

1 INTRODUCTION: WHEN THE DEATH PENALTY GOES PUBLIC

2016 was not a good year for opponents of capital punishment in the United States. Their cause suffered an important setback when Donald Trump, an avid death penalty supporter, was elected President.¹ With Trump's election, and his choice of Jeff Sessions as Attorney General, hope for continued restraint in the use of the federal death penalty and for the appointment of Supreme Court justices opposed to the death penalty was dashed.²

In addition, voters in several states expressed their support for capital punishment.³ The results of ballot measures in California, Oklahoma, and Nebraska ensured a future for that punishment in all three states. California voters narrowly rejected Proposition 62, a measure that would have ended the death penalty and replaced it with life imprisonment without parole.⁴ By a similarly narrow margin they approved Proposition 66, which was designed to speed up the death penalty process by designating special courts to hear challenges

¹ Bianca Clark, "Trump's Support for the Death Penalty Puts Him on Wrong Side of History," *The Hill*, March 29, 2017, <http://thehill.com/blogs/pundits-blog/crime/326388-trumps-support-for-the-death-penalty-puts-him-on-wrong-side-of-history>.

² John J. Donohue and Max Schoening, "Jeff Sessions, the Grim Reaper of Alabama," *New York Times*, January 8, 2017, www.nytimes.com/2017/01/08/opinion/jeff-sessions-the-grim-reaper-of-alabama.html.

³ Tess Owens, "Capital Punishment: Voters in California, Oklahoma, and Nebraska Chose to Preserve and Strengthen the Death Penalty," *Vice News*, November 8, 2016, https://news.vice.com/en_us/article/gywxqm/death-penalty-proponents-win-in-california-oklahoma-and-nebraska.

⁴ "California Proposition 62, Repeal of the Death Penalty (2016)," Ballotpedia, accessed August 28, 2018, [https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_\(2016\)](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)).

to death penalty convictions, while also limiting successive appeals and expanding the pool of lawyers who could handle those appeals.⁵

Two thirds of Oklahoma voters supported State Question 776, which declared that the death penalty cannot be considered cruel and unusual under that state's constitution. It also included a provision that "any method of execution shall be allowed, unless prohibited by the United States Constitution," making it possible for the state to employ the gas chamber, electrocution, or firing squad if lethal injection is ever declared unconstitutional.⁶ Finally, Nebraska voters reinstated the death penalty by a margin of 61 percent to 39 percent, just one year after state legislators had voted to abolish it.⁷

These election results put a brake on two decades of accelerating momentum in the effort to end America's death penalty.⁸ At the same time that voters endorsed capital punishment, the number of death sentences handed down across the country fell to its lowest number since 1972.⁹ Furthermore, there were only twenty executions in 2016, which represented a 25 percent decline from the previous year and the lowest number in a quarter of a century.¹⁰ Only five states conducted executions. Additionally, national public opinion polls showed support for capital punishment at a forty-year low.¹¹ Even in Oklahoma, a public opinion poll found that 53 percent of the respondents supported replacing the death penalty with life imprisonment without parole.¹²

Voting on the question of whether to retain or abolish capital punishment is different from responding to public opinion polls or

⁵ "California Proposition 66, Death Penalty Procedures (2016)," Ballotpedia, accessed August 28, 2018, [https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_\(2016\)](https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016)).

⁶ "Oklahoma Death Penalty, State Question 776 (2016)," Ballotpedia, accessed August 28, 2018, [https://ballotpedia.org/Oklahoma_Death_Penalty,_State_Question_776_\(2016\)](https://ballotpedia.org/Oklahoma_Death_Penalty,_State_Question_776_(2016)).

⁷ Paul Hammel, "Nebraskans Vote Overwhelmingly to Restore the Death Penalty," *Omaha World Herald*, November 9, 2016.

⁸ Jeffrey Toobin, "The Strange Case of the American Death Penalty," *New Yorker*, December 21, 2016, www.newyorker.com/news/daily-comment/the-strange-case-of-the-american-death-penalty.

⁹ "The Death Penalty in 2016: Year End Report," Death Penalty Information Center, December 21, 2016, <https://deathpenaltyinfo.org/YearEnd2016>.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Bill Shapard, "Oklahoman: Changing Views on Death Penalty?," *Soonerpoll*, February 18, 2018, <https://soonerpoll.com/oklahoman-changing-views-on-death-penalty/>.

The European Comparison

3

serving as a juror in a capital case. The most obvious difference is that votes of the kind that occurred in 2016 come at the end of political campaigns in which both the ephemeral nature of responding to survey questions and the nuance of deciding whether a particular individual who committed a particular crime should be executed are displaced. As we will show in this book, those campaigns function, to borrow sociologist Joseph Gusfield's phrase, as "symbolic crusades."¹³

The work that death penalty abolitionists have done to reframe the recent debates about capital punishment clearly has not succeeded in the electoral arena.¹⁴ The risk of executing the innocent, the problem of racial discrimination, and the possibility of botched executions have been crucial in changing the debate about capital punishment in state legislatures, but they have had much less salience when the death penalty is on the ballot. Over the course of the twentieth and into the twenty-first centuries, death penalty ballot campaigns served to mobilize affect, appeal to group thinking, and stoke fears. Images of capital punishment and its role in society have been carefully crafted and marketed, and voters have repeatedly been asked to choose sides on one of America's most charged and divisive issues.

THE EUROPEAN COMPARISON

Putting important public policy questions, like whether to retain or abolish the death penalty, on the ballot exemplifies what James Whitman calls the "weakness" of the American state in comparison with European states.¹⁵ Those states, he says, are both "relatively powerful and autonomous . . . They are autonomous in the sense that they are steered by bureaucracies that are relatively immune from the vagaries of public opinion."¹⁶ The strength of the state allowed nations

¹³ Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (Urbana, ILL: University of Illinois Press, 1963).

¹⁴ Austin Sarat, Robert Kermes, Haley Cambra, Adelyn Curran, Margaret Kiley, and Keshav Pant, "Rhetoric of Abolition: Continuity and Change in the Struggle Against America's Death Penalty, 1900–2010," *Journal of Criminal Law and Criminology* 107, no. 4 (2017): 757–780.

¹⁵ James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (New York: Oxford University Press, 2003), 13–14.

¹⁶ *Ibid.*

like Germany and France to abolish capital punishment when a majority of their citizens continued to support it.¹⁷ Describing abolition in those countries, Whitman observes that “government actors initiate abolition and slowly bring public opinion around.”¹⁸

In Germany, the post-war “Basic Law” (Grundgesetz), ratified in 1949, contained Article 102, a simple four-word article that in English reads “capital punishment is abolished.”¹⁹ This constitutional provision reflected Germany’s “revulsion at the large number of death sentences carried out in the last few years”²⁰ and symbolized the state’s commitment to distancing itself from the atrocities of the Holocaust. Since its enactment, there have been numerous attempts to reinstate capital punishment.

One, which occurred when the *Deutsche Partei* filed a motion to reintroduce capital punishment in 1952, illustrates the way German political leaders think about their role in the face of public agitation to restore the death penalty. Dr. Thomas Dehler of the Free Democratic Party urged government officials to ignore the German people’s preference for capital punishment. As Dehler put it, “one fails to recognize the true meaning of democracy when one believes that the parliament is the executor of the people’s will.”²¹ Elected representatives, he argued, were required to demonstrate “greater insight, understanding, and responsibility than the great mass of citizens” and were called upon to respect human dignity, uphold a modern justice system, and firmly reject the contempt for human life previously exhibited by the Nazi Party.²²

In France, after a series of highly publicized brutal crimes fueled an increased fear of crime and pushed public sentiment in favor of capital punishment in the 1970s, abolitionists claimed that ending capital punishment was the “next urgent step in the march of human

¹⁷ Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (Cambridge: Cambridge University Press, 1986).

¹⁸ Whitman, *Harsh Justice*.

¹⁹ “Basic Law for the Federal Republic of Germany.” Bundesministerium der Justiz und für Verbraucherschutz, accessed August 28, 2018, www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

²⁰ Richard J. Evans, *Rituals of Retribution: Capital Punishment in German Politics and Society Since the Seventeenth Century* (New York: Oxford University Press, 1996), 781.

²¹ Thomas Dehler, “Thomas Dehler: Reden Und Aufsätze,” Westdeustcher Verlag, 1969.

²² Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (London: Palgrave, 2010), 69.

The European Comparison

5

progress.”²³ Spearheaded by legal scholar and activist Robert Badinter and by François Mitterand, France’s president and leader of the Socialist Party, the French Parliament voted to end the death penalty in September 1981 by a vote of 333 to 117. In 2007 the French Constitution was amended to say, “No one can be sentenced to death.” As historian Robert A. Nye observes, “The abolition of capital punishment in France was accomplished as a *coup d’etat* by a political and intellectual elite against the clearly established sentiments of the vast majority of the public.”²⁴

While European political elites “had the legal capacity and political opportunity to pass laws that abolished . . . (the death penalty) once and for all,”²⁵ America’s political system divides and fragments power and prevents such uniform action.²⁶ The vulnerability of the American state, Whitman argues, is particularly consequential in the domain of crime and punishment, where the public tends to be more punitive in its dispositions than state officials and elites.²⁷ The death penalty persists in the United States because lawmakers responsible for criminal justice policy are much more responsive to the public than are their counterparts in Europe and because the public plays a larger role in legislating about capital punishment.

What sets America apart, Whitman argues, “is the relatively easy translation of majority sentiment into policy.”²⁸ When courts, legislators, or executives have been willing to face the political consequences of trying to abolish the death penalty, the public used initiative and referendum processes, like those in California, Nebraska, and Oklahoma in 2016, to parry those efforts. European “voters can exercise only gradual influence over the broad outlines of criminal justice policy, by voting for different political parties”; Americans can use initiatives and referenda to pass criminal laws as direct legislation.²⁹

²³ Hammel, *Ending the Death Penalty*.

²⁴ Robert Nye, “Two Capital Punishment Debates in France,” *Historical Reflections* 29, no. 2 (2003): 211–28.

²⁵ David Garland, “Capital Punishment and American Culture,” *Punishment and Society* 7, no. 4 (2005): 362.

²⁶ Whitman, *Harsh Justice*, 13.

²⁷ *Ibid.*, 14.

²⁸ *Ibid.*, 200.

²⁹ *Ibid.*, 217.

This book provides the first account of the death penalty's ballot history and its significance in the political and legal struggle over capital punishment in America. It reviews every instance in which a state's voters have been called upon to decide the fate of the death penalty since the early twentieth century. This has happened twenty-nine times in fifteen different states and, in those electoral contests, abolitionists lost twenty-five times.³⁰ These results highlight the problem abolitionists face in a political system marked by what scholars have called "criminal justice populism."³¹

In what follows, we examine the ways death penalty ballot questions have been presented in different sociopolitical eras, their distinct forms, the motivations for putting the death penalty on the ballot, and the impact of doing so on efforts to end capital punishment in the United States. In so doing, we hope to shed light on the relationship between democracy and America's death penalty and on the question of how democratic politics shapes the fate of capital punishment.

LET THE VOTERS DECIDE: INITIATIVE, REFERENDUM, AND AMERICAN DEMOCRACY

The push to establish popular initiatives and referenda of the kind used in California, Oklahoma, and Nebraska emerged in the 1890s during an era of political uncertainty. Americans were struggling "with the harsh economic transformations of an emerging industrial society," and workers, farmers, consumers, and taxpayers felt increasingly neglected by politicians and legislators.³² They were suspicious of powerful interests which seemed to "preclude any discussion of vital social, economic, and political issues."³³ In addition, many Americans

³⁰ In an article published in 2018, we said that those numbers were twenty-eight and fourteen.

Austin Sarat, John Malague, Lakeisha Arias de los Santos, Katherine Pedersen, Noor Qasim, Logan Seymour, and Sarah Wishloff "When the Death Penalty Goes Public: Referendum, Initiative, and the Fate of Capital Punishment," *Law and Social Inquiry*, April 20, 2018. <https://doi.org/10.1111/lisi.12360>.

Subsequently we identified one additional death penalty ballot question.

³¹ Mike Hough, "Populism and Punitive Penal Policy," *Criminal Justice Matters* 49 (2002): 4–5.

³² Steven L. Piott, *The Origins of the Initiative and Referendum in America* (Columbia, MO: University of Missouri Press, 2003), 1.

³³ *Ibid.*

Let the Voters Decide

7

worried that the government served those interests and was not responsive to the needs of the people.³⁴

Progressive reformers sought to use democratic processes to circumvent, or check, political institutions, which they felt were dominated by moneyed interests. They saw direct legislation as a way to supplement institutional politics, creating a parallel, democratic system less corrupted by the presence of professional politicians and their interests. Their stated aim was to return sovereignty to the American people.³⁵ They framed their reforms “as efforts to curtail corruption, weaken party bosses, and restore power to ordinary people.”³⁶

Debates about direct democracy are as old as the Constitution itself. In Federalist No. 10, James Madison observes that political regimes built on direct democracy “have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have been in general as short in their lives as they have been violent in their deaths.”³⁷ As a result, Madison argued for a republic built on representative democracy, in which it would be possible to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”³⁸ This view prevailed in the constitution that emerged from the Philadelphia Convention in 1787.

Forty years later, the so-called Jacksonian period was marked by a push for greater democracy and popular participation than the Constitution provided. As Justin Crowe writes, Jacksonians “envisioned a society where the common man had power and respect and an America where Northern financiers held no more influence than Southern or Western farmers and laborers.”³⁹ In his farewell address to the

³⁴ Ibid., 2.

³⁵ For the populist reformers of the 1890s, and to a lesser extent the progressives who followed them, these political aims were paired with economic ones. Betty Zisk, *Money, Media, and the Grass Roots* (Newbury Park, CA: Sage, 1987).

³⁶ Ibid.

³⁷ James Madison, “Federalist No. 10,” *The Federalist Papers*, November 23, 1787. The Avalon Project, http://avalon.law.yale.edu/18th_century/fed10.asp.

³⁸ Ibid.

³⁹ Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton, NJ: Princeton University Press, 2012), 109.

American people, President Jackson declared, “In your hands is rightfully placed the sovereignty of the country, and to you everyone placed in authority is ultimately responsible.”⁴⁰ He urged elected officials to “see that the wishes of the people are carried into faithful execution.”⁴¹

The principles of Jacksonian democracy were reiterated in the populist movement in the latter half of the nineteenth century. Populists, a group of agrarian reformers largely concentrated in the South and Middle West, shared the same fear of corporate charters, special privileges, franchises, and monopolies that animated the Jacksonians. They were dissatisfied with a “system of governance that rewarded organized power at the expense of the needs of the people”⁴² and with the system of representative government which, in their view, allowed social and economic inequalities to flourish and excluded the American labor class from participating in the legislative process. Populists embraced direct democracy as a means of “restoring the economic and political independence of the American farmer” and circumventing elite and moneyed interests prevalent in the railroad business and other powerful industries.⁴³ They advocated the use of initiatives and referenda to restore sovereignty to the American people and to help achieve a “government that is in its forms actually democratic.”⁴⁴

Inspired by populism, the progressive movement of the late nineteenth and early twentieth centuries wanted to address economic, political, and cultural questions that had arisen in the context of the Industrial Revolution and the growth of modern capitalism in America. They took up the cause of direct legislation in conjunction with other social issues, including the extension of the vote to women, legislative reapportionment, and direct election of U.S. senators.⁴⁵ Progressives saw initiatives and referenda as supplementing republican politics, creating a parallel, democratic system less corrupted by the presence

⁴⁰ Andrew Jackson, “Farewell Address,” The American Presidency Project, March 4, 1837, www.presidency.ucsb.edu/ws/index.php?pid=67087.

⁴¹ Ibid.

⁴² Piott, *The Origins of the Initiative and Referendum in America*, 1.

⁴³ Thomas Goebel, *A Government by the People: Direct Democracy in America, 1890–1940* (Chapel Hill: University of North Carolina Press, 2002), 21.

⁴⁴ Eltwed Pomeroy, “How the Trusts Stifle Initiative,” *The Independent* 54 (2002): 2132–34.

⁴⁵ Goebel, *A Government by the People*, 45.

Initiative and Referendum as Expressions of Popular Will 9

of professional politicians and moneyed interests. They framed their reforms “as efforts to curtail corruption, weaken party bosses, and restore power to ordinary people.”⁴⁶

At the same time, opponents of direct legislation claimed that initiatives and referenda violated the U.S. Constitution.⁴⁷ The courts were not persuaded,⁴⁸ and in 1912, the U.S. Supreme Court held that the question of whether to allow initiatives and referenda was a political one that should be left to Congress.⁴⁹ By this time, however, Congress had rendered its verdict. It had admitted to the Union three states (Oregon, Oklahoma, and Arizona) whose state constitutions contained provisions for initiatives and referenda.

None of the states that voted to uphold capital punishment in 2016 – California, Oklahoma, and Nebraska – were new to the direct democracy process. All three have long histories of employing the initiative and referendum. Many of the early populists and progressives hailed from the Great Plain states, including Nebraska and Oklahoma, laying the framework for a strong tradition of direct democracy that continues to influence politics in the region today.⁵⁰ California was another early frontier for direct legislation, in which populists seeking to curtail the power of railroad trusts and slow Chinese immigration passed a series of reforms starting in 1879. By 1909 they had succeeded in bringing the direct primary, initiative, referendum, and recall to California.⁵¹

INITIATIVE AND REFERENDUM AS EXPRESSIONS OF POPULAR WILL

It would be inaccurate, however, to frame early uses of the initiative and referendum process as untainted expressions of democratic will. Scholars have shown that proponents of direct legislation often were more interested in symbolic reforms than in changes that would

⁴⁶ Richard Braunstein, *Initiative and Referendum Voting* (New York, NY: LFB Scholarly Publishing, 2004), 2.

⁴⁷ Goebel, *A Government by the People*.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Zisk, *Money, Media, and the Grass Roots*, 12.

⁵¹ *Ibid.*, 54.

actually upset the social and political hierarchies of the day. Moreover, they wanted to limit the political power of immigrants and urban populations.⁵² Since the late 1960s, propelled by increasing distrust of government and a desire to hold elites accountable, the use of initiatives and referenda has greatly increased.⁵³ At the same time, new questions have arisen about their utility as vehicles for expression of the popular will.⁵⁴ California, the most prolific user of the referendum process, offers a good example.⁵⁵

Putting a measure on the California ballot typically begins with a self-appointed committee deciding on its precise wording. Following this, the state attorney general's office prepares a summary of each proposition. Critics point out that the wording of both the ballot measure itself and the summary "may be so broad and complex as to defeat the attempts of the best-motivated voter to understand it."⁵⁶ Many voters will rely on informational voter pamphlets in order to navigate the confusing wording on the ballot. However, even these cannot be said to solve the problem of voter confusion, as "even nonbiased descriptions can be difficult to decipher . . . understandable only to attorneys and legislative analysts."⁵⁷ The problem of legalistic and confusing wording is only compounded when there are many questions on the ballot and "voter fatigue" sets in. The further down the ballot they are listed, the less likely voters are to vote on them.⁵⁸

Moreover, the rules governing initiative and referendum elections may require more than a simple majority to secure passage. In some states, for example, when a constitutional amendment is on the ballot a two-thirds majority is required for approval.⁵⁹ As Joseph Zimmerman

⁵² Braunstein, *Initiative and Referendum Voting*, 15.

⁵³ *Ibid.*, 8.

⁵⁴ David Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (Baltimore, MD: Johns Hopkins University Press, 1984).

⁵⁵ When referenda are put on the California ballot in special elections, only about 25 percent of eligible voters turn out to vote. Magleby, *Direct Legislation*.

⁵⁶ Ken DeBow and John C. Syer, *Power and Politics in California* (New York, NY: Longman, 2003), 119.

⁵⁷ *Ibid.*, 121.

⁵⁸ Magleby, *Direct Legislation*, 247.

⁵⁹ "Supermajority Vote Requirements," National Conference of State Legislatures, accessed August 28, 2018, www.ncsl.org/research/elections-and-campaigns/supermajority-vote-requirements.aspx.