

STUDIES IN LAW, POLITICS,
AND SOCIETY

STUDIES IN LAW, POLITICS, AND SOCIETY

Series Editor: Austin Sarat

Recent volumes:

- | | |
|----------------|--|
| Volumes 1–2: | Edited by Rita J. Simon |
| Volume 3: | Edited by Steven Spitzer |
| Volumes 4–9: | Edited by Steven Spitzer and Andrew S. Scull |
| Volumes 10–16: | Edited by Susan S. Sibey and Austin Sarat |
| Volumes 17–33: | Edited by Austin Sarat and Patricia Ewick |
| Volumes 34–77: | Edited by Austin Sarat |
| Volume 78: | Edited by Livia Holden and Austin Sarat |
| Volume 79: | Edited by Austin Sarat |
| Volume 80: | Edited by Austin Sarat |
| Volume 81: | Edited by Austin Sarat |
| Volume 82: | Edited by Austin Sarat |
| Volume 83: | Edited by Austin Sarat |
| Volume 84: | Edited by Austin Sarat |

STUDIES IN LAW, POLITICS, AND SOCIETY VOLUME 85

STUDIES IN LAW, POLITICS, AND SOCIETY

EDITED BY

AUSTIN SARAT

*Department of Law, Jurisprudence & Social Thought and
Political Science, Amherst College*

Symposium: Hatred and the Law



United Kingdom – North America – Japan
India – Malaysia – China

Emerald Publishing Limited
Howard House, Wagon Lane, Bingley BD16 1WA, UK

First edition 2021

Copyright © 2021 Emerald Publishing Limited

Reprints and permissions service

Contact: permissions@emeraldinsight.com

No part of this book may be reproduced, stored in a retrieval system, transmitted in any form or by any means electronic, mechanical, photocopying, recording or otherwise without either the prior written permission of the publisher or a licence permitting restricted copying issued in the UK by The Copyright Licensing Agency and in the USA by The Copyright Clearance Center. Any opinions expressed in the chapters are those of the authors. Whilst Emerald makes every effort to ensure the quality and accuracy of its content, Emerald makes no representation implied or otherwise, as to the chapters' suitability and application and disclaims any warranties, express or implied, to their use.

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

ISBN: 978-1-80071-221-8 (Print)

ISBN: 978-1-80071-220-1 (Online)

ISBN: 978-1-80071-222-5 (Epub)

ISSN: 1059-4337 (Series)



ISOQAR certified
Management System,
awarded to Emerald
for adherence to
Environmental
standard
ISO 14001:2004.

Certificate Number 1985
ISO 14001



INVESTOR IN PEOPLE

CONTENTS

List of Contributors vii

Editorial Board ix

Section I General Article

**Chapter 1 Same Procedure as Last Year? Patterns of
Death Penalty Bill Introductions in the Era of
Abolition 1999–2018** 3
Emma Ricknell

Section II Hatred and the Law: A Symposium

**Chapter 2 Lack of Punishment Doesn't Fit the Crime:
America's Tepid Response to Bias-motivated Crime** 29
Jeannine Bell

**Chapter 3 "You Complete Me": Batman, Joker, and the
Countersubversive Politics of American Law and Order** 49
Jeffrey R. Dudas

**Chapter 4 The Role of Social Media Companies in the
Regulation of Online Hate Speech** 75
Chara Bakalis and Julia Hornle

**Chapter 5 A Socio-legal Analysis of Gender-based
Victimization, Misogyny and the Hate Crime Paradigm
in England and Wales** 101
Marian Duggan

This page intentionally left blank

LIST OF CONTRIBUTORS

<i>Chara Bakalis</i>	Oxford Brookes University, UK
<i>Jeannine Bell</i>	Indiana University, USA
<i>Jeffrey R. Dudas</i>	University of Connecticut, USA
<i>Marian Duggan</i>	University of Kent, UK
<i>Julia Hornle</i>	Queen Mary University of London, UK
<i>Emma Ricknell</i>	Linnaeus University, Sweden

This page intentionally left blank

EDITORIAL BOARD

Gad Barzilai	<i>Tel Aviv University, Isreal</i>
Paul Berman	<i>George Washington University, USA</i>
Roger Cotterrell	<i>University of London, UK</i>
Jennifer Culbert	<i>Johns Hopkins University, USA</i>
Eve Darian-Smith	<i>University of California, Santa Barbara, USA</i>
David Delaney	<i>Amherst College, USA</i>
Florence Dore	<i>University of North Carolina, USA</i>
David Engel	<i>State University of New York at Buffalo, USA</i>
Anthony Farley	<i>Albany Law School, USA</i>
David Garland	<i>New York University, USA</i>
Jonathan Goldberg-Hiller	<i>University of Hawaii, USA</i>
Laura Gomez	<i>University of California, Los Angeles, USA</i>
Piyel Haldar	<i>University of London, UK</i>
Thomas Hilbink	<i>Open Society Institute, USA</i>
Desmond Manderson	<i>Australian National University, Australia</i>
Jennifer Mnookin	<i>University of California, Los Angeles, USA</i>
Laura Beth Nielsen	<i>American Bar Foundation, USA</i>
Paul Passavant	<i>Hobart and William Smith College, USA</i>
Susan Schmeiser	<i>University of Connecticut, USA</i>
Jonathan Simon	<i>University of California, Berkeley, USA</i>
Marianna Valverde	<i>University of Toronto, Canada</i>
Alison Young	<i>University of Melbourne, Australia</i>

This page intentionally left blank

SECTION I

GENERAL ARTICLE

This page intentionally left blank

CHAPTER 1

SAME PROCEDURE AS LAST YEAR? PATTERNS OF DEATH PENALTY BILL INTRODUCTIONS IN THE ERA OF ABOLITION 1999–2018

Emma Ricknell

ABSTRACT

The death penalty has existed in a state of steady decline for the last two decades, during which state legislatures have been at the center of abolition efforts. Successful abolition is, however, very rare in contrast to how often death penalty repeal bills are introduced across state legislatures, year after year. Indeed, abolition is not a sudden event, but may be many years in the making. Research on the early phases of this process, where the groundwork for enacted legislation is laid, is nevertheless limited. This chapter explores patterns of death penalty bill introductions across all active death penalty states from 1999 to 2018, providing not only an overview of legislative activity at state level but also an analysis of potential factors fueling the activity. It argues that individual legislators play a significant role in the current trend of increased legislative support for a restricted, if not entirely abolished, death penalty, evident both in terms of persistency over time and cooperation across party lines. It also problematizes partisan aspects of legislative activity in the context of legislation on capital punishment.

Keywords: Death penalty; bill introductions; state legislatures; legislative entrepreneurs; abolition; partisanship

INTRODUCTION

The death penalty has since the turn of the century existed in a state of “free-fall” (Steiker & Steiker, 2014). Executions and death sentences are at historically low levels (Death Penalty Information Center, 2019a), as is public support (Jones, 2019). With 10 states having abolished the death penalty during the new millennium and an additional three having a gubernatorial moratorium in place,¹ there is an expectation that remaining death penalty states will eventually follow suit, likely by legislative repeal (Entzeroth, 2012; Galliher, Koch, Keys, & Guess, 2002).

Abolition is, however, not a sudden event. Even if an abolition bill ends up successful, earlier versions very likely experienced rejection a number of times throughout the legislative process, much like with any legislation introduced in state legislatures (Squire & Moncrief, 2019). Yet considering the flurry of activity regarding the death penalty in recent years, we know surprisingly little about this early phase of the legislative process. What we do know, is that the legislative activity during the early phase of the legislative process reflects the overall trend of an on-going decline for the death penalty, as bills aiming to if not repeal, at least restrict the death penalty are today the most common type of death penalty bill (Baumgartner, Davidson, Johnson, Krishnamurthy, & Wilson, 2018). However, we have scant knowledge about the legislators behind this pattern across states and over time, and cannot say under which conditions those legislators introduced their bills in the first place. If the bill introduction phase, the necessary starting point for all policies decided by state legislatures, is at all indicative of future outcomes, it is high time pay it some attention.

The aim of this chapter is to begin to address this research gap. I do so by examining determinants of death penalty bill introductions over time and across states during the last two decades. Specifically, I examine the introduction of death penalty-related bills in all death penalty states for the years 1999–2018, using a unique dataset. My approach is based upon an understanding that not only is studying the early phases of the legislative process important for understanding current overall trends, but also a comprehensive approach that covers *all* bills relating to the policy as it facilitates a contrasting analysis relevant to the current state of decline that would otherwise not be possible.

As will be elaborated upon below, I draw primarily upon research on legislative entrepreneurs and partisan aspects concerning capital punishment to guide the analysis on patterns of bill introductions. This approach enables an analysis of patterns among legislators of individual leadership as well as bipartisan collaborations, and also the partisan context within which these legislative actions were taken.

This chapter, thus, adds to the limited number of studies that have used cross-sectional, time-series approaches to examine legislative activity in the area of capital punishment. It shows the impact of legislative entrepreneurship and party control of the legislature and governor’s mansion on the number of bill introductions, depending on bill category, highlighting in particular the impact individual legislators have on current patterns of legislative activity.

UNDERSTANDING DEATH PENALTY LEGISLATION

Inherent in acting within an environment of various constraints, meaning here a state legislature, are decisions on how to spend one's limited resources. A basic starting point for viewing legislators spend these resources, for example, by introducing legislation that has very little chance of gaining any support, is that they are rational, goal-oriented actors that aim to optimize gains within the boundaries of established institutions (e.g. Schiller, 1995; Wawro, 2000). Their motivations might stem from goals of varying importance to themselves, such as preferences of what constitutes "good public policy," re-election prospects and gaining ground within the institution itself (Fenno, 1973). Translated into the context of capital punishment, patterns of bill introductions can, thus, be discussed both in terms of legislators' leadership, promoting policies that, for example, aim to eliminate the risk of wrongful executions, as well as strategic, individual career advancements, where decisions based upon the latter do not negate an attempt of developing a leadership position on a particular policy issue for a variety of other reasons. Indeed, legislators very likely pursue multiple goals (Fenno, 1973; Hall, 1996).

Beginning with the aspect of political leadership, it has indeed been a recurring theme in research seeking to explain legislators' decisions to support legislation aiming to restrict the death penalty. Researchers have pointed to the act of supporting legislation that aims to if not repeal, at least narrow a death penalty statute as requiring political courage (Kirchmeier, 2006), or a willingness to accept considerable political cost (Galliher et al., 2002), particularly when considering that the majority of voters have for decades been supportive of the death penalty (Jones, 2019). Abolition efforts, thus, likely involve those who can politically afford it, for example, withstand a charge of being "soft on crime" (Culver, 1999; Garland, 2010), and may include some form of political elite (Harcourt, 2008; Sarat, Malague, De los Santos, Pedersen, Qasim, Seymour, & Wishloff, 2019; Wozniak, 2012).

The importance of political leadership is supported by historical studies of abolition in the United States (Davis, 1957; Galliher, Ray, & Cook, 1992), as well as by numerous studies providing detailed insight into both successful and unsuccessful abolition efforts by state legislators and governors, for example, in California (Culver & Boyens, 2002), Colorado (Radelet, 2017), Illinois (Warden, 2012), Kansas (Galliher & Galliher, 1997), Maryland (Milleman, 2010), Michigan (Koch & Galliher, 1993), New Jersey (Henry, 2008; Martin, 2010; Wozniak, 2012), New Hampshire (Sarat, 2002), New Mexico (e.g. Entzeroth, 2012; Parker, 2013) and Oregon (Kaplan, 2013). Additionally, abolition in modern time has from a global perspective consistently occurred against the wishes of the public majority (Hood & Hoyle, 2015; Zimring & Hawkins, 1986); described as "leadership from the front" (Buxton, 1974, p. 245).

In situations as such, where legislators are working against the current, bills may require "champions" who invest considerable time and resources to promote and push the bills through the legislature. Entrepreneurship within legislatures have since long been theorized, yet to distinguish legislative entrepreneurship from activities that legislators engage in on a daily basis simply by performing their general duties, Wawro (2000) defines legislative entrepreneurship as

a set of activities that a legislator engages in, which involves working to form coalitions of other members for the purpose of passing legislation by combining various legislative inputs and issues in order to affect legislative outcomes. (p. 4)

These activities, [Wawro \(2000\)](#) explains, can be distilled into four main areas: acquiring information, bill drafting, coalition building and pushing legislation (p. 5). [Wozniak \(2012\)](#) in turn highlights these types of activities in a study of efforts to abolish the death penalty in New Jersey and Maryland during the 2000s, finding that legislative entrepreneurs advocating for abolition were of particular importance in New Jersey, contributing to the state abolishing the death penalty in 2007.

Bill proposals aiming to restrict or abolish can, thus, from the lens of legislative entrepreneurship be seen as part of a long-term effort to achieve a legislative goal, with persistency, leadership and the ability to make coalitions with other legislators over time as important aspects. There are to the author's knowledge no equivalent examples of research concerning bills with the aim of preserving or expanding the death penalty, but the idea of legislative entrepreneurship applies to introductions of such bills as well.

Legislative entrepreneurs, however, act within an electoral context as well, which leads to a long-running theme in the literature on capital punishment. Over many decades, researchers have pointed to ideology as being an influential factor. Particularly relevant for the focus of this chapter, is the prior research on the connection between partisan affiliation and death penalty support or opposition.

On the one hand, there is support for a distinction between the two parties, with Republicans tending to be more supportive of the death penalty compared to Democrats. Scholars have over decades found such patterns in studies involving both voters and elected officials (e.g. [Baumer, Messner, & Rosenfeld, 2003](#); [Galliher et al., 2002](#); [Nice, 1992](#); [Sarat, 2001](#); [Steiker & Steiker, 2006](#); [Vidmar & Ellsworth, 1974](#)).

Avoiding to appear as “soft on crime,” as referenced above, becomes further relevant here. Even though capital punishment was effectively suspended by the United States Supreme Court's decision in *Furman v. Georgia* in 1972, the decision allowed states to rewrite their statutes to pass constitutional muster. Within 5 years, 35 states had done exactly so ([Steiker & Steiker, 2014](#)). This development is part of a much larger context of punitive penal policy developments originating around this time period (see e.g. [McCann & Johnson, 2009](#), pp. 147–153), and unsurprisingly, the majority of citizens have since the mid-1970s supported the use of the death penalty ([Jones, 2019](#); [Masci, 2017](#)). Starting from the early 1970s to the early 1990s, capital punishment gained a very prominent role among Republicans and was transformed into a symbol that could represent a punitive attitude toward law and order as a whole, functioning as a “wedge issue” separating the two parties and ultimately benefiting the Republicans ([Garland, 2010](#), p. 247). A politicized issue as such can, thus, be used as a sort of tool in the strategic pursuit of publicity and to advance one's career ([Dingerson, 1991](#); [Garland, 2010](#); [Steiker, 2002, 2012](#)). Indeed, research points to the likelihood of a state having a death penalty law in the first place to be greater when Republicans occupy at least 60% of the seats in the legislature ([Jacobs & Carmichael, 2002](#)).

An important ingredient in how a tough stance of capital punishment can be capitalized upon politically, however, applies not just to state legislators. The entire criminal justice system is closely related to electoral politics. That means

that if expressing opposition or even doubt regarding capital punishment, means you can risk being seen as not being for law and order as a whole, this applies to a wide range of public officials, who are directly elected in the United States to a far greater extent than, for example, in Europe. This includes officials explicitly involved in the administration of the death penalty, beyond politicians, such as judges, prosecutors and police chiefs (Bae, 2007; Garland, 2010; Sarat et al., 2019).

On the other hand, the partisan division described above comes with caveats. While research has found a pattern of Republican endorsement of capital punishment in a general sense, the partisan division falters if Democratic opposition is not convincing. Part of the gains the Republican Party made in taking charge of the “law and order” approach in the 1970s was after all built upon securing the Southern white vote – a group of voters which had voted solidly in favor of the Democratic Party since the Civil War (Garland, 2010). Furthermore, while the function of capital punishment as a wedge that could split both parties into two sides of the entire debate on criminal justice did develop, by the mid-1990s it had begun to transform at the national level (Holian, 2004). In 1992, the Democratic candidate for president (then-Governor Bill Clinton) famously interrupted his campaign to oversee the execution of a brain-damaged man, Ricky Ray Rector (Soss, Langbein, & Metelko, 2003). Two years later, President Clinton signed the Violent Crime Control and Law Enforcement Act after its passage in the Democratic-controlled Congress, written largely by the chairman of the Senate Judiciary Committee, Democratic Senator Joe Biden. This very comprehensive crime bill included the Federal Death Penalty Act, which vastly expanded the number of death-eligible federal crimes by 60 in total. In 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act (AEDPA) after it too had received bipartisan support in a now Republican-controlled Congress, an act that severely limited the ability for death row inmates to seek relief in federal court for errors and abuses at state level (Williams, 2012). The generally clear divide between the two parties now became blurred on the issue of capital punishment (Garland, 2010).

Thus, while Republican enthusiasm for the death penalty may have been easy to spot during previous decades, such a finding can obscure the fact that over time, Democratic opposition may not have been equally evident (Bae, 2007), and should not be seen as a guarantee (Wozniak, 2012). Even when it comes to the Republican Party, positions have fluctuated historically (Jones, 2018). Considering the two most recent decades and the decline of the death penalty, a simple partisan explanation does not rhyme well with the composition of state legislatures, since they have predominantly either been split between the two parties, or been under Republican control (National Conference on State Legislatures, 2020). Alternatively, while effects for party on death penalty opinion have been shown, the effects may simply be too modest to be part of the main story (Soss et al., 2003).

EXPECTATIONS

Previous studies on death penalty legislation find different conclusions regarding the importance of political leadership and partisanship, and the overall motivations to why legislators engage in the promotion of legislation concerning capital

punishment. Considering, however, that legislators act based upon multiple, not necessarily competing motivations, the aim here is not to dismiss any particular theory. Elucidating exact motivations of individual legislators over time across multiple states also comes with considerable methodological difficulty. As this chapter focuses on overall patterns of legislative activity, it treats the different explanations presented above as complimentary. However, there are expectations pertaining to differences when it comes to the two main categories of bills examined, that is, bills aiming to promote the continued use of the death penalty, or even expand it, and bills aiming to do the opposite, that is, restrict or even abolish altogether.

First, I expect legislative entrepreneurs to have an effect on the level of activity when it comes to bill introductions. This applies to both categories of bills, as there is no theoretical basis for assuming that only one category is relevant for examination. However, as leadership is part of the analysis, it is logical to expect that a difference in activity for bill introductions that in different ways challenge the existence of the death penalty altogether, as opposed to those that do not. Therefore, while I legislative entrepreneurs to have a positive effect on the number of bill introductions in general, such effects are expected to be greater when it comes to restrictive bills.

Second, despite the mixed results regarding the role of party in the context of death penalty legislation, I expect an effect on the activity levels by legislators when it comes to bill introductions. Specifically, I expect a Republican majority in the chambers of the legislature, as well as a Republican governor, to have a negative effect on activity, based upon the general division between Republicans and Democrats where the former to a greater extent promotes the continued use of the death penalty.

MODEL SPECIFICATION, DATA AND METHOD

This study examines determinants of introductions of death penalty-related bills in the 38 states which had a death penalty statute at some point during the years 1999–2018. The unit of analysis is state-years and the dependent variable is the number of death penalty-related bill introductions. The variation in activity between states is considerable. In some states, there is constant activity every year, while in others, perhaps only one or two bills are introduced, if any at all. The data, thus, have a high incidence of zero, or very few counts. As is appropriate for modeling count data that exhibits over-dispersion in the dependent variable, meaning the variance is larger than the mean, I use maximum likelihood negative binomial regression (Long, 1997).² I control for year and state-fixed effects to capture constant differences across states, and account for heteroscedasticity and serial dependency by estimating standard errors clustered by a variable composed of the intersection of state and year.

Dependent Variable

To capture and examine predictors of bill introductions in the context of death penalty legislation, introduced bills were collected from each state's official state