitimacy of the practice of capital punishment.¹⁹⁴ Similarly, the Lord Bishop of Chester cited the testimony given by Professor Thorsten Sellin, a prominent sociologist at the University of Pennsylvania, to the Royal Commission.¹⁹⁵ The Commission had asked Sellin if “capital punishment cannot, on the basis of your figures, be exercising an overwhelming deterrent effect.”¹⁹⁶ Sellin answered that his data could not support the existence of such an effect.¹⁹⁷ The Bishop also cited the Evans case as a tragic miscarriage of justice.¹⁹⁸

At the conclusion of the debates in Parliament, Commons voted 355 to 170¹⁹⁹ to pass the bill, and Lords subsequently agreed by a vote of 204 to 104.²⁰⁰ A caveat was added to the bill throughout the process, however: abolition would not necessarily be permanent, but would rather be placed on a five-year ‘trial’ period.

While the Act was not debated until 1970, the Government, especially the new home secretary James Callaghan, hinted that it was looking at making abolition permanent the year prior.²⁰¹ The most important part of the ‘trial period’ was a report being compiled by the Home Office Research Unit on the facts and figures of the abolition experiment.²⁰² This report, entitled *Murder 1957-1968*, showed that murder rates had increased from 3.9 per million in 1965 to 4.2 per million in 1968, but that this rate had been steadily increasing from 1955 onwards, reinforcing the idea that murder rates were disconnected from the state of capital punishment.²⁰³

The data were used to the abolitionists’ advantage. When the new home secretary, James Callaghan, introduced a motion to make the Murder (Abolition of Death Penalty) Act of 1965 permanent,²⁰⁴ Gerald Gardiner, Lord Chancellor, pointed out in the pursuant debate that the murder rate had not significantly changed in the past ten years.²⁰⁵ But the House of Lords was not the only arena in which such data were used. The *Times*, on December 15, 1969, ran a letter signed by 35 criminologists stating they felt “compelled to point out that there is nowhere in any of the voluminous statistical material about murder and the death penalty any conclusive evidence as to its special deterrent value.”²⁰⁶

While public opinion stood strong against the permanent abolition of capital punishment, at over 80 percent, Parliament largely ignored their views.²⁰⁷ At the beginning of the debate on his motion, James Callaghan stated that:

There are times when Parliament has to act in advance of public opinion and give a lead. On penal questions it is not uncommonly the case; Parliament has done it before and Parliament was not wrong. Let us give a lead again today.²⁰⁸

Commons debated Callaghan's motion for seven hours and carried it 343 to 185. In the Lords, it passed with a majority of 46.²⁰⁹ After two decades of fervent debates, novel data collections, and complicated political movements, Parliament had finally abolished capital punishment permanently.

Part III: The Influence of Entrepreneurial Elites and of Public Opinion

For the first half of the post-war period, policy in the United States seemed to be on the same track towards an end of executions as found in Great Britain. This section will, through both theoretical and comparative analyses, explore some explanations of why the United States may have diverged from that path towards permanent abolition, instead reinstating and strengthening its institution of capital punishment.

One of the most commonly made arguments for the failure of abolition in the United States and the success of abolition in England attributes the disparity to the political elites of the United Kingdom, who were less willing to bend to public opinion on the subject.²¹⁰²¹¹ Consequently, the first part two parts of this analysis will deal with elite actions and public opinion. I will first weigh the influence of elite political entrepreneurs on the development of capital punishment policy in the two countries. I will then similarly analyze the influence of public opinion. In an effort to weigh the influence of each of these I will try to ascertain the extent of their effects on:

- (i) The initial efforts for abolition
- (ii) The prioritization of abolition as a pressing concern for government
- (iii) The reversal of abolition in the United States

At the end of this section, I will advance again and defend the central point of this paper: that the influence of a textual Constitution helped derail America from its path towards abolition and instead re-entrenched the death penalty by creating a new basis for its legitimation.

The Influence of Entrepreneurial Elites

Particular elite individuals in politics had strong influences on the development of capital punishment policy in both the United States and England. The narratives of both countries feature influential abolitionist figures in government who worked in tandem, consciously or otherwise, with interest groups advocating for abolition. These entrepreneurial elites can explain why each country made an initial effort for abolition and also why those efforts eventually gained enough traction to warrant serious government attention. Nevertheless, while the actions of interested elites may explain why abolition was initially introduced in each country, and why it was important on each country's governmental agenda, those influences do not sufficiently explain why the United States made such a significant

backtrack in the 1970s.

(i) The initial abolition efforts on the federal level in America and in Britain were both sparked by interested 'entrepreneurial' politicians. In America, and on the legislative front, Senators Morse and Hart introduced and supported several bills in the early 1960s that took steps towards ending capital punishment. Morse, whose home state of Oregon abolished the death penalty by popular referendum in 1964, was a "relentless advocate for all forms of Constitutional protection under the law,"²¹² and his stance against the death penalty was no exception. Senator Hart, meanwhile, as chairman of the congressional subcommittee of Criminal Laws and Procedures, held numerous hearings on the death penalty, though few were consequential.²¹³ Combined, Senators Morse and Hart were largely responsible for introducing and focusing discussions in Congress on capital punishment -- discussions that were very rare before the 1960s.

MP Sidney Silverman had a similar but much stronger effect in the British legislature. He was vocal in all of the debates between 1947 and 1965, often speaking first and framing the discussion in his own terms. Silverman was, much like Morse, a relentless advocate for abolition, introducing abolitionist measures in 1948, 1956, and 1965. But Silverman also took further steps in his project than any similar American politician. He co-founded and worked closely with the National Campaign for the Abolition of Capital Punishment to create a link between the public and elite campaigns for abolition. Kingdon²¹⁴ would likely identify Silverman as a "policy entrepreneur" for abolition because of his persistence and unconditional attachment to the project. Although America had politicians who were very interested in abolition like Senator Morse, none of these individuals persisted as consistently and as strategically as Silverman in the United Kingdom.

The American narrative had a stronger figure, though, in its judiciary: Justice Goldberg. Goldberg took the initiative to bring the capital punishment debate into judicial grounds. He had recruited Alan Dershowitz as a clerk in 1963, and had asked him on his first day to prepare a memorandum that could find capital punishment to be "cruel and unusual" in violation of the Eighth Amendment. Goldberg's "extraordinary initiative" resulted in a memorandum that was circulated around to the other justices had a "bombshell effect" on the Court.²¹⁵

Although the memorandum was not made available to the public at the time, Goldberg would soon transplant its arguments into a dissenting opinion that initiated the NAACP's Legal Defense Fund (LDF) to challenge capital punishment through litigation. Goldberg had no explicit connection with the LDF, like Silverman had with the NCACP. Even so, the dissenting opinion he volunteered after *Rudolph v. Alabama* "awakened interest in the constitutionality of capital punishment."²¹⁶ The ACLU also adopted a formal position against the death penalty in 1965, as it had been "encouraged by the

‘Goldberg signal.’”²¹⁷

As evidenced by the narratives, the influences of political elite and interest groups can therefore largely explain the initial abolition efforts in both England and the United States. Silverman and the NCACP led the charge for abolition in the former while Goldberg and his effectual connection to the NAACP’s LDF led the charge in the latter.

(ii) The actions of elites can also explain why the abolition of capital punishment was placed so prominently on both the British and American government agendas.

While the United States had interested congressmen, like Senators Morse and Hart, pushing for abolition, their efforts were largely unsuccessful (though they did appear to be slowly gaining more traction). Before the legislative actions in the United States could amount to significant legislation, the judiciary, in 1968, took over the issue of capital punishment. Primed by Goldberg’s dissent, the LDF put considerable pressure on the courts to make a final decision on the constitutionality of capital punishment. The LDF thereby directed significant judicial attention to the issue of abolition and effectively drove it higher on the broader government’s agenda.

The LDF orchestrated a widely dispersed legal strategy in its efforts. It reasoned that with a “campaign of test cases,” it could create a death row “logjam,” pushing the judiciary to favor abolition.²¹⁸ In 1967, with money granted from the Ford Foundation to fight for the rights of the indigent, the LDF provided assistance to over fifty men and created a “Last Aid Kit,” circulating it around to overburdened public defenders and criminal lawyers.²¹⁹ The “Last Aid Kit” was a toolkit for capital punishment cases. It contained drafts of petitions for habeas corpus, applications for stays of execution, and legal briefs that put forth every significant constitutional argument against the death penalty.²²⁰ By making its arguments and influence available to all death row inmates, the LDF put pressure on the America judiciary from many sides to do something about the constitutionality of capital punishment.

In England, the efforts of Silverman and the NCACP heightened the awareness of the issues concerning capital punishment in both the public and in Parliament, effectively placing abolition high on the political agenda. The relationship between Silverman and the NCACP forged a wider collaborative effort between abolitionist MPs and community activists to increase social awareness of the death penalty and its ills.

The political abolitionist elite in England engaged in a widespread drive of persuasion. This approach differed from the litigation strategy in America, where such efforts were not thought to be necessary in order to push the Supreme Court to find capital punishment unconstitutional. The NCACP, with its publications, town meetings, and community activism, likely increased the importance of capital punishment in the public sphere.

Gallup suddenly started asking the public questions about capital punishment much more often in the early 1950s.²²¹ While it is unclear whether or not the publication and propaganda efforts by the NCACP and the political elite had a large effect in swaying the public towards abolition, especially since public opinion never turned predominantly against the death penalty, it likely helped to develop capital punishment into a “leading issue” by 1960.²²² Moreover, Silverman’s “entrepreneurial” activities allowed him to take advantage of this change as a “policy window”²²³ of opportunity in order to push the issue of abolition to the upper ranks of Parliament’s agenda.

(iii) The motivations and activities of the political elite cannot, however, explain the backtrack by the United States from abolition in the 1970s. No remarkably influential elite figures, nor significantly organized interest groups, led the charge against abolition between Furman and Gregg. Gottschalk²²⁴ writes that there was no “grand mobilization by interest groups to change the context of litigation” on capital punishment. She also observes that Furman, for instance, “did not ignite conservative groups to fight for the death penalty with the same intensity they mobilized against abortion after *Roe v. Wade*.”²²⁵

Admittedly, there were some prominent elite figures in American politics that came out in support of the death penalty before the Gregg decision. New York City Mayor Ed Koch, for instance, declared his support for the death penalty by saying that, “when the killer lives, the victim dies twice.”²²⁶

The pleas of elite American retentionists, however, were not much different from those of some political elites in England who similarly came out in support of capital punishment during its moratorium. MP Duncan Sandys, for example, collected over 800,000 signatures for a petition submitted to Parliament, calling for the revocation of abolition. Sandys also recruited a number of small elite conservative groups to call for the reinstatement of capital punishment.²²⁷ Their efforts were unsuccessful.

In America, such interest groups did not organize elite retentionist opinion. Instead, collective reactions to the moratorium came mainly from some state legislatures. These legislatures signaled their distaste with the Court’s decision by passing laws to circumvent the Furman decision and reinstate capital punishment.

The Influence of Public Opinion

There are strong similarities in the public opinion of capital punishment between England and America in the period of 1940-1975. Both were strongly against the abolition of the death penalty, and both deviated only slightly from this position throughout the course of the abolitionist narratives. Although public opinion itself cannot explain the initial abolition efforts in either country, which were mostly elite movements, this section

will explore its influence on agenda-setting in England and its influence in the American backtrack on abolition in the 1970s. This section will conclude that public opinion cannot by itself explain the American renegeing of the abolition of capital punishment.

(i) The force of public opinion alone cannot explain initial abolition efforts in either country. Most Americans and British always favored the retention of capital punishment. Nevertheless, changes in public opinion may have their own effects on political decisions. This was not the case in England, however. Silverman's initial attempts to abolish capital punishment in the late 1940s predated the minor shift in public attitudes towards abolition in the 1950s. Moreover, this change was not very significant, and indeed may well have helped spark it.

In the United States, changes in public opinion did coincide with initial efforts for abolition, both in the legislatures and in the judiciary; but it is unlikely that these changes can explain those initial efforts for several reasons. First, as in Britain, the abolitionist population in the United States was never large enough to mount a significant majority, and thus never large enough to create a strong voting bloc to sway elite opinion to pursue abolition. Moreover, abolition of the death penalty was never a politically fruitful endeavor for a politician to initiate.²²⁸ Judicial entrepreneurs for abolition, like Justice Goldberg, and the interest groups that pursued abolition in the courts, like the LDF, were isolated from the consequences of the electorate's opinion.

(ii) Public opinion also had little to no role in the United States in pushing abolition up on the government agenda. While public support for the death penalty was falling to new lows in the United States during the early 1960s, there was also no concerted effort from the public to consider the abolition of capital punishment on any foreseeably short timetable, at least on the federal level. This is not surprising since the prioritization of capital punishment occurred largely because of the legal assault of the LDF in the courts, a realm generally sectioned off from public attitudes.

In England, however, the influence of public opinion on the government agenda is more complex. Parliament wrestled with how to deal with public attitudes towards capital punishment from 1948 onwards. Despite the conclusions of Gottschalk²²⁹ and Garland²³⁰, I do not believe that Parliament was isolated in its decision-making on the death penalty from the demands of public opinion. This is evidenced in the Parliamentary records that I have reviewed: nearly all debates over capital punishment between 1948-1969 frequently brought up the question of public opinion.

It is interesting, first, to note that Silverman in 1948 made arguments expressly for why public opinion should be taken into account in decisions over the death penalty. But Silverman did not see raw poll data as a legitimate representation of "public opinion." He believed it lay in the opinion of the

House of Commons, which provided an educated “cross section of the mind of the community.”²³¹

As public opinion, or at least poll data, began to trend toward larger support for abolition in the 1950s, abolitionists began to rely on it more frequently. MP Montgomery Hyde had argued that the changes public opinion towards abolition was a justification for ending capital punishment.²³² The Government justified the middle-of-the-road 1957 Homicide Act by noting that public opinion was still mixed over abolition, and still predominantly opposed.²³³ The Government inferred that this meant the public was calling for a “compromise.”²³⁴

By the 1960s, public opinion had halted and reversed its momentum, growing more in favor of retention. In the 1965 debates, Lord Alpert, a retentionist, stressed that public opinion was “of great importance” and “must not be ignored.”²³⁵ Lord Ferrier similarly stressed the “dangers” of acting incongruently with public opinion.²³⁶

Parliament and its members did not invoke public opinion consistently. While abolitionists justified arguments using its trends in the 1950s, they rallied against using public opinion when trends reversed in the 1960s. Members of Parliament clearly seemed to only rely on public opinion when current trends appeared to justify their pre-existing preferences on the death penalty. Likely because of this common strategy, public opinion in and of itself was rather ineffectual in driving the government agenda in one particular way.

Nevertheless, the public had been significantly shocked by the cases of Bentley, Evans, and Ellis, had been subject to the NCACP and its proliferation of abolitionist literature, and had also read of the results of the 1953 Royal Commission’s report in various national newspapers. In light of these facts, it is not particularly contentious to assert that capital punishment had risen much higher on the national agenda and in the public consciousness during the late 1950s and early 1960s. Public opinion, as an aggregation of pre-existing preferences, likely did not have a substantial effect on the government agenda, but its vocal abolitionist sector did participate in raising national awareness on the subject.

(iii) The influence of public opinion on the renegeing of American abolition is also complex. Public opinion was cited as central in the majority opinion of Gregg, which looked “to objective indicia that reflect[ed] the public attitude.”²³⁷ Meanwhile, the public had in some ways made attempts to overturn moratoria. California, for instance, overturned its own Supreme Court’s declaration of the death penalty as unconstitutional in early 1972 (before Furman) by a referendum amending the state constitution.²³⁸ Within two years of Furman twenty-eight state legislatures had passed laws to reinstate the death penalty, modifying it to meet the Court’s requirements.²³⁹

Nonetheless, as the Court is generally isolated from public opinion,

it was at the Court's discretion that the public and the legislatures were allowed to have such an effect. The Supreme Court decided to incorporate the statistics of public opinion, and decided to make public attitudes central in the reasoning of Gregg. The Court could have just as easily halted all public attempts to end the moratorium; yet it did not take such a position.

England had similar, and in fact greater, public opposition to abolition, especially after the passage of the Murder Bill of 1965, yet its government did not take that opposition seriously and did not overturn its original abolition. It is unlikely, however, that this is merely because Parliament simply ignored public opinion. Retentionists in Parliament brought up the public's overwhelming stance against abolition frequently when the question of reinstatement was on the table in 1969.

In fact, since the American moratorium was imposed outside of the representative branches of the federal government, one would think it more intuitive that America would have been less likely to renege on abolition than its British counterpart, which passed abolition through the legislature and in fact had higher rates of public support for the death penalty. It is unlikely, therefore, the public opinion itself had much effect on reinstating the death penalty in the United States.

Let us briefly then review the conclusions of this section. We have an explanation of how initial abolition efforts came about in both countries: they came from interested elites with the ability to create political and legal pressures in government. We have an explanation of why abolition was transformed into a priority issue: again these came largely from elite pressures, although abolition efforts in England were likely helped to a small degree by the national atmosphere, ignited by current events. We also have a very partial explanation of why America may have reneged on its abolition of capital punishment, namely some sort of a disorganized combination of elite and public opposition. Yet this explanation is not very tenable, because England faced parallel types of pressure after abolition and nonetheless held strong onto abolition.

Part IV: The Influence of the Ambiguously Written American Constitution

This section will pursue how the influence of the textual Constitution may fill in the gaps of the previous explanations, specifically in regard to the reinstatement and expansion of the death penalty in the United States. I will pursue two main analyses that suggest that the existence of a textual document, the Constitution, may have contributed to America's deviation from the path on which it was traveling with Britain towards permanent abolition. The first analysis (Part A) will review the historical effect of the ambiguously written Constitution on the shift in legislative and public debates away from issues of deterrence and morality. This will directly lead

into the second analysis (Part B), which will argue that a debate around the ambiguous textual phrase “cruel and unusual” tended towards affirming the general majority retentionist attitudes regarding capital punishment and thereby created a new legitimation for the practice.

Framing the Debate

The early legislative debates surrounding capital punishment in England and America were remarkably similar, despite the fact that they occurred on slightly different timescales. The modern abolition movement in Britain lasted from 1948 to 1969. The parallel movement in the United States lasted from the early 1960s to 1976. The question of whether or not the death penalty was a unique deterrent lay at the center of both during their early phases. Retentionists and abolitionists alike relied on their respective views on deterrence in both countries in the justification of their positions.

The centrality of deterrence in the debate over abolition is evidenced by the British move to convene a Royal Commission in 1949 tasked with investigating the issue. The results of the Commission would prove fruitful for the abolitionists, and the debate in England never wavered from the frame of deterrence. Abolitionists, in other words, were able to ground the debate in a frame that, in light of empirical evidence, proved to be in favor of their side. The British retentionists were not successful in moving the debate to a different arena, nor were such efforts very pronounced.

In the early 1960s, the American abolitionist congressmen did not pursue a different path than their English counterparts. These politicians, too, attempted to use the published data of criminologists, sociologists, and psychologists to prove that the death penalty was not a deterrent. The results of the 1953 Royal Commission even reverberated in the halls of the Capitol. Representative Multer submitted into the congressional record, alongside six other statements, the results of the Commission, all in an effort to prove that the death penalty did not deter people from committing crimes. The two countries, in their debates over capital punishment, were very parallel during the period immediately after their abolitionist measures began.

But there was a clear divergence between the two countries when the Constitution became involved. The LDF began its assault against capital punishment in the judiciary by the late 1960s. In 1968, the first Supreme Court decision regarding the issue, *Witherspoon v. Illinois*, announced to the country that the Court was willing to criticize the longstanding institution of capital punishment in America.

Almost immediately, Congress responded to the Court’s signal. While prior to 1967 there were no mentions of the “unconstitutionality” of the death penalty in the congressional records, as the Supreme Court became more interested in the constitutionality of the death penalty, debates in Congress began to preemptively address the issue. By 1971, Congress was

discussing whether or not capital punishment could be understood as “cruel and unusual punishment” and Senator Hart attempted to convince Congress that it should rule that it was.²⁴⁰ While he and others still referenced the ideas of deterrence, as before, the way in which deterrence was incorporated into these debates had changed. For instance, Hart’s introduction of the Death Penalty Suspension Act (S. 1969) adapted his deterrence argument into an argument that the death penalty was “cruel.”²⁴¹ Debate increasingly involved a question of whether or not any failure of the death penalty to deter counted as an adequate explanation for why it was “cruel,” rather than whether or not the punishment truly did deter.

England, at the mid-way point in its abolition narrative, had intensified its debate over deterrence. Armed with the results of the Royal Commission’s report, abolitionists seemed to fall on the winning side of the Parliamentary discussions. Without the question of constitutionality, retentionists had few arguments to draw upon to support the protection of the death penalty, and were, despite the recent data, boxed into merely repeating their beliefs that the death penalty was indeed a deterrent. In light of the 1953 Royal Commission report, this maneuver was destined to fail. The English focus on deterrence meant whichever side could marshal more objective fact on their side was more likely to succeed.

Yet such debate still took time -- in England there stood over twenty years between Silverman’s initial efforts and final abolition. In America, the courts took over the issue before less than a decade of congressional debate. Moreover, debate lulled after the judicial involvement became more pronounced. As Representative Kastenmeier noted, there was a “growing but unofficial consensus that [questioning capital punishment] ought not to be done [...] until final Supreme Court decision of all the constitutional issues.”²⁴²

After the Court’s decision in *Furman*, the judiciary’s rulings had an even more pronounced effect on legislative debates, as congressmen attempted to read the decision and the Constitution in the manner that helped them the most. The phrase “cruel and unusual” became more central to the debate, for it was the judiciary’s deciding factor of whether or not the death penalty was constitutional.

Additionally, the phrase introduced ambiguity into the debate. While the English discussions had revolved around a subject that was open to empirical measurement (i.e. the deterring effect of the death penalty), the American focus on “cruel and unusual” did not. As Caleb Foote observed seven years before *Furman*, the Eighth Amendment “represent[ed] some of the most ambiguous language in the Bill of Rights.”²⁴³

Cruel and Unusual: Interpretive Judgments vs. Social Science

The debate in America then became not one oriented towards

discovering social scientific evidence of objective behavioral patterns, as had been the case in England, but one oriented towards textual interpretation. While debates over more objective domains gravitate towards claims that can be empirically supported, debates involving interpretation are more muddled and unpredictable. In an attempt to analytically understand the complex dynamics that resulted in the reinstatement of the death penalty in America, I draw upon theories of philosophical hermeneutics and inter-subjective communication. I first apply such theories to the notion of 'interpreting' the Constitution. I then look at, and discuss the significance of, the discursive interaction between the Supreme Court and various legislatures, both state and federal. I cast this interaction as inter-subjective communication and argue that it dialogically forged a meaning of "cruel and unusual" that played into the majority's default opinion of capital punishment. I lastly compare this analysis to the English experience. In this section, I aim to conclude that the influence of the textual Constitution's written normative standards helped re-establish the American death penalty by dialogically constructing a meaning for the Eighth Amendment that justified the punishment and created new legitimation for its persistence.

Philosophical hermeneutics is indispensable to this discussion. It aims to account for what happens to us as we go about understanding the world, and it derives its basis from how we interpret texts. The constitutionality of capital punishment, of course, explicitly regarded whether or not the death penalty was, as per the text of the Constitution, "cruel and unusual punishment." Rather, though, than pursuing the debate over normative hermeneutics, theories about the 'correct' way to apply some authoritative text to a decision,²⁴⁴ I here instead attempt to use hermeneutics descriptively. In other words, I seek to describe how the acts of interpreting the Eighth Amendment themselves led to the "entrenching of the death penalty."²⁴⁵

Hermeneutics scholar Hans-Georg Gadamer, in *Truth and Method*,²⁴⁶ provided an influential account of how we approach and come to understand the meanings of texts. He noted that his objective was to identify "not what we do or what we ought to do [in interpretation], but what happens to us over and above our wanting and doing."²⁴⁷ Gadamer argues that a 'reader' is always necessarily situated in some sort of "tradition," a position that creates for him a "historically effected consciousness."²⁴⁸ The "prejudices" that result from this embeddedness interact as if in dialogue with the text, expanding or moving the "horizons" that limit one's understanding from one's particular vantage point.²⁴⁹ Interpreting a text, in other words, involves a "fusion" of these horizons.²⁵⁰

As the American debate over abolition shifted towards issues of constitutionality, 'readers' of the Constitution (i.e. justices, congressmen) engaged in this process of interpretation, or in the "fusion of horizons." In all such practices, they 'read' from a position of "communal tradition and

individual prejudices.”²⁵¹

Interpreting the Constitution on the issue of capital punishment was complex, however. Gadamer may well have summarized the tension that existed between modern abolition efforts and the Constitution when he wrote that:

In [...] legal [...] hermeneutics there is the essential tension between the text set down [...] on the one hand, and on the other, the sense arrived at by its application in the particular moment of interpretation.”²⁵²

When thinking of interpretations of the Constitution as involving such a tension, it is unsurprising that Furman produced such a “badly splintered Court.”²⁵³ Given the infamous ambiguity of the Eighth Amendment, and the relative lack of textual precedent explaining “cruel and unusual” at the time, the clause held an open world of meaning to be read. It had, in a sense, a vaguely defined background itself, and was therefore amenable to a variety of resultant understandings. It was only likely that the distribution of opinions would have been so dispersed.

But how then can we describe the subsequent convergence of Gregg? To pursue such an answer we also consider that ‘readers’ of the Constitution are not only engaging dialogically with its text, but are also engaging dialogically with other readers. We must investigate, as Vogel²⁵⁴ writes, the “constitutional conversation that goes far beyond the technical legal discourse of judges and lawyers.” In a way, the Supreme Court, the Congress, and various state legislatures all “talked” to each other between 1972 and 1976 regarding interpretations of “cruel and unusual.” The medium of this communication came in the form of Court opinions and legislative responses (i.e. bills, acts, and laws). The preceding analysis focused on isolated readers interpreting the Constitution. The subsequent analysis looks at the interactions of those interpretations in the public sphere.

Specifically, I argue that through this communication a meaning of “cruel and unusual” was dialogically forged. Habermas²⁵⁵ notes that the purpose of inter-subjective communication in the public sphere is the reaching, or forging, of a shared understanding. Gadamer’s hermeneutics similarly “insist[...] on the cultivation of shared meanings and a shared public space as a premise of interpretive praxis.”²⁵⁶

The shared meaning of “cruel and unusual” that led to interpretive consensus came about from inter-subjective communication between the Supreme Court, Congress, and various state legislatures. After the Furman decision was handed down, Congress engaged in debate over its meaning. In attempting to pass new legislation to meet the requirements of Furman, Senators Eckhardt and Hruska noted that its definition hinged upon how each Justice had interpreted the Constitution. Eckhardt attempted to identify common currents underneath the Justices’ reasoning. He noted that if the standards of the ‘swing’ Justices were met, then capital punishment would not

be “cruel and unusual.” By way of this reasoning, Eckhardt was dialogically engaging the Court in crafting a shared meaning of “cruel and unusual.”²⁵⁷

Similarly, the Supreme Court, in its majority opinion in *Gregg*, ‘read’ into the various legislative responses to *Furman*. In *Gregg* the Court assumed that the Eighth Amendment and “evolving standards of decency” necessarily referred to public opinion.²⁵⁸ Thirty-five state legislatures, as well as Congress, had passed laws introducing a modified practice of the death penalty after *Furman*, and the Court paid attention to these actions in *Gregg*.²⁵⁹ These laws essentially represented the collective opinion of each legislature as to the definition of “cruel and usual” -- they were communicative acts. Because the bills were passed, they were thus statements from each legislature about its interpretation of “cruel and unusual.” Specifically, they asserted that the specific practices they laid out were not “cruel and unusual.” Through this to-and-fro discussion, the Supreme Court and the legislatures conjointly built up a common understanding of the meaning of the phrase “cruel and unusual.”

This dynamic, however, played into the interests of the retentionists since they represented the political majority. Critical Legal Studies scholars argue that the reading of the Constitution and constitutional cases “consists of political choice.”²⁶⁰ The most extreme forms of this critique claim that ‘readers’ of the Constitution merely impose “their private value judgments on [its] text.”²⁶¹ Despite the extremity of this position, it is consistent with the events seen in the reverberations of the *Furman* decision in Congress. While abolitionist congressmen claimed that Brennan and Marshall were correct in *Furman*, retentionist congressmen aligned with Douglas, White, and Stevens. Moreover, as legislative debate over capital punishment had been essentially suspended after the Court had become involved, Congress was still mostly retentionist. While Representative Fletcher Thompson (R-GA), eight years before *Gregg*, had voiced his concern that the Supreme Court would “allow the minority to control the majority,” and impose “upon this entire nation and all the courts thereof the minority views of those who oppose capital punishment,”²⁶² it appears that the Court did just the opposite, working together with the majority to reify its opinion as constitutional truth. Moreover, the Court also verified that the legislatures had not affronted the national opinion in its legislative responses to *Furman*. The Court, for example, invalidated the mandatory death sentencing laws that were passed, arguing that they were “repudiated” by societal standards.²⁶³ In total, these communications resulted in a textual meaning that was fixed via the weaving of a “social fabric of understanding.”²⁶⁴

We may again juxtapose this sequence of events against the English experience. While the English also discussed and debated capital punishment, the domain of their discussion was significantly different. The English narrative centered on the issue of deterrence, a rational-scientific

topic, while the American narrative pursued the meaning of a textual phrase focused on more normative terms. In other words, the knowledge that the American debate eventually pursued became essentially different than the knowledge pursued by the English debates.

Habermas²⁶⁵ characterizes forms of knowledge by the interests that drive them. Each form of knowledge has a corresponding organized mode of inquiry and methodology of production. For instance, Habermas contrasts the empirical-analytical sciences, based in a technical interest to predict and control the natural environment, with the cultural-hermeneutic sciences, interpretive modes of inquiry that derive from a practical interest to come to mutual understandings between social actors. In the case of the capital punishment debates, England pursued an empirical-analytical knowledge, that is, the question of whether or not capital punishment is effective as a deterrent against crime. This type of knowledge was obtainable through social scientific searches for measurable behavior patterns. The United States, on the other hand, pursued a hermeneutic knowledge, a shared and mutual understanding as to the meaning of “cruel and unusual.” From this characterization, we notice the much greater social nature of the American contention regarding capital punishment as compared to the British. While the debate in England sought more empirically based evidence of behavioral patterns, the American debate focused on socially constructing normative understandings.

The effect of this social construction was to re-legitimize the death penalty in the United States. This line of events lies in stark contrast to the United Kingdom, which had no opportunities in its 1969 debates over reinstating capital punishment to do the same. The turn in debates towards the ambiguously written Constitution uniquely pushed the United States towards a re-entrenchment of the practice of capital punishment.

Steiker and Steiker²⁶⁶ assert that the Gregg decision “legitimized” the practice of capital punishment. They argue, drawing on the work of Max Weber, that the decision proliferated an “experience of belief in the normative legitimacy of capital punishment.”²⁶⁷ Legitimation, it is important to note, is therefore essentially social. They also note that this social belief was “false and exaggerated” in the sense that it was induced “in the absence of or in contradiction of evidence” to what capital punishment was “really” like.²⁶⁸ The researchers posit that legitimation occurs on at least two fundamental levels: “internally” with capital sentencers and other criminal justice actors, and “externally” with society at large.²⁶⁹

The narrative that I have compiled reveals legitimation on these levels and consistent with their effects. The turn to a constitutional debate over the death penalty overshadowed and diminished the absence of evidence of capital punishment’s value as a deterrent. After the Court’s decision there were pronounced changes both in courtrooms and in the national community

at large. The frequency of executions skyrocketed and the size of death row exploded to levels that were even higher than before abolitionist movements in the 1960s and 1970s²⁷⁰ -- a complete reversal of the earlier trend.²⁷¹ This reversal was indicative of juries and judges more comfortable with doling out death sentences. Moreover, Gallup poll data show public support for the death penalty suddenly increasing by the late 1970s, and reaching record highs in the 1980s and 1990s.²⁷² The results of the Eighth Amendment debate surrounding capital punishment seem to have had effectively led to a new legitimization for capital punishment as a social practice.

Conclusion

A comparative analysis between the American and English abolition narratives yields insight into an explanation of the persistence of capital punishment in the United States today. In the first half of these narratives, the countries both appeared to be moving in the same direction, towards the end of capital punishment. Similarly, the initial debates over capital punishment in each country strongly mirrored the initial debates in the other. But the American debate suddenly changed when the NAACP's Legal Defense Fund made efforts to push the issue of capital punishment into the courts and framed the discussion as one of constitutionality instead of deterrence. At this point, abolition efforts in Congress held back while the Court wrestled with whether or not the death penalty could be held unconstitutional.

After the debate over the death penalty in America was taken over by the courts, time and attention were diverted away from the debate about the efficacy of capital punishment itself, a debate that the abolitionists in England had shown could and would likely be won with the analysis of social scientific data. The shifted debate focused instead on the different understandings of a normative textual phrase, "cruel and unusual," rather than evidence gathered from the social sciences. As the American interpretive approach tended towards affirming the general supportive stance of the death penalty, it soon became a new basis for its legitimization.

The narratives themselves are consistent with this explanation of the persistence of the death penalty in the United States. Nevertheless, the social and political worlds are complex. While the shift of the American debate to the ambiguously written Constitution was probably not the sole factor that led to the persistence of the death penalty, it did coincide with the point at which the United States suddenly veered off its trend towards abolition -- a trend that was slowly developing both in legislatures and in the community at large. This "veering off" point becomes very pronounced when the American abolitionist narrative is juxtaposed to that of the British, who marched slowly and steadily towards abolition over the course of twenty years.

It is important to note that the shift to the textualist debate in America

was not in any way preordained, but rather was the effect of abolitionist elites and interest groups that took the initiative to push the debate out of the legislatures and into the courts. Ironically though, the constitutional realm gave retentionists much more ground to stand on when defending the death penalty as it was held under scrutiny.

Further research to support the claims of this paper could look at similar narratives in other countries with codified constitutions. Were their abolitionist debates pushed towards textual normative standards located in their constitutions? And if so, what were the results of those debates? Did they confirm or reject the general opinion of that country on the issue of capital punishment?

The legal legitimization of the death penalty can also help explain why the practice remains so entrenched in the 21st century. While it is beyond the scope of this paper to delve into the exact terms of that legitimization today, it does provide an account of how such legitimization may have originated in the 1960s and 1970s. When thinking of modern social institutions, it is necessary, I think, to trace how those institutions have developed and, more importantly, how the ways in which we think of those institutions have historically evolved. I hope that this paper has shed such insight into the peculiar American death penalty, the only example of capital punishment in the modern Western world.



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