pg. 166 - 190

America's Death Penalty

Between Past and Present

EDITED BY

David Garland, Randall McGowen,
and Michael Meranze

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6

Interposition

Segregation, Capital Punishment, and the Forging of the Post–New Deal Political Leader

JONATHAN SIMON

Introduction: From the New Deal to the "Crime Deal" via the Politics of Race

Historians and political scientists have long viewed Franklin Roosevelt's "New Deal," as a watershed period in American political development that created a fundamental new political order, one that dominated politics and transformed American governance for at least forty years from roughly 1936 to 1976.[1] More recently sociologists of punishment have suggested that the roots of America's turn toward hyper-punitive mass incarceration policies since 1980 mark the emergence of a post–New Deal political order, formed in large part around fear of crime.[2] Crime, or fear of crime, became a key construct, and the crime victim, a key figure, around which the fragmenting political contradictions of the New Deal order could be realigned and reframed.

Perhaps the most famous of these contradictions was race. The New Deal coalition had held together in the Democratic Party by subordinating the issue of racial inequality to the issues of economic opportunity. Once the Civil Rights movement pushed the national government for effective action on civil rights, first through the courts and then through Congress and the presidency, this coalition began to come apart. At the national level President Lyndon Johnson understood that signing the Civil Rights Act of 1964 probably lost the South for the Democratic Party for a generation, whereas Republican politicians like Richard Nixon and Ronald Reagan saw these opportunities to pick up votes by signaling a willingness to soften civil rights enforcement. At the same time leading supporters of Jim Crow segregation policies in the South saw in fear of crime, and demands for tough "law and order" policies, a way to recast their opposition to federal policies, from a southern-only defense of segregation to a national defense of citizens against crime.[3]

As political scientist Vesla Weaver[4] suggests, a full understanding of these sea changes in American political order requires attention below the national level to state-level politicians. The creation of a post–New Deal political order around fear of crime required the transformation of state-level political organizations. Political leaders, shaped to govern through New Deal mechanisms, needed to find new political footing. For crime to be that footing required more than simply rising public concern about crime (even assuming it preceded political initiatives). It also required that those leaders find a way to interpolate themselves into an issue, long dominated by local political figures (prosecutors and judges).

This chapter explores the path of the governor from a little "New Deal" executive derivative of the national government in Washington to a dominant executive in a post–New Deal order based on fear of crime and in which the governors have regularly dominated over Washington. Key to the story is the proximity of both segregation and capital punishment as important legal challenges to state authority during the pivotal decade from 1954 to 1964. Entering this decade, promising New Deal–style governors focused on building up a new political power base around welfarist New Deal policies were emerging both in the North and South. Beginning first with segregation, but soon thereafter with capital punishment, constitutional attacks to state authority on social issues with strong populist appeals across traditional economic boundaries posed a powerful political challenge to these little New Deal leaders. In the South governors like Faubus (Arkansas) and Wallace (Alabama) abandoned their appeal based on welfarist social policies to one based on an unapologetic defense of segregation. Although their association with segregation prevented them from rising to national power (although Wallace tried), their ability to cast their mission as one of defending citizens against the unconstitutional excesses of courts, a legal theory loosely known as "interposition," gave them a new logic of appeal distinct from racism itself (and one readily transferable). In the North governors like Mike DiSalle (Ohio) and Edmund "Pat" Brown (California), who as yet faced no problem with segregation (those lawsuits come later), and who were well posed to push the limits of a welfarist governance (think of Brown's investment in the University of California system), found themselves tangled in a formally unrelated (but culturally and politically probably quite related) issue, that of capital punishment. Unable to convince divided publics to embrace abolition, both governors ended up damaging their political standing and ultimately lost elections before promising national political careers could begin. A few years later, however, when California's Supreme Court struck down

the state's death penalty, Ronald Reagan, the man who defeated Brown, would borrow the populism of Faubus and Wallace to turn defense of capital punishment (asserted as a defense of the lives of citizens) into a powerful political cause that would lock his hold on California and help propel him to a national political career that would help define the end of the New Deal political order.

The doctrine of "interposition," though a constitutional failure, provided a model for a populist politics of the governor that has arguably been more effectively realized around the issue of capital punishment where governors have often succeeded in positioning themselves as defenders of the people's right to the death penalty against the assertion of courts. This success, as I have argued elsewhere,[5] has made governors the odds-on favorites to become the chief executive in the post–New Deal era.

Interposition: Segregation, Southern Governors, and the Defense of the People

In his meticulous study of the causal relationship between the *Brown* decision and the triumph of civil rights legislation in the 1960s, historian Michael Klarman[6] focuses on a set of southern politicians, mostly governors, who saw strategic value in creating dramatic confrontations between white citizens and federal authorities, and between state law enforcement and civil rights activists. In his words, these were "southern politicians who had been elected to office on the strength of the post-*Brown* backlash, and who fully appreciated the political gains to be had from fostering violent clashes with federal authorities and brutally suppressing civil rights demonstrations."[7]

For Klarman, the success of these southern politicians at the state level led to a victory for the Civil Rights movement at the national level (through the dialectical reaction of northern voters to the violent images those confrontations produced on national television). Here I suggest that they also modeled a new kind of populist relationship between governors and the citizens of a state that would become a successful national model by the end of the 1960s. While that model came too late to save southern school segregation, it would lead to a political crippling of civil rights that has seen northern segregation largely preserved, and much of the force of the major civil rights acts of the 1960s diminished.

The governors' role in massive resistance would help model a path for executives to govern through crime and seek to maximize their political advantage in an emerging culture of control. Several elements of the interposition strategy anticipated the reformation of politics around the problem of violent crime after 1968. First, massive resistance was justified as necessary to protect citizens of both races from violence, and especially white citizens from the potential threat of violence posed by proximity to blacks (rape being a major implied vulnerability that required only a hint to invoke). Second, the threat of criminality was intertwined with the threat of an overreaching federal government, and especially an overreaching judiciary, seeking to achieve abstract goals while being heedless of the cost to local citizens.[8] This, of course, was a fear with a very old pedigree, but massive resistance gave it a new meaning, one now associated with the threat of violence. Third, and this is the key place that interposition played in the story, the legal implementation of *Brown v. Board of Education*[9] created opportunities for southern governors (and other executive officials like sheriffs and police chiefs) and legislatures to place themselves between the citizenry and the danger to social order posed by federal court orders implementing *Brown* and other civil rights mandates. It is this gesture, rather than an ideology of racism, that I believe southern governors contributed to the formation of the culture of control and the regime of governing through crime that began to arise in the wake of *Jim Crow*.

Massive Resistance and Interposition

Brown v. Board of Education was announced on May 17, 1954. *Brown II*, decided the next spring, gave federal district courts responsibility for coordinating actual desegregation with "all deliberate speed." By late 1955 five southern states—Alabama, Virginia, Georgia, Mississippi, and South Carolina—had enacted so-called interposition resolutions, declaring *Brown* a usurpation of states' rights and empowering their governments to protect their citizens from the implementation of the decision. It would be years in most cases before actual desegregation orders were prepared by district courts and orders to reorganize schools materialized, but in a rapid and coordinated movement, the core of the old Confederacy had constructed an odd act of what looked like a novel assertion of sovereignty even though its legality was very much in doubt from the start.

The most (in)famous piece of this configuration was a legal theory known as "interposition," in which states claimed authority to (at least temporarily) prevent the implementation of a federal court order (such as a school desegregation order) when that order was both a radical departure from settled constitutional law and a matter in which the basic security of the citizenry

was at stake. Five southern states asserted this claim in seeking to prevent the implementation of desegregation orders. The theory traced its origins to South Carolina U.S. Senator and Vice President John C. Calhoun (1782–1850), but the post-*Brown* claim was really the unique creation of James J. Kilpatrick (1920–2010), a legendary print and later television editorialist, whose fiercely anti-*Brown* editorials in the *Richmond News-Leader* developed the claim in its modern form.[10] Realizing that white supremacy was rapidly becoming an untenable basis for defending segregation, Kilpatrick argued that it was better to resist on the twin grounds of constitutional integrity (allegedly violated by *Brown*) and the personal security of state citizens (the classic basis for the state's police power).

Liberally construing Calhoun's antebellum constitutional theories to fit the dilemma of post-*Brown* southern political leaders, Kilpatrick fashioned a bold argument based on a long history of state resistance to federal courts (including, nicely, northern states resisting fugitive slave law orders). Recognizing that the conclusion of the Civil War and the Reconstruction Amendments had undeniably altered the original foundations of Calhoun's position, Kilpatrick fashioned a rough if ready legal compromise. States should be able to suspend implementation of a radical and dangerous court decision, at least until the American people could consider their objections in the form of a constitutional amendment that would, if enacted, reverse the Supreme Court's decision. Kilpatrick's editorials, which he had published interlaced with various historical sources supporting his position, was widely read when repackaged as a pamphlet. He later published two more books elaborating the case.

Courts quickly and decisively rejected the rejuvenated interposition doctrine, but as Kilpatrick and the leading governors recognized, it provided a successful political and rhetorical posture for governors seeking to reframe their authority around citizens' insecurities. Although many of the governors who seized upon interposition were solid New Dealers, with interposition they were able to begin creating a distinctive political capital with citizens, one based not on replicating the New Deal but on hedging against its potentially unpopular social reform agenda that was a growing feature of federal power beginning with Harry Truman.

Whatever the merits of nullification before the Civil War and the ratification of several "Reconstruction Amendments" intended to rework the relationship between the states and federal rights, interposition was clearly recognized to be a doctrinal loser, and no one was surprised when the Supreme Court, in one of the last unanimous decisions they were to hand

down on desegregation, declared the argument completely invalid in *Cooper v. Aaron*.[11] Kilpatrick was a journalist without legal training, but he appears to have fully understood that the argument was certain to be rejected by the Court that had decided *Brown*. Historian John Thorndike, the author of the leading historical study of Kilpatrick's interposition strategy, argues that the strategy was a rhetorical and political one, designed to maximize the unity of the South and the capacity to attract some northern opinion.

> To understand the full significance of Kilpatrick's interposition crusade, it must be treated as a fundamentally political event. Such an approach reveals a fluid and dynamic rhetorical campaign, consistent in some of its ideological essentials but flexible in its application. In particular, the intended audience for the interposition argument shifted between 1955 and 1957. Originally conceived as a means by which to rally the South, interposition later became a tool to persuade the North. . . . Kilpatrick believed that the likelihood of northern persuasion depended, at least in part, on the appearance of southern unity.[12]

Kilpatrick appreciated that interposition as a legal argument, allowed him to link southern massive resistance to a long tradition of states seeking to protect their citizens against violent denial of their rights by federal law, including the antebellum question of enforcement actions under the fugitive slave law. The other ingredient, indelibly linked to the race question for Kilpatrick—but, he feared, not understood by northerners—was the triple "social" threat to whites of "illegitimacy, sexually transmitted disease and violent crime."[13] Of the three it was violent crime that would turn out to be easiest to invoke both symbolically and through state-encouraged violence. The violence attending to implementation of school decrees was the frontline argument for massive resistance between 1957 and 1961. Although it was roundly rejected by the courts, circumstances in the nation were about to make it a far from dead political argument.

Southern Governors and the Post–New Deal Situation

The governors who would become nationally famous and infamous by leading their states in the campaign of official and private defiance of civil rights law—a campaign that came to be known as "massive resistance"—included a number who started out as progressives on both race and economic policy, governors who sought to modernize their states and adopted

in many respects a New Deal model of leadership. Two of them, Orville Faubus of Arkansas (1910–1994; governor of Arkansas 1955–1967) and George Wallace of Alabama (1919-1998; governor of Alabama 1963–67, 1971–79, 1983–87) stand out as leaders with national potential. Most important for our story, each achieved the longevity in office they sought, and in Wallace's case two surprisingly credible runs for the White House, once as an Independent (1968), when he won 2.4 percent of the national vote but nearly 23 percent of the southern electorate, and once as a Democrat, when he won a number of primaries prior to an assassination attempt in 1972.

Faubus was an economic populist from a part of Arkansas with the least white animus toward blacks. Elected shortly following the *Brown* decision, Faubus recognized that the segregation issue could transform his role from an ordinary governor to a regional or even national leader. At first Faubus remained on the fence about massive resistance, rejecting calls from the legislature for special sessions to consider a response.[14] But by the time the Little Rock lawsuit was filed, Faubus had decided to seek a third term as governor, very rare in Arkansas, and saw in leading massive resistance a chance to supercharge his political power among the virtually all-white voting population. The infamous confrontation between Faubus and the Eisenhower administration over the integration of Little Rock High School gave Faubus an exceptional opportunity to play out interposition, not as a legal tactic but as a gesture in a piece of political theater witnessed by the whole nation. As Klarman concludes:

> By manufacturing a racial crisis that in turn led to a confrontation with the federal military, Faubus transformed himself into a nearly invincible state politician as well as something of a regional folk hero. While Faubus tolerated, rather than perpetrated, violence against blacks asserting their constitutional rights, the lesson for other southern politicians was clear: the more extreme a politician's resistance to the objectives of the civil rights movement, the greater the political rewards he might reasonably expect at the polls.[15]

George Wallace followed an even clearer path from New Dealer to segregationist. Wallace was also a progressive on economic policy and, more quietly, on race, where he was among the half of the Alabama delegation that chose not to walk out of the 1948 Democratic National Convention following Hubert Humphrey's speech in favor of civil rights as human rights. According to Klarman, he was even known as a "liberal" and to some a "dangerous left-winger."[16] He began moving to the right on race after *Brown*.

After losing the 1958 Democratic primary for governor, Wallace happened upon a wonderful opportunity to interpose himself between "the people" and the federal courts when legendary federal district court judge Frank Johnson ordered Wallace in his capacity as circuit judge for Barbour County to turn over the county registrar of voter records for a voting rights case. Wallace responded that he would arrest any federal officer who attempted to collect the records, but privately he backed down in the face of a contempt order. Once in the governor's mansion, Wallace sought out a dramatic confrontation with the federal courts over school desegregation. Klarman's vivid account provides a palpable sense of interposition as a subject position for governors.

> Wallace endeavored to entrap the Kennedy administration into using federal troops in Alabama, as it had at Ole Miss, fully appreciating the political gains that would accrue from his playing to the southern tradition of "foreseeable defeat before overwhelming odds." Resistance to federal authority at Tuscaloosa gave Wallace the opportunity "of becoming the apotheosis of the will of his people." In the now-famous charade, Wallace first physically blocked the entrance to the university and then, as planned in advance, stepped aside before a show of superior federal force. From the moment of his stand in the schoolhouse door, Wallace entered a new political dimension, both at the state and national levels.[17]

The politics of resistance to *Brown v. Board of Education* produced a new/old narrative of the relevance of governors as "interposing" themselves between the allegedly unlawful decisions of the Supreme Court and the personal safety of their citizens. While politicians would receive little traction on the specific issue of segregation, the image of a personal relationship between the governor and the security of the citizen, one threatened by the operation of unaccountable federal courts was one that would lend itself ever so well to the crime issue as it emerged in the 1960s. For Klarman the political logic here was ironic. Governors like Faubus and Wallace enhanced their own political power, but as methods of resisting civil rights their tactics backfired, leading to inflamed northern opinion and, eventually, powerful civil rights laws from Congress. But there was another lesson here as well. The more a governor could identify himself with the physical insecurity of the voters, and especially against the power of the courts, the more he or she could obtain a form of political support largely invulnerable to disappointing results on the ground. This was a lesson open to governors outside the South.

Abolition: Northern New Deal Governors and the Death Penalty

Reviewing the presidential field in early 1959, pollster Lou Harris identified two democratic governors as the most likely state chief executives to emerge as contenders in the Democratic nomination fight, expected to be dominated by senators: Pat Brown of California and Mike DiSalle of Ohio.[18] Both represented large delegate-rich states with major industries and large Democratic voting blocks. Both Brown and DiSalle were Catholic liberals eager to build on the social justice tradition of Roosevelt's New Deal. Both had agendas focused on education, labor, and health care, rather than penal issues, but both ran into considerable political resistance around the growing controversy over capital punishment and their own abolitionist sympathies. Each would be defeated seeking reelection to their respective state houses (Brown after two terms, DiSalle after one) and disappear from state and national politics. The death penalty seems to have played a significant role in both defeats, as suggested by the fact that each eventually wrote a political memoir focused specifically on the capital punishment problem of governors. In the following sections I draw on books published by both former governors, specifically on their handling of the death penalty. DiSalle published his account first in 1965; Brown published his in 1989. Both had assistance from professional writers.

When the Political Is Personal

As clemency scholar Austin Sarat notes, both books rely heavily on "the trope of anguish, the agony of the person forced by circumstances to exercise godlike power on the basis of fallible human judgment."[19] For both Brown and DiSalle, capital punishment and the problem of clemency took on a highly personal quality of responsibility and threat. Indeed, both men seemed motivated to write their memoirs at least in part to further explain and justify these uniquely personal judgments. But if we read both books as windows into the distinct historical problems of state leadership in the late 1950s and early 1960s, we can observe distinctive features of the political organization of this most existential of political decisions.

Capital punishment and clemency, in particular, opened a clear gulf between local and state politicians. Those most motivated to see or prevent a killer being executed—friends and family of the victim and the condemned—were likely to be highly concentrated locally and to accord great weight to this issue, whereas those concerned with the death penalty as a political issue were probably fairly dispersed. Local politicians were likely to feel intense pressure from families and friends of both sides, and a statewide leader was uniquely likely to confront an ambiguous situation.[20] Governor DiSalle observed that on clemency cases local politicians would shrilly attack him in public while privately agreeing with his decision.

> The same type of political shyness worked the other way, too. One member of the legislature would write or call me on behalf of some inmate seeking clemency and would then rush to Columbus to tell me to pay no attention to the request which he had made only to impress the convict's relatives who were politically potent in his county."[21]

Capital punishment also produced a highly personal kind of politics in which those affronted by the abolitionist preferences of both Brown and DiSalle felt free to express anger and condemnation of the politicians in highly personal terms and against members of the governors' own families. Brown described a very direct and personal sense of vulnerability after intervening (temporarily as it turned out) in the execution of famed death row inmate Caryl Chessman.

> The violence and anger of the anti-Chessman movement . . . now had a new target—Pat Brown. The volume of mail pouring into my office increased, with attacks on me as common as abuse of Chessman and the legal system. Dummies of me were hung in effigy in Modesto, Long Beach and West Los Angeles. Members of my own party accused me of weakness, cowardice and passing the buck to the state legislature. Even newspapers like the *Sacramento Bee*, which had always been a strong and loyal supporter, turned against me on this issue. At the opening of the Hollywood Park racetrack a few days after the stay was announced, Bernice [Brown, his wife] went down to put the wreath on the winning horse while I stayed in the stands. When the name "Mrs. Pat Brown" was announced, there was a loud chorus of booing; rage and shame almost made me run for the door. I was booed again at Squaw Valley when the [1960] Winter Olympics ended, and at the opening of Candlestick Park in San Francisco while Vice President Nixon looked on. One state assemblyman announced that he was starting a recall movement to remove me from office.[22]

For Brown, the Chessman case seemed to have been particularly painful since Brown's own children became involved in the movement to spare Chessman's life. Brown would ultimately go to the legislature seeking abolition as an alternative to the execution of Chessman, a move that narrowly failed.[23]

Opponents

Both Brown and DiSalle saw capital punishment, at least in retrospect, as giving a mortal weapon to their campaign opponents and their accomplices in the media. Brown has little doubt that this was the most effective issue for both Richard Nixon, who lost to Brown in 1962, and Ronald Reagan, who defeated Brown in 1966.

> During my two terms as governor, because of my high percentage of commutations, I became known as an outspoken foe of capital punishment. It wasn't an image I consciously tried to create; in fact, the evidence is strong that it seriously damaged my political future. Richard Nixon made it such a major issue during the 1962 gubernatorial campaign that at one point I was sure I'd lose and seriously considered dropping out. In 1966, the death-penalty issue did help Ronald Reagan defeat me for governor, thus launching one political career and effectively terminating another.[24]

Brown blamed himself, among others, for creating a political climate around Chessman that made his execution a populist cause (despite or because of his international celebrity and status as a victim of cruelty).

> By the time I became the someone with that power, other people—myself included as attorney general—had successfully stoked the fires of public indignation so high against him for "heckling his keeper" that such action was virtually impossible, especially for an elected official with a responsibility to his constituency and the programs he hoped to implement for the common good. I firmly believe all of that. I also believe that I should have found a way to spare Chessman's life.[25]

DiSalle also viewed his clemency decisions as exposing himself to easy point scoring by his political enemies and by newspaper editorialists.

> Whenever I extended mercy to a prisoner, the sensational press and my political enemies, knowing I had long been opposed to capital punishment, would accuse me of encouraging crime by coddling criminals. The slanted news stories and vituperative editorials invariably brought down an avalanche of venomous letters, telegrams, and anonymous postcards. Their message—with the scabrous shrillness removed in paraphrase—was the same: the Governor is a sentimentalist whose heart is bigger than, though not as soft as, his brain, who weeps for the poor murderer but is cold-bloodedly unconcerned about the murderer's victim.[26]

Clemency and Political Capital

In his classic article on crime and society in eighteenth-century England, Douglas Hay argued that the broad power to reprieve a capital sentence, officially exercised by the sovereign but mediated by the wider gentry and judiciary, offered a tremendous tool for gaining popular consent to the highly unequal social order being forged by English capital with the cooperation of the aristocracy.[27] Without the great expense and considerable political resistance likely to be generated by a standing army or armed executive force, the extension and refusal of pardons allowed power to project majesty as well as terror, to win sympathy and gratitude as well as fear. For New Deal–era governors, however, the power to grant clemency was a kind of kryptonite, weakening them politically with every exercise. Both Brown and DiSalle tried hard to provide individual consideration despite having broad moral objections to the death penalty, and allowed more condemned prisoners to die than they saved, but each also perceived himself as paying a heavy and specific political price for each act of clemency.

Brown found that clemency decisions often pitted him directly against police chiefs and county sheriffs prepared to compete with the governor over representing the security interests of the public.

> "The two top police officers in Los Angeles, Chief Parker and Sheriff Peter Pitchess, held a press conference to denounce my decision, saying that 'law-enforcement officers and the people they protect have suffered a major defeat'" (Brown 1989:69). To this, Brown "lashed out at Parker and Pitchess, telling reporters that 'if the Sheriff and the Chief of Police were doing their jobs as well as I'm doing mine, perhaps Los Angeles wouldn't have the highest crime rate in the country.' This didn't win me any new fans in the LAPD" (Pitchess and Brown later "became good friends").[28]

"In the case of Richard Lindsey, . . . if I spared this man's life, I would almost certainly be dooming an important farm labor minimum-wage bill that we had worked hard to promote."[29]

Brown viewed the authorization of the execution as a way to secure progressive legislation. He "was fighting a conservative legislature to spend more money on a growing state, to improve its schools and its mental health facilities and its working conditions. Should I risk, did I even have the *right* to risk, destroying any of that because of one demented criminal? By letting Richard Lindsey go to the gas chamber, I was giving her [Rose Marie Riddle, the murdered little girl] parents [who were farm laborers] and people like them a chance at a living wage."[30]

The Empirical Sovereign: Governor as Investigator

Both Brown and DiSalle were able orators who could and did appeal to their respective state legislatures to abolish the death penalty. But as innovative New Deal leaders, they also sought to develop a style of acting on the death penalty consistent with the New Deal model of the executive. Key to that model, as figured by Roosevelt himself, was a close concern with the empirical facts and a direct proximity to those personally involved in wielding science and experimentation to solve social problems. Brown "inaugurated the practice of personally conducting executive clemency hearings in every death case" and "insisted on conducting the hearings personally," sometimes sending his own investigators out to collect further information.[31]

DiSalle was even more driven to intervene personally. The strangest case involved one of the few women on America's death rows, Edythe Klumpp, who had confessed to and was convicted of the murder of her lover's wife. Klumpp afterward changed her story, prompting the governor and another man to give her "truth serum," by means of which they found out that her lover (the victim's husband) had actually committed the crime and she only helped him destroy the body.[32] The tactic of using Sodium Amytal, and personally interrogating the prisoner, was certain to draw massive media attention (another facet of the New Deal chief), but in this case the results were largely negative.

> The flood of invective, criticism, and abuse that inundated my office swept away the considerable numbers of letters and telegrams praising my stand. Editorial writers made unscientific fun of "truth serum" as a means of learning the truth, particularly in a case that had already been decided by the courts. Some excoriated me for having set myself above the conclusions of the courts and jurors, ignoring the fact that my conclusions were based on evidence that had not been considered by any judge or jury. There were many letters to the editor like this one: "We no longer need police, courts, juries or judges. The Great DiSalle will see that justice is served. He will simply give the accused a spoonful of truth serum. . . ." City editors deployed reporters to interview judges, lawyers, and public officials who would condemn me for having "dismayed law enforcement throughout Ohio," as well as for having "insulted . . . the whole modern system of criminology."[33]

In a second clemency case, that of Frank Poindexter, DiSalle traveled to Hamilton, Ohio, to personally reinvestigate a case in which three men had been involved in planning a robbery that resulted in murder and only the most mentally marginal of them had been sentenced to death. DiSalle issued a temporary stay four days prior to the execution and then traveled to Hamilton, the scene of the crime, to "understand what really took place."

> The press let me know that my trip was regarded with hostility by Hamiltonians. [The husband of the victim] told a reporter for the Cincinnati *Enquirer*: "It's ridiculous what the man is doing, or maybe I should put it, what he is trying to do." To the Associated Press he declared: "It stinks!" A group of neighbors were waiting outside Hires's [the name of the husband and murdered wife] home when I arrived. One man shouted, "You cheap politician, why don't you go back to Columbus where you can do some good?"[34]

The most curious tactic in DiSalle's repertoire was apparently a practice in Ohio for some time prior to DiSalle's term. Although it did not directly involve capital punishment, it clearly did so indirectly and DiSalle devotes a whole chapter of his clemency memoir to the topic. In Ohio, governors had to personally approve of parole for murderers under sentence of life. Prisoners with especially good records of behavior and specific talents were recommended by prison officials "for service at the Executive Mansion." Thus the cooks, drivers, and other staff (one would assume security excluded) of the governor's household were life-sentenced murderers all. In his memoir, DiSalle sets up the issue through the lens of his wife whom he depicts as apprehensive about sleeping in the same house with a number of killers:

> Although she shared my belief in rehabilitation, she had never been called upon to put the theory to a practical test. And I was aware that living under the same roof with convicted killers could be an ordeal for her.[35]

The relevance to the death penalty is obvious and stated by DiSalle in the very next paragraph. His wife, "never convinced that the death penalty might not be justified in certain cases," could not contemplate the state killing any of the very nice men whom she had come to know in the mansion.[36] And, indeed, this lengthiest chapter of the book is filled with rich life histories of several of the most memorable of the men that Governor DiSalle came to know during his single term. But if the governor calculated that knowledge leads to forgiveness, he was also rehearsing a kind of empiricism toward crime that captures well one of the chief attributes of the New Deal chief, as embodied by Franklin Roosevelt himself who, as "Dr. New Deal," touted himself as someone willing to try any remedy that would address the dire needs of the people.

The Case for Abolition

Governor Brown appealed directly to the legislature to abolish the death penalty in a speech delivered on March 2, 1960. Specifically the speech articulated all the major themes of modern abolitionism, including that the death penalty cannot be proven to deter and that the death penalty demonstrably fails to be concentrated on the most irretrievable criminals.

> These are all hard cases to review and consider. There have been 19 of them these past 14 months. They present a dreary procession of sordid, senseless violence, perpetrated by the wandering outcasts of the state. Not a single one of these 19 accomplished a pittance of material gain. Nine of the 19 suffered obvious and deep mental imbalance. In the only three cases where actual murder was entertained by conscious design, sickness of mind was clinically established to have existed for many years. All of them were products of the hinterlands of social, economic, and educational disadvantage.[37]

Brown also pointed to the shocking possibility of executing the innocent, again exemplified in a case where he had to use his pardon power to spare a clearly innocent man. Brown emphasized his own experience in prosecution and law enforcement.

> I have reached this momentous resolution after 16 years of careful, intimate and personal experience with the application of the death penalty in this State. This experience embraces seven years as District Attorney of San Francisco, eight years as Attorney General of this State, and now 14 months as Governor. I have had a day-to-day, first-hand familiarity with crime and punishment surpassed by very few.[38]

Brown's speech also focused on the taint of racism on the death penalty and sought to cast California against a very specific alternative, that of the South as a region that lagged in the formation of a progressive public sector and whose race policies had inflamed much opinion in the state, especially on its college campuses.

> As shocking as may be the statistics in our deep South where the most extensive use of the death penalty is made and against the most defenseless and downtrodden of the population, the Negroes, let it be remembered too that in California, in the 15-year period ending in 1953, covering 110 executions, 30% were of Mexicans and Negroes, more than double the combined population percentages of these two groups at the time. Indeed, only last year, 1959, out of 48 executions in the United States, 21 only were whites, while 27 were of Negroes. These figures are not mine. I tender them to you for critical examination and comparison. But I believe you will find them compelling evidence of the gross unfairness and social injustice which has characterized the application of the death penalty.[39]

He even presented the legislature with a chart showing the execution rates of the southern states (compared to California) and their contrastingly higher murder rates.

Recovering Elements of a New Deal Model of Leadership on the Death Penalty

Both Brown and DiSalle clearly believe that they lost reelection bids (and possibly national political careers) because of the death penalty. This is not uncontested. At least one master's thesis blames DiSalle's loss on the structural advantage of Republican candidates in a solidly GOP state (at this time) combined with his support for an unpopular tax increase.[40] Historian Theodore Hamm's study of Brown's handling of the Caryl Chessman death sentence suggests that other factors contributed to his defeat by Ronald Reagan in 1966, including the Watts riot and the rarity of third terms in California (even though there was no term limit at the time).[41] Both governors clearly faced major disadvantages on the death penalty. While national opinion was

moving toward abolition (it would peak with a slight majority for abolition a few years later), voters in both California and Ohio remained solidly in favor of the death penalty. The strength of the national movement meant that each faced major pressure from his liberal base to make progress on this issue, but the residual pro–death penalty majority made it a difficult choice for an elected legislature.

Both Brown and DiSalle embraced the challenge to use clemency as a tool to reduce the injustice of the death penalty while seeking to win legislative support for abolition. Failing at the latter, they paid all the political costs of opposing the death penalty while failing to mobilize their liberal base through actual victory on the death penalty.

Reading back from today's era of governing through crime in which governors have openly adopted a prosecutorial stance, it is notable that both governors sought to confront the issue of capital punishment in ways that seemed consistent with the New Deal style of governing. This led to a focus on empirical investigation both of the effects of capital punishment and of particular cases. Both governors sought to embrace the model of individualized judgment about individual offenders that the reigning treatment ideal presupposed.

Both also were prescient in seeing the personal security of the individual citizen as an emerging vulnerability of the New Deal state which had done so much to provide mechanisms of collective security. DiSalle's personal exposure to murderers in the governor's mansion is particularly salient in this regard. The chief executive of a culture of control fully embraces the mandate to protect the family through an unrelenting toughness on crime. In sleeping among murderers, the governor and his wife were relating their confidence in rehabilitation and in individualized judgment in a startlingly clear way. (Compare this to the emphasis on exposing others to crime risk that has surrounded issues of contemporary governors granting furloughs or paroles).

Both Brown and DiSalle might have done better to either ignore the death penalty (as their advisers and many supporters clearly hoped) or to have committed themselves to a de facto abolition by the grand gesture of a collective clemency (like Governor Ryan of Illinois in 2002).[42] As Sarat shows, they both felt that the nature of clemency required an individualized consideration of each case. Governors in the era of governing through crime have not felt the burden of the individual anguish: George W. Bush estimated that he spent around fifteen minutes being briefed on Texas clemency petitions for each of the more than 130 persons executed on his watch.

Brown seized upon the issue that might have provided the strongest foundation for a de facto abolition: the racial bias of the death penalty and the comparison with the segregationist South whose capital punishment practices seemed just as tainted as its school systems at a time when national political opinion had swung dramatically against the South. By linking California's death penalty to the South's segregationist state, Brown offered a compelling reason to risk his leadership on a direct confrontation with the prospect. He would have been saying, in effect, that "since the Supreme Court will not lift this racist institution from the nation, I will do so for my state." This gesture, hinted at (above) but never completed, would have formed a near mirror image "interposition," the failed legal but successful political strategy deployed by a number of southern governors to avoid being (politically) crushed between the Supreme Court's *Brown v. Board of Education* decision and the overwhelming opposition to desegregation from the almost completely white voting population in their states.

Reagan, Capital Punishment, and the Second Coming of Interposition

While southern governors enjoyed enormous political returns in their states for expounding extreme positions in defense of segregation, the northern reaction against the segregation prevented those southern politicians directly linked to its defense, from capturing a major party nomination (Wallace being a possible exception although his candidacy for the Democratic nomination in 1972 never got beyond the level of serious protest candidacy before an assassin's bullet ended his campaign.)[43] Ongoing national antipathy toward segregation, cemented in those infamous images of the mid-1960s, assured that only a southern liberal, like Jimmy Carter or Bill Clinton, was likely to win national approval for at least a generation.

This, and the fact that segregation proved impossible to defend as state policy, have led most historians to treat interposition as a curiosity that pointed to the complexities of white supremacy politics in states like Virginia. I suggest that interposition was yet to yield its strongest political effects. Freed of its association with segregation, it was reframed as the role of governors and state law in protecting citizens against the intertwined dangers of rising violent crime and an elitist judiciary's criminal procedure revolution which expanded the rights of criminal suspects and defendants. Now it would no longer need to carry the burden of its previous legal

defeats. The essence of interposition from here on would be the relationship between state executive actors, courts, and the linked fates of criminal suspects and the citizenry.

Although the Warren Court's criminal procedure decisions would provide significant targets for this law enforcement–based reassertion of state sovereignty, no single issue would act as a better "conductor" for this energy than capital punishment and the Supreme Court's 1972 decision in *Furman v. Georgia*, striking down all existing capital statutes.[44] The response to *Furman* was less furious but far more generalized nationally than *Brown*. Five states adopted new capital punishment statutes in the first months after *Furman*, and by the time that *Gregg v. Georgia*[45] was argued thirty-five states had restored the death penalty.[46]

Among the politicians that led these state crusades to save the death penalty and citizens from the Supreme Court and murderers there would be many who would rise to prominence in statewide and federal offices. None captured the opportunities of the moment better than California's popular conservative governor, Ronald Reagan. As discussed above, Reagan defeated the liberal Democrat Brown in the 1966 election in a campaign focused heavily on crime fear and race in the aftermath of the Watts riots. Reagan made Brown's waffling on executions a symbol for his leadership. In his first year in office, Reagan fulfilled a campaign promise and denied clemency to Aaron Mitchell, an African American man convicted of murdering two police officers. Mitchell's execution was the first in California in five years and the last for nearly thirty-five.

But when the California Supreme Court found capital punishment unconstitutional under the state constitution in February 1972, a few months before *Furman*, Reagan immediately attacked the court for having "set itself above the people."[47] Reagan, whose talents as an actor made him highly effective at crafting the right mix of anger, buffered by humor, and pathos in his public personality that came across far less partisan and mean sounding than politicians like Richard Nixon, deftly made the Court, not liberals or Democrats, the focus of his attack.[48] The Court was not just wrong in its insistence that "society is responsible for each and every wrongdoer," but its solicitude came at the expense of the state's power to protect the citizenry. In his first quoted remarks on the decision, Reagan tied the theme of rising crime—a theme he had raised in the 1966 campaign—to the death penalty on the grounds of deterrence, and to a contrast between elitist expert knowledge and popular belief: "In a time of increasing crime and increasing violence in types of crime . . . [c]apital punishment is needed, the death penalty is a deterrent to murder and I think the majority of people believe the same thing.[49]

The decision in *People v. Anderson*[50]—shocking at the time to many, including Governor Reagan because he had appointed a number of the justices in the majority—was in fact an unparalleled opportunity, giving Reagan a several months head start on other governors and politicians waiting for the Supreme Court's decision in *Furman*, months that Reagan used to put his face on the national reaction against the sudden judicial abolition of capital punishment. A popular referendum in 1972 voted overwhelmingly for the return of the California death penalty, and by 1973 the state had enacted a new capital statute. Reagan, as governor, had a natural leadership role in both campaigns.

Reagan's framing of this reaction skirted perilously close, at times, to invoking the kind of explicitly racialized narrative about crime that had proven so self-defeating with segregation: "With all our science and sophistication, our culture and our pride in intellectual accomplishment, the jungle is still waiting to take over. The man with the badge holds it back."[51] Much more often Reagan used crime and capital punishment to define a new civic duty unmarred by racial discrimination. In a speech to business and civic leaders, about a year and half after *Anderson*, and during debate in the legislature over whether to enact a new capital statute (the voters had already amended the state constitution to permit capital punishment). Although the speech traditionally focused on the economy, Reagan instead concentrated on "law and order."

> "For a number of years, we have had a moratorium on capital punishment . . . Unfortunately, it has not been a total moratorium. Last year alone, there were 1789 executions in California. The executions to[o]k place in our streets, in the victims' homes and in places of business. One thousand, seven hundred and eighty-nine innocent people in our state were executed with no recognition of their constitutional rights or of the moratorium that only gave shelter to their executioners.[52]

Reagan went on in the address to discuss the exclusionary rule (another example of the Supreme Court's due process protections) as handcuffing the police. Although the vast majority of such cases deal with drugs, Reagan went right to murder: "If a policeman stops a car for speeding and finds a dead body in the trunk, I don't think our legal system should ignore the fact that someone has been killed."[53] If it was important for Ronald Reagan's

political future to be the national face of reaction against judicial elites who were seemingly indifferent to popular fears of violence, it was arguably even more important for the political future of capital punishment to have a non-southern governor as the national face of a resurgent death penalty. In citing the reality of elevated homicide rates in the early 1970s (they would not level off in California until 1980, lagging behind much of the nation), Reagan offered a defense of capital punishment apparently freed from the stigma of its clearly racist application (not only in the South but in much of the nation). Like his predecessor, Brown, Reagan cited his own study of capital cases in the clemency process (although he had faced far fewer during his years, as a moratorium was in place for most of his two terms) to support his conclusions about the effectiveness of the death penalty as a deterrent. The alternative, life or even life without parole, left the people unprotected largely because of the power of authorities to release murderers back into society.

> Life imprisonment without parole won't work, Reagan told newsmen, because "people a few years from now are not bound by what someone said at this time." Current California law, he said, "makes anyone eligible for parole after seven years of a life sentence has been served—and this is something to think about with this decision [the *Anderson* case] that's been handed down."[54]

Indeed, Reagan combined his trademark friendly and happy demeanor with a guilt-free embrace of capital punishment that could both acknowledge the cruelty of capital punishment while shrugging it off: "I think there is cruelty when you execute a chicken to have a Sunday afternoon dinner," he said. But he insisted that is not the same as "cruel or unusual punishment," which the state constitution bans and which the court used as a basis for its decision.[55]

The death penalty did not figure largely in the campaign between former governor Reagan and (southern liberal governor) President Jimmy Carter in 1980. But Reagan would make solid support for capital punishment a consistent feature of his conservative populism for the rest of his life. His vice president, George H. W. Bush, the last non-governor to serve in the White House until Barack Obama, would make restoring and using a federal death penalty a premier policy issue and, to a lesser degree, so would southern liberal Bill Clinton.

Conclusion

Capital punishment and school segregation were two forms of state power under attack in the 1950s. To their critics, each institution was deeply tainted by racism and both were increasingly seen as out of step with America's posture as the leading democracy in the world. Both capital punishment and segregation posed dilemmas for governors struggling to redefine the role of state executives after the New Deal had enormously expanded the role of the federal government in the lives of the American people. These challenges were deeply sectional. Strong opposition to capital punishment was growing in many states outside the South, while segregation at this point was being problematized only in the South. Here the stories diverge in time. The Supreme Court, in 1954, found school segregation unconstitutional, setting off an immediate challenge to southern leaders, and especially New Deal–type governors who had generally built their support from the progressive wing of white voters in their states. It would be almost twenty years before a more divided Court temporarily ended capital punishment.

In this chapter I have tried to suggest that the approaches New Deal governors took to each challenge were fateful in their political survival, and ultimately in shaping the political posture of governors in the post–New Deal national political landscape. It may have been that liberal governors like Pat Brown and Mike DiSalle would have failed to achieve reelection, let alone national leadership, even without the pressure of capital punishment. As Lou Harris observed at the time, 1960 was a year for senators on the Democratic side. But their inability to frame a political and legal discourse with which to express their opposition to capital punishment clearly wounded them, and would come in many ways to anticipate the difficulties liberals would face on the death penalty and other crime issues in the decades ahead.

Southern progressives faced an even more dramatic challenge in 1954. The growing strength of the New Deal in the South seemed to presage a gradual weakening of Jim Crow politics and a slow softening of segregation. When the Supreme Court unanimously struck down segregation in 1954, leaders like Orville Faubus and George Wallace, who had built their base on this progressive tendency while hoping to avoid direct confrontation on race, now found that they had to decide in a very short time how to respond to the reactive surge in support for segregation among southern whites. Had either openly supported *Brown* or even sought compromise, he would certainly have been wiped out in the next Democratic primary for governor.

Their vigorous embrace of segregation was an act of opportunism that has been widely appreciated by historians. Fewer have appreciated the importance of how they opposed it.

I have tried to suggest that, although interposition may have failed to protect de jure segregation, it contained the germ of a powerful political logic that would ultimately prove highly productive for governors as they reclaimed the national political stage after 1976. Others have argued that the roots of the politics of crime emerged from the political failures faced by defenders of segregation.[56] I have sought to advance that argument by identifying a specific discursive link. If I am correct, this shows how the crime issue could emerge from the South, but ultimately not through generalization of racist ideologies about African Americans. Instead, it was the schema of governors as defenders of vulnerable citizens against the threat of lawlessness posed by activist courts that political leaders outside the South would adopt successfully.[57] As the crime problem came to dominate American governance after 1968, this logic would yield enormous dividends for governors. The emerging culture of control was one in which segregation (now in de facto form) and capital punishment would both find new strength as American institutions.

NOTES

The research for this chapter was greatly assisted by Omari French, Berkeley Law, JD, Class of 2010.

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3. Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (New York, 1997).

4. Vesla Weaver, "Frontlash: Race and the Development of Punitive Crime Policy," *Studies in American Political Development* 21 (2008): 23–265.

5. Simon, *Governing through Crime.*

6. Michael Klarman, "Brown, Racial-Change, and the Civil Rights Movement," 80 *Virginia Law Review* (1994): 7–150.

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8. Naomi Murakawa, "The Racial Antecedents of the Federal Sentencing Guidelines: How Congress Judged the Judges from *Brown* to *Booker*," *Roger Williams University Law Review* 11 (2008): 473–94.

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10. Joseph J. Thorndike, "The Sometime Sordid Level of Race and Segregation: James J. Kilpatrick and the Virginia Campaign against *Brown*," in *Massive Resistance to School Desegregation in Virginia*, ed. Matthew D. Lassiter and Andrew Lewis (Charlottesville, 1998).

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13. Ibid., 66.

14. A. Stephen Stephan, "The Status of Integration and Segregation in Arkansas." *Journal of Negro Education* 25, no. 3 (summer 1956): 212–20.

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16. Ibid., 125.

17. Ibid., 127.

18. Louis Harris, "Why a Governor Will Not Be President." *Political Science Quarterly* 23 (1959): 361–70.

19. Austin Sarat, *Mercy on Trial: What It Means to Stop an Execution* (Princeton, N.J., 2004), 153.

20. Richard G. Zimmerman, *Call Me Mike: A Political Biography of Michael V. DiSalle.* (Kent, Ohio, 2003).

21. Michael V. DiSalle and Lawrence G. Blochman, *The Power of Life and Death* (New York, 1965).

22. Edmund G. Brown, with Dick Adler, *Public Justice, Private Mercy: A Governor's Education on Death Row* (New York, 1989).

23. Theodore Hamm, *Rebel and a Cause: Caryl Chessman and the Politics of the Death Penalty in Postwar California, 1948-1974* (Berkeley, 2001).

24. Brown, *Public Justice, Private Mercy*, at viii.

25. Ibid., 52.

26. DiSalle and Blochman, *The Power of Life and Death*, 3–4.

27. Douglas Hay, "Property, Authority, and the Criminal Law," in Douglas Hay, Peter Linebaugh, and E. P. Thompson, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York, 1975).

28. Brown, *Public Justice, Private Mercy*, 69.

29. Ibid., 72.

30. Ibid., 83. Brown did not intervene in the case and Lindsey was executed; the bill passed and became law. Brown writes of the Lindsey case, "It was the kind of crime which seemed to cry out for vengeance, for ritual punishment as swift and terrible as the act itself."

31. Ibid., 45. Quoted in Sarat, *Mercy on Trial*, 148.

32. DiSalle and Blochman, *The Power of Life and Death*, 28–39.

33. Ibid., 39–40.

34. Ibid., 53.

35. Ibid., 135–36.

36. Ibid.

37. Brown, *Public Justice, Private Mercy*, 45.

38. Ibid., 43.

39. Ibid., 45.

40. Diana Draur, "Michael V. DiSalle in Ohio Politics: 1950–1962," master's thesis (1986), University of Nebraska at Omaha.

41. Hamm, *Rebel and a Cause.*

42. Sarat, *Mercy on Trial.*

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44. 408 U.S. 238 (1972).

45. 428 U.S. 153 (1976).

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51. Cannon, *Governor Reagan*, 216.

52. Jerry Gilliam, "Reagan Defends Capital Punishment Backers," *Los Angeles Times*, September 8, 1973, 23.

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56. Beckett, *Making Crime Pay;* Murakawa, "The Racial Antecedents of the Federal Sentencing Guidelines"; Weaver, "Frontlash."

57. My intention here is not to overstate the case. There is no discursive equivalent of a "DNA fingerprint" that can link Faubus's and Wallace's stands on segregation to Reagan's stand on capital punishment.

7

The Convict's Two Lives

Civil and Natural Death in the American Prison

REBECCA MCLENNAN

There is a death in deede, and there is a civill death, or a death in law, mors civilis and mors naturalis.

—Edward Coke, *The First Part of the Institutes of the Laws of England*, 1628

In 1870 the warden and agent of the Virginia State Penitentiary at Richmond dispatched several dozen male prisoners to forced labor camps owned and operated by the Chesapeake and Ohio Railroad Company in Bath County, some miles from Richmond.[1] That summer, while toiling on the railroad tracks beneath the hot Virginia sun, several of these prison laborers—including twenty-year-old Woody Ruffin, a former slave from Petersburg—made a break for freedom. The railroad company's overseers thwarted their escape but not before one of the guards, Lewis F. Swats, had been killed.[2] Upon recapture, the prisoners were immediately returned to the state penitentiary at Richmond. Ruffin was shortly thereafter tried before the city's Circuit Court for the murder of guard Swats. The jury found him guilty as charged, and the judge sentenced him to the gallows.

Fighting now for his natural life, not just his freedom, Ruffin appealed his case to the Virginia Supreme Court. Counsel argued that the state's Bill of Rights guaranteed "a man" prosecuted for a capital or other crime the right to a trial by an "impartial jury of his vicinage" and that Ruffin's vicinage at the time of the alleged murder had been Bath County, where the crime occurred, and not the city of Richmond. The court ought, therefore, to overturn the Richmond court's verdict and order a new trial by impartial jury in Bath County.[3] (Presumably the defense attorney hoped that a Bath County jury would find Ruffin "not guilty." Although Virginia had been "Redeemed" the previous year, black men still served on juries, and the majority of Bath County's population was black).